



## Land and Environment Court New South Wales

Case Name: Mackenzie Architects International Pty Ltd v Northern Beaches Council

Medium Neutral Citation: **[2019] NSWLEC 1453**

Hearing Date(s): Conciliation conference on 16 August 2019

Date of Orders: 4 October 2019

Date of Decision: 4 October 2019

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders:

- (1) Leave is granted to the Applicant to rely upon the amended plans listed in Condition 1 at Annexure 'A'.
- (2) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 ("EPA Act"), the Applicant is to pay those costs of the Respondent that were thrown away as a result of amending the development application in the sum of \$5,000.00 within 28 days of these orders.
- (3) The Applicant's written request pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014 ("PLEP") seeking to justify the breach of the maximum building height development standard pursuant to cl 4.3 of PLEP dated 16 August 2019 has been considered and I have formed the necessary opinion of satisfaction under cl 4.6(4) of PLEP. Consequently, the Applicant's written request is well founded and is upheld.
- (4) The appeal is upheld.
- (5) Development Application DA2018/1210 for construction of a shop top housing development at 1 Gondola Road, North Narrabeen is approved subject to the conditions at Annexure "A".

Catchwords: DEVELOPMENT APPLICATION – conciliation  
conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation  
2000  
Land and Environment Court Act 1979  
Pittwater Local Environmental Plan 2014  
State Environmental Planning Policy (Building  
Sustainability Index: BASIX) 2004  
State Environmental Planning Policy No 55 –  
Remediation of Land  
State Environmental Planning Policy No 65 – Design  
Quality of Residential Apartment Development

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council  
[2018] NSWLEC 118

Texts Cited:

Category: Principal judgment

Parties: Mackenzie Architects International Pty Ltd (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
M Staunton (Applicant)  
S Patterson (Solicitor) (Respondent)

Solicitors:  
Sattler & Associates (Applicant)  
Wilshire Webb Staunton Beattie Lawyers  
(Respondent)

File Number(s): 2018/359240

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal brought under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* ('EPA Act') against Northern Beaches Council's deemed refusal of Development Application No. DA2018/1210 ('DA').
- 2 The applicant sought consent for the construction of a shop top housing development consisting of one retail tenancy at ground floor level, 6 x 2 bedroom and 4 x 1 bedroom residential apartments, communal open space, and basement parking for 19 vehicles at 1 Gondola Road, North Narrabeen ('site').
- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* ('LEC Act'), which was held on 16 August 2019, and at which I presided. After the conciliation conference, the parties filed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 4 This decision involved the Court upholding the appeal and granting development consent to the development application subject to conditions.
- 5 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions.

### *Jurisdiction*

- 6 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. The parties advised that there were no jurisdictional considerations that would prevent the Court determining the appeal in accordance with the agreement. In terms of jurisdiction, the parties advise that:

- (1) the development works are for the purpose of a shop top housing, which is a permissible use in the B2 Local Centre zone of Pittwater Local Environmental Plan 2014 ('LEP'), the applicable planning instrument;
- (2) the development meets the objectives of the height of buildings development standard at cl 4.3 of the LEP, notwithstanding the contravention of the development standard. I consider this height contravention below.
- (3) the development is required to comply with the provisions of State Environmental Planning Policy No 55 – Remediation of Land ("SEPP 55"), and in particular cl 7(1) requiring consideration of any contamination and associated required remediation. The site has been previously used for residential and commercial purposes and does not require any remediation.
- (4) the development is required to comply with the provisions of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development ("SEPP 65") under the provisions of the Environmental Planning and Assessment Regulation 2000 ("the Regulations"). The Applicant's architect has prepared a Design Verification Statement that meets the requirements under cll 50(1AB) and 143A of the Regulations.
- (5) the development is required to comply with the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. An updated BASIX Certificate No. 926503M\_03 dated 21 August 2019 prepared by Greenview Consulting Pty Ltd has been provided by the Applicant.

**Contravention of the LEP's height control and written request**

- 7 Clause 4.3 of the LEP includes two provisions in relation to building height. Clause 4.3(2) provides for a maximum height of buildings of 8.5m for the site

via the LEP's Building Height Map. Clause 4.3(2A) introduces special arrangements for development on land, such as the subject site, which have ground levels situated below the flood planning level (FPL) applying to that land:

....  
(2A) Despite subclause (2), development on land:

(a) at or below the flood planning level or identified as "Coastal Erosion/Wave Inundation" on the Coastal Risk Planning Map, and;

(b) that has a maximum building height of 8.5 metres shown for that land on the Height of Buildings Map, may exceed a height of 8.5 metres, but not be more than 8.0 metres above the flood planning level

8 Clause 4.3(2A) limits development on the subject land to 8.0m above the FPL, which the development contravenes. The applicant seeks a variation to this development standard and has lodged a written request pursuant to cl 4.6 of the LEP, prepared by Boston Blyth Fleming Planners, and dated 16 August 2019, which I have granted leave for the use of in this appeal. I have reviewed the written request. I summarise the contravention briefly now as explained in the applicant's written request and agreed by Council. The proposed roof parapet height of RL 14.4m AHD, a communal open space balustrade height of RL 15m AHD and a lift overrun height of RL 17.8m are respectively some 10.1m, 10.7m and 13.5m above the FPL (which is 4.3m AHD). Therefore, it is non-compliant with the standard by between 2.1 (20.2%), 2.7 (26%) and 5.5m (53%).

9 Having reviewed its contents, I am satisfied that the written request has adequately addressed the matters required to be demonstrated to grant consent despite the contravention under the relevant provisions of cl 4.6(4)(a)(i) of the LEP. The reasons for my decision in regard to satisfaction are outlined below (using the findings established in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 for decision framing purposes).

10 The written request has adequately demonstrated that compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case. This has occurred through the written request demonstrating that compliance with the objectives of the standard has been achieved, notwithstanding the non-compliance. Specifically, it was demonstrated that:

- (1) The height of the development is consistent with the desired character of the locality and compatible with the height and scale of surrounding and nearby development; evidencing the North Narrabeen local character statement and other recent development in the locality with similar height characteristics in support.
- (2) Non-compliant elements of the building would not give rise to any unacceptable overshadowing (for example the lift overrun has been relocated to minimise overshadowing), or view loss.
- (3) Excavation has been minimised with sensitive arrangements for flood storage.
- (4) Due to its location, the proposal would not have adverse visual impacts on the natural environment, heritage conservation areas and heritage items.

11 The written request has also adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard. This is through its reference to the documented urban design/streetscape desire to provide a three storey shop top housing building typology on the site, consistent with that established by recently approved and constructed development of that form within the North Narrabeen Local Centre.

12 In regard to cl 4.6(4)(a)(ii) of the LEP, I am also directly satisfied that the proposed development will be in the public interest because it is consistent

with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. I rely on the written submission in regard to the consistency with the objectives of the development standard (see above). In regard to the B2 Local Centre zone objectives, I note the proposal as a mixed use development with good public transport access and which can provide for housing, shops and employment for local residents and others, and helping in the provision of safe local spaces especially in the evening. In this sense, the development seems entirely consistent with the zone objectives.

- 13 I also note that under s 4.15(1)(d) of the EPA Act there is a need for a consent authority to have regard to submissions. Council advises that due regard has been had to submissions and I accept this advice based on the oral evidence provided during the site view.
- 14 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. As the parties' decision is a decision that the Court could have so made, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision. I note that I have had no direct regard to the merits of the application in coming to this position.
- 15 The Court orders:
- (1) Leave is granted to the Applicant to rely upon the amended plans listed in Condition 1 at Annexure 'A'.
  - (2) Pursuant to s 8.15(3) of *the Environmental Planning and Assessment Act 1979* ("EPA Act"), the Applicant is to pay those costs of the Respondent that were thrown away as a result of amending the development application in the sum of \$5,000.00 within 28 days of these orders.

- (3) The Applicant's written request pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014 ("PLEP") seeking to justify the breach of the maximum building height development standard pursuant to cl 4.3 of PLEP dated 16 August 2019 has been considered and I have formed the necessary opinion of satisfaction under cl 4.6(4) of PLEP. Consequently, the Applicant's written request is well founded and is upheld.
- (4) The appeal is upheld.
- (5) Development Application DA2018/1210 for construction of a shop top housing development at 1 Gondola Road, North Narrabeen is approved subject to the conditions at Annexure "A".

A handwritten signature in black ink, appearing to read 'P Walsh', is written over a horizontal dotted line. The signature is fluid and cursive.

**P Walsh**

**Commissioner of the Court**

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