

Land and Environment Court

New South Wales

Case Name: The Owners Strata Plan No. 98554 v Newcastle City Council

Medium Neutral Citation: [2023] NSWLEC 1677

Hearing Date(s): Conciliation Conference on 8 November 2023

Date of Orders: 14 November 2023

Decision Date: 14 November 2023

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:
(1) The appeal is upheld.
(2) Fire safety order No. 1 dated 22 December 2022 issued by the Respondent to the Applicant pursuant to Div 9.3 and Sch 5, Pt 2 of the Environmental Planning and Assessment Act 1979 in respect of premises identified as Lot 1-15 and CP in SP 98554 and known as 2 Veda Street, Hamilton is modified in the terms set out at Annexure A.
(3) Fire safety order No. 1 dated 22 December 2022 issued by the Respondent to the Applicant pursuant to Div 9.3 and Sch 5, Pt 2 of the Environmental Planning and Assessment Act 1979 in respect of premises identified as Lot 1-15 and CP in SP 98554 and known as 2 Veda Street, Hamilton as modified by the Court is Annexure B.

Catchwords: DEVELOPMENT CONTROL ORDER APPEAL – fire safety – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 6.7, 8.18, 9.34, Div 9.3, Sch 5, Pts 2, 4, cl 29
Land and Environment Court Act 1979, s 34
Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021, s 26

Texts Cited: Australian Building Codes Board, Australian Fire Engineering Guidelines, 2021

Category: Principal judgment

Parties: The Owners Strata Plan No. 98554 (Applicant)
Newcastle City Council (Respondent)

Representation: Counsel:
C Koikas (Applicant)
A Sinclair (Solicitor) (Respondent)

Solicitors:
Williamson Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2023/17301

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Control Order Appeal pursuant to s 8.18 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the development control order (Fire Safety Order) issued to the Applicant by the Respondent on 22 December 2022 pursuant to s 9.34(1)(b) of the EPA Act in respect of premises at 2 Verda Street, Hamilton legally described as Lot 1-15 and CP in SP 98554 (the Site).
- 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 has been held on 8 November 2023. I have presided over the conciliation conference.
- 3 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court modifying the Fire Safety Order.
- 4 The parties have agreed on the terms of a modified Fire Safety Order, which requires fire safety upgrade works to be carried out at the Site in a manner that would resolve the contentions set out in the Statement of Facts and Contentions filed by the Respondent on 28 February 2023.
- 5 The terms of the modified DCO seek to clarify the terms of the fire safety upgrade works, prioritise the carrying out of specified fire safety upgrade works, and extend the time for the fire safety upgrade works to be carried out based on the provision of further evidence by the Applicant.
- 6 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. 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.
- 7 The parties' decision involves the Court exercising the function under s 8.18(4)(b) of the EPA Act to modify the Fire Safety Order.
- 8 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of s 8.18 of the EPA Act to modify a development control order. The parties explained how the jurisdictional prerequisites have been satisfied in a jurisdictional note.

9 The Fire Safety Order is a development control order issued by the Respondent pursuant to s 9.34(1)(b) and Order 1 of Pt 2 to Sch 5 of the EPA Act, which provides that a fire safety order can be issued to the owner of the premises or, in the case of a place of shared accommodation, the owner or manager, requiring the person to do or stop doing things for the purposes of ensuring or promoting adequate fire safety or fire safety awareness. Order 1 of Pt 2 to Sch 5 of the EPA Act can only be issued in the following circumstances:

When provision for fire safety or fire safety awareness is inadequate to—

- prevent fire, or
- suppress fire, or
- prevent the spread of fire.

To ensure or promote the safety of persons in the event of fire.

When lack of maintenance of the premises or the use of the premises constitutes a significant fire hazard.

10 Part 4 of Sch 5 to the EPA Act contains provisions relating to the giving of development control orders and related matters (see s 9.36 of the EPA Act), relevantly including:

1 Order may specify standards and work that will satisfy those standards

(1) A relevant enforcement authority may give a development control order that does the following instead of specifying in the order the things the person to whom the order is given must do or refrain from doing—

- (a) specifies the standard that the premises concerned are required to meet,
- (b) indicates the nature of the work that, if carried out, would satisfy that standard.

(2) The relevant enforcement authority may, in any such development control order, require the owner or occupier to prepare and submit to the relevant enforcement authority, within the period specified in the order, particulars of the work the owner or occupier considers necessary to make provision for such matters as may be so specified.

2 Orders that make or are likely to make residents homeless

(1) If a development control order will or is likely to have the effect of making a resident homeless, the relevant enforcement authority proposing to give the 3 order must consider whether the resident is able to arrange satisfactory alternative accommodation in the locality.

(2) If the resident is not able to arrange satisfactory alternative accommodation in the locality, the relevant enforcement authority must provide the resident with—

- (a) information as to the availability of satisfactory alternative accommodation in the locality, and
- (b) any other assistance that the relevant enforcement authority considers appropriate.

...

4 Giving and taking effect of orders

(1) A development control order is given by serving a copy of the order on the person to whom it is addressed and takes effect from the time of service or a later time specified in the order.

(2) The copy of the development control order is to be accompanied by a notice stating—

- (a) that the person to whom the order is addressed may appeal to the Land and Environment Court against the order, and
- (b) the period within which an appeal may be made.

5 Reasons for orders to be given

(1) A relevant enforcement authority that gives a development control order must give the person to whom the order is addressed the reasons for the order.

(2) The reasons may be given in the development control order or in a separate instrument.

(3) The reasons must be given when the development control order is given, except in an emergency. In an emergency, the reasons may be given the next working day.

11 The Applicant is entitled to appeal the Fire Safety Order pursuant to s 8.18(1) of the EPA Act. On hearing the Appeal, the Court may do one of the following pursuant to s 8.18(4) of the EPA Act:

(a) revoke the Order, or

(b) modify the Order, or

(c) substitute for the Order any other order that the relevant enforcement authority who gave the order could have given, or

(d) find that the Order is sufficiently complied with, or

(e) make such order with respect to compliance with the Order as the Court thinks fit, or

(f) make such other order with respect to the Order as the Court thinks fit.

12 The agreed modified Fire Safety Order includes Term C, being a provision for the Respondent to issue an instruction to prepare a fire engineering report in the event that Fire and Rescue NSW (FRNSW) does not respond to the performance-based design brief (PBDB). The Australian Fire Engineering Guidelines, 2021 (Guideline), published by the Australian Building Codes Board, recommends that the Applicant consult with and obtain support from FRNSW when it prepares a fire engineering PBDB. Term C of the Fire Safety Order relates to the upgrade of a fire hydrant at the Premises. Term C of the modified DCO has included this recommendation for the Applicant to engage FRNSW in the preparation of its PBDB.

13 However, in the event that FRNSW does not respond to the PBDB, Term C(v) of the Fire Safety Order allows the Respondent to request that the Applicant to prepare a fire engineering report, so that the Applicant can continue with the upgrade to the fire hydrant. This is consistent with Council being the regulatory authority responsible for ensuring that the fire hydrant meets the relevant regulatory requirements.

14 Section 26 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (Regulation) requires that an owner of a building must ensure that the person who develops a PBDB for a performance solution for a fire safety requirement requests the Fire Commissioner's comments on the brief. However, pursuant to cl 29 of Sch 5 of the EPA Act, a person who carries out work in compliance with a requirement of a development control order does not have to make an application under the EPA Act for consent or approval to carry out the work. Given development consent is not required, a construction certificate is also not required (s 6.7 EPA Act). The effect of this is that s 26 of the Regulation does not apply to mandate referral of the PBDB to the Fire Commissioner.

15 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.

16 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.

Orders

17 The Court orders:

- (1) The appeal is upheld.
- (2) Fire safety order No. 1 dated 22 December 2022 issued by the Respondent to the Applicant pursuant to Div 9.3 and Sch 5, Pt 2 of the *Environmental Planning and Assessment Act 1979* in respect of premises identified as Lot 1-15 and CP in SP 98554 and known as 2 Veda Street, Hamilton is modified in the terms set out at Annexure A.
- (3) Fire safety order No. 1 dated 22 December 2022 issued by the Respondent to the Applicant pursuant to Div 9.3 and Sch 5, Pt 2 of the *Environmental Planning and Assessment Act 1979* in respect of premises identified as Lot 1-15 and CP in SP 98554 and known as 2 Veda Street, Hamilton as modified by the Court is Annexure B.

E Espinosa

Commissioner of the Court

[Annexure A](#)

[Annexure B](#)
