



Land and Environment Court

New South Wales

Case Name: Aimaway Holding Pty Ltd v Sutherland Shire Council

Medium Neutral Citation: [2022] NSWLEC 1511

Hearing Date(s): Conciliation conference held on 9 September 2022

Date of Orders: 20 September 2022

Decision Date: 20 September 2022

Jurisdiction: Class 1

Before: Bish C

Decision: The Court orders:
(1) The appeal is upheld.
(2) The amended written request under clause 4.6 of the Sutherland Shire Local Environmental Plan 2015, prepared by Dickson Rothschild dated 20 July 2022 seeking a variation to the development standard for building height under clause 4.3, is upheld.
(3) Development application DA22/0014 for the demolition of existing structures, removal of 4 trees and construction of a part 5 storey and part 6 storey shop top housing development comprising 18 apartments above 2 ground floor commercial tenancies, construction of two basement levels and 30 parking spaces across the basement and ground levels, associated landscaping, communal open space and strata subdivision of the building at 20-22 Station Street, Engadine, is determined by the grant of consent, subject to the conditions of consent at Annexure 'A'.
(4) The applicant is to pay the respondents costs thrown away of \$13,500 within 28 days, pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979.

Catchwords: DEVELOPMENT APPLICATION – strata subdivision -

shoptop development with residential flat building –
height development standard non-compliance – cl 4.6
written variation request – conciliation conference –
agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979,
ss 4.15, 4.16, 4.17, 8.7, 8.15
Environmental Planning and Assessment Regulation
2000, cll 49, 55
Sutherland Shire Local Environmental Plan 2015,
cll 2.3, 4.3, 4.6
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Resilience and
Hazards) 2021, cl 4.6
State Environmental Planning Policy No 65 – Design
Quality of Residential Apartment Development, cl 28
State Environmental Planning Policy (Biodiversity and
Conservation) 2021

Texts Cited: Apartment Design Guide 2015
Sutherland Shire Development Control Plan 2015

Category: Principal judgment

Parties: Aimaway Holding Pty Ltd (Applicant)
Sutherland Shire Council (Respondent)

Representation: Counsel:
M Sonter (Applicant)
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Solicitors:
Mills Oakley (Applicant)
Sutherland Shire Council (Respondent)

File Number(s): 2022/54709

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This is an appeal against the deemed refusal of
Development Application (DA) DA22/0014 by Sutherland Shire Council, which
as amended, seeks demolition of existing structures, removal of trees and

construction of a part 5 storey and part 6 storey shoptop housing development comprising 18 residential apartments above two ground floor commercial tenancies, construction of two basement levels, 30 parking spaces, associated landscaping, communal open space and strata subdivision of the building at 20-22 Station Street, Engadine (the site).

Background

- 2 The DA was submitted to Council on 10 January 2022, and after notification, made consistent with the relevant planning controls, 11 submissions in objection were received during the notification period for the original DA. A subsequent renotification of the amended DA, resulted in two submissions.
- 3 The applicant appealed against the deemed refusal of the DA, pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 4 The applicant sought to amend the DA under appeal, pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Reg), which was agreed by the Council. Relevant plans and documents which amend the DA, were uploaded to the NSW Planning Portal and filed with the Court.
- 5 The Court agreed to a conciliation conference, pursuant to s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held without an onsite view and via Microsoft Teams, at the request of the parties.
- 6 Based on the amended DA 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 contentions of Council have been considered and are resolved. The issues raised by the objectors have also been considered. The decision of the parties is to uphold the appeal and grant consent to DA22/0014, with conditions.
- 7 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, to grant consent to development application DA22/0014, subject to conditions described in Annexure 'A', made pursuant to s 4.17(1).

Jurisdictional prerequisites

- 8 The DA was submitted with the consent of the site owners, pursuant to cl 49 of the EPA Reg.
- 9 Section 4.15(1) of the EPA Act establishes the matters to be considered in determining the development application. The following jurisdictional requirements have been specifically assessed:
 - (1) Sutherland Shire Local Environmental Plan 2015 (SSLEP):
 - (a) Pursuant to cl 2.3 of the SSLEP, the site is situated over land zoned B3 Commercial Core. The proposed development, as described to the Court is permissible with consent, pursuant to cl 2.3. The amended DA sufficiently addresses all the relevant objectives, aims, standards and requirements of the SSLEP, however, there is a resultant breach of the height standard (of 20m) for the proposed building by up to 7.95m, pursuant to cl 4.3.
 - (b) The amended DA relies on a written request, seeking a variation of the non-compliant height standard, pursuant to cl 4.6 of the SSLEP. The cl 4.6 written request provided to the Court explains that the non-compliance in the height standard responds to the sloping site, proposed location of driveway entry and architectural design, and does not result in a development that is incompatible with the character of the surrounding area or results in adverse amenity to existing dwellings on the site or adjacent to the site. The elements of the proposed development that result in the non-compliance will not perceptibly change the presentation of the proposed building to the streetscape or result in adverse bulk/scale impacts to adjoining developments. According to the cl 4.6 written request, the proposed development is consistent with the zone objectives and the relevant (height) development standard for cl 4.3.
 - (c) The Court must be satisfied that the request to vary the (height) standard is appropriately addressed, pursuant to the requirements in cl 4.6 of the SSLEP. Having reviewed the cl 4.6 written request and evidence before the Court, I am satisfied that the written request for variation of the height standard describes sufficient environmental planning grounds to justify the non-compliance, and that strict compliance of the standard would be both unreasonable and unnecessary. The proposed development, as described to the Court, is consistent with the objectives of the zone (for the B3 zone) and height (cl 4.3) standard. The breach in the height standard, which is limited to the lift overruns and an architectural feature, will not cause undue concern to surrounding residents, the streetscape, or those utilising the site. The proposed development is in the

public interest. I accept that there is no significant consequence to State or Regional environmental planning matters as a result of varying the development standard in this instance, and that there is no public benefit to maintaining the height standard for the proposed development.

- (d) I am satisfied that the requirements of cl 4.6 of the SSLEP have been addressed, and that a variation in the cl 4.3 height development standard should be granted.
- (2) State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65):
- (a) The amended DA sufficiently addresses all the relevant objectives, aims, standards and requirements of the SEPP 65. Specifically, the proposed residential flat building complies with cl 28, with the provision of an amended Design Verification Statement and the requirements of the Apartment Design Guide 2015.
- (3) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX):
- (a) The proposed development complies with the provisions of the SEPP BASIX. A BASIX Certificate (1255523M-02), relevant to the proposed development as amended, is identified in the conditions of consent.
- (4) State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience):
- (a) The Court has assessed the Stage 1 and Stage 2 report that confirms remediation is not required, which together with the agreed conditions of consent, addresses the relevant requirements of cl 4.6 of SEPP Resilience.
- (5) State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity):
- (a) The amended DA sufficiently addresses all the relevant objectives, aims, standards and requirements of the SEPP Biodiversity. Specifically, the proposed removal of trees is deemed reasonable, and that the trees to be removed are considered as not Koala habitat.
- (6) Sutherland Shire Development Control Plan 2015 (SSDCP):
- (a) The relevant requirements of the SSDCP are addressed, based on the amended plans, supporting documents to the DA and conditions of consent. The original and amended DA was publicly notified in accordance with the SSDCP with submissions received considered by Council in its assessment. According to the parties, the submissions received have been considered.

Grant of consent

- 10 Based on the amended plans and supporting documents to the DA, the parties explained to the Court that there are no jurisdictional impediments to the making of the agreement, or for the Court in making the orders as sought.
- 11 The Council has undertaken the appropriate merit assessment of the proposed development, including considering the resident submissions and environmental/architectural context of the site.
- 12 I am satisfied, based on the evidence before me, that there are no jurisdictional impediments to this agreement and that DA22/0014 can be determined by the grant of consent.
- 13 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.
- 14 The Court notes that:
 - (1) The respondent, as the relevant consent authority has agreed to the applicant amending DA22/0014, pursuant to cl 55(1) of the EPA Reg.
 - (2) The relevant amended development application documents were lodged on the NSW Planning Portal on 18 August 2022.
 - (3) The documents supporting the amended development application was filed with the Court on 30 August 2022.
- 15 The Court orders that:
 - (1) The appeal is upheld.
 - (2) The amended written request under clause 4.6 of the Sutherland Shire Local Environmental Plan 2015, prepared by Dickson Rothschild dated 20 July 2022 seeking a variation to the development standard for building height under clause 4.3, is upheld.
 - (3) Development application DA22/0014 for the demolition of existing structures, removal of 4 trees and construction of a part 5 storey and part 6 storey shop top housing development comprising 18 apartments above 2 ground floor commercial tenancies, construction of two basement levels and 30 parking spaces across the basement and ground levels, associated landscaping, communal open space and strata subdivision of the building at 20-22 Station Street, Engadine, is determined by the grant of consent, subject to the conditions of consent at Annexure 'A'.

- (4) The applicant is to pay the respondents costs thrown away of \$13,500 within 28 days, pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*.

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Sarah Bish

Commissioner of the Court

Annexure A

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