



Land and Environment Court
New South Wales

Case Name: Russo v Northern Beaches Council
Medium Neutral Citation: [2020] NSWLEC 1259
Hearing Date(s): 12 June 2020
Date of Orders: 18 June 2020
Decision Date: 18 June 2020
Jurisdiction: Class 1
Before: O'Neill C
Decision: Proceedings 2019/16066

The orders of the Court are:

- (1) The appeal against Development Control Order No. EPA2018/0279 relating to the premises at 57 Robertson Road, Scotland Island, is upheld.
- (2) Pursuant to s 8.18(4)(b) of the Environmental Planning and Assessment Act 1979 (NSW), Development Control Order No. EPA2018/0279 is modified to amend the time period for compliance with the order to a period of 56 days from the date of this order.

Proceedings 2019/360018

The orders of the Court are:

- (1) The appeal of the deemed refusal of Development Application No. 2019/1054 is dismissed.
- (2) Development Application No. 2019/1054 to demolish the existing front fence and construct a new front fence at 57 Robertson Road, Scotland Island, is refused.
- (3) The exhibits, other than Exhibits 1 and 2, are

returned.

Catchwords:	DEVELOPMENT CONTROL ORDER and DEVELOPMENT APPLICATION – order to demolish front fence – development application to demolish front fence and construct a new front fence – insufficient information to be satisfied of jurisdictional preconditions – proposal is contrary to the character of the locality
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Pittwater Local Environmental Plan 2014 State Environmental Planning Policy (Coastal Management) 2018 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008
Texts Cited:	Pittwater 21 Development Control Plan
Category:	Principal judgment
Parties:	Ricardo Russo (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: Self-represented (Applicant) A Gough (Solicitor) (Respondent) Solicitors: Storey & Gough Lawyers (Respondent)
File Number(s):	2019/16066; 2019/360018
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** These are two related matters; an appeal pursuant to the provisions of s 8.18 of the *Environmental Planning and Assessment Act 1979* (EPA Act) (Proceedings No. 2019/16066) against Development Control Order EPA2018/0279 to demolish the existing front fence at 57 Robertson Road, Scotland Island (the Order) issued by Northern Beaches Council (the Council) on 20 December 2018 and an appeal pursuant to the provisions of s 8.7(1) of the EPA Act (Proceedings No. 2019/360018) against the deemed refusal of Development Application No. 2019/1054 for the demolition of the existing front

fence and construction of a new front fence (the proposal), at 57 Robertson Road, Scotland Island (the site), by the Council.

- 2 The Order appeal was subject to a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) on 12 September 2019 and the conciliation conference was terminated pursuant to s 34(4) of the LEC Act as the parties did not reach agreement.
- 3 Following the Court's policy, "COVID-19 Further Restrictions" announced on 24 March 2020 and published on the Court's website, the proceedings were listed for a hearing pursuant to s 34C of the LEC Act using audio-visual technology and held on 12 June 2020.

Issues

- 4 The Council's contentions in relation to the Order are that the Order should be endorsed as the unauthorised works undertaken were carried out without development consent and the fence does not comply with the relevant controls for fences because the fence obstructs the passage of wildlife; it exceeds the maximum height for fences and it does not consist of material compatible with the natural environment.
- 5 The Council's contention in relation to the proposal is that there is insufficient information provided by the application for the Court to be satisfied of the jurisdictional thresholds pursuant to cll 7.6(3) and 7.7(3) of Pittwater Local Environmental Plan 2014 (LEP 2014).
- 6 The Council's merit contentions in relation to the proposal are that the proposed fence is excessive in height resulting in unacceptable streetscape impacts on Robertson Road and the proposed fence is inconsistent with the character of Scotland Island.

The site and its context

- 7 The site is on the northern side of Robertson Road and has a water frontage to the Pittwater waterway. The site contains a dwelling located near Robertson Road when compared to the position of the dwellings on adjoining allotments. The private open space of the dwelling is located on the northern side of the dwelling.

- 8 The site is irregular in shape with a frontage of 10.06m along Roberson Road and an average depth of 67.06m. The site has an area of 790.4sqm. The site falls 20.63m from Robertson Road to the water frontage. The site is accessible by water from the existing jetty within Pittwater and has no formal vehicular access. Pedestrian access is available from Robertson Road.
- 9 The existing fence is constructed proximate to the Robertson Road boundary along the southern and eastern boundaries and is shown in photographs (Exs A and 6 tab 3). The fence ranges in height between 1.7m and 2.4m and is constructed from timber frame and timber saplings (Ex 3, folio 10).

Background and the proposal

- 10 The applicant lodged a Building Certificate Application (BC2018/0070) with the Council for the front fence on 4 May 2018. The Council refused the Building Certificate Application on 3 August 2018 because the fence was not in accordance with the controls under D8.10 of Pittwater 21 Development Control Plan (Pittwater 21 DCP) because the fence is in excess of 1m in height above natural ground level, the fence is not setback a minimum of 1.5m from the front boundary and the fence encroaches upon the road reserve by up to 200mm.
- 11 The Council issued the Order on 20 December 2018, pursuant to s 9.34(1)(a) and Pt 1, Sch 5 of the EPA Act. The Order is in the following terms (Ex 3, tab 4):

To Do What:	Appropriate Circumstances:
<u>Order No. 3 – Demolish Works Order</u> 1. Demolish the front timber frame and sapling fence along the southern and eastern boundary of the property known as 57 Robertson Road Scotland Island.	A building requiring a planning approval is erected without approval.

- 12 The proposal is to demolish the existing fence and construct a new spaced hardwood fence setback from the Robertson Road boundary by 450mm at the western end and 1m at the eastern end and positioned on the shared boundary with 59 Robertson Road for 2.14m. The proposed fence ranges in height above

existing ground level from 1.2m to approximately 2m at its highest point next to the gate (Ex C).

Planning framework

- 13 The site is identified as bushfire prone land (Ex 3, folio 149). Section 4.14 of the EPA Act is in the following terms:

4.14 Consultation and development consent—certain bush fire prone land

(1) Development consent cannot be granted for the carrying out of development for any purpose (other than a subdivision of land that could lawfully be used for residential or rural residential purposes or development for a special fire protection purpose) on bush fire prone land (being land for the time being recorded as bush fire prone land on a relevant map certified under section 10.3(2)) unless the consent authority—

(a) is satisfied that the development conforms to the specifications and requirements of the version (as prescribed by the regulations) of the document entitled *Planning for Bush Fire Protection* prepared by the NSW Rural Fire Service in co-operation with the Department (or, if another document is prescribed by the regulations for the purposes of this paragraph, that document) that are relevant to the development (the relevant specifications and requirements), or

(b) has been provided with a certificate by a person who is recognised by the NSW Rural Fire Service as a qualified consultant in bush fire risk assessment stating that the development conforms to the relevant specifications and requirements.

(1A) If the consent authority is satisfied that the development does not conform to the relevant specifications and requirements, the consent authority may, despite subsection (1), grant consent to the carrying out of the development but only if it has consulted with the Commissioner of the NSW Rural Fire Service concerning measures to be taken with respect to the development to protect persons, property and the environment from danger that may arise from a bush fire.

- 14 The site is land within the coastal zone pursuant to cl 5 of the State Environmental Planning Policy (Coastal Management) 2018 (SEPP Coastal Management) (Ex 3, folio 32B). In granting consent to development on land within the coastal environmental area, the consent authority must consider whether the proposed development is likely to cause an adverse impact on the following (cl 13(1) of SEPP Coastal Management):

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.
- To provide for a limited range of development that does not have an adverse effect on those values.

- To provide for residential development of a low density and scale, integrated with the landform and landscape and not visually prominent.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.
- To ensure the continued viability of ecological communities and threatened species.

15 The site is zoned E3 Environmental Management under LEP 2014. The objectives of the E3 zone, to which regard must be had, are:

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.
- To provide for a limited range of development that does not have an adverse effect on those values.
- To provide for residential development of a low density and scale, integrated with the landform and landscape and not visually prominent.
- To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.
- To ensure the continued viability of ecological communities and threatened species.

16 The proposal, as ancillary development to a dwelling house, is permissible with consent.

17 The site is identified on the Biodiversity Map (Biodiversity Map Sheet BIO_010 of LEP 2014) and is subject to the requirements of cl 7.6 Biodiversity, which is in the following terms:

(1) The objective of this clause is to maintain terrestrial, riparian and aquatic biodiversity by—

(a) protecting native fauna and flora, and

(b) protecting the ecological processes necessary for their continued existence, and

(c) encouraging the conservation and recovery of native fauna and flora and their habitats.

(2) This clause applies to land identified as “Biodiversity” on the Biodiversity Map.

(3) Before determining a development application for development on land to which this clause applies, the consent authority must consider—

(a) whether the development is likely to have—

(i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and

(ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and

- (iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and
- (iv) any adverse impact on the habitat elements providing connectivity on the land, and
- (b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
- (4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—
 - (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
 - (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or
 - (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

18 The site is identified on the Geotechnical Hazard Map (Geotechnical Hazard Map – Sheet GTH_010 of LEP 2014) and is subject to the requirements of cl 7.7 Geotechnical hazards, which is in the following terms:

- (1) The objectives of this clause are to ensure that development on land susceptible to geotechnical hazards—
 - (a) matches the underlying geotechnical conditions of the land, and
 - (b) is restricted on unsuitable land, and
 - (c) does not endanger life or property.
- (2) This clause applies to land identified as “Geotechnical Hazard H1” and “Geotechnical Hazard H2” on the Geotechnical Hazard Map.
- (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider the following matters to decide whether or not the development takes into account all geotechnical risks—
 - (a) site layout, including access,
 - (b) the development’s design and construction methods,
 - (c) the amount of cut and fill that will be required for the development,
 - (d) waste water management, stormwater and drainage across the land,
 - (e) the geotechnical constraints of the site,
 - (f) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
- (4) Development consent must not be granted to development on land to which this clause applies unless—

(a) the consent authority is satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land, and

(b) the consent authority is satisfied that—

(i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, or

(ii) if that risk or impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that risk or impact, or

(iii) if that risk or impact cannot be minimised—the development will be managed to mitigate that risk or impact.

19 As the site is identified on the Geotechnical Hazard Map of LEP 2014, section B3.1 Landslip Hazard of Pittwater 21 DCP applies to the proposal and requires a statement in relation to the proposed development outlining how it has been designed and will be constructed to remove risk to an acceptable level.

20 The site is included in the area identified as an area of habitat mapped as Flora and Fauna Conservation Areas – Category 2. Controls in sections B3.4 and B4.4 of Pittwater 21 DCP for the protection of flora and fauna apply to the proposal, including, “Fencing, where permitted, shall be passable by native wildlife”. The Pittwater 21 DCP includes the following definition at A1.9 Definitions for Vegetation Class Category 2:

“Category 2

Areas of fragmented bushland in moderate condition and occurring outside of core bushland areas. This includes developed areas interspersed with small patches of remnant bushland with good connectivity of predominately native vegetation. Native vegetation in this category includes rainforest, forest, woodland, scrub, heath, mangroves, saltmarsh and wetland vegetation. Depending on vegetation type, all structural layers including canopy, sub-canopy, understorey and groundcovers are generally present but vegetation in this category is likely to be affected by moderate localised disturbance such as partial clearing and weed incursions (with weeds often limited to disturbed areas and remnant edges). Fragmented bushland may include large numbers of native trees and shrubs retained in gardens and parks.”

21 The site is within the locality identified as “Lower Western Foreshores and Scotland Island Locality” at A4.8 of Pittwater 21 DCP, which includes the following ‘desired character’ statement for this locality:

“The Lower Western Foreshores and Scotland Island locality will remain primarily a low-density residential area with dwelling houses a maximum of two

storeys in any one place in a landscaped setting, integrated with the landform and landscape. Development will be limited primarily due to the locality's remoteness and lack of vehicular access, but also due to the steepness of slope, proximity to the waterway, species and habitat diversity, and visual prominence. Community and recreational facilities will serve the community. Church Point will remain an important link to the offshore communities.

Future development is to be limited by the proximity of Ku-ring-gai Chase National Park, until it can be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport. A proliferation of domestic animals should also be restricted on the Western Foreshores to ensure the survival of native animals that reside in the National Park but frequent the area from time to time.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, and to enhance wildlife corridors.

Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Pedestrians will continue as the dominant desired land traffic within the locality. Private land based vehicles are to be discouraged on Scotland Island and not permitted on the Western Foreshores. Pedestrian access within the locality will be maintained and upgraded, especially public access along the Pittwater foreshore."

- 22 Section B3.2 Bushfire hazard of Pittwater 21 DCP includes the following statement regarding Scotland Island:

"Properties on Scotland Island are now subject to the Scotland Island Bushfire Management Plan. Please refer to the Scotland Island Bushfire Management Plan on Council's website in order to understand what implications it may have on your development."

- 23 D8.10 Fences of Pittwater 21 DCP is relevant to the proposal and includes the following outcomes and controls:

"Outcomes

To achieve the desired future character of the Locality. (S)

To discourage the use of fencing. (En, S)

To provide fencing only where necessary and to ensure that such fencing is sympathetic to the bushland setting of the locality. (En, S)

To ensure fences compliment and conserve the visual character of the street and neighbourhood.

To contribute positively to the public domain.

An open streetscape that allows casual surveillance of the street. (S)

Fences, where provided, are suitably screened from view from a public place. (S)

Safe sight distances and a clear view of the street including to and from driveways for motorists and pedestrians. (Ec, S)

To ensure heritage significance is protected and enhanced.

To ensure an open view to and from the waterway is maintained. (S)

Controls

a. Front fences and side fences (within the front building setback)

Front fences and side fences (within the front building setback) shall not be permitted other than for blocks with a water frontage.

For blocks with a water frontage, front fences and side fences (within the front building setback) shall have a maximum height of 1 metre above existing ground level, and shall be setback 1.5 metres from the property boundary. Landscaping is to screen the fence on the foreshore side.

Original stone fences or stone fence posts shall be conserved.

b. Rear fences and side fences (to the front building line)

Fencing is permitted along the rear and side boundaries (other than within the front building setback) to a maximum height of 1.8 metres. Such fencing should be kept to a minimum and only used where necessary for privacy, pet restraint and containment of household areas.

Fences shall not obstruct the passage of wildlife.

Fencing material shall be compatible with the natural environment, and shall be as transparent as possible, such as split timber posts and thin wire strands. Sheet metal fences are prohibited.

Where abutting a public reserve or place, fencing shall be constructed of natural materials, such as timber, brushwood, or sandstone, and be compatible with any adjoining fences.

c. Fencing in Category 1 and 2 areas

No front fences will be permitted.

Vegetation is preferred to any fencing.

Side and rear fences where necessary are to be constructed of dark coloured materials and shall not obstruct the passage of wildlife and shall have opening(s) with min dimension of 150mm accessible to ground dwelling animals.

Fencing required for the containment of companion animals should be minimised.

Variations

Within the front building setback, provided the outcomes of this clause are achieved, fencing to a maximum height of 1.8 metres may be considered where the main private open space is in front of the dwelling, the lot is a corner lot or has more than one frontage. In such instances, front fencing shall:

be setback a minimum of one metre for any fence higher than one metre (in the case of corner lots or lots with more than one frontage this setback may be varied based on merits); and

be articulated to provide visual interest and further opportunities for landscaping, and

be screened by landscaping within the setback area; and

not restrict casual visual surveillance of the street, and

provide a 45 degree splay (or equivalent) either side of any vehicular entrance, minimum dimensions of 2 metres by 2 metres; and

50% or more of the fence is transparent.

Provided the outcomes of this control are achieved, where fencing exceeds more than 1 metre in height and abuts a public road, a boundary setback less than the height of the fence may be considered based on merits."

Expert evidence

- 24 The applicant relied on the expert planning evidence of Vaughan Milligan and the Council relied on the expert planning evidence of Adam Urbancic.

Consideration

The Order appeal

- 25 It was uncontroversial in the hearing that the existing fence is not 'exempt development' under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 Pt 1, Div 2, cl 1.15 and Pt 2, Div 1, subdiv 17 Fences.
- 26 Mr Milligan's oral evidence was that the existing fence is inappropriate because it is too high and too prominent and does not integrate with the landscape setting.
- 27 The planning experts agreed that the existing fence is not suitable for the site as it does not achieve the outcomes of D8.10 of Pittwater 21 DCP because it is of an excessive height and is insufficiently screened by landscaping. The planning experts agreed that the existing fence does not meet the requirement to not obstruct the passage of wildlife under D8.10 of Pittwater 21 DCP.

- 28 On the basis of the experts' evidence, I accept the Council's submission that the Order was validly issued and the Order should only be modified to amend the time period for compliance.

The Development Application appeal

Jurisdictional preconditions not satisfied

- 29 I accept the Council's submission that there is insufficient information in the application to be satisfied of the matters pursuant to s 4.14 of the EPA Act and cl 7.6(4) and 7.7(4) of LEP 2014 and that these are preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent.
- 30 I accept the Council's submission that the geotechnical report dated 10 April 2018 annexed to the Application Class 1 (but not in evidence) was prepared for another development on the same site and does not address the proposal.

The proposal does not achieve the objects of the standards for fences in Pittwater 21 DCP

- 31 I accept the agreement of the planning experts that the proposed fence is a front fence within the meaning of the controls for fences under D8.10 of Pittwater 21 DCP (Ex 7, par 2.4.1(c)).
- 32 I accept the agreement of the planning experts that the proposed fence does not serve the purpose of containing companion animals because there would be gaps in the fence line (Ex 7, par 2.1.1).
- 33 I accept and prefer Mr Urbancic's evidence that the proposed fence does not meet the outcomes for Fences at D8.10 of Pittwater 21 DCP (Ex 7, par 2.1.3).
- 34 I accept Mr Milligan's evidence that a fence is not necessary to provide visual privacy for the occupant of the bedroom with a single window facing Robertson Road, and adequate privacy could be achieved by means other than a fence. I accept the Council's submission that the single bedroom window is below the level of the road, some distance from the road and is at least partly screened from view from the public domain by two large water tanks located in the front setback.

- 35 I am not satisfied that locating the proposed fence 450mm from the boundary will allow sufficient area for the fence to be screened from view from the public domain by foliage.
- 36 I accept the Council's submission on the basis of photographs C, H and I (Ex 6, tab 3) that there are no fences along the road boundary within the vicinity of the site and that the established visual character of the locality is open vegetation that allows for casual surveillance of the road. The introduction of a fence near the road boundary will not compliment and conserve the visual character of the street because it would be a unique, uncharacteristic and unnecessary structure in this portion of Robertson Road.
- 37 I accept the Council's submission that the proposal does not comply with the variations for fences within the front building setback at D8.10 of Pittwater 21 DCP, because the fence is within 1m of the boundary, it is not articulated to provide visual interest and it is not transparent to a level of 50% or more.
- 38 I accept the Council's submission that it is not appropriate to exercise the discretion afforded by s 4.15(3A) of the EPA Act because the proposal does not achieve the objects of the offended standard, as it is not a reasonable alternative to landscaping.

Orders

Proceedings 2019/16066

39 The orders of the Court are:

- (1) The appeal against Development Control Order No. EPA2018/0279 relating to the premises at 57 Robertson Road, Scotland Island, is upheld.
- (2) Pursuant to s 8.18(4)(b) of the *Environmental Planning and Assessment Act 1979* (NSW), Development Control Order No. EPA2018/0279 is modified to amend the time period for compliance with the order to a period of 56 days from the date of this order.

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- (3) The exhibits, other than Exhibits 1 and 2, are returned.

Susan O'Neill

Commissioner of the Court

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