

AUSTRALIA / JUDGMENT

Foresti v Georges River Council

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Land and Environment Court New South Wales Medium Neutral Citation: Foresti v Georges River Council [2025] NSWLEC 1253 Hearing dates: Conciliation Conference 31 January 2025 Date of orders: 17 April 2025 Decision date: 17 April 2025 Jurisdiction: Class 1 Before: Targett C Decision: Proceedings 2024/353445 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application No. DA2024/0278, as amended, for the construction of pool balustrading, pool equipment area, treatment of southern boundary fence and future use of those works at 42 Castle Street, Blakehurst, is determined by the grant of consent subject to the conditions at Annexure A. Proceedings 2024/353501 The Court orders that:
 - (1) The appeal is upheld.
 - (2) Pursuant to section 8.25(3) of the Environmental Planning and Assessment Act 1979, the Respondent is directed to issue a Building Information Certificate in relation to the widening of the stairs from the al fresco space to the swimming pool area, swimming pool and spa shell in terms of the draft building information certificate annexed at Annexure B.
 - (3) The Building Information Certificate referred to in order (2) shall be issued by the respondent within 14 days of these orders. Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders BUILDING INFORMATION CERTIFICATE - conciliation conference – agreement between the parties – orders Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.10, 8.11, 8.25 Land and Environment Court Act 1979, ss 17, 34 Environmental Planning and Assessment Regulation 2021 s 38 Georges River Local Environmental Plan 2021, cl 4.3, 4.4, 6.1, 6.2, 6.3, 6.6, 6.9, 6.12 State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chp 6 ss 6.6, 6.7, 6.8, 6.9, 6.10 State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6 State Environmental Planning Policy (Sustainable Buildings) 2022 Category: Principal judgment Parties: Jessica Tomini Foresti (Applicant) Georges River Council (Respondent) Representation: Counsel: J Oldknow (Solicitor) (Applicant) S Lasker (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Georges River Council (Respondent) File Number(s): 2024/353445 2024/353501 Publication restriction: No

Judgment

COMMISSIONER: This judgment deals with the following two appeals: Proceedings 2024/353445 (DA Proceedings) – an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) against the deemed refusal of Development Application No. DA 2024/0278 (Development Application) seeking consents for future works, including balustrading, tiling, construction of a pool equipment area and treatment of the southern wall, at land identified as Lot C in Deposited Plan 367453, known as 42 Castle Street, Blakehurst (Subject Land). Proceedings 2024/353501 (BIC Proceedings) – an appeal pursuant to s 8.25(1) of the EPA Act against the deemed refusal of Building Information Certificate (BIC) Application 149D2024/0077 (BIC Application), being an application by the applicant in the BIC Proceedings to regularise unauthorised works including a swimming pool, spa and paved area at the 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).

Background

The Site is zoned R2 Low Density Residential under the Georges River Local Environmental Plan 2021 (GRLEP). The Subject Land is owned by the applicant. On or about 22 March 2022, a swimming pool, spa, paved area, stairs leading from the alfresco area to the swimming pool, and southern boundary fence were constructed at the Subject Land without development consent (Unauthorised Works). On 18 January 2023, the applicant submitted an initial Building Information Certificate seeking to regularise the Unauthorised Works. This initial application was refused by the respondent on 4 December 2023. On 26 June 2024, the applicant lodged the Development Application. On 13 August 2024, the applicant lodged the BIC Application the subject of the BIC Proceedings which sought to regularise the Unauthorised Works (excluding the southern boundary fence). On 24 September 2024, the applicant commenced the: BIC Proceedings, being within the time period specified in s 8.25 of the EPA Act; and DA Proceedings, being within the time period specified in ss 8.10 and 8.11 of the EPA Act. On 31 January 2025, the parties participated in a s 34 conference in respect of the two matters, which was adjourned on multiple occasions. I presided over the conciliation conference. During the course of the conciliation process, the applicant provided additional information to the respondent and agreed to amend the Development Application as follows: relocate the OSD tank; increase the landscaped area; provide further information in relation to stormwater management; and provide additional information in relation to the fencing details for the southern boundary fence, including an amendment to the proposed height and materials, (the Amended Development Application). Following the provision of this further information and the proposed amendment of the Development Application, the parties reached agreement as to the resolution of the two proceedings. The agreement reached is for: the respondent to approve the Amended Development Application; and a BIC to be issued in respect of the following works: widening of the stairs from the al fresco area to the pool area; and swimming pool and spa shell. The parties agree that the works the subject of the Amended Development Application, in conjunction with the works to be authorised by the BIC, resolve the respondent's concerns in relation to the

Unauthorised Works. The parties provided signed s 34 agreements in the DA Proceedings and BIC Proceedings on 20 March 2025 with accompanying jurisdictional statements. Following the parties addressing my queries regarding jurisdiction, judgment was reserved on 1 April 2025. DA Proceedings To make orders in accordance with the parties' agreement in the DA Proceedings, I must be satisfied that the decision to grant development 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). As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions for the reasons that follow. Owners consent The applicant is the registered proprietor of the Subject Land and provided owners' consent to the Development Application (see Class 1 Application in the DA Proceedings, tab 2). State Environmental Planning Policy (Sustainable Buildings) 2022 A BASIX Certificate no. A447145_03 dated 22 May 2024 has been prepared as part of the Development Application (see Class 1 Application in the DA Proceedings, tab 6). State Environmental Planning Policy (Biodiversity and Conservation) 2021 Chapter 6 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP) applies to the Amended Development Application as the Subject Land is located within the Georges River Catchment. The parties agree that the matters set out in ss 6.6 to 6.10 of the BC SEPP have been considered. The following documents have been provided in support of the Amended Development Application that are relevant to Ch 6 of the BC SEPP: Stormwater Maintenance Schedule, prepared by United Consulting Engineers (undated); Letter prepared by United Consulting Engineers regarding Stormwater Management Plans dated 17 January 2025; and Amended Stormwater Plans (Rev D), prepared by United Consulting Engineers dated 17 January 2025, (collectively, the Stormwater Documents). In determining the Amended Development Application, and having regard to the agreement of the parties, the Stormwater Documents, and Agreed Conditions (see for example, condition 9), I am satisfied that the proposed development is not likely to have an adverse environmental impact and that the relevant matters set out in ss 6.6 to 6.10 have been considered and satisfied as required. State Environmental Planning Policy (Resilience and Hazards) 2021 Section 4.6(1) of 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 Supplementary Statement of Environmental Effects prepared by Plan Urban dated 17 January 2025 (Supplementary SEE), confirms that this jurisdictional matter was considered as part of the assessment for an earlier development application (No. DA 2020/0409) for which development consent was granted on 26 April 2021 relating to the Subject Land (2021 Development Consent), and it was found at that time the Subject Land was suitable for the proposed residential development. Accordingly, the parties submit, and I accept that s 4.6 of the RH SEPP is satisfied and that the land will be suitable for its proposed use, given that the Subject Land has only been occupied and used as a dwelling house since it was constructed in accordance with the 2021

Development Consent. Georges River Local Environmental Plan 2021 The Subject Land is zoned R2 Low Density Residential under the Georges River Local Environmental Plan 2021 (GRLEP). Accordingly, dwelling houses are permissible with consent. The parties agree, and I accept, that the proposal is for works and the use of works which are ancillary to a dwelling house. I have had regard to the zoning objectives which are extracted below: To provide for the housing needs of the community within a low density residential environment. To enable other land uses that provide facilities or services to meet the day to day needs of residents. To promote a high standard of urban design and built form that enhances the local character of the suburb and achieves a high level of residential amenity. To provide for housing within a landscaped setting that enhances the existing environmental character of the Georges River local government area. The Amended Development Application does not propose any changes to the height of the existing dwelling or floor space ratio. Clauses 4.3 and 4.4 of the GRLEP are therefore not engaged in respect of this application. Pursuant to cl 6.1 of the GRLEP relating to “acid sulfate soils”, the Subject Land is identified as Class 5 and is within the vicinity of Class 1 soils located at the waterline. The parties agree, and I accept that, there are no works proposed below the water level such that the requirements of cl 6.1 of the GRLEP are not engaged. Pursuant to cl 6.2 relating to “earthworks”, the consent authority must consider specified matters in deciding whether to grant development consent. The parties agree, and I accept, that the proposed earthworks: are limited to accommodating the below ground stormwater absorption trench; and are unlikely to result in any impacts upon the structural integrity of adjoining properties or the future development potential of the Subject Land. Having regard to the Supplementary SEE, Stormwater Documents and Agreed Conditions (see for example, Conditions 9 and 23), I am satisfied that the matters listed in cl 6.2(3) of the GRLEP have been considered in the determination of the Amended Development Application. Pursuant to cl 6.3 of the GRLEP relating to “stormwater management”, the consent authority must be satisfied of the matters listed in cl 6.3(2) in deciding whether to grant development consent. The Stormwater Documents included in the Amended Development Application confirm that: the proposal has been designed to encourage water permeability; an absorption system has been adopted to drainage the runoff from impervious surfaces; and there are no adverse impacts from stormwater runoff on adjoining properties. Having regard to the Stormwater Documents and Agreed Conditions, I am satisfied of the matters listed in cl 6.3(2) of the GRLEP. The parties agree that cl 6.6 of the GRLEP relating to “foreshore scenic protection area” applies to the Subject Land. Pursuant to cl 6.6(3), the consent authority must be satisfied of specified matters in deciding whether to grant development consent. The parties agree, and I accept that, given the limited scope of the works proposed by the Amended Development Application, the development facilitates the relevant matters listed in cl 6.6(3) and will maintain the scenic amenity of the Georges River Foreshore. Pursuant to cl 6.9 of the GRLEP relating to “essential services”, the parties agree, and I accept, that all required services are available at the Subject Land. Pursuant to cl 6.12 of the GRLEP relating to “landscaped areas in certain residential and conservation zones”, the parties agree that a minimum landscaped area of 25% of the total site area is required. The parties further agree, and I accept, that the landscaped area proposed by the Amended Development Application equates to 29.7% and therefore complies with this clause. Georges River Development Control Plan 2021 The parties agree, and I accept that, the

provisions of the Georges River Development Control Plan 2021 that are relevant to the Amended Development Application have been considered and addressed in the assessment of the application. Remaining matters under s 4.15(1) of the EPA Act In relation to s 4.15(1)(b) of the EPA Act, the parties agree that the proposed development will not have a significant impact on the natural or built environment (see p 19 of the Supplementary SEE). In relation to s 4.15(1)(c) of the EPA Act, the parties agree that the Subject Land is suitable for the proposed development (see p 19 of the Supplementary SEE). In relation to s 4.15(1)(d) of the EPA Act, the Development Application was notified by the respondent prior to the conciliation conference. One objection was received in response to the notification, primarily raising issues regarding the height and construction of the boundary fence, as well as stormwater and flooding issues. Further, the Court heard from that objector at the site view associated with the s 34 conference. I am satisfied that the written and oral submission received have been taken into consideration in the assessment and determination of the Amended Development Application. In relation to s 4.15(1)(e) of the EPA Act, the parties agree that the proposed development is in the public interest (see p 19 of the Supplementary SEE). BIC Proceedings To make orders in accordance with the parties' agreement in the BIC Proceedings, I must be satisfied that the decision to make orders directing the respondent to issue a BIC in the terms proposed by the parties is a decision that the Court can make 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. On hearing an appeal in connection with a BIC under s 8.25(1) of the EPA Act, pursuant to s 8.25(3), the Court may do any one or more of the following – direct the council to issue a building information certificate in such terms and on such conditions as the Court thinks fit, revoke, alter or confirm a notice to supply information, make any other order that it considers appropriate. I am satisfied that the respondent should be directed to issue a BIC in the terms proposed by the parties on the basis that: The applicant is the registered proprietor of the Subject Land upon which the works the subject of the BIC Application were carried out and provided consent to the BIC Application when it was lodged with the respondent. The works the subject of the BIC proposed to be issued comprise works to, or ancillary to, a dwelling house. Dwelling houses are permissible with consent in the R2 Low Density Zone under the GRLEP, being the zone in which the Subject Land is located. The additional stormwater information provided in respect of the BIC Application (in conjunction with the additional information and further works forming part of the Amended Development Application) address the respondent's concerns regarding inadequate stormwater provision. The parties agree, and I accept, that for the purposes of s 8.25(3)(a) of the EPA Act: the "paved area" component of the BIC Application should be excluded from the Building Information Certificate issued on the basis that the applicant has agreed to remove that paving to facilitate further landscaping (for which consent is sought under the Amended Development Application); and the BIC Application encompassed the widening of the stairs from the alfresco space to the pool area (despite not being specifically listed in the BIC Application form) on the basis that the widening of the stairs was included in the plans submitted with the BIC Application and referred to as forming part of the Unauthorised Works on p 6 of the Planning Report prepared by Plan Urban dated 21 May 2024 submitted as part of the BIC Application and did not comprise an amendment

to the application. I accept the parties' submission that there is no impediment to the Court directing the respondent to issue the BIC on the terms proposed having regard to the additional information provided by the applicant.

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 DA Proceedings and BIC Proceedings in accordance with the parties' decision. The Court notes that the respondent, as the relevant consent authority, has approved, under s 38 of the Environmental Planning and Assessment Regulation 2021, the applicant's amendment of Development Application No. DA2024/0278, to include the documents specified below: TAB DOCUMENT DATE 1. Amended Architectural Plans (Rev M), prepared by David DeChiara

- Site Plan – 2024-1 – Sheet 1/7
- Section & BASIX – 2024-1 – Sheet 2/7
- Areas – 2024-1 – Sheet 3/7
- Landscape Plan – 2024-1 – Sheet 4/7
- Site Management Plan – 2024-1 – Sheet 5/7
- Safety Notes – 2024-1 – Sheet 6/7
- Notification Plan – 2024-1 – Sheet 7/7 28 February 2025 2. (Amended) Structural Inspection Certificate, prepared by Pace Structural 25 November 2024 3. Supplementary Statement of Environmental Effects, prepared by Plan Urban 17 February 2025 4. Stormwater Maintenance Schedule, prepared by United Consulting Engineers • 5. Letter prepared by United Consulting Engineers Pty Ltd re Stormwater Management Plans 17 January 2025 6. Amended Stormwater Plans (Rev D), prepared by United Consulting Engineers Pty Ltd
- D01 – Site and Roof Drainage Plan
- D02 – Drainage Details Page
- D03 – Impervious Area Plan 17 January 2025 As set out at [14], the above documents were provided to the Court on 20 March 2025.

Orders

Proceedings 2024/353445 The Court orders that: The appeal is upheld. Development Application No. DA2024/0278, as amended, for the construction of pool balustrading, pool equipment area, treatment of southern boundary fence and future use of those works at 42 Castle Street, Blakehurst, is determined by the grant of consent subject to the conditions at Annexure A
Proceedings 2024/353501 The Court orders that: The appeal is upheld. Pursuant to section 8.25(3) of the Environmental Planning and Assessment Act 1979, the Respondent is directed to issue a

Building Information Certificate in relation to the widening of the stairs from the al fresco space to the swimming pool area, swimming pool and spa shell in terms of the draft building information certificate annexed at Annexure B. The Building Information Certificate referred to in order (2) shall be issued by the respondent within 14 days of these orders. N Targett Commissioner of the Court Annexure A Annexure B

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