

AUSTRALIA / JUDGMENT

Palmdev Pty Ltd v Northern Beaches Council

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Land and Environment Court

New South Wales

Amendment notes

Medium Neutral Citation:

Palmdev Pty Ltd v Northern Beaches Council [2025] NSWLEC 1128

Hearing dates:

Conciliation conference on 19 February 2025

Date of orders:

06 March 2025

Decision date:

06 March 2025

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

- (1) The request pursuant to clause 4.6 of the Pittwater Local Environmental Plan 2014 to vary the development standard for height of building control contained within clause 4.3 thereof, as prepared by Boston Blyth Fleming dated 2 October 2024, is upheld.
- (2) The appeal is upheld.

- (3) Development consent is granted to development application DA2023/1289 for the demolition of existing structures, construction of a shop top housing development comprising five residential apartments over two ground floor retail tenancies including one level of basement parking, associated landscaping and site preparation works and re-location of the existing bus stop and shelter on Barrenjoey Road, at 1112-1116 Barrenjoey Road, Palm Beach, subject to the conditions of consent annexed and marked “Annexure A”.

Catchwords:

DEVELOPMENT APPLICATION – Shop top housing development in E1 Local Centre zone – height standard is exceeded – conciliation conference – agreement between parties – orders

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 1.3, 4.16, 4.46, 4.47, 8.7

Land and Environment Court Act 1979, s 34

National Parks and Wildlife Act 1974, s 90

Roads Act 1993, s 138

Water Management Act 2000

Environmental Planning and Assessment Regulation 2021, ss 29, 38

Pittwater Local Environmental Plan 2014, cll 4.3, 4.5A, 4.6, 5.10, 5.21, 6.1, 7.2, 7.7, 7.10, Sch 5

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2, s 2.6

State Environmental Planning Policy (Housing) 2021, ss 147, 148, Sch 9

State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 2, ss 2.10, 2.12, 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.120, 2.48

Cases Cited:

Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582

SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112

Texts Cited:

NSW Department of Planning and Environment, Apartment Design Guide (July 2015)

Pittwater Development Control Plan 2021

Category:

Principal judgment

Parties:

Palmdev Pty Ltd (Applicant)

Northern Beaches Council (Respondent)

Representation:

Counsel:

A Galasso SC (Applicant)

C Gough (Solicitor) (Respondent)

Solicitors:

Mills Oakley (Applicant)

Storey & Gough (Respondent)

File Number(s):

2023/465007

Publication restriction:

Nil

Judgment

COMMISSIONER: Development for the purposes of shop top housing is proposed on a site located on the western side of the Palm Beach peninsula, at 1112-116 Barrenjoey Road, Palm Beach (the site).

The site was formerly occupied by a single storey commercial premises that is located north of a site known as 'Barrenjoey House'.

The proposal seeks consent for demolition of existing structures, excavation, groundworks and site preparation to enable the construction of a four-storey development comprising a single level basement for 23 vehicles, storage and plant areas; two ground floor commercial tenancies, storage and residential lobby, and five apartments located in three levels above.

To this end, development application DA2023/1289 (development application) was lodged with Northern Beaches Council (the Council) by the Applicant in these proceedings, Palmdev Pty Ltd (Palmdev) on 18 September 2023.

As the development application was not otherwise determined, Palmdev appealed the deemed refusal of the development application, pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) on 22 December 2023.

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 19 February 2025. I presided at the conciliation conference.

Prior to the conciliation conference, the parties reached agreement as to the terms of decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting conditional development consent to the development application.

A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 19 February 2025.

The parties ask me to approve their decision as set out in the s 34 agreement before the Court. This decision involved the Court upholding the appeal and granting conditional development consent to the development application.

In general terms, the agreement approves the development subject to amended plans that were prepared by Palmdev, noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.

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. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised.

For the reasons set out below, I am satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions.

The site is located within an area identified at E1 Local Centre zone by the Pittwater Local Environmental Plan 2014 (PLEP), in which development for the purpose of shop top housing is permitted with consent, where consistent with the objectives for development in the E1 zone that are as follows:

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.

- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse, and functional streets and public spaces.
- To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.

The height standard is exceeded

The site is subject to a height standard of 8.5m according to the relevant map at cl 4.3(2) of the PLEP. The proposed development exceeds the height standard at cl 4.3 by a maximum of 2.8 metres (m) and Palmdev relies upon a written request in respect of the variation to the height standard prepared by Mr Greg Boston dated 1 October 2024 (Height Request), in accordance with cl 4.6 of the PLEP.

The Height Request explains the site is highly disturbed, with levels artificially modified by demolition and past excavation on the site. Applying the method adopted by the Court in *Merman Investments Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1582, the maximum height exceedance on the site is 2.8m. However, if original levels on the site are extrapolated, the exceedance is reduced.

I am satisfied the compliance with the height standard is unnecessary or unreasonable in the circumstances of this case as the proposed development achieves the objectives of the height standard, notwithstanding the non-compliance.

The objectives of the height standard at cl 4.3 of the PLEP are as follows:

- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,
- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

I am satisfied that the objectives are achieved for reasons set out in the Height Request, summarised as follows:

The proposal is consistent with the desired future character of the Palm Beach locality, as the proposal is stepped with the topography, and respects the predominant horizontal massing, and sits below the tree canopy level in a manner sought by the locality character statement at Part A4.12 of the Pittwater Development Control Plan 2021 (PDCP).

The proposal is compatible with nearby development such as Barrenjoey House to the south, for reasons set out in the Heritage Impact Statement prepared by Urbis dated 1 October 2024, including the staggered and recessive terrace arrangement of the built form, integration of planters and landscape, and substantial setback to the ground floor level that responds to the scale of Barrenjoey House by presenting as stone. To the north, the proposed development adjoins dwelling houses in the C4 Environmental Living zone that are of lower density and scale to that in the E1 zone. Compatibility is achieved by a northern setback of between 3-6m with landscape planting in deep soil, as is the minimising of any visual impact of the development.

The shadow diagrams prepared in support of the development, as amended, demonstrates that the proposal minimises overshadowing to neighbouring properties.

View analysis images in the architectural plans demonstrate that no adverse public or private views are affected.

The highly articulated, modulated and stepped building form balances excavation with an appropriate distribution of floor space on the site, so as to sensitively respond to the natural topography of the site.

I am also satisfied that there are sufficient environmental planning grounds to justify the contravention of the height standard on the basis of the four grounds advanced in the Height Request. These include:

Firstly, the height is, in part, a consequence of the flood affectation on the site. A Flood Planning Level at RL 3.12m Australian Height Datum (AHD) is around 720mm above natural ground level at the front of the site which necessitates a raised portion of the ground floor level retail tenancies, with consequential impact to levels above.

Secondly, prior excavation on the site has distorted the natural ground level. When original, or undisturbed levels are extrapolated across the site, the exceedance is significantly reduced, as evidenced in Figure 2 of the Height Request.

Thirdly, the distribution of bulk is centred on the site and away from adjoining properties to the north and south so that potential impacts are moderated, and where the eastern presentation of the built form is well below the permitted height.

Fourthly, the proposed development is consistent with objects of the EPA Act. When the dwelling density control at cl 4.5A of the PLEP is applied to the site area of 1,361.5m², a total of nine dwellings is permitted to achieve Council's housing target set out in the relevant Local Strategic Planning Statement. The development proposes five dwellings which delivers on those targets, and promotes orderly and economic development of the land, consistent with object s 1.3(c) of

the EPA Act. As the proposal is consistent with the Palm Locality Character statement, the Height Request also asserts consistency with object s 1.3(g) of the EPA Act, which is to promote good design and amenity of the built environment. Finally, by ensuring the ground floor is substantially above the flood planning level for the site, the proposal is consistent with object s 1.3(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

I also accept, and am satisfied, that the proposal is consistent with the objectives for development in the E1 zone, at [13]. The Height Request states that the two retail spaces at ground level answer the objective to provide a range of retail and other uses that serve the need of people in the area, and encourages investment in local commercial development, including non-residential uses on the ground floor that provide active street frontages. Likewise, the five apartments above ground floor contributes to a vibrant and active local centre that contributes towards Council's housing targets.

As I am satisfied that the proposed development is consistent with the objectives of the height standard, and with the objectives of the E1 zone, I am also satisfied that the proposal is in the public interest because of that consistency, and because there is no matter of state or regional environmental planning that would preclude the Secretary's concurrence at cl 4.6(5) of the PLEP.

Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome: *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112, and I see no reason the Court should not uphold the Height Request made pursuant to cl 4.6 of the PLEP.

Other jurisdictional prerequisites of the PLEP

While the site is not identified for its heritage significance, and is not located in a heritage conservation area, the site adjoins 'Barrenjoey House' - a site identified in Sch 5 of the PLEP for its local heritage significance, and is in the vicinity of two other heritage items; 'Winten House' and 'Norfolk Island Pines (*Araucaria heterophylla*). As such, cl 5.10 of the PLEP is engaged.

The Heritage Impact Statement concludes that the proposal will not have an unacceptable impact on the heritage items in the vicinity of the site.

The Council considers heritage conservation to be satisfactorily addressed in the Aboriginal Cultural Heritage Assessment Report (ACHAR) prepared by Coast History & Heritage, and by the terms of an Aboriginal Harm Impact Permit (AHIP), issued by Heritage NSW dated 19 July 2023, and general terms of approval, issued 25 November 2024, that are incorporated into agreed conditions of consent.

The AHIP, issued in accordance with s 90 of the National Parks and Wildlife Act 1974 for a period of 5 years, permits archaeological salvage, undertaken by Coast History and Heritage. Sch 3 of the AHIP identifies a midden preservation area on the site.

It is this area to which an Aboriginal Cultural Heritage Assessment Report (ACHAR) prepared by Ecological and dated 5 April 2022 was particularly directed. Subsequent findings are agreed between the parties to have been identified with a low scientific and cultural significance that, after consultation with the local aboriginal community, are to be reburied on Country.

It is commonly held by the parties that the following investigations represent satisfactory assessment of the site:

Archaeological Technical Report prepared by Ecological Australia dated 5 April 2022.

Interim Aboriginal Archaeological Excavation Report prepared by Coast History and Heritage dated June 2024.

Aboriginal Heritage Letter prepared by Coast History and Heritage dated 13 June 2024.

On the basis of the above, I have considered the effect of the proposed development on the heritage significance of the site, and of heritage items in the vicinity of the site. I conclude the proposal does not diminish the heritage values of those items in the vicinity of the site, and continues to apply appropriate safeguards to Aboriginal heritage.

It is commonly held the site is flood affected, and the development application is accompanied by a Floodplain Management Report prepared by Van Der Meer dated 6 August 2024 (the Flood Report). The Flood Report asserts the proposal is compatible with the flood function and behaviour of the land, which has a flood planning level of 3.12m AHD, and the parties identify measures described in the Flood Report that satisfactorily address those matters to be considered at cl 5.21(2)(a)-(e) of the PLEP, such as the safe occupation of the site and a flood emergency plan are appropriate for conditions using current flood behaviour and with the effect of climate change. Finally, I note Appendix B of the Flood Report, prepared by GRC Hydro that likewise concludes no impact on the 1% Annual Exceedance Probability event results from the proposed development, demonstrating the proposal is designed to reduce the impact of flooding on the community in the area.

Not unrelatedly, the site is also identified as Class 5 Acid Sulfate Soil, according to the relevant map at cl 6.1(2) of the PLEP, and is in close proximity to soil classified Class 1 and 3 land. However, testing of the site documented in the Detailed Site Investigation prepared by EI Australia dated 30 July 2021 (DSI) concludes the soil on the site does not display characteristics of acid sulfate soils.

The development proposes excavation for the purpose of the basement. A Geotechnical Investigation Report prepared by EI Australia dated 8 August 2024 assesses the subsurface conditions and proposes an excavation and de-watering methodology that appears consistent with the Construction Methodology Report and Ground Settlement Statement by the same author and date, supported by Structural Engineering Plans prepared by M&G Engineers (Structural Plans). Those Structural Plans depict a staging of shoring to the east of the site, with bracing to the north and south. On the basis of those preceding documents, and the terms of the AHIP cited at [26], I consider those matters at cl 7.2(3) of the PLEP in respect of earthworks to be

satisfactorily addressed.

Clause 7.7(3) of the PLEP sets out matters to be considered when deciding whether the development takes into account all geotechnical risks relevant to the site. The documents cited at [32] also assist in considering those matters required to be considered in respect of geotechnical hazards. I also note the Groundwater Take Assessment prepared by EI Australia dated 8 August 2024, Groundwater Monitoring Report and Landslide Risk Assessment Report also prepared by EI Australia contain certain recommendations and concludes that the development can be undertaken, resulting in an acceptable level of risk. Finally, I note the stormwater drainage concept prepared by Taylor Consulting dated 3 October 2024 (Stormwater Plans) which depicts the collection of stormwater, partial storage in rainwater tanks, and pump out chambers connected to Council's drainage system at the front of the site. In particular, I note reference is made to Ecoceptor pollution control devices prior to the discharge of site stormwater into Council pits.

As such, I am satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land. I am also satisfied that the development is designed and sited to minimise the risks associated with excavation and construction of the development.

I am also satisfied that the site, being located on a site currently serviced by essential services will continue to be serviced by such essential services in accordance with cl 7.10 of the PLEP. External referrals to Water NSW, Transport for NSW (TfNSW) and Ausgrid has resulted in no objections from those authorities who have otherwise provided general terms of approval. The Stormwater Plans cited at [33], and a revised Traffic and Parking Assessment prepared by Varga Traffic Planning dated 13 September 2024 identify the nature of stormwater drainage and vehicular access for which consent is sought.

The design of residential apartment development

As the proposed development is residential apartment development, the Court is required by s 147 of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) to consider the quality of the design of the development, evaluated in accordance with the design principles at Sch 9.

I am assisted in so doing by a statement dated 23 September 2024 and prepared in accordance with s 29 of the Environmental Planning and Assessment Regulation 2021 that attests Mr Koichi Takada (Arch Reg No. 6901) directed the design of the proposal, and sets out the means by which the design principles have been applied in the proposed development, and how the objectives in Parts 3 and 4 of the Apartment Design Guide are addressed.

The Council's Design and Sustainability Advisory Panel has considered the proposal and provided advice on the design. However, that Panel is not a panel constituted in a manner to which s 147(1)(c) is directed. As such, the Court is not required to take into consideration its advice.

On the basis of the statement, I am satisfied the development as proposed meets the requirements set out in s 148 of the Housing SEPP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies to the site. The development application is accompanied by an Arboricultural Impact Assessment prepared by Tree Management Strategies dated 20 December 2021. Trees on adjoining land and in the road reserve are to be retained. The proposal seeks consent for the removal of 12 trees, and the agreed conditions of consent that provide for protection of trees retained. I note s 2.6 of the Biodiversity SEPP allows for the removal of vegetation with consent.

State Environmental Planning Policy (Resilience and Hazards) 2021

The site is identified within the Coastal Use Area, and with the Coastal Environment Area that are dealt with under Ch 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP).

The reasons set out at [23]-[34], also deal with those matters that are enumerated at s 2.10(1) of the Hazards SEPP, except for subs (e) and (g) that are not relevant to this site nor proposal. Accordingly, I am satisfied that the development is designed, sited and will be managed to minimise adverse impacts of a kind referred to in subs (1).

For reasons that are virtually identical, I also consider those matters at s 2.11(1) to be adequately addressed. On the basis of those aspects of height, bulk, scale and compatibility with the desired future character of Palm Beach set out at [18], I consider the visual amenity and scenic qualities of the coast appropriately considered, as is overshadowing and the retention of views from public places to the foreshore. As such, I am satisfied that the development is designed, sited and will be managed to minimise any adverse impact of a kind set out at subs (1).

On the basis of those documents cited at [33], I am satisfied that the risk of coastal hazards is not likely to increase on the subject site, or on other land, in accordance with s 2.12 of the Hazards SEPP.

I have considered whether the land is contaminated in accordance with s 4.6 of the Hazards SEPP. On the basis of the investigations undertaken and conclusions contained in the DSI, and the agreed conditions of consent that deal with hazardous building materials, I am satisfied the site can be made suitable, following remediation, for the purpose for which development is proposed to be carried out.

State Environmental Planning Policy (Transport and Infrastructure) 2021

As the proposed development proposed excavation and other works within 2m of electricity distribution poles, the development was referred to the electricity supply authority Ausgrid, in accordance with s 2.48 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Infrastructure SEPP). Ausgrid provided its concurrence on 18 October 2024, with relevant terms incorporated into the agreed conditions of consent.

The site has a frontage to Barrenjoey Road which is a Classified Road. As there is no other practical or safe vehicular access to the land, such access is to be from Barrenjoey Road. A Revised Traffic and Parking Assessment prepared by Varga Traffic Planning dated 13 September 2024 assesses traffic generated by the proposed development, noting onsite parking for 23 vehicles and total traffic generation potential of 10.7 peak hour vehicle trips. TfNSW provided its concurrence to the proposal dated 6 October 2023, subject to terms that are incorporated into agreed conditions of consent. This includes a requirement to consult with TfNSW and the relevant bus operator to determine a suitable location for the proposed relocation of the existing bus stop. Accordingly, I am satisfied that the operation of Barrenjoey Road will not be adversely affected by the development as a result of vehicular access, emissions or dust, or the nature, volume or frequency of vehicles using Barrenjoey Road, in accordance with s 2.119 of the Infrastructure SEPP.

An Acoustic Report prepared by Acoustic Logic dated 6 August 2024 (Acoustic Report) proposes design mitigation measures to address potential impacts from traffic noise generated by Barrenjoey Road, and the potential impact of noise from other sources such as plant and equipment on neighbouring properties. I note the Acoustic Report concludes that acceptable levels will be achieved, subject to measures that are incorporated into the agreed conditions of consent, at Conditions 31, 32 and 33. On this basis, I am satisfied that appropriate measures of a kind in s 2.120(3) will be taken so that certain levels are not exceeded.

Roads Act 1993

The proposal seeks the relocation of an existing bus stop on the eastern side of Barrenjoey Road. Concurrence for such work is required to be received from TfNSW under s 138 of the Roads Act 1993. TfNSW provided concurrence on 3 November 2024, with the general terms of approval incorporated into agreed conditions of consent.

Water Management Act 2000

The proposed development is integrated development pursuant to s 4.46 of the EPA Act as a Water Supply Work Approval is required under the Water Management Act 2000. Section 4.47(3) of the EPA Act provides that a consent must be consistent with the general terms of approval of an approval body. Conditions detailing the general terms of approval, issued by Water NSW on 18 November 2024, are incorporated in the agreed conditions of consent.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The application is accompanied by a BASIX certificate (Cert No. 1267340M_03 prepared by Greenview Consulting Pty Ltd and dated 29 January 2025) in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP), supported by NatHERS Certificate prepared by Greenview Consulting dated 29 January 2025.

An embodied energy report is a part of the BASIX Certificate, such that the Court can be satisfied that the embodied emissions attributable to the proposed development have been quantified in accordance with s 2.1(5) of the Sustainable Buildings SEPP.

Conclusion

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.

The Court notes that Northern Beaches Council as the relevant consent authority, has approved, under s 38(1) of the Environmental Planning and Assessment Regulation 2021, the Applicant amending Development Application DA2023/1289 by the revised Ground floor plan (A0100 Revision K), and those documents cited at [51], that were filed with the Court on 18 February 2025.

Orders

The Court orders that:

The request pursuant to clause 4.6 of the Pittwater Local Environmental Plan 2014 to vary the development standard for height of building control contained within clause 4.3 thereof, as prepared by Boston Blyth Fleming dated 2 October 2024, is upheld.

The appeal is upheld.

Development consent is granted to development application DA2023/1289 for the demolition of existing structures, construction of a shop top housing development comprising five residential apartments over two ground floor retail tenancies including one level of basement parking, associated landscaping and site preparation works and re-location of the existing bus stop and shelter on Barrenjoey Road, at 1112-1116 Barrenjoey Road, Palm Beach, subject to the conditions of consent annexed and marked "Annexure A".

T Horton

Commissioner of the Court

Amended Annexure A

Amendments

14 March 2025

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Pursuant to r 36.17 of the Uniform Civil Procedure Rules 2005 (the slip rule), a corrected version of the conditions of consent are uploaded as “Amended Annexure A”.

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14 March 2025

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