



Land and Environment Court New South Wales

Medium Neutral Citation:

**Thornton North Penrith Pty Ltd v Penrith City Council
[2025] NSWLEC 1715**

Hearing dates:

Conciliation conference on 9 September 2025

Date of orders:

01 October 2025

Decision date:

01 October 2025

Jurisdiction:

Class 1

Before:

Porter C

Decision:

The Court orders that:

- (1) The Applicant shall pay the Respondent's costs thrown away as a result of the amendment of the development application as agreed or assessed, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW).
- (2) The appeal is upheld.
- (3) Development Consent is granted to Development Application No. DA22/0214 (as amended) for demolition of existing structures, site preparation works, construction of a 15 storey mixed use development comprising two basement levels, shop top housing, commercial and retail uses, communal open space, landscaping works, southern extent of the public park, public domain works and ancillary works, at 41, 184 and 192 Lord Sheffield Circuit, Penrith subject to the conditions in Annexure A.

Catchwords:

DEVELOPMENT APPEAL — mixed use development — residential — conciliation conference — agreement between the parties — orders

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW), ss 4.16, 4.22, 4.24, 4.47, 8.7, Pt 3A (repealed)
Land and Environment Court Act 1979 (NSW), s 34
Water Management Act 2000 (NSW), s 91

Environmental Planning and Assessment Regulation 2021 (NSW), ss 23, 38, 61

Penrith Local Environmental Plan 2010, cll 2.3, 4.3, 4.4, 4.6, 8.7, 5.21, 7.1, 7.4, 7.6, 7.30, 8.2, 8.4, 8.5

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 6

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Housing) 2021, Ch 4, Schs 7A, 9, ss 8(2A), 144, 147

State Environmental Planning Policy (Planning Systems) 2021, Sch 6, s 2

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, Ch 3, ss 2.48, 2.98, 2.99, 2.100, 2.122

Cases Cited:

Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170; [2018] NSWCA 245

McMillan v Taylor (2023) 111 NSWLR 634; [2023] NSWCA 183

Texts Cited:

NSW Department of Planning and Environment, Apartment Design Guide (July 2015)

NSW Department of Planning and Environment, Development Assessment Guideline: An Adaptive Response to Flood Risk Management for Residential Development in the Penrith City Centre (June 2019)

Category:

Principal judgment

Parties:

Thornton North Penrith Pty Limited (Applicant)

Penrith City Council (Respondent)

Representation:

Counsel:

A Pickles SC (Applicant)

J Wauchope (Solicitor) (Respondent)

Solicitors:

Mills Oakley (Applicant)

Dentons (Respondent)

File Number(s):

2024/172376

Publication restriction:

Nil

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) being an appeal against the refusal of DA22/0214 by the Sydney West City Planning Panel. The amended DA seeks consent for demolition of existing structures, site preparation works, construction of a 15 storey mixed use development comprising two basement levels, shop top housing, commercial and retail uses, communal open space, landscaping works, southern extent of the public park, public domain works and ancillary works (DA) at Lots 3003, 3004 & 3005 DP1184498 known as 41, 184 and 192 Lord Sheffield Circuit, Penrith (site).
- 2 This appeal travelled with proceedings number 2024/172243 (DA1) and the appeals share some similarities, including location on the same site.
- 3 The proceedings commenced as a hearing on 8 September 2025. At the hearing, the parties agreed that the issues in dispute had been resolved as a result of joint expert conferencing and amendments to the DA. The Court granted the request and arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (LEC Act) between the parties, which was held on 9 September 2025. I presided over the conciliation conference.
- 4 The Sydney West City Planning Panel, as the relevant consent authority, has agreed under s 38 of the Environmental Planning and Assessment Regulation 2021 (NSW) (EPA Reg) to the Applicant amending DA22/0214 in accordance with the documents listed at Annexure B.
- 5 As part of the conciliation conference process, the parties 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 for the amended application and granting development consent to the amended DA subject to conditions of consent.

Jurisdictional Prerequisites

- 6 As part of the s 34 agreement, the parties have submitted a jurisdictional statement setting out how the proposal has satisfied the jurisdictional requirements and other matters.
- 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.
- 8 In considering if the agreement is a decision that could be made by the Court, the obligation is limited to being satisfied that there 'are no jurisdictional constraints on the power of the Court which would preclude an order of the kind reached in the agreement' and not an evaluative decision: *McMillan v Taylor* (2023) 111 NSWLR 634; [2023] NSWCA 183 at [60]-[65].
- 9 I have carried out the required jurisdictional check: *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 at [202]. For the reasons set out below, 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.
- 10 The amended DA is a regionally significant development pursuant to Sch 6, s 2 of State Environmental Planning Policy (Planning Systems) 2021 for general development over \$30 million dollars, as the cost of works exceeds the threshold.

Owner's consent

- 11 I am satisfied that owner's consent accompanied the DA as required by s 23 of the EPA Reg. I accept that the tree works proposed on Council's land has owner's consent, as Council has agreed to the proposed orders to uphold the appeal and grant development consent for the works.

Concept Approval MP 10-0075

- 12 Concept Approval MP 10-0075 (concept project) was granted under the now repealed Part 3A of the EPA Act. The concept project related to the North Penrith Whole precinct, for a development on 40.7 hectares and granting concept approval for approximately 1,000 dwellings, 4,500m² retail floor space, 10,625m² of commercial floor space, 7,000m² of light industrial floor space, 7.2 hectares of open space, drainage works and associated infrastructure.
- 13 I firstly accept that the concept project is not a concept DA pursuant to ss 4.22 and 4.24 of the EPA Act, and that these provisions do not apply as the concept project is a Part 3A consent.
- 14 Secondly, I accept the advice of Mr Galasso SC acting for the Applicant that the subject DA is not impeded or constrained by the concept project consent, as the development has not relationship with the concept project in terms of form and land use. It is an

entirely different development. I therefore accept the parties' agreement that the DA does not need to be consistent with the concept project.

Community notification and objections

- 15 The Respondent notified the DA between 12 September 2022 to 10 October 2022, and 14 September 2025 to 10 August 2025. 19 and 6 submissions were received respectively. Whilst there were no speakers at the hearing, several objectors reiterated that their concerns were still pressed.
- 16 As the parties have reached agreement, the Court is not able to consider the merits of the DA. The parties have advised the Court that they considered the concerns raised in the written and oral objections.

Water Management Act 2000 (NSW)

- 17 In correspondence before the Court, there was some confusion between Water NSW and the Department of Climate Change, Energy, the Environment and Water (DCCEEW) about who was the correct authority to approve activities under s 91(3) of the Water Act. Ultimately, DCCEEW provided preliminary comments. I accept that the amended DA was referred to both authorities, and that the relevant agency has failed to provide General Terms of Approval within the stipulated timeframe. Pursuant to s 4.47(5) of the EPA Act, a consent authority may determine the application in such situations. Appropriate conditions of consent have been included to obtain the required approval.

EPA Reg

- 18 The site is mapped within the Penrith City Centre and accordingly, s 61(6) of the EPA Reg applies. The parties agree that s 61(6) and the corresponding guideline *Development Assessment Guideline: An Adaptive Response to Flood Risk Management for Residential Development in the Penrith City Centre* has been considered. The total number of dwellings will not exceed 4050 dwellings in the centre, which is the amount that triggers associated actions.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 19 Chapter 6 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies to the amended DA as the site is located within the Hawkesbury-Nepean Catchment.
- 20 The amended DA is supported by the following reports:
- (1) Flood Risk Assessment and Addendum Flood Risk Assessment Report

prepared by Northrop with various dates.

- (2) Civil and Stormwater Management Report prepared by AT&L dated April 2025.
- (3) Civil Engineering plans prepared by AT&L Civil Engineers dated March 2025.
- (4) Flood Emergency Response Plan prepared by Northrop dated November 2021.

21 On this basis, I accept the parties' agreement that the relevant provisions have been satisfied and that there will be a neutral or beneficial effect on water quality, the development minimises its impacts on water flow, that aquatic ecology will not be adversely impacted and adequate flooding mitigation measures have been incorporated into the design of the development. I also accept that comments received from the NSW SES have been adequately considered.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

22 Given the lodgement date of the DA, State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies. The parties agree and I accept that a satisfactory amended BASIX certificate forms part of the amended DA.

State Environmental Planning Policy (Housing) 2021

- 23 Chapter 4 of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) applies to the amended DA. Section 147 of the Housing SEPP requires consideration of the design principles contained in Sch 9 and the Apartment Design Guide (ADG).
- 24 Relevantly, s 29 of the EPA Reg requires that residential apartment development must be accompanied by a statement prepared by a qualified designer in relation to the design principles within Sch 9 of the Housing SEPP and Parts 3 and 4 ADG.
- 25 The parties submit and I accept that they have considered the advice of the Design Review Panel, notwithstanding the various design waivers from the NSW Architect's Design Integrity Panel.
- 26 The parties agree and I accept that the amended DA meets the provisions of the Housing SEPP on the basis of the Design Verification Statement completed by the nominated qualified designer Greg Crone (NSW Architect's registration number 3929) dated 7 April 2025. Further, the non-discretionary development standards at s 148 are met.

State Environmental Planning Policy (Resilience and Hazards) 2021

27 Section 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) applies to the site. The amended DA is supported by an Addendum Contamination Report prepared by Prensa dated 7 April 2025 that finds that the site can be made suitable for the proposed uses. The recommendations in the report have been implemented through the conditions of consent. The parties agree and I accept, that the provisions of s 4.6 of the SEPP RH have been satisfied.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 28 Section 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) applies given the proximity of the proposed development to electricity power lines. Ausgrid has not raised any objections to the proposed development and the conditions requested have been included in the conditions of consent.
- 29 Sections 2.98 of the SEPP TI development adjacent to rail corridors and s 2.99 excavation in, above, below or adjacent to rail corridors apply given the site's proximity to the rail corridor. The amended DA was referred to Sydney Trains who raised no objections. Concurrence was granted and has been included in the conditions of consent.
- 30 Section 2.100 of the SEPP TI impact of rail noise or vibration on non-rail development applies. The Noise Impact Assessment prepared by Acoustic Logic dated 19 November 2021 has considered the provisions and the recommendations have been included in conditions of consent.
- 31 Section 2.122 of the SEPP TI traffic generating development is triggered as the proposal has more than 300 dwellings pursuant to Sch 3. The amended DA was referred to TfNSW who consider that the development is unlikely to detrimentally impact the classified road network. I accept the parties' agreement that s 2.122 of the SEPP TI has been satisfied.
- 32 I accept the parties' agreement that the provisions of the SEPP TI are met.

Penrith Local Environmental Plan 2010

- 33 The subject site is zoned E1 Local Centre under the Penrith Local Environmental Plan 2010 (PLEP). The proposed mixed use development including shop top housing, commercial premises and retail premises are permissible with consent. Pursuant to cl 2.3 of the PLEP, regard has been had to the objectives of the zone.
- 34 Clause 4.3 of the PLEP height of buildings applies to the site, permitting a maximum height of 32m. The proposed development has a maximum height of 54.9m. Pursuant to cl 8.7 of the PLEP the maximum building height may be exceeded if the development includes community infrastructure. Further, cl 8.7 requires that regard be had to the objectives of the clause, whether the design exhibits design excellence and the nature and value of the community infrastructure to the City Centre.
- 35 Having had regard to the objectives of the clause, the parties agree and I accept that the proposed development provides community infrastructure in the form of a park and associated embellishments, the development exhibits design excellence, and community infrastructure at just over \$4 million is appropriate. The maximum height under cl 4.3 of the PLEP can therefore be exceeded.
- 36 Clause 4.4 of the PLEP floor space ratio (FSR) applies to the site, however cl 8.7 also provides a maximum FSR of 5:1 if community infrastructure is provided and regard is had to the objectives of the clause, design excellence and value of infrastructure. For

the same reasons as above, I accept the parties' agreement that cl 8.7 is satisfied and that the proposed FSR of 2.38:1 complies with the development standard. Across this appeal and the appeal for DA1, the total FSR is 5:1 and will also comply with the development standard. I note that the DA is accompanied by an offer of a draft voluntary agreement.

- 37 Clause 5.21 of the PLEP flood planning applies. On the basis of the reports and plans referred to at [20], I accept the parties' agreement that the provisions have been met. I accept that the site is subject to minor locality flooding during the 1% AEP flood event and that sensitive uses are located above the relevant flood levels. I accept that the development is compatible with the flood behaviour and will not adversely affect other properties, the environment, safe occupation or safe evacuation.
- 38 Clause 7.1 of the PLEP earthworks applies and contains provisions for consideration. I accept that the parties' have considered the provision as demonstrated by the Geotechnical Investigation Report prepared by Douglas Partners dated 4 April 2025 (Geotechnical Report), other related report forming part of the amended DA and relevant conditions of consent.
- 39 Clause 7.4 of the PLEP sustainable development applies to the DA. I accept that the parties have considered the relevant matters as set out in the jurisdictional statement.
- 40 Clause 7.6 of the PLEP salinity applies. I accept the parties' agreement that the provisions have been considered as demonstrated by the Geotechnical Report.
- 41 Clause 7.30 of the PLEP urban heat applies and contains provisions for consideration. I accept the provisions have been considered on the basis of the amended Architectural Plans prepared by Crone Architects with various dates (architectural plans), Landscape Design Report prepared by Urbis dated June 2025 and the design of the building as set out in the jurisdictional statement.
- 42 Clause 8.2 of the PLEP sun access applies. The proposal seeks a variation to the development standard pursuant to cl 4.6 of the PLEP, as the development will result in overshadowing of the public open space. The amended DA relies on the Clause 4.6 Variation Request dated 26 March 2023 prepared by Urbis and the Addendum Clause 4.6 Variation Request – Solar Access Standard prepared by Beam Planning dated 7 April 2025 (written requests). The parties are satisfied, and I accept, that the written requests adequately demonstrate that compliance with the development standard is unnecessary or unreasonable and that there are sufficient environmental plan grounds to justify the proposed variation. Due to the lodgement date of the DA, the previous version of cl 4.6 applies. I accept that the written request and variation is in the public interest as the development and variation will be consistent with the objectives of the standard and zone.
- 43 Clause 8.4 of the PLEP design excellence applies. On the basis of the Joint Expert Report of the urban designers, design excellence endorsement, architectural plans, Preliminary Art Plan prepared by Art Pharmacy dated 26 June 2025 and the Design

Review Panel's comments (including certification that a competitive design process is not required in this instance) I accept that the advice has been considered and the development exhibits design excellence.

44 Clause 8.5 of the PLEP building separation is met as the DCP does not provide any building separation or distance controls.

Heads of consideration

45 On the basis of the material accompanying the Class 1 appeal and the jurisdictional statement, I accept that the relevant matters for consideration pursuant to s 4.15(1) of the EPA Act have been adequately considered.

Conclusion

46 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.

47 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.

48 I have considered the jurisdictional prerequisites 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

49 The Court orders:

- (1) The Applicant shall pay the Respondent's costs thrown away as a result of the amendment of the development application as agreed or assessed, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW).
- (2) The appeal is upheld.
- (3) Development Consent is granted to Development Application No. DA-22/0214 (as amended) for demolition of existing structures, site preparation works, construction of a 15 storey mixed use development comprising two basement levels, shop top housing, commercial and retail uses, communal open space, landscaping works, southern extent of the public park, public domain works and ancillary works, at 41, 184 and 192 Lord Sheffield Circuit, Penrith subject to the conditions in Annexure A.

S Porter

Commissioner of the Court

[Annexure A.394 KB.pdf](#)

[Annexure B.26 KB.pdf](#)

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Decision last updated: 01 October 2025