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| Case Name:  | Richetti v City of Canada Bay Council |
| Medium Neutral Citation:  | [2025] NSWLEC 1057 |
| Hearing Date(s):  | 20 January 2025 |
| Date of Orders: | 03 February 2025 |
| Decision Date:  | 3 February 2025 |
| Jurisdiction:  | Class 1 |
| Before:  | Horton C |
| Decision:  | The Court orders that:(1) The appeal is upheld. (2) Development application DA2024/0074 for alterations and additions to an existing dwelling house for a screened first floor balcony located at the rear of the property at 12 Preston Avenue, Five Dock, is determined by the grant of consent, subject to conditions of consent at Annexure A. |
| Catchwords:  | DEVELOPMENT APPLICATION: alterations and additions to dwelling house in R2 Low Density Residential zone – agreement between parties – conciliation conference - orders |
| Legislation Cited:  | Environmental Planning and Assessment Act 1979, ss 4.16, 8.7Land and Environment Court Act 1979, ss 34, 34AA Canada Bay Local Environmental Plan 2013, cll 4.3, 4.5, 6.1, 6.14Environmental Planning and Assessment Regulation 2021, s 38State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 6.6, 6.7, 6.28, Pt 6.3 |
| Texts Cited:  | City of Canada Bay Development Control Plan |
| Category:  | Principal judgment |
| Parties:  | Gwenyth Richetti (Applicant)City of Canada Bay Council (Respondent) |
| Representation:  | Counsel:C Gough (Solicitor) (Applicant)T Ward (Solicitor) (Respondent)Solicitors:Storey & Gough (Applicant)Pike & Verekers (Respondent) |
| File Number(s):  | 2024/330656 |
| Publication Restriction:  | Nil |

Judgment

1. **COMMISSIONER**: A dwelling house at 12 Preston Avenue Five Dock was the subject of development consent in the form of a Complying Development Certificate No 123-0315, granted on 13 May 2015.
2. Subsequent modifications were also made via Complying Development Certificates in 2015, 2016 and 2017.
3. Development Application No DA2024/0074 (the DA) now seeks consent for alterations and additions to an existing dwelling house for a screened first floor balcony located at the rear of the property.
4. The DA was lodged on 4 March 2024, and notified from 7-28 March 2024, in response to which one public submission was received, objecting to the proposal on the grounds of privacy, proximity, scale and visual and acoustic impact.
5. The Applicant in these proceedings filed an appeal in Class 1 of the Court’s jurisdiction on 6 September 2024, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
6. The appeal was listed for mandatory conciliation on 20 January 2025, in accordance with the provisions of s 34AA of the *Land and Environment Court Act 1979* (LEC Act). I presided at the conciliation conference.
7. The proceedings commenced with an onsite view during which the parties reached agreement as to terms by which in-principle agreement could be reached. I granted an adjournment to permit those amendments to be incorporated in amended architectural plans, and to be reflected in agreed conditions of consent.
8. A signed agreement was submitted to the Court on 21 January 2025, in accordance with s 34(10) of the LEC Act.
9. 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.
10. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and 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.
11. 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.
12. 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.
13. The site is located within an area identified as R2 Low Density Residential by the Canada Bay Local Environmental Plan 2013 (CBLEP), in which dwelling house development is permitted with consent, where consistent with the following two objectives of the R2 zone:

•  To provide for the housing needs of the community within a low density residential environment.

•  To enable other land uses that provide facilities or services to meet the day to day needs of residents.

1. As the proposal seeks consent for a privacy screen to an area of roof, proposed to be used as a balcony, there are no development standards that are relevant to the proposed development.
2. The proposal is within the height standard at cl 4.3 of the CBLEP, and does not represent gross floor area that would fall within the definition of FSR at cl 4.5(2) of the CBLEP.
3. While the site is identified as Class 5 Acid Sulfate Soils (ASS) and is within 500m of another class of ASS, the proposed development is isolated to the first floor, but for ancillary works that may be required to sewer and stormwater drainage. As such, consent under cl 6.1(2) of the CBLEP is not required.
4. The site is not identified on the design excellence map at cl 6.14(2) of the CBLEP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

1. As the site is within the Sydney Harbour Catchment, it is relevant to record the parties have agreed conditions of consent that ensure water quality is not compromised by the proposed use of the current roof over the pantry and kitchen, as a terrace with a bath facility requiring drainage to sewer.
2. Accordingly, I am satisfied that the proposed development will not adversely effect the quality of water entering the Sydney Harbour catchment when the existing stormwater drainage system on the site is understood, pursuant to s 6.6 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP). For the same reasons, I am also satisfied of those matters at s 6.7 of the Biodiversity SEPP.
3. The site is also identified at Part 6.3 of the Biodiversity SEPP as being located within the Foreshore and Waterways Area. I have considered those matters at s 6.28(1) of the Biodiversity SEPP and I am satisfied that the proposal does not compromise the character or function of the harbour in any way, and as it is not visible from the public domain, will not do other than maintain the visual qualities of the area in accordance with s 6.28(2) of the Biodiversity SEPP.

Conclusion

1. 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.
2. 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.
3. The Court notes that:
4. The City of Canada Bay Council, as the relevant consent authority has approved, pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021, the Applicant amending development application No DA2024/0074 in accordance with the following plans and documents:

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| Plan DA-007 | Proposed upper floor plan  | Revision 9 |
| Plan DA-008 | Property Elevations and Sections | Revision 9 |

1. On 21 January 2025 the Applicant filed with the Court a copy of the amended DA.

Orders

1. The Court orders that:
2. The appeal is upheld.
3. Development application DA2024/0074 for alterations and additions to an existing dwelling house for a screened first floor balcony located at the rear of the property at 12 Preston Avenue, Five Dock, is determined by the grant of consent, subject to conditions of consent at Annexure A.

**T Horton**

**Commissioner of the Court**

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[Annexure A](http://www.caselaw.nsw.gov.au/asset/194ca18a8ec6e37c27d60616.pdf)

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