



Land and Environment Court
New South Wales

Case Name: Holy Apostolic Catholic Assyrian Church Of The East Property Trust v Fairfield City Council

Medium Neutral Citation: [2018] NSWLEC 1521

Hearing Date(s): 5 – 6, 13 September 2018

Date of Orders: 5 October 2018

Decision Date: 5 October 2018

Jurisdiction: Class 1

Before: Dixon SC

Decision: The orders of the Court are:
(1) The appeal is dismissed;
(2) That the exhibits be returned, except for Exhibits B and 3.

Catchwords: APPEAL – development application for place of worship – AMENITY IMPACTS – Rural Residential zone – control of the number of attendees at scheduled services – PLAN OF MANAGEMENT – adequacy of POM – complexity of operational controls – suitability of a pre-registration requirement for attendance at any particular service – use of a Church APP – refusal of entry to attendees – queuing and traffic impacts

Legislation Cited: Environmental Planning and Assessment Act 1979
Fairfield Local Environmental Plan 2013

Cases Cited: Jonah Pty Ltd v Pittwater Council (2006) 144 LGERA 408

Category: Principal judgment

Parties: Holy Apostolic Catholic Assyrian Church of The East Property Trust (Applicant)

Fairfield City Council (Respondent)

Representation:

Counsel:

P McEwen SC with S Nash (Applicant)

Solicitors:

David Legal (Applicant)

A Seton, Marsdens Law Group (Respondent)

File Number(s):

2017/186578

Publication Restriction:

No

JUDGMENT

Background

- 1 At the head of the cul-de-sac of Kosovich Close, Cecil Park at Lot 2134 DP 1133688 is the St Peter and Paul Parish Church (the Church). It is one of four Parish Churches in western Sydney which belong to the Holy Apostolic Catholic Assyrian Church of the East. The Church and its associated Assembly hall were built in 2011 pursuant to a conditional development consent (DA No 776.1/2009) granted by the Fairfield City Council on 16 March 2010.
- 2 When first proposed, it was expected that the Church would accommodate a relatively small number of parishioners. Therefore, the original development consent issued by the Council in 2010 included a condition which limited the number of parishioners attending the Church at one time to 80 people. It was also stipulated by a condition of the consent that the Church and Assembly hall could not be used concurrently.
- 3 In the seven years following, the Church's membership and attendees have grown significantly. Under its current onsite parking configuration, the Church cannot accommodate the parking demands which arise when all of the Church's parishioners attend Mass at the same time. The Church concedes that this has led to an untenable situation where extensive parking has occurred in Kosovich Place and has resulted in unreasonable interference with the rural residential environment within which the Church is located.
- 4 In an effort to address this situation, the Church has lodged a new development application seeking the concurrent use of the Church and the

Assembly hall (in association with a single activity i.e. only Sunday Mass or wedding / baptism) to accommodate the increase in parishioner numbers. The background to the application, the statutory controls and the issues are set out in the Council's Statement of Facts and Contentions filed in this Class 1 appeal on 24 July 2018. I do not propose to repeat that detail, which I have read, save to note that the contentions identified have been reduced to a dispute about the applicant's ability to control the number of attendees to the site and the associated car parking through a Plan of Management (POM) - albeit one that incorporates a pre-registration system via a Church APP.

Conclusion

- 5 For the reasons that follow, I have decided to refuse the development application and dismiss the appeal. I formed this view because I am not satisfied that the POM filed with the Court on 13 September 2018 will control the number of people attempting to enter this site or park in the street. Nor am I satisfied as to how the site will be operated in order to ensure that there will be no more than 595 people at the site in any consecutive seven-day period. After a consideration of evidence, in the light of the objectives of the RU4 Primary Production Small Lots zone and the concerns expressed by Mr Grech, I do not believe that that an approval of this proposal is in the public interest.

The Proposal

- 6 The application seeks consent to increase the parishioner numbers at the site to 216 for Mass services or "Regular events", and up to 240 people (up to eight (8) times each year) for "Special events". To achieve these Mass attendances will be evenly split over multiple Mass services (morning and afternoon) for regular Sundays and three mass services on Christmas and Easter.
- 7 "Regular events" include regular and re-occurring activities associated with the church and include but are not limited to:
- regular weekly Sunday Mass;
 - Sacrament such as Confession, Baptism and Marriage;
 - Fellowship meetings;
 - Bible study groups;
 - Youth group meetings; and

- Prayer group meetings.

- 8 “Special events” include large, pre-organised events and are proposed to be limited to eight (8) times a year. They include special religious celebrations such as Christmas and Easter, as well as, talks and/or mass being given by local or international dignitaries. Apart from the Christmas and Easter services, when the services will occur during the night until 2am, the other special events are required to comply with the hours of operation as nominated in the draft condition 208 of the agreed conditions of consent. Condition 208 reads as follows:

“Hours of Operation

The approved hours of operation for the church building and assembly hall are:

Date	Time
Monday to Thursday	6:00pm to 9:30pm
Friday	8:00am to 9:30pm
Saturday	9:00am to 9:30pm
Sunday	8:00am to 9:30pm

- Notwithstanding the above, church activities are permitted on the site for the observance of Christmas and Easter. These services shall be completed and the site vacated by 2:00am.
- All staff and clergy members must vacate the premises and the immediate vicinity of the premises by 10:00pm.”

Pre-registration system

- 9 To distribute the increase in attendees over the various services, the Church proposes to introduce a pre-registration system (including via a Church APP) to manage the maximum number of parishioners permitted on the site at any one time. The pre-registration system is outlined in a POM which is to be

incorporated as a condition of consent. The workability of this arrangement is clearly dependent upon strict compliance with the terms of the POM and the pre-registration system therein.

- 10 In simple terms, under the pre-registration system, parishioners will be presented with three ways to register, being:
 - (1) assisted electronic registration at the church;
 - (2) electronic registration by a free app available on iOS and android platforms; and
 - (3) Internet/Website registration.
- 11 According to the POM, registration may occur for Mass services up to, but not greater than, three weeks in advance and up to, but not less than, one hour in advance. Protocols and other requirements concerning pre-registration are set out in the POM. The POM is structured to provide separate requirements for certain defined events, as earlier outlined and referred to as “Regular events” and “Special events”.
- 12 The final draft of the POM was submitted to the Court on 13 September 2018 and after the conclusion of the hearing. I allowed this because it was apparent that the earlier versions of the POMs referred to at the hearing were deficient of detail and unworkable. And, in order not to prejudice the Council, I allowed it to respond to the applicant’s final version of the POM, which they did by the submission of additional written submissions dated 7 September 2018. (I will deal with the Council’s response shortly but later).

Car parking

- 13 Assuming that the number of attendees at the Church events can be limited to a maximum of 240 people, the parties’ traffic experts agree that this will generate a parking requirement of approximately 109 onsite car parking spaces.
- 14 Onsite parking at the property is presently limited to 59 spaces. The proposal is for the construction of an additional 50 car parking spaces onsite. This will result in a total of 107 on-site car parking spaces on the grounds of the Church. Eleven (11) of these car parking spaces will be in a stacked arrangement. The proposed parking layout can be understood from the plan, Figure 1, in the Joint

Stacked Parking Spaces to be Linemarked and Signposted in Accordance with Clause 2.5.3

A

B

FOR LANDSCAPE WORKS OUTSIDE PROPOSED NEW WORKS REFER TO LPDA 09-366 /IC

EXISTING CARPARK

TURF

MAIN ENTRY

existing church

ALTERED DRIVEWAY PLANTING TO INCLUDE:

- 12 Murray
- 3 Westringia
- 8 D. 'Tas Red'

PROPOSED CARPARK

PROPOSED DRIVEWAY

RELOCATED

FRONT ENTRY PLANTING TO INCLUDE:

- 2 Fraxinus
- 4 Pyrus
- 5 Murray
- 18 Westringia
- 15 Cornus
- 16 D. 'Tas Red'
- 45 D. 'Little Jess'
- 25 Trachelospermum

ALTERED DRIVEWAY PLANTING TO INCLUDE:

- 3 Westringia
- 3 Cornus
- 9 D. 'Tas Red'

KOSOVICH PLACE

GATE

FOR LANDSCAPE WORKS OUTSIDE

10"

Onsite Sewerage management system

15 The number of parishioners attending the Mass services and Special events is also constrained by the onsite sewerage infrastructure. While there is no issue about the acceptability of the proposed waste water management system, it is agreed that there is no opportunity to extend the existing irrigation area beyond 700m. The infrastructure area is constrained by the requirement for a 40m buffer to the adjoining Ropes Creek to the north and west and the southern boundary defined by an open swale. To overcome this, the parties' waste water experts have agreed in the joint report, subject to the installation of a 10,000L balancing tank with flow metering (in accord with the Harris Environmental Consulting Report 2017), that the site can accommodate 595 people each 7 days' cycle. This restriction of use then feeds into the number of events held at

the site within any seven-day period. Again, the management and restriction of the number of attendees at any one time, associated with the use and the limitation of the proposed sewerage infrastructure is dependent upon the terms and workability of the POM.

The Council's position

16 The Council is unwavering in its assessment that the POM cannot control how many people attempt to enter the site or park in the street. In support of its case the Council identifies the following deficiencies with the version of the POM now relied upon and dated 13 September 2018:

- (1) The reference to Section 11 of the last sentence of Section 4 is incorrect;
- (2) The reference to 495 people in Section 6 is incorrect. It shall be not exceed 595 people;
- (3) Section 7 outlines how the pre-registration requirements will be communicated to the parishioners; however, there is no information about how these requirements will be communicated to those attending special events, such as weddings, baptisms etc;
- (4) Section 8 outlines the technical requirements to the pre-registration system – however, the system outlined is very complicated. For example, if a person does not have a mobile phone the POM invites them to register via a friend's or relative's mobile phone. However, it is unclear how this person will be able to confirm at the site that they have pre-registered to attend the church service/event when they do not have the mobile phone with them. It is likely to cause delays at the entry point and exacerbate queuing into the street;
- (5) Section 10.2 – does not include operating hours for the Assembly hall ;
- (6) Section 10.4.1 proposes that a designated person is to conduct a head count of parishioners once they are seated. However, it is unclear why this would occur within the church and not before. This requirement is only proposed for the Sunday mass service and no other event;
- (7) Section 10.51 – the parking attendants are to rely on lists of people that have pre-registered. The process of identifying and confirming the pre-registered or non-pre-registered people is likely to be a lengthy process (the 216 people during normal events, the 240 people during special events) and is likely to impact on the amenity of neighbours. Commencement of the parking attendants' responsibilities and activities 60 minutes before the commencement of regular Mass services is insufficient;
- (8) Section 10.5.1 – Appendix 2 sets out the location of checking points by parking attendants on the public road, the pre-registration parishioners. This activity will be on a public road and is likely that they will require a

Roads Act approval. Secondly, cars are likely to be queuing along the road whilst waiting to be checked. Thirdly, other road users and not associated with the church activity will be prevented from using the public road. Conducting this activity within a cul-de-sac area is not considered acceptable for these reasons;

- (9) Section 10.52 allows on the spot registration – how will this encourage parishioners to pre-register? If the parking area is full this may encourage parishioners to park on the street.
- (10) Section 10.5.4 – proposed corrective action and enforcement measures for on – street parking does not propose any effective measures to discourage on street parking.
- (11) Notably, the POM fails to provide for any acceptable method to regulate the number of persons attending for weddings or other events such as baptisms;
- (12) Under Section 10 – subsection numbering is incorrect. This needs to be fixed and updated as some of the sections are referred to in Section 11.4 and in Section 11.7;
- (13) The reference to “habitual exceedance” in the second paragraph of Section 10.6 is not certain in terms of application or enforcement of the POM;
- (14) Section 11.5 proposes a neighbour contact officer to be nominated under the special events requirements. This should be a general requirement of the POM for all activities on-site and not just special events;
- (15) Section 11.10.1.1 does not provide any effective measures to prevent parishioners from parking on the street;
- (16) Section 12 does not propose an effective complaints handling process. There is no information of who or at what radius letters will be sent to residents, how often this will occur, no details of timeframes of when complaints will be addressed, how complaints will be resolved, who will be in charge of dealing with complaints and no follow-up procedures;
- (17) Section 13 foreshadows potential measures to deal with the operation and amenity of residents as part of the review of the POM however it is unclear what the purpose of this is. Further, the POM review process and Section 13 does not seem to contemplate approval being sought from the Council for any change to the operation or details in the POM. It is essential that the POM is not changed without the approval of the Council;
- (18) Appendix 3 the sample advisory letter to be sent to residents refers to the operation of a “Temple” and not a church. It also asserts that:

“in the event that an issue cannot be directly resolved, we will keep a record of your concerns and send details to Council so that further assistance might be given in satisfactorily resolving the issue.”

Requiring Council to assist in resolving concerns is not an acceptable or satisfactory arrangement to manage the operations of the site;

- (19) There are no details about how the operation of the site will not go beyond 595 parishioners in any consecutive seven-day period and how this restriction will be enforced, having regard to all other measures proposed in the POM.
- 17 Relying on the evidence of its planner, Mr Karl Berzins, the Council submits that the pre-registration system as proposed is unlikely to effectively restrict and manage the maximum number of parishioners permitted on the site. In that regard, it submits that the complexity of the system will make it difficult to administer and implement. Furthermore, no examples were given of where this arrangement has been successfully implemented for a place of public worship. It is not unreasonable to assume that those people who are not aware of the pre-registration arrangements, in particular, special events such as weddings and baptisms are likely to park on the street once the car park is full. The POM does not provide any satisfactory measures to prevent this from occurring to avoid amenity impacts in this rural residential area.
- 18 The pre-registration system will require checking points by parking attendants standing on the public road which is not only unsafe but ultimately externalises the operation of the use and the impacts on the amenity of the adjoining neighbours. There is no satisfactory evidence before the Court to counter the proposition that the use of checking points to manage access to the site will not result in queuing on the street, or prevent other road users from accessing the public road during this time. Put simply the arrangement is unworkable. The prospect of the additional parishioners seeking to access the site after having been denied entry trying to leave the cul de sac will be to say the least difficult – guided by traffic devices such as “witches’ hats” in order to avoid parked cars and other vehicles is not acceptable traffic management or the basis to grant consent.
- 19 Furthermore, the POM does not provide a proper complaint handling process or procedures to effectively deal with any issues that may arise by neighbours regarding the operation of the site. In short, there are no details about how the complaints will be dealt with, timeframes to deal with these issues or any

follow-up procedures. Requiring Council to assist resolve concerns is just not acceptable or a satisfactory basis for the approval of the operation and management of this proposal.

- 20 Furthermore, the POM simply does not contemplate or demonstrate how the number of persons attending the site will be managed or restricted to ensure that the on-site sewage management system capacity of 595 people in any consecutive seven-day period is not exceeded.
- 21 Although permissible with consent in the RU4 Primary Production Small Lots zone, the Council contends on the evidence that the traffic impacts generated by this proposal, on the adjoining residential properties will be problematic, particularly for the most affected property at 22 - 30 Kosovich Place (adjoining at the east). And, while sufficient parking was made available onsite for the 80 approved parishioners, when that number is exceeded, experience has demonstrated that the parking overflows onto the street and, more often than not, results in the whole street parked up with cars which have been identified as being connected with the church use. Mr Grech, the adjoining neighbour, confirmed as much during his evidence at the commencement of the hearing when he voiced his continuing frustration with the current practice of Church associated parking outside his property and within the Council verge. Whilst past breaches of a development consent are not relevant considerations in this appeal (*Jonah Pty Limited v Pittwater Council* (2006) 144 LGERA 408), the impacts of past breaches are able to be considered. In that regard, the photographs tendered and the evidence by Mr Grech demonstrate the unacceptable impact of on street parking on his family's residential amenity from the use of the site as a place of worship where the number of attendees exceed 240 people and traffic is not managed properly.
- 22 For all these reasons, the Council submits that the application (as amended) has failed to satisfactorily demonstrate that the use of the site as a place of public worship, in the manner proposed, is appropriate for this site, having regard to the zone objectives and other relevant considerations under s 4.15 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The POM cannot control how many people attend the site or park in the street. Moreover,

it places an unrealistic operational regime on the operators of the Church which raises doubts about the ongoing implementation of the POM.

The applicant's position

- 23 The applicant is confident that its POM is workable and will satisfactorily control the number of attendees to the site. The applicant relies on the oral and written evidence of its planner, Mr David Haskew who drafted the POM. It also relies on the traffic evidence of Mr Thomas Heal given in Court and in the joint report (Exhibit 9).
- 24 Whilst novel, the Applicant contends that the APP will work and that the terms of the POM will be adhered to strictly because the Church will ensure compliance. Despite large numbers to the site the sewerage system has worked and with the new tank will no doubt continue to service the numbers proposed in this application.

Consideration

- 25 The site is located within the RU4 Primary Production Small Lots zone under the Fairfield Local Environmental Plan 2013. It is surrounded by development which consists of larger lot rural residential properties. And, despite the Church's current ownership of several parcels of adjoining land, it was apparent at the Court view that there are still residential uses proximate to the proposed use which must be considered in my assessment of this DA.
- 26 In undertaking that weighted assessment in accord with the EPA Act, the objectives of the zone are a relevant consideration. They provide:
- To enable sustainable primary industry and other compatible land uses.
 - To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.
 - To minimise conflict between land uses within this zone and land uses within adjoining zones.
 - To ensure that development is sympathetic to the rural environment and minimises risks from natural and man-made hazards.
- 27 With those objectives in mind, and based on my observations at the site view and the other evidence, I am very concerned about the adverse impacts of this application on the amenity of the residents nearby, particularly Mr Grech.

Appreciating the problems with the latest version of the POM, as identified by the Council and outlined above, I cannot accept that the impacts arising from the development in terms of the number of attendees, related traffic and off street parking will be satisfactorily controlled. While the POM discusses the management of car parking, including stacked spaces within the parking Area A, associated with Sunday masses and special events, the management of these events is not clear to me. I accept Council's criticisms of the terms of the POM. It is complicated and places an unrealistic burden on the Church leaders. Needless to say my concern is heightened when I think about the potential chaos which may reign for the eight (8) scheduled larger events when there is a substantial increase in attendance and increased parking demands.

- 28 The POM refers to the introduction of a shuttle bus service or expanding the car park and effluent disposal capabilities of the Church into the adjoining land in the future – if the measures as presently outlined are not effective (POM p27). However, an approval of this DA is not a test run. I must be satisfied before the issue of development consent that the POM can control the number of attendees in accord with the terms of the conditions and satisfactorily address any anticipated adverse traffic and amenity impacts for neighbouring properties. Based on the evidence, I am not confident of that outcome.
- 29 Accordingly, it is my considered opinion that the POM is inadequate and unworkable in its present form. I do not believe that it will satisfactorily address the likely adverse impacts on the adjoining residents' amenity. Furthermore, I find the development is contrary to the zone objectives in that it does not “minimise conflict between land uses within this zone” which, as I said, is a relevant consideration and, therefore an approval of this DA is not in the public interest.
- 30 Additionally, I am not confident that the proposed onsite sewerage treatment system will be able to cope with the numbers of attendees in any seven-day period, as I am unclear as to how the use of the site will be restricted, as required, to the 595 people in any seven-day period. While the applicant says that the existing sewerage system has worked effectively to date despite large

numbers of attendees – that appears to have been no more than good fortune and clearly cannot be basis on which to approve this DA.

Orders

31 The orders of the Court are:

- (1) The appeal is dismissed;
- (2) That the exhibits be returned, except for Exhibits B and 3.

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S Dixon

Senior Commissioner of the Court

Amendments

10 October 2018 - Correction to representation.

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