



Land and Environment Court  
New South Wales

---

Case Name: Collaroy Living Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2025] NSWLEC 1113

Hearing Date(s): Conciliation Conference 2, 18 December 2024

Date of Orders: 26 February 2025

Decision Date: 26 February 2025

Jurisdiction: Class 1

Before: Targett C

Decision: The Court orders that:  
(1) The appeal is upheld.  
(2) Pursuant to s 4.55(8) of the Environmental Planning and Assessment Act 1979, Modification Application Mod2024/0445, as amended, for changes to the internal floor plan of a number of approved units to increase their area, provide for minor changes to landscaping, modify the roof structure to incorporate skylights and modify the garage door location, at 37-43 Hay Street, Collaroy, is approved.  
(3) Development Consent No DA2023/0868 is modified in the terms in Annexure A.  
(4) Development Consent No DA2023/0868 as modified by the Court is Annexure B.

Catchwords: APPEAL – Modification Application – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.55  
Land and Environment Court Act 1979, ss 17, 34  
  
Environmental Planning and Assessment Regulation 2021, s 113  
State Environmental Planning Policy - Building

Sustainability Index: BASIX 2004  
State Environmental Planning Policy (Housing) 2021,  
ss 81, 84, 108  
State Environmental Planning Policy (Resilience and  
Hazards) 2021  
State Environmental Planning policy (Sustainable  
Buildings) 2022 s 4.2  
Warringah Local Environmental Plan 2012, cl 2.7, 6.2

Category: Principal judgment

Parties: Collaroy Living Pty Ltd (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
M Sonter (Solicitor) (Applicant)  
S Patterson (Solicitor) (Respondent)

Solicitors:  
Mills Oakley (Applicant)  
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2024/291256

Publication Restriction: No

## **JUDGMENT**

### **COMMISSIONER:**

#### **Background**

- 1 This matter concerns an appeal made directly to the Land and Environment Court pursuant to s 4.55(8) of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the applicant seeking to modify DA2023/0868 (Original Consent). The Original Consent was granted by the Land and Environment Court on 25 June 2024 and approved the demolition of existing dwellings and construction of a seniors housing development at Lots 43-46, Section 12, in Deposited Plan 10648, also known as 37, 39, 41 and 43 Hay Street, Collaroy (Subject Land).
- 2 The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).

### **The Modification Application**

3 The modification application (Mod2024/0445) sought to amend the Original Consent by:

- (1) internally and externally reconfiguring the ground and first floors, including changes to windows;
- (2) extending the front and rear of the ground and first floors;
- (3) changing the roof and skylights;
- (4) amending the carpark exhaust; and
- (5) amending external finishes.

4 On 8 August 2024, the applicant commenced these Class 1 proceedings.

5 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 2 December 2024 and subsequently adjourned. I presided over the conciliation conference.

### **The Amended Modification Application**

6 At the conciliation conference, the parties reached agreement under s 34(3) of the LEC Act as to the terms of a decision in the proceedings that would be acceptable to the parties. A signed s 34 agreement was provided to the Court on 19 December 2024 following the applicant amending its Modification Application with the respondent's agreement. The agreed amendments to the Modification Application are summarised in the Addendum Statement of Environmental Effects prepared by DMPS dated 6 December 2024 (SEE Addendum) and include:

- (1) the addition of a planter to the roof structure above the driveway including associated increase in height to the structure above the garage door to facilitate the planter;
- (2) amending the glazing line of relevant apartments to be 12m from the eastern boundary; and
- (3) reducing the size and amending the internal configuration of apartments 6, 9 and 10,

(Amended Modification Application).

7 The decision agreed upon is for the grant of consent to the Amended Modification Application, subject to conditions of consent.

- 8 Under s 34(3) of the 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. In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

### **Jurisdictional considerations**

- 9 As the presiding Commissioner, I am satisfied that the decision is one 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 form this state of satisfaction for the reasons that follow:

#### *Owner's consent*

- 10 The Modification Application is accompanied by letters of consent from the owners of the four properties comprising the Subject Land (see Class 1 Application, tab 1).

#### *The EPA Act*

- 11 As the Original Consent was granted by the Land and Environment Court, the Modification Application was lodged directly with the Court pursuant to s 4.55(8) of the EPA Act.
- 12 Section 4.55(2) of the EPA Act relevantly provides that a consent authority may modify development consent granted by the Court if it is satisfied of, and has considered, specified matters. Each relevant matter set out in s 4.55(2) is addressed below.
- 13 For the purposes of s 4.55(2)(a), I am satisfied that the consent as modified is substantially the same development as the development for which consent was originally granted for the following reasons:
- (1) Quantitatively, the design retains substantially similar levels of compliance with the Original Consent, with minor increases in terms of height and gross floor area as set out in the Jurisdictional Statement (at par 19). The amendments do not propose any additional units or changes to the amount of residents.
  - (2) Qualitatively, in comparing the design as approved versus proposed to be amended, the building design will remain substantially the same in

terms of presentation as set out in the Jurisdictional Statement (at par 20). The overall bulk and scale of the building remains relatively unchanged with the majority of alterations to the design being internal.

- (3) The proposed modifications do not result in a radical transformation of the approved development.
- 14 The parties agree that s 4.55(2)(b) of the EPA Act is not relevant to the Amended Modification Application.
- 15 For the purposes of s 4.55(2)(c) of the EPA Act, the Court as the consent authority must be satisfied that the development to which the consent as modified relates has been notified in accordance with a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of application for modification of development consent.
- 16 The Modification Application was notified between 23 August 2024 and 6 September 2024. 25 submissions were received in response to the notification.
- 17 In relation to s 4.55(2)(d) of the EPA Act, the submissions received as part of the notification process have been taken into consideration in reaching agreement to resolve this matter. To this end, I note that the Court heard from five objectors during the site view associated with the conciliation conference and attended the homes of two objectors. The parties agree that the relevant concerns of objectors have been considered and the Amended Modification Application is responsive to the community's concerns.
- 18 Consistent with the Northern Beaches Community Participation Plan, re-notification of the Amended Modification Application during the s 34 conciliation process is discretionary. The parties agreed that it was not necessary to re-notify in this case as the proposed changes did not result in further adverse impacts on adjoining or nearby properties.
- 19 In respect of s 4.55(3) of the EPA Act, in determining the Amended Modification Application, I have taken into consideration such of the matters referred to in s 4.15(1) of the EPA Act as are of relevance to the development the subject of the Amended Modification Application, and the reasons given by the consent authority (in this case the Court – see *Collaroy Living Pty Ltd v*

*Northern Beaches Council* [2024] NSWLEC 1352) for the grant of the Original Consent.

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

- 20 The Subject Land is subject to the provisions in Ch 4 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (RH SEPP).
- 21 The parties agree that the Amended Modification Application does not give rise to any further or additional considerations of the RH SEPP beyond what was considered in the granting of the Original Consent.

*State Environmental Planning Policy (Housing) 2021*

- 22 The State Environmental Planning Policy (Housing) 2021 (Housing SEPP) applies to land zoned R2 Low Density Residential. As such, development for the purposes of 'seniors housing' may be carried out with consent pursuant to s 81. The parties agree that the use of the development remains unchanged by the Amended Modification Application.
- 23 The Amended Modification Application proposes a 350mm increase in building height from that approved under the Original Consent. This results in a maximum building height of 8.725m, remaining below the maximum height control as applicable to the Subject Land pursuant to s 84(2)(c) of the Housing SEPP.
- 24 The Amended Modification Application proposes an increased floor space ratio (FSR) of 0.607:1, being 21% above the development standard in s 108(2)(c) of the Housing SEPP, or a 10% increase to the approved development. The Applicant's SEE Addendum concludes that the increase in FSR will result in no impact to the bulk and scale of the development. The parties agree that no clause 4.6 request is required as the approval of a modification application is not the grant of development consent.
- 25 The Amended Modification Application proposed a minor reduction in landscaped area, however the parties agree that the proposal remains compliant with the minimum requirements in s 108(2)(d) of the Housing SEPP.

*State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*

- 26 The Development Application for the original consent was lodged on the NSW Planning Portal on 6 July 2023. Pursuant to s 4.2(1)(f) of the State Environmental Planning Policy (Sustainable Buildings) 2022, the Modification Application continues to be subject to the requirements of the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- 27 As the proposed amendments include minor alterations to the glazing scheme as well as the internal layout of the dwellings, the applicant has prepared an updated BASIX Certificate for the amended design (see Tab 4 of the Section 34 Agreement Bundle).

*Warringah Local Environmental Plan 2011*

- 28 The Subject Land is zoned R2 Low Density Residential under the Warringah Local Environmental Plan 2011 (WLEP). I confirm that I have had regard to the R2 zone objectives. The parties agree that the proposed land use (seniors housing) remains unchanged from the Original Consent.
- 29 Pursuant to cl 2.7 of the WLEP relating to demolition, the Amended Modification Application does not propose any additional demolition works on the Subject Land from that approved under the Original Consent. Similarly, for the purpose of cl 6.2 regarding earthworks, the Amended Modification Application does not propose any additional earthworks.

**Conclusion**

- 30 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 31 The Court notes that the respondent, as the relevant consent authority, has approved, under s 113 of the Environmental Planning and Assessment Regulation 2021, to the applicant amending Modification Application Mod2024/0445 in accordance with the documents listed below:

<b>N o.</b>	<b>Drawing No/Revisio</b>	<b>Drawing Title</b>	<b>Prepared By</b>	<b>Date</b>
-----------------	-------------------------------	--------------------------	------------------------	-------------

	<b>n</b>			
<b>Architectural Plans</b>				
1.	MOD000/0 2	RENDER	PopovBas s	05/12/202 4
2.	MOD100/0 2	Title Page	PopovBas s	05/12/202 4
3.	MOD101/0 2	Site Analysis Plan	PopovBas s	05/12/202 4
4.	MOD102/0 2	Demolition Plan	PopovBas s	05/12/202 4
5.	MOD103/0 2	Excavation Plan	PopovBas s	05/12/202 4
6.	MOD104/0 2	Site Plan	PopovBas s	05/12/202 4
7.	MOD105/0 2	Basement Plan	PopovBas s	05/12/202 4
8.	MOD106/0 2	Level 01 Plan	PopovBas s	05/12/202 4
9.	MOD107/0 2	Level 02 Plan	PopovBas s	05/12/202 4
10	MOD108/0 2	Roof Plan	PopovBas s	05/12/202 4
11	MOD109/0	Basement	PopovBas	05/12/202



.	2	Post Adaption Plan	s	4
12 .	MOD110/0 2	Level 01 Post Adaption Plan	PopovBas s	05/12/202 4
13 .	MOD111/0 2	Level 02 Post Adaption Plan	PopovBas s	05/12/202 4
14 .	MOD112/0 2	Elevations 1	PopovBas s	05/12/202 4
15 .	MOD113/0 2	Elevations 2	PopovBas s	05/12/202 4
16 .	MOD114/0 2	Section AA & BB	PopovBas s	05/12/202 4
17 .	MOD115/0 2	Section CC & DD	PopovBas s	05/12/202 4
18 .	MOD116/0 2	Section EE & FF	PopovBas s	05/12/202 4
19 .	MOD117/0 2	Section GG	PopovBas s	05/12/202 4
20 .	MOD118/0 2	Entry Section & Renders	PopovBas s	05/12/202 4

21 .	MOD119/0 2	Compliance Diagrams	PopovBas s	05/12/202 4
22 .	MOD120/0 2	Compliance Diagrams	PopovBas s	05/12/202 4
23 .	MOD121/0 2	Shadow Diagram: 9:00am June 21	PopovBas s	05/12/202 4
24 .	MOD122/0 2	Shadow Diagram: 12:00pm June 21	PopovBas s	05/12/202 4
25 .	MOD123/0 2	Shadow Diagram: 3:00pm June 21	PopovBas s	05/12/202 4
26 .	MOD124/0 2	Sun Eye Diagrams June 21 Approved & Proposed	PopovBas s	05/12/202 4
27 .	MOD125/0 2	Sun Eye Diagrams June 21 Approved	PopovBas s	05/12/202 4

		& Proposed		
28 .	MOD126/0 2	Sun Eye Diagrams June 21 Approved & Proposed	PopovBas s	05/12/202 4
29 .	MOD127/0 2	Schedule of colours and materials	PopovBas s	05/12/202 4
30 .	MOD128/0 2	3D Diagrams of Changes	PopovBas s	05/12/202 4
31 .	MOD201/0 2	Notification Elevations 1/2	PopovBas s	05/12/202 4
32 .	MOD202/0 2	Notification Elevations 2/2	PopovBas s	05/12/202 4
33 .	MOD203/0 2	Notification Plan	PopovBas s	05/12/202 4
<b>Landscape Plans</b>				
34 .	L-00/A	Title Page	Site+Desig n Studios	11/12/202 4

35	L-01/A	Level 1 Landscape Plan	Site+Design Studios	11/12/2024
36	L-02/A	Level 2 Landscape Plan	Site+Design Studios	11/12/2024
37	L-03/A	Landscape Area Calculation Plan – Level 1	Site+Design Studios	11/12/2024
38	L-04/A	Landscape Area Calculation Plan – Level 2	Site+Design Studios	11/12/2024
39	L-05/A	Planting Schedule and Details	Site+Design Studios	11/12/2024
40	L-06/A	Specification	Site+Design Studios	11/12/2024
41	L-07/A	Material Imageries	Site+Design Studios	11/12/2024
<b>Supporting Documentation</b>				
<b>No.</b>	<b>Document</b>			<b>Date</b>

42 .	Addendum Statement of Environmental Effects prepared by DMPS Town Planning and Property Development Services	6/12/2024
43 .	BASIX Certificate 1403626M_04 prepared by Frys Building Consultancy	16/12/2024
44 .	NatHERS Certificate 9623620 prepared by Frys Building Consultancy	11/07/2024
45 .	NatHERS Certificate 9623661-01 prepared by Frys Building Consultancy	16/12/2024
46 .	NatHERS Certificate 9623679-03 prepared by Frys Building Consultancy	11/07/2024
47 .	NatHERS Certificate 9623711-01 prepared by Frys Building Consultancy	11/07/2024
48 .	NatHERS Certificate 9623745-01 prepared by Frys Building Consultancy	11/07/2024
49 .	NatHERS Certificate 9623752-02 prepared by Frys Building Consultancy	16/12/2024
50 .	NatHERS Certificate 9623786-02 prepared by Frys Building Consultancy	16/12/2024
51 .	NatHERS Certificate 9623729-02 prepared by Frys Building Consultancy	16/12/2024
52 .	NatHERS Certificate 9623760-02 prepared by Frys Building Consultancy	16/12/2024
53	NatHERS Certificate 9623778-03 prepared by	16/12/2024

.	Frys Building Consultancy	4
---	---------------------------	---

## Orders

32 The Court orders that:

- (1) The appeal is upheld.
- (2) Pursuant to s 4.55(8) of the *Environmental Planning and Assessment Act 1979*, Modification Application Mod2024/0445, as amended, for changes to the internal floor plan of a number of approved units to increase their area, provide for minor changes to landscaping, modify the roof structure to incorporate skylights and modify the garage door location, at 37-43 Hay Street, Collaroy, is approved.
- (3) Development Consent No DA2023/0868 is modified in the terms in Annexure A.
- (4) Development Consent No DA2023/0868 as modified by the Court is Annexure B.

## N Targett

### 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.