



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Hidali Pty Ltd v Minister for Planning and Public Spaces [2021] NSWLEC 1252</b>
<b>Hearing dates:</b>	Conciliation conference on 17-18 November 2020
<b>Date of orders:</b>	17 May 2021
<b>Decision date:</b>	17 May 2021
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	O'Neill C
<b>Decision:</b>	See Orders at [11]
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – tourist accommodation – bushfire prone land – conciliation conference – agreement between the parties
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Rural Fires Act 1997 Snowy River Local Environmental Plan 2013 State Environmental Planning Policy (Kosciuszko National Park—Alpine Resorts) 2007
<b>Cases Cited:</b>	Broad v Brisbane City Council (1986) 59 LGRA 296; [1986] 2 Qd R 317 Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; [2006] NSWLEC 133 HP Subsidiary Pty Ltd v City of Parramatta Council [2020] NSWLEC 135
<b>Texts Cited:</b>	Greater Sydney Regional Plan 'A metropolis of Three Cities' Local Character and Place Guideline Mulgoa and Wallacia Rural Villages Strategy Penrith Development Control Plan 2014, Parts D5, E9 and Clause 5.8 Penrith Scenic & Cultural Landscape Study Planning Circular PS 18-001 'Stepping up planning and designing better places: respecting and enhancing local character' Rural Fire Service's 'Planning for Bushfire Protection' 2006

Western Sydney City District Plan 'Connecting  
Communities'

<b>Category:</b>	Principal judgment
<b>Parties:</b>	Hidali Pty Ltd (Applicant) Minister for Planning and Public Spaces (Respondent)
<b>Representation:</b>	Counsel: J Hones (Solicitor) (Applicant) T March (Respondent)  Solicitors: Hones Lawyers (Applicant) NSW Department of Planning, Industry and Environment (Respondent)
<b>File Number(s):</b>	2020/68009
<b>Publication restriction:</b>	No

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## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No 10064 for the demolition of the existing building and construction of a seven storey building comprising two dual key apartments (or four self-contained apartments), six two-bedroom apartments, two studio apartments, car parking and restaurant, all to be used as tourist accommodation (the proposal), at 30 Diggings Terrace, Thredbo Village (the site) by the Minister for Planning and Public Spaces (the respondent).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 17-18 November 2020. I presided over the conciliation conference. 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.
- 3 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.
- 4 There are preconditions to the exercise of power to grant development consent for the proposal.

## Planning framework

The site is zoned E1 National Parks and Nature Reserves pursuant to the Snowy River Local Environmental Plan 2013 (LEP 2013). The objectives of the E1 zone are:

- To enable the management and appropriate use of land that is reserved under the National Parks and Wildlife Act 1974 or that is acquired under Part 11 of that Act.
- To enable uses authorised under the *National Parks and Wildlife Act 1974*.
- To identify land that is to be reserved under the *National Parks and Wildlife Act 1974* and to protect the environmental significance of that land.

6 The State Environmental Planning Policy (Kosciuszko National Park—Alpine Resorts) 2007 (Alpine SEPP) applies to the site at cl 3. The consent authority for the purposes of the Alpine SEPP is the Minister, at cl 7. The site is within the Thredbo Alpine Resort, at cl 5(a) of the Alpine SEPP. Tourist accommodation is a nominate permissible use in the Thredbo Alpine Resort, under the Land Use Table. Matters to be considered by the consent authority, or the Court exercising the functions of the consent authority, are identified by cll 14 and 15 of the Alpine SEPP, as follows:

#### **14 Matters to be considered by consent authority**

##### **Note—**

This clause provides for matters for consideration in addition to those provided for by section 4.15 of the Act. The consent authority is also required to take into account recovery plans and threat abatement plans under the Threatened Species Conservation Act 1995. (See sections 69 and 86 of that Act.)

(1) In determining a development application that relates to land to which this Policy applies, the consent authority must take into consideration any of the following matters that are of relevance to the proposed development—

- (a) the aim and objectives of this Policy, as set out in clause 2,
- (b) the extent to which the development will achieve an appropriate balance between the conservation of the natural environment and any measures to mitigate environmental hazards (including geotechnical hazards, bush fires and flooding),
- (c) having regard to the nature and scale of the development proposed, the impacts of the development (including the cumulative impacts of development) on the following—
  - (i) the capacity of existing transport to cater for peak days and the suitability of access to the alpine resorts to accommodate the development,
  - (ii) the capacity of the reticulated effluent management system of the land to which this Policy applies to cater for peak loads generated by the development,
  - (iii) the capacity of existing waste disposal facilities or transfer facilities to cater for peak loads generated by the development,
  - (iv) the capacity of any existing water supply to cater for peak loads generated by the development,
- (d) any statement of environmental effects required to accompany the development application for the development,

##### **Note—**

This Policy applies to land that is in the ski resort area described in clause 32A of Schedule 6 to the Act and certain other land. Regulations made under the Act set out requirements relating to the preparation of the statement of environmental effects required to accompany a development application, including specific requirements for a statement of environmental effects relating to the ski resort area if the proposed development is advertised development.

- (e) if the consent authority is of the opinion that the development would significantly alter the character of the alpine resort—an analysis of the existing character of the site and immediate surroundings to assist in understanding how the development will relate to the alpine resort,

(f) the Geotechnical Policy—Kosciuszko Alpine Resorts (2003, Department of Infrastructure, Planning and Natural Resources) and any measures proposed to address any geotechnical issues arising in relation to the development,

(g) if earthworks or excavation works are proposed—any sedimentation and erosion control measures proposed to mitigate any adverse impacts associated with those works,

(h) if stormwater drainage works are proposed—any measures proposed to mitigate any adverse impacts associated with those works,

(i) any visual impact of the proposed development, particularly when viewed from the Main Range,

(j) the extent to which the development may be connected with a significant increase in activities, outside of the ski season, in the alpine resort in which the development is proposed to be carried out,

(k) if the development involves the installation of ski lifting facilities and a development control plan does not apply to the alpine resort—

(i) the capacity of existing infrastructure facilities, and

(ii) any adverse impact of the development on access to, from or in the alpine resort,

(l) if the development is proposed to be carried out in Perisher Range Alpine Resort—

(i) the document entitled Perisher Range Resorts Master Plan, as current at the commencement of this Policy, that is deposited in the head office of the Department, and

(ii) the document entitled Perisher Blue Ski Resort Ski Slope Master Plan, as current at the commencement of this Policy, that is deposited in the head office of the Department,

(m) if the development is proposed to be carried out on land in a riparian corridor—

(i) the long term management goals for riparian land, and

(ii) whether measures should be adopted in the carrying out of the development to assist in meeting those goals.

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## **15 Additional matters to be considered for buildings**

(1) **Building height** In determining a development application for the erection of a building on land, the consent authority must take into consideration the proposed height of the building (where relevant) and the extent to which that height—

(a) has an impact on the privacy of occupiers and users of other land, and

(b) limits solar access to places in the public domain where members of the public gather or to adjoining or nearby land, and

(c) has an impact on views from other land, and

(d) if the building is proposed to be erected in Thredbo Alpine Resort—has a visual impact when viewed from the Alpine Way, and

(e) if the building is proposed to be erected in Perisher Range Alpine Resort—needs to be limited so as to assist in maintaining the skyline when viewed from Kosciuszko Road and any other public roads, and

(f) if the building is proposed to be erected in an alpine resort other than Thredbo Alpine Resort or Perisher Range Alpine Resort—is similar to existing buildings in the resort where it is proposed to be erected, and

(g) if the building is proposed to be erected in Bullocks Flat Terminal—relates to the topography of its site.

(2) **Building setback** In determining a development application for the erection of a building on land, the consent authority must take into consideration the proposed setback of the building (where relevant) and the extent to which that setback—

(a) assists in providing adequate open space to complement any commercial use in the alpine resort concerned, and

- (b) assists in achieving high quality landscaping between the building and other buildings, and
- (c) has an impact on amenity, particularly on view corridors at places in the public domain where members of the public gather, and
- (d) is adequate for the purposes of fire safety, and
- (e) will enable site access for pedestrians, services (including stormwater drainage and sewerage services) and the carrying out of building maintenance, and
- (f) will facilitate the management of accumulated snow.

(3) **Landscaped area** In determining a development application for the erection of a building on land, the consent authority must take into consideration (where relevant) the extent to which landscaping should be used—

- (a) as a means of assisting in the protection of the unique alpine environment of the alpine resort concerned, and to maximise its natural visual amenity, for the benefit of visitors and natural ecosystems, and
- (b) to assist in the provision of adequate open space to complement any commercial use in the alpine resort concerned, and
- (c) to limit the apparent mass and bulk of the building, and
- (d) as an amenity protection buffer between the proposed building and other buildings, and
- (e) as a means of reducing run-off, and
- (f) to protect significant existing site features and limit the area of any site disturbed during and after the carrying out of development.

- 7 I accept the agreed submissions of the parties regarding the matters to be considered by the consent authority under cll 14 and 15 of the Alpine SEPP as particularised in the Supplementary Jurisdictional Statement provided on 19 March 2021 (Attachment 1).
- 8 The amended proposal has been referred to the National Parks and Wildlife Service (NPWS) pursuant to cl 17 of the Alpine SEPP. The NPWS has reviewed the amended plans and provided comments which do not raise any environmental concerns.
- 9 The proposal is integrated development pursuant to s 4.46 of the EPA Act as it is tourist accommodation and requires a Bush Fire Safety Authority under s 100B of the *Rural Fires Act 1997*, which has been granted by the Rural Fire Services (RFS) on 15 February 2021 subject to the General Terms of Approval being met.
- 10 I accept the agreed submissions of the parties in the Jurisdictional Statement provided on 9 March 2021. The parties submitted that the amended proposal has been re-notified in accordance with the requirements for notification and the submissions received have been considered in the drafting of conditions of consent.

## Orders

- 11 The orders of the Court are:
- (1) The applicant is granted leave to amend the application to rely on the following documents:
    - (a) Amended Architectural Plans (Various Revisions) prepared by Popov Bass:
      - (i) Drawing No 0555-DA001, Level 0 Plan, Revision 09 dated 16 December 2020;

- (ii) Drawing No 0555-DA002, Level 1 Plan, Revision 09 dated 16 December 2020;
- (iii) Drawing No 0555-DA003, Level 2 Plan, Revision 09 dated 16 December 2020;
- (iv) Drawing No 0555-DA004, Level 3 Plan, Revision 09 dated 16 December 2020;
- (v) Drawing No 0555-DA005, Level 4 Plan, Revision 08 dated 16 December 2020;
- (vi) Drawing No 0555-DA006, Level 5 Plan, Revision 08 dated 16 December 2020;
- (vii) Drawing No 0555-DA007, Level 6 Plan, Revision 08 dated 16 December 2020;
- (viii) Drawing No 0555-DA008, Roof Plan, Revision 08 dated 16 December 2020;
- (ix) Drawing No 0555-DA009, North Elevation, Revision 07 dated 16 December 2020;
- (x) Drawing No 0555-DA010, South Elevation, Revision 07 dated 16 December 2020;
- (xi) Drawing No 0555-DA011, East Elevation, Revision 07 dated 16 December 2020;
- (xii) Drawing No 0555-DA012, West Elevation, Revision 07 dated 16 December 2020;
- (xiii) Drawing No 0555-DA013, Section 1, Revision 06 dated 16 December 2020;
- (xiv) Drawing No 0555-DA014, Section 2, Revision 06 dated 16 December 2020;
- (xv) Drawing No 0555-DA015, Section 4, Revision 06 dated 16 December 2020;
- (xvi) Drawing No 0555-DA016, Shadow Diagrams, Revision 05 dated 4 January 2021;
- (xvii) Drawing No 0555-DA017, Shadow Diagrams, Revision 05 dated 4 January 2021;
- (xviii) Drawing No 0555-DA018, Shadow Diagrams, Revision 05 dated 4 January 2021;
- (xix) Drawing No 0555-DA019, Proposed Materials, Revision 06 dated 16 December 2020;
- (xx)

- Drawing No 0555-DA020, Exterior Perspectives, Revision 06 dated 16 December 2020;
- (xxi) Drawing No 0555-DA021, Site Plan (Split Level), Revision 05 dated 16 December 2020;
- (xxii) Drawing No 0555-DA000, Title Page, Revision 07 dated 4 January 2021;
- (xxiii) Drawing No 0555-DA022, Shadow Diagrams – Sun Eye, Revision 04 dated 4 January 2021;
- (xxiv) Drawing No 0555-DA023, Shadow Diagrams – Sun Eye, Revision 04 dated 4 January 2021;
- (xxv) Drawing No 0555-DA024, Shadow Diagrams – Sun Eye, Revision 04 dated 4 January 2021; and
- (xxvi) Drawing No 0555-DA025, Height Plan Diagram, Revision 04 dated 4 January 2021.
- (b) Letter from Dabyne Planning regarding amended plans dated 21 January 2021; and
- (c) Geotechnical Report (Issue 2) prepared by Crozier Geotechnical Consultants dated 15 January 2021.
- (2) The applicant is to pay the costs of the respondent thrown away as a result of the amendment of the application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as agreed or assessed.
- (3) The appeal is upheld.
- (4) Development Application No 10064 for the demolition of the existing building and construction of a seven storey building comprising two dual key apartments (or four self-contained apartments), six two-bedroom apartments, two studio apartments, car parking and restaurant, all to be used as tourist accommodation, at 30 Diggings Terrace, Thredbo Village, is approved, subject to the conditions of consent at Annexure A.

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**Susan O'Neill**

**Commissioner of the Court**

[Annexure A \(297152,.pdf\)](#)

[Attachment 1 \(349815,.pdf\)](#)

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Decision last updated: 17 May 2021