
AUSTRALIA / JUDGMENT

Avnir Group Pty Ltd v Ku-ring-gai Council [2004] NSWLEC 238

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Land and Environment Court

of New South Wales

CITATION : Avnir Group Pty Ltd v Ku-ring-gai Council [2004] NSWLEC 238 revised - 16/06/2004

APPLICANT

Avnir Group Pty Ltd

PARTIES :

RESPONDENT

Ku-ring-gai Council

FILE NUMBER(S) : 11512-13, 11515, 11517-22 of 2003

CORAM: Bly C

KEY ISSUES: Designated Development :- Development applications for subdivision and detached dual occupancy developments - subdivision design - residential amenity

LEGISLATION CITED:

CASES CITED:

DATES OF HEARING: 13/04/04-15/04/04

DATE OF JUDGMENT: 05/21/2004

APPLICANT

Mr S Kondilios, solicitor

SOLICITOR

Maddocks

LEGAL REPRESENTATIVES:

RESPONDENT

Mr Simmington, solicitor

SOLCITOR

Phillips Fox

JUDGMENT:

IN THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

11512-13, 11515, 11517-22 of 2003

Bly C

21 May 2004

Avnir Group Pty Ltd

Applicant

v

Ku-ring-gai Council

Respondent

Judgment

Introduction

1. These nine appeals involve:

- (a) The subdivision of lots 4, 5 and 6 of DP 232995 and Part 1 and Part 2 of DP 501142 also known as 404A, 404 and 406 Mona Vale Road, St Ives ("the site") into eight lots ("the subdivision"), and
- (b) The erection of two, two-storey dwelling houses in the form of a detached dual occupancy development ("the dwelling houses") on each of the eight lots created in (a) above.

2. The site has an area of 10,761 m² with a frontage of 91 m to Mona Vale Road. It is generally flat. Each of the three existing lots is developed with a detached dwelling house. There are more than 100 trees on the site including a number of mature trees such as Himalayan cedar, Sydney red gum and spotted gum. Several are acknowledged to be remnant bushland specimens.

Locality

3. The site is surrounded by low-density detached residential development of one and two storeys. The lots sizes in the locality are in groups the order of 700 m² opposite the site on Mona Vale Road, 900 m² to 1200 m² on Richmond Road to the south and, adjacent to the subject site ranging between 1000 m² and 2000 m². The adjoining property at 402 Mona Vale Road to the south has been developed with eight detached dual occupancy dwellings.

Statutory provisions

4. The site is zoned Residential 2(c) under the Ku ring gai Planning Scheme ("the planning scheme"). Clause 58B Subdivision requirements for dwelling house lots contains applicable development standards which, in subcll (3)(a)(ii) require that land is not to be subdivided unless each separate lot created with a frontage to a main or county road must have an area of at least 790 m² and a width of not less than 27.4 m at a distance of 12.2 m from the street alignment. Subclause (3)(a)(iii) requires that hatchet- shaped lots must have an area of not less than 1105 m² exclusive of the access corridor. All of the proposed lots meet the area requirements of cl 58B however lots 1, 2, 3 and 4 having widths of between 18 m and 20 m fail to meet the 27.4 m minimum width. An objection pursuant to State Environmental Planning Policy No 1 - Development Standards ("SEPP 1") has been provided in relation to this deficiency.
5. The proposed dual occupancy dwelling houses are permissible with development consent pursuant to State Environmental Planning Policy Number 53 -- Metropolitan Residential Development ("SEPP 53").

Advertising and council's decision

6. The applications were advertised and some 15 objections were received from residents residing in the locality. In addition, Mrs T Whitmore of the Richmond Avenue Action Group forwarded letters of objection. Matters of concern raised in these letters include: the development would be out of character with the area; an excessive number of trees would be removed from the site with consequential impacts on native fauna; non-compliance with various council standards; excessive built upon area and excessively bulky buildings; vulnerability of the site to bush fires; unresolved drainage problems; and amenity impacts on adjoining development including overshadowing. A number of these residents explained their concerns to the Court at the commencement of the hearing on site. Mrs Whitmore explained her organisation's concerns in detail during the hearing.
7. The applications were also referred to the New South Wales Rural Fire Service and the Roads and Traffic Authority of New South Wales.

8. The subdivision application was refused by the council for reasons relating to: failure to meet the site width requirements of the planning scheme; the resulting built form will be less than satisfactory as a consequence of the lot sizes; unsatisfactory on site easements; and inadequate water supply.
9. The eight applications for the dwelling houses were all refused by the council for reasons relating to: non-compliances with the requirements of SEPP 53; risks associated with bushfires; and overdevelopment of the sites.

The evidence

10. On behalf of the respondent council expert evidence was provided by:

+ Mr R Fewster - town planner

+ Mr S. Fen - horticulturalist

+ Mr S. Johnson - architect

+ Mr T O'Toole - snr planning officer Rural Fire Service

11. On behalf of the applicant expert evidence was provided by:

+ Mr I. Glendinning - town planner

+ Mr D Ford - arborist

+ Mr B Eadie - bushfire consultant

The issues

12. In relation to the subdivision application statement of issues identifying 14 separate issues was provided to the applicant and the Court. Following changes to the proposal these issues were reduced to matters essentially involving: the subdivision requirements in the planning scheme; vehicular access to the site; the on-site stormwater detention system; and the proximity of the site to the Ku ring gai Chase National Park and associated bushfire risks.
13. In relation to the dwelling houses applications, statements of issues containing as many as 14 separate issues were provided to the applicant and the Court. Again, following changes to the proposals these issues were reduced to matters essentially involving: the urban design, architectural qualities and amenity of the dwelling houses; amenity impacts on neighbouring properties; the preservation of existing trees and the adequacy of the landscaping; and the proximity of the houses to the Ku ring gai Chase National Park and associated bushfire risks.
14. Having considered all of the evidence including that of the residents and having inspected the site and its environs the following are the critical issues which require the particular attention of the Court. For the subdivision:

1. Whether the subdivision arrangement would be satisfactory taking into account the proposed access easement connecting the two proposed access roads and the effective division of proposed lots 6 and 7 into two by the access road and the fire truck access road.
2. Whether the SEPP 1 objection should be upheld and the subdivision approved given the non-compliance of proposed lots 1 to 4 with the minimum site width requirement in cl 58B of the planning scheme.
15. For the dwelling houses, the issues requiring the particular attention of the Court are:
 1. Whether when considered together the proposed dwellings would represent a satisfactory urban design solution for the site.
 2. Whether the proposed dwellings would have satisfactory amenity particularly for their private open space areas.
 3. Whether any of the proposed dwellings would have an adverse impact on the amenity of any dwellings on adjoining sites.
16. Bushfire threat was originally raised as an issue. However following consultation with the New South Wales Rural Fire Service, advice from Sydney Water, the provision of appropriate water storage facilities on site, the agreed conditions of consent and the agreement between the bushfire consultants, this matter was no longer in issue.
17. Notwithstanding that the residents expressed considerable concern as to inadequate water pressure in the locality, particularly in times of bushfire threat and high water demand, taking into account the advice from Sydney Water this cannot be a determinative issue.
18. The residents also expressed considerable concern in relation to difficulties associated with traffic emerging from Richmond Avenue (to the north of the site) and turning right into Mona Vale Road, especially regarding safety and traffic congestion. It can be reasonably expected that traffic generated by these developments will follow this same route.
19. This is a matter which requires expert evidence and having been considered by Council's traffic engineering personnel it was not considered to be a matter of concern and on this basis I accept that traffic and safety cannot be a determinative issue.
20. It nevertheless appears to me that any application for the development of this site which would result in additional traffic turning right at this same intersection, and notwithstanding that vehicles can use an existing turning facility some distance further to the north-east in Mona Vale Road, that this particular intersection would need to be improved.
21. Concerns were also expressed in relation to the number of trees to be removed from the site. However a number of trees are proposed to be retained and many new trees are to be provided. This matter could have been dealt with by the provision of a landscaping plan and associated conditions of consent.

The subdivision application

22. It is proposed that the existing five allotments, which comprise the site, are to be resubdivided into eight separate allotments. There are to be four lots (lots 1 to 4) fronting Mona Vale Road with four lots (lots 5 to 8) at the rear. Lots 5 and 6 will be accessed via a 6 m wide right of carriageway off Mona Vale Road between lots 3 and 4 and lots 7 and 8 will be accessed via another 6 m wide right of carriageway off Mona Vale Road between lots 1 and 2. These two rights of carriageway will also provide access to the lots fronting Mona Vale Road, there being no direct access to the lots off that road.
23. Lot 7 has an area of 1764 m² and will be essentially bisected by the right of carriageway, which provides access to lot 8. Lots 6 and 7 will also be affected by a proposed easement providing a fire truck access driveway essentially between the western ends of the two rights of carriageway. This driveway is to be 4 m wide with a 1 m verge on both sides and is to be provided with cell-block paving planted out with grass. It was included in the design as a result of negotiations in relation to access for fire fighting vehicles and like the right of carriageway through lot 7, cannot be obstructed by landscaping, fencing or buildings.
24. The right of carriageway and the fire fighting access driveway, comprise significant constraints on the manner in which lots 6 and 7 can be developed. Any privacy or security fencing associated with the dwellings on these lots must be outside these roads thus reducing opportunities for the provision of quality private open space.
25. I agree with Mr Fewster that the effect of the right of carriageway on lot 7 is not good planning and would not be an efficient use of land. Whilst Mr Glendinning is correct in suggesting that, as an alternative to the provision of two detached dual occupancy dwellings, a house could be erected on one side of the right of carriageway with its recreation areas on the opposite side, this does not represent an appropriate or satisfactory subdivision design.
26. It is entirely possible that for whatever reason lot 7 might be sought to be developed for the purpose of a single dwelling house and it should be capable of being so developed. The need for the residents of such a dwelling to traverse the right of carriageway, which provides vehicular access, in this instance to two other dwellings, would in my view be an unacceptable arrangement. These same arguments must also be applied when considering the effect of the fire fighting access driveway on lot 6.
27. The deficiencies associated with lots 6 and 7 as a consequence of the right of carriageway and the fire truck access result in my decision to refuse the subdivision application.
28. As detailed above, the development standard in cl 58B (3)(a)(ii) of the planning scheme requires that land is not to be subdivided unless each separate lot created with a frontage to a main or county road must have a width of not less than 27.4 m at a distance of 12.2 m from the street alignment.

29. The SEPP 1 objection notes that there is no identified objective for this development standard in the planning scheme. It therefore identifies the underlying objectives as follows:

Reduce the number of entry and exit points along main roads for vehicle access and traffic safety considerations.

Maintain consistency in the streetscape and subdivision pattern of the locality

30 . Whilst Mr Fewster argued that the underlying objectives were more about streetscape, particularly the rhythm and built form of buildings and their relationship to surrounding open space and the maintenance of open large lot character, I nevertheless accept the appropriateness of the objectives identified in the SEPP 1 objection. I also accept that these objectives would have been met by the proposal for the reasons given and that compliance with the standard would have been unreasonable or unnecessary in the circumstances of the case.

31 . I particularly accept that this development standard has a particular relevance to Mona Vale Road (a main road). With the subdivision arrangement reducing access to this site to two driveways where previously there were three is a strong indication that the traffic based objective would be met. Whilst Mr Fewster did not accept Mr Glendinning's contention that over 90% of all residential lots in the 2 (c) zone have frontages of less than 27.4 m I am inclined to believe that this is correct. An examination of the provided orthophoto map shows that the proposed lot widths would not be out of character with the existing lot widths in Mona Vale Road to the south - east of the site and in the vicinity of Richmond Avenue and Kitchener Street, this being the relevant context.

32 . Whilst I later express concerns in relation to be repetitive appearance of the proposed dwelling houses I do not accept that this points to a conclusion that the lots fronting Mona Vale Road are too narrow. I have no difficulty accepting that the proposed Mona Vale Road lots are capable of accommodating appropriately separated dwelling houses in landscaped settings that would be entirely satisfactory in this streetscape.

The dwelling houses applications

33. Because I have decided that the subdivision application should be refused it will be necessary, if the applicant wishes to proceed with the subdivision of this land, for a revised subdivision design to be produced and submitted for approval. I expect that such a design will be different to that presently proposed and as a consequence there would be no utility in obtaining any approval for the dwelling houses particularly as such an approval would relate to a non existent allotment. In the circumstances I have decided that the eight dual occupancy development applications should be refused. Despite this I make the following observations in relation to the proposed dwelling houses.
34. I agree with Mr Fewster's contention that the division of lot 6 by the fire truck access driveway is a particular problem in relation to the two dwellings proposed for lot 6. Having examined the plans for the dwellings on this lot and their necessary security and privacy

fences together with their orientation and the shadow diagrams, the private open space arrangement would be unsatisfactory. Indeed this unsatisfactory arrangement seems to have principally resulted from the superimposition of the fire truck access driveway between the two dwellings on this lot rather than designing the houses to suit the subdivision pattern. The fire truck access driveway would also have an effect on the northern dwellings on lots 7 and 8.

35. More generally I am satisfied that many of the proposed dwelling houses would have satisfactory amenity in terms of privacy and solar access at the winter solstice. However a more sensitive approach might have avoided designs where significant areas of private open space are located on the south side of buildings and are subject not only to their own overshadowing but also later in the afternoon and earlier in the morning to shadowing from neighbouring dwellings.
36. As for the impacts, principally overshadowing, on the adjoining medium density development at No 402 Mona Vale Road I again agree with Mr Fewster that more sensitive building designs for the offending dwellings on the Southern boundary of the site should have mitigated these impacts although this may not have been determinative of the relevant applications. The development at No 402 is subject to overshadowing from existing vegetation on the site but this is to be distinguished from the shadows generated by buildings and fences.
37. Finally, whilst there are numerous design differences between the dwellings I agree with Mr Johnson that there are sufficient similarities in their design, size and relationships to one another to give an impression of repetitive building forms. This would be inappropriate in this locality. Given that there are to be 16 dwellings which are essentially evenly spaced over the site, this would result in an overall development that would have an inappropriate character and would be inconsistent with the surrounding area.
38. It would nevertheless not be terribly difficult to resolve this issue in a future design which might take into account the suggestions of Mr Fewster and Mr Johnson.

Orders

39. For the above reasons I have decided that these applications should not be approved. The orders of the Court are that:

1. The appeals are dismissed.
2. The development applications for
 - a. the subdivision of lots 4, 5 and 6 of DP 232995 and Part 1 and Part 2 of DP 501142 also known as 404A, 404 and 406 Mona Vale Road, St Ives into eight lots (Appeal No. 11512 of 2003) and
 - b. the erection of two, two-storey dwelling houses in the form of a detached dual occupancy

development on each of the lots created in (a) above (Appeal Nos. 11513, 11515, 11517-22 of 2003) are determined by the refusal of development consent.

3. Exhibits 1 and Z are retained.

T A Bly

Commissioner of the Court

mp

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Prepared on 29 October 2026 · Esheria