



Land and Environment Court  
New South Wales

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Case Name: M & J Conradt Pty Ltd and M & J Conradt Investment Trust v Georges River Council

Medium Neutral Citation: [2016] NSWLEC 1425

Hearing Date(s): 19 July 2016

Date of Orders: 19 July 2016

Decision Date: 19 July 2016

Jurisdiction: Class 1

Before: Dixon C

Decision: See paragraph [31]

Catchwords: APPEAL - consent orders - development application – construction of a multi-dwelling development with strata subdivision – density of development – objectors concerns - privacy and amenity impacts

Legislation Cited: Environmental Planning and Assessment Act 1979  
Hurstville Local Environmental Plan 2012  
Hurstville Development Control Plan No 1

Category: Principal judgment

Parties: M & J Conradt Pty Ltd and M & J Conradt Investment Trust (Applicant)  
Georges River Council (Respondent)

Representation: Counsel:  
Mr M Staunton (Applicant)  
Ms Jennifer Ware (Solicitor) (Respondent)

Solicitors:  
Mr Grant Christmas, Apex Planning and Environment Law (Applicant)  
Ms Jennifer Ware, Georges River Council

(Respondent)

File Number(s): 2016/00161764

## **EX TEMPORE JUDGMENT**

- 1 This judgment concerns a development application (DA 2015/0209) for the construction (and strata subdivision) of a multi-dwelling development at 59 Park Street, Peakhurst (the Site).
- 2 The proceedings were commenced by M & J Conradt Pty Ltd and M & J Conradt Investment Trust, (the Applicant) pursuant to s 97(1) of the *Environmental Planning Assessment Act 1979* (EPA Act) following the Georges River Council's decision to refuse its consent to the development. The Council's decision to refuse consent was contrary to the recommendation of the Council's Assessing Officer who had supported a variation to the density and excavation controls under Hurstville Development Control Plan – No 1 (Exhibit 5) and recommended a conditional approval of the development. Since that decision the Council has had an opportunity to assess further information about the proposal, including expert planning and arboriculture evidence. I am told that it is now satisfied that a conditional approval of the development should be granted.
- 3 The Council joins with the Applicant in requesting the Court to make Consent Orders granting the development consent, subject to conditions (Exhibit A).
- 4 Notwithstanding the agreed position between the parties, I am required to be satisfied that it is appropriate to make the orders sought by them. In considering the Consent Orders, the Court's *Practice Note – Residential Class 1- Development Appeals* (the Practice Note) provides that I must consider any submission made by an objector to the proposed Orders. In accordance with the Practice Note, by letter dated 15 June 2016 the Council's solicitor notified those persons who had objected to the original proposal of the proposed Consent Orders and the agreed conditions of consent. The letter also gave notice of the date of the hearing before the Court to consider the making of the proposed Consent Orders and invited any interested person to be heard at that time.

5 Mrs S Lavender, who resides at 20 Caledonia Crescent, Peakhurst, behind the development site, indicated to Council's solicitor that she wished to address the Court hearing today. For that reason, these proceedings were commenced on-site at 9.30am. On arrival at the site I was advised that Mrs Lavender had changed her mind and no longer wished to address the Court orally. Instead, she relied upon her written objections lodged with the Council and included in the Council's Bundle of documents (Exhibit 3). As the Court was at the development site it took the opportunity to inspect the area before the hearing was reconvened in Court. Before the hearing resumed in Court I received some oral evidence from the parties' planning consultants addressing the objectors' concerns, particularly the trees said to be impacted upon by the proposal. The planning experts who addressed the Court onsite and later gave concurrent evidence at the Court in Sydney were the Applicant's consultant town planner, Mr Kirk Osborne, of DFP Planning Consultants; and the Council's Acting Director Planning and Development, Ms Tina Christy. Mr Osborne's written statement of evidence is (Exhibit C).

### **Background**

6 The background facts and the statutory controls are recorded in the Council's Amended Statement of Facts and Contentions dated 15 June 2016 (SOFC) (Exhibit 1). The relevant details are summarised below.

### **The proposal**

7 The amended proposal involves the following works:

- (a) Demolition of existing house ;
- (b) Construction of three (3) dwellings which are described as follows:
  - (i) Townhouse 1 : located at the front of the site with a two (2) storey built form comprising three (3) bedrooms;
  - (ii) Townhouse 2 : located in the middle of the site with a two (2 ) storey built form comprising three (3) bedrooms ;
  - (iii) Townhouse 3 : located at the rear of the site with a single storey built form comprising three (3) bedrooms;
- (c) Basement level – comprising six (6) open car spaces in total with two (2) car spaces to be allocated to each dwelling;

- (d) Retention of two (2) large trees and the removal of three (3) small mango trees on the site;
- (e) One (1) tree within the Council reserve to be retained;
- (f) Strata subdivision.

8 The DA was lodged with the Council on 19 June 2015 and notified from 1 July 2015 to 17 July 2015. The Council received six (6) submissions by way of objection from local residents.

9 The DA was refused by the Council on 9 December 2015.

10 The Notice of Determination, (Exhibit 7), states that the reasons for refusal are 1) non-compliance with the minimum site area per dwelling and loss of amenity to adjoining neighbours.

#### **Objectors' concerns**

11 Those making submissions raised the following concerns:

- (61 Park Street ) - overlooking of dining rooms, bedrooms and outdoor living areas and backyard of units 1 and 2;
- (20 Caledonai Crescent ) - Mrs Lavender requests the removal of the Camphor Laurel tree in the rear of the site because of alleged impacts of the tree's roots on her pool area. She is also concerned about damage to her the common boundary fence during construction and the loss of privacy from windows on the second storey of the proposed dwelling facing into her backyard.
- (57A Park Street) – loss of privacy to their backyard due to the proposed rear dwelling; overshadowing and loss of solar access during mud winter; impact of basement driveway due to frequency of vehicle movements; noise associated with the stormwater discharge pit in the basement; the length of the eastern elevation; glare from the proposed skillion roof and structural impacts upon 57A from the basement excavation;
- (57 Park Street) – wants more parking for visitors on the site; a traffic management plan during construction; alignment of kerb and gutter to facilitate drainage of stormwater;
- (54 Park Street) – traffic and congestion ; height of the development and impact on privacy;
- (54A park Street) - traffic and congestion and; height of the development and impact on privacy.

#### **The site**

12 The site is legally described as Lot 201 in DP 573405 and known as 59 Park Street Peakhurst. It has a rectangular shape with a total land area of 862.3sqm comprised of a 15.31m frontage on the southern side of Park Street, a 56.31m

eastern side boundary, a 15.31m northern rear boundary and a 56.29m western side boundary.

- 13 The site slopes from rear to front with a gentle fall of 1.3m.
- 14 The neighbourhood comprises a mix of dwelling types and styles including single and two storey detached houses, two storey duplexes and one and two storey multi dwelling developments.

#### **Statutory controls**

- 15 The site is zoned R2 – Low Density Residential under the provision of the *Hurstville Local Environmental Plan 2012* (the LEP). It is also subject to the provisions of the *Hurstville Development Control Plan No 1 – LGA wide* (DCP). The other relevant controls are identified at p5 of the SOFC.
- 16 The provisions of Section 4.3 “Multiple Dwellings and Residential Flat Buildings” of the DCP are relevant. Section 4.3.2 sets out “General Development Controls” for multiple dwellings and residential flat buildings, including the controls for Site Planning. The stated objective of the Site Planning is “*Site planning aims to maximise the attributes of a site while establishing a good relationship between buildings on a site and with neighbouring properties*”.
- 17 Clause 4.3.2.1(i) (a) of the DCP set a residential density control for the land zoned R2 Low Density Residential of 315m<sup>2</sup> of site area per dwelling.
- 18 The LEP also sets out controls for residential density , specifically floor space ratios (FSR) at cl4.4. The Applicant’s case is that FSR control is the primary development standard that establishes the maximum density of development on the land. An objective of the FSR provision of the LEP is to control maximum development density and intensity of land use: cl4. 4 (1) (b).
- 19 The maximum FSR for the site is 0.6:1. The proposed development has an FSR of 0.5: 1 which is below the maximum permissible FSR.
- 20 However, as the Council's planning assessment report (Exhibit 5) makes clear, the development does not comply with the density control of the Council's DCP. The control provides for a density of one dwelling per 315sqm, which

results in 2.73 dwellings on this site. The proposal provides three dwellings - one dwelling per 287.43 m<sup>2</sup> (resulting in an 8.8 % variation).

- 21 The development also exceeds the maximum excavation control of 0.5m - although only in respect of the basement car park area. (At all times the Assessing Officer accepted that the proposed variation of this control is reasonable on this site (Exhibit 5 p 11)).

### **Planning Evidence**

- 22 Mr Osborne acknowledges in his written evidence (at paragraph 27 of his statement (Exhibit C)) that the residential density provisions in cl4.4 of the LEP are inconsistent with the controls in s 4.3.2.1 (i) (a) of the DCP. However, by virtue of the operation of the EPA Act he believes that the LEP controls prevail. This outcome, he says, is consistent with the operation of s79C (3A) which allows for the flexible application of DCP controls and reasonable alternative solutions to achieve the objects of the standard.
- 23 The Council agrees with Mr Osborne's approach to its planning controls which is, in fact, consistent with the Assessing officer, Mr Raymundo's recommendation (Exhibit 5) namely; that the DCP density control works in tandem with the FSR controls under the Hurstville LEP in order to maximise the attributes of the site while establishing a good relationship between buildings (refer to the Objectives in cl 4.3.2.1 of the DCP).
- 24 On that basis the Council now accepts that the proposed variation to the dwelling density control of 82.7 m<sup>2</sup> is not significant when one has regard to the fact that the FSR of the proposal is more than compliant at 0.5:1, and offers a floor area of 84m<sup>2</sup> less than that permitted by the LEP. In short, the expert evidence is that the development is not an overdevelopment of the site but rather an appropriate response to the limitations of the site. Nor is the development out of character when viewed from the immediate streetscape or the public domain more generally. The planners agree that the proposed design results in minimal visual massing and offers a compatible bulk and scale with adjoining developments. The location of the six car parking spaces within the basement level assists in this regard.

- 25 In the ultimate the Council accepts that the development will provide acceptable amenity for its future occupants as each unit will offer appropriate dimensions, layout, and private open space. Having had opportunity to consider the additional arboreal evidence and information provided by the Applicant since the appeal was lodged, the Council is satisfied that the objectors' concerns - which generally relate to bulk, scale, overshadowing, amenity impacts, traffic generation - are not made out. The development must be considered in the context of the existing streetscape and in this case the immediately adjoining properties (which comprise multi-dwelling and dual-occupancy developments) are close to the maximum development potential for the R2 low-density zone. This development must sit within the existing streetscape and on that basis it is not out of character. In short, it will not result in unreasonable planning impacts to adjoining properties.

#### **Traffic evidence**

- 26 The traffic study prepared by McLaren Traffic Engineering (at tab 6 of Exhibit B) concludes that the development will not generate any unacceptable traffic impacts and will have a negligible impact on the surrounding road networks/residential amenity (Exhibit B Tab 3 at p 8). The six car spaces in the basement of the development will comply with the DCP requirements and no visitor parking is required.

#### **Arboriculture evidence**

- 27 The proposal retains three trees on the site and this vegetation was assessed by Australis Tree Management (Exhibit B, Tab 5). Subject to the proposed conditions of consent, the arboreal assessment is that the development will not compromise the integrity of the trees which are to be retained, particularly tree number 3 on the boundary, with Mrs Lavender's property - the Camphor Laurel.
- 28 While Mrs Lavender would prefer the Camphor Laurel tree to be removed because she considers the tree to be a nuisance, with roots extending into her yard, the arboreal evidence is that the development does not require the tree to be removed. In that circumstance, it would be entirely inappropriate and beyond power for the Court to order the removal of the Camphor Laurel tree. With regard to Mrs Lavender's concerns about the integrity of the rear

boundary fence during construction of the development, I am satisfied that the proposed condition 48A, which requires the Applicant to repair or replace the fence if damaged occurs during the course of construction, adequately addresses her concern.

- 29 As stated earlier, the Court has had the benefit of a view and opportunity to consider the planning and traffic expert evidence, which collectively support an approval of the application after assessment under s 79C. In my opinion there is no basis to displace the expert evidence by the views expressed in the lay evidence of the objectors.

### **Conclusion**

- 30 For the reasons outlined, I am satisfied on the evidence that it is appropriate to grant development consent to the application in accordance with the parties' proposed consent orders dated 19 July 2016.

- 31 Accordingly, the Court orders:

- (1) The appeal is upheld; and
- (2) Development application DA2015/0209 for the demolition of the existing dwelling, construction of three multi-dwellings, including basement parking, is approved subject to conditions attached and marked Annexure A to the consent orders, including condition 48A.
- (3) The Council is directed to forward to the Court consolidated conditions of consent, including the additional condition 48A, within 48 hours upon receipt of the conditions the Exhibits are to be returned to the parties, except for Exhibits A and B.

**Susan Dixon**

**Commissioner**

[161764.16 - Annexure A \(152 KB, pdf\)](#)

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