



Land and Environment Court New South Wales

Medium Neutral Citation:	Courallie Avenue Pty Limited v Strathfield Council [2015] NSWLEC 1128
Hearing dates:	20-21 April, 2015
Decision date:	30 April 2015
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	<ol style="list-style-type: none">1. The appeal is upheld.2. Development Application No. 2013/052 for the demolition of existing structures, remediation works and construction of three detached three storey residential flat buildings containing 36 units, basement parking and construction of a drainage culvert, is approved, subject to the conditions of consent at Annexure A.3. The exhibits, other than exhibits 1 and A, are returned.
Catchwords:	DEVELOPMENT APPLICATION: residential flat building; exception to the height of buildings development standard; privacy and overlooking; waste collection; flooding.
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979
Cases Cited:	Mison v Randwick Municipal Council (1991) 23 NSWLR 734
Category:	Principal judgment
Parties:	Courallie Avenue Pty Limited (Applicant) Strathfield Council (Respondent)
Representation:	Counsel: Mr A. Pickles Barrister (Applicant) Ms P. Burns Solicitor (Respondent) Solicitors: Storey & Gough Lawyers (Applicant) Maddocks Lawyers (Respondent)
File Number(s):	10622 of 2014

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 97 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 2013/052 for the demolition of existing structures, remediation works and construction of three detached, three storey residential flat buildings, containing 36 units, basement parking and construction of a drainage culvert (the proposal), at 21 Mandemar Avenue, Homebush West (the site) by Strathfield Council (the Council).
- 2 The appeal was subject to mandatory conciliation on 23 October, 2014, 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 4 February, 2015, pursuant to s 34(4) of the LEC Act. The proposal was amended following the termination of the conciliation conference and leave was granted by the Court on 11 February, 2015 for the applicant to rely on the amended proposal.

Issues

- 3 The Council's contentions in the matter can be summarised as:
 - The proposed ground floor patios will impact on the visual privacy of the private open space of the dwellings fronting Courallie Avenue, to the east of the site;
 - The proposal to engage a private contractor for waste collection will set an undesirable precedent;
 - The proposal will result in an adverse impact in a 100 year average recurrence interval (ARI) flood event on surrounding floodplain users, located at 41-45 Courallie Avenue; and
 - The proposed drainage culvert is contrary to the Council's current floodplain management practice.

The site and its context

- 4 The site is a battle-axe block, 4,575.70sqm in area, on the north-eastern side of Mandemar Avenue, Strathfield. The site has a frontage to Mandemar Avenue of approximately 6.31m. The site falls from south to north. This site is currently used for light industrial purposes.
- 5 To the west of the site is an existing drainage channel on Council's land.
- 6 The site's eastern boundary is the rear boundaries of the properties on the north-western side of Courallie Avenue, containing dwellings.

The proposal

- 7 The proposal is for three detached, three storey residential flat buildings containing 36 units and basement car park with 63 spaces.

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The proposal includes an enclosed drainage culvert, running the length of the site along the western boundary. The drainage culvert is 1.78m wide along the access handle to the site and 5m wide adjacent and to and north of Building A. The private open courtyards of ground floor units are located over the drainage culvert. The drainage culvert drains into Council's existing drainage channel to the west of the site.

Planning framework

- 9 The proposal is subject to the provisions of State Environmental Planning Policy No 65 – Design Quality of Residential Flat Buildings (SEPP 65) at cl 4(1)(a).
- 10 Consideration is to be given to the design quality of residential flat development, when evaluated in accordance with the design quality principles, at cl 30(2)(b) of SEPP 65 and the publication Residential Flat Design Code (RFDC) at cl 30(2)(c).
- 11 The RFDC supports the ten design quality principles identified in SEPP 65 and gives greater detail in how to achieve these principles in development proposals. The Council submits that the only relevant primary development control in the RFDC is building separation. For buildings up to four storeys/12m, there should be 12m between habitable rooms and balconies; 9m between habitable/balconies and non-habitable rooms; and 6m between non-habitable rooms.
- 12 The site is zoned R3 Medium Density Residential pursuant to the Strathfield Local Environment Plan 2012 (LEP 2012) and the proposal is permissible with consent. The objectives for the R3 zone are:
 - To provide for the housing needs of the community within a medium density residential environment.
 - To provide a variety of housing types within a medium density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- 13 Clause 4.6 Exceptions to development standards of LEP 2012 permits variations of the development standards.
- 14 The proposal is subject to the provisions of the *Strathfield Consolidated Development Control Plan 2005* (DCP 2005). Part C of DCP 2005, 'Multiple-Unit Housing', requires that Council not grant consent to a multiple-unit residential development unless it is satisfied that the development is unlikely to affect the amenity of existing residential development, at sub-section 2.1. The relevant objective for the density, bulk and scale of multiple-unit residential development at sub-section 2.2, is to establish appropriate building envelopes which allow flexibility in siting buildings. Sub-section 2.2 requires a minimum side setback of 4m. The relevant objective of sub-section 2.8, 'Privacy and security', is to ensure the siting and design of buildings provides visual privacy for residents and their neighbours in their dwellings and open space areas. The guidelines for sub-section 2.8 include the following:

Suitable screening shall be provided within developments when direct overlooking is likely from proposed dwellings to the private open space areas of adjacent existing dwellings, or to balcony or private open space areas of dwellings within the same development.

- 15 Part H of DCP 2005, 'Waste Management', requires, at Appendix 3, multi-unit dwellings less than 4 storeys, to provide the following:
- 1 x 240L MGB per two occupancies for general waste;
 - 1 x 240 L yellow lid MRB per two occupancies for recycling;
 - Clean Up Material Storage Room.
- 16 Part N of DCP 2005, 'Water Sensitive Urban Design', includes the objectives at 1.2 of (a) protecting and enhancing natural water systems (creeks and rivers etc) and (f) integrating stormwater management into the landscape so as to maximise the visual and recreational amenity of urban development.
- 17 The Council's Stormwater Management Code 1994 includes the following:
- 4.1 Adverse Impact and Controlling Site Runoff
- Development/building work must not cause an adverse impact on adjoining or any other properties. This includes preserving surface flow paths and not increasing water levels. Site discharges will need to be restricted to pre-development discharges using On-site Stormwater Detention (OSD) storages where required. Protection is to be provided for all rainfall events through to 100 years ARI.
- 4.17 Natural Watercourses and Open Channels
- The straightening, widening, lining or piping of open channels will require the creation of inlet structural and surface flow paths to convey all flows to the 100 year ARI standard. Additionally, emergency flow paths are required in case of obstruction. Depending upon channel conditions on properties adjacent to the site, inlet training and outlet scour controls will be required.
- Approval for enclosing or lining natural channels may be refused in areas where such work is not consistent with the character of the watercourse in the vicinity.

Public submissions

- 18 Four resident objectors provided evidence on site at the commencement of the conciliation conference on site on 23 October, 2014. Their objections to the proposal can be summarised as:
- The proposal would impact on the privacy of the dwellings to the east of the site fronting Courallie Avenue;
 - The proposal would result in additional traffic in Mandemar Avenue and future residents will park in the streets around the development; and
 - The proposal would overshadow the dwellings to the east of the site fronting Courallie Avenue.

Expert evidence

- 19 Expert evidence was provided on behalf of the Council by Ms Sophie Olsen (planning) and Mr Richard Dewar (flood engineering). Expert evidence was provided on behalf of the applicant by Mr Brett Daintree (planning) and Dr Brett Phillips (flood engineering).

Consideration

Exceedance of the height of buildings development standard

- 20 The Council does not raise a contention in relation to the height of the proposal.

21 The applicant provided a written request for an exception to the height of buildings development standard of 9.5m for the site (Daintree Associates dated 16 Dec 2014). According to the applicant's written request, it is unreasonable and unnecessary for the proposal to comply with the building height development standard, for the following reasons:

- The proposal exceeds the height of buildings development standard for the site as a result of Council's requirement that the proposal's habitable floor levels are above the 1:100 ARI flood level;
- The height of the proposal is compatible with development in the vicinity of the site;
- There are no adverse amenity impacts as a result of the height of the proposal; and
- The objectives of the height of buildings development standards are achieved, notwithstanding the non-compliance with the numerical control.

22 In order for development consent to be granted for a development that contravenes a development standard in LEP 2012, I must be satisfied that the proposal is consistent with the objectives of the development standard and the objectives for development within the zone (cl 4.6(4)(a)(ii) of LEP 2012) and that the applicant's written request has adequately addressed that compliance with the development standard is unreasonable or unnecessary in the circumstances (cl 4.6(3)(a) of LEP 2012) and that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) of LEP 2012).

23 The relevant objectives for the height of buildings, at sub-cl 4.3(1) of LEP 2012 is to ensure that development is of a height that is generally compatible with or which improves the appearance of the existing area, to encourage a consolidation pattern that leads to the optimum sustainable capacity height for the area and to achieve a diversity of small and large development options.

24 The written request seeking to justify the contravention of the building height development standard adequately addresses the matters required to be demonstrated in cl 4.6(3)(a) and (b) and the proposal is in the public interest because it is consistent with the objectives of the height of buildings development standard and the objectives for development within the R3 Medium Density Residential zone.

Privacy/overlooking

25 In Ms Olsen's view, the proposed ground floor elevated patios have an unacceptable impact on the visual privacy of the private open space of the properties to the east fronting Courallie Avenue.

26 I accept the agreement of the planning experts that as the adjoining sites fronting Courallie Avenue are zoned R3, it is likely that they will be redeveloped for medium density housing in the future. Ms Olsen is not concerned about the privacy of the existing development; however she is concerned about the privacy of future residential flat buildings on the sites fronting Courallie Avenue.

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Condition 9 is worded in the alternative, as follows (exhibit 10):

(a) Amended plans providing privacy screening, angled downward at 32 degrees to a height of 1.8m above finished floor level to the eastern elevation of the ground floor patios of units A2, A3, B2, B3 and C2, C3 shall be submitted to and approved by the Principal Certifying Authority prior to the issue of a Construction Certificate.

OR

(b) Amended plans showing a 2.5m high dividing fence of colourbond [sic] or timber pailing [sic] construction along the full length of the eastern boundary shall be submitted to and approved by the Principal Certifying Authority prior to the issue of a Construction Certificate.

28 Ms Olsen is content with either 9(a) or (b) of exhibit 10 being imposed on the consent. Mr Daintree says that condition 9(b) is preferable and should be changed to a fence 2m high. In Mr Daintree's opinion, the privacy screening proposed by condition 9(a) would unnecessarily enclose the patios and obstruct views of the landscaping in the 6m setback from the eastern boundary.

29 I am satisfied that the ground floor patios, at a maximum of 1.5m height above ground level, do not present an unacceptable visual privacy impact on the private open space of the existing or future development on the properties to the east of the site for the following reasons:

- The eastern side setback is 6m, which complies with the RFDC building separation between habitable rooms/balconies of development up to four storeys, by accommodating half of the required 12m separation between buildings on the site;
- The basement level is also setback 6m from the eastern side boundary, providing 6m of deep soil within the side setback for substantial landscaping which will aid in screening the proposal from the private open space of the properties to the east, particularly at the ground floor level;
- A 2.5m high fence on the boundary would unnecessarily impact on the amenity of the private open space of the properties fronting Courallie Avenue;
- The terraces on the eastern side of the upper two floors of the proposal, which present a greater threat to the visual privacy of the open space of the properties to the east of the site due to their height above ground level, have fixed louvres on the eastern side to prevent overlooking of the adjoining properties.

30 Condition 8 in Annexure A (being condition 9 in exhibit 10) is deleted from the conditions of consent, as a standard 1.8m high fence along the eastern boundary is acceptable and additional screening of the patios is not required.

Waste management

31 I accept the agreement of the planning experts agree that there is sufficient space provided in the basement to store the requisite number of bins and that the proposal complies with the waste management requirements of DCP 2005.

32 The applicant proposes that the garbage is to be collected by a private contractor. The proposal provides 2.6m high clearance at the basement entry and sweep paths for a truck commensurate with the height clearance provided. The Council waste service truck requires 3.4m clearance at the basement entry to access the bins on site.

- 33 According to Ms Olsen, there are no residential flat buildings within the Strathfield Municipality serviced by a private contractor for waste collection. She is concerned that the proposal will set a precedent for the use of private contractors and that this will result in garbage being collected on different days of the week when compared to the Council collection days and may cause traffic impacts in the locality.
- 34 I do not accept that the engagement of a private contractor for waste collection will set an undesirable precedent. The proverbial horse had bolted on the issue of private contracting for waste collection in residential flat buildings.
- 35 I accept the applicant's submission that the site, being a battle-axe block in a cul-de-sac, coupled with the scale of the proposal, makes on road collection of bins both unviable and undesirable. I accept that increasing the floor to ceiling dimension in the basement to 3.4m to accommodate Council's existing garbage trucks would have detrimental implications for either the height and bulk or the amount of excavation of the proposal. I am satisfied that the applicant's proposal to engage a private contractor for waste collection is an acceptable solution.

Flooding and overland flow

- 36 The 100 year ARI flood event, as modelled, extends across the site and across part of Courallie Avenue, including the properties to the north of 61 Courallie Avenue (exhibit G, Cardno letter dated 17.12.14, Figure 6B). The post development modelling of the 100 year ARI flood event shows a decrease in the water level of between 0.01 and 0.2m in the vicinity of the site and an increase in water level up to 0.02m on parts of 41-45 Courallie Avenue (exhibit G, Cardno letter dated 17.12.14, Figure 23B).
- 37 According to Mr Dewar, an increase of 0.02m or even up to 0.05m is small and unlikely to make any significant difference to the risk to life or flood damage in the 1% annual exceedance probability (AEP) event, however the cumulative effect of development on the floodplain may create an issue in the future. In his view, the impact of the proposal should be confined to a maximum 0.01m increase in water level in the 1% AEP event, beyond the site (exhibit 3, par 4). To this end, condition 6 (exhibit 10) has been included in the conditions of consent, requiring that the proposal shall not result in adverse flooding outside the development site beyond 0.01m during the 1% AEP event.
- 38 The applicant accepts the imposition of condition 6 (exhibit 10) on the consent. However, the Council submits that this condition requires the proposal to be adjusted so that the post development modelling does not result in an area of increased water levels outside the site and that such an adjustment of the proposal enlivens the Mison principle (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734). In *Mison*, the Court of Appeal held that if a condition imposed on development consent has the effect of leaving an important aspect of the development for a later decision, which may alter the proposed development in a fundamental respect, then the consent is not consent to the application.

According to Dr Phillips and Dr Martens, it is likely that a subtle adjustment to the proposal (such as a low barrier inside the boundary fence, or increasing the ground level of the development at the northern end of the site up to 150mm, or modifying the dimensions of the drainage culvert) could be used to “tweak” the model and eliminate the small area of increase in water level outside the site during the 1% AEP event, to comply with condition 6. Mr Pickles submits that such an adjustment constitutes design development and does not leave an important aspect of the proposal undecided.

- 40 I accept Dr Phillips and Dr Martens evidence that the condition will be satisfied by a subtle adjustment to the proposal during the design development stage. The imposition of the condition, which has been reworded and agreed upon by the flood engineering experts, satisfies Council’s contention regarding flooding and overland flow and does not enliven the Mison principle. The revised condition, agreed upon by the flood engineering experts, states (condition 5 in Annexure A):

Supplementary flood modelling shall be undertaken prior to the issue of a Construction Certificate and approved by the suitably qualified and registered Hydrologist and submitted to the Principal Certifying Authority, and shall demonstrate that there is no adverse impact, defined as increase in the 100yr ARI flood level of greater than 0.01m, on any adjoining privately owned land.

The physical works required to achieve this objective shall be wholly within the subject land and not require any changes to building footprints or the built form or any changes to the proposed surface levels of the site, up to 100mm from the levels shown on the approved plans.

Changes in site levels shall be surveyed and works as executed drawings submitted to Council prior to the Occupation Certificate.

Drainage culvert

- 41 Mr Dewar’s view is that the proposed drainage culvert constitutes a retro approach to drainage and is inconsistent with current drainage standards. Mr Dewar describes the drainage culvert as follows (exhibit 3, p 3):

A relatively complex and costly secondary drainage channel whose sole purpose is to provide approval for a single development on the floodplain without any other hydraulic benefit to surrounding floodplain users and with no other option being reported.

- 42 According to Mr Dewar, the proposed drainage culvert is not consistent with the water sensitive urban design principles in Part N of DCP 2005 and Council’s Stormwater Management Code at 4.17 (quoted above at par 17). In his view, the proposal could include a drainage culvert for the length of the access handle; however the rest of the site should have a different, environmentally sensitive solution not requiring concrete, such as grass covering and porous pavers.
- 43 I accept Mr Pickles submission that the site is not part of a natural water system such as a creek or river, other than it lies within the floodplain, pursuant to Part N of DCP 2005 and 4.17 of Council’s Stormwater Management Code 1994. There is not a definition for ‘natural watercourse’ in the DCP 2005 or the code. The dictionary of LEP 2012 includes a definition of ‘watercourse’, as follows:

Watercourse means any river, creek, stream or chain of ponds, whether artificially modified or not, in which water usually flows, either continuously or intermittently, in a defined bed or channel, but does not include a waterbody (artificial).

- 44 Objective (a) of 1.2, Part N, DCP 2005 is not relevant to the proposal as it deals specifically with natural water systems. Part N of DCP 2005 deals broadly with water conservation and stormwater quality and there is nothing in Part N to suggest that a privately constructed drainage culvert is not consistent with any water sensitive urban design principles. On that basis, I accept Mr Pickles submission that Mr Dewar has a philosophical objection to the proposed drainage culvert.
- 45 The drainage culvert, as a floodplain management measure, does not offend any of Council's controls and policies and successfully deals with the flooding issue (notwithstanding the subtle adjustment required to comply with condition 5 in Annexure A), so it follows that the drainage culvert is acceptable.

Conclusion

- 46 I am satisfied that the ground floor patios, at a maximum of 1.5m height above ground level, do not present an unacceptable visual privacy impact on the private open space of the existing or future development on the properties to the east of the site as a result of the adequate side setback of the proposal and the opportunity for deep soil landscaping within the side setback. Condition 8 is therefore deleted from the conditions of consent at Annexure A.
- 47 I do not accept that the engagement of a private contractor for waste collection will set an undesirable precedent and I am satisfied that it is an acceptable solution.
- 48 I accept Dr Phillips and Dr Martens evidence that condition 5 of Annexure A will be satisfied by a subtle adjustment to the proposal during the design development stage and that the subtle adjustment is adequately contained by the reworded and agreed condition 5. The imposition of condition 5 satisfies Council's contention regarding flooding and overland flow.
- 49 The drainage culvert, as a floodplain management measure, is acceptable as it does not offend any of Council's controls and policies and successfully deals with the flooding issue (notwithstanding the subtle adjustment required to comply with condition 5 in Annexure A).

Orders

- 50 The orders of the Court are:
- (1) The appeal is upheld.
 - (2) Development Application No. 2013/052 for the demolition of existing structures, remediation works and construction of three detached three storey residential flat buildings containing 36 units, basement parking and construction of a drainage culvert, is approved, subject to the conditions of consent at Annexure A.
 - (3) The exhibits, other than exhibits 1 and A, are returned.

Susan O'Neill**Commissioner of the Court**

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Decision last updated: 30 April 2015