



Land and Environment Court
New South Wales

Case Name: Drumalbyn B Pty Ltd & Ors v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1569

Hearing Date(s): Conciliation conferences on 11 August, 25 August and 4 September 2023

Date of Orders: 28 September 2023

Decision Date: 28 September 2023

Jurisdiction: Class 1

Before: Porter C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent DA416/2021/1 is modified in the terms in Annexure A to this agreement.
(3) Development consent DA416/2021/1 as modified by the Court is Annexure B to this agreement.

Catchwords: MODIFICATION APPLICATION – modification application to Court consent – seniors living – conciliation conference – agreement between parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.56, 8.9
Environmental Planning and Assessment Regulation 2021, ss 38, 102
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 17

State Environmental Planning Policy (Housing) 2021, Sch 7A, s 2
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy 65 (Design Quality of Residential Flat Development), cl 28, 30
Woollahra Local Environmental Plan 2014 , cl 1.8A, 4.4, 5.10, 6.1, 6.2

Cases Cited: RNB Property Group Pty Ltd v Woollahra Municipal Council [2023] NSWLEC 1012

Texts Cited: NSW Department of Planning, Apartment Design Guide 2015
Woollahra Community Participation Plan 2019

Category: Principal judgment

Parties: Drumalbyn B Pty Ltd (First Applicant)
Drumalbyn R Pty Ltd (Second Applicant)
Bureau SRH Pty Ltd (Third Applicant)
Woollahra Municipal Council (Respondent)

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

Solicitors:
Boskovitz Lawyers (Applicant)
HWL Ebsworth (Respondent)

File Number(s): 2023/168554

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the deemed refusal of modification application No DA416/2021/2 by Woollahra Municipal Council (the Respondent). At the 6 July 2023 Woollahra Local Planning Panel meeting, the modification application was refused.
- 2 The modification application seeks to modify Development Consent DA416/2021/1, which was issued by the Land and Environment Court in

proceedings No 2021/358556 and granted approval for the adaptive reuse of two local heritage listed items for the purpose of a seniors housing development of six units and multi-level underground parking (the consent) at 53 and 55 Drumalbyn Road, Bellevue Hill (site) (legally known as Lot 3 in DP316390, Lot B in DP186880 and Lot 1 in DP135110).

- 3 The modification application seeks approval for internal and external modification to the consent which includes:
 - Addition of one residential unit located on the ground level of Building B;
 - Four additional carparking spaces;
 - Additional excavation; and
 - Associated works.
- 4 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 11 August 2023. I have presided over the conciliation conference and adjourned conferences on 25 August and 4 September 2023.
- 5 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. This decision involved the Court upholding the appeal for the amended modification application (amended MA) and granting development consent to the amended MA, subject to amended plans and other documents being prepared for which I granted an adjournment.
- 6 Further information and amended plans were filed with the Court on 19 September 2023. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 18 September 2023.
- 7 The Respondent, as the relevant consent authority, agreed under s 38 of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending modification application No DA416/2021/2 in accordance with the documents listed at [33]. The key amendments include a reduction in the size of the proposed additional unit from 210m² to 184m², resultant decrease in excavation, decreased terrace area and resultant increase in side setback and landscaped area to the north and north/west.

- 8 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.

Jurisdictional Prerequisites

- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings and explained how the jurisdictional prerequisites have been satisfied. 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 set out below.
- 10 I am satisfied that owners consent accompanied the development application.
- 11 The modification application was lodged with the Respondent on 6 April 2023 pursuant to s 4.56 of the EPA Act.
- 12 Section 4.56(1)(a) of the EPA Act requires that a modification application (MA) be substantially the same development as the development for which development consent was originally granted. The parties agree and I am satisfied that the proposed modifications are substantially the same development as that approved by the Court. I have considered the original development consent, architectural plans and documentation the subject of these proceedings. From a quantitative and qualitative analysis, the amended MA results in one additional unit, is consistent with the approved height, maintains similar side setbacks, maintains a similar amount of landscaping and maintains the approved use as a seniors living development. Whilst I note that additional excavation will occur as a result of the amended MA, I am satisfied that the amended MA does not radically change the development as originally approved and is substantially the same.
- 13 The Respondent notified the development application between 26 April to 11 May 2023 in accordance with the Woollahra Community Participation Plan 2019. The parties advised the Court that the Respondent notified or made reasonable attempts to notify people who had made a submission to the original development application in accordance with s 4.56(1)(b) and (c).

- 14 Fifteen submissions were received, and oral objections were made at the section 34 conciliation conference. The written and oral objections have been considered by the consent authority in accordance with s 4.56(1)(d).
- 15 Section 4.56(1A) of the EPA Act requires that the consent authority must take into consideration the reasons given by the consent authority, in this instance the Court, for the grant of the consent. I have considered the reasons for the grant of consent within proceedings *RNB Property Group Pty Ltd v Woollahra Municipal Council* [2023] NSWLEC 1012.
- 16 Section 4.56(1A) of the EPA Act requires that the consent authority must take into consideration the matters referred to in s 4.15(1) and I consider these matters, where they are jurisdictional and relevant to the amended MA, below.

Woollahra Local Environmental Plan 2014 (WLEP)

- 17 The site is zoned R2 Low Density Residential. The approved development is permissible pursuant to cl 17 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.
- 18 The parties agree and I accept on the basis of the architectural plans at Annexure A that the amended MA does not change the overall height of the development.
- 19 The parties agree and I accept that the amended MA is saved from cl 4.4 Floor Space Ratio (FSR) of the WLEP in accordance with cl 1.8A(2) of the WLEP. Accordingly, there is no FSR control applicable.
- 20 Clause 5.10 Heritage Significance of the WLEP applies to the site, which contains heritage items. The parties agree and I accept on the basis of the Heritage Impact Assessment of Proposed Modifications letter prepared by Zoltan Kovacs Architect dated 7 March 2023 that the provisions of cl 5.10 are met.
- 21 Clause 6.1 Acid Sulfate Soils of the WLEP applies to the site, which is located within a Class 5 area. I accept the parties agreed position that cl 6.1(3) and (4) are not engaged by the development.
- 22 Clause 6.2 Earthworks of the WLEP applies to the site. The proposed modifications include an increased amount of excavation of the site. The

development consent contains a number of deferred commencement and operative conditions in relation to earthworks, none of which are proposed to be removed. I have considered the provisions of the clause, further documentation filed with the amended MA including the letter authored by Mr Green, Principal Geotechnical Engineer at Alliance Consulting dated 24 April 2023, Structural Engineering Methodology dated 31 March 2023 and Structural Construction Methodology dated 13 March 2023 both prepared by structural engineer Dr Barnes from Bureau SRH, the documentation prepared by GSA Planning dated 27 March 2023, further structural engineering letter prepared by structural engineer Dr Barnes from Bureau SRH dated 10 August 2023 and the conditions of consent at Annexure B. I agree with the parties that the requirements of cl 6.2 Earthworks have been satisfied.

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP)

- 23 As the amended MA relates to a development application submitted prior to the commencement of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP), in accordance with Sch 7A, s 2(1)(da), the provisions of the Housing SEPP do not apply.
- 24 I have considered the relevant provisions of the Seniors SEPP. I accept the agreed evidence of the parties that the amended MA does not result in new or further breaches to these provisions and that the requirements are met.

State Environmental Planning Policy 65 (Design Quality of Residential Flat Development) (SEPP 65)

- 25 Consistent with cll 28 and 30 of SEPP 65 and s 102 of the Environmental Planning and Assessment Regulation 2021, an amended Design Verification Statement prepared by Bureau SRH and dated 23 August 2023 accompanies the amended MA which adequately addresses the design quality principles and Apartment Design Guide provisions.

State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC)

- 26 Chapter 2 Vegetation in non-rural areas applies to the site. I accept the parties' agreed evidence that the amended MA does not propose any further removal of vegetation that is subject to the provisions of SEPP BC.

- 27 Chapter 6 Water Catchments applies to the site, which is located within the mapped Sydney Harbour catchment but is not located within a foreshore or waterway area. The parties agree and I accept, with consideration of the Respondent's Assessment Report dated 6 July 2023, that the provisions of Ch 6 SEPP BC are met.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX)

- 28 An amended BASIX Certificate dated 22 August 2023 accompanies the amended MA. The parties agree and I accept that the BASIX Certificate satisfies the provisions of SEPP BASIX and has been incorporated into the conditions of consent at Annexure B.

State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH)

- 29 The provisions of s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) apply to the site. The amended MA is consistent with the original consent and therefore continues to satisfy the provisions of SEPP RH.

Conclusion

- 30 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.
- 31 I have considered the jurisdictional prerequisites and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.
- 32 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.
- 33 The Court notes that the Respondent has agreed, as the relevant consent authority, under s 38 of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending modification application No DA416/02021/2 to rely upon the following amended plans and documents:

Reference	Description	Author/Drawn	Date(s)
S4.56 104 Revision C	Building A / Level 1	Bureau SRH Architecture	17 August 2023
S4.56 105 Revision C	Building A / Level 2		17 August 2023
S4.56 106 Revision C	Building A / Roof - Building B / Ground Floor		17 August 2023
S4.56 110 Revision B	Building B / Level 1		17 August 2023
S4.56 200 Revision B	Elevation - Building A / North West		17 August 2023
S4.56 201 Revision B	Elevation - Building A + Building B / South East		17 August 2023
S4.56 204 Revision B	Elevation - Building B / North East		17 August 2023

S4.56 300 Revision B	Sections - Building A + Building B / Long Section		17 August 2023
2022.04.53-55. Drumlabyn.A0.8.ABL Revision B	Building A Basement	Ben Kaye Garden Design	August 2023
2022.04.53- 55.Drumlabyn.A0.8.AL GF Revision B	Building A Lower Ground		August 2023
2022.04.53- 55.Drumlabyn.A0.8.A GF Revision B	Building A Ground Floor		August 2023
2022.04.53- 55.Drumlabyn.A0.8.AL 1 Revision B	Building A Level 1		August 2023
2022.04.53- 55.Drumlabyn.A0.8.AL 2 Revision B	Building A Level 2		August 2023
2022.08.53- 55.Drumlabyn.A0.8.B	Building B Ground		August 2023

GF Revision B	Floor		
2022.04.53- 55.Drumlabyn.A0.8.BL 1 Revision B	Building B Level 1		August t 2023
2022.04.53- 55.Drumlabyn.A0.8.BL 2 Revision B	Building B Level 2		August t 2023
	BASIX Certificate No 1237642M_ 04		22 August t 2023
	Response to SOFAC	BUREAU SRH	10 August t 2023
	Design Verification Statement	SHRA	23 August t 2023

34 The Applicant filed the amended application with the Court on 18 September 2023.

Orders

35 The Court orders:

- (1) The appeal is upheld.

- (2) Development consent DA416/2021/1 is modified in the terms in Annexure A to this agreement.
- (3) Development consent DA416/2021/1 as modified by the Court is Annexure B to this agreement.

S Porter

Commissioner of the

Court/asset/18ad9639a62ceab1a978ef30.pdf/asset/18ad9639a62ceab1a978ef30.pdf

168554.22 Annexure

A/asset/18ad963f2a87a4a2ee4283c5.pdf/asset/18ad963f2a87a4a2ee4283c5.pdf

168554.22 Annexure B

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.