



Land and Environment Court
New South Wales

Case Name: BL2093 Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2025] NSWLEC 1527

Hearing Date(s): Conciliation Conference 27 June 2025

Date of Orders: 23 July 2025

Decision Date: 23 July 2025

Jurisdiction: Class 1

Before: Targett C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) The written request, prepared by Planning Ingenuity dated 23 April 2025, pursuant to cl 4.6 of the Waringah Local Environmental Plan 2011 seeking variation to the building height development standard, pursuant to cl 4.3, is upheld.
(3) Development consent is granted to Development Application DA2024/1009, as amended, for the construction of a residential flat building over basement parking and associated landscaping in accordance with Division 1 In-fill Affordable Housing of State Environmental Planning Policy (Housing) 2021 at Lot 25 in DP 7002 known as 67 Pacific Parade, Dee Why NSW 2099, subject to the conditions in Annexure A.
(4) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the applicant is to pay the respondent's costs thrown away in the sum of \$6,000, payable within 28 days of the date of these orders.

Catchwords: APPEAL – Development application – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979 (NSW), ss 4.15, 8.7, 8.10, 8.11
Land and Environment Court Act 1979 (NSW), ss 17, 34

Environmental Planning and Assessment Regulation 2021 (NSW), s 38
State Environmental Planning Policy (Sustainable Buildings) 2022
State Environmental Planning Policy (Housing) 2021, ss 15C, 18, 19, 21, 145(2), 147, Ch 4
State Environmental Planning Policy (Transport and Infrastructure) 2021,
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Warringah Local Environmental Plan 2011, cl 4.3, 4.6, 6.2, 6.4

Texts Cited: Warringah Development Control Plan 2011

Category: Principal judgment

Parties: BL2093 Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
D Tyrrell (Solicitor) (Applicant)
D Taylor (Solicitor) (Respondent)

Solicitors:
Tyrrells Planning Law (Applicant)
Wilshire Webb (Respondent)

File Number(s): 2024/362783

Publication Restriction: Nil

JUDGMENT

Background

1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) by the applicant against the respondent's deemed refusal of the applicant's development application (No DA2024/1009) (Development Application). The

Development Application sought consent for the construction of a residential flat building over basement parking and landscaping on land identified as Lot 25 in Deposited Plan 7002, known as 67 Pacific Parade, Dee Why (Subject Land).

- 2 The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (NSW) (LEC Act).

The Development Application

- 3 The Development Application was lodged with the respondent on 29 July 2024.
- 4 The Development Application was publicly exhibited between 16 and 30 August 2024. 28 submissions were received objecting to the proposed development.
- 5 On 1 October 2024, the proceedings were commenced in relation to the deemed refusal of the Development Application, being within the appeal period prescribed by ss 8.10 and 8.11 of the EPA Act.
- 6 The Court arranged a conciliation conference under s 34 of the LEC Act between the parties, which was held on 27 March 2025 and adjourned on two occasions. The conciliation conference was presided over by a Commissioner of the Court.
- 7 During the conciliation process, the parties reached agreement under s 34(3) of the LEC Act as to the terms of a decision in the proceedings that would be acceptable to the parties. A signed s 34 agreement was provided to the Court on 9 May 2025 following the applicant agreeing to amend the Development Application. The signed s 34 agreement is supported by an agreed jurisdictional statement.
- 8 The agreed amendments to the Development Application relevantly include:
 - (1) increased setbacks to the eastern side;
 - (2) additional landscaping on the eastern boundary;
 - (3) amendments to driveway levels;
 - (4) additional landscaping presented to the street and at upper levels; and

- (5) additional setbacks at the upper levels,
 - (6) (collectively, the Amended Development Application).
- 9 Judgment was reserved on 19 May 2025 by the Commissioner who had presided over the conciliation conference up until that time. Due to extenuating circumstances, the matter was required to be listed for a further s 34 conciliation conference on 27 June 2025 before a different Commissioner. I presided over this conciliation conference and reserved judgment on the same date.
- 10 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.

Jurisdictional considerations

- 11 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I form this state of satisfaction for the reasons that follow.

Owners consent

- 12 The applicant is the registered proprietor of the Subject Land and owners consent was provided to the Development Application when it was lodged with the respondent (see Class 1 Application, tab 22).

State Environmental Planning Policy (Resilience and Hazards) 2021

- 13 Section 4.6 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* (RH SEPP) provides that:
- (1) A consent authority must not consent to the carrying out of any development on land unless—
 - (a) it has considered whether the land is contaminated; and
 - (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
 - (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

- 14 The Development Application is accompanied by a Preliminary Site Investigation prepared by Environmental Consulting Services dated 3 July 2024 (PSI). The PSI concludes that the Subject Land has a longstanding history of residential use with no known contaminating activities and the Subject Land is considered “suitable for redevelopment and sensitive land use following the implementation of the following recommendations”. These recommendations include the preparation of waste classifications for any material excavated and disposed of offsite and any waste being managed and disposed of in accordance with current guidelines and regulations. The parties agree that these findings are sufficient for the purposes of cl 4.6 of the RH SEPP.
- 15 Having regard to the PSI and Agreed Conditions, I am satisfied that s 4.6 of the RH SEPP has been satisfied.

State Environmental Planning Policy (Sustainable Buildings) 2022

- 16 The Amended Development Application is accompanied by a BASIX Certificate (Certificate No. 1756473M) in compliance with the relevant requirements under the State Environmental Planning Policy (Sustainable Buildings) 2022.

State Environmental Planning Policy (Housing) 2021

- 17 The parties agree that the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) applies to the Amended Development Application as the proposed development meets the requirements of s 15C of the Housing SEPP. This is because the Amended Development Application is permissible with consent under the Warringah Local Environmental Plan 2011 (WLEP) (being a residential flat building in the R3 Medium Density Residential zone), provides more than 10% gross floor area as affordable housing, and is carried out within an accessible area.
- 18 The Amended Development Application seeks the benefit of a height bonus under s 18 of the Housing SEPP. The Subject Land is permitted a maximum building height of 11m under the WLEP. In accordance with s 18(2) of the Housing SEPP, 19.7% of the total gross floor area (GFA) (or 205m²) will be allocated to affordable housing and therefore the full 30% additional building height is available to the proposed development under s 18(3). As such, the

parties agree, and I accept, that the maximum building height permitted on the Subject Land, in accordance with the 30% bonus, is 14.3m. The Amended Development Application seeks to exceed this height standard (addressed at [28]-[30] below).

- 19 Section 19 of the Housing SEPP sets out the non-discretionary development standards that apply to affordable housing development. The parties agree, and I accept, that the proposal satisfies the requirements in s 19 of the Housing SEPP (see Statement of Environmental Effects, prepared by Planning Ingenuity, dated 26 July 2024 (SEE) pp 25-27).
- 20 Section 21 of the Housing SEPP relevantly requires the consent authority to be satisfied that the affordable housing component of the development will be used for affordable housing for at least 15 years following the issue of an occupation certificate and that the affordable housing component will be managed by a registered community housing provider. Condition 59 of the Agreed Conditions adequately addresses s 21 of the Housing SEPP. In determining the Amended Development Application, I am satisfied of the matters set out in s 21 of the Housing SEPP, having regard to condition 59 of the Agreed Conditions.
- 21 The parties agree that Ch 4 of the Housing SEPP applies to the proposed development as the proposal is for a residential flat building. Section 145(2) of the Housing SEPP requires the consent authority to refer the application to the design review panel for the local government area in which the development will be carried out for advice on the quality of the design of the development. The Development Application was referred to the Northern Beaches Design and Sustainability Advisory Panel (Panel) on 22 August 2024.
- 22 Section 147 of the Housing SEPP requires the consent authority to have considered the matters listed in s 147(1) of the Housing SEPP (which includes the Apartment Design Guide (ADG)) before granting consent.
- 23 The parties agree, and I accept, that the Design Verification Statement prepared by DKO dated 17 July 2024, and the consideration at pp 30-33 of the SEE and Annexure A to the SEE, adequately demonstrate that the matters listed in s 147(1) of the Housing SEPP have been considered.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 24 The parties agree that s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (TI SEPP) relating to development likely to affect an electricity transmission or distribution network, applies to the proposed development.
- 25 The Development Application was referred to Ausgrid in accordance with s 2.48(2) of the TI SEPP and Ausgrid provided recommended conditions of consent via letter (undated). Ausgrid's recommended conditions have been included at condition 2 of the Agreed Conditions.

Warringah Local Environmental Plan 2012

- 26 The Subject Land is zoned R3 Medium Density Residential under the WLEP. Accordingly, residential flat buildings are permitted with consent in the R3 zone. I have had regard to the zone objectives which are extracted below:
- 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 ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.
 - To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.
- 27 The parties agree, and I accept, that the Amended Development Application is compatible with the objectives of the R3 zone.
- 28 Pursuant to cl 4.3 of the WLEP relating to height of buildings and noting the height bonus established at [18] above, a maximum height development standard of 14.3m applies to the Subject Land (Height Standard). The Amended Development Application seeks a maximum height of 15.84m, being a variation of 1.54m or 10.7%. As such, the Amended Development Application seeks to vary the Height Standard and is supported by a request made under cl 4.6 of the WLEP prepared by Planning Ingenuity dated 23 April 2025 (Height Request).

- 29 The Height Request provides a detailed assessment of the Amended Development Application's compliance with the matters raised in cl 4.6(3) of the WLEP and concludes that:
- (1) Compliance with the Height Standard is unreasonable or unnecessary in the circumstances because:
 - (a) The Amended Development Application achieves the objectives of the Height Standard set out in cl 4.3 of the WLEP, despite the numerical non-compliance. The variation is minor and relates only to the lift overrun, balustrades surrounding the air conditioning units on the roof and a minor portion of the roof form and awning, and are a result of the topography of the Subject Land. The height exceedance will not be perceptible from the street.
 - (b) The proposed variation will not result in any significant loss of views or outlook or additional overshadowing compared to a building compliant with the Height Standard, and does not introduce any privacy impacts for neighbouring properties.
 - (c) The Amended Development Application will facilitate the delivery of new in-fill affordable housing which will meet the needs of very low, low and moderate income households. To require strict compliance with the Height Standard would reduce the provision of affordable housing without any benefit to streetscape character or amenity of neighbouring properties.
 - (2) There are sufficient environmental planning grounds to justify the contravention because:
 - (a) the proposal will deliver affordable housing in accordance with the Housing SEPP;
 - (b) the non-compliance is minor and will not have an adverse impact on the character of the locality;
 - (c) the non-compliance does not contribute to GFA;
 - (d) the topography contributes to the extent of non-compliance; and
 - (e) the impacts of the height breach will be imperceptible.
- 30 In respect of the Height Request, I am satisfied that the applicant has demonstrated that compliance with the Height Standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify the contravention of the Height Standard in accordance with the requirements under cl 4.6(3) of the WLEP.
- 31 Pursuant to cl 6.2 of the WLEP relating to earthworks, the consent authority must consider the matters specified in cl 6.2(3) when deciding whether to grant

consent for earthworks. The parties agree, and I accept, that the Geotechnical Investigation Report prepared by CMW Geosciences dated 3 July 2024 (Geotech Report) addresses the matters listed in cl 6.2(3) in conjunction with the Stormwater Plans prepared by CAM Consulting (Stormwater Plans) and there is no impediment to the grant of development consent.

- 32 Pursuant to cl 6.4 of the WLEP relating to development on sloping land, the consent authority must be satisfied of the matters listed in cl 6.4(3) prior to granting consent. The parties agree, and I accept that the proposed development will not impact stormwater discharge or flow conditions, having regard to the Geotech Report and Stormwater Plans for the purposes of cl 6.4(3) of the WLEP.

Warringah Development Control Plan 2011

- 33 The SEE has considered and addressed the relevant provisions of the Warringah Development Control Plan 2011 in respect of the Amended Development Application (see pp 71 to 89).

Remaining matters under s 4.15(1) of the EPA Act

- 34 The matters set out in s 4.15(1)(b), (c) and (e) of the EPA Act are addressed in the SEE (see pp 38-44).
- 35 As set out at [4] above, for the purposes of s 4.15(d) of the EPA Act, the Development Application was publicly notified between 16 and 30 August 2024. 28 submissions were received objecting to the proposed development, raising concerns including excessive height, bulk and scale, inadequate setbacks, character, density, traffic and parking, amenity, tree loss and construction impacts. In addition, further informal notification took place between 11 and 22 April 2025 and eight submissions were received.
- 36 I am satisfied that the written and oral submissions received have been taken into consideration in the assessment and determination of the Amended Development Application.

Conclusion

- 37 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.
- 38 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.
- 39 The Court notes that the respondent, as the relevant consent authority, has agreed under s 38 of the Environmental Planning and Assessment Regulation 2021 (NSW), to the applicant's amendment of Development Application No 2024/1009 in accordance with the following plans and documents:

Architectural Plans prepared by DKO Architecture			
Plan No.	Title	Issue	Date
DA101	Site Plan	C	8 April 2025
DA200	Basement Level	B	26 February 2025
DA201	Ground Floor Plan	C	8 April 2025
DA202	Level 1 Plan	C	8 April 2025
DA203	Level 2 Plan	C	8 April 2025
DA204	Level 3 Plan	C	8 April 2025
DA205	Level 4 Plan	C	8 April 2025
DA206	Level 5 Plan	C	8 April 2025
DA207	Roof Plan	C	8 April 2025

DA300	N & E Elevations	C	8 April 2025
DA301	S & W Elevations	C	8 April 2025
DA302	Section North-South	B	8 April 2025
DA303	Section East-West	C	8 April 2025
DA304	Materials & Finishes	C	8 April 2025
-	Entrance Sections	C	8 April 2025
Landscape Design Drawings prepared by Matthew Higginson Landscape Architecture Pty Ltd dated 10 April 2025			
Plan No.	Title	Issue	
LP01	Landscape Plan: Basement	D	
LP02	Landscape Plan: Group Flood	D	
LP03	Landscape Plan: Level 1	D	
LP04	Landscape Plan: Level 2	D	
LP05	Landscape Plan: Level 4	D	
LP06	Landscape Plan: Level 5	D	
LP07	Schedule + Section	D	
LP08	Section	D	
Stormwater Plan prepared by CAM Consulting dated 15 April 2025			
Plan No.	Title	Issue	

C23181 – 100	Stormwater notes & cover page	F
C23181 – 101	Basement drainage plan, sections & details	F
C23181 – 102	Lower ground floor and ground floor stormwater layout	F
C23181 – 103	First floor and second floor stormwater layout	F
C23181 – 104	Third floor and fourth floor stormwater layout	F
C23181 – 105	Fifth floor and roof stormwater layout	F
C23181 – 106	Stormwater sections & details	F
Clause 4.6 Variation Request – Building Height prepared by Planning Ingenuity dated 23 April 2025		

Orders

40 The Court orders that:

- (1) The appeal is upheld.
- (2) The written request, prepared by Planning Ingenuity dated 23 April 2025, pursuant to cl 4.6 of the Warringah Local Environmental Plan 2011 seeking a variation to the building height development standard, pursuant to cl 4.3, is upheld.
- (3) Development consent is granted to Development Application DA2024/1009, as amended, for the construction of a residential flat building over basement parking and associated landscaping in accordance with Division 1 In-fill Affordable Housing of State Environmental Planning Policy (Housing) 2021 at Lot 25 in DP 7002, known as 67 Pacific Parade, Dee Why NSW 2099, subject to the conditions in Annexure A.

- (4) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW), the applicant is to pay the respondent's costs thrown away in the sum of \$6,000, payable within 28 days of the date of these orders.

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Commissioner of the Court

Annexure A (1.87 MB, pdf)

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