



Land and Environment Court
New South Wales

Case Name:	Marshall v Woollahra Municipal Council
Medium Neutral Citation:	[2022] NSWLEC 1590
Hearing Date(s):	Conciliation conference held on 24 October 2022
Date of Orders:	26 October 2022
Decision Date:	26 October 2022
Jurisdiction:	Class 1
Before:	Bish C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development Consent No. DA-494/2020 is modified by consent to DA-494/2020/3, in the terms described in Annexure A.</p> <p>(3) Development Consent No. DA-494/2020 as modified by the Court is described in Annexure B.</p>
Catchwords:	MODIFICATION APPLICATION – conditions relating to approved dwelling - conciliation conference conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.17, 4.46, 4.55, 8.9</p> <p>Environmental Planning and Assessment Regulation 2000, cl 121B</p> <p>Land and Environment Court Act 1979, ss 34, 34AA</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, cl 3</p> <p>Woollahra Local Environmental Plan 2014</p>
Texts Cited:	Woollahra Development Control Plan 2015
Category:	Principal judgment

Parties: Melissa Marshall (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor)(Applicant)
P Rigg (Solicitor)(Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Woollahra Municipal Council (Respondent)

File Number(s): 2022/199722

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JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the conditions imposed on Modification Application DA494/2020/3 (the MA) by the Woollahra Municipal Council (hereafter the Council), which relate to an existing consent DA494/2020, on Lot 135 in DP 1269793, also known as 113-115 Victoria Road, Bellevue Hill (hereafter the site).
- 2 The original Development Application DA494/2020 (the DA) was granted by Council on 17 July 2021, and the MA was approved with conditions on 16 June 2022.
- 3 The applicant was dissatisfied with the determination of the MA by the Council, specifically regarding conditions A.6(b) and C.1 (h, i, k), and consequently the Class 1 appeal is made pursuant to s 8.9(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 4 The Court agreed to a conciliation conference, pursuant to s 34AA of the *Land and Environment Court Act 1979* (Court Act), without an onsite view, by agreement of the parties. The conciliation was held remotely by Microsoft Teams.
- 5 The Council agreed for the applicant to amend the plans and documents, that amend the MA, pursuant to cl 121B of the Environmental Planning and Assessment Regulation 2000.

- 6 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the Court after expert consultation and design amendments, which amend the contested conditions of consent and also require additional conditions, as described in Annexure A.
- 7 Pursuant to s 34(3) of the Court 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 power under s 4.55(2) of the EPA Act, to amend DA494/2020/3, as described in Annexure A, and thereby modify DA494/2020, as described in Annexure B.
- 8 The parties identified the jurisdictional prerequisites of particular relevance in these proceedings as described in the Woollahra Local Environmental Plan 2014 (WLEP), and also the Woollahra Development Control Plan 2015 (WDCP). The parties agree that the amendments to the conditions of consent address all relevant jurisdictional requirements.
- 9 The requirements of s 4.55(2)(a) of the EPA Act are satisfied. The parties agree that the modification is substantially the same as originally approved under the DA, specifically with regards to the development footprint, character and visual assessment.
- 10 The parties confirm that the development is not integrated development, pursuant to s 4.46 of the EPA Act, and that the requirements of 4.55(2)(b) are not relevant for consideration.
- 11 The Council confirms that the notification of the MA under appeal was made pursuant to the requirements of the WDCP and received two submissions in objection. The issues raised in these submissions have been considered in the amendments to the MA and conditions of consent. Subsections 4.55(2)(c) and (d) of the EPA Act are satisfied.
- 12 The requirements of subs 4.55(3) and (4) of the EPA Act are sufficiently addressed. The parties confirm that the proposed changes to the development will have minimal environmental impact and satisfy the relevant requirements

of s 4.15 of the EPA Act. The amendments relied on by the MA result in minimal overshadowing and solar access impact to adjoining properties. The amendments as described in the MA comply with the relevant provisions of the WLEP and generally satisfy the relevant provisions of the WDCP.

- 13 I am satisfied that based on the evidence before the Court that there are no jurisdictional impediments to the agreement seeking amendments to the MA and modifications to the DA, as described in Annexures A and B. Council has undertaken the appropriate merit assessment of the amendments agreed. The amended appeal for modification of DA494/2020 satisfies the requirements of s 4.55(2) of the EPA Act.
- 14 The parties confirm that there are no design amendments that would require the re-issuance of a BASIX Certificate, prior to consent, pursuant to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- 15 The parties also confirm that the MA relates only to works not yet commenced, pursuant to s 4.55 of the EPA Act, and excludes the excavation for the 'geothermal' area, as described in the amended plans and conditions of consent. All works relied on by the MA are contained within the site.
- 16 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 Court Act to dispose of the proceedings in accordance with the parties' decision.
- 17 The Court notes:
 - (1) That the Woollahra Municipal Council, as the relevant consent authority has agreed, under cl 121B of the Environmental Planning and Assessment Regulation 2000, to the applicant amending DA494/2020/3 relating to modification of development consent DA494/2020.
 - (2) That the applicant has uploaded the amended modification application on the NSW Planning Portal on 23 and 24 October 2022.
 - (3) That the applicant has subsequently filed the amended modification application with the Court on 23 and 24 October 2022.
- 18 The Court orders that:
 - (1) The appeal is upheld.
 - (2) Development Consent No. DA-494/2020 is modified by consent to DA494/2020/3, in the terms described in Annexure A.

- (3) Development Consent No. DA-494/2020 as modified by the Court is described in Annexure B.

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Sarah Bish

Commissioner of the Court

Annexure A

Annexure B

Amendments

27 October 2022 - Amended to reflect correct titles in legal representation.

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