



Land and Environment Court
New South Wales

Case Name: Pomeroy v Hawkesbury City Council

Medium Neutral Citation: [2018] NSWLEC 1146

Hearing Date(s): 19-20 March 2018

Date of Orders: 23 March 2018

Decision Date: 23 March 2018

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
1. The appeal is upheld.
2. Development Application No. 0123/17 for the strata subdivision of 179 Windsor Street, Richmond, into two allotments and the construction of a 13 room boarding house on Lot 2 is approved, subject to the conditions of consent at Annexure A.
3. The exhibits, other than exhibits 2, A and B, are returned.

Catchwords: DEVELOPMENT APPLICATION: boarding house; strata subdivision of site to create two lots and common property, existing heritage listed dwelling; provision of parking; whether there is sufficient parking spaces for potential future commercial use of existing dwelling; whether an accessible parking space should be provided; amenity.

Legislation Cited: Environmental Planning and Assessment Act 1979
Hawkesbury City Council Development Control Plan
Hawkesbury Local Environmental Plan 2012
Land and Environment Court Act 1979
State Environmental Planning Policy (Affordable Rental Housing) 2009

Cases Cited: Orico Properties Pty Ltd v Inner West Council [2017] NSWLEC 90
Hawkesbury City Council Development Control Plan

Category: Principal judgment

Parties: Ron Pomeroy (Applicant)
Hawkesbury City Council (Respondent)

Representation: Counsel:
Ms J. Reid barrister (Applicant)
Mr T. To barrister (Respondent)

Solicitors:
Hartley Solicitors (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2017/192890

Publication Restriction: No

JUDGMENT

- 1 COMMISSIONER: This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 0123/17 for the construction of a boarding house (the proposal) at 179 Windsor Street, Richmond (the site) by Hawkesbury City Council (the Council).
- 2 The appeal was subject to mandatory conciliation on 11 September 2017, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached during the conciliation phase, the conciliation conference was terminated on 5 October 2017, pursuant to s 34(4) of the LEC Act.
- 3 The applicant was granted leave by the Court at the commencement of the hearing to rely on an amended proposal (exhibits A and B).

Issues

- 4 The Council's contentions can be summarised as:
 - The proposal provides insufficient onsite car parking; and

- The proposal does not provide an acceptable level of amenity to the residents of the boarding house.
- 5 The contentions regarding insufficient bicycle parking, heritage and archaeology, legal access, stormwater, the provision of details of the front fence and a concept landscaping plan and inadequate and inconsistent information were not pressed, as they were dealt with either by amendments and the provision of additional information, or by condition. I accept the Council's submission regarding the imposition of condition 17 (Annexure A) requiring an updated archaeological report.
 - 6 The planning experts agreed that eight 240L bins be provided for use by the boarding house and two 240L bins be provided for use by the existing dwelling and they agreed that the waste room dimensions are sufficient to accommodate the ten bins. The Council contends that the introduction of the 4 car parking spaces means that there is no convenient location for the placement of the bins for collection.
 - 7 It was conceded by the Council in closing submissions that the strata subdivision of the site is not prohibited under cl 52 of State Environmental Planning Policy (Affordable Rental Housing) 2009, because the boarding house in the amended proposal is wholly contained on a single lot of the proposed strata subdivision (exhibit B). The Council submits that the existing dwelling should be identified as common property in the strata plan because the owners' corporation is under a statutory duty to maintain common property and this arrangement would ensure funding for the maintenance of the heritage item.

The site and its context

- 8 The site is on the north-eastern side of Windsor Street, Richmond, on the block bounded by Market Street East and Market Street West. The site is within the Richmond town centre, with surrounding development generally comprising commercial and retail development.
- 9 The site has an area of 594.4m² and contains a two storey dwelling in the Federation style.

- 10 The site is approximately 150m from Richmond Railway Station and there is a bus stop directly in front of the site on Windsor Street.

The proposal

- 11 The proposal is to strata subdivide the site into two lots with an area of common property along the north-western side boundary to provide a pathway across the site and between the car parking spaces at the rear of the site. Lot 1 is to contain the existing dwelling and Lot 2 is proposed to contain the boarding house development. There are 4 car parking spaces at the rear of the site on either side of the pathway, 3 parking spaces are part of Lot 2 and one parking space is part of Lot 1.
- 12 The boarding house consists of three levels, with three boarding rooms, entry and common open space on the ground floor, 5 boarding rooms on the first floor and 5 boarding rooms on the second floor. Each boarding room has either a balcony or a courtyard, orientated to either the north-west or the north-east.

Planning framework

- 13 The application is made pursuant to State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH). The relevant aims of SEPP ARH are:
- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards
 - (f) to support local business centres by providing affordable rental housing for workers close to places of work
- 14 The site is zoned B2 Local Centre under Hawkesbury Local Environmental Plan 2012 (LEP 2012) and the objectives of the B2 zone, to which regard must be had, are:
- Objectives of zone
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To promote the development and expansion of business activities to meet the optimum employment and social needs of Hawkesbury.

- 15 It was uncontroversial that the proposal is consistent with the height of buildings development standard for the site of 12m.
- 16 The site is identified as a local heritage item (I112 Schedule 5 LEP 2012) and the terms of cl 5.10 of LEP 2012 are a relevant consideration.
- 17 The site is within an ANEF contour of 20 or greater and the terms of cl 6.6 of LEP 2012 are a relevant consideration.

Public submissions

- 18 One objector provided evidence at the commencement of the hearing onsite. She owns the commercial property adjoining the site to the south-east. Her concerns can be summarised as:
 - The applicant should be required to provide parking onsite or contribute to the provision of parking in the area as she was when she and her husband developed the adjoining site;
 - The three storey structure of the boarding house at the rear of the site will enclose the walkway on her property and result in the deterioration of her property; and
 - The development should not rely on the walkway through her property.

The amended proposal

- 19 The applicant, by Notice of Motion filed on 16 March 2018, sought leave to rely on amended plans in the proceedings. The Council opposed the application for leave to amend on the basis that the amended proposal amounted to a new development application. In addition, the Council submitted that the introduction of 4 car parking spaces was required to be renotified under the terms of Hawkesbury City Council Development Control Plan (DCP).
- 20 The recognised limit of the Court's power under cl 55 of the Environmental Planning and Assessment Regulation 2000 to amend a development application is that there is no jurisdiction to entertain an original development application (*Orico Properties Pty Ltd v Inner West Council* [2017] NSWLEC 90 [8]). In determining whether the amended proposal is within the ambit of cl 55, the Court has established three clear principles (*Orico Properties Pty Ltd v Inner West Council* [2017] NSWLEC 90 [10]):

1. The power to amend is “beneficial and facultative” so as to enable an applicant to respond to any issues identified, and to encourage the consent authority to solicit a better outcome.

2. The power to amend is the power to change, not to propose a new or original application.

3. A proposal may change in terms of design and layout, however the focus remains on whether the proposal can answer the overall description and essence of the development as originally proposed.

21 The amended proposal (revision E) includes the following changes to the original proposal:

- The introduction of 4 car and 4 motorbike parking spaces accessed via a public car park at the rear of the site;
- A reduction in the number of boarding house rooms from 17 to 13;
- Deletion of the proposed use of the existing dwelling or part of the existing dwelling as manager’s accommodation and excision of the use of the existing dwelling as part of the proposal;
- A common area for a pathway along the north-western side boundary to allow occupants of both buildings to access Windsor Street and the car park to the rear of the site;
- Communal open space of 20m² with a width for part of that area of 3m;
- Garbage storage for 10 bins for both the boarding house (8) and the existing dwelling (2); and
- A reduction of 200mm in the separation between the building envelope of the boarding house and the existing dwelling.

22 Having considered and compared the plans identified as revision E to earlier iterations of the plans, I find that the amended proposal is not an original development application, but is instead an amended version of the development application which retains the essential elements of the original application and the changes made to the proposal respond to the issues identified by the Council, for the following reasons:

- The planners, in their joint report (exhibit 4), considered a number of iterations of the plans identified as revisions B, C and D. Some of the changes to the proposal illustrated in the various iterations of plans resolved some of the issues between the parties (exhibit 4, “General Points of Agreement”).
- The provision of 4 parking spaces at the rear of the site is in response to the Council’s principal contention regarding the insufficient provision of parking on the site (exhibit 2, contention no. 1 Parking).
- The deletion of the proposed use of the existing dwelling as manager’s accommodation and excision of the use of the existing dwelling as part of the

proposal is a function of the reduction in the capacity of the boarding house to a maximum of 18 boarders, as cl 30(1)(e) of SEPP ARH only requires a boarding room or onsite dwelling for a boarding house manager if the boarding house has capacity to accommodate 20 or more lodgers.

- I am satisfied that the excision of the use of the existing dwelling as part of the proposal or the proposed strata subdivision of the site does not raise a new issue regarding heritage impact on the identified heritage significance of the heritage listed dwelling. Development consent has previously been granted for a Torrens Title subdivision of the site (exhibit 5), although in a different configuration, and so it is not the subdivision of the site per se that raises an issue regarding heritage impact. The separation distance between the existing dwelling and the proposed building in the amended proposal has been reduced by 200mm and an issue was not raised regarding the rear extent of the heritage curtilage of the heritage item in response to the original proposal (exhibit 2), despite the narrow proportion of the separation between the two buildings in the original proposal. I do not accept that 200mm represents the difference between an acceptable curtilage to the rear of the heritage item and an unacceptable impact on that curtilage.

- 23 In exercising the relevant power contained in sections 3.2.1 and 3.3.2 of the DCP under s 39(2) of the LEC Act, it is my opinion that the amended proposal in exhibit A is not required to be renotified because the changes to the proposal are not likely to have an additional impact on the environment or the locality.

Expert evidence

- 24 The applicant relied on the expert evidence of Mr Benjamin Black (planning) and Mr Craig McLaren (traffic). The Council relied on the expert evidence of Mr Andrew Johnston (planning) and Mr Ron Brear (traffic).

Consideration

Car parking

- 25 The proposal provides 3 car parking spaces at the rear of the site devoted to the boarding house use. I accept the parties' agreement that 3 car parking spaces for the boarding house meets the standard set out in cl 29(2)(e)(i) of SEPP ARH and therefore consent cannot be refused on the basis of insufficient car parking spaces for the boarding house.

Allocation of parking spaces

- 26 The Council seeks by the imposition of condition 75 (exhibit 10) that two parking spaces be allocated to the front lot (the existing dwelling) and two spaces be allocated to the rear lot containing the boarding house. I accept the Council's submissions regarding the allocation of two parking spaces to the lot

containing the existing dwelling and two parking spaces allocated to the boarding house and this condition is retained in the conditions of consent at Annexure A.

- 27 Two car parking spaces allocated to the existing dwelling is consistent with the parking provision requirements for a residential use at 2.5.1 of the DCP, although the note in the DCP table states that consideration will be given to reducing car parking for residential development in commercial zones. If the existing dwelling is used in the future for a commercial use, the provision of two car parking spaces will maintain some flexibility for an appropriate commercial use, even though more car parking would be required under the standards of the DCP for a commercial use. Nevertheless, given the location of the existing dwelling in the Richmond town centre, close to the railway station, it is conceivable that many commercial uses could be successfully accommodated in the existing dwelling with 2 car parking spaces for tenants. For this reason, it is my view that the applicant's offer of a condition requiring the existing building to be used only as a dwelling (exhibit H) is not necessary.
- 28 I am satisfied that two car parking spaces allocated to the boarding house is sufficient under all of the circumstances of this application, and that there is power to consent to a proposal that does not meet the standards set out at cl 29 of SEPP ARH, at sub-cl 29(4). The site is ideally located in the Richmond town centre within walking distance of many services and amenities, and it is within an accessible area as defined by cl 4(1) of SEPP ARH. In determining the provision of onsite car parking, the objectives at 2.2 of the DCP require consideration of, amongst other things, the degree of accessibility by public transport. The site is a short walk to the railway station with direct access to nearby town centres including Windsor, Blacktown and Parramatta and there is a bus stop directly in front of the site on Windsor Street.
- 29 I accept Mr McLaren's evidence that there is adequate on-street parking in the vicinity of the site for boarders without access to onsite parking, including overnight parking, within 100m and 200m of the site (exhibit 6, 11.1.3). The proposal provides, in addition to car parking, sufficient motorbike and bicycle parking onsite.

- 30 I accept the applicant's position that vehicles must reverse into the car parking spaces given the configuration of the onsite parking, and that it is relatively safe to do so. This is consistent with the existing arrangement for vehicles manoeuvring in the public carpark at the rear of the site. As the onsite car parking is accessed from a public car park, pedestrians and drivers will anticipate manoeuvring vehicles in the vicinity of the rear of the site and be appropriately cautious.
- 31 I am satisfied that, although constrained, there is sufficient room to the rear of the site for garbage bins to be located for collection by the private waste collection operator (condition 60 Annexure A).

Accessible parking space

- 32 The Council seeks by the imposition of condition 79 (exhibit 10) a requirement that car parking space 2 (exhibit B) be marked for use by room 2 of the proposal which is an accessible room and that the aisle between car parking spaces 2 and 3 be kept clear at all times. The Council submits that the accessible car parking space should be provided for the accessible boarding room.
- 33 In my view, the imposition of such a condition in the circumstances of this proposal is onerous. There is no requirement for the applicant to provide an accessible car parking space and the accessible room may be occupied by a person without a car. The proposed condition unnecessarily restricts the use of one of the two car parking spaces available to the boarding house and thereby further limits the availability of onsite parking associated with the proposal. For this reason, condition 79 is deleted.

Applicant's agreement with a car share provider

- 34 I accept the Council's submission that no weight should be given to an agreement between the applicant and a car share provider for an application to be made to Council for two car share pods (exhibit 11) as the proposal for a car share service is uncertain.

Amenity

- 35 1.3 Height in Part D of the DCP (exhibit 8) includes the objective of protecting the privacy and solar access to private open space of adjoining development.

The Council submits that if the adjoining property to the north-west of the site is developed to its full potential, including 12m height and no side setbacks, it will unreasonably impact on the amenity of the common open space and the solar access to the rooms. Consequently, the proposal will unreasonably constrain the future development of the neighbouring property. 1.3 of the DCP includes, under “Rules” at (e), the following:

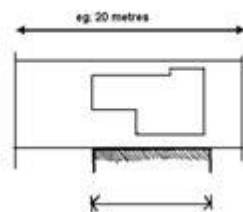
(e) Building to the side & back boundary within the Building Height Plane is permitted

where:

it can be shown that building to the boundary does not reduce the privacy of neighbouring dwellings and their private open space and does not reduce their existing solar access; and

the continuous length of the boundary walls is not more than 10m or is a maximum of 50% of the boundary length; whichever is the shorter. Refer to Figure D1.2.

Figure D1.2 Length of building on the boundary



- 36 I am satisfied that the proposal provides adequate amenity to the future occupants of the boarding house. All of the balconies and courtyards are orientated to either the north-west or the north-east, providing good solar access to all of the occupants. The communal open space is on the north-western side of the building and will have adequate solar access. Furthermore, there is an abundance of open space in close proximity to the site including Richmond Park and oval on the opposite side of Windsor Street.
- 37 I do not accept the submission that the proposal will unreasonably constrain the future development of the adjoining site to the north-west. The future development of the adjoining site may impact on the quantity of solar access and privacy enjoyed by the rooms facing north-west and this will be a matter for consideration in determining the building envelope and the design of the adjoining development. 1.3(e) of Part D of the DCP has to be read in context and requires some articulation of the boundary wall, and the articulation of the

south-eastern wall of the future building envelope can be modelled so as to minimise its impact on the amenity enjoyed by the boarding house occupants.

Conditions

38 The following conditions are disputed by the applicant:

- Conditions 9, 13(b) and 77 requiring accommodation to only be offered to boarders who meet the income household groups qualifying as affordable housing within the meaning of cl 6 SEPP ARH; and
- Condition 75 requiring a draft plan of strata subdivision to identify the structure of the existing heritage dwelling in proposed lot 1 as common property.

Whether a limit on household income for eligibility as a boarder should be imposed

39 It appears in SEPP ARH to be a legislative intention not to limit the eligibility of boarders in boarding houses as SEPP ARH does not require a limitation on the income groups that can be accommodated in a boarding house development, unlike the requirements in SEPP ARH for infill affordable housing at cl 17, which does require a proportion of the proposal to be used for the purpose of affordable housing consistent with the definition in cl 6, for a period of time. I accept the applicant's submission that it is instead the form of the building of a boarding house and the limited size of rooms that constrains the relative cost of boarding house accommodation, which is provided at market rents.

40 Boarding houses may provide short term accommodation, being a minimum of 3 months, to a range of income groups, as well as accommodation to those that fall within the definition of low and moderate income households under cl 6 of SEPP ARH. It is possible that the intention behind the policy of not limiting the eligibility of boarders in boarding houses is to encourage diversity and counteract some of the historic stigma associated with boarding houses that predate the "new generation" boarding houses under SEPP ARH. It is an aim of the policy at cl 3(f) to support local business centres by providing affordable rental housing for workers close to places of work and potential employees in the Richmond town centre should not be precluded from being accommodated in the boarding house if their income for a period exceeds the limit in cl 6 of SEPP ARH, as this would be contrary to the aims of the policy.

41 For these reasons, it is my view that the requirement in conditions 9, 13(b) and 77 to further restrict the boarding house accommodation to those that fall within

the definition of very low, low or moderate household incomes in cl 6 of SEPP ARH further constrains the policy in a way that was not intended in the drafting of the policy.

Whether the existing dwelling should be common property

- 42 I accept the applicant's submission that the existing dwelling is in good repair and that it is permissible under LEP 2012 to use the existing dwelling as a residence without consent, or for a commercial use with consent, and both uses are viable and capable of funding ongoing costs of maintaining the existing dwelling.
- 43 The Torrens Title subdivision (exhibit 5) of the site determined in 2003 permitted the subdivision of the heritage listed existing dwelling on a site of 329m² presumably on the basis that the heritage item was considered to have a sufficient heritage curtilage and that it would be viable and capable of accommodating a use that would be consistent with its ongoing conservation and maintenance. I am satisfied that the strata subdivision of the site similarly provides an opportunity for a suitable future use for the heritage item and for its ongoing viability and maintenance.
- 44 Condition 75 is amended to delete this requirement in the conditions of consent at Annexure A.

Conclusion

- 45 I am satisfied that the proposal for the strata subdivision of the site and the construction of a 13 room boarding house on the rear lot is consistent with the aims of SEPP ARH and the relevant aims and objectives of LEP 2012 and the DCP.

Orders

- 46 The orders of the Court are:
- (1) The appeal is upheld.
 - (2) Development Application No. 0123/17 for the strata subdivision of 179 Windsor Street, Richmond, into two allotments and common property, and the construction of a 13 room boarding house on Lot 2 is approved, subject to the conditions of consent at Annexure A.
 - (3) The exhibits, other than exhibits 2, A and B, are returned.

Susan O'Neill

Commissioner of the Court

Annexure A (146 KB, pdf)

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