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|  | Land and Environment Court  New South Wales |

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| Case Name: | Kara-Ali v Hawkesbury City Council |
| Medium Neutral Citation: | [2023] NSWLEC 1075 |
| Hearing Date(s): | Conciliation Conference 9 and 10 February 2023 |
| Date of Orders: | 21 February 2023 |
| Decision Date: | 21 February 2023 |
| Jurisdiction: | Class 1 |
| Before: | Espinosa C |
| Decision: | The Court Orders: (1) The Appeal is upheld. (2) Development Application No. DA0005/22 in respect of 1855 Putty Road, Colo for Dual Occupancy (Attached) – Vegetation removal, earthworks and the construction of a dual occupancy (attached) is determined by the grant of consent, subject to the conditions contained in Annexure “A”. |
| Catchwords: | DEVELOPMENT APPEAL – vegetation clearing – construction of dual occupancy – earthworks - conciliation conference – agreement between the parties - orders |
| Legislation Cited: | Biodiversity Conservation Act 2016 Biodiversity Conservation Regulation 2017 Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7 Environmental Planning and Assessment Regulation 2000, cll 49, 55 Hawkesbury Local Environmental Plan 2012, cll 2.3, 4.3, 6.1, 6.4, 6.7 Land and Environment Court Act 1979, s 34 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Koala Protection) 2021, s 11 State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.118 |
| Cases Cited: | Hawkesbury City Council v Kara-Ali (No. 2) [2018] NSWLEC 129 Kara-Ali v Hawkesbury City Council [2021] NSWLEC 1418 |
| Texts Cited: | Hawkesbury Development Control Plan 2002 |
| Category: | Principal judgment |
| Parties: | Wafaa Kara-Ali (Applicant) Hawkesbury City Council (Respondent) |
| Representation: | Counsel: L Nurpuri (Applicant) T Ward (Solicitor)(Respondent)  Solicitors: Sadek Lawyers (Applicant) Pikes & Verekers Lawyers (Respondent) |
| File Number(s): | 22/167212 |
| Publication Restriction: | No |

Judgment

1. **COMMISSIONER**: This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act* 1979 (EPA Act) being an appeal against the refusal of Development Application (DA) DA0005/22 for vegetation clearing, earthworks and the construction of an attached dual occupancy (the Proposed Development) at 1855 Putty Road Colo legally described as Lot 1 in DP1060733 (the Site).
2. The Proposed Development specifically involves:
3. The removal of native vegetation on the raised south-western section of the property to establish an Asset Protection Zone (APZ);
4. Earthworks and the construction of retaining walls on the raised south-western section of the property to accommodate residential development;
5. The construction of an attached dual occupancy on the raised south-western section of the property. Each of the dwellings is to have a gross floor area (GFA) of approximately 149m² and are to be provided with four bedrooms, two bathrooms, a kitchen, laundry and living room. Two parking spaces per dwelling are to be provided within the lower level carports;
6. The construction of an internal access driveway from Putty Road on the raised southwestern section of the property;
7. The installation of an Aerated Wastewater Treatment System and 36.8m² absorption bed within the south-western section of the property to service the attached dual occupancy; and
8. Weed removal and revegetation works on both the south-western and north-eastern sections of the property.
9. The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held on 9 and 10 February 2023. I presided over the conciliation conference.
10. The Amended Statement of Facts and Contentions filed on 31 October 2022 provides the following background:
11. Unauthorised clearing, works and uses have previously been undertaken on the property and these matters were subject to Class 4 proceedings in Court. In the matter of *Hawkesbury City Council v Kara-Ali (No. 2)* [2018] NSWLEC 129, the Court issued a series of Orders relating to revegetation and rehabilitation works, the demolition of unauthorised structures and the cessation of unauthorised uses.
12. The property is also subject to a Court issued consent for vegetation clearing, the construction of a stables building, the installation of a prefabricated staff building and the operation of an animal boarding or training establishment. This development, identified as Development Consent No. DA0069/20 and L&E Court Proceedings No. 2020/323302, was approved by the Court on 23 July 2021 (*Kara-Ali v Hawkesbury City Council* [2021] NSWLEC 1418). Development Consent No. DA0069/20 approved the installation of a prefabricated staff building that would provide temporary accommodation for people to care for horses when they are foaling. A maximum of 20 horses may be kept, trained or bred on the property at any one time under this consent.
13. The Site has an area of approximately 12.89005Ha and is intersected by Putty Road, with the north-eastern section of the land adjoining the Colo River and the south-western section of the land raised above the road on the side of a hill.
14. The north-eastern section of the land varies in height from approximately 11m Australian Height Datum (AHD) adjoining Putty Road down to approximately 2m AHD near the Colo River. This portion of the land has a relatively gentle fall towards the Colo River.
15. The raised north-western section of the land varies in height from approximately 13m AHD adjoining Putty Road up to approximately 100m AHD towards the property’s rear boundary. Located on the side of a hill, this section of the property has a steep fall towards Putty Road. Access to the property is available via a ‘northern entry’ and a ‘southern entry’ that were recognised by Transport For NSW (Roads and Maritime Services) in response to *Hawkesbury City Council v Kara-Ali (No. 2)* [2018] NSWLEC 129.
16. At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting development consent to the D A subject to conditions.
17. The parties agree that all Contentions raised in the Statement of Facts and Contentions filed on 31 October 2022 (SOFAC) have been resolved by the preparation of the:
18. amended plans and documents referred to in the Approved Plans and Supporting Documentation Table Condition of Consent No.1 at Annexure A of the agreement between the parties, and
19. agreed conditions of consent; also Annexure A.
20. Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties’ decision if the parties’ decision is a decision that the Court could have made in the proper exercise of its functions. In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
21. The parties’ decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
22. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of the Hawkesbury Local Environmental Plan 2012 (HLEP) and various State Environmental Planning Policies.
23. The parties explained how the jurisdictional prerequisites have been satisfied in an agreed jurisdictional note.
24. The owner of the Site is Wafaa Kara-Ali who made the DA in accordance with cl 49 of the Environmental Planning and Assessment Regulation 2000. The DA was lodged with Hawkesbury City Council (the Respondent) on 7 January 2022.
25. The DA in its original form was advertised and notified to adjoining and nearby landowners from 31 January to 14 February 2022 in accordance with Part A Chapter 3 of the Hawkesbury Development Control Plan 2002 (HDCP). No submissions were received.
26. The Site is zoned part C4 Environmental Living and part SP2 Infrastructure – Classified Road pursuant to the HLEP. The majority of the land is zoned C4 Environmental Living, although strips of the land adjoining Putty Road have an SP2 Infrastructure – Classified Road zoning. Development for the purpose of dual occupancies (attached) is permissible in the C4 zone with consent. The Proposed Development is prohibited in the SP2 zone, however no development is proposed on the land zoned SP2.
27. Clause 2.3 of the HLEP requires the consent authority to have regard to the objectives of the C4 zone. The parties agree the Proposed Development is consistent with the objectives of the C4 zone which are as follows:

•  To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.

•  To ensure that residential development does not have an adverse effect on those values.

•  To restrict development on land that is inappropriate for development because of its physical characteristics or bushfire risk.

•  To ensure that land uses are compatible with existing infrastructure, services and facilities and with the environmental capabilities of the land.

•  To encourage existing sustainable agricultural activities.

•  To ensure that development does not create or contribute to rural land use conflicts.

•  To promote the conservation and enhancement of local native vegetation, including the habitat of threatened species, populations and ecological communities by encouraging development to occur in areas already cleared of vegetation.

•  To ensure that development occurs in a way that does not have a significant adverse effect on water catchments, including surface and groundwater quality and flows, land surface conditions and important ecosystems such as waterways.

1. The Site is subject to a maximum height of buildings control of 10m which is not exceeded by the Proposed Development (cl 4.3, HLEP).
2. The location of the proposed dual occupancy (attached) building is within an area identified as having Class 5 Acid Sulfate Soils, however, no works are proposed below 5 metres Australian Height Datum (cl 6.1, HLEP).
3. The Site is identified as being affected by terrestrial biodiversity (cl 6.4, HLEP). Narla Environmental has prepared a Vegetation Management Plan which includes a range of management measures which have been incorporated into the conditions of consent. The parties agree the Proposed Development is designed, sited and will be managed to avoid any significant adverse environmental impact.
4. The provision of essential services has been incorporated into the conditions of consent to ensure those services will be available when required pursuant to cl 6.7 of the HLEP.
5. Both the *Biodiversity Conservation Act* *2016* and Biodiversity Conservation Regulation 2017 apply to the Site, however as the Proposed Development does not propose more than 1Ha of clearing, the terms of the *Biodiversity Conservation Act* are not engaged.
6. In accordance with s 11 of the State Environmental Planning Policy (Koala Protection) 2021, assessment of any likely impact on koalas or koala habitat must be assessed. As part of the Development Application, Narla Environmental has prepared an Individual Koala Plan of Management. The parties agree that conditions with respect to the Individual Koala Plan of Management, ensure that the Proposed Development will not any impact on koalas or koala habitat.
7. Section 2.118 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 relates to development on land reserved for the purposes of a classified road (but before the land is declared to be a classified road). Though part of the Site is zoned SP2, no development is proposed on that part of the Site and therefore clause 2.118 is not triggered.
8. BASIX Certificates No. 1259258S and 1259289S dated 14 November 2021 have been issued by Architectural Solutions confirming the Proposed Development will meet the NSW Government’s requirements for sustainability. The Court is satisfied that the Proposed Development, as amended, meets BASIX requirements pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
9. Section 2.10 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) provides that development consent must not be granted to development on land that is within the coastal environment area (the riparian zone) unless the consent authority has considered whether the Proposed Development is likely to cause an adverse impact on the matters identified therein. The agreed conditions of consent at Annexure A provide for the riparian zone to be fenced off and there is no development proposed within that area. As such, the parties agree and I am satisfied that there is not an adverse impact by the Proposed Development on the coastal environmental area (riparian zone).
10. Pursuant to s 4.6 of the Resilience and Hazards SEPP a consent authority must consider contamination and remediation prior to the determination of a development application. The parties agree that the Site has not previously been used in a manner typically associated with activities that would result in the contamination of the site. The proposed works do not result in any concerns with respect to contamination. In this regard there is no indication that the land is contaminated, and as a result I am satisfied that the requirement for a preliminary site investigation report referred to in s 4.6(2) of the Resilience and Hazards SEPP does not arise.
11. The parties have had regard to the relevant provisions of HDCP. In particular, the parties have had regard to the clauses noted in the SOFAC and the particularised Contentions. The Court is satisfied that the Proposed Development can be approved as the parties have had regard to the provisions of the HDCP and section 4.15(1)(a)(iii) of the EPA Act in reaching their agreement as to the merits of the Proposed Development including the terms of the agreed conditions of consent.
12. I am satisfied that the parties’ decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. I adopt the reasons given by the parties as set out in this judgment.
13. As the parties’ decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties’ decision.

Notations:

1. The Court notes that:
2. The Applicant has amended Development Application No DA0005/22 with the agreement of Hawkesbury City Council (pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000) as the relevant consent authority to incorporate the following amended plans and documents:

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| **Document/Plan description** | **Prepared by** | **Date** |
| Drawing No. 18552022-5.4-d  Landscape Concept Plan | TIG Design | January 2023 |
| Vegetation Management Plan (Reference: Dika2 Final v2.0 – DA Dual Occupancy) | Narla Environmental | January 2023 |
| Soil & Site Assessment for Onsite Wastewater Disposal Report (Reference: 4873WW Rev ‘3.0’) | Harris Environmental Consulting | 3 February 2023 |

(Amended Development Application).

1. The Applicant has filed the Amended Development Application with the Court on 10 February 2023.

Orders:

1. The Court orders:
2. The Appeal is upheld.
3. Development Application No. DA0005/22 in respect of 1855 Putty Road, Colo for Dual Occupancy (Attached) – Vegetation removal, earthworks and the construction of a dual occupancy (attached) is determined by the grant of consent, subject to the conditions contained in Annexure “A”.

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E Espinosa

Commissioner of the Court

[Annexure A (253449, pdf)](http://www.caselaw.nsw.gov.au/asset/186720ea9b11f141179e6000.pdf)

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