



Land and Environment Court New South Wales

Medium Neutral Citation:

Captag Investments Pty Ltd ATF Captag Investments Trust v City of Parramatta Council [2025] NSWLEC 1459

Hearing dates:

Conciliation conference on 23-24 June 2025

Date of orders:

27 June 2025

Decision date:

27 June 2025

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

(1) The Applicant is to pay the Respondent's costs thrown away by the amendment of the Development Application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the amount of \$6,830 within 28 days from the date of these Orders.

(2) The appeal is upheld.

(3) Development consent is granted to Development Application No. DA222/2024, as amended, for staged development including the demolition of existing buildings and construction of a part-four, part-seven storey residential flat building comprising 46 residential units and a shared basement, and construction of a six-storey mixed use development comprising a childcare centre and 45 residential units, at 15A and 15B Moseley Street and 25-31 Donald Street, Carlingford NSW 2118, subject to the conditions at Annexure A.

Catchwords:

DEVELOPMENT APPLICATION – residential apartment development – residential flat building – centre-based childcare facility – mixed use development in R4 high density residential development – conciliation conference – agreement between parties - orders

Legislation Cited:

Architects Act 2003, Sch 7

Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15

Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation 2021, ss 29, 38

Parramatta Local Environmental Plan 2023, cll 4.3, 4.4, 5.21, 6.1, 6.2, 6.5, 6.8

State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 2.6, 6.6, 6.7, 6.9, Chs 2, 6

State Environmental Planning Policy (Housing) 2021, ss 16, 146, 147, 148

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1

State Environmental Planning Policy (Transport and Infrastructure) 2021, s 3.23

Texts Cited:

Child Care Planning Guidelines published by the Department of Planning, Industry and Environment

Category:

Principal judgment

Parties:

Captag Investments Pty Ltd ATF Captag Investments Trust (Applicant)

City of Parramatta Council (Respondent)

Representation:

Counsel:

E Whitney (Solicitor) (Applicant)

C Morton (Solicitor) (Respondent)

Solicitors:

Mills Oakley (Applicant)

Sparke Helmore Lawyers (Respondent)

File Number(s):

2024/238881

Publication restriction:

Nil

JUDGMENT

- 1 **COMMISSIONER:** Mixed use development is proposed on land comprising six lots that, together, front Moseley Street and Donald Street in Carlingford. The proposal is for two buildings to be constructed in stages. The first building proposed appears as two buildings, identified as Buildings A1 and A2, and is an apartment building of between 4-

7 storeys. The second building, identified as Building B proposed comprises a child care centre for 80 children and apartments over a basement carpark at 15A and 15B Moseley Street and 25-31 Donald Street.

2 A total of ninety-one (91) residential units are proposed, comprising a mix of 1-bedroom, 2-bedroom and 3-bedroom apartments.

3 The site comprises the following multiple irregular lots:

- 15A Moseley Street, Carlingford and legally described as Lot 35 DP 536982
- 15B Moseley Street, Carlingford and legally described as Lot 34 DP 536982
- 25 Donald Street, Carlingford and legally described as Lot 5 DP 35555
- 27 Donald Street, Carlingford and legally described as Lot 33 DP 536982
- 29 Donald Street, Carlingford and legally described as Lot 32 DP 536982
- 31 Donald Street, Carlingford and legally described as Lot 2 DP 35555

4 Development Application No. 222/2024 ("the DA") was lodged by the applicant in these proceedings, Captag Investments Pty Ltd ATF Captag Investments Trust (Captag) on 22 April 2024.

5 As the DA was otherwise undetermined, Captag appealed its deemed refusal by City of Parramatta Council on 28 June 2024, under s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act).

6 On 31 March 2025, the Court directed joint conferencing between experts that the parties agree has resulted in certain amendments to plans and other documents that resolve the contentions pressed by the Respondent in this matter.

7 Accordingly, while the matter was initially listed before me for hearing, the parties sought the matter be re-allocated by the Court under s 34 of the *Land and Environment Court Act 1979* (LEC Act).

8 At the conciliation conference, the parties reached agreement on the matters in contention, and a signed agreement was filed with the Court on 23 June 2025, in accordance with s 34(10) of the LEC Act.

9 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development

application. There are jurisdictional prerequisites, with respect to the following environmental planning instruments that must be satisfied before this function can be exercised:

- (1) State Environmental Planning Policy (Transport and Infrastructure) 2021.
- (2) State Environmental Planning Policy (Resilience and Hazards) 2021.
- (3) State Environmental Planning Policy (Housing) 2021.
- (4) State Environmental Planning Policy (Biodiversity and Conservation) 2021.
- (5) State Environmental Planning Policy (Sustainable Buildings) 2022.
- (6) Parramatta Local Environmental Plan 2023.

10 For the reasons set out below, I am satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions.

11 The Site is located in an area zoned R4 – High Density Residential, according to the Parramatta Local Environmental Plan 2023 (PLEP) in which the proposed uses are permitted with consent, where consistent with the objectives of the R4 zone, that are:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for high density residential development close to open space, major transport nodes, services and employment opportunities.
- To provide opportunities for people to carry out a reasonable range of activities from their homes if the activities will not adversely affect the amenity of the neighbourhood.

Parramatta Local Environmental Plan 2023

12 In considering the height and floor space ratio (FSR) controls applicable to the site under the PLEP, it is helpful to state here that Lot 5 in DP 35555, otherwise known as 25 Donald Street (Lot 5), is subject to a different height and FSR control to the remainder of the site.

13 The majority of the site is subject to a height control of 16m according to the relevant map at cl 4.3(2) of the PLEP, while a height control of 21m applies to Lot 5.

14 The proposal exceeds the height permitted. However, the DA includes residential flat buildings. As such, s 16(3) of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) provides the maximum building height for a building used for

residential flat buildings is the maximum permissible building height for the development on the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).

- 15 Subsection (1) provides for an additional height of 30%, where the proposal includes a minimum affordable housing component of 15%, when the method at subs (2) is applied.
- 16 The maximum height of Buildings A1 and A2, and Building B, is less than the maximum permitted by the additional bonus. The proposed maximum height of Building A2, located on Lot 5, is 26.440m. The proposed maximum height of built form on the remainder of the site is 15.00m for Building A1, and 12.50m for Building B.
- 17 The proposal also relies on the additional floor space ratio provisions for affordable housing at s 16 of the Housing SEPP. The FSR control on Lot 5 is 1.94:1 while the FSR permitted on the remainder of the site is 1.3:1.
- 18 The proposed FSR of Building A2, located on Lot 5, is 1.94:1 or a gross floor area of 1968m². The proposed FSR of built form on the remainder of the site is 1.3:1 or gross floor area of 6402m².
- 19 The site is not identified as flood-prone. However, two lots that comprise the site are within a flood planning area. A Flood Impact Assessment report authored by Northrop Engineers dated 3 April 2024 documents the flood behaviour and assesses the risks and hazards associated with the site. I am satisfied that as the levels of the proposed development are clear of the 1% AEP level plus freeboard, the proposal is compatible with the flood function and behaviour on the land, and that onsite detention of stormwater avoids impacts to properties in the area. Furthermore, as on-site refuge is provided in case of flood, I am satisfied appropriate and safe occupation and evacuation is provided to manage risks.
- 20 Relatedly, on the basis of the amended Stormwater Plans prepared by SGC dated 20 May 2025 (Stormwater Plans), I am also satisfied that the proposed development will not adversely affect the environment or cause erosion in the manner set out at cl 5.21(2)(e) of the PLEP.
- 21 On the same basis, and noting 26.8% of the site is proposed to be deep soil, I also note the amended Stormwater Plans satisfy me that the development is designed to maximise the use of water permeable surfaces, provides for onsite retention of stormwater and so avoids significant impacts of stormwater on adjoining properties or other areas, in accordance with cl 6.5 of the PLEP.
- 22 The site is not identified as Acid Sulfate Soils on the relevant maps at cl 6.1(2) of the PLEP.
- 23 The Site falls steeply from northeast to southwest, with a crossfall of approximately 12m. Earthworks are proposed in the form of excavation to a depth of RL98.750 AHD. A Geotechnical Investigation undertaken by Morrow Geotechnics dated 21 November 2023 (Geotechnical Report) records the results of six boreholes to a maximum depth of

5m, dynamic cone penetrometer testing and groundwater observations to conclude the site is suitable for the development proposed. Having regard to the amended Stormwater Plans, Landscape Plans prepared by Conzept and the Geotechnical Report, I consider those aspects of the proposed earthworks required to be considered at cl 6.2(3) of the PLEP to be adequately addressed.

- 24 On the basis of the amended Stormwater Plans and the recommendations and conclusions of the Geotechnical Report, I am satisfied the development is designed, will be sited, constructed and be managed to avoid landslide risk and that forms of drainage will retain and detain water so as not to adversely affect the rate, volume, or quality of water leaving the site, in accordance with cl 6.8(4) of the PLEP. In forming this state of satisfaction, I note the site is currently burdened by an Easement for Drainage, 1.83m wide, which conveys stormwater through the centre of the site, crossing Lots 32, 33 and 35 in DP 536982. There is also an existing drainage easement 1.83m wide as shown on DP 35555, however this easement is not listed on the title of the property. The Stormwater Management Report prepared by Northrop dated 3 April 2024 (Stormwater Report) proposes the realignment of stormwater infrastructure and easements adjacent to the site boundary, and confirms DRAINS modelling assumes such a scenario. The agreed conditions of consent require relocation of the existing Council owned drainage assets across the development site prior to the operation of the consent.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 25 Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies to the site for that aspect of the development proposing the removal of vegetation in a non-rural area. The development application is accompanied by an amended Arboricultural Impact Assessment and Method Statement by Ezigrow – Rev D dated 20 May 2025 and the Landscape Plan LP-S34 23–280, Rev J dated 19.05.2025. Together, these documents identify 68 trees proposed to be removed, and eleven of the trees proposed for removal are assessed as important. Twelve trees are proposed to be retained.
- 26 I note s 2.6 of the Biodiversity SEPP allows for the removal of vegetation with consent.
- 27 It is also relevant to record that as the proposal is for development within the Sydney Harbour Catchment, Chapter 6 of the Biodiversity SEPP also applies to the proposal.
- 28 Section 6.6 of the Biodiversity SEPP precludes the grant of consent unless the Council, or the Court on appeal, is satisfied that the proposed development ensures that, firstly, the effect on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and secondly, that the impact on water flow in a natural waterbody will be minimised.
- 29 The Stormwater Plans, and Stormwater Report details the collection, storage and discharge parameters proposed. Onsite detention (OSD) with a capacity of 294.35m³ is proposed, as is a rainwater tank with a capacity of 15,000L. Water quality treatment

devices are proposed in certain external pits and in the Stormfilter chamber of the OSD. The result of the MUSIC modelling, and of DRAINS modelling, depicted on Stormwater Plan SW501, demonstrates a reduction in post development flow of stormwater when compared to pre-development flow, and a reduction in pollutants. As such, I am satisfied the discharge into Council's drainage infrastructure land will be beneficial. I have also considered those matters at s 6.7 of the Biodiversity SEPP and am satisfied, there will be no direct, indirect or cumulative impact on terrestrial, aquatic or migratory animals or on vegetation or aquatic reserves, and no adverse impact in terms of erosion.

Neither will the proposed development have an adverse impact on recreational land uses or access to public land, in terms set out in s 6.9 of the Biodiversity SEPP.

State Environmental Planning Policy (Housing) 2021

Where an application relates to residential apartment development, s 29 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) requires the application be accompanied by a statement by a qualified designer, defined in the Dictionary at Sch 7 as a person registered as an architect in accordance with the Architects Act 2003.

The statement is required by s 29 of the EPA Regulation to verify matters that are relevant to those matters that must be taken into consideration when determining a development application for residential apartment development, at s 147 of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP).

While the statement prepared in support of the DA dated April 2024, in the names of nominated architects Mr Koos de Keijzer and Mr David Randerson, failed to conform, for whatever reason, to the requirements of s 29 of the EPA Regulation, the Court was later provided with a conforming statement signed by Mr Randerson that satisfies me that the statement dated 24 June 2025 does conform, and so permits the Court to take into consideration those matters at ss 147 and 148 of the Housing SEPP.

For completeness, it is relevant to state here that the Council does not, for whatever reason, have a Design Review Panel to which a proposal may be referred, or from which advice can be taken (s 146 of the Housing SEPP).

State Environmental Planning Policy (Transport and Infrastructure) 2021

Child Care Planning Guidelines

- 36 The Child Care Planning Guidelines published by the Department of Planning, Industry and Environment, dated September 2021 (the Guidelines) are a matter for the consent authority, or the Court, to consider to the extent relevant according to s 3.23 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Infrastructure SEPP).
- 37 On the basis of the assessment against the Guidelines, contained in Appendix B of the Statement of Environmental Effects prepared by Mecone dated April 2023, the parties agree, and I accept, that the Guidelines have been considered.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 38 I have considered whether the land is contaminated in accordance with s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP).
- 39 A Preliminary Site Investigation undertaken by Neo Consulting, dated 22 November 2023 concludes, on the basis of soil sampling, that relevant health and ecological assessment criteria are not exceeded and that the site is suitable for the development proposed.

State Environmental Planning Policy (Sustainable Buildings) 2022

- 40 The application is accompanied by a BASIX certificate for 91 apartment dwellings (Cert No. 1730439M_02 dated 28 March 2024) prepared by EcoMode Design in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP).
- 41 An embodied energy report is a part of the BASIX Certificate, such that the Court can be satisfied that the embodied emissions attributable to the proposed development have been quantified in accordance with s 2.1(5) of the Sustainable Buildings SEPP.

Conclusion

- 42 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 43 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
- 44 The Court notes that:
- (1) City of Parramatta Council, as the relevant consent authority, has approved, under s 38 of the Environmental Planning and Assessment Regulation 2021, the Applicant amending Development Application No. DA222/2024 to include the

documents set out in Annexure B.

- (2) The Captag filed the documents set out in Annexure B with the Court on 23 June 2025.

Orders

45 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away by the amendment of the Development Application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the amount of \$6,830 within 28 days from the date of these Orders.
- (2) The appeal is upheld.
- (3) Development consent is granted to Development Application No. DA222/2024, as amended, for staged development including the demolition of existing buildings and construction of a part-four, part-seven storey residential flat building comprising 46 residential units and a shared basement, and construction of a six-storey mixed use development comprising a childcare centre and 45 residential units, at 15A and 15B Moseley Street and 25-31 Donald Street, Carlingford NSW 2118, subject to the conditions at Annexure 'A'.

T Horton

Commissioner of the Court

[Annexure A \(412 KB, .pdf\)](#)

[Annexure B \(165 KB, .pdf\)](#)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 27 June 2025