



Land and Environment Court
New South Wales

Case Name: Penrith Lakes Development Corporation Ltd v Independent Planning Commission

Medium Neutral Citation: [2019] NSWLEC 1002

Hearing Date(s): Conciliation conference on 21 December 2018

Date of Orders: 8 January 2019

Decision Date: 8 January 2019

Jurisdiction: Class 1

Before: Walsh C

Decision: See orders at [17] below

Catchwords: DEVELOPMENT APPLICATION: modification application; additional fill material, conciliation conference; agreement between the parties; orders

Legislation Cited: Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017
Land and Environment Court Act 1979
State Environmental Planning Policy (Infrastructure) 2007

Category: Principal judgment

Parties: Penrith Lakes Development Corporation Ltd (Applicant)
Independent Planning Commission (Respondent)

Representation: Counsel:
Dr J Smith (Applicant)

Solicitors:
Minter Ellison (Applicant)
D Holm, Department of Planning & Environment

(Respondent)

File Number(s): 2018/310891; 2018/310892 & 2018/310893

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This judgment is concerned with three distinct, although related, appeals lodged under s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The appeals are based on deemed refusals and fall within Class 1 of the Land and Environment Court's jurisdiction. The appeals each relate to applications to modify a consent under s 4.55(2) of the EPA Act.

Background

- 2 Each of the existing consents are concerned with implementing the Penrith Lakes Scheme on land located at 89-151 Old Castlereagh Road, Castlereagh (the site). The existing consents apply to different somewhat smaller areas within the larger Penrith Lakes Scheme site and each involves the progressive extraction and then rehabilitation of land within the site.
- 3 As can occur in major developments of this kind, there are already a series of approved modifications to the three original Ministerial consents of relevance here. Below I list the three consents for which modification is sought, including reference to the now proposed modification application number, also linking to the relevant Court file reference:
 - DA 2 (granted 24 February 1987) – the current appeal refers to “DA 2 Mod 7” – the Court file reference is 2018/310892.
 - DA 3 (granted 27 June 1995) – the current appeal refers to “DA 3 Mod 6” – the Court file reference is 2018/310891.
 - DA 4 (granted 9 September 1998) - the current appeal refers to “Mod 11” of “DA 4 Mod 11” – the Court file reference is 2018/310893.
- 4 I rely on the affidavit dated 2 November 2018, of Timothy James Poisel, a solicitor representing the Applicant, for the following further particulars:
 - (1) The Applicant is an unlisted public company which is responsible for the rehabilitation operations on the Penrith Lakes Scheme site. The Applicant's activities on the site are regulated by four principal operational approvals, being development consents DA 2, DA 3, DA 4

(described above) and an Environment Protection Licence No. 2956. The original development consents permitted development (namely, by way of approval of subsequent and successive two year plans to be approved on a progressive basis) for the progressive extraction and then rehabilitation of land within the site. The submission and grant of sequential development applications (being DA 2, 3 and 4) allowed for the progressive release of designated extraction areas.

- (2) Virgin Excavated Natural Material (VENM) has been utilised (and its import permitted) since around 2012 in various quantities in accordance with aggregate approval volumes. VENM is required to fill areas where extraction has historically occurred on the site, and is specifically used for the purpose of final landform creation. The importation of fill to the site was required as there was not enough remaining material within the site, of adequate quality or characteristics, to be utilised as fill.
- (3) Additional fill is required in excess of current approved aggregate volumes to fulfil the landform requirements as set out in the Lakes 2 Year Plans for the Northern Lot 4 Urban Precinct which was approved on 20 October 2016. In DA 2, Condition 49C would require modification to allow additional aggregate volumes. In DA 3, it is Condition 41C which is particularly pertinent. In DA 4, it is Condition 48C. The changes are necessary to meet the increased flood planning level and rising grade requirements for urban landforms, rehabilitation of the site and geotechnical pre-load requirements set out in the most recent 2 Year Plan (Urban North Two Year Plan) relating to the site.
- (4) The productive utilisation of VENM on the site serves an essential and additional beneficial purpose as it provides a final destination for large quantities of fill which is otherwise generated and needs to be relocated from many projects and infrastructure sites across the Sydney Metropolitan area, including the NSW State Government's WestConnex Project. The continued relocation and use of this fill material is of fundamental importance to the ongoing operational efficiency and delivery of the Sydney Metro and the WestConnex Stage 3 Projects.

The conciliation conference

- 5 A conciliation conference was held between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) on 21 December 2018. I presided over the conciliation conference.
- 6 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. This decision involved the Court upholding the appeals and approving the modification applications under s 4.55(2) of the EPA Act in accordance with agreed conditions.

Decision

- 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. The parties have advised positively in regard to the question of the satisfaction of jurisdictional prerequisites. I summarise the particulars in the following paragraphs.
- 8 The first consideration (under 4.55(2)(a) of the EPA Act) is concerned with the question of "substantially the same development". I note the background to the existing consents - previously deemed approvals under Part 3A of the former EPA Act, and as such affected by the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (NSW) (Transitional EP&A Regulation). In accordance with advice from the parties, cl 3BA(6) of Schedule 2 of the Transitional EP&A Regulation provides that for modifications under section 4.55(2), the consent authority must be satisfied that the development is substantially the same development "*as last modified under section 75W*" of the EPA Act (rather than the original consent or approval as would be the case for a typical Part 4 modification under section 4.55(2)(a) as opposed to a transitional Part 3A modification). Clause 3BA(6) relevantly provides:
- (6) In the application of section 4.55 (1A) or (2) or 4.56 (1) of the Act to the following development, the consent authority **need only be satisfied** that the development to which the consent as modified relates is substantially the same development as the development authorised by the consent (**as last modified under section 75W**):
- (a) development that was previously a transitional Part 3A project and whose approval was modified under section 75W,
- (b) development that was taken to be an approved project pursuant to clause 8J of the *Environmental Planning and Assessment Regulation 2000* and whose consent was modified under section 75W.
- (emphasis added)
- 9 The consents are concerned with implementing the Penrith Lakes Scheme and involve the progressive extraction and then rehabilitation of land within the site. The three modification applications seek to increase the importation of VENM and/or ENM by five million tonnes across the entirety of the Penrith Lakes Scheme site. This is indicated as necessary to meet the increased flood planning level and rising grade requirements for urban landforms, rehabilitation

of the site and geotechnical pre-load requirements set out in the most recent 2 Year Plan (Urban North Two Year Plan). The changes do not alter the substance of the development. I am satisfied that the development to which the consents, as would be modified, relate are substantially the same development as the development authorised by the existing consents.

- 10 The parties have also advised of compliance in regard to s 4.55(2)(b) and s 4.55(2)(c) of the EPA Act in regard to consultation with authorities and notification. I am satisfied in this regard.
- 11 I note the further advice from the parties that there were a total of 42 submissions received during public exhibition, comprising seven submissions from public authorities and 35 submissions (including 26 objections) from the general public; the Applicant responded to the public submissions in a Submissions Report dated 28 September 2018.
- 12 The further advice is that on 7 December 2018, the Respondent issued letters to objectors:
 - (a) notifying them that the Applicant had commenced a Class 1 Application in relation to the Modification Application;
 - (b) indicating that the Respondent is considering reaching agreement with the Applicant to approve the Modification Application; and
 - (c) inviting further submissions made in relation to the Modification Application received by 20 December 2018.
- 13 Then on 12 December 2018, the Respondent issued letters to objectors notifying them of the conciliation conference and inviting any interested person to attend. And further on 18 December 2018, the Respondent issued letters to government agencies:
 - (a) notifying them that the Applicant had commenced a Class 1 Application in relation to the Modification Application;
 - (b) indicating that the Respondent is considering reaching agreement with the Applicant to approve the Modification Application;
 - (c) inviting further submissions made in relation to the Modification Application received by 20 December 2018; and
 - (d) notifying them of the conciliation conference and inviting any interested person to attend.

- 14 Mindful of s 4.55(2)(d) of the EPA Act, the consideration of submissions was a factor in the agreement of the parties to amend other existing conditions and include new conditions.
- 15 The parties are also of the view that, mindful of s 4.55(3) of the EPA Act, proper consideration has been given to the matters referred to in s 4.15(1) of the EPA Act.
- 16 As outlined above, 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. 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.
- 17 The Court orders:

Matter 2018/310891

- (1) The appeal be upheld.
- (2) Modification Application DA 3 MOD 6 lodged on 29 March 2018 to amend condition of consent 41C to permit the importation of an additional five million tonnes of Virgin Excavated Natural Material (**VENM**) to deliver the approved landform plans in respect of the development at the Penrith Lakes Scheme site on land located at 89-151 Old Castlereagh Rd, Castlereagh, 2749 is approved subject to the conditions set out in '**Annexure A**' attached hereto.

Matter 2018/310892

- (3) The appeal be upheld.
- (4) Modification Application DA 2 MOD 7 lodged on 29 March 2018 to amend condition of consent 49C to permit the importation of an additional five million tonnes of Virgin Excavated Natural Material (**VENM**) to deliver the approved landform plans in respect of the development at the Penrith Lakes Scheme site on land located at 89-151 Old Castlereagh Rd, Castlereagh, 2749 is approved subject to the conditions set out in '**Annexure A**' attached hereto.

Matter 2018/310893

- (5) The appeal be upheld.
- (6) Modification Application DA 4 MOD 11 lodged on 29 March 2018 to amend condition of consent 48C to permit the importation of an additional five million tonnes of Virgin Excavated Natural Material (**VENM**) to deliver the approved landform plans in respect of the

development at the Penrith Lakes Scheme site on land located at 89-151 Old Castlereagh Rd, Castlereagh, 2749 is approved subject to the conditions set out in '**Annexure A**' attached hereto.

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Peter Walsh

Commissioner of the Court

310891.18 DA 3 - Annexure A

310892.18 DA 2 - Annexure A

310893.18 DA 4 - Annexure A

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