



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Chemico Holdings Pty Ltd v Central Coast Council  
[2023] NSWLEC 1360**

**Hearing dates:**

Conciliation conference on 1 May 2023

**Date of orders:**

11 July 2023

**Decision date:**

11 July 2023

**Jurisdiction:**

Class 1

**Before:**

Dixon SC

**Decision:**

The Court orders:

- (1) The applicants are to pay the respondent's costs thrown pursuant to s.8.15(3) of the *Environmental Planning and Assessment Act 1979* in the amount of \$8,000.00
- (2) The appeal is upheld.
- (3) Development consent is granted to development application 61540/2021, as amended, for the partial demolition of the existing structures (except the existing chemist located on 315 West Street), and construction of a mixed-use building containing shop top housing, commercial premises, and associated works over basement parking, subject to the conditions contained in Annexure A.

**Catchwords:**

APPEAL – development application – conciliation conference – agreement between the parties – orders

**Legislation Cited:**

Central Coast Local Environmental Plan 2022, cl 1.8A  
Environmental Planning and Assessment Act 1979, ss 4.15(1)(d), 4.16, 8.15(3)  
Environmental Planning and Assessment Regulation 2000, cl 55  
Gosford Local Environmental Plan 2014, cll 4.3, 4.6, 4.4, 5.10, 6.7  
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, s 4.6
	State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development
<b>Cases Cited:</b>	Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130
<b>Texts Cited:</b>	Gosford Development Control Plan 2013 Gosford Development Control Plan 2014
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Chemico Holdings Pty Ltd (First Applicant) Chemico Property Holdings Pty Ltd (Second Applicant) Central Coast Council (Respondent)
<b>Representation:</b>	Counsel: P Saab (Solicitor) (Applicants) M Ball (Solicitor) (Respondent)  Solicitors: Macquarie Lawyers (Applicants) MBM Legal + Conveyancing (Respondent)
<b>File Number(s):</b>	2022/367699
<b>Publication restriction:</b>	Nil

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## JUDGMENT

- 1 These proceedings arise following Central Coast Council's refusal of the applicants' development application (DA 61540/2021) (DA) for the partial demolition of the existing structures (except the existing chemist located on 315 West Street), and construction of a mixed-use building containing shop top housing, commercial premises, and

associated works over basement parking over the properties at 315 West Street and 1 and 3 Alfred Street, Umina Beach being Lots 32, 33 and 35 Section A Deposited Plan 8872 (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 was held on 1 May 2023. I presided over the conciliation conference. At the conciliation, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to them. The agreement was based on an amended application.
- 3 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the decision is one that the Court could have made in the proper exercise of its functions.
- 4 The parties' decision involves the Court exercising the function under s 4.16 of the *Environmental Planning and Assessment Act 1979* (EPA Act) to grant consent to the DA subject to conditions. Based on the evidence, I accept the parties' joint submissions that the proposed development satisfies all relevant preconditions for the following reasons.

#### **Owners' consent**

- 5 The applicants are the owners of the site and the declaration regarding consent is contained in the development application form, a copy of which forms part of the Class 1 Application.

#### **State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH)**

- 6 Section 4.6 of SEPP RH requires a consent authority to consider the contamination and remediation of land when determining a development application.
- 7 The applicants have provided a Report on Geotechnical Investigation prepared by Douglas Partners dated October 2018 and the Statement of Environmental Effects prepared by Michael Leavey Consulting dated March 2021, and in accordance with s 4.6(2)) of SEPP RH.
- 8 The Council is satisfied that there is no known contamination of the site, no further investigation of the site is warranted and the site is suitable for the proposed use.
- 9 The parties are therefore satisfied, and I accept that s 4.6 of SEPP RH has been addressed.

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

- 10 Pursuant to the BASIX SEPP and the Environmental Planning and Assessment Regulation 2000 (Regulation) the amended proposal is a BASIX-affected development, containing a BASIX-affected building. An updated BASIX certificate 973163M\_04 has been provided.

## **State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)**

- 11 SEPP 65 applies to all residential flat buildings of three storeys or more and with four or more dwellings and applies to the DA.
- 12 A SEPP 65 Report addressing all of the nine Design Quality Principles has been submitted by the applicants and found to be satisfactory to the Council.
- 13 An Apartment Design Guide Parts 3 and 4 Compliance Table was also submitted by the applicants and found to be satisfactory to the Council.

## **Gosford Local Environmental Plan 2014 (GLEP 2014)**

- 14 Having received and considered the amendments, the Council is satisfied that, subject to the imposition of conditions of consent, the amended proposal generally complies with the aims of the GLEP 2014.
- 15 The amended proposal is permissible with development consent in the B2 Local Centre zone under the GLEP 2014. The parties agree that the amended proposal is consistent with the objectives of the B2 Local Centre zone under the GLEP 2014.
- 16 The height of the amended proposal does not comply with cl 4.3 of the GLEP 2014 for development located on the B2 Local Centre Zone. The shade structure to rooftop communal open space, the fire stairs and accessible bathroom located in the communal open space, a portion of the balustrading to the communal open space, and also the lift overrun to the communal open space exceed the maximum height standard of 14.25m. The maximum exceedance is the lift overrun that exceeds the maximum height standard by 2.75m.
- 17 The applicants submitted a cl 4.6 written request with respect to exceedance of the building height prepared by PM Anderson Consulting dated 9 June 2023 (cl 4.6 request). The cl 4.6 request addresses the matters set out at cl 4.6(3) of the GLEP 2014 having regard to the tests referred to in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118; and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 per Preston CJ at [24].
- 18 In exercising the functions of the consent authority, pursuant to cl 4.6(4)(a), I must be satisfied of both of the matters in cl 4.6(4)(a)(i) and (ii), being:
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out...
- 19 Only if the requirements in cl 4.6(3) and (4) are met will the power in cl 4.6(2) to grant consent to development that contravenes the development standard be enlivened.
- 20 In this case, as the cl 4.6 request explains the proposal seeks to reduce the height that would otherwise be permitted by the standard to West Street to achieve a better urban design outcome by a transition to the recently approved development at 323-325 West

Street. That transition is achieved by including some bulk to West Street and concentrating the balance of the bulk in the centre of the land where impacts can be managed and there is no impact to the streetscape. The addition of the bulk to the top of the existing (and to be retained) chemist building will provide an ability for the land at the corner of West Street and Alfred Street to achieve the intended height standard if it chooses to.

21 The proposal also includes a pathway which is intended to be open to the public and will connect with the approved area on the land at 323-325 West Street and may be added to the future by the Council when other development is ultimately approved. By providing public access (which is also now used to access the shop top housing) the applicants have lost an opportunity to realise commercial floor space in that area at ground level. The slight height breach allows for redistribution of that bulk to achieve the permitted floor space ratio and the streetscape outcome to West Street. The breach also permits high quality communal outdoor space to be provided which will have far greater amenity than ground floor open space which presents generally to the back of house area development in West Street.

22 I am satisfied for the reasons outlined in the cl 4.6 request that it is unreasonable and unnecessary to comply with the height control in the circumstances of this case and for the reasons outlined above that there are sufficient environmental planning grounds to justify contravening the development standard. That said, it follows having been satisfied on the basis of the reasoning in the cl 4.6 request that the development is consistent with the relevant objectives of the cl 4.3 development standard and the objectives for development within the B2 Zone in which the development is proposed to be carried out I accept that the proposed development will be in the public interest. Finally, I accept after a consideration of the matters identified in cl 4.6(5) of the GLEP 2014 that the concurrence of the Planning Secretary is not required mindful of the provisions of the Planning Circular PS 20-002 dated 5 May 2020.

23 For those reasons I find that the cl 4.6 request in relation to the breach of the height standard should be upheld.

24 The floor space ratio of the amended proposal complies with cl 4.4 of the GLEP 2014.

25 Clause 5.10 Heritage Conservation is not relevant to the amended proposal.

26 Clause 6.7 Water Cycle Management of the GLEP 2014 has been considered and the stormwater impacts found acceptable.

## **Gosford Development Control Plan 2014 (GDCP)**

- 27 The site is located in:
- (1) the “Umina 13:Main Street Centre in Chapter 2 of Gosford Development Control Plan 2013 (GDCP 2013); and
  - (2) the B2 Local Centre zone under the Gosford Local Environmental Plan 2014 (GLEP 2014).
- 28 The DA was lodged prior to the commencement of the Central Coast Local Environmental Plan 2022 (CCLEP 2022) and, in accordance with cl 1.8A of CCLEP 2022, the DA is to be assessed having regard to GLEP 2014, and as if CCLEP 2022 had not commenced. The development is permissible with consent.
- 29 The GDCP applies to the DA, including relevantly Part 4 have been considered generally and found to be acceptable to the Council.

### **Notification of DA and public interest considerations**

- 30 The DA lodged with the Council was placed on notification from 28 May 2021 to 28 June 2021. Two public submissions (including a petition) were received in relation to the application. No objectors attended the s34 conference and gave evidence.
- 31 The parties agree that any submissions of objectors have been considered as required under s 4.15(1)(d) of the EPA Act along with the impact on the amenity of adjoining properties.

### **Conclusion**

- 32 As the parties’ decision is within power as required by s 34(3) of the LEC Act, I now dispose of the proceedings in accordance with their decision.
- 33 The Court notes that:
- (1) Central Coast Council as the relevant consent authority, pursuant to cl 55(1) of the Regulation, has consented to the applicants amending the development application 61540/2021 made on 17 May 2021 to rely on the documents and plans specified below:
    - (a) Architectural Plans by: ADG Architects

Drawing	Description	Sheets	Issue	Date
A000	Cover Sheet	1	6	02/06/2023
A001	Site Plan	1	6	02/06/2023
A100	Basement Plan	1	6	02/06/2023
A101	Ground Floor Plan	1	6	02/06/2023

A102	Level 1	1	6	02/06/2023
A103	Level 2	1	6	02/06/2023
A104	Level 3	1	6	02/06/2023
A105	Level 4	1	6	02/06/2023
A106	Roof Plan	1	6	02/06/2023
A107	Elevations	1	6	02/06/2023
A108	Elevations	1	6	02/06/2023
A109	Sections	1	6	02/06/2023
A110	Sections	1	6	02/06/2023
A111	Bin Diagram Plan	1	6	02/06/2023
A120	Materials Schedule	1	5	29/05/2023

(b) Supporting documentation

Document	Title	Date
Michael Leavey Consulting	Statement of Environmental Effects	March 2021
ADG Architects	SEPP 65 Design Verification Report - Revision B	17/06/2023
PM Anderson Consulting	Waste Management Plan	16/06/2023
Contour Landscape Architecture	Landscape Plans Cover Sheet and C1-C8 (9 Sheets) (Revision B)	07/06/2023
Granda Consulting Building Services	BCA Assessment Report 18-0073R3	June 2020
BJ Bradley & Associates	Traffic & Parking Assessment Report	04/03/2021
Acor Consultants (CC) Pty Ltd	Stormwater Drainage Plans C1-C9 (9 sheets) Revision B	26/03/2021

Greenworld Architectural Drafting	NatHERS Certificate No. 0003485950	23/06/2023
Greenworld Architectural Drafting	BASIX Certificate No. 973163M_04	23/06/2023

(the amended application).

- (2) The applicants have uploaded the amended application on the NSW Planning Portal on 20 June 2023
- (3) The applicants have subsequently filed the amended application with the Court on 20 June 2023.

34 The Court orders:

- (1) The applicants are to pay the respondent's costs thrown pursuant to s.8.15(3) of the *Environmental Planning and Assessment Act 1979* in the amount of \$8,000.00.
- (2) The appeal is upheld.
- (3) Development consent is granted to development application 61540/2021, as amended, for the partial demolition of the existing structures (except the existing chemist located on 315 West Street), and construction of a mixed-use building containing shop top housing, commercial premises, and associated works over basement parking, subject to the conditions contained in Annexure A.

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**S Dixon**

**Senior Commissioner of the Court**

[Annexure A \(228455,.pdf\)](#)

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Decision last updated: 11 July 2023