



Land and Environment Court
New South Wales

Case Name: Darling Point 1 Pty Ltd v Council of the Municipality of Woollahra

Medium Neutral Citation: [2023] NSWLEC 1086

Hearing Date(s): Conciliation conference 13 February 2023

Date of Orders: 28 February 2023

Decision Date: 28 February 2023

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders that:
(1) The Appeal is upheld.
(2) Modification Application DA-2/2017/6 for the relocation of AC condenser units and plant, increase in height of retail floor space, increase in size of balconies to Units 6 and 15, modification of glazing and materials in the front elevation, reduction in total unit numbers to 23, internal apartment layout changes and construction of a roof top terrace is approved and development consent DA-2/2017 is modified in the terms detailed in Annexure B.
(3) Development consent DA-2/2017, as now modified by the Court, is contained in Annexure C.

Catchwords: MODIFICATION APPLICATION – amendments to approved shop top housing – potential view and amenity impacts to adjoining properties – amended plans – agreement between the parties – orders made.

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 4.15, 4.55, 8.9
Environmental Planning and Assessment Regulation 2021 s 113
Land and Environment Court Act 1979 s 34

State Environmental Planning Policy (Biodiversity and Conservation) 2021 s 10.10

State Environmental Planning Policy (Resilience and Hazards) 2021 s 4.6

Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development

Texts Cited:

NSW Department of Planning and Environment,
Apartment Design Guide, July 2015
Woollahra Development Control Plan 2015

Category:

Principal judgment

Parties:

Darling Point 1 Pty Ltd (Applicant)
Council of the Municipality of Woollahra (Respondent)

Representation:

Counsel:
E Whitney (Solicitor) (Applicant)
P Rigg (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Peter Rigg Solicitor and Barrister (Respondent)

File Number(s):

2022/333685

Publication Restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns an application to modify a development consent (DA-2/2017) for demolition of existing buildings, consolidation of lots and the construction of a seven storey mixed use development with basement car parking including a vehicular turntable and car stackers at 1 and 9 Mona Road, Darling Point, legally known as Lot 1 in DP 1278919 and Lot 3 in DP 171284. The modification application (DA/2-2017/6) seeks to modify the development consent as follows:

(1) Building Raised

- Level 1 to roof level raised 300mm to increase ground level ceiling heights in retail tenancies
- Level 6 ceiling raised 300mm to provide 3m floor to ceiling height

- Total Roof level raised 2130mm from RL42,240 to RL 44,370, corresponding to a maximum height of 24.75m to accommodate the lift overrun

(2) Change Location of Air Conditioner (AC) Condenser Plant

- AC condenser plant removed from Level 6 terrace per council condition. All residential condenser units relocated to ground floor service room and two retail condenser located above the driveway with the remaining two retail condensers located in the basement

(3) Penthouse access to rooftop terrace

- External spiral staircase removed and internal spiral staircase to rooftop located in previous study room. Glass canopy added to rooftop terrace to enclose spiral staircase

(4) Swim spa added to rooftop terrace (western end) along with planter integrated with the pool plant

(5) Total apartment units reduced from 24 to 23 units due to amalgamation of units 9 & 10

(6) Apartment layouts rearranged internally and changes to the front façade of the ground floor facing New South Head Road

(7) Gross Floor Area (GFA) increase by 66m²

- Total GFA increased by 66m² from 3,088m² to 3,154m² as a result of Retail 03 area expanding into large retail plant/ services area. The reduction in the width of through link between Retail 02 & 03 also attributed to the increase in retail area

(8) Changes to meet current development consent conditions

- Maintenance ladder to rooftop terrace removed from level 06 rooftop
- Privacy screens added to windows 4w17, 4w18, 4w19, 5w17, 5w17, 5w18, and 5w19.
- 1.5m high obscured glazing from finished floor level for windows 1w10, 3w09, 3w10, 4w09, 4w10, 4w11, 4w12 & 4w13, 5w09, 5w10, 5w11, 5w12, 5w13, 6w09 & 6w10.
- Retail ceiling heights raised 300mm
- Tandem car parking to be allocated to a single unit.
- Increase in balcony size of units 6 and 15 (now 14) to achieve minimum of 8m²

2 The appeal is lodged pursuant to s 8.9 of the Environmental Planning and Assessment Act 1979 (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the modification application pursuant to s 4.55(2) of the EPA Act. The final orders in this appeal, outlined in [8] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 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 13 February 2023. I presided over the conciliation conference. Following the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The decision agreed upon is for the grant of the modification application, as amended, subject to conditions, pursuant to s 4.55(2) of the EPA Act. The agreement was filed on 21 February 2023. The agreement followed the amendment of the plans the subject of the modification application and the provision of additional information.
- 4 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I form this state of satisfaction on the basis that:
 - (1) I am satisfied that the development to which the consent as modified relates is quantitatively and qualitatively substantially the same development as the development for which consent was originally granted satisfying s 4.55(2)(a) of the EPA Act. The amendments relate to the approved shop top housing development, including internal layout changes, external design refinements. The modified proposal remains a mixed use (residential and retail) development.
 - (2) There are no conditions which have been imposed as a requirement of a concurrence to the original consent or general terms of approval, and therefore no consultation is required under s 4.55(2)(b) of the EPA Act.
 - (3) The Modification Application was notified in accordance with the EPA Act, and the provisions of Woollahra Development Control Plan 2015, satisfying s 4.55(2)(c) of the EPA Act. In additional oral submissions were provided by residents as part of the onsite view. I am satisfied that the matters raised in submissions have been considered as required by s 4.55(2)(d) of the EPA Act and where appropriate have resulted in amendments or the imposition of conditions.
 - (4) Under s 4.55(3) of the EPA Act the consent authority must also take into consideration:
 - (a) such of the matters referred to in s 4.15(1) as are of relevance to the development the subject of the application; and
 - (b) the reasons given by the consent authority for the grant of the consent that is sought to be modified.
 - (5) With the assistance of the agreed jurisdictional note filed by the parties I conclude:

- (a) None of the matters referred to in s 4.15(1) of the EPA Act that are of relevance to the development the subject of the application, including the provisions of s 10.10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 and s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 preclude the approval of the Modification Application. For completeness I note:
 - (i) An amended BASIX certificate has been prepared addressing the modified development as required by State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
 - (ii) With the benefit of an updated Design Verification statement, I am able to be satisfied that the Modification Application demonstrates compliance with the relevant provisions of State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development and demonstrates compliance with the relevant Apartment Design Guide criteria, particularly with regard to solar access, cross ventilation and bedroom size.
 - (iii) A portion of the Site at No. 9 Mona is identified as a locally listed heritage item (I153). The Site also adjoins locally listed heritage items No. 155 and 159 but is located just outside of the Mona Road Heritage Conservation Area. I am satisfied that the Modification Application as amended will not impact the heritage item located on Site and that this clause will be satisfied through the implementation of the approved Heritage Impact Statement.
 - (iv) That the amendments proposed by the Modification Application do not generate impacts which preclude approval.
 - (v) In determining the Modification Application, I have taken into consideration the suitability of the site for the development, the submissions received and the public interest.
- (b) The original consent was determined by the Local Planning Panel in April 2018. The reasons, relevant to s 4.55(3) of the EPA Act, are those contained in the Development Assessment Report to the panel and the Notice of Determination. In determining the Modification Application, I have taken into consideration the reasons ascertainable from these documents for the grant of the consent to the original consent.

5 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC

Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).

6 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the modification application against the discretionary matters that arise pursuant to an assessment under ss 4.55(3) and 4.15(1) of the EPA Act.

7 The Court notes:

- (a) Woollahra Municipal Council, as the relevant consent authority, has agreed under s 113(1) of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending its modification application to Development Application No. DA-2/2017 to incorporate the plans, drawings and documents listed in Annexure “A” to this agreement (Amended Modification Application).
- (b) The Applicant is not required to lodge the Amended Modification Application on the NSW Planning Portal pursuant to s 113(6) of the Environmental Planning and Assessment Regulation 2021.
- (c) That the plans, drawings and documents listed in Annexure A were filed with the Court on 20 February 2023.

8 The Court orders that:

- (1) The Appeal is upheld.
- (2) Modification Application DA-2/2017/6 for the relocation of AC condenser units and plant, increase in height of retail floor space, increase in size of balconies to Units 6 and 15, modification of glazing and materials in the front elevation, reduction in total unit numbers to 23, internal apartment layout changes and construction of a roof top terrace is approved and development consent DA-2/2017 is modified in the terms detailed in Annexure B.
- (3) Development consent DA-2/2017, as now modified by the Court, is contained in Annexure C.

D Dickson

Commissioner of the Court

Annexure A

Annexure B

Annexure C

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