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| Case Name:  | Columbia Nursing Homes Pty Ltd v Inner West Council |
| Medium Neutral Citation:  | [2019] NSWLEC 1596 |
| Hearing Date(s):  | Conciliation conference on 14 November 2019 |
| Date of Orders: | 6 December 2019 |
| Decision Date:  | 6 December 2019 |
| Jurisdiction:  | Class 1 |
| Before:  | Clay AC |
| Decision:  | The Court orders that:(1)   The Applicant is granted leave to rely upon the amended plans set out in Annexure “A”. The Applicant is to pay the Council’s costs thrown away in the agreed sum of $5,000 pursuant to section 8.15(3) of the EP&A Act.(2)   The Appeal is upheld.(3)   Development Application Number 2018/00066, for demolition of an existing residential aged care facility and construction of new residential aged care facility with basement car parking and associated infrastructure and landscaping at 442-444 Marrickville Road, Marrickville, NSW is approved subject to the conditions set out in Annexure “B”. |
| Catchwords:  | DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders |
| Legislation Cited:  | Environmental Planning and Assessment Act 1979Land and Environment Court Act 1979Marrickville Local Environmental Plan 2011State Environmental Planning Policy (Affordable Rental Housing) 2009State Environmental Planning Policy No 55 – Remediation of Land |
| Category:  | Principal judgment |
| Parties:  | Columbia Nursing Homes Pty Ltd (Applicant)Inner West Council (Respondent) |
| Representation:  | Counsel:Dr J Smith (Applicant)M Bonnano (Solicitor) (Respondent) Solicitors:McKees Legal Solutions (Applicant)Inner West Council (Respondent) |
| File Number(s):  | 2018/274951 |
| Publication Restriction:  | No |

Judgment

1. **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by the Respondent of a development application DA 179/2018 (the DA) for the demolition of existing structures and the construction of an aged care facility at Lot 5 Deposited Plan 215816 known as 442-446 Marrickville Road, Marrickville (the site).
2. On 8 October 2019, the Registrar ordered that the appeal be heard together with appeal 2019/281032 against the refusal by the Respondent of development application DA 2019/00258 for the demolition of a portion of a footbridge at Lot E Deposited Plan 2623 known as 448 Marrickville Road, Marrickville (448). The footbridge connects 448, which operates as an aged care facility, with the existing aged care facility at the site (442-446) and is proposed to be demolished as part of the DA the subject of this appeal.
3. 448 is a local heritage item (Schedule 3 MLEP) and accordingly cl 5.10 of the Marrickville Local Environmental Plan 2011 (MLEP) applies to the DA.
4. A conciliation conference between the parties pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act) took place on 8 April 2019 and was then adjourned on a number of occasions but the matter was not resolved and the conciliation was terminated on 10 May 2019.
5. The hearing of the two appeals commenced on 13 November 2019. I carried out an inspection of the site and surrounds in the presence of the parties and those advising them. Representatives of a neighbouring objector were present but did not give evidence. The planning and heritage experts explained their respective positions to me and answered questions of a preliminary nature.
6. When the hearing resumed in Court, I was advised that the Applicant was proposing some amendments to the proposal for the aged care facility which had the potential to resolve the Council’s concerns. Notwithstanding that potentiality, the hearing progressed to the extent of the tender of documents and opening submissions by each of the parties.
7. At the outset of the second day of hearing, I was informed that the issues between the parties had been resolved by proposed amendments to the plans and conditions, and the parties requested that the matter be fixed for immediate conciliation pursuant to s 34 of the LEC Act.
8. On 14 November 2019, the Registrar ordered conciliation in accordance with the parties’ request and I presided over the conciliation conference between the parties pursuant to s 34 of the LEC Act on the same day.
9. 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. The proposed decision was to grant leave to amend DA, subject to a costs order in favour of the Respondent, uphold the appeal and grant development consent to the development application subject to conditions.
10. Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties’ agreement if the proposed decision the subject of the agreement is a decision that the Court could have made in the proper exercise of its functions.
11. The parties’ agreement involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. The following jurisdictional prerequisites relevant in this case have been satisfied so this function can be exercised:
12. the site is zoned R1 pursuant to MLEP pursuant to which seniors housing, which includes residential care facility, is a permissible use;
13. the development application is made pursuant to the State Environmental Planning Policy (Affordable Rental Housing) 2009 (the SEPP);
14. the proposed development does contravene the development standard for Floor Space Ratio (FSR) in the MLEP but not any other applicable environmental planning instrument including the SEPP;
15. the Respondent argued that an objection is required pursuant to cl 4.6 of the MLEP in relation to the FSR non-compliance, whereas the Applicant argued that it is not required. The Applicant has provided an objection pursuant to cl 4.6 in the event its primary position is wrong;
16. I am satisfied that the objection pursuant to cl 4.6 in relation to FSR is well founded and therefore do not need to decide whether or not the objection is required, in that;
17. the written request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary as the objectives of the FSR development standard are met notwithstanding the noncompliance (cl 4.6(3)(a) of the MLEP);
18. the written request adequately establishes sufficient environmental planning grounds that justify the breach of the FSR standard (cl 4.6(3)(b) of the MLEP);
19. on the preceding basis, I am satisfied that the requirements of cl 4.6(4)(a)(i) of the MLEP are met;
20. for the reasons outlined in the written request, I am satisfied that the development is in the public interest as it is consistent with the objectives of the R2 Low Density Residential zone and the height development standard. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the MLEP are met.
21. pursuant to cl 4.6(5), I am satisfied the proposal is not considered to raise any matter of significance for State or regional development.
22. the states of satisfaction required by cl 4.6 of the MLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the FSR control.
23. the development is at or below the flood planning level and accordingly cl 6.3 of the MLEP applies. A flood study by Cardno dated 16 January 2018 has been provided and I am satisfied as to the tests in cl 6.3 of the MLEP in essence that the development itself is not flood affected and does not affect flood behaviour adversely in the local area;
24. I am satisfied that the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2 of Part 3 of Chapter 3 of the SEPP as required by cl 32 of the SEPP;
25. the site is not shown affected on the sulphate soils map and so a sulphate soils management plan is not required by cl 6.1 of the MLEP;
26. consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55 – Remediation of Land (SEPP 55). A preliminary Site Assessment by AArgus Pty Ltd has been provided in satisfaction of cl 7 of SEPP 55;
27. consideration has been given to cl 5.10 of the MLEP in respect of the impact of the development on the heritage significance of 448.
28. 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.
29. The parties have not raised, and I am not aware of, any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
30. The Court orders that:
31. The Applicant is granted leave to rely upon the amended plans set out in Annexure “A”. The Applicant is to pay the Council’s costs thrown away in the agreed sum of $5,000 pursuant to section 8.15(3) of the EP&A Act.
32. The Appeal is upheld.
33. Development Application Number 2018/00066, for demolition of an existing residential aged care facility and construction of new residential aged care facility with basement car parking and associated infrastructure and landscaping at 442-444 Marrickville Road, Marrickville, NSW is approved subject to the conditions set out in Annexure “B”.

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P Clay

Acting Commissioner of the Court

[Annexure A (16.6 KB, pdf)](http://www.caselaw.nsw.gov.au/asset/5dede702e4b0c3247d713d7a.pdf)

[Annexure B (126 KB, pdf)](http://www.caselaw.nsw.gov.au/asset/5dede863e4b0c3247d713d7e.pdf)

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