GRIFFITH NARRABUNDAH COMMUNITY ASSOCIATION v ACT PLANNING AND LAND AUTHORITY & ANOR (Administrative Review) [2011] ACAT 61

12 September 2011

Introduction

1. The Griffith/Narrabundah Community Association ("the applicant") has sought review of a decision of the ACT Planning and Land Authority ("the respondent") to approve, with conditions, Development Application ("DA") No 201018575, for the construction of a 160 bed Residential Aged Care Facility on Griffith Section 78 Block 46 ("the subject land"). The decision was made pursuant to section 162 of the *Planning and Development Act 2007* (ACT) ("the Planning Act") on 10 February 2011. The applicant is an Incorporated Association which made a representation under section 156 of the Planning Act about the decision and is by virtue of Schedule 1, Column 4, Item 4 of the Planning Act an eligible entity entitled to apply for review of the decision under section 408 of the Planning Act.

The primary issue

11. Ms Fanning submitted that Rule R6 of the CFZ Code had the effect of calling up the Residential Zones - Multi Unit Housing Development Code ("the MUHD Code") and that, as a consequence, the proposed development was required to comply with that Code. In particular, she submitted that Rule R258 applied, which limits Residential Care Accommodation to a maximum plot ratio of 35%, whereas they estimated the plot ratio of the proposal to be over 70%.

    Rule R6 of the CFZ Code reads as follows:

    All single and multi unit dwelling developments are designed to comply with the relevant parts of the Residential Zones – Multi-Unit Housing Development Code. This is a mandatory requirement. There is no applicable criterion.

12. Mr Powell contended that the effect of Rule R6 was to expropriate the MUHD Code; in effect, it became the Residential Zones and Community Facility Zone MUHD Code. He noted that in the public information report accompanying Draft Variation 302 (entitled CFZ Development Code Policy Review) the respondent had stated that "Currently Rule R6 of the CFZDC calls up the relevant parts of the Residential Development Codes of the Territory Plan for assessment purposes". However, because Variation 302 had not been adopted, the Tribunal ruled that its contents could not be relied upon.

13. Ms Stockley gave evidence about how she had interpreted Rule R6. She observed that both single dwelling housing and multi-unit housing were prohibited uses in the CFZ Development Table. In her opinion, the multi unit dwelling developments referred to in R6 were developments such as supportive housing or retirement complex which were

permissible uses within the CFZ and to which the MUHD Code could be applicable. In any case, she opined that the proposed development did not constitute a multi unit dwelling development, as it did not contain any "dwelling".

14. Multi-Unit housing is defined in the Plan as

The use of land for more than one dwelling and includes but is not limited to dual occupancy housing and triple occupancy housing.

15. The term "dwelling" is defined in the Plan as having the same meaning as in the *Planning and Development Regulation 2008* ("the Planning Regulation"). That definition reads

5 Meaning of dwelling

(1)In this regulation

dwelling -

(a) means a class 1 building, or a self-contained part of a class 2 building that –

(i) includes the following that are accessible from within the building, or the self-contained part of the building:

(A) not more than two kitchens;
(B) at least 1 bath or shower;
(C) at least 1 toilet pan; and

(ii) does not have access from another building that is either a class 1 building or the self contained part of a class 2 building;

(b) includes any ancillary parts of the building and any class 10a buildings associated with the building.

(2) In this section
kitchen does not include -
(a)outdoor cooking facilities; or
(b)a barbeque in an enclosed garden room.

16. This is scarcely the most lucid definition and it is no surprise to the Tribunal that it generated much discussion as to its meaning. The reference to class 1, class 2, and class 10a buildings calls up the Building Code of Australia ("the BCA") use of these terms. Ms Stockley observed that there was a pre-requisite requirement that to be a dwelling, a building must be a class 1 or self-contained part of a class 2 building.

17. While the BCA was not in evidence, the relevant sections were cited in the

witness statement of Mr Hawke. A class 1 building is defined as a single dwelling (whether a detached house or one or more attached houses each separated by a fire resisting wall) or a boarding house, guesthouse, hostel or the like with a total area of all floors not exceeding 300 m^2 and where not more than 12 reside…while a class 2 building is defined as a building containing 2 or more self-occupancy units each being a separate dwelling. It is self evident that the proposed development is not a class 1 building, but whether it is a class 2 building depends on whether it contains 2 or more self-occupancy units each being a separate dwelling.

18. The applicant contended that because each of the resident rooms in the proposed development contained a bathroom and toilet, it was in effect self-contained accommodation forming part of the building, and that the absence of a kitchen did not rule it out from being a dwelling because the requirement was that there should be not more than two kitchens, which did not preclude there being no kitchen at all. They contended that there were numerous instances of units without kitchens being built in Canberra, for example student accommodation.

    The Tribunal did not accept this proposition, because the definition of "dwelling" required the listed facilities to be "accessible" and it was not possible for a non-existent kitchen to be accessible.

19. Examination of the plans for the building revealed that in each of the 8 "homes" forming the common area of each group of resident rooms was a kitchen accessible to residents from any part of the building. Consequently, the Tribunal concluded that even if the resident rooms were to be regarded as self-contained parts of a class 2 building, there were more than 2 kitchens accessible to them, so that they did not meet the Planning Regulation definition of a dwelling.

20. Further, the BCA defines a self-occupancy unit as including "a room or suite of associated rooms in a Class 5, 6,7, 8 or 9 building, or a room or suite of associated rooms in a Class 9c aged care building which includes sleeping facilities and any area for the exclusive use of a resident". It is clear that most of the proposed resident rooms are "self-occupancy units" (some are proposed to house two residents) but in the Tribunal's opinion they do not meet the definition of a dwelling in the Planning Regulation. Our view is reinforced by the fact that the BCA includes a separate Class 9c for aged care buildings and the proposed development was accepted as such by BCS consultants Cardno ITC when reviewing the proposal (at T 361).

21. The Tribunal therefore ruled that the proposed development was not a multi unit dwelling development and hence Rule R6 did not apply to it. Consequently, no plot ratio limitation applied to the development in question. We now turn to the other issues raised by the applicant and will deal first with those arising under sections 119 and 120 of the Planning Act and then with those arising under the CFZ Code.

22. The applicant was particularly concerned that a number of valuable trees would need to be removed in order to accommodate the proposed development on the site and noted that

the Conservator of Flora and Fauna ("the Conservator") had given advice that the application could not be supported for this reason.
Ms Fanning drew attention to section 119 (2) of the Planning Act which requires that *development approval must not be given for a development proposal in the merit track if approval would be inconsistent with any advice given by an entity to which the application was referred under division 7.3.3 unless the person deciding the application is satisfied that -*

(a) the following have been considered:

(i) any applicable guidelines;

(ii) any realistic alternative to the proposed development or relevant aspects of it; and

(b) the decision is consistent with the territory plan.

In her submission, there were realistic alternatives to the proposed development that had not been given proper consideration.

23. When asked what realistic alternatives to the proposed development he had considered, Mr Hawke said that there were none, because there was an ACT Government requirement to supply 160 beds, and in order to meet this and retain the trees in question, it was likely the facility would need to be significantly increased in height (to 4 storeys) and he did not consider that realistic.

24. Ms Fanning submitted that insufficient effort had been made to get ACT Government agreement so a smaller facility, such as 120 beds but no evidence was given to support this submission. On the contrary, a letter from Kerry Browning of the Direct Sales section of the LDA to the LDA's Chief Executive dated 5 December 2008 (attached to the Applicant's second Statement of Facts and Contentions) and an email from Mr Ross McKay, Director, Project Facilitation, Department of Land and Property Services dated 2 May 2011 (Exhibit 12) make it clear that the direct sale of the land was contingent on BCS achieving 160 beds on the site. Ms Fanning also suggested that a staged redevelopment of the considerably larger Morling Lodge site at Red Hill was a realistic alternative, but the Tribunal believes that would require relocation of existing Morling Lodge residents during the construction phase, which does not seem to this Tribunal to be a realistic alternative as it would involve complex and disruptive arrangements, even if available beds could be found.

25. While the Conservator's advice was said to have been sought under section 148(1) of the Planning Act (T306) and Mr Hawke stated that the Conservator's advice was provided pursuant to section 119(2) of the Planning Act, it was not advice given following referral under division 7.3.3 which relates only to registered trees and declared sites (as section 119(3) of the Planning Act makes clear). The trees in question are not "registered" nor is the land a "declared site". Division 7.3.3 deals with referral of DAs and section 148 requires the respondent to refer a DA prescribed by regulation to an entity prescribed by regulation. The relevant regulation is the Planning Regulation section 26(2), which specifies only a DA relating to any part of a declared site within the meaning of the *Tree Protection Act 2005* ("the Tree Act") as needing to be referred to the Conservator. Interestingly, there is no requirement to refer a DA involving a registered tree, despite the

provisions of section 119(3).

26. The matter is further complicated by the fact that the land is, at present, unleased Territory land. The Tree Act defines "regulated tree" as being a tree of a particular size on leased land in a tree management precinct which must be declared by the Minister under section 39 of the Tree Act and must be in a declared built-up urban area. By *Notifiable Instrument N12009-213* and *Notifiable Instrument N12010 – 414*, the land in question has been declared to be in a tree management precinct in a declared built-up urban area, but it is not yet leased land.

27. Mr Walker submitted that the proposed development need never have been submitted to the Conservator for the reasons set out in paragraph 26 above, but instead should have been referred to the Land Custodian, as specified in Planning Regulation 26(2) because it is unleased land. He further submitted that the Land Custodian had given agreement (referring to T312). However, the Land Custodian has simply signed the DA form (at T328) in his capacity as notional lessee of the land. The Tribunal does not consider that this can be regarded as some form of approval to the damaging or removal of the trees in question.

28. It is a condition of the approval under review that the approval will not take effect until a crown lease for the land has been registered, so that if the DA is approved by the Tribunal and a lease is issued, some of the trees upon the land will become regulated trees and hence protected trees and will come under the relevant provisions of the Tree Act.

29. It is an offence under section 15(1) of the Tree Act to damage a protected tree or to undertake prohibited groundwork within the protection zone of a protected tree, but section 22 provides for a person to apply for approval to undertake tree damaging activity or prohibited groundwork. The Conservator may approve such activities in certain circumstances. Section 23(3) requires the Conservator to have regard to (a) the approval criteria and (b) the advice (if any) of the advisory panel and (c) anything else the Conservator considers relevant.
Section 21 provides for the Minister to determine the approval criteria. This has been done by way of *Disallowable Instrument D12006 – 60*. It has not been suggested that any of the trees in question may be removed under the Criteria, nor does there appear to have been any advice from the advisory panel. The question is are there any relevant considerations.

30. An earlier Tribunal considered the difficulties posed by the change in wording between the repealed *Tree Protection (Interim Scheme) Act 2001* ("the Interim Scheme Act")and the Tree Act in *Bozin v Conservator of Flora and Fauna (Administrative Review) [2010] ACAT 91* at [49], noting that there is no express provision in the current Criteria Determination to permit removal of a tree to permit redevelopment of a property, whereas the Criteria Determination under the Interim Scheme Act allowed the Conservator to approve the removal of a tree if it was demonstrated that all reasonable development options and design solutions had been considered to avoid the necessity of tree removal. However, it also noted that under the present Act the Conservator could have

regard to anything that she considered relevant. The Tribunal concluded that the redevelopment proposal in *Bozin* was a relevant matter, albeit not one that would in that case outweigh the Conservator's advice.

31. The consequence of the issuing of a lease over the subject land would be that an application could be made by the party joined in this matter to undertake tree damaging activities. That, however, would lead to a repetition of much of what has already occurred. The facts are that the proposed development was referred to the Conservator by the respondent. The Conservator gave advice on the proposal and the respondent has decided not to accept the Conservator's advice, relying on the provisions of section 119(2) which allows a development approval to be given if the respondent is satisfied that "any realistic alternative to the proposed development, or relevant aspects of it" has been considered. However, s 119(2) applies only to advice given in response to a referral under Division 7.3.3, which this was not.

32. Mr Erskine suggested (and Mr Walker agreed) that in order to avoid having the issue raised again when a crown lease is issued, the Tribunal might make it a condition of approval of the DA that the trees marked for removal on Drawing No TMP1C Sheet 2 (at T587) be removed, and that such a condition would provide a basis for exemption from the controls in sections 15 to 19 of the Tree Act under section 19(1)(c)(3)(A) of that Act. Ms Fanning objected to this course of action as a "further attempt to circumvent the Tree Protection Act and to minimize any possibility that the Conservator exercise powers under the Act to protect the trees concerned" and submitted that the suggestion should be rejected.

33. While conscious of the concerns of the Conservator about several trees that will be removed if the development proceeds, the Tribunal is satisfied that there are no realistic alternatives to what is proposed and recognises that the architect has gone to some lengths to retain a significant number of the larger trees on the site. We see no merit in further review of the matter. If it decides to approve the DA, the Tribunal will adopt the course of action proposed by Mr Erskine. However, the issue of the trees is further considered below under Code issues at paragraphs 108 -112.

Tree Management Plan

108. Rule R34 and Criterion C34 deal with Tree Management Plans. The Rule requires that, in accordance with section 148 of the *Planning and Development Act 2007*, where the development proposal requires groundwork within the tree protection zone of a protected tree or is likely to cause damage to, or removal of, any protected trees, the application must be accompanied by a Tree Management Plan approved under the *Tree Protection Act 2005*. The party joined conceded that no approved Plan was submitted with the DA, but relied instead on Criterion C34 which requires that, if an approved Tree Management Plan is required but not provided, then a draft Tree Management Plan is to accompany the application, and that draft Plan will be referred to the relevant agency in accordance with the requirements of the *Planning and Development Act 2007*. The party joined stated (T

348) that a Tree Management Plan and assessment has been compiled by Scenic Landscape architecture for referral to the relevant agency.

109. This Rule refers, however, to section 148 of the Planning Act. As has been explained above at paragraph 25, section 148 does not require the respondent to refer this proposed development to the Conservator, because it is not on a declared site nor does it affect a registered tree. Consequently, it could be argued that no Tree Management Plan is required under the CFZ Code.

110. Part 4 of the Tree Act deals with Tree Management Plans which "may provide for activities that may be undertaken in relation to a tree and may set out conditions about how the activities are to be undertaken". Section 31 provides that the Conservator may determine guidelines for tree management plans, and such a determination is a notifiable instrument. Tree Management Plan guidelines have been established by *Notifiable Instrument NI 2010 -50*.

111. Section 32 of the Tree Act provides, inter alia, that the Conservator may propose, and the land management agency may apply, for a tree management plan, and that, in addition, "anyone else may apply for approval of a tree management plan for any tree on leased land in a built-up urban area" (to the Conservator in writing). Section 35(1) provides that the Conservator must decide whether to approve the plan. Section 35(4) requires the Conservator to have regard to (a) the guidelines; (b) the advice (if any) of the advisory panel; and (c) anything else the conservator considers relevant.

112. In the event that the Tribunal decides to approve the development, and to make it a condition of approval that the trees marked for removal on T587 be removed (as proposed in paragraphs 33 and 34 above), we will also amend Condition B11 of the decision under review to require that a Tree Management Plan, covering the protected trees that will remain on the subject land, is to be completed and submitted to the Conservator for approval prior to construction.