



Land and Environment Court New South Wales

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| Medium Neutral Citation: | Silverdale & Spring Farm Pty Ltd v Camden Council [2021] NSWLEC 1561 |
| Hearing dates: | 9-10 September 2021 |
| Date of orders: | 27 September 2021 |
| Decision date: | 27 September 2021 |
| Jurisdiction: | Class 1 |
| Before: | Morris AC |
| Decision: | The Orders of the Court are: (1) The appeal is dismissed. (2) Development application DA2020/984/1 for the construction of a single storey centre based childcare centre for 80 children with associated play areas, landscaping and car parking at Nos 17-23 Bluebell Crescent Spring Farm is determined by way of refusal. (3) The exhibits, other than exhibits A, B, E, F and 1 are returned. |
| Catchwords: | DEVELOPMENT APPLICATION – child care centre – design – amenity impacts |
| Legislation Cited: | Camden Local Environmental Plan 2010, cll 4.3, 7.2, 7.3 Environmental Planning and Assessment Act 1979 s 8.7 State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017, cll 3, 23, 25, 26 |
| Cases Cited: | Renaldo Plus 3 Pty Limited v Hurstville City Council [2005] NSWLEC 315 |
| Texts Cited: | Camden Development Control Plan 2019 NSW Department of Planning and Environment, Child Care Planning Guideline, (August 2017) |
| Category: | Principal judgment |
| Parties: | Silverdale & Spring Farm Pty Ltd (Applicant) Camden Council (Respondent) |
| Representation: | Counsel: C Gough (Solicitor) (Applicant) |

Solicitors:

Storey and Gough Lawyers (Applicant)

Holding Redlich (Respondent)

File Number(s): 2021/21812

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JUDGMENT

- 1 **COMMISSIONER:** Development Application DA/2020/984/1 was lodged on behalf of Silverdale & Spring Farm Pty Ltd (applicant) with Camden Council on 10 December 2020 seeking consent for the construction of a single storey centre-based child care centre for eighty children with associated play areas, landscaping and car parking.
- 2 The Council had not determined the application within the prescribed period and the applicant is appealing its deemed refusal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

The proposal

- 3 The proposal is described as ‘Amalgamation of 4 lots and construction of a single storey centre-based child care facility with the capacity to accommodate 80 children, with associated landscaping, play area and car parking at 17-23 Bluebell Crescent, Spring Farm.’
- 4 The development includes construction of a single storey building with an area of 557.8m² and a separate 24.69m² external storage area. The main building would be setback 13.601m from the front property boundary, between 1.4m and 1.873m from the north eastern side boundary, and a minimum of 13.6m from the south western side boundary. The building setback from the rear boundary ranges from 7m to 16.594m with an awning above a deck extending to within 1.2m of the eastern corner of the site. That awning is an irregular shaped structure and covers part of the L-shaped deck. Three shade sails are proposed within the rear play area.
- 5 Parking for 20 cars and a loading bay is provided to the front and south western side of the building. Separate ingress and egress driveways are proposed, at opposing ends of the site with a separate pedestrian pathway at the north eastern end of the site.
- 6 A 1m wide landscaped area (including the wall) is provided between the two driveways across the site frontage behind a 1.2m high solid noise barrier. A 1.8m high solid noise barrier would be constructed around the boundary of the carparking area and would stop approximately 1m from the street boundary on the western side to facilitate sight lines for drivers leaving the site, however an existing 1.8m high colour bond fence that encloses the backyard on the adjoining property already extends to the boundary of the street. The applicant was unable to assist the Court in describing how this backyard

could remain enclosed and the fence stop at the point nominated. The purpose of the fence stopping short of the boundary is to facilitate safe vehicle access from the site to Bluebell Crescent. Further landscaped strips are proposed along the side boundaries of the carparking areas.

- 7 The rear play area would be enclosed by a solid 2.1m high acoustic wall. The height of that wall reduces to 1.8m along the side of the proposed building.
- 8 A narrow landscaping strip would be provided behind the front fence and along both side boundaries. Additional landscaping would be provided within the play area, adjacent to the entry and around the staff parking areas to the south of the building.
- 9 The slope of the land, which generally falls from the rear to the street necessitates the construction of retaining walls around the boundary.
- 10 The main childcare building has dimensions of 33.003m x 16.403m and is rectangular in shape. The main entry is indented however a fence and gate are provided across the frontage in line with the main façade of the building. A glazed roof feature defines that entry. Eight skylights provide light to the internal rooms.
- 11 The proposed hours of operation are shown on the Development Application form as 7am to 7pm seven days per week however, all other documentation including the Acoustic Report and final Plan of Management indicate the centre would only operate on weekdays between 7am and 6pm.

The site and locality

- 12 The site comprises four lots legally described as Lots 326-329 in DP 1241701 and is known as Nos 17-23 Bluebell Crescent, Spring Farm. It has a frontage of 48.04m, north east boundary of 37m, south west boundary of 47.14m and rear boundary of 48.81m resulting in a site area of 2069.1m². The site has a fall of approximately 2.6m from the eastern rear corner to the western front corner.
- 13 Spring Farm is a developing residential area primarily comprising low density housing with neighbourhood services and a bush corridor. Development immediately surrounding the site comprises one and two storey houses on small lots, the majority of the buildings occupying a large proportion of the sites. A number of lots within the vicinity of the site remain vacant and many new homes are currently under construction.
- 14 An Anglican Church and childcare centre development are located at the entry to Bluebell Crescent at the intersection with Richardson Road.

Planning controls

- 15 The site is zoned R1 General Residential pursuant to the Camden Local Environmental Plan 2010 (LEP). Centre-based child care facilities are permitted with consent in that zone.

Clause 4.3 of the LEP establishes maximum building heights and the development standard for this site is 9.5 metres. The proposal complies with this development standard.

- 17 The site and proposal are subject to cl 7.2 Air Space Operations. The consent authority must be satisfied the proposed development will not penetrate the obstacle limitation surface. Clause 7.3 also applies, and consent cannot be granted for the purpose of a child care centre if the development will be in an ANEF contour 25 or higher. There are no contentions that the provisions of these clauses have not been met.
- 18 Camden Development Control Plan 2019 also applies to the site with Parts 1, 2 and 6 most relevant to the application. Clause 6.5 deals with specific land use controls with 6.5.1 applying to child care centres. The objectives of those controls are:
- a. Ensure child care centres are compatible with neighbouring land uses and are appropriately integrated into existing or new residential environments;
 - b. Ensure child care centres are well designed with a high standard of outdoor play areas, landscaping and are integrated in appropriate locations to meet community needs;
 - c. Minimise adverse impacts on the environment and amenity of residential areas and other land uses. In particular, noise and traffic generation from the development and operation of child care centres; and
 - d. To ensure the location and design of waste storage facilities, and the on-going management of waste associated with the centre, minimises undue impacts on amenity (e.g. visually, by emission of odour, or causing noise nuisance).
- 19 Setback controls require the front setback to be consistent with the existing character, side setbacks to be a minimum of 1.2 metres and rear setbacks 4m metres at ground floor. The LEP includes a definition of building line or setback as follows:
- building line or setback** means the horizontal distance between the property boundary or other stated boundary (measured at 90 degrees from the boundary) and—
- (a) a building wall, or
 - (b) the outside face of any balcony, deck or the like, or
 - (c) the supporting posts of a carport or verandah roof,
- whichever distance is the shortest.
- 20 The building is setback 13.6m from the front property boundary, a minimum of 13.143m from the south western side boundary and 1.4m from the north eastern side boundary. The main building is setback a minimum of 6.755m from the rear boundary with a timber deck around 5m from the boundary. An awning covers that deck and part of the rear play area and extends within the 4m setback, the closest point being around 1.2m in the eastern corner of the site.
- 21 State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (SEPP2017) applies to the site. That policy prevails over the LEP in the event of any inconsistency.
- 22 The aims of the policy are set out in cl 3 as follows:
- (a) improving regulatory certainty and efficiency through a consistent planning regime for educational establishments and early education and care facilities, and
 - (b) simplifying and standardising planning approval pathways for educational establishments and early education and care facilities (including identifying certain development of minimal environmental impact as exempt development), and

- (c) establishing consistent State-wide assessment requirements and design considerations for educational establishments and early education and care facilities to improve the quality of infrastructure delivered and to minimise impacts on surrounding areas, and
- (d) allowing for the efficient development, redevelopment or use of surplus government-owned land (including providing for consultation with communities regarding educational establishments in their local area), and
- (e) providing for consultation with relevant public authorities about certain development during the assessment process or prior to development commencing, and
- (f) aligning the NSW planning framework with the National Quality Framework that regulates early education and care services, and
- (g) ensuring that proponents of new developments or modified premises meet the applicable requirements of the National Quality Framework for early education and care services, and of the corresponding regime for State regulated education and care services, as part of the planning approval and development process, and
- (h) encouraging proponents of new developments or modified premises and consent authorities to facilitate the joint and shared use of the facilities of educational establishments with the community through appropriate design.

- 23 Clause 23 of SEPP2017 requires that the consent authority, before determining a development application for development for the purpose of a centre-based child care facility, must take into consideration any applicable provisions of the *Child Care Planning Guideline*, in relation to the proposed development.
- 24 Clause 25 of SEPP2017 establishes non-discretionary development standards. None of these standards are in contention.
- 25 Clause 26 of SEPP2017 deals with the application of development control plans and is in the following form:
- (1) A provision of a development control plan that specifies a requirement, standard or control in relation to any of the following matters (including by reference to ages, age ratios, groupings, numbers or the like, of children) does not apply to development for the purpose of a centre-based child care facility—
 - (a) operational or management plans or arrangements (including hours of operation),
 - (b) demonstrated need or demand for child care services,
 - (c) proximity of facility to other early education and care facilities,
 - (d) any matter relating to development for the purpose of a centre-based child care facility contained in—
 - (i) the design principles set out in Part 2 of the Child Care Planning Guideline, or
 - (ii) the matters for consideration set out in Part 3 or the regulatory requirements set out in Part 4 of that Guideline (other than those concerning building height, side and rear setbacks or car parking rates).
 - (2) This clause applies regardless of when the development control plan was made.
- 26 The planning objectives of the Child Care Planning Guideline (Guideline) are to:
- “• promote high quality planning and design of child care facilities in accordance with the physical requirements of the National Regulations
 - ensure that child care facilities are compatible with the existing streetscape, context and neighbouring land uses
 - minimise any adverse impacts of development on adjoining properties and the neighbourhood, including the natural and built environment
 - deliver greater certainty to applicants, operators and the community by embedding the physical requirements for service approval into the planning requirements for child care facilities.”
- 27 Part 2 of the Guidelines outlines the design quality principles with a forward that states:

“The design quality principles establish the broad design context guide of all new proposals for child care facilities, regardless of whether they are stand alone, part of a mixed-use development, modifications or retrofits of existing buildings or seeking to occupy premises without incurring new building works.

Good design is integral to creating sustainable and liveable communities. There is growing appreciation of the significant role that good design can play in education with increasing evidence that learning outcomes are closely related to the quality of learning environments.

Factors such as air quality, ventilation, natural lighting, thermal comfort and acoustic performance have been shown to have a profound impact on learning, engagement, social interactions and competencies. They also contribute to wellbeing through creating a sense of belonging, self-esteem and confidence.”

- 28 There are seven Design Quality Principles – Context; Built form; Adaptive learning spaces, Sustainability; Landscape; Amenity and Safety.
- 29 The matters for consideration in Part 3 of the Guideline give guidance to applicants on how to design a high-quality proposal that takes account of its surroundings and any potential environmental impacts the development may cause and to be mindful of potential impacts that may arise from existing uses and conditions within a locality. The matters support the design principles and must be considered by the consent authority when assessing a DA for a child care facility. Child care facilities can be developed in a broad range of locations and need to be flexible in how they respond to the requirements and challenges this brings.
- 30 There are 38 matters for consideration and the associated objectives relevant to the case are as follows:

“C5 To ensure that the child care facility is compatible with the local character and surrounding streetscape.

The proposed development should:

- contribute to the local area by being designed in character with the locality and existing streetscape
- reflect the predominant form of surrounding land uses, particularly in low density residential areas
- recognise predominant streetscape qualities, such as building form, scale, materials and colours
- include design and architectural treatments that respond to and integrate with the existing streetscape
- use landscaping to positively contribute to the streetscape and neighbouring amenity
- integrate car parking into the building and site landscaping design in residential areas.

...

C12 to ensure that the scale of the child care facility is compatible with adjoining development and the impact on adjoining buildings is minimised.

The following matters may be considered to minimise the impacts of the proposal on local character:

- building height should be consistent with other buildings in the locality
- building height should respond to the scale and character of the street
- setbacks should allow for adequate privacy for neighbours and children at the proposed child care facility
- setbacks should provide adequate access for building maintenance
- setbacks to the street should be consistent with the existing character.

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C15. To ensure that the built form, articulation and scale of development relates to its context and buildings are well designed to contribute to an area's character.

The built form of the development should contribute to the character of the local area, including how it:

- respects and responds to its physical context such as adjacent built form, neighbourhood character, streetscape quality and heritage
- contributes to the identity of the place
- retains and reinforces existing built form and vegetation where significant
- considers heritage within the local neighbourhood including identified heritage items and conservation areas
- responds to its natural environment including local landscape setting and climate
- contributes to the identity of place.

...

C18 and C19. To provide landscape design that contributes to the streetscape and amenity.

Appropriate planting should be provided along the boundary integrated with fencing. Screen planting should not be included in calculations of unencumbered outdoor space.

Use the existing landscape where feasible to provide a high quality landscaped area by:

- reflecting and reinforcing the local context
- incorporating natural features of the site, such as trees, rocky outcrops and vegetation communities into landscaping.

Incorporate car parking into the landscape design of the site by:

- planting shade trees in large car parking areas to create a cool outdoor environment and reduce summer heat radiating into buildings
- taking into account streetscape, local character and context when siting car parking areas within the front setback
- using low level landscaping to soften and screen parking areas.

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C36. To provide a safe and connected environment for pedestrians both on and around the site.

The following design solutions may be incorporated into a development to help provide a safe pedestrian environment:

- separate pedestrian access from the car park to the facility
- defined pedestrian crossings included within large car parking areas
- separate pedestrian and vehicle entries from the street for parents, children and visitors
- pedestrian paths that enable two prams to pass each other
- delivery and loading areas located away from the main pedestrian access to the building and in clearly designated, separate facilities
- in commercial or industrial zones and mixed use developments, the path of travel from the car parking to the centre entrance physically separated from any truck circulation or parking areas
- vehicles can enter and leave the site in a forward direction."

31 Part 4 of the guidelines requires consideration and application of the National Regulations to development proposals. There are no contentions in the case that suggests these regulations would not be met and the agreed draft conditions of consent address that requirement.

Other relevant legislation that applies to the site is listed in the Further Amended Statement of Facts and Contentions, Exhibit 1. Other than the legislation detailed above, there are no contentions that suggest the grant of the consent would be contrary to the provisions of those Acts and State Environmental Planning Policies.

The contentions

- 33 The contentions in the case are that the proposed development does not satisfactorily respond to the existing and desired future character of the locality; that the design of the proposed development does not appropriately respond to the topography of land; that the proposed development provides insufficient landscaping within the front setback area of the development site and that the landscaping as proposed is inadequate. The contention regarding additional information required to allow proper assessment of these application was addressed by the applicant through the submission of an amended operational Plan of Management, the registration of and easement to drain water, and the agreed consent conditions.
- 34 The Council contends that the restrictions on the use of the playground area detailed in the POM demonstrate the failure of the proposal to adequately provide useable play areas for use by children at all times. This is because the acoustic assessment of the proposal and the design of the development require certain management practices to be implemented to ensure acoustic performance is achieved. The POM also requires that when the indoor rooms are used for passive uses or activities i.e. sleeping, reading, eating etc, the doors, windows and skylights shall be opened. At all other times, the centre will be serviced by mechanical ventilation, with the doors and windows closed to ensure compliant acoustic attenuation is achieved.
- 35 The Council contends that this is poor practice and further demonstrates the poor design of the development and prevents natural ventilation of the building when the skylights and doors and closed. It also says the requirement is onerous and unlikely to be implemented and for that reason the POM is contrary to the planning principles articulated in *Renaldo Plus 3 Pty Limited v Hurstville City Council* [2005] NSWLEC 315 as it requires people to act in a manner that would be unlikely or unreasonable in the circumstances of the case.

The evidence

- 36 During the hearing the parties requested the Court undertake a site view in order that the character of the area could be understood. A view was undertaken without legal or expert representatives present due to the current COVID restrictions. The Court observed and inspected the sites nominated and those streets the parties considered defined the character of the local area.
- 37 Expert planning evidence was heard from Ms E Daniel for the applicant and Mr B McDonald for the Council.
- 38

There is little agreement between the experts. It is agreed that the amended landscape plan, exhibit B, does address the amount of landscaping within the front setback however Mr McDonald contends that the trees now proposed along the southwestern boundary are excessive in height and not required.

39 It is also agreed that the POM requires absolute compliance to ensure relevant acoustic requirements are met.

40 They also agree that the Future Streetscape elevation plan that forms part of Exhibit A does not accurately represent the likely future form of development along Bluebell Crescent.

41 Mr McDonald says the proposal fails to respond to Design quality principle No. 1 - Context and in particular the building design is bulky and out of character with the existing cohesive character of the locality derived from individual houses on relatively small allotments. By placing the car parking at the front of the site, the site plan gives no regard to the established pattern of detached dwellings with small front gardens. He says the car park would be a dominant and discordant element in the streetscape and create an uninviting appearance.

42 The building length of 33 metres and large rectangular building footprint under a single hip roof is inconsistent with the finer grained pattern and streetscape of the existing and future residential development contrary to Design quality principle No. 2. He says the small length of the hipped roof at either end of the main building roof does nothing to reduce the impact and considers it will read as a large bulky building despite that attempt to break up the size of the roof. He also says that the building does not provide sufficient articulation and that the proposed use of colour does not address the need to break down the wall or reflect the context of the site. He says that context is a mix of single and two storey dwellings that are read as individual buildings with gaps and changes in roof forms that are smaller than the long expanse of roof proposed.

43 Mr McDonald says little regard has been given to the fact that the site is bordered on three sides by relatively small allotments with small backyards due to the shallow rear setbacks. He considers the amenity of these areas is already compromised and the plans did not identify the houses and rear yards of the adjoining residential properties, not even on the shadow diagrams.

44 Because the ground levels of the property at the south corner of the site are lower than the site levels, which would be made even more pronounced by filling the southwestern part of the site to create the raised ground level for the play area, the development further reduces that amenity together with the addition of acoustic barriers that must be provided around those play areas. This would result in the top of the fence at 2.77 metres above the ground level of the rear yard of the dwelling at No. 5 Galah Way, this being the worst-case scenario. He says compliance with the height standard is not enough to ensure that the bulk and scale of the proposed building is acceptable. Built form is function of length, width and shape as well as height.

Taking these factors into account he says the built form fails to respond to the prevailing smaller built forms of detached dwelling houses in the immediate locality.

- 46 He does not consider the setback of the building is appropriate and conflicts with the existing dwellings along Bluebell Crescent which are setback between 4.5m and 5.5m. The proposed building, being setback further, is totally inconsistent and uncharacteristic with the built form on both sides of the street and the locality.
- 47 Ms Daniel says the site forms part of a Greenfield subdivision and as the area develops the character of the area will evolve, character being subjective and guided by the DCP controls for the area. She says the immediate locality comprises standard project dwelling type homes, generally two storey in height with small front gardens and whilst the proposed development is commercial in use and permissible within the R1 zone, it comprises elements to ensure compatibility with the evolving character of the area whilst maintaining a sense of individuality for site identification and use. The proposed single storey building of face brick construction with painted render relief and a hip roof form, front entry addressing the street and residential style windows exhibit the predominant form of development in the area.
- 48 She considers the proposed building is well designed with an emphasis on materiality and built form apparent in the neighbourhood and the elevations contain both modulation and articulation. The building complies with the setback and height controls that apply to the land and are proportionate to the adjoining residential dwellings to maintain consistency with the established platform and character of the streetscape. The proposed building is set back from the street, with the location of the car park in front of the building activating the street life and provides a clear separation between pedestrian and vehicle activity.
- 49 It is her opinion that the proposed development offers an improved bulk and scale to that currently presented in the streetscape, which consists of a number of bulky two storey dwellings, relatively close to all boundaries which creates passive spaces and reduces the open space attributable to each dwelling. Conversely the proposed development provides a low scale, single storey building with articulated materials and colours to reduce massing, providing a sense of transition between the existing buildings which adjoin the site. She says the articulation is achieved through the use of colour, materials, roof style, horizontal or vertical cladding and a combination of these.
- 50 Ms Daniel submits the proposed building offers an improved outcome in comparison to a number of approved and constructed child care centres in the immediate locality, which generally consist of prefabricated concrete cast walls, two storey built form, black palisade fencing and inclusion commercial colours, tones and built form.
- 51 In relation to the siting of the proposed car park, Ms Daniel notes it complies with SEPP2017 in that there is a separate pedestrian access from the car park to the centre, there are separate pedestrian and vehicle entries to the site, the pedestrian paths allow two prams to pass, the delivery and loading area is away from the main pedestrian access to the building and vehicles can enter and leave in a forward direction. The

location of the car park adjoining the street and in front of the building enables compliance with CPTED principles particularly from a passive surveillance and pedestrian vehicle conflict perspective. She notes that a number of existing child care centres in the vicinity of the site have their car parks at the front of the property.

- 52 She concludes the proposal is compatible with the local character and streetscape in that it is designed in character with the locality and streetscape, it reflects the predominant form of surrounding land uses, it recognises predominant streetscape qualities and includes architectural treatments of the street and the proposed landscape will contribute positively to the streetscape and amenity.

Conclusion and findings

- 53 Having regard to the evidence, I find the proposed development is not suitable for the site and is not in the public interest. In addition, the design of the development does not adequately respond to the existing and likely future character of the area.
- 54 Whilst not mandatory controls, the considerations contained within the guidelines provide useful and clear outcomes that inform how a child care centre can be developed on land considering all relevant design and environmental considerations. As the consent authority, the Court is obliged to consider the provisions of those guidelines and, having considered the matters raised, I am not of the view that the development has been designed with adequate regard to the location of the site and the surrounding development.
- 55 In this regard, I prefer the evidence of Mr MacDonald, in finding that the proposed building, due to its large, rectangular, bulky nature and its siting, located in to the rear and in the corner of the site, is totally inconsistent with the prevailing character of the locality. That locality is defined by smaller buildings in terms of scale however large when compared to the size of the individual allotments. Those buildings are constructed on reduced but consistent setbacks with articulation and varying roof and building forms. In addition, the proposed treatment of the setback area, including the provision of a 1.2 metre high solid fence on the front property boundary, is also uncharacteristic of the area.
- 56 The proposed development does not achieve a design outcome that recognises the predominant local qualities and visual presentation to the public domain. Nor does it include design and architectural treatments that appropriately respond to and integrate within the neighbourhood or respect and respond to its physical contexts such as the adjacent built form, neighbourhood character and streetscape quality.
- 57 The proposed development does not reflect the predominant form of surrounding land uses, an important consideration in low density residential areas, nor does it recognise the predominant streetscape qualities such as building form and scale. Whilst the proposal does make use of materials and colours in an attempt to address streetscape issues, the lack of articulation results in a large and bulky building that does not respond or integrate within the existing streetscape.

- 58 Whilst it may be possible to relocate the 1.2 metre high front acoustic wall behind the landscaped area, the lack of substantial landscaping and the amount of hardstand area within the front set back area is also a detrimental aspect of the design of the building and its surrounds.
- 59 The Council's criticism of the conflict between the POM and the sustainability principle is well founded, particularly in relation to cross ventilation. The impact of the proposed acoustic wall on No 5 Galah Way is unacceptable, particularly given the orientation of that fence and the solar impacts to the neighbouring property during the morning and the visual scale of the fence. The proposal failed to provide good amenity due to lack of natural ventilation when active pursuits are undertaken within the child care centre.
- 60 For these reasons, the proposal is not worthy of development consent.
- 61 The Orders of the Court are:
- (1) The appeal is dismissed.
 - (2) Development application DA2020/984/1 for the construction of a single storey centre based childcare centre for 80 children with associated play areas, landscaping and car parking at Nos 17-23 Bluebell Crescent Spring Farm is determined by way of refusal.
 - (3) The exhibits, other than exhibits A, B, E, F and 1 are returned.

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Sue Morris

Acting Commissioner of the Court

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Decision last updated: 27 September 2021