



Land and Environment Court  
New South Wales

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Case Name: Adria Care Limited v Wollongong City Council

Medium Neutral Citation: [2025] NSWLEC 1288

Hearing Date(s): Conciliation Conference 17 April 2025

Date of Orders: 02 May 2025

Decision Date: 2 May 2025

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:

- (1) The Court, exercising the functions of the consent authority pursuant to s 39(2) of the Land and Environment Court Act 1979, agrees under s 38(2) of the Environmental Planning and Assessment Regulation 2021 to the amendment of development application DA-2022/136 to rely upon the plans and documents filed on 17 April 2025.
- (2) The Applicant pay the respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 as a result of the amendment of the application for development consent in order 1, as agreed or assessed.
- (3) The appeal is upheld.
- (4) Development Application DA-2022/136 lodged with the respondent on 14 February 2022 for retention of existing church and community hall, demolition of other existing structures, removal of trees and construction of a seniors living development comprising a residential aged care facility and independent living units with basement and at-grade parking with associated ancillary uses, infrastructure and landscaping on land known as 7-13 Bellevue Road and 38-40 Princes Highway, Figtree, also known as Lot 76 and 77

DP17037, Lot 10 DP1034856, Lot 100 DP614698 and Lot 2 DP210588, is determined by the granting of consent subject to conditions set out in Annexure A.

Catchwords: APPEAL – development application – residential care facility and independent living units – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15  
Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation 2021 ss 27, 37, 38

State Environmental Planning Policy (Housing) 2021, ss 84, 85, 86, 87, 88, 89, 90, 91, 107, 108, Sch 7A, Ch 3 Pt 5, Ch 4

State Environmental Planning Policy (Resilience and Hazards) 2021 s 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.120

Wollongong Local Environmental Plan 2009, cl 4.3, 4.4, 4.6, 5.21, 7.1, 7.6

Cases Cited: McMillan v Taylor [2023] NSWCA 183

Category: Principal judgment

Parties: Adria Care Limited (Applicant)  
Wollongong City Council (Respondent)

Representation: Counsel:  
J Smith (Applicant)  
J Reid (Respondent)

Solicitors:  
Foundation Law (Applicant)  
Marsdens Law (Respondent)

File Number(s): 2024/63656

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application for the construction of a new residential care facility and a new independent living unit facility, together with works in a mix-used complex containing those new buildings in addition to an existing church and community hall, at 7-13 Bellevue Road and 38-40 Princes Highway, Figtree. The appeal is lodged 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 [9] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 2 Following an adjournment of the hearing, 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 17 April 2025. 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 was provided on the same date, and a final agreement was filed on 28 April 2025. The agreement includes an order that the Court exercise the functions of the consent authority, pursuant to s 39(2) of the LEC Act, to agree to an application for an amendment to a development application pursuant to ss 37 and 38 of the *Environmental Planning and Assessment Regulation 2021* (EPA Regulation 2021). The amended development application was filed on 17 April 2025 and has reduced height, floor space ratio (FSR) and unit numbers from what was originally proposed, and it includes a culvert for managing the overland flow during storm events, as well as a landscape design for the open space areas.
- 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 an Agreed Statement of Jurisdictional Prerequisites that sets out the jurisdictional prerequisites to the exercise of the power to

approve the development application. I have considered the contents of the Agreed Statement, together with the documents referred to therein, the Class 1 Application and its attachments, and the documents that are referred to in condition 1 of Annexure A. 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 could have made in the proper exercise of its functions, this being the test applied by s 34(3) of the LEC Act. This test is concerned with there being no jurisdictional constraints that preclude the making of orders in accordance with the decision that the parties' have agreed upon (see *McMillan v Taylor* [2023] NSWCA 183 at [4], [51]). I formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:

- (1) Development for the purpose of seniors housing is permissible in the R2 Low Density Residential zone in which the site is located, pursuant to the Wollongong Local Environmental Plan 2009 (WLEP).
- (2) Chapter 3 Pt 5 of the State Environmental Planning Policy (Housing) 2021 (SEPP Housing) concerns housing for seniors and people with a disability and therefore applies to the proposed development. Having regard to the savings provision in Sch 7A(3), the version of the SEPP Housing that was in force immediately prior to 14 December 2023 applies to the development application (except in relation to Ch 4 concerning building height and FSR). Other than the height and FSR standards, the proposed development complies with the discretionary and non-discretionary development standards contained in ss 84-91, 107-108 of the SEPP housing.
- (3) The site is within an area mapped by the WLEP as having a 9m height development standard. As set out in the updated Clause 4.6 Request, prepared by James Lovell and Associates Pty Limited dated 14 April 2025 (the written request), s 87(2)(c) of the SEPP Housing raises the building height standard for the proposed development by an additional 3.8m. The parties agree that the effect of s 87(2)(c) is that the relevant building height development standard for the proposed development is 12.8m. The proposed development has a maximum height of 14.6m in the location of the lift overrun for Building 1. The written request deals with the variation to the height standard that applies pursuant to s 87(2)(c) of the SEPP Housing as well as the height standard in ss 84(3), 107 and 108 to the extent that it applies. I am satisfied that:

- (a) The written request, lodged pursuant to cl 4.6 of the WLEP as it was worded at the time the development application was lodged, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard by demonstrating that the breach arises from the topographical features of the site, that the height is largely compliant with the 12.8m height permitted under cl 87(2)(c) and those areas above the building height of 12.8m are confined to a small area located towards the centre of the site.
  - (b) The written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposal is consistent with the objectives of the height development standard in cl 4.3 of the WLEP notwithstanding the non-compliance.
  - (c) Based on the content of the written request, the proposal is in the public interest because it is consistent with the objectives of the zone and of the height development standard in cl 4.3 of the WLEP.
- (4) The site is within an area mapped by the WLEP as having a FSR development standard of 0.5:1. As set out in the written request, s 87(2)(b)(iii) of the SEPP Housing allows an additional 25% FSR for that part of the development that is for the purpose of independent living units or a residential care facility. The parties agree that the effect of s 87(2)(b)(iii) of the SEPP Housing is that the relevant FSR development standard for the proposed development is 0.625:1. The proposed development has a FSR of 0.758:1. The written request deals with the variation to the FSR standard that applies pursuant to s 87(2)(b)(iii) of the SEPP Housing as well as what is contained in ss 107 and 108 to the extent that they apply. I am satisfied that:
- (a) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the FSR development standard, by demonstrating that the proposed development would comply with the non-discretionary FSR controls in ss 107 and 108 of the SEPP if the controls (1:1 for “residential care facilities” and 0.5:1 for “independent living units”) are apportioned on the basis of the approximate portions of the site occupied by the residential care facility and the independent living units and Church and hall.
  - (b) The written request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary as the objectives of the FSR development standard are met notwithstanding the non-compliance.
  - (c) For the reasons outlined in the written request, the proposal is in the public interest as it is consistent with the objectives of the zone and of the FSR development standard.

- (5) Clause 5.21 of the WLEP, concerning flood planning, applies to the site, and development consent must not be granted unless the Court, exercising the functions of the consent authority, is satisfied of the matters in cl 5.21(2). The development application was accompanied by a Flood Study dated 14 February 2022, and the application includes a culvert that redirects stormwater flow in storm events away from neighbouring land and to the existing stormwater disposal network in the Princes Highway. Based on the Flood Study dated 14 February 2022, the joint expert report dated 28 March 2025 and the new design of the culvert, I have considered the matters in cl 5.21(3) of the WLEP and I am satisfied of the matters in cl 5.21(2).
- (6) The site is in a fully serviced residential area, such that public utility infrastructure is available to service the proposed development, in satisfaction of cl 7.1 of the WLEP.
- (7) The development application includes earthworks for the provision of the basement level for car parking. Based on the Geotechnical Investigation Report dated November 2020 and the Construction Environmental Management Plan dated April 2025, I have considered the matters set out in cl 7.6(3) of the WLEP.
- (8) Consistent with the requirements of s 27 of the EPA Regulation 2021, the development application is accompanied by the BASIX certificate dated 7 April 2025. Based on the BASIX certificate, I am satisfied of the requirement in s 2.1(5) of the State Environmental Planning Policy (Sustainable Buildings) 2022.
- (9) Consideration has been given as to whether the subject site is contaminated as required by cl 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. Based on the Detailed Site Investigation report dated 23 December 2024 and the Remedial Action Plan dated 27 December 2024, the site can be made suitable for the development, subject to the adopted remediation strategy. The Site Audit Report dated 7 February 2025 confirms that the remediation action plan is appropriate.
- (10) The site has frontage to the Princes Highway, which is a classified road, and cll 2.119 and 2.120 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) apply. In accordance with cl 2.119, vehicular access is provided from Benney Avenue and Bellevue Road, which are roads other than the classified road, and 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 cl 2.119(2)(c) and cl 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 Acoustic Report dated 3 December 2021 that will ensure a suitable degree of amenity for residents and other occupants of the proposed development, including compliance with the LAeq levels in cl 2.120(3).

- (11) The development application was notified between 21 February 2022 and 9 March 2022, and a number of written submissions were received in addition to a petition. I have considered the issues raised in the written submissions.
- 6 Having reached the state of satisfaction that the decision is one that the Court could have made 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)).
- 7 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any evaluative judgment on the matters that were originally in dispute between the parties, or 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.
- 8 The Court notes:
- (1) The Applicant filed the amended development application with the Court on 17 April 2025, to include the following documents:
- (a) Updated Detail Survey Plan, 17079/0-D, prepared by C. Robson & Associates Pty Ltd, dated 1 April 2025, Revision D.
  - (b) Updated Arboricultural Impact Assessment Report, prepared by Allied Tree Consultancy, dated April 2025.
  - (c) Updated NatHERS Certificate, ZUIFYEOSR8, prepared by ACOR Consultants Pty Ltd, dated 7 April 2025.
  - (d) Updated BASIX Certificate, 1266141M\_04, prepared by ACOR Consultants Pty Ltd, dated 7 April 2025.
  - (e) Updated Hydraulic Plans, prepared by Sellick Consultants, dated 7 April 2025, Revision 2
  - (f) Updated Landscape Plans, prepared by Clouston Associates, dated 16 April 2025, Revision G.
  - (g) Updated Architectural Plans, prepared by AMC Architecture, dated 2 April 2025 and 15 April 2025, Revisions A and B.
  - (h) Updated Civil Plans, prepared by Sellick Consultants, dated 2 April 2025, 15 April 2025 and 16 April 2025, Revisions AC, AB, AE and AF.
  - (i) Detailed Flood Study and Flood Emergency Response Plan, prepared by Rienco Pty Ltd, dated 14 October 2024, Revision 2.

- (j) Detailed Flood-Related Plan of Management, prepared by Rienco Pty Ltd, dated 28 March 2025, Revision 1.
- (k) Detailed Site Investigation, prepared by Environment & Natural Resource Solutions, dated 23 December 2024, Revision 1.
- (l) Remediation Action Plan, prepared by Environment & Natural Resource Solutions, dated 27 December 2024, Revision 1.
- (m) Contaminated Site Audit Report, prepared by Phreatic Consulting Pty Ltd, dated 7 February 2025, Revision 1.
- (n) Site Audit Statement, prepared by Phreatic Consulting Pty Ltd, dated 7 February 2025.
- (o) Updated Clause 4.6 Request, prepared by James Lovell and Associates Pty Limited, dated 14 April 2025.
- (p) Additional Geotechnical Earthworks Advice, prepared by Fortify Geotech Pty Ltd, dated 3 April 2025.
- (q) Updated Construction Environmental Management Plan, prepared by Environment & Natural Resource Solutions, dated 7 April 2025.
- (r) Alternate Culvert Design Report, prepared by Rienco Pty Ltd, dated 7 April 2025.

## Orders

9 The Court orders that:

- (1) The Court, exercising the functions of the consent authority pursuant to s 39(2) of the *Land and Environment Court Act 1979*, agrees under s 38(2) of the Environmental Planning and Assessment Regulation 2021 to the amendment of development application DA-2022/136 to rely upon the plans and documents filed on 17 April 2025.
- (2) The Applicant pay the respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as a result of the amendment of the application for development consent in order 1, as agreed or assessed.
- (3) The appeal is upheld.
- (4) Development Application DA-2022/136 lodged with the respondent on 14 February 2022 for retention of existing church and community hall, demolition of other existing structures, removal of trees and construction of a seniors living development comprising a residential aged care facility and independent living units with basement and at-grade parking with associated ancillary uses, infrastructure and landscaping on land known as 7-13 Bellevue Road and 38-40 Princes Highway, Figtree, also known as Lot 76 and 77 DP17037, Lot 10 DP1034856, Lot 100 DP614698 and Lot 2 DP210588, is determined by the granting of consent subject to conditions set out in Annexure A.



**J Gray**

**Commissioner of the Court**

Annexure A (3255852, pdf)

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