



Land and Environment Court
New South Wales

Case Name: T & P Manly Land Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1446

Hearing Date(s): Conciliation Conference 11 April, 6, 21, 29 May, 14 June, 2 July 2024

Date of Orders: 30 July 2024

Decision Date: 30 July 2024

Jurisdiction: Class 1

Before: Byrne AC

Decision: The Court orders that:
(1) The appeal is upheld;
(2) Development Application DA2023/0987 for the demolition of existing structures and construction of a shop top housing development comprising of ground floor retail premises, 24 residential apartments and two levels of basement carparking, associated infrastructure and landscaping at 35-43 Belgrave Street Manly, NSW 2095, is determined by a grant of consent subject to conditions contained in Annexure 'A';
(3) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment in accordance with section 8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed.

Catchwords: DEVELOPMENT APPEAL – demolition existing shops and commercial buildings – construction shop top housing – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 4.16, 8.7
Land and Environment Court Act 1979, s 34

Roads Act 1993, s 138
Water Management Act 2000, ss 90, 91

Manly Local Environmental Plan 2013, cl 4.3, 4.4, 4.6,
5.10, 5.21, 6.1, 6.2, 6.4, 6.9, 6.11, 6.12, 6.16
State Environmental Planning Policy (Biodiversity and
Conservation) 2021
State Environmental Planning Policy (Housing) 2021
State Environmental Planning Policy (Resilience and
Hazards) 2021
State Environmental Planning Policy (Sustainable
Buildings) 2022
State Environmental Planning Policy (Transport and
Infrastructure) 2021

Texts Cited: Manly Development Control Plan 2013

Category: Principal judgment

Parties: T&P Manly Land Pty Ltd
ABN 79662039483 (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
M Sonter (solicitor) (Applicant)
J Simpson (solicitor) (Respondent)

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

File Number(s): 2024/51916

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act* 1979 (EPA Act) against the refusal by the Northern Beaches Council (the Council) of DA2023/0987 (the Development Application) for demolition of existing structures and construction of a shop top housing development (the Proposed Development) at 35-43 Belgrave Street Manly, NSW 2095, being collectively Lot 1 in DP 100633, Lot 1 in DP 104766, SP14133, Lot 1 in DP 34395 and Lot 1 in DP 719821 (the Site).

- 2 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on site and at Court. I presided over the conciliation conference.
- 3 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties and which addressed the Council's contentions. This decision involved Council approving an application to amend the Applicant's plans pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021. The agreed position is for the Court to uphold the Class 1 appeal and grant development consent to the Proposed Development with conditions at Annexure A.
- 4 The main amendments made to the Proposed Development include:
 - (1) Removal of the vaulted roof form and provision of a flat roof form at level 5 with no awnings;
 - (2) Provision of 3m setbacks to level 5 to Whistler and Belgrave Streets;
 - (3) Provision of 6m setbacks to the roof top private terraces;
 - (4) Increase in the level of the ground floor above the 1% AEP flood level to RL5.955;
 - (5) Removal of a penthouse apartment on level 5; and
 - (6) Provision of 2 additional car parking spaces for the retail tenancies.
- 5 The parties are satisfied that the amended application satisfactorily addresses the Respondent's contentions in the Statement of Facts and Contentions (SOFAC), subject to the imposition of conditions.
- 6 There are jurisdictional prerequisites which require my satisfaction before the power to grant consent under s 4.16(1)(a) of the EPA Act can be exercised by the Court. The parties outlined jurisdictional matters of relevance to the development in an agreed Jurisdictional Statement (the Statement) provided to the Court. The statutory planning controls relevant to the Site and the Proposed Development are listed in the Council's SOFAC.

Satisfaction as to Jurisdiction:

- 7 Regarding jurisdiction and taking into account the parties advice in the Statement, I am satisfied in regard to the following relevant matters.

Water Management Act 2000 (WM Act)

- 8 The Development Application is nominated integrated development, requiring approval under s 91 of the WM Act. The Development Application was referred to Water NSW on 8 January 2024.
- 9 Pursuant to s 90(2) of the WM Act, Water NSW issued their General Terms of Approval (GTA) for a water supply work on 13 June 2024 and these have been incorporated into the agreed conditions of consent.

Roads Act 1993 (Roads Act)

- 10 Approval under s 138 of the Roads Act is required for the construction of a new driveway crossover from the site to Whistler Street.
- 11 The Development Application was referred to Transport for NSW (TfNSW) on 8 January 2024 for assessment. On 23 January 2024 TfNSW confirmed that Whistler Street is a local road under the management and control of the Council and concurrence is not required.
- 12 A condition has been imposed (condition 23) which requires a s 138 approval to be obtained from Council in relation to works within the road reserve.

State Environmental Planning Instruments

- 13 I have considered the jurisdictional issues raised by the following Environmental Planning Instruments (EPIs) applicable to the Proposed Development and the Site, as set out in the Statement:
 - (1) State Environmental Planning Policy (Resilience and Hazards) 2021
 - (2) State Environmental Planning Policy (Sustainable Buildings) 2022
 - (3) State Environmental Planning Policy (Housing) 2021
 - (4) State Environmental Planning Policy (Biodiversity and Conservation) 2021
 - (5) State Environmental Planning Policy (Transport and Infrastructure) 2021
- 14 I am satisfied that the parties detailed analysis of the provisions of the EPIs and conclusions drawn as set out in the Statement [at paragraphs 24 to 43] has comprehensively covered matters of relevance to the subject land at 35-43 Belgrave Street, Manly, that will be consolidated to comprise the Site. Where necessary, the Applicant has provided additional reports (listed in the Notation

at the end of the judgment) and the Respondent has promulgated further conditions of consent which are agreed (set out in Annexure A to the judgment). I accept and agree with the parties conclusions and am satisfied that no jurisdictional impediments arise from the requirements of the EPIs listed above that would prevent the Court from allowing the appeal and granting consent to the Development Application, as amended.

Manly Local Environmental Plan 2013 (MLEP)

- 15 The site is zoned E1 – Local Centre under the MLEP. The proposed development is defined as ‘shop top housing’, which is permissible with consent in the E1 zone. The parties have considered the objectives of the zone and the Proposed Development is not inconsistent with the zone objectives.

Clause 4.3 (Height of Buildings)

- 16 the maximum building height for the site is 15 metres. The highest point of the Proposed Development is 18.61 metres, being an exceedance of the Manly LEP control of 3.61 metres (24%). The Proposed Development requires a cl 4.6 request to justify a contravention of the Building Height development standard contained in cl 4.3 of the MLEP. I have read the Request drafted by Boston Blyth Fleming dated 5 June 2024 supporting the contravention summarised by the parties in the Statement at paragraph 47.
- 17 The parties agree that the cl 4.6 request is prepared with the relevant requirements under cl 4.6(3), the development will be in the public interest because it is consistent with the objectives of the FSR development standard and the objectives of the C4 Environmental Living zone, and there are adequate environmental planning grounds to support the proposition that compliance with the development standard is unreasonable and unnecessary.
- 18 Further reasons stated are that the Proposed Development:
- “(1) is consistent with the prevailing building heights in the surrounding area, particularly along Belgrave Street;
 - (2) provides a bulk and scale that is commensurate with surrounding and nearby buildings;
 - (3) will minimise disruption on views to and from nearby residential development from public spaces, including the harbour and foreshores and views between public spaces;”

- 19 The Court accepts and agrees with the parties position in the Statement and I am satisfied to make the finding that the Applicant's written request under cl 4.6 of the MLEP to vary the height of buildings development standard in cl 4.3 of the MLEP for the Proposed Development, as amended, at 35-43 Belgrave Street Manly, NSW 2095, is upheld.

Clause 4.4 (Floor Space Ratio)

- 20 the Site has a mapped maximum Floor Space Ratio (FSR) control of 3:1. The Development Application has a maximum FSR of 3:1 (3,181m² of Gross Floor Area).

Clause 5.10 (Heritage Conservation)

- 21 The Development Application does not propose works on heritage items, or land within a heritage conservation area as defined in the MLEP. As such, consent is not required for works proposed in the Development Application under cl 5.10(2). Pursuant to cl 5.10(4) the Development Application is in the vicinity of the following heritage items and Heritage Conservation Areas as defined in sch 5 of the MLEP:

- (1) Ivanhoe Park (Local Significance 'I162');
- (2) Electricity Substation No 15009, 34A-36 Whistler Street (State Significance 'I255');
- (3) St Mary's Church, presbytery and school, Whistler Street (corner Raglan Street) (Local Significance 'I254');
- (4) Baby health care centre building, 1 Pittwater Road (Local Significance 'C1');
- (5) Pittwater Road Conservation Area (Local Significance 'C1'); and
- (6) Town Centre Conservation Area (Local Significance 'C2').

- 22 Pursuant to cl 5.10(4) of the MLEP, the Applicant has demonstrated, through the Heritage Impact Statement that the demolition of the existing building and the construction of the proposed development will not have a significant adverse impact on the heritage significance of the area.
- 23 the Court is satisfied that the matters in cll 5.10(4) and 5.10 generally of the MLEP are satisfied.

Clause 5.21 (Flood Planning)

24 Pursuant to cl 5.21 the site is classified as flood prone land and is within the Flood Planning Area. The Applicant has provided a Floodplain Management Report (listed in the Notations) which addresses the requirements in cl 5.21(2). The parties agree and the Court is satisfied that the development meets the following provisions:

- (1) Clause 5.21(2)(a) is compatible with the flood function and behaviour of the land as the proposal maintains the existing building footprint. Flooding is confined to the Belgrave and Raglan Street frontages. The proposed development will match the existing flooding function of the site.
- (2) Clause 5.21(2)(b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other properties as there is no loss of flood storage on the site. Refer to section 6 of the Floodplain Management Report.
- (3) Clause 5.21(2)(c) will not adversely affect the safe occupation and efficient evacuation routes and capacity of surrounding area as the development provides a ground floor level of RL5.955. Any inundation of the ground floor level will be limited to 12.5cm of water which is not anticipated to pose a risk to safety or evacuation routes. The basement entrance is located above the flood planning level. A safe evacuation route to the manly Bowling Club has been identified. Refer to section 4.4 of the Floodplain Management Report;
- (4) Clause 5.21(2)(d) incorporates appropriate measures to manage risk to life in the event of a flood through a safe evacuation route and minimal onsite inundation level. Refer to section 4.4 of the Floodplain Management Report;
- (5) Clause 5.21(2)(e) will not adversely affect the environment or cause avoidable erosion siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses through the provision of an On Site Detention Tank and the proper management and filtration of stormwater flows into existing council stormwater infrastructure as set out in the Stormwater plan.

25 Pursuant to cl 5.21(3) the parties are satisfied, and the Court is satisfied that the following matters have been considered in determining the application:

- (1) Clause 5.21(3)(a) – the impact of the development on projected changes to flood behaviour as a result of climate change – refer to Flooding Map F in Floodplain Management Report;
- (2) Clause 5.21(3)(b) - the design and scale of the development has been considered and the development has specifically accommodated a raised ground floor level to respond to flooding levels;

- (3) Clause 5.21(3)(c) - the development provides a safe evacuation route for the retail premises to avoid any risk to life. The maximum inundation level is 12.5cm and as such is not considered a significant threat to life; and
- (4) Clause 5.21(3)(d) - due to management of flooding and stormwater impacts, as well as the location of the building away from the coastal foreshore, it is not expected that flooding impacts will require the modification or relocation of the building.

Clause 6.1 (Acid Sulfate Soils)

- 26 The site is mapped as having Class 4 Acid Sulfate Soils (ASS). The Development proposes excavation of more than 2m below natural ground level and therefore requires development consent pursuant to cl 6.1(2). In accordance with the requirements of cl 6.1(3) an ASS Management Plan has been prepared for the works and accompanied the Class 1 application.

Clause 6.2 (earthworks)

- 27 The development seeks consent for earthworks and is consistent with the matters to be addressed pursuant to cl 6.2(3). Stormwater management plans accompanied the Class 1 application which outline the capture, management and discharge of stormwater on the site. Similarly, an erosion and sediment control plan are also provided to manage stormwater flows and quality during any excavation and site works.
- 28 The fill to be excavated is managed in accordance with the Remediation Action Plan (RAP) and will be excavated and disposed of in a safe manner. Any fill to be imported onto the site will be clean fill.
- 29 The development and stormwater management system are designed to drain water into an on-site detention tank (OSD) and treat water via a filtration system before discharging to existing stormwater infrastructure as outlined in the Stormwater Plans prepared by Van Der Meer.
- 30 The parties agree and the Court accepts that as outlined in the Geotechnical Assessment the development and excavation is not expected to result in an adverse impact on the amenity or structural integrity of adjoining properties. The stormwater management measures on the site will ensure that no adverse stormwater impacts occur to surrounding properties.

Clause 6.4 (Stormwater management)

31 Pursuant to cl 6.4(3), the parties are satisfied and the Court accepts that the development meets the following criteria having regard to the assessment and findings contained within the Stormwater Engineering Plans (accompanying the Class 1 application):

- (1) is designed to maximise the use of water permeable surfaces on the land through on structure planting;
- (2) provides for on site stormwater retention and reuse through a 5KL rainwater tank
- (3) avoids significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact through the provision of onsite capture, filtration, detention and discharge of stormwater.

Clause 6.9 (foreshore Scenic protection area)

32 The land is identified as being within the foreshore scenic protection area. Pursuant to cl 6.9(3) the parties are satisfied and the Court accepts that the development meets the following criteria having regard to the assessment and findings outlined below:

- (1) The development does not result in any significant adverse overshadowing or visual amenity impacts on surrounding properties, the foreshore or public places (refer to the Shadow diagrams at DA6020-DA6022 in the Amended Architectural Plans). The development does not result in the loss of views from a public place to the foreshore, as outlined in the Amended View Impact assessment;
- (2) The development provides a recessed level 5 and the proposed materiality improves scenic qualities of the coastline, as outlined in the Amended Architectural Plans and the Design Verification Statement;
- (3) The development is a permitted use on the site and is suitable for the site in that it provides a mix of uses that enhance the relationship with the foreshore by providing high quality living spaces and active commercial uses at ground floor;
- (4) Will not result in potential for conflict on land or water based activities due to its location away from the immediate Manly Beach foreshore to the east.

Clause 6.11 (Active Street Frontages)

33 Th site is identified on the active street frontages map. Pursuant to cl 6.11(3) the development provides ground floor retail premises that face and have

access from the street frontages. Pursuant to cl 6.11(4) the building provides residential lobby and vehicular access uses to the Whistler Street frontage which are uses exempt from the active street frontage requirements in cl 6.11(3).

Clause 6.12 (Essential Services)

- 34 Pursuant to cl 6.12(1) the development has access to water, electricity, disposal and management of sewage, stormwater drainage or on-site conservation, and suitable vehicular access.

Clause 6.16 (Gross floor area in certain areas)

- 35 The site is identified on the key sites map as 'gross floor area for certain Commercial Premises'. Pursuant to cl 6.16(3) the development must provide a minimum of 25% of the Gross Floor Area (GFA) as commercial premises. The development provides 563m² of commercial GFA (being 17.69% of the total GFA) which is a variation of 232.25m² or 29.2% to the minimum commercial GFA control.
- 36 A cl 4.6 request has been prepared by Boston Blyth Flemming dated 5 June 2024 justifying the contravention of this cl 6.16 development standard. Compliance with the development standard is considered by the authors to be unreasonable or unnecessary in the circumstances of the case and that the objectives of the standard are achieved notwithstanding the non-compliance as the development.
- 37 The request further notes that the development has been designed to maximise commercial floor space on the ground floor while preserving areas for servicing, residential lobby and vehicular access. A number of other elements of the Proposed Development in its setting are raised in the cl 4.6 request and listed in the parties agreed Statement at paragraph [59].
- 38 The cl 4.6 request states that strict compliance with the minimum commercial floor space control would require additional car parking spaces, as the commercial car parking rate is higher than the residential rate under the Manly Development Control Plan 2013. The additional parking requirement would necessitate a third basement level which is not considered to be viable for the Site, particularly due to the high water table on the Site. The proposal is

consistent with recent approvals at 21 Whistler Street and 21 Belgrave Street which both approved developments with commercial GFA less than 25%.

- 39 The parties agree that the cl 4.6 request is prepared with the relevant requirements under cl 4.6(3), the development will be in the public interest because it is consistent with the objectives of 'Gross Floor Area for certain commercial premises' cl 6.16 development standard and the objectives of the C4 Environmental Living zone, and there are adequate environmental planning grounds to support the proposition that compliance with the development standard is unreasonable and unnecessary.
- 40 The Court accepts and agrees with the parties position in the Statement. I am satisfied to make the finding that the Applicant's written request under cl 4.6 of the MLEP to vary the 'Gross Floor Area for certain commercial premises' development standard in cl 6.16 of the MLEP for the Proposed Development, as amended, at 35-43 Belgrave Street Manly, NSW 2095, is upheld.

Public Consultation:

- 41 The Development Application was notified by the Council from 27 July 2023 to 29 August 2023. The Council received thirteen submissions which were before the Court. At the on Site part of the s 34 conference the Court was taken to some of the residential units in close proximity to the Site at the request of and accompanied by the owners of those units who had made submissions to the Respondent. One owner had their own town planner present who made oral submissions to the Court and the parties at the subject property. I am satisfied that the objectors reasonable concerns were considered by the parties and the objectors were accorded procedural fairness.

Conclusion:

- 42 For these reasons, based on the evidence before me, and my observations on site, I am satisfied that there is no jurisdictional impediment to the making of the proposed orders, and the decision is one that the Court could have made in the proper exercise of its functions.
- 43 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. In making

the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

Notations:

44 The Court notes that:

Northern Beaches Council, as the relevant consent authority, has approved, under section 38(1) of the Environmental Planning and Assessment Regulation 2021, the amendment of Development Application DA2023/0987 in accordance with the documents listed below:

Drawing No.	Issue	Plan Title	Dated
Amended Architectural Plans			
DA-0000	-	Cover	•
DA-0103	10	Site plan and site analysis	28.05.2024
DA-0110	8	Floor plan – Basement 2	22.04.2024
DA-0111	10	Floor plan – Basement 1	22.04.2024
DA-0112	10	Floor plan – Ground	22.04.2024
DA-0113	9	Floor plan – Level 1	14.05.2024
DA-0114	4	Floor plan – Level 2	28.06.2023
DA-0115	4	Floor plan – Level 3	28.06.2023
DA-0116	10	Floor plan – Level 4	28.05.2024
DA-0117	11	Floor plan – Roof	28.05.2024

DA-1401	8	Elevation North	14.06.2024
DA-1402	7	Elevation East	14.06.2024
DA-1403	7	Elevation South	14.06.2024
DA-1404	7	Elevation West	14.06.2024
DA-1410	8	Streetscape Elevation	28.05.2024
DA-1501	12	Section A-A	28.05.2024
DA-1502	7	Section B-B	28.05.2024
DA-1503	5	Section C-C	28.05.2024
DA-2510	8	3D Height Plane Diagram	28.05.2024
DA-6020	5	Shadow Diagrams (winter Solstice) 9AM	28.05.2024
DA-6021	5	Shadow Diagrams (winter Solstice) 12PM	28.05.2024
DA-6022	5	Shadow Diagrams (winter Solstice) 3PM	28.05.2024
DA-6601	8	Photomontage – View from Belgrave Street	28.05.2024
DA-6605	4	Photomontage – View from Whistler Street	28.05.2024
DA-6608	3	Photomontage – View from Belgrave Street	28.05.2024

DA-6610	3	External Finishes	14.06.2024
Amended Landscape Plans			
LD-DA000	3	Cover Sheet and Design Statement	05.06.2024
LD-DA001	3	Planting schedule & legend	05.06.2024
LD-DA100	3	Ground floor & public domain plan	05.06.2024
LD-DA110	2	Level 1 Landscape Plan	05.06.2024
LD-DA130	2	Level 4 Landscape Plan	05.06.2024
LD-DA140	2	Rooftop Landscape Plan	05.06.2024
LD-DA200	3	Ground floor & public domain planting plan	05.06.2024
LD-DA210	2	Level 1 Outline Planting Plan	05.06.2024
LD-DA400	3	Typical Section A	06.06.2024
LD-DA900	1	Typical Details & outline specification & Maintenance	07.07.2023

Reports
Schedule of Architectural Amendments prepared by SJB Architects dated 24 April 2024
Amended Clause 4.6 Variation Request – Building Height control prepared by Boston Blyth and Flemming dated 4 June 2024
Amended Clause 4.6 Variation Request – Commercial Floor Space control prepared by Boston Blyth and Flemming dated 5 June 2024
Amended Design Verification Statement prepared by SJB Architects dated 20 June 2024
Amended Floodplain Management Report prepared by Van der Meer Consulting dated 29 April 2024
Traffic Response Letter prepared by JMT Consulting Pty Ltd dated 23 April 2024
Amended Acoustic Report and Response letter prepared by E-Lab Consulting dated 28 March 2024
On Site Human Health Risk Assessment prepared by En Risks dated 3 March 2024
Detailed Site Investigation prepared by JK Environments dated 10 April 2024
Remediation Action Plan prepared by JK Environments dated 10 April 2024
Amended BASIX Certificate, Report and Stamped Plans prepared by E-Lab Consulting dated 5 June 2024
Amended View Impact Statement prepared by Urbaine Design Group Pty Ltd dated April 2024

Orders:

45 The Court orders:

- (1) The appeal is upheld;
- (2) Development Application DA2023/0987 for the demolition of existing structures and construction of a shop top housing development comprising of ground floor retail premises, 24 residential apartments and two levels of basement carparking, associated infrastructure and landscaping at 35-43 Belgrave Street Manly, NSW is determined by a grant of consent subject to conditions contained in Annexure 'A';
- (3) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.

L Byrne

Acting Commissioner of the Court

Annexure A

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.