



Land and Environment Court
New South Wales

Case Name: 11 Church Street Pty Ltd ATF The Trustee for 11 Church Street Discretionary Trust v Newcastle City Council (No.2)

Medium Neutral Citation: [2022] NSWLEC 1446

Hearing Date(s): 23 September 2021, Notice of Motion 12 November 2021 and 23 March 2022

Date of Orders: 26 August 2022

Decision Date: 26 August 2022

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is upheld
(2) Development Application DA 2020/00621 for a 13 Storey mixed use development comprising; food and drink premises (café) at ground floor, residential flat building (34 units including affordable rental housing), basement, demolition, signage, associated landscaping and site works at 625 Hunter Street, Newcastle West is determined by the grant of consent, subject to conditions of consent contained at Annexure 'A'.
(3) All exhibits are returned, except for Exhibits A, C and D.

Catchwords: DEVELOPMENT APPLICATION – infill affordable housing in B4 zone – whether development is total development – whether must not refuse provision applies – traffic impacts – failure to provide car parking onsite

Legislation Cited: Environmental Planning and Assessment Act 1979, s 4.16
State Environmental Planning Policy (Resilience and

Hazards) 2021, s 4.6

Category: Principal judgment

Parties: 11 Church Street Pty Ltd ATF The Trustee for 11 Church Street Discretionary Trust (Applicant)
Newcastle City Council (Respondent)

Representation: Counsel:
N Eastman (Applicant)
J Smith (Respondent)

Solicitors:
Mills Oakley (Applicant)
Newcastle City Council (Respondent)

File Number(s): 2021/39496

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** In a judgment given on 13 May 2022, the Court gave its decision in *11 Church Street Pty Ltd ATF The Trustee for 11 Church Street Discretionary Trust v Newcastle City Council* [2022] NSWLEC 1252 in respect of Development Application DA2020/00621 seeking consent for a 13 Storey mixed use development comprising a food and drink premises (café) at ground floor, residential flat building (34 units including affordable rental housing), basement, demolition, signage, associated landscaping and site works at 625 Hunter Street, Newcastle West (the site).
- 2 In my preliminary judgment, I formed the view that the development, the subject of the development application, warrants the grant of consent in accordance with s 4.16 of the *Environmental Planning and Assessment Act 1979* (EPA Act), subject to conformance with certain directions made by the Court.
- 3 Those directions were in respect of a report specifying the findings of a preliminary investigation of the land concerned, to be carried out in accordance with the contaminated land planning guidelines, pursuant to s 4.6(2)(c) of the State Environmental Planning Policy (Resilience and Hazards) 2021.

- 4 On 3 June 2022, the Applicant provided the Court with a Preliminary Contamination Assessment dated 31 May 2022, prepared by Qualtest Laboratory (NSW) Pty Ltd. The Assessment recommended that a detailed contamination assessment be carried out, in order to determine whether soil contamination is present on the site and, if so, make recommendations for any remediation and/or management works.
- 5 The Court directed the Applicant file and serve a Detailed Contamination Assessment by 11 July 2022 and, subject to the findings of that assessment, file and serve a remediation action plan by 25 July 2022. And, in the event that a remediation action plan was found to be required, the parties were to file and serve amended conditions of consent by 1 August 2022.
- 6 On 27 July 2022, the parties filed with the Court a copy of the Detailed Contamination Assessment dated 30 June 2022 and a Remediation Action Plan dated 7 July 2022, prepared by Qualtest Laboratory (NSW) Pty Ltd, together with conditions of consent, consistent with the Court's directions at [129] of the preliminary judgment.
- 7 On 28 July 2022, the Respondent filed a Notice of Motion seeking leave to reopen the proceedings to rely upon two further conditions of consent said to have been omitted, unintentionally, from those conditions filed the day prior.
- 8 On 2 August 2022, the Court sought advice from the parties as to the position of the Applicant in respect of the two conditions.
- 9 On 4 August 2022, the parties advised the Court that the two additional conditions were agreed to, and updated conditions of consent were filed with the Court the same day.
- 10 The conditions of consent were generally agreed with respect to incorporating the recommendations of the Assessments listed at [6].
- 11 Additionally, the Applicant seeks the adoption of a condition of consent requiring the Applicant to submit a report for Newcastle Traffic Committee's consideration that, in summary, would legally allow waste collection vehicles to stand and empty bins outside of road network and pedestrian peak periods.

- 12 This proposed condition, incorporated by the Applicant at condition 16 of the otherwise agreed conditions of consent, is consistent with the recommendation of the Applicant's traffic expert, summarised at [97] of my preliminary judgment, but on which, for the reasons set out at [121(6)] of my preliminary judgment, the development does not wholly rely as an acceptable alternative is available to the site for waste servicing.
- 13 Likewise, I adopt the Applicant's proposed condition at condition 14 requiring the preparation of a Green Travel Plan, consistent with [121(5)] of my preliminary judgment.
- 14 Accordingly, the Applicant's proposed conditions of consent are adopted.
- 15 As the parties have now complied with those directions, it is appropriate to make orders granting development consent in accordance with s 4.16 of the EPA Act.

Orders

- 16 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development Application DA 2020/00621 for a 13 Storey mixed use development comprising; food and drink premises (café) at ground floor, residential flat building (34 units including affordable rental housing), basement, demolition, signage, associated landscaping and site works at 625 Hunter Street, Newcastle West is determined by the grant of consent, subject to conditions of consent contained at Annexure 'A'.
 - (3) All exhibits are returned, except for Exhibits A, C and D.

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T Horton

Commissioner of the Court

Annexure A (277617, pdf)

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.