

Land and Environment Court
New South Wales

Case Name: Kingsford Property Developments v Randwick City Council

Medium Neutral Citation: [2019] NSWLEC 1486

Hearing Date(s): 9 to 10 September 2019

Date of Orders: 15 October 2019

Decision Date: 15 October 2019

Jurisdiction: Class 1

Before: Bish C

Decision: The Court orders:
(1) Leave is granted to rely on: Amended DA and Class 1 appeal application filed on 10 September 2019; Draft Strata Plan, dated 5 September 2019; and amended conditions of consent, dated 25 September 2019.
(2) The appeal is upheld.
(3) Development Application (DA) 798/2018 which relates to demolition of existing structures, construction of a two storey dual occupancy (attached) dwellings with garages and strata subdivision into two lots on Lot 9 DP 253076, also known as 1249 Anzac Parade, Chifley is approved subject to conditions in Annexure A.
(4) The exhibits, except for Exhibits 1, 2, 3, A and C are returned.

Catchwords: DEVELOPMENT APPLICATION – two lot strata subdivision – dual occupancy (attached) dwellings – minimum lot size – character

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
Randwick Local Environmental Plan 2012
Real Property Act 1900
Roads Act 1993
Strata Schemes Development Act 2015

Cases Cited:

DM & Longbow Pty Ltd v Willoughby City Council [2017]
NSWLEC 1358
Kelly v Randwick City Council [2018] NSWLEC 1322

Texts Cited: Randwick Development Control Plan 2013

Category: Principal judgment

Parties: Kingsford Property Developments (Applicant)
Randwick City Council (Respondent)

Representation: Counsel:
J Palmer (Solicitor) (Applicant)
K Gerathy (Solicitor) (Respondent)

Solicitors:
Pikes Lawyers (Applicant)
HWL Ebsworth Lawyers (Respondent)

File Number(s): 2019/18565

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against a deemed refusal of Development Application (DA) 798/2018 by Randwick City Council (hereafter the Council) which relates to demolition of existing structures, construction of a two storey dual occupancy (attached) dwellings with garaging, and strata subdivision into two lots on Lot 9 DP 253076, also known as 1249 Anzac Parade, Chifley (hereafter the site).

Background

- 2 The DA was submitted to Council on 14 November 2018, and after notification made consistent with relevant planning controls, one submission in objection was received, identifying issues that related to privacy and overshadowing impacts. This objector was also heard at the conciliation conference and their submission is tendered into evidence by agreement of the parties.
- 3 On 16 November 2018, the Council sought concurrence from NSW Roads and Maritime Services (RMS), as Anzac Parade on which the site fronts, is a classified road and any access works therefore require approval, pursuant to s 138 of the *Roads Act 1993*. A request for further information was received from RMS on 7 December 2018, and subsequent to amended plans being provided, RMS gave its concurrence, which is included in the conditions of consent.

- 4 The applicant appealed against the deemed refusal of the DA, pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act).
- 5 As a result, the Land and Environment Court (the Court) ordered a conciliation between the parties, pursuant to s 34AA(2)(a) of the *Land and Environment Court Act 1979* (the Court Act), which commenced as a site view on 9 September 2019. As the parties were unable to reach an agreement, pursuant to s 34AA(2)(b)(i) of the Court Act, the conciliation was terminated and the hearing was held forthwith.
- 6 Prior to the conciliation and hearing of the appeal, amendments to the DA and appeal application, including plans and some supporting documents were made for which the Court grants leave to rely on. These documents were tendered over the course of the hearing. Specifically, the DA was amended to remove reference to a part three dwelling and also the (Class 1) appeal application for grammatical errors, which now form Exhibit A.
- 7 Further to plan amendments made prior to the conciliation conference and also in the hearing, together with the agreed draft conditions (Exhibit 3) and clarification provided by the experts during the hearing, the parties agree that the following contentions as specified in the Amended Statement of Facts and Contentions (SoFC tendered as Exhibit 1) remain for the Court's consideration to grant consent to this DA under appeal include:
- (a) breach of the minimum lot size development standard, which is not supported by a sufficient cl 4.6 written request for variation,
 - (b) inconsistent with desired future character, and
 - (c) as a consequence, the proposed development is not in the public interest.
- 8 The applicant tendered, in Exhibit C, an amended Strata Plan, dated 5 September 2019. The Court grants leave to rely on the amended Strata Plan, which the respondent does not oppose.
- 9 The parties agree that based on the amended plans and agreed conditions of consent for the DA under appeal, the issues of privacy and overshadowing raised by the objector are addressed to their satisfaction and are not pressed.

The Site

- 10 The site is an irregular, triangular shape, fronting Anzac Parade for 17.2m², which forms the eastern boundary. The total area of the site is 669m², with the rear boundary of 8.4m, and side boundaries of 51.8m and 53.1m to the north and south, respectively.

- 11 To the north and south, the site adjoins two/single storey detached residences, which form the dominant character of the zone, and to the west is a child care centre. Currently on the site is a brick/weatherboard dwelling, similar in character to other residences in the local area.
- 12 The site has a slight cross fall towards the rear (west and south).

Relevant Planning Controls

- 13 The requirements of s 4.15 of the EP&A Act, require satisfaction to grant the DA under appeal.
- 14 Of relevance for the Courts consideration is s 6.2(2)(b) of the EP&A Act, which relates to the proposed strata subdivision as follows:

6.2 Meaning of “subdivision” of land (cf previous s 4B)

(1) For the purposes of this Act, subdivision of land means the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The division may (but need not) be effected:

- (a) by conveyance, transfer or partition, or
- (b) by any agreement, dealing, plan or instrument rendering different parts of the land available for separate occupation, use or disposition.

(2) Without limiting subsection (1), subdivision of land includes the procuring of the registration in the office of the Registrar-General of:

- (a) a plan of subdivision within the meaning of section 195 of the Conveyancing Act 1919, or
- (b) a strata plan or a strata plan of subdivision within the meaning of the Strata Schemes Development Act 2015.

Note. The definition of plan of subdivision in section 195 of the Conveyancing Act 1919 extends to plans of subdivision for lease purposes (within the meaning of section 23H of that Act) and to various kinds of plan under the Community Land Development Act 1989.

(3) However, subdivision of land does not include:

- (a) a lease (of any duration) of a building or part of a building, or
- (b) the opening of a public road, or the dedication of land as a public road, by the Crown, a statutory body representing the Crown or a council, or
- (c) the acquisition of land, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of land by compulsory process, or
- (d) a division of land effected by means of a transaction referred to in section 23G of the Conveyancing Act 1919, or
- (e) the procuring of the registration in the office of the Registrar-General of:

(i) a plan of consolidation, a plan of identification or a miscellaneous plan within the meaning of section 195 of the Conveyancing Act 1919, or

(ii) a strata plan of consolidation or a building alteration plan within the meaning of the Strata Schemes Development Act 2015.

- 15 The DA under appeal seeks strata subdivision of an existing (Torrens title) lot into two strata lots by the registration of a strata plan. Section 9 of the *Strata Schemes Development Act 2015* (SSD Act) is relevant for the Courts consideration:

9 Subdivision of land by strata plan

(1) The following land may be subdivided into lots, or lots and common property, by the registration of a plan as a strata plan:

(a) land including the whole of a building and consisting of one current plan lot or 2 or more contiguous current plan lots,

(b) land including part only of a building and consisting of one current plan lot or 2 or more current plan lots (whether contiguous or not).

(2) For the purpose of creating a leasehold strata scheme, land that is subject to a lease or leases may be subdivided under this section.

(3) Land that is a development lot in a strata plan cannot be subdivided under this section.

Note. See section 14 for subdivision of land that is a development lot.

(4) In this section:

current plan lot means an existing lot within the meaning of the *Conveyancing Act 1919*, other than a lot as defined in this Act.

land means land under the *Real Property Act 1900* that is held in fee simple, other than land comprised in a limited folio or qualified folio.

- 16 The parties do not agree on the area calculated for the proposed strata lots. The Court is drawn to consider s 6 of the SSD Act, as follows:

6 Boundaries of lot

(1) For the purposes of this Act, the boundaries of a lot shown on a floor plan are:

(a) except as provided by paragraph (b):

(i) for a vertical boundary in which the base of a wall corresponds substantially with a base line—the inner surface of the wall, and

(ii) for a horizontal boundary in which a floor or ceiling joins a vertical boundary of the lot—the upper surface of the floor and the under surface of the ceiling, or

(b) the boundaries described on the floor plan relating to the lot, in the way prescribed by the regulations, by reference to a wall, floor or ceiling in a building to which the plan relates or to common infrastructure within the building.

(2) In this section:

base line—see paragraph (a) of the definition of **floor plan** in section 4 (1).

- 17 Pursuant to s 4 of the SSD Act, providing the definitions for a floor area, floor plan and lot are as follows:

floor area of a lot means the area occupied on a horizontal plane by the base of the cubic space of the lot.

floor plan means a plan that:

(a) defines by lines (each a base line) the base of the vertical boundaries of each cubic space forming the whole of a proposed lot, or the whole of a part of a proposed lot, to which the plan relates, and

(b) shows:

(i) the floor area of each proposed lot, and

(ii) if a proposed lot has more than one part—the floor area of each part together with the aggregate of the floor areas of the parts, and

(c) if a proposed lot or part of a proposed lot is superimposed on another proposed lot or part—shows the separate base lines of the proposed lots or parts, by reference to floors or levels, in the order in which the superimposition occurs.

lot, in relation to a strata scheme, means one or more cubic spaces shown as a lot on a floor plan relating to the scheme, but does not include any common infrastructure, unless the common infrastructure is described on the plan, in the way prescribed by the regulations, as a part of the lot.

- 18 The site is located within the R2 Low Density Residential zone, on lands subject to the Randwick Local Environmental Plan 2012 (RLEP). Pursuant to cl 2.3 of the RLEP, the proposed development is permissible and subject to the following objectives of the zone:

Zone R2 Low Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.
- To protect the amenity of residents.
- To encourage housing affordability.
- To enable small-scale business uses in existing commercial buildings.

- 19 Of particular relevance for the Courts consideration is cl 4.1A of the RLEP, as follows:

4.1A Minimum subdivision lot size for strata plan schemes in Zone R2

(1) The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.

(2) This clause applies to land in Zone R2 Low Density Residential.

(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986) is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

Note. Part 6 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 provides that strata subdivision of a building in certain circumstances is specified complying development.

(4) Despite subclause (3), if the subdivision is of a lot on which there is a dual occupancy (attached):

(a) the size of each lot resulting from the subdivision is not to be less than 400 square metres, and

(b) 1 dwelling must be situated on each lot resulting from the subdivision.

20 The Randwick Development Control Plan 2013 (RDCP) provides relevant controls for the Courts consideration of the DA under appeal, specifically Part C1, Section 2.1, which describe minimum lot size and frontage requirements.

Evidence

21 The Court heard from the following planning experts: Mr Gary Chapman for the applicant; and Mr Stuart Harding for the respondent. The Court relies on their joint expert report, tendered as Exhibit 2.

Has the minimum strata lot size, as specified in cl 4.1A(4(a) of the RLEP for a dual occupancy (attached) development been achieved?

22 There are two interrelated issues that the Court must have regard to in consideration of this appeal, namely: the area of each proposed strata lot; and as a consequence, any potential breach of the minimum lot size for the strata subdivision and sufficiency of the cl 4.6 (of the RLEP) written request for variation of the development standard.

23 The experts agree that based on cl 4.1A(4) of the RLEP, the minimum lot size for strata subdivision in the (R2) zone as relevant to this site, is 400m², and that the definition of a 'lot' as it relates to a strata scheme appears in the SSD Act (s 4), and not in the EP&A Act or RLEP.

24 The experts also agree that a common property lot is not required nor proposed for this development, as all relevant services, including electricity, waste, sewer and stormwater are shown separately to each lot (and dwelling). There are no common services requiring a separate lot, pursuant to the definition of a lot in the SSD Act. It is

noted that the Court has included a condition to this effect, to ensure compliance with this jurisdictional requirement.

- 25 The parties however, disagree on the areal dimension of the proposed strata lots, due to differences in the method of calculation, and therefore whether each proposed strata lot attains 400m² in size. The difference in area relates to whether the (strata) lot is calculated based on the land area alone, that is in the horizontal dimension, or on the building 'area', considering all floor levels, in both the horizontal and vertical plane (three dimensional).
- 26 Based on the amended Strata Plan (Exhibit C) as provided by the applicant, the areal dimension of the proposed two lot strata subdivision are: Lot 1 of 422m²; and Lot 2 of 428m².
- 27 Mr Chapman considers that the aggregation of floor areas on each level of the proposed dwelling for each strata lot is consistent with the requirements as set out in s 6 of the SSD Act. By his calculation, the resultant areal dimension for each strata lot exceeds 400m² and is therefore in compliant with cl 4.1A(4)(a) of the RLEP.
- 28 Mr Harding however, contends that based on the site area for each proposed strata lot, the areal dimension is defined in the two-dimensional plane, based on land area only. By his calculation, the strata lot areas are 335m² each for Lots 1 and 2. He contends that to be consistent with the required lot size of 400m², pursuant to cl 4.1A(4)(a) of the RLEP, the site would need to be at least 800m² in area to be developed as a two lot strata subdivision. Therefore, a cl 4.6 written request for variation of the minimum (strata lot) size development standard is required.
- 29 Further to this, Mr Harding considers that the proposed development of a two lot strata subdivision with a dual occupancy (attached) dwelling on each proposed strata lot does not satisfy the objective of cl 4.1A(1) of the RLEP, and therefore results in additional dwelling entitlement on the site. This is disputed by Mr Chapman.
- 30 The experts agree that the proposed dual occupancy (attached) dwellings comply with all other relevant numerical development standards, as specified in the RLEP and the RDCP.

Findings

- 31 The issue for the Courts consideration is to determine whether the proposed strata lot size development standard has been breached, pursuant to cl 4.1A of the RLEP.
- 32 There is no dispute that the draft Strata Plan is made consistent with the requirements of cl 6.2 of the EP&A Act.

33 Commissioner Dixon in *DM & Longbow Pty Ltd v Willoughby City Council* [2017] NSWLEC 1358 found that the clear and ordinary reading of the text of the EP&A Act provides the required context for the Courts consideration of a relevant planning instrument. I consider this approach in trying to understand what is intended to be included in the calculation of a strata lot area.

34 The Merriam-Webster dictionary defines area as:

Area: the surface included within a set of lines, specifically, the number of unit squares equal in measure to the surface

35 I accept that the calculation of a Torrens title lot, as existing on the site, is a two dimensional concept based on the total land area, which for this site equates to 669m². I also accept that the proposed land area of each strata lot is 335m². However, I do not accept that land area alone forms the basis for the calculation of the minimum lot size requirement for a strata lot. I explain the basis for my assessment below.

36 The applicant has adopted the calculation approach as described in s 6 of the SSD Act, whereby the floor areas for the ground and first floor levels are included. The respondent on the other hand has relied on the calculation of land area, as described in s 9 of the SSD Act, with 'land' defined in the *Real Property Act 1900*.

37 I agree with Mr Chapman, that the strata lot area is a three-dimensional concept, including all floor levels/areas of the dwelling on the strata lot. I consider that the calculation of a strata lot area should be consistent with s 6 of the SSD Act, which is based on floor area as opposed to land area.

38 Based on the evidence before me, I find that the proposed strata lot area is 422m² and 428m² for Strata Lots 1 and 2, respectively. The proposed development therefore, exceeds the minimum lot size of 400m², as specified in cl 4.1A(4)(a) of the RLEP. In making this determination, I rely on the definition of 'floor plan' provided in the SSD Act, which includes the areas of each floor.

39 I do not accept the approach of Mr Harding's that cl 4.1A(4)(a) of the RLEP requires that the site must have at least 800m² to be strata subdivided into two strata lots, with dual occupancy (attached) dwellings.

40 My approach to calculation of strata lot area is consistent with that held by Commissioner Dickson in *Kelly v Randwick City Council* [2018] NSWLEC 1322.

41 The objectives of the minimum lot size and frontage requirement as described in the RDCP (Part C1, Section 2.1) are as follows:

- To ensure land subdivision respects the predominant subdivision and development pattern of the locality.
- To ensure land subdivision creates allotments that have adequate width and configuration, to deliver suitable building design and to maintain the amenity of the neighbouring properties.

42 The subdivision pattern is not changed as a result of the proposed development for two strata lots. The Torrens title lot of the site, which is registered on the land title, is not changed. The subdivision pattern therefore remains consistent with the predominant subdivision of the locality.

43 Based on my observations from the site inspection, I identified a number of other existing dual occupancy developments of similar frontage appearance to that proposed in close proximity to the site, along Anzac Parade. Therefore, the proposed development reflects a consistent development pattern of the locality.

44 The parties agree that there are no amenity impacts to residents of the proposed development or adjoining properties. They also agree all other numerical development standards and controls are satisfied by the proposed development.

45 I agree with the experts that the site satisfies the lot frontage requirement of 15m for dual occupancy development as described in the RDCP, Section 2.1 of Part C1, as the site has a frontage (to Anzac Parade) of 17.2m.

46 I therefore consider that the objectives of the RDCP for minimum lot size (and frontage) are achieved by the proposed development.

47 I find that the objective of cl 4.1A(1) of the RLEP has been satisfied. I agree with Mr Chapman that the two strata lots created by the proposed development will not result in 'fragmentation' of the land or 'additional dwelling entitlement'.

48 I disagree with Mr Harding that the objectives specified in cl 4.1A(1) of the RLEP are not complied with. The proposed development does not result in an additional dwelling entitlement, as only one lot remains registered on the Torrens title.

49 I find that the proposed two strata lot subdivision on the site does not breach the minimum lot size requirement of 400m², pursuant to cl 4.1A(4)(a) of the RLEP, and therefore no (cl 4.6) request for variation of this development standard is required for the Courts satisfaction to grant consent to the DA under appeal.

Is the proposed development consistent with the desired future character of the area?

50 Council contends that the proposed two lot strata subdivision with dual occupancy (attached) dwellings on each (strata) lot, will result in a development that is

inconsistent with the desired streetscape along Anzac Parade, and therefore does not satisfy the zone objectives in cl 2.3 of the RLEP. In addition, Council contends that the objectives of cl 4.1A of the RLEP have not been achieved.

51 I have already dealt with and found satisfaction with the objectives of cl 4.1A(1) of the RLEP. Therefore, the discussion below will focus on the consistency of the proposed development with cl 2.3 of the RLEP.

52 The Council accepts that based on the amended plans before the Court the built form of the proposed dwellings does not present inconsistently with the streetscape. Their contention, as pressed, relates to how the two dwellings satisfy the existing and proposed subdivision pattern of the locality and result in a burden to infrastructure.

53 Mr Harding considers the additional residents from two dwellings on the site and their potential reliance on existing bus transport networks is unacceptable and will create an undue burden to services along Anzac Parade.

54 He also considers that the proposed development will result in a change to the character of the area not envisaged in the planning instruments and will create precedence for future increased development along Anzac Parade.

55 Mr Chapman however, considers that the existing bus transport system, as evidenced by the timetable provided in Exhibit L, demonstrates that the transport system has capacity and is well functioning, whereby residents from the new dwellings will not cause added burden to the existing transport infrastructure.

56 He does not consider that the proposed dual occupancy (attached) dwellings are out of character for the local area, as they are consistent with other approved developments in the local area and will not result in an unintended proliferation of dwellings.

Findings

57 With respect to the objectives of the R2 zone, described in cl 2.3 of the RLEP, I find that the proposed development is not inconsistent with the emerging, and future character of the local area, specifically along Anzac Parade and immediately around the site. I observed a number of existing dual occupancy (attached) dwellings of similar design and streetscape appearance that suggest the changing character in the streetscape along Anzac Parade. I consider that the proposed development does not appear out of character with what is intended for this area. I agree with the experts that there is no change to the subdivision pattern as a result of the proposed development.

58 The experts agree and I concur, that there will be no adverse amenity impacts to either the future residents of the proposed development or to adjoining residences.

59 I therefore find the proposed development is consistent with the objectives of the R2 zone, as described in cl 2.3 of the RLEP, and specifically is not out of character for the desired, future character of the area.

60 For the reasons provided above, namely consistency with relevant development standards and objectives, I find that the proposed development is in the public interest, and consistent with s 4.15(1)(e) of the EP&A Act.

Conditions

61 DA 798/2018 is granted with conditions, as agreed and amended in Exhibit 3. However, an additional condition is added by the Court to ensure separate (public utility) services are provided to the dwelling on each strata lot, becoming Condition 14A as follows:

“Each dwelling is to have its own, separate public utilities contained and managed within the relevant strata lot boundary.”

62 Further to this, the note attached (by the respondent) to condition 63 is deleted by the Court as the DA is approved.

Conclusion

63 The proposed development has been assessed by the Court, based on the DA's (amended) supporting plans, documents and conditions of consent to satisfy the requirements of the relevant planning instruments, in particular: the EP&A Act, specifically ss 4.15 and 6.2; SSD Act, specifically ss 4, 6 and 9; and the RLEP, specifically cll 2.3 and 4.1A.

64 Therefore, I find that DA 798/2018 is granted with conditions, pursuant to s 4.16(1)(a) of the EP&A Act. As it is assessed that there is no contravention of the EP&A Act or the other relevant planning instruments, I find the proposed strata subdivision is not in contravention of s 4.16(2).

Orders

65 Consequently, the orders of the Court are as follows:

- (1) Leave is granted to rely on: Amended DA and Class 1 appeal application filed on 10 September 2019; Draft Strata Plan, dated 5 September 2019; and amended conditions of consent, dated 25 September 2019.
- (2) The appeal is upheld.
- (3) Development Application (DA) 798/2018 which relates to demolition of existing structures, construction of a two storey dual occupancy (attached) dwellings with garages and strata subdivision into two lots on Lot 9 DP 253076, also

known as 1249 Anzac Parade, Chifley is approved subject to conditions in Annexure A.

- (4) The exhibits, except for Exhibits 1, 2, 3, A and C are returned.

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Sarah Bish

Commissioner of the Court

Annexure A (565 KB)

Amendments

21 October 2019 - Pursuant to UCPR r 36.17, and by consent of the parties, amend Annexure A of the Court's orders of 15 October 2019, to include Condition 14A as mentioned in paragraph 61 of the judgment. Substitute the attached Annexure A with the amended copy which includes the insertion of Condition 14A.