



Land and Environment Court New South Wales

Medium Neutral Citation:

Wunulla Developments Pty. Limited v Council of the Municipality of Woollahra [2023] NSWLEC 1525

Hearing dates:

Conciliation conference 20 July 2023

Date of orders:

14 September 2023

Decision date:

14 September 2023

Jurisdiction:

Class 1

Before:

Walsh C

Decision:

The Court orders that:

- (1) The appeal is upheld.
- (2) Development Consent No. 13/2019 is modified in the terms in Annexure A.
- (3) Development Consent No. 13/2019 as modified by the Court is set out in Annexure B.

Catchwords:

MODIFICATION APPLICATION – conciliation conference – agreement between the parties – orders

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 No 65—Design

Quality of Residential Apartment Development

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

Woollahra Local Environmental Plan 2014

Cases Cited:

Green Wall Property Developers Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1560

SDHA Pty Ltd v Waverley Council (2015) 209 LGERA 233; [2015] NSWLEC 65

Texts Cited:

NSW Department of Planning and Environment, Apartment Design Guide, 2015

Woollahra Development Control Plan 2015

Category:	Principal judgment
Parties:	Wunulla Developments Pty. Limited (Applicant) Council of the Municipality of Woollahra (Respondent)
Representation:	A Whealy (Solicitor) (Applicant) A Rutherford (Solicitor) (Respondent)
	Solicitors: Mills Oakley (Applicant) Lindsay Taylor Lawyers (Respondent)
File Number(s):	2023/35766
Publication restriction:	Nil

JUDGMENT

- COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal by the applicant pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Woollahra Municipal Council (Council), the respondent in the proceedings, of a modification application made pursuant to s 4.55 of the EPA Act.
- The modification application (DA13/2019/7), as amended, seeks to modify development consent DA13/2019 which permits the construction of a new residential flat building, which in its currently approved form, contains 15 residential apartments, underground parking, new landscaping, strata subdivision, and remediation of land. The modification application would modify layout details, amalgamate two apartments, relocate on-site detention, make certain landscaping and retaining wall changes and the like. The site comprises adjoining parcels of land located in Point Piper and described as follows: Lot 100 in DP 1281139, otherwise known as 2A Wunulla Road and SP10763 and SP17501, otherwise known as 590-592 New South Head Road.
- The Court arranged a conciliation conference between the parties under s 34 of the *Land and Environment Court Act 1979* (LEC Act), which was held on 20 July 2023 and at which I was delegated to preside. After more time was given, on 28 August 2023 the parties filed an 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, as amended, subject to agreed conditions.

- 4 In respect of the amendments, I am advised that Council, as the relevant consent authority, has approved under s 113 of the Environmental Planning and Assessment Regulation 2021, the applicant amending Modification Application No. 13/2019/7 to rely upon the amended plans and documents as set out in Annexure C to this judgement. Council advises that these amendments have resolved all the Council's contentions.
- 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 a decision that the Court could have made in the proper exercise of its functions.
- 6 The parties' decision involves the Court exercising the function under s 4.55 of the EPA Act to grant consent to the modification application. There are certain jurisdictional pre-requisites which require attention before this function can be exercised.

Jurisdiction

- 7 The modification application is made pursuant to s 4.55(2) of the EPA Act, and the power to modify the consent is available to the consent authority if (relevantly):
- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
 - (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
 - (c) it has notified the application in accordance with—
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
 - (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.
- 8 Further the provisions of s 4.55(3) provide that:

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

- 9 By way of an agreed statement of jurisdictional prerequisites filed on 28 August 2023 and follow-up advice dated 1 September 2023, the parties outlined jurisdictional matters of relevance in these proceedings and explained how they have been or could be satisfied.
- 10 In regard to jurisdiction and mindful of the parties' advice, I find as follows:
- (1) Having regard to s 4.55(2)(a) of the EPA Act, I am satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted. There is no essential element of the development the subject of the development consent that is being altered by the amended modification application. Here I essentially accept and agree with the advice of the parties as follows. In a qualitative sense, the proposed modifications would continue to provide a three-storey residential flat building, with basement parking. As such, the bulk, scale, and appearance of the approved built form would not be significantly altered in the streetscape or as perceived from neighbouring properties. From a quantitative viewpoint, the proposal as modified would remain a residential flat building, and the works involve some reduction in Gross Floor Area (noted at p 2 of Statement of Environmental Effects, at Tab 2 of Class 1 Application filed 3 February 2023). Additionally, the proposed modification involves some reduction in excavation volume and increase in deep soil planting.
 - (2) Having regard to s 4.55(2)(b) of the EPA Act, I am satisfied with the advice of Council that there were no requirements for concurrence from a Minister, public authority or approval body in relation to the proposal.
 - (3) Having regard to subss 4.55(2)(c) and (d) of the EPA Act, I am satisfied with the advice of Council that the modification application was notified in accordance with requirements and one objecting submission was received. I am aware of the substance of the objecting submission and I accept the advice of the parties that the amendments reasonably respond to the concerns raised in this objecting submission.
 - (4) Having regard to s 4.55(3) of the EPA Act, I have taken into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. Here I am mindful that it was myself, albeit after a conciliated agreement, who was the decision-making in the relevant proceedings *Green Wall Property Developers Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1560, which brought about the originating consent. I have also reviewed and taken into consideration relevant matters under s 4.15(1) of the EPA Act, noting the different test applicable here when compared to the evaluation of a development application (noting s 4.55(4) of the EPA Act specifically states the "modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part"). The jurisdictional advice from the parties analyses the applicability of various environmental planning instruments and the applicable development control plan. I note the following:
 - (a) In relation to State Environment Planning Policy (Resilience and Hazards) 2021, and in particular its s 4.6, I note that the long-term use of the site is residential and accept the position of the parties that the site is unlikely to be contaminated and therefore further investigation is not required.
 - (b) In relation to State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG), I note that in this instance the modification application was not referred to a design review panel, but that Council advises it has considered the overall design quality of the proposed modification, as amended, when evaluated in accordance with the SEPP

65 design quality principles and the ADG. The parties advise that Council's position is that the proposed modification (as amended) offers a more desirable design solution and that there is no detrimental impact in regard to compliance with the Design Quality Principles in SEPP 65 or the ADG. I also acknowledge that a Design Verification Statement with respect to the amended modification application was provided to the Court on 7 September 2023. I agree with the parties that it has been demonstrated that adequate regard has been given to the SEPP 65 Design Quality Principles and the ADG.

(c) The proposal is permissible pursuant to existing use rights. However, in respect of Woollahra Local Environmental Plan 2014, I have nevertheless considered the objectives of the relevant R2 Low Density Residential zone. The parties advise that proposed roof condenser units would protrude slightly above the current 9.5m building height control but would be located below the previously approved ridge line. The parties refer me to *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65 (at [31]), to argue that powers at s 4.55(2) of the EPA Act are sufficiently broad to allow the grant of a modification application that breaches a development standard (ie without a cl 4.6 written request). I am satisfied in regard to the proposed modifications to building height.

(d) In respect of Woollahra Development Control Plan 2015, I note that pp 23-26 of the statement of environmental effects gives consideration to relevant matters. Nothing turns on this, jurisdictionally.

(5) I have given appropriate consideration to these instruments and nothing of significance arises in regard to them. I have also given consideration to likely impacts, site suitability, public submissions and the public interest and again nothing would persuade me against the agreement the parties have come to.

11 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. 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.

12 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Consent No. 13/2019 is modified in the terms in Annexure A.
- (3) Development Consent No. 13/2019 as modified by the Court is set out in Annexure B.

P Walsh

Commissioner of the Court

[Annexure A](#)

[Annexure B](#)

[Annexure C](#)

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Decision last updated: 14 September 2023