



Land and Environment Court New South Wales

Case Name:	Green Kingswood Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	[2025] NSWLEC 1068
Hearing Date(s):	9-10 and 18 December 2024
Date of Orders:	11 February 2025
Date of Decision:	11 February 2025
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	The orders of the Court are: (1) The appeal is upheld. (2) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the application on 18 December 2024, as agreed or assessed, pursuant to s 8.15(3) of the <i>Environmental Planning and Assessment Act 1979</i>. (3) Development Application No. 2023/0976 for the demolition of existing buildings and a 54 lot community title subdivision comprised of 47 Torrens title lots, with the construction of 47 dwellings (19 detached and 28 attached dwellings), and one community title lot containing the inner road/laneways and common areas, including earthworks, stormwater, services, landscaping and creekline works, at 20-22 Macpherson Street, Warriewood, is determined by the grant of consent, subject to the conditions of consent at Annexure A. (4) The exhibits, other than Exhibits 2, A, B, C, D, E and F, are returned.
Catchwords:	DEVELOPMENT APPLICATION – residential subdivision – amended application – contentions satisfactorily addressed by the amended plans and documents – orders

Legislation Cited:	<i>Environmental Planning and Assessment Act 1979</i> , s 8.7 <i>Land and Environment Court Act 1979</i> , ss 34, 39 Environmental Planning and Assessment Regulation 2021, s 38 Pittwater Local Environmental Plan 2014, cl 2.6, 4.3, 4.4, 5.21, 6.1, 7.1, 7.6, 7.10 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Texts Cited:	Pittwater 21 Development Control Plan 2003
Category:	Principal judgment
Parties:	Green Kingswood Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) A Seton (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Marsdens Law Group (Respondent)
File Number(s):	2023/457771
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 refusal of Development Application No. 2023/0976 for the demolition of existing buildings and a 54 lot community title subdivision comprised of 47 Torrens title lots, with the construction of 47 dwellings (19 detached and 28 attached dwellings), and one community title lot containing the inner road/laneways and common areas, including earthworks, stormwater, services, landscaping and creekline works (the proposal), at 20-22 Macpherson Street, Warriewood (the site), by Northern Beaches Council (the Council).
- 2 The appeal was subject to conciliation on 24 July 2024, 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 application is amended

- 3 On 18 December 2024, the applicant was granted leave to amend the application pursuant to s 38(1) of the *Environmental Planning and Assessment Regulation 1979* and s 39(2) of the LEC Act, to rely on additional material (Exh F) including amended architectural plans, landscape plans, plan of subdivision, stormwater plans, BASIX certificate and Access Design Review. The Council submitted that the amended plans and documents satisfactorily addressed the contentions raised in the Amended Statement of Facts and Contentions (Exh 2).
- 4 Agreed conditions of consent were filed with the Court on 23rd December 2024.

The site

- 5 The site is on the north-eastern side of Macpherson Street, west of the intersection with Garden Street. The rear of the site is bounded by Narrabeen Creek.

- 6 The site is irregular in shape with a frontage to Macpherson Street of 140m. The site has an area of 2.049ha.
- 7 The site is currently occupied by the plant nursery, Flower Power Garden Centre.

Public submissions

- 8 One objector, representing the north-western neighbour, provided evidence onsite at the commencement of the hearing. The concerns of the neighbour include visual privacy between the existing multi-dwelling development on the neighbouring property and the proposed dwellings adjacent to the shared boundary, including the raising of the ground level which will exacerbate overlooking between the developments (Exh 1).

Expert evidence

- 9 The applicant relied on the expert evidence of John Wynne (planning and urban design), Dr Brett Phillips (flooding), Ross Nettle (traffic) and Conrad Grayson (landscape).
- 10 The Council relied on the expert evidence of Thomas Prosser (planning), Dominic Chung (urban design), Valerie Tulk (flooding), James Brocklebank and John Coldwell (traffic) and Joseph Tramonte (landscape).
- 11 The experts' joint reports were adduced as urban design (Exh 4), planning (Exh 5), landscape (Exh 6), traffic (Exh 7) and flooding (Exh 8).

Jurisdictional pre-conditions to the grant of development consent

- 12 Section 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 applies to the proposal. An investigation of the land has been adduced pursuant to s 4.6(2) (Exh D, tab 14 and Exh C, tab 7) and the Council submitted that no issue is raised regarding contamination.
- 13 The site is zoned R3 Medium Density Residential under the Pittwater Local Environmental Plan 2014 (LEP 2014) and the proposal, for attached dwellings,

dwelling houses and multi-dwelling housing, is permissible with consent. Subdivision of land requires development consent, pursuant to cl 2.6 of LEP 2014. The objectives of the R3 zone, to which regard must be had, are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.

- 14 The proposal complies with the height of buildings development standards for the site of 10.5m and 8.5m within the area 12.5m measured from the boundary to Macpherson Street, pursuant to cl 4.3(2) and 4.3(2F) of LEP 2014.
- 15 There is no floor space ratio development standard for the site under cl 4.4 of LEP 2014.
- 16 The site is mapped as being within the flood planning area and cl 5.21 applies to the proposal. The consent authority must be satisfied of the matters listed under sub-cl (2). In deciding whether to grant consent to the proposal, the consent authority, or the Court exercising the functions of the consent authority, must be satisfied of the matters under sub-cl (3), as follows:
 - (a) the impact of the development on projected changes to flood behaviour as a result of climate change,
 - (b) the intended design and scale of buildings resulting from the development,
 - (c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,
 - (d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.
- 17 I accept the agreement of the flooding experts that the matters under sub-cl 5.21(3) of LEP 2014 are satisfied (Exh B, tab 7 and Exh 8).

- 18 The site is mapped as being part of the Warriewood Valley Release Area and cl 6.1 of LEP 2014 applies to the proposal. No more than 53 dwelling or less than 42 dwellings are permitted on the site, under sub-cl (3) and the proposal complies with this standard.
- 19 The site is mapped as Classes 4 and 5 acid sulphate soils and cl 7.1 of LEP 2014 applies to the proposal. Most of the site is mapped as Class 4, and no works are proposed more than 2m below the natural ground surface. A small section of the creek corridor is mapped as Class 5. I accept the agreement of the parties that an acid sulphate soils management plan is not required, pursuant to sub-cl (3).
- 20 The site is mapped as biodiversity and cl 7.6 of LEP 2014 applies to the proposal. The consent authority, or the Court exercising the functions of the consent authority, must consider the matters listed under sub-cl (3) and must be satisfied of the matters listed under sub-cl (4). I am satisfied by the conclusions of the Flora and Fauna Assessment (Exh D, tab 13), the Statement of Environmental Effects (Exh E, tab 3, pp 52-53) and the Council's submission that the proposal is designed, sited and will be managed to avoid any significant adverse environmental impact.
- 21 I accept the Council's submission that no issue is raised regarding the provision of essential services under cl 7.10 of LEP 2014.
- 22 Pittwater 21 Development Control Plan 2003 (DCP 21) applies to the proposal at A1.2.
- 23 A4.16 Warriewood Valley Locality of DCP 21 provides an overview of the strategic planning goals for the valley. I accept the Council's submission that the proposal is consistent with the strategic planning goals for the valley.
- 24 Section B1.4 of DCP 21 addresses Aboriginal heritage significance requirements. I accept the planning experts' agreement that the Aboriginal Heritage Information Management System (AHIMS) has been consulted and that

no Aboriginal sites or places have been recorded or declared within a 1km radius of the site (Exh 5, [30]).

Conclusion

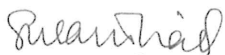
25 I have considered the submissions made by the Council in the Jurisdictional Statement filed with the Court on 23 December 2024 and I am satisfied on the basis of the evidence before me that it is appropriate to determine the application by the grant of consent.

Orders

26 The orders of the Court are:

- (1) The appeal is upheld.
- (2) Development Application No. 2023/0976 for the demolition of existing buildings and a 54 lot community title subdivision comprised of 47 Torrens title lots, with the construction of 47 dwellings (19 detached and 28 attached dwellings), and one community title lot containing the inner road/laneways and common areas, including earthworks, stormwater, services, landscaping and creekline works, at 20-22 Macpherson Street, Warriewood, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
- (3) (3) The exhibits, other than Exhibits 2, A, B, C, D, E and F, are returned.

I certify that this and the preceding 4 pages are a true copy of my reasons for judgment.



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Susan O'Neill

Commissioner of the Court
