

Land and Environment Court

New South Wales

**Medium Neutral
Citation:**

**Camden Council v Rafailidis [2012] NSWLEC
51**

Hearing dates:

05/03/2012

Decision date:

05 March 2012

Jurisdiction:

Class 4

Before:

Lloyd AJ

Decision:

1. The Court declares that in breach of section 76A(1) (b) of the *Environmental Planning and Assessment Act 1979* the Respondents have carried out development otherwise than in accordance with the Notice of Determination of Development Application No. 701/2008 dated 22 October 2010 for the proposed development at Lot 10, Deposited Plan 27602, 955 Camden Valley Way Catherine Field New South Wales 2750.
2. Order pursuant to section 124 of the Act that the Respondents are within ninety (90) days to demolish and remove the existing single storey dwelling on the Property, or otherwise obtain an appropriate development consent to allow it to remain in some form or another.
3. As alternative to Order No 2, an order pursuant to section 124 of the Act that the Respondents are:
 - (a) within fourteen (14) days to lodge a development application with the Applicant for the demolition and removal of the existing single storey dwelling on the Property; and
 - (b) to demolish and remove the existing single storey dwelling within ninety (90) days of the granting of consent to the Development Application in accordance with such consent.
4. The Respondents are to pay the Applicant's costs of the proceedings.
5. The exhibits may be returned.

Catchwords:

CIVIL ENFORCEMENT - non-compliance with conditions of development consent - appropriate relief

Legislation Cited:	Camden Local Environmental Plan No. 48 Camden Local Environmental Plan 2010 Environmental Planning and Assessment Act 1979 Local Government Act 1993
Category:	Principal judgment
Parties:	Camden Council (Applicant) Efrem Rafailidis (First Respondent) Koula Rafailidis (Second Respondent)
Representation:	M Bonanno (Sol) (Applicant) First and second Respondents in person Lindsay Taylor Lawyers (Applicant)
File Number(s):	40855 of 2011
Publication restriction:	Nil

EXTEMPORE JUDGMENT

- 1 The applicant, Camden Council, seeks to enforce compliance with a development consent granted by it on 22 October 2008.
- 2 The relevant facts may be briefly described. By a notice of determination dated 22 October 2008 the council granted development consent to the respondents, Mr E Rafailidis and Mrs K Rafailidis, for the erection of a new dwelling at 955 Camden Valley Way Catherine Fields. There had been a previous development consent for a new dwelling which had been granted on 28 February 2006. The respondents have erected the new dwelling pursuant to the second development consent.
- 3 There was, and still is, an existing fibro dwelling on the land. The development application lodged by the respondents on or about 5 August 2008 contains a statement of environmental effects which relevantly states:

The property is currently occupied with a single storey fibroclad dwelling which will be removed on completion of the new home.
- 4 Moreover, a letter to the council accompanying the development application by Masterton Homes, dated 5 August 2008, contains the following statement:

With regards to our development application being lodged to council please be advised that the existing fibroclad dwelling will remain on site until the completion of the proposed home and will be then demolished by the owner as per a previous development approval for this property.
- 5 The development consent contains two relevant conditions. Condition 1.(8) states:

A separate development application shall be lodged with council for the demolition of the existing house. This application shall be lodged prior to the issue of any occupation certificate and completion of the proposed dwelling to ensure that occupation of the new development can legally occur (as per the conditions of this development consent).

A further condition of the same consent, condition 5.(6) states:

The existing single storey dwelling on the site shall be demolished and/or removed from the site within twenty-eight days of the completion of the proposed dwelling.

- 6 The conditions were imposed because of the requirements of the *Camden Local Environmental Plan No. 48* cl 14 which effectively permits only a single dwelling to be erected on each allotment in the relevant zone. The *Camden Local Environmental Plan No. 48* has since been replaced by the *Camden Local Environmental Plan 2010* which again effectively prohibits the retention of the second dwelling on the same allotment.
- 7 A person who receives the benefit of a development consent and carries out the development for which consent has been granted must also comply with the conditions of that consent. In the present case the conditions to which I have referred do not appear to be severable from the consent. That is, if the conditions had not been imposed then the consent itself could not have been granted.
- 8 The respondents have moved into the new dwelling but the original dwelling remains and is occupied by an elderly couple, Mr and Mrs Kingston. In a conversation between Council officers Ms Diana Davis and Mr Charlie Saab with Mr Kingston on 13 July 2010 Mr Kingston said:

It's nice that council care even if it's only because the legislation you said you have to but we have no intention of moving, my wife is ill and this location suits us and the owner has looked after us by not increasing the rent. We will not move until the Court forces us to and we will cross that bridge when we came to it.
- 9 The respondents have known all along that the original dwelling had to be demolished following completion of the new dwelling. They have previously been served with two orders under s 121B of *the Local Government Act 1993*, on 25 March 2010, and on 27 June 2010, requiring them to comply with the development consent. The planning controls which are in place would be set at nought if persons could avoid complying with those controls and, in particular, avoid complying with the conditions of any development consent which has been granted.
- 10 Accordingly it is appropriate that the Court makes the orders sought in the summons. Those orders will be postponed for a period of 90 days to allow the respondents to either demolish and remove the existing single storey dwelling or else apply to the council by way of a modification application under s 96 of

the *Environmental Planning and Assessment Act 1979* , or by way of a fresh development application to utilise the existing dwelling.

11 I make the following declaration and orders:

1. A declaration that in breach of s 76A(1)(b) of the *Environmental Planning and Assessment Act 1979* the respondents have carried out development otherwise than in accordance with the notice of determination of development application number 701/2008 dated 22 October 2010 for the proposed development at lot 10 deposited plan 27602 955 Camden Valley Way Catherine Field.

2. An order pursuant to s 124 of the Act that the respondents are within ninety days to demolish and remove the existing single storey dwelling on the property, or otherwise obtain an appropriate development consent to allow it to remain on the land in some form or another.

3. As an alternative to order number 2 an order pursuant to s 124 of the Act that the respondents are:

(a) within fourteen days to lodge a development application with the applicant for the demolition and removal of the existing single storey dwelling on the property, and

(b) to demolish and remove the existing single storey dwelling within ninety days of the granting of consent to the development application in accordance with such consent.

12 The council seeks an order for costs. It is usual for a successful applicant to be awarded their costs of proceedings such as this. In the present case the respondents oppose an order for costs. I concede that they are acting for themselves and may not fully appreciate what they have got themselves into but there seems to be a reluctance on their part to move the tenants out and for what appear to be reasons of sympathy for the tenants' position.

13 However, they have been on notice for some time that the council requires the second dwelling to be removed and the condition to be complied with. I have referred to the two notices under s 121B of the *Local Government Act* which were issued in March and again in June 2010 so they have been on notice for a long time of the council's requirement and insistence on compliance with the conditions.

14 It follows that the respondents are ordered to pay the applicant's costs.

15 The exhibits may be returned.

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Decision last updated: 20 March 2012