



Land and Environment Court
New South Wales

Case Name: Club Marconi Limited v Fairfield City Council

Medium Neutral Citation: [2022] NSWLEC 1315

Hearing Date(s): 30-31 March 2022; 30 May 2022

Date of Orders: 20 June 2022

Decision Date: 20 June 2022

Jurisdiction: Class 1

Before: Walsh C

Decision: See orders at [44]

Catchwords: DEVELOPMENT APPLICATION – seniors housing development – registered club – site compatibility certificate – minimising gambling harm – lay objections

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55
Environmental Planning and Assessment Regulation 2021, cl 24, 61
Fairfield Local Environmental Plan 2013, cl 2.3, 5.10, 6.1, 6.2, 6.9

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 23, 26, 28, 30, 32, 40, 41
State Environmental Planning Policy No 65— Design Quality of Residential Apartment Development, cl 28, 30
State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6

	State Environmental Planning Policy (State and Regional Development) 2011, cl 2
Cases Cited:	Club Marconi Limited v Fairfield City Council [2021] NSWLEC 132
Texts Cited:	NSW Department of Planning and Environment, Apartment Design Guide, (July 2015) Fairfield Development Control Plan 2013
Category:	Principal judgment
Parties:	Club Marconi Limited (Applicant) Fairfield City Council (Respondent)
Representation:	Counsel: P Tomasetti SC (Applicant) A Seton (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Marsdens Law Group (Respondent)
File Number(s):	2021/205869
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** Club Marconi Limited (applicant) seeks the grant of development consent for a seniors housing development within the grounds of its site located at 121-133 Prairie Vale Road, Bossley Park (site). The development application (DA) to Fairfield City Council (Council) has a reference number of 174.1/2021.
- 2 These proceedings are an appeal brought by the applicant under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of the DA by the consent authority. As the capital investment value of the proposed development is greater than \$30 million, the proposal is regionally significant development as identified in cl 2 of Sch 7 of State Environmental Planning Policy (State and Regional Development) 2011 (SEPP SRD). In turn, the Sydney Western City Planning Panel (Panel) is the consent authority. However, Council is the respondent to the appeal by virtue of s

8.15(4) of the EPA Act, albeit subject to the control and direction of the Panel in connection with the conduct of the appeal.

- 3 I would mention here that I rely on Council's amended statement of facts and contentions filed 9 March 2022 (Ex 1), the agreed (without prejudice) draft conditions of consent filed 30 May 2022 and a "jurisdictional statement" agreed between the parties and provided to the Court on 30 May 2022 for much of the descriptive content contained in the following three sections.

Site and locality

- 4 The site is of a quite rectangular shape occupying a total area of approximately 12.2 ha. It is made up of the following allotments: Lot 7 DP 664803, Lot 1 DP 332770, Lot 5 Section B DP 6934, Lot 6 Section B DP 6934 and Lot 3B DP 407243. The site is generally flat with a fall to the south-west.
- 5 The site contains an existing registered club known as Club Marconi (Club). The Club's facilities include a large club building, playing fields including an enclosed field known as Marconi Stadium (stadium), a gymnasium and a total of 1681 car parking spaces for members, staff and guests. The car parking is presently provided at-grade across the site and within a two storey structure at the north-eastern corner of the site. The Club operates Monday to Friday from 10am to 4am and on Saturdays and Sundays from 9am to 4am. The gymnasium presently operates 24 hours, 7 days a week on a temporary 3 year basis.
- 6 The site enjoys road frontage along its northern and (most of its) southern boundaries (comprising Restwell Road and Prairie Vale Road, respectively). The South West Italian Australian Association ("SWIAA") seniors housing development is situated to the east of the site at 84-88 Restwell Road. The rest of the site's eastern boundary is shared with a conservation area and playing fields. The site's eastern boundary adjoins generally low density residential uses. The areas to the north, west and south of the site are also generally low density and occupied by single and two storey dwelling houses.

Proceedings

- 7 The proceedings commenced with an on-site view, at which various particulars of the proposal were explained to the Court, including in regard to responses to

contentions. On Day 1 of the hearing, the Court agreed to certain amendments to the application sought by the applicant (with consent of Council), and made procedural orders in relation to formalising the amendment in accordance with the requirements of cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000), which were subsequently actioned.

Proposal

- 8 The proposal before the Court seeks consent for certain earthworks and demolition works, removal of certain identified trees and the construction of a two to four storey seniors housing development comprising of 93 self-contained dwellings (independent living units) across five buildings. There would be associated indoor and outdoor communal facilities. Modifications to the existing at-grade Club parking area would provide for 113 spaces and the construction of a replacement at-grade car parking area containing 219 further spaces. There would be associated site infrastructure and landscaping works (including the planting of 252 new trees) and nominated public domain works for pedestrian and vehicle access (including upgraded access to Restwell Road). Relevant in the circumstances were the intended retention of six mature trees along the Restwell Road frontage, along with the demolition of two eastern light towers which would be replaced by new light towers within the stadium confines.

No contested issues

- 9 This DA was subject to considerable dialogue between the parties and certain amendments before the hearing and at its commencement. By the point of time at which I reserved my decision in these proceedings, and based on amendments to the DA (enacted with consent of Council and legitimised pursuant to the processes of cl 55(1) of the EPA Regulation 2000), there was no contested issue in dispute between the parties in regard to either merits or legal considerations. In fact on 27 May 2022, the parties filed an agreement outlining the terms of a decision in this matter with which the parties agreed. This decision was that the DA be granted consent in accordance with agreed conditions which occupy Annexure A to this judgment. Soon after, the parties provided the Court with the abovementioned jurisdictional statement explaining

why the parties believed this decision was one which the Court could make in the proper exercise of its function.

- 10 Of course, in determining a development application it is the function of the Court to make its own evaluation of the DA, in terms of both jurisdiction and merits and mindful of the matters for consideration at s 4.15(1) of the EPA Act. This evaluation was assisted by various specialist reports accompanying the application and the following experts who prepared joint reports in relation to the proceedings.

Name	Expertise	Engaged by
D Ryan	town planning	Applicant
S Cullen	town planning	Council
C Frias	urban design	Applicant
S Pearse	urban design	Council
K Hollyoak	traffic and parking	Applicant
T Steal	traffic and parking	Council
A Washer	acoustics	Applicant
A Shearer	acoustics	Council

Evaluation

Environmental planning instruments

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

- 11 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (HSPD SEPP) applies to the site. The particulars of the application of HSPD SEPP were assisted by the findings of Duggan J in *Club Marconi Limited v Fairfield City Council* [2021] NSWLEC 132 (*Club Marconi*) where it was found (at [56]) that the site is land zoned primarily for urban purposes.
- 12 Clause 23, relating to development on land used for the purpose of an existing registered club, applies. In regard to subcl 23(1)(a), I am satisfied that: (1) there are appropriate measures to separate the Club from the residential areas of the proposed development in order to avoid land use conflicts. My position aligns with the agreed position of the parties and the appointed experts (noise, lighting and planning). In regard to noise, it is essentially because of the built form design configuration (distance attenuation), acoustic treatments adopted for the accommodation units and the Club's agreement to surrender a current approval which would allow amplified/live music in an outdoor courtyard area on the site (reference Supplementary Joint Report of Acoustic Experts dated 30 March 2022, Ex 9). In relation to obtrusive lighting, a lighting plan prepared by Floth dated 18 March 2022 has been found to be acceptable (JER Town Planning Ex 3 par 2.68).
- 13 I am also satisfied in regard to subcl 23(1)(b). That is, that an appropriate protocol is in place to manage the relationship between the proposed development and the Club's gambling facilities in order to minimise gambling harm, misuse and abuse for future residents. There was some consideration of this topic prior to, and during, the hearing. Council's Social Planning and Community Development experts provided memos of advice raising key issues of concern dated 10 August 2021 and 31 March 2022. There were also discussions held between the applicant's expert M Brammer OAM and Council's Manager Social Planning and Community Development (SPCD) prior to my reserving my decision. These exchanges brought about refinements to

the proposed Gambling Plan of Management to Council's satisfaction as outlined in a memo from Council's Manager SPCD dated 7 April 2022:

“... In summary, the areas of amendment to the (Club Marconi Responsible Conduct of Gaming Plan of Management) include replacement of the term ‘problem gambling’ with ‘gambling harm’; an annual forum on strategies to avoid gambling harm presented by an independent third party organisation; insertion of an acknowledgement of the range of gambling harms from occasional overspend to pathological gambling addiction; insertion of promotion of the Voluntary Pre-commitment Program into Section 6 and a larger range of non-gambling focused activities offered by the Club. The *Club Marconi Responsible Conduct of Gaming Plan of Management version ‘Adjusted and Finalised 06042022* now addresses the key issues raised in the memos dated 10 August 2021 and 31 March 2022.”

- 14 Based on this advice, I am satisfied that the final Gambling Plan of Management dated April 2022 provides for an appropriate protocol under subcl 23(1)(b).
- 15 Under subcl 24(2), a site compatibility certificate is required for this DA. After an application made on 27 June 2019, on 14 August 2020, the Sydney Western City Planning Panel (Panel) issued a site compatibility certificate (SCC) for a seniors housing development comprising in-fill self-care housing, car parking and landscaping on the site. The SCC was tendered into evidence as Ex H and is valid for 24 months from the date of issue. I accept the position of the town planning experts that the DA, as amended and subject to the conditions at Annexure A, is consistent with the site compatibility certificate (Ex 3 par 2.1-2.6).
- 16 In regard to the matter of the site's accessibility to facilities and cl 26, I am satisfied that the future residents would have access to shops, banking services, retail, commercial, community, medical and recreational facilities in accordance with requirements. This is demonstrated in part 6.5.4 of the Statement of Environmental Effects (SEE) at Tab 3 of the Class 1 Application (tendered as Ex A) and in amended architectural drawing DA0005 dated 30 March 2022.
- 17 I am satisfied in regard to cl 28 in that it has been demonstrated that the proposed development would be able to be connected to a reticulated water

system and have adequate facilities for the removal and disposal of sewage (Part 2, Appendix BB and Appendix Z of the SEE).

- 18 A site analysis has been provided in accordance with the requirements of cl 30 (Appendix BB of the SEE and the information required as part of the site analysis is detailed on architectural drawing DA0009 dated 30 March 2022) and I am satisfied that the applicant has taken the site analysis content into account in preparation of the application.
- 19 I am satisfied in regard to the requirements of cl 32. In this instance the proposed development demonstrates that adequate regard has been given to the design principles set out in Div 2 in relation to: neighbourhood amenity and streetscape, visual and acoustic privacy, solar access and design for climate, stormwater, crime prevention, accessibility and waste management. The particulars in relation to these matters are considered in Part 3.3, Appendix E and Appendix Z of the SEE and the State Environmental Planning Policy No 65— Design Quality of Residential Apartment Development (SEPP 65)/ Apartment Design Guide (ADG) table at Tab 5 of the Notice of Motion filed on 30 March 2022 (Ex X). After earlier disagreement, the urban design experts were in clear agreement after plan amendments (and agreed consent conditions) that the proposal, with proposed conditions, was satisfactory in regard to streetscape, context and neighbourhood amenity (Ex 4 par 10 and Ex 5 pars 3-6). Similarly, there had been earlier concerns in regard to acoustic and visual privacy especially in regard to proposed residential balconies, but as indicated above, after certain amendments there was agreement from the acoustic experts in regard to both external and internal acoustics. The planners were satisfied in regard to visual privacy (Ex 3 par 2.55) and solar access (Ex 3 par 2.34). The proposal also demonstrates adequate regard for stormwater management (Ex N), crime prevention (Ex D), accessibility (Ex B and Ex O) and waste management (Ex L). I believe it is reasonable for me to rely on the agreed findings of the relevant experts on these matters.
- 20 Clause 40 is concerned with minimum lot dimensions and building height. As detailed in the Appendix Z to the SEE and in the SEPP 65 compliance table (Ex Y) the proposal satisfies the development standards set out in this clause.

Here I note that cl 40(4), which is concerned with building heights in a residential zone, does not apply as the site does not fall within a residential zone.

- 21 Clause 41 is concerned with accessibility and useability. The proposal, relevantly, satisfies the requirements of Parts 1 and 2 of Schedule 3 of the HSPD SEPP, as demonstrated in the plans before the Court and the agreed position of the experts as per Joint Town Planning Expert Reports filed on 25 and 31 March 2022.

State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development

- 22 Because the proposal includes an element defined as a residential flat building, SEPP 65 applies.
- 23 SEPP 65 brings forward certain requirements, as does the EPA Regulation 2000. Relevantly, cl 50(1A) of the EPA Regulation 2000 requires a development application that relates to residential apartment development to be accompanied by a design verification statement (DVS) meeting stipulated requirements. A DVS dated 29 March 2022 prepared by DACCA (Ex X) was submitted with the application explaining how the development addresses the design quality principles and demonstrating how the objectives of the ADG have been achieved.
- 24 Mindful of the requirements of cl 28(2) of SEPP 65, I have taken into consideration: the design quality of the development when evaluated in accordance with the design quality principles, and I have taken into account the ADG. The DVS (Ex X) and the cross referencing of ADG criteria (Ex Y) and the joint reports of the urban design experts were useful to me here (Ex 4 and 5).
- 25 Having regard to the agreed position of the urban design experts, I am satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles and the objectives specified in the Apartment Design Guide for the relevant design criteria, addressing cl 30(2) of SEPP 65.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 26 Under cl 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience SEPP), a consent authority cannot consent to the carrying out any development on land unless it has considered whether the land is contaminated, and if so, it is satisfied that the land is suitable (or will be suitable after remediation) for the purpose for which the proposed development is to be carried out.
- 27 A Stage 1 Contamination Assessment prepared by Ground Technologies Pty Ltd (Ex T) found that the site is suitable for residential use and that no remediation action plan is required. Council is satisfied that the requirements of cl 4.6 are satisfied. On the basis of the evidence before me, I too am satisfied in that regard.
- 28 Fairfield Local Environmental Plan 2013 Fairfield Local Environmental Plan 2013 (FLEP) applies to the site.
- 29 The site is zoned RE2 Private Recreation under FLEP. I have had regard to the zone objectives, noting this requirement of cl 2.3(2). While the development would not be permissible within the RE2 zone under FLEP, there is no dispute (after the findings of *Club Marconi* – see [11]) that the proposal is permissible with consent under SEPP HPSPD.
- 30 Selected additional provisions are considered below:
- No floor space ratio or height of buildings controls apply to the site under FLEP.
 - The site is not a heritage item or located within a heritage conservation area, as such cl 5.10 does not apply.
 - The site is not identified as having acid sulfate soils and as such cl 6.1 does not apply.
 - The site involves earthworks. I have considered the matters listed at cl 6.2(3). I accept the agreed advice of the parties that as a consequence of the earthworks scheme, and proposed consent conditions, there would be no unreasonable adverse effects.
 - Under cl 6.9 consent must not be granted unless the consent authority is satisfied that essential services are available for the proposed development or that adequate arrangements have been made to make them available as required. Part 4.6.3 of the SEE indicates that the site is currently serviced by water, electricity, sewage. The agreed stormwater scheme is indicated at Ex 9.

There are suitable upgrades to vehicular and pedestrian access proposed in accordance with an agreed position adopted by the parties which accords with the joint expert report prepared by traffic and parking specialists (Ex 7). Accordingly cl 6.9 of FLEP is addressed.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

- 31 Under State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation 2000 the proposed development is a BASIX-affected development. BASIX Certificate No. 1292957M dated 24 March 2022 issued by EcoResults, accompanies the amended application (Ex AA).

Fairfield Development Control Plan 2013

- 32 Fairfield Development Control Plan 2013 (FDCP) applies. In their jurisdictional statement, the parties advised of their agreement that the amended proposal either complies with the relevant controls, or if not, achieves the objectives of such controls. I have considered the analysis at Part 5.4 of the SEE (Ex A) which works through relevant FDCP content. Due consideration has been given to FDCP.

Objecting submissions made in regard to the application

- 33 Council notified the DA on two occasions receiving a total of four submissions and one petition (Ex 1 p 10-11). I have considered these lay submissions which can be grouped into three distinct topics, which are considered in turn below. Of note is that I requested the planning experts to give attention to the submissions and a brief joint report by these two experts (see [10]) in response was tendered into evidence as Ex 10.

Development height and its implications

- 34 The objector concern was that due to its height the development would cause problems with overshadowing, visual privacy, obstruction to open views or outlooks, creating an undesirable precedent and bringing about reduced property values. The maximum building height should be two storeys.
- 35 It is noteworthy that the proposal would have a two storey height nearest to the existing residential areas along Restwell Road. Given the siting within the Club grounds, the proposal could not be expected to bring about external impacts in regard to overshadowing or privacy, and the internal design has been deemed

satisfactory in regard to SEPP 65 and the ADG. The proposed landscaping reasonably addresses any potential adverse impacts in regard to existing outlooks. The specific circumstances of this development (wherein HSPD SEPP opens up certain opportunities in relation to registered clubs) would not reasonably be seen as creating a precedent for residential flat buildings in areas where they are not currently permitted. Impact on property values is not a matter which has been in any way demonstrated in the circumstances of this matter. This objection is not supported.

Seniors housing is not required and this density is not appropriate in this area

- 36 According to this concern there were already two seniors housing developments in the locality and the local population was more characteristically younger people, and that development of this density would place pressure on already strained services.
- 37 I note that the social impact assessment undertaken for the proposal found that there is a growing demand for housing which is more suitable for seniors as this demographic cohort ages. That is to say, the existing housing stock is more characteristically 3-4 bedroom, and the proposal can add to the availability of housing for seniors as they seek to downsize. Overall the proposal can add to the housing mix in the locality and would reasonably be seen as helping in the accommodation of Sydney's population growth, which government services and facilities planning seeks to support. This objection is not supported.

Traffic and parking

- 38 This concern notes what are seen to be existing traffic and parking concerns in the locality, some of which are seen to be related to existing club activities. This evaluation is focused on the proposed seniors housing development. I have accepted the advice of the traffic and parking experts and see the proposal as satisfactory in regard to these concerns.

Environmental Planning and Assessment Regulation 2021 (EPA Regulation 2021)

- 39 I have reviewed the requirements of cl 24 and 61 of the EPA Regulation 2021. To the extent they are relevant I have considered these matters and am satisfied in regard to them.

Consideration of likely impacts

- 40 Through my appraisal of the documentary evidence filed in regard to the application, I have taken into consideration the environmental impacts on both the natural and built environments, and social and economic impacts in the locality likely to be brought about by the proposal. Mindful of the agreement of the relevant experts and the agreed position of the parties, I do not find there would be unreasonable impacts in the circumstances.

Site suitability and public interest

- 41 Based on the overall findings, as outlined above, the site is seen to be suitable for the proposal and I do not see any public interest considerations which would act against a positive evaluation of the proposal.

Conclusion

- 42 All of the contentions originally raised by Council have been addressed to Council's satisfaction through the various amendments to the proposal. A matter which I did see as warranting some additional attention was in regard to arrangements to minimise gambling harm. The liaison between the experts has resulted in a management plan which responds appropriately to this risk. Based on the evaluation outlined above, I am satisfied that the development application, as amended, warrants the grant of consent.

- 43 In respect of the amendments, I would formally note:

- (1) That the applicant has amended the DA, with the agreement of Council (pursuant to cl 55(1) of the EPA Regulation 2000), to incorporate the following amended plans and documents (henceforth referred to collectively as the further amended development application):
 - (a) Architectural plans prepared by DACCA Architecture, as listed at the first bullet point to Condition 1 in Annexure A.
 - (b) Landscape Plans as prepared by Arcadia Landscape Architects, as listed at the second bullet point to Condition 1 in Annexure A.
 - (c) Traffic Report as prepared by TTPP Transport Planning, Reference Number 20384, dated 20 January 2022.
 - (d) Acoustic Report as prepared by Acoustic Logic, Project ID Number 2020113.1, Revision 4, dated 12 November 2021.
 - (e) Responsible Conduct of Gaming Plan of Management as prepared by Liquor Advisory Services, dated 7 April 2022.

- (f) Lighting Plans prepared by Floth, Job number 17605, dated 18 March 2022.
- (g) Sustainability Statement prepared by Gyde Consulting dated 18 March 2022.
- (2) The further amended development application was lodged on the NSW Planning Portal on 14 June 2022.
- (3) The applicant filed the further amended development application with the Court on 27 May 2022.

44 The Court orders:

- (1) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the applicant is to pay the costs of the respondent that are thrown away as a result of the Court allowing the applicant to file the further amended development application, as agreed or assessed.
- (2) The Appeal is upheld.
- (3) Development Application No. DA/174.1/2021 for the construction of a two (2) to four (4) storey seniors housing development comprising 93 self-contained dwellings with associated seniors indoor and outdoor facilities at 121-133 Prairie Vale Road, Bossley Park NSW 2176, is approved subject to the conditions in Annexure A.
- (4) All exhibits are retained with the exception of the following which are returned: Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

.....

P Walsh

Commissioner of the Court

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