



New South Wales

Medium Neutral Citation:	Sage by Moran Pty Limited v Sutherland Shire Council [2022] NSWLEC 1115
Hearing dates:	Conciliation conference on 25 February 2022
Date of orders:	08 March 2022
Decision date:	08 March 2022
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	The Court orders: (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:	DEVELOPMENT APPEAL – Modification of development consent - conciliation conference – agreement between the parties - orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.55, 8.9 Environmental Planning and Assessment Regulation 2000, cl 121B Land and Environment Court Act 1979, s 34
Category:	Principal judgment
Parties:	Sage by Moran Pty Ltd (Applicant) Sutherland Shire Council (Respondent)
Representation:	Counsel: E Whitney (Solicitor) (Applicant) J Amy (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Sutherland Shire Council (Respondent)
File Number(s):	2021/317653
Publication restriction:	No

JUDGMENT

- COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act* 1979 (EPA Act) being an appeal against deemed refusal of an application to modify a development consent Modification

Application No. MA21/0333 seeking approval to modify Development Consent No. DA20/0737 for mixed use development for ground-floor commercial and seniors living dwellings (the Proposed Modification) at 37 Gerrale Street Cronulla (the Site).

- 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 has been held on 25 February 2022. I have presided over the conciliation conference.
- 3 I note that on 21 January 2022, the parties participated in a s.34 conciliation conference before Commissioner Bish which was adjourned until 11 February 2022 to allow the Applicant to prepare a suite of amended plans and materials, as agreed between the parties at the s.34 conference.
- 4 The Applicant has prepared a suite of amended plans and materials, and on 31 January 2022 provided these to the Respondent. The amendments were made in response to the Respondent's Statement of Facts and Conditions (SOFAC) discussions between the parties at the s34 conciliation conference.
- 5 Broadly, the Modification Application (as amended) includes the following:

Ground Floor:

- Services door amendments to the Gerrale Street interface including:
- Essential service doors adjoining the existing bus stop
- Sprinkler Booster set moved back into the streetwall façade, to the north of the retail space.
- Vertical timber look batten finish to the above service doors.
- Amendments to the landscaping in front of both the substation kiosk and the service doors to Gerrale Street.
- Northern lift opens into Residents Lounge.

Level 1

- Clarification in height, material and acoustic requirement for the privacy screen between the Level 1 common terrace and apartment on the Gerrale Street frontage.
- Balcony soffits amended to have timber look soffit as per materials board submitted

Level 2-8

- Recess to the southern façade at the end of the common lift lobby/corridor: plant and louvre screen removed. Landscaping planters and glazing reinstated.
- Balcony soffits amended to have timber look soffit as per materials board submitted

Level 9

- Northern lift opens to western side with the introduction of a lift lobby separate to the residents common pavilion.
- As a result the connection to the pool and circulation space has been amended.
- Mechanical plant relocated from pool edge to the northern enclosure.
- Additional planting added to perimeter of pool with planter top of walls and balustrade heights confirmed.

Other

- Balustrade and screen details added.

(Amended Modification Application)

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 modifying the development consent subject to conditions.

7 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 4.55 of the EPA Act to modify a development consent.

8 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 terms of s 4.55 of the EPA Act to modify a consent.

9 The parties explained how the jurisdictional prerequisites have been satisfied in an agreed jurisdictional statement. The parties agree that the Amended Modification Application can be approved taking into consideration the following matters in section 4.55(2) of the EPA Act:

(a) The development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (at all);

(b) The consent authority has consulted with the relevant approval body in respect of any condition imposed as a requirement of concurrence and that body has not, within 21 days after being consulted, objects to the modification of that consent; and

(c) The modification application has been notified.

(d) The Respondent has considered any submissions made.

10 The Amended Modification Application is considered by the parties to be substantially the same development, as required by section 4.55(2), for the following reasons:

- (1) The overall building envelope, despite the minor changes to the ground floor, first floor and level 9, will remain largely consistent with the development approved by the Development Consent.
- (2) The proposed modifications result in a development outcome that is quantitatively and qualitatively substantially the same as the original development and improves a number of the original design elements to increase the amenity of the residents and the wider environment.
- (3) The fundamental characteristics and essence of the proposed development remain unchanged. In particular, the amended development will still deliver:
 - (a) Ground floor commercial tenancies and 37 residential units for seniors living;
 - (b) Appropriate built form that continues to comply with the key planning controls, including SEPP 65, the LEP and the DCP;
 - (c) and will result in a number of planning and environmental improvements, including increased car parking, removal of the level 1 plant room and improved design and landscaping treatment throughout the development.
- (4) The Amended Modification Application remains consistent with the built form as

approved and continues to compliment the character of the surrounding area.

- (5) The Respondent was not required to consult with any approval bodies regarding condition(s) of consent.
- (6) The modification application has been notified and no submissions were made.
- 11 The parties agree that the Amended Modification Application can be approved as they have taken into consideration the matters referred to in section 4.15(1) of the EPA Act as are of relevance to the development the subject of the application. The parties have also considered the reasons given by the South Sydney Planning Panel for the grant of the Development Consent that is sought to be modified and consider the Amended Modification Application acceptable.
- 12 In relation to the requirements of s 4.55(3) of the EPA Act I have considered the relevant matters referred to in s 4.15(1) of the EPA Act and I have considered the reasons given by the South Sydney Planning Panel as extracted in the SOFAC filed 23 December 2021 at par (32), and the Court has been provided with a copy of the Determination and Statement of Reasons Sydney South Planning Pannell dated 17 June 2021 for DA20/0737.
- 13 I am 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. I adopt the reasons given by the parties.
- 14 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.

Notations

- 15 The Court notes that:

- (1) the consent authority agrees under cl 121B of the Environmental Planing and Assessment Regulation 2000, to the Applicant amending modification application MA21/0333 to rely on the documents specified below:

TAB	DOCUMENT	DATE
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1.	Architectural Plans, prepared by Scott Carver Architects: • AD-DA000 Cover Page Revision 9 • AD-DA111 GA Plan Level 1 Revision 11 • AD-DA119 GA Plan Level 9 Revision 11 • AD-DA201 North Elevation Revision 13 • AD-DA202 South Elevation Revision 14 • AD- DA203 East Elevation Revision 13 • AD-DA204 West Elevation Revision 13 • AD-DA260 Detailed Section Revision 11 • AD-Da270 Balustrade and Screen Details Revision 2 • AD-DA940 Material Board Revision 2 Landscape Plans prepared by Scott Carver Architects: • LD-DA000 Cover Page Revision 5 • LD-DA010 Planting Schedule Revision 5 • LD-DA300 Planting Ground Revision 5 • LD-DA302 Planting Plan Level 2 Revision 4 • LD-DA303 Planting Plan Rooftop Revision 5 • LD-DA301 Planting Plan Level 1 Revision 5	7 February2022 28 January 2022 10 January 2022
2.	• Acoustic Report prepared by ADP Consulting	31 January 2022
3.	• Geotechnical Report prepared by Morrow	31 January 2022

- (2) The Applicant has filed the amended application with the Court on 1 February 2022.
- (3) The Applicant has uploaded the amended application on the NSW Planning Portal on 24 February 2022

Orders:

16 The Court orders:

- (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.

E Espinosa

Commissioner of the Court

[Annexure A \(201668, pdf\)](#)

[Annexure B \(386567, pdf\)](#)

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Decision last updated: 08 March 2022