



Land and Environment Court

New South Wales

Case Name:	Goldcoral Pty Ltd v Richmond Valley Council
Medium Neutral Citation:	[2023] NSWLEC 1540
Hearing Date(s):	16 June, 2023, 18 July 2023 and 27 July 2023
Date of Orders:	18 September 2023
Decision Date:	18 September 2023
Jurisdiction:	Class 1
Before:	Froh R
Decision:	The orders to the Court are: (1) The application for leave to amend the development application is refused; and (2) The Notice of Motion is dismissed.
Catchwords:	NOTICE OF MOTION – application to amend the development application
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 1.5, 8.7 Environmental Planning and Assessment Regulation 2000, cl 55 Environmental Planning and Assessment Regulation 2021, Sch 6, s 3 Land and Environment Court Act 1979, s 39
Cases Cited:	Ardill Payne Partners v Tweed Shire Council [2022] NSWLEC 1153 Australian Enterprise Holdings Pty Ltd t-as AEH Group v Camden Council (2010) 173 LGERA 226; [2010] NSWLEC 70 Campton v Parramatta City Council [2011] NSWLEC 12 Chris Lonergan & Associates v Byron Shire Council [2004] NSWLEC 468 Groeneveld v Wollongong City Council (2009) 168

LGERA 260; [2009] NSWLEC 149
Hallidays Point Development Pty Ltd v Greater Taree
City Council (No 2) [2008] NSWLEC 1446
Orico Properties Pty Limited v Inner West Council
[2017] NSWLEC 90
Pepperwood Ridge Pty Ltd v Newcastle City Council
[2007] NSWLEC 19
Radray Contructions Pty Limited v Hornsby Shore
Council (2006) 145 LGERA 292; [2006] NSWLEC 155
Rose Bay Afloat Pty Ltd v Woollahra Council (2002)
126 LGERA 36; [2002] NSWLEC 208
Sydney Tools Pty Ltd v Canterbury-Bankstown Council
(No 2) [2019] NSWLEC 6
The Next Generation Pty Limited v Independent
Planning Commission [2020] NSWLEC 13

Category: Procedural rulings

Parties: Goldcoral Pty Ltd (Applicant)
Richmond Valley Council (First Respondent)
Simone Barker (Second Respondent)

Representation: Counsel:
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M Astill (First Respondent)
L Sims (Second Respondent)

Solicitors:
Corrs Chambers Westgarth (Applicant)
Wilshire Webb Staunton Beattie (First Respondent)
King & Wood Mallesons (Australia) (Second
Respondent)

File Number(s): 2022/279591

Publication Restriction: Nil

JUDGMENT

- 1 **Registrar:** This application is a Notice of Motion seeking leave to amend the development application currently under appeal in this Court. The Notice of Motion was filed by Goldcoral Pty Ltd (Receiver and Manager appointed) (the Applicant) and is opposed by the first and second Respondent.

- 2 The substantive proceedings concern the appeal brought by the Applicant under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) and relate to the refusal on 7 September 2022 by the Northern Regional Planning Panel (the Panel) of concept development application DA2015/0096 (the DA) at 240 Iron Gates Drive, Evans Head.
- 3 The Applicant's motion was listed before me for hearing on 16 June 2023, 18 July 2023 and 27 July 2023. The motion to amend was supported by three affidavits of Mr Newman affirmed on 27 March 2023, 13 April 2023 and 13 June 2023 and an affidavit of Ms Camenzulli affirmed on 11 July 2023. The first Respondent relied on the affidavit of Mr Edwards sworn on 29 June 2023. All three parties helpfully provided the Court with written submissions.
- 4 The development application the subject of this appeal has had a long history. The DA was originally lodged with the Richmond Valley Council on 27 October 2014 and was amended on four occasions prior to its determination by the Panel in September 2022. These proceedings were commenced on 19 September 2022.
- 5 On 1 February 2023, the Applicant went into receivership and a receiver and manager for the Applicant was appointed and new solicitors engaged.
- 6 The second Respondent, Ms Barker, was joined to the proceedings on 1 March 2023 and she filed her Statement of Facts and Contentions on 10 March 2023.
- 7 All three parties participated in a conciliation conference on 6 March 2023 which were later terminated. The matter is listed for a 10-day hearing commencing on 23 October 2023.

The statutory framework

- 8 As the DA was lodged and not finally determined before 1 March 2022, the Environmental Planning and Assessment Regulation 2000 (EPA Reg 2000) continues to apply to the DA by effect of the savings and transitional provision (Sch 6, s 3 to the Environmental Planning and Assessment Regulation 2021).
- 9 As such, the power to amend the DA is contained in cl 55(1) of the EPA Reg 2000 which provides:

(1) A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined, by lodging the amendment or variation on the NSW planning portal.

- 10 The Court has power to exercise the functions and discretions of the consent authority to permit an amendment to the DA under cl 55 of the EPA Reg 2000, pursuant to s 39 (2) of the *Land and Environment Court Act 1979*.

Considerations

- 11 The parties agreed with the approach adopted by her Honour Jagot J in *Radray Contructions Pty Limited v Hornsby Shire Council* (2006) 145 LGERA 292; [2006] NSWLEC 155, and the two questions which the Court must be satisfied in considering whether leave should be granted to amend a DA, namely:

- (1) Is the power available as a matter of statutory construction having regard to its scope and the proposed amendments; and
- (2) Should the power be exercised on discretion.

- 12 Although there is no guidance in the EPA Reg 2000 as to the scope and extent of the power under cl 55 or relevant considerations to the exercise of the power, cl 55 has been subject to much judicial consideration.

- 13 Robson J in *Orico Properties Pty Ltd v Inner West Council* [2017] NSWLEC 90 (*Orico*) at [10] helpfully sets out a useful summary of the case law as follows:

“...in applying cl 55 the Court has established three “clear principles” which may be summarised as follows:

- (1) The power to amend is “beneficial and facultative” so as to enable an applicant to respond to any issues identified, and to encourage the consent authority to solicit a better outcome (see Ebsworth at [40]).
- (2) The power to amend is the power to change, not to propose a new or original application.
- (3) A proposal may change in terms of design and layout, however the focus remains on whether the proposal can answer the overall description and essence of the development as originally proposed.”

- 14 Robson J went on to note the comments of Talbot J in *Pepperwood Ridge Pty Ltd v Newcastle City Council* [2007] NSWLEC 19 at [35]:

“...having regard to the overall concept I am not convinced that the substantial changes to the layout, specification and configuration of the proposed buildings are such that the proposal submitted in August 2006 can be regarded as an amendment or variation of the original development. It is in

truth a new and conceptually different proposal which bears little resemblance to the original except in its overall description of the type of the development...”

15 Robson J goes on to say at [27] in *Orico*:

“...Reliance on descriptive nomenclature such as “essence”, “overall concept”, and/or “characterisation” whilst of some assistance, does not substitute for the close consideration of the detail involved.

...”

16 In other words, just because the proposal retains the overall description of a subdivision this does not mean that the proposed amendments are within the scope of cl 55.

17 In this matter, Applicant submits that my consideration of whether the proposed amendment is within my power should be guided by whether the proposed development remains the same in overall concept and that I should not adopt any approach that involves a quantitative assessment of the variations to determine whether they are substantial by using some empirical formula to ascertain the degree of change.

18 The Respondents disagree with this approach and direct me to Robson’s J findings in *Orico* where his Honour details the elements of that proposal that were sought to be changed and the significant suite of further reports that were sought to be relied on. Despite his Honour finding that this was done by the Applicant in *Orico* so as to address some of the reasons for refusal and to achieve a better outcome, it was Robson J’s view that, in the particular application before him, a “tipping point” had been reached such that the amendment sought constituted a new or fresh application.

19 In support of this, the Respondents set out the changes proposed, which they say illustrate the extent of change in the proposed amendment. These changes include:

- (1) There is now multi-dwelling housing lot whereas previously there was not;
- (2) The total area of residential subdivision has been reduced by over 2.2 hectares;
- (3) The area of the road reserve has reduced by close to 2 hectares;

- (4) By retaining a hill that was to have been levelled, the proposed earthworks are reduced by approximately:
 - (a) 90,000 cubic metres of cut; and
 - (b) 85,000 cubic metres of fill;
 - (5) A community title subdivision is now proposed whereas previously there was not; and
 - (6) Crown foreshore embellishment works were previously proposed and now they are not.
- 20 In *The Next Generation Pty Limited v Independent Planning Commission* [2020] NSWLEC 13 (*The Next Generation*), Moore J referred to *Orico* and adopted a similar approach to Robson J and examined very closely the relevant plans to comprehend the precise nature and scope of the changes. In that case, his Honour considered the changes to fuel composition, layout, the placement of a large building where previously there was none and the changes to the proposed built form shown on the elevations.
- 21 Ultimately, his Honour found that although the proposed amendment was ostensibly to reduce the scale and environmental impact of the overall development, the changes were, as a matter of fact, so different as to constitute a development for which a fresh application was required.
- 22 Although all parties in the matter before me appear to agree that the proposed amendment remains a subdivision, the question before me for determination is whether what Robson J refers to as the “tipping point” has been reached.
- 23 To assist me with this determination, the Applicant has provided me with numerous authorities where the Court has granted leave to amend development applications in similar factual circumstances as its proposed amendment.
- 24 Within the context of a development application for subdivision, the Court has granted leave for amendments of the following nature:
- (1) Amendment to the number and dimensions of subdivided lots: *Ardill Payne Partners v Tweed Shire Council* [2022] NSWLEC 1153;
 - (2) Amendment to the number and location of lots and location of a perimeter road: *Hallidays Point Development Pty Ltd v Greater Taree City Council (No 2)* [2008] NSWLEC 1446;

- (3) Relocation of a proposed road for a residential subdivision and subdivision works, and changes to trees marked for removal: *Groeneveld v Wollongong City Council* (2009) 168 LGERA 260; [2009] NSWLEC 149;
 - (4) Changes to the extent of cut and fill for roads and site improvements, removal of vegetation, changes to the number of lots to be subdivided and their position, relocating a sewerage treatment plans and transpiration bed: *Chris Lonergan & Associates v Byron Shire Council* [2004] NSWLEC 468.
- 25 The power to amend has also been applied in respect of a proposed development, the land to which the proposed development relates, or both: *Rose Bay Afloat Pty Ltd v Woollahra Council* (2002) 126 LGERA 36; [2002] NSWLEC 208. Extending the land to which the development application relates has also been held to be within the ambit of cl 55: *Sydney Tools Pty Ltd v Canterbury-Bankstown Council (No 2)* [2019] NSWLEC 6.
- 26 The fact that an amendment seeks to add an additional type of development within the meaning of “development” under s 1.5(1) of the EPA Act has also been found to not necessarily require a fresh development application: *Australian Enterprise Holdings Pty Ltd t-as AEH Group v Camden Council* (2010) 173 LGERA 226; [2010] NSWLEC 70; *Campton v Parramatta City Council* [2011] NSWLEC 12.
- 27 Although these decisions provide authority for elements of the proposed amendment, none are determinative, as I am required to consider the cumulative effect of the whole of the proposed amendment. Similarly, to *The Next Generation*, these amendments are responsive to the contentions that have been raised by the Respondents and are a reduction in scale. However, my view is that these changes which I have detailed earlier in my judgment are more than a minor matter of amendment and have pushed past the “tipping point”.
- 28 Accordingly, I am satisfied that the proposed amendments are, as a matter of fact, so different as to constitute a new development application. There is no need to consider the jurisdictional issues posed by the Council or Ms Barker as to whether important and substantial discretionary matters are engaged.
- 29 The consequence is that I must refuse the application.

30 The orders to the Court are:

- (1) The application for leave to amend the development application is refused; and
- (2) The Notice of Motion is dismissed.

.....

S Froh

Registrar of the Court

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