



Land and Environment Court
New South Wales

Case Name: Montessori Academy Group Developments Pty Ltd v Penrith City Council

Medium Neutral Citation: [2024] NSWLEC 1447

Hearing Date(s): Conciliation conference on 4 and 26 April 2024, 3, 10 and 15 May 2024

Date of Orders: 30 July 2024

Decision Date: 30 July 2024

Jurisdiction: Class 1

Before: Kullen AC

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development Application DA23/0076 as amended for the clearing of the site and tree removal, and construction of a two-storey centre based child care facility with basement parking, drainage, and landscaping on land legally described as Lot 10 DP1224143, at 72 Park Avenue, Kingswood, NSW, 2747 is approved subject to the conditions included in Annexure A.

Catchwords: DEVELOPMENT APPEAL – conciliation conference – agreement between the parties – centre based child care facility - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 8.7, Sch 1 Div 2 cl 7
Land and Environment Court Act 1979, s 34

Education and Care Services National Regulations 2011, regs 107,108
Environmental Planning and Assessment Regulation 2021, s 38

Penrith Local Environmental Plan 2010, cl 2.2, 2.3, 2.7, 4.3, 7.1, 7.4, 7.7, 7.30
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2, Ch 6, ss 6.6
State Environmental Planning Policy (Industry and Employment) 2021, Ch 3, Sch 5
State Environmental Planning Policy (Precincts – Western Parkland City) 2021, ss 4.19, 4.22
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021, Ch 2, ss 2.48, 2.98, 2.120, 2.122, Ch 3, ss 3.22, 3.23, 3.26

Texts Cited: Department of Planning, Industry and Environment,
Child Care Planning Guideline, September 2021
Penrith Development Control Plan 2014

Category: Principal judgment

Parties: Montessori Academy Group Developments Pty Ltd
(Applicant)
Penrith City Council (Respondent)

Representation: Counsel:
M Staunton (Applicant)
J McKelvey (Respondent)

Solicitors:
Mitry Lawyers (Applicant)
Penrith City Council (Respondent)

File Number(s): 2023/277167

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of development application DA23/0076 (the DA) for the clearing of the site, tree removal, and construction of a two-storey centre based child care facility for 117 children, over basement parking, drainage, and landscaping on land

legally described as Lot 10 DP1224143, at 72 Park Avenue, Kingswood, NSW, 2747 (the site).

- 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 4 April 2024. I presided over the conciliation conference, which began with an on-site view. There were no objectors to the proposed development.
- 3 The s 34 conciliation conference was adjourned to 26 April 2024 to allow time for amended plans to be prepared by the Applicant and assessed by the Respondent. The s 34 conciliation conference was further adjourned to enable the parties to come to an agreement over the proposed development, including finalising the amended plans.
- 4 On 15 May 2024 the parties indicated that they had reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting development consent to the amended DA subject to conditions.
- 5 A signed s 34 agreement with Annexure A was filed with the Court on 15 May 2024, with amended plans and additional material (the amended DA) as agreed between the parties. The s 34 agreement is supported by an agreed statement of jurisdictional prerequisites.
- 6 The parties advise that a number of updates have been made to the plans and supporting material, leading to amended plans being included in the DA, including the following changes:
 - (1) Reduction in the number of children on site from 117 to 108;
 - (2) Changes to the proposed building basement layout and footprint to provide for an increase in deep soil areas, including enhanced landscaping in the side and rear setbacks;
 - (3) Further articulation of the eastern elevation of the proposed building; and
 - (4) Deletion of the upper floor of the proposed building.
- 7 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. In making the orders

to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

- 8 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties have identified and explained how the jurisdictional prerequisites of relevance have been satisfied in a written submission accompanying the s 34 agreement, and those requirements have been satisfied as follows below.

Jurisdictional Matters

Owner's consent

- 10 The parties advise that owner's consent has been provided in respect of the DA lodged for the site.

Community Participation (Sch 1, Pt 1, Div 2, cl 7(1)) - Environmental Planning and Assessment Act 1979

- 11 The DA was lodged on 3 February 2023 and exhibited between 27 February 2023 and 13 March 2023. No submissions were received in response to the notification.

Conditions

- 12 The s 34 agreement includes the imposition of conditions which are imposed under s 4.17(1) of the EPA Act.

Evaluation under s 4.15 - Environmental Planning and Assessment Act 1979

- 13 Section 4.15(1) of the EPA Act requires the Court to take into consideration the provisions of any environmental planning instrument and any development control plan as of relevance to the development the subject of the development application.
- 14 The parties submit that the relevant requirements of the State Environmental Planning Policies, the Local Environmental Plan and Development Control Plan have been considered and satisfied, as set out below.

Penrith Local Environmental Plan 2010

15 The Penrith Local Environmental Plan 2010 (the LEP) is the relevant local environmental planning instrument that applies to the site. Under the LEP provisions:

- (1) The site is zoned R4 High Density Residential pursuant to cl 2.2 of the LEP; and
 - (a) Pursuant to cl 2.3 of the LEP the proposed development for a child care centre is permissible with consent in the R4 zone; and
 - (b) I am satisfied that the proposed development is consistent with the objectives for development within the zone in which the development is proposed to be carried out.
- (2) Clause 2.7 of the LEP provides that the demolition of a building or work requires development consent.
- (3) Pursuant to cl 4.3 of the LEP the maximum height of buildings on the site is 15 metres; and
 - (a) The parties advise that the proposed development is located wholly below the maximum height, and therefore complies with cl 4.3.
- (4) Clause 7.1 of the LEP relates to earthworks and applies to the site. The parties advise that:
 - (a) The proposed development has been designed to ensure that the excavation will have a limited impact on the topography of the site and neighbouring properties and will not have a visual impact when viewed from the public domain;
 - (b) The proposed excavation will not have a detrimental effect on drainage patterns;
 - (c) The proposed excavation will be done to ensure stability of the subject site and neighbouring properties;
 - (d) Excavated material will be managed in accordance with the waste management plan;
 - (e) Disturbance of relics is not anticipated given the site has a history of residential use; and
 - (f) The site is not in proximity to water catchments or environmentally sensitive land.
- (5) Clause 7.4 of the LEP requires that in deciding whether to grant development consent for the DA, the consent authority must have regard to the principles of sustainable development as they relate to the development based on a “whole of building” approach, and as set out at (a)-(j) of cl 7.4. The parties advise that:

- (a) Condition 18 requires that a Sustainability Report be submitted to and approved by the Principal Certifying Authority and requirements, recommendations and commitments outlined within that report must be incorporated and implemented in the construction and operation of the development; and
- (b) The parties are satisfied that the requirements of cl 7.4 have been addressed.
- (6) Clause 7.7 of the LEP relates to servicing. The parties advise that the proposed development will be connected to a water supply and have facilities for the removal and disposal of sewage, complying with cl 7.7.
- (7) Clause 7.30 (Urban Heat) of the LEP applies to this DA as the site is located in a residential zone; and
 - (a) The parties advise that they are satisfied that the proposed development maximises opportunities for deep soil planting and minimises urban heat island effect and contributes to passive cooling on the site, satisfying cl 7.30 of the LEP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 16 Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) seeks to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
- 17 The site is located within a well-established residential area, historically used for urban purposes. The parties advise that the DA provides for retention of identified trees, and removal of others, with proposed replacement planting and landscaping to soften the built form and assist with maintaining privacy to neighbouring properties.
- 18 The site is located within the Hawkesbury-Nepean Catchment and Chapter 6 - Water Catchments of the Biodiversity SEPP is applicable to the site. This chapter generally aims to protect the environment of river systems, including the Hawkesbury-Nepean River system. The parties advise that all of the matters contained in s 6.6 of the Biodiversity SEPP have been considered and are addressed by the amended plans and the proposed stormwater management plan.

State Environmental Planning Policy (Industry and Employment) 2021

- 19 Chapter 3 of the State Environmental Planning Policy (Industry and Employment) 2021 (Industry and Employment SEPP) provides controls for advertising and signage and seeks to ensure that signage is compatible with the desired amenity and visual character of an area, provides effective communication in suitable locations and is of a high quality.
- 20 The parties advise that the proposed signage is considered to be of a suitable design which will provide effective communication without compromising the visual appearance of the building. The Applicant provided an assessment of the proposed signage against the Schedule 5 assessment provisions of the Industry and Employment SEPP to support this conclusion.

State Environmental Planning Policy (Precincts – Western Parkland City) 2021

- 21 The State Environmental Planning Policy (Precincts - Western Parkland City) 2021 (Western Parkland City SEPP) contains a map entitled the “Wildlife Buffer Zone Map” which relates to wildlife buffer areas. Pursuant to s 4.19 of the Western Parkland City SEPP, the site is within a 13km ‘wildlife buffer zone’ of the Western Sydney Airport Site.
- 22 The parties submit that the proposed development is not one of the types of uses which warrant additional consideration under the Western Parkland City SEPP with regard to wildlife and the operation of the airport.
- 23 The site is also identified as being located within the “Obstacle Limitation Surface Map” area under the Western Parkland City SEPP. Section 4.22 of the Western Parkland City SEPP relates to development that would penetrate the prescribed air space for the airport and be a ‘controlled activity’.
- 24 The parties submit that the proposed development neither penetrates the prescribed airspace, nor is it a controlled activity and therefore does not trigger any additional considerations under s 4.22.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 25 Section 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) provides that a consent authority must not consent to the carrying out of any development on land unless it has

considered whether the land is contaminated, and if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable after remediation) for the purpose for which the development is proposed to be carried out; and

- (1) The parties advise that the Applicant has provided a Preliminary Environmental Site Investigation prepared by Geotechnical Consultants Australia which concludes that the site is considered suitable for the proposed redevelopment and sensitive land use provided that certain recommendations are implemented;
- (2) Conditions have been included to implement the recommendations of the Preliminary Environmental Site Investigation report; and
- (3) The Court is satisfied for the purposes of s 4.6 of the Resilience and Hazards SEPP that the site is suitable for the proposed development.

State Environmental Planning Policy (Transport and Infrastructure) 2021

26 Chapter 2 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) provides a consistent planning regime for infrastructure and the provision of services across the State, along with providing for consultation with relevant public authorities during the assessment process.

27 The parties advise that:

- (1) Section 2.48 of the Transport and Infrastructure SEPP relates to electricity infrastructure and is not applicable as the site is not in the vicinity of electricity infrastructure that would require concurrence of the electricity supply authority;
- (2) Section 2.98 of the Transport and Infrastructure SEPP relates to development adjacent to rail corridors. The site is adjacent to a rail corridor. The Respondents notified Sydney Trains. Concurrence was provided by Sydney Trains to the Respondent by letter dated 11 October 2023;
- (3) The proposed development is not located within proximity to a classified road nor is it a residential land use and as a result it is not necessary to consider the provisions of s 2.120 of the Transport and Infrastructure SEPP that requires a consent authority to consider the impact of arterial roads on buildings used for residential purposes; and
- (4) Section 2.122 of the Transport and Infrastructure SEPP identifies several types of development that require concurrence from Roads and Maritime Services where development is identified as 'traffic generating development'. The current proposal is not identified as traffic generating development by schedule 3 of the Transport and Infrastructure SEPP.

Accordingly, the proposal is not required to be referred to the RMS for comment.

28 Chapter 3 of the Transport and Infrastructure SEPP) aims to facilitate the effective delivery of educational facilities and early education and care facilities in NSW; and the parties advise that:

- (1) the Department of Planning, Industry and Environment Child Care Planning Guideline 2021 (CCPG) has been considered in the design and plan of management for the proposed child care centre as required by s 3.23 of the Transport and Infrastructure SEPP;
- (2) Concurrence is not required pursuant to s 3.22 as the proposal complies with the relevant floor space requirements identified in regs 107 and 108 of the Education and Care Services National Regulations 2011;
- (3) Non-discretionary development standards in s 3.26 are met by the proposed development.

Education and Care Service National Regulations 2011

29 The Education and Care Services National Regulations 2011 (the Regulations) provide extensive controls and requirements in addition to that of Local Environmental Plans and Development Control Plans and includes licensing and approvals processes, including documentation requirements; facilities and equipment requirements; staffing requirements; child number requirements; operational requirements; administrative requirements; and probity check requirements; and

- (1) The parties advise that the amended DA satisfies the requirements of the Regulations.

Child Care Planning Guideline 2021

30 The CCPG establishes the assessment framework to deliver consistent planning outcomes and design quality for centre based child care facilities in NSW; and

- (1) The parties advise that the amended DA takes into account the requirements of the CCPG as required by s 3.23 of the Transport and Infrastructure SEPP.

Penrith Development Control Plan 2014

31 The Penrith Development Control Plan 2014 applies to the site; and the provisions of the DCP which were identified in the Statement of Facts and Contentions have been addressed in the amended DA.

Conclusion

32 Having considered the advice of the parties provided above at [10-31], I am satisfied that:

- (1) The Applicant's amended DA can be approved having regard to the matters in s 4.15(1)(b) – (e) of the EPA Act;
- (2) The jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EPA Act have been satisfied; and
- (3) Approval of the proposed development is in the public interest.

33 Further, I am satisfied that 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.

34 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

35 The Court notes:

- (1) That Penrith City Council, under delegation from the Sydney Western City Planning Panel as the relevant consent authority, pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021, has approved the application for an amendment to development application DA23/0076 made on 15 May 2024 to rely on the documents and plans specified below (the amended development application):

(i) Plans Reference:

Description	Sheet No.	Re v No.	Prepared by	Date
<i>Architectural Plans</i>				
Cover Sheet	DA0000	7	Altis Architectur e	April 2024
Site Location	DA000	1	Altis Architectur	Decembe

Plan	1		e	r 2022
Site Analysis Plan	DA0002	4	Altis Architecture	April 2024
Site plan/roof plan	DA0003	7	Altis Architecture	April 2024
Shadow Diagrams – 22 June	DA0004	7	Altis Architecture	April 2024
Shadow Diagrams – 22 September	DA0005	7	Altis Architecture	April 2024
Existing & Demolition Plan	DA1001	7	Altis Architecture	April 2024
Ground Floor Plan	DA1102	10	Altis Architecture	April 2024
Level 1 Plan	DA1103	10	Altis Architecture	April 2024
Level 2 Plan	DA1104	10	Altis Architecture	April 2024

Level 3 Plan	DA110 5	6	Altis Architectur e	April 2024
Proposed Elevations Sheet 1	DA210 1	9	Altis Architectur e	April 2024
Proposed Elevations Sheet 2	DA210 2	9	Altis Architectur e	April 2024
Proposed Sections Sheet 1	DA300 1	7	Altis Architectur e	April 2024
Proposed Sections Sheet 2	DA300 2	7	Altis Architectur e	April 2024
Proposed Sections sheet 3	DA300 3	7	Altis Architectur e	April 2024
Signage details	DA900 1	3	Altis Architectur e	April 2024
Area plans	DA901 1	7	Altis Architectur e	April 2024
<i>Landscape Plans</i>				
Cover sheet	LCD-01	D	Fiona	April 2024

– drawing schedule, location plan			Robbe Landscape Architects	
Tree protection plan	LCD-10	D	Fiona Robbe Landscape Architects	April 2024
Surfaces, materials plan (ground floor and level 1)	LCD- 20-01	D	Fiona Robbe Landscape Architects	April 2024
Surfaces, materials plan (level 2)	LCD- 20-02	D	Fiona Robbe Landscape Architects	April 2024
Planting plan (ground floor and level 1)	LCD- 30-01	D	Fiona Robbe Landscape Architects	April 2024
Planting plan (level 2)	LCD- 30-02	D	Fiona Robbe Landscape Architects	April 2024
Sections & elevations 1	LCD- 40-01	D	Fiona Robbe Landscape Architects	April 2024

Sections & elevations 2	LCD-40-02	D	Fiona Robbe Landscape Architects	April 2024
Equipment precedent images 1	LCD-50-01	D	Fiona Robbe Landscape Architects	April 2024
Equipment precedent images 2	LCD-50-02	D	Fiona Robbe Landscape Architects	April 2024
Landscape maintenance notes	LCD-60	D	Fiona Robbe Landscape Architects	April 2024
<i>Stormwater Plans – Civil Sketches</i>				
SW-000	SW-000	2	Stellen Consulting	22 April 2024
SW-001	SW-001	3	Stellen Consulting	22 April 2024
SW-002	SW-002	3	Stellen Consulting	22 April 2024
SW-003	SW-003	3	Stellen Consulting	22 April 2024
SW-004	SW-	3	Stellen	22 April

	004		Consulting	2024
SW-100	SW-100	2	Stellen Consulting	22 April 2024
SW-101	SW-101	1	Stellen Consulting	22 April 2024
SW-200	SW-200	4	Stellen Consulting	22 April 2024
SW-900	SW-900	2	Stellen Consulting	22 April 2024
LT-001	LT-001	4	Stellen Consulting	22 April 2024

(ii) Supporting Documentation:

Description	Rev	Prepared by	Date
Plan of Management	3	Daniella Assaf – Montessori Academy Project Manager	6 May 2024
Operational Waste Management Plan	C	Elephants Foot Consulting Pty Ltd	3 May 2024
Construction & Demolition Waste Management Plan		Elephants Foot	26 June 2023
Preliminary Site		Geotechnical	17

Investigation		Consultants Australia	January 2023
StormFilter Operations & Maintenance Manual		Ocean Protect	March 2019
Supplementary Geo- hydrological Assessment and Peer Review		Australian Ground Sciences	20 February 2024
Geotechnical Investigation Report	A	Geotechnical Consultants Australia	17 January 2013
Arboriculture Response		Peter Castor	18 February 2024
Tree Report 2024: Arboricultural Impact Assessment	5	Tree Report Pty Ltd	7 May 2024
Noise Impact Assessment	6	Acoustic Logic	3 May 2024
Supplementary Traffic and Parking Advice		McLaren Traffic Engineering & Road Safety Consultants	8 May 2024
Traffic and Parking Impact Assessment of the Proposed Child Care Centre at 72 Park	D	McLaren Traffic Engineering & Road Safety Consultants	8 May 2024

Avenue, Kingswood			
BCA Assessment Report	5	Jensen Hughes	7 May 2024
NCC Section J Assessment Report		BCA Energy	23 December 2022

36 The Court orders:

- (1) The appeal is upheld.
- (2) Development Application DA23/0076 as amended for the clearing of the site and tree removal, and construction of a two-storey centre based child care facility with basement parking, drainage, and landscaping on land legally described as Lot 10 DP1224143, at 72 Park Avenue, Kingswood, NSW, 2747 is approved subject to the conditions included in Annexure A.

G Kullen

Acting Commissioner of the Court

2023.277167 Annexure A

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