



Land and Environment Court
New South Wales

Case Name: Wollongong Investments No. 4 Pty Ltd v Wollongong City Council

Medium Neutral Citation: [2023] NSWLEC 1426

Hearing Date(s): Conciliation Conference on 27 July 2023

Date of Orders: 8 August 2023

Decision Date: 8 August 2023

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) Leave is granted to the Applicant to rely on the amended documentation listed in Annexure 'B'.
(2) The Applicant is to pay the Respondent's reasonable costs thrown away as a result of the amendment in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the amount of \$15,000 payable within 28 days.
(3) The appeal is upheld.
(4) Development Application No DA-2021/1000 for the demolition of existing structures on the site, remediation and erection of a 7 to 9 storey shop top housing development comprising three ground floor commercial tenancies, 182 apartments, above 2 basement levels at 35-43 Flinders Street, Wollongong, is determined by a grant of consent subject to conditions contained in Annexure 'A'.

Catchwords: APPEAL – development application – commercial development with shop top housing – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15

Environmental Planning and Assessment Regulation
2000, cll 50, 55, Sch 1
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Biodiversity and
Conservation) 2021, Ch 4, Pt 4.2
State Environmental Planning Policy No 65—Design
Quality of Residential Apartment Development, cll 28,
30
State Environmental Planning Policy (Resilience and
Hazards) 2021, ss 2.10, 2.12, 4.6
State Environmental Planning Policy (Transport and
Infrastructure) 2021, ss 2.119, 2.120, 2.122
Wollongong Local Environmental Plan 2009, cll 4.3,
4.4, 4.4A, 7.1, 7.6, 7.18

Texts Cited: Department of Planning and Environment, Apartment
Design Guide, 2015

Category: Principal judgment

Parties: Wollongong Investments No. 4 Pty Ltd (Applicant)
Wollongong City Council (Respondent)

Representation: Counsel:
B Salon (Solicitor) (Applicant)
J Reilly (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Wollongong City Council (Respondent)

File Number(s): 2022/258168

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This appeal concerns a development application for the demolition of existing structures, remediation of land and the construction of a seven to nine storey shop top housing development comprising three ground floor commercial tenancies, 182 apartments, and two basement levels at 35-43 Flinders Street, Wollongong. Following the expiry of the period after which a development application is deemed to be refused, the applicant lodged an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act*

1979 (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [10] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 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 was held on 27 July 2023. I presided over the conciliation conference.
- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The agreement reflects that which was filed on 25 July 2023, and follows the agreement of the Council to an amendment to the development application, pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000). The key changes made in the amended development application are as follows:
 - Changes to the basement level layout, including to the car parking configuration and introduction of a deep soil setback from the northern boundary and other pockets for deep soil landscaping above.
 - Changes to the ground floor design to remove deep recesses to the residential lobbies, to redesign the retail tenancies which also increases the length of activated retail frontage, and to introduce an access strategy for improved wayfinding with revised lobbies and stairs leading to the podium level from the street.
 - The introduction of genuine breaks between buildings above the podium, together with a reduction in the residential floorplates and increased separation between buildings.
 - Changes to the façade expression to break down the massing into smaller elements and reinforce the breaks between buildings, which includes the breaking of the massing vertically into a commercial podium, low rise and high rise components and horizontally into smaller elements using massing blocks.
 - Improved landscaping and deep soil landscaping, including the replacement of large retaining walls around the perimeter of the development with a series of terraced planters and swales for stormwater conveyance.
- 4 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by a Jurisdictional Statement that sets out the subject

site and zoning, the amendments made to the development application, and each of the jurisdictional matters about which the Court must be satisfied prior to the grant of development consent. I have considered the contents of the Jurisdictional Statement, together with the documents referred to therein, the Class 1 Application and its attachments, and the documents listed in Annexure B. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.

5 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:

- Development for the purpose of shop top housing and commercial development is permitted with development consent in the B6 Enterprise Corridor zone in which the site is located, pursuant to the Wollongong Local Environmental Plan 2009 (WLEP).
- The proposed development complies with the development standards for height and floor space ratio, which apply pursuant to cll 4.3, 4.4 and 4.4A of the WLEP.
- Based on the Jurisdictional Statement and the documents in Annexure B, as well as on the fact that the land is already developed for other uses, I am satisfied that public utility infrastructure that is essential for the proposed development is available or that adequate arrangements have been made to make them available when required, consistent with the requirements of cl 7.1 of the WLEP.
- The development application includes earthworks for the provision of the basement level and part of the ground level. Based on the detailed stormwater management and drainage plan, the Preliminary Geotechnical Assessment dated 20 November 2020 and the Flood Impact Assessment dated 21 July 2023, I have considered the matters set out in cl 7.6(3) of the WLEP.
- Consistent with cl 7.18(3) of the WLEP and based on the contents of the Revised Statement of Environmental Effects prepared by Sutherland & Associates Planning dated April 2023, I have had regard to the matters in cl 7.18(4) and I am satisfied that the design of the proposed development in the amended development application exhibits design excellence.
- The site is located within the coastal zone and the coastal environment area pursuant to Ch 2 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH). Based on the location of the site, and the Revised

Statement of Environmental Effects prepared by Sutherland & Associates Planning dated April 2023, I am satisfied that the land is not impacted by coastal hazards and there are not expected to be any adverse impacts on the coastal environment. I am therefore satisfied of the matters about which a consent authority is required to be satisfied in ss 2.10(2)(a) and 2.12 of the SEPP RH.

- Consideration has been given as to whether the subject site is contaminated as required by s 4.6 of the SEPP RH, and, consistent with the requirements of s 4.6(2), I have considered a report specifying the findings of a preliminary investigation of the land concerned and a Detailed Site Investigation prepared by EI Australia dated 21 November 2022. The report confirms that the site is able to be remediated in accordance with a Remedial Action Plan, which was subsequently prepared and dated 22 November 2022 and, therefore, will be made suitable for the proposed development.
- As required by cl 30(2) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65), I am satisfied that adequate regard has been given to the design quality principles and to the objectives specified in the Apartment Design Guide for the relevant design criteria. Based on the compliance table prepared by Tony Owens Partners, I have considered the Apartment Design Guide and the design quality of the development when evaluated in accordance with the design quality principles, as required by cl 28(2) of the SEPP 65.
- The amended development application is accompanied by a statement of a qualified designer that verifies the design of the development, as required by cl 50(1A) and (1AB) of the EPA Regulation 2000.
- The amended development application is accompanied by a BASIX Certificate in accordance with the requirements of Sch 1 of the EPA Regulation 2000.
- Chapter 4 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP B&C), which concerns koala habitat protection, applies to the site. As the proposed development does not involve the clearing of native vegetation, there is no potential impact on koala habitat and I am satisfied that development consent can be granted in accordance with Pt 4.2 of the SEPP B&C.
- The site has frontage to Flinders Street, which is a classified road, and ss 2.119 and 2.120 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) apply. In accordance with s 2.119, it is not practicable to provide vehicular access to the land by a road other than the classified road. Nevertheless, based on the Amended Traffic Impact Statement by Traffix dated January 2023, I am satisfied that the safety, efficiency, and ongoing operation of the classified road will not be adversely affected by the development as a result of the vehicular access or the emissions from the development. Consistent with the requirements of s 2.119(2)(c) and s 2.120(3), the proposed development has been designed to prevent or reduce the impacts associated with road traffic noise and will be carried out in accordance with the recommendations in the Traffic Noise Assessment prepared by Rodney Stevens Acoustic dated 3 February 2023 that will ensure a suitable

degree of amenity for residents and other occupants of the proposed development, including compliance with the LAeq levels in s 2.120(3).

- Pursuant to s 2.122 of the SEPP TI, the proposed development is a traffic generating development and has therefore been referred to Transport for NSW (TNSW) for comment. The response from TNSW has been incorporated into condition 10 of the agreed conditions of development consent.

- 6 The development application was notified between 5 October 2021 and 20 October 2021, and the amended development application was notified prior to the conciliation conference on 27 July 2023. Three resident objectors (one in person and two by telephone) also spoke at the commencement of the conciliation conference. I have considered the issues raised in the submissions received through the notification of the amended development application and at the commencement of the conciliation conference. Those issues include concerns with respect to view loss and the loss of access to sunlight. I note that any view loss and loss of access to sunlight is from a proposed built form that complies with the height and floor space ratio controls that apply to the site, and the proposed development, as amended, already incorporates significant breaks in the built form in order to retain access to sunlight for residents to the east and south, and in order to allow residents to the east to retain some view corridors.
- 7 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 8 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 9 The Court notes:
 - (1) The Wollongong City Council, as the relevant consent authority, has agreed, under cl 55 of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application No. DA-2021/1000 in accordance with the documents listed in Annexure ‘B’.

10 The Court orders that:

- (1) Leave is granted to the Applicant to rely on the amended documentation listed in Annexure 'B'.
- (2) The Applicant is to pay the Respondent's reasonable costs thrown away as a result of the amendment in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the amount of \$15,000 payable within 28 days.
- (3) The appeal is upheld.
- (4) Development Application No DA-2021/1000 for the demolition of existing structures on the site, remediation and erection of a 7 to 9 storey shop top housing development comprising three ground floor commercial tenancies, 182 apartments, above 2 basement levels at 35-43 Flinders Street, Wollongong, is determined by a grant of consent subject to conditions contained in Annexure 'A'.

J Gray

Commissioner of the Court

Annexure A

Annexure B

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.