



Land and Environment Court New South Wales

Medium Neutral Citation:	Fountaindale Project Management Pty Ltd v Kiama Municipal Council [2024] NSWLEC 1225
Hearing dates:	Conciliation conference on 17 and 23 April 2024
Date of orders:	01 May 2024
Decision date:	01 May 2024
Jurisdiction:	Class 1
Before:	Walsh C
Decision:	The Court orders that: <ul style="list-style-type: none"> (1) The appeal is upheld. (2) Development application DA10.2021.26.1 seeking consent for Torrens title subdivision of land to create 50 residential lots, signage, roads and related infrastructure at 15 Golden Valley Road and 705 Jamberoo Road Jamberoo on land legally described (respectively) as Lot 2 & Part Lot 3 DP 626183 and Part Lot 1 & Part Lot 3 in DP 798624 is determined by the grant of development consent subject to the conditions in Annexure A.
Catchwords:	DEVELOPMENT APPLICATION – land subdivision – conciliation conference – agreement between the parties – orders
Legislation Cited:	<i>Environmental Planning and Assessment Act 1979</i> , ss 4.15, 4.46, 8.7 <i>Land and Environment Court Act 1979</i> , s 34 <i>National Parks and Wildlife Act 1974</i> , s 90 <i>Rural Fires Act 1997</i> <i>Sydney Water Act 1994</i> Environmental Planning and Assessment Regulation 2000, cl 55

Kiama Local Environmental Plan 2011, cl 2.6, 5.10, 5.21, 6.12

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, cl 2.48

Category:

Principal judgment

Parties:

Fountaindale Project Management Pty Ltd (Applicant)
Kiama Municipal Council (Respondent)

Representation:

Counsel:

M Young (Solicitor) (Applicant)

S Puckeridge (Solicitor) (Respondent)

Solicitors:

McCartney Young Lawyers (Applicant)

Lindsay Taylor Lawyers (Respondent)

File Number(s):

2023/124129

Publication restriction:

Nil

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal is brought by Fountaindale Project Management Pty Ltd (applicant) under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by Kiama Municipal Council (Council) of development application DA10.2021.26.1 (DA) seeking consent for Torrens title subdivision of land to create 50 residential lots, roads, street signs, stormwater management and related infrastructure.
- 2 While the bulk of the subdivision involves Lot 2 DP 626183. The proposal also involves Part of Lot 3 in DP 626183 and Part of Lots 1 and Lot 3 in DP 798624. The street address includes 15 Golden Valley Road and 705 Jamberoo Road, Jamberoo.

Agreement between the parties

- 3 At the request of the parties, the Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (LEC Act), at which I presided. The conciliation conference was held on 17 April 2024.
- 4 Prior to the conciliation conference, the parties reached agreement on the matters in contention, and a signed agreement which was filed with the Court on 16 April 2024. The terms of the decision between the parties would have the Court undertaking the

function to uphold the appeal and grant consent to the DA, as amended, in accordance with agreed conditions.

- 5 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.

Amendments

- 6 The parties' agreement involved certain amendments to the DA, which have been approved by Council under cl 55 of the Environmental Planning and Assessment Regulation 2000. I note the agreed amendments involve the following material.

DA 02 Geometric Road Layout Plan	DA 03 Road 01 Long Sections
DA 04 Road 01 Cross Sections	DA 05 Road 01 Cross Sections
DA 06 Road 01 Cross Sections	DA 07 Road 01 Long and Typical Sections
DA 08 Road 02 & Driveway Long Sections	DA 09 Golden Valley Road, Road Widening Long, Typical & Cross Sections
DA 10 Stormwater & Water Quality Upstream Catchment Plan	DA 11 Stormwater & Water Quality Catchment Plan
DA 12 Stormwater & Water Quality Details	DA 13 Soil and Water Management Plan
DA 14 Retaining Wall Layout Plan	DA 15 Detailed Retaining Wall Layout
DA 16 Turning Paths	DA 17 Bulk Earthworks Plan
DA 18 Flood Study Extents Plan	DA 19 Golden Valley Road Footpath Extension Kerb Transition & Demolition Part Plans

DA 20 Golden Valley Road Intersection Grading Plan	DA 21 Golden Valley Road Intersection Cut/Fill Plan
DA 22 Building Envelope Plan	Envisage Consulting, Concept Landscape Plan, prepared for Fountaindale Group, 3 April 2024, Plan 031211_GVR_DA 23 CLP v03)

- 7 The parties advise that all plans referenced above are prepared by Land Team (Job No. 212562) and are referenced Issue U dated 15 April 2024, unless otherwise shown. The parties agree, and I accept that the amendments are minor and no order as to costs is made.

Pre-requisites to undertaking the function to grant consent

- 8 There are certain statutory pre-requisites which require attention before this function of granting consent to the DA, in accordance with the parties' agreement, can be exercised. The parties outlined matters of statutory relevance here in an agreed jurisdictional note provided to the Court on 16 April 2024 and through oral submissions at the conciliation conference. Noting the advice of the parties, I address the statutory pre-requisites below.

Integrated Development

- 9 The parties advise that an Aboriginal cultural heritage object known as 52-5-0832 (according to the Aboriginal Heritage Information Management System) is located on the site. It has been anticipated that an Aboriginal heritage impact permit would be required pursuant to s 90 of the *National Parks and Wildlife Act 1974*, which in turn triggers the integrated development provisions under s 4.46 of the EPA Act. The parties advise that subsequently an addendum Aboriginal Cultural Heritage Assessment report (ACHA Report) was prepared addressing additional information requests of Heritage NSW and presenting the results of additional consultation undertaken for the project.
- 10 General Terms of Approval have subsequently been issued by Heritage NSW, along with a supplementary advice letter. The practical effect of this is that a condition of consent will require that a restriction on title be established to protect and conserve the site's Aboriginal cultural heritage including the known object. The parties indicated the affected area to me, which is marked in the amended plans. I am satisfied that the

required response to the identified aboriginal cultural heritage deposit has been undertaken and that the necessary conditions of consent have been included in Annexure A.

- 11 The parties advise that site is not identified as bushfire prone land and that therefore it is not integrated development with respect to the *Rural Fires Act 1997*. Nevertheless Council referred the DA, which was accompanied by a bushfire assessment report, to the Rural Fire Service (RFS). The RFS in turn recommended certain conditions of consent, including in relation to Road 1 as a perimeter road, which the parties advise have been adopted.

State Environmental Planning Policy (Transport and Infrastructure) 2021 (Infrastructure SEPP)

- 12 I accept the advice of the parties that in accordance with the requirements of cl 2.48(2) of SEPP Infrastructure, Council gave written notice to the electricity supply authority (Endeavour Energy) on 1 June 2021. A response was received from that authority providing conditions of consent and the matters raised by Endeavour Energy have been taken into consideration in the position agreed between the parties.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 13 For the purpose of s 4.6, and in relation to contamination and remediation, the parties advise that specialist reports, including a Site Investigation Report, have concluded the site to be suitable for the proposal. I accept this advice.

Kiama Local Environmental Plan 2011

- 14 Subdivision is permissible with consent on land, such as the site, to which KLEP applies under cl 2.6. I accept the advice of the parties that the land that would contain the residential lots is zoned R2 Low Density Residential. A road, pedestrian path and stormwater detention basin are proposed on adjoining land that is zoned RU2 Rural Landscape. There is no dispute that these works are permissible in this zone.
- 15 I accept the advice of the parties that the proposal does not breach any development standard under KLEP.
- 16 The provisions of cl 5.10(8) relating to heritage conservation are triggered in relation to the identified Aboriginal cultural heritage object on site. This topic has been considered to an extent above where reference is made to the GTAs issued by Heritage NSW and the agreed approach to requiring a restriction on title, relating to this matter (at [10]). I

- accept the advice of the parties that appropriate investigations and assessments have been undertaken, including notification to Aboriginal communities and consideration of feedback, and that the requirements of cl 5.10(8) have been met.
- 17 The provisions of cl 5.21 relate to flood planning and apply to “land the consent authority considers to be within a flood planning area”. Council advises (and the applicant agrees) that the site is not within a flood planning area.
- 18 Clause 6.12 is concerned with essential services and requires a positive finding of satisfaction. In their jurisdictional note, the parties explain how each of the relevant essential services can be made available to the development when required. Among other things Sydney Water has issued a “Notice of Anticipated Requirements” in accordance with s 73 of the *Sydney Water Act 1994* with respect to both water and sewerage and Endeavour Energy has indicated its requirements. Matters relating to stormwater and suitable road access are also in hand. With this advice I am satisfied in regard to the relevant provisions at cl 6.12.
- 19 I accept the advice of the parties that there are no further requirements for positive findings by the Court in relation to KLEP.

Other matters for consideration under s 4.15(1) of the EPA Act

- 20 While there are no further requirements for positive jurisdictional findings under s 4.15(1) of the EPA Act, I can note here that there were a number of objecting submissions received following the notification of the proposal. During the conciliation conference the parties provided me with an explanation of the submissions and a summary of how these submissions had been considered in the evaluation of the proposal. A number of changes to the final plans were adopted in response to these submissions. I can note that consideration has been given to objecting submissions and that the requirements of s 4.15(1)(d) have been met in that respect.

Conclusion

- 21 It follows the above findings that the parties’ decision is a decision that the Court could have made in the proper exercise of its functions. Therefore, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties’ decision.
- 22 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.

Orders

23 The Court orders that:

- (1) The appeal is upheld.
- (2) Development application DA10.2021.26.1 seeking consent for Torrens title subdivision of land to create 50 residential lots, signage, roads and related infrastructure at 15 Golden Valley Road and 705 Jamberoo Road Jamberoo on land legally described (respectively) as Lot 2 and Part Lot 3 DP 626183 and Part Lot 1 & Part Lot 3 in DP 798624 is determined by the grant of development consent subject to the conditions in Annexure A.

P Walsh

Commissioner of the Court

124129.23 Annexure A

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Decision last updated: 01 May 2024