



Land and Environment Court

New South Wales

Medium Neutral Citation:	Quarantine Investments Co Pty Ltd v Manly Council [2013] NSWLEC 1222
Hearing dates:	18 November, 2013
Decision date:	22 November 2013
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	1. The appeal is upheld. 2. Development Application No. 216/2012 for an extension to the awning over the eastern deck, roll down clear blinds to enclose the deck and a trial period of extended trading hours on the eastern deck is approved, subject to the conditions in Annexure A. 3. The exhibits, other than exhibits 6 and L, are returned.
Catchwords:	DEVELOPMENT APPLICATION: Extension of awning with roll down clear blinds to enclose eastern deck area of Manly Wharf Hotel and impacts on views of the harbour from the public domain; extension of trading hours for the eastern deck and acoustic impacts.
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979
Cases Cited:	Rose Bay Marina Pty Limited v Woollahra Municipal Council and anor [2013] NSWLEC 1046 TGM Developments Pty Ltd v Manly Council [2013] NSWLEC 1099
Category:	Principal judgment
Parties:	Quarantine Investments Co Pty Ltd Manly Council
Representation:	Mr C. McEwen SC (Applicant) Ms L. Finn (Solicitor) (Respondent) Solicitors Sparke Helmore (Applicant) HWL Ebsworth Lawyers (Respondent)
File Number(s):	10304 of 2013

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s97 of the *Environmental Planning and Assessment Act 1979* against the refusal of Development Application No. 216/2012 for an extension of the awning over the eastern deck, the addition of roll down clear blinds around the perimeter of the awning and an extension of hours for the use of the eastern deck until midnight (the proposal) by Manly Council (the Council) at the Manly Wharf Hotel, East Esplanade, Manly (the site).

Issues

- 2 The Council's contention in the matter is that the proposal will impact on views of the harbour from the public domain.
- 3 The Council's contention regarding adverse noise impacts resulting from the extension of hours of trading for the eastern deck area was resolved to Council's satisfaction by way of the acoustic experts agreement and a condition for a trial period and monitoring.

The site and its context

- 4 The Manly Wharf Hotel (the hotel) is on the south-eastern side of the Manly Wharf complex and the eastern deck wraps around the eastern corner of the hotel and is accessed from the internal bar area. The eastern deck is adjacent to the raised public promenade along the Manly Cove foreshore, on the south-western side of East Esplanade, Manly.
- 5 The eastern deck is enclosed by a solid balustrade clad in timber boarding approximately 1.2m high and contains tables and bench seats with umbrellas over, for use by patrons of the hotel. The eastern deck extends approximately 8m from the south-eastern facade of the hotel, at its widest point.

Background and the proposal

- 6 The hotel currently trades from 5am until 1am the following day, Monday to Saturday and 10am until midnight on Sunday (exhibit F, pp 1-2). The outdoor seating areas on the eastern deck and the jetty bar close at 10pm (exhibit 2, tab 2, appendix 1E, p 3).
- 7 Hugo's Restaurant, on the north-western side of Manly Wharf, trades until midnight Monday to Thursday and Sunday and until 1am the following day on Friday and Saturday and the outdoor dining area closes at midnight (exhibit G, p1). Both Hugo's Restaurant and the Bavarian Bier Cafe, on the north-western side of Manly Wharf, have pergolas and roll down PVC blinds enclosing their outdoor dining areas.

The recent approval of two restaurants within a first floor addition to Manly Wharf (DA142/2011) permits them to trade from 8am until 1am the following day on Friday and Saturday and 8am until midnight on Sunday (on a trial basis for 3 years from the commencement of trading of the first restaurant) and until 11pm Monday to Thursday (exhibit J, p18).

- 9 The proposal is to remove the existing steel roof beams and perspex roofing and install a straight batten fabric awning roof over the area of the eastern deck, with eight 90 x 90mm aluminium columns and concealed downpipes to the edge of the timber deck. The proposal includes roll down clear PVC blinds around the perimeter of the awning, to be zippered at the sides and to sit on the timber counter below for an acoustic seal, for use during inclement weather and after 10pm.
- 10 The proposal is to extend the trading hours on the eastern deck from 10pm until midnight every night.

Planning Framework

- 11 The site is located within the Foreshores and Waterways Area pursuant to *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (Harbour SREP). The Council is the consent authority for land/water interface development, pursuant to cl 5(1) of the Harbour SREP and so the Court, standing in the shoes of the Council, is the consent authority for this matter, pursuant to s 39(2) *Land and Environment Court Act 1979* (NSW).
- 12 Cl 14 of the Harbour SREP, 'Foreshores and Waterways Area', includes the following planning principle for land within the Foreshores and Waterways Area:
 - (d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores
- 13 Cl 18 of the Harbour SREP, 'Development control in the waterways' includes a table of permissible and prohibited uses for each of the zones. 'Licensed hotel' is not listed in the table, however development not referred to in the table may be carried out with development consent if the consent authority is satisfied that the development is not inconsistent with the aims of the Harbour SREP and will not otherwise have any adverse impacts, at subcl 18(2). The aims of the Harbour SREP, at cl 2, are as follows:
 - (a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained:
 - (i) as an outstanding natural asset, and
 - (ii) as a public asset of national and heritage significance, for existing and future generations,
 - (b) to ensure a healthy, sustainable environment on land and water,
 - (c) to achieve a high quality and ecologically sustainable urban environment,
 - (d) to ensure a prosperous working harbour and an effective transport corridor,
 - (e) to encourage a culturally rich and vibrant place for people,
 - (f) to ensure accessibility to and along Sydney Harbour and its foreshores,

- (g) to ensure the protection, maintenance and rehabilitation of watercourses, wetlands, riparian lands, remnant vegetation and ecological connectivity,
- (h) to provide a consolidated, simplified and updated legislative framework for future planning.

14 Under the Harbour SREP, the site is zoned W2 - Environmental Protection. The objectives of the W2 Zone at cl 17 are as follows:

- (a) to protect the natural and cultural values of waters in this zone,
- (b) to prevent damage or the possibility of longer term detrimental impacts to the natural and cultural values of waters in this zone and adjoining foreshores,
- (c) to give preference to enhancing and rehabilitating the natural and cultural values of waters in this zone and adjoining foreshores,
- (d) to provide for the long-term management of the natural and cultural values of waters in this zone and adjoining foreshores.

15 Manly Wharf is listed on the NSW State Heritage Register (SHR), listing number 01434 and the schedule in Part 2 'Heritage items identified in Sydney and Middle Harbour Areas', item no. 18 of the Harbour SREP. The Statement of Significance for Manly Wharf is as follows:

Of environmental significance as a visually prominent man-made feature. Of historical significance for its associations with the maritime activities at Manly as a tourist destination and suburb of Sydney, dependent on the ferry link to the CBD. (Anglin 1990:2033) Together with Circular Quay, the wharf is the only substantial older style ferry wharf surviving in Port Jackson: association with Manly's history as a recreational centre. (Blackmore, Ashton, Higginbotham, Rich, Burton, Maitland, Pike 1985)

16 Cl 15 of the Harbour SREP, 'Heritage', includes the following relevant planning principle for heritage conservation:

- (e) significant fabric, settings, relics and views associated with the heritage significance of heritage items should be conserved,

17 The proposal has been granted an exemption, pursuant to s 57(2) *Heritage Act* 1977, from the need for a s 60 approval by the NSW Heritage Council, by the Heritage Branch, NSW Office of Environment and Heritage, on the basis that the proposed works have been assessed as likely to have a minor impact on the heritage values of Manly Wharf (exhibit 2, tab 5).

18 Cl 25 of the Harbour SREP, 'Foreshore and waterways scenic quality' requires the following matters to be taken into consideration in relation to the maintenance, protection and enhancement of the scenic quality of foreshores and waterways:

- (a) the scale, form, design and siting of any building should be based on an analysis of:
 - (i) the land on which it is to be erected, and
 - (ii) the adjoining land, and
 - (iii) the likely future character of the locality,
- (b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,
- (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.

Cl 26 of the Harbour SREP, 'Maintenance, protection and enhancement of views', requires the following to be taken into consideration in relation to the maintenance, protection and enhancement of views:

- (a) development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,
- (b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,
- (c) the cumulative impact of development on views should be minimised.

- 20 As the proposal is within the Foreshores and Waterways Area (Harbour SREP), the *Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005* (Harbour DCP) applies to the proposal.
- 21 The site is identified as 'Landscape Character 8' by the Harbour DCP and any development within this landscape is to satisfy the following criteria, at iii) 'Performance criteria':
- the vegetation is integrated with land-based development to minimise the contrast between natural and built elements;
 - design and mitigation measures are provided to minimise noise and amenity impacts between incompatible land uses;
 - the maritime uses on the Harbour are preserved. Pressure for these uses to relocate is minimised. New developments adjoining maritime uses are designed and sited to maintain compatibility with existing maritime uses; and
 - remaining natural features that are significant along the foreshore are preserved and views of these features are maintained.
- 22 The Harbour DCP includes, at 4.5 'Built form', that the use of reflective materials is to be minimised.

Public submissions

- 23 Three local residents provided evidence on site at the commencement of the hearing. Their objections can be summarised as follows:
- the proposal to extend the trading hours on the eastern deck from 10pm until midnight will adversely and unreasonably impact on their amenity by prolonging the loud noise created by patrons of the hotel and music played within the internal bar area; and
 - the proposal to roll down the PVC blinds at 10pm will do little to alleviate the adverse impact of the noise on their amenity.

Expert evidence

Impact of the proposal on views from the public domain

- 24 Ms Nancy Sample (Council) and Mr Robert Chambers (Applicant) provided expert planning evidence.
- 25 The planners agree that the proposal does not impact on private views of the harbour

from surrounding residential development (exhibit 5, p5).

- 26 Ms Sample considers that the proposal 'will have an unreasonable visual impact to this end [the south-eastern side] of the Wharf development and will also reduce public access to valuable harbour and headland views to an unreasonable level' (exhibit 5, p 4). In Ms Sample's opinion, the proposal does not meet clauses 14(d) or 25 of the Harbour SREP as it does not 'maintain, protect and enhance' the visual qualities of the harbour (exhibit 5, pp 4, 7).
- 27 Mr Chambers considers that the limited scale of the proposal, its position, height, materials and appearance will have minimal impacts on the scenic quality of the foreshore area and that it is appropriate within its context (exhibit 5, p7). In Mr Chamber's opinion, the proposal minimises any impacts on views of the harbour from the public domain as the blinds are transparent and will generally be rolled up, providing views through the eastern deck area to the harbour beyond. Furthermore, the proposal will result in the removal of the existing umbrellas (exhibit 5, p6).

Adverse noise impacts resulting from the extension of hours of operation for the eastern deck area

- 28 Mr Barry Murray (Council) and Mr Steven Cooper (Applicant) provided expert acoustic reports (exhibits 4, D and E). Mr Cooper concluded, following acoustic monitoring and various assumptions, that the use of the eastern deck will comply with the OLGR (Office of Liquor, Gaming and Racing) noise criteria when the deck is being used on a Friday or Saturday night between 10pm and midnight, during summer (exhibit D, p6). Mr Murray agrees with Mr Cooper's conclusion (exhibit 4, p1).
- 29 Notwithstanding his agreement with Mr Cooper, Mr Murray recommended a 12 month trial period to allow the proposal to be monitored to ascertain the actual noise levels at nearby residential receivers and to determine whether lowering the PVC blinds after 10pm is effective in ameliorating the noise (exhibit 4, p1). Mr Murray's recommendation has been included in the conditions of consent (Part A, condition 2), as follows:

Trial Period

The operation of the eastern deck from 10pm until 12 midnight is subject to a 12 month probationary period which shall operate from the issue of an occupation certificate for the physical works.

Within 3 months prior to the conclusion of the 12-month probationary period, attended acoustic assessments during the time period 10pm to 12 midnight over three days being selected from Fridays and Saturdays must be undertaken by a qualified and experienced acoustical consultant and a report provided ('Acoustic Compliance Report'). The assessment must take into consideration the extended trading hours and the level of noise imposed on nearby residences as a result of patron, musical and mechanical plant noise. The Acoustic Compliance Report must be submitted to the Council and must certify that noise levels emitted from the premises do not exceed the noise limits specified in Conditions 10 and 11 of Part F, or otherwise should provide recommendations as to how the limits can be complied with.

If an application to delete this condition is not made within one (1) month after the end of the trial period then the hours of operation for the eastern deck will revert back to their previous hours of operation being no later than 10pm on any day.

Submissions

- 30 Ms Finn submitted that the Council's contention regarding adverse noise impacts resulting from the extension of hours of operation for the eastern deck area was resolved by way of the acoustic experts agreement and the condition for a trial period and monitoring.
- 31 Ms Finn submitted that the Manly Wharf Hotel is a well managed venue.
- 32 Ms Finn submitted that the roll down blinds should only be lowered after 10pm at night in order to mitigate noise impacts and should remain open during the day, regardless of the weather, to allow for views of the harbour from the public domain across the eastern deck.
- 33 Mr McEwen submitted that the Senior Commissioner's interpretation of cl 18(2) and 26 of the Harbour SREP in *TGM Developments Pty Ltd v Manly Council* [2013] NSWLEC 1099 (*TGM Developments*) at paragraphs 23 - 33 should be adopted in this matter. Ms Finn agreed with this approach.

Findings

Impact of the proposal on views from the public domain

- 34 I adopt the Senior Commissioner's interpretation of cl 18(2) and 26 of the Harbour SREP as set out in his judgment, *TGM Developments*. That is, for the development to be permissible with consent, I must be satisfied that the development is not inconsistent with the aims of the Harbour SREP [cl 18(2)(a) of the Harbour SREP]. I must then consider the impact of the proposal on views [cl 26(a), (b) and (c) of the Harbour SREP]. Importantly, cl 26 is not a form of mandatory prohibition, unlike cl 18(2), but rather a matter required to be taken into consideration. Having done so, I must then return to consider whether the proposal will not otherwise have any adverse impacts [cl 18(2)(c)].
- 35 The Senior Commissioner notes the following in his decision in *TGM Developments* in regard to the construction of cl 26 of the Harbour SREP, at par 31:
- There is a tension in the wording of cl 26(a) - in that it is difficult to understand how something that can merely maintain can also enhance, that provision being in the cumulative rather than in the alternative. It is also difficult to understand how, if the objective exhorted to be considered as a consequence of cl 20 and 26 is the maintenance, protection and enhancement of views, there can be any cumulative impact of development on view as discussed in cl 26(c).
- 36 With regard to the impact of the proposal on harbour views from the public domain, I am persuaded by Mr Chambers evidence, that the limited scale of the proposal, its position, height, materials and appearance will have minimal impacts on the scenic quality of the foreshore area and that the proposal minimises any impacts on views of the harbour from the public domain, as the blinds are transparent and will generally be rolled up, providing views through the eastern deck area to the harbour beyond.

- 37 The impact of the proposal on views from the raised promenade along the Manly Cove foreshore is confined to one small area of the footpath immediately to the north of the hotel. The view to be partially interrupted by the extended awning is to the south-west, of Manly Cove, for a pedestrian moving along the footpath of the promenade for a matter of meters. When the existing umbrellas are open, they too partially interrupt the same view. In the seated position, the view is currently interrupted by the 1.2m high solid balustrade. In the context of the overall promenade, the view impact of the proposal is minor, when compared to the sweep of views available along the promenade. I am satisfied that the impact of the proposal on views of the harbour from the public domain is so inconsequential that it does not warrant an analysis using the 'Impact on public domain views' planning principles (*Rose Bay Marina Pty Limited v Woollahra Municipal Council and anor* [2013] NSWLEC 1046 pars 44 - 48).
- 38 It would be inappropriate to refuse the proposal on the basis of a minor encroachment on the harbour view from the public domain, by simply adopting and applying the objective of maintaining, protecting and enhancing views, pursuant to cl 26(a) of the Harbour SREP (*Rose Bay Marina Pty Limited v Woollahra Municipal Council and anor* [2013] NSWLEC 1046 par 52). I am satisfied that the design and detailing of the proposal minimises any adverse impacts on views and vistas from the public domain and minimises the cumulative impact of development along the Manly Cove foreshore (cll 26(b) and (c) Harbour SREP).
- 39 I am satisfied that the views associated with the heritage significance of the Manly Wharf are conserved by the proposal and that as a consequence, the proposal has no impact on the identified heritage significance of Manly Wharf. In coming to this conclusion, I have given weight to the exemption, granted to this proposal, for an application for approval pursuant to the Heritage Act 1977, provided by the Heritage Branch, NSW Office of Environment and Heritage (exhibit 2, tab 5).
- 40 The proposal satisfies cl 18(2) of the Harbour SREP as it is not inconsistent with the aims of the Harbour SREP and it will not otherwise have any adverse impacts.
- 41 The roll down PVC blinds should be permitted to be lowered during inclement weather because it is practical and reasonable to do so.

Adverse noise impacts resulting from the extension of hours of operation for the eastern deck area

- 42 In my view, the local residents have raised valid concerns regarding the potential for adverse noise impacts as a result of extending trading hours on the eastern deck until midnight. I accept Council's submission that their contention regarding this matter was resolved to Council's satisfaction by way of the acoustic experts' agreement and a condition for a trial period. The trial period of 12 months will allow the extended trading hours on the eastern deck to be monitored to ascertain the actual noise levels at nearby residential premises and for this aspect of the proposal to be reviewed by Council at the conclusion of the trial period.

Conclusion

- 43 The impact of the proposal on views from the raised promenade along the Manly Cove foreshore is confined to a small area of the footpath immediately to the north of the hotel. In the context of the overall promenade, the view impact is minor, when compared to the sweep of views available along the promenade. I am satisfied that the design and detailing of the proposal minimises any adverse impacts on views and vistas from the public domain and minimises the cumulative impact of development along the Manly Cove foreshore.
- 44 I accept Council's submission that their contention regarding potential for adverse noise impacts as a result of extending trading hours on the eastern deck until midnight was resolved by way of the acoustic experts' agreement and the imposition of a trial period for the extended hours.

Orders

- 45 The orders of the Court are:
1. The appeal is upheld.
 2. Development Application No. 216/2012 for an extension to the awning over the eastern deck, the addition of roll down blinds to enclose the deck and a trial period of extended trading hours on the eastern deck is approved, subject to the conditions in Annexure A.
 3. The exhibits, other than exhibits 6 and L, are returned.

Susan O'Neill

Commissioner of the Court

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Decision last updated: 22 November 2013

