



Land and Environment Court
New South Wales

Case Name:	Oberman v Woollahra Municipal Council
Medium Neutral Citation:	[2023] NSWLEC 1250
Hearing Date(s):	Conciliation conference 2 & 3 May 2023
Date of Orders:	24 May 2023
Decision Date:	24 May 2023
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Modification application number DA/419/2021/2 seeking consent for internal and external modifications to the approved dwelling at Lot 34, Sec 7 in DP 9245, also known as 44 Hopetoun Avenue, Vacluse, is approved and Development Consent No DA/419/2021 is modified in the terms in Annexure A.</p> <p>(3) Development Consent No DA/419/2021 as modified by the Court is Annexure B.</p>
Catchwords:	DEVELOPMENT APPEAL – modification application – alterations and additions to a dwelling house – conciliation conference – amended plans - agreement reached – orders made
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.55,</p> <p>Land and Environment Court Act 1979, ss 34, 34AA</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</p> <p>Environmental Planning and Assessment Regulation 2021, s 113</p>

Cases Cited: Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2022] NSWCA 227

Category: Principal judgment

Parties: Ethan Oberman (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
L Nurpuri (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2022/362587

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) by Mr Ethan Oberman (Applicant) against Woollahra Municipal Council's (the Respondent's) deemed refusal of Modification Application DA/419/2021/2 lodged on 21 October 2022 (the Modification Application) made pursuant to s 4.55(2) of the EPA Act.
- 2 The Modification Application seeks to modify Development Consent No DA/419/2021 issued by the Respondent on 5 July 2022. The consent was granted for demolition and construction of a new dwelling at Lot 34, Sec 7 in DP 9245, also known as 44 Hopetoun Avenue, Vaucluse. The Modification Application seeks approval to modify the approved development as follows:
 - (a) Demolition of an existing cabana and construction of a new cabana with non-trafficable green roof cover;
 - (b) Lowering the ground floor by 300mm from the approved level of RL 48.30 to RL 48.00;
 - (c) Extension to, and internal modifications of, the upper level main bedroom including increasing the height to 11.225m;
 - (d) Modification of the approved roof form, new solar panels and skylights,

- (e) Additional landscaping to the rear of the property;
- (f) Consequent miscellaneous amendments.

- 3 The Court arranged a conciliation conference between the parties under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act). This was held on 2 and 3 May 2023. I presided over the conciliation conference.
- 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. The agreement followed the amendment of the plans the subject of the modification application and the provision of additional information. The agreement is recorded in a signed agreement which was provided to me on 3 May 2023. The signed agreement is supported by a Jurisdictional Note that sets out the jurisdictional prerequisites to the exercise of the power to grant development consent. In determining the development application, I have considered the contents of the Jurisdictional Note, together with the documents referred to therein, the Class 1 Application and its attachments, and the documents that are referred to in condition 1.
- 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:
 - (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 on the basis that the proposed modifications do not alter or discernibly intensify the approved use for a dwelling house satisfying s 4.55(2)(a) of the EPA Act.
 - (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) Pursuant to s 4.55(3) of the EPA Act in determining the development, I have taken into consideration the matters referred to in s 4.15(1) of the EPA Act that are of relevance to the development which preclude the approval of the Modification Application. For completeness I note:
 - (a) An amended BASIX certificate has been prepared addressing the modified development as required by State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
 - (b) That the amendments proposed by the Modification Application do not generate impacts which preclude approval.
 - (c) 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.
 - (6) Further, in determining the development I have taken into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. No reasons were given by the Council for the grant of the consent that was sought to be modified: *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227 [63]-[77].
- 6 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)).
- 7 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.
- 8 The Court notes:
- (a) Pursuant to s 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 DA/419/2021/2 in accordance with the following amended plans and documents:

(i) Amended Architectural Plans prepared by Core Collective Architects:

A-130, Floor Plans – Lower Ground, Revision 22, dated 4 April 2023

A-131, Floor Plans – Ground, Revision 21, dated 4 April 2023

A-132, Floor Plans – Level 1, Revision 21, dated 4 April 2023

A-200, Elevations, Revision 15, dated 4 April 2023

A-201, Elevations, Revision 17, dated 4 April 2023

A-202, Elevations, Revision 14, dated 4 April 2023

A-301, Sections, Revision 11, dated 28 April 2023

A-302, Cabana Sections, Revision 10, dated 28 April 2023

(ii) Amended Landscape Plans prepared by Common Grounds Landscape Architecture:

LD-DD-01, Proposed Planting Height, Revision A, dated 5 April 2023

LD-DD-107, Plant Mixes, Revision A, dated 5 April 2023

LD-DD-112, Detail Planting Plan 1 of 3, Revision A, dated 5 April 2023

LD-DD-113, Detail Planting Plan 2 of 3, Revision A, dated 5 April 2023

LD-DD-114, Detail Planting Plan 3 of 3, Revision A, dated 5 April 2023

9 The Court orders:

- (1) The appeal is upheld.
- (2) Modification application number DA/419/2021/2 seeking consent for internal and external modifications to the approved dwelling at Lot 34, Sec 7 in DP 9245, also known as 44 Hopetoun Avenue, Vacluse, is approved and Development Consent No DA/419/2021 is modified in the terms in Annexure A.
- (3) Development Consent No DA/419/2021 as modified by the Court is Annexure B.

D Dickson

Commissioner of the Court

Annexure A

Annexure B

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.