



Land and Environment Court
New South Wales

Case Name: Canberra Estates Consortium No 69 Pty Limited v Queanbeyan-Palerang Regional Council

Medium Neutral Citation: [2022] NSWLEC 1734

Hearing Date(s): Conciliation conference on 21 October 2022, 5 December 2022 and 15 December 2022

Date of Orders: 23 December 2022

Decision Date: 23 December 2022

Jurisdiction: Class 1

Before: Adam AC

Decision: The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA.2021.1284, to rely on the amended plans and documents specified in Annexure A.
- (2) The appeal is upheld.
- (3) Development Application no. DA.2021.1284 for:
 - (a) the concept approval for the staged subdivision of land at 360A Alderson Place, Tralee NSW 2620 and identified as Lot 126 DP 1269436 and part Lot 189 DP 1272220 (formerly known as the lot references set out in Annexure B to the Class 1 Application) for residential purposes, and
 - (b) stages 1 and 2 of the residential subdivision, being the subdivision of the part of the land identified as Lot 126 DP 1269436 to create 161 residential lots (as amended by Annexure B, Schedule 2, Condition 3), 1 open space lot detention basin, 3 open space lots, 2 residue lots and associated roads, infrastructure and landscaping,

is determined by the grant of consent subject to the conditions set out in Annexure 'B'.

Catchwords:

APPEAL – deemed refusal – subdivision for future residential development – conciliation conference – agreement between the parties – orders made

Legislation Cited:

Biodiversity Conservation Act 2016, Pt 7
Environmental Planning and Assessment Act 1979 ss 4.7, 4.15, 8.7, Div 4.8
Environmental Planning and Assessment Regulation 2000 cl 55
Land and Environment Court Act 1979 s 34
National Parks and Wildlife Act 1974
Queanbeyan Local Environmental Plan (South Jerrabomberra) 2012 cll 2.6, 4.1, 4.6, 5.10, 5.21, 6.1, 6.2, 6.3, 7.1, 7.2, 7.3, 7.4, 7.6
Queanbeyan-Palerang Local Environmental Plan 2022
Rural Fires Act 1997 s 100B
State Environmental Planning Policy (Biodiversity and Conservation) 2021 s 4.9
State Environmental Planning Policy (Planning Systems) 2021 Sch 6 s 1
State Environmental Planning Policy (Resilience and Hazards) 2021 s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021
Water Management Act 2000 Pt 3, Ch 3

Cases Cited:

Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118

Texts Cited:

South Jerrabomberra Development Control Plan 2015

Category:

Principal judgment

Parties:

Canberra Estates Consortium No 69 Pty Limited (Applicant)
Queanbeyan-Palerang Regional Council (Respondent)

Representation:

Counsel:
M Staunton (Applicant)
A Menyhart (Solicitor) (Respondent)

Solicitors:
Lindsay Taylor Lawyers (Applicant)
Bradley Allen Love Lawyers (Respondent)

File Number(s): 2022/00194981

Publication Restriction: No

JUDGMENT

- 1 Canberra Estates Consortium No 69 Pty Limited, the Applicant, appeals, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), against the deemed refusal of Development Application 2021.1284 (DA) by Queanbeyan-Palerang Regional Council, the Respondent.
- 2 Much of the information below was derived from the Application and the Jurisdictional Statement provided to the Court by the parties.
- 3 The DA was lodged with Council on 25 May 2021 and sought consent for:
 - (1) the concept development application for the staged subdivision of land identified as Lot 126 DP 1269436 and Lot 189 DP 1272220 (formerly known as the lot references set out in Annexure B of the Class 1 Application), known as 360A Alderson Place, Tralee NSW 2620 (Site), for residential purposes, and
 - (2) stages 1 and 2 of the residential subdivision, being the subdivision of the part of the land identified as Lot 126 DP 1269436 to create 161 residential lots, 1 open space lot detention basin, 3 open space lots, 2 residue lots and associated roads, infrastructure and landscaping.
- 4 The development is regionally significant development pursuant to s 1 of Sch 6 of the State Environmental Planning Policy (Planning Systems) 2021. On 5 April 2022 the DA was reported to the Southern Regional Planning Panel (Planning Panel) as the relevant consent authority. To date the DA has not been determined.
- 5 The subject Site is part of the South Jerrabomberra urban release area, earlier stages of which have already commenced. The Site is bounded to the west by the ACT/NSW border. To the east the ANEF 20-25 contours provide an artificial boundary to the development. (The noise contours are those associated with the use of the nearby Canberra airport).

- 6 On 19 and 27 October 2022 and 4 November 2022 the Applicant provided amended plans to the Council in response to without prejudice discussions between the parties. The Council in exercising the development assessment functions of the Planning Panel pursuant to s 4.7(2) of the EPA Act agreed under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Reg) to the Applicant amending the DA in accordance with the amended plans and reports now listed at Annexure A of the s 34 Agreement.
- 7 The DA was originally notified and publicly exhibited from 3 November to 1 December 2021. Only one submission was received in response to the notification of the original proposal. The Applicant had provided a response to the submission that was included within the Class 1 Application at Tabs 18a and 18b. The amended DA was forwarded to the relevant concurrence and approval bodies pursuant to cl 55(3) of the EPA Reg.
- 8 In view of the fact that the only submission made following the original public exhibition had been addressed and that no other submissions had subsequently been received, there were no objectors to be heard. It was therefore not necessary to commence the matter with a site inspection with the parties and their experts in attendance.
- 9 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act).
- 10 The s34 conciliation commenced on 21 October 2022 and was held by Microsoft Teams. I presided at the conciliation conference. Discussions between the parties and the Court continued, and a s34 Agreement and a Jurisdictional Statement were filed on 15 December 2022. A final version of the s34 Agreement was filed on 21 December 2022. The Applicant was represented by Mr Staunton, counsel on 21 October 2022, and subsequently by Ms Puckeridge, solicitor.
- 11 The parties seek that the Court make orders in accordance with the s34 Agreement filed by the parties. Section 34(3) requires:

If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the

Court could have made in the proper exercise of its functions), the Commissioner—

(a) must dispose of the proceedings in accordance with the decision, and

(b) must set out in writing the terms of the decision.

- 12 In order to be satisfied that the decision was one which the Court could have made in the proper exercise of its functions when it is standing in the shoes of the Council, I must be satisfied that all jurisdictional prerequisites are met. In order for me to determine that this is the case I have been assisted by the comprehensive Jurisdictional Statement provided by the parties.
- 13 The DA is for subdivision and associated works; it does not involve construction of any dwellings, which will be the subject of separate DAs at a later time, so that none of the development standards which will apply to the construction of buildings within the estate arise for consideration at this time.
- 14 From my consideration of the matters raised in the Jurisdictional Statement, and the relevant documents included within the Application, I am satisfied that there are no jurisdictional impediments to me upholding the appeal.

Owner's consent

- 15 The owner's consent was provided in the Development Application form included as Tab 1 in the Class 1 application.

Permissibility

- 16 The Estate 2 Concept Subdivision relates to land within the South Jerrabomberra urban release area.
- 17 The site includes a mix of zones comprising R2 Low Density Residential, RE2 Private Recreation and C2 Environmental Conservation. The development is for the purposes of residential accommodation, which will be the subject of separate applications subsequently, is primarily within the R2 zone and I am satisfied that the amended DA meets the objectives of the R2 zone.
- 18 Subdivision of land included within the Queanbeyan Local Environmental Plan (South Jerrabomberra) 2012 (LEP 2012) is permitted with consent (cl 2.6).
- 19 I am therefore satisfied that the Amended DA meets the requirements for permissibility.

Notification requirements

- 20 As discussed earlier I am satisfied that the applicable notification requirements have been satisfied.

State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity and Conservation)

- 21 Chapter 4 of the SEPP Biodiversity and Conservation applies to the Site. Section 4.9 addresses koala issues.

4.9 Development assessment process—no approved koala plan of management for land

- (1) This section applies to land to which this Chapter applies if the land—
- (a) has an area of at least 1 hectare (including adjoining land within the same ownership), and
 - (b) does not have an approved koala plan of management applying to the land.
- (2) Before a council may grant consent to a development application for consent to carry out development on the land, the council must assess whether the development is likely to have any impact on koalas or koala habitat.
- (3) If the council is satisfied that the development is likely to have low or no impact on koalas or koala habitat, the council may grant consent to the development application.
- (4) If the council is satisfied that the development is likely to have a higher level of impact on koalas or koala habitat, the council must, in deciding whether to grant consent to the development application, take into account a koala assessment report for the development.
- (5) However, despite subsections (3) and (4), the council may grant development consent if the applicant provides to the council—
- (a) information, prepared by a suitably qualified and experienced person, the council is satisfied demonstrates that the land subject of the development application—
 - (i) does not include any trees belonging to the koala use tree species listed in Schedule 3 for the relevant koala management area, or
 - (ii) is not core koala habitat, or
 - (b) information the council is satisfied demonstrates that the land subject of the development application—
 - (i) does not include any trees with a diameter at breast height over bark of more than 10 centimetres, or
 - (ii) includes only horticultural or agricultural plantations.

- 22 The land is more than 1 ha, and there is no approved koala management plan.

- 23 I am satisfied from the investigations carried out on the Site that there is no core koala habitat and that koalas are unlikely to occur.
- 24 I am satisfied that pursuant to s 4.9(5) that development consent can be granted.

State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards)

- 25 Section 4.6 of the SEPP Resilience and Hazards addresses possible contamination of the land, and requires that I am satisfied that the land is or can be made suitable for development:

4.6 Contamination and remediation to be considered in determining development application

(1) A consent authority must not consent to the carrying out of any development on land unless—

- (a) it has considered whether the land is contaminated, and
- (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
- (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subsection (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.

(3) The applicant for development consent must carry out the investigation required by subsection (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.

- 26 I am satisfied that the relevant investigations have been conducted, and that both a Preliminary and Detailed Site Investigation has been carried out by Douglas Partners, and that Condition 22 in Annexure B of Schedule 1 of the consent requires that the recommended remediation actions included in the Detailed Site Investigation Report be completed before the issue of a subdivision works certificate.

- 27 I am therefore satisfied that s 4.6(1)(b) and (c) requirements are met and that approval can be granted.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 28 Referrals have been made to Essential Energy and Transport for NSW and the relevant agencies have provided General Terms of Approval (GTAs) that have been incorporated into the conditions. Accordingly, I am satisfied that the necessary jurisdictional prerequisites have been met.

Applicable LEP

- 29 Queanbeyan-Palerang Local Environmental Plan 2022 (LEP 2022) commenced on 14 November 2022, and is thus a relevant matter for consideration pursuant to s 4.15(1)(a)(i) EPA Act. However, as the DA was made, but not finally determined, before the commencement of the LEP 2022, the application is to be determined as if the LEP 2022 had not commenced. It is the requirements of the LEP 2012 which must be satisfied.

Principle development standards

- 30 Clause 4.1 of LEP 2012 set the development standard requiring that the size of any lot resulting from a subdivision must be not less than the minimum size shown on the lot size map (MLS). The DA includes a cl 4.6 written request for a variation to the development standard relating to minimum lot size in nine of the lots in the total subdivision.
- 31 The proposed variation is considered reasonable because:
- (1) The general arrangement of lots is consistent with the extension of the development in Estate 1.
 - (2) Adequate allowance has been made for the erection of a dwelling on all lots that can be achieved almost wholly with the area that is inside the R2 zone and MLS boundaries.
 - (3) The MLS for land in the R2 zone is 330sqm. If the zone boundary were aligned to Environa Drive, all lots achieve the MLS and in the case of proposed Lot 76 it is 80% larger than required by the MLS.
 - (4) Realigning the road to match the alignment of the MLS boundary is unreasonable because the intention of the rezoning was to set the boundary at 250m from the rail corridor and the line was not surveyed at the time.
- 32 For the reasons given by the Applicant:

- (1) the Applicant's written request adequately addressed the matters required to be demonstrated by cl 4.6(3), including having regard to the tests set out in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118; and
- (2) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out; and
- (3) the concurrence of the Planning Secretary is not required having regard to Planning Circular PS 20-002 dated 5 May 2020.

Miscellaneous provisions

- 33 The Site is not located within the vicinity of any heritage items or heritage areas for purposes of cl 5.10 of the LEP 2012 and will not be carried out in the flood planning area under cl 5.21 of the LEP 2012.

Urban release provisions

- 34 Development consent must not be granted for the subdivision of land in an urban release area if the subdivision would create a lot smaller than the minimum lot size permitted on the land immediately before the land became, or became part of, an urban release area, unless the Director-General has certified in writing to the consent authority that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure in relation to that lot: cl 6.1(2) of the LEP 2012.
- 35 The developer has offered to enter into a deed entitled 'South Jerrabomberra Urban Release Area Planning Agreement SPVA2022-28' (Urban Release VPA) with the Minister administering the EPA Act to secure a development contribution of \$3,513.48 for each lot created for the purpose of residential accommodation in order to enable the Secretary to provide the certification required by cl 6.1(2) of the LEP 2012.
- 36 The Urban Release VPA has been executed by the developer and provided to the Minister for execution. The developer has provided a security in the form of a bond in order to facilitate the issue of a certificate of satisfactory arrangements. The Director-General certified in writing that satisfactory arrangements were in place on 18 November 2022. A condition of consent has been included which requires evidence of compliance with the Urban Release

VPA prior to the issue of a subdivision certificate for any stage of the development.

- 37 Development consent must not be granted for development on land in an urban release area unless the Council is satisfied that any public utility infrastructure that is essential for the proposed development is available or that adequate arrangements have been made to make that infrastructure available when it is required: cl 6.2 of the LEP 2012. The Site is located in an urban release area.
- 38 The parties entered into a planning agreement entitled 'South Tralee Essential Infrastructure Planning Agreement' on 19 June 2018.
- 39 Development consent must not be granted for development on land in an urban release area unless a development control plan that provides for the matters specified in subcl (3) has been prepared for the land: cll 6.3(2) and 6.3(3) of the LEP 2012. The South Jerrabomberra Development Control Plan 2015 (South Jerrabomberra DCP 2015) applies to the land and addresses the matters specified in cl 6.3(3) of LEP 2012. Therefore, this provision is satisfied.
- 40 I am satisfied that the advice from the parties demonstrates that the urban release provisions have been met.
- 41 Part 7 of the LEP 2012 provides additional local provisions applying within the area covered by LEP 2012. Earthworks are the subject of cl 7.1. Clause 7.1(3) provides that the consent authority must have considered a range of factors before development consent can be granted. The criteria included in cl 7.1(3) were addressed in the Civil Engineering report and drawings prepared by spiire (Class 1 Application at Tab 12 and the plans listed in Annexure A to the judgment). I therefore consider that cl 7.1(3) is satisfied and there is no impediment to my granting consent arising from cl 7.1.
- 42 Given the proximity of the subject Site to Canberra Airport, cl 7.2 of LEP 2012 applies. The consent authority must not grant consent unless, if the authority considers that the proposed development will penetrate the Limitation or Operations Surface, unless the consent authority has consulted with the relevant Commonwealth body (cl 7.2(2)).

- 43 If consultation is required cl 7.3(2)(a) and (b) apply:
- (2) Before determining a development application for development on land to which this Plan applies, the consent authority:
 - (a) must consider whether the development will result in an increase in the number of dwellings or people affected by aircraft noise, and
 - (b) must consider the location of the development in relation to the criteria set out in Table 2.1 (Building Site Acceptability Based on ANEF Zones) in AS 2021—2000, and
- 44 The development area is outside the Limitation and Operation Surface but GTAs had been sought from the Commonwealth Department of Infrastructure and Regional Development in relation to the reservoir. The consent authority must not grant development consent if the Commonwealth body advises that the development for which approval is sought will penetrate the Limitation and Operations Surface.
- 45 The parties informed me that no advice has been received from the relevant Commonwealth body.
- 46 There is therefore no constraint arising from cl 7.2 preventing the granting of approval to the proposed development.
- 47 Clause 7.4 applies to land, adjoining the Hume Industrial Area and the Goulburn/Bombala railway line, identified as Visual and Acoustic Buffer Area on the Local Clauses Map sheet in LEP 2012.
- 48 The western boundary of the Site abuts the railway line and the Hume Industrial Area is adjacent to the parts of the proposed development. The proposed development site includes areas mapped as visual and acoustic buffer.
- 49 Clause 7.4(3) LEP 2012 states:
- (3) Despite any other provision of this Plan, the consent authority must not grant consent to any development on the land to which this clause applies, unless the consent authority has assessed the following matters:
 - (a) the impact of any noise from any nearby land uses, having regard to any noise attenuation measures proposed,
 - (b) the visual impact that any nearby land uses would have on the proposed development,

(c) the impact that noise and other emissions from any nearby industrial land uses and associated activities would have on the proposed development.

- 50 I am satisfied that the Amended DA has been designed to minimise visual and possible acoustic impacts on future residential development in the release area from the Hume Industrial Area.
- 51 Clause 7.6 applies to land identified on the Riparian Lands and Watercourses Map in LEP 2012 as riparian land, water course and all lands within 40 metres of the top of the bank of each mapped watercourse. The Site includes an area, Dogtrap Gully, mapped as a watercourse. Clause 7.6(4) provides that consent cannot be granted for development on land so mapped unless the consent authority is satisfied that adverse impacts can be avoided managed or mitigated.
- 52 The plans and documents now included in the conditions of consent provide such satisfaction.

Development referrals

- 53 The DA is for integrated development and approvals were sought under the *Rural Fires Act 1997*, the *Water Management Act 2000* and the *National Parks and Wildlife Act 1974*.
- 54 The Site contains bushfire prone land. Before the development can be carried out a bushfire safety authority must have been issued by the Commissioner of the NSW Rural Fire Service (RFS) under s 100B of the *Rural Fires Act 1997*. The RFS has issued GTAs, pursuant to Div 4.8 of the EPA Act. The requirements of the RFS are incorporated into the conditions of consent.

Water Management Act 2000

- 55 Works are proposed within 40 metres of the top of the bank of a watercourse. A Controlled Activity Approval is required under Pt 3, Ch 3 of the *Water Management Act 2000* from the Department of Planning and Environment (DPE) – Water.
- 56 The DA was referred to the DPE – Water in November 2021. The DPE – Water issued GTAs on 11 October 2022. These GTAs are incorporated within the conditions of consent.

Heritage NSW

- 57 An Aboriginal Cultural Heritage Assessment Report (ACHAR) dated March 2022 accompanied the DA. The ACHAR identified 25 sites within or adjacent to the subject land. Sixteen of these were directly and four partly impacted by the proposal. Heritage NSW issued GTAs but required that the Statement of the Environmental Effects accompanying the proposal be amended to reflect what is proposed in the Amended DA. The Heritage NSW GTAs were incorporated into the conditions of consent.

Biodiversity Conservation Act 2016 (BC Act)

- 58 Part 7 of the BC Act requires biodiversity assessment report where a DA, if approved, would be likely to significantly affect threatened species.
- 59 The development exceeds the threshold for the Biodiversity Offset Scheme (BOS) as it will directly affect more than 0.25 ha of vegetation. Parts of the Site support a critically Endangered Ecological Community – White Box – Yellow Box – Blakely's Redgum Grassy Woodland and Derived Native Grassland – One individual species, the Pink-tailed Worm-lizard, is a vulnerable species under the BC Act. Two Biodiversity Assessment Reports (BDARs) were included in the Applicant's documentation. The Concept BDAR V3 (dated 16 March 2022) covered the entire Jerrabomberra Estate 2, the Site BDAR V1 (dated 17 June 2021) covered Stage 1.
- 60 If consent is granted and the BOS applies, the conditions of consent must require the Applicant to retire biodiversity credits to offset the residual impacts on biodiversity values. In Schedule 2 of Annexure B, Condition 5 specifies the number of biodiversity credits to be retired in accordance with the BDAR. The Department of Planning, Industry and Environment-Biodiversity Conservation Division gave approval to the Concept BDAR on 15 December 2021.
- 61 I am satisfied that the proposed development as documented will not have serious irreversible impacts on biodiversity values and that therefore there are no impacts on diversity that would form a barrier to the granting of consent.
- 62 I am satisfied, as explained above, that the terms of decision set out in the parties' s34 agreement are a decision that the Court can make in the proper exercise of its functions as required by s 34(3) of the LEC Act.

63 The Court notes:

- (1) The Respondent, in exercising the development assessment functions of the Planning Panel pursuant to s 4.7(2) of the EPA Act, has agreed pursuant to cl 55 of the EPA Reg to the Applicant amending the Development Application No. DA.2021.1284, the subject of these proceedings, to rely on the documents specified in Annexure 'A'.
- (2) The Applicant has uploaded the documents in the amended application to the NSW Planning Portal.
- (3) The Applicant filed the amended application with the Court on 13 December 2022.
- (4) The Respondent sent a copy of the amended application to the relevant integrated approval bodies and concurrence authorities, in accordance with cl 55(3) of the EPA Reg, on 14 December 2022.

Orders

64 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA.2021.1284, to rely on the amended plans and documents specified in Annexure A.
- (2) The appeal is upheld.
- (3) Development Application no. DA.2021.1284 for:
 - (a) the concept approval for the staged subdivision of land at 360A Alderson Place, Tralee NSW 2620 and identified as Lot 126 DP 1269436 and part Lot 189 DP 1272220 (formerly known as the lot references set out in Annexure B to the Class 1 Application) for residential purposes, and
 - (b) stages 1 and 2 of the residential subdivision, being the subdivision of the part of the land identified as Lot 126 DP 1269436 to create 161 residential lots (as amended by Annexure B, Schedule 2, Condition 3), 1 open space lot detention basin, 3 open space lots, 2 residue lots and associated roads, infrastructure and landscaping,

is determined by the grant of consent subject to the conditions set out in Annexure 'B'.

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P Adam

Acting Commissioner of the Court

Annexure A (108659, pdf)

Annexure B (595514, pdf)

Amendments

06 January 2023 - Correction to name of counsel on coversheet and in [10].

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