



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Principal Healthcare Finance Pty Limited v Penrith City Council [2023] NSWLEC 1462**

**Hearing dates:**

Conciliation conference on 12 July 2023

**Date of orders:**

17 August 2023

**Decision date:**

17 August 2023

**Jurisdiction:**

Class 1

**Before:**

O'Neill C

**Decision:**

The orders of the Court are:

(1) The appeal is upheld.

(2) Development Application No. 21/0607 for the demolition of a dwelling, tree removal and construction of a two-storey residential aged care facility, comprising 149 beds and associated facilities/services, drainage and landscaping works, at 94-100 Explorers Way, St Clair NSW 2759, is determined by the grant of consent, subject to the conditions of consent at Annexure A.

**Catchwords:**

DEVELOPMENT APPLICATION – residential aged care facility – conciliation conference – agreement between the parties – orders

**Legislation Cited:**

Biodiversity Conservation Act 2016, Pt 7, s 7.7

Environmental Planning and Assessment Act 1979, ss 4.16, 8.7

Environmental Planning and Assessment Regulation 2000, cll 55, 55AA, 121

Environmental Planning and Assessment Regulation 2021, Sch 6 s 3

Land and Environment Court Act 1979, s 34, 39

Penrith Local Environmental Plan 2010, cll 4.3, 4.6, 5.21, 7.1, 7.4, 7.30

State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.60, 2.118, 2.119

**Cases Cited:**

Cumming v Cumberland Council (No 2) [2021] NSWLEC 117  
Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90  
Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118  
RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130  
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

**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):**

2023/65908

**Publication restriction:**

No

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**JUDGMENT**

- 1 **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 refusal of Development Application No. 21/0607 for the demolition of a dwelling, tree removal and

- construction of a two-storey residential aged care facility, comprising 149 beds and associated facilities/services, drainage and landscaping works (the proposal), at 94-100 Explorers Way, St Clair NSW (the site) by Penrith City Council (the Council).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 12 July 2023. I presided over the conciliation conference. At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 3 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. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 4 There are preconditions to the exercise of power to grant development consent for the proposal.

### Amended Plans

- 5 The Environmental Planning and Assessment Regulation 2000 (EPA Regulation) continues to apply to the application, because the application was lodged on 17 August 2021 and not yet determined on 1 March 2022 (s 3 of Sch 6 to the Environmental Planning and Assessment Regulation 2021 (2021 Regulation)). Pursuant to s 3(2) of Sch 6 to the 2021 Regulation, there is a requirement to use the NSW Planning Portal under the 2000 Regulation, therefore cll 55(1), 55AA(2)(d) or 121B(1) do not apply if the development application is subject to proceedings in the Court.
- 6 The Council, as the consent authority, consented to the amendment of the application. The amended application amended the proposal, the subject of the application.

### Planning framework

- 7 The site is zoned R2 Low Density Residential pursuant to the Penrith Local Environmental Plan 2010 (LEP 2010). The objectives of the R2 zone, to which regard must be had, are:
- To provide for the housing needs of the community within a low density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
  - To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.
  - To enhance the essential character and identity of established residential areas.
  - To ensure a high level of residential amenity is achieved and maintained.
- 8 Health services facilities are permitted with development consent in the R2 zone pursuant to s 2.60(1) of the State Environmental Planning Policy (Transport and

- Infrastructure) 2021.
- 9 The height of buildings development standard for the site is 8.5m pursuant to cl 4.3 of LEP 2010. The proposal has a maximum building height of 9.84m.
- 10 The site is not affected by mainstream flooding and only by overland flow flooding. I accept the conclusions of the Stormwater Management Report provided with the application that the proposal will have no tangible impact on the flood levels through the site and that the swale has been carefully designed to ensure that it provides the capacity to direct flows up to the 100-year storm event, pursuant to the matters for consideration under cl 5.21 of LEP 2010.
- 11 I accept the conclusions of the Geotechnical Assessment submitted with the application that the matters required to be considered under cl 7.1(3) of LEP 2010 are satisfied.
- 12 I accept the conclusions of the Section J Report submitted with the application that the proposal is a sustainable development, having had regard to the matters under cl 7.4 of LEP 2010.
- 13 I accept the conclusions of the Detailed Site Investigation Report submitted with the application that the matters under cl 7.6(2) have been addressed.
- 14 I accept the Council's submission that the amended landscape proposal demonstrates that planning and design measures are incorporated into the proposal to reduce the urban heat island effect as listed under cl 7.30(3) of LEP 2010.
- 15 Pursuant to Pt 7 of the *Biodiversity Conservation Act 2016*, the application includes a letter from Abel Ecology that confirms the Biodiversity Development Assessment Report demonstrates the proposal has avoided and minimised the impacts on Cooks River / Castlereagh Ironbark Forest. Section 7.7(2) of the Act requires a biodiversity development assessment if a development is likely to significantly affect threatened species, and this has been provided with the application.
- 16 A Detailed Site Investigation Report is provided with the application. The report concludes that a Remediation Action Plan should be provided to guide the remediation of known asbestos containing material contamination. Following the remediation works, the site is considered suitable for the proposed use, pursuant to Ch 4 of State Environmental Planning Policy (Resilience and Hazards) 2021.
- 17 Chapter 2 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 applies. Section 2.118 deals with development with frontage to a classified road. Access is not provided to the site from the M4 and the development will not have any detrimental impact on its safety, efficiency and ongoing operation. Section 2.119 relates to impact of road noise or vibration on non-road development. A noise impact assessment report was submitted with the application. This report includes an assessment of noise from the M4 motorway and the recommended acoustic treatments to ensure internal noise criteria are achieved. This report recommends the appropriate acoustic treatments including external glazing thickness, which are included in the proposal.

## Contravention of the height of development standard

- 18 The applicant provided a written request seeking to justify the contravention of the height of buildings development standard prepared by BBC Consulting Planners and dated June 2023.
- 19 Clause 4.6(4) of LEP 2010 establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] “*Initial Action*”). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

- 20 On appeal, the Court has the power under cl 4.6(2) of LEP 2010 to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) LEC Act, but should still consider the matters in cl 4.6(5) of LEP 2010 (*Initial Action* at [29]).

### *The applicant’s written request to contravene the height of buildings development standard*

- 21 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant’s written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) of LEP 2010 (see *Initial Action* at [15]), as follows:
- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

- 22 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).
- 23 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21] and are summarised below:
- (1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
  - (2) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
  - (3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
  - (4) the development standard has been abandoned by the Council;
  - (5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).
- 24 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).
- 25 The applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard are achieved, notwithstanding non-compliance with the standard. In summary, the written request justifies the non-compliance with the height of buildings development standard on the basis of the following:
- The site slopes, and the brief requires a consistent floor level for ease of access for aged residents, resulting in a breach of the height of buildings development standard for a part of the roof of the facility.
  - The height, bulk and scale of the proposed development is compatible with the existing and desired future character of the locality and is appropriate for the context;

- The building design and onsite arrangement will result in a development that is consistent with the character of the St Clair locality;
- The proposed additional height has minimum visual impact; and
- The exceedance of the height of buildings development standard does not result in amenity impacts on adjoining development.

26 The grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24] and *Cumming v Cumberland Council* (No 2) [2021] NSWLEC 117 at [78]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

27 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). I am satisfied that justifying the aspect of the development that contravenes the development standard for the reasons set out above can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

*Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone*

28 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) of LEP 2010 (*Initial Action* at [26]).

29 I accept the justifications that the proposal is consistent with the objectives of the development standard and zone set out in the written request.

## Conclusion

30 I have considered the submissions made by the Council in the Statement of Jurisdictional Issues filed with the Court on 19 July 2023 and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.

## Orders

31 The orders of the Court are:

- (1) The appeal is upheld.
- (2) Development Application No. 21/0607 for the demolition of a dwelling, tree removal and construction of a two-storey residential aged care facility, comprising 149 beds and associated facilities/services, drainage and landscaping works, at 94-100 Explorers Way, St Clair NSW 2759, is determined by the grant of consent, subject to the conditions of consent at Annexure A.

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**Susan O'Neill**

**Commissioner of the Court**

**[Annexure A \(331877,.pdf\)](#)**

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Decision last updated: 17 August 2023