



Land and Environment Court
New South Wales

Case Name: FLDC Pty Ltd v Liverpool City Council

Medium Neutral Citation: [2024] NSWLEC 1475

Hearing Date(s): Conciliation conference on 2 August 2024

Date of Orders: 07 August 2024

Decision Date: 7 August 2024

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) The Applicant is granted leave to rely upon the amended plans and documentation referred to in the index at Annexure A.
(2) The appeal is upheld.
(3) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed.
(4) Development Application DA19/2023 for the demolition of existing buildings and structures, construction and operation of a three storey childcare centre over basement accommodating 120 children, together with associated facilities, access, and landscaping, at 73 Lachlan Street, Warwick Farm being Lots 1 and 2 in Deposited Plan 1058859 is determined by the grant of consent subject to conditions contained in Annexure B.

Catchwords: APPEAL – development application – child care centre – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15

Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation
2021, ss 37, 38

Liverpool Local Environmental Plan 2008, cl 7.1, 7.4,
7.5, 7.17A, 7.31

State Environmental Planning Policy (Biodiversity and
Conservation) 2021, Pt 6.2, ss 6.6, 6.7, 6.8, 6.9, 6.11

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

State Environmental Planning Policy (Transport and
Infrastructure) 2021, Ch 3, ss 2.48, 2.119, 2.120, 2.122,
3.22, 3.23

Texts Cited: Child Care Planning Guideline

Category: Principal judgment

Parties: FLDC Pty Ltd Applicant)
Liverpool City Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
J King (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2023/00203811

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application for the demolition of existing buildings and the construction of a three-storey childcare centre over basement at 73 Lachlan Street, Warwick Farm. The development application was lodged with Liverpool City Council on 11 July 2023. Following the expiry of the period after which a development application is deemed to be refused, the applicant lodged an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the

development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [9] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 2 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 2 August 2024. I presided over the conciliation conference.
- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The agreement reflects that which was filed on 29 July 2024, and follows the Council's approval of an application for an amendment to a development application pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021. The amendments include a reduction in the number of children to 120, an increase in building separation and landscaping, a reorientation of the building to improve the streetscape outcome and to achieve the rear setback sought by the Council, and the provision of an updated Plan of Management.
- 4 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by a Jurisdictional Statement that sets out the jurisdictional prerequisites to the exercise of the power to grant development consent. I have considered the contents of the Jurisdictional Statement, together with the documents referred to therein, the Class 1 Application and its attachments, and the documents that are referred to in Annexure A. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.
- 5 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:

- The proposed development is for the purpose of a centre based child care facility, which is permissible in the R4 High Density Residential zone in which the site is located, pursuant to the Liverpool Local Environmental Plan 2008 (LLEP).
- The proposed development complies with the development standards in the LLEP for height and floor space ratio.
- Clause 7.1 of the LLEP concerns the Liverpool City Centre and applies to the site. Based on the location and design of the proposed development, I am satisfied that the proposed development is consistent with the objectives in cl 7.1.
- Clause 7.4 of the LLEP concerns building separation in the Liverpool city centre, and requires 9m of separation from neighbouring buildings for parts of buildings between 12m and 25m above ground level. Based on the architectural plans prepared by FLDC Architects dated 28 May 2024, I am satisfied that the separation requirements in cl 7.4(2) are met.
- Based on the statement prepared by FLDC Architects dated 24 April 2024, I am satisfied that the development exhibits design excellence, consistent with cl 7.5 of the LLEP
- Clause 7.17A of the LLEP applies to the proposed development as it is development under the hospital helicopter airspace. Pursuant to cl 7.17A(2), the development application was referred to Capital Works and Infrastructure at the South Western Sydney Local Health District. No response has been received, and, given that the building is 40m below the hospital helicopter airspace, I am satisfied in accordance with cl 7.17A(2)(c).
- The development application includes earthworks for the provision of the basement level for car parking. Based on the Statement of Environmental Effects dated December 2022, I have considered the matters set out at cl 7.31(3) of the LLEP.
- Consideration has been given as to whether the subject site is contaminated as required by s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. Based on the Detailed Site Investigation report dated 8 February 2023, the site can be made suitable for the development, subject to the carrying out of recommendations contained in the report, which are required to be implemented by condition 42 of Annexure B.
- The site falls within the Georges River Catchment, such that Part 6.2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC) applies to the development application. Based on the stormwater concept plans dated 16 May 2024 and the engineer's letter dated 12 February 2024, I am satisfied of the matters in ss 6.6(2) and 6.7(2), and I have considered the matters in s 6.8(1). Further, the development will not change any public access to recreational areas or waterbodies, and I am therefore satisfied of the matters in s 6.9(2). Finally, whilst the proposed development is located within 100m of a natural waterbody, I have considered the matters in s 6.11 and note that the land use proposed is not a water-dependent use and there is no conflict between land uses.

- The proposed development could affect an overhead electricity power line, as a result of which s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) requires notification to the electricity supply authority and consideration of their response. Consistent with those requirements, Endeavour Energy was notified of the development application and I have considered the content of their response dated 21 July 2024.
 - The site has frontage to Hume Highway (also named Sydney Road in this location), which is a classified road, and ss 2.119 and 2.120 of SEPP TI apply. In accordance with s 2.119, vehicular access is provided from Lachlan Street, a road other than the classified road, and I am satisfied that the safety, efficiency, and ongoing operation of the classified road will not be adversely affected by the development as a result of the vehicular access or the emissions from the development. Consistent with the requirements of s 2.119(2)(c) and s 2.120(3), the proposed development has been designed to prevent or reduce the impacts associated with road traffic noise and will be carried out in accordance with the recommendations in the Noise Impact Assessment dated 19 February 2024 that will ensure a suitable degree of amenity for occupants of the proposed development, including compliance with the LAeq levels in s 2.120(3).
 - The proposed development is traffic generating development and notice of the application was given to Transport for NSW in accordance with s 2.122 of the SEPP TI. I have considered their response dated 14 April 2023, and, based on the Traffic and Parking Impact Assessments dated 22 December 2022 and 5 March 2024, I have considered the matters in s 2.122(4)(b) of the SEPP TI.
 - Chapter 3 of the SEPP TI concerns child care facilities and applies to the proposed development. The proposed development complies with the requirements for unencumbered indoor and outdoor space, and therefore concurrence of the Regulatory Authority is not required by s 3.22. In accordance with s 3.23 and based on the Statement of Environmental Effects dated December 2022, I have considered the applicable provisions of the Child Care Planning Guideline.
 - The development application was notified between 22 March and 6 April 2023, and two submissions were received. I have considered the issues raised in those submissions, which concern noise, traffic and privacy.
- 6 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 7 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the

development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

8 The Court notes:

- (1) The Respondent, Liverpool City Council, as the relevant consent authority, has approved, under section 38(1) of the Environmental Planning and Assessment Regulation 2021, the Applicant amending Development Application No. DA19/2023 to rely on the documents as outlined in Annexure A.
- (2) The applicant has filed the plans and documents listed in Annexure A on 2 August 2024.

9 The Court orders that:

- (1) The Applicant is granted leave to rely upon the amended plans and documentation referred to in the index at Annexure A.
- (2) The appeal is upheld.
- (3) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.
- (4) Development Application DA19/2023 for the demolition of existing buildings and structures, construction and operation of a three storey childcare centre over basement accommodating 120 children, together with associated facilities, access, and landscaping, at 73 Lachlan Street, Warwick Farm being Lots 1 and 2 in Deposited Plan 1058859 is determined by the grant of consent subject to conditions contained in Annexure B.

J Gray

Commissioner of the Court

Annexure A

Annexure B

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.