



Land and Environment Court New South Wales

Medium Neutral Citation:	Environa Studio Pty Ltd v Inner West Council [2016] NSWLEC 1618
Hearing dates:	10 November 2016
Date of orders:	20 December 2016
Decision date:	10 November 2016
Jurisdiction:	Class 1
Before:	Brown C
Decision:	1. The appeal is upheld. 2. The application to modify the approval for a housing development containing live-work units at 39 Phillip Street, Newtown is approved subject to the conditions in Annexure A. 3. The exhibits are returned with the exception of exhibits 1 and B.
Catchwords:	MODIFICATION: modifications to change the approved live-work units by creating retail tenancies at the ground level and separate residential units at the first floor level – whether contrary to the objectives of the B7 Business Park zone and character of the area
Legislation Cited:	Environmental Planning and Assessment Act 1979 Marrickville Local Environmental Plan 2011
Cases Cited:	BGP Properties Pty Ltd v Lake Macquarie City Council [2004] 138 LGERA 237
Category:	Principal judgment
Parties:	Environa Studio Pty Ltd (Applicant) Inner West Council (Respondent)
Representation:	Counsel: Mr T To, barrister (Applicant) Mr J Strati, solicitor (Respondent) Solicitors: Mills Oakley (Applicant) Inner West Council (Respondent)
File Number(s):	2016/00210865

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal of Application Number DA 2014/00388.01 for the modification under s 96(AA) of the *Environmental Planning and Assessment Act* 1979 of the development consent to the approved housing development containing live-work units at 39 Phillip Street, Newtown.
- 2 The modifications remove the proposed live-work units creating retail tenancies at the ground level, and separate residential units at the first floor level. The proposed modifications specifically provide for:
 - *Basement:* reconfiguration to accommodate an additional accessible parking space, and provide residential storage areas. There are 13 spaces including three accessible spaces. There is no increase in the number of spaces from the original approval.
 - *Ground floor:* the deletion of the live-work units with the removal of the internal stairs between the ground first floor of the three units fronting Gladstone Street and two units fronting Phillip Street. Deletion of the internal separation between the units and conversion to a retail space of 198 sq m at Gladstone Street and 73 sq m at Phillip Street and change to the garbage storage area with the separate retail garbage storage room and modifications to the toilet.
 - *First floor:* the conversion of the live/work units to separate residential units by three studios, a one bedroom unit and a two bedroom unit. Increase the balcony areas for Unit 3 to 30 sq m and reduce the balcony for Unit 4 to 13.5 sq m.
- 3 The modified development ultimately comprises a four story building with three retail premises ranging from 73 sq m to 198 sq m at ground level, and 11 residential units at the upper levels of the building and basement car parking for 13 vehicles.
- 4 The council maintains that the modification application should be refused for two principal reasons:
 - it is contrary to the objectives of the B7 Business Park zone, and cl 6.13 of the *Marrickville Local Environmental Plan* 2011 (LEP 2011) and supporting s 6.6 of the *Marrickville Development Control Plan* 2011 (DCP 2011), and
 - it is not compatible with the character of the locality.

The site

- 5 The site is located at the corner of Phillip Street and Gladstone Street, Newtown, north of the intersection of Enmore Road and Phillip Street. To the north of the site on the opposite side of Gladstone Street is an electrical substation and railway corridor. The southern boundary of the site adjoins a two storey dwelling house at 37 Phillip Street and a three storey dwelling house at 2D Gladstone Street.
- 6 The site is described as SP 55583 which contains two strata lots known as 39 Phillip Street, Newtown. It is irregular in shape with a frontage of 31.81 m to Phillip Street, 45.755 m to Gladstone Street and a rear boundary of 34.725 m with a combined site

area of 661 sq m. The site is currently undergoing excavation consistent with the development consent.

- 7 The locality consists of a mix of low and medium density residential and commercial/industrial uses.

Relevant planning controls

- 8 The site is zoned B7 Business Park under LEP 2011. The use, after modification, is characterised as shop-top housing and is a permissible use in this zone.
- 9 DCP 2011 relevantly provides requirements for Residential Uses in Specified Employment Areas (Live/Work) (pt 6.6) and The Strategic Context for the Enmore North and Newtown Central Precinct (Precinct 8), where the site is located.(pt 9.8).

Zone objectives

- 10 The B7 zone objectives are:
- To provide a range of office and light industrial uses;
 - To encourage employment opportunities;
 - To enable other land uses that provide facilities or services to meet the day to day needs of the workers in the area;
 - To provide for limited residential development in conjunction with permissible active ground floor uses;
 - To provide businesses and office premises for the purpose of art, technology production and design sectors;
 - To enable a purpose-built dwelling house to be used in certain circumstances as a dwelling house.
- 11 Clause 2.3(2) requires the Court to have regard to the zone objectives when considering a development application.
- 12 Clause 6.13 states:
- 6.13 Dwellings and residential flat buildings in Zone B7 Business Park**
- (1) The objective of this clause is to provide for limited residential development for small scale live-work enterprises, to assist in the revitalisation of employment areas and to provide a transition between adjoining land use zones
- (2) This clause applies to land in Zone B7 Business Park.
- (3) Development consent must not be granted to development for the purpose of a dwelling or a residential flat building on land to which this clause applies unless the consent authority is satisfied that the development is part of a mixed use development that includes business premises, office premises or light industry on the ground floor.
- 13 With the benefit of submissions on this matter from Mr To, for the applicant and Mr Strati, for the council, I accept the submission of Mr To that there is no barrier to the modification application being approved... I accept that the B7 zone seeks to limit residential uses by prohibiting the large range of residential uses included in the definition of "residential accommodation." The B7 zone does however specifically allow some residential uses being residential dwellings, residential flat buildings and shop-top housing.

- 14 Clause 6.13(3) places further restrictions on the permissible forms of residential development in the B7 zone by requiring that “the development is part of a mixed use development that includes business premises or light industry on the ground floor.” Importantly, cl 6.13(3) applies only to a dwelling or a residential flat building and not shop top housing.
- 15 I accept the submission of Mr To that the wording in cl 6.13(3) does not include shop-top housing and as such cl 6.13 does not apply. Consequently part 6.6 of the DCP also does not apply. It is relevant that the prohibited uses within the B7 zone include residential accommodation.

Character

- 16 On the question of character, I also accept the submissions of Mr To. As shop-top housing is a permissible use in the zone, the comments of McClellan CJ in *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] 138 LGERA 237 are relevant. At [117], His Honour states:
- 117 In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor (see *Mobil Oil Australia Ltd v Baulkham Hills Shire Council* (No 2) 1971 28 LGRA 374 at 379), planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects (*Nanhouse Properties Pty Ltd v Sydney City Council* (1953) 9 LGR(NSW) 163; *Jansen v Cumberland County Council* (1952) 18 LGR(NSW) 167). Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened
- 17 These comments are directly applicable to the issue of character raised by the council. The applicant has reasonably accepted a condition requiring that development consent be obtained for the retail/commercial uses on the ground floor where a proper assessment under s 79C will determine the appropriateness or not of any uses that seek to use the new retail/commercial areas.
- 18 Given the fact that shop-top housing is a permissible use and that the council raised no issue with the size, location and design of the proposed building, I am satisfied that the objectives for the B7 zone are not offended.
- 19 Similarly, I am satisfied that the proposed development does not offend the desired future character as set out in part 9.8.2 of the DCP. There being no dispute over any conditions, the orders of the Court are:
- (1) The appeal is upheld.
 - (2) The application to modify the approval for a housing development containing live-work units at 39 Phillip Street, Newtown is approved subject to the conditions in Annexure A.
 - (3) The exhibits are returned with the exception of exhibits 1 and B.

G Brown

Commissioner of the Court

[210865.16 - Annexure A - Conditions of Consent \(141 KB. pdf\)](#)

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Decision last updated: 21 December 2016

