



Land and Environment Court New South Wales

Case Title: Barrett and ors v Blue Mountains City Council

Medium Neutral Citation: TBA

Hearing Date(s): 29, 30 September 2011

Decision Date: 13 October 2011

Jurisdiction: Class 1

Before: Brown ASC

Decision: Directions for preparation of landscape plan

Catchwords: DEVELOPMENT APPLICATION:
construction of a detached dual occupancy development - breach of the secondary road setback and the unsuitability of the objection submitted under SEPP 1 - unacceptable impact on the character of the area by way of the loss of existing vegetation and the bulk and scale of the proposed buildings

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979

Cases Cited: Winten Property Group Limited v North Sydney Council (2001) NSWLEC 46
Zhang v Canterbury City Council (2001) 115 LGERA 373

Texts Cited:

Category: Interim findings

Parties: Terry Barrett, Kerrie Barrett, Colin May and Sharon May (Applicants)

Representation	Blue Mountains City Council (Respondent)
- Counsel:	Mr C Maley, solicitor (Applicant)
	Mr A Seton, solicitor (Respondent)
- Solicitors:	Maclarens Lawyers (Applicant)
	Marsdens Law Group (Respondent)
File number(s):	10629 of 2011
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JUDGMENT

- 1 **ACTING SENIOR COMMISSIONER:** This an appeal against the refusal of Development Application N X/443/2010 by Blue Mountains City Council (the council) for the construction of a detached dual occupancy development at 47 St Georges Crescent, Faulconbridge (the site). The detached dual density development comprises a two-storey dwelling on that part of the site fronting St Georges Crescent and a single storey dwelling fronting Adeline Street.
- 2 The appeal was conducted as a conciliation conference on 29 and 30 September 2011 under s 34AA of the *Land and Environment Court Act* 1979 (the Court Act). As part of the conciliation conference process, the opportunity for an agreement or a reduction in the number of conditions in contention was explored with the parties however Mr Seton, for the council, indicated that no delegations were available to the council representatives at the hearing and that if any agreement was reached, it would need to be referred back to the elected council for consideration although the contention relating to stormwater management was addressed through the provision of additional information and a revised condition of consent..

- 3 On this basis, and as no overall agreement was reached in any event, the conciliation conference was terminated pursuant to s 34AA(2)(b). In accordance with s 34AA(2)(b)(i) the hearing was held forthwith and in accordance with s 34AA(2)(b)(ii), on the basis of what occurred at the conciliation conference.
- 4 In summary, the contentions raised by the council relate to:
- the breach of the secondary road setback to Adeline Street and the unsuitability of the objection submitted under *State Environmental Planning Policy No. 1 - Development Standards* (SEPP 1), and
 - the unacceptable impact of the development on the character of the area by way of the loss of existing vegetation and the bulk and scale of the proposed buildings.

The site and locality

- 5 The site is Lot 5 Sec 5 DP 8526. It is regularly shaped with a 20.8 m frontage to St Georges Crescent, a 56.415 m frontage to Adeline Street and a site area of 1226 sq m. It is currently vacant but remnant vegetation covers a large portion of the site, including a tree designated as significant by the council.
- 6 The locality is predominantly residential in nature, with older style cottages, some with recent additions and some newer style dwellings. The majority of dwellings are single storey although there are some two-storey dwellings and other dwellings with the appearance of a two-storey dwelling in the locality.

Relevant planning controls

- 7 The site is located within the Living - General Zone under *Blue Mountains Local Environmental Plan 2005* (LEP 2005). The proposed development is permissible with consent within this zone. The other relevant provisions in LEP 2005 include cl 9 that provides before granting consent, the Court must be satisfied that the development complies with the relevant principal

objectives of plan in cl 12, particularly objective (h) (cl 9(b)) and complies with the applicable locality management provisions in Part 2 (cl 9(c)).

- 8 Clause 13(1)(a)) that provides that consent shall not be granted unless the development "complies" with the relevant zone objectives. The relevant zone objectives in cl 22 are:

(c) To ensure that residential and non-residential development maintains and improves the character of residential areas, in a manner that minimises impacts on the existing amenity and environmental quality of those areas.

(e) To ensure that development responds to the environmental characteristics of the site.

- 9 Clause 44 addresses environmental impact. Relevantly, cll 44(4), (5) and (6) state:

(4) Other development

All buildings and works, and any asset protection zone, not subject to subclauses (2) or (3) should be designed and sited so as to have no adverse environmental impact on any of the following:

- (a) any significant vegetation community,
- (b) the habitat of any threatened species, populations or ecological communities,
- (c) any rare species of flora,
- (d) any fauna corridor,
- (e) the hydrological aspect of the locality,
- (f) any watercourse or wetland,
- (g) any significant natural features, including rock outcrops, rock ledges and cliffs.

(5) Where an adverse environmental impact cannot be avoided for development to which subclause (4) applies, consent shall not be granted unless the consent authority is satisfied that the development:

- (a) has been designed and sited so as to have the minimum possible adverse impact on the environmental attributes identified in subclause (4)(a)–(g), and
- (b) incorporates effective measures to remedy or mitigate any adverse environmental impact, and
- (c) offsets those environmental impacts through the restoration of any existing disturbed areas on the site.

(6) In determining whether an adverse environmental impact cannot be avoided in accordance with subclause (5), the consent authority shall:

- (a) have regard to the purposes for which the land is intended to be used with reference to the zone objectives applying to the land, and

(b) be satisfied that no practicable alternative is available in terms of the design, type and site coverage of the proposed development (including any measures required to protect life and property from the threat of bush fire) and the suitability of the physical characteristics of the land for the proposed development.

- 10 There was agreement that the site contains 7 groups of Faulconbridge Mallee Ash (*Eucalyptus burgessiana*), of differing maturity, which fall within the definition of a "rare species of flora" in cl 44(4)(c). "Rare species of flora" is defined in the Dictionary to LEP 2005. The site also contains a number of rock outcrops, which are identified in cl 44(4)(g).
- 11 Clause 52 addresses significant vegetation communities and rare species of flora and states where a development may have an impact on a rare species of flora, consent must not be granted unless the Court is satisfied, by means of a detailed environmental assessment, that the development complies with the relevant requirements of cl 44. The make-up of the detailed environmental assessment is contained within cl 52(2).
- 12 Clause 53 addresses retention and management of vegetation and cl 53(1) requires that before granting consent to a development that would remove vegetation regard must be given to a range of priorities, relevantly:
 - (a) retaining vegetation, in relation to location, species type or physical characteristics, that does not pose a threat to life or property in the event of bushfire,
 - (f) retaining vegetation that contributes to the streetscape character of the locality.
- 13 Clause 53(3) provides that before granting consent to development, the Court must take into account that vegetation retained on the site of the development is to be protected from activities that may reduce the safe useful life expectancy of that vegetation.
- 14 Clause 60 provides matters for the consideration of character and landscape and states that consent shall not be granted unless the Court has considered the extent to which the development is consistent with, or

enhances, the established character and streetscape of the surrounding area with regard to a number of factors identified in cl 60(1).

- 15 Clause 66 provides requirements for a detailed landscape plan for dual with the developments, amongst other forms of development. Clause 66(1) provides that consent shall not be granted unless the Court has considered a detailed landscape plan. Clause 66(2) provides the matters to be provided in the landscaping plans to comply with the requirements of cl 66(1).
- 16 Clause 119 provides specific requirements for dual occupancy developments including minimum lot sizes (cl 119(1)(b)) and requirement relating to design (cl 119(3)) and character and streetscape (cl 119(4)).
- 17 Schedule 2 Part 1 of LEP 2005 provides development standards for maximum building height, maximum height at the eaves, primary and secondary street setbacks, site coverage and development density for the Living - General Zone. There was agreement that the proposed development satisfies these development standard with the exception of the secondary street setback. Clause 2(1)(b) states;
 - 2 Building setback
 - (1) Front building setback
The front wall of a new building or carport is to be set back from the primary front boundary a distance that is:
 - (b) a minimum of 4 metres from the secondary road frontage, in the case of corner residential allotments, and
- 18 *Blue Mountains Better Living Development Control Plan* (the DCP) applies. Part C2.1 addresses streetscape and character, Part C2.2 addresses landscaping and Part D3 addresses dual occupancy developments.
- 19 *Blue Mountains City Council Development Control Plan No 9 – Significant Trees* (DCP 9) applies as the largest tree on the site is identified as *Eucalyptus sclerophylla x Eucalyptus piperita* (the Hybrid). DCP 9

contains objectives (cl 2), protection measures (cl 6) and considerations in light of development proposals (cl 7).

The evidence

20 Expert town planning evidence was provided by Mr Patrick Hurley for the applicant and Mr Michael Brown for the council. Ms Susan Hobley, an arborist, ecologist and landscape designer provided evidence for the council and Dr Daniel McDonald, an ecologist and Mr Fredrick Janes, an arborist provided evidence for the applicant.

21 A number of local residents provided evidence on site and supported the contentions raised by the council. An additional concern raised by the local residents and not pressed by the council was stormwater disposal.

The SEPP 1 objection

The evidence

22 Mr Hurley and Mr Brown provided a joint report that addresses the SEPP 1 objection to the breach of the development standard cl 2(1)(b). Mr Hurley and Mr Brown agree that the setback of the single storey dwelling from Adeline Street, which forms the secondary road frontage of the site, is 2.534 m (or a 36.6% variation to the 4 m development standard). They also agree that the departure from the development standard relates only to the open sided entrance porch structure that has a length of around 2.86 m.

23 The SEPP 1 objection addresses the departure to the development standard in the manner set out the judgment of Lloyd J in *Winten Property Group Limited v North Sydney Council* (2001) NSWLEC 46 (at 26), where a number of questions are posed. The first question asks whether the subject planning control is a development standard. In this regard there was no dispute that the answer to this question was yes. The second question asks what is the underlying object or purpose of the standard. As cl 2(1)(b) does not provide specific objectives, Mr Hurley and Mr Brown

adopt the objective as set out in the council officers report, which states that the 4 m secondary road frontage serves to:

...operate in conjunction with the primary street setback to facilitate a consistency in the streetscape while at the same time allowing a reasonable amount of land to be available for development on a property with more than one road frontage.

- 24 The third question asks whether compliance with the development standard is consistent with the aims of SEPP 1. The aims state:

3. This policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable and unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act.

- 25 This question also asks does compliance with the development standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the EPA Act. These objects state:

5. The objects of this Act are:
to encourage –

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;
- (ii) the promotion and coordination of the orderly and economic use and development of land.

- 26 The fourth question asks whether compliance with the development standard is unreasonable or unnecessary in the circumstances of case. The fifth, and final question asks whether the objection is well founded.

- 27 Mr Hurley states that strict compliance with the development standard is unreasonable or unnecessary because:

- the porch is only a small structure, open on three sides, with the house forming the forth side,
- it provides a house with a streetscape that is compatible with all other houses in the street,
- as the porch is located on the second house from the corner, it does not inhibit view lines for drivers at the intersection, and

- the porch provides all weather access to the main entrance to the house.

28 For these reasons, Mr Hurley states that the SEPP 1 objection is consistent with the aims of SEPP 1, does not hinder the attainment of the objects in s 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act* 1979 (the EPA Act) and is well founded.

29 Mr Brown states that he disagrees that the SEPP 1 objection addresses the appropriate requirements as the objection must address the objectives of the clause within the LEP or the underlying purpose of the setback requirement. In his opinion, this has not been demonstrated.

The findings

30 Mr Hurley and Mr Brown agree that the underlying objective deals principally within the question of streetscape. With the benefit of the site inspection and an understanding of the plans, I am satisfied that the relatively small encroachment of the porch into the secondary street setback will have no meaningful effect on the streetscape of Adeline Street or the wider area. It occupies only 2.86 m of a 56.415 m frontage to Adeline Street and is located within a landscaped setback area. As stated by Mr Hurley, the porch is a small open structure, and in my view, is more akin to an architectural feature that provides some articulation to this elevation rather than a dominant feature of the design that would unacceptably impact on the streetscape or character of the area.

31 I am satisfied that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of this case. The objection is consistent with the aims of SEPP 1, does not in hinder the attainment of the objects in s 5(a)(i) and (ii) of the EPA Act and is well founded.

Impact of the built form on the character of the area

The evidence

32. Mr Hurley states that the scale and mass of a building is regulated by Schedule 2 Part 1 of LEP 2005, which prescribes maximum building height, setbacks, site coverage and floor space ratio (FSR). With the exception of the encroachment of the porch into the Adeline Street secondary road setback, the buildings comply with Schedule 2 Part 1. Mr Hurley states that these controls are for all buildings within the Living General zone regardless of whether it is a single dwelling or a dual occupancy. Indicators that a building is unacceptable in terms of scale and mass include overshadowing or privacy issues with neighbouring properties however no such contentions are raised in this appeal. Importantly, there is no single dominant housing type in the area and the built form of the proposal reflects the character and streetscape of the area. Consequently Mr Hurley states that the proposed scale and mass of the dwellings is acceptable in this context.

33. Mr Brown accepts that there is not one distinct built form character in the area, although in his opinion, the majority of the dwellings are modest and occupy a very small area of the lots on which they are located. The proposed development, on the other hand, occupies a greater footprint than these properties, and this is mainly brought about by the introduction of a second dwelling on the site. In his understanding, no site has been developed for a dual occupancy development within the immediate area. Mr Brown notes that most properties in the area have also retained considerable vegetation on their lands, due to the small print occupied by these dwelling. The proposal provides for the removal of much vegetation and the finished development will appear to represent a denuded site when compared to other development in the immediate area.

Findings

34. On this matter, I agree with Mr Hurley. In accepting that the character of the area consists largely of smaller older style dwellings, many in a landscaped setting, some weight must be given to the form of

development anticipated by the development standards set out in Schedule 2 Part 1 of LEP 2005. These relate to building height, setbacks, site coverage and FSR and there was agreement that the proposed development satisfies these requirements, with the exception of the minor encroachment into the secondary street setback.

35 I do not accept that it can be reasonably argued that a development, which largely satisfies the development standards considered appropriate by the council for the area, can be so inconsistent with the character of the area, that it should be refused for this reason, particularly when no concerns have been raised over the architectural qualities of the building or amenity impacts.

36 I note that from the site inspection, there are some new dwellings being constructed within the general area that are both two-storey and appear to have greater site coverage than the existing smaller older style dwellings that predominate in the area. Even though there are no dual occupancy developments within the general area, I do not consider this to be necessarily a matter that supports the refusal, given that it is a form of development that is a permissible within the zone.

37 Pursuant to cl 60(1), and for the reasons mentioned in the preceding paragraphs, I am satisfied that the proposed development is consistent with, or enhances, the established character and streetscape of the surrounding area.

38 Pursuant to cl 119(3), and for the reasons mentioned in the preceding paragraphs, I am satisfied that the proposed buildings are acceptable in terms of form, design and appearance.

Impact of tree loss on the character of the area

The Hybrid

39 The retention or removal of the Hybrid was a significant issue in the proceedings. A decision on whether the Hybrid should be removed also impacted on whether the relief offered by cl 44(6(b)), in relation to whether

there is "no practicable alternative is available in terms of the design, type and site coverage of the proposed development" should be available. The retention the Hybrid was also a common theme in the evidence given by residents on-site and the submissions provided to the council when the development application was advertised.

- 40 The Hybrid is located towards the southern part of the site. It is a large and mature specimen with the crown extending approximately 20 m x 20 m, effectively limiting any development to the northern part of site, if development was restricted to the area outside the canopy. A large branch has dropped and is currently being supported by an existing Red Bloodwood located on the site. The health and vigour of the tree was the subject of considerable conflicting evidence by the experts.

The Hybrid – the evidence

- 41 Dr McDonald and Mr Janes rely on two separate and independent arboricultural reports prepared by the applicants and submitted to the council as part of the development application. The first report was completed in May 2008 and the second report in September 2010. Both reports investigate the viability of the tree, and in both cases include a Picus Sonic Tomograph test that is used to detect decay and cavities in standing trees by measuring the velocity of sound in wood, that is a function of the elasticity and density of the measured wood.
- 42 The 2008 test concluded that there was a considerable percentage of internal decay and recommended that the tree be removed if the site was to be developed. The 2010 test concluded that there is very little sound wood remaining in the base of the tree due to the large percentage of decay in the lower trunk area. Also, it was noted that tree has many defects from decay to the base in at least two of the three main trunk of the tree; one of which is being supported by an adjoining tree. The report also described the tree as being mature to over mature and requiring substantial remedial care and only being suitable for retention in the short

term. The recommendation of the 2010 report was that the tree be removed and replaced with another long living Eucalypt species.

- 43 Dr McDonald states that the tree has reasonable vigour when based on a visual assessment however its structural condition, near the base, is poor based on the two Tomograph tests. He notes that some interspecific plant hybrids, like the Hybrid, are weaker and this may explain why the tree is not excessively old yet is starting to fail structurally. Also, Dr McDonald states it is difficult to determine the likely longevity of hybrid individuals.
- 44 Mr Janes states that the tree may not fall down as a whole tree, but over time the large limbs will fail due to the size and weight of these limbs. This can be seen from one branch of the tree that is resting on another younger tree on the site. Mr Janes is of the opinion that the tree should be removed as the impact of the development on the tree will be significant through firstly, the construction of two-storey home, and secondly the ground disturbance during construction of the two buildings and their services. He states that the risk of leaving this tree, in a residential situation, would be high with the likelihood of damage or injury through branch or tree failure. In his opinion, it would be appropriate, at present, to fence off the area under the tree canopy to avoid potential danger to persons who may be underneath the tree canopy.
- 45 Ms Hobley comes to a different conclusion. She does not concur with the findings of both Tomograph tests. In her opinion, the tree is a healthy, mature specimen of very large dimensions. It has a full crown with no signs of major dieback. Its structural condition is considered good for such a large old tree, and in the context of the site; it still has all its primary lateral branches and the branch losses that have occurred, in terms of secondary and tertiary branches; are typical of the attrition that occurs due to intra-canopy competition associated with tree growth and development. Its major branch unions appear healthy and structurally sound. While one branch is interacting with a nearby tree, the situation needs to be monitored but the failure zone for this branch is the low use landscape

zone of the nature strip. Ms Hobley states that old trees of this genus typically contain large cavities and this does not mean they are likely to fall over and die in the near future. Ms Hobley is also of the opinion that it may be possible for a dwelling to be constructed outside the area of the canopy or even under the canopy, subject to specific engineering requirements to protect the root system and monitoring of the condition of the Hybrid.

The Hybrid – findings

- 46 In balancing the different evidence of Dr McDonald and Mr Janes and Ms Hobley, I agree that the Hybrid can be removed for three main reasons. First, and while the provisions of DCP 9 must be considered as a fundamental element in, or a focal point to, the decision-making process (*Zhang v Canterbury City Council* (2001) 115 LGERA 373) it does not necessarily follow that the tree should be retained under any circumstances. DCP 9 is silent on how to address trees that are potentially dangerous or unhealthy although cl 6 provides the opportunity to "cut down... any tree listed on the Register of Significant trees" but with the consent of council.
- 47 Second, and accepting that the Hybrid adds to the scenic quality of the site and the surrounding area, this benefit needs to be balanced against the likely longevity of the tree and its health. In this case, I have little trouble in concluding that the balance falls in favour of the removal of tree. The conclusions of the two Tomograph tests and the evidence of Dr McDonald and Mr Janes, and supported by the council officer, leave little doubt as to the appropriate outcome. I do not accept that the retention of the tree, irrespective of the scenic quality links to the area, should be preferred when there is a serious and legitimate question over the safety of the tree. In my view, the overwhelming expert and scientific evidence clearly suggests that the tree is dangerous and presents an unsafe situation for future occupants of the site.

- 48 Third, and even if a dwelling is constructed outside of the area covered by the tree canopy, I am not satisfied that is sufficiently overcomes the potential danger from the tree. It would be clearly impractical to fence off the area under the canopy, given the limited area remaining for a dwelling on the site and the need to provide ancillary matters such as private open space and buildings setbacks. The suggestion by Ms Hobley that a dwelling could be located underneath the tree canopy is misconceived, given the weight of evidence for branch failure and which is supported by the obvious example where an existing branch has failed and only remains because it is held up by another tree on the site. I am not satisfied that Ms Hobley has given proper consideration to the potential for injury in her assessment of the tree.

The rare species of flora

- 49 Clause 44(b) provides that any buildings and works shall be designed and sited so as to have no adverse environmental impact on "any rare species of flora". Exemptions are provided where an adverse environment impact cannot be avoided (and subject to the satisfaction of the matters identified in cl 44(5)(a)–(c)) and subject to the matters in cl 44(6).
- 50 There was agreement by Dr McDonald, Mr Janes and Ms Hobley that the site contains 7 groups of Faulconbridge Mallee Ash (*Eucalyptus burgessiana*), of differing maturity, which fall within the definition of a "rare species of flora" in cl 44(4)(c). There was also agreement that four groups were affected by the proposed building while three groups will be located in the setback areas of the proposed development. Importantly, there was also agreement that the loss of four groups was not necessarily a reason to refuse the application providing that the three groups unaffected by building work were retained and additional Faulconbridge Mallee Ash were included on any new landscaping on the site.
- 51 Pursuant to cl 44(5), I accept that an adverse environmental impact cannot be avoided however I am satisfied that the proposed development has been designed and sited to minimise any impacts through the retention of

3 groups of Faulconbridge Mallee Ash and the inclusion of the same species in the additional planting required for the site. In coming to the conclusion that the adverse environment impact cannot be avoided, I am satisfied that there is no practicable alternative in terms of design, type and site coverage, having regard to the permissibility of the proposed development (including compliance with the relevant zone objectives but subject to the provision of an acceptable landscape plan) and significant compliance with the development standards in Schedule 2 Part 1. While a different design could retain all 7 groups (or even a lesser number) of Faulconbridge Mallee Ash, I am satisfied that such a design would significantly reduce the opportunity for the development of the land for a purpose for which it was to be intended that it could not be deemed to be a "practicable alternative".

Rock outcrops

- 52 Clause 44(4)(g) provides that any buildings and works shall be designed and sited so as to have no adverse environmental impact on "any significant natural features, including rock outcrops, rock ledges and cliffs".
- 53 The site contains a number of rock crops however there was agreement by Dr McDonald, Mr Janes and Ms Hobley that the proposed design adequately addresses the retention of rock outcrops with the most significant outcrop being retained between the two proposed dwellings.
- 54 Pursuant to cl 44(5), I accept that an adverse environmental impact cannot be avoided however I am satisfied that the proposed development has been designed and sited to minimise any impacts on the number rock outcrops on the site through the retention of the most significant outcrop and other minor outcrops. In coming to the conclusion that the adverse environment impact cannot be avoided, I am satisfied that there is no practicable alternative in terms of design, type and site coverage, having regard to the permissibility of the proposed development (including compliance with the relevant zone objectives) and significant compliance with the development standards in Schedule 2 Part 1. While a different

design could retain all rock outcrops, I am satisfied that such a design would significantly reduce the opportunity for the development of the land for a purpose for which it was to be intended that it could not be deemed to be a "practicable alternative".

- 55 Pursuant to cl 52(1), I am satisfied that the detailed environmental assessment undertaken as part of these proceedings adequately addresses the requirements in cl 44.
- 56 Pursuant to cl 53, I have had regard to the question of vegetation retention, including vegetation that contributes to the streetscape character (but subject to the provision of an acceptable landscape plan) of the locality and I am satisfied that the vegetation to be removed is reasonable in the circumstances of this application.

Habitat/loss of vegetation

- 57 While not raised as a contention in proceedings, Dr McDonald and Ms Hobley addressed the question of potential loss of vegetation and consequent loss of habitat. Dr McDonald states that the site has a similar habitat to be habitat that is abundant in the wider area, including the Blue Mountains National Park. Many invertebrate fauna, fungal species and microorganisms are dispersed by the wind and as similar habitat occurs in the wider area, these species are also highly likely to occur widely in the area. Dr McDonald also states that the site does not function as a corridor, apart from a "stepping stone" for birds.
- 58 Ms Hobley states that the level of vegetation removal is significant in terms of impacts on the sites existing ecological values but that it is only of low significance in terms of impacts on habitat resources in the locality although she states that the significance of tree loss, in terms of its role in any ecological corridor, is not be established.

- 59 On this matter, I did not understand Dr McDonald and Ms Hobley to be so far apart in their positions that the loss of vegetation and the consequent loss of habitat was an issue that warranted the refusal of the application.

The landscape plan

- 60 The applicant provided a landscape plan (Exhibit D) however at the suggestion of the Court, the applicant reviewed this plan to minimise the amount of existing vegetation being removed within the site and particularly, the existing street setback areas. This resulted in an amended plan being produced during the hearing that identified a further six trees to be retained (Trees 3, 4, 6, 7, 29 and 62). These additional trees were shown on Exhibit S.

- 61 Clause 66 provides specific requirements for landscaping for dual occupancy development. Clause 66 states:

66 Detailed landscape plan for certain residential development

- (1) Consent shall not be granted for development for the purpose of accessible housing, a boarding house, a dual occupancy, multi-dwelling housing or tourist accommodation unless the consent authority has considered a detailed landscape plan.
- (2) A detailed landscape plan prepared to comply with subclause (1) shall include on that plan at least the following information:
- (a) the location, size and species of existing vegetation to be affected by the development, including trees, hedges, large shrubs, shrub beds and any areas of natural vegetation,
 - (b) replacement planting for any vegetation which is proposed to be removed,
 - (c) a planting plan showing the location and size within 10 years of each tree and large shrub,
 - (d) a table indicating common name, botanic name, ultimate height and width and planting size (pot size and height) of each tree and large shrub proposed if relying on planting of trees or large shrubs for privacy,
 - (e) a planting plan showing the location and indicative planting for mid-low shrubs and ground covers.
- (3) A detailed landscape plan prepared to comply with subclause (1) shall demonstrate to the satisfaction of the consent authority that the development incorporates planting that will promote a garden setting and enhance the streetscape of the surrounding area.

62 While Mr Maley, for the applicant, urged the Court to include the requirements in cl 66 as a deferred commencement condition of consent, I accept the submission of Mr Seton that the clause does not allow such an approach. Clause 66(1) is clear in that development consent cannot be granted unless a landscape plan has been prepared that satisfies the requirements in the clause. Clearly, this has not been done when Exhibits D and S are compared to the requirements in cl 66.

63 However, with the benefit of Exhibit S and other relevant evidence in the proceedings, I am satisfied that it is possible that a concept landscape plan could be prepared that addresses the requirements in cl 66. On the basis of the findings I have made in relation to the other contentions, I propose to allow time for the applicant to prepare a landscape plan in accordance with cl 66 and some further time for the respondent to consider this plan, prior to making any formal orders in the proceedings. An appropriate timeframe will be discussed with the parties at the time of handing down these preliminary findings.



G T Brown

Acting Senior Commissioner