



Land and Environment Court
New South Wales

Case Name: Protract Contractors Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2025] NSWLEC 1109

Hearing Date(s): Conciliation conference on 23 August, 13 September and 12 December 2024

Date of Orders: 25 February 2025

Decision Date: 25 February 2025

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend Modification Application MOD2024/0048 and rely on the amended plans and documents listed at Condition B of Annexure A.
(2) Development Consent DA2018/1166 is modified subject to the conditions of consent set out at Annexure A.
(3) Development Consent DA2018/1166 (as modified) is subject to the consolidated conditions of consent set out at Annexure B.

Catchwords: MODIFICATION APPLICATION – multi dwelling boarding house development – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.55
Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation 2021, ss 98, 100, 113
State Environmental Planning Policy (Resilience and

Hazards) 2021, s 4.6
Warringah Local Environmental Plan 2011, cl 2.3, 4.3,
4.4, 5.10, 6.1, 6.2

Cases Cited: Leech Harmon Architects v Northern Beaches Council
[2020] NSWLEC 1032

Category: Principal judgment

Parties: Prostruct Contractors Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
G Hartley (Solicitor) (Applicant)
J Ede (Solicitor) (Respondent)

Solicitors:
Hartley Solicitors (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2024/44633

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** Pursuant to the provisions of s 4.55(8) of the *Environmental Planning and Assessment Act 1979* (EPA Act), these proceedings concern a Modification Application MOD2024/0048 (the MA) made directly to the Court by Prostruct Contractors Pty Ltd (the Applicant). In these circumstances, Northern Beaches Council (the Respondent) is required to exercise certain functions of the relevant consent authority.
- 2 The MA seeks to modify Development Consent DA2018/1166 (the parent DA), which comprises the demolition of existing structures and the construction of five x two-storey buildings over a split-level basement carpark for the purposes of a multi dwelling boarding house development containing 80 boarding rooms, including five managers' rooms with associated access, communal areas and landscape works at 11 May Road and 613-615 Pittwater Road, Dee Why (the site).

- 3 Consent for the parent DA was granted by the Court on 22 January 2020 in proceedings *Leech Harmon Architects v Northern Beaches Council* [2020] NSWLEC 1032.
- 4 The parent DA has been modified on two previous occasions, initially by the Sydney North Planning Panel (MOD2020/0366) on 25 November 2020.
- 5 A second MA (MOD2021/0226) was approved by the Court on 30 September 2021. Relevant to these proceedings, this MA deleted one level of basement car parking and allowed for the reconfiguration of the basement.
- 6 The subject MA was lodged with the Court on 5 February 2024 and initially sought to further modify the parent DA to increase the building envelope of all five buildings, extending the building footprint and volume of the development on each level and including an additional floor level to Blocks A and E.
- 7 The MA also sought to modify the development from a two-storey hipped roof pavilion style development to a part two-, three- and four-storey development with flat roofs. The extension of the building envelope provides for twelve additional boarding rooms and four additional common rooms. The ten upper floor rooms each propose balconies.
- 8 The MA also sought to reinstate the basement car parking which was removed under MOD2021/0226 and reduce the approved number of car parking spaces. Landscaped open space and the number of trees to be planted are proposed to be reduced.
- 9 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 23 August, 13 September and 12 December 2024. I presided over the conciliation conference.
- 10 During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court granting approval to an amended MA, subject to conditions.
- 11 Of note, the MA has been amended during the conciliation conference to resolve the contentions originally pressed by the Respondent, which included

concerns that the MA did not reflect substantially the same development, incompatibility with the desired streetscape character, impacts arising from excessive building bulk and scale, inadequate landscape and reduced tree planting, the creation of unacceptable overshadowing of affected neighbours, unacceptable privacy and cross viewing impacts, and inadequate parking and vehicle access amongst other contentions.

- 12 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. The parties' decision involves the Court exercising the function under s 4.55 of the EPA Act to modify the existing DA.
- 13 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 14 In that regard, pursuant to ss 98(1) and 100(1)(i) of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), I am satisfied the amended MA has been made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 15 Pursuant to s 4.56(2)(a) of the EPA Act, I am satisfied the amended MA remains substantially the same as the parent DA. The amended MA results in some change to the form of Blocks A and E, however this is configured in a manner that is set well back from the adjacent street network. Additionally, Blocks B, C and D retain their currently approved form and silhouette but each adopt a lower ground floor level relative to the closest neighbouring properties, reducing the privacy and overshadowing impacts of the existing DA. These changes to the proposed building form are nonetheless sufficient to accommodate an additional six rooms, taking the resultant total number of rooms to 86.
- 16 The parties agree, and I am satisfied, that the MA was notified in accordance with the Respondent's Community Participation Plan. The MA was notified from 19 February to 11 March 2024, and again from 3 May to 24 May 2024. The Respondent received 23 submissions raising concerns for a range of issues, including:

- (1) Concern the MA is not substantially the same as the approved DA due to additional storeys, additional building bulk and changed roof forms.
 - (2) Concern regarding proposed increase in building height and resultant adverse impacts to neighbouring properties and the streetscape.
 - (3) Impacts upon local traffic and parking, worsening traffic conditions, concern regarding pedestrian safety.
 - (4) Reduction of deep soil, reduction of landscaping and absorption of rainwater, impacts to planting and overdevelopment of the site.
- 17 At the conciliation conference, a number of affected local residents addressed the Court to restate these concerns and the Court visited a number of adjacent properties to directly observe building separation, privacy and overshadowing relationships.
- 18 The parties agree, and I am satisfied, the amended MA addresses the concerns raised by objectors.
- 19 The parties agree, and I am satisfied, that the Warringah Local Environmental Plan 2011 (WLEP) is the relevant local environmental planning instrument. The site is zoned R2 Low Density Residential and the proposed development - characterised as multi dwelling housing development - is permissible with consent, and that the amended MA maintains the objectives of the R2 zone, pursuant to cl 2.3(2) of the WLEP.
- 20 The parties agree, and I am satisfied, that pursuant to cl 4.3 of the WLEP - Height of buildings - the site is subject to a 8.5m building height development standard. The amended MA complies with this development standard.
- 21 The parties agree, and I am satisfied, that pursuant to cl 4.4 of the WLEP - Floor space ratio (FSR) - the site is not subject to a FSR development standard.
- 22 In any case, I note that the increase in gross floor area associated with the amended MA is configured in a manner that remains discreet in its presentation to the two primary street addresses and does not give rise to unreasonable additional impacts.
- 23 Pursuant to cl 5.10 of the WLEP - Heritage conservation - the parties agree, and I am satisfied, that there are no listed heritage items or Heritage

Conservation Areas in the vicinity of the site, and the amended MA therefore creates no adverse impacts to any heritage item.

- 24 Pursuant to cl 6.1 of the WLEP - Acid sulfate soils - the parties agree, and I am satisfied, that the amended MA proposes no changes that would require further assessment of those matters set out at cl 6.1.
- 25 Pursuant to cl 6.2 of the WLEP - Earthworks - the parties agree, and I am satisfied, that the amended MA proposes no changes to the approved extent of excavation that would require further assessment of those matters set out at cl 6.2.
- 26 The parties agree, and I am satisfied, that the amended MA is subject to the provisions of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience). Pursuant to s 4.6 of SEPP Resilience, potential site contamination was assessed with the parent DA and the site's historical use for residential purposes renders the land suitable for the approved development.
- 27 Having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.
- 28 The Court notes that:
 - (1) Pursuant to s 113 of the Environmental Planning and Assessment Regulation 2021, the Applicant has amended the MA with the approval of the Respondent.
 - (2) The Applicant has filed the amended MA with the Court on 13 January 2025.

Orders

- 29 The Court orders that:
 - (1) Leave is granted to the Applicant to amend Modification Application MOD2024/0048 and rely on the amended plans and documents listed at Condition B of Annexure A.
 - (2) Development Consent DA2018/1166 is modified, subject to the conditions of consent set out at Annexure A.
 - (3) Development Consent DA2018/1166 (as modified) is subject to the consolidated conditions of consent set out at Annexure B.

M Pullinger

Acting Commissioner of the Court

Annexure A

Annexure B

Architectural Plans

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