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|  | Land and Environment Court  New South Wales |

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| Case Name: | NVE Menangle Pty Ltd v Wollondilly Shire Council and Department of Customer Services trading as Subsidence Advisory NSW |
| Medium Neutral Citation: | [2022] NSWLEC 1546 |
| Hearing Date(s): | Conciliation conference held on 4 October 2022 |
| Date of Orders: | 07 October 2022 |
| Decision Date: | 7 October 2022 |
| Jurisdiction: | Class 1 |
| Before: | Bish C |
| Decision: | The Court orders: 1)   The appeal is upheld. 2)   Development Application DA/2020/637/1, as amended, seeks Torrens title subdivision into two (2) residential lots on Lot 2 DP 734656, also known as 135 Quirkes Lane, Menangle is determined by grant of consent, subject to the conditions set out in Annexure ‘A’. |
| Catchwords: | DEVELOPMENT APPLICATION – Torrens title subdivision – conciliation conference conciliation conference – agreement between the parties – orders |
| Legislation Cited: | Biodiversity Conservation Act 2016  Coal Mine Subsidence Compensation Act 2017, s 22 Environmental Planning and Assessment Act 1979, ss 4.14, 4.15, 4.16, 4.47, 8.7 Environmental Planning and Assessment Regulation 2000, cll 49, 55  Land and Environment Court Act 1979, s 34 Rural Fires Act 1997, s 100B State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 4, 9 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4 Water Management Act 2000, s 91 Wollondilly Local Environmental Plan 2011, cl 2.3 |
| Texts Cited: | Wollondilly Development Control Plan 2016 |
| Category: | Principal judgment |
| Parties: | NVE Menangle Pty Ltd (Applicant) Wollondilly Shire Council (First Respondent) Department of Customer Services trading as Subsidence Advisory NSW (Second Respondent) |
| Representation: | Counsel: Warry (Solicitor) (Applicant) Hones (Solicitor) (First Respondent) Smith (Second Respondent)  Solicitors: Maddocks Lawyers (Applicant) Hones Lawyers Pty Ltd (First Respondent) Department of Customer Service (Second Respondent) |
| File Number(s): | 2021/341573 |
| Publication Restriction: | No |

Judgment

1. **COMMISSIONER:** This is an appeal against the refusal of Development Application DA/2020/637/1 (DA) by Wollondilly Shire Council (hereafter the Council), which as amended seeks Torrens title subdivision into two (2) residential lots on Lot 2 DP 734656, also known as 135 Quirkes Lane, Menangle (the site). It is noted that the amended DA also seeks to retain the existing dwelling on the site, located on proposed Lot 100.

Background

1. The DA was submitted to Council on 12 October 2020. The original DA was notified to residents, with one submission received concerning loss of trees.
2. The original (and amended) application was referred to various relevant authorities, pursuant to s 4.47 of the *Environmental Planning and Assessment Act 1979* (EPA Act), including Subsidence Advisory NSW (SA NSW), Natural Resources Access Regulator (NRAR) and NSW Rural Fire Service (RFS).
3. After advice from SA NSW that consent should be refused, and internal review, the DA was refused by Council on 10 May 2021.
4. The applicant appealed against the refusal of the DA, pursuant to s 8.7(1) of the EPA Act.
5. The Council agreed for the applicant to amend the plans and documents that support the DA, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Reg).
6. Pursuant to s 34(1) of the *Land and Environment Court Act 1979* (the LEC Act), the Court arranged a conciliation conference, which at the parties’ request, commenced without a site view and held via Microsoft Teams.
7. Based on the amended application and the agreed conditions of consent, the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The parties agree that the contentions of Council and SA NSW have been considered and are resolved. The agreed position of the parties is for the Court to grant consent to the amended application, DA/2020/637/1, with conditions.
8. Pursuant to s 34(3) of the LEC Act, I must dispose of the 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. The parties' decision involves the Court exercising its function under s 4.16 of the EPA Act and being satisfied, pursuant to ss 4.14 and 4.15, and other relevant jurisdictional requirements, to grant consent to DA/2020/637/1, subject to conditions in Annexure ‘A’.

The Site

1. The site is an irregular, rectangular shape, surrounded by large rural lots with single residential dwellings. The site currently contains a dwelling and a shed located in the northeast, close to Quirkes Lane. The western and eastern portions of the site are covered by a dense cover of large canopy trees.
2. The site fronts to Quirkes Lane for a length of 917m, forming the northern boundary. The southern, eastern and western boundaries are 875m, 1112m and 1053m in length, respectively. The total area of the site is 73.6 hectares (ha).
3. The site is dissected by numerous unnamed creeks with dams, within the catchment of the Nepean-Hawkesbury River.

Jurisdictional prerequisites

1. The site is mapped as having biodiversity values on the Biodiversity Values Map, prepared according to the *Biodiversity Conservation Act 2016* (BC Act). The parties agree that the proposed subdivision does not impact vegetation associated with areas of mapped biodiversity values, and that any excavation works (for electricity trenching) is to be excluded from these areas, as described in the agreed conditions of consent. The Court is not required to further assess the impact to biodiversity relating to the proposed subdivision, and notes that any future development on the site would likely require consideration of the BC Act.
2. The site is identified as being on ‘bushfire prone’ land. Satisfaction of s 4.14 of the EPA Act is therefore a requirement to grant consent on the site. The amended DA is supported by a Bushfire Hazard Assessment Report and the agreed conditions of consent identify the required bushfire protection measures for the existing dwelling (on proposed Lot 100). The Rural Fire Service (RFS) have issued a Bushfire Safety Authority, pursuant to s 100B of the *Rural Fires Act 1997* and General Terms of Approval (GTA’s), which are adopted in the agreed conditions of consent. I am satisfied that the relevant provisions of the *Rural Fires Act 1997* and s 4.14 of the EPA are addressed.
3. The site is in an area potentially impacted by subsidence, due to longwall mining, and subject to consideration of s 22 of the *Coal Mine Subsidence Compensation Act 2017* (CMSC Act). SA NSW, as second respondent, have provided GTA’s based on the amended DA, which are adopted in the agreed conditions of consent.
4. The amended application does not specifically rely on works within 40m of a watercourse, although if future approval is required, pursuant to s 91 of the *Water Management Act 2000* (WM Act)*,* NRAR have issued GTA’s, which are adopted in the agreed conditions of consent.
5. Section 4.15(1) of the EPA Act establishes the matters to be considered in determining a development application. Additional to the above jurisdictional considerations, the following jurisdictional requirements have been assessed by the Court:
6. Wollondilly Local Environmental Plan 2011 (WLEP):
7. Pursuant to cl 2.3 of the WLEP, the site is located within land zoned as C4 Environmental Living. The proposed subdivision, as described to the Court, is permissible with consent. The amended DA with agreed conditions of consent sufficiently addresses all the relevant objectives, aims, standards and requirements of the WLEP.
8. State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity):
9. The site is located within the Hawkesbury-Nepean catchment, therefore subject to the provisions of the SEPP Biodiversity. The amended application, with agreed conditions of consent is consistent with the relevant provisions of the SEPP Biodiversity, and specifically addresses Ch 9.
10. The site located within the Wollondilly Shire, is also subject to assessment pursuant to Ch 4 of the SEPP Biodiversity. The site does not comprise core koala habitat and is assessed as having no impact to koalas from the proposed subdivision. The requirements of Ch 4 of the SEPP Biodiversity are sufficiently addressed.
11. State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience):
12. Pursuant to the SEPP Resilience, the site must be deemed suitable, or can be made suitable for the proposed use, prior to grant of consent. Based on the supporting documents to the amended DA, the Court is satisfied that the applicant has provided sufficient evidence, including a desktop contamination assessment report (Stage 1), and that the amendments made to the application rely on no excavation works (other than minor trenching for electricity services), which together with the agreed conditions of consent, address the requirements of Ch 4 of the SEPP Resilience. Any unexpected finds and requirement for remediation are addressed in the agreed conditions of consent.
13. Wollondilly Development Control Plan 2016 (WDCP):
14. The original application was publicly notified in accordance with the WDCP, with one submission received in objection. The relevant requirements of the WDCP are generally complied with, based on the amended plans, supporting documents to the amended DA and agreed conditions of consent. The issue of tree loss, as raised by the objector, has been considered on its merits by the amendments made to the application.
15. The agreed conditions of this consent adopt the GTA’s as provided by relevant authorities, pursuant to s 4.47 of the EPA Act.
16. Pursuant to cl 49 of the EPA Reg, the applicant has satisfied the Court with the provision of consent from all landowners for the proposed subdivision and any works as described in the agreed conditions of consent, including to Quirkes Lane.

Grant of consent

1. Based on the amended plans and supporting documents to the DA, the parties explained to the Court that there are no jurisdictional impediments to the making of the agreement or for the Court in making the orders, as sought.
2. The Council has undertaken the appropriate merit assessment of the proposed subdivision. The Court notes that the issues raised in contention and objection have been addressed by the amendments made to the application, and which now rely on a two-lot residential subdivision. A merit assessment of the amended application has been undertaken by Council.
3. I am satisfied, based on the evidence before me, that there are no jurisdictional impediments to this agreement and that application DA/2020/637/1 can be granted consent, as it satisfies the relevant requirements of the BC Act, WM Act, CMSC Act and EPA Act.
4. 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.
5. The Court notes that:
6. Wollondilly Shire Council, as the relevant consent authority, has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending Development Application DA/2020/637/1.
7. The amended application was lodged on the NSW Planning Portal on 8 September 2022.
8. The amended application was filed with the Court on 29 September 2022.
9. The Court orders that:
10. The appeal is upheld.
11. Development Application DA/2020/637/1, which as amended, seeks Torrens title subdivision into two (2) residential lots on Lot 2 DP 734656, also known as 135 Quirkes Lane, Menangle is determined by grant of consent, subject to the conditions set out in Annexure ‘A’.

**Sarah Bish**

**Commissioner of the Court**

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[Annexure A](http://www.caselaw.nsw.gov.au/asset/185bdbeab2c93bbf66ddeaf8.pdf)

Amendments

17 January 2023 - Pursuant to UCPR r 36.17, the Court amends condition 1(2) of Annexure A referred to in Order 2 of the judgment to correct a typographical error.