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AUSTRALIA / JUDGMENT

## Niu v Warringah Council [2012] NSWLEC 1109

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Land and Environment Court

New South Wales

Medium Neutral Citation: Niu v Warringah Council [2012] NSWLEC 1109

Hearing dates: 8, 9 March, 26 April 2012

Decision date: 04 May 2012

Jurisdiction: Class 1

Before: Pearson C

Decision: Appeal upheld

Catchwords: CONSENT ORDERS - Development Application - Dwelling house - Asset Protection Zone - Impact on vegetation

Legislation Cited: Environmental Planning and Assessment Act 1979

Land and Environment Court Act 1979

Warringah Local Environmental Plan 2000

Warringah Local Environmental Plan 2011

Cases Cited: Mison v Randwick Municipal Council (1991) 23 NSWLR 734

Vigor Master Pty Ltd v Warringah Council [2011] NSWLEC 1096

Weal v Bathurst City Council (2000) 111 LGERA 181

Category: Principal judgment

Parties: Wei Ru Niu (Applicant)

Warringah Council (Respondent)

Representation: Mr J Doyle (Applicant)

Mr K Webber, Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 10015 of 2012

## Judgment

1This is an appeal under s97 of the Environmental Planning and Assessment Act 1979 (the Act) against the refusal by the respondent Council of Development Application DA 2011/0877 for the erection of a dwelling house on lot 8 DP 1035344, known as Lot 8 Beacon Hill Road Brookvale (the site).

2The Council refused consent on 24 October 2011 and the applicant appealed to the Court on 9 January 2012. In its Statement of Facts and Contentions filed on 24 February 2012 the Council contended that the site is environmentally sensitive because it is steeply sloping and potentially subject to landslip, there are rock outcrops throughout the site, the site is densely vegetated, is in a sensitive location at the top of Glendale Creek catchment, and the site is visually prominent. The Council identified as reasons for refusal of consent that the applicant had not provided sufficient information to demonstrate that the site can be developed for a dwelling, or that the development is consistent with the principles in the applicable planning controls. The Council contended that further information was required including an accurate survey plan, hydrology details, a geotechnical report, details of cut and fill, details of the extent of the change and impact to vegetation to create any asset protection zones (APZs), a visual impact analysis, and a fauna assessment.

3The matter was set down for a conciliation conference under s34AA of the Land and Environment Court Act 1979 on 8 March 2012. On that occasion the Council accepted that most of the information identified in the Statement of Facts and Contentions had been provided and assessed pursuant to a separate development application then before the Council, and identified as remaining issues the provision of an accurate survey plan, provision of evidence to show that the applicant had adequately demonstrated or explored options to reduce or minimise the amount of vegetation removed, provision of information to assess the impact of clearing, and resident issues and concerns.

4The parties reached agreement during the conciliation conference on most of the issues in dispute. At the hearing of the matter following termination of the conciliation conference the Council's representative advised that the Council wished to enter into consent orders. The hearing was adjourned to enable the Council to notify objectors in accordance with the Court's Practice Note: Class 1 Residential Development Appeals.

5The parties are seeking final orders by consent, and further evidence, including evidence from resident objectors, was presented during the adjourned hearing. I am satisfied, for the reasons below, that it is lawful and appropriate to grant the consent in the terms sought by the parties, including the proposed conditions.

## The site

6The total area of lot 8 DP 1035344 is 9.78ha, and the whole of the site is currently vacant and covered with dense vegetation. The dwelling house the subject of the development application is proposed to be located on an area approximately 4,200 sq m, in the north east corner of the site close to the corner of Warringah Road and Northcliffe Road, and with vehicle access from Northcliffe Road. The land slopes steeply to the south and is bush fire prone.

## Planning controls

7The majority of the site is identified within the cross hatched area pursuant to Warringah Local Environmental Plan 2000 (the 2000 LEP) which was in force when the development application was lodged. The development application proposes the erection of a dwelling house in a rectangular area at the north east corner of the site which is not included in the cross hatched area.

8The site is located in the F4 Locality under the 2000 LEP, and the Desired Future Character Statement for this locality includes:

The Brookvale Valley locality will remain an area characterised by a mixture of detached style housing and apartment style housing interspersed with a range of complementary and compatible uses. In order to protect the bushland and scenic quality of the Valley and to maintain the water quality of Greendale Creek, the head of the Brookvale Valley, as shown cross-hatched on the map, will remain as undeveloped bushland except for the land at Lot 7 DP 236335 where a maximum of one dwelling may be erected provided the design and construction of that development has regard to the topography, potential slip and sensitive visual character of the land as well as potential loss of views to adjoining or nearby properties. The development of further apartment style housing will be confined to the "medium density areas" shown on the map.

Outside the "medium density areas" future development will maintain the visual pattern and predominant scale of existing detached style housing in the locality. The streets will be characterised by landscaped front gardens and consistent front building setbacks. The spread of indigenous tree canopy will be protected throughout the locality and enhanced where possible. Unless exemptions are made to the housing density standard in this locality statement, any subdivision of land is to be consistent with the predominant pattern, size and configuration of existing allotments in the locality.

9Under cl 14(2) of the 2000 LEP a dwelling house that is not in cross hatched areas is identified as Category 1. Category 3 development includes development on land shown cross hatched "otherwise than for the purpose of bushfire hazard reduction". Clause 12(3)(b) requires that prior to granting consent for development identified as Category 1 the consent authority must be satisfied that the development is consistent with the desired future character described in the relevant Locality Statement.

10The Warringah Local Environmental Plan 2001 (the 2011 LEP) came into force on 9 December 2011. Clause 1.8A of the 2011 LEP provides that a development application made before the 2011 LEP commenced is to be determined as if the 2011 LEP had not commenced. Under the 2011 LEP the cross hatched area is zoned E2 Environmental Conservation and the rectangular area in the north east corner is zoned R2 Low Density Residential. A dwelling house is permissible with consent in the R2 zone; environmental protection works are permissible with consent in the E2 zone.

### Subdivision approval

11In *Vigor Master Pty Ltd v Warringah Council* [2011] NSWLEC 1096 Moore SC granted development consent for the subdivision of the unhatched area in the north eastern corner of the site. The original development application was for subdivision of the unhatched area together with an area of approximately 7,000 sq m. Moore SC concluded (at [24]):

24 However, I am satisfied that creating the proposed Lot 1, as it is now proposed, with some over 6,500 sq m within the hatched area, is inappropriate because it will create an expectation in the eyes of an owner that there might be future development of that area and that future development of that area for an asset protection zone would be inconsistent with the desired future character statement.

12Moore SC noted that under the 2011 LEP (which at that time had not commenced, but which was imminent and certain) the only works permissible with consent in the E2 zone would be environmental protection works and roads. Moore SC considered the expert evidence as follows:

27 The first is that the bush fire experts agreed - that is Mr Rose (for the council) and Mr Swain (for the applicant), that, if the boundary were to follow the 95 m contour, there would be sufficient area on the resultant allotment for a dwelling to be erected with its asset protection zone entirely within that allotment. They noted, however, that if it were appropriate to create a larger allotment, there would perhaps be a potential future for a greater scope of development on that allotment than would be the case if it were confined to the unhatched area.

28 The planners' joint report also makes it clear that the area and configuration of the proposed Lot 1 accords with Mr Swain's estimation of the required APZ for a sixlot development on the unhatched land. They then noted, *inter alia*, it would also be possible to develop the unhatched land in proposed Lot 1 in accordance with the density provisions of minimum dimensions set out in the 2000 LEP for housing and that the proposed subdivision should realistically be viewed as a precursor of future residential development upon the unhatched land.

13Moore SC noted that creating a possible expectation of future use of part of the E2 zone area for new asset protection zones to protect new assets would be contrary to the objectives of the zone, and concluded (at [33]) that the only subdivision that it was appropriate to permit was one which conformed "in general terms to the area that was in the unhatched area but consistent with the evidence of the planners and bushfire experts as to manageability and the like", and that it was appropriate to require that the allotment boundary follow the 95m contour. The

consequence was that development consent was granted for subdivision for the smaller allotment that virtually but not entirely constituted the area unhatched on the LEP 2000 map.

14It was not in dispute that the subdivision approved in those proceedings has not yet been registered.

## Evidence

15The evidence on which the applicant relies, and which the Council is now satisfied meets the contentions raised, is in the form of a survey report by John Lowe & Associates Pty Ltd dated 2 December 2011, which includes a note that the only drainage route or watercourse identified in the survey area is more than 45m from the zoning boundaries; a visual analysis plan and landscaping plan prepared by landscape architect Andrew Lane; a Flora and Fauna Assessment Impact Assessment dated November 2011 prepared by GIS Environmental Consultants; a geotechnical assessment dated 20 December 2011 prepared by GeoEnviro Consultancy Pty Ltd; an Aboriginal Heritage Survey prepared by Mr Allen Madden dated 23 November 2011; and two bushfire assessments.

16With the exception of a supplementary bushfire assessment (discussed below) the documents identified above were provided to the Council in support of a development application seeking approval for the erection of a dwelling house of the same design and in the same location as proposed in the present proceedings. That development application (DA2011/1670) was made after the commencement of the 2011 LEP.

## Bushfire Assessments

17Mr Wayne Tucker, Building Code & Bushfire Hazard Solutions, prepared a Bushfire Hazard Assessment Report dated 8 December 2011, which states (at 7.05) that the proposed dwelling is located on the part of the site where the maximum APZ can be provided. Mr Tucker noted that the proposed APZ would consist entirely of an Inner Protection Area covering the entire R2 area of 4,445.39 sq m, and that the APZ would consist of grounds within the subject site only and would not encroach on the residual E2 portion of the site. Mr Tucker concluded that applying "Planning for Bushfire Protection-2006" to the proposed dwelling, the bushfire attack level of the southern aspect was "BAL Flame Zone" and for the western aspect, "BAL 40". Tucker considered Australian Standard AS 3959-2009 "Construction of buildings in bushfire-prone areas", and noted that the highest Bushfire Attack Level was determined to be "Flame Zone" and construction requirements were therefore outside the scope of AS 3959-2009, and that the proposed dwelling would be constructed to a varied BAL FZ with additional measures. At 9.0 Mr Tucker's recommendations included recommendations relating to construction of the dwelling.

18Mr Tucker provided a Statement of Evidence (exhibit C) to supplement the report of 8 December 2011 in which he considered the issues raised by the Council, namely whether it is possible to reduce the width of the APZ; alternative locations for a dwelling on the site; orientation of the building; building materials; and whether a colorbond fence would act as a

heat barrier along the perimeter of the APZ. Mr Tucker recommended against reduction of the APZ. In relation to the location of the dwelling, Mr Tucker's opinion was that any footprint closer to Northcliffe Road would require the APZ to be split above and below an escarpment and to achieve a similar APZ would require significant land clearing in the E2 zoned land. Without vegetation removal in the E2 zoned land a maximum APZ of only 12m would be possible. The only possible building platform near the corner rests on a steep escarpment; additional clearing below the escarpment would be necessary to allow fire fighting access and a dwelling in that location would be within a higher risk area. Mr Tucker stated that a change in orientation of the building would not significantly alter the required width of the APZ; there was no scope to further increase material elements; and there was no discernible advantage in the addition of a colorbond fence.

19The present development application was referred to the NSW Rural Fire Service as required by s 79BA of the Act. In a letter dated 22 August 2011 the NSW Rural Fire Service recommended a condition that the development comply with the recommendations provided in a Bushfire Assessment Report by Mr Tucker dated 7 July 2011, which is in the same terms as the report dated 8 December 2011 referred to above.

20The Council referred development application DA2011/1670 to the NSW Rural Fire Service, and received a response dated 31 January 2012 which recommended additional conditions relating to water supply and design and construction of the building.

21The agreed conditions of consent include requirements to comply with the recommendations of the Bushfire Assessment Reports of 7 July 2011 and 8 December 2011, and the additional requirements of the NSW Rural Fire Service in their letter dated 31 January 2012.

#### Residents' evidence

22The documentary evidence includes written submissions made to the Council during its assessment of the development application.

23Seven residents gave evidence at the conciliation conference. Mr Col Doolan, who lives in Beacon Hill Road, supported the application if the proposed dwelling complies, on the basis that the site is a bushfire hazard. Mr Graham Dawson, Ms Elaine Silver, Margaret Ratcliffe, Ms Christina Kirsch and Ms Ann Sharp expressed opposition to the proposed development. Their concerns related to the wisdom of retaining the residential zoning under the new 2011 LEP; the siting of the dwelling some distance away from Northcliffe Road rather than closer to the corner; impact on native vegetation, threatened species, and watercourses; impact on the catchment for Curl Curl Lagoon; bushfire protection and the unreliability of the reticulated water supply; the clearing required to provide an APZ; and the steepness of the site and potential for landslip.

24In accordance with the Court's Practice Direction, those who had provided written submissions or given evidence at the conciliation conference were advised of the proposed consent orders. At the hearing on 26 April 2012, Mr Graham Dawson, Ms Christina Kirsch, and Ms Ann Sharp gave evidence opposed to the granting of consent. Mr Dawson's evidence concerned bushfire hazard,

based on his experience living in the area, including risks to fire fighters; the irregular slope of the site; and the potential for weed invasion into the vegetated area once a dwelling is occupied. Ms Kirsch addressed the proposed conditions, in particular condition 17 which should include a requirement to minimise loss of tree canopy. Ms Sharp's evidence related to her concerns for the catchment of Curl Curl Lagoon, location of the dwelling, and bushfire hazard including the requirements of "Planning for Bushfire Protection". Ms Sharp maintained that locating the dwelling in the north east corner would be preferable; in response to questioning she stated that if that meant that clearing would be required below the escarpment, it would need to be looked at and the acceptability of that would depend on the vegetation.

## Conditions

25The agreed Conditions include condition 17 which requires preparation of an Environmental Site Management Plan to include a survey of all environmental features to be retained on the site, a works environment protection plan, a soil and water management plan, and a biodiversity management plan. Condition 17 was amended during the course of the hearing to incorporate the suggestion made by Ms Kirsch.

26Condition 10 addresses stormwater disposal; condition 18 requires incorporation of requirements to ensure that alteration of vegetation in the APZ and riparian lands does not resulting adverse changes in hydrology or water quality on the downstream environment; condition 22 requires that bushfire APZs be maintained outside of riparian land; and condition 31 requires installation and maintenance of sediment control measures.

27The Conditions include a requirement to comply with the recommendations in the Bushfire Hazard Assessment Reports of 7 July 2011 and 8 December 2011, and incorporate in condition 48A the additional conditions relating to requirements for water and utilities to protect buildings during and after the passage of bushfire recommended by the NSW Rural Fire Service.

28The agreed Conditions include a deferred commencement condition requiring the applicant to provide additional information that demonstrates that the area and design of the APZ are the best solutions available to ensure the narrowest acceptable APZ can be achieved on the site, including measures that could be incorporated in the design including construction materials, orientation and size of the dwelling house and the potential to design a fence to act as a radiant heat barrier.

## Consideration

29The proposed development is located within the unhatched area under the 2000 LEP, and in the R2 zone under the 2011 LEP, and is permissible with consent. It was common ground that the site is bushfire prone and that the erection of any dwelling house in this locality would require inclusion of an APZ. The proposed APZ extends approximately, but not precisely, along the zoning boundary, and the clearing required for that purpose is also permissible. Clause 12 of the 2000 LEP requires that the development be consistent with the any relevant general principles of development control in Part 4, and that it comply with relevant requirements of parts 2 and 3. As

a Category 1 development, the desired future character described in the relevant Locality Statement must be considered. The applicant accepts that there will be vegetation removal for construction of the dwelling and the associated APZ, however submits that the design and location of the dwelling will ensure that rock outcrops are protected and vegetation removal is minimised. Condition 17 provides specific measures to meet the requirements of cl56 relating to retention of environmental features. The survey evidence establishes that the closest watercourse is some 45m distant from the zoning boundary. The Council accepts that there will be clearing of trees, however is satisfied that this is to the minimal extent required.

30Based on the Development Assessment Report prepared for the Council (tab 3, exhibit 2) the proposed development complies with the numerical built form controls relating to density, height, setbacks and landscaping in the 2000 LEP, and, subject to the need for further information, meets the general principles of development control contained in Part 4 of the 2000 LEP.

31The applicant has provided evidence addressing the concerns of the Council relating to the provision of a survey, measures to address bushfire hazard, and the impact on vegetation of clearing required for the construction of a dwelling and the associated APZ. The proposed conditions address the concerns raised by objectors relating to impacts on water quality, tree clearing, impacts on vegetation, and sediment and erosion control. The additional requirements in condition 48A address the concerns raised about the unreliability of the reticulated water supply, and require provision of a 5000 litre water supply for fire fighting purposes, truck access to the water source, a petrol or diesel pump for the water supply, and construction requirements for the tank and associated fittings.

32Section 80 (3) of the Act enables a development consent to be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. The applicant agrees to the proposed deferred commencement condition. The matters identified in the proposed deferred commencement condition relate to the need to include measures to protect the proposed dwelling from bushfire while minimising impacts associated with clearing, and relate to the matters in s 79C(1)(b) and (c) of the Act. The evidence provided by the applicant in the form of the Bushfire Hazard Assessment Reports supports the acceptability of a dwelling house of the proposed design and location on the site. I agree with the Council that that evidence means that these issues are not left unresolved and improperly deferred for future determination: *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; *Weal v Bathurst City Council* (2000) 111 LGERA 181. The Council accepts, based on the preliminary advice it has been able to obtain, that Mr Tucker's supplementary statement of evidence (exhibit C) addresses the four matters identified in the proposed condition. In circumstances where there is evidence establishing the acceptability of the proposed development in its present form, I accept that it is appropriate to impose a requirement that the applicant provide information as to whether there are any additional reasonable measures that could be incorporated to improve the impacts of the proposed development.

33 Having regard to the above, I am satisfied that the relevant statutory provisions have been complied with and that the objections have been properly taken into account, and that it is lawful and appropriate to grant development consent subject to the proposed conditions.

## Orders

34 The orders of the Court are, by consent:

1. The appeal is upheld.
2. Development consent is granted to DA No 2011/0877 for the erection of a two storey dwelling house at Lot 8, Beacon Hill Road Brookvale, subject to the conditions in Annexure A.
3. The exhibits are returned except for exhibits A, 1, 4 and 5.

Linda Pearson

## Commissioner of the Court

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