



Land and Environment Court  
New South Wales

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Case Name: Keyser v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1422

Hearing Date(s): Conciliation conference on 23 July 2021

Date of Orders: 23 July 2021

Decision Date: 23 July 2021

Jurisdiction: Class 1

Before: Gray C

Decision: Refer to orders at [8]

Catchwords: APPEAL – modification application – conciliation conference – agreement reached – breach of development standard – amendment to modification application – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, s 4.55  
Environmental Planning and Assessment Regulation 2000, cll 115, 121B  
Land and Environment Court Act 1979, ss 8.9, 34  
Woollahra Local Environmental Plan 2014, cll 4.4, 4.6

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

Category: Principal judgment

Parties: Kenneth Keyser (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
A Boskovitz (Solicitor) (Applicant)  
A Kleiss (Solicitor) (Respondent)

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

File Number(s): 2021/91198

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns an application to modify a development consent for the construction of a residential flat building containing 4 units, on Lot 11 in Section G in Deposited Plan 8103, also known as also known as 20 Boronia Road, Bellevue Hill NSW 2023. The application seeks to modify the consent in relation to works to the basement, utilising voids and spaces for the purpose of storage, modifications to one of the units, the relocation of pool plant and equipment, and the provision of an internal laundry chute. The appeal is lodged pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the modification application pursuant to s 4.55(2) of the EPA Act. The final orders in this appeal, outlined in [8] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 2 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 23 July 2021. I presided over the conciliation conference.
- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The agreement is supported by an agreed statement on jurisdictional prerequisites. The decision agreed upon is for leave to be granted to rely on amended plans, pursuant to the requirement for agreement to amendments under cl 121B of the Environmental Planning and Assessment Regulation 2000, and the grant of the modification application subject to conditions, pursuant to s 4.55(2) of the EPA Act. The amended plans differ from the earlier plans by, inter alia, removing any excavation beyond what was approved in the grant of development consent, and re-configuring the

proposed storage spaces to ensure that they will not be used as habitable space.

- 4 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 the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, for the reason that the modifications to the built form are minor, there is no change to the proposed use or to the external appearance of the approved building, and the development will be of the same height, bulk and scale and have the same number of residential units. The modification application has been notified in accordance with the respondent's Community Participation Plan, and I have considered the content of the submission that was received in response to that notification. Consistent with the requirements of cl 115(1) of the Environmental Planning and Assessment Regulation 2000, the amended modification application is accompanied by a design verification statement and a BASIX certificate.
- 5 The modification application, as amended, results in a non-compliant floor space ratio (FSR). Pursuant to cl 4.4 of Woollahra Local Environmental Plan 2014 (WLEP) the maximum permissible FSR is 0.75:1. The proposed FSR of the development excluding additional parking spaces in the basement is 0.78:1. Consistent with the decision of the Court in *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65 (at [31]), the power in s 4.55(2) is sufficiently broad to allow the grant of a modification application that breaches a development standard, and cl 4.6 of the WLEP does not apply to modification applications.
- 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 orders that:

(1) The Applicant is granted leave to rely upon the following plans and documents:

<i>No.</i>	<i>Drawing/Document</i>	<i>Rev</i>	<i>Date</i>	<i>Prepared by</i>
DA2000	Basement	G	28.05.21	Mark Shapiro Architects
DA2001	Ground Floor	G	28.05.21	Mark Shapiro Architects
DA2005	Ground Floor – Rear Amenities	G	28.05.21	Mark Shapiro Architects
DA9001	GFA Plan	G	28.05.21	Mark Shapiro Architects
DA9004	Storage Schedule & Cross Ventilation	G	28.05.21	Mark Shapiro Architects
1070146M_02	BASIX Certificate		02.06.21	NSW Department of

				Planning, Industry & Environment
	Design Verification Statement		28.05. 21	Mark Shapiro Architects

- (2) The Appeal is upheld.
- (3) Development Consent No. 44/2020/1 is modified in the terms in Annexure A.
- (4) Development Consent No. 44/2020/1 as modified by the Court is Annexure B.

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**J Gray**

**Commissioner of the Court**

[Annexure A \(191781, pdf\)](#)

[Annexure B \(713588, pdf\)](#)

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