
Sent: 28/07/2020 12:47:13 PM
Subject: DA 2020-0347 49 Forest Way, Frenchs Forest [ADDISONS-iManage.FID193859]
Attachments: 3718756_1.pdf;

Dear Sir/Madam

Please find attached a submission in relation to DA 2020-0347.

Regards

Regards
Penny

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28 July 2020

Our Ref: PLM:ADD015/4041

The General Manager
Northern Beaches Council
PO Box 82
MANLY NSW 1655

By email:
council@northernbeaches.nsw.gov.au

Attention: Lashta Haidari, Development Officer

Dear General Manager

**DA 2020-0347 – Construction of 4 Seniors Housing Units, with basement parking and strata subdivision (Development Application) Response to various conditions proposed in the development application assessment report relating to the construction of a footpath along Adams Street and bus stop design.
49 Forest Way FRENCHS FOREST NSW 2086 (Site)**

1. Introduction

- 1.1 We refer to the Development Application (**DA**) lodged with the Northern Beaches Council (**the Council**) and act for the owners Seyed Jalaledin Ziaolhagh, Rezvan Saket and Arvin Saket.
- 1.2 We note that the DA has been recommended for approval subject to a number of conditions as set out in the 'Development Application Assessment Report' (**the assessment report**).
- 1.3 A number of these conditions relate to the requirement to construct a footpath and to upgrade designated bus stops to be DDA compliant, being conditions 5, 12, 38, 51 and 65.
- 1.4 We submit on behalf of our clients that the DA should be approved with these conditions removed because they do not relate to the development and are unreasonable under the principles enunciated in the decision in *Newbury*¹.

2. Relevant conditions and the Newbury Test

- 2.1 Draft condition 12 requires engineering plans to be submitted for:
 - (a) footpath construction (1.5m wide with 600mm grass verge either side) along all frontages and provision of a footpath connection to the nearest bus top for both northbound and southbound travel.
 - (b) upgrade of the designated bus stops to be DDA compliant.

¹ *Newbury District Council v Secretary of State for Environment* [1980] 1 All ER 73.

- 2.2 The stated reason for the proposed condition is “to ensure compliance with Council’s specification for engineering works”.
- 2.3 Draft condition 38 requires the applicant to construct a 1.5m wide footpath in Adams Street to be connected to the existing footpath at the “Warringah Road” corner. We suspect that this is meant to refer to the Forest Way corner not the Warringah Road corner. The reason for the stated condition is “To ensure compliance of footpath works with Council’s specification for engineering works”.
- 2.4 Draft condition 65 requires construction of a footpath prior to occupation along the frontage of Adams Street. The noted reason is “to provide satisfactory pedestrian facilities”.
- 2.5 Draft conditions 5, 51 and 65 relate to the conditions above.
- 2.6 The *Newbury test* is the accepted test for determining the validity of consent conditions in New South Wales². In order for a condition to be valid under the *Newbury test* it must:
- (a) be imposed for a proper planning purpose,
 - (b) fairly and reasonably relate to the development for which permission is given, i.e. does the condition relate to the purpose for which the function of the consent authority is being exercised – determined through the consideration of the *Environmental Planning and Assessment Act 1979* and any relevant scheme arising under that Act³.
 - (c) be reasonable in the sense that it must be a condition which a reasonable local authority properly advised might impose – i.e. would the effect of the condition be to impose an obviously unreasonable burden on the applicant⁴.
- 3. Conditions relating to the construction of a footpath on Adams St (conditions 5, 12, 38, 51 and 65)**
- 3.1 The conditions do not fairly and reasonably relate to the development and nor are they are reasonable for the following reasons:
- (a) the conditions when read together require a footpath along the entire frontage of Adams Street but also to upgrade the existing Forest Way footpath frontage and then to the nearest bus stops;
 - (b) the construction of a footpath to the north and south of the site would not benefit the site but is imposed to upgrade footpaths generally;
 - (c) the footpaths are not required in order to comply with the standards in Schedule 3 of *Clause State Environment Planning Policy (Housing for Seniors or People with a Disability) 2004 (HSPD SEPP)*;
 - (d) there is no Council policy requiring it, noting that Council’s Footpath Priority Schedule does not identify any priority footpath on the southern side of Adam Street;
 - (e) a footpath along the northern frontage on Adams Street is not required to service the property or make the development acceptable. The construction of additional footpath required by the conditions is superfluous as the site can be safely and easily accessed in the absence of the additional footpath via Forest Way;
 - (f) the levels of the proposed vehicular crossing do not require it;

² *St George Building Society v Manly Municipal Council* (1982) 3 APA 370

³ *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490

⁴ *Newbury District Council v Secretary of State for the Environment (UK)* [1981] AC 578; [1980] 2 WLR 379, Lord Lane at 627 (AC).

- (g) the additional footpath required by the condition would not form a connection between pre-existing sections of footpath, it would not form part of a more substantive pedestrian link and nor is it in a high pedestrian area;
- (h) we note that the Ason Group letter issued and relied upon by Council noted an “observed demand for pedestrian movements along the Site frontage” and that the stated reason for the condition is “to provide satisfactory pedestrian facilities”. This suggests the condition is recommended to deal with existing pedestrian movements not the demands of the development itself. We note that the development results in only 3 additional dwellings with pedestrian entry via Forest Way not Adams Street and there is an existing footpath on Forest Way;
- (i) we are advised that the construction of a footpath on Adams Street would require the removal of three large trees which is an unreasonable burden to place on the applicant; and
- (j) generally the burden of the cost of construction of these footpaths is unreasonable in the circumstances of the case.

4. Condition relating to the upgrading of the designated bus stops to be DDA compliant.

4.1 The condition does not fairly and reasonably relate to the development and is not reasonable for the following reasons:

- (a) we understand that there are existing “DDA compliant” bus stops in front of the development site at 49 Forest Way and at the Forest Way Shopping Centre approximately 550m to the south;
- (b) the assessment report at page 15 notes that the development complies with clause 26(2) of the HSPD SEPP in relation to access to public transport. Further, there is no standard in Schedule 3 to HSPD SEPP requiring it;
- (c) the condition is not required under the *Warringah Development Control Plan 2011*. As a consequence the condition does not fairly and reasonably relate to compliance with a Council policy or planning instrument;
- (d) the assessment report does not set out any basis for this condition in so far as it requires all designated bus stops to be DDA compliant. The stated reason for the condition is to ensure compliance with Council specifications but this only applies where the applicant proposes the development which the applicant does not;
- (e) the Council has not imposed a condition of this nature on a number of similar developments for which approval has been granted. To impose the condition would be unreasonable in the circumstances as it would result in this development being arbitrarily treated differently from and having more burdensome obligations falling on the applicants as compared to similar developments; and
- (f) “DDA” is not defined and is assumed to mean Disability Discrimination Act. There is no specific criteria in that legislation to which the bus stops are to be designed to and the clause is vague. Compliance with the Disability Discrimination Act is a matter for TfNSW.

4.2 For the reasons above, the Council should remove the conditions set out above in relation to the footpath and bus stops.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Murray', with a stylized, cursive script.

Penny Murray

Partner

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