

Land and Environment Court

New South Wales

Case Name: Fetherston v Wollongong City Council

Medium Neutral Citation: [2016] NSWLEC 1527

Hearing Date(s): 2,18 August 2016, 5 23 September 2016, 7 October 2016

Date of Orders: 9 November 2016

Decision Date: 9 November 2016

Jurisdiction: Class 1

Before: Brown C

Decision:

1. The appeal is upheld.
2. Development consent is granted to Development Application No. DA2014/1065 for an attached dual occupancy development at Lot 22 DP 1163490 otherwise known as 4 Kallaroo Avenue, Stanwell Park, subject to the conditions set out in annexure "A".
3. There be no orders for costs.
4. The exhibits are returned with the exception of exhibits A and 101.

Catchwords: DEVELOPMENT APPLICATION: construction of a dual occupancy development – council prepared to enter into consent orders – intervener granted leave to provide evidence and cross-examine on impact of coastal processes on flood risk and coastal erosion and inundation

Legislation Cited: Environmental Planning and Assessment Act 1979
Wollongong Local Environmental Plan 2009

Category: Principal judgment

Parties: Adrian Fetherston (Applicant)
Wollongong City Council (Respondent)

Michelle Carr (Intervener)

Representation: Counsel:
Ms A Pearman, barrister (Applicant)
Mr J Reilly, solicitor (Respondent)
Ms H Irish, barrister (Intervener)

Solicitors:
Michael Mantei Planning Law Solutions (Applicant)
Wollongong City Council (Respondent)
Swaab Lawyers (Intervener)

File Number(s): 2016/152821

Publication Restriction: No

JUDGMENT

- 1 This is an appeal against the refusal of DA 2014/ for the erection of a dual occupancy development on land known as 4 Kallaroo Avenue Stanwell Park NSW (the site).
- 2 On 23 July 2016, Registrar Gray made the following orders in relation to the appeal:
 - (1) Pursuant to s 38(2) of the Land and Environment Court Act 1979, leave is granted to Michelle Carr to make submissions and instruct Mr Daniel Martens to provide an expert report to the Court in relation to the site-specific impact of coastal processes on flood risk and coastal erosion and inundation.
 - (2) Any expert report prepared by Mr Daniel Martens in accordance with order 1 above is to be filed and served by 1 July 2016.
 - (3) Any individual expert report in response is to be filed and served by 15 July 2016.
 - (4) If individual expert reports are filed in accordance with orders (2) and (3) above, the experts are to confer and file and serve a joint report by 25 July 2016.
 - (5) The exhibits to the affidavits of Mr Debnam sworn 25 May 2016 and Mr Shaw sworn 4 May 2016 be returned.
- 3 The council relied on an Amended Statement of Facts and Contentions that identified the following areas of dispute:
 - (1) unacceptable impacts on adjoining properties and the locality, which includes the coastal zone (Contention 1),
 - (2) site not suitable for the proposed development (Contention 2),

- (3) inconsistent with objectives of cl 5.5 within the coastal zone, as specified by LEP 2009 (Contention 3),
- (4) inconsistent with DCP 2009 (Contention 4), and
- (5) unacceptable impact on views from adjoining properties (Contention 5)

4 The appeal was subject to mandatory conciliation on 02 August 2016 under s 34AA of the *Land and Environment Court Act 1979*. During the conciliation, alternate designs were discussed to address the concerns raised by the council. The legal representative of the intervener, Mr Shaw was also invited to participate in the discussions. Following the discussions, a potential design was formulated that could potentially address the concerns of the council. The council sought revised plans to ensure that the design that was discussed at the mandatory conciliation on 02 August 2016 was responsive to all the contentions raised by the council.

5 The amendments to the original application (the amended application) can be summarised as:

- reduction in overall finished height of the building from RL 16.63 to RL 16.14 and changes to the roof line,
- changes to the front setbacks to Kallaroo Avenue,
- various amendments to the internal configuration of the units,
- articulation to the southern wall and amendments to the number and configuration of windows along that elevation,
- minor amendments to fenestration on the western elevation to reflect the internal redesign,
- minor amendments to fenestration on the eastern elevation,
- northern elevation has been provided with articulation and changes to fenestration,
- amendments to the size of the first floor balconies, resulting in an overall reduction to the size of Unit 1 balcony, and an increase in size to Unit 2 balcony,
- changes to the configuration and orientation of Unit 2 garage, which include the relocation of the garage doors to the southern elevation, relocation of the visitor parking space from between the units to the front of Unit 2, and
- reduction in the area of hard stand previously required for manoeuvring in the north eastern corner of the site and a commensurate increase in landscaping within this area

- 6 Following the preparation and assessment, the council accepted that the amended application addressed all the matters previously raised by the council. The council sought to have the appeal dealt with by way of consent orders. As no agreement was reached, in the terms required by s 34AA, the conciliation conference was terminated on 23 September 2016 pursuant to s 34AA(2)(b), and the proceedings dealt with on 7 October 2016 pursuant to s 34AA(2) b(i) and on the basis of what occurred at the conciliation conference pursuant to s 34AA(2)(b)(ii).

The site and locality

- 7 The site is Lot 22 in DP 1163490 and is currently vacant. It is generally rectangular in shape, and has a frontage of 24.32 m to Kallaroo Avenue, side boundaries of 37.216 m and 36.979 m and an area of 836.9 sq m. It slopes from the south western corner to the north eastern corner. The site is located at the bottom and the end of Kallaroo Avenue and is highly visible from Stanwell Park beach.
- 8 The site was created via the subdivision of 51 Lower Coast Road Stanwell Park and both lots are currently in the same ownership. Part of the subdivision approval was a realigned watercourse running adjacent to the western (rear) and northern boundaries of the site.
- 9 The properties on the eastern side of Kallaroo Avenue have ocean frontage. There has been some replacement of older housing stock on this side of Kallaroo Avenue with multi-level dwellings of contemporary design. The land directly opposite and to the north east of the site incorporates Stanwell Park beach and lagoon.

Relevant planning controls

- 10 The site is within Zone R2 Low Density Residential under *Wollongong Local Environmental Plan 2009* (WLEP 2009). The proposed development is permissible with consent in this zone.
- 11 Clause 4.3, together with the Height of Buildings Map, limits building height to a maximum of 9 m on the site. The amended application satisfies this requirement.

- 12 Clause 4.4, together with the Floor Space Ratio Map, limits the maximum floor space ratio (FSR) permitted on the site. The maximum FSR for the site is 0.5:1. The amended application satisfies this requirement.
- 13 Clause 5.5 is headed "Development within the coastal zone" and requires that development consent must not be granted for development on land unless the consent authority is satisfied concerning the matters identified at that clause.
- 14 Clause 7.3 relates to the flood planning area and applies to the site as it is mapped as being flood prone land.
- 15 *Wollongong Development Control Plan 2009* (DCP 2009) applies. Chapter B1 - Residential Development contains residential development controls including, dual occupancy developments. Section 4 provides general development controls which apply to the erection of all dual occupancy developments. Chapter D1 - Character Statements identifies the existing character and desired future character for each particular suburb. Chapter E13 Floodplain Management provides council's requirements for development upon flood liable land and applies to the site as it is identified as flood prone land and Chapter E14 - Stormwater Management outlines council's requirements for stormwater drainage design and onsite stormwater detention for all developments.

Consent orders

- 16 Prior to the Court entering into consent orders, the Court's *Practice Note Class 1 Development Appeals* (the Practice Note) relevantly provides [at 36]:
 36. Any application for consent final orders in development appeals will be listed before the Court for determination. The parties will be required to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to grant the consent or approval having regard to the whole of the relevant circumstances, including the proposed conditions. The consent authority will be required to demonstrate that relevant statutory provisions have been complied with and that any objection by any person has been properly taken into account.
- 17 Additionally, the consent authority will be required to demonstrate that it has given reasonable notice to all persons who objected to the proposal of the following:
 - (1) the content of the proposed orders (including the proposed conditions of consent);

- (2) the date of the hearing by the Court to consider making the proposed consent orders; and
- (3) the opportunity for any such person to be heard, or that, in the circumstances of the case, notification is not necessary.

18 In summary, the Practice Note requires:

- (1) evidence to show that approval is lawful and appropriate including whether any statutory provisions have been complied with,
- (2) whether any objection has properly been taken into account, and
- (3) whether reasonable notice has been given to all persons who objected to the proposal, the date of the hearing and the opportunity to be heard at the hearing.

19 In response, the council provided a further statement (Exhibit 103) to address the Practice Note requirement that approval is lawful and appropriate and whether any objection has properly been taken into account. Exhibit 103 addresses each of the contentions and states:

Unacceptable impacts on adjoining properties and the locality, which includes the coastal zone [Contention 1]:

The building design has been amended such that additional articulation has been provided along the northern and southern elevations to reduce the bulk and improve the built form design. The garage doors for proposed Unit 2 have been relocated away from the facade of the proposal, thus reducing the impacts on the streetscape arising previously from the dominance of garage doors. This has also enabled redesign of the visitor parking space to a more appropriate location on site, with an associated reduction in concrete platform required for manoeuvring. As such, the north eastern corner of the site is now provided with additional landscaping which assists in screening the proposal and reducing its visual impact when viewed from the adjacent foreshore area.

Council accepts that the Contention raised with respect to impact on adjoining properties and the locality is now satisfied.

Site not suitable for the proposed development [Contention 2]:

There have been significant amendments to the proposal specifically in relation to the relocation of the garage doors for Unit 2, the location of the visitor parking area and the design of the driveway. Egress from the site now relies on manoeuvring both on the site and on Kallaroo Avenue to enable vehicles safe egress away from the site. This in turn has allowed the driveway hardstand to be reduced in the north eastern corner of the site, whilst maintaining the provision of visitor parking on the site. The substantial landscaped area now proposed for the north eastern corner of the site is considered to provide sufficient landscape softening for both the driveway hardstand area and the elevated sub-floor area of the proposal.

With regard to the gradient of Kallaroo Ave and concerns for construction traffic it is noted that the road is a public road and a number of new

developments and alterations in recent times would have required similar construction traffic management considerations.

Council accepts that the Contention raised with regard to site suitability is now satisfied.

Proposal not consistent with objectives of Clause 5.5 Development within the coastal zone, as specified by WLEP 2009 [Contention 3]

The redesign of the proposal, including the additional articulation and reductions to overall height, provide for reduced impacts arising from the bulk and design of the development. The proposed reduction of hardstand area at the front of the building, and enhancements to landscaping in the north eastern corner of the site are also considered to cumulatively improve the overall appearance of the proposal when viewed from both adjoining properties and public places, including the foreshore area.

Council accepts that the Contention raised with respect to development within the coastal zone is now satisfied.

The proposal is inconsistent with Wollongong DCP 2009 (WDPC 2009) [Contention 4]

Design amendments are such that the proposal now reasonably meets the landscaping control requiring a landscaping strip within the front setback for the majority of the width, and increases in the amount of landscaping proposed has provided a further softening effect to the development.

The proposal has incorporated sufficient articulation and is considered appropriate in scale, form and finishes

The relocation of the visitor parking space has enabled a reduction in hard stand area and provides for an increase in the area available for landscaping.

The re-orientation of garage doors mitigates dominance on the streetscape appearance.

Council accepts that the Contention raised with respect to inconsistencies with WDPC 2009 is now satisfied.

Proposal will produce unacceptable impact on views from adjoining properties [Contention 5]

The redesign of the proposal, including the additional articulation, reductions to overall height, and reconfiguration of balconies are considered to cumulatively provide for the mitigation of view impacts from both adjoining properties, to the extent that further redesign of the development is not considered as warranted.

Council accepts that the Contention raised with respect to unacceptable view impact from adjoining properties is now satisfied.

Section 79C Matters

In terms of considerations pursuant to the provisions of Section 79C (1) of the Environmental Planning and Assessment Act 1979, the development as now proposed is capable of being approved.

It is considered the proposal provides for the orderly development of the land on a suitable site.

The development is not expected to have unreasonable impacts on the environment or the amenity of the locality.

It is considered appropriate with consideration to the zoning and the character of the area and is therefore considered to be in the public interest

Exhibition

Design amendments were not re-exhibited as it is understood such details have been made available to all interested parties as required by the conciliation process.

Conclusion

Having regard to the changes made to the development the proposal now provides for the orderly development of the land on a suitable site.

It is considered that the original reasons for refusal in Council's Notice of Determination dated 23 December 2015 have either been directly addressed by redesign or impacts are sufficiently mitigated and/or can be reasonably managed by way of the proposed draft conditions.

20 With the benefit of the site inspection, including an inspection of the intervener's property in Lower Coast Road and the adjoining property in Kallaroo Avenue, an understanding of the amended plans, the council's planning controls and the contentions initially raised by the council, I am satisfied "that approval is lawful and appropriate and any objection has properly been taken into account".

21 In coming to this conclusion, I have read and understood the report prepared by Mr Jeremy Swan, a town planner, for the intervener (Exhibit 104). The report was not an expert report but sought to address the contentions raised by the council. The report identifies that the application should be refused because of:

- (1) front setback,
- (2) visual impact and poor design,
- (3) view loss,
- (4) vehicular access, and
- (5) water quality.

22 I am satisfied that the concerns raised by Mr Swan do not individually, or collectively support the refusal of the application. Specifically:

- (1) the front setback is consistent with other front setbacks in the street given the variety of different setbacks and building forms,

- (2) the visual impact and design has been sufficiently improved through the re-orientation of the garage for Unit 2, the relocation of the visitor parking space, the additional landscaping and the driveway design,
- (3) any view loss associated with the proposed development would not be inconsistent with the reasonable development of the site and the council's planning controls for the site,
- (4) the access along Kallaroo Avenue is steep however the refusal of the application for this reason would be unreasonable given the recent approval of the subdivision and the fact that this street provides the only access, and
- (5) water quality from the site is controlled in the same manner as other recent developments in the street.

Coastal processes on flood risk and coastal erosion and inundation.

23 Expert evidence on this issue was provided by Dr Daniel Martens for the intervener and Mr Anthony Barthelmess. Both are experienced consultant engineers in the fields of flood risk, coastal erosion and inundation.

24 Dr Martens and Mr Barthelmess disagreed on the following matters:

- (1) whether a flood study is required,
- (2) the minimum setback from the creek,
- (3) the 1 in 100 year coastal water level and the appropriate setback.

Flood study

25 Mr Barthelmess states that the flood studies that were used by the council in the assessment of the subdivision were site specific studies. The studies were used to support the approved watercourse engineering works on the site that required the relocation of an existing open channel that previously cut diagonally across the site.

26 On this basis, the 2006 and 2007 flood studies are suitable documents to use to ascertain flood levels through the site in the pre-development scenario. These studies show the flow, in all events up to and including the PMF, as being contained within the creek bank and outside the proposed building footprint. This being the case, there is no need for post-development modeling. Mr Barthelmess maintains that these studies are acceptable and a new flood study is not required.

- 27 Dr Martens states that during his inspection of the creek both upslope and within the site, the Mannings roughness coefficients were considerably higher than those assumed for the historical modelling exercises. By adopting appropriately higher roughness, Dr Martens expects that flood flows would breach the creek banks and impact upon the proposed buildings. The risk to life of future home owners, as well as the expected amenity for outdoor areas within the site therefore remains unknown.
- 28 In relation to the appropriate roughness coefficient, Mr Barthelmess states that the roughness of the watercourse will vary considerably over time. More than any other factor, roughness over time depends on the maintenance of the watercourse, and when these watercourses are in private property, this is difficult to control. There may have been a significant change in roughness between Dr. Marten's site inspection and Mr Barthelmess's inspection, simply because the inspections were performed at different times and during different periods of channel maintenance by the adjoining land owners.
- 29 Mr Barthelmess states that what needs to be determined is a suitable roughness value for the purposes of determining a peak 1% AEP design flood level, based on the expected roughness at the peak of that event. To this end, Mr Barthelmess accepts that, along with council's stormwater engineers, that the values adopted in the 2006 and 2007 studies are reasonable and fit for that purpose.
- 30 The issue of whether the flood study should include the effects of climate change and elevated ocean boundary conditions was addressed by Dr Martens and Mr Barthelmess. Dr Martens maintains that the adoption of best practice would result in increased flow rates and flood levels however Mr Barthelmess states that DCP 2009 (Ch E13) does not make explicit allowances for climate change for new residential development; instead relying on the provision of freeboard to habitable rooms. Mr Barthelmess notes that the proposed development is well in excess of the required freeboard.
- 31 I agree with Mr Barthelmess on this matter. I accept that the 2006 and 2007 studies are acceptable to assess potential flooding impacts. There was no suggestion that the relocated channel was not the same as that set out in the

flood studies and approved with the subdivision. While there is some merit in Dr Martens approach that the effects of climate change and elevated ocean boundary conditions should be included; I accept that this was not a matter specifically required by DCP 2009.

Minimum setback from the creek

32 Clause 6 3, Chapter E, DCP 2009 defines a High Flood Risk Precinct as:

The area within the envelope of land subject to high hydraulic hazard in a 100 year flood event plus all land within a corridor 10 m from the top of the creek bank....Most development should be restricted in this precinct.

33 Dr Martens and Mr Barthelmeß agree that strict compliance with the 10 m requirement is not required. Dr Martens suggests a setback of 2-5 m and Mr Barthelmeß agrees that the proposed setback of notionally 1 m and a 2m setback is appropriate as the existing channel is heavily engineered and would be stable during 'design flood' conditions.

34 Mr Barthelmeß concludes that as the proposed development is founded on rock and does not rely on the channel for support; Dr. Martens reliance on a minimum 2 m setback is immaterial given the difference between the two proposed setbacks. Mr Barthelmeß states that the view he expresses, also reflects the view of council's stormwater engineers.

35 I agree with Mr Barthelmeß on this matter.

1 in 100 year coastal water level

36 Dr Martens calculates the near shore coastal water level could reach over 5.0 m AHD however it may be as low as 4.0 m AHD, depending on off-shore wave. Dr Martens further estimates that wave 'wash' has the potential to reach a further 2.2 m up the slope.

37 Dr Martens states that the shore face at the lower portions of the site, including the creek, are affected by coastal inundation, and a significant portion of the lower part of the site is further at risk of wave attack during extreme weather events. The area affected by inundation is very similar to that which Dr Martens estimated originally estimated. The mapping also shows that the entire site is mapped as being susceptible to coastal geotechnical risk; irrespective of

whether current council mapping does or does not include the site as being affected by coastal inundation or hazards. Having inspected the site and assessed inundation and wave related processes on a site specific basis, Dr Martens concludes that the lower portion of the site is in an area affected by a coastal hazard and may be subject to coastal erosion. Having considered the presence of bedrock beneath the site, the grade and elevation of the allotment, Dr Martens is of the view that a 5 m building set-back from the zone of coastal inundation, which is approximately the alignment of the creek bank, is appropriate for the development and would achieve a desirable planning outcome.

38 Mr Barthelmiss notes that DCP 2009 (Chapter E14) provides guidance on ocean levels to be used in flood modelling for the purposes of assessing a sites suitability for development. Clause 10.3.3 "Ocean Levels" states that flood surface profiles must be determined using the following criteria:

- Adopting a 100 year ARI ocean level of RL 2.9m* AHD and a 10 year ARI fluvial flood.
- Adopting an ocean level of RL 1.9m* AHD and a 100 year ARI fluvial flood.

39 Clause 10.3.3 further states that:

...a value of 0.4 metres has been included for the effects of climate change in the period up to the year 2050. For developments including essential community facilities, critical utilities and subdivisions creating more than 10 lots, a 100 year ARI ocean level of RL 3.4m AHD shall be adopted for item (i) and RL 2.4m AHD shall be adopted for item (ii).

40 Mr Barthelmiss notes that other standards exist however none exceed RL +2.90m AHD for oceanic conditions. As the lowest water surface level in the 2006 and 2007 studies is much higher than the DCP 2009 recommended values, inclusion of these levels (or otherwise) is immaterial. DCP2009 also recognises that it is inappropriate to design for the combined probability of a peak 1% AEP oceanic event and a peak 1% AEP fluvial (or land based flood) event, as suggested by Dr. Martens. He accepts that higher or more adverse sea level conditions could and will exist at some point in the future; one estimate of such a possibility has been provided by Dr. Martens. However, such conditions are not representative of design conditions which the council

and the Department of Environment and Climate Change recommend for residential development.

- 41 Mr Barthelmess is of the view that the *Wollongong City Council Coastal Zone Study* (the Coastal Study) provides the most appropriate information upon which to assess the suitability of the proposed development. Mr Barthelmess accepts that the site is affected by coastal hazards but disagrees that those hazards preclude or prohibit the proposed development. After consideration of the Coastal Study, the council has identified no necessary development controls for the site, with regard to those coastal hazards. The proposal complies with all of the council's DCP 2009 requirements
- 42 As with other areas of dispute between Dr Martens and Mr Barthelmess, I agree with Mr Barthelmess, not necessarily because the matters raised by Dr Martens are not valid but because the approach relied upon by Mr Barthelmess adopts the requirements of DCP 2009. Even considering the flexibility of a DCP, it can reasonably be expected that a person seeking to lodge a development application with the council could rely on the requirements the council has adopted in a DCP. Conversely, it would be unreasonable that an applicant would be expected to comply with a higher standard that did not form part of the relevant DCP. As I understand, the development complies with Chapter E of DCP 2009 and was considered acceptable to Mr Barthelmess and the council's stormwater engineers.
- 43 There being no reason why the consent orders should not be made, the Court makes the following orders:
- (1) The appeal is upheld.
 - (2) Development consent is granted to Development Application No. DA2014/1065 for an attached dual occupancy development at Lot 22 DP 1163490 otherwise known as 4 Kallaroo Avenue Stanwell Park, subject to the conditions set out in annexure "A".
 - (3) There be no orders for costs.
 - (4) The exhibits are returned with the exception of exhibits A and 101.

G Brown

Commissioner of the Court

152821.16 - Annexure A (102 KB,

pdf)<http://www.caselaw.nsw.gov.au/asset/5823c215e4b0e71e17f552d6.pdf>