
CHAIRPERSON'S REPORT - LOT 432

Dear Resident,

On Wednesday 4 October 2017, the Executive Committee of Community Association DP270336 resolved to approve an application for building works from the owner of Lot 432. The application was first submitted to the Community Association in July 2016. The Executive Committee is aware that this application has attracted some discussion and debate among owners. The Executive Committee provides the following information to ensure owners have the facts about the application, process and outcome.

The process was lengthy and complicated and the following is a summary of the various stages the application underwent and the actions the EC undertook in dealing with the application. The report is followed by frequently asked questions and answers.

At its first Executive Committee (EC) meeting following the AGM of 10 October 2016 the new EC considered the application for building works from owners of Lot 432 – it was one of a number of applications on the agenda for this first meeting. The documents provided to the EC for this meeting (held on 24 October 2016) relating to the matter included plans/drawings, objection/complaint email from adjoining owner of Lot 335 and a report from Jones and Jones, the architectural expert engaged by the previous EC to assess compliance with the Architectural and Landscape Standards of the DP270336 (ALS) and the Auburn Council Newington Development Control Plan (DCP).

The building works proposed were additions and alterations to an existing 5 bedroom home – ground floor additions consisted of refurbishment and extension of kitchen and family room, first floor additions and alterations consisted of enlargement of master bedroom, addition of a walk-in wardrobe and a new media room, the works also included installation of a swimming pool at rear of the site.

The minutes of the previous EC meeting of 14th September 2016 recorded the resolution on Lot 432 as:

“Motion Deferred. It was agreed the motion be deferred and considered via OOMD (*Out of Meeting Determination*) as the amended application and autistic (sic) report had only been received within the last two days and required review by all EC members, some of whom were not present. That pursuant to By-Law 1, 3, 4.1, 4.2 & 34 of the Community Management Statement, that the amendments to the application received 18th July 2016 as requested via OOMD on 16th August 2016 for the addition of a 6th bedroom and walk in wardrobe and renovation of bathroom and ensuite upstairs, extension of Kitchen/dining room and addition of full bathroom downstairs, installation of swimming pool to rear yard and change to front facade from dual single garage doors to single garage door to be considered and approved.”

The new EC sought advice from the managing agent as to any objections received from neighbours to the application. Managing Agent advised that 2 owners had expressed objections. The EC considered the concerns expressed by the owner of Lot 335 in his objection/complaint email. His concerns were air conditioning operating noise for the night, smoke alarm going off after 10pm and people noise (talking). The complaint concludes that the intended media room,

the pool and outdoor human activities will impact the enjoyment of Lot 335 as an owner. The email also raised concerns about the wood fence (existing) not providing sufficient barrier against noise. The Managing Agent advised that the owner of Lot 336 had telephoned the Managing Agent and expressed his objection verbally. The Managing Agent advised that both owners had been advised of the 24 October 2016 EC meeting, but did not attend. The owner of Lot 432 and his architect were in attendance.

The EC asked if a breach notice had been issued for the issues raised in the Lot 335 correspondence relating to existing matters (i.e. smoke alarm, people noise, air conditioner). The Managing Agent noted that it had.

The EC then considered the report from the independent architects Jones & Jones ([Attachment 1](#)). The Jones & Jones report stated:

“The following findings are made with respect to the Newington Architectural Standards and Landscape Standards. Section 3.2.1 Dwelling Mix & Sizes: “The houses consist of a mix of two storey townhouses, courtyard houses, family houses and executive houses of 3 to 4 bedrooms...”

Finding: The development proposal for 26 Tooth Ave, Newington creates a 5 bedroom house with a media room. Whether intended or unintended, the design creates the potential for existing or future owners to create a 6th bedroom, as the media room can readily be furnished as a bedroom. It is noted that the Newington ALS does not mention 5 or 6 bedroom houses in the design standard in section 3.2.1 Dwelling Mix and Sizes. This is a matter for the committee’s discretion.”

The EC then considered the acoustic report provided for 26 Tooth Avenue. The Acoustic report is focused on potential noise from the swimming pool. The report mentions that the main source of noise is people swimming in the pool. Plant noise must comply with Council controls. The report states that activities associated with the pool are no different to use of gardens and backyards for children play areas, bbq and the like of residential properties with no pool. The report states that the location of the pool will not generate a reduction in acoustic amenity to the neighbouring properties. The report concludes that the pump will be contained within an enclosure.

The EC advised the owner of Lot 432 and his architect that the plans should be amended to address the issue raised in the acoustic report and that the pump be contained within an enclosure. The owner of Lot 432 advised that the application would be amended and resubmitted.

The EC deferred the application pending receipt of amended plans that would be considered via Out of Meeting Determination (OOMD).

The amended plans for Lot 432 were submitted on 2 November 2016 and were considered by the EC to comply with the ALS and to have addressed the issues raised in the acoustic report. The application was approved via OOMD on 10 November 2016.

The owners of Lots 335 & 336 wrote to Ace on 19 January, firstly seeking clarification of the grounds on which Lot 432 application was approved, and then requesting the approval be overturned by the EC by way of rescission motion.

The EC declined the request for a rescission motion, but instead agreed to list the owners request to address the meeting on the agenda for EC meeting of 6 February 2017.

At the EC meeting held 6 February 2017 the owners of Lot 432, 335 and 336 were in attendance along with a number of other owners. The EC resolved to hear from the owners of Lot 335 and 336 regarding the approval of the building works application for Lot 432. The EC requested clarity from Lot 335 and 336 owners of the nature of the objections. The owners clarified their concerns being as follows:

- non-compliance of ALS 3.2.1, Lot 335 owner considers the standard to explicitly restrict dwellings to only 3 or 4 bedrooms.

The EC did not agree that Standard 3.2.1 is to be interpreted so strictly. If Standard 3.2.1 was to be interpreted so strictly the wording would be very clear to avoid misinterpretation of intent. The EC is also aware that Lot 432 was originally built as a 5 bedroom home as are a number of homes in P1S.

- The owners of Lot 335 and 336 also believed that the drawings and plans posted by Parramatta Council to its website included additional drawings of drainage works that were not on the plan approved by the EC. The owners stated that these drawings should also be submitted to the Community Association for approval.

The EC responded that the Managing Agent confirmed with Parramatta Council that the owner of Lot 432 submitted the drawings and plans stamped by the Managing Agent as being approved. The EC explained that it had no control over Parramatta Council to instruct them to post the stamped plans.

The discussion of Lot 432 matter lasted approximately for 80 minutes of the EC meeting, however, the discussion did not result in an amicable solution.

The owners of Lot 335 and 336 applied to the NSW Civil and Administrative Tribunal (NCAT) on 20 February 2017 for orders to rescind the motion approving the building works application for Lot 432. The application lists many matters not previously raised with the EC ([Attachment 2](#)).

The first NCAT hearing was scheduled for 13 March 2017 and was attended by the applicants (owners of Lot 335 & 336) and the respondent being the Community Association was represented by the Chairperson, Secretary and Treasurer of the Executive Committee and the Managing Agent. The architect for Lot 432 was also in attendance. NCAT directed the parties to attempt mediation as a first step. As an interpreter organised for Lot 335 and 336 owners did not attend the NCAT hearing, mediation could not proceed. Another hearing date was advised.

The next NCAT hearing was held on 24 April 2017. The EC Chairperson and Secretary and Managing Agent attended as respondents and the owners of Lot 335 and 336 attended as the applicants. An interpreter also attended. The applicants were not willing to sit in the same mediation room as EC representatives. Mediation was attempted by the Managing Agent going between the rooms the applicants and interpreter were sitting in and then communicating the issues to the EC representatives. The mediation was unsuccessful.

As a result, on 24 April 2017, the NCAT issued orders for a direction hearing to be arranged at a date to be determined by the Divisional Register. These orders instructed Lots 335 and 336 owners (as the applicants) to serve points of claim to the Community Association (as the respondent) by 15 May 2017, and the Community Association was ordered to respond to matters of claim by 22 May 2017. The orders further encouraged the parties to seek settlement discussions prior to the next hearing.

As directed by NCAT the owners of Lot 335 & 336 provided their points of claim to the EC and the EC provided its response. Following this, Lot 335 & 336 owners, EC representatives and the Managing Agent agreed to meet in an informal environment to discuss the points of claim and the EC's response in an attempt to facilitate a resolution. The meeting was held over a 2-hour period with the owners, 4 members of the EC and the Managing Agent present. Both parties spoke at length about the issues raised by the owners in their NCAT application and points of claim, however, a resolution could not be found. The meeting was recorded by the owner of Lot 335.

A NCAT directions hearing was held on 7 June 2017, the Community Association was represented by the Chairperson, Secretary and Managing Agent. The hearing was brief with NCAT adjourning the matter until a date for a full directions hearing could be arranged. The NCAT issued orders for the Community Association (CA) and applicant (Lot 335 & 336 owners) to seek professional legal representation and for the applicant to serve matters of claim by 21 June 2017 and the CA to respond by 5 July 2017.

The EC sought legal advice from a solicitor with extensive experience in strata and community land management law.

The EC provided the solicitor with all relevant documentation relating to the application for Lot 432 including minutes of OOMDs and EC meetings, reports from Independent Experts and DP270336 CMS and ALS.

On examination of the documents it became apparent that there were 2 versions of the Jones & Jones report. Both versions were undated.

The undated Jones & Jones report considered by the previous EC at the OOMD 16 August 2016 found the application 'non-compliant' with the ALS, particularly standards 3.2.1 (dwelling mix and sizes) and 3.2.6 (design standards: acoustic privacy).

The undated Jones & Jones report considered by the new EC at its first meeting of 24 October 2016 did not raise specific findings concerning ALS standard 3.2.6 and for ALS standard 3.2.1 provided a finding '*this is a matter for the committee's discretion*'.

The new EC was only provided with Jones & Jones report by the Managing Agent on 14 October 2016 (in preparation for the EC meeting on 24 October 2016) that provided the finding for ALS 3.2.1 '*this is a matter for the committee's discretion*'. The new EC was not advised that there were different versions of the Jones & Jones report with different findings for compliance with ALS.

The legal advice received from the solicitor cites procedural error made on 16 Aug 2016 in an out of meeting determination (OOMD) of the Executive Committee of the Community

Association. The minutes of the 16 August 2016 OOMD ([Attachment 3](#)) show that the undated Jones and Jones report cites non-compliance with the ALS for standards 3.2.1 and 3.2.6. The EC does not have power to consider a matter where non-compliance with the ALS has been detected. Amending the ALS may only occur by unanimous resolution of all owners present in general meeting.

The Jones and Jones report attached to the 16 August 2016 OOMD minutes for Lot 432 found for ALS standard 3.2.1:

“Section 3.2.1 Dwelling Mix & Sizes: “The houses consist of a mix of two storey townhouses, courtyard houses, family houses and executive houses of 3 to 4 bedrooms...”

Finding: The development proposal for 26 Tooth Ave, Newington creates a 5 bedroom house with a media room. Whether intended or unintended, the design creates the potential for existing or future owners to create a 6th bedroom, as the media room can readily be furnished as a bedroom. It is noted that the Newington ALS does not mention 5 or 6 bedroom houses in the design standard in section 3.2.1 Dwelling Mix and Sizes, leaving the current 5 bedroom configuration of the existing house non-compliant.”

“Section 3.2.6 Design Standards: Acoustic Privacy:

Finding:

The development proposal for 26 Tooth Avenue includes the proposal for a 40,000L swimming pool. The development of this pool would create an active recreation area within 9 meters of a bedroom in the neighbouring dwelling at 27 Spitz Avenue, as well as 26 Tooth Avenue bedroom 3. While the neighbouring bedroom at 27 Spitz Avenue is separated by a solid barrier, being the boundary fence, given that “acoustic privacy” is essential, it is advised that, if the committee is considering granting approval for this proposal, an acoustic study be conducted to describe how and/or ensure that sleeping areas are protected from noise intrusion”.

“Summary:

The following areas of non-compliance have been identified for the development proposal for 26 Tooth Avenue, Newington: 3.2.1 Dwelling mix & sizes, 3.2.6 Design standards: acoustic privacy”.

The legal advice was that:

“the EC is on notice that there is the potential of a procedural error in the review of the proposed works. That knowledge alone creates a duty to act in the best interest of all owners to remediate the error.”

In accordance with the legal advice the EC gave notice of an EC Meeting to be held on 13 June 2017 to consider motions to rescind the decision to approve Lot 432. The meeting resolved to rescind the decision to approve Lot 432.

As the Expert Independent advice concerning compliance with the ALS was inconsistent and undated it was considered unreliable should the owners of Lot 432 pursue their right to apply to NCAT for an order to approve their application. The EC had a responsibility to protect the Community Association against any claim for damages and resolved to seek the advice of a

competent expert, alternative to Jones & Jones Design, to assess the application made by the owners of Lot 432 for compliance with the ALS.

The EC engaged Mr Rowan Hukins, to review the Lot 432 application. Mr Hukins was heavily involved in the development of all 4 precincts of Newington with Mirvac. Mr Hukins is a registered architect with the NSW Architects Registration Board (registration number 6207), a member of the Australian Institute of Architects and has 20 years of experience in the industry.

On 30 June 2017, the EC was notified that actions in the NCAT have been withdrawn by the applicants (owners of Lots 335 & 336). Notwithstanding this the EC was of the view it had an obligation to receive the expert advice of Mr Hukins on the application made by the owners of Lot 432 in order to provide closure to the matter to the point where the interests of the CA were protected from further legal action.

A report was received from Mr Hukins on 18 August 2017 identifying a number of minor non-compliances with the ALS with the application for Lot 432. These were:

- Item 1 - No Sun hoods shown on new north facing window
- Item 2 - New windows to eastern facade do not have vertical screens or solar film applied (acknowledgment given to alternative solar protection by way of pergola above windows).
- Item 3 - New roof space is not indicated as ventilated.

With regard to the dwelling size and mix the report found the following:

“Dwelling Mix and Sizes (cl 3.2.1)

It is the opinion of the reviewer that this refers to an “historic” design statement included to describe how a “varied, interesting, yet cohesive and consistent streetscape” had been generated. To support this opinion; if the intent was to limit maximum bedroom numbers through the application of the ALS, a dwelling mix and size control would have been listed in the “Design Standards” (cl. 3.2.6).”

The report concluded that:

“It is the opinion of the Reviewer that the Lot specific non-compliances can be dealt with by way of a resubmission of information that deals specifically with the ALS compliance requirements.”

The application and report of ALS non-compliances were referred to the owner of Lot 432 to be amended to comply.

The owners of Lot 432 addressed the non-compliance matters in an amended plan and resubmitted it to the EC for consideration.

The amended application was referred to Mr Hukins for a further report on compliance with the ALS.

Mr Hukins final report was received on 27 September 2017. The report found that the proposed works were generally compliant with the DP270336 ALS. ([Attachment 4](#))

Having received Mr Hukins final report the Executive Committee held a meeting on 4 October 2017 and resolved to approve an application for building works from the owner of Lot 432.

Through the various stages of dealing with the application for Lot 432 and responding to the application to NCAT by the owners of Lots 335 & 336 the EC became aware that the ALS is not reflective of the standards that the last stage of DP270336 (also referred to as Precinct 1 South (P1S)) was built to.

The ALS currently being applied for compliance of building works is dated February 2003. The date of registration of DP270336 as a Community Association is 9 May 2003. The original masterplan for P1S was amended in 2007 to delete the proposed unit blocks with individual lots to accommodate the building of a mix of single and two storey free standing dwellings of 3, 4 and 5 bedrooms. A number of lots are of battle-axe formation with free-standing dwellings built to address Blankers-Koen Park not the street.

It is clear that the current ALS was not updated in 2007 to reflect the amendments to the masterplan or the final design and format that dwellings were built to. This is apparent when considering a number of the clauses of the ALS.

As the ALS is being used to assess the compliance of proposed building works throughout DP270336 it should be up to date and fit for purpose. This is a matter that the Community Association should rectify in the near future.

The EC is aware that the owners of Lot 335 & 336 genuinely believe their objections to the application are grounds for the EC to refuse the application for the building works application for Lot 432. As the EC has worked through this process it became aware that the owners of Lot 335 and 336 were given reason to form this view. The previous EC at its OOMD considering the application for Lot 432 included in its resolution the following condition:

“Written approval of the development must be provided to the Managing Agent from 24 Tooth Ave and 27 & 25 Spitz Ave if the issues in Item 1 are addressed and compliant.”

The EC does not have the authority to require an owner to gain written approval of the owners of adjoining properties as a pre-condition of approval of an application for building works.

In addition to the resolution of the OOMD 16 August 2016 the Managing Agent wrote to the owners of Lot 335 and 336 and other adjoining owners advising them in the following terms:

“A report has been received from our Independent Advisor and we will work to ensure your interests are protected via the Community Management Statement, (By Law 3), Architectural and Landscaping Standards and Auburn/Newington Development Control Plan.”

The EC has the authority under by-law 3 of Community Management Statement (CMS) to ensure that any building works comply with the Architectural and Landscape Standards (ALS). The CMS does not give the EC the authority to ensure compliance with Newington Development Control Plan (DCP). Recent legal advice commissioned by Parramatta Council confirmed that the legal responsibilities of the Community Association and Council are independent of each other, that is, that Council ensures compliance with the DCP and the Community Association ensures compliance with the ALS. ([Attachment 5](#))

The EC regrets that past advice provided to the owners of Lot 335 & 336 have given an expectation that the Community Association and EC have power beyond the authority vested in them by the *Community Land Management Act 1989*, DP270336 Community Management Statement and Architectural and Landscaping Standards.

The EC is of the view that it exposes the Community Association to risk of damages if it acts beyond its legal authority. Accordingly, the EC approved the application for Lot 432 based on its compliance with the ALS.

It is worth noting that part way through this process the owners of Lot 432 provided the EC with original approved designs for 26 Tooth Avenue as obtained from Sydney Olympic Park Authority. These designs designate the Lot as 443, however it is the same lot known as Lot 432 today. The original design has capacity for 5 bedrooms, and is clearly marked as such. Diagram is dated 2 April 2007 for 'BA' – this is building approval. The location of the Lot on the BA approved drawing matches the current location of Lot 432 as obtained from LPI NSW title search. Thus confirming that this dwelling was originally approved and built as a 5 bedroom dwelling.

Frequently Asked Questions

The EC is aware that misinformation has come about throughout the lengthy process of dealing with the application for Lot 432, we provide the following frequently asked questions with answers in an attempt to clarify a number of issues raised about the application and process:

1. Why did the Community Association (CA) seek legal representation?

At the directions hearing of the NSW Civil and Administrative Tribunal (NCAT) on 7 June 2017, orders were issued for both the applicant (lots 335 and 336) and the respondent (the Community Association) to obtain professional legal representation.

2. Why did the CA continue with legal representation post withdrawal of the NCAT matter by the applicants?

Given the history of this item, the EC was of the view that continued legal representation was necessary to place the CA in the best possible position for application Lot 432. The EC did not wish to place the CA in a legally ambiguous position with regard to expert evidence.

3. Does the CA have oversight over DCP/LEP matters?

No. The legal advice from Parramatta council provided to the Newington meeting provides clarity on this matter. DCP/LEP matters are council issues, the CA has no authority over either instrument. This advice is supported by CA solicitor in advice dated 6 June 2017.

4. Why did the EC continue to consider Lot 432 application after the withdrawal of the NCAT application?

The EC is bound by the by-laws to consider applications put before it. Post the rescission of the approval for Lot 432 made by EC on 13 June 2017, the applicant (Lot 432) did not withdraw the application.

Key to the EC decision to withdraw the application was inconsistency in expert advice provided to the CA by Jones and Jones. Two undated advices are found on CA records, one advice cites a non-compliance with specific standards in the ALS on dwelling mix and sizes and acoustic privacy, the other states that this is a matter for the committee's discretion. The EC received legal advice that conflict in expert advice received on compliance with the ALS placed the CA in a position where it had no basis to apply its discretion to approve or disallow the Lot 432 application.

The EC then sought the advice of a new expert, Mr Rowan Hukins, to review the application. Mr Hukins was heavily involved in the development of all 4 precincts of Newington with Mirvac. The EC commissioned Mr Hukins to review application for Lot 432 against the ALS/CMS.

5. Did the EC rubber stamp the application upon receiving advice from Mr Hukins?

No. The EC received advice from Mr Hukins on non-compliances with the ALS. The EC provided this advice to the applicant. The applicant rectified the ALS non-compliances identified by Mr

Hukins. Mr Hukins then re-assessed these changes, and the entire Lot 432 application and provided a finding of general compliance with the ALS. Given this finding, the EC, being empowered with expert evidence that assured it of its ability to consider the Lot 432 application, convened an EC meeting to re-consider the Lot 432 application.

6. Why is compliance with the ALS necessary?

The CA is bound by the *Community Land Management Act 1989*. The EC is not empowered to approve changes to the ALS, such changes may only be made by owners through unanimous resolution at a general meeting (section 17 of the *Community Land Management Act 1989*). The EC did not re-consider the application for Lot 432 until it had expert advice indicating general compliance with the ALS for DP270336.

7. Why did the EC not take the Lot 432 application to general meeting?

The expert evidence provided by Mr Hukins on Lot 432 application provided clarity to the EC that it was within its power to consider. The EC then considered the matter as is the usual process undertaken by DP270336 for building works applications.

8. Has the EC changed the by-laws and Architectural and Landscaping Standards of the Community Association.

No, the EC cannot change by-laws or the Architectural and Landscaping Standards, these can only be changed at a general meeting of the Community Association by a vote of owners.

The EC hopes this report has provided owners with an understanding of the decisions and actions it took in dealing with the application for building works for Lot 432. In particular, we have attempted to inform and provide clarity around the lengthy and complicated process this application has been subject to. Please be assured the Executive Committee has acted in the collective interests of owners and the Community Association in all of its deliberations in this matter.

Helen Westwood AM

Chairperson
Executive Committee
Community Association DP270336