



Land and Environment Court  
New South Wales

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Case Name:	EMCON Group Pty Ltd v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1511
Hearing Date(s):	Conciliation conference on 7 July and 18 August 2021
Date of Orders:	01 September 2021
Decision Date:	1 September 2021
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld;</p> <p>(2) Modification Application No. DA518/2018/3, seeking to modify development consent DA518/2018 for the demolition of an existing building and construction of a five-storey residential flat building with 6 residential units including 2 affordable rental housing units, associated basement car parking and site works is approved subject to the modified conditions of consent annexed hereto and Marked "A".</p>
Catchwords:	MODIFICATION APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.56, 8.9, 8.14</p> <p>Land and Environment Court Act 1979, s 34</p>
Texts Cited:	<p>Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (April 2021)</p> <p>Woollahra Community Participation Plan</p>
Category:	Principal judgment

Parties: EMCON Group Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
S Hale (Solicitor) (Applicant)  
J Fan (Solicitor) (Respondent)

Solicitors:  
Madison Marcus Law Firm (Applicant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/46871

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** EMCON Group Pty Ltd (the Applicant) has appealed the refusal by Woollahra Municipal Council (the Respondent) of its modification application made under cl 4.56 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), to modify the consent (DA/518/2018) approved by the Court on 31 October 2019 for demolition of existing structures and construction of a residential flat building (RFB) containing six residential units, including two affordable units, associated basement car parking and associated works (the original consent) at 164 Victoria Road, Bellevue Hill (the Subject Site).
- 2 The Applicant's modification application (DA518/2018/3) seeks to amend the original consent in relation to:
  - (1) changes to the excavation required at the rear of the approved RFB;
  - (2) an increase to the floor space ratio of the approved RFB;
  - (3) changes to windows;
  - (4) changes to parking arrangements;
  - (5) amendments to landscaping and stormwater provisions.
- 3 The appeal comes to the Court pursuant to s 8.9 of the EP&A Act and falls within Class 1 of the Court's jurisdiction. The proceedings are determined pursuant to the provisions of s 8.14 of the EP&A Act.

- 4 The Court had arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the Parties, which was held on 7 July and 18 August 2021, and I presided over the conciliation conference.
- 5 The conciliation conference was convened in a manner consistent with the Court's COVID-19 Pandemic Arrangements Policy April 2021 (the Policy). A site view was not undertaken at the commencement of the conciliation conference.
- 6 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 granting consent to the Applicant's modification application, subject to conditions.
- 7 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.
- 8 Under the provisions of s 4.56 of the EP&A Act there are jurisdictional matters that must be satisfied in order for the Court to have power to approve the Applicant's modification application, and that these requirements have been satisfied as follows:
  - (1) the Parties have confirmed, and I am 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 in satisfaction of the provisions of s 4.56(1)(a) of the EP&A Act;
  - (2) in relation to the provisions of s 4.56(1)(b) of the EP&A Act, the Parties have advised, and I accept, that, consistent with the provisions of Woollahra Community Participation Plan (WCPP), the modification application was initially notified between 20 January and 4 February 2021, and again between 24 March and 8 April 2021. Two submissions were received in response to the notifications;
  - (3) in relation to the provisions of s 4.56(1)(c) of the EP&A Act, the Respondent had advised, and I accept, that it notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person; and
  - (4) in relation to the provisions of s 4.56(1)(d) of the EP&A Act the submissions made concerning the proposed modification have been

considered in reaching agreement to resolve their contentions in this matter.

- 9 There are no other jurisdictional prerequisites that must be satisfied before the Court can exercise the power to determine the appeal under s 8.14 of the EP&A Act.
- 10 Having considered the advice of the Parties, provided above at [8], I agree that the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 8.14 of the EP&A Act have been so satisfied.
- 11 I am further 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.
- 12 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.
- 13 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.
- 14 Finally, the Court notes that:
  - (1) the Applicant has amended its modification application with the Respondent's agreement;
  - (2) the Respondent has uploaded the amended application on the NSW planning portal on 9 August 2021;
  - (3) the Applicant has subsequently filed the amended application with the Court on 16 August 2021.
- 15 Consequently, the Court orders that:
  - (1) The appeal is upheld;
  - (2) Modification Application No. DA518/2018/3, seeking to modify development consent DA518/2018 for the demolition of an existing building and construction of a five-storey residential flat building with 6 residential units including 2 affordable rental housing units, associated basement car parking and site works is approved subject to the modified conditions of consent annexed hereto and Marked "A".

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**M Chilcott**

**Commissioner of the Court**

Annexure A (301877, pdf)

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**Amendments**

03 September 2021 - Pursuant to UCPR r 36.17 the Court amends paragraphs [2], [15(2)] and Annexure A of the judgment so that references to the Modification Application No as "DA518/2018/2" instead read "DA518/2018/3".

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