



Land and Environment Court New South Wales

Medium Neutral Citation:	Halcyon Hotels Pty Ltd (93 124 421 199) v Wingecarribee Shire Council [2022] NSWLEC 1221
Hearing dates:	Conciliation conference on 31 March 2022
Date of orders:	13 May 2022
Decision date:	13 May 2022
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	Orders – see [16].
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Biodiversity Conservation Act 2016, Pt 7 Biodiversity Conservation Regulation 2017, cl 7.3 Environmental Planning and Assessment Act 1979, Pt 4 ss 4.14, 4.15, 4.16, 8.7 Environmental Planning and Assessment Regulation 2021, cl 37 Environmental Planning and Assessment Regulation 2000, cl 77 Land and Environment Court Act 1979, s 34 Rural Fires Act 1997 State Environmental Planning Policy No 55 - Remediation of Land, cl 7 State Environmental Planning Policy (Biodiversity and Conservation) 2021, cll 4.16, 8.8, 8.9 State Environmental Planning Policy (Koala Habitat Protection) 2019 State Environmental Planning Policy (Koala Habitat Protection) 2020, Pt 2. cll 3, 5, 7, 8, 9, 10. Schs 1, 2 State Environmental Planning Policy (Koala Habitat Protection) 2021, cl 18 State Environmental Planning Policy (Planning Systems) 2021, cl 2, Sch 6 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy (State and Regional Development) 2011 State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 State Environmental Planning Policy (Transport and Infrastructure) 2021, Part 2.3, cll 2.97, 2.98, 2.99, 2.121. Sch 3. State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017, cl 8 Water Management Act 2000

Wingecarribee Local Environmental Plan 2010, cl 2.3, 4.3, 4.4, 5.10, 7.3, 7.5

Texts Cited: Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (February, 2022)

Category: Principal judgment

Parties: Halcyon Hotels Pty Ltd (93 124 421 199) (Applicant)
Wingecarribee Shire Council (Respondent)

Representation: Counsel:
P Lalach (Solicitor)(Applicant)
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Solicitors:
HWL Ebsworth Lawyers (Applicants)
Marsdens Law Group (Respondent)

File Number(s): 2021/228053

Publication restriction: No

JUDGMENT

- 1 **COMMISSIONER:** Halcyon Hotels Pty Ltd (93 124 421 199) (the Applicant) has appealed the refusal by Southern Regional Planning Panel under delegation from Wingecarribee Shire Council (the Respondent) of its development application DA20/1400, made with owner's consent, seeking consent for a proposed mixed use development (the Proposed Development) at The Maltings, 2 Colo Street, Mittagong (the Subject Site).
- 2 Specifically, the Application sought development consent for the following:
 - (1) detailed development consent for buildings M1 to M4 to accommodate a range of uses in multi-purpose spaces suitable for a range of cultural uses including art, exhibitions, functions, recreation activities and performances as well as a hotel with associated ancillary uses and ground improvements including landscaping, parking and vehicular access;
 - (2) site works including rehabilitation of the riparian corridor along the Nattai River and conservation works to support the adaptable re-use of heritage items on the Site;
 - (3) demolition of the ruins of the Malter's Cottage and construction of a multi-purpose space;
 - (4) concept approval for proposed buildings M5 and M6 to accommodate the following potential uses:
 - (a) residential accommodation;
 - (b) tourist and visitor accommodation; and/or
 - (c) seniors living development.
- 3 The appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) and falls within Class 1 of the Court's jurisdiction. The appeal is determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 4 Pursuant to the provisions of cl 77 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation), the Proposed Development was placed on public exhibition by the Respondent between 10 July to 14 August 2021, and six submissions were received in response to that notification.
- 5 The Development Application (as amended) was re-exhibited by the Respondent between 11 March 2021 and 19 April 2021. The Respondent received nil submissions in response to the re-exhibition period.

On 31 March 2022, the Parties participated in a s 34 conciliation conference and reached an in-principle agreement regarding the granting of consent to the DA, subject to conditions.

- 7 The conciliation conference was convened in a manner consistent with the Court's COVID-19 Pandemic Arrangements Policy (the Policy). A site inspection was not undertaken prior to the conciliation conference as no objectors sought to make submissions during the site view.
- 8 At the conciliation conference, undertaken via Microsoft Teams, 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 granting consent to the Applicant's development application, subject to conditions.
- 9 Under s 34(3) of the *Land and Environment Court Act 1979* (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.
- 10 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
- (1) in relation to the permissibility of the Proposed Development under the provisions of Wingecarribee Local Environmental Plan 2010 (WLEP):
- (a) the Subject Site is zoned R2 Low Density Residential pursuant to the provisions of cl 2.3 of WLEP;
- (b) the Land Use Table for Zone R2 Low Density Residential identifies the following uses as permissible without consent, permissible with consent and prohibited:
- “2 Permitted without consent
- Environmental protection works; Home-based child care; Home occupations
- 3 Permitted with consent
- Bed and breakfast accommodation; Boarding houses; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Environmental facilities; Exhibition homes; Exhibition villages; Group homes; Health consulting rooms; Home businesses; Home industries; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Respite day care centres; Roads; Seniors housing; Serviced apartments; Signage; Tank-based aquaculture
- 4 Prohibited
- Any development not specified in item 2 or 3”
- (c) the Parties have noted that:
- (i) development for the purposes of recreation facilities (indoor), some species of tourist and visitor accommodation (including bed and breakfast accommodation and serviced apartments) and some species of residential accommodation (including boarding houses, dual occupancies, dwelling houses, group homes and seniors housing) are permissible with consent within Zone R2 Low Density Residential; but
- (ii) any development that is not specified in items 2 or 3 of the Land Use Table is prohibited in the Zone R2 Low Density Residential, and so the Applicant's proposed function centre, information and education facility, pub, hotel and motel accommodation, restaurant or café and other forms of residential accommodation and tourist and visitor accommodation are prohibited within the zone.
- (d) however, the Parties agree, and I am satisfied, that the Applicant's development application can rely upon the conservation incentives provision in clause 5.10(10) of WLEP to achieve permissibility for those aspects of the Proposed Development that would otherwise be prohibited within the R2 zone because:
- (i) clause 5.10(10) of WLEP provides as follows:
- “(10) Conservation incentives
- The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that -

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area."

- (ii) the Applicant's Class 1 Application contains a Heritage Impact Statement prepared by Paul Davies Pty Ltd and dated May 2020 (HIS) and this HIS addresses the heritage significance of the Subject Site and the matters identified in scl 5.10(10)(a) and (d) of WLEP as it confirms that the conservation of the heritage items which are currently ruins, is facilitated by the adaptive re-use of the ruined buildings which are at risk of loss and further deterioration in the absence of redevelopment.
- (iii) the Applicant's Class 1 Application also contains a Conservation Management Plan prepared by Paul Davies Pty Ltd, dated December 2020, (Conservation Management Plan) which was reviewed and accepted by the Respondent's heritage consultant David Logan of GML Heritage, and which confirmed that the heritage items on the Subject Site require conservation work to be carried out, in satisfaction of cl 5.10(10)(b) of WLEP;
- (iv) the Conservation Management Plan was approved by the Southern Region Planning Panel, on behalf of the Respondent, and its implementation is the subject of an agreed condition (condition 74) within the Parties' agreed conditions of consent, and which requires the Applicant to ensure ongoing compliance and implementation of the Conservation Management Plan, in satisfaction of scl 5.10(10)(c) of WLEP;
- (v) on the basis of the documents listed in Condition 11 of the Parties agreed proposed conditions of consent for the Proposed Development, the development would not have any significant adverse effect on the amenity of the surrounding area and therefore cl 5.10(10)(e) is satisfied, noting that the documents include:

- an Acoustic Report prepared by ARUP and dated 12 May 2020 at Tab 16 of the Class 1 Application;
- a Plan of Management prepared by Elton Consulting and dated 17 February 2021 at Tab 14 of the Class 1 Application;
- a Soil & Water Management Plan prepared by J.Wyndham Prince and dated 29 April 2020 at Tab 9 of the Class 1 Application; and
- Landscape Plans prepared by Snohetta and dated May 2020 at Tab 7 of the Class 1 Application,

(2) in relation to other relevant provisions of WLEP:

- (a) the Subject Site is not subject to any maximum height of buildings development standard pursuant to the Height of Buildings Map referred to in cl 4.3(2) of WLEP;
- (b) the Subject Site is not subject to any maximum floor space ratio pursuant to the Floor Space Ratio Map referred to in cl 4.4(2) of WLEP;
- (c) the provisions of cl 7.3 of WLEP require a consent authority to consider various matters relating to earthworks where development consent is sought, and in relation to this:
 - (i) the Applicant has provided a geotechnical report prepared on 16 April 2020 by JK Geotechnics which was lodged with the Application and filed with the appeal;
 - (ii) the Parties agree, and I am satisfied, that the Proposed Development would not have any significant adverse impact and that the Parties' agreed proposed conditions of consent will manage and mitigate any impacts associated with any proposed earthworks;

- (d) the Nattai River is a Category 1 Environmental Corridor identified on the Natural Resources Sensitivity Map in WLEP and therefore the provisions of cl 7.5 of WLEP apply to the Proposed Development; and
 - (i) clause 7.5 of WLEP requires that consent not be granted to development on land to which cl 7.5 applies unless the consent authority is satisfied that:
 - “the development is defined, sited and managed to avoid any potential adverse environmental impacts; or
 - if that impact cannot be avoided - the development is defined, sited and will be managed to minimise that impact; or
 - if that impact cannot be minimised - the development will be managed to mitigate that impact.
 - (ii) those works proposed within the land mapped as on the Natural Resources Sensitivity Layer - Riparian Land Category 1 Environmental Corridor as part of the Proposed Development are required to upgrade the buildings and to rehabilitate the riparian zone;
 - (iii) all the proposed works would take place on land that has already been disturbed and rehabilitation to the riparian zone is proposed; and
 - (iv) therefore the Proposed Development will not have any adverse environmental impacts and the restoration works are consistent with the objectives in WLEP and the provisions of cl 7.5 of the Plan;
- (3) consistent with the provisions of s 4.14 of the EP&A Act and in relation to the provisions of the *Rural Fires Act 1997*:
 - (a) the Subject Site is identified as 'bush fire prone land' and as the development falls within the definition of 'special fire protection purpose' a bush fire authority is required from the NSW Rural Fire Service (RFS);
 - (b) on 25 August 2020, the NSW RFS issued general terms of approval subject to conditions of consent which have been included in the Parties' agreed proposed conditions of consent at Annexure 'B' to this judgment;
- (4) in relation to the provisions of the *Water Management Act 2000*:
 - (a) the Proposed Development involves works on 'waterfront land' of Nattai River and a controlled activity approval from the Natural Resources Access Regulator is required;
 - (b) on 5 July 2021 Water NSW on behalf of the Natural Resources Access Regulator issued concurrence to the Applicant's Development Application as stated above.
- (5) in relation to the provisions of the *Biodiversity Conservation Act 2016*:
 - (a) approximately 0.1 hectares of Southern Highlands Shale Woodlands understorey vegetation is expected to be impacted by the Proposed Development;
 - (b) the Biodiversity Values Map prepared by the Department of Planning and Environment under Pt 7 of the *Biodiversity Conservation Act 2016* (BC Act), and consistent with cl 7.3(3) of the Biodiversity Conservation Regulation 2017, does not identify the Subject Site as containing biodiversity values that would trigger the Biodiversity Offsets Scheme within the BC Act; and
 - (c) no offsets are required in relation to the proposed vegetation impacts of the Proposed Development;
- (6) in relation to the provisions of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H) (incorporating the provisions of the former and now repealed State Environmental Planning Policy No. 55 - Remediation of Land).
 - (a) consideration has to be given to the matters in scl 4.6(1) of the SEPP R&H;
 - (b) based on the conclusions in the Applicant's Stage 1 Preliminary Site Investigation prepared by JK Environments and dated 17 April 2020, its Detailed Site Investigation prepared by JK Environments and dated 22 March 2022, as well as the Interim Audit Advice Letter No. 1 from Rowena Salmon of Ramboll dated 24 March 2022:
 - (i) the Parties' agreed conditions of consent require the preparation of a remediation action plan and validation report; and
 - (ii) the Parties advise, I am satisfied, that the Subject Site will be remediated and made suitable for the purposes of the Proposed Development before the Subject Site is used for such purposes in satisfaction of the provisions of cl 4.6(1) of SEPP R&H;

- (7) *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (SEPP BC) (incorporating the provisions, *inter alia*, of former State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011):
- (a) pursuant to the provisions of cl 8.8 of SEPP BC, a consent authority must not grant consent to the carrying out of development under Pt 4 of the EP&A Act on land in the Sydney drinking water catchment unless it is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on water quality, and in relation to this:
 - (i) the Applicant's Class 1 Application contains a Storm & Flood Management Strategy prepared by J Wyndham Prince and dated 31 May 2021 (JWP Report); and
 - (ii) an assessment undertaken in the JWP Report using the NorBE tool in Appendix 1 of the Neutral or Beneficial Effect on Water Quality Assessment Guideline 2021 confirmed that pollutant loads currently being generated at the Subject Site will be improved under the Proposed Development; and
 - (iii) the same assessment confirms that the post development pollutant concentrations for total phosphorus and total nitrogen will be less than the pollutant concentrations in the pre-development scenario and therefore a neutral or beneficial effect will be achieved;
 - (b) further in relation to the provisions of cl 8.8 of SEPP BC, the Applicant's Class 1 Application contained a Vegetation Management Plan prepared by Eco Logical and dated 22 December 2020 (VMP), in relation to which:
 - (i) the VMP requires revegetation of sedges, rushes and aquatic plants along the riparian corridor which will improve water quality by effectively removing stormwater pollutants from the overland flow into Nattai River;
 - (ii) additionally, a total of eight bio-retention raingardens will be strategically placed along the riparian corridor and will utilise native sedges to uptake pollutants and improve water quality;
 - (iii) condition 11 of the Parties' agreed conditions of consent requires the development to be implemented in accordance with the documents listed in that condition, including the VMP; and
 - (iv) further, as confirmed by Water NSW in its letter dated 5 July 2021, the stormwater management measures in the JWP Report together with the measures required by the VMP will achieve a neutral or beneficial effect on water quality;
 - (c) consequently, the Parties agree, and I am satisfied, that the Proposed Development would have a neutral or beneficial effect on water quality, if approved, as required under cl 8.8 of SEPP BC;
 - (d) pursuant to the provisions of cl 8.9 of SEPP BC a consent authority must also not grant consent to the carrying out of development under Pt 4 of the E P&A Act on land in the Sydney drinking water catchment except with the concurrence of the Regulatory Authority;
 - (e) on 5 July 2021, Water NSW provided its concurrence in relation to the Application, including general terms of agreement with conditions now included within the Parties' agreed conditions of consent. Consequently, I am satisfied that the relevant provisions of SEPP BC have been satisfied;
- (8) SEPP BC (incorporating the provisions, *inter alia*, of former State Environmental Planning Policy Koala Habitat Protection (2020) (Koala SEPP 2020) applies to the Proposed Development, and in relation to this:
- (a) SEPP BC commenced on 1 March 2022, and cl 4.16 of SEPP BC provides that a development application made in relation to land, but not finally determined before this Chapter applied to the land, must be determined as if this Chapter had not commenced in its application to the land;
 - (b) the Applicant's development application was lodged on 10 June 2020, and so Ch 4 of SEPP BC is of no effect in relation to the Proposed Development;
 - (c) at that time that the Applicant's development application was lodged on 10 June 2020, State Environmental Planning Policy Koala Habitat Protection (2019) (Koala SEPP 2019) was in force;
 - (d) however, on 30 November 2020 Koala SEPP 2019 was repealed by Koala SEPP 2020 which did not contain any savings provisions in relation to development applications lodged but not yet determined;
 - (e) on 17 March 2021 State Environmental Planning Policy (Koala Habitat Protection) 2021 commenced (Koala SEPP 2021), and cl 18 of Koala SEPP 2021 states:

"A development application made in relation to land, but not finally determined before this Policy applied to the land, must be determined as if this Policy had not commenced in its application to the land".

- (f) accordingly the application that is the subject of the current appeal is saved from the provisions of Koala SEPP 2021 and it is the provisions of Koala SEPP 2020 that apply to its evaluation;
 - (g) Koala SEPP 2020 applies to development on the Subject Site because the site is within the Wingecarribee local government area (see cl 5 and Sch 1 of Koala SEPP 2020); and
 - (h) Part 2 of Koala SEPP 2020 applies because pursuant to cl 7 of that SEPP, the Applicant's development application has been made over land to which Koala SEPP 2020 applies and the Subject Site has an area of 6.44 hectares (being over the 1 hectare requirement in cl 7(c)(i) of Koala SEPP 2020;
 - (i) cl 8(1) of the Koala SEPP 2020 states that before a council, or the Court on appeal, may grant consent to a development application on land to which Pt 2 of the Koala SEPP 2020 applies, the council must be satisfied as to whether or not the land is a potential koala habitat;
 - (j) 'Potential koala habitat' is defined in Koala SEPP 2020 as 'areas of native vegetation where trees of the types listed in Sch 2 constitute at least 15% of the total number of trees in the upper or lower strata of the tree component';
 - (k) the Applicant's Class 1 Application contains a Flora and Fauna Assessment prepared by EcoLogical Australia Pty Ltd and dated 30 April 2020 (FFA), and Appendix A of the FFA lists the species of tree identified within the Subject Site;
 - (l) the list of tree species on the Subject Site was prepared by Diane Campbell, a Principal Ecologist at EcoLogical Australia,, an expert who has qualifications in tree identification as required under cl 8 of Koala SEPP 2020;
 - (m) Appendix A of the FFA does not list any of the trees listed in Sch 2 of Koala SEPP 2020 and so confirms that the Site does not contain potential habitat; and
 - (n) the Parties have advised, and I am satisfied, that the Subject Site does not contain potential koala habitat, and pursuant to cl 3(a) of Koala SEPP 2020 the Court is not prevented from granting consent to the subject application by reason of the Koala SEPP 2020;
- (9) for completeness, the Parties have noted, and I accept, that:
- (a) the FFA and Koala Assessment Report prepared by Eco Logical Australia and dated 29 April 2020 (Koala Report) which is contained within the Applicant's Class 1 Application, also confirms that the Subject Site does not contain core koala habitat (as that term is defined in Koala SEPP 2020);
 - (b) Appendix B of the FFA lists likelihood of occurrence for threatened and migratory species, and while it lists Koalas it states that the likelihood of occurrence on the Subject Site is unlikely as habitat present is substantially degraded such that the species is unlikely to utilise the Site for foraging or breeding;
 - (c) the Koala Report concludes that Koalas may use the Subject Site for foraging on an intermittent basis but is unlikely to be significant to the local population for breeding or dispersal across the landscape; and
 - (d) accordingly, cll 9 and 10 of Koala SEPP 2020 are not invoked;
 - (e) notwithstanding the above, the Parties are aware that the management and protection of koalas and their habitat is considered and provided for in the Koala Report, and this has addressed adequately all direct and indirect impacts of the Proposed Development on this species;
- (10) in relation to the provisions of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP T&I) (incorporating the provisions of the former, and now repealed, State Environmental Planning Policy (Infrastructure) 2007):
- (a) the Subject Site is located adjacent to a rail corridor, and Pt 2.3, Div 15 Subdiv 2 of SEPP T&I relates to development adjacent to rail corridors;
 - (b) clause 2.97(1) applies to development on land that is in or adjacent to a rail corridor and is likely to have an adverse effect on rail safety, in relation to which:
 - (i) in relation to the current appeal, pursuant to cl 2.97(2) of SEPP T&I, the consent authority must notify the rail authority of the application and consider any response and guidelines issued by the Secretary for the purposes of the section;
 - (ii)

clause 2.97(3) overrides the requirement in cl 2.97(2) in circumstances where the development is on land adjacent to a rail corridor vested in or owned by Australian Rail Track Corporation (ARTC), which is the case in relation to the Proposed Development;

- (c) clause 2.98(1) of SEPP T&I applies to a development that involves the penetration of ground to a depth of at least 2m below ground level on land within 25 metres of a rail corridor, but in relation to this:
 - (i) no excavation is proposed within 25 metres of a rail corridor; and
 - (ii) the Parties' proposed and agreed condition of consent 56 confirms that any future proposed excavation on the Subject Site that is within 25 metres of the rail corridor, would be the subject of a further approval from the Australian Rail Track Corporation (ARTC) prior to any works of this nature being undertaken; and
- (d) clause 2.99 of SEPP T&I does not apply to the Proposed Development because development consent is not sought for any of the uses listed in cl 2.99(1) of SEPP T&I, and any future development in relation to Stage 2 of the Proposed Development which may seek consent for any of the uses listed in cl 2.99(1) would have to have regard to the provisions of cl 2.99(3) of the SEPP, but this is not required for the purposes of the current appeal;
- (e) the Proposed Development is a "traffic-generating development" within the meaning of cl 2.121 and Sch 3 to SEPP T&I, and in relation to this:
 - (i) before determining a development application to which cl 2.121 applies, the consent authority must give written notice of the development application to Transport for NSW (TfNSW) and take into consideration the matters listed in that section;
 - (ii) TfNSW advised on 24 March 2022 that the Application was considered acceptable subject to conditions which are included in the conditions of consent at Annexure "A" of the Parties agreement reached under s 34 of the LEC Act.

(11) in relation to the provisions of State Environmental Planning Policy (Planning Systems) 2021 (SEPP PS) (formerly State Environmental Planning Policy (State and Regional Development) 2011):

- (a) the Proposed Development is regionally significant development identified in cl 2 of Sch 6 SEPP PS, being general development with a capital investment value ("CIV") of more than \$30 million given that the CIV of the proposed development is \$68,108,909; and
- (b) all parts of the Proposed Development that may be the subject of a separate development application is development specified in Sch 6 for the purposes of SEPP PS, but only if that part of the development exceeds the minimum value or size or other aspect specified in that Schedule for the development; and
- (c) the Parties have noted that the Southern Regional Planning Panel, which was the originally designated consent authority for the development application that is the Subject of this appeal has directed the Respondent to enter into the agreement reached in relation to the conciliation conference under the provisions of s 34 of the LEC Act;

(12) the Proposed Development is acceptable having regard to the provisions of s 4.15(1) of the EP&A Act including in relation to the submission of the one objector which is a relevant consideration under s 4.15(1)(d) of the EP&A Act. The Parties agree that the submission of the objector has been considered by them and the Proposed Development, as amended, can be approved.

11 Having considered the advice of the Parties, provided above at [10], I agree that:

- (1) the Applicant's Development Application can be approved having regard to the matters in s 4.15(1)(b) – (e) of the EP&A Act; and
- (2) the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been so satisfied.

12 Further, 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.

13 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties' decision.

14 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.

15 Further the Court notes that:

- (1) development application no. 20/1400 was amended pursuant to cl 37(1) of the Environmental Planning and Assessment Regulation 2021 with the consent of the Respondent, in accordance with the following documents:
 - (a) Interim Audit Advice Letter No. 1 - Review of Preliminary Site Investigation and Detailed Site Investigation, the Maltings: 2 Colo Street, Mittagong NSW dated 24 March 2022;
 - (b) Detailed Site Investigation prepared by JK Environments and dated 22 March 2022;
 - (c) Traffic Memorandum from Brett McClurg of SLR Consulting dated 2 March 2022; and
 - (d) Letter from Eco Logical dated 14 April 2022.
- (2) the Respondent has confirmed that it has uploaded the documents referred to above at 15(a) to 15(d) to the NSW Planning Portal on 31 March 2022, and Respondent uploaded those documents to the NSW Planning Portal on 14 April 2022.

Orders

16 The Court orders that:

- (1) the Applicant is granted leave to amend its Class 1 Application form in accordance with Annexure 'A' to this judgment, and to rely upon its amended Application in the proceedings including changing the Applicant's name to "Halcyon Hotels Pty Ltd (93 124 421 199)";
- (2) the appeal is upheld;
- (3) concept development application DA 20/1400 lodged with the Respondent on 10 June 2020 seeking consent for the proposed mixed use re-development at The Maltings, 2 Colo Street, Mittagong 2575 is determined by the grant of consent subject to the conditions set out in Annexure 'B' to this agreement.

.....

M Chilcott

Commissioner of the Court

[Annexure A \(137023,.pdf\)](#)

[Annexure B \(956435,.pdf\)](#)

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Decision last updated: 13 May 2022