



Land and Environment Court
New South Wales

Case Name: Collaroy Street Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2023] NSWLEC 1555

Hearing Date(s): Conciliation conference on 19 July 2023, 23 August and 8 September 2023, final agreement filed on 8 September 2023

Date of Orders: 22 September 2023

Decision Date: 22 September 2023

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend DA2020/1453 and rely on the amended plans and documents listed at Condition 1B of Annexure A.
(2) The appeal is upheld.
(3) Development Consent DA2020/1453 is modified in the terms set out at Annexure A.
(4) Development Consent DA2020/1453 as modified by the Court is set out at Annexure B.

Catchwords: MODIFICATION APPLICATION – residential apartment development – shop-top housing – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.55, 8.9
Environmental Planning and Assessment Regulation 2021, ss 102, 113
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

Warringah Local Environmental Plan 2011

Texts Cited:	Northern Beaches Community Participation Plan NSW Department of Planning and Environment, Apartment Design Guide (2015)
Category:	Principal judgment
Parties:	Collaroy Street Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: G McKee (Solicitor) (Applicant) S Patterson (Solicitor) (Respondent) Solicitors: McKees Legal Solutions (Applicant) Wilshire Webb Staunton Beattie (Respondent)
File Number(s):	2023/160307
Publication Restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The appeal concerns a Modification Application MOD2023/0315 (the MA) seeking to modify the parent Development Consent DA2020/1453 (the DA) which granted consent for the demolition of the existing dwelling and the construction of a residential apartment building and strata subdivision at 4 Collaroy Street and 1 Alexander Street, Collaroy (the site).
- 2 Consent for this parent DA was granted by the Court on 22 December 2021.
- 3 An earlier Modification Application (MOD2022/0230) was approved by the Court on 25 August 2022.
- 4 The MA which forms the subject of this appeal was lodged with the Court on 19 May 2023 pursuant to s 4.55(8) of the EPA Act.
- 5 At the date of its lodgement, the MA sought approval for the following modifications:

- (1) Refinement in the detailing of the DA to reflect final construction design, including minor modifications to accommodate purchaser variations to a number of individual units.
 - (2) Refined flood management works adjacent to the Alexander Street frontage.
 - (3) Minor modifications to the retail facade, fenestration and planter detailing.
- 6 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 19 July 2023, 23 August and 8 September 2023. I presided over the conciliation conference.
- 7 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 upholding the appeal and granting approval to an amended MA, subject to conditions.
- 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. The parties' decision involves the Court exercising the function under s 4.55(8) of the EPA Act to modify the existing DA.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 In that regard, I am satisfied the MA has been made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 11 The parties agree, and I am satisfied, that pursuant to s 4.55(2)(a) of the EPA Act, the amended MA remains substantially the same as the parent DA. The amendments are relatively minor, there is no change to the proposed use, no change to the number of levels above or below ground, no change to the number of dwellings, and the general appearance of the building continues to present as shop-top, residential apartment development.
- 12 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 on

22 June 2023 and the Respondent received one submission raising concerns for damage to a neighbouring property arising from the construction of the basement.

- 13 Of particular note, the MA has been amended to resolve a key contention pressed by the Respondent. The effect of this amendment is to refine the basement piling methodology to incorporate an extent of bored secant piles in the proximity of an existing neighbouring building. The bored secant piles result in less vibration than driven sheet piles proposed elsewhere in the basement and thereby reduces the risk of damage to the neighbouring structure.
- 14 The parties agree, and I am satisfied, that the Warringah Local Environmental Plan 2011 (WLEP) is a relevant environmental planning instrument. At the date the DA was granted consent, the site was zoned B2 Local Centre. More recently, the site has been rezoned to E1 Local Centre and the proposed development - characterised as shop-top housing - remains permissible with consent. I am satisfied the amended MA maintains the objectives of both the B2 and E1 zones.
- 15 The parties agree, and I am satisfied, that all principal development standards of the WLEP are maintained by the amended MA.
- 16 The parties agree, and I am satisfied, that the amended MA is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX). An amended BASIX certificate, dated 5 May 2023, has been submitted with the MA. Conditions of consent are imposed to ensure compliance with the BASIX certificate.
- 17 The parties agree, and I am satisfied, that the amended MA is subject to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65).
- 18 Pursuant to the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), the Applicant's architect, Walsh Architects and its nominated architect, Mr Scott Walsh (NSW registered architect DR2624), has prepared a Design Verification Statement fulfilling the requirements of s 102 of the EPA Reg, confirming that the amended MA does not diminish or detract

from the design quality or compromise the design intent of the parent DA for which consent was granted, and stating how the design quality principles of SEPP 65, and the objectives of Parts 3 and 4 of the NSW Apartment Design Guide have been achieved.

19 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.

20 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 8 September 2023.

Orders

21 The Court orders that:

- (1) Leave is granted to the Applicant to amend DA2020/1453 and rely on the amended plans and documents listed at Condition 1B of Annexure A.
- (2) The appeal is upheld.
- (3) Development Consent DA2020/1453 is modified in the terms set out at Annexure A.
- (4) Development Consent DA2020/1453 as modified by the Court is set out at Annexure B.

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M Pullinger

Acting Commissioner of the Court

[Annexure A \(173859, pdf\)](#)

[Annexure B \(467115, pdf\)](#)

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