



Land and Environment Court New South Wales

Case Name: Forest Apartments Pty Ltd v Northern Beaches Council

Medium Neutral Citation: 2023 NSWLEC 1042

Hearing Date(s): 24 and 25 October 2022

Date of Orders: 03 February 2023

Date of Decision: 03 February 2023

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The appeal is dismissed.
(2) Development application DA2021/2362 for a three-storey building over basement parking at 1105 Barrenjoey Road, Palm Beach and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022) is determined by refusal of consent.
(3) The exhibits are returned except Exhibits 1, A, B, D and E which are retained.

Catchwords: DEVELOPMENT APPLICATION – shop top housing development – height of building contravention – whether written request demonstrates sufficient environmental planning grounds to justify the contravention

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 1.3, 8.7
Land and Environment Court Act 1979
Pittwater Local Environmental Plan 2014 cl 4.3, 4.6

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118

Texts Cited: Pittwater 21 Development Control Plan

Category: Principal judgment

Parties: Forest Apartments Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
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File Number(s): 2022/89442

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JUDGMENT

- 1 This judgement is concerned with an appeal by the applicant under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Northern Beaches Council (Council) of development application No DA2021/2362 (DA) for a mixed use development at 1105 Barrenjoey Road and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022), hereafter referred to as the site.

Site and locality

- 2 The site is triple fronted and irregularly shaped. It is bound to the east by Barrenjoey Road and to the north by Iluka Street. When Iluka Street bends to the south, at the site's north-western corner, this street also provides the western boundary to the site.
- 3 The site's surveyed area is 1366.5m². It presently accommodates a part two/ part three storey development comprising commercial premises at ground level and residential accommodation on the levels above. The site does not have basement car parking. Council's Statement of Facts and Contentions filed 11 October 2022 (Ex 1) suggests the current building was constructed between 1991 and 1994.
- 4 The site sits near the northern extremity of a strip of commercially zoned land running along the western side of Barrenjoey Road. To the immediate south, the site abuts a building commonly known as Iluka Apartments, which has commercial tenancies below. To the west across Iluka's Street are beachfront detached dwelling houses. To the north, across Iluka Street, is a single storey retail premises which includes a bottleshop. To the east of the site is McKay Reserve zoned for public recreation, with other dwelling houses and residential flat buildings further north and south of the reserve along Barrenjoey Road.

Proposal

- 5 The DA seeks consent for demolition of existing structures, excavation and ground works, and construction of a three-storey building over one level of basement car parking, two ground floor retail tenancies and eight three-bedroom apartments on Levels 1 and 2 along with associated landscaping and public domain works.

Planning provisions

- 6 The site is located within the B2 Local Centre zone under Pittwater Local Environmental Plan 2014 (PLEP). It was not contested that the proposal is permissible in the zone. There is a breach to the height of building development standard at cl 4.3 of PLEP, which will be seen to be determinative in this appeal. Also of relevance are certain inclusions in Pittwater 21 Development Control Plan (PDCP).

Issues

- 7 Following certain amendments to the proposal, three matters remained in contention in this appeal: (1) the building height contravention, (2) character and landscape, (3) impact on neighbouring amenity.
- 8 I also note there were many objections submitted to Council by lay persons (Ex 8). I heard submissions from some of these objectors during the site inspection on the first day of the hearing and had the chance to visit premises within Iluka Apartments. Given my findings, there is no need to particularise the concerns raised in lay submissions. Suffice to say they included the three matters pressed by Council in the proceedings and listed above.
- 9 Here I will also mention the experts giving oral evidence in the proceedings were G Boston (appointed by the applicant) and A Susko (appointed by the Council).

Height of building development standard contravention

Conditional permissive powers

10 There are permissive powers in cl 4.6(2) of PLEP which allow approval of a proposal notwithstanding a contravention of a development standard, such as the height of buildings contravention evident in this proposal. But use of these permissive powers by a consent authority is subject to the restrictions at subcll 4.6(3)-(5) of PLEP:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

- (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.

(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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

11 Thus, the Court must form two positive opinions of satisfaction under cl 4.6(4)(a) of PLEP to enliven the permissive power under cl 4.6(2) to grant development consent in instances of a development standard contravention (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [14]).

12 The first opinion of satisfaction, at cl 4.6(4)(a)(i) of PLEP, is in regard to a written request from the applicant seeking to justify the contravention of the

development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3) of PLEP. Because I am not satisfied in regard to this first opinion of satisfaction, at cl 4.6(4)(a)(i), there is no need for me to go to the second opinion of satisfaction, at cl 4.6(4)(a)(ii) of PLEP.

- 13 The applicant has opened the door to the Court's consideration of the use of the permissive powers at cl 4.6(2) of PLEP by providing a written request seeking to justify the height of building contravention. The written request was prepared by Boston Blyth and Fleming Town Planners and was dated 24 October 2022 (Ex E).

Particulars of the contravention

- 14 The applicable height of building standard under cl 4.3 of PLEP is 8.5m. According to the written request, the proposed works have a building height measured to the top of the lift overruns of between 10.96m and 10.98m representing a variation of between 2.41m (28.3% exceedance) and 2.48m (29.1%). The roof parapet would exceed the standard by between 1.75m (20.5%) and 2m (23.5%). The proposed acoustic screen around an internal roof top service area is suggested to have a building height of about half a metre higher than the lift overruns. In the course of the hearing, a floor plan of this roof top service area was produced which indicated a reduced footprint (Ex 11).
- 15 Notable, is the proportionate footprint of the building contravening the height standard. While not dimensioned, this is depicted isometrically in Figure 1 of the written request. Mr Susko calculated that the proportion of the site occupied by building height in excess of the standard was 58% (Expert Planning Report, (Ex 3) par 3.1.4.13), a figure which Mr Boston accepted in oral evidence.

Whether written request adequately demonstrates sufficient environmental planning grounds

- 16 The first opinion of satisfaction, under cl 4.6(4)(a)(i) of PLEP, itself involves two thresholds. One of these is that I must not grant consent to this application unless I am satisfied that the written request has adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention (PLEP cll 4.6(3)(b) and 4.6(4)(a)(i), in part).
- 17 At pages 15-16, the written request nominates two environmental planning grounds, seen as sufficient to justify the contravention. These were: (1) that the proposal provides a contextually responsive building design, and (2) that the proposal promoted the achievement of certain nominated objects of the EPA Act itself. In the written request, under these two nominated environmental planning grounds, there were a number points of explanation which can be thought of as “sub-grounds”. I address the two grounds and explanatory sub-grounds below. I will note here that in this consideration of the written request’s demonstration of environmental planning grounds, (to justify contravening the development standard) I am not only considering the commentary at pages 15-16, but rather I have considered the written request as a whole. It will be seen that, in this case, the written request has nominated the proposal’s argued alignment with relevant zone and development standard objectives as part of the environmental planning grounds it relies upon, calling these matters of the written request coverage to attention in any event.

Environmental planning ground 1: Contextually responsive building design

Sub-ground 1.1: proposal adopts established design characteristics

- 18 The written request indicates that the proposal adopts design characteristic established by other three-storey mixed use development within this local centre and within the street block. Three points are drawn to attention, with the proposal, seen as: (1) “maintaining a predominant 2 storey building form with the upper-level apartments contained predominantly within a pitched roof form”, (2) “(using) natural materials and finishes” and (3) “(adopting) recessed

verandas at both ground and first floors levels”. The written request also calls up relevant policy provisions by suggesting the proposal is seen to “(reflect) the 'seaside-village' built form character identified in the Palm Beach Locality desired future character statement for development within the commercial centre”.

Consideration

- 19 The area falls within the land subject to clause A4.12 Palm Beach Locality under PDCP. The “desired character” commentary to this clause includes the following:

“Future development will maintain a building height limit below the tree canopy and minimise bulk and scale whilst ensuring that future development respects the horizontal massing of the existing built form. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the commercial centres will reflect a 'seaside-village' character through building design, signage and landscaping, and will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, to provide feed trees and undergrowth for koalas and other animals, and to enhance wildlife corridors.”

- 20 While I note the written request’s argument, it seems to me a fairer analysis to see the proposal as quite partial in its adoption of both established design characteristics and policy provisions. It is true that the other reference mixed use developments (gaining most attention were the Iluka Apartments to the immediate south, and a mixed use development further south again at 1073-1077 Barrenjoey Road) do adopt a built form comprising ground level retail and commercial then, two levels of residential above, with the uppermost apartments within a pitched roof form. However, the proposal embodies

significant differences when compared with these other mixed use developments. First is in regard to the form of the roof, which I go to later. Second is in regard to the proportionate scale of the third-floor element (which is related to the scale of the building height contravention of 58% site cover). Here I note Figure 4 in Ex 3 and the commentary of Mr Susko generally on the point of the area of the contravening element. A third point of comparison, in regard to established design characteristics, is the adopted boundary setbacks, which considerably breach the 3.5m front boundary setback control under PDCP. This limits the potential to provide opportunity for landscaping, in particular deep soil landscaping, which may have been able to offset the otherwise building massing above the height control, and in allow for canopy trees, in the longer term, to achieve a setting where building heights (rather than gutterlines) were “below the tree canopy”. Generally, I am not convinced by the written request that the proposal would maintain a predominant two storey building presentation. The scale of the third-level element, the proposed idiosyncratic roof form (short pitch above the gutter with a largely flat roof) and the lack of opportunities for landscape relief are obvious points of difference to reference buildings which are not effectively countered in the written request.

- 21 The written requests argument that proposed “colours and materials will harmonise with the natural environment” can be accepted, but this is more seen by me as a basic compliance response rather than as special environmental grounds to justify a contravention of the proposed scale.

- 22 The written request is correct in describing balcony elements of the ground and first floor as being recessed rather than protruding. There are two points here. First that, under PDCP, there are considerable front setback breaches at these levels (that is to say it should not be seen as a particular positive that there isn’t a further breach by balcony elements). Second is that balconies and dormers in the contravening third level form do protrude.

Sub-ground 1.2: due to the site geometry, any pitched roof form element above a two storey wall height would likely exceed the 8.5m height control

Consideration

- 23 While I note the written requests point, the question here is not whether any or all height contraventions should be deemed inappropriate or otherwise. The points of attention in this case are the specifics and reasonableness of this particular contravention. I comment further on site geometry in my concluding findings in regard to the test under examination here (from [35]).

Sub-ground 1.3: most observers would not find the proposal, by virtue of building height, offensive, jarring or unsympathetic in a streetscape

Comment

- 24 While the author is entitled to hold this opinion in regard to the impressions of future observers, the planning controls are not limited to preventing offence and the like; and are concerned with establishing a certain physical and landscape character. In this instance I am not convinced that these are strong environmental planning grounds to justify a contravention of the scale proposed.

Sub-ground 1.4: height of building breach does not prevent achievement of zone or development standard objectives

- 25 Under cl 4.6 of PLEP, indirect or direct findings in regard to how a proposal lines up with zone and development standard objectives are separate tests to that of whether a written request establishes sufficient environmental planning grounds to justify a contravention. That does not prevent me from considering the written request's submissions here in relation to the specified objectives.

- 26 The zone objectives are as follows:

- 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 provide healthy, attractive, vibrant and safe local centres.
- To strengthen the role of centres as places of employment.
- To provide an active day and evening economy.

- To provide for residential uses above street level where they are compatible with the characteristics and uses of the site and its surroundings.

27 I have noted the written request's argument that the proposal is consistent with and does not prevent achievement of the zone objectives. This is largely true. However, there is nothing in the written request's consideration of the relationship between the proposal and the zone objectives which might provide sufficient environmental planning grounds for the breach.

28 The objectives of cl 4.3 of PLEP, which establishes the height of buildings development standard, are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

29 The most pertinent objectives to the matter at hand are objectives (a) and (b) above. The written request's arguments in regard to them are similar to the points raised at sub-grounds 1.1-1.3 above, and warrant the same response. But it seems to me generally, if the test is concerned with establishing sufficient environmental planning grounds to justify a contravention, something more than compliance or consistency with zone and development standard objectives is sought.

Sub-ground 1.5: it can be demonstrated that the proposal achieves better planning outcome and therefore is in the public interest.

Consideration

30 I note the statement in the written request that the proposal achieves a better outcome for and from development by allowing flexibility in particular circumstances, linking to the objectives at cl 4.6(1)(b) of PLEP. I do not see the evidence in the written request to support the statement. But I also

acknowledge, as does the written request (p 16), that there is no obligation to achieve the stated objectives at cl 4.6(1) of PLEP.

Environmental planning ground 2: promoting achievement of nominated objects of the EPA Act

Sub-ground 2.1: promotion of the orderly and economic use and development of land (s 1.3(c) EPA Act)

- 31 In the written request the proposal is argued to promote the orderly and economic use and development of land by “facilitating a 3rd level of floor space on this site consistent with other 3 storey mixed use development within the sites visual catchment including the existing development on the subject property”.

Consideration

- 32 On the evidence of Mr Susko, with which I agree, the proposal considerably exceeds the proportionate quantum of development that contravenes the height of building development standard when compared to the on-site and nearby three storey mixed use development.

Sub-ground 2.2: promotion of good design and amenity of the built environment (s 1.3(g) EPA Act)

- 33 The written request points to the proposal’s adherence to “more contemporary floor to floor heights both at ground and upper levels, as required by the ADG”, when compared to the building immediately to the south.
- 34 I would acknowledge this comparative design benefit, but I will come back to the question of good design and amenity of the built environment below.

Written request has not adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention

- 35 I am not satisfied that the written request has adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify the contravention. The written request relied on two (headline) grounds. Even if these two grounds were sufficient to justify the

contravention, the written request failed to demonstrate either were successfully achieved under the proposed design.

- 36 The first environmental planning ground was that the proposal provided a contextually responsive building design. It seems to me that the proposal's arguments on contextual responsiveness adopt two perspectives. The first perspective was outward looking. It sought to demonstrate that the proposal was responsive to other buildings in the setting. However, the scale of the height contravention, as proposed, was well in excess of the other referenced buildings. As a result, the development would have an inappropriate and jarring height massing in the streetscape.
- 37 The second perspective, in regard to contextual responsiveness, was more inward looking and had regard to the site's geometry, or its relatively long frontage to Barrenjoey Road, its triple frontage and its depth. This was to suggest that this site geometry should be seen as an environmental planning ground to justify height contraventions of the nature proposed. It is unconvincing to suggest the site's geometry should be a factor in the consideration of whether the proposal might fit harmoniously into the existing contextual setting. This was not the point of this second perspective. I think it was to suggest that given the site geometry certain allowances were due as a planning ground. While there may be something in that point in the abstract, with a view to development yield and the like, in this instance there is also reasonably direct evidence to suggest that larger and wider sites (such as the proposed site) can accommodate more architecturally responsive design. The corner site development at 1073-1077 Barrenjoey Road, which seems to have a similar area, and a frontage to Barrenjoey Road of similar length, is considerably more responsive to the setting, accommodating buildings with in roof accommodation at a third level which integrate sensitively with roof pitches to visible ridges or peaks, and does manage to maintain "a predominant two storey building form" as the desired character statement seeks (see [19]), with the upper-level apartments contained predominantly within a pitched roof form, a roof form which the experts seemed to value.

- 38 The second environmental planning ground referred to the objects of the EPA Act. I need to comment further on the claims in the written request that the proposal lines up with the object at s 1.3(g) EPA Act, which is concerned with promoting good design and amenity of the built environment. I note this particular claim in the written request relates to floor to ceiling heights. However, larger questions arise when this object of the EPA Act is called upon in a written request of this kind.
- 39 There are beneficial aspects of the proposal in design terms. An increased activity at street level can be anticipated when compared to the existing relatively inactive streetside, but this is an expectation of any new development along Barrenjoey Road.
- 40 Of itself, the proposed building height contravention would provide for an oversized massing at the upper level when compared to its setting. On the form of the roof of the proposal, I am not convinced the proposal's roof is the kind of "pitched roof" that might be thought of as a fundamental element to achieving a seaside village character consistent with clause A4.12 Palm Beach Locality of PDCP (mindful of the expert's agreed position, Ex 3 par 3.1.1.8). There is a pitch, or angle, to the roof above the gutter line but the pitched roof form is broken by quite extensive upper level balconies and is relatively short in its height, in any event, before the major element of the roof design, the flat roof element, begins.
- 41 The scale and massing of the height contravention would change the streetscape presentation from that which might be reasonably understood from the existing controls. Other elements of the design mean that there is insufficient opportunity for significant canopy landscaping to offset this in a meaningful way.

Conclusion

- 42 There may well be opportunities for a redevelopment of the subject site which better achieves planning objectives relating to the addition of vibrancy to this centre and providing increased opportunity for residential uses at upper levels

of buildings. However, for height contraventions of the scale proposed here, it seems to me, there needs to be more direct and explicit environmental planning grounds in support.

- 43 As the written request has not adequately addressed the requirement to demonstrate that there are sufficient environmental planning grounds to justify contravention of the height of buildings at cl 4.3 of PLEP, the facultative powers of cl 4.6(2) of PLEP are not available. In these circumstances, there is no jurisdiction to grant consent.

Orders

44 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application DA2021/2362 for a three-storey building over basement parking at 1105 Barrenjoey Road, Palm Beach and 43 Iluka Road, Palm Beach (Lot CP SP 87024 and Lot CP SP 87022) is determined by refusal of consent.
- (3) The exhibits are returned except Exhibits 1, A, B, D and E which are retained.

I certify that this and the preceding 12 pages are a true copy of my reasons for judgment.



.....
P Walsh

Commissioner of the Court
