

AUSTRALIA / JUDGMENT

Pinot v Warringah Council

[2008] NSWLEC 1189

COURT

Land and Environment Court

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Source record**Land and Environment Court
of New South Wales****CITATION :** Pinot v Warringah Council [2008] NSWLEC 1189**APPLICANT**

Tracy Pinot

PARTIES :**RESPONDENT**

Warringah Council

FILE NUMBER(S) : 10234 of 2008**CORAM:** Hoffman C**KEY ISSUES: :-** Refusal of Building Certificate for balcony enclosure, streetscape character, building design, private open space requirement, BCA compliance, precedent

Environmental Planning and Assessment Act 1979

LEGISLATION CITED: Building Code of Australia

Warringah Local Environmental Plan, 2000

DATES OF HEARING: 19/05/2008**EX TEMPORE JUDGMENT DATE :** 19 May 2008**APPLICANT**

Mr Tom Howard, barrister

LEGAL**REPRESENTATIVES:****RESPONDENT**

Mr A. Hudson, solicitor,

of Wilshire Webb Staunton Beattie lawyers

JUDGMENT:**THE LAND AND****ENVIRONMENT COURT****OF NEW SOUTH WALES**

Hoffman C

19 May 2008

10234 of 2008 Pinot v Warringah Council

JUDGMENT

1 This is Appeal No. 10234 of 2008 between Tracy Pinot and Warringah Council in regard to the refusal to issue a Building Certificate for the partial enclosure of a balcony at unit 37, the fifth storey of No. 11-13 Oaks Avenue, Dee Why.

2 The onsite hearing was attended by:

- o Mr A. Hudson, solicitor for the respondent;
- o Ms A. Sutherland, town planner,
- o Mr Warwick Hunter, building surveyor and
- o Mr E. Juillard, in-house solicitor.

3 Attending for the applicant was:

- o Mr T. Howard, barrister,
- o Mr A. Ridgway, building surveyor, and
- o Ms Tracy Pinot and Mr J. Lovell, town planner.

4 The balcony enclosure is in the form of a glass sliding doors to the kitchen/dining room of the unit on to what was a large balcony. The larger glass doors which are quadruple sliding are erected along the outer edge of the balcony above, and run between a wall at one end and a corner column at the other. There is still part of the balcony about two square metres by two square metres outside these doors that overlooks Oaks Avenue. With the sliding doors open the dining room is open to this northern aspect. There is a smaller glass sliding door on the side return of the enclosure from the same column to the dining room wall and it gives access to a side terrace about 8 metres long by 1.5 metres that contains barbeque and planter box.

5 Unit 37 is a split level sub penthouse. Its upper floor is the top floor or sixth storey of the building and on that level has a living room and two bedrooms and two bathrooms. The living room also has large north facing windows onto the balcony above the subject partial enclosure. This balcony leads to a much larger roof terrace facing east. The terrace is about 10 metres by 4.5 metres.

6 The issues in summary are:

1. visual impact of enclosure on building itself
2. streetscape impact
3. open space requirements of balconies off living rooms
4. building requirements of fire protection

5. precedents.

7 I note that the Body Corporate of the building and all the adjoining unit owners had given written approval of the enclosure.

8 The provisions of the Warringah Local Environmental Plan 2000 (LEP) apply. This six storey mixed use commercial, retail and residential building at No.s 11-13 Oaks Avenue, Dee Why was one of the first under that statute. The parties agree this balcony enclosure under that statute should be dealt with by considering the merits. The Local Environmental Plan has special provisions for Oaks Avenue which is one of the main streets of Dee Why shopping Centre. These streetscape objectives can be summarised as;

- o new buildings having a three storey podium and
- o upper stories being set back about 16 metres from the kerb line.

9 I was told the enclosure does not intrude on the 16 metre upper set back.

10 The upper three stories of the building are highly articulated in a stepped building form having terraces and balconies on the set backs at each level. There are two separate three storey blocks on the fourth fifth and sixth stories and they are designed to be symmetrical as seen from Oaks Avenue. They each have mirror image symmetrical curved roofs on top.

11 The subject balcony enclosure can be seen from below but only from the opposite side of Oaks Avenue, where it is seen just above the vegetation in the planter boxes on the street façade of the podium. When seen at an angle from the east of the site, the enclosure is obscured by tall street trees, but from the west it is seen.

12 Mr Lovell's evidence is that the high articulation of the upper three stories is such that the enclosure would not be noticed by the layman and if it was noticed it would be seen to fit in. The only clue to any non-fit is unit 36, the symmetrical unit to unit 37, it has no enclosure to its balcony, but the owner did indicate she would seek approval for a matching enclosure if this is granted.

13 The motivation for the enclosure appears to be that the kitchen/dining room as original was quite compact having about 2.8 metres from the kitchen bench to the north wall. This space would hold only a dining suite with very little room for other furniture. On the Council plans it is named as a combined kitchen, dining room and living area but is quite small for these three combined functions.

14 Ms Sutherland referred to State Environmental Planning Policy No. 65 (SEPP 65) design guides and the Oaks Avenue desired future character statement in the LEP to say that enclosing this balcony would interrupt the symmetry of the design which is important in the streetscape presentation of the building. Also that an approval by Building Certificate of this would give others in this and other buildings an expectation of balcony enclosure. It would lead to buildings becoming an aesthetic mish-mash as some owners want enclosure and others don't.

15 Mr Lovell said that given the desire of the matching unit of this building to do a matching enclosure, the presentation of this building would be preserved. Also each enclosure must be examined on its merits and there are several exceptional circumstances in this case that are unlikely to apply elsewhere.

16 The first merit consideration is that the LEP only requires a substantial balcony or terrace or private open space off a living room, not as in the SEPP 65 combined kitchen, dining, living space. The respondent argued that the approved development consent plans showed a room behind this enclosure as such a triple use space and the reduced size of the balcony does not meet the statutory minimum sizes in dimension or area.

17 Nevertheless I read the Local Environmental Plan 2000 as specifying a living room only not one that combines kitchen, dining and living. The upstairs living room of unit 37 is obviously the main living room with direct access to a huge roof-top terrace. Thus the statute is satisfied on size and private amenity and, as I mentioned before, the façade set back from Oaks Avenue.

18 In regard to the Building Code of Australia (BCA) compliance issues Mr Hunter and Mr Ridgway agreed that a 700 millimetre high masonry wall erected behind part of the smoked glass balustrade would resolve that. Also other concerns about water-proofing window frames especially to stop water getting underneath into the sub-floor of the living room extension could be dealt with by conditions. Those works would have to be done before a building certificate could be issued.

19 I am concerned about the potential for balcony enclosures to become a floodgate of applications if any particular enclosure is approved. There is the concept that a finished building in its originally approved form should not be seen as immutable over time. Thinking ten years, twenty years or thirty years plus ahead, most buildings will have alterations and additions of some kind. The important thing is that each change be acceptable under the applicable statutes and controls of the time.

20 Without the confirmed intention of Number 36 to seek a similar approval, I would be concerned about issuing a certificate to allow this unapproved enclosure to become permanent. As a single enclosure on the street façade of the building it does disturb the streetscape presentation of the building and the urban design objectives of the LEP.

21 However I am prepared to say that given the higher articulation of the upper three stories of Nos 11-13 Oaks Avenue, the enclosure would be compatible with retention of that desired character, because it is a minor part of the entire façade, provided it is matched with unit 36. Both the symmetry and articulation would be retained.

22 However, Council would need to receive and approve a matching enclosure of unit 36. In coming to this conclusion I sought further submissions from the parties on this approach. The parties agree it is within power, and therefore I foreshadow that the Council may issue a building certificate subject to appropriate conditions and the work being completed beforehand, provided unit 36 makes application and receives approval from the council and commences a matching enclosure.

23 As a result of this I defer issuing any Orders at this time, and give Directions as follows:

1. This hearing is adjourned to a date to be fixed.
2. The parties to appear at a Mention at 4.30pm 25 August 2008 to advise progress.
3. The parties are given leave to restore to the list on 2 days notice.

K.G Hoffman

Commissioner of the Court

kb/ljr

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