



Land and Environment Court
New South Wales

Case Name: Steyne Hotel Freehold Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2022] NSWLEC 1509

Hearing Date(s): 6 September 2022

Date of Orders: 20 September 2022

Decision Date: 20 September 2022

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The appeal is upheld.
(2) Development Application No. 2021/2257 for alterations and additions to an existing hotel, including the construction of a shop top housing development and strata subdivision, at 75 The Corso, 41 North Steyne and 42 North Steyne, Manly, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
(3) The exhibits, other than 1 and A, are returned.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to an existing hotel – construction of a four storey shop top housing development – heritage item – no contentions raised by the Respondent

Legislation Cited: Environmental Planning and Assessment Act 1979, s 8.7
Environmental Planning and Assessment Regulation 2000, cl 55
Environmental Planning and Assessment Regulation 2021, Sch 6 cl 3
Land and Environment Court Act 1979 ss 34,39
Manly Local Environment Plan 2013, cll 4.3, 4.4, 4.6,

5.10, 5.21, 6.1, 6.4, 6.8, 6.9, 6.11, 6.13, 6.16, Sch 5
State Environmental Planning Policy (Infrastructure)
2007, cl 45
State Environmental Planning Policy (Resilience and
Hazards) 2021 cl 2.10, 4.4, 4.6
State Environmental Planning Policy (Transport and
Infrastructure) 2021, cl 2.48
Water Management Act 2000

Cases Cited: Cumming v Cumberland Council (No 2) [2021]
NSWLEC 117
Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC
90
Initial Action Pty Ltd v Woollahra Municipal Council
(2018) 236 LGERA 256; [2018] NSWLEC 118
RebelMH Neutral Bay Pty Limited v North Sydney
Council [2019] NSWCA 130
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827

Category: Principal judgment

Parties: Steyne Hotel Freehold Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
I Hemmings SC (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Northern Beaches Council (Respondent)

File Number(s): 2022/32828

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act* 1979 (EPA Act) against the deemed refusal of Development Application No. 2021/2257 for alterations and additions to the existing Steyne Hotel, including the construction of a four storey shop top housing development (the proposal) at 75 The Corso, Manly,

41 North Steyne, Manly and 42 North Steyne, Manly (the site) by Northern Beaches Council (the Council).

- 2 The appeal was subject to conciliation on 14 April 2022, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated, pursuant to s 34(4) of the LEC Act.

The development application has been amended

- 3 The applicant was granted leave by the Court to amend the application on 15 July 2022.
- 4 The Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000) continues to apply to the application because it was lodged on 22 November 2021 and has not yet been determined (cl 3 of Sch 6 to Environmental Planning and Assessment Regulation 2021). The amended application was uploaded to the NSW planning portal on 26 July 2022 with the Council's consent (cl 55 of the EPA Regulation 2000).
- 5 The amended application was renotified to affected residents and additional submissions were received.
- 6 On Monday 5 September 2022, the resident objectors were informed of the Council's decision not to raise any contentions in the hearing following the amendment of the application and the parties' agreement on the terms of the draft conditions of consent, and the resident objectors were provided with a copy of the draft conditions of consent.

Issues

- 7 The Council submitted that the amended application and the conditions of consent (Ex 8) address the contentions raised by the Council in the Statement of Facts and Contentions (Ex 1) to the Council's satisfaction. No contentions are raised by the Council.

The site and its context

- 8 The site is legally described as Lot 1 in DP 1034722, Lots 1, 2 and 3 in DP 1042657, Lot 102 in DP 1069144, and Lots 100 and 101 in DP 1069144.

- 9 The site is on the western corner of The Corso and North Steyne. Manly Beach is located directly opposite the site to the east.
- 10 The site has an area of 2,216m².
- 11 The adjoining and surrounding development is characterised by multi-level commercial, residential, and mixed-use developments.

The proposal

- 12 The proposal includes the partial demolition of existing structures; and construction of a four storey shop top housing development including seven residential apartments, office premises and hotel reception on the ground floor, basement parking, lift access and lift access for the hotel, stormwater infrastructure, landscaping and strata and stratum subdivision.

Public submissions

- 13 Two resident objectors gave evidence at the commencement of the hearing onsite and the Court and the parties viewed the site from an apartment opposite the site within the Pacific Waves development.
- 14 A town planning consultant gave evidence during the hearing on behalf of thirteen (13) apartment owners in the Pacific Waves development.
- 15 The concern of the objectors can be summarised as:
 - The disturbance the construction of the proposal will cause to nearby residential apartments, including dust, noise and traffic;
 - Limited access for construction vehicles in the laneway;
 - No additional entries to the hotel from the laneway should be permitted as another entry would increase noise;
 - No plant should be located on the roof of the shop top housing development;
 - The compliance of the building envelope with the development consent should be confirmed by a survey during construction;
 - The plant that has been removed from the hotel roof, and is shown on the architectural drawings, should not be reinstated; and
 - Visual privacy impacts from the apartments in the shop top housing development.
- 16 In response to the concerns raised by the resident objectors regarding the proposal, as amended, and the draft conditions of consent, the parties agreed

to a further six (6) conditions being added to the conditions of consent to address the issues raised by the resident objectors.

Expert evidence

- 17 The applicant relied on the expert evidence of Jennifer Hill (heritage), Kristy Hodgkinson (planning), Robert Varga (traffic) and Paul Scrivener (landscaping).
- 18 The Council relied on the expert evidence of Brian McDonald (heritage), Maxwell Duncan (planning), Phil Devon (traffic) and Joseph Tramonte (landscaping).
- 19 The heritage experts prepared a joint report (Ex 6), the planning experts prepared a joint report (Ex 3), the traffic experts prepared a joint report (Ex 4) and the landscaping experts prepared a joint report (Ex 5). The experts were not required to give oral evidence.
- 20 The experts agreed that the contentions raised by the Council in the Statement of Facts and Contentions (Ex 1) are successfully addressed by the amended proposal and conditions of consent. I accept the agreements of the experts.

Consideration

- 21 The application includes construction of a basement level and development below the identified groundwater levels. The Natural Resources Access Regulator has reviewed the application and advised the Council on 20 January 2022 that, for the purposes of the *Water Management Act 2000*, a controlled activity approval is not required for the proposed works and no further assessment by the agency is required (Ex 2, f 309).
- 22 Ausgrid has reviewed the application pursuant to cl 45(2) of the State Environmental Planning Policy (Infrastructure) 2007 [now cl 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021] and advised the Council (undated) that there is no objection to the proposed development (Ex 2, f 311).
- 23 State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) applies to the site at cl 4.4. The Council has assessed the applicant's Preliminary Site Investigation Report by Foundation Earth

Sciences dated 26 October 2021 and the Council is satisfied that there is a low to moderate risk of contamination in the excavated material and that the site can be remediated, if necessary. I accept the conclusions of the Council's Environmental Health Officer and the recommendation that the proposal is acceptable, subject to conditions (Ex 2, f 277-280). Those conditions have been included in the conditions of consent at Annexure A. I am satisfied that the requirements of cl 4.6(1) of SEPP Resilience and Hazards are met.

- 24 SEPP (Resilience and Hazards) applies to the site at cl 2.10, as the site is mapped as being within the coastal environment area. I accept the Council's assessment as detailed in the Natural Environment Referral Response – Coastal (Ex 2, f 259-260) that the meets the requirements of cl 2.10 of SEPP (Resilience and Hazards). I accept the Council's submission that the proposal will not impact on access to and along the foreshore; will not result in any overshadowing or loss of views from public places to foreshores; will not result in any visual amenity impacts; will not impact cultural or heritage places; and that the proposal, as amended, respects the view corridor over the site from the rear neighbour at 9-15 Central Avenue, Manly (Pacific Waves development).
- 25 The site is zoned B2 Local Centre pursuant to the Manly Local Environmental Plan 2013 (LEP 2013). Shop top housing is a permissible use with consent in the B2 zone. The objectives of the B2 zone, to which regard must be had, are:
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.
- 26 The proposal exceeds the height of building and floor space ratio (FSR) development standards for the site under LEP 2013, pursuant to cll 4.3 and 4.4 of LEP 2013. The objectives of the height of buildings and FSR development standards are:

4.3 Height of buildings

(1) The objectives of this clause are as follows—

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

(b) to control the bulk and scale of buildings,

(c) to minimise disruption to the following—

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

(iii) views between public spaces (including the harbour and foreshores),

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

4.4 Floor space ratio

(1) The objectives of this clause are as follows—

(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,

(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,

(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,

(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.

- 27 The site is a local heritage item (Sch 5 to LEP 2013, item 111 “Hotel Steyne”). The site is within a heritage conservation area (Sch 5 to LEP 2013, “Town Centre Conservation Area”). The consent authority, or the Court exercising the functions of the consent authority, must consider the effect of the proposal on the heritage significance of the item, and the area, pursuant to cl 5.10(4) of LEP 2013. I accept the agreement of the heritage experts that the proposal has

an acceptable impact on the heritage significance of the item, and the area (Ex 4).

- 28 Clauses 5.21 and 6.4 of LEP 2013 applies to the site. The site is located in a flood prone area. The application includes a Flood Management Report and stormwater plans prepared by Xavier Knight dated 7 October 2021 and 29 September 2021 respectively. I accept the conclusions of the Council's Natural Environment Referral Response – Flood, dated 7 January 2022, and the recommendation that the proposal is acceptable, subject to conditions (Ex 2, ff 273-276). Those conditions have been included in the conditions of consent at Annexure A. I am satisfied that the proposal is consistent with the requirements of cl 5.21(2) and 6.4(3) of LEP 2013.
- 29 Clause 6.1 of LEP 2013 applies to the site as the site is identified as being Class 4 land (Acid Sulfate Soils Map & Landslide Risk Map – Sheet CL1_005 of LEP 2013). I accept the conclusions of the Council's Environmental Health Referral Response – acid sulfate soils, dated 29 December 2021, and the recommendation that the proposal is acceptable, subject to conditions (Ex 2, f 271-272). Those conditions have been included in the conditions of consent at Annexure A.
- 30 Clause 6.8 of LEP 2013 applies to the site, because the site is identified as being 'Area 3' on the landslide risk map (Acid Sulfate Soils Map & Landslide Risk Map – Sheet CL1_005 of LEP 2013). The application includes geotechnical and construction responses which provide an assessment of the matters required by cl 6.8(4) of LEP 2013. I accept the Council's submission that the proposal adequately mitigates the risk of landslide, pursuant to cl 6.8(3) of LEP 2013.
- 31 Clause 6.9 of LEP 2013 applies to the site, at cl 6.9(2) (Foreshore Scenic Protection Area Map Sheet FSP_005 of LEP 2013). I accept the agreement of the planning experts that the proposal, as amended, is consistent with the requirements of cl 6.9(3) of LEP 2013.
- 32 I accept the Council's submission that the Council is satisfied that the proposal will activate the appropriate street frontages, pursuant to cl 6.11 of LEP 2013.

- 33 Clause 6.13 of LEP 2013 applies to the site, at cl 6.13(2)(a). I accept the agreement of the planning experts that the proposal, as amended, exhibits design excellence, having considered the criteria under cl 6.13(4) of LEP 2013. I am satisfied of the following:
- The proposal reflects a high standard of architectural design exhibited in terms of the design materials and detailing, and that the external appearance of the development will improve the quality and amenity of the public domain.
 - The proposal will achieve an acceptable relationship with existing and proposed buildings on neighbouring sites.
 - The design of the development is such that sustainable design principles have been incorporated into the design.
 - The development will not detrimentally impact on existing view corridors or landmarks.
- 34 I accept the Council's submission that the proposal provides at least 25% of the gross floor area (GFA) for commercial premises, as demonstrated by the architectural documentation, pursuant to cl 6.16 of LEP 2013.

Contravention of the height of buildings development standard

- 35 The proposal has a maximum height above existing ground level of 15.15m. There is no change of height to the hotel building at 75 The Corso, Manly.
- 36 The site has two height of building development standards, 12m and 10m. For the portion of the site to which the 10m height of buildings development standard applies, the height of the proposal is generally 12m, with a higher part which is setback from the street boundary by 5m and is a maximum height of 15.15m.
- 37 The applicant provided a written request seeking to justify the contravention of the height of buildings development standard, prepared by Hamptons Property Services (Ex 3).
- 38 Clause 4.6(4) of the LEP 2013 establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent; *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] (*Initial Action*). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are

expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

39 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) LEC Act, but should still consider the matters in cl 4.6(5) of LEP 2013 (*Initial Action* at [29]).

40 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant’s written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* at [15]), as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

41 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion

of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).

42 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]:

- the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
- the development standard has been abandoned by the council;
- the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

43 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

44 The applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the B2 zone and height of buildings development standard are met, notwithstanding the non-compliance with the numerical standard, for the following reasons:

- The existing building in the location of the proposed shop top housing development exceeds the height of buildings development standard;
- The existing building is higher than the proposal;
- The proposal maintains or improves the existing view corridors towards Shelley Beach from the affected apartments in the Pacific Waves development on the opposite side of Henrietta Lane;

- The proposal has no impact on solar access to private open spaced or habitable rooms of adjacent development;
- The additional height above the height of buildings development standard is located in the centre of the site; and
- The proposal is consistent with the desired future character and streetscape context of the locality.

45 The grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24] and *Cumming v Cumberland Council* (No 2) [2021] NSWLEC 117 at [78]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

46 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). I am satisfied that justifying the portion of the proposed building envelope that contravenes the development standard by comparing it favourably to the additional amenity impacts caused by the existing building envelope can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

47 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent

authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

- 48 I am satisfied that the proposal, as amended, is consistent with the objectives of the B2 zone and the height of buildings development standard, for the reasons given by the applicant in justifying the exceedance of the height of buildings development standard.

Contravention of the FSR development standard

- 49 The FSR development standard for the central part of the site is 3:1 and for the remainder of the site, 2.5:1. The proposal has a FSR of 4.26:1 and 3.75:1 on the portions of the site with a FSR development standard of 3:1; and a FSR of 3:1 and 2.78:1 on the portion of the site with a FSR development standard of 2.5:1.
- 50 The applicant provided a written request seeking to justify the contravention of the FSR development standard (Ex 3).
- 51 The applicant's written request justifies the contravention of the FSR development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the B2 zone and FSR development standard are met, notwithstanding the non-compliance with the numerical standard, for the following reasons:
- The permitted GFA across the site is 6,395m². The existing GFA is 5,553m². The proposed GFA is 5,734m². The non-compliance with the development standard arises as a result of cl 6.16(3) of LEP 2013, which requires at least 25% of the GFA of a building within the B2 zone to be used as commercial premises.
 - The proposal improves the existing visual presentation of the roof with services that are highly visible, by replacing the existing residential component of the development with a well-designed, contemporary form that improves the streetscape presentation of the development and conceals the plant.
 - The proposal maintains and improves the existing view corridors from the upper level of Pacific Waves and removes the plant over the residential component of the development.
 - The proposal does not result in additional solar impacts on surrounding development.
- 52 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). I

am satisfied that justifying the portion of the proposed building envelope that contravenes the development standard by comparing it favourably to the additional amenity impacts caused by the existing building envelope, can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

53 I am satisfied that the proposal, as amended, is consistent with the objectives of the B2 zone and the FSR development standard, for the reasons given by the applicant in justifying the exceedance of the FSR development standard.

Conclusion

54 On the basis of all of the evidence before me, including the jurisdictional statement provided by the parties, I am satisfied that it is lawful and appropriate to grant development consent to the amended proposal.

Orders

55 The orders of the Court are:

- (1) The appeal is upheld.
- (2) Development Application No. 2021/2257 for alterations and additions to an existing hotel, including the construction of a shop top housing development and strata subdivision, at 75 The Corso, 41 North Steyne and 42 North Steyne, Manly, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
- (3) The exhibits, other than exhibits 1 and A, are returned.

Susan O'Neill

Commissioner of the Court

32828.22 O'Neil C Annexure A (425913, pdf)

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