



Land and Environment Court
New South Wales

Case Name: Lin v Council of the Municipality of Woollahra

Medium Neutral Citation: [2021] NSWLEC 1579

Hearing Date(s): Conciliation conference on 6 and 14 September 2021

Date of Orders: 6 October 2021

Decision Date: 6 October 2021

Jurisdiction: Class 1

Before: Bish C

Decision: The Court orders that:
1. The appeal is upheld.
2. The application to modify Development Consent No. [DA492/2019] in the terms set out in Annexure A is approved.
3. The terms of the consolidated Development Consent No. [DA492/2019] are set out in Annexure B.

Catchwords: MODIFICATION APPLICATION – condition of consent relating to terrace area – amenity – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.55, 8.9
Environmental Planning and Assessment Regulation 2000, cl 121B
Land and Environment Court Act 1979, ss 34, 34AA
Woollahra Local Environmental Plan 2014

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Xiaofen Lin (Applicant)
Council of the Municipality of Woollahra (Respondent)

Representation:

Counsel:

G McKee (Applicant)

P Rigg (Respondent)

Solicitors:

McKees Legal Solutions (Applicant)

Peter R Rigg (Respondent)

File Number(s):

2021/136517

Publication Restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the imposition of conditions in the granting of Modification Application DA492/2019/2 (the MA) by the Municipality of Woollahra (hereafter the Council), which seeks deletion of condition (C.1b), relating to a roof terrace on Lot 1 in DP 942621, known as 13 Nulla Street, Vaucluse (hereafter the site).
- 2 The MA was granted with conditions by Council on 22 February 2021. The original Development Application DA492/2019 (DA) was granted by Council on 29 July 2020.
- 3 The Class 1 appeal seeking deletion of condition C.1b in the consent of the MA is made pursuant to s 8.9(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 4 The Court agreed to a conciliation conference, pursuant to s 34AA(2) of the *Land and Environment Court Act 1979* (Court Act), without an onsite view, by agreement of the parties. The conciliation was held primarily by MS Teams, with one (adjoining) resident objector providing oral submission by telephone, at the commencement of the conciliation.
- 5 The Court has not had the benefit of a site view, and therefore relies on the expert evidence, photographs, plans and documents supporting the MA that contextualise the site.
- 6 The Council agreed for the applicant to amend the plans and documents, that amend the MA, pursuant to cl 121B of the Environmental Planning and Assessment Regulation 2000 (EPA Reg). The amended plans and documents

were uploaded to the NSW Planning Portal by the Council on 14 September 2021.

- 7 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the Court. At the conciliation conference, after expert consultation, the parties agreed to amend the area of the terrace adjacent to bedroom 5, and thereby delete condition (C.1.b) to be relied upon in the granting of consent to the MA under, as identified in Annexure A of the orders.
- 8 This decision of the parties is to uphold the appeal and grant consent to modify DA492/2019/2, with conditions of consent in Annexure B.
- 9 Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, if it is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising its function under s 4.55(1A) of the EPA Act to grant consent to modify DA492/2019 as agreed, with conditions in Annexure B. The proposed amendment to conditions of consent is limited to that described in Annexure A, and as described in condition A.2 in Annexure B, upon which the Court relies to consent to this agreement.
- 10 The parties identified the jurisdictional prerequisites of particular relevance in these proceedings, pursuant to consideration under s 4.55(1A) of the EPA Act, as the: EPA Reg; Woollahra Local Environmental Plan 2014 (WLEP); and Woollahra Development Control Plan 2015 (WDCP). The parties agree that the amended conditions of consent address the merits of the proposal.
- 11 The parties agree that the relevant requirements of the WLEP remain satisfied and unchanged by the deletion of condition C.1b, and amendment of the area of the terrace with a wall height increase, as shown in amended plans in condition A.2.
- 12 Based on the agreement of the parties, the contentions and issues raised in objection that relate to the controls of the WDCP are resolved. In particular, the parties agree that the amended terrace area, protects the public and private view corridors, and amenity of the adjoining resident. The requirements of s

4.55(1A)(a) are satisfied, as the parties agree that the proposed changes to the development will have minimal environmental impact.

- 13 The Council confirms that notification of the application under appeal was made, pursuant to the requirements of the WDCP, which satisfies subss 4.55(1A)(c) and (d) of the EPA Act. The adjoining resident at 13 Nulla Street provided written submission and was also heard at the conciliation conference. The issues raised by this resident have been considered and are resolved to the satisfaction of the parties. The amenity to the adjoining resident is not adversely impacted by the dimension of the agreed terrace area and proposed wall height.
- 14 The parties agree that the modification as agreed is substantially the same as previously approved. The parties also agree that the requirements of s 4.55(1A)(b) of the EPA Act are satisfied, in addition to the requirements of subss 4.55 (3) and (4).
- 15 I am satisfied that based on the evidence and advice of the experts, there are no jurisdictional impediments to this agreement seeking amendments to the upper level terrace, with deletion of condition C.1b, as described in Annexure A. This amended appeal for modification of DA492/2019/2, satisfies the requirements of s 4.55(1A) of the EPA Act.
- 16 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 Court Act to dispose of the proceedings in accordance with the parties' decision.
- 17 The Court notes:
 - (1) That the Council of the Municipality of Woollahra, as the relevant consent authority has agreed, under cl 121B(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending the application for modification of the development consent (DA492/2019) granted by the Council of the Municipality of Woollahra on 29 July 2020 for DA492/2019/2.
 - (2) That the Council of the Municipality of Woollahra has uploaded the amended application on the NSW planning portal on 14 September 2021.
 - (3) That the applicant has subsequently filed the amended application with the Court on 15 September 2021.

18 The Court orders that:

- (1) The appeal is upheld.
- (2) The application to modify Development Consent No. [DA492/2019] in the terms set out in Annexure A is approved.
- (3) The terms of the consolidated Development Consent No. [DA492/2019] are set out in Annexure B.

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Sarah Bish

Commissioner of the Court

[Annexure A \(131039, pdf\)](#)

[Annexure B \(753607, pdf\)](#)

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