



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Davies v Northern Beaches Council [2019] NSWLEC 1637</b>
<b>Hearing dates:</b>	Conciliation conference on 13 December 2019
<b>Date of orders:</b>	24 December 2019
<b>Decision date:</b>	24 December 2019
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Bish C
<b>Decision:</b>	See orders at [23] below
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – residential dwelling – view loss – coastal protection – character – conciliation conference – agreement between the parties – orders
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Pittwater Local Environmental Plan 2014 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Coastal Management) 2018
<b>Texts Cited:</b>	Pittwater 21 Development Control Plan 2014 Planning for Bushfire Protection 2006
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Jennifer Davies (Applicant) Northern Beaches Council (Respondent)
<b>Representation:</b>	Counsel: J Palmer (Solicitor) (Applicant) K Webber (Solicitor) (Respondent)  Solicitors: Pikes and Verekers (Applicant) Wilshire Webb Staunton Beattie (Respondent)
<b>File Number(s):</b>	2019/150634
<b>Publication restriction:</b>	No

## JUDGMENT

- COMMISSIONER:** This is an appeal against a deemed refusal of Development Application (DA) 2019/0309 by Northern Beaches Council (hereafter the Council) for the demolition of existing structures and construction of a new dwelling house, two car

garage, swimming pool, associated landscaping works and front fencing on Lot 171 DP 15376, also known as 257 Whale Beach Road, Whale Beach (hereafter the site).

- 2 This Class 1 appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 The Court agreed to a conciliation conference under s 34AA(2)(a) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 13 December 2019 in Court. I presided over the conciliation conference. There was one legal representative whom spoke (and provided written submission) at the conciliation on behalf of four surrounding properties, and one further written submission for a separate property on issues relating to: overshadowing; character; height; view loss; and bulk and scale.
- 4 Prior to the conciliation conference, and following expert discussion, the applicant sought to amend the associated plans to the DA to be relied upon in the agreement.
- 5 Based on these amended plans, together with the DA's supporting documents and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The parties agree that the issues raised by the objectors have been considered and resolved. The decision of the parties is to uphold the appeal and grant consent to DA 2019/0309 with conditions.
- 6 Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, if it is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising its function under s 4.16 of the EPA Act and being satisfied, pursuant to s 4.15(1) to grant consent to DA 2019/0309, with conditions described in Annexure A.
- 7 The parties identified the jurisdictional prerequisites of particular relevance in these proceedings, in consideration of s 4.15(1) of the EPA Act, as consistency with the: State Environmental Planning Policy (Coastal Management) 2018 (SEPP Coastal); State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX); and Pittwater Local Environmental Plan 2014 (PLEP). In addition, the Pittwater 21 Development Control Plan 2014 (P21DCP) is of consideration to grant consent to the DA.
- 8 In compliance with the requirements of SEPP Coastal, the DA is supported by a Statement of Environmental Effects (SEE) and a coastal engineering advice (report), as referenced in the conditions of consent and considered in the amended plans. The parties agree the site is located within the Coastal Use Zone, and therefore the relevant clauses, namely cl 14 and 15, of the SEPP Coastal must be satisfied to grant consent to the DA. The parties agree that the requirements of SEPP Coastal are satisfied by the siting of the development in the elevated portion of the site that does not cause adverse coastal impact.
- 9 The proposed development is required to comply with the provisions of SEPP BASIX. An updated BASIX Certificate, No. 1003412S\_02, dated 10 December 2019, relates to the proposed development and is identified in the conditions of consent in compliance with the SEPP BASIX.
- 10 The parties agree that the relevant provisions of the PLEP are addressed to their satisfaction by the supporting documents and amended plans to the DA under appeal. The site is located within the E4 Environmental Living Zone. The proposed

development is permissible in the zone and the objectives of the zone, as specified in cl 2.3 of the PLEP, are satisfied.

- 11 The proposed development exceeds the numeric requirement of cl 4.3(2) (height standard) of the PLEP established at 8.5m, however does not exceed the exception standard (cl 4.3(2D)), and also satisfies the objectives for the application of the maximum height limit (of 10m). The elements of the dwelling that exceed the height standard, although are less than the maximum height, are limited to a minor portion of the roof form, which does not result in any amenity impacts, including overshadowing or view loss. The parties agree that the proposed development responds to the slope of the land and the building footprint is located on a slope of less than 30 degrees. I am therefore satisfied that the objectives of the cl 4.3(2D) are achieved, and the maximum building height, proposed at 9.665m, should be applied to the development in this DA.
- 12 Therefore, it is accepted that a (cl 4.6 written) request for variation of the height standard, as set out in cl 4.4 of the PLEP, is not required for further consideration of the proposed development, and that the Court can be satisfied of its consistency to grant consent to the DA.
- 13 The proposed development is located on an area of the site above the designated Flood Planning Level, as described in cl 4.3(2C) of the PLEP.
- 14 The parties agree that there are no unreasonable impacts to adjoining properties from the visual bulk, that result in view loss, solar access or privacy as a result of the proposed development.
- 15 The parties agree that the proposed development does not adversely affect the character of the local area, due to the visual perception that the roof form resulting in the maximum height standard will not be a dominant feature from the main street frontage or result in loss of views or amenity, particularly overshadowing or privacy to adjoining properties. The proposed development achieves the required setbacks and other relevant development standards.
- 16 Based on the amended plans and supporting documents to the DA, the issues raised by objectors that relate to the controls as specified in the P21DCP are achieved to the satisfaction of the parties. The parties agree that the amended plans address any potential view loss from adjoining residences and there are no amenity impacts, including privacy, solar access or acoustic that should result in the refusal of the DA. The applicant's consultant report assessing potential view loss impacts has been considered by the parties, and they agree that based on the amended plans, the proposed development will not adversely impact the loss of water views or the land/sea interface from adjoining properties, although acknowledge that some minor loss of district and sand views will occur, albeit across a side boundary.
- 17 The parties agree that the requirements of the P21DCP are complied with, based on the amended plans and conditions of consent. The proposed development was publicly notified in accordance with the P21DCP. During the initial notification period for this DA under appeal, six submissions in objection were received by Council. Those submissions were considered by the parties, prior to reaching the agreement.
- 18 The site is not located within bush fire prone land, therefore s 4.14 of EPA Act is not triggered for assessment. However, the site is partially mapped as being within the 100m buffer from 'Category 1 Vegetation', as described in the Council's Planning for Bushfire Protection 2006. A Bushfire Hazard Assessment Report and Bushfire Risk

Assessment Certificate are referred to in the conditions of consent to the DA. The parties do not raise this as an issue that would warrant consent of the DA to not be granted.

19 The amended plans have been considered in the context of the site and with reference to the concerns raised in public submissions.

20 Based on these amended plans and supporting documents to the DA, the contentions/issues raised by the respondent/residents, and jurisdictional requirements are resolved to the satisfaction of the parties.

21 I am satisfied that there are no jurisdictional impediments to this agreement and that DA 2019/0309 should be granted, as it satisfies the requirements of s 4.15(1) of the EPA Act.

22 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

23 The Court orders that:

- (1) The Applicant is granted leave to rely on the following amended plans and supplementary material:
  - (a) Drawing A1101 B Site Plan, dated 20 September 2019 and prepared by Walter Barda Design;
  - (b) Drawing A1190 B Landscape Plan, dated 20 September 2019 and prepared by Walter Barda Design;
  - (c) Drawing A2001 B Floor Plans Lower, dated 20 September 2019 and prepared by Walter Barda Design;
  - (d) Drawing A2002 B Floor Plans Upper & LOS Area Plan, dated 20 September 2019 and prepared by Walter Barda Design;
  - (e) Drawing A3001 B Elevations West, South & East, dated 20 September 2019 and prepared by Walter Barda Design;
  - (f) Drawing A3002 B Nth Elevations & Sections 01, 02, 03 & 04, dated 20 September 2019 and prepared by Walter Barda Design;
  - (g) Drawing A3101 B Long Sections 01, dated 20 September 2019 and prepared by Walter Barda Design;
  - (h) Drawing A2501 B Shadow Diagrams 9am 21 June, dated 20 September 2019 and prepared by Walter Barda Design;
  - (i) Drawing A 2502 B Shadow Diagrams 12pm 21 June, dated 20 September 2019 and prepared by Walter Barda Design;
  - (j) Drawing A2503 B Shadow Diagrams 3pm 21 June, dated 20 September 2019 and prepared by Walter Barda Design;
  - (k) Drawing A2505 A Shadow Diagrams 10am 21 June, dated 20 September 2019 and prepared by Walter Barda Design;
  - (l) Drawing A2506 A Shadow Diagrams 11am 21 June, dated 20 September 2019 and prepared by Walter Barda Design;
  - (m) Drawing A2511 A Sunview Diagrams 9am and 10am June 21, dated 20 September 2019 and prepared by Walter Barda Design;
  - (n) Drawing A2512 A Sunview Diagrams 11am & 12pm June 21, dated 20 September 2019 and prepared by Walter Barda Design;
  - (o) Drawing A2513 A Sunview Diagrams 1pm and 2pm June 21, dated 20 September 2019 and prepared by Walter Barda Design;
  - (p) Statement of Support – Amended DA-2019/0309 prepared by SJB Planning and dated 1 October 2019;
  - (q) View Sharing Assessment prepared by Dr Richard Lamb and dated 1 October 2019;

- (r) Submission to Development Determination Panel prepared by Alison McCabe and dated 25 November 2019;
  - (s) BASIX Certificate dated 10 December 2019;
  - (t) Nationwide House Energy Rating Scheme Certificate dated 10 December 2019; and
  - (u) Assessor Certificate – Single Dwelling dated 10 December 2019.
- (2) The appeal is upheld.
  - (3) Development Application DA 2019/0309 for demolition of existing dwelling and carpark structures and construction of a new dwelling house, two car garage, swimming pool, associated landscaping works and front fencing is approved subject to the conditions at Annexure A.

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**S Bish**

**Commissioner of the Court**

[Annexure A \(132 KB, .pdf\)](#)

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Decision last updated: 31 December 2019