



Land and Environment Court  
New South Wales

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Case Name: BMN Properties Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2025] NSWLEC 1242

Hearing Date(s): 3 & 4 March 2025

Date of Orders: 15 April 2025

Decision Date: 15 April 2025

Jurisdiction: Class 1

Before: Washington C

Decision: The Court orders:  
(1) The appeal is upheld.  
(2) Pursuant to s 8.15(3) of the EPA Act, the applicant is to pay the respondent's costs thrown away as a result of the amendment of the application for development consent, as agreed or assessed.  
(3) Development Application DA2023/0129 for the subdivision of one lot into thirteen (13) lots and associated works at 4 Forest Road and 8 Forest Road, Warriewood, is determined by the grant of consent.  
(4) Exhibits 2 and MFI 1 are returned. All other exhibits are retained.

Catchwords: DEVELOPMENT APPLICATION – subdivision – matters resolved between parties

Legislation Cited: Biodiversity and Conservation Act 2016, s 7.16  
Environmental Planning and Assessment Act 1979, ss 4.15, 8.14, 8.15, 8.17  
Rural Fires Act 1997, s 100B  
  
Pittwater Local Environmental Plan 2014, cll 2.6, 6.1, 7.1, 7.2, 7.6, 7.7  
State Environmental Planning Policy (Resilience and

Hazards) 2021, s 4.6

Texts Cited: Pittwater 21 Development Control Plan  
Planning for Bush Fire Protection 2019

Category: Principal judgment

Parties: BMN Properties Pty Ltd (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
R Lancaster SC (Applicant)  
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Solicitors:  
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File Number(s): 2023/450443

Publication Restriction: No

## JUDGMENT

- 1 BMN Properties Pty Ltd (BMN) have applied to Northern Beaches Council for subdivision and associated works to their property at 4 Forest Road, Warriewood. The Council refused this application, and it is this refusal that forms the basis of this Class 1 appeal.
- 2 Following an earlier unsuccessful conciliation conference before the Court in July to September 2024, the parties have continued to conciliate and have now advised the Court that the issues in contention between the parties have been resolved.
- 3 Despite this position, the Council have advised the Court that they remain neutral as to the approval or refusal of the development application, and so it is at my discretion pursuant to the power under s 8.17 of the *Environmental Planning and Assessment Act 1979* (EPA Act) that I determine the application. In doing so, and with consideration of the required matters under s 4.15 of the EPA Act, I find that all issues of merit are adequately resolved, and there is no legal impediment to the granting of consent. Accordingly the appeal should be upheld.

### **The site and proposed development**

- 4 The subject site at 4 Forest Road, Warriewood, is legally described as Lot B in DP 370222. It is located on the western edge of the Warriewood Urban Release Area. A portion of road and retaining wall is also required, as part of this development, on land at 8 Forest Road, Warriewood, legally described as Lot 1 in DP 5055.
- 5 It is bounded by bushland and the Ingleside Chase Reserve to the west, existing residential to the north and east, and Mater Maria Catholic School across Forest Road to the south. To the north west is a residential development that is currently under construction at 8 Forest Road.
- 6 Following leave being granted by the Court in this hearing for BMN to amend the application, the application that is now before the Court is for the subdivision of one lot into 13 lots, including one community title lot, and associated works including:
  - (1) Demolition of the existing dwelling and ancillary structures
  - (2) Construction of roads
  - (3) Excavation, groundworks and construction of retaining walls
  - (4) Stormwater infrastructure
  - (5) Establishment of Bushfire Asset Protection Zones, and
  - (6) Tree removal.
- 7 The parties agree, and I accept, that these amendments are more than minor and are therefore subject to an order for costs pursuant to s 8.15(3) of the EPA Act.

### **The planning framework**

- 8 The site is zoned R3 Medium Density Residential, pursuant to the Pittwater Local Environmental Plan 2014 (PLEP). The proposed development, which can provide for the housing needs of the community with a variety of housing types within a medium density residential environment, meets the objectives of the R3 zone.
- 9 Subdivision is permitted with consent pursuant to PLEP cl 2.6.

- 10 The site is located within the Warriewood Valley Release Area under Part 6 Urban Release Areas of the PLEP. The proposed development meets the objectives of cl 6.1(1) by:
- facilitating development in accordance with the relevant strategic framework listed at 6.1(1)(a),
  - ensuring development does not adversely impact on waterways and creek line corridors, and
  - protecting existing native riparian vegetation.
- 11 PLEP cl 6.1(3) sets a maximum number of dwellings for this area. Sector 5 consists of the subject site and the land at 8 Forest Road to the west. On the basis of one dwelling per lot on the subject site, when combined with the approved 81 dwellings at 8 Forest Road the the subdivision will achieve the maximum dwellings of 94.
- 12 As the proposed development does not drain directly to any creek line corridor, I am satisfied that it will not have any adverse impact of the types listed in PLEP cl 6.1(4) relating creek line corridors.
- 13 A portion of the site to the south and southwest of the subject site is mapped as 'Biodiversity' on the relevant PLEP map. I have considered the Streamlined Biodiversity Development Assessment Report (BDAR) and Vegetation Management Plan (VMP), both by Travers Ecology dated 13 February 2025, the parties' submissions, and the joint expert evidence of the ecologists (Ex 5) against the matters listed at PLEP cl 7.6(3), and am satisfied that the development is designed, sited and will be managed to avoid any significant adverse environmental impact as per cl 7.6(4).
- 14 The land is mapped as 'Geotechnical Hazard H1' on the Geotechnical Hazard Map of the PLEP. From the parties' submission, subdivision plans, Geotechnical Investigation Report by Alliance Geotechnical and Environmental solutions dated 6 December 2024 (Geotechnical Report) and stormwater plans by ACOR Consultants dated 16 December 2024, I have considered the matters listed in cl 7.7(3) of the PLEP and am satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land. I am further satisfied that the development is designed sited and will be managed to

avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, in accordance with PLEP cl 7.7(4).

- 15 A small portion of the site is mapped on the Biodiversity Values Map of the *Biodiversity Conservation Act 2016* (BC Act). Accordingly, s 7.16 affords that the consent authority must not grant consent if the proposed development is likely to have serious and irreversible impacts on biodiversity values. I am satisfied that the proposed development is unlikely to lead to any such serious or irreversible impacts for the reasons discussed below.
- 16 The development is integrated development, and as the land is identified as bush fire prone land (Category 1 and buffer), the application was referred to the NSW Rural Fire Service (RFS) to obtain General Terms of Approval (GTAs). On the basis of this referral, the RFS declined to issue GTAs and raised numerous concerns. The amended application was subsequently re-referred to the RFS however at the time of hearing these proceedings a response had not been received. Pursuant to s 8.14 of the EPA Act, the Court has the power in these proceedings to grant development consent in the absence of GTAs, noting that the applicant will need to obtain a bush fire safety authority (BFSA), pursuant to s 100B of the *Rural Fires Act 1997*, in due course. From the information contained in the Joint Expert Report of Bushfire Experts (Ex 3), I am satisfied that the concerns raised by the RFS in their letter of response have been adequately addressed in the amended application that is now before the Court, and that the proposed development now provides adequate measures to meet the requirements of Planning for Bushfire Protection 2019.
- 17 Section 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) requires the consent authority to consider whether the land is contaminated and, if so, whether it is suitable for the intended purpose. From the Council's planning report at Ex 2 and the information contained in the Statement of Environmental Effects prepared by Urbis dated July 2024 (SEE) (Ex A tab 3), I am satisfied that the subject site has historically been used for residential purposes, with no prior land uses and no record or evidence of contaminating activities. I am therefore satisfied that,

from a contamination standpoint, the site is fit for the intended purpose of subdivision for residential development.

- 18 Pursuant to PLEP cl 7.1, the site is mapped as containing Class 5 Acid Sulfate Soils and is within 500m of land identified as containing Class 4 Acid Sulfate Soils. However, the site is not situated below 5m Australian Height Datum, and the proposed development will not lower the water table by more than 1m. Accordingly, the requirements of cl 7.1 are met.

### **The resolution of contentions raised by the Council**

- 19 In the Amended Statement of Facts and Contentions (Ex 1), the Council raised contentions relating to bushfire safety, biodiversity, subdivision design, stormwater management, earthworks, inadequate information and public interest. All of these contentions were resolved between the parties at the commencement of the hearing. For the following reasons, I am satisfied that there are no unacceptable issues of merit in these proceedings.

#### *Bushfire safety*

- 20 As outlined above, the setbacks, building envelopes and asset protection zones (APZs) shown on the amended application, and the evidence of the bushfire experts, demonstrates that the proposed development makes allowance for adequate APZs where required, and that subject to the agreed conditions of consent that now form Annexure A, those zones will be managed accordingly. Further, I am satisfied from the amended lot layout and the expert evidence that the potential building footprints on the site will not be exposed to radiant heat levels exceeding 29 kW/m<sup>2</sup> on the proposed lots, and will meet the requirements of Planning for Bushfire Protection 2019.

#### *Biodiversity*

- 21 The Council contended that the application should be refused as insufficient information has been provided to enable a proper assessment, and that the application fails to demonstrate that the proposed development avoids and minimises impacts upon the biodiversity values and native vegetation of the site and surrounding land. The site includes two mapped native vegetation communities, including Sydney Coastal Sandstone Gully Forest and Sydney Coastal Sandstone Gully Forest – Derived Grassland.

- 22 In the Joint Expert Report of Ecologists (Ex 5), the experts note that the amended application removes the conflict between APZs and remnant vegetation. The VMP demonstrates that the remnant vegetation of importance will now be both retained and restored. Further, the VMP and the BDAR demonstrate that the proposed development avoids and minimises the impacts on the biodiversity values and native vegetation of the subject site and surrounding land, in accordance with cl 7.6 of the PLEP and the BC Act. Accordingly, the proposal is now also consistent with the provisions of Clause B4.18 and B4.22 of the Pittwater 21 Development Control Plan (PDCP).

#### *Subdivision design*

- 23 The Council contended that the subdivision plan does not adequately respond to the physical characteristics and constraints of the site, and does not result in lots of a configuration that can appropriately accommodate the proposed housing product.
- 24 From the evidence of the planning experts in their Joint Report (Ex 4) and the amended lot layout, I am satisfied that the applicant has demonstrated that the lots in the amended application now before the Court are capable of accommodating appropriately sized housing, landscaping, private open space, stormwater infrastructure, parking and access. I am also satisfied for the above reasons that the subdivision now appropriately responds to the site constraints relating to bushfire and biodiversity.

#### *Stormwater Management*

- 25 The Council contended that the design and arrangement of the proposed stormwater management infrastructure was unacceptable and does not comply with Council's Water Management Specification. Specifically, queries were raised about the location, access to, and management of the OSD tank that is located in the north eastern corner of the site.
- 26 The amended application resolved these issues by placing the OSD tank within community title, and having a 3.5m wide easement with driveway access to allow for maintenance of this OSD. The location of the OSD tank remained generally unchanged, and the experts confirmed that with the appropriate access arrangements that this was acceptable. On this basis, and from of the

amended civil engineering plans by ACOR dated 5 March 2025, I am satisfied that adequate arrangements have been made for on-site stormwater management, and that the stormwater design adequately manages any likely impacts on neighbouring properties.

### *Earthworks*

- 27 Due to the sloping topography of the site, the Council raised concerns about the possibility of excessive cut and fill being required to accommodate future built form, resulting in development that may contravene PLEP cl 7.2 and PDCP Clause B8.1. To resolve this, conditions of consent were agreed that restrict future building footprints. This restriction would also prohibit earthworks within 4 metres of the northern and eastern boundaries of the site, which are the downslope boundaries neighbouring existing residential lots. These conditions have been incorporated into Annexure A.
- 28 From the amended subdivision design, the expert evidence in Ex 4 and the oral evidence of Mr Adam Croft, the Council's town planning expert, I am satisfied that the subdivision has been amended to remove the several metres of fill that would have otherwise been required on the eastern site boundary.
- 29 Subsequently, and based on the information in the Geotechnical Report, and noting that the site is mapped as 'Geotechnical Hazard H1' pursuant to PLEP cl 7.7(2), I am satisfied that the matters listed in PLEP cl 7.2 have been adequately considered and that the earthworks required for this development will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.
- 30 Pursuant to PLEP cl 7.7, for these reasons, I am further satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land, and that the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development.



### *Insufficient information*

31 From the parties' submissions, the information contained in the amended application and the expert evidence, I am satisfied that the insufficient information identified by the Council has now been resolved in the amended application, including clarification of:

- (1) The proposed titling arrangements for Torrens title lots and community title lots, and easement provision for access to the OSD.
- (2) The suitable landscape and surface treatment of the residual area of the site located to the south-west of road MC-01, noting both bushfire, landscape and physical safety requirements.
- (3) The management of this residual area to the south-west of road MC-01.
- (4) Road ownership.

### **The resolution of issues raised by the residents**

32 No oral submissions were made on site by resident objectors, however nine written submissions were made during the notification period. The amended application that is now before the Court was not renotified, and for the following reasons, I am satisfied that the amended application adequately addresses the relevant concerns raised in these submissions.

### *Traffic impacts*

33 Concerns were raised by several neighbouring residents regarding possible traffic congestion resulting from the proposed development. In oral evidence, Mr Croft stated that the configuration and ownership of the new road MC01 resolved any possible traffic impacts, particularly as it will form a new through-link between Forest Road and Jubilee Avenue. The experts concurred that the amount of traffic generated is as envisaged and planned for by the Warriewood release area masterplan, and is within acceptable limits.

34 The experts also concur that condition 17 in the agreed conditions of consent will result in adequate management of construction traffic.

### *Bushfire evacuation*

35 Several objectors raised concerns about potential risks to safe evacuation during a bushfire event, particularly noting the site is across the road from a school. In response to this, in oral evidence the bushfire experts concurred that the proposed development will not increase this risk for several reasons.

- 36 Firstly, Forest Road leads into urban form, which is downslope of the site and therefore subject to a slower rate of spread if a fire comes through the adjacent bushland to the west of the site. Secondly, Mr McMonnies, the bushfire expert for the Council confirmed that the school has its own BFSA with conditions that manage safe evacuation, and limited occupation of the school during certain levels of bushfire risk. Both experts concur that the thirteen houses in this development will not unacceptably add to the number of people evacuating, and importantly that the road network has the capacity to manage evacuation in a fire event.

#### *Stormwater runoff*

- 37 For the reasons given above, the engineering experts concur and I am satisfied that the proposed development adequately manages stormwater impacts both on-site and off-site. In oral evidence, the experts agreed that the OSD system is designed to manage stormwater to a pre-development level of runoff, and further that a construction management plan, as required by condition, will manage any issues that may arise during construction.

#### *Overshadowing/privacy*

- 38 Residents located to the east (downslope) of the subject site raised concerns about possible impacts of future buildings to their properties in terms of both overshadowing and privacy.
- 39 As per the oral evidence of the planning experts, the revised subdivision design and the information in Ex H, as a result of the restrictions on earthworks and setbacks to the relevant boundaries, the application now demonstrates that individual dwelling design is feasible without impinging on compliant site setbacks, and further that unreasonable overshadowing of neighbouring properties can be avoided. This will also be subject to further scrutiny through the assessment of detailed development applications for individual lots in the future, post-subdivision.

#### *Ecological impacts*

- 40 Submissions were made raising issues regarding the impact of the development on flora and fauna, including threatened species. Concerns included the fragmentation and loss of habitat, and species loss generally.

- 41 In response to these concerns, the ecology experts, Mr Michael Sheather-Reid for the applicant and Mr Robert Blackall for the respondent, concurred in oral evidence that the species listed in the objectors' submissions are seen in the local area, and use that local area for habitat. However, the particular vegetation on the site is a common vegetation community, and is not a known breeding habitat for threatened species. The BDAR confirms that the proposed development avoids and minimises the impacts on the biodiversity values and native vegetation of the subject site and surrounding land, and adequately manages any risk to known threatened species. Irrespective of this, the VMP as amended now directs enhancement of the existing vegetation on site, improving the conditions for flora and fauna generally.

**The approval of the development application is in the public interest**

- 42 For the reasons given, I am satisfied that the proposed development, as amended, will meet the relevant planning controls, and does not raise any issue of merit that renders it unacceptable. Further, I am satisfied that the issues raised by resident objectors have been addressed through these amendments, and that when considered against these issues, the application is acceptable.
- 43 I therefore conclude that the granting of consent of the development application that is now before the court is in the public interest.

**Orders**

- (1) Pursuant to s 8.15(3) of the EPA Act, the applicant is to pay the respondent's costs thrown away as a result of the amendment of the application for development consent, as agreed or assessed.
- (2) The appeal is upheld
- (3) Development Application DA2023/0129 for the subdivision of one lot into thirteen (13) lots and associated works at 4 Forest Road and 8 Forest Road, Warriewood, is determined by the grant of consent.
- (4) Exhibits 2 and MFI 1 are returned. All other exhibits are retained.

## **E Washington**

### **Commissioner of the Court**

#### **Annexure A**

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