



## *The Avicultural Society of New South Wales (ASNSW)*

*(Founding in 1940 as the Parrot & African Lovebird Society of Australia)*

### **Getting an aviary in Kogarah**

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When I moved into the Kogarah area I certainly didn't expect that my aim to have an aviary would turn into a long running saga that would eventually end up in the Land and Environment Court.

After all I only wanted to construct a relatively small aviary (24 square metres) housing a mixed collection of birds (approximately 50), being mainly finches, and located over 12 metres from the neighbour's house. It should have been a simple process but proved to be anything but. My first problem was my next door neighbour. I knew that they would object to an aviary so I thought it best to lodge a building application with Council. This way I would have formal approval and once I had that there would be little they could do.

I thought the process would be straightforward - put in an application, get approval, build aviary, end of story.

In March 1996 I sent a building application to Council that included information on building materials to be used, vermin controls, types of birds to be kept, and aviary plans.

The Council sent notification to all my immediate neighbours. As a result Council received three objections. This was due to my neighbour scaring the others with talk of bird diseases being transmitted to humans. After meeting with Council's Health & Building Surveyor to discuss their concerns two of the objections were subsequently withdrawn.

At the time I also spoke to Gary Sawyer, Council's Building Manager, who informed me that it would be best to come to some sort of compromise with my neighbour rather than having the matter go before Council as they were "sensitive" to the issue of birds. I understood this to mean bias and realised that my plans probably weren't going to proceed as smoothly as expected. He suggested that I send him more information on the types of birds I intended to keep. Accordingly, I sent him photocopies from various avicultural books that stated that the bird species I intended to keep were quiet. He then passed this information onto my neighbour.

Regardless of my willingness to cooperate with Council and reach a compromise my neighbour refused to budge and objected to every aspect of my application. As a result my application was first brought before Council in December 1996. A report prepared by Craig Tibbey, Health & Building Surveyor, was presented to Council. In it he considered all aspects of my application and also addressed all the objections of my neighbour. His conclusion was that my application should be approved.

At the time Kogarah Council had a policy for the keeping of pigeons but didn't have one for aviary birds. The policy allowed an active member of a racing pigeon club to keep a total of 160 birds and non-members only 20. Immediately prior to my application being discussed at the Council meeting they chose to review the pigeon policy. As a result they voted to set a maximum limit of 10 birds regardless of species and whether the applicant was a member of a bird club or not. This number was to be included in future policies on the keeping of birds (interestingly this number never appeared in the following draft policies). My application was for approximately 50 birds and so on this basis, and Council's claim that "the keeping of birds will have a detrimental effect on the amenity of the adjoining residents", my application was refused.

I was stunned by Council's actions and so went to see a solicitor. He informed me that a Council could not make a decision based on a proposed policy i.e. one that may or may not be introduced. I wrote to Council requesting that they review the determination of my application. I also wrote to each Councillor outlining my case and all the relevant issues. It was at this time that I contacted the Associated Birdkeepers of Australia (ABA), Avicultural Society of NSW (ASNSW) and the Avicultural Society of Australia to inform them of my problem and to seek their assistance. All of these organisations then sent letters of support to Kogarah Council.

My application next appeared before Council in April 1997. At the meeting they decided to defer a decision until Council had adopted a policy for the keeping of birds. They aimed to do this by the end of the month and then make a decision on my application in May.

So a month later a report prepared by Gary Sawyer, Manager of Development Assessment, was presented which outlined a proposed policy. The main details were that the maximum size of an aviary was to be set at 10 square metres, height at 2.4 metres, maximum number of birds set at 50, and to be located at least 10 metres from neighbouring dwellings. Just before the policy was discussed it was announced that a rescission motion had been moved. As a result a decision on my application was again deferred until a draft policy was determined by Council and placed on public exhibition.

A draft policy was placed on exhibition in July. The main features were a maximum size of 10 square metres, height restricted to 2.1 metres, total of 30 birds, and a minimum of 15 metres from neighbouring dwellings. The ABA and ASNSW informed members of the policy and encouraged them to send submissions to Council opposed to the draft policy. Letters were also sent to aviculturists, bird dealers, pet shops and vets in the Kogarah area encouraging them to send in submissions.

A report prepared by Jean Rosewall, Environment Health Manager, was presented to Council in October. It considered the current situation and also reviewed the submissions received in response to the exhibition of the draft policy. A total of 421 submissions were received of which only two were in support of the policy. Importantly, the report stated that the Council had only received a total of 10 complaints about birds over the previous two years. Almost all were about noisy roosters and cockatoos, but none were about general aviary birds. The conclusion was that the draft policy should be reviewed with the intent of incorporating more performance measures rather than only prescriptive measures. So Council decided that the amended draft policy be placed on public exhibition again.

At this meeting my neighbour claimed to have a petition containing over 200 signatures that supported an extremely restrictive policy for the keeping of birds. Some councillors must have been disappointed with only having two out of 421 submissions supporting the draft policy so they voted (along party lines) to send letters advising of the latest draft policy to all of the petitioners and also to all those who had objected to this type of development over the past two years. But no mention was made of writing to aviculturists. So much for equity and impartiality as Council blatantly chose sides in this dispute.

Rather than coming to a conclusion the whole saga was simply prolonged. It was simply amazing as just when you thought councillors' decisions could not become more ridiculous and stupid they did. A big mistake was to assume that all the councillors possessed some commonsense and objectivity. Unfortunately, those that did were very much in the minority. The most vocal opponent to the keeping of birds was Cr Liaros with strong support from Cr Staas, Cr Witheridge and Cr Jordan. Our main support came from Cr Katris, who spoke strongly in favour of bird keeping at each meeting, and Cr Platt. All voting on the policy was strictly along party lines.

So the amended version of the draft policy was again placed on public exhibition in November. This version was quite reasonable as it proposed that application were to be performance based and so judged on its merits.

At this time a new anti-bird group appeared on the scene calling itself the Kogarah Ratepayers Non-Birdkeeper Majority, led by Robert Milner. Interestingly, he also holds a position in the local branch of the Liberal Party (Kogarah Council is Liberal dominated). I discovered later that he, and a couple of other neighbours, have a long running dispute, going back many years, with his next door neighbour who happens to be a pigeon fancier. The whole situation there has been quite nasty with the pigeon fancier claiming that someone allegedly poisoned his dog. He has also received abusive phone calls one of which was allegedly traced to the mother of one of the anti-bird Councillors. This group also did a letter drop in parts of the local area. The (mis)information presented can only be described as an exercise in scaremongering.

Brian Healy again drafted several letters that put forward the views of bird keepers. These could be used as a basis for individuals writing their own submission, or simply signing copies and sending them to Council. Copies of these letters were again distributed to aviculturists, bird dealers, pet shops and vets in the area.

At this time I also wrote to Ernie Page, Minister for Local Government, the NSW Ombudsman, and our local member of State Parliament. All sympathised with my situation but basically stated that there wasn't much that they could do and that I had the right to appeal to the Land and Environment Court.

Another report was prepared by Jean Rosewall, Environmental Health Manager, and presented to Council in February 1998. In it she again stated that the number of complaints received by Council regarding the keeping of birds was minimal and that no complaints had been received about aviary birds. This time Council received a total of 469 submissions. Unfortunately, the majority (333 copied standard letters - about 60 without addresses) were from the anti-bird lobby.

Council decided to amend the draft policy and place it on public exhibition yet again. The main details were to be the same as the draft policy that was first exhibited in July 1997. So we were back where we started and again faced another very restrictive policy.

It was obvious that going through Council wasn't getting anywhere and that I was being set up for another refusal. The only option left was to lodge an appeal with the Land and Environment court, which I did in early May. The ABA very generously offered to cover the legal costs from its Fighting Fund. We were also fortunate that an ABA member, Mr Mark Williams, is a solicitor with extensive experience in dealing with Councils. He also generously offered his services free of charge.

To save all concerned time and money I proposed to Council that the matter be settled through mediation. Even Council's solicitor agreed that this was the appropriate course of action in a situation such as this. However, Council refused outright to consider mediation but instead wanted to go straight to a hearing. So they wanted a fight but little did they know what sort of fight they were in for.

Council's issues were based on the fact that my aviary exceeded their proposed limit of 10 square metres and was not at least 15 metres away from the neighbour's house. They also claimed that it would have an adverse impact on the amenity of neighbours through the emission of unacceptable levels of noise, odour and dust and the attraction of vermin.

In response Mark Williams organised a team to prepare a case for the hearing which was set down for the 17 & 18 August. The legal team consisted of a barrister, Ms Sandra Duggan, and another solicitor Mr Jim Maspero (from Mark Williams' office). He also organised two expert witnesses - a town planner, Mr Neil Kennan, and an aviculturist, Dr Brian Healy. Neil would address the building issues whilst Brian would deal with the other issues. Brian also arranged for Neil to visit the homes of some aviculturists who had aviary setups similar to what I proposed. Between the two of them they prepared over 70 pages of evidence. Council's evidence, we discovered later, consisted of a total of one and a quarter pages, which basically only restated their issues.

In the meantime Council's amended policy went out on exhibition. The ABA again distributed letters to aviculturists, bird dealers, pet shops and vets in the Kogarah area. A total of 81 submissions were received by Council, of which 66 were opposed to the policy. The matter came up before the Council on 10 August. On the same day my neighbour presented another one of his much loved petitions which he claimed contained about 130 signatures. The petition was accepted by Council even though the closing date for submissions was mid-June. Not surprisingly Council voted to introduce the policy. So after a couple of years of waiting they finally introduced a policy one week before the hearing. They probably believed this would strengthen their case rather than if the policy was only a draft version.

The day of the hearing finally arrived and as could be expected I was a bit nervous. I would soon find out if I could again enjoy my hobby or not. The case was to be heard by Assessor Bly who was a qualified solicitor and town planner. As it turned out I really had nothing to worry about. Council presented no valid arguments to the Court. The submissions prepared and evidence given by our expert witnesses, together with the persuasive arguments presented by our barrister convinced the assessor that there was no grounds on which to reject my application. Even the Council's officer admitted that the aviary would not adversely impact on the amenity of the neighbours. The assessor agreed that the criteria as set out by Council's bird policy were arbitrary and had no scientific basis. He confirmed that the application should instead be judged on its merits.

Our case was so strong that the hearing lasted only some five hours (including breaks), and the standard practice of a site visit was dispensed with. The nature of the hearing is pretty well summed up by a comment made to me by our barrister as we were walking out of the Court building that "if I had lost this case I would have given up practising law".

Obviously I am very pleased with the result. However, not only do I finally get my aviary, but this case sets an important precedent should similar cases occur in the future with Kogarah Council, or any other council. Hopefully it may also deter other councils from introducing such absurdly restrictive policies.

I believe this whole saga was brought about by the actions of a vindictive neighbour who was able to get support from several councillors who in turn pursued the matter for their own ends. Interestingly during this time Cr Jordan and Cr Witheridge sought Liberal pre-selection to represent Kogarah in Federal Parliament and State Parliament respectively. Now both will be contesting the seat in the upcoming elections.

I am finally able to enjoy the wonderful hobby of aviculture again. But there are many people to thank for this. My thanks go to Sandra Duggan, Jim Maspero and Neil Kennan for the very professional job they did. Special thanks go to Mark Williams for all his time and effort in organising the whole case. Thanks also to the Avicultural Society of Australia. I wish to thank very much the members of the Avicultural Society of NSW, Des Dowling for writing letters of support, and Allen Fish for his continual interest and support throughout the whole affair. I would also like to thank all those who sent submissions to Council and those who offered words of encouragement.

Finally, my sincere thanks go to the ABA for all they have done. To the members for sending submissions to Council and voting to provide the funds to cover the legal costs. To Barbara Devnie for her constant support since the whole thing started. I would especially like to thank Brian Healy for the huge amount of time and effort he has put into both my case and fighting the introduction of Kogarah Council's bird policy. This involved many letters, innumerable phone calls, addressing Council meetings, meetings with our barrister and solicitor, organising aviary visits for our town planner, preparing a comprehensive submission for the Court and giving evidence at Court. All this time and effort given freely and for this I extend my gratitude and thanks.

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