



Land and Environment Court  
New South Wales

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Case Name: Jacob v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1501

Hearing Date(s): Conciliation Conference 15 August 2023

Date of Orders: 05 September 2023

Decision Date: 5 September 2023

Jurisdiction: Class 1

Before: Targett AC

Decision: The Court orders that:  
(1) The appeal is upheld.  
(2) Modification application DA353/2012/2 (as amended), for modifications to Development Consent DA353/2021/1 including modification of Conditions A.3, C.2, C.4, H.1 and I.1 and the deletion of Conditions C.2(a), (b), (c) and (d) of the conditions of consent, at 36 Beresford Road Rose Bay, is approved, subject to the conditions of consent as modified as set out in Annexure A.

Catchwords: APPEAL – Modification Application – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.55, 8.9, 8.10, 8.14  
Environmental Planning and Assessment Regulation 2021, ss 100, 113  
Land and Environment Court Act 1979, ss 17, 34AA, 34  
Woollahra Local Environmental Plan 2014  
Woollahra Local Environmental Plan 2014 (Amendment No 33)  
State Environmental Planning Policy (Biodiversity and Conservation) 2021  
State Environmental Planning Policy (Resilience and

Hazards) 2021

Texts Cited: Woollahra Community Participation Plan 2019

Category: Principal judgment

Parties: Pierre Jacob (Applicant)  
Woollahra Municipal Council (Respondent)

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

Solicitors:  
Boskovitz Lawyers (Applicant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2023/74031

Publication Restriction: No

## JUDGMENT

### Background

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the applicant against the respondent's deemed refusal of the applicant's modification application seeking to modify DA353/2021 (Original Consent). The Original Consent was granted by the Woollahra Local Planning Panel on 21 July 2022 and approved the construction of a new dwelling house and swimming pool on Lot 1 in Deposited Plan 538009, known as 36 Beresford Road, Rose Bay (Site). The modification application the subject of this appeal, made under s 4.55(2) of the EPA Act, seeks to amend the Original Consent.
- 2 The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act). The proceedings are determined pursuant to the provisions of s 8.14 of the EPA Act.

### The modification application

- 3 The modification application (DA353/2021/1) as lodged with the respondent on 20 September 2022 pursuant to s 4.55(2) of the EPA Act, sought to amend the

Original Consent by seeking changes to all levels of the proposed dwelling including the basement, ground floor, first floor, second floor and roof.

- 4 Of particular issue in this matter were the proposed changes to the basement floor and streetscape. Specifically, the modification application (DA353/2021/1) as lodged sought to change the basement floor level generally by way of a revised basement layout including converting the existing double garage into a gym with rooftop balcony above, an extension to the approved basement area, addition of a basement plant area and basement parking for two cars. To facilitate these basement level changes, the following works were proposed:
  - (1) increased excavation (approximately 1,250m<sup>3</sup> compared to 517m<sup>3</sup> approved by the Original Consent);
  - (2) removal of Tree 6 (required to be retained by the Original Consent);
  - (3) removal of 50% of the approved deep soil area and planting of 3 canopy trees required under the Original Consent; and
  - (4) introduction of an additional driveway and associated hardstand area visible from the street in place of the approved deep soil area and canopy plantings.
- 5 The proposed changes to the first floor, second floor and roof were not in dispute between the parties.
- 6 On 6 March 2023, the applicant commenced these Class 1 proceedings under s 8.9 of the EPA Act in respect of the respondent's deemed refusal of its modification application (DA353/2021/1). The modification application was subsequently refused by the Woollahra Local Planning Panel on 6 April 2023.
- 7 The proceedings were commenced within the appeal period prescribed by s 8.10 of the EPA Act.
- 8 The Court arranged a conciliation conference under s 34AA(2)(a) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 15 August 2023. I presided over the conciliation conference.

### **The Amended Modification Application**

- 9 At the conciliation conference, the parties reached agreement under s 34(3) of the LEC Act as to the terms of a decision in the proceedings that would be acceptable to the parties. An agreement was filed on 15 August 2023 following

the applicant amending its modification application with the respondent's agreement. The agreed amendments to the modification application as lodged are outlined by the town planning experts (Mr George Karavanas for the applicant and Mr Stephen McMahon for the respondent) in the Joint Expert Report filed on 28 July 2023 (Joint Town Planning Report) and relevantly include:

- (1) removal of existing gym and proposed terrace above in the front setback;
- (2) stepped terrace planter beds introduced to the front setback;
- (3) spatial dimensions for plant room services identified;
- (4) existing natural ground levels retained in the south-western corner of the Site around Tree 6 maintained to ensure protection of that tree;
- (5) increase to the deep soil landscaped area in the front setback from 83.1 to 89.57m<sup>2</sup>;
- (6) reduction in the deep soil landscaped area in the rear from 178.89m<sup>2</sup> to 160.67m<sup>2</sup>, noting that this reduction is a consequence of the recognition of an error in the measurement in the filed plans. There is no actual change to the deep soil landscaped area in the rear from the filed plans;
- (7) reduction to the overall floorplate from 572.37m<sup>2</sup> to 526.65m<sup>2</sup>;
- (8) reduction in excavation from 1,250m<sup>3</sup> to 894m<sup>3</sup>.

(Amended Modification Application).

- 10 The decision agreed upon is for the grant of consent to the Amended Modification Application, subject to conditions of consent. The signed agreement is supported by an agreed jurisdictional statement dated 15 August 2023.
- 11 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. 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.

### **Jurisdictional considerations**

- 12 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) The applicant is the registered proprietor of the Site and provided consent to the modification application when it was lodged with the respondent.
- (2) The Site is zoned R2 Low Density Residential under the Woollahra Local Environmental Plan 2014 (WLEP 2014). Accordingly, dwelling houses are permitted with consent in the R2 zone. I accept the parties' submission that the Amended Modification Application does not breach any development standard in the WLEP 2014 and that there are no issues raised by the incorporation of a FSR development standard in the WLEP 2014 by way of Woollahra Local Environmental Plan 2014 (Amendment No 33) on 14 July 2023.
- (3) For the purposes of s 4.55(2)(a) of the EPA Act, the development to which the Original Consent as proposed to be modified by the Amended Modification Application relates is substantially the same development as the development for which the Original Consent was granted. I have formed this view for the following reasons as generally identified in the Joint Town Planning Report:
  - (a) the modifications are minor;
  - (b) the environmental impacts are minimal;
  - (c) the physical changes associated with the Amended Modification Application are not significant;
  - (d) the deletion of the single car garage at the northern part of the eastern frontage of the Site and part restoration of its footprint with deep soil landscaped area with a width of 2.65m and a depth of terraces of 4.51m and 2.43m (from the front boundary) for the planting of a canopy tree (by way of the Amended Modification Application) is consistent with the conditions of the Original Consent;
  - (e) the deletion of the 6.3 x 6.0m gym building in the front setback area and the:
    - (i) relocation of the garage function immediately behind the proposed building line at basement level with an associated double width driveway; and
    - (ii) part restoration of the existing building footprint with deep soil landscaped area with approximate dimensions of 7.5 x 4.5m upper terrace and 10.74 x 3.47m lower terrace,
    - (iii) by way of the Amended Modification Application, is a response to the conditions of the Original Consent that required modifications to the approved garage and the required planting of an additional three canopy trees;

- (f) the provision of two car parking spaces to serve the development remain as approved by the Original Consent;
  - (g) the additional basement plant floor space to service the dwelling (for hot water pumps, solar room, air conditioning, electrical, communications and waste) are incidental to the development approved by the Original Consent and do not result in a radical transformation of, or significant change to, the character of the development.
- (4) Section 4.55(2)(b) of the EPA Act does not apply to this matter.
- (5) In relation to s 4.55(2)(c), the respondent has confirmed that the modification application as lodged was notified in accordance with the requirements of the Woollahra Community Participation Plan 2019. I accept the respondent's submission that the Amended Modification Application was not considered to require re-notification as it reduced environmental impacts.
- (6) In relation to s 4.55(2)(d), the two submissions received as part of the notification process have been taken into consideration in reaching agreement to resolve their contentions in this matter.
- (7) In respect of s 4.55(3), in determining the Amended Modification Application, I have taken into consideration such of the matters referred to in s 4.15(1) of the EPA Act as are of relevance to the development the subject of the Amended Modification Application, and the reasons given by the consent authority for the grant of the Original Consent.
- (8) I accept the parties' submission that the BASIX certificate dated 14 September 2022 which was prepared in accordance with s 100(3) of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) to support the modification application as lodged, is sufficient to support the Amended Modification Application on the basis that the amendments made as part of the Amended Modification Application largely relate to earthworks and excavation.
- (9) I accept the parties' submission that it is satisfied that the requirements of State Environmental Planning Policy (Resilience and Hazards) 2021 have been considered and are satisfied in relation to the Amended Modification Application.
- (10) I accept the parties' submission that the relevant provisions of State Environmental Planning Policy (Biodiversity and Conservation) 2021 have been considered and are satisfied in relation to the Amended Modification Application.
- 13 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.
- 14 The Court notes that:

- (1) The respondent, as the relevant consent authority has agreed under s 113 of the EPA Regulation, to the applicant's modification application DA353/2012/2 (as amended) in accordance with the amended plans and materials contained at condition A.6 of Annexure A;
- (2) The applicant filed the amended plans outlined above with the Court on 15 August 2023; and
- (3) The Development Consent DA353/2021/1, as modified in accordance with the orders below, is set out in Annexure B.

## **Orders**

15 The Court orders that:

- (1) The appeal is upheld.
- (2) Modification application DA353/2021/2 (as amended), for modifications to Development Consent DA353/2021/1 including modification of Conditions A.3, C.2, C.4, H.1 and I.1 and the deletion of the Conditions C.2(a), (b), (c) and (d) of the conditions of consent, at 36 Beresford Road, Rose Bay, is approved, subject to the conditions of consent modified as set out in Annexure A.

**N Targett**

**Acting Commissioner of the Court**

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Annexure A

Annexure B

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