



Land and Environment Court of New South Wales

CITATION : **Bespoke Properties v Gosford City Council [2010] NSWLEC 1080**

PARTIES : APPLICANT
Bespoke Properties Pty Limited

RESPONDENT
Gosford City Council

FILE NUMBER(S) : 10552 of 2009

CORAM: Brown C

KEY ISSUES: DEVELOPMENT APPLICATION :- demolition of all existing improvements and the construction of a new retail, commercial and residential development - visual impact - SEPP 1 objections to floor space ratio, height and building height plane development standards - whether species impact statement required - bushfire

LEGISLATION CITED: Environmental Planning and Assessment Act 1979
Threatened Species Conservation Act 1995
State Environmental Planning Policy No. 1
State Environmental Planning Policy No 71
Gosford Planning Scheme Ordinance
Gosford City Council Development Control Plan 159

CASES CITED: North Sydney Council v Lygon 302 Pty Limited (No 2) 196 93 LGERA 23
Stockland Development Pty Limited v Manly Council [2004] NSWLEC 472
Winten Property Group Ltd v North Sydney Council (2001) NSWLEC 46
Zhang v Canterbury City Council [2001] 115 LGERA 373

DATES OF HEARING: 2, 3, 4, 5 March 2010

EX TEMPORE JUDGMENT DATE 8 March 2010
:

LEGAL REPRESENTATIVES: APPLICANT
Mr J Robson SC with Mr M Staunton, barrister
SOLICITORS
Carneys Lawyers

RESPONDENT
Mr P Tomasetti SC with Mr M Fraser, barrister
SOLICITORS
P J Donnellan & Co

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Brown C

8 March 2010

10552 of 2009 Bespoke Properties Pty Limited v Gosford City Council

JUDGMENT

1 COMMISSIONER: This is an appeal against a refusal of Development Application No 35452/2008 by Gosford City Council (the council) for the demolition of all existing improvements and the construction of a new retail, commercial and residential development at 58-62 Araluen Drive, Hardys Bay (the site).

The proposal

2 The proposal provides for four commercial/retail premises on the ground floor and nine residential dwellings on the upper floors replacing the existing commercial retail development on the site. The proposed commercial retail premises include a real estate agency of 47 sq m, a takeaway food shop of 28 sq m, a restaurant of 67 sq m and a doctor's surgery of 25 sq m. The nine residential units have floor areas between 181 sq m and 249 sq m.

3 The development is between one and three storeys above ground level at the Araluen Drive frontage and there are seven different levels that step up the hillside although the proposal is generally two stories above natural ground level.

The site

4 The site is located on the southern side of Araluen Drive at Hardys Bay. On the opposite side of Araluen Drive is a narrow strip of public reserve that adjoins Brisbane Water. The site is a rectangular parcel of land with a frontage of 65.215 m to Araluen Drive and a total area of 2,392 sq m.

5 The front area of the site is generally level but rises up the hillside to the rear boundary. The site rises 19.5 m from the front to the rear and has a cross fall of approximately 6 m. Significant natural vegetation is located on the rear undeveloped area of the site.

Relevant planning controls

6 The site is zoned Business General 3(a) under the *Gosford Planning Scheme Ordinance* (the Ordinance) and development for the purpose of shops, commercial premises and residential flat buildings are permitted in the zone with the consent of council.

7 The objectives of the 3(a) zone are:

- (a) to provide retail and commercial centres which make provision for the shopping and service needs of the community at the regional, district or neighbourhood levels (or at 2 or more of these levels);*
- (b) to allow residential or other ancillary development but only where it is unlikely to significantly prejudice the supply of retail and commercial floor space within the City of Gosford.*

8 Clause 10(3) provides that consent must not be granted for development of land within the prescribed zone unless the objectives of the zone have been taken into consideration.

9 Clause 10(4) provides that consent must not be granted for development unless the consent authority has taken into consideration the character of the development site and the surrounding area where, for the purpose of this provision character means the qualities that distinguish each area and the individual properties located within that area.

10 Clause 28 provides requirements for residential flat buildings with requirements for building height plane at cl 28(4)(a), height at cl 28(4)(b) and floor space ratio (FSR) at cl 29B(2).

11 The council has been preparing a new city wide local environmental plan to replace the Ordinance. The draft local environmental plan is currently being advertised until 8 April 2010. There was agreement that the draft local environmental plan could not be seen as imminent or certain and as such no weight is given to this document.

12 *Gosford City Council Development Control Plan 159 : (Character) Amendment 1* (DCP 159) applies. DCP159 provides detailed character statements for specific suburbs in the local government area including Hardys Bay and Killcare. The site is within “Places” in Hardys Bay and is categorised as 2. Woodland Hillsides. The sites to the east (including other 3(a) zoned sites) are in “Places” in Killcare and categorised as 5. Village Centre.

13 *State Environmental Planning Policy No 71 - Coastal Protection* (SEPP 71) also applies. Clause 2 provides aims for the plan and cl 8 provides matters to be considered in determining a development application.

The contentions

14 The council filed a number of different Statements of Contentions, the last filed during the hearing. Mr Robson SC, for the applicant, submitted that some of the contentions in the most recent Statements of Contentions could not be properly addressed without additional time to respond. The most recent contentions identified by the council relate to:

1. the permissibility of the proposed development on the basis that it was “a mixed use development” and as such was not identified as a permissible use in the Ordinance,
2. the unacceptable visual impact on the character of the area, including tree loss and built form,
3. the breaches of the development standards relating to FSR, height and building height plane (BHP) and the unacceptable SEPP1 objections,

4. excessive excavation and tree loss,
5. the impact on acid sulphate soils due to the excessive excavation, particularly the potential for material to leach into Brisbane Water,
6. the absence of a species impact statement (SIS) because of the significant impact on the Wagstaff Spotted Gum Ironbark Forest,
7. whether construction traffic can safely remove material from the site because of the condition and alignment of local roads and whether a construction traffic management plan is appropriate as a condition of consent,
8. the risk of bushfires,
9. the potential for inundation given the council's recent adoption of a sea level rise of 0.9 m for planning purposes,
10. the unacceptable impact on the heritage significance of nearby heritage items, and
11. whether the proposed development is inconsistent with the principles of ecologically sustainable development.

15 Following discussions with the parties, it was agreed that contention 2 (visual impact), contention 3 (breaches of FSR, height and BHP), contention 6 (SIS), contention 8 (bushfire) and contention 10 (heritage) above could be addressed as preliminary matters and if in the Court's assessment, these are not matters that would warrant the refusal of the application then further directions could be made for the provision of further evidence on the remaining contentions and the future conduct of the hearing. Conversely, if the assessment of these matters found that one or more of the matters warranted the refusal of the application, then final orders could be made without the need for further evidence on the remaining contentions.

Visual Impact

The evidence

16 Emeritus Professor Peter Webber provided evidence on this issue for the applicant and Mr Brett Newbold provided evidence for the council. Professor Webber states that in relation to character; the proposal is reasonable in light of the business zoning of the site and the type and scale of buildings, which are anticipated by that zoning. In his opinion, the business zone confers a broader definition of compatibility. The visual impacts are reasonable having regard to the zoning of the site, the articulation of the building forms and the anticipated screening effects of new landscaping and the future redevelopment of properties facing Killcare Road that are similarly zoned to the site.

17 Mr Newbold comes to the opposite conclusion to Professor Webber. He states that the proper assessment of the impact on character comes from the assessment against DCP159 as the Ordinance provides little guidance on this issue. When considered against DCP159, Mr Newbold states that the development would have a profound negative visual impact because:

the site is in a prominent location and contains indigenous vegetation that contributes to the scenic quality of the backdrop to Hardys Bay, at least 80% of the existing vegetation will be lost, the size and scale of the building will exacerbate the scenic impacts through the clearing of vegetation and dramatically contrast with existing development, and the siting of the proposed building close to side boundaries contributes to scale and amenity impacts.

Findings

18 The impact of the proposed development on the scenic qualities of the area was a significant issue in the proceedings. It was a consistent matter raised in the 791 letters of objections sent to the council when the proposed development was advertised. The Court had the benefit of a view of the site, from the surrounding area and also from Brisbane Water. From these locations, an accurate estimate could

be made of the location and size of the proposed building based on the architectural plans and existing features.

19 While visual impact and impact on the character of the area was raised by local residents, it also has statutory importance through cl 10(4) of the Ordinance and s 8(d) of SEPP 71. Clause 10(4) provides that consent must not be granted for development unless the consent authority has taken into consideration the character of the development site and the surrounding area where, for the purpose of this provision character means the qualities that distinguish each area and the individual properties located within that area.

20 Section 8(d) of SEPP 71 requires the consent authority to consider:

The suitability of a development given its type, location and design and its relationship with the surrounding area.

21 DCP159 is also important as it provides specific criteria for the assessment of visual impact and character for the site.

22 In considering this issue, the experts have adopted different approaches. Professor Webber has relied to a greater extent on the zoning and the applicable standards in the Ordinance being the 1:1 FSR and the maximum 6 m height requirement. Mr Newbold, who is also the author of DCP159, has placed greater emphasis on the desired character as set out in Hardys Bay 2: Woodland Hillside. This states:

Desired character

These should remain very leafy, low density residential hillsides, conserving natural and scenic qualities of the bushland backdrops that are fundamental features of Gosford's City's identity, where landscape settings that adjoin bushland reserves are not dominated by new development. Conserve natural and scenic characters of wooded hillside properties plus unformed road verges by retaining natural slopes and the continuity of tree canopy that is provided by existing bushland remnants. Complement the established tree canopy by new plantings that are predominantly indigenous, and do not plant any identified noxious or environmental weeds. Facing all boundaries, emphasise a leafy garden character by avoiding tall retaining walls, fences that are not see-through, elevated structures such as terraces or pools and steep driveways that would visibly compromise the existing bushy hillside character.

In areas that are defined as bushfire prone, hazard must not be increased by inappropriate new plantings or structures. Minimise extent of cleared asset protection zones by fire-resistant siting, design and construction for all new structures, plus effective management of gardens. The ideal compromise between desired scenic quality and hazard-reduction would limit clearing to thinning of the canopy to establish breaks between existing trees. Screen or shield all verandahs, windows, roofs and suspended floors to prevent the entry of sparks and flying embers.

Prevent further disturbance to natural slopes and trees by appropriate siting of structures plus low-impact construction such as suspended floors and decks rather than extensive cut and fill. On the steeper sites, locate parking next to the street in structures that are designed to blend with the natural setting. Avoid the appearance of a continuous wall of development along any street or hillside by locating buildings within setbacks that are similar to the surrounding properties, and by providing at least one wide side setback or stepping the shape or front and rear facades.

Minimise the scale and bulk of buildings by strongly-articulated forms that sit beneath the canopy with floor-levels that step to follow natural slopes in irregular floor plans such as linked pavilions that are separated by courtyards, and capped by individual roofs. Front or rear facades that are taller than neighbouring dwellings should be screened by balconies, verandahs, stepped forms or extra setbacks. Roofs should be gently pitched to minimise the height of ridges and flanked by wide eaves to disguise the scale of exterior walls.

Minimise the scale of prominent facades by using extensive windows and verandahs plus a variety of materials and finishes rather than expanses of plain masonry. Where dwellings would be visible

from their road frontage, display a traditional street address with verandahs or decks, and living rooms or front doors that are visible from that roadway. Avoid wide garages that would visually dominate any front façade. Locate and screen all balconies or decks to maintain the existing levels of privacy and amenity that are enjoyed by neighbouring dwellings.

23 One significant reason for the difference between the experts stems from the classification of the site as Hardys Bay 2: Woodland Hillside. This classification also applies to the residentially zoned land to the west along Araluen Drive but not to the similarly zoned commercial land directly to the west. This land is classified as Killcare 5: Village Centre.

24 While it is unusual to have a desired character that applies equally to residential land as it does to commercial land, it is not in my view such a conflict that it requires the specific requirements of DCP159 that apply to the site to be abandoned or reduced in importance. Section 74C(5) of the *Environmental Planning and Assessment Act 1979* (the EPA Act) provides that a development control plan (DCP) has no effect to the extent that it is inconsistent with any environmental planning instrument or its application prevents compliance with any provision of the environmental planning instrument. No submission was made that this section should be invoked.

25 The weight to be given to a DCP is addressed in *Zhang v Canterbury City Council* [2001] 115 LGERA 373. Spigelman CJ at par 75 raises three important propositions. First, and although the Court has a wide-ranging discretion, the discretion is not unfettered. Secondly, the provisions of a DCP are to be considered as a fundamental element in or a focal point to the decision making process, particularly if there are no issues relating to compliance with a local environmental plan. Thirdly, a provision of a DCP directly pertinent to the application is entitled to significant weight in the decision making process but it is not in itself determinative.

26 The role of a DCP is also addressed by McClellan CJ in *Stockland Development Pty Limited v Manly Council* [2004] NSWLEC 472 at pars 83-92 and includes a review of recent judgments on this issue. Relevantly, at par 87 his Honour states:

A development control plan is a detailed planning document which reflects a council's expectations for parts of its area which may be a larger area or confined to an individual site. The provision of a development control plan must be consistent with the provisions of any relevant local environmental plan. However, a development control plan may operate to confine the intensity of development otherwise permitted by a local environmental plan.

27 The ability of a DCP to confine the intensity of development comes from *North Sydney Council v Lygon 302 Pty Limited (No 2)* 196 93 LGERA 23 at par 30 where Cole JA said the following:

The content of development control plans is in s 72 (as it was at the time). It is to contain the more detailed provisions that are contained in the North Sydney Local Environmental Plan which council regards as necessary or desirable (s 72(1)). Generally the development control plan must conform to the North Sydney Local Environmental Plan(s 72(3)). However, that does not mean that where a use is permissible with consent under North Sydney Local Environmental Plan "more detailed provisions" regarded as desirable or necessary and specified in a development control plan may not regulate the circumstances in which a use is permissible with consent. There is no reason in principle why those "provisions" would not have the character either of a "prohibition" unless certain criteria are satisfied, or of a "development standard" which permits a development only on satisfaction of certain criteria.

28 Based on these comments, there is no reason why the desired future character as set out in Hardys Bay 2: Woodland Hillside should not be the “fundamental element in or the focal point in the decision making process.” While the desirable character elements in DCP 159 may confine the intensity of a development based on the development standards in the Ordinance, this is consistent with the findings in *Lygon 302* and *Stockland Development*. Put simply, the Ordinance and DCP 159 are to be considered conjunctively rather than preference given to one document over the other. It must also be remembered that the development standards in the Ordinance are maximums and that the natural qualities of the site are relevant matters to take into account when considering development options. In this case, the natural qualities of the site are constraints to the development of the site and it does not follow that the maximum development potential as set out in the Ordinance can necessarily be achieved for all sites with the same zoning

29 The relevant character elements in Hardys Bay 2: Woodland Hillside can be summarised as :

- very leafy, low density residential hillside should remain,
- conserve natural and scenic qualities of the bushland backdrops,
- conserve continuity of tree canopies,
- for all boundaries, emphasise a leafy garden character by avoiding tall retaining walls, non-see-through fences and elevated structures,
- prevent further disturbances to natural slopes and trees by appropriate siting of structures,
- avoid the appearance of a continuous wall of development along any hillside,
- minimise bulk and scale by strongly articulated forms, and
- roofs should be gently pitched.

30 Balancing the weight to be given to DCP 159, the character elements in Hardys Bay 2: Woodland Hillside and with the benefit of the site view, I agree with the conclusions of Mr Newbold. The character of Hardys Bay is typically one and two storey residential development of mainly modest proportions located largely as a band along the waterfront but with scattered dwellings amongst the trees above the dwellings at the waterfront. The houses are generally separated by vegetation either native or exotic but providing generous landscape areas between built forms in strong horizontal and vertical bands. The visual catchment has a wide and largely undisturbed band of natural vegetation that extends to the skyline. Built forms are seen as minor incursions into the natural vegetation that extends from the band of dwellings at the foreshore to the skyline. The most significant manmade feature is the recently constructed residential flat buildings on the opposite side of Killcare Road. The evidence of Mr Newbold was that this development predates DCP 159.

31 From Brisbane Water, the proposal will clearly be the most dominant built form in the area. When viewed from many locations on Brisbane Water, the proposal will be seen as a large mass rising from street level to a height exceeding the adjoining residential dwelling to the west and importantly spread over three lots. While the massing of the building is not obvious in some locations near the site, the perception of depth and articulation created by the stepping of the building up the slope will be lost with increasing distance from the site on Brisbane Water.

32 A significant negative aspect of the proposal that leads to the proposal being inconsistent with the character of the area is the loss of the vertical and horizontal bands of landscaping. These existing bands of vegetation characterise the existing settlement pattern in the area and are consistent with the desired character in DCP 159. This is particularly noticeable from Brisbane Water.

33 From locations around Hardys Bay, the loss of vegetation will be dramatic with the removal of some trees that create the interface of the tree line with the sky. The backdrop of vegetation, particularly from Killcare Road, is most likely to be lost. The backdrop from Araluen Drive will be appreciably thinned at best. Consistent with reliance on the development standards in the Ordinance, the design philosophy shows little regard for the retention of any trees beyond the narrow band at the rear of the site. I agree with Mr Newbold that greater emphasis should have been given to the

retention of more trees to ensure greater satisfaction with the desired character for the site. I do not accept that the proposed landscaping can compensate in any meaningful way for the loss of existing vegetation.

34 Clause 10(4) of the Ordinance requires consideration of the character of the development site and the surrounding area and s 8(a) of the SEPP 71 requires consideration of “the suitability of the development given its type, location and design and its relationship with the surrounding area”. Giving proper, genuine and realistic consideration to these matters in the context of the desired character in Hardys Bay 2: Woodland Hillsides, I am satisfied that the proposed development is unsuitable for the site. The extent of the unsuitability is such that the appeal should be dismissed and the development application refused for this reason alone.

35 For completeness, I will briefly deal with the other issues.

The development standards

36 Mr George Smith provided evidence on the planning issues for the council and Mr Gary Shiels provided evidence for the applicant. Mr Shiels provided objections under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) to show why strict compliance with the development standard is unreasonable and unnecessary in the circumstances of this case. The SEPP 1 objections of Mr Shiels address the variations to the development standards in the manner set out in *Winten Property Group Ltd v North Sydney Council* (2001) NSWLEC 46.

Floor space ratio.

37 Clause 29B of the Ordinance provides that a building shall not exceed an FSR of 1:1. Mr Shiels maintains that this standard is satisfied but provides a SEPP 1 for caution whereas Mr Smith states that the FSR is 1.3:1.

38 The method of calculating the floor space for the FSR development standard was the central issue between Mr Shiels and Mr Smith. Floor space is defined in the Ordinance as:

“Floor space” in relation to a building or work, includes all wall thicknesses, ducts, vents, staircases and lift wells but does not include:
(a) in the case of a building, any parking space in the building being a space provided to meet the standards required by the consent authority (but not a parking space provided in excess of those standards) or any internal access to that parking space.
(b) space used for loading or unloading of goods; or
(c) lift towers, cooling towers, machinery and plant rooms and any storage space related thereto”.

39 In his calculation of “floor space”, Mr Smith includes the overhangs and covers over balconies as they are substantial structures and should form part of the building. Mr Shiels disagrees with the inclusion of the overhangs and covers over balconies. Mr Smith and Mr Shiels agreed that if the elements included by Mr Smith are excluded, then the FSR is below 1:1.

40 Based on the definition in the Ordinance, I am satisfied that the cantilevered overhangs and covers should not be classified as part of the “building”, notwithstanding their relatively substantial nature. They are cantilevered elements of the building and are not supported by walls. In the main, these elements could not be reasonably categorised as being part of the “building”. On this basis, a SEPP 1 objection is not required as the FSR is below 1:1.

Height

41 Clause 28(4)(b) of the Ordinance provides for a maximum topmost floor height of 6 m. Mr Shiels

and Mr Smith agree on the extent of the exceedence but not whether the SEPP 1 objection is well founded.

42 The exceedence of the height requirement was shown diagrammatically in the SEPP 1 objection of Mr Shields. The following objections were adopted by Mr Shiels, and accepted by Mr Smith, in the absence of any objectives for the development standard in the Ordinance:

to ensure that the uppermost floor of residential flat buildings are not unreasonably raised above natural ground level, and
to ensure building follows the sites topography.

43 Mr Shiels states that the majority of the topmost floor is located below 6 m and the areas of the non-compliances are located away from the side boundaries and involve only four small locations.

44 Considering this issue in isolation from the other issues, I am satisfied that the breach of the height requirement can be supported in this case for the reasons statement by Mr Shiels. Consequently, strict compliance with the height development standard is unreasonable and unnecessary in this case and that the SEPP 1 objection is well founded.

Building height plane

45 Clause 28(4)(a) of the Ordinance provides for a BHP measured from a height of 3.5 m at the side and rear boundaries and extending at an angle of 45 degrees. Mr Smith and Mr Shields also agree on the extent of the exceedence but not whether it is well founded.

46 The following objections were adopted by Mr Shiels, and accepted by Mr Smith, in the absence of any objectives for the development standard in the Ordinance:

generally to maintain bulk and scale within a building plane to encourage and orderly form of development while still promoting good design, and maintain the amenity of adjoining development.

47 Mr Shiels states that for most part, the proposal complies with the BHP. The area of non-compliance relates mainly to the top areas of the building rather than entire rooms or dwellings. Mr Shiels further states that the encroachment to the western elevation does not include balconies or windows and while there is adjoining residential development, the variations do not generate any amenity impacts to these properties. The eastern elevation BHP encroachment face existing commercial developments and as such amenity impacts are not of significant importance.

48 In considering this in isolation from the other issues, I am not satisfied that the SEPP 1 objection is well founded, particularly considering the objective relating to maintaining amenity. I see no reason why compliance should not be achieved when adjoining a single residential dwelling. Amenity extends beyond just overlooking and privacy, and in this case, I accept that the bulk and scale when viewed from the adjoining property, is also a relevant consideration. Notwithstanding Mr Shiels comments, and based on the site view, I do not accept the overlooking could not occur from the lower unit directly into the pool area of the adjoining residential property.

49 For these reasons, I do not accept that strict compliance with the BHP development standard is unreasonable or unnecessary, so it follows that the SEPP 1 objection is not well founded.

Is a species impact statement required?

The evidence

50 Dr AnneMarie Clements provided evidence for the council and Ms Elizabeth Ashby provided evidence for the applicant on this issue. The issue raised by council over the loss of vegetation,

involves not only the removal of vegetation per se, but the significance of that vegetation. Dr Clements states that the vegetation has been identified as Wagstaff Spotted Gum Ironbark Forest, a sub-variant of the endangered ecological community; Pittwater Spotted Gum Forest. A 7- part test carried out by Dr Clements found that there would be a significant impact on the Wagstaff Spotted Gum Ironbark Forest community. In her opinion, as this community is a sub-variant of the endangered ecological community, a SIS was required. As this has not been provided, the application cannot be approved.

51 Ms Ashby states that while the Wagstaff Spotted Gum Ironbark Forest has a similar assemblage of species to the Pittwater Spotted Gum Forest, it was not found in the Pittwater local government area and as such cannot be regarded as an endangered ecological community. While not her principal position, Ms Ashby conducted a 7-part test and concluded that the proposal will not have a significant impact on the Wagstaff Spotted Gum Ironbark Forest community.

Findings

52 Section 4 of the *Threatened Species Conservation Act 1995* (the TSC Act) provides a definition for endangered ecological community. An endangered ecological community means:

an ecological community specified in Part 3 of Schedule 1.

53 The relevant wording in Part 3 of Schedule 1 states,

Pittwater Spotted Gum Forests (as described in the final determination of the Scientific Committee to list the ecological community).

54 The final determination of the Scientific Committee (at par 6) states the “Pittwater Spotted Gum Forest has been reported for the local government area of Pittwater”. The existence of a similar assemblage of species in the Gosford local government area, in my view, cannot entitle that community to the same status of Pittwater Spotted Gum Forest. It may well be that the vegetation on the site is of some significance but until it is identified in the final determination of the Scientific Committee, it cannot be given the equivalent status to the Pittwater Spotted Gum Forest.

55 This is a succinct point that goes to the loss of a particular vegetation community. I have already found that the extent of the tree removal, irrespective of the particular vegetation community is unacceptable.

Heritage

The evidence

56 Mr David Logan provided evidence for the council and Mr Robert Stass provided evidence for the applicant although neither expert was required for cross-examination. Schedule 8 to the Ordinance identifies the following relevant heritage items:

House (Capri) lot 49 DP 302278, 40 Araluen Drive, Hardys Bay.

House (Bayview) lot 1 DP 171147, 42 Araluen Drive, Hardys Bay.

Killcare Store, lot 43 DP 8830, 54 Araluen Drive, Hardys Bay.

Killcare Marina site, lot 495 DP 822113 opposite 46 Araluen Drive, Hardys Bay.

Rickards Wharf, Araluen Drive, Killcare.

57 Mr Logan states that the impact of the proposed development on the Killcare Store and Killcare Marina would be dramatic. It would also impact on the setting of the houses at 40 and 42 Araluen Drive. Overall the development will have an unacceptable heritage impact.

58 Mr Stass states that the proximity of the site to the heritage items is not of itself a reason to expect that there would be an unacceptable heritage impact from the proposed development. The site forms part of the wider visual setting of the Killcare Store and that the visual and physical relationship between it and the marina site and the cottages at 40 and 42 Araluen Drive is tenuous.

Findings

59 The Ordinance, while identifying heritage items does not provide any requirement for the consideration of the impact of a development on the heritage items. Notwithstanding this, if the appropriate test was to determine whether the proposed development had an unacceptable impact on the heritage significance of the items, then I agree with Mr Stass. The closest item is the Killcare Store located on the opposite corner of Araluen Drive and Killcare Road. The Killcare Store is separated from the site by Killcare Road and a largely undeveloped lot within the commercial zone. This site is currently used as a bottle shop. I am satisfied that the existing relationship between the proposal and the heritage item is not so detrimental to the Killcare Store that it would warrant the refusal at this time given the more than reasonable separation distance. With the likely redevelopment of this site over time, greater screening of the site will be provided and will ensure that even the minor impacts on the significance of the heritage item are further diminished.

60 In my view, the other heritage items are sufficiently distant from the site to not impact on the heritage significance. I note this was a conclusion also reached by council's heritage planner.

Bushfire

The evidence

61 Mr Wayne Tucker provided evidence on this issue for the applicant. He provided a Bushfire Hazard Assessment Report and statement of evidence. The council did not provide any expert evidence in response but cross-examined Mr Tucker on his evidence.

62 Mr Tucker stated that he reviewed the revised landscaping plan and considered that it was within the context of the Bushfire Hazard Assessment Report he had prepared. That report concluded that with the bushfire safety measures contained in the report and a consideration of the site specific bushfire risk assessment then a reasonable and satisfactory level of bushfire protection will be provided to the satisfaction of the Rural Fire Service and the council.

Findings

63 As no expert evidence was provided to challenge the evidence of Mr Tucker, I accept his conclusions. I note that the Rural Fire Service has indicated that they "*raised no concerns or issues in relation to bushfire*". I also note that the report of the council officer on this application raised no issue with bushfire safety.

Orders

64 The orders of the Court are:

1. The appeal is dismissed.
2. Development Application No 35452/2008 for the demolition of all existing improvements and the construction of a new retail, commercial and residential development at 58-62 Araluen Drive, Hardys Bay is refused.
3. The exhibits are returned.

G T Brown
Commissioner of the Court

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