



Land and Environment Court
New South Wales

Case Name: Lenton v Sutherland Shire Council

Medium Neutral Citation: [2019] NSWLEC 1229

Hearing Date(s): Conciliation conference on 10 May 2019

Date of Orders: 24 May 2019

Decision Date: 24 May 2019

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) Leave is granted to rely on amended subdivision plan DA005 prepared by Kevin Casey, Rev D dated 15 May 2019.
(2) The appeal is upheld.
(3) Development Application DA18/0610 for the strata subdivision of the approved dual occupancy development at 20 Glaisher Parade, Cronulla is approved subject to the conditions of consent at annexure "A".

Catchwords: DEVELOPMENT APPLICATION – strata subdivision - conciliation conference – agreement between the parties – development standard for minimum size of original lot – orders

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
Sutherland Shire Local Environmental Plan 2015

Category: Principal judgment

Parties: Gregory John Lenton (Applicant)
Sutherland Shire Council (Respondent)

Representation: Solicitors:
C Rose, Swaab Attorneys (Applicant)
J Amy, Sutherland Shire Council (Respondent)

File Number(s): 2019/27615

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal by Gregory Lenton against the refusal, by Sutherland Shire Council, of development application DA18/0610 for the strata subdivision of an approved dual occupancy development at 20 Glaisher Parade, Cronulla. The appeal is lodged pursuant to s 8.7 to the *Environmental Planning and Assessment Act 1979* (“EPA Act”). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [12] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 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 10 May 2019. I presided over the conciliation conference.
- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act.
- 4 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision 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 have reached this state of satisfaction as each of the pre-jurisdictional requirements identified by the parties has been met, for the reasons that follow.

- 5 Pursuant to the Sutherland Shire Local Environmental Plan 2015 (“SSLEP 2015”), the site is within the E4 – Environmental Living zone. Pursuant to cl 4.1B the minimum lot size for the strata subdivision of land within the E4 zone is determined by the Lot Size Map. Clause 4.1B provides:

4.1B Minimum lot sizes for strata subdivisions of dual occupancies in Zone E4

(1) The objectives of this clause are as follows:

- (a) to limit the impacts associated with increased residential density (because of development resulting in dual occupancies) on land in Zone E4 Environmental Living,
- (b) to maintain the amenity and character of land in that zone,
- (c) to prevent the cumulative fragmentation of land in that zone.

(2) Development consent may be granted for the strata subdivision of a dual occupancy on a lot of land (an **original lot**) in Zone E4 Environmental Living if:

- (a) the size of the original lot is not less than the minimum lot size shown on the Lot Size Map in relation to the land, or
- (b) the dwellings comprised in the dual occupancy were lawfully erected on or before 23 June 2015.

- 6 The minimum lot size for the E4 zone, for the purpose of cl 4.1B(2)(a), is 700sqm. As such, cl 4.1B(2)(a) requires that the original lot be not less than 700sqm to facilitate the granting of a strata subdivision of a dual occupancy. The lot size in the present application is less than the prescribed 700sqm. It is 695.6sqm according to the deposited plan and 698.6sqm according to the site survey.

- 7 The parties agree, and I accept, that the size of the original lot is a development standard as defined by s 1.4 of the EPA Act. Clause 4.6 of the SSLEP 2015 allows consent to be granted to a development that contravenes a development standard, subject to a number of pre-conditions set out in subss (3) and (4). However, cl 4.6(6) states:

Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

- 8 The parties agree, and I accept, that neither cl 4.1, nor 4.1B(2)(a), specifies a minimum area for strata lots within the E4 zone. Clause 4.1B(2) establishes a minimum area for the original lot, not a minimum area for a resultant strata lot. As the reference in s 4.6(6)(a) to “the minimum area specified for such lots by a development standard” is a reference to the minimum area of a resultant lot, and there is no such minimum area applicable for the strata subdivision, cl 4.6(6)(a) is not offended by the present application.
- 9 As such, consent can be granted pursuant to cl 4.6 of the SSLEP 2015 if I reach the state of satisfaction required by cl 4.6(4). In accordance with cl 4.6(4)(a), I am satisfied that:
- The written request, lodged pursuant to cl 4.6 of the SSLEP 2015, adequately establishes sufficient environmental planning grounds that justify the breach in the development standard by demonstrating that the breach is negligible (0.2% variation), will not be perceived, and cannot be avoided to achieve the strata subdivision, which will enable the better ongoing management of the dual occupancy.
 - The written request demonstrates that compliance with the development standard is unreasonable and unnecessary as the objectives of the development standard are met notwithstanding the non-compliance, and the breach of the standard has negligible adverse impact.
 - For the reasons outlined in the written request, the proposal is in the public interest as it is consistent with the objectives of the zone and of the height development standard.
- 10 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also required me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 11 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 12 The Court orders that:

- (1) Leave is granted to rely on amended subdivision plan DA005 prepared by Kevin Casey, Rev D dated 15 May 2019.
- (2) The appeal is upheld.
- (3) Development Application DA18/0610 for the strata subdivision of the approved dual occupancy development at 20 Glaisher Parade, Cronulla is approved subject to the conditions of consent at annexure "A".

13 The Court notes the parties' agreement in relation to costs.

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Commissioner Gray

Annexure A

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