



Land and Environment Court
New South Wales

Case Name: Principal Healthcare Finance Pty Limited v Penrith City Council

Medium Neutral Citation: [2020] NSWLEC 1232

Hearing Date(s): Conciliation conference on 21 May 2020

Date of Orders: 29 May 2020

Decision Date: 29 May 2020

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court Orders:
(1) Leave is granted to the Applicant to amend the Development Application and rely on the plans listed in Condition 1 of the Conditions of Consent at Annexure A.
(2) The Applicant is to pay the Respondent's costs thrown away pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), in the amount of \$5,000, payable within 28 days of the date of this agreement.
(3) The Clause 4.6 variation application in relation to the development standard contained in clause 40(4)(c) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 is upheld.
(4) The appeal is upheld.
(5) Development Application No. DA19/0419 lodged with the Respondent on 25 June 2019 and as amended by the plans, drawings and material listed in Condition 1 of the Conditions of Consent for the demolition of existing structures and construction of a 2 storey Residential Aged Care Facility including 142 beds, an allied health facility, at-grade carparking,

earthworks and landscaping at 5-7 Floribunda Avenue, Glenmore Park NSW 2745 is approved subject to the conditions annexed to this agreement as Annexure A.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Regulation 2000
Land and Environment Court Act 1979
Penrith Local Environmental Plan 2010
Rural Fires Act 1997
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004
State Environmental Planning Policy No 55—
Remediation of Land

Cases Cited: Ku-ring-gai Council v Pathways Property Groups Pty Ltd [2018] NSWLEC 73

Category: Principal judgment

Parties: Principal Healthcare Finance Pty Limited (Applicant)
Penrith City Council (Respondent)

Representation: Counsel:
A Whealy (Solicitor) (Applicant)
A Avery (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Penrith City Council (Respondent)

File Number(s): 2019/321826

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against Sydney Western City Planning Panel's deemed refusal of development application DA19/0419 (DA).

- 2 The DA, as amended, seeks consent for the demolition of existing structures and construction of a two storey Residential Aged Care Facility including 142 beds, an allied health facility, at-grade carparking, earthworks and landscaping at 5-7 Floribunda Avenue, Glenmore Park.
- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on 21 May 2020. At the conciliation conference the parties provided evidence of an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 4 This decision involved the Court upholding the appeal and granting consent to the DA subject to certain amendments to plans and conditions.
- 5 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, if the parties' decision is a decision that the Court could have made in the proper exercise of its functions.

Considering jurisdiction

- 6 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are certain jurisdictional pre-requisites which require attention before this function can be exercised. The parties outlined jurisdictional matters of relevance in these proceedings and explained how they have been or would be satisfied. In regard to jurisdiction, and noting this advice of the parties, I find as follows.

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

- 7 The parties advise that the DA seeks consent under Chapter 3 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP). The SEPP nominates certain pre-requisites before consent to a DA may be issued under Chapter 3.

Site-related requirements

- 8 I can advise that based on written evidence provided to me I am satisfied as follows:
 - Regarding cl 26 and access to facilities, that there will be compliant access to shops, bank service providers and other retail and commercial services that

residents may reasonably require, as well as community services, recreation facilities, and the practice of a general medical practitioner.

- Regarding cl 27 and bushfire, the Applicant indicates that Council's Bushfire Prone Land Map (BPLM) identifies the subject site as partially containing the 100m buffer zone from Category 1 Vegetation. I accept the advice of the Council that the requirements in regard to compliance with 'Planning for Bush Fire Protection' have been met by the bushfire assessment report accompanying the application, mindful of the general terms of approval issued by the Rural Fire Service (see [26]).
- Regarding cl 28, that reticulated water and adequate facilities for the removal or disposal of sewage would be available.

Design requirements

- 9 I am satisfied that the Applicant has taken into account the site analysis prepared for the application in accordance with the requirements of cl 30, as evidenced in the documentation supplied.
- 10 Regarding cl 32, I am satisfied that the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2 of the SEPP. This finding is based on: (1) the detailed commentary in Appendix 20 to the Statement of Environmental Effects (SEE) accompanying the DA which responds to each of the particulars raised in Division 2, (2) Council's advice of 21 May 2020 which particularises certain issues including noise generation, natural ventilation and solar access, and (3) my review of the proposal overall. The Council's position of satisfaction in regard to this point was also relevant to me.

Development standards to be complied with under the SEPP

- 11 The parties concur and I also find that the proposal complies with each of the relevant development standards, except for the provisions at cl 40(4)(c). There are permissive powers which allow the granting of consent for a development despite the contravention of development standard, which involve certain preconditions, as considered below.

Consideration of contravention of development standard

- 12 Clause 40(4)(c) of the SEPP applies in this instance as residential flat buildings are not permitted within the zone upon which the site is proposed. Clause 40(4)(c) of the SEPP provides that:

40 Development standards—minimum sizes and building height

....

(4) **Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted—

...

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

- 13 The proposed development seeks consent for development that would breach the one storey limit within part of the rear 25% of the site.
- 14 The permissive powers at cl 4.6(2) of the Penrith Local Environmental Plan 2010 (LEP) apply here, even though the contravention is related to the SEPP (*Ku-ring-gai Council v Pathways Property Groups Pty Ltd* [2018] NSWLEC 73).
- 15 To open the gate to the application of these permissive powers, mindful of cl 4.6(3) of the LEP, the Applicant has filed a written request (dated March 2020 and prepared by Willowtree Planning) seeking to justify the contravention of the development standard at cl 40(4)(c) of the SEPP.
- 16 I have considered the written request. I am satisfied that it demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (LEP cl 4.6(3)(a)). There are two points of justification which provide reasons for my decision on this point. The first is that the written request shows how the development is consistent with relevant objectives notwithstanding the contravention. While there are no specific objectives nominated for the development standard at cl 40(4)(c) of the SEPP, I find that the written request's examination of the broader objectives of the SEPP (cl 2) uncovers the underlying objectives behind cl 40(4)(c), and demonstrates achievement through its linking of the proposed design to its setting, including the particular rear boundary relationship in evidence here (see below).
- 17 The second point of justification in regard to cl 4.6(3)(a) of the LEP is that the written request demonstrates that the underlying objective of the standard could be thwarted by strict compliance with the standard. This is because the layout as proposed does not unreasonably impact upon the adjacent residential properties (to the south-east) and is of an acceptable bulk and scale

when viewed from the public reserve to the rear; and a compliant proposal may, as a consequence of efforts to achieve objectives of the SEPP relating to accommodation supply, have a greater impact on the adjacent residential properties.

- 18 I am also satisfied that the written request demonstrates that there are sufficient environmental planning grounds to justify the breach of the standard (cl 4.6(4)(a)(ii)). This is through demonstrating how the rear of the site backs onto a public reserve. The written request demonstrates how this particular circumstance of this site brings a higher capacity to accommodate the rear boundary contravention relationship. It is the side boundary (south eastern side) which is the more sensitive in terms of proximity to residential neighbours, and the application provides for a considerable larger setback than required to that boundary.
- 19 For the reasons outlined above and having regard to cl 4.6(4)(a)(i) of the LEP, I am satisfied that the Applicant's written request has adequately addressed the matters required to be demonstrated under cl 4.6(3) of the LEP.
- 20 I am also satisfied regarding cl 4.6(4)(a)(ii) of the LEP. That is, that the proposed development is in the public interest because it is consistent with: (1) the objectives for development within the applicable R2 zone, and (2) the objectives of the standard. In regard to the objectives of the standard I adopt the finding above [16], where I consider the same question in light of the content of the written request. In regard to the objectives of the zone, I relevantly find that the proposal will provide for facilities and services which meet the day to day needs of residents. I also see uses of this kind (of course naturally needed by communities) can play a role in regard to the goal of enhancing the essential character and identity of a locality. I further find, based on the submissions of the parties, that the sought-after high levels of residential amenity are reasonably accommodated with this proposal.
- 21 Turning to cl 4.6(4)(b), I am satisfied the proposal does not raise any matter of significance for State or regional environmental planning.
- 22 The states of satisfaction required by cl 4.6 of LEP have been reached in regard to the contravention of the SEPP's cl 40(4)(c). There is therefore power

to grant development consent to the proposed development notwithstanding the breach of this development standard.

Penrith Local Environmental Plan 2010

23 Penrith Local Environmental Plan 2010 applies to the site.

24 I accept the advice of the parties that the proposal conforms with relevant development standards in the LEP. I further mention in reference to:

- cl 7.1(3) and earthworks, Council has explained to me how the relevant matters have been considered in coming to the recommended conditions of consent.
- cl 7.4 and sustainable development, I have had regard to the relevant nominated principles, with the SEE of assistance in that regard.
- cl 7.6 and salinity, I note the advice of the parties that specialist geotechnical assessment has identified that the soils are non-saline and that therefore, the development is not likely to impact on salinity processes.
- cl 7.7 and servicing, I note Council's advice that the site is currently connected to all required services including reticulated water supply and a wastewater system.

Other jurisdictional considerations

25 Having regard to cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), I am satisfied with the consideration given to whether the subject site is contaminated. The Council advised that there were contamination studies associated with the rezoning of the Glenmore Park area for development and Council's specialists have taken the view that there is no likelihood of potentially contaminating activities occurring on the site since that time.

26 I am advised that the development is integrated development because it requires a bush fire safety authority, under s 100B of the *Rural Fires Act 1997*. The general terms of approval have been issued by the Rural Fires Service and accommodated in the proposed conditions of consent.

27 Having regard to notification requirements and requirements for a consent authority to take into consideration any submissions made subsequently, I am advised that the application was placed on notification in accordance with requirements. I have been notified of the issues raised in public submissions, including the particulars of submissions to the most recent proposal

amendments. I believe the requirements regarding the consideration of public submissions at s 4.15(3) of the EPA Act have been addressed.

Conclusion

- 28 With the above findings, I am satisfied that jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 29 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties.
- 30 The LEC Act also required me to "set out in writing the terms of the decision" (s 34(3)(b)). The final orders have this effect.
- 31 The Court orders:
- (1) Leave is granted to the Applicant to amend the Development Application and rely on the plans listed in Condition 1 of the Conditions of Consent at Annexure A.
 - (2) The Applicant is to pay the Respondent's costs thrown away pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW), in the amount of \$5,000, payable within 28 days of the date of this agreement.
 - (3) The Clause 4.6 variation application in relation to the development standard contained in clause 40(4)(c) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 is upheld.
 - (4) The appeal is upheld.
 - (5) Development Application No. DA19/0419 lodged with the Respondent on 25 June 2019 and as amended by the plans, drawings and material listed in Condition 1 of the Conditions of Consent for the demolition of existing structures and construction of a 2 storey Residential Aged Care Facility including 142 beds, an allied health facility, at-grade carparking, earthworks and landscaping at 5-7 Floribunda Avenue, Glenmore Park NSW 2745 is approved subject to the conditions annexed to this agreement as Annexure A.

.....
P Walsh

Commissioner of the Court

[Annexure A \(345001, pdf\)](#)

[Architectural Plans Part 1 \(19972689, pdf\)](#)

[Architectural Plans Part 2 \(18087910, pdf\)](#)

[Architectural Plans Part 3 \(18414921, pdf\)](#)

[Landscape Plans Part 1 \(17929628, pdf\)](#)

[Landscape Plans Part 2 \(17959740, pdf\)](#)

[Landscape Plans Part 3 \(5159853, pdf\)](#)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.