



Land and Environment Court New South Wales

Medium Neutral Citation:	Wycombe Services Pty Ltd v The Hills Shire Council [2021] NSWLEC 1693
Hearing dates:	Conciliation conference on 20 and 24 September 2021
Date of orders:	16 November 2021
Decision date:	16 November 2021
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	<p>The Court orders:</p> <p>(1) The Applicant is to pay the Respondent's costs that have been thrown away as a result of the amendment of the application for development consent under section 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW) in the agreed sum of \$12,000 within 30 days of these orders being made.</p> <p>(2) The appeal is upheld.</p> <p>(3) Development consent is granted to Development Application No. 677/2021/JP (as amended) for the demolition of the existing local heritage item, erection and fit out of a medical centre, with associated external landscaping on the land at 1, 1A-1B President Road, Kellyville, and an associated median in President Road, subject to the conditions in Annexure "A".</p>
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15</p> <p>Environmental Planning and Assessment Regulation 2000, cl 55(1)</p> <p>Land and Environment Court Act 1979, s 34</p> <p>Roads Act 1993, s 138</p> <p>State Environmental Planning Policy (Infrastructure) 2007, cl 56, 57(1), 101, 104</p> <p>State Environmental Planning Policy No 55—Remediation of Land, cl 7</p> <p>State Environmental Planning Policy No 64— Advertising and Signage, Sch 1</p> <p>State Environmental Planning Policy (State and Regional Development) 2011</p> <p>The Hills Local Environmental Plan 2019, ss 2.3, 4.3, 5.10</p>
Texts Cited:	<p>Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (April 2021)</p> <p>The Hills Development Control Plan 2012</p>
Category:	Principal judgment

Parties: Wycombe Services Pty Ltd (Applicant)
The Hills Shire Council (Respondent)

Representation: Counsel:
H Grace (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
Herbert Smith Freehills (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2021/202172

Publication restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings concern an appeal by Wycombe Services Pty Ltd (the Applicant) against the deemed refusal of Development Application number 677/2021/JP (DA) lodged on 10 November 2020 for the erection and fit out of a medical centre, associated external landscaping, and subsequent demolition of a local heritage item (the Original Development) on the land at 1, 1A-1B President Road, Kellyville (the Subject Site) by The Hills Shire Council (the Respondent).
- 2 The Applicant appealed under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) as the Applicant of the DA who is dissatisfied with the determination of the DA by the Respondent as consent authority.
- 3 On 20 and 24 September 2021, the Parties participated in a s 34 conciliation conference and reached an in principle agreement regarding the granting of consent to the DA, subject to conditions.
- 4 The Parties agreed to amend the development subject of the DA, which is now described as the “demolition of the existing local heritage item, erection and fit out of a medical centre, with associated external landscaping on the land at 1, 1A-1B President Road, Kellyville, and an associated median in President Road” (the Proposed Development).
- 5 The conciliation conference was convened in a manner consistent with the Court’s COVID-19 Pandemic Arrangements Policy (the Policy). A site view was not undertaken as part of the conciliation conference.
- 6 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. This decision involved the Court upholding the appeal and granting consent to the Applicant’s development application, subject to conditions.
- 7 Under s 34(3) of the *Land and Environment Court Act 1979* (LEC Act), I must dispose of the proceedings in accordance with the Parties’ decision if the Parties’ decision is a decision that the Court could have made in the proper exercise of its functions.
- 8 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
 - (1) in relation to the provisions of the State Environmental Planning Policy (State and Regional Development) 2011, the Parties advise, and I am satisfied, that the Sydney Central City Planning Panel is the relevant consent authority in relation to the DA in circumstances where the DA seeks consent for a medical centre, which is a type of health services facility, and has a capital investment value of more than \$5 million;
 - (2)

in relation to the provisions of the State Environmental Planning Policy No 55 – Remediation of Land (SEPP55), the Parties advise, and I am satisfied, that a Preliminary Site Investigation, entitled the Due Diligence Assessment (Contaminated Land) prepared by Canopy Enterprises Pty Ltd and dated July 2020 which was annexed to the Applicant's Statement of Environmental Effects prepared by Willowtree Planning Pty Ltd dated October 2020, has concluded that the Subject Site is suitable for the Proposed Development in satisfaction of the provisions of cl 7 of SEPP55;

- (3) in relation to the provisions of the State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure), the Parties advise, and I am satisfied, that:
- (a) pursuant to cl 57(1) of SEPP Infrastructure, development for the purpose of a "health services facility" (which includes a "medical centre") may be carried out by any person with consent on land in a prescribed zone;
 - (b) the zone R3 – Medium Density Residential, which is the zoning of the Subject Site, is a "prescribed zone" as defined in cl 56 of SEPP Infrastructure;
 - (c) the Subject Site contains a frontage to Windsor Road, which is a classified road, and so the provisions of cl 101 of SEPP Infrastructure apply. Relevantly, the matters set out in cl 101(2) of SEPP Infrastructure are satisfied in circumstances where vehicular access to the Subject Site is provided by a road other than a classified road; and
 - (d) the Applicant's DA, as amended, is for a "traffic generating development" and as such the provisions of cl 104 of SEPP Infrastructure apply, and as required by that clause notice was provided to Transport for NSW (TfNSW) of the DA in accordance with cl 104(2A) of SEPP Infrastructure. Further, I am satisfied that the responses from TfNSW received on 7 December 2020 and 4 May 2021 have been taken into consideration by the Parties in reaching agreement in this appeal.
- (4) in relation to the provisions of the *Roads Act 1993*, TfNSW has provided concurrence pursuant to s 138 of that Act on 4 May 2021, subject to the imposition of conditions included within the determination of the appeal at Annexure A;
- (5) in relation to the provisions of the State Environmental Planning Policy No 64—Advertising and Signage (SEPP 64), the Parties advise, and I am satisfied, that the signage that is part of the Proposed Development as amended is consistent with the objectives of SEPP 64 and satisfies the assessment criteria provided within Schedule 1 of SEPP 64;
- (6) in relation to the provisions of The Hills Local Environmental Plan 2019 (THLEP), the Parties advise, and I am satisfied, that:
- (a) the Subject Site is zoned R3 – Medium Density Residential under the provisions of cl 2.3;
 - (b) development for the purposes of a "health services facility" and "business identification signs" is permissible with consent in the R3 zone;
 - (c) a "medical centre" is a type of "health services facility" as defined under THLEP;
 - (d) the land use of "health services facility" is defined as:

health services facility means a building or place used to provide medical or other services relating to the maintenance or improvement of the health, or the restoration to health, of persons or the prevention of disease in or treatment of injury to persons, and includes any of the following—

- a medical centre,
- community health service facilities,
- health consulting rooms,
- patient transport facilities, including helipads and ambulance facilities,
- hospital;

- (e) the land use of "medical centre" is defined as:

medical centre means premises that are used for the purpose of providing health services (including preventative care, diagnosis, medical or surgical treatment, counselling or alternative therapies) to out-patients only, where such services are principally provided by health care professionals. It may include the ancillary provision of other health services;

- (f)

- the Proposed Development as a whole, including the pharmacy / dispensary use, is development for the purpose of a “medical centre”; and
- (g) the DA (as amended) satisfies applicable provisions of THLEP and in particular the following specific provisions have been met:
 - (i) in relation to the provisions of cl 4.3 of THLEP, the Proposed Development complies with the height of buildings development standard of 10 metres applicable to the Subject Site; and
 - (ii) in relation to the provisions of cl 5.10 of THLEP, the Proposed Development has met the requirements in respect of demolition of a heritage item;
 - (7) in relation to the provisions of The Hills Development Control Plan 2012 (THDCP), the Parties advise, and I am satisfied, that:
 - (a) the following sections of THDCP are applicable to the Proposed Development:
 - (i) Part A – Introduction;
 - (ii) Part B Section 6 – Business;
 - (iii) Part C Section 1 – Parking;
 - (iv) Part C Section 2 – Signage; and
 - (v) Part C Section 3 – Landscaping;
 - (b) the Proposed Development:
 - (i) is compliant with the applicable provisions of THDCP; or
 - (ii) where numerical compliance with controls is not achieved, represents a reasonable alternative that achieves the objectives of the controls and merits flexibility in the application of the controls.

- 9 Having considered the advice of the Parties, provided above at [8], I agree that the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been so satisfied.
- 10 I am further satisfied that the Parties’ decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.
- 11 As the Parties’ decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties’ decision.
- 12 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.
- 13 The Parties have advised that:
- (1) The Sydney Central City Planning Panel as the relevant consent authority has agreed, under clause 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending development application No. 677/2021/JP to rely upon the material described in Condition 1 of Annexure “A”.
 - (2) The Applicant has uploaded the amended application to the NSW Planning Portal on 27 October 2021.
 - (3) The Applicant has subsequently filed the amended application with the Court on 27 October 2021.

Orders

- 14 The Court orders:
- (1) The Applicant is to pay the Respondent's costs that have been thrown away as a result of the amendment of the application for development consent under section 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW) in the agreed sum of \$12,000 within 30 days of these orders being made.
 - (2) The appeal is upheld.
 - (3) Development consent is granted to Development Application No. 677/2021/JP (as amended) for the demolition of the existing local heritage item, erection and fit out of a medical centre, with associated external landscaping on the land at 1, 1A-1B President Road, Kellyville, and an associated median in President Road, subject to the conditions in Annexure “A”.

The Respondent is directed to upload the development consent to the NSW Planning Portal within seven days of these orders being made.

- 16 The Respondent is directed to upload the consolidated development consent to the Planning Portal within 7 days of this judgment.

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M Chilcott

Commissioner of the Court

Annexure A (346492,.pdf)

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Decision last updated: 16 November 2021