

Land and Environment Court  
New South Wales

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Case Name: Maskeen & Co Pty Ltd v Blacktown City Council

Medium Neutral Citation: [2024] NSWLEC 1606

Hearing Date(s): Conciliation Conference on 16 September 2024

Date of Orders: 01 October 2024

Decision Date: 1 October 2024

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:  
(1) The appeal is upheld.  
(2) Development Application DA-23-00104 for the demolition of structures on the site, excavation, tree removal and construction of an 84 place single-storey childcare centre with basement car parking and associated works at 18 Nelson Street, Mt Druitt NSW 2770 is determined by the grant of consent subject to conditions contained in Annexure A.

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

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7  
Land and Environment Court Act 1979, s 34  
  
Blacktown Local Environmental Plan 2015, cll 4.3, 4.4, 5.10, 5.21, 7.2, 7.5, 7.7  
Environmental Planning and Assessment Regulation 2021, s 38  
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6  
State Environmental Planning Policy (Transport and

Infrastructure) 2021, Chs 2, 3, ss 2.48, 2.98, 2.120, 2.122, 3.3, 3.25, 3.26, Sch 3

Texts Cited: Blacktown City Council Community Participation Plan 2022 - 2024

Category: Principal judgment

Parties: Maskeen & Co Pty Ltd ACN 660 073 496 (Applicant)  
Blacktown City Council (Respondent)

Representation: Counsel:  
J Farrell (Applicant)  
M Fozzard (Respondent)

Solicitors:  
Fortis Law (Applicant)  
Bilias and Associates (Respondent)

File Number(s): 2023/217384

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the refusal of development application DA-23-00104 for single storey child care centre (the Proposed Development) at 18 Nelson Street, Mount Druitt legally described as Lot 8 in DP 23818 (the Site).
- 2 The matter was listed for hearing on 16 September 2024 and the proceedings commenced on site with a view of the neighbouring property at 16A Nelson Street. The DA was notified for the period between 9 and 23 March 2023. Two submissions were received during this time. The objector on Site raised 3 concerns:
  - (1) Stormwater;
  - (2) Dilapidation report; and
  - (3) Privacy.
- 3 After the site view, the parties sought and the Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC

Act) between the parties, which has been held on 16 September 2024. I presided over the conciliation conference.

- 4 Joint Expert Report prepared by the parties' expert stormwater engineers was filed on 4 September 2024. As part of the joint report process, the Applicant has provided the additional stormwater plans to the Respondent. The parties' experts agree that all contentions raised in the Amended Statement of Facts and Contentions filed 12 July 2024 (ASOFAC) have been resolved by the preparation of the additional stormwater plans and conditions of consent.
- 5 The relevant officer of the Respondent has formed the opinion that the additional stormwater plans are not required to be re-notified because the environmental impact of the amendments will be the same or lesser than the original proposal and that the impact on the owners and occupiers of adjoining land will not be detrimentally affected in any manner described in the relevant section of the Respondent's Community Participation Plan. In that regard, the parties explain that the 3 concerns raised by the objectors on site are addressed as follows:
  - (1) Stormwater is managed in accordance with the additional stormwater plans following the agreement reached between the parties' stormwater engineer experts where the stormwater is captured on site in an onsite stormwater detention tank and then discharged onto the street;
  - (2) The conditions of consent include a requirement to submit a dilapidation report prior to the issue of a construction certificate; and
  - (3) The visual privacy is protected because the windows of the adjacent property at 16A Nelson Street will not overlook any play area of the child care centre. The drawings indicate that the windows overlook the pitched roof of the building and shade awning.
- 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 appeal and granting development consent to the development application subject to conditions.
- 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 development application.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms applicable to a centre based child care facility in the Blacktown Local Environmental Plan 2015 (BLEP), Ch 3 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) and s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. The parties explained how the jurisdictional prerequisites have been satisfied in an agreed Jurisdictional Statement.
- 10 The DA was lodged with the consent of the owners of the Land (see Tab 15 of the Class 1 Application).
- 11 Compliance with the BLEP is addressed generally in the Statement of Environmental Effects dated March 2024 filed with Exhibit GEP-1 to the Affidavit of George Emmanuel Pavlis sworn 6 June 2024.
- 12 The Site is zoned R2 Low Density Residential under the BLEP and the Proposed Development is permissible with consent in the R2 zone.
- 13 A 9m height of building (HOB) development standard applies to the Site pursuant to cl 4.3 of the BLEP and the Proposed Development provides a complying maximum HOB of 5.6m as noted in Drawing A001 Rev D and A009-A010 Rev D.
- 14 Chapter 3 of the Transport and Infrastructure SEPP provides a planning regime for education establishments and child care facilities across the State. Section 3.25 of the Transport and Infrastructure SEPP provides that development consent must not be granted for the purposes of a centre-based child care facility in Zone R2 Low Density Residential if the floor space ratio (FSR) for the building on the site of the facility exceeds 0.5:1. The Proposed Development complies with this because an FSR of 0.36:1 is proposed as

noted in Drawing A001 Rev D. The Site is not subject to FSR controls under cl 4.4 of the BLEP.

- 15 The Site is not listed as a heritage item or located within a conservation area, nor are there any heritage items within close proximity to the Site (cl 5.10 of the BLEP).
- 16 The Site is not identified as being flood prone under cl 5.21 of the BLEP.
- 17 As required by cl 7.5 of the BLEP I am satisfied that essential services are available or that adequate arrangements have been made to make them available when required to the Site because there is an existing dwelling on the Site and the plans show the proposed provision of the essential services for the Proposed Development.
- 18 The Site is not identified on the design excellence map (cl 7.7 of the BLEP).
- 19 As a result of the proposed change of use from residential to a centre based child care facility, being a sensitive use, the Applicant relies on Preliminary Site Investigation Report (PSI) prepared by Geotechnical Consultants Australia (GSA) dated 22 August 2022 to satisfy the terms of s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. The PSI was filed with the Class 1 Application on 11 July 2023. The Court is satisfied that consent can be granted because the PSI confirms that following the site investigation undertaken on 8 August 2022 GSA did not observe any environmental issues, risks or exposures considered to be of significant concern. In addition, various conditions of consent have been agreed to address any potential contamination issues, and risks associated with the potential presence of any asbestos on Site.
- 20 Chapter 2 of the 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. The Proposed Development does not attract any of the Ch 2 provisions for the following reasons:
  - (1) The Site is not in the vicinity of electricity infrastructure that would require concurrence of the electricity supply authority, s 2.48, Transport and Infrastructure SEPP;

- (2) The Site is not adjacent to a rail corridor, s 2.98 Transport and Infrastructure SEPP;
  - (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) The Proposed Development is not identified as traffic generating development by Sch 3 of the Transport and Infrastructure SEPP. Accordingly, the proposal is not required to be referred to the Roads and Maritime Services (RMS) for comment, s 2.122 Transport and Infrastructure SEPP.
- 21 The proposed development is for a centre-based child care facility pursuant to s 3.3 of the Transport and Infrastructure SEPP. The parties explain that the provisions of Ch 3 of the Transport and Infrastructure SEPP are satisfied.
- 22 Section 3.26 of the Transport and Infrastructure SEPP sets out development standards for particular matters relating to a centre-based child care facility that, if complied with, prevents the consent authority from requiring more onerous standards for those matters. Section 3.26(2) of the Transport and Infrastructure SEPP 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. One such development standard relates to the minimum requirements for indoor or outdoor space: s 3.26(2)(b) Transport and Infrastructure SEPP. In relation to unencumbered indoor play space, the Proposed Development provides 3.58m<sup>2</sup> of unencumbered indoor play space per child which complies with the required minimum 3.25m<sup>2</sup> of unencumbered indoor play space per child. In relation to unencumbered outdoor play space, the Proposed Development provides 7.01m<sup>2</sup> of unencumbered outdoor play space per child which complies with the outdoor unencumbered space of 7m<sup>2</sup> of unencumbered outdoor play space per child.
- 23 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. I adopt the reasons given by the parties as set out in this judgment.

- 24 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.

**Notations:**

- 25 The Court notes that Blacktown City Council, as the relevant consent authority, has approved, under section 38(1) of the Environmental Planning and Assessment Regulation 2021, the amendment of Development Application DA-23-00104 to incorporate the documents listed below:

Drawing	Issue	Plan Title	Dated
<b>Amended stormwater plans</b>			
SW001	G	Cover Sheet	29.8.2024
SW010	G	Basement floor plan	29.8.2024
SW011	G	Basement floor plan	29.8.2024
SW020	G	Ground floor plan	29.8.2024
SW021	G	OSD tank plan and details	29.8.2024
SW022	G	Stormwater layout plan	29.8.2024
SW023	G	Stormwater layout plan – section A details	29.8.2024
SW024	G	Section B details	29.8.2024
SW025	G	Swale plan	29.8.2024
SW026	G	Pre and post development	29.8.2024
SW030	G	Roof plan notes and detail	29.8.2024

ER001	G	Erosion and sediment control plan	29.8.2024
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### Orders:

26 The Court orders:

- (1) The appeal is upheld.
- (2) Development Application DA-23-00104 for the demolition of structures on the site, excavation, tree removal and construction of an 84 place single-storey childcare centre with basement car parking and associated works at 18 Nelson Street, Mt Druitt NSW 2770 is determined by the grant of consent subject to conditions contained in Annexure A.

**E Espinosa**

**Commissioner of the Court**

**Annexure A** <http://www.caselaw.nsw.gov.au/asset/192467b377fc5571121cb040.pdf>

**Operational Plan of Management** <http://www.caselaw.nsw.gov.au/asset/192467bbac17a217d8a5e0bb.pdf>

**Architectural Plans (Rev D)** <http://www.caselaw.nsw.gov.au/asset/192467c438075317aa6c4b8e.pdf>

**Stormwater Plans (Rev G)** <http://www.caselaw.nsw.gov.au/asset/192467cf6dae8139ea71d9a0.pdf>

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