



Land and Environment Court  
New South Wales

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Case Name: Clutch Developments No.2 Pty Ltd v Waverley Council;  
Clutch Developments Pty Ltd v Waverley Council

Medium Neutral Citation: [2024] NSWLEC 1804

Hearing Date(s): Conciliation conference on 15 August and 2  
September: Final submissions 19 September 2024

Date of Orders: 13 December 2024

Decision Date: 13 December 2024

Jurisdiction: Class 1

Before: Byrne AC

Decision: In Proceedings No 2024/71549  
The Court orders:  
(1) The appeal is upheld.  
(2) Development consent is granted to Development Application No DA-381/2023, for the demolition of existing buildings and construction of a new shop top housing development at 135 – 139 Curlewis Street, Bondi Beach, being land of SP20512, subject to the conditions of consent in Annexure A.  
(3) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the agreed sum of \$8,000 to be paid within 28 days of orders being made.

In Proceedings No 2024/71554  
The Court orders:  
(1) The appeal is upheld and the modification application is granted.  
(2) Development Consent No DA-472/2022 is modified in the terms in Annexure A1.

(3) Development Consent No DA-472/2022 as modified by the Court is at Annexure B.

Catchwords: APPEAL – DEVELOPMENT APPEAL – consolidation of adjoining lot to existing development – shop top housing – MODIFICATION – modification of existing DA – conciliation conference – agreements reached – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.5, 4.15, 4.56, 8.7, 8.9, 8.11, 8.15  
Land and Environment Court Act 1979, ss 17, 34, 39  
  
Environmental Planning and Assessment Regulation 2021, ss 38, 113  
Waverley Local Environmental Plan 2012, cll 1.2, 4.3, 4.6

Category: Principal judgment

Parties: Proceedings 2024/71549  
Clutch Developments No.2 Pty Ltd (Applicant)  
Waverly Council (Respondent)

Proceedings 2024/71554  
Clutch Developments Pty Ltd (Applicant)  
Waverley Council (Respondent)

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File Number(s): 2024/71549  
2024/71554

Publication Restriction: No

## JUDGMENT

1 **COMMISSIONER:** This judgment concerns two Class 1 appeals to the Court in respect of a shop top housing development already under construction (existing development) at Bondi Beach. The existing development under DA

No DA-472/2022, was approved by the Court on 1 September 2023 pursuant to a s 34 conciliation conference and Agreement: *Clutch Developments Pty Ltd v Waverley Council* [2023] NSWLEC 1496.

- 2 The Applicant subsequently acquired the property to the west, adjoining the existing site which was consolidated into the existing development requiring a second DA and a Modification to the current operational DA No DA-472/2022 (existing DA).
- 3 The current proceedings before the Court comprise the following:
  - (1) Appeal No 2024/71549 – appeal from the deemed refusal of DA-381/2023 (second DA) – seeks consent for the demolition of an existing building and construction of a new shop top housing development at 135 – 139 Curlewis Street, Bondi Beach, being land identified as SP20512; and
  - (2) Appeal No 2024/71554 – application direct to the Court for the modification of No DA-472/2022/A (MOD application) – seeks approval to modify the existing consent granted by the Court on 1 September 2023 for the demolition of existing buildings, lot amalgamation and construction of a new shop top housing development with two levels of basement parking at 141 – 155 Curlewis Street, Bondi Beach and currently under construction.
- 4 The total land of the development being Nos 135-155 Curlewis St comprises Lot A in DP955097, Lot 1 in DP724290, Lot 1 in DP102895 and Lot 1 in DP724793 which will be consolidated at completion.
- 5 The Court arranged a conciliation conference under s 34(2)(a) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on-site and at Court.
- 6 The conciliation conference was adjourned on two occasions to facilitate the Applicant amending plans and providing further documents to the Council's satisfaction (Amended DA). Following that process the parties reached an agreement in each matter as to the terms of a decision in the proceedings that would be acceptable to the parties and which addressed the Council's contentions in both matters.
- 7 Under s 34(3) of the LEC Act, I must dispose of the Class 1 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.

- 8 The parties' experts agree that all Contentions raised in the Statement of Facts and Contentions filed in the Court on 27 March 2024 (SOFAC) have been resolved by the preparation of:
- (1) Amended plans and documents listed in the Notations at the end of this judgment for each matter; and
  - (2) Agreed conditions of consent.
- 9 There are jurisdictional pre-requisites which require my satisfaction before the power to grant consent to the second DA and approve the Modification Application under the respective provisions of *the Environmental Planning and Assessment Act 1979* (EPA Act) (ss 8.9 and 8.11) and LEC Act (ss 17(d) and 39(2)) can be exercised by the Court. The parties outlined jurisdictional matters of relevance in an agreed Jurisdictional Statement ("the Statement") for each matter provided to the Court.

*Satisfaction as to Jurisdiction*

- 10 Taking into account the parties' advice in the Statements, I am satisfied in regard to the jurisdictional matters raised by the parties which I do not need to reproduce in full in the judgment.
- 11 However I will set out seriatim certain key issues for each appeal as provided by the parties' separate Jurisdictional Statements.

**DA for 135 – 139 Curlewis St – File No 2024/71549**

*State Environmental Planning Policies (SEPPs)*

- 12 I have considered the jurisdictional provisions applicable to the proposed development on the subject Site that are raised by the following SEPPs, discussed in detail in the parties Statement at paragraphs (22) – (33). I agree with the parties conclusions that proper consideration has been given and no jurisdictional impediments arise pursuant to the following SEPPs:

- (1) State Environmental Planning Policy (Resilience and Hazards) 2021
- (2) State Environmental Planning Policy (Biodiversity and Conservation) 2021
- (3) State Environmental Planning Policy (Housing) 2021
- (4) State Environmental Planning Policy (Sustainable Buildings) 2022

*Waverley Local Environmental Plan 2012*

- 13 Waverley Local Environmental Plan 2012 (WLEP) applies to the whole of the Site.
- 14 Compliance with the WLEP is addressed generally in the Statement of Environmental Effects prepared by GSA Planning dated 7 December 2023 (SEE). The parties agree that the Amended DA is consistent with the aims in cl 1.2 of the WLEP.
- 15 The Site is zoned E1 Local Centre under the WLEP and the development is permissible with consent in the E1 Local Centre zone.
- 16 Provisions of the WLEP that apply are discussed in detail in the Statement at paragraphs (38) to (53).
- 17 Based on the material provided by the parties and the analysis and conclusions in the Statement I am satisfied that no jurisdictional impediments arise in the grant of development consent to DA-381/2023.

#### *Notification and Public Participation*

- 18 The DA was notified in accordance with the Respondent's Community Participation Plan between 29 January 2024 and 22 February 2024. Five submissions were received in relation to the DA (see paragraph 18 on page 6 of the SOFAC).
- 19 The Respondent has considered the submissions by objectors under s 4.15(1)(d) of the EPA Act. Oral submissions were made to the Court on Site from a neighbouring owner and considered by the parties. I am satisfied that the objectors reasonable concerns were considered by the parties in reaching the s 34 agreement and the objectors were accorded procedural fairness.

#### **MOD Application – 141 – 155 Curlewis St – File No 2024/71554**

- 20 MOD Application No DA-472/2022/A seeks approval to modify the existing development consent, No DA-472/2022 and was made by the Applicant, who is the owner of that site.
- 21 The MOD Application as originally lodged sought approval for the following changes:

- (1) New connection to the proposed development at 135 Curlewis Street, adjacent to the Site;
  - (2) Parking reconfiguration to allow for additional bays for the proposed development at 135 Curlewis Street;
  - (3) Reconfiguration to services, amenity and storage location;
  - (4) Proposed relocation to retail lift;
  - (5) Removal of retail entry indentation;
  - (6) Internal layout reconfiguration;
  - (7) Updated design to the lightwells to improve amenity and privacy;
  - (8) Reduction to western setback line for continuity with the proposed development at 135 Curlewis Street;
  - (9) Minor update/refinement to architectural details;
  - (10) Proposed skylight relocation;
  - (11) Proposed additional lift overrun height;
  - (12) Proposed additional floor-floor height; and
  - (13) Proposed change to the colour of a material.
- 22 Sydney Eastern City Planning Panel is the consent authority for the determination of the MOD Application pursuant to s 4.5(b) of the EPA Act. However, the Respondent in these proceedings is Waverley Council in accordance with s 8.15(4) of the EPA Act.
- 23 The Respondent (exercising the consent authority's assessment functions) has approved, pursuant to s 113 of the Environmental Planning and Assessment Regulation 2021, the Applicant amending the MOD Application in accordance with the discussions prior to and during the conciliation conference. The documents comprising the Amended MOD application are set out in the Notations at the end of this judgment.

*Section 4.56 – Environmental Planning and Assessment Act 1979*

- 24 The MOD Application and the Amended MOD Application were made pursuant to s 4.56(1) and s 4.56(1A) of the EPA Act. In this regard, the parties agreed that:
- (1) The development to which the Consent as modified relates is substantially the same development as the development for which the Consent was originally granted; see paragraphs 21(a) and (b) of the Statement;

- (2) The MOD Application was appropriately notified in accordance with s 4.56(1)(b) and (c) of the EPA Act;
  - (3) Submissions received in response to the notification of the MOD Application were considered by the Respondent pursuant to s 4.56(1)(d) of the EPA Act.
- 25 The parties considered the amended MOD Application against matters referred to in s 4.15(1) of the EPA Act as are of relevance to the proposal before the Court.
- 26 The Respondent considered the Amended MOD in regard to the public interest and the Court is satisfied that there are no public interest issues that warrant the refusal of the amended MOD Application.
- 27 Having read the parties detailed analysis, assessment and conclusions in the Statement with respect to the MOD Application No DA-472/2022/A, as amended, I am satisfied that there are no jurisdictional impediments to the Court upholding the appeal No 2024/71554 and granting the MOD Application.

#### *State and Local Environmental Planning Instruments*

- 28 Statutory planning controls applicable to the Site and the proposed development were considered by the Respondent in the previous assessment undertaken for the existing DA which was ultimately considered and granted by me as the presiding Commissioner pursuant to a s 34 conciliation conference and Agreement: see *Clutch Developments Pty Ltd v Waverley Council* [2023] NSWLEC 1496. The modification proposed by this application does not raise any new jurisdictional issues which would alter previous conclusions at the development assessment stage and as considered by the Court such that I am required to re-consider each of the relevant Environmental Planning Instruments and planning controls. I refer to the analysis undertaken in the Statement and accept the agreed position of the parties.

#### **Conclusion**

- 29 Based on the evidence before me, my observations on site and oral submissions made to me on site, I am satisfied that there is no jurisdictional impediment to the making of the proposed orders, the decision is one 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. In making the orders to give effect to the agreements 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.

## Notations

30 Notations as follows:

- (1) In respect of proceedings No 24/71549 the Court notes that:
- (a) Waverley Council, as the relevant consent authority, has agreed, pursuant to section 38(1) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Development Application No DA-381/2023 in accordance with the following amended plans and documents:
- (i) The following amended architectural plans prepared by PBD Architects:

Drawing No.	Drawing Title	Date
DA000, Issue B	Cover Sheet	08.07.2024
DA001, Issue B	Demolition Plan	08.07.2024
DA002, Issue B	Site Analysis Plan	08.07.2024
DA100, Issue B	Basement 02 Plan	08.07.2024
DA101, Issue B	Basement 01 Plan	08.07.2024
DA102, Issue B	Ground Floor Plan	08.07.2024
DA103, Issue C	Level 1 Plan	29.07.2024



DA104, Issue C	Level 2 Plan	29.07.2024
DA105, Issue C	Level 3 Plan	29.07.2024
DA106, Issue B	Roof Plan	08.07.2024
DA200, Issue B	Elevations	08.07.2024
DA201, Issue B	Elevations	08.07.2024
DA300, Issue B	Sections 01	08.07.2024
DA301, Issue B	Sections 02	08.07.2024
DA400, Issue B	Material Schedule	08.07.2024
DA501, Issue B	FSR Diagram	08.07.2024
DA510, Issue B	Deep Soil & Landscape Diagram	08.07.2024
DA520, Issue B	Cross Ventilation Diagram	08.07.2024
DA530, Issue B	Storage Diagram	08.07.2024

DA540, Issue B	Height Plane Diagram	08.07.2024
DA610, Issue B	Solar Access Diagram	08.07.2024
DA620, Issue B	Shadow Diagrams 01 Plan	08.07.2024
DA700, Issue B	Adaptable Layout	08.07.2024
	BASIX Thermal Comfort Commitments	
	BASIX Water & Energy Commitments	

(ii) Sketch Plan No SK01 (Western Wall Reduction Sketch), issue A, prepared by PBD Architects dated 3 September 2024.

(iii) Amended survey plans prepared by SDG Pty Ltd:

Drawing No.	Drawing Title	Date
8600, Issue E (Sheet 1 of 2)	Detail and Level Survey of Lot A In DP955097, Lot 1 In DP724290, Lot 1 In DP102895, Lot 1 In DP724793 and SP20512	07/03/2024
8600, Issue E (Sheet 2 of 2)	Detail and Level Survey of Lot A In DP955097, Lot 1 In DP724290, Lot 1 In DP102895, Lot 1 In DP724793 and SP20512	07/03/2024

(iv) Indicative Detail Section prepared by PBD Architects.

(v) Waverley LEP 2012 Clause 4.6 Exceptions to Development Standards the sit – Height of Buildings prepared by GSA Planning dated August 2024.

- (vi) Structural Design Statement prepared by Dunnings Consulting Engineers dated 13 March 2024.
  - (vii) Consultant Advice Note, “Minimum Floor to Floor Heights in Residential Buildings”, prepared by IGS and dated 12 March 2024.
  - (viii) Character Analysis prepared by AE Design Partnership Pty Ltd dated June 2024.
  - (ix) View Loss Assessment prepared by AE Design Partnership Pty Ltd dated June 2024.
  - (x) Natural Ventilation Letter prepared by RWDI dated 16 May 2024.
  - (xi) Waste Management Plan prepared by AusWide Consulting dated May 2024.
  - (xii) Supplementary Letter of Advice of Mixed Use Development prepared by McLaren Traffic Engineering & Road Safety Consultants dated 13 June 2024.
  - (xiii) BASIX Certificate No 1378396M\_02 prepared by ESD Synergy Pty Ltd dated 26 July 2024.
  - (xiv) BASIX Assessment Report prepared ESD Synergy Pty Ltd dated 26 July 2024.
  - (xv) Nationwide House Energy Rating Scheme (NatHERS) Certificate No 0009105220 dated 26 July 2024.
- (b) The Applicant provided the amended development application to the Court on 19 September 2024.
- (2) Leave is granted to the Applicant to amend Development Application No DA-381/2023 and rely upon the amended plans and documents referred to in Note 1(a).
- (3) The Applicant’s written request prepared by GSA Planning dated August 2024, pursuant to clause 4.6 of the Waverley Local Environmental Plan 2012 (WLEP), to vary the height of buildings development standard in clause 4.3 of the WLEP is upheld.
- 31 In respect of proceedings No 24/71554 the Court notes that:
- (1) Waverley Council, exercising the assessment functions of the relevant consent authority, has agreed, pursuant to section 113 of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Modification Application No DA-472/2022/A in accordance with the following amended plans and documents:
- (a) The following amended architectural plans prepared by PBD Architects:

Drawing No.	Drawing Title	Date
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DA000, Issue G	Cover Sheet	08.07.2024
DA098, Issue L	Basement 02 Plan	08.07.2024
DA099, Issue L	Basement 01 Plan	08.07.2024
DA100, Issue S	Ground Floor Plan	18.09.2024
DA101, Issue M	Level 1 Plan	08.07.2024
DA102, Issue M	Level 2 Plan	08.07.2024
DA103, Issue M	Level 3 Plan	08.07.2024
DA104, Issue N	Roof Plan	29.07.2024
DA200, Issue M	Elevations	08.07.2024
DA201, Issue M	Elevations	29.07.2024
DA300, Issue M	Sections 01	08.07.2024
DA301, Issue M	Sections 02	29.07.2024

DA302, Issue M	Sections 03	29.07.2024
DA400, Issue J	Material Schedule	08.07.2024
DA501, Issue H	FSR Diagram	29.07.2024
DA510, Issue F	Deep Soil & Landscape Diagram	08.07.2024
DA540, Issue J	Storage Diagram	08.07.2024
DA560, Issue J	Height Plane Diagram	08.07.2024
DA620, Issue J	Shadow Diagrams 01 Plan	08.07.2024
DA621, Issue J	Shadow Diagrams 02 Plan	08.07.2024
DA700, Issue L	Adaptable Layout	08.07.2024

(b) Amended survey plans prepared by SDG Pty Ltd:

Drawing No.	Drawing Title	Date
8600, Issue E (Sheet 1 of 2)	Detail and Level Survey of Lot A In DP955097, Lot 1 In DP724290, Lot 1 In DP102895, Lot 1 In DP724793 and SP20512	07/03/2024

8600, Issue E (Sheet 2 of 2)	Detail and Level Survey of Lot A In DP955097, Lot 1 In DP724290, Lot 1 In DP102895, Lot 1 In DP724793 and SP20512	07/03/2024
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- (c) Indicative Detail Section prepared by PBD Architects.
  - (d) Design Verification Statement prepared by PBD Architects dated 22 August 2024.
  - (e) Structural Design Statement prepared by Dunning's Consulting Engineers dated 13 March 2024.
  - (f) Consultant Advice Note, "Minimum Floor to Floor Heights in Residential Buildings", prepared by IGS and dated 12 March 2024.
  - (g) View Loss Assessment prepared by AE Design Partnership Pty Ltd dated June 2024.
  - (h) Waste Management Plan prepared by AusWide Consulting dated May 2024.
  - (i) Supplementary Letter of Advice of Mixed Use Development prepared by McLaren Traffic Engineering & Road Safety Consultants dated 13 June 2024.
  - (j) BASIX Certificate No 1335214M\_05 prepared by ESD Synergy Pty Ltd dated 26 July 2024.
  - (k) BASIX Assessment Report prepared ESD Synergy Pty Ltd dated 26 July 2024.
  - (l) Nationwide House Energy Rating Scheme (NatHERS) Certificate No 0008059390 dated 26 July 2024.
  - (m) Letter of offer to enter into a VPA prepared by Clutch dated 21 August 2024.
- (2) The Applicant provided the amended modification application to the Court on 19 September 2024.
  - (3) Leave is granted to the Applicant to amend Modification Application No DA-472/2022/A and rely upon the amended plans and documents referred to above.

## Orders

*In Proceedings No 2024/71549*

32 The Court orders:

- (1) The appeal is upheld.

- (2) Development consent is granted to Development Application No DA-381/2023, for the demolition of existing buildings and construction of a new shop top housing development at 135 – 139 Curlewis Street, Bondi Beach, being land of SP20512, subject to the conditions of consent in Annexure A.
- (3) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the agreed sum of \$8,000 to be paid within 28 days of orders being made.

*In Proceedings No 2024/71554*

33 The Court orders:

- (1) The appeal is upheld and the modification application is granted.
- (2) Development Consent No DA-472/2022 is modified in the terms in Annexure A1.
- (3) Development Consent No DA-472/2022 as modified by the Court is at Annexure B.

**L Byrne**

**Acting Commissioner of the Court**

**Annexure A**

**Annexure A1**

**Annexure B**

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