



Land and Environment Court
of New South Wales

CITATION : Artro Management Pty Limited v Council of the City of Sydney
[2009] NSWLEC 1007

PARTIES : APPLICANT
Artro Management Pty Limited

RESPONDENT
Council of the City of Sydney

FILE NUMBER(S) : 10521 of 2008

CORAM: Bly C

KEY ISSUES: Development Application :- requirements of development control
plan, supermarket, car parking and traffic

LEGISLATION CITED: Environmental Planning and Assessment Act 1979
South Sydney Local Environmental Plan 1998
South Sydney Development Control Plan 1997-(Urban Design).
Development Control Plan No 11 - Transport Guidelines for
Development 1996

DATES OF HEARING: 24, 25, 26 & 27 November and 5 & 9 December 2008

DATE OF JUDGMENT: 13 January 2009

LEGAL REPRESENTATIVES: APPLICANT
Mr M Craig QC with Mr I Hemmings Barrister
Instructed by Reid & Vesely

RESPONDENT
Mr C McEwen SC with Mr M Staunton Barrister
Instructed by Maddocks Lawyers

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

Bly C

13 January 2009

**10521 of 2008 Artro Management Pty Limited v
Council of the City of Sydney**

JUDGMENT

Introduction

- 1 Situated on the corner of Erskineville Road and Gowrie Street Newtown, a short distance from the Newtown railway station is a single storey industrial building known locally as "the hive". It is presently vacant and is in a generally poor condition. It was constructed circa 1943, its principal elevations to Erskineville Road and Gowrie Street being in the Art Nouveau style.

- 2 The applicant in these proceedings proposes to partially demolish the building, excavate the site and construct a two-storey plus basement building that retains much of the building' s existing character. The new building is to contain a gross leaseable floor area of about 2,140 m2 of which about 1,900 m2 will be used for a two-level supermarket with pedestrian access off Gowrie Street. The remainder of the floor space will be utilised for a single specialty shop at ground level with access off Erskineville Road. The basement will provide car parking for 31 cars with access off Gowrie Street and egress onto Angel Lane. Similarly access to the loading dock is off Gowrie Street with egress onto Angel Lane.

- 3 The likely turnover of the proposed supermarket is estimated to be around \$20 million per annum.
- 4 The address of the irregular shaped site of the development application is 21-23 Erskineville Road, Newtown. Despite its Newtown address, being located on the south side of the railway line and being proximate to the Erskineville business area it can just as easily be described as being in Erskineville. It has an area of 1,555 m² and frontages of 29 m and 53 m to Erskineville Road and Gowrie Street respectively.
- 5 According to the council's Statement of Facts and Contentions the general character of the area in which the site is situated is medium density residential of low to medium scale. To the north there are medium scale commercial uses, and rail and road transport corridors. To the northeast of the site across Erskineville Road is Green Bans Park. Adjoining the site of the northwest is a disused factory building and to the southeast on the opposite side of Gowrie Street is a service station. To the southwest there are single and two-storey terrace dwellings.

Advertising and council's decision

- 6 The application was advertised and about 260 letters of objection plus a petition containing about 4,500 signatures were received. The main matters of concern expressed in these objections comprise:
- The number of parking spaces proposed will be insufficient for the size of the development resulting in parking problems in surrounding residential streets. Customer traffic and delivery vehicles will unacceptably increase traffic in surrounding narrow streets resulting in increased congestion and pollution and road safety issues. Together these matters will adversely affect residential amenity.
 - Erskineville is already well served by supermarkets and another supermarket is not needed. A supermarket of the size proposed would be inappropriate and would adversely affect the village atmosphere and character. Existing retailers will also be adversely affected.

- 7 Other matters of concern include: excessive opening hours; traffic, delivery and construction noise; excessive signage, garbage disposal and overshadowing.
- 8 In support of the proposal the council received 12 letters/e-mails. Reasons for support essentially include:
- This part of Erskineville is in need of redevelopment as existing buildings including the subject building in a dilapidated state
 - The supermarket would benefit the area by introducing competition and a wider range of goods at lower prices but is far enough away from existing shops such that they would not be affected.
- 9 On 16 May 2008 the council decided that the development application should be refused for reasons essentially involving:
- By virtue of its scale, intensity and traffic generation the proposed development would be incompatible with an adversely affect the amenity of surrounding land uses. It will not enhance the quality of life and well-being of the local community.
 - The proposed development will not respect, improve or enhance Erskineville's urban village character. The new built form would not respect the scale and form of the existing building.
 - Failure to comply with various associated provisions of the LEP and the DCP.
- 10 The applicant has now appealed against this decision under s 97 of the *Environmental Planning and Assessment Act 1979* to this Court.

The issues in contention

- 11 At the conclusion of the hearing the respondent submitted that the issues in the appeal are threefold:
1. *The primary contention is that the proposal does not comply with the specific requirements of the DCP because it cannot be described as small-scale. More particularly it is not a shop*

that is designed to serve the local population. Instead, in serving a much wider population fails to contribute to the desired future character of the precinct being the Erskineville urban village.

2. *The second contention is that this development will result in an unsatisfactory traffic impact involving the use of limited on-street parking in the surrounding streets and increased traffic congestion. Residential amenity will thus be adversely affected.*

12 The third contention that the design of the proposal was inappropriate on urban design grounds has now been satisfactorily addressed by the imposition of an agreed condition requiring modification of the building's street fenestration. The principal concern here involved the *Public Domain Improvement Plan* in the DCP that in Section 2 requires an *active street frontage*. I am satisfied that this requirement is now been met.

Planning controls

13 The planning controls that are relevantly applicable to this application are the *South Sydney Local Environmental Plan 1998, Development Control Plan No 11 - Transport Guidelines for Development 1996 (DCP 11)* and the *South Sydney Development Control Plan 1997-(Urban Design)(the DCP)*.

14 Under cll 18 and 21 of the LEP the site is partly zoned 10 - Mixed Uses and 9(a) Arterial Road Reservation. The proposed development, comprising shops, is permissible with consent in the Mixed Uses zone. It is also permissible with development consent in the 9(a) zone that permits development that may be carried out on land in an adjoining zone, in this case the Mixed Uses zone, subject to it being consistent with the objectives of that zone. Also, cl 10 of the LEP requires that consent may not be granted unless the proposal is consistent with the objectives of the relevantly applicable zone.

15 The objectives of the Mixed Uses zone in cl 21 that said to be applicable are:

- (g) *To minimise any adverse impact on residential amenity by devising appropriate design assessment criteria and applying specified impact mitigation requirements by the use of development control plans, and*
- (h) *To ensure that the nuisance generated by non-residential development such as that related to operating hours, noise, loss of privacy, vehicular and pedestrian traffic or other factors, is controlled so as to preserve the quality of life for residents in the area.*

The evidence

16 On behalf of the respondent Council expert evidence was given by:

- Mr A Sutherland - town planning
- Mr R West - traffic engineering
- Mr P. Leyshon - economics

17 On behalf of the applicant expert evidence was given by:

- Prof P Webber - architecture and urban design
- Mr G. Shiels - town planning and urban design
- Mr A Hack - economics
- Mr G. Pindar - traffic engineering

18 In addition, when the hearing began on-site I heard from a number of resident objectors and supporters of the proposal who elaborated on the above-mentioned concerns.

Small-scale shop to serve the local population?

19 The respondent's primary concern is that the proposed supermarket would serve a much wider population than the local population and would thus not be the kind of small-scale shop as is required by the DCP and would be out of character with the Erskineville Village.

Planning controls

- 19 As referred to above objective (g) for the Mixed-Use zone is concerned to avoid adverse impacts on residential amenity and relies upon particular provisions of development control plans for specific impact mitigation measures. Objective (h) seeks to ensure that nuisance generated by non-residential development is controlled in the interest of residential amenity.
- 20 Part C of the DCP deals with the *Public domain*. According to the *Erskineville Road Urban Village Improvement Plan* and by reference to the map titled *Erskineville - Alexandria Public Domain Plan* (at page 29), that part of Erskineville Road between Erskineville Railway Station and Albert Street is identified (by yellow colouring) as a *Village Urban Centre*. The site appears to be at the very edge of this centre although this is clarified in the text (at page 31) by describing the *Erskineville Road Shopping Precinct* as being situated between Bridge Street and Union Street, thus excluding the subject site. The extent of this precinct is emphasised by the reference in the *Concept* section that refers to the ... *creation of gateways at Union Street and Bridge Street...* The *Erskineville Road Urban Village Precinct* is said to be the focal centre of Erskineville, displaying much of the physical form and many of the characteristic features of an urban village. These features include a strong sense of enclosure and place and a definite sense of entering and leaving the village.
- 21 Whilst the site is not included in the *Erskineville Road Shopping Precinct*, according to *Map 8 - Mixed Use* in Section 4 of Part F (at page 136) it is plainly within one of a number of *Urban Village Centres*. I thus accept that for the purposes of Section 4, the site is located within the *Urban Village* of Erskineville.
- 22 Clause 4.1 of the DCP (at page 135) deals with mixed-use development on lands zoned 10 - Mixed Uses and being one of a number of *Urban Village Centres*, the site is subject to the requirements of Precinct 3 (at page 139) including: *Characteristics; Planning intent; and Land use*

criteria. The characteristics of the centres are said to comprise a series of small shopping centres that provide a focus for the local community. They contain a variety of shops, convenience stores restaurants, cafes and personal services that generate pedestrian activity and social interaction. Importantly the planning intent is to encourage:

- *A range of small-scale shops, offices and cafes compatible with the urban village character of the surrounding area.*
- *Development that meets the needs of the local community and encourages social interaction.*
- *Improvements to the public domain to reinforce the particular village character of the precinct.*

23 The associated land-use criteria describe certain compatible activities including:

- *Medium density residential...*
- *Restaurants, cafes and take-away shops, which serve primarily the local resident and work population.*
- *Small-scale offices (but generally not at ground floor as they do not encourage great pedestrian activity).*
- *Shops and personal service stores which provide goods and services for the local population.*
- *Small-scale educational and medical activities.*

24 Clause 4.1 also requires that applications should contribute to the desired future character of the precinct by pursuing the above planning intent and land use criteria in the light of objectives including the achievement of a mix of uses that enhance the physical quality and function of the urban environment.

The planning evidence

25 In their joint report Mr Shiels and Mr Sutherland disagreed as to whether the proposal satisfies the objectives of the Mixed-Use zone and the desired future character requirements of the DCP in relation to this *Urban*

Village Centre. Whilst Mr Shiels thought that the development would activate this part of Erskineville Road by generating pedestrian traffic, Mr Sutherland believes that it would not be consistent with the dominant character of the village that comprises a series of small-scale shops. Whilst small-scale shops are not defined an appropriate scale can be derived from the village's existing urban fabric that includes shops having areas up to 150 square metres. Mr Shiels disagreed with this approach explaining that the subject building and its neighbours have large footprints and have a different character to the pattern described as *Urban Village Centres* in the DCP. They can accommodate larger premises.

- 26 In dealing with the DCP's requirement that shops should primarily serve the local resident and work population Mr Shiels pointed out that it would be impossible to only approve such uses and that there are many uses in the village that cater for the wider area. Whilst Mr Sutherland accepted this contention he did not agree that the test was as simple as this. He explained that the applicable controls seek to encourage uses that are compatible with the urban village character and that such uses are generally small-scale shops, offices and cafes and that will serve the needs of the local community. He also argued that because of the scale of the proposed supermarket that resulting increased traffic, on-street parking demand and noise will adversely affect on the village character. Mr Shiels said that the proposed use has the capacity to improve the viability of small-scale shops.

The economics evidence

- 27 The joint report of Mr Leyshon and Mr Hack revealed a degree of agreement in relation to a number of matters. The trade area of the proposed supermarket not only includes Erskineville, but also Darlington and Camperdown, a small part of Alexandria and the majority of the suburbs of Newtown and Enmore. The supermarket is capable of catering to major weekly food/grocery shopping trips.

- 28 In terms of need, there is an undersupply of supermarket floor space in the Erskineville /Newtown area based on a comparison of available sales and existing supermarket/grocery store floor space. Mr Hack calculated this to be around 8,000 m². About 40% to 50% of the sales of the proposed supermarket will come from an area bounded by a radius of 500 m from the proposed store the balance is likely to come from the wider trade area referred to above.
- 29 Whilst Mr Leyshon agreed that, taking into account the size of the trade area, the proposed supermarket intends to service an area significantly beyond Erskineville. Mr Hack did not entirely agree with this, explaining that only a small minority of turnover would be derived from shoppers living beyond a 1 km radius, hence the majority of shoppers would come from within this radius that he suggested was equivalent to the local area.
- 30 Mr Leyshon said that because the store would not be viable simply based on demand from Erskineville, it cannot be regarded as a small-scale shop primarily catering to the needs of the local community. In response Mr Hack explained that the proposed supermarket would have a contained trade area and will contribute to meeting the presently unsatisfied shopping needs of the local population.

Conclusions - small-scale shops

- 31 I agree that there is no reason why there should not be a supermarket in the Erskineville *Urban Village Centre*, indeed an appropriately sized supermarket would as Mr Hack explained anchor the centre and improve its vitality and sustainability to the benefit of the local community. Some support for this can be found in the fact that *shops* (unlimited in area) as well as *local shops* (less than 60m²) are permissible in the mixed-use zone. However in the light of the provisions of section 4 of the DCP it is clear that a supermarket in the order of 2,000 m² cannot be described as a small-scale shop, particularly by comparison with the average size of shops in the village and even by comparison with other supermarkets in the area that have areas of around 1,000 m².

- 32 I have now been persuaded by the evidence that the proposed supermarket is too large and does not meet the planning intent of the DCP relating to shops that service the local population. It is apparent that the subject existing building and the adjacent buildings do not display characteristics identified for the precinct, but I do not accept that this is a reason to not impose the DCP's planning intent and land-use criteria that are designed to achieve a particular future character.
- 33 In relation to the need to service the local population, the critical problem is the extent to which the supermarket will, as is intended, attract a significant number of customers from a trade area beyond the 500 m radius. In this regard it is important to note that distinction that whilst certain compatible activities such as restaurants, cafes and take-away food shops may *serve primarily the local resident and work population* shops are to provide goods for the local population. (My emphasis)
- 34 The population of Erskineville that corresponds to the 500 m radius catchment area was originally thought to be 4,500 persons but is now agreed to be 6,460 persons and I accept this as comprising the local population. However, I do not accept that this larger population necessarily means that the percentage of trade coming from within the local area would necessarily be much different to the 40% -50% initially referred to by Mr Hack and Mr Leyshon.
- 35 I understand that the \$20 million likely turnover for the supermarket is based upon what Mr Hack describes as a target turnover rate of \$10,000 per m². Having heard no evidence to suggest that this rate must be an upper limit, I see no reason why the increase in the estimated population should not be indicative of an increase in total turnover beyond the \$20 million. I nevertheless accept that the increased population is likely to account for more than the 40% - 50% of turnover referred to above but not as much as the 67% - 74% that was calculated on the basis of an upper limit of turnover of \$20 million.

- 36 It is therefore plain that, the proposed supermarket's total turnover will be generated by a population living in a catchment that is considerably larger than the local catchment. Similarly the size of the supermarket and the likely range of goods on offer will be such as to encourage drivers in greater numbers than would otherwise be the case for a smaller supermarket to come into the area for major shopping trips. Such an outcome would, in my opinion, be contrary to the thrust of the DCP's requirements that new development should be responsive to the needs of the local community. It can be accepted that a local shop will still attract non-local customers, but what cannot be accepted in the light of the requirements of the DCP is a relatively large shop that is designed to accommodate a trade area well beyond the local catchment. Given that there will be a significant number of non-local customers who are highly likely to come to the supermarket by car, this must result in the erosion of the village character and result in a loss of amenity for residents.
- 37 There can be little doubt that the proposal will enliven surrounding streets by generating additional pedestrian activity and meet the shopping needs of the local community. It is also likely that it will provide a support function for the Erskineville Road Shopping Precinct and be of some commercial benefit of the other shops, but these matters are not sufficient to overcome the planning intent of the DCP to encourage a range of small-scale shops for the local population.

Adequate provision of on-site parking?

- 38 The traffic contention in essence involves concerns that by not providing sufficient on-site parking the proposal will adversely affect residential amenity as a result of the use of limited on-street parking in the surrounding streets and increased traffic congestion.

Planning controls

- 39 The objectives of DCP 11 include the need to encourage a reduction in the level of vehicular travel by reducing parking requirements whilst ensuring that an acceptable level of parking is provided on-site to minimise the unreasonable overflow of parking onto surrounding streets. Section 3.1 contains guideline rates for car parking and this development, falling within the category of *Shopping Centre* is required to provide parking on the basis of a "survey based assessment". Small shops are to provide one car parking space per 50 m² of gross floor area.

Economic evidence

- 40 According to Mr Leyshon the proposed supermarket, whilst not able to be classified as a full line supermarket (these being generally greater than 2,500 m²) it will nevertheless have the capacity to attract major weekly/fortnightly grocery shopping trips. Also, being almost double the size of the two nearest existing supermarkets in Newtown it will have a much greater capacity to attract such shopping trips.

Traffic and parking evidence

- 41 In their second joint report Mr Pindar and Mr West reviewed the likely parking demand for the proposal in the light of the surveyed existing similar sized supermarket in Pymont. In doing so they adopted the revised Erskineville population of 6,460 by comparison with the population of 9,092 in Pymont (also within 500 m). On this basis, Pymont has a 41% higher density than Erskineville, this being a relevant consideration in the assessment of expected parking demands. Taking into account the parking surveys for the Pymont supermarket they agreed that the peak parking demand at any time for that supermarket was 28 spaces.
- 42 On applying this result to the proposal and applying a correction factor for the lower population density in Erskineville, Mr Pindar calculated that 32 spaces would be required. Despite this, the lower density would indicate a lower level of patronage overall with fewer people attending the site and in

the circumstances he believed that 30 car parking spaces would be reasonable and appropriate.

- 43 Applying a similar methodology Mr West calculated that 35 spaces would be required. However he believed that this understates likely real demand for parking because it does not take into account the fact that traffic volumes passing the site can be up to three times greater than traffic passing the Pymont site. Similarly, pedestrian activity at the Pymont site is some 2 - 3 times greater than at the Erskineville site. In short he believes that the provision of 59 spaces would be appropriate for the supermarket, being approximately half (so as not to provide for unfettered demand) of the RTA's (unrestrained) rate of 6.1 spaces per 100 m² of floor area. Failure to provide sufficient on-site car parking will result in a demand for scarce on-street parking causing inconveniences for nearby residents.

Conclusion – traffic and parking

- 44 As concluded above the proposed supermarket's turnover will be generated by a population living in a catchment that is considerably larger than the local catchment. Even taking into account the likelihood of a considerable number of pedestrians using the supermarket it is likely that a significant proportion of shoppers will travel from beyond the 500 m radius of the site in their cars to the supermarket. It can also be expected that some shoppers who reside within this area will also use their cars especially if a major shopping trip is involved.
- 45 This part of Erskineville is frequently subject to considerable traffic congestion. Taking into account the extremely limited availability of on-street parking it is therefore particularly important that there be compliance with the DCP 11 requirement that there be an appropriate level of on-site parking to minimise overflow parking onto surrounding streets. Whilst the survey based assessment as required by DCP 11 is important, the need to minimise impacts on surrounding streets is an overarching consideration.

- 46 Having considered their evidence I have not been persuaded that Mr Pindar's recommended 32 parking spaces or Mr West's similarly calculated 35 spaces would be sufficient for this development. Whilst I accept that the RTA's unrestrained parking standard should not be applied I am uncomfortable with the subjective approach of simply halving the standard to obtain Mr West's requirement of 59 spaces.
- 47 Unfortunately the survey of the Pymont supermarket is of limited assistance. Although this supermarket is of a comparable size to the proposal comparison is with it are unreliable because adjustments of a largely subjective nature need to be made. These adjustments involve the significant differences in passing vehicular traffic volumes; and significant differences in residential population density and pedestrian activity generally, including the propensity of Pymont residents to walk rather than drive to work.
- 48 As indicated, Mr West and Mr Pindar agreed that the peak parking demand for the Pymont supermarket was 28 spaces. Taking into account the above differences I do not accept that the proposed 31 parking spaces, an additional three spaces, would be sufficient for this development even taking into account that DCP 11 encourages a reduction in the level of vehicular travel by reducing parking requirements.
- 49 All things considered and accepting that a greater emphasis should be placed on ensuring a sufficiency of car parking that would minimise amenity impacts associated with on-street parking, I am in considerable doubt that this would be achieved by the level of parking proposed.

Conclusion

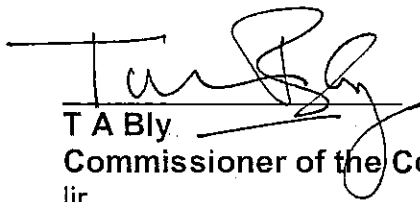
- 50 A supermarket is permissible with consent in the Mixed-Use zone and, in this location would have commercial and social benefits for the *Urban Village* of Erskineville. The redevelopment of the existing dilapidated buildings would benefit the area and would probably even be a catalyst for

further redevelopment. However, these benefits are not sufficient to overcome the fundamental concerns in relation to car parking and the requirements of the DCP for small-scale shops in urban villages. In the circumstances I have not been persuaded that objectives (g) and (h) of the mixed-use is zoned have been met.

Orders

51 For the above reasons the orders of the court are:

1. The appeal is dismissed.
2. Development application No. 07/1932 for alterations and additions to the existing building for the purpose of shops at 21-23 Erskineville Road, Newtown is determined by refusal.
3. Exhibit J is retained.


T A Bly
Commissioner of the Court
ljr