



Land and Environment Court  
New South Wales

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Case Name: Sage by Moran Pty Ltd as Agent for the Cronulla by Moran Partnership v Sutherland Shire Council

Medium Neutral Citation: [2023] NSWLEC 1264

Hearing Date(s): Conciliation conference on 16 May 2023

Date of Orders: 31 May 2023

Decision Date: 31 May 2023

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:  
(1) The appeal is upheld.  
(2) Development Consent No 20/0737 is modified in the terms in Annexure A.  
(3) Development Consent No 20/0737 as modified by the Court is Annexure B.

Catchwords: MODIFICATION APPLICATION – modification application for mixed use development in B3 Commercial Core zone – conciliation conference – agreement between parties - orders

Legislation Cited: Architects Act 2003  
Conveyancing Act 1919, s 88B  
Environmental Planning and Assessment Act 1979, ss 4.15, 4.56, 7.11, 7.13, 8.9  
Environmental Planning and Assessment Regulation 2021, Sch 7, ss 102, 113  
Land Environment Court Act 1979, s 34  
State Environment Planning Policy (Resilience and Hazards) 2021, ss 2.4, 2.11, 4.6  
State Environmental Planning Policy (Building Sustainability Index BASIX) 2004  
State Environmental Planning Policy (Housing for

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|--------------------------|--|
|                          | Seniors or People with a Disability) 2004<br>State Environmental Planning Policy No 65 – Design<br>Quality of Residential Apartment Development, cl 30,<br>Sch 1<br>Sutherland Shire Local Environmental Plan 2015, cl<br>4.3, 4.4, 4.6, 6.1, 6.2, 6.4, 6.7, 6.8, 6.16, 6.17 |
| Cases Cited:             | SDHA Pty Ltd v Waverley Council (2015) 209 LGERA<br>233; [2015] NSWLEC 65  |
| Texts Cited:             | NSW Department of Planning and Environment,<br>Apartment Design Guide<br>Sutherland Shire Section 7.11 Development<br>Contribution Plan 2016   |
| Category:                | Principal judgment   |
| Parties:                 | Sage by Moran Pty Ltd as Agent for the Cronulla by<br>Moran Partnership (Applicant)<br>Sutherland Shire Council (Respondent)   |
| Representation:          | Counsel:<br>E Whitney (Solicitor) (Applicant)<br>J Amy (Solicitor) (Respondent)<br><br>Solicitors:<br>Mills Oakley (Applicant)<br>Sutherland Shire Council (Respondent)  |
| File Number(s):          | 2022/382265  |
| Publication Restriction: | Nil  |

## 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 deemed refusal by Sutherland Shire Council (the Respondent) of modification application No MA22/0266 seeking to modify development consent DA20/0737 (the original consent).
- 2 The original consent was for construction of a new mixed used development consisting of 37 seniors living units and 4 commercial tenancies, at 37 Gerrale Street, Cronulla (the site).

- 3 The modification application, made pursuant to s 4.56 of the EPA Act, seeks consent for amendments that may be summarised as follows:
- (1) Changes to external design elements on balconies.
  - (2) New roof over security entrance and reinstating security gates.
  - (3) Deletion of bathroom in Retail 1 on ground floor.
  - (4) Provision of a solid white upstand around the rooftop plant space for acoustic reasons.
  - (5) Modification of the conditions of consent imposed prior to the modification application.
- 4 In accordance with its usual practice, the Court arranged a mandatory conciliation conference under s 34 of the Land Environment Court Act 1979 (LEC Act) on 16 May 2023, at which I presided.
- 5 Prior to the conciliation conference, the parties advised that, as a result of further amendments to the modification application, the parties had reached agreement as to the terms of a decision in the proceedings that was acceptable to the parties. To this end, the Respondent approved the amending of the application by the Applicant, in accordance with s 113 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).
- 6 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 16 May 2023, and the matter was re-allocated to me under s 34 of the LEC Act.
- 7 The parties ask me to approve their decision as set out in the s 34 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 s 34 agreement.
- 8 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 prepared a jurisdictional statement to assist the Court in understanding how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [18].

- 9 I formed an opinion of satisfaction that each of the pre-jurisdictional requirements identified by the parties have been met, for the reasons that follow.
- 10 Firstly, with respect to s 4.56 of the EPA Act, I have formed the necessary state of satisfaction that the development to which the consent as modified relates is substantially the same as the development for which the consent was originally granted by the Sutherland Shire Council Assessment Panel on behalf of the Respondent on 17 June 2021.
- 11 I have formed this opinion on the basis of the modifications agreed by the parties to be limited to the following:

Ground Floor:

- (1) Installation of Security gates and 'hit and miss' brickwork to protect entrance courtyard.
- (2) Installation of roof over entrance courtyard for weather protection
- (3) Deletion of bathroom in Retail 1
- (4) Installation of blade wall on north side beside basement entrance to Surf Lane.
- (5) Revision of paving layout along Surf Lane to match Gerrale Street
- (6) Allocation of 1.2m of land along Surf Lane for the purposes of a footway (condition 6)
- (7) Amendment to design of overland flow to road reserve (condition 17)

Typical Tower:

- (8) Champagne colour powder coat metallic paint finish to balcony up-stands substituted with champagne colour aluminium paint finish.
- (9) Equitone façade panels substituted with Metz panel
- (10) Deletion of timber-look aluminium soffits on balconies to be replaced with white painted finish.

Level 9:

- (11) Modification of Pool layout to improve serviceability and amenity for senior residents.
- (12) Upper pool deck finished floor level raised to suit pool depth and below deck pool plant.
- (13) Access to southern lower deck has been improved by removing the pool gate and replacing steps with a ramp. Former elevated pool fencing to

the southern lower deck has been reduced in height as it no longer forms part of the pool enclosure.

Roof Plant:

- (14) Rooftop plant acoustically and visually concealed through addition of a white painted concrete screen.
- 12 Secondly, I record here that the modification application was notified between 2 December 2022 and 19 December 2022, in response to which no written submissions were received.
- 13 Thirdly, I have also taken into consideration those matters under s 4.15(1) of the EPA Act as they are relevant to the modification application, as well as the reasons given by the consent authority for the grant of the consent in the original consent.
- (1) In respect of the Sutherland Shire Local Environmental Plan 2015 (SSLEP):
    - (a) The proposal exceeds the height permitted under the height of building standard at cl 4.3, and also exceeds the floor space ratio permitted under cl 4.4. However, for the reasons shown in *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65, at [31], the provisions dealing with modification applications contained in the EPA Act is a complete source of power to modify a consent that breaches a development standard, and cl 4.6 of the SSLEP does not apply to modification applications. That said, I note the agreed position of the parties is that the screen proposed around the mechanical ventilation at the rooftop level will not be visible from the Gerrale Street when approached from the north; will not be visible from Surf Road and will be visible from the far northern end of Surf Lane, although will be partially screened by existing vegetation not shown in the perspective studies prepared on behalf of the Applicant.
    - (b) The parties have set out grounds on the basis of which the matters at cll 6.1, 6.2, 6.4, 6.7, 6.8, 6.16 and 6.17 are agreed to be satisfied or otherwise considered and addressed as are of relevance to the subject of the application.
  - (2) In respect of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, I accept that the scope of modification of the development for which consent was originally granted, set out at [11], does not disturb the state of compliance found before that consent as originally granted was modified.
  - (3) In respect of State Environment Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP):

- (a) I understand there to be no proposed modification at [11] that would disturb the consideration made in respect of the original consent in accordance at s 4.6 of the Hazards SEPP.
  - (b) As part of the site is within the Coastal Use Area, pursuant to s 2.4(5) of the Hazards SEPP, the provisions of s 2.11 apply to the site. The parties are satisfied that the proposed modification will not cause an adverse impact on the existing safe access to and along the foreshore, beach, headland or rock platform for members of the public, loss of views from public places to foreshores, or the visual and scenic amenity qualities of the coast.
- (4) In respect of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65):
  - (a) A statement by a qualified designer, defined at Sch 7 of the EPA Regulation as a person registered as an architect under the *Architects Act 2003*, supports the modification application in accordance with s 102(1)(b) of the EPA Regulation.
  - (b) The statement, prepared by Mr Doug Southwell (Arch Reg No 7362), is in accordance with s 102(2) and (3) of the EPA Regulation.
  - (c) The statement establishes that those matters at cl 30(1) of SEPP 65, evident in the development the subject of the original consent, remain undisturbed and unaffected by the modifications at [11].
  - (d) The statement also demonstrates, in my view, that adequate regard has been given to the design quality principles at Sch 1 of SEPP 65, and the objectives specified in the Apartment Design Guide, in accordance with cl 30(2) of SEPP 65.
- (5) In respect of State Environmental Planning Policy (Building Sustainability Index BASIX) 2004, I accept that the scope of the modifications proposed at [11] do not comprise amendments that would require a revised BASIX certificate.
- (6) In respect of the agreed conditions of consent:
  - (a) The parties have agreed that the Applicant will provide 1.2m of land running parallel to Surf Lane, as shown in the attached plan, free of cost; and in consideration of the same, the Respondent agrees to delete condition 9.
  - (b) Section 7.13(2) of the EPA Act relevantly provides that the Court:
    - may impose a condition under s 7.11 of the EPA Act even though it is not authorised (or of a kind allowed) by, or is not determined with, a contributions plan, but

- the Court must, before imposing the condition have regard to any contributions plan that applies to the whole or any part of the area in which development is to be carried out.
- (c) Section 7.13(3) of the EPA Act further provides: “A condition under section 7.11 that is of a kind allowed by a contributions plan (or a direction of the Minister under this Division) may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan (or direction). This subsection does not authorise the Court to disallow or amend the contributions plan or direction.”
- (7) Having considered the Sutherland Shire Section 7.11 Development Contribution Plan 2016 and its application to the site, I am satisfied that condition 6 may be amended to require the Applicant to provide land identified on the relevant plan to the Respondent by registering an easement on title pursuant to s 88B of the *Conveyancing Act 1919* prior or on registration of the strata plan;
- (8) Furthermore, I am also satisfied that condition 9 may be deleted in accordance with the Court’s powers under s 7.13(3) of the EPA Act, even though it was determined in accordance with the Contributions Plan, because it would be unreasonable to require the Applicant to provide any further contribution under s 7.11 beyond dedicating 1.2m of land for use by the public as a footway, and by that improve amenity in the local area.
- 14 Fourthly and finally, I am satisfied as the presiding Commissioner, for the reasons set out above, that the decision is one that the Court can make in the proper exercise of its functions, being the test applied by s 34(3) of the LEC Act.

## Conclusion

- 15 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.
- 16 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.
- 17 The Court notes that:
- (1) The Sutherland Shire Council, as the consent authority agrees under s 113(4) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Modification Application MA22/0266 to

rely on the documents specified in Annexure C ('the Amended Application').

- (2) The Amended Application as described at Annexure C was filed with the Court on 15 May 2023.

18 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Consent No 20/0737 is modified in the terms in Annexure A.
- (3) Development Consent No 20/0737 as modified by the Court is Annexure B.

**T Horton**

**Commissioner of the Court**

[382265.22 Annexure A \(186749, pdf\)](#)

[382265.22 Annexure B \(390388, pdf\)](#)

[382265.22 Annexure C \(133085, pdf\)](#)

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