



Land and Environment Court  
New South Wales

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Case Name: 14 Boronia Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1412

Hearing Date(s): Conciliation Conference 1 and 23 June 2021

Date of Orders: 21 July 2021

Decision Date: 21 July 2021

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:  
(1) The Appeal is upheld.  
(2) Development Consent No. 105/2019 is modified in the terms in Annexure A.  
(3) Development Consent No. 105/2019/1 as modified by the Court is Annexure B.

Catchwords: DEVELOPMENT APPEAL – modification application – residential flat building – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 4.55, 4.56, 8.9  
Land and Environment Court Act 1979, s 34  
Woollahra Local Environmental Plan 2014, cl 2.3, 2.7, 4.4, 4.6, 5.10, 6.1, 6.2, 6.3

Cases Cited: 14 Boronia Pty Ltd (ACN 624 963 355) v Woollahra Municipal Council [2020] NSWLEC 1193

Texts Cited: Apartment Design Guide NSW Department of Planning

Category: Principal judgment

Parties: 14 Boronia Pty Ltd ACN 624 963 355 (Applicant)

Woollahra Municipal Council (Respondent)

Representation:

Counsel:

A Boskovitz (Solicitor) (Applicant)

J Hewitt (Solicitor) (Respondent)

Solicitors:

Boskovitz Lawyers (Applicant)

HWL Ebsworth Lawyers (Respondent)

File Number(s):

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No

## JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the deemed refusal to modify a development consent DA 105/2019 granted by the Land and Environment Court (the Court) on 28 April 2020 pursuant to the decision in *14 Boronia Pty Ltd (ACN 624 963 355) v Woollahra Municipal Council* [2020] NSWLEC 1193. The Modification Application (MA) seeks approval for internal and external modifications to the approved demolition of the existing dwelling and the construction of a new residential flat building (Modification Application) at 14 Boronia Road Bellevue Hill legally described as Lot 14, Section G, Deposited Plan 8103 (the Site).
- 2 The Modifications sought involve the following works:
  - (1) Modification to the layout of the basement level;
  - (2) Increase to the size of the units and the provision of additional gross floor area to the front, sides and rear of the building. This results in a reduction to the area of private open space to the units;
  - (3) Increase the height of the lift overrun by 1 m;
  - (4) Internal and external modifications.
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held on 1 and 23 June 2021. I have presided over the conciliation conference which commenced at the Site. Two residents addressed the s 34 conference. One neighbour at 16 Boronia Road objected to the height and the bulk of the

lift overrun. The Site inspection took place from a variety of locations including the neighbouring property at 16 Boronia Road. Upon understanding the changes proposed the neighbour indicated she was satisfied by the modifications. The other objector lives in the strata block at 12 Boronia Road and raised an objection with respect to the retention of Tree 2 at the North-West corner of the Site. This objector indicated that they were satisfied and did not press any objection upon understanding that there was no application to remove Tree 2.

- 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. This decision involved the Court upholding the appeal and approving the Modification Application subject to conditions.
- 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. The parties' decision involves the Court exercising the function under s 4.56 of the EPA Act to modify the development consent. 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 the parties explained how the jurisdictional prerequisites have been satisfied in a document titled "Agreed Statement – Jurisdictional Prerequisites" which I summarise below.

**The terms of s 4.56 of the EPA Act to modify a consent.**

- 6 In relation to s 4.56(1)(a), the parties are satisfied that the Proposed Development is substantially the same development as the development approved by the Consent, as:
  - (1) the amendments are relatively minor,
  - (2) is no change to the proposed of the development,
  - (3) the number of units is the same as the Consent:
  - (4) other than a minor variation to the Floor Space Ratio (FSR) and height of the lift over run, the development will be read as similar with respect to bulk and scale; and

- (5) there are no adverse amenity impacts associated with the Amended MA.
- 7 The Modification Application has been notified in accordance with the Respondent's Community Participation Plan in compliance with s 4.56(1)(b) of the EPA Act. The Council notified the application from 21 October 2020 to 4 November 2020 and received 10 unique submissions.
- 8 I have considered the reasons given by the consent authority as required by the s 4.56(1A) of the EPA Act as set out in *14 Boronia Pty Ltd (ACN 624 963 355) v Woollahra Municipal Council* [2020] NSWLEC 1193 at [6] as follows:
- "6. The parties' agreement involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. The following jurisdictional prerequisites relevant in this case have been satisfied so this function can be exercised:
- (a) the site is zoned R3 pursuant to Woollahra Local Environmental Plan 2014 (WLEP) pursuant to which residential flat buildings are a permissible use;
  - (b) the proposed development does not contravene any development standard in the WLEP or any other applicable environmental planning instrument. In particular, there is no non-compliance with the Height and Floor Space Ratio controls in WLEP;
  - (c) a sulphate soils management plan has been provided in accordance with cl 6.1 CLEP;
  - (d) consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land (SEPP 55). Given the long-term use of the site for residential purposes, the subject site is not likely to be contaminated. Material has been provided in satisfaction of cl 7 of SEPP 55;
  - (e) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the proposed development. A BASIX certificate has been provided in compliance with that Policy; and
  - (f) Consideration has been given to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development and a Design Verification Statement has been provided."
- 9 Section 4.56(1A) also requires that the consent authority take into consideration such matters listed in s 4.15(1) as are of relevance to the application. The matters of relevance under s 4.15(1) are discussed below.

### **Woollahra Local Environmental Plan 2014 (WLEP)**

- 10 The Site is zoned R3 Medium Density Residential pursuant to the WLEP. Development for the purposes of a *residential flat building* is permitted with

development consent in the zone (cl. 2.3(1)(c)). Demolition may be carried out with development consent (cl 2.7).

- 11 The Modification Application results in a non-compliant FSR Pursuant to cl 4.4 of WLEP the maximum permissible FSR is 0.75:1. The proposed FSR of the development is 0.83:1. The Court is not required to consider a cl 4.6 written request to justify the contravention of the FSR development standard as this is not an application for development consent, but an application under s 4.56 for the modification of an existing consent.
- 12 The parties agree that the Proposed Development is not on land shown on the Acid Sulfate Soils Map for the purposes of cl 6.1, and is not on land shown on the Flood Planning Map for the purposes of cl 6.3.
- 13 The parties agree that the Modification Application involves substantially the same excavation as the excavation approved by the Consent. On this basis no matters arise in respect of cl 6.2 of the WLEP.
- 14 The parties agree that no issues arise in respect of heritage and that cl 5.10 of the WLEP is not a consideration in these proceedings.

**Statement Environmental Planning Policy No 55 – Remediation of Land (SEPP 55).**

- 15 In relation to clause 7(1) of SEPP 55, the parties agree that the Court can be satisfied that the Proposed Development does not give rise to matters relating to contamination of land.

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

- 16 The parties agree that the Court can be satisfied that the BASIX certificate dated 18 August 2020 is satisfactory.

**State Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SH SEPP)**

- 17 The Parties agree that the Site falls with land marked on the maps associated with the SH SEPP.

- 18 The parties agree that consideration has been given to the SH SEPP and that the Proposed Development is consistent with the aims and objectives of the SH SEPP.

**State Environmental Planning Policy 65: Design Quality of Residential Apartment Development**

- 19 Clause 115(3) of the *Environmental Planning and Assessment Regulation 2000* (the Regulations) require the provision of a design verification statement. Clause 115(3A) of the Regs outlines the requirements in respect of the contents of the statement.
- 20 A design verification statement has been provided to the Respondent Council dated 17 June 2021 that addresses the requirements of the Regulations.
- 21 The parties agree that the Court can be satisfied that the design verification documents satisfy the requirement of the Regulations and that all jurisdictional requirements in respect of same have been satisfied.

**Remaining matters is s 4.15(1) of the EPA Act**

- 22 The parties say that the Modification Application can be approved taking into consideration the matters in section 4.15(1)(b) – (e) of the EPA Act.
- 23 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 and I adopt the reasons provided by the parties as set out above in this judgment.
- 24 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.
- 25 The Court orders:
- (1) The Appeal is upheld.
  - (2) Development Consent No. 105/2019 is modified in the terms in Annexure A.
  - (3) Development Consent No. 105/2019/1 as modified by the Court is Annexure B.

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**E Espinosa**

**Commissioner of the Court**

Annexure A (98068, pdf)

Annexure B (841330, pdf)

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