



Land and Environment Court
New South Wales

Case Name: DA No. 9 Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1089

Hearing Date(s): Conciliation Conference on 24 February 2023

Date of Orders: 02 March 2023

Decision Date: 2 March 2023

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Consent No. DA404/2017 is modified in the terms in Annexure A.
(3) Development Consent No. DA404/2017 as modified by the Court is Annexure B.

Catchwords: APPEAL – modification application – internal and external alterations to a seniors living development – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.56, 4.15, 8.9
Environmental Planning and Assessment Regulation 2021 cl 100, 102, 113
Land and Environment Court Act 1979, s 34

Category: Principal judgment

Parties: DA No. 9 Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
J Ede (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/273435

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns an application to modify a development consent for a seniors living housing at 63 New South Head Road, Vaucluse. The modification application was lodged on 6 May 2022 and seeks to make internal and external changes to the development, including, inter alia, reconfiguration of the internal layout, extension of the unit at the second floor by 2.9m toward the street, deletion of the roof terrace, a new plunge pool and pergola at the upper ground floor, and new service areas and a communal open room at the lower ground floor level where void spaces will be created by the proposed excavation methodology. Following the expiry of the period after which a modification application is deemed to be refused, the applicant lodged an appeal 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 4.56(1) of the EPA Act. The final orders in this appeal, outlined in [12] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 2 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 24 February 2023. I presided over the conciliation conference.
- 3 At 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 agreement was filed on the same date, following the Council's approval of an application for an amendment to the modification application pursuant to cl 113 of the *Environmental Planning and Assessment Regulation 2021* (EPA Regulation 2021). The amendments to the

modification application include the reduction in the extent of additional excavation at the lower ground floor and basement levels, the reduction in the proposed additional floor plate at the second floor so that the extension is now to 2m toward the street, and a shift in the built form to the east with the internal layout adjusted.

- 4 The decision agreed upon is for the grant of the modification application subject to conditions, pursuant to s 4.56(1) of the EPA Act. The signed agreement is supported by an Applicant Statement of Jurisdictional Prerequisites that sets out a number of matters that arise for consideration under ss 4.56 and 4.15 of the EPA Act. I have considered the contents of the Applicant Statement, together with the documents referred to therein, the Class 1 Application and its attachments, and the documents that are referred to in 1(a) of the signed agreement. Based on those documents, I have considered the matters required to be considered pursuant to s 4.56(1A) and 4.15(1) of the EPA Act.
- 5 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 the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, for the following reasons:
 - Qualitatively, the proposal remains seniors living housing in a residential flat building consistent with the building approved by the development consent. Both the approved development and the proposed modified development present a similar bulk and scale to the street, with the upper level stepped back and within a mansard roof form. There is no essential element of the development the subject of the consent that is being altered by the modification application.
 - Quantitatively, the proposed seniors housing as modified provides a change to the extent of excavation and a relatively small change to the floor plate. The development maintains its appearance as a two-storey building, although it is three storeys with a storey set back in the Mansard roof style. The number of units has been reduced by one, and the internal and external changes do not so alter the development such as to render it not substantially the same.
- 6 The modification application was notified by the Council between 25 May 2022 and 9 June 2022 in accordance with s 4.56(1)(b) of the EPA Act, and to the

residents who made a submission in respect of the development application, as required by s 4.56(1)(c). There were no submissions received response to the notification of the modification application.

- 7 Consistent with the requirements of cl 100(3)(a) of the EPA Regulation 2021, the modification application is accompanied by the BASIX certificate dated 17 January 2023.
- 8 As required by cl 102(2) of the EPA Regulation 2021, the amended modification application is accompanied by a design verification statement dated 7 February 2023, which verifies that the modification does not diminish or detract from the design quality of the original development, or compromise the design intent of the original development.
- 9 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)).
- 10 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 4.56(1A) and 4.15(1) of the EPA Act.
- 11 The Court notes that, pursuant to cl. 113 of the Environmental Planning and Assessment Regulation 2021, Woollahra Municipal Council, as the relevant consent authority, approves the Applicant’s amendment of Modification Application No. DA404/2017/5 in accordance with the following amended plans and documents:
 - (a) Amended Architectural Plans prepared by GCCV Pty Ltd:
 - DA_000, Project Cover + Drawing List, Revision 8, dated 20 December 2022
 - DA_001, Project Vision – Front Elevation (Artist Impression), Revision 2, dated 13 December 2022
 - DA_002, Approved DA404/2017/3 Plans, Revision 8, dated 13 December 2022

- DA_003, Summary of Proposed Designed Modification, Revision 11, dated 20 December 2022
- DA_004, Proposed s4.56 GFA Measurement, Revision 10, dated 13 December 2022
- DA_005, Proposed s4.56 Floorplate Measurement, Revision 2, dated 13 December 2022
- DA_006, Proposed s4.56 Balcony Measurement, Revision 5, dated 13 December 2022
- DA_007, Proposed s4.56 Storage Areas Measurement, Revision 6, dated 13 December 2022
- DA_008, Proposed s4.56 Natural Ventilation, Revision 6, dated 13 December 2022
- DA_009, Proposed s4.56 Landscape Measurement, Revision 8, dated 13 December 2022
- DA_010, Bulk Excavation Measurement - Basement, Revision 2, dated 13 December 2022
- DA_011, Bulk Excavation Measurement - Lower Ground, Revision 2, dated 13 December 2022
- DA_012, Proposed External Finishes, Revision 9, dated 13 December 2022
- DA_013, Proposed s4.56 Shadow Studies – Sheet 1, Revision 11, dated 13 December 2022
- DA_014, Proposed s4.56 Shadow Studies – Sheet 2, Revision 7, dated 13 December 2022
- DA_015, Proposed s4.56 Shadow Studies – Sheet 3, Revision 7, dated 13 December 2022
- DA_016, Proposed s4.56 Solar Compliance – Sheet 1, Revision 9 dated 13 December 2022
- DA_017 Proposed s4.56 Solar Compliance – Sheet 2, Revision 9, dated 13 December 2022
- DA_018, Site Survey Plan, Revision 7, dated 13 December 2022
- DA_019, Site Demolition Plan, Revision 7, dated 13 December 2022
- DA_020, Proposed s4.56 Setbacks, Revision 6, dated 13 December 2022
- DA_021, Proposed Site Building Area, Revision 6, dated 13 December 2022
- DA_022, Building Setback Plan, Revision 2, dated 13 December 2022

- DA_101, General Arrangement Plan – Basement, Revision 16, dated 13 December 2022
- DA_102, General Arrangement Plan – Ground Lower, Revision 18, dated 20 December 2022
- DA_103, General Arrangement Plan – Ground Upper, Revision 18, dated 13 December 2022
- DA_104, General Arrangement Plan – Level 1, Revision 18, dated 13 December 2022
- DA_105, General Arrangement Plan – Level 2, Revision 17, dated 13 December 2022
- DA_106, General Arrangement Plan – Roof, Revision 14, dated 13 December 2022
- DA_111, General Arrangement Plan – Basement, Revision 9, dated 13 December 2022
- DA_112, General Arrangement Plan – Ground Lower, Revision 12, dated 20 December 2022
- DA_113, General Arrangement Plan - Ground Upper, Revision 11, dated 13 December 2022
- DA_114, General Arrangement Plan – Level 1, Revision 11, dated 13 December 2022
- DA_115, General Arrangement Plan – Level 2, Revision 11, dated 13 December 2022
- DA_116, General Arrangement Plan – Roof, Revision 9, dated 13 December 2022
- DA_200, Overall Building Elevations, Revision 12, dated 13 December 2022
- DA_201, Overall Building Elevations, Revision 12, dated 13 December 2022
- DA_300, Overall Building Sections, Revision 13, dated 13 December 2022
- DA_500, Street View Study – Sheet 1, Revision 11, dated 13 December 2022
- DA_501, Street View Study – Sheet 2, Revision 11, dated 13 December 2022
- DA_502, Street View Study – Sheet 3, Revision 11, dated 13 December 2022
- DA_700, Comparison Set - Basement, Revision 3, dated 13 December 2022

- DA_701, Comparison Set – Lower Ground, Revision 3, dated 20 December 2022
 - DA_702, Comparison Set – Upper Ground, Revision 3, dated 13 December 2022
 - DA_703, Comparison Set – Level 1, Revision 2, dated 13 December 2022
 - DA_704, Comparison Set – Level 2, Revision 3, dated 13 December 2022
 - DA_705, Comparison Set – Roof, Revision 2, dated 13 December 2022
- (b) Electrical, NBN, CCTV/Security Equipment Spatials Letter prepared by Riz Engineering Pty Ltd dated 20 December 2022.
- (c) Hydraulic, Mechanical and Wet Fire Spatial Compliance Statement prepared by JR Engineering Group dated 20 December 2022.
- (d) Civil Engineering Spatial Assessment Letter prepared by Northrop Consulting Engineers Pty Ltd on 21 December 2022.
- (e) BASIX Certificate No. 1366261M dated 17 January 2023.
- (f) BASIX Building Fabric Requirements, undated.
- (g) NatHERS Certificate No. 4TWLQV8WQF dated 17 January 2023.
- (h) Traffic Impact Letter prepared by Traffix dated 18 January 2023.
- (i) SEPP 65 Design Verification Statement prepared by GCCV Pty Ltd dated 7 February 2023.
- (j) Geotechnical Report, 30663BN2rpt Rev1 prepared by JK Geotechnics dated 14 April 2022.
- (k) Landscape Plan Plan No.s Sheet 1/DD-6 – Sheet 7/DD-6 prepared by Paul Bangay dated 26/04/2022.
- (l) Stormwater Management Plans prepared by Birzulis Associates:
- 8355 C.07-Issue 4, dated 19/05/22;
 - 8355 C.08-Issue 1, dated 12/04/22;
 - 8355 C.09-Issue 3, dated 12/04/22; and
 - 8355 C.10-Issue 3, dated 12/04/22.

12 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Consent No. DA404/2017 is modified in the terms in Annexure A.

- (3) Development Consent No. DA404/2017 as modified by the Court is Annexure B.

.....

J Gray

Commissioner of the Court

Annexure A (230665, pdf)

Annexure B (943265, 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.