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| Case Name: | Anglican Community Services v Ku-ring-gai Council |
| Medium Neutral Citation: | [2020] NSWLEC 1189 |
| Hearing Date(s): | Conciliation conference on 26 March 2020 |
| Date of Orders: | 23 April 2020 |
| Decision Date: | 23 April 2020 |
| Jurisdiction: | Class 1 |
| Before: | Chilcott C |
| Decision: | See orders at [13] below |
| Catchwords: | MODIFICATION APPLICATION – conciliation conference – agreement between the parties – orders |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 |
| Category: | Principal judgment |
| Parties: | Anglican Community Services (Applicant) Ku-ring-gai Council (Respondent) |
| Representation: | Counsel: R Pleming (Solicitor) (Applicant) A Hudson (Solicitor) (Respondent)   Solicitors: Allens (Applicant) Wilshire Webb Staunton Beattie (Respondent) |
| File Number(s): | 2019/363494 |
| Publication Restriction: | No |

Judgment

1. **COMMISSIONER:** Anglican Community Services (the Applicant) has appealed the decision of Ku-ring-gai Council (the Respondent) to refuse its application to modify development consent 0257/16, granted for alterations and additions, including part demolition, construction of new buildings, with associated works, at the Roden Cutler Retirement Village, including the use of that facility for seniors housing (the development consent) at 6-10 Edward Street, 1 Melkin End and 37 Rosedale Avenue, Gordon (the Subject Site).
2. The appeal comes to the Court pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), and falls within Class 1 of the Court’s jurisdiction.
3. These proceedings are determined pursuant to the provisions of s 4.56 of the EP&A Act.
4. The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the Parties, which has been held on 26 March 2020 by teleconference, and I have presided over the conciliation conference.
5. 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 modification application, subject to conditions.
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’ decision involves the Court exercising the function under s 4.56 of the EP&A to grant consent to the modification application.
7. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The Parties identified the jurisdictional prerequisites of relevance in these proceedings to be:
8. the provisions of cl 4.56(1) of the EP&A Act which require that a consent authority, or the Court on appeal:
9. is satisfied that the development to which the consent as modified relates is substantially the same as the development for which consent was originally granted and before that consent as originally granted was modified (if at all);
10. it has notified the application in accordance with:
11. the regulations, if the regulations so require, and
12. 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;
13. it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person; and
14. it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.
15. the provisions of cl 4.56(1A) of the EP&A Act, which require that a consent authority, or the Court on appeal:
16. 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 s 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.
17. The Parties have explained, and I accept, that the above jurisdictional prerequisites have been satisfied, as follows:
18. in relation to the requirements of cl 4.56(1)(a) of the EP&A Act, the development to which the consent as modified relates is substantially the same as the development for which consent was originally granted because the modification continues to be for alterations and additions, including part demolition, construction of new buildings, with associated works, at the Roden Cutler Retirement Village, including the use of that facility for seniors housing, which was the purpose for which development consent 0257/16 was originally granted;
19. the modification application has been properly notified as required under the provisions of cl 4.56(1)(b) and (c), and three submissions were received in response to that notification;
20. all submissions received, whether in response to public notification or through agency consultation, have been taken into consideration;
21. the matters referred to in s 4.15(1) as they are of relevance to the Proposed Development and which are the subject of the application the modification application, have been considered; and
22. the reasons given by the Court for the grant of the consent that is sought to be modified have been considered.
23. The Respondent also confirmed that the NSW Rural Fire Service had advised that it had no objection to the modification application that is the subject of this appeal on the basis that the General Terms of Approval issued by it in relation to the original development application would continue to apply to the development as modified.
24. Having considered the advice of the Parties, provided above at [[8](#_Ref532203381)] and [9], I agree that the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.56(1) of the EP&A Act have been so satisfied.
25. 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, for reasons provided at [[8](#_Ref532203381)], [[9](#_Ref532203498)] and [10].
26. 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.
27. The Court orders:
28. The Applicant is granted leave to rely on the following amended plans:

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| **Drawing No.** | **Drawing Name.** | **Rev** | **Date** |
| AR-DA-1113 | Context – Comparative Analysis of Built Form | G | 25 March 2020 |
| AR-DA-2011 | Burnham Thorpe – Proposed Lower and Ground Floor Plan | J | 17 February 2020 |
| AR-DA-2012 | Burnham Thorpe – Proposed First Floor and Roof Plan | H | 17 February 2020 |
| AR-DA-3011 | RACF Elevations 1 | H | 17 February 2020 |
| AR-DA-5001 | Building B, C, D, E & H – Proposed Basement and Ground Floor Plan | N | 17 February 2020 |
| AR-DA-5002 | Building B, C, D, E & H – Proposed First Floor and Roof Plan | K | 17 February 2020 |
| AR-DA-5021 | Building F – Proposed Floor Plans | L | 17 February 2020 |
| AR-DA-5041 | Building G – Proposed Floor Plans | M | 18 March 2020 |
| AR-DA-5051 | Building G – Proposed Elevations | J | 25 March 2020 |
| AR-DA-5501 | Unit Layout – Sheet 1 | B | 25 March 2020 |
| AR-DA-5502 | Unit Layout – Sheet 2 | A | 14 February 2020 |
| AR-DA-6011 | Site Section – Sheet 01 | G | 25 March 2020 |
| LAND-DA-A12 | Section N02 - Precinct 3 – Residential Aged Care Facility (RACF) | E | 1 March 2019 |
| LAND-DA-A15 | Section N04 - Precinct 5, Rosedale Road & Melkin End ILU | E | 1 March 2019 |

1. The appeal is upheld.
2. Pursuant to s 4.56 of the *Environmental Planning and Assessment Act 1979*, Development Consent No. DA0257/16 is modified in accordance with Modification Application No. MOD0066/19, in respect of the Roden Cutler Retirement Village at 6-10 Edward Street, 1 Melkin End and 37 Rosedale Road, Gordon NSW, subject to the modified conditions of consent at Annexure A.

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M Chilcott

Commissioner of the Court

[Annexure A (357 KB)](http://www.caselaw.nsw.gov.au/asset/5ea119fee4b0d927f74af273.pdf)

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