



Land and Environment Court
New South Wales

Case Name: Mersonn Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1517

Hearing Date(s): Conciliation conference on 12 September 2022

Date of Orders: 21 September 2022

Decision Date: 21 September 2022

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent no. DA/533/2017 for substantial alterations and additions to the approved residential dwelling at 4 Cove Street, Watsons Bay is modified in the terms set out in Annexure 'B'.
(3) Development consent no. DA/533/2017 as modified by the Court is Annexure 'C'.

Catchwords: MODIFICATION APPLICATION— modification application for dwelling house development in R2 low density residential zone – heritage conservation area – conciliation conference – agreement between parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.55
Environmental Planning and Assessment Regulation 2021, cl 113
Land Environment Court Act 1979, ss 34, 34AA
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 10, ss 10.19, 10.20, 10.22, 10.23, 10.24
State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 2.11, 4.6

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
Woollahra Local Environmental Plan 2014, cl 4.3, 5.10, 5.21, 6.1, 6.2, 6.4

Category: Principal judgment

Parties: Mersonn Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
N Eastman (Applicant)
A Kleiss (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2022/126017

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal is in respect of a dwelling house located at 4 Cove Street, Watson's Bay for which development consent was granted on 19 July 2018.
- 2 The Applicant now seeks to modify the consent, pursuant to s 4.55 of the *Environmental Planning and Assessment Act 1979* (EPA Act). To this end, Modification application No DA/533/2017/2 was lodged with Woollahra Municipal Council (the Respondent) on 10 March 2022, and was notified between 30 March 2022 and 4 April 2022.
- 3 In accordance with its usual practice, the Court arranged a mandatory conciliation conference under s 34AA of the *Land Environment Court Act 1979* (LEC Act) on 12 September 2022, which commenced with an onsite view after which the conciliation conference, at which I presided, continued on MS Teams.
- 4 Prior to the conciliation conference, the Applicant prepared amended plans and other documents that, in the view of the Respondent at the commencement of proceedings, addressed the matters in contention.

- 5 On the basis of those amended plans, and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that was acceptable to the parties. To this end, the Respondent approved the amending of the application by the Applicant, in accordance with s 113 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).
- 6 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 12 September 2022.
- 7 The parties ask me to approve their decision as set out in the s34 agreement before the Court. 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 s34 agreement.
- 8 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 prepared a jurisdictional statement to assist the Court in understanding how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [38].
- 9 I formed an opinion of satisfaction that each of the pre-jurisdictional requirements identified by the parties have been met, for the reasons that follow.
- 10 Firstly, as the appeal is made pursuant to s 4.55 of the EPA Act, as the presiding Commissioner, I must be satisfied that the decision is one that the Court can make in the proper exercise of its functions, being the test applied by s 34(3) of the LEC Act. I have also taken into consideration those matters under s 4.15(1) of the EPA Act as they are relevant to the modification application, as well as the reasons given by the consent authority for the grant of the consent.
- 11 With respect to s 4.55(2) of the EPA Act, I have formed this state of satisfaction given the development to which the consent as modified relates is substantially the same as the development for which the consent was originally granted.

- 12 In forming this opinion of satisfaction, I have considered the lowering of the roof and the chimney which are now wholly compliant with the height standard at cl 4.3 of the Woollahra Local Environmental Plan 2014 (WLEP), notwithstanding the exception granted to masts, flagpoles, chimneys and the like according to the dictionary of the WLEP.
- 13 The effect of the lowering of the roof, the change in profile to form two opposing skillion roof pitches, the increase in side setbacks to 1500mm, and removal of the eaves' overhang to the side setbacks is to reduce the overall bulk of the building envelope.

Woollahra Local Environmental Plan 2014

- 14 The site is within the R2 Low Density Residential zone according to the WLEP, in which dwelling house development is permitted with consent, and where consistent with the following objectives of the 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.
 - To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 15 The site is identified as a Contributory Item in the Watsons Bay Heritage Conservation Area (HCA), for rock formations on the site. On the basis of the agreement between the heritage experts, set out in a heritage and planning joint expert report dated 29 August 2022, I accept that the development as modified does not detract from the heritage significance of the Watsons Bay HCA, or of nearby heritage items, pursuant to cl 5.10 of the WLEP.
- 16 As the site is potentially affected by estuarine hazards, cl 5.21 of the WLEP applies. It is relevant to note that a Coastal Inundation Assessment and Coastal Engineering Advice dated 6 October 2017 (Coastal Assessment) was prepared by Horton Coastal Engineering in support of the original consent, and Condition C.14 of the original development consent requires the existing seawall on the site to be repaired to a crest of RL 3.00m AHD.

- 17 I also note that the finished floor level of the ground floor in the proposed modified development is RL 3.23, so it is further elevated from the original consent, which satisfies me that those issues at cl 5.21 of the WLEP are adequately addressed.
- 18 While the site is identified at cl 6.1(2) of the WLEP as being within an area of Class 5 acid sulfate soils, I accept that the works subject to the modification application are not likely to lower the water table below 1.0m AHD on any land within 500m of a Class 1, 2 and 3 land classifications, pursuant to cl 6.1 of the WLEP.
- 19 The proposal, as modified, provides for further excavation of the finished ground floor level at the northern portion of the site, fronting Cove Street, by approximately 2.2m, to achieve a level consistent with the remainder of the proposal, as modified, of RL 3.23 AHD. I have considered the extent of additional earthworks and, on the basis of the agreed conditions of consent requiring detailed stormwater plans (Condition C.7), Soil and Water Management Plan (Condition C.12), and Geotechnical and Hydrogeological Design, Certification and Monitoring (Condition C.13), I conclude that those matters at cl 6.2 of the WLEP are adequately addressed.
- 20 While the site is located within Foreshore Area 12 and is identified on the Foreshore Building Line Map at cl 6.4(6) of the WLEP, no works are proposed beyond the Foreshore Building Line.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 21 The site has a frontage to Sydney Harbour, and so the planning principles and matters for consideration under Ch 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP), Sydney Harbour Catchment, apply.
- 22 A portion of the site is also located within 'Zone No W8—Scenic Waters: Passive Use', pursuant to s 10.13 of the Biodiversity and Conservation SEPP, however no works are proposed in this area of the site.
- 23 The proposal is largely within the approved building footprint for which consent has been granted, but for those areas where greater side setbacks reduce the

footprint. On this basis, I accept that the modification now proposed will not adversely impact the biodiversity, ecology and environmental protection of those matters to be considered under s 10.19 of the Biodiversity and Conservation SEPP.

- 24 As for the matters to be taken into consideration at s 10.20(e) of the Biodiversity and Conservation SEPP, I note general terms of approval are incorporated into the agreed conditions of consent in respect of any works to the existing seawall on the site, to mitigate the potential flow on turbidity related impacts to the adjoining waterway.
- 25 Section 10.22 of the Biodiversity and Conservation SEPP requires, relevantly, consideration of the minimisation of the risk to development on foreshore land from rising sea levels or changing flood patterns as a result of climate change. On the basis of the site survey, prepared by Project Surveyors dated 18 May 2015, denoting relative levels, and the agreement of the experts engaged by the parties, that the ground floor level has been elevated appropriately, I consider the provision addressed.
- 26 As stated at [12]-[13], the proposal is largely within the envelope of the development for which consent was originally granted, but for certain reductions in scale, and amendment to the form, design and siting of the built form. I have considered the reductions and amendment in form and design, and I accept those matters at s 10.23 of the Biodiversity and Conservation SEPP are adequately addressed. In particular, I note the reduction in bulk and scale achieves compliance with the height standard and will enhance the visual qualities of Sydney Harbour and its foreshores by removing bulk and permitting a greater appreciation of those qualities.
- 27 Likewise, as the modification proposes a reduction in height of the chimney, removal of eaves overhang and side setbacks of 1500mm, with conditions of consent agreed with respect to landscape planting, I accept that there will be an enhancement of views from the development for which consent was originally granted, in accordance with s 10.24 of the Biodiversity and Conservation SEPP.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 28 The site is located within the Coastal Environment Area, pursuant to s 2.10 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP), and also within the Coastal Use area pursuant to s 2.11.
- 29 As stated at [13], the proposal is largely within the approved building footprint for which consent has been granted, but for those areas where greater side setbacks reduce the footprint, and in respect of bulk and scale.
- 30 On this basis, I accept that the modification now proposed will not adversely impact upon the coastal environment, values and processes, water quality, the vegetation, fauna, undeveloped headlands, rock platforms, existing public open space, or access to it, any matter of heritage or use of the surf zone, and so I am satisfied that the development, as proposed to be modified, is designed and sited to avoid adverse impact on the coastal environment area in accordance with s 2.10 of the Resilience and Hazards SEPP.
- 31 Likewise, I have considered whether the proposal so modified would cause an adverse impact of the sought set out in s 2.11(1)(a), and I am satisfied that the development so modified is designed and sited to avoid adverse impact on the coastal environment area in accordance with s 2.10 of the Resilience and Hazards SEPP. In arriving at this opinion of satisfaction, I note the increased setback to the eastern side boundary, the removal of eaves overhang, and the amended front fence to 50% transparent, are likely to result in an enhancement of views from Cove Street to the foreshore.
- 32 While consideration was given to whether the land is contaminated prior to the initial grant of consent, the modification proposes additional excavation and so it is appropriate to consider cl 4.6 of the Resilience and Hazards SEPP which requires consideration of a report specifying the findings of a preliminary investigation of the land where a change of use is proposed.
- 33 I accept that no change of use is proposed. I also accept, on the basis of the chronology of land ownership and use set out in the Statement of Heritage Impact prepared by Mr John Oultram dated February 2022, that the site is suitable for the purpose for which the development is proposed, as modified.

State Environmental Planning Policy (Building Sustainability Index BASIX) 2004

- 34 I am satisfied that the modification application is accompanied by a BASIX certificate (Cert No. A472829 dated 5 September 2022), prepared by Sustain Build Projects in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.

Conclusion

- 35 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.
- 36 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.
- 37 The Court notes that:
- (1) The Woollahra Municipal Council, as the relevant consent authority, has approved under s.113(4) of the *Environmental Planning and Assessment Regulation 2021*, the Applicant's amendment to Modification Application No. DA533/2017/2 in accordance with the documents referred to at **Annexure 'A'**.
 - (2) The amended application as described at **Annexure A** was lodged on the NSW Planning Portal on 9 September 2022.
 - (3) The Applicant subsequently filed the amended application with the Court on 12 September 2022.

Orders

- 38 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development consent no. DA/533/2017 for substantial alterations and additions to the approved residential dwelling at 4 Cove Street, Watsons Bay is modified in the terms set out in **Annexure 'B'**.
 - (3) Development consent no. DA/533/2017 as modified by the Court is **Annexure 'C'**.

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T Horton

Commissioner of the Court

126017.22 (Annexure B) (214806, pdf)

126017.22 (Annexure C) (583904, pdf)

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