



Land and Environment Court
New South Wales

Case Name: Doug Sneddon Planning Pty Ltd v Central Coast Council

Medium Neutral Citation: [2023] NSWLEC 1653

Hearing Date(s): Conciliation conference 20 October 2023

Date of Orders: 03 November 2023

Decision Date: 3 November 2023

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent DA 46290/2014 is modified in the terms in Annexure A.
(3) Development consent DA 46290/2014, as modified, is set out in Annexure B.

Catchwords: MODIFICATION APPLICATION – modification to an approved residential flat building - alterations to the building’s podium and residential tower floorplates – amended plans and additional materials – agreement between the parties – orders made.

Legislation Cited: Environmental Planning and Assessment 2021, ss 29, 102
Environmental Planning and Assessment Act 1979, ss 4.15, 4.53, 4.55, 8.9
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Precincts – Regional) 2021
State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 2.11, 4.6

State Environmental Planning Policy 65 – Design
Quality of Residential Apartment Development

Cases Cited:	Betohuwisa Investments Pty Ltd v Kiama Municipal Council (2010) 177 LGERA 312; [2010] NSWLEC 223 Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2022] NSWCA 227
Texts Cited:	Gosford City Centre Development Control Plan 2018
Category:	Principal judgment
Parties:	Doug Sneddon Planning Pty Ltd (Applicant) Central Coast Council (Respondent)
Representation:	Counsel: P Tomasetti SC (Applicant) S Simington (Solicitor) (Respondent) Solicitors: Hall & Wilcox Lawyers (Applicant) Lindsay Taylor Lawyers (Respondent)
File Number(s):	2022/368079
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** This appeal concerns an application to modify development consent, DA/46209/2014. That consent approved the demolition of existing buildings and structures, excepting the heritage listed structure ‘Creighton Funeral Parlour’ which is to be retained, and construction of a 19 storey mixed used development. The works are proposed at 27-37 Mann Street, Gosford. The modification application, DA/46209/2014/D seeks consent for the following modifications:

- (1) Changes to the buildings podium and residential tower floor plates,
- (2) Amendments to the architectural form and materiality of the development,
- (3) An increase in the building’s maximum height,
- (4) An increase in the total gross floor area (GFA) of the development,
- (5) A reduction in apartment numbers from 132 to 128,

- (6) An increase in parking spaces from 209 to 217,
 - (7) Changes to the external and internal treatment of the heritage item: 'Creighton Funeral Parlour',
 - (8) Amendments to the podium rooftop communal space and landscaping,
 - (9) Modified waste arrangements.
- 2 The appeal is lodged pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the modification application pursuant to s 4.55(2) of the EPA Act. The final orders in this appeal, outlined below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 3 The Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (LEC Act) between the parties which was held on 1 May 2023. That conciliation conference was adjourned, but ultimately terminated on 17 July 2023.
- 4 Following the conciliation conference, the parties continued without prejudice discussions and reached in principle agreement. The Applicant was granted leave by the Court on 29 August 2023 to amend their development application and rely on amended plans and materials. By consent, the parties sought a further conciliation conference which was held on 20 October 2023. I presided over the further conciliation conference. Following the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The decision agreed upon is for the grant of consent to the modification application, as amended, subject to conditions, pursuant to s 4.55(2) of the EPA Act. The agreement was entered into on 19 October 2023.
- 5 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I form this state of satisfaction on the basis that:
- (1) The Respondent accepted the requirement for physical commencement of the consent was met at the time of the approval of modification application DA/46209/2014/C. The parties agree, and I accept, that the

requirements of s 4.53(4) of the EPA Act are met and the consent has not lapsed as relevant works were undertaken within the prescribed period.

- (2) The modification application was lodged by Doug Sneddon Planning Pty Ltd, as agent for the Applicant. The landowner of the land on which the development is proposed, Rola Property Group Pty Ltd, provided their consent to the lodgement of the modification application. The Applicant (as principal) has standing to commence the proceedings: *Betohuwisa Investments Pty Ltd v Kiama Municipal Council* (2010) 177 LGERA 312; [2010] NSWLEC 223 at [43].
- (3) The modification application is made pursuant to s 4.55(2) of the EPA Act. This provision has a number of conditions that need to be satisfied. The provision states:

4.55 Modification of consents—generally (cf previous s 96)

...

(2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
- (c) it has notified the application in accordance with—
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

Is the development substantially the same: s 4.55(2)(a) of the EPA Act

- (1) The parties agree, and I accept that I can be satisfied, that the development to which the consent as modified relates is quantitatively and qualitatively substantially the same development as the development for which consent was originally granted. There is no 'radical' change to the massing or bulk/scale of the development. The changes to the architectural design and material do not substantially change the building footprint or massing. The number of storeys is maintained, and the modification application does not make transformative changes in the building height or gross floor area. I find that s 4.55(2)(a) of the EPA Act is satisfied.

Consultation with concurrence authorities: s 4.55(2)(b) of the EPA Act

- (1) There are no conditions which have been imposed as a requirement of a concurrence to the original consent or general terms of approval, and therefore no consultation is required under s 4.55(2)(b) of the EPA Act.

Notification: ss 4.55(2)(c) and 4.55(d) of the EPA Act

- (1) The modification application was notified in accordance with the Environmental Planning and Assessment 2021 Regulation (EPA Regulation) satisfying s 4.55(2)(c) of the EPA Act. I am satisfied that the matters raised in submissions have been considered as required by s 4.55(2)(d) of the EPA Act and where appropriate have resulted in amendments or the imposition of conditions.

6 *Matters at s 4.15 of the EPA Act: s 4.55(3) of the EPA Act*

- (1) Under s 4.55(3) of the EPA Act the consent authority must also take into consideration two matters. Firstly, such of the matters referred to in s 4.15(1) of the EPA Act that are of relevance to the development the subject of the application. Secondly, the reasons given by the consent authority for the grant of the consent that is sought to be modified.
- (2) With the assistance of the agreed jurisdictional note filed by the parties I conclude, none of the matters referred to in s 4.15(1) of the EPA Act that are of relevance to the development, the subject of the application, precludes the approval of the Modification Application.
 - (a) State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development (SEPP 65) applies to the erection of a new residential flat building (as defined under SEPP 65) comprising three or more storeys and four or more self-contained dwellings. Section 102 of the EPA Regulations requires a modification application, where the original development application was required to be accompanied by a statement by a qualified designer under s 29, to be accompanied by a statement by a qualified designer in accordance with s 102(2). This modification application is such an application. A Design Verification Statement prepared by KannFinch Architecture accompanies the modification application and it is

consistent with the requirements at s 102(2) of the EPA Regulations. While the Design Verification Statement was not prepared by a designer who designed or directed the design of the development for which the original development consent was granted, s 102(4) of the EPA Regulations does not apply as the Council has not constituted a design review panel.

- (b) An amended BASIX certificate has been prepared addressing the modified development as required by State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- (c) Pursuant to chapter 2 Coastal Management of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) the subject land is mapped as being within the Coastal Environment Area and partly within the Coastal Land Use Area. The Statement of Environmental Effects (SEE) details how the modification application is consistent with the requirements of Chapter 2 of SEPP RH. In determining the modification application, I have considered the matters at ss 2.10 and 2.11 of SEPP RH.
- (d) Pursuant to s 4.6 of SEPP RH, contamination and remediation was considered as part of the determination of the development application.
- (e) The land is located within the Gosford City Centre and subject to the provisions of Chapter 5 of State Environmental Planning Policy (Precincts – Regional) 2021 (SEPP Precincts).
 - (i) The subject land is mapped on the *Building Heights Map* as having a maximum building height development standard of 46.8m on the Mann Street side and 31.2m on the Parlour Lane side. The Modification Application has a maximum building height of RL 75.050 (63.75m above natural ground level – Mann Street frontage). The increased maximum building height of the proposed modified development is 0.69m, representing a variation of 1.09%. A modification application does not engage s 5.28 (Exceptions to development standards) of the SEPP Precincts.
 - (ii) The subject land is mapped on the Floor Space Ratio Map as having a maximum floor space ratio development standard of 5.2:1 on the Mann Street side and 3.9:1 on the Parlour Lane side. The Modification Application has a floor space ratio of 4.67:1. A modification application does not engage s 5.28 (Exceptions to development standards) of the SEPP Precincts.
 - (iii) Further, a modification application does not engage s 5.47 Car parking in Zones B3 and B4. However, the parties confirm the modification application provides the

required parking for the commercial and retail spaces proposed.

- (iv) A portion of the Site No 37 Mann Street is 'Creighton's Funeral Parlour' which is listed as an item of environmental heritage under Schedule 9 – Item 37 of the SEPP Precincts. The modification application is accompanied by a Heritage Impact Statement. I accept the conclusion of that statement and the agreement of the parties that I am able to be satisfied that the modification application as amended will not detrimentally impact the significance of the heritage item located on Site. Section 5.36 of SEPP Precincts is satisfied.
- (v) The subject site is identified on the Active Street Frontages Map of SEPP Precincts. I am satisfied the modification application provides an active street frontage as required by s 5.48 in SEPP Precincts.
- (f) The provisions of Gosford City Centre Development Control Plan 2018 (DCP 2018) apply. In determining the modification application, I have considered the assessment of the development against the provisions of DCP 2018 detailed in the SEE and I am satisfied none warrant the refusal of the modification application.

The reasons given by the consent authority: s 4.55(3) of the EPA Act

- (1) The original consent was determined by the Hunter & Central Coast Regional Planning Panel on 15 December 2016. The consent does not contain such specific reasons: *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227 at [64].
- 7 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 8 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the modification application against the discretionary matters that arise pursuant to an assessment under ss 4.55(3) and 4.15(1) of the EPA Act.
- 9 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development consent DA 46290/2014 is modified in the terms in Annexure A.

- (3) Development consent DA 46290/2014, as modified, is set out in Annexure B.

D Dickson

Commissioner of the Court

Annexure A

Annexure B

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.