

AUSTRALIA / JUDGMENT

Woghil Developments Pty Ltd v Newcastle City Council

[2025] NSWLEC 1129**COURT**

Land and Environment Court

DECIDED

06 March 2025

BEFORE

Dickson C

CASE / FILE NUMBER

2024/22810

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Land and Environment Court New South Wales

Medium Neutral Citation: Woghil Developments Pty Ltd v Newcastle City Council [2025] NSWLEC 1129**Hearing dates:** Conciliation conference 4 July 2024, 17 February 2025**Date of orders:** 06 March 2025**Decision date:** 06 March 2025**Jurisdiction:** Class 1**Before:** Dickson C**Decision:**

The Court orders that:

- (1) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the Respondent's costs "thrown away" as a result of the amendments to the development application in the agreed amount of \$20,000 within 28 days of these orders.
- (2) The appeal is upheld
- (3) Development application DA2023/00491 for multi dwelling housing (16 units) and strata subdivision comprising:
 - (i) site clearing, earthworks, construction of proposed internal road and driveways, drainage, retaining walls, utility services, infrastructure and landscaping;
 - (ii) construction of 16 units on site consisting of fourteen 3-bedroom units, two 2-bedroom units with 14 double garages and 2 single garages;
 - (iii) eight visitor parking spaces; and
 - (iv) strata subdivision.

at Lot 7 DP 842408 at 18 Nerigai Close, Elemore Vale is determined by the grant of consent subject to the conditions in Annexure A

Catchwords:	DEVELOPMENT APPLICATION: site clearing, civil works and new multi dwelling housing – conciliation conference – amended plans – agreement between the parties – orders made.
Legislation Cited:	Biodiversity Conservation Act 2016, Pt 7, ss 6.15, 7.2, 7.3, 7.7, 7.16 Coal Mine Subsidence Compensation Act 2017, s 22 Environmental Planning and Assessment Act 1979, Div 8, ss 4.15, 4.46, 4.47, 8.7, 8.15 Land and Environment Court Act 1979, s 34 Roads Act 1993, s 9 Rural Fires Act 1997, s 100B Water Management Act 1997, s 91 Biodiversity Conservation Regulations 2017, cll 6.2, 6.7, 7.2 Environmental Planning and Assessment Regulations 2021, s 38 Newcastle Local Environmental Plan 2012, cll 4.3, 4.4, 5.21, 6.2 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Texts Cited:	Newcastle Development Control Plan 2012
Category:	Principal judgment
Parties:	Woghil Developments Pty Ltd ACN 652030290 (Applicant) Newcastle City Council (Respondent)
Representation:	
Counsel:	M Ball, solicitor (Applicant) A Sinclair, solicitor (Respondent)
Solicitors:	MBM Legal and Conveyancing (Applicant) Lindsay Taylor Lawyers (Respondent)
File Number(s):	2024/22810
Publication restriction:	No

JUDGMENT

COMMISSIONER: This is an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 against the deemed refusal of development application DA2023/00491. The development application, as amended, seeks consent for site clearing, civil works, the construction of multi dwelling housing (16 units) and strata subdivision. The development is proposed at 18 Nerigai Close, Elemore Vale (Lot 7 DP 842408). 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 July 4, 2024. Despite an adjournment of the conciliation conference no agreement was reached, and the conciliation conference was ultimately terminated on 9 September 2024 and the matter set down for hearing. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 4 February 2024. The parties approached the Court seeking orders for a further conciliation conference which was listed on 17 February 2025. I presided over the further conciliation conference. At the further conciliation

conference, agreement was reached between the parties as to the terms of a decision that would be acceptable to them. This agreed decision involved the Court upholding the appeal and granting conditional development consent to the development application as amended. 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 on the basis that: The Applicant is the owner of the site. The development application was supported by landowners' consent executed by two directors Woghil Developments Pty Ltd. The Class 1 Application was updated to reflect the full company name during the proceedings. The development application was publicly notified and advertised to adjoining and surrounding properties between 27 June and 1 August 2023. Three submissions were received. At the commencement of the proceedings the Court was also addressed by a member of the public. As required by s 4.15(1)(d) of the EPA Act, I am satisfied that the issues raised have been considered by the parties and where appropriate are addressed in either amendments to the development application or conditions of consent. The development application is integrated development under s 4.46 of the EPA Act, as the site is mapped as bushfire prone land pursuant to s 100B of the Rural Fires Act 1997. The NSW Rural Fire Service has issued a Bushfire Safety Authority pursuant to s 100B and General Terms of Approval (GTAs) which are adopted in the agreed conditions of consent: s 4.47(3) of the EPA Act. The site is waterfront land as a tributary of Ironbark Creek runs through the north west corner of the site. The development application includes specified controlled activity works within 40m of the top of bank and requires a controlled activity approval pursuant to s 91 of the Water Management Act 2000. On 21 August 2024 the NSW Department of Planning and Environment issued GTAs under Div 8 of the EPA Act. The amended development application involves the dedication of an area of the site as public road to enable future construction of a road connection between Nerigai Close and Kerry Avenue. Such a dedication is consistent with s 9 of the Roads Act 1993. The site is located within a mine subsidence district pursuant to the Coal Mine Subsidence Compensation Act 2017 (CMSC Act). Pursuant to s 22 of the CMSC Act, approval is required to subdivide land in mine subsidence districts. On 9 December 2022, Subsidence Advisory granted that approval. Pursuant to s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH), the consent authority must not grant consent to a development unless it has considered whether a site is contaminated, and if it is, that it is satisfied that the site is suitable (or will be suitable after undergoing remediation) for the proposed use. The development application is accompanied by a preliminary site investigation report (PSI). the PSI concludes that the site is suitable for the proposed development. The parties agree and I accept that s 4.6 of SEPP RH is satisfied. The amended development application is accompanied by a BASIX certificate, complying with the requirements of State Environment Planning Policy (Building Sustainability Index: BASIX) 2004. A condition of consent requires compliance with the commitments detailed in the BASIX certificate. Part 7 of the Biodiversity Conservation Act 2016 (BC Act) requires biodiversity assessment where a development application is likely to significantly affect threatened species. Pursuant to s 7.2 of the BC Act, a development application is likely to affect threatened species if: It is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test at s 7.3 of the BC Act, or The development

exceeds the Biodiversity Offsets Scheme (BOS) threshold if the BOS applies to the impacts of the development on biodiversity values, or It is carried out in a declared area of outstanding biodiversity value. The amended development application involves clearing of more than 0.25ha, triggering the BOS as the area of clearing exceeds those specified in cl 7.2 of the Biodiversity Conservation Regulation 2017. As the development application is likely to affect threatened species, a Biodiversity Development Assessment Report (BDAR) is required: s 7.7(2) of the BC Act. The BDAR which accompanies the amended development application is properly certified: s 6.15 of the BC Act. Further, I am satisfied that the proposed development implements appropriate avoidance and minimisation measures. Firstly, by avoiding impacts on biodiversity values through provision of a functional local biodiversity corridor between bushland at the end of Robinia Close and the public owned land which is managed as a bushland reserve. Secondly through the retention of as many hollow bearing trees as practicable. Further, by mitigating impacts through the implementation of vegetation management to an defined area with clear requirements that have been agreed between the parties as part of the development consent. Finally, through the retirement of biodiversity credits to offset the residual impacts. Pursuant to s 7.16(2) of the BC Act a consent authority 'must refuse' a development application if of the opinion that the proposed development is likely to have a serious and irreversible impact (SII) on biodiversity values. The assessment of SII is based on the impacts that remain after measures taken to avoid or minimise the impact of the development. Clause 6.7(2) of the BC Regulation provides that a SII arises because an impact is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct. The parties agree and I accept that on the basis of the proceeding the proposed development is unlikely to have a serious and irreversible impact on biodiversity values: s 7.16(2) of the BC Act. The Newcastle Local Environmental Plan 2012 (LEP 2012) is the applicable environmental planning instrument to the site. The land is zoned R2 Low Density Residential development. In determining the development application, I have had regard to the objectives of the R2 zone. Pursuant to cl 4.3 'Height of Buildings' and the Height of Buildings Map in LEP 2012 the maximum height standard for the site is 8.5m. The amended development application is compliant with this height standard. Pursuant to cl 4.4 'Floor space ratio (FSR)' and the FSR map the maximum FSR for the site is 0.6:1. The amended development application is compliant with this FSR standard. The site is located within a flood planning area. Accordingly, the consent authority must be satisfied of the matters set out in cl 5.21(2) of LEP 2012. The consent authority must also consider the matters set out in cl 5.21(3) of LEP 2012 prior to the grant of consent. I have considered the matters listed at cl 5.21(3) of LEP 2012. The parties agree, and I accept that on the following basis I can be satisfied that these provisions are met. A detailed flood impact assessment has been prepared in accordance with the NSW Flood Risk Management Manual and the NSW Flood Prone Land Policy guide and Newcastle City -wide Floodplain Risk Management Study and Plan. These documents have informed the preparation of the Stormwater Management Plan for the site by GCA Engineering Solutions. The applicant has demonstrated that the proposed road culvert crossing at Kerry Avenue is able to convey the flow during the design events without impacting the roadway. The development application complies with the minimum floor levels for the design events. The amended application has demonstrated that the development will not negatively impact the

existing flood environment. The agreed conditions provide a number of measures to ensure that the development will not result in the detrimental increase of flood affection to adjoining properties and to ensure the efficient evacuation of people in a flood and minimise the risk to life. Clause 6.2 'Earthworks' applies as the development application proposes earthworks to regrade the site. The development application includes Civil Engineering Plans, including a cross sections, and an Erosion and Sediment Control Plan. The amended development application includes stormwater plans and details. Further, appropriate conditions of consent have been included to address required earthworks and the potential impacts of same. In determining the development application, I have considered the matters listed at cl 6.2(3) and I am satisfied that none would warrant the refusal of the development application. Newcastle Development Control Plan 2012 (DCP 2012) applies to the site. The statement of environmental impacts filed with the application details the compliance of the proposed development with DCP 2015. In determining the development application, I have considered the provisions of the development control plan s 4.15(1) of the EPA Act. For these reasons, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. As the parties' 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. The Court notes that: Respondent has approved, pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021, the Applicant amending of Development Application DA2023/00491 to incorporate the documents listed below: Architectural plans, Urban Living, all Rev 17 dated 17.12.24 DWG No. SHEET TITLE S01: COVER PAGE S02: PROPOSED SITE PLAN (WITH TREES) S02A: PROPOSED SITE PLAN (WITHOUT TREES) S03: UNIT 1 & UNIT 2 S04: UNIT 3 & UNIT 4 S05: UNIT 5 & UNIT 6 S06: UNIT 7, UNIT 8, UNIT 9 & UNIT 10 S07: UNIT11, UNIT12, UNIT 13 & UNIT 14 S08: UNIT 15 & UNIT 16 S09: ELEVATIONS S10: SECTION S11: ELECTRICAL: UNIT 1 - UNIT 6 S12: ELECTRICAL: UNIT 7 - UNIT 14 S13: ELECTRICAL: UNIT15 & UNIT16 AND BASIX REQUIREMENTS S14A: HOURLY SHADOW DIAGRAMS - PLAN VIEW S14B: SHADOWS IN ELEVATION S14C: SHADOWS IN ELEVATION S14D: SHADOWS IN ELEVATION S15A: SITE SECTIONS WITH BUILDING ENVELOPE S15B: SITE SECTIONS WITH BUILDING ENVELOPE Civil Engineering plans, GCA Engineering Solutions – All Rev 22 dated 12.12.24 DWG No. SHEET TITLE C00 COVER SHEET21 C01 CIVIL WORKS PLAN C02 RAIN GARDEN DETAILS C03 POLLUTION CONTROL PIT DETAILS C04 EROSION AND SEDIMENT CONTROL PLAN C05 EROSION AND SEDIMENT CONTROL DETAILS C06 VEHICLE MANOEUVRING PLAN (1 OF 2) C07 VEHICLE MANOEUVRING PLAN (2 OF 2) C08 EARTHWORKS PLAN C09 SITE CROSS SECTION PLAN C10 SITE CROSS SECTIONS (1 OF 2) C11 SITE CROSS SECTIONS (2 OF 2) C12 WATERCOURSE PLAN C13 POSSIBLE COUNCIL ROAD WORK C15 LINEMARKING AND SIGNAGE PLAN C16 LANDSCAPE PLAN UNDERLAY Landscape plans, Paul Scrivener Landscape, all Rev M dated 10.12.24 DWG No. SHEET TITLE SHEET 1 LANDSCAPE SITE PLAN SHEET 2 DETAIL PLAN A SHEET 3 DETAIL PLAN B SHEET 4 DETAIL PLAN C SHEET 5 DETAIL PLAN D SHEET 6 PLANTING PLAN A SHEET 7 PLANTING PLAN B SHEET 8 PLANTING PLAN C SHEET 9 PLANTING PLAN D SHEET 10 DETAILS SHEET 11 NOTES SHEET 12 TREE RETENTION PLAN Amended Biodiversity Development Assessment Report, Sarah Jones BAAS18020 Accredited Assessor, Firebird ecoSultants Pty Ltd - Version 9 dated 11.12.2024

Amended Bushfire Threat Assessment Sarah Jones Firebird ecoSultants Pty Ltd – Revised 12/11/24 VMP Map (Figure 1-1) prepared by Firebird Consulting dated 6 January 2025 vii. Arborist report, Abacus Tree Services Project: 18 Nerigai Close, Elmore Vale Client: Woghil Developments Pty Ltd Date: 15 November 2024 Stormwater Management Plan, GCA Engineering Solutions, Rev 7, 12.12.2024 Preliminary Site Investigation by Hunter Environmental Consulting dated 12.4.24. Top of Bank assessment report by Lucy Ellis/GHD dated 16 July 2024. Traffic and Parking Assessment by Intersect Traffic Amended November 2024. Amended draft strata plan dated 17.12.24. The Court orders that: Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the Respondent's costs "thrown away" as a result of the amendments to the development application in the agreed amount of \$20,000 within 28 days of these orders. The appeal is upheld; Development application DA2023/00491 for multi dwelling housing (16 units) and strata subdivision comprising:

- (i) site clearing, earthworks, construction of proposed internal road and driveways, drainage, retaining walls, utility services, infrastructure and landscaping; (ii) construction of 16 units on site consisting of fourteen 3-bedroom units, two 2-bedroom units with 14 double garages and 2 single garages; (iii) eight visitor parking spaces; and (iv) strata subdivision. at Lot 7 DP 842408 at 18 Nerigai Close, Elmore Vale is determined by the grant of consent subject to the conditions in Annexure A D Dickson Commissioner of the Court Annexure A

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Prepared on 29 October 2026 · Esheria