



Land and Environment Court
New South Wales

Case Name: Restifa & Partners Pty Ltd v Blacktown City Council

Medium Neutral Citation: [2021] NSWLEC 1587

Hearing Date(s): Conciliation conference on 30 March, 16 April, 7 and 25 May, 30 June, 29 July, 6 and 24 August, and 7 September 2021

Date of Orders: 6 October 2021

Decision Date: 6 October 2021

Jurisdiction: Class 1

Before: Peatman AC

Decision: The Court orders:
(1) The appeal is upheld.
(2) Consent is granted to Modification Application No. MOD-20-00357 for the modification of Development Consent SPP-17-00039 (development consent), relating to amendments to the vehicular access and loading arrangements, overall height, total apartment and car parking numbers and variations to the building envelopes of the approved Concept Plan and Stage 1 on Lot 72 and 73 in Deposited Plan 208203, otherwise known as 43 - 53 Cudgegong Road, Rouse Hill, subject to the conditions in Annexure C.
A summary of the approved modifications to conditions of consent is set out in Annexure B.
(3) Development Consent SPP-17-00039, as now amended by Modification Application MOD-20-00357, is subject to the consolidated and updated conditions as set out in Annexure C.
(4) The respondent is directed to register the development consent on the NSW planning portal within 14 days.

Catchwords: MODIFICATION APPLICATION – concept plan
approval – amenity – access – traffic – streetscape –
open space – conciliation conference – agreement
between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979 ss
4.15, 4.16, 4.17, 4.24, 7.3, 8.9, 8.10, 8.14
Environmental Planning and Assessment Regulation
2000 cl 49, 121B, 77
Land and Environment Court Act 1979 ss 17, 34, 39
State Environmental Planning Policy No 55—
Remediation of Land cl 7
State Environmental Planning Policy No 65—Design
Quality of Residential Apartment Development
cl 30(2)(a), and Schedule 1
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Infrastructure)
2007 cl 45, 104
State Environmental Planning Policy (State and
Regional Development) 2011
State Environmental Planning Policy (Sydney Region
Growth Centres) 2006 cl 4.1A, 4.3, 4.4, 4.6, 6.5,
Appendix 6

Cases Cited: Restifa & Partners Pty Ltd v Blacktown City Council
[2019] NSWLEC 1432

Texts Cited: Blacktown City Council Growth Centre Precincts
Development Control Plan 2018

Category: Principal judgment

Parties: Restifa & Partners Pty Ltd (Applicant)
Blacktown City Council (Respondent)

Representation: Counsel:
B Salon (Solicitor) (Applicant)
D Loether (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Bartier Perry Lawyers (Respondent)

File Number(s): 2020/341094

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Modification Application No. MOD-20/00357 (Modification) pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act), lodged with Blacktown City Council (Council) on 11 September 2020, to modify development consent no. SPP-17-00039 for concept development of Cudgegong Town Centre at 43-53 Cudgegong Road, Rouse Hill NSW 2155 (granted by the Land and Environment Court on 18 September 2019 – [2019] NSWLEC 1432 (Concept Plan Approval)).
- 2 The Concept Plan Approval was for the concept of a town centre adjacent to the new railway Station of Tallawong at 43-53 Cudgegong Road, Rouse Hill – residential and retail uses with associated infrastructure and services, Torrens title subdivision (of 2 lots into 7 lots), and Stage 1 development being for the construction of residential flat buildings for 256 apartments with parking on Lots 72 and 73 in Deposited Plan 208203.
- 3 The Modification in summary seeks to modify the Concept Plan Approval and its conditions 2.1.2, 2.4, 2.5 and 2.6 by modifying the following:
 - (1) Vehicular access and loading arrangements;
 - (2) Minor variations to the overall height of the development;
 - (3) Minor variations to total apartment and car parking numbers;
 - (4) Minor variations to the building envelope; and
 - (5) Minor variations to open space/landscaping.
- 4 The Site comprises Lots 72 and 73 in Deposited Plan 208203 known as 43-53 Cudgegong Road, Rouse Hill NSW 2155. The Site is rectangular in shape having the following dimensions:
 - (1) Frontage to Cudgegong Road (eastern boundary): 144.125m
 - (2) Norther boundary to Lot 74 in DP 1265948: 280.915m
 - (3) Western boundary to lots 9 in DP 1249124 and 298 in DP 1213279: 144.125m
 - (4) Southern boundary to Lot 299 in DP 1213279: 280.915m

The Site has a total area of approximately 2.025ha. The Site has a fall of approximately 11.2m over a distance of 200m from the northern boundary

- 5 The Site is located within the Tallawong Station (Area 20) Precinct of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP). The surrounding land is in the process of being developed from rural to urban land. The land to the south of the Site includes Tallawong Metro Station at the intersection of Cudgegong Road and the future Implexa Parade.
- 6 Owners' consent to the Modification was given on 6 August 2020 pursuant to cl 49 of the EPA Act by J Michael & Westgate Development Pty Ltd (owners of 72 Cudgegong Road Rouse Hill), Westmill Corporate Partners Pty Ltd (owners of 73 Cudgegong Road Rouse Hill).
- 7 The proceedings fall within Class 1 of the Court's jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).
- 8 The statutory function to be exercised by the Court is ss 4.6, 4.16 and 8.14 of the EPA Act, and ss 34(3) and 39(2) of the LEC Act.
- 9 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 30 March, 16 April, 7 May, 25 May, 30 June, 29 July, 6 and 24 August, and 7 September 2021. I presided over the conciliation conference.

Legislation

Environmental Planning and Assessment Act 1979

4.16 Determination (cf previous s 80)

(1) General A consent authority is to determine a development application by—

(a) granting consent to the application, either unconditionally or subject to conditions, or

(b) refusing consent to the application.(2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.

...

(4) **Total or partial consent** A development consent may be granted—

- (a) for the development for which the consent is sought, or
- (b) for that development, except for a specified part or aspect of that development, or
- (c) for a specified part or aspect of that development.

...

(7) If the Minister has requested that a review (with or without a public hearing) be conducted by the Independent Planning Commission in relation to all or any part of the development the subject of a development application for which the Minister is the consent authority, the Minister must not determine the development application until—

- (a) the review has been conducted, and
- (b) the Minister has considered the findings and recommendations of the Independent Planning Commission.

...

(11) **Other restrictions on determination of development applications** The regulations may specify other matters of a procedural nature that are to be complied with before a development application may be determined.

...

(12) **Effect of issuing construction certificate** If a consent authority or a registered certifier issues a construction certificate, the construction certificate and any approved plans and specifications issued with respect to that construction certificate, together with any variations to the construction certificate or plans and specifications that are effected in accordance with this Act or the regulations, are taken to form part of the relevant development consent (other than for the purposes of section 4.55).

(13), (14) (Repealed)

...

4.24 Status of concept development applications and consents (cf previous s 83D)

(1) The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a concept development application and a development consent granted on the determination of any such application.

(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.

(3) Subsection (2) does not prevent the modification in accordance with this Act of a consent granted on the determination of a concept development application.

Note—

See section 4.53(2) which prevents a reduction in the 5-year period of a development consent.

8.9 Appeal by applicant—modifications of development consent (cf previous s 97AA)

An applicant for the modification of a development consent who is dissatisfied with the determination of the application by the consent authority may appeal to the Court against the determination

8.14 Powers of Court on appeals (cf previous s 39(6A) Land and Environment Court Act)

(1) In addition to any other functions and discretions that the Court has apart from this subsection, the Court has, for the purposes of hearing and disposing of an appeal under this Division, all the functions and discretions which the consent authority whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(2) The decision of the Court on an appeal under this Division is, for the purposes of this or any other Act or instrument, taken to be the final decision of that consent authority and is to be given effect to accordingly.

(3) If the consent authority was under this Act required to consult or obtain the concurrence of another person or body before making the decision the subject of an appeal under this Division—

(a) the Court may determine the appeal whether or not the consultation has taken place and whether or not the concurrence has been granted, and

(b) in a case where the concurrence has been granted—the Court may vary or revoke any conditions imposed by that person or body or may impose any conditions that could have been imposed by that person or body.

(4) If an appeal under this Division relates to integrated development—

(a) the Court may determine the appeal whether or not the consent authority has obtained general terms of approval from each relevant approval body, and

(b) the Court is not bound to refuse an application for development consent because a relevant approval body has decided that general terms of approval will not be determined or has decided not to grant a relevant approval, and

(c) the Court may determine an appeal even though a development consent granted as a result of the appeal is inconsistent with the general terms of approval of a relevant approval body.

Environmental Planning and Assessment Regulation 2000

121B Amendment of modification application—the Act, s 4.64(1)(q)

- (1) An application for modification of a development consent may, with the agreement of the consent authority, be amended by the applicant at any time before the application is determined by lodging an amendment on the NSW planning portal.
- (2) If the amendment results in a change to the development, the applicant must provide the consent authority with details of the nature of the change to the application

Land and Environment Court Act 1979

17 Class 1—environmental planning and protection appeals

The Court has jurisdiction (referred to in this Act as “Class 1” of its jurisdiction) to hear and dispose of the following—

...

- (d) appeals, objections and applications under sections 4.55, 8.7, 8.8, 8.9, 8.16, 8.18, 8.21, 8.22, 8.23 and 8.25 of, and clause 35 of Schedule 5 to, the Environmental Planning and Assessment Act 1979,

...

39 Powers of Court on appeals

- (1) In this section, appeal means an appeal, objection, reference or other matter which may be disposed of by the Court in proceedings in Class 1, 2 or 3 of its jurisdiction.
 - (2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.
 - (3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.
 - (4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.
 - (5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.
- ...
- (7) The functions of the Court under this section are in addition to and not in derogation from any other functions of the Court.
 - (8) This section (other than subsection (5)) does not apply to proceedings under section 30 or 31 of the Access to Neighbouring Land Act 2000.

Contentions

10 Council raised the following contentions:

- (1) Poor amenity: the location of the plant enclosure on the upper ground level for Stage 3 is likely to cause poor amenity outcomes for apartments A1.UG.07, A1.UG 06, B1.UG.09 and B2.UG.08 in close proximity to the plant equipment.
- (2) Access: access via the jersey kerb on Cudgegong Road, and updated road levels to match Cudgegong Road as constructed.
- (3) Streetscape and design: particularly in relation to driveway crossings, impact on pedestrian experience at the ground plane, and activation of the streetscape.
- (4) Traffic: the jersey kerb and retaining wall fronting Cudgegong Road, concrete median strip, extent of the proposed median strip, traffic implications re access for retail/residential/service vehicles.
- (5) Planning: insufficient information regarding the amended floor plans; and further information on RL level of 60.3 for Building 3B where the stair core is proposed to be included to the roof terrace that projects above the existing approved RL 88 to the top of the stair core by 1.4m.
- (6) Waste: various matters to be addressed in Buildings 3A/3B and 4A/4B.
- (7) Engineering: insufficient information regarding manoeuvring ability so as not to cross the centre line.
- (8) Endeavour Energy: location of the electricity easement.

11 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 agreeing to amended plans, and reports as listed below being provided to Council to satisfy Council's contentions, Council uploading the amended plans on the NSW Planning Portal, and the Applicant filing the amended Modification including the updated reports in Court. The decision requires the Court to uphold the appeal, and grant consent to the Modification subject to conditions.

12 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 ss 4.16 and 8.14 of the EPA Act, and ss 34(3) and 39(2) of the LEC Act together with cl 4.6 of the Growth Centres SEPP to uphold the height variation and appeal, and grant consent to

the Modification. 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 to be:

- (1) Development of the Site is controlled by the Growth Centres SEPP. The Site is situated within the Tallawong Station (Area 20) Precinct and the provisions of Appendix 6 of the Growth Centres SEPP: Blacktown Growth Centres Precinct Plan apply. The aims of the Growth Centre SEPP are:
 - (a) to co-ordinate the release of land for residential, employment and other urban development in the North West Growth Centre, the South West Growth Centre, the Wilton Growth Area and the Greater Macarthur Growth Area,
 - (b) to enable the Minister from time to time to designate land in growth centres as ready for release for development,
 - (c) to provide for comprehensive planning for growth centres,
 - (d) to enable the establishment of vibrant, sustainable and liveable neighbourhoods that provide for community well-being and high quality local amenity,
 - (e) to provide controls for the sustainability of land in growth centres that has conservation value,
 - (f) to provide for the orderly and economic provision of infrastructure in and to growth centres,
 - (g) to provide development controls in order to protect the health of the waterways in growth centres,
 - (h) to protect and enhance land with natural and cultural heritage value, and
 - (i) to provide land use and development.
- (2) Under the Growth Centres SEPP, the Site is zoned B2 Local Centre and B4 Mixed Use. The proposed development is permissible with consent and the aims of the zones are as follows:
 - (a) Zone B2:
 - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities.
 - To maximise public transport patronage and encourage walking and cycling.
 - (b) Zone B4:
 - To provide a mixture of compatible land uses.

- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To provide for residential development that contributes to the vitality of the local centre.
- To ensure that residential development adjacent to the local centre does not detract from the primary function of the centre, being to provide for retail, business, entertainment and community uses.
- To facilitate active retail, commercial, entertainment and community facility uses at ground level of mixed use developments.

(3) The relevant clauses in Appendix 6 of the Growth Centres SEPP that apply to the determination of the Modification Application are considered below:

Clause	Requirement	Proposal
Minimum Lot Size		
4.1A(2) Minimum lot size	The minimum lot size for development for the purpose of residential flat buildings is 2,000m ² .	The proposed development complies with clause 4.1A(2).
Height of Buildings		
4.3 Height of Buildings	The permitted maximum height of the proposed development is 26m.	<p>DA (LEC Proceedings 2020/341091)</p> <p>A breakdown of the proposed maximum building heights and variations to the maximum building height standard is below:</p> <p>Building 3A: 31.50m</p> <p>Building 3B: 32.2m</p>

		<p>Building 4A: 31.10m</p> <p>Building 4B: 28.9m</p> <p>The maximum building height proposed for buildings 3A, 3B, 4A and 4B is 32.20m, which equates to a variation of 6.2m. The Applicant submitted with its DA a clause 4.6 variation request prepared by City Plan dated 2 September 2021 (uploaded to the planning portal on 7 September 2021 and filed in the Court on 7 September 2021). The clause 4.6 request adequately justifies the exceedance to the height of buildings control.</p> <p>Modification Application (LEC Proceedings 2020/341094)</p> <p>The building heights have not been amended from the Original Consent other than Building 4B which has been lowered from 30.6m to 28.9m.</p>
Floor space ratio		
4.4 – Floor Space Ratio	<p>The floor space ratio for a building on any land is not to exceed the maximum floor space ratio shown for the land on the Floor Space Ratio Map https://www.legislation.nsw.gov.au/-/view/EPI/2006/418/maps. The maximum floor space ratio is 2.75:1.</p>	<p>The FSR has been adjusted to 2.22:1 for Stage 3 and 2.17:1 for Stage 4.</p> <p>The total FSR is</p>

		2.19:1 which complies with the FSR control
Part 6 Additional Local Provisions		
6.5 Active Street Frontages	Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use.	Active street frontages are proposed along the eastern frontage and southern of building 4A and 4B and the western and southern frontage of building 3A and 3B in satisfaction of this requirement.

- (4) State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) cl 7 requires a consent authority to consider the contamination and remediation of land prior to determining the Modification.
- (a) On 2 November 2015 a contamination site investigation was undertaken by Douglas Partners to investigate the likelihood of the presence of contamination on the site (Site Investigation Report). The Site Investigation Report is found behind Tab 13 of the Class 1 Application filed in Court.

- (b) The Site Investigation Report concluded that the Site can be made suitable for the proposed mixed use development subject to:
 - (i) Completion of a detailed site investigation for contamination;
 - (ii) Remediation and/or management of any contamination issued identified by the Detailed Site Investigation; and
 - (iii) Additional investigations being undertaken should excavations exceeding 2.8m be conducted.
 - (c) Council is satisfied that cl 7(1) of SEPP 55 has been addressed through the Site Investigation Report and the conditions of consent in the Concept Plan Approval, which will not be amended in the Modification.
 - (d) The potential for contamination was considered prior to consent being granted to the Concept Plan Approval, and resulted in condition of consent no 7.1.2 requiring implementation of the recommendation provided in the Site Investigation Report prior to the issue of a construction certificate.
- (5) In relation to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, the BASIX Certificate 836587M_3 issued 3 August 2019 remains valid and is referenced in Annexure C - conditions of consent.
- (6) In relation to State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP):
 - (a) Pursuant to cl 45 of the Infrastructure SEPP, before determining an application that requires penetration of ground within 2m of an underground electricity power line, distribution pole or within 10m of an electricity power line, the consent authority must give written notice of the application to the relevant supply authority. The Modification was referred to Endeavour Energy, and as a result of that consultation relevant design changes have been made to the plans.
 - (b) Pursuant to cl 104 of the Infrastructure SEPP, before determining an application, the consent authority must give written notice of the application to Transport for NSW (that part which was formerly RMS). Council referred the Modification to Transport for NSW, and as a result of the recommendations design changes have been made and conditions of consent imposed to address Transport for NSW's recommendations.
- (7) Pursuant to s 7.23 of the EPA Act, a condition of consent is proposed that requires the payment of a Special Infrastructure Contribution – which is now proposed condition 4.3 of the conditions of consent to the Modification.

- (8) State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65).
- (a) Clause 30(2)(a) of SEPP 65 require that development consent must not be granted if an application does not demonstrate that adequate regard has been given to the design quality principles.
 - (b) The Modification has been amended during the s 34 process.
 - (c) The Modification as amended complies with SEPP 65. How the nine design quality principles in Schedule 1 of SEPP 65 were satisfied are set out in Zhinar Architects' SEPP 65 Design Verification Statement dated 24 August 2021.
- (9) The Modification was notified between 2 October 2020 and 16 October 2020. No submissions were received in response to the notification. As there were no objectors to the Modification, and there were no changes to the built form, Council exercised its discretion not to notify the amendments to the Modification. I agree with Council's decision in this regard.
- (10) The parties agree that the Modification can be approved taking into consideration the matters in s 4.15(1)(b)-(e) of the EPA Act.
- (11) The parties have agreed the conditions of consent which are Annexure C, and agree the conditions are appropriate taking into account s 4.17 of the EPA Act.
- 13 Council's contentions as set out in par [10 [Ref83803231](#)] above have been satisfied as set out below.

Contention 1	Poor Amenity	Council's contention on poor amenity have been addressed with amended plans and drawings to address acoustic amenity concerns for residential apartments arising from plant enclosures and equipment.
Contention 2	Access	Council's contention on access has been addressed as the suspended slab previously required along Cudgegong Road has been removed and access redesigned, and with the requested updated survey plans by Usher & Co dated 12.07.2021.

Contention 3	Streetscape and design	In the Concept Plan Approval there were 2 x driveway crossings off Cudgegong Road and none of New East West Street 01. The proposed modification had 3 x crossings off Cudgegong Road and 1 off New East West Street 01. The contention has been met by redesign of the plans and in the conditions.
Contention 4	Traffic	The traffic contention relates to the 150m frontage to Cudgegong Road. Council requested a median strip in front of the development near the site and the future entrance to the future Implexa Parade/ Tallawong Station carpark. An existing jersey kerb and retaining wall fronting the development was retained, and the engineers agreed the form of the median strip, and the swept paths as provided by the Applicant.
Contention 5	Insufficient Information to assess the Modification	Council's planning contentions have been addressed by the provision of amended floor plans details as agreed during s 34 process. The Concept Plan Approval granted a cl 4.6 variation approval to increase the height of the Stage 1 buildings by 4.5m and the Stage 2 buildings by 6.2m. In granting the cl 4.6 variation consideration was given to ensure a better development

		outcome.. See below in [14 Ref83803413].
Contention 6	Waste	Council requested, and the Applicant provided, further detailed drawings demonstrating that the waste collection and removal was suitable; i.e. waste truck loading bays, swept paths for waste collection, vertical cross sections plans, ramp grades, location of the bulky waste storage areas, bin travel distances, suitable bin tub and trolley storage area, waste rooms with required number of bins for the residential component, travel bin paths to waste chute rooms on each floor, physical treatment to the loading bay of the residential flat building to prevent unauthorised parking, and an amended waste management plan.
Contention 7	Engineering	This contention relates to traffic engineering. The contention has been met by the Applicant providing additional engineering plans and drawings (including swept paths and sight line assessment) as agreed and included into the architectural layout on the amended plans.
Contention 8	Endeavour Energy	Council's Endeavour Energy contention has been addressed by amending the relevant plans to include the high voltage power line easement.

- 14 The cl 4.6 Variation Request Report by City Plan dated 2 September 2021 gave background to the request and concluded as follows:

- (a) The exception is sought pursuant to cl 4.6 of the Growth Centres SEPP to the strict application of the height of building development standard prescribed the said cl 4.3. Clause 4.3 prescribes a maximum building height of 26m for the Site, whereas the Modification includes height up to 32.2m from the existing ground level.
- (b) A cl 4.6 exception was granted in the Concept Plan Approval where a maximum height of RL 84.90 was allowed for at the highest habitable level of Building 3A. The Modification seeks consent for a maximum height of RL 89.40 (an increase of 500mm from the Concept Plan Approval).

In the Concept Plan Approval, a maximum height of RL 84.90 was allowed for the top of the lift over-run of Building 3B. The Modification seeks approval for a maximum height of RL 86.20 (or an increase of 1.3m).
- (c) However, the lift over-run in Building 4A at RL 90.80 has been reduced from RL 91.80 (a decrease of 1m in height).
- (d) In both instances of the height increase in Buildings 3A/3B the area of vertical and horizontal variances is minor in comparison to the Concept Plan Approval area. The building mass associated with the variances are located somewhat internally, or completely internally in the case of the mass associated with Building 3A. As such, the mass would not be readily visible from the public domain. Similarly, the limited mass ensures that there are no unreasonable shadow impacts. Despite the variances, the Modification does not breach the overall maximum height allowed for by the Concept Plan Approval. For these reasons, the objectives of, and tests related to cl 4.6 are satisfied by the Modification.
- (e) The City Plan report submits in par 9 on p 17:
 - (i) Compliance with the development standard is unreasonable and unnecessary in the circumstances of the Modification;
 - (ii) The Modification achieves the objectives of the development standard and is consistent with the objective of the B2 and B4 zones, and is therefore in the public interest;
 - (iii) There are sufficient environmental planning grounds to justify the contravention;
 - (iv) There is no public benefit in maintaining the standard;

- (v) The proposal is consistent with the building height strategy approved as part of the Concept Plan Approval. That is, height of Gross Floor Area lost from the building envelope immediately adjacent to the town squares, but offset with additional height elsewhere throughout the Concept Plan, is a suitable response to the Site as it improves solar access to the squares, and is without unreasonable amenity impacts elsewhere; and
 - (vi) The contravention does not raise any matter of State or Regional significance.
 - (f) Pursuant to s 39(2) of the LEC Act, I accept that the cl 4.6 variation to the height control is reasonable in the circumstances of the Modification. I accept the City Plan Report meets the requirements to enable me to grant the variation to the height control.
- 15 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 ss 34(3) and 39(2) of the LEC Act and ss 4.16 and 8.14 of the EPA Act. I have set out in detail, and attached as Annexures A and B, together with the conditions in Annexure C, that each jurisdictional prerequisite has been satisfied.
- 16 The Court agreed to the amendments made during the s 34 conciliation conference, and in compliance with cl 121B of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) the amended plans, as referenced in par 1 of the conditions of consent in Annexure C, were uploaded to the NSW Planning Portal on 1 September 2021 by the Council.
- 17 In accordance with cl 121B(2) of the EPA Regulation on 23 August 2021 the Applicant filed the amended Modification in Court.
- 18 The Concept Plan Approval is able to be modified in accordance with s 4.24(3) of the EPA Act provided consideration is given to the provisions of s 4.15 of the EPA Act, and the development as modified is consistent with the Concept Plan Approval in accordance with s 4.24(2) of the EPA Act. I have considered the provisions of s 4.24 and accept that the Modification is consistent with the Concept Plan Approval.
- 19 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.

20 The Court notes that:

- (1) Blacktown City Council, as the relevant consent authority has agreed, pursuant to cl 121B of the Environment Planning and Assessment Regulation 2000, to amend Modification Application MOD-20/00357.
- (2) The respondent uploaded Modification MOD-20/00357 being the amended modification application to the NSW Planning Portal on 19 August 2021.
- (3) The Applicant has subsequently filed the amended Modification Application with the Court on 23 August 2021, as described in Annexure A.

21 The Court orders:

- (1) The appeal is upheld.
- (2) Consent is granted to Modification Application No. MOD-20/00357 for the modification of Development Consent SPP-17-00039 (development consent), relating to amendments to the vehicular access and loading arrangements, overall height, total apartment and car parking numbers and variations to the building envelopes of the approved Concept Plan and Stage 1 on Lot 72 and 73 in Deposited Plan 208203, otherwise known as 43 - 53 Cudgegong Road, Rouse Hill, subject to the conditions in Annexure C. A summary of the approved modifications to conditions of consent is set out in Annexure B.
- (3) Development Consent SPP-17-00039, as now amended by Modification Application MOD-20/00357, is subject to the consolidated and updated conditions as set out in Annexure C.
- (4) The respondent is directed to register the development consent on the NSW planning portal within 14 days.

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M Peatman

Acting Commissioner of the Court

Annexure A (122218,
pdf)<http://www.caselaw.nsw.gov.au/asset/17c4db062f8c3813949d4984.pdf>

Annexure B (268373,
pdf)<http://www.caselaw.nsw.gov.au/asset/17c4db1ef267b55acc11249a.pdf>

Annexure C (516549,
pdf)<http://www.caselaw.nsw.gov.au/asset/17c53b735bdb8f37567fc597.pdf>

Plans (13888796,
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