



Land and Environment Court
New South Wales

Case Name: Wolin Investments Pty Ltd v Mid-Coast Council

Medium Neutral Citation: [2023] NSWLEC 1053

Hearing Date(s): Conciliation on 24 October, 21 November, 8 and 19 December 2022

Date of Orders: 09 February 2023

Decision Date: 9 February 2023

Jurisdiction: Class 1

Before: Bradbury AC

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development consent is granted to Development Application DA100/2019 for the staged subdivision of the land described as Lot 2 DP 1154170 and known as 90 Viney Creek Road, East Tea Gardens, to create 226 Torrens Title lots, one drainage reserve and two public reserves subject to the conditions in Annexure A.

Catchwords: APPEAL – development application – staged residential subdivision – conciliation conference – agreement reached – orders made

Legislation Cited: Biodiversity Conservation Act 2016, s 7.7
Biodiversity Conservation Regulation 2017, s 7.2
Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.10
Environmental Planning and Assessment Regulation 2000, cl 3, 49, 55, Sch 1 cl 2A
Environmental Planning and Assessment Regulation 2021, Sch 6 Pt 1 s 3
Great Lakes Local Environmental Plan 2014, cl 2.3, 2.6, 4.1, 6.1, 6.2, 7.1, 7.2, 7.3, 7.5, 7.6
Land and Environment Court Act 1979, s 34

Rural Fires Act 1997, s 100B
Standard Instrument (Local Environmental Plans)
Amendment (Flood Planning) Order 2021, cl 8
State Environmental Planning Policy (Biodiversity and
Conservation) 2021, Ch 3
State Environmental Planning Policy Amendment
(Flood Planning) 2021, cl 5.21
State Environmental Planning Policy (Resilience and
Hazards) 2021, ss 2.10, 4.6
State Environmental Planning Policy (Transport and
Infrastructure) 2021, s 2.122, Sch 3

Category: Principal judgment

Parties: Wolin Investments Pty Ltd (Applicant)
Mid-Coast Council (Respondent)

Representation: Counsel:
A McKelvey (Solicitor) (Applicant)
A Pickup (Respondent)

Solicitors:
Sparke Helmore Lawyers (Applicant)
Local Government Legal (Respondent)

File Number(s): 2022/190721

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application (Council reference DA100/2019) (DA) for the subdivision of the land described as Lot 2 DP 1154170 known as 90 Viney Creek Road, East Tea Gardens (Site).
- 2 The DA proposes the subdivision of the Site in stages to create 226 Torrens Title lots, one drainage reserve and two public reserves (Proposed Development).
- 3 The DA was made to the Council on 24 August 2018 and was publicly notified between 4 April 2019 and 7 May 2019. The Council received 19 submissions objecting to the DA.

- 4 In 2021, a Voluntary Planning Agreement was entered into between the Council and the Applicant for the future development of the North Shearwater Estate. That agreement requires the dedication and management of land for environmental purposes.
- 5 The DA was refused by the Hunter and Central Coast Regional Planning Panel on 2 July 2021. The Applicant appeals from that decision pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
The appeal is an appeal in Class 1 of the Court's jurisdiction.
- 6 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the DA pursuant to s 4.16 of the EPA Act.
- 7 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held at the Site and at the Council's offices in Tea Gardens on 24 October 2022 and then by Microsoft Teams on 21 November, 8 and 19 December 2022. I presided over the conciliation conference.
- 8 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to them. This decision involves the Court upholding the appeal and granting development consent to the development application subject to conditions.
- 9 The final signed agreement was lodged with the Court on 25 January 2023 and is supported by a Jurisdictional Note prepared by the parties which was lodged with the Court on the same day. Under 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.
- 10 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. I am satisfied of this for the reasons that follow.

The statutory conditions on the grant of development consent

The conditions in the EPA Act and Regulation

- 11 The appeal was brought pursuant to s 8.7, and was made within the time required by s 8.10, of the EPA Act.

12 Section 4.15(1)(d) of the EPA Act requires the consent authority to take into consideration any submissions made in accordance with the Act. The written submissions received by the Council (referred to in paragraph 3 above) raised a number of issues including:

- The layout and design of the Proposed Development - some objectors indicated a preference for the layout of a previously approved subdivision of the Site and some indicated that the Proposed Development was not consistent with the future vision for the area;
- The likely construction Impacts associated with the required subdivision infrastructure;
- Bushfire risk;
- Biodiversity impacts;
- Traffic impacts
- Water quality and hydrology;
- The provision of services (electricity and water).

13 In addition to the written submissions, a number of residents braved the wet and windy weather to give oral evidence on site on 24 October 2022 which echoed the concerns raised in the written submissions. These matters were discussed at the conciliation and the Council is satisfied that the amendments to the Proposed Development and the proposed conditions to be imposed on the development consent will address the relevant merit objections raised by the local residents.

14 The Applicant made the DA with the consent of the owners of the Site in accordance with cl 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation). The EPA Regulation was repealed by the Environmental Planning and Assessment Regulation 2021 (2021 Regulation) on 1 March 2022. However, the EPA Regulation continues to apply instead of the 2021 Regulation to a development application made but not finally determined before that date: 2021 Regulation, Sch 6 Pt 1 s 3. The DA was made before, but had not been finally determined by, 1 March 2022 so the EPA Regulation continues to apply to the DA.

- 15 The Proposed Development is not BASIX affected development as defined in cl 3(1) of the EPA Regulation and is not required by Sch 1 cl 2A of that Regulation to be accompanied by a BASIX certificate.

The conditions in the LEP

- 16 The Land is partly within Zone R2 Low Density Residential, Zone C2 Environmental Conservation and Zone RU2 Rural Landscape under the Great Lakes Local Environmental Plan 2014 (LEP). The civil works required to construct the proposed roads within the subdivision are permissible with development consent on land within those zones.
- 17 Clause 2.3(2) of the LEP provides that the consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within that zone. In determining the DA, I have had regard to the objectives of each of the zones in which the land is situated.
- 18 Clause 2.6 of the LEP provides that land to which the LEP applies may be subdivided, but only with development consent.
- 19 Clause 4.1 of the LEP sets minimum lot size requirements for the subdivision of land to which the clause applies and the minimum lot size for the Site is 450 m². The lots proposed to be created by the DA all comply with the prescribed minimum lot size.
- 20 The Site is within an urban release area and cl 6.1 of the LEP relevantly provides that development consent must not be granted to the DA unless the Director-General has certified in writing that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure in relation to the Site. The Secretary's Certificate certifying that the Applicant has made satisfactory arrangements for designated State public infrastructure was issued on 12 July 2022.
- 21 The Site is in the North Shearwater Urban Release Area and is therefore subject to cl 6.2 of the LEP which requires the consent authority to be satisfied that any public utility infrastructure that is essential for the Proposed Development is available or that adequate arrangements have been made to make that infrastructure available when it is required. The parties agree, and I

accept, that adequate arrangements have been made and the Site will be connected to water and sewer, electricity, and will be serviced by the respondent's waste collection service.

- 22 While part of the Site is mapped as containing Class 5 Acid Sulfate Soils on the Acid Sulphate Soils Map prescribed by cl 7.1(2) of the LEP, the remaining provisions of cl 7.1 do not apply to the DA as the Proposed Development is not within 500m of any adjacent Class 1, 2, 3 or 4 land.
- 23 The DA proposes earthworks and cl 7.2 of the LEP sets out a number of matters that must be considered before granting consent to earthworks. In this regard I note that:
- (1) the DA is accompanied by a detailed set of civil engineering plans which show the location of earthworks and the extent of cut and fill across the Site;
 - (2) the DA indicates that any fill required for the Proposed Development will be either VENM (Virgin Excavated Natural Material), ENM (Excavated Natural Material) or exempt materials;
 - (3) the DA indicates that, during the course of all construction and until such time as the Site is stabilised, appropriate erosion and sediment control measures will be implemented as provided in the erosion and sediment control plans which form part of the DA;
 - (4) the DA is also accompanied by a stormwater management report which proposes a piped drainage system that will ensure there is no detrimental impact on existing drainage patterns.
- 24 When the DA was lodged, cl 7.3 of the LEP applied. Clause 7.3 was repealed on 14 July 2021 by the State Environmental Planning Policy Amendment (Flood Planning) 2021 without a savings provision. Also on 14 July, cl 5.21 commenced by operation of the Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021. The DA is, however, saved from the operation of cl 5.21 by cl 8 of the Standard Instrument (Local Environmental Plans) Order 2006: see *OM Vinayak Pty Ltd v Central Coast Council* [2022] NSWLEC 1269 at [23]-[28] per Commissioner Dickson.
- 25 The DA is subject to cl 7.5(2) of the LEP which requires the Court to be satisfied of certain matters about stormwater. A stormwater management report accompanies the DA which the parties agree, and I accept, satisfactorily

addresses each of the relevant matters the Court is required to be satisfied of.

In particular, the DA proposes:

- (1) a piped drainage system which will collect stormwater runoff and discharge it into existing and improved riparian corridors, a detention basin or into the nearby Myall River. This includes:
 - (a) construction of three stormwater detention basins;
 - (b) construction of an offline end-of-pipe biofiltration rain garden in Precinct 1;
 - (c) construction of roadside swales, where grades allow, on perimeter roads; and
 - (d) provision of vegetated buffer strips within riparian corridors.
- (2) the treatment of stormwater in the detention basins or riparian corridors and for beneficially re-use. The parties agree that treatment of stormwater in this manner will result in pollutant levels post development being less than pre-development, achieving a nil or beneficial effect; and
- (3) no increase in stormwater levels across the Site (confirmed by relevant modelling).

26 Part of the Site is located within a Drinking Water Catchment as identified on the Drinking Water Catchment Map in the LEP. Clause 7.6 of the LEP provides that, before determining the DA, the consent authority must consider the matters which are set out in cl 7.6(3). In this regard the parties agree, and I accept, that the Statement of Environmental Effects which accompanied the DA addresses the matters set out in cl 7.6(3).

The conditions in State Environmental Planning Policy (Resilience and Hazards) 2021

27 A small portion of the Proposed Development, which comprises proposed open space, is located within a coastal environment area under Div 3, Pt 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP). The parties agree, and I accept, that the Statement of Environmental Effects submitted with the DA addresses the reasons why the Court can be satisfied of the prescribed matters in s 2.10(2). In particular, the parties agree:

- (1) the development has been designed to include measures to ensure that the biophysical, hydrological and ecological attributes of the Site will be protected in the large riparian corridors which are to be improved and

dedicated to Council under the North Shearwater Planning Agreement dated 13 November 2012; and

- (2) the development is not adjacent to any existing public beach, sensitive coastal lake, headland, rock platform, foreshore or surf zone and does not impact on any Aboriginal cultural heritage.

- 28 The DA is also subject to s 4.6(1) of the Resilience and Hazards SEPP which relates to contamination. The DA is accompanied by a detailed Phase 1 Site Investigation which concludes that the Site is considered unlikely to contain any gross ground contamination and is suitable for its intended future use for residential development.

The conditions in the Rural Fires Act 1997

- 29 The Site is identified on the respondent's Bushfire Prone Land Map as bushfire prone land and is therefore subject to s 100B of the *Rural Fires Act 1997* (Rural Fires Act). That section provides that a person must obtain a bush fire safety authority before developing bush fire prone land for residential or rural residential purposes.
- 30 The Rural Fire Service has provided a bushfire safety authority under the *Rural Fires Act 1997* and the Rural Fire Service's requirements have been included in the proposed conditions of development consent.

The conditions in the Biodiversity Conservation Act 2016

- 31 The DA proposes the removal of native vegetation which exceeds the biodiversity offset clearing threshold in s 7.2 of the Biodiversity Conservation Regulation 2017. The DA is accompanied by a Biodiversity Development Assessment Report as required by section 7.7(2) of the *Biodiversity Conservation Act 2016*.

The conditions in the State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 32 Chapter 3 Koala Habitat Protection 2020 applies to the DA as the Site has an area greater than 1ha.
- 33 Part A.2 of the Biodiversity Development Assessment Report submitted with the DA includes an assessment against the three-step process in Ch 3 and concludes that, while the Site is potential koala habitat, it is not considered to

be core koala habitat. I am satisfied that a Koala Plan of Management is therefore not required to be prepared to accompany the DA.

The conditions in the State Environmental Planning Policy (Transport and Infrastructure) 2021

34 The DA is traffic generating development under s 2.122 and Sch 3 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 which requires the DA to be referred to Transport for NSW (TfNSW) and for the following matters to be considered by the consent authority in determining the DA:

- (1) Any submissions made by TfNSW within 21 days of being notified of the DA;
- (2) the accessibility of the site concerned, including—
 - (a) the efficiency of movement of people and freight to and from the site and the extent of multi-purpose trips, and
 - (b) the potential to minimise the need for travel by car and to maximise movement of freight in containers or bulk freight by rail, and
- (3) any potential traffic safety, road congestion or parking implications of the development.

35 The DA was referred to TfNSW on 20 March 2019 which provided a submission to the Council on 5 April 2019. The parties agree, and I accept, that the issues raised in the submission from TfNSW have been addressed by the proposed conditions of development consent, in particular:

- (1) conditions 40 and 42, which provide for the payment of monetary contributions by the Applicant for roadworks;
- (2) condition 64, which requires the Applicant to install advanced warning signs and appropriate line marking for speed reduction to 60 km/hr on Myall Way; and
- (3) condition 12, which requires the Applicant to indicate the location where future bus stops will be constructed to service the subdivision prior to the issue of a Subdivision Works Certificate for any stage of development.

Conclusion

36 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required by s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

37 The parties have not raised, and I am not aware of, any jurisdictional impediment to the making of these orders to give effect to the agreement between the parties. Further, in making the orders, I was not required to make, and have not made, any assessment of the merits of the DA against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

38 The Court notes that:

- (1) Mid-Coast Council, as the relevant consent authority, has agreed, under cl 55(1) of the EPA Regulation, to the applicant amending development application DA100/2019 in accordance with the documents below:

Name	Number	Revision	Date	Author
Road and Drainage Plans	1-39	F	23 November 2022	Tattersall Lander Pty Ltd
Precinct 1-3 DA Landscape Plans	1-2	E	23 November 2022	Tattersall Lander Pty Ltd
Report on Geotechnical, Preliminary Site Investigation (Contamination) and Salinity Investigation	R.001.Rev 1	1	4 October 2022	Douglas Partners

Satisfactory Arrangements Certificate	IRF22/2 229	•	12 July 2022	Department of Planning and Environment
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- (2) The amended application was lodged on the NSW Planning Portal on 19 December 2022.
- (3) The applicant filed the amended application with the Court on 15 December 2022.

39 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted to Development Application DA100/2019 for the staged subdivision of the land described as Lot 2 DP 1154170 and known as 90 Viney Creek Road, East Tea Gardens, to create 226 Torrens Title lots, one drainage reserve and two public reserves subject to the conditions in Annexure A.

A Bradbury

Acting Commissioner of the Court

Annexure A

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