

AUSTRALIA / JUDGMENT

Daher v Penrith City Council

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Land and Environment Court New South Wales Medium Neutral Citation: Daher v Penrith City Council [2025] NSWLEC 1258 Hearing dates: Conciliation Conference 19 March 2025 Date of orders: 17 April 2025 Decision date: 17 April 2025 Jurisdiction: Class 1 Before: Targett C Decision: The Court orders that:

- (1) The applicant is pay the respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, as a result of the amendments to the development application, in the agreed amount of \$5,000.
- (2) The appeal is upheld.
- (3) Development consent is granted to Development Application DA22/1065 for the demolition of existing structures, tree removal and construction of a childcare facility for 150 children with basement parking and associated works, on land legally described as Lot 579 in DP 12590, commonly known as 86 & 88 Sydney Street, St Marys, subject to the conditions in Annexure A. Catchwords: APPEAL – Development application - childcare centre - conciliation conference – agreement between the parties - orders Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.10, 8.11, 8.15 Land and Environment Court Act 1979, ss 17, 34 Education and Care Services National Regulations 2011 Penrith Local Environmental Plan 2010, cll 4.3, 4.4, 7.1, 7.4, 7.6, 7.7, 7.30 State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 9, ss 6.65, 9.1, 9.3, 9.4, 9.5 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, Ch 3, ss 3.23, 3.26 Environmental Planning and Assessment Regulation 2021, s 38 State Environmental Planning Policy Amendment (Water Catchments) 2022 Texts Cited: Penrith Development Control Plan 2014 Department of Planning, Industry and Environment, “Child Care Planning Guideline: Delivering Quality Child Care for NSW”, September 2021 Category: Principal judgment Parties: Nassar Daher (Applicant) Penrith City Council (Respondent) Representation: Counsel: T Poisel (Applicant) J McKelvey (Respondent) Solicitors: Madison Marcus Law Firm (Applicant) HWL Ebsworth Lawyers (Respondent) File Number(s): 2023/76932 Publication restriction: No

Judgment

COMMISSIONER:

Background

This is a Class 1 Development Appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) by the applicant against the respondent's deemed refusal of the applicant's development application No DA22/1065 (Development Application) seeking consent for the demolition of existing structures, tree removal and construction of a 120-place childcare centre on land legally described as Lots 579 and 580 in Deposited Plan 12590 and known as 86-88 Sydney Street, St Marys, respectively (Subject Land). The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the Land and Environment Court Act 1979 (LEC Act). The Development Application The Development Application was lodged with the respondent on 17 November 2022. The Development Application was publicly notified between 5 and 19 December 2022. On 8 March 2023, the applicant commenced proceedings in relation to the deemed refusal of the Development Application, being within the appeal period prescribed by ss 8.10 and 8.11 of the EPA Act. The Court arranged a conciliation conference under s 34 of the LEC Act between the parties, which was held on 2 August 2023 and subsequently terminated and the matter listed for hearing. On 19 January 2024, the applicant was granted leave to amend its Development Application (January 2024 Amendments) and an Amended Statement of Facts and Contentions was filed by the respondent on 20 February 2024. Notably, the January 2024 Amendments increased the number of child care places sought from 120 to 150. The January 2024 Amendments were publicly notified from 17 to 31 January 2024. On 13 December 2024, the applicant was granted further leave to amend its Development Application (December 2024 Amendments) and a Further Amended Statement of Facts and Contentions was filed by the respondent on 3 February 2025. The December 2024 Amendments were publicly notified from 23 December 2024 to 26 January 2025. Prior to the hearing, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. Further amended plans and further documents were filed with the Court on 19 March 2025 (March 2025 Amendments) cited at [54]. The March 2025 Amendments primarily include: Redesign of the southern above ground onsite detention tank in combination with revision to the ground and first floor plans to allow for an increased southern boundary setback. The revisions provide for a minimum 2.0m unimpeded planting zone. Amendment of the basement setbacks and relocation and redesign of waste management and water management infrastructure to provide an increased unimpeded front boundary planting zone. Reconfiguration of the basement arrangements to respond to increased front boundary setbacks and waste management requirements. Reconfiguration of internal floor space arrangements to respond to increased front (western) and side (southern) setback zones. Deletion of externalised outdoor play area immediately adjoining part of the northern boundary and replacement with landscaping. This allows for rationalisation and reduction in fencing, fill and retaining wall requirements. Relocation and redesign of waste management infrastructure to be located underneath the entry ramp of Level B1. Amendment of the landscape arrangement and design detail in response to the above changes. The Development Application, as amended by the January 2024 Amendments, December 2024 Amendments and March 2025 Amendments, comprises the Amended Development Application. The decision agreed upon by the parties is for the grant of consent to

the Amended Development Application, subject to conditions of consent. The signed agreement is supported by an agreed jurisdictional statement. 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. Jurisdictional considerations As the presiding Commissioner, I am satisfied that the decision is one 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 form this state of satisfaction for the reasons that follow. Owners' consent The registered proprietors of the Subject Land provided their written consent to the lodgement of the Development Application (see Tab 17 of the Class 1 Application). State Environmental Planning Policy (Resilience and Hazards) 2021 Section 4.6(1) of the State Environmental Planning Policy (Resilience and Hazards) 2021 (RH 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 if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose. The Amended Development Application includes a Preliminary Site Investigation prepared by Environmental Engineering Services dated 7 October 2022 (PSI) (see Tab 17 of the Class 1 Application). The PSI concludes that the Subject Land is unlikely to be contaminated due to its long history of residential use and that the Subject Land can be made suitable for the proposed development provided the recommendations at section 10 of the PSI are implemented. The recommendations of the PSI have been incorporated into the Agreed Conditions. The parties agree, and I accept that, the requirements of s 4.6 of the RH SEPP are satisfied. State Environmental Planning Policy (Biodiversity and Conservation) 2021 The Amended Development Application proposes the removal of trees to facilitate the proposed development. The parties agree that as the Amended Development Application seeks development consent to remove the identified trees, Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP) relating to permits, is not enlivened due to the BC SEPP regulating a different and separate scheme to seeking development consent under the EPA Act. Chapter 9 of the BC SEPP (Hawkesbury-Nepean River) applies to the proposed development. This is because: Although Ch 9 of the BC SEPP was repealed on 21 November 2022 through the commencement of the State Environmental Planning Policy Amendment (Water Catchments) 2022 (Water Catchments Amendment SEPP), s 6.65 of the BC SEPP provides that former Chapters continue to apply to a development application lodged, but not finally determined, before the commencement of the Water Catchments Amendment SEPP. The Development Application was lodged on 17 November 2022, being prior to the commencement of the Water Catchments Amendment SEPP. As the Development has not yet been determined, Ch 9 of the BC SEPP continues to apply to the Amended Development Application. The proposed development the subject of the Amended Development Application is located in the Penrith local government area (s 9.1(1) of the BC SEPP). Section 9.3 of the BC SEPP requires the consent authority to take into consideration the matters set out in ss 9.4 and 9.5 of the BC SEPP in determining a development application on land to which the Chapter applies.

Relevant to the matters for consideration under ss 9.4 and 9.5, the parties agree that: water sensitive urban design requirements have been incorporated in the stormwater design and described in the Stormwater Report (Version 3) prepared by Deboke Engineering Consultants dated 18 February 2025; the Amended Development Application will have a neutral effect on the quality of water entering the Hawkesbury-Nepean Catchment, and the impact on water flow to the natural waterbody will be minimised; the Amended Development Application will not have an impact on the condition, structure and floristics of native vegetation in the catchment and the development will maintain the scenic quality of the locality; there will be no or minimal impact on aquatic ecology as the Subject Land is not located on land which contains terrestrial, aquatic or migratory animals or vegetation and the Subject Land is not located near a natural waterbody nor wetlands; the Subject Land is not located on flood liable land and the proposed development will no impact on periodic flooding; the Subject Land is not located near any natural waterbodies or foreshores, and will have no impact on any public access to recreational land uses; and the proposed development is not likely to have an adverse environmental impact on any adjacent or downstream local government areas. The parties also rely on the following documents accompanying the Amended Development Application: Stormwater Concept Plans (Issue 11) prepared by Deboke Engineering Consultants dated 11 March 2025; Stormwater Filtration Operation and Maintenance manual prepared by Ocean Protect dated 11 February 2025; and Stormwater Report (Version 3) prepared by Deboke Engineering Consultants dated 18 February 2025. In determining the Amended Development Application, and having regard to the position of the parties and documents listed above, I am satisfied that the matters set out in ss 9.4 and 9.5 of the BC SEPP (insofar as they are relevant) have been considered for the purposes of s 9.3. State Environmental Planning Policy (Transport and Infrastructure) 2021 Section 3.23 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (TISEPP) relevantly provides that before determining a development application for the purpose of a centre-based child care facility, the consent authority must take into consideration any applicable provisions of the Child Care Planning Guideline (Guidelines) in relation to the proposed development. The proposed development's compliance with the Guidelines has been addressed in the Amended Statement of Environmental Effects prepared by Think Planners dated 11 March 2025 (Amended SEE) (see pp 33-51). In determining the Amended Development Application, I confirm that I have taken into consideration the applicable provisions of the Guidelines in relation to the proposed development for the purpose of s 3.23 of the TISEPP. Section 3.26 of the TISEPP sets out non-discretionary development standards for the purpose of s 4.15(2) and (3) of the EPA Act in relation to the carrying out of development for the purpose of a centre-based child care facility. Namely, s 3.26(2)(b) provides the requirements for indoor and outdoor space. The Amended Development Application provides at least 3.25m² of unencumbered indoor play space and at least 7m² of unencumbered outdoor play space per child (see pp 51 and 55, respectively, of the Amended SEE) which is consistent with the indoor and outdoor unencumbered space requirements of the Education and Care Services National Regulations 2011. In determining the Amended Development Application, I am satisfied that the matters outlined in Ch 3 of the TISEPP have been considered and addressed. Education and Care Services National Regulations 2011 The Education and Care Service National Regulations 2011 provides extensive controls and

requirements in addition to those set out in the TISEPP and Penrith Local Environmental Plan 2010 (PLEP). Compliance with the Education and Care Services National Regulations 2011 is assessed at pp 51-61 of the Amended SEE. Penrith Local Environmental Plan 2010 The Subject Land is zoned R3 Medium Density Residential under the PLEP. Accordingly, the proposed development, being a “centre-based child care facility” is permissible with consent in the R3 zone. I have had regard to the zone objectives which are extracted below:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a concentration of housing with access to services and facilities.
- To enhance the essential character and identity of established residential areas.
- To ensure that a high level of residential amenity is achieved and maintained.
- To ensure that development reflects the desired future character and dwelling densities of the area. An assessment of the proposed development against the R3 zone objectives is set out at p 64 of the Amended SEE. The parties agree that the Amended Development Application is consistent with the objectives of the R3 zone insofar as they are relevant. Clause 4.3 of the PLEP prescribes a maximum building height of 8.5m for the Subject Land (Height Standard). The Amended Development Application seeks a maximum height of 8.4m, thus complying with the Height Standard. For the purposes of cl 4.4 of the PLEP, the parties agree that no maximum floor space ratio applies to the Subject Land. Pursuant to cl 7.1 of the PLEP relating to earthworks, the consent authority must consider specified matters before granting development consent. The parties agree that the Court would be satisfied that the matters listed in cl 7.1(3) of the PLEP have been adequately considered, having regard to p 65 of the Amended SEE and the Geotechnical Investigation Report prepared by Geotechnical Consultants Australia Pty Ltd dated 26 February 2025 (Geotech Report). The parties agree, and I accept that: The proposed development will not adversely affect or disrupt drainage and flood patterns, flood storage or soil stability in the area. The proposed excavation is consistent with the Subject Land’s context and is in accordance with the respondent’s current and proposed planning strategies. The destination of any excavated material is to be in accordance with the Agreed Conditions. It is considered unlikely that excavation will lead to the disturbance of relics as the Subject Land is not known to be situated within an area of archaeological significance. The earthworks are unlikely to impact on any watercourse, drinking water catchment or environmentally sensitive areas due to the location of the Subject Land. Any likely impact arising from earthworks can be appropriately minimised and mitigated by the proposed Agreed Conditions. In determining the Amended Development Application, having regard to the above position of the parties, Amended SEE,

Geotech Report and Agreed Conditions, I confirm that I have considered the matters required to be considered pursuant to cl 7.1(3) of the PLEP. Pursuant to cl 7.4 of the PLEP relating to sustainable development, the consent authority must have regard to the matters listed in cl 7.4 in deciding whether to grant development consent for development. The parties agree, and I accept, that the matters listed in cl 7.4 have been considered and addressed in detail within the Amended SEE (pp 65-67) and Environmentally Sustainable Development Assessment Report prepared by Senica dated 11 March 2025 (ESD Report). Pursuant to cl 7.6 of the PLEP relating to salinity, the consent authority must not grant consent to any development unless it has considered the matters listed in cl 7.6(2). The parties agree, and I accept, that the matters listed in cl 7.6(2) have been considered and assessed in the Geotech Report. Pursuant to cl 7.6 of the PLEP relating to servicing, before granting development consent, the consent authority must be satisfied of the matters listed in cl 7.7(2). The parties agree, and I accept, that the necessary utility services and supply are available and will be connected to the proposed development and that the need for public amenities or public services have or will be met (see p 68 of the Amended SEE). Pursuant to cl 7.30 of the PLEP relating to urban heat, development consent must not be granted to relevant development unless the consent authority is satisfied of the matters listed in cl 7.30(3). The parties agree, and I accept that, the proposed development incorporates the measures specified in cl 7.30(3) as set out in the ESD Report and pp 68-69 of the Amended SEE and that these matters are therefore satisfied. Penrith Development Control Plan 2014 The parties are satisfied that all relevant provisions of the Penrith Development Control Plan 2014 have been taken into consideration in the assessment and determination of the Amended Development Application. Remaining matters under s 4.15(1) of the EPA Act The matters listed in subss 4.15(1)(b), (c) and (e) are considered generally in the Amended SEE and there is no impediment to the approval of the Amended Development Application having regard to those matters. In respect of s 4.15(1)(d) of the EPA Act, as set out above, the Development Application as lodged was publicly exhibited between 5 and 19 December 2022. One written submission was received, which raised concerns regarding the commercial nature of the proposed use, the scale and nature of the proposed built form, traffic generation and traffic management, landscaping provision and availability of deep soil zones, tree and vegetation removal, parking provision and design, stormwater management, site topographic impacts and pedestrian safety. As also set out above at [8], the January 2024 Amendments were publicly notified from 17 to 31 January 2024. During this period, one written submission was received which raised the following issues: inadequate staff-to-student ratio; increased vehicle movements; inadequate information concerning the increased excavation, and impacts to neighbouring properties of that excavation; inadequate stormwater capacity; and inconsistency with a proposed expansion of the neighbouring primary school. The December 2024 Amendments were publicly notified from 23 December 2024 to 26 January 2025. During this period, one written submission was received which raised the following issues: traffic generation, access and parking; and adverse impacts to redevelopment opportunities for an adjacent property. I am satisfied that the written submissions have been taken into consideration in the assessment and

determination of the Amended Development Application.

Conclusion

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. 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. The Court notes that: The respondent, as the relevant consent authority, has approved under s 38(1) of the Environmental Planning and Assessment Regulation 2021, the amendment of Development Application No DA22/1065 in accordance with the following plans and reports: Statement of Environmental Effects prepared by Think Planners Pty Ltd dated 11 March 2025 Architectural Plans (Rev E) prepared by Baini Design dated 17 February Landscape Plans (Rev F) prepared by Outside In Design dated 7 March 2025 Stormwater Concept Plans (Issue 11) prepared by Deboke Engineering Consultants dated 11 March 2025 Civil Plans (Version 01) prepared by Deboke Engineering Consultants dated 12 February 2025 Stormwater Filtration Operation and Maintenance manual prepared by Ocean Protect dated 11 February 2025 Stormwater Report (Version 3) prepared by Deboke Engineering Consultants dated 18 February 2025 Environmental Noise Impact Statement (Rev E) prepared by Day Design Pty Ltd dated 18 February 2025 Geotechnical Investigation Report prepared by Geotechnical Consultants Australia dated 26 February 2025 Swept Path and Ground Clearance Assessment Plans prepared by Stanbury Traffic dated 7 March 2025, and Waste Management Plan prepared by Dickens Solutions dated 26 February 2025. Accessibility Compliance Report (Issue C) prepared by Access Link Consulting dated 8 March 2025 Registered Quantity Surveyor's Estimated Development Costs Report prepared by Australian Quantity Surveyors dated 10 March 2025 Ecologically Sustainable Design Report (Issue B) prepared by Senica Consultancy Group dated 11 March 2025 Plan of Management (Version 4) dated 13 March 2025 The applicant filed the amended plans and documents outlined above with the Court on 19 March 2025.

Orders

The Court orders that: The applicant is pay the respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, as a result of the amendment to the development application, in the agreed amount of \$5,000. The appeal is upheld. Development consent is granted to Development Application DA22/1065, as amended, for the demolition of existing structures, tree removal and construction of a childcare facility for 150 children with basement parking and associated works, on land legally described as Lot 579 in DP 12590, commonly known as 86 & 88 Sydney Street, St Marys, subject to the conditions in Annexure A. N Targett Commissioner of the Court

Annexure A 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. Decision last updated: 17 April 2025

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