

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION:

Lane v Manly Council [2009] NSWLEC 1329

PARTIES:

APPLICANTS

Tom Lane

Emma Lane

RESPONDENT

Manly Council

FILE NUMBER(S):

10997 of 2008

CATCHWORDS:

DEVELOPMENT APPLICATION :- erection of residential flat building in open space zone; existing use rights; impact on adjoining open space, street and foreshore; and view loss.

LEGISLATION CITED:

Environmental Planning and Assessment Act 1979

Manly Local Environmental Plan 1988

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

CASES CITED:

Stromness Pty Limited v Woollahra Municipal Council [2006] NSWLEC 587

Ashfield Municipal Council v L Armstrong [2003] NSWCA 353

Ashfield Municipal Council v Armstrong [2002] NSWCA 269

Royal Agricultural Society of NSW v Sydney City Council [1987] NSWCA

Shire of Perth v O'Keefe and Anor [1968 Vol 110 CLR] WASC

CORAM:

Murrell C

DATES OF HEARING:

31 March 2009, 1 April 2009 & 21 April 2009 (outstanding documents filed)

JUDGMENT DATE:

7 October 2009

LEGAL REPRESENTATIVES

APPLICANT
Mr P Rigg (solicitor)
SOLICITOR
Deacons

RESPONDENT
Mr S Griffiths (solicitor)
SOLICITOR
Pikes Lawyers

JUDGMENT:

**But it is THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Murrell C

7 October 2009

10997 of 2008 Tom and Emma Lane v Manly Council

JUDGMENT

- 1 The applicant in these proceedings is seeking to demolish the existing structures on the site known as number 38 Stuart St Manly and erect a building containing two residential units with a garage and a swimming pool. The subject site is zoned open space under the Manly Local Environmental Plan and the applicant relies on existing use rights
- 2 The proposal is referred to in the development application form as: demolition of an existing residential flat building and construction of a 2 and 3 storey residential flat building comprising two units including double garage, swimming pool and associated site landscaping.
- 3 The application involves the demolition of the existing 2-storey four unit residential flat building, removal of trees and construction of a 3-storey building comprising one x four bedroom unit and one x two bedroom unit with a double garage and elevated access way/driveway bridge.
- 4 The ground floor is set one storey below the street level at RL 3.3 m and is comprised of the living areas of the larger of the two units. The ground floor includes living area and dinning area, kitchen, staircase, lift, study, plant room, laundry and bathroom. The side setbacks at this level are generally between 920 mm to 2.12 mm on the south east side boundary and 900 mm to 1.9 mm on the north west side boundary.
- 5 The second floor includes four bedrooms, bathrooms, foyer area, lift and staircase. Separate stairs provide access to the two bedroom unit on the third storey. Adjoining the living area of the top floor unit there is a deck of 5.3 by 1.5 facing the beach and Harbour and there is also a deck adjoining the bedroom of 2.2 by 5.3

facing the street. At Figure 5 shows the elevations of the proposed building.

Site and Environs

- 6 The site is located on the south-western side of Stuart Street and has a site area of about 592 square metres. The site is irregular in shape and has a frontage to Stuart Street of 12.2 m with the boundary to Little Manly Cove Beach of 10.5 m. The north-western boundary is some 59 m and the south eastern boundary 52 m. Figures 1 is an aerial photograph of the area and figures 3 and 4 show the existing premises from the street and beach front, and open space areas in the vicinity of the site.
- 7 The site is adjoined to the west by land zoned for open space purposes as is the subject site. The area is generally zoned for residential uses and includes a number of residential flat buildings and single dwelling houses. Immediately to the east of the site there is a single residence of two storeys. The southern boundary of the subject site adjoins the Little Manly Cove Beach and close to this boundary there is a stone retaining wall that is proposed to be retained. The existing stairs protrude onto the beach area and it is proposed that these be removed.
- 8 On the north east side of Stuart Street the residential development is characterised by two and three storey dwellings and apartments located on this high side of the street. These dwellings are generally multi level with the majority of buildings cascading down the street with garages at grade to the street with upper floors dominated by decks and extensive glazed areas to take advantage of the Harbour views. To the west of the subject site Nos. 34 and 36 Stuart Street have been acquired by Manly Council. The subject site at No. 38 and the adjoining residence at No. 40 are zoned for open space and are currently privately owned.
- 9 Within the visual catchment of Little Many Cove to the north there are several higher density residential developments comprising multi-storey residential flat buildings. Development in the area is characterised by an eclectic mix of residential buildings including dwelling houses, flats and apartment buildings of varying size, age and condition.

Statutory planning framework

- 10 The subject site under the ***Manly Local Environmental Plan*** 1988 is in zone 6 - open space. A relevant aim of the plan is:
 - (j) to ensure that new development does not detract from the very special visual quality of the municipality.
- 11 The LEP generally adopts the model provisions.
- 12 The objectives of the open space zone are:
 - (a) to ensure that there is provision for adequate open space areas to meet the needs of all residents and provide opportunities to enhance the total environmental quality of the municipality;
 - (b) to encourage a diversity of recreation activities suitable for youths and adults;
 - (c) to identify and protect and conserve land, which is environmentally sensitive, visually exposed to the waters of middle harbour and the Pacific Ocean and of natural or aesthetic significance at the waters edge;
 - (d) to facilitate access to open areas particularly along the foreshore and visually exposed locations, while allowing recreation use of those areas;
 - (f) to identify areas which
 - (i) in the case of area shown unhatched on the map are now used for open space purposes; and
 - (ii) in the case of land shown hatched on the map are proposed for open space purposes.
- 13 Development without consent includes works for the purpose of landscaping, garden or bushfire hazard

reduction and with development consent there are a number of uses including: boating facilities; childcare centres; marinas; parks; public baths; public dressing pavilions and recreation areas.

14 Clause 10(3) requires:

“Except as otherwise provided by this plan, the council shall not grant consent to the carrying out of development on land to which this plan applies unless the council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out.”

15 Clause 13 refers to the acquisition of certain land and “the owner of any land shown hatched on the map and within zone No. 6 may by notice in writing, require the council to acquire that land and on the receipt of such notice the public authority shall acquire the land”.

16 Subclause 3 of clause 13 states:

Land to which this clause applies may be developed for any purpose, with the consent of the council, until that land is acquired by the public authority concerned where the council is satisfied that the carrying out of that development will not adversely affect the usefulness of the land for the purposes for which it has been reserved.

17 Clause 17 relates to visual and aesthetic protection of certain land and states that:

The council shall not grant consent to the carrying out of development unless it is satisfied that the development will not have a detrimental affect on the amenity of the Foreshore Scenic Protection Area.

18 For development in the vicinity of an item of the environmental heritage cl 19 states:

The council shall not grant consent to a development application to carry out development in the vicinity of an item of the environmental heritage unless it has made an assessment of the effect which the carrying out of that development will have on the historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the item of the environmental heritage and its setting.

19 The Sydney Regional Environmental Plan (Sydney Harbour) 2005 ("SHREP") applies to the site. The SHREP has the following aims with respect to the Sydney Harbour Catchment:

- (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.

20 The site is located within the Foreshores and Waterways Area pursuant to SHREP and there are several matters that need to be considered by consent authorities before granting consent to development in this area. The relevant matters for the current proposal include:

Clause 25 - Foreshore and waterways scenic quality

- (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.

Clause 26 - 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.

21 The SHREP contains heritage provisions for the protection of items listed under this instrument. The subject site does not contain any heritage items pursuant to SHREP, however, there are several items in the vicinity of the site. The heritage items under SHREP in the vicinity of the site include Little Manly Cove Pool Stuart Street (Item 20), site and remains of Brightside cargo wharf Stuart Street (Item 22) and site and remains of harbour side pool and steps Stuart Street, Manly (Item 23). Before granting development consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item (Clause 59).

22 The *Little Manly Coastline Management Plan* was endorsed by Manly Council on 10 May 2004 and applies to the site and locality. This Coastline Management Plan is intended to be a strategic plan for the study area with a long-term time frame of 10-20 years. The plan was developed to define the type, nature and significance of coastal hazards of relevance to Little Manly & Spring coves, to identify other issues relevant to land management of the coastal area in general and to identify appropriate management options. The plan also serves as the specific Community Land Plan of Management for those community lands located within the study area.

23 Under the heading land ownership and logistics of this plan it states that the acquisition options for 38 and 40 Stuart St one option is to the Council to acquire when they become available on markets. Another option is noted as the Council could also negotiate the acquisition of the rear of each of these properties including the undeveloped grassed areas for conversion into public lands will stop this would enable existing houses to continue to enjoy their position while improving public access to the foreshore and con activity between the two sections of reserve. Although at the time this option it was noted was not favourable to the owners.

24 The existing use rights provisions of the **Environmental Planning and Assessment Act 1979** and the Regulation 41 are as follows:

106 Definition of "existing use"

In this Division, "existing use" means:

- (a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4A of Part 3 or Division 4 of this Part, have the effect of prohibiting that use, and
- (b) the use of a building, work or land:
 - (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and
 - (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.

41 Certain development allowed

- (1) An existing use may, subject to this Division:
 - (a) be enlarged, expanded or intensified, or
 - (b) be altered or extended, or
 - (c) be rebuilt, or
 - (d) be changed to another use, but only if that other use is a use that may be carried out

with or without development consent under the Act, or

44 Development consent required for rebuilding of buildings and works

- (1) Development consent is required for any rebuilding of a building or work used for an existing use.
- (2) The rebuilding:
 - (a) must be for the existing use of the building or work and for no other use, and
 - (b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.

Issues

25 The respondent provided a Statement of Contentions known as Exhibit 6 in the proceedings. The issues can be summarised as follows:

1. It is contended that the proposal may not be entitled to rely on existing use rights.
2. The proposal would have excessive bulk and height and would have inadequate setbacks with regard to its physical context. Particulars: The FSR is 0.79:1 the proposal is 3-storeys high with a maximum wall height of 7.7 and 8.8 on the end gables above ground level. The footprint of the proposal significantly exceeds the existing stubs. The setbacks are inadequate.
3. The proposal is not complimentary to the visual amenity of the Little Manly Reserve area and it will have an adverse effect on the scenic quality because of its bulk and scale and it would be out of character with permissible development in the open space zone.
4. Heritage impact: the proposal is in the vicinity of two heritage items and in particular the elevated concrete driveway will adversely effect the curtilage of No. 34 Stuart Street;
5. Swimming pool and external works: the proposal adjoins the open space reserve and a generous setback in the order of 6 to 8 m is required as a buffer to the public open space.
6. Six inadequate and inappropriate car parking arrangements, the proposal provides unworkable off street parking in an area of high on street parking demand. The proposal relies on stacked car parking and it is not safe for pedestrians due to restricted sight line and does not respond to or respect the streetscape and open space zone.
7. Loss of views: the proposal results in view loss to development to the north east side of Stuart Street.
8. The proposal is detrimental to streetscape of the zone and it would create adverse impacts with an uncharacteristic elevated concrete bridge.
9. The proposal is not in the public interest. The public benefit of restoring the subject site to open space is a major benefit that is the subject of statutory acquisition provisions and adopted management plan and the proposal is inconsistent with the existing and future surrounding development of land as set out in the Little Manly Coast Line Management Plan.
10. Suitability of the site for development, climate change is expected to have adverse affects on sea levels and the subject site is flat and the precautionary approach to encourage an open space unit use as reflected in the zoning is required.

Evidence and assessment

26 The Court met on site the first morning of the hearing and heard evidence from a number of resident objectors. Counsellor Griffen of 67 Stuart Street said that the site is zoned open space and it is the last piece in the jigsaw for continuous open space and that a decision on the compulsory acquisition of same should be awaited and the applicant purchased the property in full knowledge of council's intention. She expressed concern that approval would increase the value of the site she also expressed concern about the rise in sea level 40 cm x 2050 and the effect of storm surges on the property. Ms Griffen said that the proposed dwelling was out of context with a swimming adjacent to the beach and also stated that bandicoots an endangered species used the subject site as a foraging area. She said that this was part of the walking coast of Sydney and the proposal would alienate the public in terms of being overlooked.

- 27 Ms Brain of 71 Stuart Street expressed concern about the driveway that would obstruct the pedestrians and wheelchair access in the area and that the driveway bridge was incongruous with streetscape and that there is no existing use for vehicles to access the site. She also objected to the swimming pool and the fact that the house would intrude into the open space.
- 28 Ms Treichler of 66 Addison Road said that she was not personally affected by the proposal but in terms of social justice and climate change that the property should provide access as open space and that adjoining the beach frontage should be shared and not privately owned and developed. She said that it would adversely impact on the open space and the beach around it and that the proposal was an undesirable precedent impacting on the beautiful coast.
- 29 Mr and Ms Deane of 1/43 Stuart Street said that the open space is of regional environmental significance and adjoins land owned by the council and for the public good and interest the proposal should not be allowed as it will impact on the quiet enjoyment by users of the open space majority of as the proposed building would dominate the area and reduce the enjoyment of Little Manly Beach.
- 30 Mrs Young of 47 Stuart Street agreed with the previous speakers and also is concerned about her loss of harbour views and the impact on her lifestyle. She told the Court that when she purchased her property she knew the land was zoned open space opposite her dwelling and that council has had plans for its acquisition for 40 years. She is of the opinion that the open space zoning for the site is given effect to preserve it for future generations and that the new structure would lead to a rezoning and be a precedent.
- 31 Mr Encell of 3 Marshall Street said that the land is zoned for open space and it is of value to the local community and that the elevated ramp and garage doors to the street would adversely impact on the streetscape and that the increased wall height would compromise the landscaping opportunities for the park and close the vista of the adjoining open space. He said that the current building was well mannered and the new development was imposing with decks and glass on the future users on the open space.
- 32 Mr Tom Klein who lives opposite the subject site is concerned that the development would be a precedent and oppose to the public good and public interest. He also expressed concern about the development and the impact of sea level rise.
- 33 Ms Susan Griffiths of 13 Balgowlah Street uses the beach regularly with small children and the future of the land for open space should be considered in terms of its importance on the harbour.
- 34 Mr John Chapman the adjoining owner of No. 40 Stuart Street to the east said that he was granted approval to renovate his premises, which is zoned for open space, and he supports the application as it will improve the amenity of the area. In his opinion the proposal would have little impact on the area.
- 35 Mr Poliakov of 2/39 Stuart Street is concerned about the view loss from his property.
- 36 On behalf of the respondent council expert evidence was given to the Court by Ms Diane Smith, heritage advisor to Manly Council and Mr Steven Layman, consultant town planner. For the applicant Mr Robert Staas, consultant heritage architect and Mr James Nangle, consultant town planner gave evidence to the Court. Individual Statements of Evidence were prepared as well as joint reports to assist the Court.
- 37 The heritage experts agreed that demolition of the existing building on the subject is not objected to. The heritage items in the vicinity of the subject site are No. 34 Stuart Street and the harbour foreshores and in addition the harbour baths are listed as a heritage item. The heritage listing for the harbour foreshores is described as referring to the extent of municipal area adjacent to the harbour, significance is defined as natural landscape, type-aesthetic and description for the item is length of foreshore including natural and built elements of the landscape, rocky sandstone ledges, beaches, mud flats and sandstone retaining walls and timber structures.

- 38 The experts further agreed that the streetscape of Stuart Street has no identified heritage significance and is not listed in any relevant planning document. The experts noted that in 1977 council purchase No. 34 and No. 36 in 1998 and that council in February 2008 resolved to purchase by negotiation at residential market value the subject site, that was identified as open space for acquisition in 1988.
- 39 On Issue 4 that the proposal is in the vicinity of heritage items Mr Staas comments that the site has been alienated by development since 1900 and has in its present configuration been part of a visual curtilage of the foreshore since 1925 and forms part of much wider built in environment surrounding Little Manly Cove. He comments that additionally as proportion of the entire foreshore the subject site is minimal and that the council did not deem the kiosk as adverse to the foreshore and did not consider that the boat storage area or the public car parking to be adverse. He states that:
“to separate the historic residential uses from these other visually detracting uses can not in his opinion be sustained.”
- 40 Mr Staas in his assessment states:
“The presentation of the proposed building to Stuart Street has no impact on the views from the harbour or the beach with the landscaped rear yard substantially retaining it’s existing visual contribution to the edge of the beach. Historically the site has been part of urban development that edges the beach...The separation and the context mitigate any perceived impacts”.
- 41 Ms Smith comments that:
“The site is part of the curtilage of the harbour foreshore of Little Manly Cove and is significant in respect of historic, aesthetic and representative criteria... The boat facilities and the amenities are considered acceptable attributes to the harbour foreshore area. The proposed development, which reinforces the residential use is considered inappropriate particularly as it is situated on the sandy soil of Little Manly Cove and in close proximity to the waters edge.”
- 42 On the question of curtilage of the heritage item Mr Staas says that there is no disagreement that the site falls within the original bay of Little Manly Cove, however it has been developed in its current form for at least 84 years and while it is attached to the foreshore this does not imply that they should be returned to their pre-European settlement condition. He comments further that the fact that the treatment of the land at the south has little resemblance to the original character of the cove and is unsympathetic to its original landscape character. Ms Smith on the other hand considers that the site is an intrinsic part of the harbour foreshore.
- 43 For the particular issue that restoration of the original natural relationship Mr Staas states that “Council has done nothing to conserve the original relationship of the beach and the hinterland and has not attempted any restoration. By heritage listing No. 34 council has ensured that any original relationship will never be achieved. Since purchasing the two sites council has adopted proposal further alienates the area from its natural character through the boat storage and the car park”. Mr Staas comments that the development of the site will not prevent any future purchase and demolition for open space if this is pursued by the council. In his opinion “the development has no significant adverse impacts on the setting of the harbour foreshores or any visual and functional relationship of those areas and the subject site”. He further states that the proposed landscaping will enhance the setting of the beach and general views from the harbour.
- 44 Ms Smith considers that by refusing the application this would reinforce the residential use council is endeavouring to minimise on the heritage listed harbour foreshore. Ms Smith states that:
The proposal would extend the residential use of the land and that the open space for a more holistic and connected reserve system in the area with greater public access to the foreshore would not be achieved.
- 45 The planners agreed that the first key issue is existing use rights and they agreed that the site enjoys

existing use rights for residential flat building. However, Mr Layman considers that the extreme difference in the size of the units with Unit 1 being four times that of Unit 2 in size the poor amenity of Unit 2 with water views obstructed by the roof of Unit 1 and the inappropriate car parking arrangements for Unit 2 suggest the proposal is more akin to a large dwelling with a granny flat than a genuine residential flat building.

- 46 Mr Nangle on the other hand considers that difference in size of the units and their amenity is not such as to render the proposal not a residential flat building, furthermore he states that there is no evidence that what is proposed is two separate dwellings and is therefore a residential flat building.
- 47 On the issue of physical context Mr Layman considers that the relevance surrounding sites are those in the open space zone. Mr Nangle on the other hand considers that surrounding sites should include the opposite side of Stuart Street and in the context of open space zone this would enable a number of built forms including childcare centres, surf lifesaving clubs etc. Mr Layman says that while many buildings in Stuart Street appear not to comply with the current Residential DCP provisions the pre-eminent situation should be the open space zone and the proposal is out of character with a low scale character of development in this open space zone and it is also out of character with the likely future character of the open space zone.
- 48 Mr Layman considers that there would be an adverse impact on Little Manly Cove beach from overlooking from the dwelling and there would be an adverse impact on the streetscape in particular the curtilage of the heritage item at No. 34. Mr Nangle points out that the rear setback is minimum of 22.8 metres with the upper floor setback further and that it would not have an adverse impact on the beach.
- 49 It is agreed that the setbacks of the existing development and the adjoining development are different in that the existing front setback is 5.5 to 7.1 and the proposed setback is 5.4 to 6.5 and that the adjoining development at No. 36 has a setback of 9.3 and at No. 40 it varies from 5.1 to 6.9. The experts agreed that the open space provision is 41% of the site area and that many buildings in Stuart Street appear not to comply with the Residential DCP and are unlikely to change in the foreseeable future.
- 50 Mr Layman considers the proposal has unacceptable streetscape impacts and is not in harmony with the adjoining development on No. 34 to 40 Stuart Street. Mr Nangle on the other hand considers that the proposal is in character with surrounding area and in harmony with the buildings around it.
- 51 Mr Layman considers the landscaping is appropriate in the context and that 83% of the frontage width is taken up by building structure and while Mr Nangle agrees with this he also states that there is a reasonably large area within the road reservation not affected by the proposal that can be landscaped as it currently is which restricts most of the views of the ground floor of the existing building.
- 52 Mr Layman expressed concern about the retaining wall encroaching on the beach and said that it should be rebuilt on the subject site whereas Mr Nangle considers that there is no need to relocate the retaining wall where it has been in-situ since about 1925. Other issues raised in the front or waterside yard of the proposal Mr Layman said can be dealt with by way of conditions in terms of structures and increasing the setback of the swimming pool.
- 53 Mr Layman considers that the driveway arrangement and landscaping does not assist pedestrian visibility and this combined with the narrowness of the footpath creates a safety risk in particular where there is stacked parking and reversing. Mr Nangle on the other hand considers that the driveways in surrounding area all require reversing in particular the multi-dwellings, units at 2, 3, and 4 Craig Avenue.
- 54 On the issue of loss of views Mr Layman is of the opinion that the views to be effected are high quality and contain iconic elements in particular the views from 2/39 Stuart Street and No. 47 Stuart Street. Mr Nangle considers the impact on views at Nos. 43 and 47 are minimal and Mr Layman is of the opinion that the view loss from No. 2/39 is significant of the waterway of Little Manly Cove and for the dwelling at No. 47 it loses

part of its harbour view although there is minor gain over the lowered part of the proposed second floor and in his opinion the view loss is moderate for No. 47. Mr Nangle considers that for No. 39 the views available are a foreshore development, water landscape, headland and harbour which are panoramic and high quality and the impact is minor in the extreme and will not cause any appreciable loss of views available.

- 55 On the issue that the proposal is detrimental to the streetscape Mr Layman says that the garage doors and parking spaces are elevated and the driveway structure dominates the frontage. Mr Nangle considers that the existing road reservation landscaping can be retained as well as some additional site landscaping. He notes that many vehicle access driveways in the area provide little or no landscaping and he referred to Nos. 39, 43, 45, 47 and 51 Stuart Street and Nos 1, 2, 3, 4 and 5 Craig Avenue.
- 56 For the issue that the proposal is not in the public interest Mr Layman considers that there are significant sections of the public, both residents and visitors, whose enjoyment of the foreshore area would be adversely affected by the proposal and that it is in the public interest to restore the subject site and adjoining open space zoned land to a more natural state. Mr Nangle considers that while there is a public interest this is limited and that little public benefit is served by the inclusion of the land as open space due to the large attractive existing beach, baths and park land already available in the vicinity.

Existing use rights

- 57 It was submitted on behalf of the respondent that the subject site has existing use rights for a residential flat building and that the proposal is a dual occupancy not a residential flat building. As such the respondent states that a change of use is not permitted under existing use rights legislation and regulations. Mr Griffiths submitted common parlance/ terminology should be used in describing the proposal not definitions of the instrument and that the proposal is a dwelling house with a granny flat or young adult accommodation. He further submitted that the smaller flat does not share the benefits of the larger dwelling unit. Mr Griffiths submits that the existing building is a block of flats /residential flat building but the new building could not be characterised as an RFB and one must have regard to ordinary terminology.
- 58 On behalf of the applicant Mr Rigg submitted that the proposal is a residential flat building in that two dwellings, are proposed one with four bedrooms and one with two bedrooms and with all its own facilities including laundry kitchen and bathroom with a total area of some 107 square metres with two balconies one of 8 sq m and 11 sq m with on-site parking. Mr Rigg further submitted that it is a suite of rooms for separate occupation and that this is consistent with the model provisions adopted in

the LEP where dwelling means “a room or suite of rooms capable of being occupied as a separate domicile”. In terms of common parlance Mr Rigg states that this is consistent with the Oxford dictionary definition of flat as a suite of rooms used as a residence. Mr Rigg submitted that the existing use rights provisions have priority over the LEP provisions. Furthermore planning instrument provisions cannot derogate from the existing use provisions in terms of section 108(3).

- 59 The Court was taken to the judgement of *Shire of Perth v O'Keefe and Anor* [1968 Vol 110 CLR] WASC. Once depart from the broad categories that are found in the prohibitory by-laws, it is said, and there is no limit to the minuteness of detail that may enter into the description of a purpose so as to form an essential part of it. But at the outset it is necessary to observe that the “existing use” by-laws take two steps, which should be kept distinct from one another. First it is required that a purpose be identified as the end for which it can be seen that the premises are being used at the date of gazettal of the by-laws. Then the provision is made that the land may continue to be used for that purpose: not that the precise manner of use for that purpose may alone continue but that use generally for that purpose may continue. The application of the by-law in a particular case has therefore not be approached through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate

designation of the purpose being served by the use of the premises at the material date. This question being answered, it remains only to inquire, when a use that is being made of the premises at a later date is challenged as not being authorized by by-law 372, whether that use is really and substantially a use for the designated purpose. That will often be a question of fact and degree: cf. *Marshall v Nottingham Corporation*(1); and for that reason border-line cases will inevitably arise in which opinions will differ. ...

But to seek more precise guidance from the by-laws is vain. The general considerations that have been mentioned will suffice for most cases. If premises were being used as professional offices at the commencement of the by-laws, no greater degree of particularity in defining the purpose is likely to appeal to practical minds as appropriate in the application of town-planning legislation than is involved in saying that the purpose is that of professional offices”.....”such ranges of activities as may be described in the ordinary use of language by expressions descriptive of trades, industries, manufactures, shops or places of public amusement, such as the expression ‘retail butcher’s shop’ “, rather than “ to the details of the particular aggregation of activities”.

60 Having regard to the facts of the matter before me I am satisfied that the proposal is a residential flat building and the same purpose as the activity/use being carried on in the building that exists on the site today that has the benefit of existing use rights. The purpose for which the premises were being used at the relevant date of the LEP rezoned the land to open space in 1988 was a residential flat building.

61 I recognize that the purpose is more particular than the residential use of the land and the existing use rights only pertain to a residential flat building. On the facts I am satisfied the particular purpose in this case is a residential flat building as opposed to a general purpose such as residential and that the proposal in my assessment containing two dwellings units is a residential flat building in ordinary terminology and parlance. The Macquarie Dictionary defines flat as “a suite of rooms, usually on one floor only, forming a complete residency”.

62 The Court was also taken to *Royal Agricultural Society of New South Wales v Sydney City Council* [1987] 61 LGRA 305:

“The object of ‘existing use’ provisions in town planning legislation is to permit the continuation of the use of land for any purpose for which it was used immediately before the passing of the legislation even though the terms of the legislation prohibit that purpose wholly or partly or upon conditions. The rationale of these saving provisions is that it is unjust to deprive an owner of the right to use his land for an existing purpose. Because ‘existing use’ provisions are incompatible with the main objects of the legislation of which they form part, the Courts have had to develop principles which reconcile the right of owners to have the full benefit of the existing use of the land with the right of the local authority to enforce the conflicting objectives of town planning legislation. The Courts have done so by refusing to categorise an ‘existing use’ so narrowly that natural changes in the method of using the land or carrying on a business or industry will render an existing use right valueless. At the same time, the Courts have been concerned not to categorise the purpose of an existing use so widely that the land or premises could be used for a prohibited purpose, which was not part of its use at the commencement of the legislation. Accordingly, a test has been devised which requires the purpose of the use of land to be described only at that level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on at the relevant date. Thus the test is not so narrow that it requires characterisation of purpose in terms of the detailed activities, transactions or processes which differ in kind from the use which the activities etc as a class have made of the land.”

63 The respondent referred the Court to the matter of Her Honour Pain J. in *Stromness Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 587 wherein the planning principle articulated in *Fodor Investments v Hornsby Shire Council* was referred to. I accept that a proposed development that relies on existing use rights must be assessed under section 79C and this may include the questions articulated including site and context, impacts on adjoining properties and the public domain and streetscape. I also accept there is no automatic entitlement to another building of the same FSR height etc and every development must be assessed on its merits.

- 64 The respondent contests that the length of the building its height and setbacks are not consistent with the residential DCP. Planning policies and DCPs are a useful guide in the assessment of existing use rights developments however they are not mandatory and each application must be assessed on its merits. I am satisfied that the proposal will not adversely impact on the adjoining open space when viewed from: the beach; the adjoining property at number 36; or the streetscape. In this regard I am persuaded by the evidence of Mr Nangle.
- 65 The council also raised the contention that the development should reflect the open space zone given this is the zoning of the sites. Mr Layman for the respondent considers that the built form should be recessive given the open space zone where the character is different. He considers that the driveway access and garages will impact heavily on the surrounding area and that the heritage item at number 34 would also be impacted
- 66 It was submitted on behalf of the applicant that for a service station with existing use rights in a residential zone there would be no suggestion that it should resemble the residential zone Mr Nangle considers that the context of the sites must include the surrounding residential development as well as the open space. In his opinion the proposal is appropriate in the streetscape and will not impact on the adjoining open space and the proposal will read as a residential flat building. He pointed to garages opposite the subject site and in Craig Avenue where there are doors located at the boundary with the street and the proposal will not be out of character in the streetscape with the garages near grade level and a storey above with the lower-level being below the road level. Furthermore, he considers that the subject site and road reservation provides for an area of landscaping.
- 67 During the proceedings the question of whether the design of the garage could be improved was discussed. Mr Layman is of the opinion that this should not be done on the run and it was submitted by the respondent that the proposal should be assessed on the basis of the plans before the Court. On further assessment, while there could be an improvement to the detail of the design for the presentation to Stuart Street, at the same time I have determined that this would not warrant refusal of the application and no amendment is required.
- 68 The planners agreed that it is desirable that the proposal provides for parking given that parking is a premium in the area. However Mr Layman is of the opinion that the driveway should provide for garages at a lower level. I am satisfied that the level of the garages is acceptable as is its presentation to Stuart Street. Mr Nangle is of the opinion any driveway will be noticeable, however, he considers it will not be out of character with the streetscape and is appropriate given the high level of demand in the area for parking.
- 69 On the issue of view loss for number 47 Mr Nangle is of the opinion that it would not be perceived and there would be no appreciable loss of view whereas Mr Layman considers that it would be minor to moderate. In my assessment I am satisfied that the view loss is minor and that the views will remain relatively unaffected. For the property known as 2/39 the majority and significant elements will still be retained however Mr Layman is of the view that a more skilful design would not impact.
- 70 In my assessment I agree with Mr Nangle that the view loss is minor when viewed from the deck although inside the property the view of the quarantine station would be affected. In my overall assessment the view loss is minor and would not warrant refusal of the application. I am satisfied that there is little adverse impact on the overall views afforded to number 47 or 2/39.
- 71 The Sydney Harbour Foreshores and Waterways area DCP contains a number of design guidelines for land based developments and it is noted that “a distinguishing characteristic of Sydney Harbour is its dramatic topography the combination of dramatic topography, natural vegetation and built elements provide an attractive background to the harbour”. Figure 2 is an extract from the Sydney Harbour foreshores and waterways DCP and the area within the landscape character area is No. 8.
- 72 The *Statement of Character and Intent* for 8 states that “these areas have a high level of the built form with

waterside commercial, industrial and residential uses”. The performance criteria include that “any development in this landscape is to satisfy the criteria that vegetation is integrated with land-based development to minimise the contrast between natural and built elements”. I am satisfied the proposed development is consistent with the provisions of this DCP.

- 73 The DCP refers to foreshore access and states that it is most desirable for foreshore links to join public open space or access points. The DCP contains provisions for the siting of buildings and structures and for the built form it states that buildings and other structures should generally be of a sympathetic design to their surroundings walls and fences should be kept low enough to allow views of private gardens from the waterway and the cumulative impact of development along the foreshore should be considered. It is noted that for multiunit residential developments the DCP states that these should be sited and designed to consider the site in the context of the harbour and where public access is to be extended buildings should be set back from the foreshore boundary a minimum of 12 m.
- 74 A number of objectors raised concern about the need to have regard to sea level rise and storm surges in the area. I note that the floor level of the dwelling is to be constructed at an RL of 3.3 m. I am satisfied that on the evidence before the court in these proceedings that this matter would not warrant refusal of the application.
- 75 The proposed building is set back between 23 to 26 m and the swimming pool 9 m from the common boundary with the beach. The raised deck and paved area adjoining the beachfront have been deleted and there are no structures between the building and the beachfront. From the elevations the maximum ridge height of the gable roof is 12.3 RL to the upper storey that is set back an additional 6 m on the Harbour side. I am satisfied the proposed building will not be imposing on the beachfront and will not be overwhelming for users of the beachfront area. Between the dwelling house and the boundary with the beach it is proposed to be landscaped with endemic species.
- 76 I am satisfied that the presentation of the proposed building in its context when viewed from the Harbour will appear with a generous setback with landscaping appropriate for a coastal location and it will not be out of character and is satisfactory on a merits assessment under section 79C of the Act.
- 77 The Council contends that the side boundary setback to No. 36, purchased for open space by the Council, is inadequate and the need for a 6 m setback was raised by objectors as a requirement of the DCP for a boundary that adjoins the open space. I am satisfied that the varying setbacks as shown in the plans between 1.6 on the Harbour side to 900mm to 1.2 to 1.9 at the street frontage are satisfactory in the context of the site and surrounds and the impacts on the open space land are not unreasonable. I say this also having regard to the length and height of the wall on this elevation that exceeds the current building on the site. I am satisfied the roof design and increased setback of the upper storey ameliorates the bulk of the building.
- 78 The presentation of the driveway and building to the streetscape was raised as a contention by the Council together with the impact on the heritage dwelling at number 34. I accept Mr Staas’s evidence that “the proposal is sufficiently separated from the heritage item to have no adverse impact on it, its setting or any visual curtilage that may be identified with it... and there is no significant streetscape and the proposal is compatible with the predominant character of development in the vicinity”. Mr Staas comments that “the dominant character created by the development in the vicinity is of buildings fronting the sites extending across the sites and presenting as driveways and garages to the street. There is no valid reason to single out this site to different treatment to others in the immediate vicinity”.
- 79 I have assessed the application under the provisions of clause 19 in the Manly LEP. and I am satisfied that the proposed building will not adversely impact on the heritage significance of the heritage item at number 34. The *Sydney Harbour Regional Environmental Plan* also contains a provision at cl.59 that requires an assessment of development in the vicinity of a heritage item and am satisfied that there is no impact.

- 80 The site inspection was most instructive in understanding the relationship of the subject site to the topography, the level of the street, the heritage item, the surrounding open space, the Harbour and beachfront. There is no dispute that the subject site and other land in an ideal world would be maintained for open space, however the role of the Court in this appeal is to assess the development application on its merits under section 79C having regard to the existing use rights provisions.
- 81 I have assessed the application in the context of the planning framework and all the evidence to the Court, including the site inspection and the evidence of the objectors and the experts. I am satisfied that the proposed development will not adversely affect the usefulness of the land for the purposes for which it has been reserved pursuant to the provisions of clause 13(3) of the Manly LEP. The land can be acquired with or without this development consent in accordance with the provisions of the LEP. I am also satisfied the development will not have a detrimental affect on the amenity of the Foreshore scenic Protection Area under cl 17 of the LEP.
- 82 The role of the court is to assess the application having regard to the existing use rights and the merits of the proposal. The fact that the site is zoned for open space allows the owner of the subject site to request the land be purchased or alternatively the Council can commence compulsory acquisition.
- 83 From the documents made available to the Court the Council resolved 3 November 2008 “to compulsorily acquire number 38 Stuart St for the purpose of open space and it further resolved that while it awaits the advice of the Governor and the Minister from Local Government the matter be referred to a community engagement process... the outcome is to be reported back to the Council for a final decision”. The outcomes of these processes is not a matter for the Court in the determination of this application. The development application the subject of this appeal must be assessed on its merits under section 79C and the existing use rights provisions of the Act. and in accordance with the relevant regulations.

Conditions

- 84 The conditions are as generally agreed to between the parties. It is to be noted the landscape plan must be amended prior to the issuing of a construction certificate to show the red markings on exhibit F.
- 85 I have deleted conditions AS20(i) and (ii) and incorporated the changes to condition No. DA 1 to include: the deletion of both the existing and proposed stairs from the subject property to the beach; the requirement for the side boundary fence with number 36 to be a maximum height of 1.2 m for a distance of 18 m from the corner adjoining the beach; and the deletion of the timber screen and curved portion of the deck in the vicinity of the common boundary with number 36.
- 86 Condition ANSO1 has been deleted. This required consent for the use of portion of the road reserve and I accept the applicant's submission that section 6 of the Roads Act 1993 provides the right of access to a public road by owners of adjoining land to access the property between the land and the public road.
- 87 The Council advised the Court following the hearing that the boundary of the road reservation adjoins the subject property and there is no other parcel of land between same. I note that conditions DA09 to DA13 require the applicant to: construct the vehicular footpath crossing and kerb lay-back in accordance with Council's policy; a long section for the driveway is required to be submitted with the construction certificate: the driveway and hard stand area are to be sheeted with hard wood timber and suitably sealed and maintained to preserve the timber grain; and no gates etc are to encroach on the road reserve or other public land.
- 88 The council's sustainability team leader recommended a number of conditions to be attached in particular for the *Long Nosed Bandicoot* and these are incorporated into the councils set of conditions. The report included in Council's bundle states that:
“based on an assessment of the information provided the natural resources branch is satisfied that the proposal can be carried out without a significant impact on the conservation of the

endangered population of Long Nosed Bandicoots and Little Penguins, subject to a number of conditions.”

89 The Council sought to impose a two-year time limited consent on the basis that this is Council's practice however I am not persuaded that a two-year consent is warranted in the circumstances of this case. The site is zoned for open space and I do not accept that its context is likely to change between the two and five year period. There is a dwelling house at number 40, also zoned open space together with the subject site, and Council may be requested to purchase same at any time or indeed commence, compulsory acquisition. The site at number 36 Council has already purchased and it is understood that it has resolved to demolish the dwelling on this land and at number 34 there is a heritage listed dwelling. The subject site together with adjoining properties share a common boundary with the beach known as Little Manly Cove.

90 Accordingly on the basis of my assessment above the Court makes the following orders:

1. The appeal in respect of the property known as No. 38 Stuart Street Manly is upheld.
2. The development application No. 261 of 2008 to Manly Council and as amended is determined by the granting of consent subject to the conditions contained in Annexure 'A'.
3. The exhibits are returned to the parties with the exception of exhibits: E; F; G; K; and 14.

J S Murrell

Commissioner of the Court

ljr/ajl

Amendments 8/10/09 made to correct paragraph numbers, typographical errors and refer to figures in judgment.

[]

[]

[]

[]

[]