



Land and Environment Court  
New South Wales

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Case Name: Australian United Investment Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1405

Hearing Date(s): 20-22 May 2024

Date of Orders: 17 July 2024

Decision Date: 17 July 2024

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:  
(1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, arising from the amended application contained in the Notice of Motion dated 20 May 2024.  
(2) The appeal is dismissed.  
(3) Development Application DA2023/0172 seeking development consent for the demolition of existing site improvements and construction of a multi dwelling housing development comprising 26 dwellings with associated carparking, landscaping and infrastructure at Nos 1, 5, 5A and 7 Gladys Avenue, Frenchs Forest, is refused.  
(4) All exhibits are returned except for Exhibits A, D, E, F, G, M and 6.

Catchwords: DEVELOPMENT APPLICATION: Multi dwelling development in R3 Medium Density Residential zone – whether consistent with desired future character - consent in an environment of uncertainty is

problematic - no power to consider development that is not the subject of the development application

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15  
Land and Environment Court Act 1979, s 39  
Environmental Planning and Assessment Regulation 2021, s 38  
Warringah Local Environmental Plan 2011, cl 4.3, 4.4, 8.5

Cases Cited: Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117  
Ku-ring-gai Council v Bunnings Properties Pty Ltd [2019] NSWCA 28

Texts Cited: Warringah Development Control Plan 2011  
Apartment Design Guide 2015  
Northern Beaches Community Participation Plan 2019  
National Construction Code 2022

Category: Principal judgment

Parties: Australian United Investment Pty Ltd (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
R O’Gorman-Hughes (Applicant)  
A Stafford (Respondent)

Solicitors:  
Maddocks (Applicant)  
Northern Beaches Council (Respondent)

File Number(s): 2023/123323

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** Multi dwelling housing development is proposed on four lots in Gladys Avenue, a cul-de-sac in the Sydney suburb of Frenchs Forest.
- 2 On 2 March 2023, Development Application DA2023/0172 was lodged by the Applicant in these proceedings, Australian United Investment Pty Ltd, seeking development consent for the demolition of existing site improvements and

construction of a multi dwelling housing development comprising 30 dwellings with associated carparking, landscaping and infrastructure at Nos 1, 5, 5A and 7 Gladys Avenue, Frenchs Forest.

3 The proposed development comprises:

- Demolition of existing dwellings and ancillary structures,
- Tree removal,
- Construction of a three-storey, multi dwelling housing development comprising: 30 dwellings (1 x 1 bedroom, 5 x 2 bedroom and 24 x 3 bedroom), and basement carparking for 45 cars, 15 motorbikes, and 68 bicycles,
- New internal driveway and driveway crossing,
- Landscaping, and
- Stormwater infrastructure

4 The Respondent, the Northern Beaches Council, notified the DA in accordance with the Northern Beaches Community Participation Plan between 8 March and 22 March 2023.

5 On 17 April 2023, as the DA was not otherwise determined, the Applicant filed an appeal in Class 1 of the Court's jurisdiction under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

6 The Applicant initially sought to amend the DA by Notice of Motion filed with the Court on 15 May 2023, returnable at the commencement of proceedings on 20 May 2024.

7 However, on 20 May 2024 the Applicant sought to move the Court, by Notice of Motion under an affidavit in the name of Mr Blake Dyer, prepared 19 May 2024, containing further amended architectural plans, stormwater concept plans, landscape plans and other documents.

8 The Respondent opposed the proposed amendments due to the prejudice resulting from late amendments, received over the course of a weekend, that were described as piecemeal, and which were not accompanied by a schedule of amendments describing the precise extent and nature of changes.

9 While the Court noted the late issue of the proposed amendments, the Court observed that the degree of amendment between those documents under the

affidavits dated 15 and 19 May, when understood in the context of the amendments between the development the subject of the Class 1 appeal and those documents served on the Respondent on 15 May 2024, could be dealt with in the three days for which the matter was listed.

- 10 The Court granted the Applicant leave to rely upon amended plans and other documents and, exercising the functions of Northern Beaches Council as the relevant consent authority, the Court under s 39(2) of the *Land and Environment Court Act 1979*, approved the amending of the DA (the DA as amended) in accordance with s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) by the following document:
  - (1) Schedule of amendments, dated 14 May 2024 (Exhibit B)
  - (2) Schedule of fixtures and appliances dated 8 May 2024 (Exhibit C)
  - (3) Amended architectural plans (Exhibit D)
  - (4) Amended BASIX Certificate (Exhibit E)
  - (5) Amended Stormwater Plans (Exhibit F)
  - (6) Amended Landscape Plans (Exhibit G)
- 11 The Court directed the Applicant to pay the Respondent's costs thrown away as agreed or assessed, pursuant to s 8.15(3) of the EPA Act, and also directed that experts confer further on those amendments at [10] and reduce to writing in the form of supplementary joint reports, to be filed prior to the Court's resumption the following day.
- 12 However, at the commencement of the second day of the hearing, the Applicant advised the Court that further amended plans were expected sometime during the morning.
- 13 As a consequence of the further amendments, experts who had been directed to further confer on the amended plans at [10] were unable to file and serve supplementary joint reports during the morning.
- 14 The Applicant sought to tender further amended architectural plans sometime after midday on the second day of the hearing, appended to the supplementary joint expert report of the urban designers. The Respondent opposed the tender given the late notice of amendments.

- 15 The amendments were not accompanied by a schedule of amendments other than a summary contained in the supplementary joint report which proved incomplete. Furthermore, joint conferencing of the experts was ongoing, and other documents such as amended landscape plans, a survey overlay plan were said to be in production for completion at a time unknown.
- 16 I declined to grant leave to the Applicant to rely upon the amended architectural plans that would have the effect of further amending the development application before the Court. I record here that counsel for the Applicant, sought instructions and proceeded to press the Court to reconsider its decision, absent a schedule of amendments, further amended landscape plans or supplementary joint expert reports that would assist the Court in its consideration of the development the subject of the development application.

### **The site and its context**

- 17 The site, by aggregation of the lots comprising it, forms a U-shape, with a total area of 3523m<sup>2</sup>.
- 18 The four lots comprising the site are described as follows:
- (1) 1 Gladys Avenue, Frenchs Forest (Lot 19 in Deposited Plan 25713),
  - (2) 5 Gladys Avenue, Frenchs Forest (Lot 171 in Deposited Plan 849591),
  - (3) 5A Gladys Avenue, Frenchs Forest (Lot 172 in Deposited Plan 849591),  
and
  - (4) 7 Gladys Avenue, Frenchs Forest (Lot 16 in Deposited Plan 25713).
- 19 In the centre, or void within the U-shape site, is the site at 3 Gladys Avenue that has an area of 1066m<sup>2</sup>, and a 24.39m wide frontage to Gladys Avenue, on which there is currently detached dwelling house.
- 20 Together, the lots comprising the site accommodate 48 trees with a further 5 trees located in the road reserve.
- 21 The site is located within Precinct 05, Frenchs Forest Road West Neighbourhood, in the Frenchs Forest Town Centre, according to Figure 31, subclause 5.2.1 of Section G9 of the Warringah Development Control Plan 2011 (WDCP) which contains objectives and controls in respect of this area.

- 22 The site is also located within what is known as Site G on the Key Sites Map of the Warringah Local Environmental Plan 2011 (WLEP).
- 23 The site is also located within an area identified in the WLEP as R3 Medium Density Residential, in which multi dwelling housing development is permitted with consent, where consistent with the following objectives:
- 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 ensure that medium density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.
  - To ensure that medium density residential environments are of a high visual quality in their presentation to public streets and spaces.

### **Public submissions**

- 24 In response to notification of the DA at [1] fifteen public submissions were received, with concerns that include traffic and parking, pedestrian safety, tree removal and environmental impact.
- 25 At the onsite view, the owner of No 3 Gladys Avenue provided an oral submission, initially represented by another who spoke on their behalf.
- 26 The primary submission by the representative of the owner of No 3 Gladys Avenue relates to the nature of offers to purchase the site from the owner, and the isolation of the site by the proposed development.
- 27 Counsel for the Applicant sought clarification from the owner of No 3 Gladys Avenue on the chronology of discussions as to purchase. Notes of the lengthy exchange that ensued are agreed by the parties (Exhibit 6).

### **Site consolidation**

- 28 The Respondent contends not so much that the site at No 3 Gladys Avenue is isolated by the form of consolidation proposed, but that the site, absent No 3 Gladys Avenue, fails to conform to the objectives and requirements of the WDCP.

- 29 Site consolidation is dealt with under Part G, Section 5.2.6 of the WDCP, with the following objectives and requirements:

**“5.2.6 Site consolidation**

Objectives

- A. To ensure that the size of new allotments caters for a variety of dwelling and household types and permits adequate solar access, areas for open space, landscaping and car parking.
- B. To ensure that new development achieves the Desired Future Character and Character Statement for the Precinct.

Requirements

1. Proposed lots must have dimensions to enable the siting and construction of a buildings [sic] that:
    - 1.1 Protect any natural site features;
    - 1.2 Address the street;
    - 1.3 Minimise the impact on neighbours' amenity including access to sunlight, daylight, privacy and views;
    - 1.4 Provide usable outdoor open space;
    - 1.5 Provide activities for relaxation, recreation, outdoor dining and children's play areas; and
    - 1.6 Provide convenient pedestrian, bicycle, motor vehicle access and parking.
  2. Shop top housing, residential flat buildings, multi dwelling housing and attached dwellings must have a street frontage.
  3. Should a development result in an isolated lot, the applicant must demonstrate that the isolated lot is capable of being reasonably developed without detracting from the character of the surrounding area.”
- 30 While the U-shape of the site presents two frontages to the curving alignment of Gladys Avenue, the Respondent submits the presentation of the built form is akin to a side elevation, and not a front presentation that is required to conform to Requirement 1.2 above.
- 31 Next, the sites shape means private open space to the townhouses are generally smaller than is desirable. In particular, Building B and C present frontages to an internal passageway addressing the ‘back fence’ of No 3 Gladys Avenue. Openings to those townhouses look directly towards No 3 Gladys Avenue that may or may not be developed in the future to realise the potential of the R3 zone. If so, the proposed development would create privacy

and acoustic impacts that must be considered, whether or not the site at No 3 Gladys Avenue transitions to the higher density character.

- 32 However, similar impacts on adjoining properties to the south and east cannot be properly considered while survey information depicting the location of dwellings, window openings, uses and the like are missing from documents before the Court.
- 33 The Applicant acknowledges that while a four-storey residential flat building on No 3 Gladys Avenue is depicted on architectural plans with FSR expressed as 2.18:1, such development is unlikely to be approved.
- 34 Instead, when the Court considers the objectives at Section 5.2.6 of the WDCP, the proposal represents variety in dwelling types that permits adequate solar access, areas for open space, landscaping and car parking, and achieves the Desired Future Character and Character Statement for the Precinct when balanced against the higher density development anticipated in the Frenchs Forest Town Centre.
- 35 As such, the controls at Section 5.2.6 of the WDCP should be applied flexibly, in accordance with s 4.15(3A) of the EPA Act.
- 36 In the alternative, the Court would find attempts by the Applicant to acquire the site at No 3 Gladys Avenue to have been reasonable.
- 37 On the final day of the hearing, the Applicant tendered an amended design report (Exhibit M) that included, at p 16, a revised concept plan. At 1.20pm on that day a further plan was provided with setbacks marked (Exhibit S).
- 38 While Mr Haynes, planning expert for the Applicant, is of the view the concept plan would result in 3 hours of sunlight being received to private open space of Townhouses 1-8, the Respondent's planning expert, Ms Rebecca Englund, observes the concept plan does not show private open space, pathways or other features that would assure the Court such a concept would achieve appropriate amenity for future residents, and in any event it would appear to demonstrate more generous setbacks to the concept plan on No 3 Gladys Avenue than is proposed in the proposed development.



## **Form and massing of development**

- 39 The Respondent contends the footprint of the proposed development is excessive, resulting in adverse impacts for amenity of future residents of the proposed development, of neighbouring properties, on the natural environment, and is inconsistent with the desired future character of the locality.

### *Desired Future Character*

- 40 A stated at [21], the site is within Precinct 05: Frenchs Forest Road West Neighbourhood. The character statement for this area is at Part G9, Section 5.2.1 of the WDCP, and reads:

#### **“Character Statement**

The Frenchs Forest Road West Neighbourhood will provide a contextually appropriate interface to surrounding low density residential areas, whilst increasing housing diversity and activating Frenchs Forest Road West with a range of office, health and medical uses to support the town centre and Hospital. The precinct will be characterised by:

High quality medium rise apartment buildings, up to 6 storeys to create a new urban residential character to the north of Frenchs Forest Road West.

Mixed use buildings with a range of ground floor uses, located directly opposite the town centre on Frenchs Forest Road West to create an active and engaging streetscape.

Non-residential ground floor uses along Frenchs Forest Road West, including medical and health related uses, supporting the Northern Beaches Hospital.

A pedestrian focused street at Frenchs Forest Road West to deliver a high quality streetscape on Frenchs Forest Road West.”

- 41 The Applicant places emphasis on the meaning of “contextually appropriate interface” to submit that such a form of words supports the scale and density of the proposed development as an appropriate transition between the R2 zone to the north and the R3 zone that incorporates the site, and land fronting Frenchs Forest Road West, to which a greater height standard of 17.5m applies.
- 42 The desired future character is also found in development for which consent has been granted in Gladys Avenue, including boarding house and seniors housing development on the opposite side of the street, in the R2 zone.
- 43 Next, the housing diversity sought by the character statement at [40] must include townhouse development, that counsel for the Applicant describes as the ‘missing middle’, which I understand to refer to low-rise or mid-rise medium density development.

- 44 Mr Haynes believes the single dwelling character of the R2 zone is likely to remain over time, and so the existing character is more relevant to consider than any future character.
- 45 However, those properties to the south of the subject site are intended to have zero-side setback when redeveloped because of Control 1, Section 5.2.3 that requires development with a frontage to Frenchs Forest Road West to adopt a nil side setback to ensure a continuous frontage to the street.
- 46 Given the desired future character of these sites within the Frenchs Forest Road West area, the location of the site between the existing character of the R2 zone, and the medium and high density character of the area to the south, the setbacks shown in the amended DA are appropriate.
- 47 Mr Haynes' written evidence is that where a change in character is anticipated by the planning controls, as is the case in the R3 zone, the future character is most relevant to consider and that as the zone transitions from low to higher density, there may be less privacy available to low density properties. Regardless, Mr Haynes states simply that privacy measures will provide an appropriate level of privacy and amenity to adjoining properties, now and into the future.
- 48 Furthermore, the proposed built form is within the height and floor space ratio standards applicable to the site under cll 4.3 and 4.4 of the WLEP, and is within the building height plane at Part G9, Section 5.2.3 of the WDCP.
- 49 Finally, the setbacks are also reasonable when the distinct character of multi dwelling housing is understood, such that living spaces are generally located at the ground floor level, unlike residential flat buildings where living spaces and balconies are often elevated, giving rise to overlooking and the like.

### *Setbacks*

- 50 Notwithstanding Mr Haynes' opinion as to setbacks, the planning experts disagree as to precisely what minimum side and rear setbacks apply to the development under the WDCP.

- 51 Ms Englund relies on Section 5.2.3, Control 3 of the WDCP to require a minimum setback of 6m for the first 2 storeys, as the proposed development is adjacent to R2 Low Density Residential and RE1 Public Recreation zones.
- 52 Instead, the side and rear setbacks proposed range from 4.5m-6m but for where the basement, and other landscape features such as retaining walls, walkways and covered terraces encroach within this setback.
- 53 That said, the experts agree that a 4.5m minimum side and rear setback may be acceptable given the part-two, part-three storey bulk and scale proposed, subject to certain amendments sought by Ms Englund.
- 54 According to Ms Englund, landscaping currently shown within this zone is inadequate. There is insufficient area for functional private open space and meaningful landscaping. For instance, trees nominated in this area are shown planted within 1m of the boundary, and with a canopy spread likely to encroach within 2m of the proposed dwellings, that would permit removal of such trees.
- 55 The issue is exacerbated by the limited setback of the basement from the boundary that encroaches into setbacks that are to be landscaped, as is required by Part G9, Section 5.2.8, Control 4, of the WDCP. In so doing, the basement does not maximise deep soil planting in accordance with Part G9, Section 5.2.10, Control 3, of the WDCP.
- 56 In particular, where the architectural plans initially showed tandem car parking below townhouses 09 – 21, the number of car parking spaces has now reduced, without a reduction in the basement footprint that is given over to storage that Ms Englund considers excessive.
- 57 Similarly, Ms Englund observes basement ceiling heights of up to 4.2m extends the horizontal distance required of stairs connecting parking with townhouses internally, further contributing to the basement footprint.
- 58 Mr Haynes does not consider the 6m setback sought by Ms Englund to be relevant or appropriate as the site is separated from the R2 zone by Gladys Avenue, and the proposed development is not for the purpose of a residential flat building, to which Section 5.2.3, Control 3 is directed.

- 59 Neither does Mr Haynes consider the alternative basement car park diagram at p 12 (Exhibit 2) suggested by Ms Englund to be worthy of any weight as it is proposed without the benefit of civil or traffic engineering, architectural expertise or consultants in access, or the National Construction Code.
- 60 Additionally, Mr Haynes argues that the basement is entirely concealed below ground, including those portions of the basement that extend beyond the footprint of the built form above. Those areas that do extend are capable of supporting landscape planting over.
- 61 I accept Mr Haynes' argument that Gladys Avenue serves to separate the site from R2 land such that a setback of 4.5m is appropriate, and not the 6m cited by Ms Englund.
- 62 However, I also note here the basement setback to the eastern boundary is depicted with a dimension of 2m (Drawing DA100) and that on Section A (Drawing DA200), the basement in this location is shown extending above the natural ground surface, in the location of paved terraces to the rear of Townhouses 09-21.
- 63 In the 2m setback beyond these terraces, the landscape plans show a strip of planting, presumably 1.1m wide, and a strip identified on Stormwater Plans to be a 900mm wide drainage swale within a concrete channel.
- 64 Relatedly, I note here that the arboricultural expert on behalf of the Respondent, Mr Torin Calf, considers the deep soil in this location to be compromised by the width available between the basement and the boundary, that does not allow for a spread of replacement canopy trees across the site.

### **Urban design**

- 65 In this matter, experts in urban design were engaged by the parties to assist the Court. Mr Rohan Dickson was engaged on behalf of the Applicant and Mr Dominic Chung, an employee of the Respondent, appeared on behalf of the Respondent. The experts conferred in the preparation of a joint expert report marked Exhibit 4.
- 66 The joint expert report prepared by the experts contains no areas of disagreement, and includes a statement that the experts agree that if the full

set of co-ordinated architectural drawings, re-produced in Annexure B of Exhibit 4, incorporating changes identified by the experts were produced, the contentions dealt with by the experts “might be capable of being, in their opinion, to be [sic] suitably addressed.”

- 67 However, within this statement, it is also clear that the experts agree the DA as amended exhibits design excellence, a matter to be considered in accordance with cl 8.5 of the WLEP. A statement to this effect is at p 6 of the joint expert report on urban design. However, not only does the statement lack reasons, grounds or argument for reaching such an opinion of satisfaction, no response is provided to the particular provisions of design excellence in cl 8.5 of the WLEP. Furthermore, in response to a question from the Court, it became evident that experts had formed their opinion without the benefit of information I consider material to forming such an opinion.
- 68 In particular, the urban design experts arrive at their conclusion without a clear position as to how the proposal addresses the relationship of the development with existing development at No 9 Gladys Avenue in terms of separation, setbacks, amenity and urban form, being a matter of a kind that may be reasonably expected to be considered by cl 8.5(3)(d)(iv) of the WLEP.
- 69 This may be because the architectural drawings in Annexure B of Exhibit 4 are limited to floor plans of development proposed on the site itself, without any attempt to depict surrounding development, and lack any elevations or sections. Furthermore, there are no shadow diagrams, sun eye diagrams or representations of 3-dimensional form.
- 70 Neither does the survey submitted with the Class 1 Application (Exhibit A, Tab 7) show levels to adjoining properties, nor the location of windows or other features of the adjoining dwelling at No 9 Gladys Avenue. However, when asked, Mr Dickson and Mr Chung concur that the overlooking likely to occur on the eastern terrace of Townhouse TH21 does not compromise design excellence when the relationship of the development with the neighbouring site is considered in terms of separation and amenity.
- 71 The experts confirm they did not consult the Architectural Design Report at Exhibit A Tab 16 (Design Report) in arriving at their agreed position. I note here

that the Design Report in Exhibit A is not relied on in these proceedings, as it relates to the development as proposed in the Class 1 application.

72 However, as it is the Design Report that addresses design excellence the Respondent suggested an amended Design Report be prepared overnight to address the DA as amended (Amended Design Report) (Exhibit M).

73 The Amended Design Report is notable, in my view, for two reasons. Firstly, when it is read with the relationship of the proposed development and the existing development at No 9 Gladys Avenue in mind, the Site Analysis at Section 2.0 of the amended Design Report does not depict the existing development at No 9 Gladys Avenue. Instead, a different development, suggestive of townhouse development, appears on a presumably hypothetical site that appears to amalgamate Nos 9-15 Gladys Avenue. The existing condition is not shown.

74 This may be because of the statement that appears in the amended Design Report in respect of cl 8.5(3)(d)(iv) is as follows:

“The relationship of the proposed development to its other existing development is not a critical item as the area has been recently rezoned and is intended on being uplifted in a similar manner as this site. The Frenchs Forest Place Strategy 2041 outlines this major shift.

The proposal still achieves the density and planning strategies as determined within the CHROFI masterplan of this area. The proposal has a much smaller height than allowable, ensuring there is great solar access to neighbouring sites. The separation and setbacks from future neighbouring developments is generous given the medium density development opposed to high density apartments. The site to the south also will be mainly fronting Forest Road West (as all controls are trying to create a street wall with activated road frontages) which allows for a very substantial separation to this site.”

75 The conclusion of the urban design experts as to the relationship of the proposed development with the existing development at No 9 Gladys Avenue appears to be without the aid of levels of No 9 Gladys Avenue and, on the basis of the Amended Design Report, without consideration of the existing development which is dismissed as “not a critical item”. Instead, the Amended Design Report appears to consider some hypothetical development that is neither the existing development, nor a proposed development on that neighbouring site.

- 76 That said, as shown by Preston CJ in *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117 ("*Toga*"), it is not sufficient for the Court to form an opinion as to whether the proposed development does or does not exhibit design excellence by having regard to the evidence of the urban design experts alone. Instead, cl 8.5 of the WLEP prescribes a framework for deciding whether a development exhibits design excellence (*Toga*, at [70]) and the Court must have regard to the particular terms of, and answer the particular questions raised by, the matters in the design excellence provisions (*Toga*, at [75]).
- 77 While Mr Haynes' statement at [47] is that the proposal affords appropriate privacy and amenity to adjoining properties now and into the future, this statement is likewise unassisted by levels in the property at No 9 Gladys Avenue.
- 78 I note here the Requirements for Plans at Schedule A of the Court's Practice Note on Class 1 Residential appeals provides that survey plans are to indicate topography (spot levels, contours) including that of adjoining properties where relevant, and that, where privacy is an issue in the proceedings, the location of windows to the adjoining property. Neither levels or the location of windows are marked.
- 79 The upshot of all this is that the architectural plans show an elevated terrace or balcony to Townhouse TH21 with a reduced level of RL 156.300. The closest RL to this terrace that is on the boundary shown RL 155.045, resulting in a terrace 1,255mm above ground line and around 550mm below an 1800mm fence on the boundary. Clearly this would result in a sightline to No 9 Gladys Avenue for anyone standing on the terrace to the east of TH21. For reasons stated at [69]-[70], it is not certain what such a sightline would take in, other than to observe the deep setback to the frontage of No 9 Gladys Avenue would appear to be suited to principal private open space given its size and north-facing orientation when compared to the smaller setback to the south of the dwelling.
- 80 In response, the Applicant proposes a condition of consent at Condition 24(p) to lower the ground floor, level 1 and roof of Townhouse 21 by 200mm, to be achieved without additional excavation. However, it is my considered view that

such a lowering would still result in a sightline, taken 1500mm above the lower RL that is 750mm or so above the boundary fence, with a direct view into the frontage, and towards the dwelling at No 9 Gladys Avenue.

- 81 Landscape screen planting is proposed in the narrow setback between the terrace at TH21, and No 9 Gladys Avenue, similar to that described at [62]-[63] but which I will now address in more detail.

## **Landscape character**

### *Whether minimum landscape area is appropriate*

- 82 The experts agree there is no minimum landscaped area requirement set out in the WDCP, however Ms Englund's opinion is that as multi dwelling housing is of similar scale to residential flat buildings to which an area of 45% landscape area by Section 5.2.8 of the WDCP is directed, a similar target is reasonable to expect.
- 83 Part G9, Section 5.2.8 of the WDCP provides as follows:

#### **"5.2.8 Landscaped area**

##### **Objectives**

A.To ensure that new development achieves the Desired Future Character and Character Statement for the precinct.

B. To retain existing trees, encourage new tree plantings and maximise deep soil areas.

C. To ensure communal open space minimises amenity impacts to adjoining neighbours.

##### **Requirements**

1. For all residential flat building developments, landscaped area is to be at least 45% of the site area.

2. Development must retain and protect any significant trees on the site and adjoining sites. Any tree removal will require offset planting at a ratio of 2 to 1.

3. Canopy trees must be planted within the front setback of residential flat buildings.

4. Building setbacks are to be landscaped and generally free of any structures, basements, car parking or site facilities other than driveways, mail boxes, garbage storage areas and fences.

5. Communal open space shall be located to minimise impact on adjoining neighbours' amenity including privacy and noise.

Note: To measure the area of landscaped area:



- a) Driveways, paved areas, roofed areas, tennis courts, car parking and stormwater structures, decks etc. and any open space areas with a dimension of less than 2m are excluded from the calculation;
- b) The water surface of swimming pools and impervious surfaces which occur naturally such as rock outcrops are included in the calculation;
- c) Landscaped areas must be at ground level (finished); and
- d) The minimum soil depth of land that can be included as landscaped area is 1m"

- 84 Furthermore, when Ms Englund applies the agreed side and rear setbacks of 4.5m to the site, and likewise adopts Control 4 at Section 5.2.8, requiring building setbacks to be landscaped and generally free of any structures, basements, car parking or site facilities other than driveways, mail boxes, garbage storage areas and fences, she again arrives at a figure of 45% of the site as landscaped area.
- 85 While the proposal asserts a landscaped area of 43% of the site, Ms Englund notes this area does not discount those impervious areas greater than 2m in width that are to be excluded by notation a) of Part G9, Section 5.2.8 of the WDCP, such as the private open space initially shown adjacent to Townhouse 15, the passageway that runs adjacent to the boundary with No 3 Gladys Avenue alongside Townhouses 12-17, and the area identified to contain rainwater tanks and clotheslines serving townhouses 22-25 that is likely to be paved by future residents given the nature of its use.
- 86 Mr Haynes' written evidence considers landscaped area requirements for other types of development, such as terraces, seniors housing for which a landscaped area of 30% is required, and for residential development shown on the Landscaped Area and Bushland Setting Map at Part D1 of the WDCP, of 40%.
- 87 Additionally, while the Apartment Design Guide (ADG) is not relevant to multi dwelling housing development, the landscaped area required by objective 3E-1 of the ADG is just 7% of the site, with a minimum dimension of 6m for residential flat buildings.
- 88 In any event, when an assessment of the merits of the proposal is undertaken, the private open space, landscaped areas, setbacks, privacy and landscaping

within the site are appropriate for an area in transition to a higher density form of development.

*Whether desired landscape character is achieved*

- 89 The Respondent also contends the proposed development should be refused because it results in unacceptable impacts on existing canopy trees, and fails to provide adequate compensatory planting consistent with the Desired Future Character of Frenchs Forest contained at Section G9(2) of the Warringah Development Control Plan 2011 (WDCP) that states:

“Frenchs Forest is an urban forest, with green streets and new open space, making a feature of the forest that has always shaped the site's story.

Frenchs Forest will provide character and great places; it will foster health and connected communities, attract families and encourage new business. It will set the benchmark for health and wellness, liveability and prosperity in a new urban centre.”

- 90 It is commonly held that 48 canopy trees stand on the site today. Of the 39 trees proposed to be removed as a result of the development, 23 are identified as trees suitable for retention for more than 10 years and worthy of being a material constraint to development.
- 91 Furthermore, 10 of the trees proposed to be removed are assessed by the Applicant's arborist to have a high retention value, recorded in Appendix D of Exhibit 3, and Exhibit J to include a Prickly-leaved Paperbark, three lemon-scented gums, a cabbage tree palm, a coastal cypress pine, a Sydney Red gum, a red mahogany, and two Queensland brush box.
- 92 Initially, the DA as amended also proposed the removal of 4 canopy trees from the adjoining property at 3 Gladys Avenue, and a group of trees identified as “G1”.
- 93 However the Amended Notice of Motion at [10], for which leave was granted, sought to further amend the description of the DA as amended, by reference to there being no removal of vegetation proposed from the site at No 3 Gladys Avenue, which I understand to be a reference to Trees T8, T9 and T10, and to the hedge known as G1.

- 94 While initially contested, the Respondent ultimately accepts that G1 is located on the property of 3 Gladys Avenue, and so works are not proposed or required on the adjoining property.
- 95 It is in this approximate location that the landscape plans at Exhibit G show a continuous hedge of Lilly Pilly planted on the eastern side of the boundary between Buildings B and C, and No 3 Gladys Avenue.
- 96 In her oral evidence, Ms Catriona Mackenzie, arborist and landscape expert for the Applicant, opines that the tree species nominated in the landscape plans at Exhibit G must be “massaged” from those identified on Landscape drawing LS501.3 so as to be better suited to the site.
- 97 For example, while a lemon-scented gum is currently shown to the west of Townhouse TH15, it is preferable for this tree to be a smaller, medium sized feature tree that is deciduous. Such changes were identified by Ms Mackenzie at pars 45-46 of the joint expert report of the landscape experts (Exhibit 3), but is now proposed to be the subject of a condition of consent that requires a change in species, notwithstanding the Court’s observation that four versions of the landscape plans had been prepared since the date of filing of Exhibit 3, on 16 April 2024.
- 98 At the invitation of the Applicant, the Court directed the landscape experts to confer on the revised species selections (Exhibit Q) that were later incorporated in the Applicant’s without prejudice conditions of consent, filed with the Court on 29 May 2024.
- 99 Mr Calf agrees with the proposed change in species in the development. However, his oral evidence is that it is the canopy spread across the site that is the big issue, and not individual species selections. The Desired Future Character for the area is one that makes a feature of the urban forest that relies on tree canopy extending beyond the street frontage, as a forest extends beyond its edge. Such character is not achieved.
- 100 To achieve such an outcome, Mr Calf acknowledges the replacement ratio of 2:1 trees may not be achievable on the site, but nevertheless believes 9

additional canopy trees are able to be accommodated on the site, in locations shown by him on Figure 1 (Exhibit 10, p 4).

- 101 The Applicant submits that controls seeking the removal of single dwellings in favour of medium and high density development that, to Frenchs Forest Road West Road, permits nil setbacks, is incapable of making a feature of urban forest.
- 102 Ms Mackenzie, likewise, regards it as unreasonable to assume the transition to medium density to support the same number or size of trees as in a low density residential setting.
- 103 Where trees are proposed over basement structure, Ms Mackenzie believes the depth of 1000mm proposed equates to 10m<sup>3</sup> of soil volume suited to small trees that would grow to 6-8m in height, with a 4m canopy spread.
- 104 In particular, the setback of the basement from the eastern boundary to Building B and C is not sufficient to support canopy trees, but for Townhouse TH15 that can support a canopy tree of 12m in height.
- 105 In her written evidence, Ms Mackenzie believes that the proposed arrangement of built form on the site is suited to 14 canopy trees being planted, achieving a height of around 11m.
- 106 However, the Amended Arboricultural Impact Assessment (Exhibit J) revises this number to 17, comprising 9 large trees, between 13-25m, and 8 medium sized trees, of 8-12m in height.
- 107 At the commencement of the hearing, the arboricultural expert on behalf of the Respondent, Mr Torin Calf, asserted that, absent an amended landscape plan, the appropriateness of offset planting designed to replace those trees proposed for removal could not be properly assessed.
- 108 Regardless, those areas of deep soil proposed do not allow a spread of replacement canopy because of the proximity of the basement to the boundary that constrains root growth.

- 109 The Respondent contends the proposal fails to conform to certain objectives and requirements of Part E1 of the WDCP, which deals with Preservation of Trees or Bushland Vegetation as follows:

**“Objectives**

To protect and enhance the urban forest of the Northern Beaches.

...

To promote the retention and planting of trees which will help enable plant and animal communities to survive in the long-term.

To protect and enhance the scenic value and character that trees and/or bushland vegetation provide.

**Requirements for other Development Applications**

...

6. Development is to be sited and designed to minimise the impact on remnant native vegetation, including canopy trees and understorey vegetation, and on remnant native ground cover species.

7. Where the applicant demonstrates that no reasonable alternative design exists and a tree must be removed, suitable compensatory tree planting is required. Details including proposed species and the location of replacement planting are to be provided.”

- 110 Ms Mackenzie identifies amendments made to the proposal during design development that demonstrate siting designed to minimise the impact on vegetation, consistent with Requirement 6, including the relocation of the on-site stormwater detention (OSD), and reduction in footprint of Townhouse TH15.
- 111 Further amendments are proposed at Condition 10 of the Applicant’s without prejudice conditions of consent. Condition 10(xiv) requires that amended landscape plans “must be consistent with the final architectural plans including planters and any change (if required) to the layout of TH21”.
- 112 However, this presents the Court with a difficulty that is, in my view, insurmountable for the Applicant. Primarily because the architectural plans with which the Landscape plans must be consistent, according to the conditions prepared by the landscape experts, are for reasons set out below, unacceptable to the landscape experts.
- 113 During the proceedings, the Court once again accepted the invitation of the Applicant to direct landscape and urban design experts to confer on without

prejudice conditions of consent that would narrow or resolve the issues held by experts for the Respondent.

- 114 Urban design experts prepared the conditions of consent at Exhibit R, which included vignette plans that appear identical or similar to those plans at [16] for which leave was declined.
- 115 When the conditions proposed by the urban design experts to amend Townhouse TH21 was shown to landscape experts, the encroachment of the built form on Tree T30, a tree to be retained, was said by the experts to increase to be in the order of 22%, according to Ms Mackenzie. As I understand Ms Mackenzie's evidence, the result would be the decline and likely death of Tree T30.
- 116 Additionally, a landscaped swale is proposed to convey drainage from the south west corner of the site, in the vicinity of Building A, around the southern and eastern perimeter of the site. The swale is proposed to be planted out with mixed climbers, pruned within the lower 200mm to allow for water flow.
- 117 The swale drains to Gladys Avenue in the vicinity of T30. In the Arboricultural Impact Assessment (Exhibit J), Ms Mackenzie estimates the encroachment in to the Tree Protection Zone (TPZ) of T30 to be 19.37%, which she initially describes at p 13 to be moderate. The section of stormwater pipe in this location is noted to be underbored by Ms Mackenzie.
- 118 However, Mr Calf notes the reduced level of the pit located in the TPZ of T30 is some 700mm below natural ground surface, requiring deep excavation in the TPZ.
- 119 Furthermore, the amendments agreed by the urban design experts at [115] include a further encroachment into the TPZ of T30 by an elevated terrace to TH21 that Ms Mackenzie estimates might result in an incursion of 22%.
- 120 The agreed position of the Urban design experts likewise proposes changes that are likely to result in fill within the TPZ of T21 by the Waste Room north of Building C.
- 121 Finally, the conditions agreed between the urban design experts also propose the widening of the path to the south of Building D by 500mm, along with other

amendments as to location of gates, footpaths and the like, which has the effect of reducing the area of Private Open Space to TH22-TH26. I also note the widened path is now proposed in Exhibit R, and reflected at Condition 24(g) to be paved, which aligns to the surface shown in Architectural plan DA 404 and DA 404.1, but which differs from the turf finish shown on architectural plans DA101 and landscape plans LS501.1 and LS501.2.

- 122 No more confidence or certainty is gained when overlooking to No 9 Gladys is considered. For reasons stated at [79], the east facing terrace of TH21 clearly provides a sightline over the boundary fence shared with No 9 Gladys Avenue. Even if the urban designers' proposed condition of consent were adopted to lower this terrace, the evidence of the landscape experts is that the amendments proposed by the urban designers imperils T30.
- 123 If TH21 was setback further from Gladys Avenue, or deleted, some but not all of the likely impacts on T30 may be avoided. Such a scenario would appear to be of a kind proposed by the Respondent that, in effect, seeks a form of development that makes the most of the height and density controls, with greater landscape area.
- 124 It may also avoid the decline or death of T30 that is prominent in the streetscape, and which is a part of the urban forest that is a part of the desired future character of Frenchs Forest. The proposal at present does not contemplate the removal of T30, however it would appear to be the inevitable result of development consent for the development the subject of this development application. The impact of such an outcome has not been considered by the experts, but could only exacerbate the loss of tree canopy on the site which is a principally contested issue between the parties.
- 125 Next, whether or not a path shown to the west of T30 is ultimately intended depends on whether the architectural plans at Exhibit D, Landscape Plans at Exhibit G, conditions as proposed by the urban designers, or by the landscape experts are adopted. The path is shown deleted by the Urban design experts proposed condition at Condition 24(k), but is to be amended to include steps so that excavation is minimised around to the proposed landscape condition at Condition 10(xiii).

- 126 There is no greater certainty as to what might be contained in the “final architectural plans” to be derived from the supplementary joint expert report of the planning experts (Exhibit 11).
- 127 Ms Englund observes clotheslines to TH01 and TH02 are located 900mm lower than an external terrace, with the means of access uncertain, in response to which Mr Haynes offers the remedy to delete the clotheslines. It must be said that the difference in level, depicted on Section E, Drawing DA202, is a result of the basement extending beyond the natural ground surface adjacent, in the manner identified at [62].
- 128 It is in this same location that Ms Mackenzie speculates at the potential to resolve discrepancies in the levels shown between stormwater pits and proposed ground levels identified by Mr Calf (Exhibit 10, para 90). While Ms Mackenzie notes the original design intent was for there to be no walls between the PoS north of dwellings in Building A, walls are proposed, as often follows when such open space is intended to be private. Ms Mackenzie proposes that levels be somehow modified, although in what manner is unclear, as is the potential impact on stormwater function.
- 129 The same arrangement of levels results in overlooking between TH01 and TH02, and No 3 Gladys Avenue, according to Ms Englund. In this case, Mr Haynes suggests a condition be imposed to regulate the maintenance of a hedge to a height of 2.7m. The impact that would arise from such a hedge on the solar access to the Private Open Space (PoS) of TH 01 and TH02 is unknown.
- 130 Turning to the basement, the experts agree proposed storage areas could be deleted and excavation reduced so that setbacks to the western boundary might be increased, however this is not proposed other than in Mr Haynes’ oral evidence which is that garage spaces are of a proportion that can be used for either storage or parking. Such a statement appears to overlook that a wall and door separate the garage from storage so that such flexibility is clearly not evident in the architectural plans. As such, the storage area appears to obviate optionality of the space being used for parking.



- 131 Furthermore, the extension of the storage into the eastern setback would appear to also extend above the natural ground surface, and constrain the growth of landscape planting proposed to this setback of 2m, further constricted by the path of the concrete swale along the entire length of this boundary.
- 132 When the conditions proposed by the Applicant are considered, in my view, there is such conflict and confusion contained therein for the Court to conclude the Applicant seeks consent for a development application that differs from the development application before the Court. To proceed with conditions of consent proposed by the Urban design experts would appear to result in the loss of T30, the impact of which has not been assessed in terms of streetscape, landscape character, or in respect of the tree canopy across the site, considered by Mr Calf at [99] to be 'the big issue', and being central to the desired future character of the precinct.
- 133 To adopt the myriad and differing amendments set out above would be to permit the Applicant a form of 'amber light' in the manner set out by the Court of Appeal in *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 ("*Bunnings*"), because the amendments proposed by the Applicant are in inherent conflict so as to require an unknown degree of co-ordination that would result in further amendment of the development prior to the final outcome being known to the Court, necessitating further expert evidence as to the impacts of that development.
- 134 As shown by Preston CJ (*Bunnings* at [200]), to consider the grant of consent in an environment of such uncertainty is problematic, as the task of the Court is to consider and determine the particular development application that is the subject of the appeal, and not some other development.
- 135 This is because the Court has no power to consider development that is not the subject of the development application or to determine by granting or refusing consent, a development application that is not the subject of the appeal (*Bunnings*, at [202]).
- 136 The Court has power under s 4.16 of the EPA Act to grant consent subject to conditions, including consent to the development for which consent was

sought, except for a specified part or aspect of that development that the Court considers to be unacceptable, or to grant consent only to the specified part or aspect of the development that the Court considers to be acceptable (*Bunnings* at [205]). However in the circumstances of this case, the changes proposed by the urban design experts to TH21 seek to resolve the streetscape presentation of the development, while also having the effect of so adversely affecting the streetscape by the removal of T30, that the Court is simply unable to unscramble the egg.

- 137 The Court has also considered whether an interim judgment is appropriate so that parties may be provided the opportunity to further submit amended documentation and draft conditions of consent to give effect to the Court's interim judgment. I consider the resolution of the issues in the vicinity of TH21 to be so uncertain as to preclude this option.
- 138 I accept Ms Englund's evidence that the problems with this proposal effectively begin in the basement that so extends beyond the footprint of development over, and natural ground surface, that it serves to constrain the deep soil area from supporting tree canopy across the site in an area that seeks to promote an urban forest.
- 139 To the extent that the Applicant and its experts argue that development to the south of the site envisages nil setbacks, this is only relevant to side setbacks. Front and rear setbacks are such that canopy trees and under storey planting can be expected on those sites fronting French Forest West Road.
- 140 To suggest, as the Applicants' experts do at [101] and [102], that the controls at Part G9, Section 5.2.3 are at odds with the desired future character for a precinct in which an urban forest is a feature is not supported by a close reading of the requirements in respect of building setbacks, landscaped area and parking, basement design and basement access.
- 141 In my view, My Haynes also dismisses Ms Englund's diagram at [59] of an alternative basement too quickly, and without adequate explanation. Ms Englund's diagram convinces me that the basement extends unnecessarily beyond the footprint of the development at the ground floor for little gain

beyond large storage areas that is, according to the levels shown on Section A, Drawing DA200, and Section F, drawing DA202, 3500mm in height.

- 142 The proposal is not sited nor designed to minimise the impact on remnant native vegetation. Mature trees such as Trees T51, T56 and T58, that are all identified with a high retention value, and are all located in close proximity to the boundary of the subject site, with heights ranging from 13m-17m, are proposed for removal.
- 143 The Applicant has not demonstrated reasonable design alternatives to the removal of mature trees, and I accept Mr Calf's evidence that the compensatory tree planting plan proposed is unreasonable. The change made to TH15 and cited by Ms Mackenzie at [110] does not minimise the impact on remnant native vegetation, which is the focus of Requirement 6 at Part E1 of the WDCP. Rather, the increase to the setback of the development in this location permits a new tree to be planted.
- 144 Accordingly, the objectives of Part E1 of the WDCP, at [109], are not achieved so that grounds to apply the controls flexibly are not made out.
- 145 While I accept a setback of 4.5m is reasonable to apply on this site, that is not what is proposed. The encroachment of the basement to within 2m of the adjoining properties to the east is not consistent with the control at Part G9, Section 5.2.8 of the WDCP for building setbacks to be landscaped and generally free of any structures such as basements. Instead, the basement, together with the concrete swale, pits and other components of the stormwater solution located within the eastern setback fail to achieve the objectives of Part G9, Section 5.2.8 of the WDCP to ensure that new development achieves the Desired Future Character and Character Statement for the precinct, or to retain existing trees, or to maximise deep soil areas.
- 146 Once again, accordingly I cannot apply the controls at Part G9, Section 5.2.8 of the WDCP flexibly.
- 147 Finally, while I accept that attempts have been made to purchase the property at No 3 Gladys Avenue, the proposal is deficient in two ways when the objectives and requirements of Part G9, 5.2.6 are considered.

- (1) Firstly, the allotment on which development is proposed does not, in my view, address the street in a manner sought by requirement 1.2, other than by the waste collection enclosures, and does not minimise the impact on neighbours amenity in terms of privacy or views, being the subject of requirement 1.3. As stated, neither does the proposal achieve the desired future character, and whilever a 2m setback and overlooking to properties to the east of the subject site remain, the proposal cannot be said to represent a contextually appropriate interface as sought by the Character Statement for the precinct.
- (2) Secondly, I accept Ms Englund's oral evidence that, absent an indication of where entry pathways, PoS and the like will be located in the concept plan for No 3 Gladys Avenue, it is unclear as to what form development might be proposed to No 3 Gladys Avenue, and what likely impact it may have on the development the subject of the development application before the Court. I would add to Ms Englund's observation that the concept plan lacks any indication of how and where car parking might be accommodated, what access is required, including fire egress and other services such as waste storage and collection. Finally, I also observe the concept plan also appears to present a side elevation, and not a front address, to Gladys Avenue.

148 The DA as amended lacks such co-ordination between the architectural and landscape plans, stormwater and arboriculture, in my view, that it is unclear what is the development for which consent is sought. In particular, when the uncertainty of the proposal in respect of T30 and TH21 is also considered, I can only conclude the application must fail and the appeal be dismissed.

## **Orders**

149 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed, pursuant to s 8.15(3) of the EPA Act, arising from the amended application contained in the Notice of Motion dated 20 May 2024.
- (2) The appeal is dismissed.
- (3) Development Application DA2023/0172 seeking development consent for the demolition of existing site improvements and construction of a multi dwelling housing development comprising 26 dwellings with associated carparking, landscaping and infrastructure at Nos 1, 5, 5A and 7 Gladys Avenue, Frenchs Forest, is refused.
- (4) All exhibits are returned except for Exhibits A, D, E, F, G, M and 6.

.....

**T Horton**

**Commissioner of the Court**

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