

Pepperwood Ridge v Newcastle City Council - [2009] NSWLEC 1046

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Land and Environment Court

of New South Wales

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CITATION: Pepperwood Ridge v Newcastle City Council [2009]  
NSWLEC 1046

PARTIES:

APPLICANT  
Pepperwood Ridge Pty Limited

RESPONDENT  
Newcastle City Council

FILE NUMBER(S): 10470 of 2005

CORAM: Brown C

KEY ISSUES: DEVELOPMENT APPLICATION :- demolition of  
existing buildings and the construction of 70 seniors  
living self-contained dwellings and community centre -  
orientation of buildings

LEGISLATION  
CITED: [Environmental Planning and Assessment Act 1979](#)  
State Environmental Planning Policy (Seniors' Living)  
2004

DATES OF HEARING: 9,10/02/09

EX TEMPORE JUDGMENT DATE: 11 February 2009

LEGAL REPRESENTATIVES: APPLICANT  
Mr C McEwen SC  
SOLICITORS  
Mallik Rees Lawyers  
  
RESPONDENT  
Mr J Maston, barrister  
SOLICITORS  
Sparke Helmore

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JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Brown C

11 February 2009

10470 of 2005 Pepperwood Ridge Pty Limited v Newcastle City Council

JUDGMENT

1 COMMISSIONER: This is an appeal against the refusal of DA 04/0673 by Newcastle City Council (the council) for the demolition of existing buildings and the construction of 70 seniors living self-contained dwellings and community centre at 164-168 Lake Road, Elernmore Vale (the site).

The site

2 The site consists of Lot 1 and A in DP 417903 and Lots A and B in DP 417019. The site has a 94 m frontage to Lake Road. a 285 m north-east side boundary, a 315 m south-west side boundary and a 58 m rear boundary. The total site area is 2.47 ha. The land slopes towards the rear of the site from Lake Road with an average gradient of approximately 10%. The overall change in height is from 65 m AHD to 40.5 m AHD being a difference of 24.5 m along the north-east boundary.

3 The site currently contains three residences, a pet grooming facility and several large sheds. The existing buildings are constructed towards the Lake Road frontage with the remainder of the site cleared and used for agricultural and grazing purposes. The land to the north-west is vacant and contains some vegetation. The land to the north-east and south-west are occupied by the Elmore Glen Retirement Village, dwelling houses, outbuildings and pastoral land.

#### Relevant planning controls

4 The site is within zone 7(c) - Environmental Investigation under *Newcastle Local Environmental Plan 2003*. The principal planning document for the purposes of the development application is *State Environmental Planning Policy (Seniors' Living) 2004* (SEPP SL) published in Government Gazette No. 67 of 31 March 2004. This is the appropriate version of the state policy because of the transitional provisions in cl 6. The proposed development is a permissible use in the zone (see *Peppewood Ridge Pty Limited v Newcastle City Council* [2006] 145 LGERA 34).

5 SEPP SL contains Site related requirements (Part 2), Design requirements (Part 3), Development standards to be complied with (Part 4) and Development standards that cannot be used as grounds to refuse consent (Part 7).

#### The contentions

6 The development application has been amended during the time leading up to the hearing with the original contentions 1, 5, 9 and 11 deleted by the council. Of the remaining contentions, bushfire protection (Contentions 2 and 3), internal design (Contention 4), stormwater and design (Contention 7), collection and disposal of waste (Contention 8) and landscaping (Contention 10) were addressed to the satisfaction of the council through amended plans prior to the hearing.

7 The sole remaining issue was the orientation of the proposed buildings and whether the proposal was adequately designed for climate in accordance with cl 33(b) of SEPP SL.

#### The expert evidence

##### *Solar access – cl 33(a)*

8 There was agreement between the town planning experts, Mr Garry Fielding for the applicant and Ms Robyn Hawes for the council, that the proposal satisfies the numerical requirements for solar access in cl 33(a) in that the living rooms and private open space for at least 70% of the dwellings will receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter.

9 There was also agreement between the experts that the proposed development satisfies the requirements in cl 33(a) in that there is “adequate daylight to the main living areas of neighbours in the vicinity and residents, and adequate sunlight to substantial areas of private open space”.

##### *Design for climate – cl 33(b)*

10 Mr Fielding and Ms Hawes disagree on whether the proposal satisfies the requirements of cl 33(b). This subclause states:

##### *The proposed development should:*

..

*(b) involve site planning, dwelling design and landscaping that reduces energy use and makes the best practical use of natural ventilation, solar heating and lighting by locating the windows of living and dining areas in a northerly direction.*

11 Ms Hawes states that the requirements of cl 33(b) go beyond solar access as this is addressed in cl 33(a). She states that cl 33(b) is properly addressed by buildings being orientated in a “northerly direction”. As none of the buildings are orientated in this direction, the development does not satisfy the subclause and as such is unsatisfactory.

12 Mr Fielding agrees that orientating buildings in a northerly direction is desirable but notes that the topography of the site tends to counter the requirements of cl 33(b). Nonetheless, in excess of 70% of the development’s living and dining room windows are orientated in a northerly direction. In his opinion, design for climate would be further assisted by the addition of shading devices to west facing windows, particularly in the lower two buildings (Buildings J and L).

### *Findings*

13 For the development to be approved, the Court must be satisfied that the development application demonstrates that adequate regard has been given to the principles in cl 33(b) of climate change. Reference in the clause is made to *AMCORD : A National Resource Document for Residential Development 1995* (AMCORD) in addressing the requirements. Element 5.10 - Design for Climate in AMCORD states that housing should be designed to minimise energy consumption in winter and cooling in summer. Five main design principles for low energy housing are identified in Element 5.10. These are:

- site planning orientation and layout,
- size and location of glazing and shading,
- construction type,
- ventilation and
- appliances.

14 Figure 1 in Element 5.10 identifies suggested positioning of dwellings or orientation to achieve low energy housing. In this case, the suggested orientation range is between 20 deg west of true north (TN) and 30 deg east of TN.

15 Ms Hawes provides a table in her evidence showing the orientation of each individual building. **Block A** has an orientation of 38 deg west of TN; Blocks B to F and Block I have an orientation of 58 deg west of TN and Blocks H, J and L have an orientation of 83 deg west of TN. As I understand, the variation of the buildings from the 20 deg west of TN is the basis for Ms Hawes’ conclusion that the application is unsatisfactory.

16 In accepting that it is desirable and optimal for all buildings to be located within the range set out in Element 5.10 of AMCORD, I am not satisfied that a non-compliance with this orientation necessarily warrants the refusal of the application. To adopt this approach would be to give no weight to the natural topography as a mitigating factor in the proposed layout of the buildings by Mr Fielding and importantly, essentially disregard the relevant matters for consideration in SEPPL SL at cll 2(2)(b) and 31(c)(ii) where buildings should relate to the site’s landform.

17 To strictly apply the desirable northerly aspect range in Figure 1 of Element 5.10 is, in my view, overly simplistic as it ignores the natural orientation and topography of the site and the particular design features of the development. In this case, all buildings follow the topography of the site. The natural topography of the site has a more westerly aspect the further the site moves from the street and this is reflected in the more westerly aspect of Buildings H, J and L that are located furthest from the street.

18 I do not accept that the practical affect of the variation to the optimal orientation in Figure 1 of Element 5.10 is anything other than marginal for the buildings, with the exception of Buildings H, J and L. For buildings H, J and C, the impact is clearly greater and clearly not optimal, but still not a reason to refuse the application. I accept that the single width of the dwellings in these blocks provides the opportunity for cross ventilation and shading devices could be used to provide some protection from westerly summer sun, as contemplated in Element 5.10. Air-conditioning is also to be provided, however, this has both positive and negative aspects in terms of managing climate, although it is recognised as a valid approach in Element 5.10. I am also mindful that all buildings achieve a satisfactory NATHERS Energy Efficiency rating; a matter also raised in Element 5.10.

19 In accordance with cl 30, I am satisfied that the proposed development demonstrates that adequate regard has been given to the principle in cl 33(b) relating to design for climate and as such there is no barrier to consent being granted to the proposed development.

#### Conditions

20 A number of conditions are in dispute between the parties.

21 Condition 3.2 requires the provision of kerb and guttering for internal roads, whereas the applicant seeks to amend this condition to replace the kerb and guttering with roll-top kerbing for greater safety for future occupants. I accept the applicant's amendment on this condition.

22 Conditions 21 and 22 (now conditions 13.8 and 13.9) require the provision of an easement over the relocated drainage channel. The disagreement between the parties is whether the easement should include upstream properties. The applicant submits that this part of the condition does not reasonably relate to the proposed development and as such should be deleted. I accept this submission and the reference to the upstream properties should be removed from conditions 21 and 22.

#### Orders

23 For these reasons the Order of the Court are:

1 The appeal is upheld.

2 DA No 04/0673 for the demolition of existing buildings and the construction of 70 seniors living self contained dwellings and community centre at 164-168 Lake Road Elmore Vale, is approved subject to the conditions in Annexure A.

3. The exhibits are returned with the exception of exhibits 6 and B.

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G T Brown  
Commissioner of the Court