



Land and Environment Court New South Wales

Medium Neutral Citation:	Principal Healthcare Finance Pty Limited v Blacktown City Council (No 2) [2021] NSWLEC 1548
Hearing dates:	15 September 2021
Date of orders:	24 September 2021
Decision date:	24 September 2021
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	The Orders of the Court are: (1) The appeal is upheld. (2) Development Application No. SPP-19-00012 for construction of a two storey 148-bed residential aged care facility including car parking, landscaping, stormwater drainage, signage and associated services, at Northbourne Drive, Marsden Park (Lot 2890 DP 1230906) is approved, subject to the conditions of consent at Annexure A. (3) The exhibits, other than Exhibits 1, A, B and F, are returned.
Catchwords:	DEVELOPMENT APPLICATION – aged care facility – disputed conditions of consent – water conservation
Legislation Cited:	Environmental Planning and Assessment Act 1979 ss 4.16, 8.15
Cases Cited:	Principal Healthcare Finance Pty Limited v Blacktown City Council [2021] NSWLEC 1247
Texts Cited:	Blacktown City Council WSUD developer handbook MUSIC modelling and design guide 2020 at 11.14.5 Blacktown Development Control Plan 2015 Part J
Category:	Principal judgment
Parties:	Principal Healthcare Finance Pty Limited (Applicant) Blacktown City Council (Respondent)
Representation:	Counsel: R White (Applicant) L Byrne (Respondent) Solicitors: Mills Oakley (Applicant) Bartier Perry Lawyers (Respondent)
File Number(s):	2020/233986
Publication restriction:	Nil

JUDGMENT

COMMISSIONER: This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. SPP-19-00012 for construction of a two storey 148-bed residential aged care facility including car parking, landscaping, stormwater drainage, signage and associated services (the proposal) at Northbourne Drive, Marsden Park (Lot 2890 DP 1230906) (the site) by Blacktown City Council (the Council).

- 2 Leave was granted by the Court on 25 November 2020 for the applicant to amend the application to rely on an amended proposal, subject to an order that the applicant pay the respondent's costs thrown away as a result of the amendment of the application, pursuant to s 8.15(3) of the EPA Act.
- 3 Leave was granted by the Court on 2 March 2021 for the applicant to amend the application to rely on amended architectural plans and landscape plans (Ex F).
- 4 On 13 May 2021, judgment was delivered, and the parties were directed to file agreed conditions of consent within 3 weeks (*Principal Healthcare Finance Pty Limited v Blacktown City Council* [2021] NSWLEC 1247). I found that it was appropriate to grant development consent to the proposal on the basis of the Council's version of the conditions of consent (Ex 8). The applicant's version of the conditions (Ex H) sought to delete a number of conditions with notes in the margin that the deletion of those conditions was subject to obtaining further legal advice. No submissions were made, and no evidence was adduced, on the competing substantive matters regarding the disputed conditions.
- 5 The parties were unable to reach agreement on the conditions of consent. The matter was listed for hearing on 15 September 2021 and the parties were directed on 10 June 2021 to file relevant experts' joint reports addressing the disputed conditions of consent.

Planning framework

- 6 Blacktown Development Control Plan 2015 (DCP 2015) Part J includes the following controls at 4.3 regarding water conservation:

"4.3 Water conservation

Buildings not subject to BASIX that are installing any water use fittings must demonstrate compliance with the minimum standards defined by the Water Efficiency Labelling and Standards (WELS) Scheme.

Industrial and business developments must supply 80% of their non-potable demand using non potable sources. Rainwater shall be the primary source and only supplemented by recycled water when rainwater cannot meet 80% of the demand. When the 80% demand threshold cannot be met, the use of non-potable sources shall be maximised and be considered on a merits basis by Council.

Where dual reticulation is being provided for future recycled water delivery, any recycled water supply shall only supplement or 'top up' any rainwater or stormwater scheme. Note rainwater tanks shall not be topped up with recycled water unless approved by Sydney Water.

The percentage of proposed roof area directed to a rainwater tank must be maximised to increase the effectiveness and reliability of the reuse system.

Where cooling towers are used they shall:

- (a) Be connected to a conductivity meter to ensure optimum circulation before discharge
- (b) Include a water meter connected to a building energy and water metering system to monitor water usage
- (c) Use alternative non-potable water sources where practical.

Water use within public open space (for uses such as irrigation, pools, water features) must be supplied from non-potable sources such as recycled water, roof water, harvested stormwater or other non-licensed water sources and treated to NSW Government and Commonwealth Government standards."

DCP 2015 includes, at Part J, 4.1, a requirement that all development must comply with the Council's WSUD Handbook. The WSUD developer handbook includes the following relevant requirement at 11.14.5:

"11.14.5 Achieving 80% non-potable demand for business and industrial development

For business and industrial development, the target is 80% non-potable reuse. Residential development generally has

no minimum percentage reuse (except as noted previously). To design a tank for reuse involves balancing the supply and demand and selecting an appropriate tank size. The simple guidelines are as follows:

- increasing tank size increases percentage reuse
- increasing roof area increases percentage reuse
- increasing demand decreases percentage reuse.

In some business developments it may not be possible to meet the 80% non-potable reuse target using rainwater alone due to high demand and/or small roof areas. The first response is to provide waterless urinals to reduce the demand. If the target is still not met, provide a rainwater tank and a separate stormwater tank and split the nonpotable demands. Typically, all toilet flushing will be met through rainwater and the other uses, such as landscape watering, is met through treated stormwater (where fit for purpose). The design of the stormwater tank and its constraints are detailed in Section 11.14.2. As the stormwater tank has a much larger catchment area than the rainwater tank collecting only roof water, the use of smaller stormwater and rainwater tanks can result in a more economical solution than a single much larger rainwater tank.

In some situations, even after splitting the non-potable demand it may still not be possible to achieve the 80% nonpotable reuse for the rainwater tank. In most of these situations the demand and roof area are fixed and the only variable is the tank size. To meet a reasonable proportion of reuse, run a series of MUSIC models varying only the rainwater tank size while maintaining the roof area and demand. Plot the various MUSIC tank sizes in kL on the X axis and corresponding percentage reuse on the Y axis. Submit to Blacktown Council's Drainage Development section via floodadvice@blacktown.nsw.gov.au for assessment to determine an agreed tank size to avoid significant diminishing returns."

Expert evidence

- 8 The applicant relied on the expert evidence of Dan Brindle (planning), Andrew Norris (contamination), Andrew Francis (civil engineering) and Alex Washer (acoustic).
- 9 The Council relied on the expert evidence of Sami Ahangari (planning), David Yee (development engineer), Laith Almoil (civil engineering) and Amelia Tabrett (environmental compliance).
- 10 David Yee, Laith Almoil and Andrew Francis prepared a joint report (Ex 4) regarding conditions 6.5.2c, 6.5.6, 6.6, 10.8.1, 11.8.2 and 11.8.4 (the requirements for the rainwater tank, line marking and signposting); Ameilia Tabrett and Alex Washer prepared a joint report (Ex 2) on condition 7.6 (acoustics); and Amelia Tabrett and Andrew Norris prepared a joint report (Ex 3) on conditions 7.3 and 7.4 (contamination).

Disputed conditions of consent

- 11 The parties agreed on the terms of Condition 3.3.1(a) and the agreed condition is substituted in the conditions of consent at Annexure A.
- 12 The parties disagreed on Condition 11.1.4. Condition 11.1.4 is in the following terms (Ex 8):

"11.1.4 Prior to the issue of an Occupation Certificate, documentation shall be submitted to Council certifying that the ventilation system has been installed and is operating in accordance with Australian Standard 1668.2:2002 *The use of ventilation and air conditioning in buildings – Ventilation design for indoor air contaminant control.*"
- 13 The applicant presses for "relevant" to be added to Occupation Certificate, on the basis that a part of the building may be the subject of an Occupation Certificate pursuant to s 6.9(1)(a) of the EPA Act and the necessary documentation relating to the ventilation system should be provided only for that part of the building. I do not accept the applicant's submission. Adding the word "relevant" to Occupation Certificate does not achieve the distinction the applicant wishes to draw. The statutory scheme for building certification is setout in Part 6 of the EPA Act.

The applicant submitted that Condition 11.1.6 should be deleted, because no warm water or water cooling system is to be installed. Condition 11.1.6 is in the following terms (Ex 8):

“11.1.6 Where any warm water or water cooling system is installed, the following shall be undertaken:

(a) A Compliance Certificate shall be obtained certifying that the system has been installed in accordance with the provisions of the Public Health Act 2010, the Regulations thereunder, the NSW Code of Practice for the Control of Legionnaires Disease and Australian Standard 3666.

(b) The occupier of the premises shall be given both an operation and maintenance manual. The system shall be maintained monthly. All inspection results shall be kept on site.

Submit a Registration form to Council.”

- 15 The Council submitted that the condition should be retained as a warm water or water cooling system could be installed at a later stage.
- 16 I accept the Council's submission and Condition 11.1.6 is retained because it is possible that a water cooling system is incorporated during the detailed design stage of the development.
- 17 Following the joint reporting of the experts, conditions 6.5.2c, 6.5.6, 11.8.2 and 11.8.4 remained in dispute on the basis of expert evidence.

The use of collected rainwater

- 18 Conditions 6.5.2c, 6.5.6, 11.8.2 and 11.8.4 are in the following terms (Ex 8):

“6.5.2 Engineering plans from Henry & Hymas, Dwg. 19459_D2_C000 (Rev 02) to BE01 in consecutive, Job No. 19459_D2 (Rev 02) dated 03.09.2020 are to be amended as follows:

...

c. Dwg. 19459_D2_C251 (Revision 02) dated 03.09.2020

i. Catchment C12 is modelled as a roof in MUSIC yet shown as landscaped area on plan. This is to be amended to reflect a roof.

ii. Catchment C18 is not a landscaped area but a trafficable roof. Use the appropriate hatching to reflect this as per the MUSIC model.

iii. The low efficiency of the rainwater tank as claimed in the engineering response by Henry & Hymas is due to the lack of roof area being directed to the rainwater tank. Consider directing all the western roof areas to the rainwater tanks to achieve the desired outcome of 80% non-potable reuse. i.e. if roof catchment C20, C15 and C12 are included then the rainwater 80% reuse can be achieved with good efficiency. This method will not require an additional stormwater tank. The final volume of 220kL rainwater tank inclusive of 10% increase can cater for the sites 80% non-potable reuse.

6.5.6 Development shall incorporate water efficient fixtures such as taps, showerheads, and toilets. The fixtures must be rated to at least AAA under the National Water Conservation Rating and Labelling Scheme.

11.8.2 A Chartered Civil Engineer registered with NER, is to certify that:

- a. all the requirements of the approved drainage plan have been undertaken;
- b. a minimum 220 m³ rainwater tank has been provided collecting roof water from a minimum 4700m² of roof area from the western catchment;
- c. all warning notices have been installed;
- d. any proprietary water quality devices have been installed for the site as per the manufacturer's recommendations.
- e. a copy of the certification and the works-as-executed drainage plan has been provided to the certifier, who shall provide it to Council.

11.8.4 A plumber licensed with NSW Fair Trading, or experienced hydraulic engineer, is to certify that:

- a. All the non-potable water uses are being supplied by rainwater;
- b. All the requirements of the detailed Non-Potable Water Supply & Irrigation Plan have been installed to the required locations;
- c. The flow meters have been installed on the pump outflow and the solenoid controlled mains water bypass to determine non-potable usage and actual percentage of reuse;
- d. The pumps, alarms and all other systems are working correctly;
- e. The water from at least one garden tap and two toilets (one from each level) have been tested to show no chlorine residual;
- f. Rainwater warning signs are fitted to all external taps using rainwater; and

Conditions 6.5.2c, 6.5.6, 11.8.2 and 11.8.4

- 19 The parties disagree on the use of recycled rainwater for toilet flushing in the development. The parties disagreed on the size of the rainwater tank required for the development.
- 20 The applicant submitted that using rainwater for toilet flushing purposes presents a risk for the elderly as they have weakened immunity. It is the applicant's position that a 50kL rainwater tank is sufficient capacity to irrigate the site.
- 21 The Council submitted that rainwater should be used for toilet flushing purposes and a 220kL rainwater tank should be provided as part of the development, consistent with the Council's water conservation requirements under 4.3 of Part J of DCP 2015 (Ex A on 15.9.21).
- 22 According to Mr Francis, if internal re-use is excluded, the development can achieve Council's water conservation of 80% of non-potable external demand satisfied from stored rainwater with a 50kL rainwater tank which includes a 205 tank size increase for an anaerobic digestion zone and a roof catchment of approximately 2,695m².
- 23 According to Mr Francis, if the internal re-use is not excluded, the total non-trafficable western roof area is 4,641.56m², because catchments C12 and 18 are trafficable and cannot be drained to the rainwater tank due to the risk of contamination. As the available roof area is smaller than detailed in the Council's version of Condition 6.5.2c, then even if the full western roof catchment was drained to the rainwater tank the development would still not meet the 80% non-potable re-use target with a 220kL rainwater tank.
- 24 It is Mr Francis' position that a 100kL rainwater tank that collects from 3,153.27m² (67%) of the available roof area and meets 54% non-potable demand through stored re-use be required, if internal re-use is not excluded. According to Mr Francis, and based on the Council's WSUD development handbook MUSIC modelling and design guide 2020 at p 53 (Ex B on 15.9.21), dispensation can be given on the 80% water conservation target where "increase in percentage re-use slows significantly even where the tank size becomes much larger" and "significant diminishing returns" are met. Mr Francis' opinion, a 100kL tank will achieve 61% non-potable re-use. It is his view that the development should be eligible for such dispensation as the rainwater tank will need to be in excess of 220% of the currently documented tank size (from 100 to 220kL) to increase the re-use target by less than 26%.
- 25 According to Mr Almoil, 80% re-use of water is possible and requires 4,700m² of roof area drained to the rainwater tank. The UV treatment of the re-used rainwater internally for flushing toilets and designed by an expert is sufficient to address concerns about risk to residents of the development. In Mr Almoil's opinion, the 220kL rainwater tank is the minimum volume required to meet Council's water conservation targets.
- 26 I accept Mr Francis' evidence the total non-trafficable western roof area is 4,641.56m². Condition 6.5.2c includes a requirement that this area of roof is to be directed to the rainwater tank.
- 27 I prefer and accept the Council's submissions and expert evidence regarding the use of treated rainwater to flush toilets. The appropriate treatment of the water to be used to flush toilets by the incorporation of conditions requiring UV disinfection is satisfactory to address the applicant's concern regarding the health of the future residents of the development. Internal re-use of water to flush toilets is not excluded from the conditions of consent.

I prefer and accept the Council's submissions and expert evidence that the required size of the rainwater tank should be 220kL, because it is possible, given the size of the site and the roof area available to drain to the rainwater tank, to achieve 80%, or close to 80%, non-potable re-use target using rainwater. The second half of the capacity of the 220kL tank will provide the final quarter of the non-potable re-use target. I agree with Mr Almoil that this large development should set an example for smaller developments in the Blacktown Local Government Area of meeting water conservation targets when it is possible to do so.

Orders

29 The Orders of the Court are:

- (1) The appeal is upheld.
- (2) Development Application No. SPP-19-00012 for construction of a two storey 148-bed residential aged care facility including car parking, landscaping, stormwater drainage, signage and associated services, at Northbourne Drive, Marsden Park (Lot 2890 DP 1230906) is approved, subject to the conditions of consent at Annexure A.
- (3) The exhibits, other than Exhibits 1, A, B and F, are returned.

Susan O'Neill

Commissioner of the Court

[Annexure A \(321465,.pdf\)](#)

[Architectural Plans \(51423014,.pdf\)](#)

[Landscape Plans \(9003713,.pdf\)](#)

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Decision last updated: 24 September 2021