Land and Environment Court

New South Wales

Case Name:	Woodcote Developments Pty Ltd v Wollongong City Council
Medium Neutral Citation:	[2025] NSWLEC 1327
Hearing Date(s):	Conciliation conference held 6 May 2025
Date of Orders:	12 May 2025
Decision Date:	12 May 2025
Jurisdiction:	Class 1
Before:	Walsh C
Decision:	The Court orders that: (1) The appeal is upheld. (2) Development consent is granted to Development Application No. DA- 2023/481 for concept approval of site layout for subdivision and 8 stages of development, with stages 2 – 8 to be the subject of future DAs, and a detailed proposal for the first stage of development described as Stage 1 on part of the land including tree removal, remediation of land, earthworks, dewatering of three dams, stormwater infrastructure, landscaping to road reserves, subdivision to create 116 residential lots, 1 'environmental' lot, 1 lot for a detention basin and 1 residual lot and associated works, construction of local park including embellishment and landscaping, and the establishment of a Biodiversity Stewardship Agreement under the Biodiversity Conservation Act 2016 at 200, 220, 240 and 330 Marshall Mount Road, Marshall Mount NSW 2530 (Lots 1 and 2 in DP1277366, Lot 5 in DP1280030 and Lot 1 in DP1280028) subject to the conditions set out in Annexure A. (3) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the Applicants are to pay the costs of the Respondent that are thrown away

	as a result of amending the development application, as agreed or assessed.
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Biodiversity Conservation Act 2016, ss 6.12, 7.4, 7.7, 7.16, Pt 6, Div 3 Environmental Planning and Assessment Act 1979, Div 4.4, ss 4.15, 4.17, 4.22, 4.46, 8.7, 8.15 Land and Environment Court Act 1979, ss 34, 39 National Parks and Wildlife Act 1974, s 90 Roads Act 1993, s 138 Rural Fires Act 1997, s 100B Water Management Act 2000, s 91 Biodiversity Conservation Regulation 2017, cl 6.8 Environmental Planning and Assessment Regulation 2000, cll 38, 50, 97 State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 4.9 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.48, 2.97, Sch 3, 2.122 Wollongong Local Environmental Plan 2009 cll 2.6, 5.10, 5.21, 7.1, 7.2, 7.4 Sch 5
Cases Cited:	HP Subsidiary Pty Ltd v City of Parramatta Council [2020] NSWLEC 135 McMillan v Taylor (2023) 111 NSWLR 634; [2023] NSWCA 183
Category:	Principal judgment
Parties:	Woodcote Developments Pty Ltd (Applicant) Wollongong City Council (Respondent)
Representation:	Counsel: I Hemmings SC (Applicant) J Reilly (Solicitor) (Respondent) Solicitors: Allens (Applicant) Wollongong City Council (Respondent)

File Number(s): 2024/86816

Publication Restriction: Nil

JUDGMENT

1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of development application DA-2023/481 (DA) by Wollongong City Council (Council). The DA relates to land at 200, 220 and 330 Marshall Mount Road, Marshall Mount and 240 Marshall Mount Road, Avondale comprising Lots 1 and 2 in DP 1277366, Lot 5 in DP 1280030 and Lot 1 in DP 1280028 (site). The site falls within the West Dapto urban release area.

Conciliation and agreement between the parties

2 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), at which I presided. The conference was held on 6 May 2025. Prior to the conference, and after considerable dialogue between the parties, the parties had come to an 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 granting consent to the DA, as amended, in accordance with agreed conditions.

Pre-requisites to the exercise of the function to grant development consent

3 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.

4 The point of consideration here is whether there are any jurisdictional constraints to the exercise of the function to grant development consent in accordance with the parties' agreement (*McMillan v Taylor* (2023) 111 NSWLR 634; [2023] NSWCA 183 at [63], [65]). Ultimately, I find that there are none. But there are certain statutory queries which require attention before this function can be exercised by the Court. I attend to the relevant matters below, assisted

by the advice in the parties' agreed jurisdictional statement, as finalised on 6 May 2025 (JS).

Concept development application

5 The DA, lodged pursuant to Div 4.4 of the EPA Act, is a concept development application. In relation to concept development applications s 4.22 of the EPA Act provides as follows:

> 4.22 Concept development applications
>
> (1) For the purposes of this Act, a ***concept development application*** is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.
>
> (2) In the case of a staged development, the application may set out detailed proposals for the first stage of development.
>
> (3) A development application is not to be treated as a concept development application unless the applicant requests it to be treated as a concept development application.
>
> (4) If consent is granted on the determination of a concept development application, the consent does not authorise the carrying out of development on any part of the site concerned unless—
>
> > (a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or
> >
> > (b) the concept development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.
> >
> > The terms of a consent granted on the determination of a concept development application are to reflect the operation of this subsection.
>
> (5) The consent authority, when considering under section 4.15 the likely impact of the development the subject of a concept development application, need only consider the likely impact of the concept proposals (and any first stage of development included in the application) and does not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications.

6 The DA sets out concept proposals for the development of the site; with detailed proposals for separate parts of the site to be the subject of a subsequent development application or applications (s .4.22(1) EPA Act).

7 More specifically, and as put in the JS (par 13(a)), the concept proposal for which consent is sought include:

> "• staging plan;
>
> • overall transport movement hierarchy showing road hierarchy and road pattern for vehicles, buses, pedestrians and cyclists;
>
> • an overall landscaping strategy;
>
> • riparian zones including their extent and revegetation strategy;
>
> • a network of recreation areas (passive and active);
>
> • stormwater and water quality management controls;
>
> • amelioration of natural and environmental hazards, including bushfire, flooding and site contamination and, in relation to natural hazards, the safe occupation of, and the evacuation from, relevant land in relation to flooding and bushfire hazards;
>
> • development controls for the concept proposal; and
>
> • public facilities and services to the extent relevant at concept level."

8 The DA also seeks consent for a site layout and detailed proposals for the first stage development (s 4.22(2), 4.22(4)(b) EPA Act). The first stage development includes (JS par 13(b)):

> "• tree removal
>
> • remediation of land;
>
> • earthworks;
>
> • dewatering of three dams;
>
> • stormwater infrastructure;
>
> • landscaping to road reserves;
>
> • subdivision to create 116 residential lots, 1 'environmental' lot, 1 lot for a detention basin and 1 residual lot and associated works;
>
> • construction of a local park including embellishment and landscaping; and
>
> • establishment of a Biodiversity Stewardship Agreement under the Biodiversity Conservation Act 2016"

9 Subsequent Stages 2-8 would be subject to separate development applications.

Jurisdictional considerations

Integrated development

10 The parties advise that the DA is integrated development for the purposes of s 4.46 of the EPA Act, as the proposal would also require approvals under:

(1) Section 91 of the *Water Management Act 2000*, in relation to the need to obtain a controlled activity approval from the Natural Resource Regulator for works within waterfront land.

(2) Section 100B of the *Rural Fires Act 1997*, in relation to the need to obtain a bush fire safety authority from Rural Fire Service.

(3) Section 90 of the *National Parks and Wildlife Act 1974*, in relation to the need to obtain an Aboriginal heritage impact permit from Heritage NSW within the Department of Climate Change, Energy, the Environment and Water (DCCEEW).

11 The parties advise and I accept that in each instance general terms of approval (GTAs) have been obtained from the approval bodies and factored into consent conditions. The approval bodies were relevantly advised of amendments to the proposal, which have occurred during the course of these appeal proceedings. While only one of the approval bodies provided revised GTAs (DCCEEW dated 8 March 2025 – see proposed Condition 2 in Annexure A), I accept the advice of the parties that there is nothing in these amendments to the DA which would be inconsistent with the GTAs of the other approval bodies. Moreover, I note that, under s 39(6)(a) of the LEC Act, in this instance, the Court has power to determine the appeal with, or without further (or any) general terms of approval.

Biodiversity Conservation Act 2016

12 The parties advise that the proposal would exceed the biodiversity offsets scheme (BOS) threshold under s 7.4 of the *Biodiversity Conservation Act 2016* (BC Act), by (JS par 25):

> "a) proposing to clear vegetation on land mapped on the Biodiversity Values Map, thereby exceeding the BOS threshold under cl 7.1(1)(b) of the Biodiversity Conservation Regulation 2017 (BC Regulation); and
>
> b) exceeding the native vegetation clearing threshold (based on minimum lot size) under cl 7.1(1)(a) of the BC Regulation."

13 Mindful of s 7.7, the DA is accompanied by biodiversity development assessment reports (BDARs) prepared in accordance with Division 3 of Part 6

of the BC Act and cl 6.8 of the Biodiversity Conservation Regulation 2017 and assessment under the Biodiversity Assessment Method (BAM). The analysis in this work is supported by the parties. They advise that jurisdictional pre-requisites have been satisfied, as follows (JS par 25(b)).

> "(Under s 7.16 of BC Act) : The consent authority must refuse to grant consent under Part 4 of the EP&A Act if it is of the opinion that the proposed development is likely to have serious and irreversible impacts (SAII) on biodiversity values. For the concept component of the Proposed Development, there are two potential SAII Plant Community Types (PCTs), namely PCT 838 - Forest Red Gum and PCT 1326 - Woollybutt - White Stringybark - Forest Red Gum. For the Stage 1 component of the Proposed Development, there is one potential SAII PCT, namely PCT 838 - Forest Red Gum.
>
> Both PCT 838 and PCT 1326 are considered to be 'Illawarra Lowlands Grassy Woodland', listed under the BC Act. As such, detailed consideration is given to whether the impacts on the Illawarra Lowlands Grassy Woodland are serious and irreversible in the accompanying BDARs pursuant to Section 9.1.2 of the BAM. The BDARs both find that the impacts to the Illawarra Lowlands Grassy Woodland are considered unlikely to result in an SAII."

14 Mindful of s 6.12(c) of the BC Act, the parties also referred to strategies and actions set out in the BDARs and BAM that would be taken to avoid and minimise impacts on biodiversity values. I note it is the respondent's opinion that the applicants have demonstrated extensive avoidance and minimisation in the documentation before the court (JS par 25(a)).

15 I accept the advice of the parties. Given the measures proposed, I am not of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values. The jurisdictional requirements of s 7.16(2) have been satisfied.

State Environmental Planning Policy (Resilience and Hazards) 2021

16 Pursuant to s 4.6, a consent authority must be satisfied that appropriate consideration has been given to whether the land is contaminated, the suitability of the land to the proposed development and whether satisfactory measures are put into place to remediate the land should it be required to do so. The parties advise that the contamination assessment concludes that the site can be made suitable for the proposed development and that a Remediation Action Plan and Preliminary Long Term Environmental

Management Plan have been prepared in support of this conclusion. On the basis of this advice, I am satisfied as to the matters set out in s 4.6(1).

State Environmental Planning Policy (Transport and Infrastructure) 2021

Electricity transmission or distribution

17 The proposal includes the penetration of ground within 2m of an underground electricity power line, development carried out within or immediately adjacent to an easement for electricity purposes, and development involving or requiring the replacement of power lines underground. In turn s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 applies. The DA was referred to TransGrid (as the electricity supply authority) inviting comments about potential safety risks. The parties advise that a response was received advising of no comments for Stage 1. The parties advise that further liaison with Transgrid will occur for future stages. Written notice was also given to Endeavour Energy which have also been given consideration mindful of s 2.48(2). The requirements to give written notice and take into consideration any response has been met.

Railways

18 A level crossing is located on Avondale Road to the north-east of the site. Of potential relevance here is s 2.97 concerning potential increase in the total number of vehicles using a level crossing as a result of a development application. The parties advise that written notice was given to Sydney trains who “granted concurrence to the development proposal”. The parties advise that there will be negligible traffic generated by the development that would use the relevant level crossing, relevant trigger for the engagement of s 2.97 in any event.

Traffic generating development

19 The proposal is “traffic-generating development” under Sch 3 and therefore s 2.122(4) applies. The parties advise that the required notice of the DA has been provided to Transport for New South Wales (TfNSW) and that the feedback has been taken into consideration in accordance with requirements.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 4 – Koala habitat protection 2021

20 The parties advise that Chapter 4, and in particular, s 4.9 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 applies (relating to land with no approved koala plan of management). This brings the requirement for assessment of whether the development is likely to have any impact on koalas or koala habitat. The parties advise that, while the site contains koala-use tree species, the land is "outside the species' known range and no koalas have been recorded in the Illawarra Plains for at least 20 years" (JS par 28). I accept the parties' advice that that the development is likely to have low or no impact on koalas or koala habitat. The requirements of section 4.9(3) have been met.

Wollongong Local Environmental Plan 2009

21 A wide variety of different zonings apply across the site, under applicable Wollongong Local Environmental Plan 2009 (WLEP), as follows (JS par 44):

> "R2 Low Density Residential zone,
> R3 Medium Density Residential zone,
> C2 Environmental Conservation zone,
> C3 Environmental Management zone,
> C4 Environmental Living zone,
> MU1 Mixed Use zone, and
> RE1 Public Recreation zone."

22 I accept the parties' advice that the proposed development is permissible under applicable zonings and that subdivision is permissible under cl 2.6 of WLEP. The parties advise of their shared view that the proposal is consistent with the objectives of each zone, relevantly.

23 The parties advise that the proposal does not breach any development standards.

24 Clause 5.10 of WLEP relates to heritage conservation. While no part of the study area is listed as a heritage item under Sch 5, the parties advise that there are "Aboriginal sites within the site" and that:

> "The proposal was referred to Heritage NSW and comments were received on 11 March 2025, which are incorporated in agreed Conditions of Consent".

25 The parties also advised of the completion of an Aboriginal Cultural Heritage Assessment (ACHA) (Exhibit AK-1 Tab 15), which I have reviewed. The ACHA indicates the parameters for, and approach to, investigation and assessment. This included notification to the local aboriginal community and others, various consultation processes and consideration of community feedback on findings (ACHA Section 2). The potential effect on significance has been identified and processes for minimisation of impact identified. I have also noted the particulars of the GTAs. There are no jurisdictional bars apparent with respect to cl 5.10.

26 Clause 5.21 of WLEP relates to flooding. It applies, as the site includes land within the flood planning area. There are various matters of consideration (cl 5.21(3)) and six matters requiring findings of satisfaction on the part of the consent authority under cl 5.21(2). The applicant (via its consultants Rhelm) has addressed each of these matters in some detail. The Flood Impact Assessment (reference Exhibit AK-1 Tab 13) particularises each point of satisfaction and provides explicit technical details with respect to the relevant points, relevantly cross-referencing related findings. Certain flood-related public safety factors are also further considered (reference Exhibit AK-2 received by the Court on 30 April 2025 Tab 6 p 27). The parties advise of their acceptance of the Rhelm commentary. I too accept this explanation and am satisfied with respect to each of the points at cl 5.21(2).

27 Clause 7.1 of WLEP is concerned with public utility infrastructure provision. Consent must not be granted unless the consent authority is satisfied that essential infrastructure is available or that adequate arrangements have been made to make that infrastructure available when required. The parties have indicated their agreement that all essential infrastructure is available or that adequate arrangements are in place. I am satisfied in respect of cl 7.1(2).

28 Clause 7.2 is concerned with natural resource sensitivity (biodiversity) and applies to the DA because the site includes land mapped as Terrestrial Biodiversity under the WLEP. It requires a consent authority to consider certain

matters. In this instance the parties advise that this consideration has occurred (JS par 56). Clause 7.2 also brings a requirement for findings of satisfaction relating to certain matters. In particular, under subcl 7.2(4), development consent must not be granted without findings of satisfaction on the part of the consent authority that the development is consistent with the objectives of the clause and that:

> (a) the development is designed, sited and managed to avoid potential adverse environmental impact, or
>
> (b) if a potential adverse environmental impact cannot be avoided, the development—
>
> > (i) is designed and sited so as to have minimum adverse environmental impact, and
> >
> > (ii) incorporates effective measures so as to have minimal adverse environmental impact, and
> >
> > (iii) mitigates any residual adverse environmental impact through the restoration of any existing disturbed or modified area on the site.

29 The objective of cl 7.4 is as follows:

> The objective of this clause is to protect, maintain or improve the diversity and condition of the native vegetation and habitat, including—
>
> > (a) protecting biological diversity of native flora and fauna, and
> >
> > (b) protecting the ecological processes necessary for their continued existence, and
> >
> > (c) encouraging the recovery of threatened species, communities, populations and their habitats.

30 The parties advise that the proposal is consistent with these objectives because the proposed development will (JS par 55):

> "(a) preserve 40.38 ha of land mapped as Natural Resource Sensitivity – Biodiversity and ensure its preservation in perpetuity (including through in perpetuity funding for required management actions) through the registration of a Biodiversity Stewardship Agreement (BSA); and
>
> (b) avoid impacts on a further 7.13 ha of land mapped as areas of Natural Resource Sensitivity – Biodiversity, … and
>
> (c) restore and manage associated modified lands within riparian corridors not currently mapped as Natural Resource Sensitivity – Biodiversity, through the inclusion in a BSA or management through a vegetation management plan."

31 The parties further advise that the proposal will 'protect, maintain or improve the diversity and condition of the native vegetation and habitat' of 83% of all land mapped as Natural Resource Sensitivity – Biodiversity within the study area. I agree with the parties and am satisfied that the proposal is consistent with the clause objectives.

32 The parties also provide advice that the requirements of subcll 7.4(4)(a) and (b), are satisfied having regard to (JS par 58, 59):

> "The Concept BDAR and Stage 1 BDAR address the impacts of the development upon native terrestrial fauna and flora, including habitat and threatened species. Where impacts cannot be avoided, they have been mitigated most notably through the establishment of the BSA.
>
> …protection measures have been incorporated into the agreed conditions including:
>
> (a) conditions 28 and 183 which require the Applicants to prepare and implement vegetation management plans and/or BSAs; and
>
> (b) condition 27 which ensures the protection of riparian land."

33 Based on the advice of the parties I am satisfied that each of the requirements of cl 7.4(4) of the WLEP are satisfied.

Other matters

Other provisions of s 4.15(1) of the Environmental Planning and Assessment Act 1979

34 I also note that throughout their agreed jurisdictional statement the parties refer to various other points of consideration to which they have attended, including Wollongong Development Control Plan 2009.

35 The parties have advised that the development application was notified to surrounding properties in accordance with requirements. The parties advise that objecting submissions have been considered. A joint expert report of the parties' town planning experts, filed on 6 May 2025, was prepared to demonstrate the manner in which submissions made in relation to the interface between the proposed Stage 3 of the development and the adjoining Cedars Estate have been addressed.

Future proposed works

36 The parties advise as follows with respect to a factor concerned with the relationship between the Stage 1 development and the wider concept for the site (JS pars 46-47):

> "In conjunction with the Proposed Development, but not forming part of the DA, two small sections of the Western Ring Road are proposed to be constructed on parts of the land located within the C2 Environmental Conservation Zone. Those sections of the Western Ring Road can be carried out by or on behalf of Council, as development without consent subject to an assessment under Part 5 of the EP&A Act
>
> A (review of environmental factors) was prepared concurrently with the original application to assess the impacts associated with the proposed construction of those two small sections of the Western Ring Road. Further, while development consent has not been sought to construct those sections of the Western Ring Road, the environmental impacts of that work have been considered in the assessment reports accompanying the Proposed Development."

37 I understand this statement of the parties to indicate that technical assessment of the potential impacts of these related works has been undertaken, and considered, and that nothing of significance has arisen to vary Council's position, which is supportive of the proposal now before me.

Owner's consent and lodgement

38 The parties advise that the application was lodged in accordance with requirements including with respect to the consent of the owners of the site.

Conclusion

39 With the above findings, I am satisfied that the jurisdictional prerequisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

40 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties. Subsection 34(3)(b) of The LEC Act also requires me to "set out in writing the terms of the decision". The final orders have this effect.

Notations

41 With respect to the amendments of the development application, the Court notes that the Respondent has agreed under cl 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW) to the Applicant's further amending Development Application No. DA-2023/481 to rely on the plans and documents comprising Exhibit AK-2 to the Affidavit of Alisha Louise Kinkade dated 29 April 2025 and received by the Court on 30 April 2025, an index to which is at Annexure A of that affidavit.

Orders

42 The Court orders that:

(1) The appeal is upheld.

(2) Development consent is granted to Development Application No. DA-2023/481 for concept approval of site layout for subdivision and 8 stages of development, with stages 2 – 8 to be the subject of future DAs, and a detailed proposal for the first stage of development described as Stage 1 on part of the land including tree removal, remediation of land, earthworks, dewatering of three dams, stormwater infrastructure, landscaping to road reserves, subdivision to create 116 residential lots, 1 'environmental' lot, 1 lot for a detention basin and 1 residual lot and associated works, construction of local park including embellishment and landscaping, and the establishment of a Biodiversity Stewardship Agreement under the *Biodiversity Conservation Act 2016* at 200, 220, 240 and 330 Marshall Mount Road, Marshall Mount NSW 2530 (Lots 1 and 2 in DP1277366, Lot 5 in DP1280030 and Lot 1 in DP1280028) subject to the conditions set out in **Annexure A**.

(3) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the Applicants are to pay the costs of the Respondent that are thrown away as a result of amending the development application, as agreed or assessed.

P Walsh

Commissioner of the Court

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Annexure A (4.83 MB, pdf)