



Land and Environment Court New South Wales

Medium Neutral Citation:	Graham v Northern Beaches Council [2022] NSWLEC 1670
Hearing dates:	Conciliation conference on 14 November 2022
Date of orders:	6 December 2022
Decision date:	06 December 2022
Jurisdiction:	Class 1
Before:	Washington AC
Decision:	The Court orders: (1) The appeal is upheld. (2) Development Consent No. DA2019/1383 is modified as set out in the terms of Annexure A. (3) Development Consent No. DA2019/1383 is modified by the Court as set out in Annexure B.
Catchwords:	MODIFICATION APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 s 4.55 Environmental Planning and Assessment Regulation 2021 cl 37 Land and Environment Court Act 1979 s 34 Pittwater Local Environmental Plan 2014 State Environmental Planning Policy (BASIX Sustainability Index – BASIX) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021 s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021 ss 2.48, 2.118
Category:	Principal judgment
Parties:	Julie Graham (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: G N McKee (Solicitor) (Applicant) J N Ede (Solicitor) (Respondent)

Solicitors:

McKees Legal Solutions (Applicant)

Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 22/215565

Publication restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal, filed pursuant to s 4.55(8) of the *Environmental Planning and Assessment Act 1979* (EPA Act) is the result of the deemed refusal by Northern Beaches Council (the Council) of modification application MOD2022/0425, which seeks to modify development application DA2019/1383.
- 2 The original development application is for demolition of works and construction of a dwelling house including a swimming pool. This modification application proposes a number of modifications, which can loosely be grouped as works within the road reserve, walls and fencing, provision of a new upper-level northern courtyard, landscape works, drainage, and minor building amendments. The works are proposed to the approved development at Lot 24, DP11552, 11 Ocean Road, Palm Beach.
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 14 November 2022. I presided over the conciliation conference. The principal contention discussed at this conference pertained to the new upper level courtyard and its impacts on the provision of landscaped area and deep soil.
- 4 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 consent to the modification application subject to conditions.
- 5 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 one that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under s 4.55 of the EPA Act to grant consent to the modification application.
- 6 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 and explained how the jurisdictional prerequisites have been satisfied. From this I note the following:
 - (1) The parties have agreed, and I am satisfied that the proposal to modify Development Application No. DA2019/1383 results in a development that is substantially the same development as the development for which consent was

originally granted. As modified, the proposed development is essentially and materially the same as the originally approved development, and the threshold test of EPA Act s 4.55 (1A)(b) is met.

- (2) Further pursuant to EPA Act s 4.55, the Modification Application was notified by Council from 4 August 2022 to 24 August 2022. No submissions were received.
- (3) The modification has been made with the written consent of the owner of the subject site.
- (4) Pursuant to the requirements of State Environmental Planning Policy (Resilience and Hazards) 2021 s 4.6, the parties submit, and I accept that the relevant requirements of this clause have been considered and that the Development Application meets the objectives of this policy. Further, that the land has in the past been used for residential purposes and there is no history or evidence to suggest that the site is contaminated. These submissions are supported by an updated Geotechnical report that has been submitted with the modification application.
- (5) Pursuant to cl s 2.48 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Infrastructure), the modification application was notified to Ausgrid, and the Council has taken into consideration the response received. Additionally, pursuant to s 2.118 of this policy, given the proposed development provides for vehicular access from a classified road, the modification application has been notified to Transport for NSW (TFNSW). TFNSW have provided concurrence subject to conditions of consent, which form part of Annexure A.
- (6) The development application is supported by a BASIX certificate which applies to the development as modified by this modification application, in accordance with the requirements of State Environmental Planning Policy (BASIX Sustainability Index – BASIX) 2004.
- (7) The land is zoned C4 Environmental Living pursuant to Pittwater Local Environmental Plan 2014, and the proposed development is permitted with consent within this zone. The parties submit and I accept that the proposed development as amended is compatible with the relevant objectives of this zone.

7 For these reasons 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.

8 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.

9 The Court notes:

(1)

That the Respondent as the relevant consent authority has agreed under clause 37 of the Environmental Planning and Assessment Regulation 2021 to the Applicant's amending Modification Application MOD2022/0425 in accordance with the plans and documents listed below:

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
S4.56(2)-0014 Rev.C - SITE PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0100 Rev.C - LOWER GROUND FLOOR PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0101 Rev.C - GROUND FLOOR PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0102 Rev.C - LEVEL 01 FLOOR PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0103 Rev.C - LEVEL 02 FLOOR PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0104 Rev.C - LEVEL 03 FLOOR PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0105 Rev.C - ROOF PLAN	31/10/2022	Koichi Takada Architects
S4.56(2)-0200 Rev.C - NORTH ELEVATION (SIDE)	31/10/2022	Koichi Takada Architects
S4.56(2)-0201 Rev.C - SOUTH ELEVATION (SIDE)	31/10/2022	Koichi Takada Architects
S4.56(2)-0202 Rev.C - EAST ELEVATION (OCEAN ROAD)	31/10/2022	Koichi Takada Architects
S4.56(2)-0203 Rev.C - WEST ELEVATION (REAR)	31/10/2022	Koichi Takada Architects

S4.56(2)-0300 Rev.C - SECTION A (BUILDING)	31/10/2022	Koichi Takada Architects
S4.56(2)-0301 Rev.C - SECTION B (NORTH BOUNDARY)	31/10/2022	Koichi Takada Architects
S4.56(2)-0302 Rev.C - SECTION C (SOUTH BOUNDARY)	31/10/2022	Koichi Takada Architects
1 Issue.D – Landscape Site Plan – Lower GF & Ground Floor	17/11/2022	Paul Scrivener
2 Issue.D – Landscape Site Plan – Level 1 and 2	17/11/2022	Paul Scrivener
3 Issue.D – Landscape Site Plan – Level 2	17/11/2022	Paul Scrivener
4 Issue.D – Calculations Plan	17/11/2022	Paul Scrivener
5 Issue.D – Details	17/11/2022	Paul Scrivener
6 Issue.D – North & South Elevation	17/11/2022	Paul Scrivener
7 Issue.D – East Elevation & Section A	17/11/2022	Paul Scrivener

- (2) The amended plans and documents above have been filed with the Court on 22 November 2022.

10 The Court orders:

- (1) The appeal is upheld.
- (2) Development Consent No. DA2019/1383 is modified as set out in the terms of Annexure A.
- (3) Development Consent No. DA2019/1383 is modified by the Court as set out in Annexure B.

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E Washington

Acting Commissioner of the Court

[Annexure A \(185055,.pdf\)](#)

[Annexure B \(355540,.pdf\)](#)

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Decision last updated: 06 December 2022