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|  | Land and Environment Court  New South Wales |

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| Case Name: | Lloyd Rothschild Pty Ltd v Randwick City Council |
| Medium Neutral Citation: | [2024] NSWLEC 1482 |
| Hearing Date(s): | Conciliation Conference on 21 May, 5, 14, 28 June and 12 July 2024 |
| Date of Orders: | 09 August 2024 |
| Decision Date: | 9 August 2024 |
| Jurisdiction: | Class 1 |
| Before: | Byrne AC |
| Decision: | The Court orders that: (1) The appeal is upheld. (2) Development consent No DA/214/2022 is modified in the terms set out in Annexure A.  (3) Development consent No DA/214/2022, as modified by the Court, is subject to the consolidated modified conditions set out in Annexure B. |
| Catchwords: | APPEAL – MODIFICATION – modification of consent for gym – hours - parking and plan of management – conciliation conference – agreement reached – orders made |
| Legislation Cited: | Environmental Planning and Assessment Act 1979, ss 4.15, 4.55, 8.9 Land and Environment Court Act 1979, s 34   Environmental Planning and Assessment Regulation 2021, ss 98, 113 |
| Cases Cited: | Erina Investments Holdings Pty Ltd v Snowy Monaro Regional Council [2021] NSWLEC 1204 |
| Texts Cited: | Randwick Community Participation Plan 2019 |
| Category: | Principal judgment |
| Parties: | Lloyd Rothschild Pty Ltd (Applicant) Randwick City Council (Respondent) |
| Representation: | Counsel: J Reid (Applicant) V McGrath (Solicitor) (Respondent)  Solicitors: Pikes & Verekers Lawyers (Applicant) Randwick City Council (Respondent) |
| File Number(s): | 2023/307217 |
| Publication Restriction: | No |

Judgment

1. **COMMISSIONER**: This is an appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) from the refusal by Randwick City Council (the Council) to modify development consent No DA/214/2022. The modification application No DA/214/2022/A (MOD) seeks to modify the approved development to change the operating hours, staffing operations and car parking arrangements for the approved gymnasium located on land at 102-104 Brook Street, Coogee, NSW 2034, being Lot 1 in DP 1050760 (the Site). The original consent was granted by the Randwick Local Planning Panel on 14 December 2022 subject to conditions.
2. The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on-site and at Council’s Chambers. I presided over the conciliation conference.
3. At the conciliation conference the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties and which addressed the Council’s contentions. Council accordingly approved the amendment to the Applicant’s modification application pursuant to s 113(1) of the Environmental Planning and Assessment Regulation 2021 (the Regulation).
4. Under s 34(3) of the LEC Act, I must dispose of the Class 1 proceedings in accordance with the parties’ decision if it is a decision that the Court could have made in the proper exercise of its functions.
5. The parties’ decision involves the Court exercising the power under s 4.55(2) of the EPA Act to grant the MOD, as amended, to the development consent No DA/214/2022 subject to the conditions in Annexure A.
6. There are jurisdictional pre-requisites which require my satisfaction before the power to grant consent under s 4.55(2) of the EPA Act can be exercised by the Court. The parties outlined jurisdictional matters of relevance in an agreed Jurisdictional Statement (“the Statement”) provided to the Court.

Satisfaction as to Jurisdiction

1. Taking into account the parties agreed analysis and advice in the Statement, I am satisfied in regard to the jurisdictional matters.
2. The modification application was lodged with the consent in writing from Marc Elazzi who is a director of Lloyd Rothschild Pty Ltd which is the owner of the Site, as required under s 98(1) of the *Environmental Planning and Assessment Regulation 2021.*

Section 4.55 – Environmental Planning and Assessment Act 1979

1. The modification application and the amended modification application were initially made pursuant to s 4.55(1A) of the EPA Act. However Council contended that the proposed modification application was not of minimal environmental impact and the MOD was required to be determined as a s 4.55(2) application. The parties note and I accept that the Court has the power in respect of applications brought under s 4.55(1A) to grant approval pursuant to s 4.55(2) of the EPA Act, provided the necessary pre-conditions are met: *Erina Investments Holdings Pty Ltd v Snowy Monaro Regional Council* [2021] NSWLEC 1204 at [34], per Clay AC.
2. In this regard, the parties agree and I accept pursuant to s 4.55(2)(a), that the proposed modification results in a development which is substantially the same as originally approved because the MOD, as amended, among other things (the Statement paragraph 10):

“(a) … Does not propose any changes to the height, bulk or scale of the existing building, or propose any change in use as a gymnasium;

(b) The proposed modifications relate to the approve opening hours, parking arrangements at the existing on-site car park, and hours of staffing. These changes do not result in any “radical transformation” of the fitout and use as approved.”

Section 4.55(2)(b) Consultation/Concurrence

1. There were no objections to the MOD arising from any public authority or approval body who imposed conditions or general terms of approval with respect to the development consent.

Section 4.55(2)(c) and (d) Notification

1. The MOD was notified in accordance with the Regulation and the Randwick Community Participation Plan for 14 days from 16 June 2023. Thirteen objections were received. A number of nearby residents and residents from the same residential flat building the gym is located in attended the on site conciliation on 21 May 2024 and made further oral submissions to the Court. I am satisfied that the objectors reasonable concerns were considered by the parties and the objectors were accorded procedural fairness.

Section 4.55(3)

1. As set out in detail in the Statement, pursuant to s 4.55(3) of the EPA Act, the parties have considered the amended MOD against such of the matters referred to in s 4.15(1) of the EPA Act as are of relevance to the proposal.
2. In addition pursuant to s 4.55(3), the reasons given by the consent authority for the grant of consent must be taken into consideration in determining the MOD. The Minutes of the Randwick Local Planning Panel on 14 December 2022 provide reasons for the conditions which are the subject of this appeal. The parties are satisfied the reasons for imposing the conditions have been considered as follows (the Statement paragraph 15):

“(a) Amended condition 4 now provides for additional, free, off-street parking. Additionally, the Applicant is obliged under the amended Plan of Management to install additional bike racks.

(b) Amended condition 39 concerning hours of staffing and amended condition 47 concerning hours of operation are now supported by amendments to the Plan of Management including installation of various safety measures, and are limited to a trial period to allow for identification of any operational amenity impacts.”

State and Local Environmental Planning Instruments

1. Statutory planning controls applicable to the Site and the proposed development were considered by the Respondent in the previous assessment undertaken for the grant of consent. The modification proposed by this MOD, as amended, do not raise any new jurisdictional issues which would alter previous conclusions at the development assessment stage such that I am required to re-consider each of the relevant EPIs and planning controls. I refer to the analysis undertaken in the Statement and accept the agreed position of the parties.

Conclusion

1. Based on the evidence before me, my observations on site and oral submissions made to me on site, I am satisfied that there is no jurisdictional impediment to the making of the proposed orders, the decision is one 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. 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.

Notations

1. The Court notes that:
2. Randwick City Council as the relevant consent authority for the purposes of section 113 of the Environmental Planning and Assessment Regulation 2021 agrees to the Applicant amending the modification application to incorporate the following amended plans and documentation:
3. Amended Plan of Management prepared by Urbis dated 20 May 2024.
4. The Applicant has agreed to pay the Respondents costs in the agreed sum of $5,040 within 28 days of the orders.

Orders

1. The Court orders that:

The appeal is upheld.

Development consent No DA/214/2022 is modified in the terms set out in **Annexure A**.

Development consent No DA/214/2022, as modified by the Court, is subject to the consolidated modified conditions set out in **Annexure B**.

L Byrne

Acting Commissioner of the Court

[Annexure A](http://www.caselaw.nsw.gov.au/asset/19135ae259ad44a96beb3713.pdf)

[Annexure B](http://www.caselaw.nsw.gov.au/asset/19135ae6e54767ffed8ddd00.pdf)

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