



Land and Environment Court
New South Wales

Case Name: Dallad Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1021

Hearing Date(s): 01 November 2022

Date of Orders: 18 January 2023

Decision Date: 18 January 2023

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The appeal is upheld.
(2) Development Application No. 59/2022 for the demolition of the existing dwelling, construction of two semi-detached dwellings, associated landscaping and swimming pools, and Strata subdivision into two lots, at 41 Carlotta Road, Double Bay, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
(3) The exhibits, other than Exhibits 1, A, B and E, are returned.

Catchwords: DEVELOPMENT APPLICATION – application for the construction of semi-detached dwellings and Torrens title subdivision – application properly characterised as dual occupancy (attached) development and Torrens title subdivision because the development is on one lot of land – prohibition of Torrens title subdivision that would create separate titles for each of the two dwellings resulting from a dual occupancy development

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 1.4, 6.9, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55

Environmental Planning and Assessment Regulation
2021, cl 3 Sch 6
Land and Environment Court Act 1979, s 34
Woollahra Local Environmental Plan 2014, cll 2.6, 4.1,
4.1A, 4.1B, 4.6, 5.21, 6.2, 6.5

Cases Cited: Botany Bay City Council v Pet Carriers International Pty
Limited (2013) 201 LGERA 116; [2013] NSWLEC 147
Chamwell Pty Limited v Strathfield Council (2007) 151
LGERA 400; [2007] NSWLEC 114
Gordon & Valich Pty Ltd v City of Sydney Council
[2007] NSWLEC 780
Laurence Browning Pty Ltd v Blue Mountains City
Council [2006] NSWLEC 74
Minister Administering the
Crown Lands Act v New South Aboriginal Land Council
(1993) 80 LGRA 173
Shire of Perth v O'Keefe (1964) 110 CLR 529

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Dallad Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
J Reid (Applicant)
P Rigg (Solicitor) (Respondent)

Solicitors:
Pikes & Verekers Lawyers (Applicant)
Peter Rigg (Respondent)

File Number(s): 2022/106763

Publication Restriction: Nil

JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. 59/2022 for the demolition of the existing dwelling, construction of two semi-detached dwellings, associated landscaping and swimming pools, and Torrens title subdivision into two lots

(the proposal) at 41 Carlotta Road, Double Bay (the site), by Woollahra Municipal Council (the Council).

- 2 The appeal was subject to conciliation on 11 July 2022, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated on 14 July 2022, pursuant to s 34(4) of the LEC Act.

The application is amended

- 3 The Court granted leave for the applicant to amend the application on 7 September 2022, subject to an order that the Applicant pay the Council's costs thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to s 8.15(3) of the EPA Act.
- 4 The Environmental Planning and Assessment Regulation 2000 continues to apply to the application because the application was lodged with the Council on 23 February 2022 and had not been determined at the commencement of the new regulation on 1 March 2022 (cl 3 of Sch 6 to Environmental Planning and Assessment Regulation 2021).
- 5 At the commencement of the hearing, the Applicant, by Notice of Motion, sought the Court's leave to amend the application to rely on a further amended proposal, which complies with the height of buildings development standard, increases the rear setback of the swimming pool structures to 4m with additional landscaping in the rear setback, and increases the side setbacks of the garages to 900mm. The Court's leave to amend the application was unopposed and granted. The amended architectural and landscape plans were admitted into evidence as Ex A.
- 6 The Council, as the relevant consent authority under cl 55(1) of the EPA Regulation 2000, agreed to the amendment of the application and the amended application was lodged on the NSW planning portal on 31 October 2022.

Issues

- 7 The Council's contentions can be summarised as:

- The Torrens title subdivision must not be granted, as such subdivision would create separate title for the two dwellings resulting from a dual occupancy development, and thus be in breach of cl 6.5 of Woollahra Local Environmental Plan 2014 (LEP 2014).
 - The proposal does not achieve the minimum subdivision lot size development standard and the applicant's written request does not justify the contravention of the development standard.
- 8 The contentions regarding the built form of the proposal (building height, floorplate, side setbacks, wall height and inclined plane, internal amenity, excavation, visual privacy, excessive height of swimming pool structure, trees and landscaping, and insufficient information) were addressed to the Council's satisfaction by the amendments made to the proposal.

The site and its context

- 9 The site is on the western side of Carlotta Road.
- 10 The site has a frontage of 15.24m to Carlotta Road and an area of 650.2m².
- 11 The two properties to the north of the site, 39A and 39B Carlotta Road (Lots 20 and 21 in DP 1255622) are the result of a Torrens title subdivision of Lot 27 in DP 9421 (Ex F) which had an area of 650.3m². The resulting lots each contain a semi-detached dwelling.

The proposal

- 12 The proposal is for two semi-detached dwellings, each dwelling is three levels (two levels visible from the street), with swimming pools towards the rear of each proposed lot and associated landscaping. The proposal is for the Torrens title subdivision of the site into two lots of 325m² each (Ex E, tab 3, SEE p 7).

Planning framework

- 13 The site is zoned R3 Medium Density Residential and semi-detached dwellings are permissible with consent in the R3 zone. The relevant objectives of the R3 zone are:
- To provide for the housing needs of the community within a medium density residential environment.
 - To provide a variety of housing types within a medium density residential environment.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

14 Semi-detached dwelling is defined in the dictionary of LEP 2014 as:

semi-detached dwelling means a dwelling that is on its own lot of land and is attached to only one other dwelling.

15 Dual occupancy (attached) is defined in the dictionary of LEP 2014 as:

dual occupancy means a dual occupancy (attached) or a dual occupancy (detached).

dual occupancy (attached) means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling.

Note—

Dual occupancies (attached) are a type of dual occupancy—see the definition of that term in this Dictionary.

16 Land may be subdivided with development consent (cl 2.6 of LEP 2014).

17 The minimum lot size development standard for the site is 700m² (cl 4.1(2) and Lot Size Map LSZ_003 of LEP 2014). The objectives of the minimum lot size development standard, at cl 4.1(1) of LEP 2014, are:

(a) to establish a minimum subdivision lot size that is consistent with the desired future character of the neighbourhood,

(b) to ensure that lot sizes support development envisaged under this Plan,

(c) to ensure that lots have a minimum size to retain or enhance amenity by providing useable areas for building and landscaping,

(d) to identify locations suitable for increased development density,

(e) to ensure that development complies with the desired future character of the area.

18 Clause 4.1 of LEP 2014 does not apply in relation to the subdivision of land by the registration of a strata plan or strata plan of subdivision (sub-cl 4.1(4)).

19 Clause 4.1A of LEP 2014 is in the following terms:

4.1A Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing and residential flat buildings

(1) The objective of this clause is to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood.

(2) Development consent may be granted to development on a lot in a zone shown in Column 2 of the table to this clause for a purpose shown in Column 1 of the table opposite that zone, if the area of the lot is equal to or greater than the area specified for that purpose and shown in Column 3 of the table.

Column 1	Column 2	Column 3
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Dual occupancy (attached)	Zone R3 Medium Density Residential	460 square metres
Dual occupancy (detached)	Zone R3 Medium Density Residential	460 square metres
Multi dwelling housing	Zone R3 Medium Density Residential	700 square metres
Multi dwelling housing (terraces)	Zone R3 Medium Density Residential	700 square metres
Residential flat building	Zone R3 Medium Density Residential	700 square metres

20 Clause 4.1B is in the following terms:

4.1B Exceptions to minimum subdivision lot sizes for certain residential development

- (1) The objective of this clause is to encourage housing diversity without adversely impacting on residential amenity.
- (2) This clause applies to development on land in Zone R3 Medium Density Residential.
- (3) Development consent may be granted to a single development application for development to which this clause applies that is—
 - (a) the subdivision of land into 3 or more lots, and
 - (b) the erection of a dwelling house, an attached dwelling or a semi-detached dwelling on each lot resulting from the subdivision, if the size of each lot is equal to or greater than—
 - (i) for the erection of a dwelling house—230 square metres, or
 - (ii) for the erection of an attached dwelling—230 square metres, or
 - (iii) for the erection of a semi-detached dwelling—230 square metres

21 Clause 4.6 of LEP 2014 is in the compulsory terms of the Standard Instrument LEP. The Applicant's written request to contravene the minimum lot size development standard under sub-cl 4.1(3) of LEP 2014 was admitted into evidence as Ex B.

22 Clause 6.5 of LEP 2014 is in the following terms:

6.5 Particular dual occupancy subdivisions must not be approved

(1) Development consent must not be granted for a subdivision that would create separate titles for each of the 2 dwellings resulting from a dual occupancy development.

(2) This clause does not apply in relation to a subdivision under—

(a) the *Community Land Development Act 1989*, or

(b) the *Strata Schemes (Freehold Development) Act 1973*.

- 23 The land is flood affected land. In decided whether to grant consent on land to which cl 5.21, Flood planning, applies, the consent authority must consider the matters under sub-cl (3). Those matters have been considered and addressed by a condition of consent (Condition C.10(f), Ex D).
- 24 The proposal includes excavation of the site. In deciding whether to grant consent on land to which cl 6.2, Earthworks, applies, the consent authority must consider the matters under sub-cl (3). Those matters have been considered and addressed by conditions of consent.

Public submissions

- 25 The adjoining southern neighbour is concerned that the proposal will overshadow the northern elevation of their dwelling.

Expert evidence

- 26 The applicant relied on the expert planning evidence of Jeff Mead, and the Council relied on the expert planning evidence of Matthew Kelly. The planning experts prepared a joint report which was admitted into evidence as Ex 2.
- 27 The planning experts agreed that the built form of the proposal is acceptable and does not result in any impacts on adjoining or surrounding properties. They agreed that the proposal is compatible with the existing and desired future character of the locality.
- 28 The planning experts were not required to give oral evidence.

Submissions

- 29 The Council submitted the following:
- The application for two semi-detached dwellings (and Torrens title subdivision) is not correctly characterised. An applicant's description itself does not necessarily determine the scope of an application (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [15]-[19]). If the description of

the development in the application is wrong, it is important to identify the actual development by reference to the plans in particular. The two attached dwellings will be built and completed on one lot, so the development proposed is dual occupancy (attached), as defined by LEP 2014.

- The dictionary definition under LEP 2014 for a semi-detached dwelling is a dwelling that is on its own lot of land and is attached to only one other dwelling.
- The analysis must start with the plans, and cannot start with a condition of consent for the subdivision of the site.
- Subdivision requires consent, at cl 2.6(1). Torrens title subdivision must not be granted as such a subdivision for two dwellings resulting from a dual occupancy development would be in breach of cl 6.5 of LEP 2014. Clause 6.5 creates a boundary between permissible and prohibited subdivision such that the characterisation of the development preceding any subdivision is a fundamental and crucial element for determination.
- Clause 6.5 of LEP 2014 is a prohibition, and not a development standard amenable to cl 4.6 of LEP 2014.
- Clause 6.5 of LEP 2014 must be assumed to have work to do. One must assume that the provision is not insignificant. The characterisation of the subject application as involving a dual occupancy is a factual enquiry based on the relevant LEP 2014 definition and an objective examination of the proposal by reference primarily to the plans and existing title status of the development site. The task of characterisation involves question of fact. The question of the applicant's intentions or subjective motives for the proposed development are irrelevant to the characterisation of that development. The test is purely objective.
- The proposed development is not at law able to be characterised as semi-detached dwellings within the dictionary definition of "semi-detached dwelling" because the development does not comprise a dwelling being built and developed "that is on its own lot of land". Instead, the two dwellings will be built (developed) on one lot of land and attached to each other and thus be correctly characterised as dual occupancy development.
- The Council's submission makes valid a finding that cl 6.5 of LEP 2014 operates such that a jurisdictional prohibition exists to the granting of development consent for a Torrens title subdivision creating separate titles for each of the two dwellings proposed to be built on the site.
- The Torrens title subdivision component of the appealed application should be refused for reason of cl 6.5 of LEP 2014.

30 The Applicant submitted the following:

- The Council's contention regarding cl 6.5 of LEP 2014 is based on a misunderstanding of the application and operation of cl 6.5 when properly construed.
- The experts agreed that the application will result in a final outcome of two semi-detached dwellings being two separate dwellings which are attached,

each on a separate lot of land. The experts have further agreed that a condition of consent requiring the subdivision of the land prior to occupation of the dwellings would be required to meet the definition of semi-detached dwellings without invoking cl 6.5 of LEP 2014.

- The land is zoned R3 Medium Density Residential. Semi-detached dwellings and dual occupancy dwellings are both permissible with consent in the R3 zone. The description of the development in the application is two semi-detached dwellings, and not a dual occupancy. The only difference between the two uses is that dual occupancy must be on one parcel of land and each semi-detached dwelling must be on its own lot of land.
- The characterisation of a development must be done in a common sense and practical way (*Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114 at [45]) (*'Chamwell'*)
- It is well settled in planning law that use must be for a purpose (*Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534-535 and *Minister Administering the Crown Lands Act v New South Aboriginal Land Council* (1993) 80 LGRA 173 at 188, cited in *Chamwell* at [27]). As confirmed in *Chamwell*, the purpose is the end to which the land is seen to serve.
- Section 6.9 of the EPA Act provides that an occupation certificate is required for the commencement of the occupation or use of the whole or any part of a new building. Accordingly, the 'use' of a building is not authorised unless or until an occupation certificate is issued. That is, the use authorised under a development consent does not become a use for the purpose of land until the occupation certificate has issued. The Applicant proposes a condition be imposed requiring that the subdivision certificate be issued prior to issue of an occupation certificate. The condition will ensure that the building is never used for the purpose of a dwelling until the Torrens title subdivision is effected.
- The Council's contention that cl 6.5 of LEP 2014 is a prohibition and not a development standard is irrelevant to the Court's determination of the application before it, because the application is for semi-detached dwellings. There is no application before the Court for subdivision of a dual occupancy development.
- The applicant relies upon cl 4.6 of LEP 2014 to request to vary the minimum lot size development standard under sub-cl 4.1(3) of LEP 2014 (Ex 2).

Characterisation of the proposed development

- 31 I accept the parties' agreement that the only difference between the definitions for semi-detached dwelling and dual occupancy (attached) is that a semi-detached dwelling is a dwelling on its own lot of land, and a dual occupancy (attached) is two dwellings on one lot of land. The purpose of the two uses in the land use table, as defined, is described at a level of particularity, related to whether a dwelling is on its own lot of land, or it is two dwellings on one lot of land. The two uses are alternate. Either the proposed development is on a

single lot of land, and it is a dual occupancy (attached), or the proposed development is on two lots of land, and it is two semi-detached dwellings.

- 32 The question of the characterisation of the proposed development as either dual occupancy (attached), or two semi-detached dwellings, arises because subdivision that would create separate titles for each of the two dwellings resulting from a dual occupancy development is prohibited under LEP 2014. The Council's position is that the two attached dwellings are proposed on the existing one lot of land; and the Applicant's position is that the two attached dwellings will each be on their own lot of land, following the subdivision, which forms part of the application.
- 33 The Applicant's position is to look at the development that would result from the carrying out of the particular works depicted in the architectural and landscape plans, and the subdivision of the land. The Applicant submitted that this is the "end purpose" referred to by the Chief Judge in *Chamwell*. This end purpose is anticipated by the application, which is for the development and the subdivision of the land, and is achieved by the imposition of a condition of consent requiring the subdivision certificate to be issued prior to issue of an occupation certificate. The condition ensures that the development is not occupied until the development is two dwellings, on two lots of land. For this reason, the proposed development is properly characterised as two semi-detached dwellings, as defined under LEP 2014.
- 34 I agree with the Council's submissions.
- 35 "The purpose of a development is objective in the sense that it is the end which is seen to be served by the carrying out of the development, not subjective in the sense that it is the object in the minds of the persons carrying out the development" (*Botany Bay City Council v Pet Carriers International Pty Limited* (2013) 201 LGERA 116; [2013] NSWLEC 147 at [25], citing *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534). I accept the Council's submissions that the description of the development in the application may not be correctly characterised by an applicant, and the characterisation of the purpose of a development is objective. It is open to the consent authority, or the Court exercising the functions of the consent authority, to characterise the proposed

development if there is a misdescription of the development in the application (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [19]).

- 36 I do not accept the Applicant's submission that the "end purpose", referred to in *Chamwell* at 406, is authority for assessing the proposed two attached dwellings each on their own lot of land (citations omitted):

In planning law, use must be for a purpose. The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued.

- 37 The Chief Judge's sentence, "the purpose is the end to which the land is seen to serve" in *Chamwell* at 406, is the basis for his finding that a carpark, intended to partly serve a proposed supermarket on an adjoining lot, and located on Lot D which was zoned for residential development where retail development was prohibited, was properly characterised as being for the purpose of the supermarket. The "end purpose" of all the components of the development that served the retail purpose of the supermarket was that retail purpose, not something independent or unrelated to that retail purpose. "The physical acts involved in the erection of the building including the construction of the car park, driveways, access ways and the landscaped forecourt are the means by which the land is made to serve the retail purpose of the supermarket. Viewed this way, all of the land on, in or under which the applicant's proposed retail development is to be carried out, including Lot D, can be seen to be intended to be used and will be used for the purpose of the supermarket", at 406. This principle is not authority for assessing this application as a *fait accompli*, that is, as two lots of land. The end purpose of ancillary elements or components of a development, and the proposed subdivision of a parcel of land, are distinct.
- 38 The proposed development is properly characterised as a dual occupancy (attached) development, as defined by LEP 2014, because the site is a single lot. The proposal is for two dwellings on one lot of land, and for the subdivision of the lot into two lots of land. The assessment is done at the time of the making of the application, and at the time of the making of the application, the

site is a single lot, and the proposal to be assessed is for two dwellings on that single lot and the subdivision of the lot into two lots.

- 39 Pursuant to cl 6.5 of LEP 2014, development consent cannot be granted for a subdivision that would create separate titles for each of the two dwellings resulting from a dual occupancy.
- 40 Clause 6.5 of LEP 2014 is a prohibition, and not a development standard. Having regard to the eight principles derived from the authorities regarding whether a clause in an environmental planning instrument is a development standard or a prohibition articulated in *Laurence Browning Pty Ltd v Blue Mountains City Council* [2006] NSWLEC 74 at [26], I am satisfied that cl 6.5 is a prohibition for a subdivision that would create separate titles for each of the two dwellings resulting from a dual occupancy development, for the following reasons:
- LEP 2014 includes development standards under Pt 4. Clause 6.5 is identified as an “additional local provision” under Pt 6.
 - The provision does not specify or fix a standard in respect of an aspect of development, as listed under the definition of development standards (s 1.4 of the EPA Act).
 - The provision prohibits subdivision in a certain circumstance.
- 41 The proposed Torrens title subdivision of the development is prohibited.

The proposal, other than the Torrens title subdivision of the dual occupancy development, is acceptable

- 42 I accept the agreement of the planning experts that the built form of the proposal is acceptable and consistent with the existing and desired future character of the locality. I accept the agreement of the planning experts that the development does not result in any unacceptable amenity impacts on adjoining development.
- 43 I am satisfied that the jurisdictional pre-requisites to the grant of consent are met.
- 44 The Applicant submitted that should I find that the proposal is for a dual occupancy (attached), the Applicant’s preference is for an opportunity to amend the application accordingly and for the imposition of a condition of

consent requiring the subdivision of the site by the registration of a strata plan, and not a refusal of the application.

- 45 There is no need to amend the application because I have determined that the application the subject of this appeal is for a dual occupancy (attached) development, as defined under LEP 2014.

Directions

- 46 On 6 December 2022, the Court directed the parties to do the following:
- (1) The Council is to file conditions of consent that provide for the subdivision of the site by the registration of a strata plan within 14 days of the date of this judgment.
 - (2) Liberty to restore on 3 days' notice.
- 47 On 11 January 2023 the conditions of consent, in accordance with the Court's direction, were filed.

Orders

- 48 The orders of the Court are:
- (1) The appeal is upheld.
 - (2) Development Application No. 59/2022 for the demolition of the existing dwelling, construction of two semi-detached dwellings, associated landscaping and swimming pools, and Strata subdivision into two lots, at 41 Carlotta Road, Double Bay, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
 - (3) The exhibits, other than Exhibits 1, A, B and E, are returned.

Susan O'Neill

Commissioner of the Court

Annexure A

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.