



Land and Environment Court New South Wales

Medium Neutral Citation:	Hezlett Group Pty Ltd v Cumberland City Council [2021] NSWLEC 1663
Hearing dates:	Conciliation conference on 31 August and 15 September 2021
Date of orders:	2 November 2021
Decision date:	02 November 2021
Jurisdiction:	Class 1
Before:	Horton C
Decision:	The Courts orders that: (1) The appeal is upheld. (2) Development Consent No. DA2016/164/1 is modified in the terms in Annexure A. (3) Development Consent No. DA2016/164/1 as modified by the Court is Annexure B.
Catchwords:	MODIFICATION APPLICATION – Residential apartment development – residential flat building – State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development – conciliation conference – agreement between parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Holroyd Local Environmental Plan 2013 Land and Environment Court Act 1979 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development Architects Act 2003
Cases Cited:	SDHA Pty Ltd v Waverley Council (2015) 209 LGERA 233; [2015] NSWLEC 65
Texts Cited:	Apartment Design Guide
Category:	Principal judgment
Parties:	Hezlett Group Pty Ltd (Applicant) Cumberland City Council (Respondent)
Representation:	Counsel: J Reid (Applicant) C McFadzean (Solicitor) (Respondent) Solicitors: Swaab (Applicant) Cumberland Council (Respondent)
File Number(s):	2021/103440
Publication restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by the Sydney City Central Planning Panel on behalf of Cumberland City Council (the Respondent) of Modification Application MOD2020/0414 seeking to modify Development Application No DA 2016/164/1 for the demolition of existing structures, consolidation of 3 lots, the construction of a part 5/part 7 storey shop top housing development comprising 90 residential units, 4 retail tenancies and basement parking for 145 cars on Lot 1 in DP 548919 and Lot 101 in DP 789369 (known as 9-11 Sherwood Road, Merrylands West).
- 2 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 31 August 2021. I presided over the conciliation conference.
- 3 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, subject to amended documents for which an adjournment was granted. This decision involved agreement by the Council as the consent authority to amendments under cl 121B of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation), and the grant of the modification application subject to conditions, pursuant to s 4.55(2) of the EPA Act.
- 4 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 7 October 2021. A further signed agreement was filed on 21 October 2021 consistent with the standard orders for modification of consents published on the Court's website, and a final corrected agreement was filed on 29 October 2021.
- 5 The parties ask me to approve their decision as set out in the s34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s34 agreement.
- 6 Under s 34(3) of the 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. The parties explained to me during the conference as to how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [14].
- 7 In particular, as the application is a modification application, s 4.55(2) of the EPA Act provides power for the Court, on appeal, to grant consent to modify a development consent if satisfied, as I am, that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted, if it has consulted in respect of matters requiring concurrence, and subject to considering submissions.
- 8 In reaching an opinion of satisfaction, I note that as the development is located within close proximity of an existing substation, written notice was made to Endeavour Energy, and comments received have been incorporated in the modified consent, consistent with cl 45(1)(b)(ii) and 45(2) of the State Environmental Planning Policy (Infrastructure) 2007. Furthermore, public submissions in respect of acoustic and amenity impacts from the roof top terrace have been incorporated by design measures including planter beds at the perimeter of roof top open space.
- 9 I also record here that the draft Cumberland Local Environmental Plan 2020 was exhibited from 1 April 2020 to 8 May 2020, but has not yet been made. That said, the zoning of the site and the relevant development standards at cl 4.3 and 4.4 are not

proposed to change, and shop top housing is proposed to remain permissible within the proposed B2 Local Centre zone.

10 I have also formed an opinion of satisfaction that each of the pre-jurisdictional requirements identified by the parties have been met, for the following reasons:

- (1) The site is located within the B2 Local Centre zone in accordance with the Holroyd Local Environmental Plan 2013 (HLEP) in which shop top housing development is permissible with consent, and wherein the zone objectives are as follows:
 - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To permit residential development that is complementary to, and well-integrated with, commercial uses.
- (2) The height of building development standard applicable under cl 4.3 of the HLEP provides for a maximum height of 23m along Sherwood Road in the vicinity of Block C, and 17m for the remaining part of the site with which the proposed modification complies.
- (3) Clause 4.4 of the HLEP permits a maximum floor space ratio (FSR) of 2.4:1 over Lot 101 and 2.2:1 over Lots 1 and 2. The proposed FSR is 2.45:1 on Lot 101, and 2.18:1 on Lots 1 and 2. If considered in conjunction, the proposed net gross floor area is within the maximum permitted across the entire site. However, for the reasons shown in *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65 at [31], s 4.55(2) is a complete source of power to modify a consent that breaches a development standard, and cl 4.6 of the HLEP does not apply to modification applications.
- (4) The site is not identified by the HLEP as a site of relevance in respect of the Additional Permitted Uses Map (clause 2.5); Acid Sulfate Soils Map (clause 6.1); the Biodiversity Map (clause 6.5); the Riparian Land and Watercourse Map (clause 6.6); the Site Specific Provisions Map (clause 6.9); or the Design Excellence Map (clause 6.11).
- (5) Clause 6.3 of the HLEP requires the consent authority to be satisfied that certain essential services are available or that adequate arrangements have been made to make them available. As the site is within an established urban area, and on the basis of the agreed conditions on consent, the Court is satisfied that water supply, electricity supply, sewage disposal stormwater drainage and road access are available or can be made available.
- (6) While the site is identified on the Salinity Map at cl 6.8 of the HLEP as having moderate salinity potential, I am satisfied that the matter was disposed of at the grant of consent to which the modification relates, and no further impact on salinity processes on the land arise from the proposed modification, and no additional measures are required to avoid, minimise or mitigate the impact of the development.
- (7) Clause 30(2) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) precludes the grant of consent if a modification application does not demonstrate that adequate regard has been given to the design quality principles at Schedule 1, and the objectives specified in the Apartment Design Guide for the relevant design criteria.
- (8) Relatedly, where an application seeks to modify development consent under s 4.55(2) of the EPA Act and that consent is for residential apartment development, the application must be accompanied by a statement by a

qualified designer, defined by cl 3 of the EPA Regulation as a person registered under the *Architects Act 2003*.

- (9) The statement by the qualified designer must attest to certain things set out at cl 3A of the EPA Regulation, including attestations in respect of the design quality principles, and the objectives specified in the Apartment Design Guide for the relevant design criteria. A complying design statement prepared by the architect Mr Robert Del Pizzo (Arch Reg No 3972) accompanies the modification application.
- (10) Finally, I am satisfied that the application is accompanied by a BASIX Certificate (Certificate No. 722281M_05 dated 1 October 2021), prepared by ESD Synergy in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.
- 11 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.
- 12 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

Orders

- 13 The Court notes:
- (1) That the Applicant has amended Modification Application MOD2020/0414 with the consent of Cumberland City Council to incorporate the amended plans and documents referred to below (Amended Modification Application):

Drawing No. and Revision/Issue	Title	Prepared by	Date
1. Architectural plans			
	Cover Page	Architex	
Drawing No .00 Issue A	Site Analysis		3 May 2016
Drawing No .01 Issue GG	Basement Level 1		7 September 2021
Drawing No .02 Issue II	Level 1		7 September 2021
Drawing No .03 Issue II	Level 2		14 September 2021
Drawing No .04 Issue EE	Level 3		7 September 2021

Drawing No. and Revision/Issue	Title	Prepared by	Date
Drawing No .05 Issue EE	Level 4		7 September 2021
Drawing No .06 Issue FF	Level 5		14 September 2021
Drawing No .07 Issue FF	Level 6		14 September 2021
Drawing No .08 Issue DD	Level 7 & 8		30 June 2021
Drawing No .09 Issue EE	Roof Level		7 September 2021
Drawing No .10 Issue EE	East Elevation Sherwood Road		14 September 2021
Drawing No .11 Issue EE	West Elevation Coolibah Road		7 September 2021
Drawing No .12 Issue EE	North-South Elevations		7 September 2021
Drawing No .13 Issue EE	Site Elevations		7 September 2021
Drawing No 13a Issue EE	Site Elevations 2		7 September 2021
Drawing No 13b Issue EE	Building Height Details		7 September 2021
Drawing No .14 Issue EE	Site Sections		7 September 2021
Drawing No .19 Issue EE	Shadow Diagram 9am – 21 st June		7 September 2021

Drawing No. and Revision/Issue	Title	Prepared by	Date
Drawing No .20 Issue EE	Shadow Diagram 12noon – 21 st June		7 September 2021
Drawing No .21 Issue EE	Shadow Diagram 3pm – 21 st June		7 September 2021
Drawing No .24 Issue C	Ramp Details		7 September 2021
Drawing No .24a Issue A	Driveway Section & Site Details		7 September 2021
Drawing No .25 Issue J	Waste Management Plan & Mailbox Details		17 August 2021
Drawing No .26 Issue BB	FSR Calculation Diagrams		14 September 2021
Drawing No .27 Issue H	3D Shadow Diagrams – Coolibah Hotel		30 June 2021
Drawing No .28 Issue BB	Solar Access – Level 2		7 September 2021
Drawing No .29 Issue BB	Solar Access – Level 3		7 September 2021
Drawing No .30 Issue BB	Solar Access – Level 4		7 September 2021
Drawing No .31 Issue BB	Solar Access – Level 5		7 September 2021
Drawing No 31a Issue A	Clerestory Skylight Solar Details		14 September 2021
Drawing No .32 Issue BB	Solar Access – Level 6		7 September 2021

Drawing No. and Revision/Issue	Title	Prepared by	Date
Drawing No .33 Issue BB	Solar Access – Level 7		7 September 2021
Drawing No .34 Issue BB	Solar Access – Level 8		7 September 2021
Drawing No .35 Issue T	Sections – Sewer Pipe Clearance		9 March 2020
Drawing No .36 Issue T	Sections – Sewer Pipe/Shaft Detail		9 March 2020
Drawing No .37	Massing 3D – Approved v Proposed		undated
Drawing No 38 Issue BB	Private common & Public Open Space Diagram		14 September 2021
Drawing No 39 Issue BB	3D Building Height Plane		30 June 2021
Drawing No 40 Issue HH	Substation Details		17 August 2021
Drawing No 41 Issue FF	Substation Details 2		22 April 2021
	Schedule of Finishes		undated
2. Landscape Plans			
Drawing No: 1297.L.01 Issue F	Landscape Plan – Level 2 Area 1	Greenland Design Pty Ltd	14 September 2021
Drawing No: 1297.L.02 Issue F	Landscape Plan – Level 2 Area 2		14 September 2021
Drawing No: 1297.L.03 Issue F	Landscape Plan – Level 3 Planters		14 September 2021
Drawing No: 1297.L.04 Issue F	Landscape Plan – Level 4 Planters		14 September 2021

Drawing No. and Revision/Issue	Title	Prepared by	Date
Drawing No: 1297.L.05 Issue F	Landscape Plan – Level 6		14 September 2021
Drawing No: 1297.L.06 Issue F	Landscape Details & Specification		14 September 2021

Title	Prepared by	Date
Supplementary Letter of Advice – Traffic	McLaren Traffic Engineers	9 September 2021
Acoustic Impact Assessment Report	Day Design Pty Ltd	8 September 2021
Waste Management Plan	Dickens Solutions	September 2021
Electromagnetic Field Assessment	MG Child & Associates	13 September 2021
BASIX certificate	722281M_05	1.10.2021
SEPP 65 Certificate	Architex	24.9.21
SEPP 65 Design Verification Statement	Architex	18.10.21

- (2) That the Amended Modification Application has been lodged on the NSW planning portal on 16 September 2021 and 1, 6 and 19 October 2021.
- (3) That the Applicant has subsequently filed the Amended Modification Application with the Court on 20 September 2021 and 7 & 19 October 2021.

14 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Consent No. DA2016/164/1 is modified in the terms in Annexure A.
- (3) Development Consent No. DA2016/164/1 as modified by the Court in Annexure B.

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T Horton

Commissioner of the Court

[Annexure A \(249844,.pdf\)](#)

[Annexure B \(502865,.pdf\)](#)

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Decision last updated: 02 November 2021