



Land and Environment Court
New South Wales

Case Name: Strata Scheme 831 v Sutherland Shire Council

Medium Neutral Citation: [2023] NSWLEC 1147

Hearing Date(s): Conciliation Conference 23 January 2023, 6 February 2023, 8 February 2023, 3 March 2023, and 22 March 2023

Date of Orders: 04 April 2023

Decision Date: 4 April 2023

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders that:
(1) The Applicant shall pay the Respondent's costs thrown away as a result of the Amendment of the development application pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979, as agreed or as assessed.
(2) The Applicant's written request prepared by Avenue Town Planning dated 14 March 2023, pursuant to clause 4.6 of the Sutherland Shire Local Environmental Plan 2015, to vary the landscaping areas development standard in clause 6.14 of the Sutherland Shire Local Environmental Plan 2015 is upheld.
(3) The appeal is upheld.
(4) Development consent is granted to Development Application No. DA21/1317, for the replacement of existing foreshore access stairs and restoration of the sandstone cliff at land identified as Common Property in Strata Plan 831, known as 12 Ozone Street, Cronulla NSW 2230, subject to the conditions of consent in Annexure A.

Catchwords: DEVELOPMENT APPEAL – alterations and additions –

foreshore access stairs – landscape development
standard - orders

Legislation Cited:	Environmental Planning and Assessment Act 1979, s 4.15, 4.16, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979, s 34 State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 2.11, 4.6, Ch 2 Sutherland Shire Local Environmental Plan 2015, cll 2.3, 4.3, 4.4, 4.6, 5.10, 6.1, 6.4, 6.5, 6.8, 6.9, 6.14, 6.16
Texts Cited:	Sutherland Shire Community Engagement Policy 2019 Sutherland Shire Development Control Plan 2015
Category:	Principal judgment
Parties:	Strata Scheme 831 ABN 87 099 757 256 (Applicant) Sutherland Shire Council (Respondent)
Representation:	Counsel: D Loether (Solicitor)(Applicant) J Amy (Solicitor)(Respondent) Solicitors: Bartier Perry (Applicant) Sutherland Shire Council (Respondent)
File Number(s):	2022/288402
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the refusal of development application DA 21/1317 for partial replacement of existing foreshore access stairs and restoration of the sandstone cliff (the Proposed Development) at 12 Ozone Street Cronulla legally described as Common Property in Strata Plan 831 (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 has been

held on 23 January 2023, 6 February 2023, 8 February 2023, 3 March 2023 and 22 March 2023. 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. This decision involved the Court upholding the appeal and granting development consent to the development application subject to conditions.
- 4 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. 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.
- 5 The parties experts' agree that all contentions raised in the Statement of Facts and Contentions filed on 2 November 2022 have been resolved by the preparation of the Applicant's amended plans and documents and the agreed conditions of consent.
- 6 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of cl 4.6 of the Sutherland Shire Local Environmental Plan 2015 (SSLEP) to vary a development standard. The parties explained how the jurisdictional prerequisites have been satisfied in an agreed jurisdictional statement. I set out this explanation as relevant below.
- 8 Owner's consent has been provided to make the application for the Proposed Development.
- 9 The parties agree that the submissions of objectors are a relevant consideration under s 4.15(1)(d) of the EPA Act. The original development application was notified from 18 March 2022 to 11 April 2022 in accordance with section A2.2 of Appendix 2 to the Respondent's Community Engagement

Policy 2019. No submissions were received by the Respondent and renotification is not required as a result of the amended application.

- 10 The Site is located within the R4 High Density Residential zone under the SSLEP. Development for the purposes of residential flat buildings is permitted with consent in the zone (cl 2.3 of the SSLEP). The parties agree that the Proposed Development is consistent with the objectives of the zone because it promotes a high standard of urban design and residential amenity in a high quality landscape setting that is compatible with natural features.
- 11 A maximum building height of 20m for the Site is prescribed by cl 4.3 of the SSLEP and the Proposed Development complies with that development standard.
- 12 Clause 4.4 of the SSLEP prescribes a maximum floor space ratio of 1.8:1 for the Site. The Proposed Development does not propose any change to the floor space ratio of the existing residential flat building on the Site.
- 13 Clause 5.10 of the SSLEP requires a consent authority to consider the effects of proposed development on land identified as a heritage item, neighbouring a heritage item, or located within a heritage conservation area. The Site adjoins Heritage Item 1035 identified in schedule 5 of the SSLEP as 'Sandstone cliff feature above Esplanade walkway'. The parties agree that having considered the Heritage Impact Statement (HIS), Heritage Addendum, the DA, as amended, and appropriate conditions of consent, the subject proposal will have a positive impact on Heritage Item 1035 for the following reasons:
 - (1) The HIS prepared by John Oultram Heritage & Design dated April 2020 filed with the Application Class 1 at Tab 20, states at section 8 that the 'new stair is an open structure that will enhance the presentation of the cliff face to the beach by exposing more of the cliff face and the new stair will have a largely neutral/positive impact in the cliff face'.
 - (2) The Addendum to Heritage Report prepared by Couvaras Architects dated 15 November 2021 filed with the Application Class 1 at Tab 21, states that the Proposed Development will 'enhance the significance of the cliff face'.
- 14 The Site is categorised as Class 5 land on the Acid Sulfate Soils Map as being within 500m of Class 4 land that is below 5m Australian Height Datum (ADH). No excavation is proposed and the parties agree that an acid sulfate soils

management plan is not required for the works as the works are not likely to lower the water table below 1m AHD (cl 6.1, SSLEP).

- 15 Clause 6.4 of the SSLEP prevents a consent authority from granting development consent unless the consent authority is satisfied that the development is designed to maximise water permeable surfaces, includes on-site stormwater retention and avoids any significant adverse impacts of stormwater runoff. I am satisfied that the Proposed Development will reduce the amount of non-permeable built structures on the Site and will therefore not adversely impact the existing stormwater management on the Site. To reach this state of satisfaction I have considered pages 16-17 of the Statement of Environmental Effects (SEE) prepared by Planning Ingenuity dated 11 May 2020 filed with the Application Class 1 at Tab 14.
- 16 The Site is identified as “Environmentally Sensitive Land” pursuant to the Terrestrial Biodiversity Map and the Natural Landforms Map and cll 6.5, 6.8 and 6.9 of the SSLEP require the Court to reach a state of satisfaction regarding the Proposed Development.
- 17 Clause 6.5 of the SSLEP requires a consent authority to consider the adverse impacts of development on the environment and prevents a consent authority from granting development consent unless the consent authority is satisfied that the development is designed to avoid, minimise or manage any such significant adverse environmental impact.
- 18 The Proposed Development proposes to remove weeds and low amenity shrubs to expose the sandstone cliff, and plant native species across the sandstone cliff. Accordingly, I am satisfied that the Proposed Development will not have any adverse environmental impact and will enhance the environmentally sensitive area by the restoration of the cliff face and the planting of native flora. I have considered page 17 of the SEE and the Landscape Plans prepared by Zenith Landscape Design dated 14 March 2023.
- 19 Clause 6.8 of the SSLEP requires a consent authority to consider the adverse impacts of development on the environmental and scenic qualities of natural landforms and prevents a consent authority from granting development consent unless the consent authority is satisfied that the development is

designed to avoid, minimise or manage any such significant adverse environmental impact.

- 20 The Proposed Development proposes to replace the existing foreshore access stairway with a less intrusive stairway and proposes to expose the sandstone cliff (page 18 of the SEE). I am satisfied that the Proposed Development will have a positive impact on the environmental and scenic qualities of the sandstone cliff by sensitively exposing more of the cliff face and removing insensitive manmade structures which currently exist.
- 21 Cause 6.9 of the SSLEP prevents a consent authority from granting development consent for certain types of development in the foreshore area and if the permissible development will have adverse impacts on the development on the foreshore area. The Proposed Development is for the replacement of waterway access stairs, which is permissible development in the foreshore area pursuant to clause 6.9(2)(c)(viii) of the SSLEP.
- 22 The Proposed Development proposes to replace the existing dilapidated and intrusive stairway with a less intrusive stairway within the boundaries of the Site. In addition, it is proposed to expose the sandstone cliff and plant native flora to make supports of the proposed stairway more discreet, having a neutral/positive impact on the sandstone cliff overall (pages 18-19 of the SEE). I am satisfied that the Proposed Development will have a positive impact on the foreshore area.
- 23 The Proposed Development will contravene a development standard prescribed in cl 6.14 of the SSLEP which requires a 30% minimum landscaped area at the Site in accordance with the Landscape Area Map. The Applicant relies on a written request pursuant to cl 4.6 of the SSLEP seeking to justify the contravention of this landscape development standard prepared by Avenue Town Planning dated 14 March 2023 and filed 23 March 2023 (Written Request). Existing on the Site is landscaped area of approximately 10.9% site coverage. The Proposed Development proposes to remove weed coverage over and expose the sandstone cliff, and to plant native flora on the sandstone cliff and at the top of the sandstone cliff, increasing the overall landscaped area of on the Site to approximately 12.88% site coverage.

- 24 The parties agree that the Proposed Development results in an increase of the percentage of the site coverage consisting of landscaped areas and that the landscaped area is enhanced, and having regard to the Written Request the contravention of cl 6.14 of the SSLEP has been satisfactorily justified.
- 25 The Court is satisfied that the Written Request seeking to justify the contravention of the landscape development standard in cl 6.14 of the SSLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the SSLEP and that the Proposed Development would be in the public interest because it is consistent with the objectives of the landscape development standard and the objectives for development within the zone in which the development is proposed to be carried out
- 26 Clause 6.16 of the SSLEP requires the consent authority to consider the quality and design of any proposed development in deciding whether to grant development consent. The parties agree that the Proposed Development exhibits high quality urban design which improves the scenic quality of and enhances the sandstone cliff (pages 19-20 of the SEE).
- 27 The applicable have been considered in the assessment of the subject proposal, as amended.
- 28 The parties agree that the Proposed Development is acceptable having regard to the applicable controls in Chapters 10 and 34 of the Sutherland Shire Development Control Plan 2015 (DCP) and the particular circumstances of this Site.
- 29 There are relevant sections of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) which apply to the Proposed Development. Firstly, ss 2.10 and 2.11 prevent a consent authority from granting development consent unless the consent authority is satisfied that the development is designed to avoid, minimise or manage any adverse impact to the coastal environment area and the coastal use area respectively. The Site is located in the coastal environment area and coastal use area pursuant to Ch 2 of the Resilience and Hazards SEPP. I am satisfied that the Proposed Development will not have any significant adverse environmental impact upon the coastal environment area or coastal use area

for the reasons already given in this judgment and as set out in the Addendum to SEE prepared by Couvaras Architects dated 15 November 2021 filed with the Application Class 1 at Tab 16.

- 30 Secondly, s 4.6(1) of the Resilience and Hazards SEPP requires the consent authority to consider whether the land is contaminated. An assessment of the previous use of the Site indicated that the land has only been used for residential purposes. I am satisfied that the Site poses little or no risk of contamination, and that the land is considered suitable for the residential land use (page 8 of the SEE).
- 31 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.
- 32 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.

Notations:

- 33 The Court notes that;

- (1) Sutherland Shire Council as the relevant consent authority has agreed, under cl 55 of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application No. DA21/1317 in accordance with the following amended plans and documents:

- (a) The following amended architectural plans prepared by Couvaras Architects (Project 20001):

Drawing Title	Sheet No.	Issue	Date
Cover Sheet	00	L	09/03/23
Stair Plan	01	L	09/03/23
Rock Contours and Stair Plan	02	L	09/03/23
East Elevations	03	L	09/03/23

North Elevation/Section	04	L	09/03/23
Section	05	L	09/03/23
Site Plan	06	L	09/03/23
Stair Details	07	L	09/03/23
Stair Details	08	L	09/03/23
East Photo Overlay	09	L	09/03/23

(b) The following amended structural engineering plans prepared by Jones Nicholson Pty Ltd (Project N0230097):

Drawing Title	Drawing No.	Revision	Date
Steel Stair Concept Page 1	SSK01	D	06/03/23
Steel Stair Concept Page 2	SSK02	D	06/03/23

(c) The following amended landscape plans prepared by Zenith Landscape Designs:

Drawing Title	Drawing No.	Revision	Date
Landscape Plan	23-4825 LO1	B	14/03/23
Landscape Plan	23-4825 LO2	B	14/03/23

(d) Amended geotechnical rock contour plan prepared by Douglas Partners (Project 85871.01, Report R.001, Revision 2) dated 23 February 2023.

(2) The Applicant filed the amended development application with the Court on 23 March 2023.

Orders:

34 The Court orders:

- (1) The Applicant shall pay the Respondent's costs thrown away as a result of the Amendment of the development application pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as agreed or as assessed.
- (2) The Applicant's written request prepared by Avenue Town Planning dated 14 March 2023, pursuant to clause 4.6 of the Sutherland Shire Local Environmental Plan 2015, to vary the landscaping areas development standard in clause 6.14 of the Sutherland Shire Local Environmental Plan 2015 is upheld.
- (3) The appeal is upheld.
- (4) Development consent is granted to Development Application No. DA21/1317, for the replacement of existing foreshore access stairs and restoration of the sandstone cliff at land identified as Common Property in Strata Plan 831, known as 12 Ozone Street, Cronulla NSW 2230, subject to the conditions of consent in Annexure A.

E Espinosa

Commissioner of the Court

Annexure A

Annexure B

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