



Land and Environment Court
New South Wales

Case Name:	Lidbetter v Woollahra Municipal Council
Medium Neutral Citation:	[2022] NSWLEC 1506
Hearing Date(s):	Conciliation conference on 11 August 2022
Date of Orders:	20 September 2022
Decision Date:	20 September 2022
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	<p>The Court orders:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development Application DA 408/2021/1 for alterations and additions to existing dwelling comprising a new swimming pool, garage and cabana at 41 Etham Avenue, Darling Point is determined by the grant of consent subject to the conditions set out in Annexure “A”.</p>
Catchwords:	DEVELOPMENT APPEAL – residential – alterations and additions to a dwelling – garage, swimming pool and cabana - heritage – acoustic attenuation - conciliation conference – agreement between the parties - orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.16, 8.7</p> <p>Environmental Planning and Assessment Regulation 2000</p> <p>Land and Environment Court Act 1979, ss 34, s34AA</p> <p>State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6</p> <p>Woollahra Local Environmental Plan 2014, cl 2.3, 5.10</p>

Category: Principal judgment

Parties: Jacinta Lidbetter (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Knox (Solicitor) (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Pikes and Verekers Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/137263

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the refusal of Development Application DA 408/2021/1 for alterations and additions to existing dwelling comprising a new swimming pool, garage, and cabana (the Proposed Development) at 41 Etham Avenue Darling Point legally described as Lot 1 in Deposited Plan 165386 (the Site).
- 2 The Court arranged a conciliation conference under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held on 11 August 2022. I have presided over the conciliation conference.
- 3 The proceedings commenced onsite, and the Court heard from a neighbour objector through her town planner as representative and the Court also heard from a representative of the Darling Point Society. The Respondent provided to the Court a copy of all written submissions received in relation to the Proposed Development contained in the Respondent's Bundle of Documents.
- 4 It is relevant that the Applicant amended the Proposed Development pursuant to a Notice of Motion on 4 August 2022 and that the amended plans were notified in accordance with the letter dated 4 August 2022 located under Tab 5 of the Respondent's Bundle of Documents.

- 5 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. This decision involved the Court upholding the appeal and granting development consent to the development application subject to conditions.
- 6 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.
- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be as set out below.
- 8 The parties explained how the jurisdictional prerequisites have been satisfied in an agreed Jurisdictional Note which I have considered and now summarise below.
- 9 The Proposed Development is sought with the consent in writing of the existing owner of the land being Jacinta Lidbetter, in accordance with the requirements of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).
- 10 The Proposed Development is for the purposes of a dwelling house as defined in the Dictionary of the Woollahra Local Environmental Plan 2014 (WLEP).
- 11 The Site is situated within the Zone R3 Medium Density Residential pursuant to the provisions of the WLEP. The objectives of the R3 zone are:
- To provide for the housing needs of the community within a medium density residential environment.
 - To provide a variety of housing types within a medium density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 12 As required by cl 2.3(2) of the WLEP, the Court has had regard to the above objectives.

- 13 The Site is a listed local heritage item (item 126 Sch 5 to the WLEP) and is located within the Etham Avenue Heritage Conservation Area (HCA) (item C4 Sch 5 to the WLEP). As required by cl 5.10(5) of the WLEP, the Court must consider the effect of the proposed development on the item and HCA.
- 14 I have read and considered the Heritage Impact Statement (HIS) prepared by Weir Phillips Heritage and Planning dated September 2021 located under Tab 7 of the Class 1 Application filed 12 May 2022. The HIS concludes and I accept as follows:

“the proposed works will have an acceptable impact on the significance of the site and surrounding Etham Avenue Heritage Conservation Area and the setting of nearby Heritage Items of local and state significance.”

- 15 Consideration has been given to whether the Site is contaminated as required by s 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021. I have considered the Statement of Environmental Effects prepared by PCN Urban Planning Consultants dated 10 September 2021 located under Tab 5 of the Class 1 Application filed 12 May 2022 which concludes at page 14, and I accept as follows:

“Given the historical use of the site for residential purposes, there is no reason to believe that the land is contaminated.”

- 16 A BASIX Certificate dated 10 August 2022 has been provided to satisfy the requirement in Sch 1 of the EPA Regulation.
- 17 In relation to the concerns raised by objectors I am satisfied that these have been considered and addressed in the conditions of consent and in particular I note the noise concerns. These are noise concerns regarding the swimming pool pump and are addressed by consent condition C13 which requires acoustic certification of mechanical plant and equipment prior to the issue of any Construction Certificate, and consent condition F3(h) which requires satisfaction of works as executed plans and satisfaction of compliance with requirements of the conditions of consent in relation to all acoustic attenuation work.
- 18 The other concern raised by the objector is the potential impact of the Proposed Development on a large tree in their rear yard. I am satisfied that the risks to the tree have been duly considered in the Arboricultural Impact

Assessment and Tree Protection Specification Rev 2 prepared by Laurence & Co dated 19 July 2022 which is listed in consent condition A3. Consent condition A6 also requires retention of the identified tree, namely Tree 16 *Cinnamomum campora* (Camphor Laurel) located in the rear yard of 39 Etham Avenue Darling Point with dimension of 25 x 10 m.

- 19 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. I adopt the reasons given by the parties as I have set out above in my judgment.
- 20 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.

Orders:

21 The Court orders:

- (1) The appeal is upheld.
- (2) Development Application DA 408/2021/1 for alterations and additions to existing dwelling comprising a new swimming pool, garage and cabana at 41 Etham Avenue, Darling Point is determined by the grant of consent subject to the conditions set out in Annexure "A".

.....

E Espinosa

Commissioner of the Court

137263.22 Espinosa C (Annexure A) (852624, pdf)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.