Request for review of decision under 8.6 of *the Environment Planning and Assessment Act 1979* (EP&A Act)

Project detail: The proposed new build dwelling, includes the following areas: - Balcony to the front facade on the first floor accessed from Living room and Bed-3 - Balcony to the rear on the first floor to be accessed from Bed-2 and Bed-4 - Proposed two columns on the front - Proposed one column at the alfresco
DA Number: DA671/2024 / PAN-447626
Address: 30 Belmore Avenue, Belmore NSW 2192.
Lot and DP: Lot 27 DP 6016
Decision Date: 30 August 2024
Consent Authority: Canterbury Bankstown Council

Attachments:

A: Notice of Decision - Refusal

B: Application Package (as contained in the NSW Planning Portal and submitted to Council)

C: Email Correspondence

Background

1. The development application (DA) seeks to add two (2) covered external balconies and three (3) supporting columns to the approved principal residence.

2. The principal residence has been reviewed by a principal certifying authority (PCA) and approved as complying development. The proposed residence is located at 30 Belmore Avenue and is zoned R3 – Medium Density Residential through the *Canterbury Local Environment Plan 2023*. Dwelling houses are identified as a permitted use.

3. Accordingly, the principal residence is viewed as having demonstrated compliance with the *Environmental Planning and Assessment Act 1979* (EP&A Act) (NSW) and relevant State Environmental Planning Policies (SEPPS) environment protection instrument (EPIs), inclusive of representing “orderly and economic” development, the development of a residential dwelling in appropriately zoned land.

4. On 30 August 2024 the Consent Authority (Canterbury Bankstown Council) refused the DA using the power in section 4.16(1)(b) EP&A Act for the following reasons:

    4.1. Pursuant to Section 4.15(1)(a)(i) of the Environment Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of the Environment Planning and Assessment Act 1979. Object (c) under Section 1.3 of the EP&A Act is to promote the orderly and economic use and development of land. The pathway sought by the applicant via this DA would be contrary to proper planning consideration and the orderly use of land by allowing the site to benefit from an unconstructed CDC, for which there has been limited merit assessment, and then limiting Council’s assessment of the DA to a relatively minor component of the proposed overall development.

5. Notwithstanding Council’s opinion the approved residence has complied with all requirements of the complying development process. To state that the complying development has had ‘limited merit assessment’ is in our view an irrelevant consideration to Council’s decision on the DA application and it was therefore inappropriate for Council to take that matter into account in its decision to reject the DA application.

If Council holds the view that CDC is an inappropriate pathway for the approval of residential dwellings in the Council area, then that decision should be applied consistently across all developments in the Council area.

6. Further consideration of the design, scale and layout of the principal residence, inclusive of the applied legally allowable approval through the complying development pathway are not relevant considerations.

7. It is noted that no submissions objecting to the DA were received during the statutory exhibition period.

8. The DA has demonstrated compliance with development standards and that no significant increase in impacts is expected.

9. The determination (**Attachment A**) provided by Council demonstrates several deficiencies and omissions in the interpretation and application of the EP&A Act, as highlighted below. Rectifying these deficiencies is the basis for this request for a review as per cl8.6 of the EP&A Act.

Principle and key reasons for review

10. Council's decision fails to demonstrate that the proposed DA is inconsistent with cl1.3(c) of the EP&A Act, noting this is the sole stated reason for refusal.

10.1. In its determination of the DA and prior communication with the Site Foreman (TSF, the applicant) Council has failed to demonstrate on any level that the approval of the DA to add two (2) balconies and 3 supporting columns to the approved principal resident dwelling would not represent orderly and economic development.

10.2. For reference, cl1.3 of the EP&A Act sets out, in its entirety, that:

1.3 Objects of Act *(cf previous s 5)*

The objects of this Act are as follows—

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

10.3. Its is noted that in its refusal Council has depended solely upon a perceived inconsistency with cl1.3(c). As no other inconsistencies were highlighted by Council, it is taken that the proposed development was found to be consistent with these objects only. That is, *to promote the orderly and economic use and development of land*.

10.4. The reasoning put forward by Council in its refusal of the development application is that as the approved residence had been legally considered and approved as complying development, seeking to amend that residence through a separate planning process or statutory body does not represent the orderly and economic use and development of land because Council has not had a role in reviewing the approved primary residence or had any other function as a consent authority for the approved residence.

10.5. The NSW planning process also actively allows for different consent authorities to review and consider subsequent amendments or associated development applications. For example, projects may be determined through panels and/or commissions established under the EP&A Act, with subsequent modifications or associated DAs able to be determined as a matter of standard practice by different delegated consent authorities.

10.6. Beyond the fact that the DA is seeking to amend an approved project and Council is unhappy that it is unable to consider the complying development approved primary residence, Council has not provided any substantial reasons or indeed any indication of how the DA is inconsistent with cl1.3(c).

10.7. Council's position was further expanded through the prior correspondence between Council and TSF. This correspondence detailed Council's uncertainty with the process for achieving assessing a DA relating to a residence approved as complying development. The TSF addressed this consideration in full, inclusive of confirmation by the PCA that separation of the elements could be achieved, and demonstration of equivalent process being undertaken in neighbouring local government areas **(Attachment C**).

10.8. Importantly, throughout this correspondence Council staff were informed by the Site Forman that no state statute, EPI or regulatory instrument had been identified which prevented the proposed DA from being approved, especially in light of the fact that Council assessment staff failed to raise or identify any inconsistency or exceedance of a development standard as part of Council's assessment. Furthermore, when prompted Council assessment staff were unable to identify local regulations or policies which would prevent the DA from proceeding.

10.9. Council's single sentence response that these examples were irrelevant as they had occurred in different local government areas seems to deliberate ignore the fact that all relevant statutory requirements relied on in Councils decision have statewide application. Council's decision appears to be little more than an attempt to justify a preferred outcome based on Council's opinion about optimal process rather than an unbiased consideration and evaluation of the actual merit of the matter being considered, as required by NSW planning law.

10.10. It is unreasonable and contrary to the EP&A Act and relevant EPI that seeking to amend a legally approved development (aka demonstrating Indeed it is an absurd outcome noting that the primary residence has been legally approved, demonstrating that it represents orderly and economic development of land. As addressed in detail below what Council proposes, which is that the primary residence be constructed according to the CDC, and approval sought from Council after construction is complete for a variation, thereby requiring the construction to be partially demolished so that the variation can be constructed, would itself constitute non-compliance with the orderly and economic development of land. Indeed, it would be the exact opposite of orderly and economic and the fact that Council would suggest the approach, rather than given due consideration to a straightforward DA application, is in our submission non-compliant with the EP&A Act.

10.11. Councils' interpretation and application of cl1.3c is also contrary to multiple findings by the NSW Land and Environment Court, which routinely identify that cl1.3c is meant to be utilised as a mechanism to facilitate development, even when non-compliance with numeric development standards has been identified, which Council has not demonstrated or identified.

10.12. This principle has recently been demonstrated repeatedly, for example in Sim v Georges River Council [2024] NSWLEC 1582, that a development can be considered to achieve the objectives contained within cl 1.3(c) of the EPA Act through the redevelopment or amendment of a dwelling to provide high functionality and amenity that meets current living standards

10.13. It is also noted that the objectives of the EP&A Act need to be considered holistically, inclusive of 1.3(g) – the promotion of good design and amenity. This finding is set out in the findings of Chrysoglou v Canterbury Bankstown Council [2022] NSWLEC 1655, which clearly states that achieving good design and good amenity is a vital part of achieving the orderly and economic development of land.

10.14. In submitting this DA, it was demonstrated in the application package that the addition of the proposed balconies would increase the amenity of the approved dwelling, providing increased airflow and diversity of space (including outdoor space), especially during periods of inclement weather. Further, the proposed balconies were entirely consistent with the neighbouring properties and would ensure consistency of the street scape.

10.15. It is noted that Council did attempt to provide a "solution" (Attachment C, correspondence dated) which would require building the principal residence and having an occupation certificate issued, applying for the DA after an occupation certificate had been issued and then demolishing a portion of a newly constructed residence to facilitate the proposed balconies.

10.16. In advocating for this process Council is proposing a process which is demonstrably inconsistent with multiple objects of the EP&A Act, as set out in Cl1.3, including:
- cl1.3(b) - the proposed process would deliberately involve significant increases in construction waste and material consumption through seeking to retrofit balconies onto the building
- 1.3(c) - the proposed process would deliberately and significantly increase construction costs and timeframes through requiring unneeded administrative processes which demonstrably do not serve a planning function or outcome.
- 1.3(d) – the increases in associated costs would significantly impact the affordability of the project for the landowners, with no demonstratable planning function or outcome
- 1.3(g) – the proposed process would deliberately be ignoring the importance of considering good design and amenity at a practicable time
- 1.3(h) – the proposed process would deliberately be compromising construction and safety outcomes by knowingly delaying consideration and incorporation of a reasonable design amendment.

10.17. In reviewing the objects of the EP&A Act, there is no reasonable interpretation of these objectives that would support Council's position that:
- the proposed DA is inconsistent with cl1.3(c) of the EP&A Act; or
- that Council's preferred process (as set out in 10.15 - 10.16) is consistent with cl1.3(b), 1.3(c), 1.3(d), 1.3(g) and 1.3(h) of the EP&A Act.

11. Council's decision fails to demonstrate that the proposed DA would result in any significant adverse impact or non-compliance with relevant development controls or relevant EPIs.

11.1. The DA application (**Attachment B**) provided a detailed consideration of the proposed development and assessment of the proposed development to the relevant numeric development controls.

11.2. It is assumed that Council has had due regard to its obligations under cl4.15 of the EP&A Act and had appropriate consideration of the DA in its entirety.

11.3. In reviewing the Council's determination and having regard to cl4.15 of the EP&A Act and relevant caselaw, it is noted that Council has not identified any aspect of the proposed development which:
- exceeds or is non-complaint with an established development control; or

- would result in a significant increase in impacts which could not be managed or mitigated through reasonable and feasible measures.

11.4. It is also noted that in Council's determination and associated correspondence, Council has not identified any aspects of the proposed development which do not exhibit merit.

11.5. As these aspects were not raised as reasons for refusing the DA, it is taken that Council acknowledges and agrees with the view that the proposed development is compliant with all relevant development controls, will not result in an unacceptable impact and demonstrate merit.

11.6. As noted at paragraph 10.10 – 10.11 above, cl1.3c of the EP&A Act is most frequently interpreted and enacted under NSW planning law in a way to facilitate development, including development which has demonstrated merit but acknowledged non-compliance with numeric development controls.

11.7. In considering the compliance of the proposed development, it is noted that it is a well-established principle in NSW that simple non-compliance with a numeric control is in of itself not grounds to refuse a project without appropriate consideration of the intended outcome of the control and the merit of the development being considered (*Wehbe v Pittwater Council* [2007] NSWLEC 827).

11.8. Accordingly, if simple non-compliance is insufficient grounds to refuse a project, in a case such as this one where non-compliance cannot be demonstrated whatsoever, Council is required as the consent authority to consider the merit of the application being considered. While this consideration may include whether a particular planning process may be legally applied to a proposed development, in our submission it is not up to the consent authority to determine that a legally applied and suitable planning process cannot be utilised based on irrelevant considerations, such as the personal preferences of approving delegates within an organisation.

11.9. In making this determination Council has put forward a perverse view that utilising legal assessment and approval pathways is unacceptable, regardless of whether an evaluation of the proposed development in accordance with cl4.15 of the EP&A Act and associated EPI's, establishes the developments compliance with numeric controls, the merit of the project and the limited potential for impact with carrying out the development. This approach is particularly absurd noting that the approval pathway Council has rejected in its determination, being the CDC pathway, is a pathway that is encouraged and widely used in the Council area. As noted above if CDC is considered by Council as being an inappropriate approval pathway '*for which there has been limited merit assessment'* then Council should promulgate its position being the rejection of the CDC process across the Council area.

12. <u>Council has based their determination on materials not subject to the DA or relevant for consideration.</u>

12.1. Council in its decision has placed a total weight of is reasons to reject the DA on its consideration of the merits and acceptability of the DA approval pathway sought to be utilised for the consideration of the variation to the approved primary residence. In doing this Council has seemingly disregarded its obligations under the EP&A Act to evaluate a DA based on its merits.

12.2. As noted above Council's determination that the approval pathway utilised for the principal residence has undergone "limited merit review" is flawed and a matter of Council's opinion rather than a matter that is a relevant consideration under NSW planning law.

12.3. The determination places a heavy weighting and consideration on the planning pathway for the residence, which does not form part of the application and is not subject to consideration as part of the current DA.

12.4. The approval pathway utilised for the principal residence has no bearing on the relevant considerations for the DA, particularly as stated in s8 of the EP&A Act, that the development application involves no

demonstrated significant adverse impact or non-compliance. The variation sought through this DA application are so minor that they can in no way demonstrate significant adverse impact or non-compliance. However, in any event, and as noted above, as Council has not addressed any of these factors in its determination it can only be assumed that Council does not consider the DA to give rise to such concerns.

12.5. As noted above the extrapolation of Council's approach to this DA application is that Council does not consider the CDC scheme to be consistent with s1.3c of the EP&A Act, which is an entirely unsupportable position for Council to take.

12.6. If Council has an objection to the overall impact and management of development approvals, as established by the State Government of NSW, it would be appropriate for Council to address these matters through appropriate channels rather than through penalising individuals applying legal and accepted development assessment practices and processes in the simple attempt to build a family home.

13. Public Interest

13.1. It is considered that the provision of the requested balconies is demonstrably in the public interest as it would allow for improved design and amenity of a new residential build in the midst of a nationally and NSW acknowledged housing crisis. It is unconscionable and not in the public interest that Council is denying rate payers the opportunity to build a family home with minor variations based solely on a bureaucratic decision which is entirely inconsistent with NSW planning laws.

14. Apprehended bias in decision making

14.1. Unfortunately, it is also incumbent on the applicant to raise concerns of apprehended bias is Council's decision-making process which compound Council's overall poor decision making in relation to this DA.

14.2. On 8 July 2024 the assessing officer wrote to TSF predetermining the outcome of the development application based solely upon a procedural basis which was not supported by any NSW or Council statute, EII or policy and without any due consideration of the merits of the DA. At this stage the assessing officer suggested the withdrawal of the application, seemingly in an attempt to curtail our legal review rights.

14.3. When presenting the view that the application was inconsistent with s1.3 of the EP&A Act no discussion or support for how the application was inconsistent was provided by the assessing officer (consistent with his final decision). The assessing officer's dismissal of and assertation that procedural outcomes achieved in other LGA's are irrelevant to Council are in our view unreasonable, considering NSW LGA's are making decisions based upon the statutory process established through the EP&A Act.

14.4. It is unsurprising then that approximately 30 days later on 30 August 2024 the same assessing officer provided a decision based on the deficient reasons, as set out above.

15. Conclusion

15.1. As set out in the original DA package, the proposed DA is consistent with cl1.3 - Objects of Act, and in particular cl1.3(c). Additionally, it is also noted that Council's preferred processes constitutes multiple noted inconsistencies with cl1.3 and would result in an absurd outcome for the applicant property owners, neighbours and the surrounding area which would be subject to a much longer period of construction.

15.2. The proposed DA is approvable, noting that there has been absolutely no non-compliance with numeric controls or significant adverse impacts identified.

15.3. It should be noted that as the original decision by Council is predicated on several easily demonstrated failures in Council process and legal obligation to consider the DA in a reasonable and unbiased manner, consistent with good practice planning and assessment, copies of this request for review have also been forwarded to the offices of the Mayor of Canterbury Bankstown Council and Councillors.

15.4. The applicant reserves all rights to bring this matter before the NSW Land and Environment Court for arbitration should it be necessary to do so to determine whether the development of a residence on R2 zoned land is in fact contrary to the objectives of the EP&A Act. Preferably this escalation will be unnecessary once appropriate lawful consideration is given to the DA by Council, noting that it would not represent an effective, efficient and ethical of resources for Council and indeed the applicant who, as noted above, is only seeking to construct a simple family home.