



Land and Environment Court
New South Wales

Case Name: Cranney v The Council of Camden

Medium Neutral Citation: [2018] NSWLEC 1036

Hearing Date(s): 24 January 2018

Date of Orders: 2 February 2018

Decision Date: 2 February 2018

Jurisdiction: Class 1

Before: Brown C

Decision: Directions for new plans (see par 36)

Catchwords: DEVELOPMENT APPLICATION: change of use of an existing dwelling and secondary dwelling to semi-detached dwellings and strata subdivision; whether consent required for strata subdivision; lot width; streetscape/character

Legislation Cited: Environmental Planning and Assessment Act 1979
State Environmental Planning Policy (Sydney Region Growth Centres) 2006

Cases Cited: DM & Longbow Pty Ltd v Willoughby City Council
[2017] NSWLEC 173

Texts Cited: Oran Park Precinct Development Control Plan 2007

Category: Principal judgment

Parties: Robert Cranney (Applicant)
The Council of Camden(Respondent)

Representation: Counsel:
Mr G McKee, solicitor (Applicant)
Mr C McFadzean, solicitor.(Respondent)

Solicitors:
McKees Legal Solutions (Applicant)
Swaab Lawyers.(Respondent)

File Number(s): 2017/287689

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JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal of Development Application 10.2016.1034.1 for the change of use of an existing dwelling and secondary dwelling to “semi-detached dwellings”, minor amendments and the strata subdivision of the two dwellings at 14 Davidson Street, Oran Park (the site). Proposed Lot 1 has a street frontage of 4.64m and an area of 191sqm and proposed Lot 2 has a street frontage of 10.36m and an area of 255sqm.
- 2 The minor amendments proposed involve:
 - change of one garage to an open carport with a pergola structure at the entrance,
 - redefined entry through the carport, and
 - minor internal changes to accommodate the new entry.
- 3 The dispute centres largely on whether the proposed development is appropriate as “semi-detached dwellings” and also whether the strata subdivision is permissible, without consent.

The site

- 4 The site is generally rectangular in shape with an area of 450.1sqm, a frontage of 15m and a depth of around 30m. It is located in the south of the Oran Park Precinct in the South West Priority Growth Area, and is located approximately 1.4km from the Oran Park Town Centre.
- 5 The dwelling and secondary dwelling constructed on the site were approved by the council on 22 October 2015 (DA 10.2015.868.1) but did not include the subdivision of the two dwellings.
- 6 The surrounding area is exclusively residential in character with recently constructed single and two storey residential dwellings. A strata titled dual

occupancy development is located at 18 Davidson Street on a lot with an area of around 500sqm.

Relevant planning controls

7 The site is within Zone R1 – General Residential under *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (Growth Centres SEPP). The proposed development, as “semi-detached dwellings” is permissible, with consent in this zone.

8 The Dictionary to the Growth Centres SEPP provides the following relevant definitions:

dual occupancy (attached) means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling.

secondary dwelling means a self-contained dwelling that:

(a) is established in conjunction with another dwelling (the principal dwelling), and

(b) is on the same lot of land as the principal dwelling, and

(c) is located within, or is attached to, or is separate from, the principal dwelling.

studio dwelling means a dwelling that:

(a) is established in conjunction with another dwelling (the principal dwelling), and

(b) is on its own lot of land, and

(c) is erected above a garage that is on the same lot of land as the principal dwelling, whether the garage is attached to, or is separate from, the principal dwelling,

but does not include a semi-detached dwelling.

semi-detached dwelling means a dwelling that is on its own lot of land and is attached to only one other dwelling, but does not include a studio dwelling.

9 The controls that apply to the site are in Appendix 1 and relate to the Oran Park and Turner Road Precinct, South West Growth Centre (cl 7). Clause 2.6 provides consent requirements for subdivision and was an area of disagreement between the parties, specifically whether consent was required for the strata subdivision and this is discussed later in the judgment.

10 Part 4 provides Principal development standards for the site. Clause 4.1 provides objectives for minimum subdivision lot size, cl 4.1A(1) provides that “Development must not be carried out on a lot in Zone R1 General Residential

or Zone R3 Medium Density Residential for any of the following purposes if the area of the lot is less than the area specified below in relation to those purposes". Relevantly, subsec (e) provides an area of 200 sqm for "semi-detached dwelling".

11 Clause 4.1B (1) provides:

(1) The objective of this clause is to make provision with respect to the delivery of 7,540 new dwellings in the Oran Park Precinct.

12 *Oran Park Precinct Development Control Plan 2007* (DCP 2007) applies to the site. Clause 7.2 addresses Residential Density and provides objectives and controls. The controls identify four density bands in Table 11 (10-12.5 dwelling per hectare (dw/Ha), 15-20 dw/Ha, 25-30 dw/Ha and 40+ dw/Ha). The desired streetscape is set out pictorially in Figure 31 and the typical characteristics for the respective density bands in Table 11. Table 13 provides minimum lot frontages for three density bands 10-12.5 dw/Ha, 15 dw/Ha and 20-40 dw/Ha of 12.5m, 9m and 7m respectively, for front loaded lots.

Does the strata subdivision require development consent?

13 Section 2.6 of the Growth Centres SEPP states:

2.6 Subdivision—consent requirements

(1) Land to which this Precinct Plan applies may be subdivided, but only with consent.

Note.

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 specifies certain subdivision development as exempt development.

(2) (Repealed)

(3) Despite subclause (1), consent is not required for subdivision under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, except:

(a) in the case of a building to which Part 3 of *State Environmental Planning Policy (Affordable Rental Housing) 2009* applies, or

(b) where the building has been designed or approved for occupation as a single unit.

14 Mr McKee, for the applicant, submits that in statutory construction, the words must be given their plain meaning and in this case, it is clear that the consent is

not required by s 2.6(3) for the proposed development as it does not fall within either of the two exemptions in s 2.6(3)(a) and (b).

15 Mr McFadzean, for the council, submits that It would be a strange town planning outcome if a land use could be changed from one use to another without obtaining development consent and in the absence of the change being exempt development. It would be stranger still if the resultant land use happened to be prohibited in the relevant zone. For example, Mr McFadzean states that If principal and secondary dwellings could be strata subdivided without consent, the resultant subdivision would have the effect of changing the use of the dwellings to "semi-detached dwellings" if they are attached or two "dwelling houses", if they are detached. Similarly, it would not be appropriate to strata subdivide "studio dwellings".

16 Preston CJ in *DM & Longbow Pty Ltd v Willoughby City Council* [2017] NSWLEC 173 at [19] sets out some general principles for statutory interpretation. These are; :

The general principles relating to the interpretation of statutes are equally applicable to the interpretation of delegated legislation: *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389; [1996] HCA 36 at 398. The basic principles of statutory construction "require that the language be read in context and having regard to the objective which it was designed to promote", however "the primary focus must remain upon the text": *4Nature Inc v Centennial Springvale Pty Ltd* at [51] and see *Cranbrook School v Woollahra Municipal Council* at [36].

17 It was agreed that consent is not required for strata subdivision except for those matters in s 2.6(3)(a)and (b). The point of conflict lies with the wording in s 2.6(3)(b) and not s 2.6(3)(a). Section 2.6(3)(b) states:

(b) where the building has been designed or approved for occupation as a single unit

18 Put simply, consent is required for strata subdivision "where the building has been designed or approved for occupation as a single unit". Conversely, consent is not required for strata subdivision "where the building has (not) been designed or approved for occupation as a single unit".

19 I am satisfied that proposed development has not been "designed or approved for occupation as a single unit " as the application seeks two separate tenancies (or two units in the words of s 2.6(3)(b) the Growth Centres SEPP)

and as such, consent is not required for strata subdivision. While the words “single unit” are not defined in the Growth Centres SEPP, it is likely in my view that was a deliberate attempt to provide a generic term that fitted a range of different circumstances but within the overall intent of the clause to provide flexibility in instances where strata subdivision may be carried out, without the need for consent.

- 20 Even though Mr McFadzean pointed out examples where the strata subdivision of some permissible uses may potentially create problems with permissibility, I am not satisfied that this is sufficient to adopt his approach. If this was the intention of the draftsman then these uses could have easily been included with the other exceptions in the clause. While Mr McFadzean may well be correct for the examples he highlighted; this does not affect the interpretation required for this particular matter. The Court is required to determine whether the application falls within the exemptions from allowing strata subdivision without consent rather than the applicability of cl 2.6(3) in all applicable situations.
- 21 It was suggested that the decision of Preston CJ in *DM & Longbow Pty Ltd* supports the position of the council however the question to be answered in this case was different as it involved an exemption from the need for consent for strata titling except where “the subdivision of individual lots in a strata plan or community title scheme”. These words are so different to those in the Growth Centres SEPP that any comments in *DM & Longbow Pty Ltd* are of little assistance.
- 22 In this case, I find that consent is not required for the strata subdivision of the proposed development because the development does not fall within either s 2.6(3)(a) or (b).

Is the proposal acceptable as “semi-detached dwellings”

- 23 Mr Glen Apps, provided expert town planning evidence for the council and Ms Georgia Sedgmen provided expert town planning evidence for the applicant. The joint report of Mr Apps and Ms Sedgmen addressed different scenarios for the subdivision given that leave was granted to rely on different plans. Torrens title was originally proposed but ultimately consent was sought for the strata

title of the two separate residential dwellings as “semi-detached dwellings”. An addendum to this report was also tendered that specifically addresses the dwelling density per hectare requirements in relation to land within Oran Park.

- 24 The concerns expressed by Mr Apps were diminished but were not totally addressed if the strata subdivision was sought, compared to a Torrens title subdivision. As I understand the following matters were still in dispute:

Lot width

- 25 Notwithstanding that the application seeks to strata subdivide an existing development, Mr Apps and Ms Sedgmen disagree on the appropriateness of the proposed width of Lot 1. They agree that Area K (the sub precinct where the site is located) is approximately 24.5ha in size and is identified with a dwelling yield of 292 dwellings, which equates to a dwelling yield of 11.9dw/Ha however, they disagree if this is adequate evidence that the site should be identified within the 10-12.5dw/Ha density band. Ms Sedgmen suggests that Figure 3 is intended to provide minimum dwelling targets in each sub-precinct to ensure the total yield of 7,540 dwellings, which was the target identified for Oran Park and notes the text on Figure 3 that states;

"Note: These are minimum dwelling targets that may be exceeded provided that the other provisions of this DCP are addressed"

- 26 Mr Apps agrees that by calculation, the densities for each area sub precinct range from approximately 9 dw/Ha to under 12 dw/Ha. In his opinion, this falls within the 10-12.5 dw/Ha density band and for confirmation, this is consistent with the pictorial representation in Figure 31 and which calls up a minimum frontage of 12.5m in Table 13.
- 27 In consideration of the different evidence of Mr Apps and Ms Sedgmen, I am satisfied that the proposed frontage to Lot 1 is acceptable for a number of reasons. First, the matter of the lot width is a moot point given that I have found that consent is not required for the proposed strata subdivision. Second, and while I accept that DCP 2007 provides a link between density, (expressed as dw/Ha) and lot frontage, I can only say that this link is tenuous, at best. In my view, the matters of density and lot frontage relate to different aspects of the development process and may need to be considered independently of each

other. For example, the proposed development does not provide an increase in density; the approval of the dwelling and secondary dwelling achieved this with the approval by the council on 22 October 2015. The current development does not seek to alter this but only to subdivide the general form of that approved by the council. Practically, it is largely irrelevant which density band the site falls into given that two dwellings already exist on the site. Third, and as agreed by Mr Apps and Ms Sedgmen, the subdivision will have no discernible change in appearance when viewed from the street. In relation to the comparison with the pictorial streetscapes in Figure 31 and the respective densities; there is little, if any change to that approved by the council in 2015.

Orientation

- 28 Mr Apps and Ms Sedgmen agree that the orientation of the site per se, is not an issue as it is an existing lot however they disagree whether the orientation results in adverse solar access issues, particularly to the two rear courtyards.
- 29 On this question, there was unfortunately little, if any evidence, oral or written, to confirm or reject this concern. While the orientation of the two courtyards will likely allow sunlight after midday and into the afternoon, the fencing of the courtyards will restrict this solar access. Presumably, the council considered this question with the approval of the dwelling and secondary dwelling. Given that there is no change proposed to this part of the building with the current application I accept that solar access to the rear courtyards is acceptable.

Streetscape/character

- 30 Mr Apps and Ms Sedgmen agree that the dwellings were not designed as semi-detached dwellings but disagree as to whether the secondary dwelling is capable of being appropriately and successfully converted to a semi-detached dwelling that can stand on its own lot of land.
- 31 Mr Apps expressed concern that the dwellings have not been designed as semi-detached dwellings and fail to achieve a desirable outcome for this form of dwelling. Mr Apps relies on the objective in cl 7.7.1(a) and the control in cl 7.7.1(2) in DCP 2007 that relate to “attached or abutting dwellings” but, in his

opinion, are relevant to the application and do not support the approval of the application. These clauses provide:

Objectives

(a) To ensure that the development of attached or abutting dwellings creates an architecturally consistent street character.

Controls - Attached or Abutting Dwellings

(1) It is preferred that garages for attached dwellings are located at the rear of the lot. Where attached dwellings have frontage to a collector road, all vehicle access and parking is to be located at the rear of the lot.

- 32 Ms Sedgmen states that the development application does not need to be defined as an “abutting dwelling” as the application is for semi-detached dwellings. While DCP 2007 addresses “abutting dwelling”, Ms Sedgmen notes that there is no definition for this form of development in DCP 2007 and it is not a use identified in the Growth Centres SEPP.
- 33 I am satisfied that the proposed development is acceptable in its context and how it appears in the streetscape for a number of reasons. First, and importantly, it is an existing building that sits comfortably in its setting amongst other similar dwellings. The question of whether the building looks like the popularly conceived view of semi-detached housing is largely irrelevant; the relevant matter is whether the building satisfies the definition of “semi-detached dwelling” in the Growth Centres SEPP.
- 34 Second, any reliance on controls for “attached or abutting dwellings” is inappropriate given the lack of a definition in DCP 2007 and the lack of any reference to this form of development in the Growth Centres SEPP. The importation of a definition for ‘abutting dwellings’ from another planning document from another area is also inappropriate. Clearly, people would have a greater understanding of what is required for lodging and assessing a development application if there was greater consistency in land uses between the Growth Centres SEPP and DCP 2007.
- 35 Third, I have little trouble in concluding that the proposed development “creates an architecturally consistent street character”. It could not be said that the approved development creates any inconsistency in the streetscape and the minor changes proposed do not change this acceptable association with other

dwellings in the area. Given that the application seeks to change the use of an existing building, the control requiring garages to be located at the rear of the site cannot be reasonably enforced.

Directions

36 The plans that the applicant seeks approval for are those in Exhibit A. As there have been a number of iterations of the plans; the plans in Exhibit A still contain the words “Torrens title subdivision” in the title block. These words are confusing and should be removed. On filing of plans that reflect the approval (and contain new plan numbers to distinguish these plans) including a change to the plan numbers in condition 1 of the agreed conditions, final orders will be made in chambers in the following terms:

- (1) The appeal is upheld
- (2) Development Application 10.2016.1034.1 for the change of use of an existing approved dwelling and secondary dwelling to semi-detached dwellings, minor amendments and the strata subdivision of the two dwellings at 14 Davidson Street Oran Park is approved subject the conditions in Annexure A.
- (3) The exhibits are returned with the exception of exhibits 1, A and B.

G Brown

Commissioner of the Court

[Annexure A \(1.13 MB, pdf\)](#)

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