

Land and Environment Court

New South Wales

Medium Neutral Citation:	Camden Council v Rafailidis (No 2) [2012] NSWLEC 125
Hearing dates:	30 May 2012
Decision date:	30 May 2012
Jurisdiction:	Class 4
Before:	Biscoe J
Decision:	Order 2 made on 5 March 2012 is stayed on condition that the respondents file and serve a Class 1 appeal against the Council's refusal of their development application of May 2012 on or before 31 May 2012.
Catchwords:	CIVIL ENFORCEMENT:- failure by respondents to comply with condition of consent for construction of a dwelling that they demolish existing dwelling - whether Court order for demolition of the existing dwelling should be stayed to enable respondents to appeal against Council refusal of development consent for retention of the dwelling as a secondary dwelling.
Legislation Cited:	Civil Procedure Act 2005 s 67 Environmental Planning and Assessment Act 1979 s 96 Land and Environment Court Act 1979 s 34 Camden Local Environmental Plan 2010 State Environmental Planning Policy (Affordable Rental Housing) 2009 cll 47, 49, 50, Part 3
Cases Cited:	Camden Council v Rafailidis [2012] NSWLEC 51
Category:	Consequential orders
Parties:	Camden Council (Applicant) Efrem Rafailidis (First Respondent) Koula Rafailidis (Second Respondent)
Representation:	COUNSEL: Mr M Bonanno, solicitor (Applicant) Mr M Vassili, solicitor (Respondents) SOLICITORS:

File Number(s): 40855 of 2011

EX TEMPORE JUDGMENT

- 1 These proceedings were brought by Camden Council against Mr and Mrs Rafailidis to enforce compliance with conditions of a development consent granted by the Council on 22 October 2008 for the erection of a new dwelling on their residential property at 955 Camden Valley Way, Catherine Fields. They failed to comply with conditions 1.(8) and 5.(6) of the consent which provided for the demolition or removal of the existing dwelling on the property, as follows:
 - 1.(8) 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).
 - ...
 - 5.(6) 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.
- 2 On 5 March 2012 the proceedings were determined in the Council's favour by Lloyd AJ: *Camden Council v Rafailidis* [2012] NSWLEC 51. His Honour made 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.
- 3 By notice of motion filed on 26 April 2012, the respondents now move for an order pursuant to s 67 of the *Civil Procedure Act* 2005 that Order 2 made by Lloyd AJ be stayed until final determination by the consent authority, including this Court by way of appeal, of the respondents' current development

application to retain the existing dwelling on the property.

- 4 On 8 May 2012 the notice of motion came before the Acting Registrar who, inter alia, ordered the respondents to lodge their development application for retention of the existing dwelling within 14 days and listed the motion for hearing today.
- 5 An affidavit of the second respondent, Mrs Koula Rafailidis, of 23 April 2012 indicates that:
 - (a) On 13 March 2012, after a discussion with a Council town planner, she lodged a modification application under s 96 of the *Environmental Planning and Assessment Act 1979* and on 28 March 2012 received a letter from the Council rejecting the application, basically because of deficiencies as to its contents in various respects.
 - (b) She engaged in further related correspondence with the Council until 13 April 2012.
 - (c) On 29 March 2012 she sought legal advice as to what she could and should do.
 - (d) After forming the view that she could no longer progress a development application to retain the existing dwelling without legal representation, on 23 April 2012 she instructed the same lawyers to apply for a stay of the orders of Lloyd AJ so that she could properly prepare and lodge an appropriate development application and pursue all appeal rights as may be necessary to maintain the existing dwelling.
- 6 Having obtained the assistance of a town planner, Mr Phillip Gardner, as well as legal advice, last Friday the respondents lodged a further development application with the Council for the retention of the dwelling as a secondary dwelling. The Council refused the application. There is in evidence a report by Mr Gardner dated 30 May 2012 responding to the Council's reasons for the refusal. The respondents wish to lodge a merits appeal against the refusal to this Court. However, the 90 day period in Order 2 made on 5 March 2012 expires next Sunday. In substance, therefore, the stay application is for an extension of the 90 day period for a sufficient time to allow an appeal to be lodged and determined.
- 7 The respondents were unrepresented at the hearing before Lloyd AJ. In his Honour's judgment at [12] he acknowledged that as a result they may not have fully appreciated what they had got themselves into and that there seemed to be a reluctance on their part to move the tenants in the subject building out for what appeared to be reasons of sympathy for the tenants' position. It is clear that the respondents made an attempt to obtain a development consent to retain the existing building reasonably promptly after

his Honour's orders were made but that due to their failure to appreciate what was required to support such a development application it was rejected. This substantially explains why any appeal to the Court against refusal of a properly constituted development application will not be determined by the time that the said 90 day period expires.

8 The Council submits that there should be no stay because an appeal to the Court against refusal of development consent is doomed to failure. The reasons advanced by the Council in submissions include the following

(a) retention of the existing dwelling as a secondary dwelling is prohibited under the *Camden Local Environmental Plan 2010* because (at least) it does not fall within the definition of a "secondary dwelling" for which consent can be granted; and

(b) *State Environmental Planning Policy (Affordable Rental Housing) 2009* Part 3, which prohibits demolition of "low-rental residential dwellings" (cl 49 and 50), is inapplicable because the subject dwelling does not fall within the definition of "low-rental residential building" in cl 47 (even if it falls within the definition of "low-rental dwelling", which is also contested).

9 I have reached the conclusion that there should be a conditional stay of Order 2 made on 5 March 2012 for a limited period to enable the respondents to have their day in Court, if they wish, through the machinery of a Class 1 merits appeal against the refusal of consent, which should be set down for hearing in about a month. Of course, such an appeal may be earlier resolved by agreement given that by then the respondents will have the benefit of time to reflect on the Council's submissions as noted in [8] above.

10 Having indicated my conclusion, the parties have consulted and agreed on directions for a Class 1 appeal, which I propose to adopt.

11 I also propose to order the respondents to pay the Council's costs of their notice of motion. Had the respondents obtained at the outset the planning or legal advice which they have now obtained, an appeal against refusal of a properly constituted development application could have been disposed of within the 90 days provided for in Order 2 and their notice of motion would have been unnecessary.

12 The orders of the Court are as follows:

(1) Order 2 made on 5 March 2012 is stayed on condition that the respondents file and serve a Class 1 appeal against the Council's refusal of their development application of May 2012 on or before 31 May 2012.

(2) In relation to the said Class 1 proceedings:

- (a) The Council is to file and serve its submissions and statement of facts and contentions by Monday, 4 June 2012.
 - (b) The respondents are to file and serve all evidence upon which they rely by close of business on 6 June 2012.
 - (c) The respondents are to file and serve their submissions by 11 June 2012.
 - (d) The Council is to file and serve its evidence by 14 June 2012.
 - (e) The matter is set down for a conciliation conference under s 34 of the *Land and Environment Court Act 1979* on Monday, 18 June 2012.
 - (f) The matter is set for hearing on Wednesday, 4 July 2012 in Court.
- (3) The respondents are to pay the Council's costs of the respondents' notice of motion filed on 26 April 2012.
- (4) The exhibits may be returned.

Amendments

17 September 2012 - case name number series omitted

Amended paragraphs: cover page

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Decision last updated: 19 September 2012