

AUSTRALIA / JUDGMENT

Rothshire Pty Ltd v Georges River Council

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Land and Environment Court New South Wales Amendment notes Medium Neutral Citation: Rothshire Pty Ltd v Georges River Council [2025] NSWLEC 1251 Hearing dates: Conciliation conference held on 8 April 2025 Date of orders: 17 April 2025 Decision date: 17 April 2025 Jurisdiction: Class 1 Before: Espinosa C Decision: In relation to the DA Appeal 2024/390006, the Court orders:

- (1) The appeal is upheld.
 - (2) Development Application DA2022/0624 for demolition works and completion and future use of a partially constructed two-storey dwelling, swimming pool, retaining walls, landscaping and site works at 1174 Forest Rd, Lugarno NSW is determined by the grant of consent subject to the conditions in Annexure A. In relation to the BIC Appeal 2024/390016, the Court orders:
 - (1) The appeal is upheld.
 - (2) The Respondent is directed to issue a building certificate for the existing building structural elements (including foundations, retaining walls, concrete slabs, structural masonry walls, timber wall framing, timber roof framing and swimming pool structure) on the land at 1174 Forest Rd, Lugarno (Lot A in DP328702)("the Land") within 7 days after the date that the Respondent is satisfied of the following matters:
 - (a) The existing retaining wall on the northern boundary of the Land has been altered to be as shown on the plan at Annexure B; and
 - (b) Either:
 - (i) Any physical alterations to the existing building on the Land required by DA2022/0624 have been carried out; or
 - (ii) An occupation certificate has been issued for the building on the Land under DA2022/0624.
- Catchwords: DEVELOPMENT APPEAL – residential development – alterations and additions – conciliation conference – agreement between the parties – orders BUILDING INFORMATION CERTIFICATE APPEAL – orders
- Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 6.22, 6.25, 8.7, 8.25 Land and Environment Court Act 1979, ss 34AA, 34 Environmental Planning and Assessment Regulation 2021, ss 23, 38 Georges River Local Environmental Plan 2021, cl 4.3, 4.4, 4.4A, 6.1, 6.2, 6.3, 6.6, 6.9, 6.10 State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 6, ss 6.6, 6.7, 6.8, 6.9, 6.10 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021, ss 4.3, 4.6, 4.8 State Environmental Planning Policy (Sustainable

Buildings) 2022, s 4.2 State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.48 Texts Cited: Georges River Stormwater Management Policy NSW Government, Contaminated Land Planning Guidelines National Construction Code Category: Principal judgment Parties: Rothshire Pty Ltd ACN 620 622 344 (Applicant) Georges River Council (Respondent) Representation: Counsel: B Salon (Solicitor)(Applicant) J Hewitt (Solicitor) (Respondent) Solicitors: ZBA Lawyers (Applicant) HWL Ebsworth (Respondent) File Number(s): 2024/390006 (DA Appeal) 2024/390016 (BIC Appeal) Publication restriction: Nil

Judgment

COMMISSIONER: This judgment deals with two related Class 1 Appeals regarding a dwelling at 1174 Forest Road, Lugarno legally described as Lot A DP 328702. (the Site). There is some development history regarding development on the Site from 2015 to date detailed in the Statement of Facts and Contentions (SOFAC) from par 33, filed 6 December 2024 in relation to the first Class 1 Appeal which was commenced pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) being an appeal against the refusal of Development Application DA2022/0624 seeking consent for alterations and additions to the existing building (Proposed Development) on the Site (DA Appeal). The second Class 1 Appeal is pursuant to s 8.25 of the EPA Act being an appeal against the refusal of Building Information Certificate 149D2023/0005 (BIC) sought to regularise the partially completed residential dwelling at the Site (BIC Appeal). The Site is currently occupied by a partly completed two-storey dwelling with a swimming pool in the rear yard and associated retaining walls. The DA Appeal seeks consent to complete the dwelling and for the future use and occupation of the completed dwelling. The amendments to the Proposed Development agreed to by the parties include amended and additional architectural drawings, amended landscape drawings, amended stormwater drawings, amended driveway drawings, a certificate of structural adequacy, a swimming pool compliance certificate and revised detailed site investigation and a revised remedial action plan. The proposed conditions of consent together with the amended and additional material provided by the Applicant, and the agreement reached in the BIC Appeal, proceedings 2024/00390016 have resolved the Respondent's contention in the DA Appeal SOFAC sufficiently to reach settlement of the matter by agreement pursuant to s 34 of the Land and Environment Court Act 1979 (LEC Act). The parties explain that the works to be done under the Proposed Development the subject of proceedings 2024/390006, once consent is granted, are to mesh with and complete the requirements for the issue of the BIC the subject of proceedings 2024/00390016, which the parties have agreed can also be resolved by an agreement pursuant to s 34 of the LEC Act. The parties rely on Joint Expert Reports prepared by Town Planners, Environmental Consultants and Engineers, in each of the proceedings and filed with the Court. The Court arranged a conciliation conference between the parties under s 34AA(2) of the LEC Act in relation to the DA Appeal and under s 34 of the LEC Act in relation to the BIC Appeal, which has been held on 8 April 2025. I presided over the conciliation conference. 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 in relation to the DA Appeal, granting development consent to the development

application subject to conditions. In relation to the BIC Appeal, the decision involved the Court directing the Council to issue a BIC subject to conditions. 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. The parties' decision involves the Court exercising the function in relation to the DA Appeal under s 4.16 of the EPA Act to describe the function, such as to grant consent to the development application, and in relation to the BIC Appeal under s 8.25 of the EPA Act to direct the Council to issue a BIC. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance: in the BIC Appeal to be the terms of s 6.25 of the EPA Act to issue a BIC. In the DA Appeal to be the terms of Ch 6 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP) relating to development on land in a regulated catchment, s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) regarding the contamination status of the Site, and various provisions of the Georges River Local Environmental Plan 2021 (GRLEP). The parties explained how the jurisdictional prerequisites have been satisfied in jurisdictional statements provided to the Court. The registered proprietor of the Site is Golden King Assets Pty Ltd (ACN 165 015 645) (the Owner). The Applicant is authorised in writing to lodge the BIC Application with the Respondent by the owner of the land (s 6.22(b), EPA Act) and a copy of that letter dated 5 November 2024 was provided to the Court. Owner's consent was also provided in relation to the DA Appeal pursuant to s 23(1) of the Environmental Planning and Assessment Regulation 2021 and a copy of that letter dated 5 November 2024 was provided to the Court. BIC Appeal Pursuant to s 6.25(1) of the EPA Act, a building information certificate is to be issued by a council only if it appears that—

- (a) there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under this Act or the Local Government Act 1993—
- (i) to order the building to be repaired, demolished, altered, added to or rebuilt, or (ii) to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or (iii) to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or
- (b) there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings. Given the broad discretion conferred by s 6.25(1) (a) and (b), there is no jurisdictional impediment to determination of the appeal and issue of a BIC. Notwithstanding this, for completeness, the relevant circumstances are: In response to Contention 1 of the Respondent's Statement of Facts and Contentions in Reply (Reply), the agreed position of the experts was that the existing building does not comply with the National Construction Code (NCC). However, it is understood that the issues arise from the works being incomplete, and they will comply if works carried out under related development consent in proceedings 2024/390006, noting that those works will need to

comply with the NCC as a matter of law; In response to Contention 2 of the Reply, the development will be consistent with the development consent to be issued in 2024/390006. In response to Contention 3 of the Reply, as noted above, owner's consent has been provided. In response to Contention 4-7, 9-11 of the Reply, considered as a notional development application (and when considered in conjunction with the works and use approved by the consent to be issued in 2024/390006), the development application would be supported (for the reasons set out in the jurisdictional statement for 2024/390006). In response to Contention 8 of the Reply, the agreed position of the building surveyors is that structural adequacy during construction and structural adequacy at present have both been addressed by engineering information provided in support of the BIC. We note for completeness that an updated engineering certificate (which addresses inconsistencies identified by Respondent's SOFAC in Reply) is part of the amended application in proceedings 2024/390006. On the basis of those proposed conditions being ordered and noting the broad discretion in s 6.25(1)(a) of the EPA Act, Respondent does not propose to make any such order or take any such proceedings found in s 6.25(1)(a) of the EPA Act and as such the BIC can be issued as proposed. DA Appeal The Proposed Development was placed on public notification by the Respondent between 13 July 2023 and 27 July 2023 and no submissions were received in that period, however one submission was received in December 2023. Following amendments, the Proposed Development was again put on public notification from 28 March 2024 and 18 April 2024 and no submissions were received during that period. However, the neighbours on Forest Road were present at the commencement of the proceedings at the Site view and made oral submissions regarding the impacts on their privacy and the contamination of the Site. The Site is zoned R2 Low Density Residential pursuant to the GRLEP. The objectives and permissible development are set out in the Land Use Table, noting that the Proposed Development, being development for the purposes of a dwelling house, is permitted with consent. The Proposed Development does not propose any change to the height of the dwelling as constructed which has a reduced level (RL) of 66.93, as depicted in Proposed Long Section Drawing DA-A-505 Rev 3 dated 25 February 2025, and does not exceed the maximum building height as determined by the Height of Buildings Map of 9 metres (m) pursuant to cl 4.3 of the GRLEP. The maximum floor space ratio (FSR) as shown on the Floor Space Ratio map is 0.55:1 (cl 4.4, GRLEP). Clause 4.4A provides particular controls for dwelling houses on specific land, but application of these specific controls is the same as the general FSR for the site (cl 4.4A(2), GRLEP). The Proposed Development does not exceed the permitted FSR. The Site is mapped as containing Class 5 acid sulfate soils, however the Proposed Development does not propose works to which cl 6.1 of the GRLEP applies. The Proposed Development includes earthworks as defined in the Dictionary to the GRLEP, cl 6.2 of the GRLEP. In determining the DA Appeal, cl 6.9 of the GRLEP requires that the consent authority must be satisfied that essential services, including stormwater drainage, are available or that adequate arrangements have been made to make them available when required. The outstanding essential service to be addressed in the DA Appeal was stormwater drainage, because the Applicant initially relied on an easement and infrastructure on other privately owned land, however this has been

resolved. The parties rely on their civil engineer experts, Brett Morris and David England, and the expert opinions given in their Joint Expert Report filed 21 March 2025 (Stormwater JER) in particular their agreement in the Stormwater JER at pars 14-18 which refers to the stormwater plans prepared by H&M providing for a stormwater drainage system which drains by gravity to the street drainage system without impact on any neighbouring properties. As the Site is located within a regulated catchment, namely the Georges River Catchment, the terms of Ch 6 of the Biodiversity and Conservation SEPP apply. In deciding whether to grant consent to the Proposed Development, being development on land in a regulated catchment, the consent authority must be satisfied of certain matters identified in ss 6.6 (Water quality and quantity), 6.7 (Aquatic ecology), 6.8 (Flooding), 6.9 (Recreation and public access) and 6.10 (Total catchment management) of the Biodiversity and Conservation SEPP. These matters were expressly contended in the DA Appeal SOFAC at Contention 2 and were considered by the parties' civil engineering experts. The civil engineering experts agree at par 9 of the Stormwater JER that the amended stormwater plans provide for "a coherent drainage system for the development which drains to the existing street drainage without impact on any neighbouring properties" and at par 11, will have a "neutral or beneficial effect for the quality of the water being discharged from the site ultimately entering the Georges River". They conclude at par 12 that the "proposed stormwater drainage system satisfied the requirements detailed in Chapter 6, Division 2 of the Biodiversity and Conversation SEPP". Similarly, in determining the DA Appeal, the consent authority must be satisfied of certain matters relating to stormwater under cl 6.3(2) of the GRLEP. These matters include certain the requirements of the Georges River Stormwater Management Policy published on 18 December 2023 (cl 6.3(2)(b), GRLEP). The civil engineering experts expressly addressed this requirement in their joint report at pars 20-25 and they agree that the Proposed Development satisfies the policy. The parties have agreed to several conditions of consent which cement compliance with these matters, including various onsite stormwater detention related restrictions and covenants on title. A consent authority must not consent to the carrying out of any development unless it is satisfied of certain matters identified in s 4.6(1) of the Resilience and Hazards SEPP, specifically:

- (a) it has considered whether the land is contaminated, and
- (b) 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
- (c) 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. In addition, the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines (Guidelines) where the land on which development for a purpose referred to in Table 1 to the Guidelines is known to have been carried out: s 4.6(4)(b) Resilience and Hazards SEPP. Those Guidelines include

"agricultural/horticultural activities" (p 12, Guidelines). On consideration of such a report, the consent authority may require a detailed site investigation to be prepared if warranted: s 4.6(3). Prior to these proceedings, there was reason to believe the Site was contaminated due to previous unlawful building and construction work and due to the previous use of the Site for "agricultural/horticultural activities", which is a purpose referred to in Table 1 of the Guidelines. Filed with the Class 1 Application are a detailed site investigation (DSI) and a remedial action plan (RAP) and in the course of the DA Appeal, the Applicant commissioned a further DSI and RAP. The parties' environmental consultant experts, Ehsan Zare and Jason Clay, agree in their Joint Expert Report filed 11 March 2025 (Contamination JER) that the further DSI adequately identifies that the Site is contaminated and the nature of that contamination: Contamination JER, pars 10-11. For the purpose of satisfying s 4.6 of the Resilience and Hazards SEPP, I note that the experts agree that appropriate conditions of consent can secure the following obligations: Contamination JER pars 13, 14 and 15: The areas of the Site which are "garden areas" (i.e. those areas that are not handstand or the existing building) can be made suitable for the proposed residential use if the actions described in the updated RAP (at Attachment D to the Contamination JER) are carried out: Contamination JER par 12; The areas of the Site which are not "garden areas" are not proposed to be disturbed in the carrying out of the development for the purpose of the Proposed Development, and do not make the land unsuitable for the proposed use, though they do recommend certain preventative actions to be taken: Contamination JER par 15. The Site is within the "Foreshore Scenic Protection Area" on the Foreshore Scenic Protection Area Map pursuant to cl 6.6(2) of the GRLEP and as such: the consent authority must be satisfied that the Proposed Development could facilitate a number of matters listed in cl 6.6(3) of the GRLEP; the consent authority must not grant consent to the Application unless it exhibits design excellence, having regard to the matters set out in cl 6.10(4) and (5) of the GRLEP; In that regard, Design excellence was expressly addressed in the by the parties' town planning experts, Naomi Roberts-Thomson and Renee Arrowsmith, in their Joint Expert Report filed 11 March 2025, (Planning JER) at p 6 and is satisfied by the amended plans. The specific issues of concern for the Respondent were the effect of significant privacy screens and the trafficable use of the north-west first storey terrace, and were said not to exhibit design excellence. These features have been removed; and the Proposed Development has been amended to formally seek consent for the carrying out of Remediation Work because certain remediation work, being "category 1 remediation work" as defined in s 4.3 of the Resilience and Hazards SEPP, requires development consent in circumstances identified in s 4.8 of the Resilience and Hazards SEPP. Those circumstances relevantly include work carried out in an area or zone which are classified in effect as "scenic area or scenic protection" under an environmental planning instrument: s 4.8(e)(ix) of the Resilience and Hazards SEPP. In relation to cl 6.6 of the GRLEP, the parties explain that the current physical features of the Site (which does not contain significant rock formations, vegetation, and habitat for native flora and fauna) and the nature of the Proposed Development (which does not propose significant changes to the topography and features of the Site, and does not affect the health and longevity of canopy vegetation outside the Site)

mean that the Court can be satisfied the Proposed Development facilitates the matters identified in cl 6.6(3)(a)-(e) and (g). The remaining issue, cl 6.6(3)(f) dealing with the minimisation of the impact on the views and visual environment, including views to and from the Georges River, foreshore reserves, residential areas and public places, is expressly addressed by the Planning JER at p 6. The town planning experts agree that the requirement of cl 6.6(3)(f) of the GRLEP is met by the removal of the 1.5m high privacy screen on the eastern façade and northern façade. In light of the above, the Court can be satisfied that the terms of s 4.6 of the Resilience and Hazards SEPP have been satisfied for the following reasons: There has been adequate consideration of whether the land is contaminated: s 4.6(1)(a), The Court can be satisfied that the Site can be made suitable for its intended residential use notwithstanding its contamination: s 4.6(1)(b); Remediation will be carried out prior to the occupation and use of the Site: s 4.6(1)(c); A DSI has been prepared: s 4.6(3); and Consent has been sought for all Category 1 remediation work which is required for the use of the Site: s 4.8. The Respondent provided Ausgrid with written notice of the Proposed Development on 4 July 2023 as required by s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) because development consent is sought for development carried out within 5m of an exposed overhead electricity power line (s 2.48(1)(b)(iii) Transport and Infrastructure SEPP). On 6 July 2023, Ausgrid provided a response, supporting the Proposed Development subject to conditions which have been incorporated into the agreed conditions of consent. The State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX SEPP) applies to the determination of the Proposed Development as the application of the BASIX SEPP is saved by s 4.2(1)(a) of the State Environmental Planning Policy (Sustainable Buildings) 2022. A BASIX certificate was filed with the Class 1 Application for the Proposed Development and the amendments to the Proposed Development have not resulted in a requirement for a new certificate. 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 I have set out in this judgment. 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: In relation to the DA, the Court notes: The Georges River Council as the relevant consent authority, has approved under s 38(1) of the Environmental Planning and Assessment Regulation 2021 the Applicant amending Development Application DA2022/0624 in accordance with the following documents: Item Date Amended Architectural Drawings (2122-301A), prepared by Rothshire, rev 3:

- Cover Sheet, sheet number DA-A-000;
- Existing Site Plan, sheet number DA-A-050;
- Existing Ground Floor Plan, sheet number DA-A-101;
- Existing First Floor Plan, sheet number DA-A-102;

- East and West Elevation, sheet number DA-A-201;
- South and North Elevation, sheet number DA-A-202;
- Existing Long Section, sheet number DA-A-205;
- Existing Cross Section, sheet number DA-A-206;
- Ground Floor Demolition, sheet number DA-A-302;
- First Floor Demolition Plan, sheet number DA-A-303;
- Proposed Site Plan, sheet number DA-A-350;
- Proposed Ground Floor Plan, sheet number DA-A-401;
- Proposed First Floor Plan, sheet number DA-A-402;
- Proposed East and West Elevation, sheet number DA-A-501;
- Proposed North and South Elevation, sheet number DA-A-502;
- Proposed Long Section, sheet number DA-A-505;
- Proposed Cross Section, sheet number DA-A-506;
- Shadow Diagram, sheet number DA-A-507;
- Door and Window Schedule, BASIX, sheet number DA-A-601;
- Colours and Finishes Schedule, sheet number DA-A-701;
- Frontage Elevation, sheet number DA-A-801; and
- Erosion & Sediment Control Plan, sheet number DA-A-900. 25 Feb 2025 Landscape Drawings (250031), prepared by Dapple Designs, rev C:
- LP 01 Sheet 1 of 3, Landscape Plan
- LP 01 Sheet 2 of 3, Plant List / Specification
- LP 01 Sheet 3 of 3, Details 6 Mar 2025 Stormwater Drawings (2425-218) prepared by H&M Consultancy, Rev 2:
- Sheet 1 of 4 – Concept Stormwater Drainage Project Information Sheet;
- Sheet 2 of 4 – Proposed Site Coverage and Roof Drainage Plan;
- Sheet 3 of 4 – Site Drainage Plan; and

- Sheet 4 of 4 – Details. 20 Mar 2025 Certificate of Structural Adequacy (Ref 2122301A-COSA-001-V3) 5 Jan 2025 Certificate of Swimming Pool Compliance (REF: 2122301A-COSP-002-V1) prepared by Avreek AI Zuhairi 5 Jan 2025 Detailed Site Investigation (E2529-1), prepared by GCA 10 Mar 2025 Remedial Action Plan (E2535-1), prepared by CGA 10 Mar 2025 Notice of Determination DA2022/0624, Georges River Council 12 Jun 2024 Amended Driveway Drawings (2122301A), prepared by Rothshire, Rev A: -Driveway Plan
- Section B-B & C-C 5 Feb 2025

Orders:

In relation to the DA Appeal 2024/390006, the Court orders: The appeal is upheld. Development Application DA2022/0624 for demolition works and completion and future use of a partially constructed two-storey dwelling, swimming pool, retaining walls, landscaping and site works at 1174 Forest Rd, Lugarno NSW is determined by the grant of consent subject to the conditions in Annexure A. In relation to the BIC Appeal 2024/390016, the Court orders: The appeal is upheld. The Respondent is directed to issue a building certificate for the existing building structural elements (including foundations, retaining walls, concrete slabs, structural masonry walls, timber wall framing, timber roof framing and swimming pool structure) on the land at 1174 Forest Rd, Lugarno (Lot A in DP328702)("the Land") within 7 days after the date that the Respondent is satisfied of the following matters: The existing retaining wall on the northern boundary of the Land has been altered to be as shown on the plan at Annexure B; and Either: Any physical alterations to the existing building on the Land required by DA2022/0624 have been carried out; or An occupation certificate has been issued for the building on the Land under DA2022/0624. E Espinosa Commissioner of the Court Annexure A (352855, pdf) Annexure B (461038, pdf)

Amendments 30 April 2025 - Pursuant to r 36.17 of the Uniform Civil Procedure Rules 2005 (the "slip rule"), amendment is made to Order 2(a) for the matter of BIC Appeal 2024/390016 and attach the relevant plans as 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. Decision last updated: 30 April 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/196378115bc4dbb4f634c1b7>

CASE PAGE <https://chat.esheria.ai/case-law/australia/rothshire-pty-ltd-v-georges-river-council-2025>

Prepared on 30 October 2026 · Esheria