



Land and Environment Court New South Wales

Medium Neutral Citation:

**Broadstate Group Pty Ltd v Blacktown City Council
[2025] NSWLEC 1743**

Hearing dates:

21 to 23 July and 1 September 2025

Date of orders:

14 October 2025

Decision date:

14 October 2025

Jurisdiction:

Class 1

Before:

Espinosa C

Decision:

The Court orders:

- (1) The appeal is upheld.
- (2) Development consent is granted to development application DA-24-00513 seeking consent for the demolition of existing structures, removal of vegetation and construction of a two-storey centre based child care centre to accommodate 130 children and 18 staff with basement car parking for 40 vehicles, associated site works, acoustic barriers/fencing and landscaping with proposed hours of operation of 7 am to 6 pm Monday to Friday at 151 Bridge Street, Schofields legally described as Lot 161 in DP 1001063 subject to the conditions of consent in Annexure A.
- (3) All Exhibits are retained.

Catchwords:

DEVELOPMENT APPEAL – centre based child care facility – consideration of compatibility with the local character and surrounding streetscape – assessing the impact of development on trees - deferred commencement condition for off site disposal of stormwater - orders

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW), ss 4.16, 8.7

Water Management Act 2000 (NSW)

Fisheries Management Act 1994 (NSW)

Environmental Planning and Assessment Regulation 2021 (NSW), ss 38

Education and Care Services National Regulations (NSW),
c11 107, 108
State Environmental Planning Policy (Biodiversity and
Conservation) 2021, Ch 6, ss 6.6, 6.7, 6.8
State Environmental Planning Policy (Precincts - Central
River City) 2021, ss 2.7, 5.9, 6.1, Appendix 9
State Environmental Planning Policy (Transport and
Infrastructure) 2021, Ch 2, 3, Div 15, ss 2.98, 2.100, 2.120,
3.23, 3.25, 3.27

Cases Cited:

Ballina Shire Council v Palm Lake Works Pty Ltd [2020]
NSWLEC 41
Eboli v Penrith City Council [2024] NSWLEC 1320
*Hoxton Park Residents Action Group Inc v Liverpool City
Council* (2011) 81 NSWLR 638; [2011] NSWCA 349
Project Venture Developments v Pittwater Council (2005)
141 LGERA 80; [2005] NSWLEC 191
Woollahra Municipal Council v SJD DB2 Pty Limited [2020]
NSWLEC 115

Texts Cited:

Australian Standard, AS 4970-2009, Protection of trees on
development sites, 31 July 2009
Australia Standard, AS 4970-2025, Protection of trees on
development sites, 30 May 2025
Blacktown City Council Growth Centre Precincts
Development Control Plan 2010
Department of Planning, Industry and Environment, Child
Care Planning Guideline, September 2021
Department of Planning, Development Near Rail Corridors
and Busy Roads – Interim Guideline, 19 December 2008

Category:

Principal judgment

Parties:

Broadstate Group Pty Ltd (Applicant)
Blacktown City Council (Respondent)

Representation:

Counsel:
T To (Applicant)
D Le Breton (Solicitor)(Respondent)

Solicitors:
Macpherson Kelley (Applicant)
HWL Ebsworth Lawyers (Respondent)

File Number(s):

2024/334820

Publication restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) being an appeal against the refusal of Development Application DA-24-00513 seeking consent for the demolition of existing structures and construction of a two-storey child care centre facility to accommodate 135 children, basement car parking for 42 vehicles, associated site works and landscaping at 151 Bridge Street, Schofields 2762, legally described as Lot 161 in DP 1001063 (the Site).
- 2 On 30 May 2025, the Court granted the Applicant leave to rely on an amended development application (Amended Application), which is the subject of the Amended Statement of Facts and Contentions (ASOFAC) filed 18 June 2025 (Ex 1). The Amended Application seeks development consent for the demolition of existing structures and construction of a two-storey child care facility to accommodate 130 children, basement parking for 40 vehicles, associated site works and landscaping (Proposed Development).
- 3 During the hearing of the appeal the Applicant sought to further amend its development application and the Court notes that the Respondent council as the relevant consent authority, pursuant to s 38(1) of the *Environmental Planning and Assessment Regulation 2021* (NSW), has approved the application for an amendment to development application DA-24-00513 made on 21 July 2025 to rely on the documents and plans specified as follows:
 - (1) Arboricultural Impact Assessment Report – Drainage Easement (Project No. G112, Revisions D, dated 4 July 2025) (Ex D)
 - (2) Plan of Management (Version 10, dated 17 July 2025 (Ex E)
 - (3) Supplementary Traffic and Parking Response by Tom Steal dated 17 July 2025 (Ex F)
 - (4) Easement Drainage Concept plans Issue C, G, B and E (Ex H)
 - (5) Easement Plan - Option C Drawing 104 Issue A dated 21 July 2025 (Ex K)
- 4 At the conclusion of the third day of hearing on 23 July 2025, I reserved my judgment. The Respondent filed a Notice of Motion to reopen the case on 6 August 2025 in order to tender further evidence from Transport for NSW regarding the Easement Plan – Option C. The Applicant did not object and also sought to tender further evidence. The Motion was heard on 1 September 2025 and by consent, leave was granted to reopen the case and the following additional documents were tendered into evidence:
 - (1) Email dated 4 August 2025 from Mr Chau, Assistant Town Planner, TfNSW, including email trail and attachment (Ex 13).
 - (2) Letter to TfNSW Mr Chau, Assistant Town Planner, TfNSW dated 8 August 2025 from Emma Flemming of Macpherson Kelley and email response dated 8 August 2025 from Mr Chau, Assistant Town Planner, TfNSW dated 8 August

2025 from Emma Flemming of Macpherson Kelley (Ex O).

- (3) Letter dated 7 August 2025 from Tim Lupton of The Property Law Group to Macpherson Kelley Lawyers (Ex P).

5 This case is about 3 principle contested issues:

- (1) Compatibility with local character and surrounding streetscape;
- (2) Impact on trees; and
- (3) Off site disposal of stormwater.



Fig 1: West Elevation extract from Drawing A011 Rev O dated 25 June 2025 (Ex C)

- 6 The first contested issue is titled Character and Streetscape and particularised in Contention 1 of the ASOFAC. The Respondent refers to this as the main issue that remains in dispute in relation to planning (Transcript 21 July 2025, p 18 at 30) and broadly speaking, contends that the Proposed Development is not compatible with the existing and desired future character of the locality, building width combined with side and front setbacks and the “cantilevered element at the rear of the first floor, which is inconsistent with the character” (Transcript 21 July 2025, p 18 at 40). The Respondent goes further to contend that the Proposed Development is not adequately articulated or modulated resulting in a dominating street presentation of excessive bulk and scale.
- 7 The Applicant submits that the design of the Proposed Development has specifically looked at existing and contemplated character and has used relevant elements of that character. I give my reasons below at [29] for accepting the Applicant’s submission and for my conclusion that, notwithstanding some differences with the existing character,

the Proposed Development is otherwise compatible with the existing and desired future character of the locality in accordance with the objective of the Child Care Planning Guideline September 2021 (CCPG) at Section 3.2.

8 The second contested issue relates to whether the Proposed Development will have an unacceptable impact on trees located both on and adjacent to the Site (Contention 5, ASOFAC), which involves the following 2 aspects:

- (1) The removal of existing trees from the Site; and
- (2) The incursion within the Tree Protection Zone (TPZ) of two street trees referred to as T1 and in particular T2.

9 I come back to the impact of the Proposed Development on trees at [56] below and conclude that the impacts are acceptable and do not warrant the refusal of the Proposed Development.

10 The third contested issue relates to stormwater management, specifically the assessment of off site disposal of stormwater, referred to in Contention 6 of the ASOFAC as Water Sensitive Urban Design and Stormwater. In particular (e) of Contention 6, the ASOFAC sets out that:

“The Site does not have the right to drain water to the north-eastern boundary of Lot 162. It is unclear whether drainage is proposed into the Railway Corridor and if it is, evidence is required to show consent to drain water has been obtained from the Railway Corridor Authority.”

11 The Applicant submits, and it is agreed, that the Proposed Development does not seek consent for draining works on the adjacent property at 153 Bridge Street Schofields, however, concept stormwater drainage plans are relied on by the Applicant to demonstrate that the disposal of stormwater from the Site is feasible (Ex H and K). The three stormwater disposal options put forward by the Applicant have been assessed for impacts on the trees on the neighbouring lands in the Arboricultural Impact Assessment dated 4 July 2025 (Ex D) and it is agreed that pipes can be installed within the existing easement without unacceptable impacts on trees.

12 I come back to this third contested issue below at [85] where I conclude that there is sufficient information before the court to assess the environmental impacts of the Proposed Development, in particular in relation to the off site disposal of stormwater.

13 The Respondent agrees that Contentions 3 and 4 of the ASOFAC regarding indoor amenity and outdoor play space were resolved and as no expert childcare evidence was required and with the consent of the parties, Ms Campbell was excused from giving any further evidence in the proceedings.

The locality and the Site

14 The Site is zoned R2 Low Density Residential pursuant to Appendix 9 to the State Environmental Planning Policy (Precincts - Central River City) 2021 (Precinct Plan, but also referred to by the parties as the Schofields Precinct LEP) and the North West Growth Centre Land Zoning Map – Sheet LZN_005 (Ex 2, Tab 4). Development for the

purpose of centre-based childcare facilities is permitted with consent in this R2 zone and demolition may be carried out with development consent pursuant to s 2.7 of the Precinct Plan.

- 15 The proceedings commenced on site and the Court heard from objectors starting with Mr McLister from 141A Bridge Street in accordance with the List of Objectors filed 14 July 2025 (Ex 8). Then, departing from the List of Objectors, the Court heard from a solicitor, Mr Lupton, and from Con Katsoulas of CK Engineering Services both on behalf of the owners of the adjoining rear residence at 153 Bridge Street, Schofield and addressed their letter of 27 June 2025 (Ex 8). An agreed note of the oral submissions by objectors on site was added to Ex 8.
- 16 Council received four objections following the Development Application notification period of 14 August 2024 and 28 August 2024. The issues raised in these objections relate to traffic, parking, noise, privacy and stormwater. The adjoining neighbours to the rear of the Site, at 153 Bridge Street, raised additional concerns in relation to the impacts of the Proposed Development within in the existing easement over their property benefitting the Site for stormwater drainage. I will come back to the concerns raised at [85] when I deal with stormwater and its off site disposal as particularised in contention 6.
- 17 After hearing from objectors, the view started by walking down the battle axe access driveway to 153 Bridge Street and the parties noted the lower elevation of the two storey dwelling compared with the Site in the context of privacy and overlooking. The view proceeded to the side, north-western boundary of 153 Bridge Street noting the location of the existing easement for drainage from the boundary with the Site to the rear boundary adjacent to the rail corridor. Observations were made of the rear fence along the rail corridor which was constructed in such a way that the bottom of the fence was clear of the ground and that was to permit the flow of water from 153 Bridge Street into the rail corridor land, as well as observations of a pit which was situated under a small wooden bridge and it was described that this was the location of an On Site Detention (OSD) tank, which had an outlet into an absorption trench.
- 18 After noting the 3 trees that had been assessed for impacts of the future construction of stormwater disposal pipe infrastructure within the existing easement the view continued within the Site where the two street trees, T1 and T2 were identified and the 2 trees on the Site T5 and T6 were identified. Observations were made from the location of T5 and T6 as to what could or could not be seen looking back towards the adjacent rear property of 153 Bridge Street and the proposed setbacks of play areas and building distances were pointed out by Mr Wood by reference to the ground floor plan, namely

15 m to the rear boundary and an overall proposed distance between buildings of approximately 22 m. Observations were then made of the front setback relative to the location of T2.

19 On returning to Bridge Street, the traffic engineers observed proposed sight lines from a driver's right-hand side in a north-westerly direction down Bridge Street and the parties identified the agreed position between the engineers that there be a condition of consent regarding parking controls on the side of the street of the Site to change from 'no parking' with a time limit to 'no stopping', subject to approval of the local traffic committee.

20 Observations were then made of the streetscape and character noting the new and under construction properties across the road from the Site. Visible at the time were the built forms one block further to the west on Lillyana Street, including a row of what appeared to be attached dwellings or terraces, with a sequence of street wall and pitched roof forms and materials. The view proceeded by walking further to the west along Bridge Street to the boundary of the change in the minimum residential density requirements under the Blacktown City Council Growth Centre Precincts Development Control Plan 2010 (Precincts DCP) (I reproduce below at Fig 3 the map as extracted on p 8 of the Town Planning JER from Figure 2-1 of the Indicative Layout Plan indicates Medium Density Residential applying to the 30 dwellings per Ha area- per page 4 of 41 of the Development Control Plan – notably Precincts DCP, Schedule 5 Schofields Precinct).

21 The parties oriented the Court to the locality around or by reference to a cul-de-sac known as Eos Place and observed two more recent developments further to the west and on the opposite side of the street to the Site, of more contemporary two storey built forms. Mr Wood drew attention to the fact that there was some articulation on the front, but quite limited to the sides.

22 An observation was made that the closest set of dwellings had flat parapets over their front entries, but without any balconies or fenestration associated with balconies above. And contrasted that with the other group of contemporary development a little further down to the west in which there were several examples of balconies and railings et cetera at first floor. The parties identified that both sets of contemporary dwellings were within the minimum residential density area of 15 dwellings per hectare, noting that the Site and its surrounds were subject to the minimum residential density of 30 dwellings per hectare. The site view then concluded.

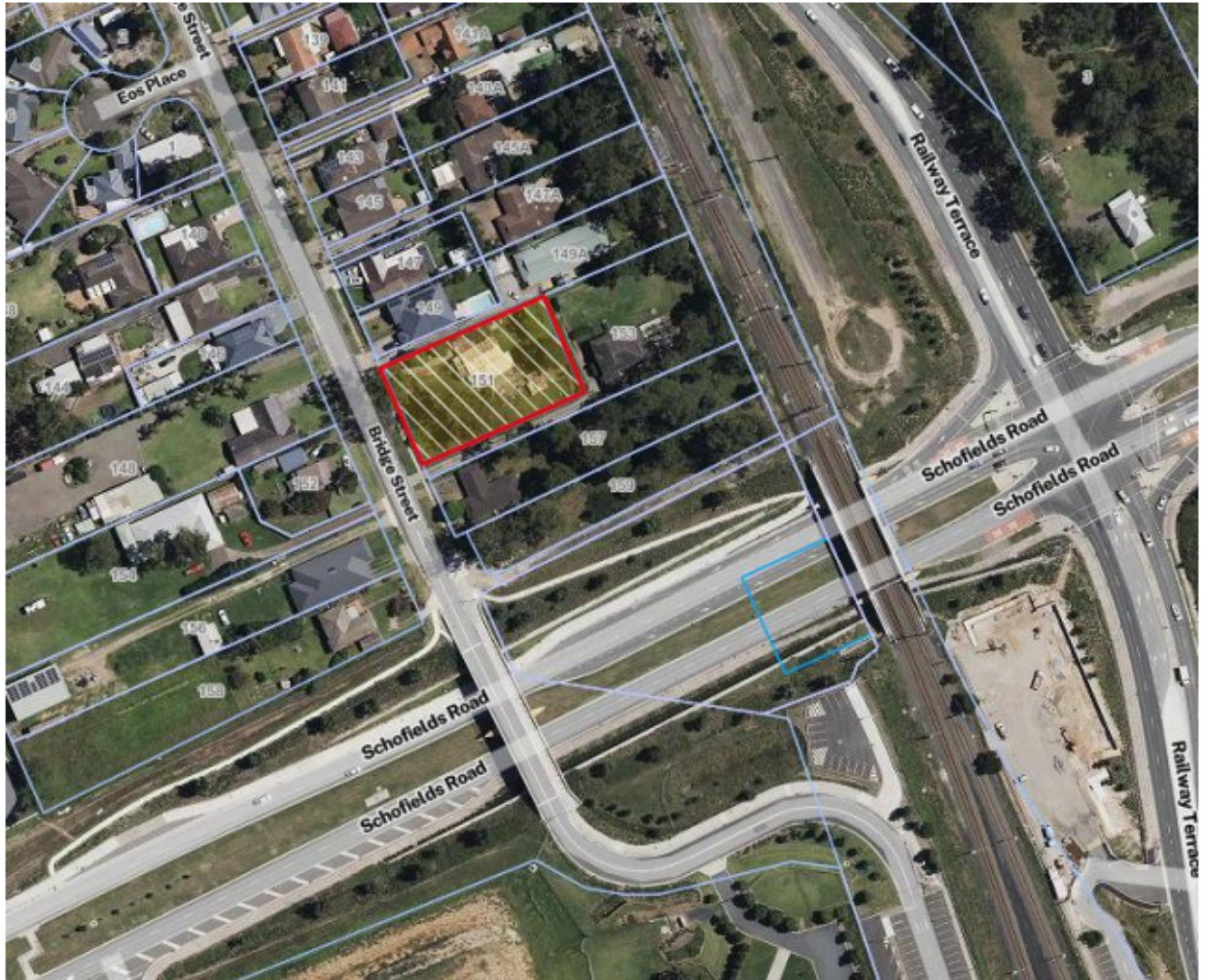


Figure 1. Aerial image of the Site with the boundaries outlined in red (Source: NSW Explorer)

Fig 2: Aerial image from ASOFAC (Ex 1)

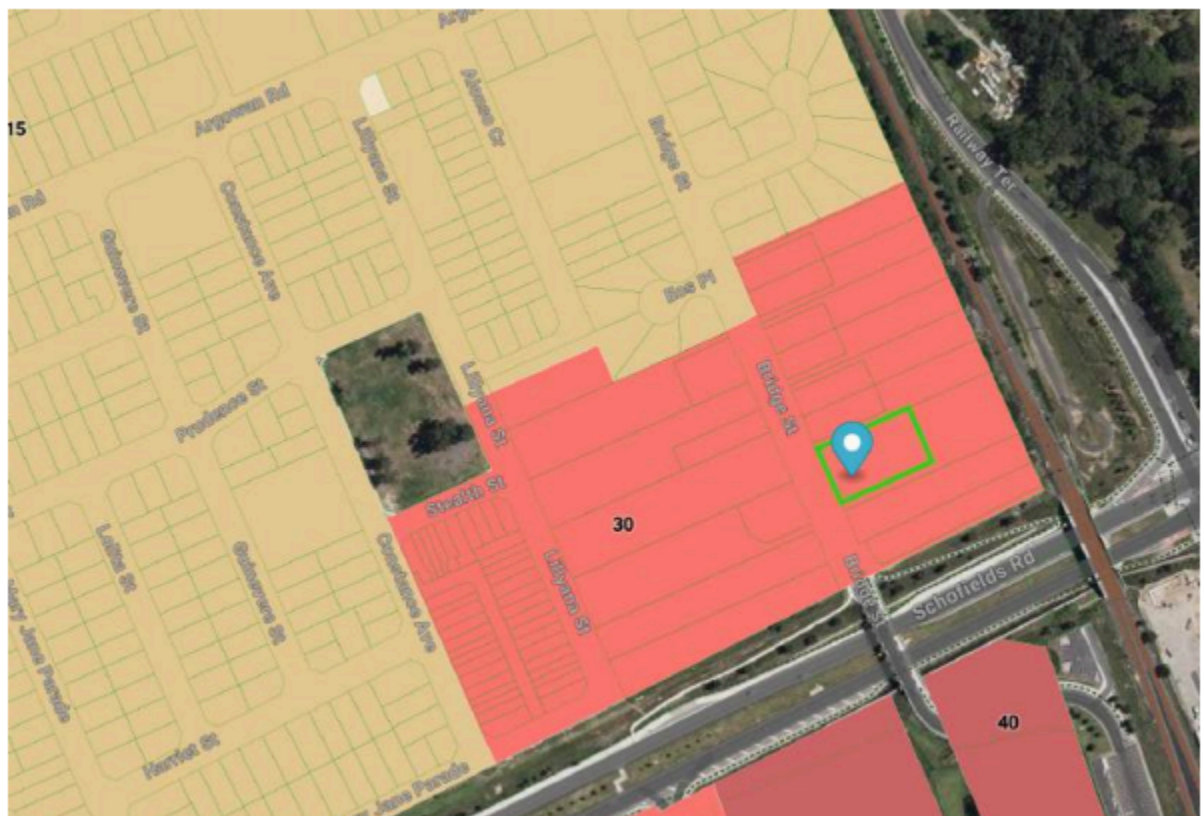


Fig 3: Dwelling Density Mapping Extract from p 8 of Town Planning JER (Ex 3)

- 23 The registered proprietor of the Site is Rong Wang and owners consent is included in the Class 1 Application (Ex A) at Tab 3.
- 24 The Site does not have a maximum floor space ratio (FSR) control pursuant to the Precinct Plan however, the Proposed Development's FSR of 0.439:1, as demonstrated in drawings A001 and A029 Rev O, dated 25 June 2025 (Ex C) complies with the FSR development standard of 0.5:1 pursuant to s 3.25 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP).
- 25 The Precinct Plan does provide for a maximum height of building (HOB) development standard of 9 m and the Proposed Development does not exceed the HOB development standard as shown on the Elevations and Sections at drawings A011 and A012 (Rev O, dated 25 June 2025 (Ex C).
- 26 The relevant provisions of the Transport and Infrastructure SEPP including Ch 2, Div 15, Subdivision 2 and Ch 3 of the Transport and Infrastructures SEPP apply to the Proposed Development. Under s 3.23 of the Transport and Infrastructure SEPP, before determining a development application for development for the purpose of a centre-based child care facility, the consent authority must take into consideration any applicable provisions of the CCPG, in relation to the Proposed Development.
- 27 The parties rely on, and the Court is assisted by Joint Expert Reports from five areas of expertise as follows:
- (1) Town Planning and Childcare prepared by Jonathon Wood, Town Planner and Lynda Campbell, Early Childhood Expert for the Applicant and Nabila Sarwary, Town Planner for the Respondent filed 3 July 2024 (Town Planning JER) (Ex 3);
 - (2) Arboricultural and Landscaping prepared by Greg Tesoriero, Arboricultural Expert and Rebecca Surian, Landscape Expert for the Applicant and Catriona Mackenzie, Landscape Expert for the Respondent filed 4 July 2025 (Landscaping JER) (Ex 4);
 - (3) Traffic prepared by Thomas Steel, Traffic Engineer for the Applicant and David England, Civil Engineer for the Respondent filed 30 June 2025 (Traffic JER) (Ex 7);
 - (4) Acoustic prepared by Stephen Gauld, Acoustical Engineer for the Applicant and Richard Haydon, Acoustical Consultant for the Respondent filed 9 July 2025 (Acoustic JER) (Ex 6); and
 - (5) Stormwater Engineering prepared by Joe Bacha, Civil Engineer for the Applicant and David England, Civil Engineer for the Respondent filed 11 July 2025 (Stormwater JER) (Ex 5).
- 28 I now address the 3 contested issues in the order listed above at [5].

Character and Streetscape (Contention 1)

- 29 The Respondent contends in the ASOFAC that the development proposes excessive built form and its bulk and scale is inconsistent with the existing and desired future character of the locality as established by existing development, the Precincts Plan and Precincts DCP, contrary to s 3.23 of the Transport and Infrastructure SEPP. It is agreed that by application of s 3.27 of the Transport and Infrastructure SEPP, the relevant provisions of the Precincts DCP do not apply to the Proposed Development for the purpose of addressing Contention 1 regarding the consideration of whether the Proposed Development is consistent with the existing and desired future character and streetscape.
- 30 Although the Acoustic and Town Planning experts agree that the visual and acoustic privacy impacts are reasonable, the Town Planning experts were unable to agree whether the Proposed Development was compatible with the existing and desired future character of the locality.
- 31 The requirement to consider the character of the locality is found in Section 3.2 of the CCPG titled “Local character, streetscape and public domain interface” and the stated objective of this consideration is:
- “To ensure that the child care facility *is compatible with* the local character and surrounding streetscape” [emphasis added].
- 32 The Applicant’s position is that the design of the child care centre has “quite specifically looked at elements of character, both existing and as contemplated by the applicable controls in order to inform the design. And it has used elements of character as are relevant in the design that the Court has before it.” (Transcript 21 July 2025, p36 at 1). The Applicant submits that the Court “will be comfortably satisfied that the design is one that does respond to elements of existing and desired future character, through understanding the applicable controls ... that includes ... the suite of controls that apply to the various types of residential development.” (Transcript 21 July 2025, p36 at 8).
- 33 The Applicant observes in written submissions that nothing in the Precinct Plan, the Growth Centres DCP nor the CCPG requires achievement of consistency with local character. Similarly, there is no requirement to achieve the desired future character in the Precinct Plan, the Growth Centres DCP nor the CCPG. I agree with the Applicant’s observation and I deal with Contention 1 in accordance with the provisions of s 3.23 of the Transport and Infrastructure SEPP, which requires the Court to consider whether that the proposed child care facility is compatible with the local character and surrounding streetscape.
- 34 Section 3.23 of the Transport and Infrastructure SEPP provides that before determining a development application for development for the purpose of a centre-based child care facility, the consent authority must take into consideration any applicable provisions of

the CCPG, in relation to the Proposed Development. The Statement of Environmental Effects dated 3 July 2024 filed with the Class 1 Application at Tab 5 (Ex A) provides an assessment of the Proposed Development against the CCPG at pp 38 to 61.

35 Relevantly, the ASOFAC at particular (a) repeats the terms of s 3.23 of the Transport and Infrastructure SEPP. Particular (b) relies on Section 3.1, Control C1 at point 3 of the CCPG which in turn requires a consideration of 'visual amenity impacts' without imposing any normative standards.

36 The Respondent focuses on control C5 of Section 3.2 of the CCPG at particular (c) and reproduces six of the eight bullet points of C5 which in consideration of the objective 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 such a way to respond to the character of the locality and existing streetscape;
- reflect the predominant form of surrounding land uses, particularly in low density residential areas;
- recognise and respond to 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 and local character;
- use landscaping to positively contribute to the streetscape and neighbouring and neighbourhood amenity; and
- in R2 Low Density Residential zones, limit outdoor play space to the ground level to reduce impacts on amenity from acoustic fences/barriers onto adjoining residences, except when good design solutions can be achieved.”

37 The Respondent contends at particular (d) that the Proposed Development will have a streetscape presentation as follows:

“The proposed streetscape presentation is a 29m wide building across the width of the Site, with side setbacks of less than 2m on either side which provide only 1m for landscaping. The streetscape presentation also includes three concrete pathways and a 6m wide driveway within the front setback. The proposed excessive built form and associated infrastructure will present a cluttered front setback which will dominate the streetscape in a way which is inconsistent with the existing and desired future character of the locality”

38 At particulars (e) and (f):

“(e) The proposed built form does not contribute to the locality in a way which responds to its character and existing streetscape, fails to recognise and respond to predominant streetscape qualities and by the provision of childcare facilities on the first floor, introduces elements such as first floor acoustic fencing which are uncharacteristic in the locality.

(f) The proposal is inconsistent with the design quality principles within Part 2 and sections 3.2 and 3.3 of the CCPG. An insufficient attempt has been made to respond and enhance the existing and emerging qualities of the area particularly the streetscape. The cantilevered first floor at the rear of the building is inappropriate in the context of the local character of the area. There is a significant absence with regard to the address of the development to the eastern boundary and north east and south east corners with acoustic fencing between 1.8 m to 2.4m high.”

39 I have already noted above at [30] the agreement between the experts in terms of the visual impact. The dispute is limited to whether the Proposed Development will be compatible with the existing and desired future character of the locality.

40 The Applicant submits that the evidence does not support the contention. I agree with

the Applicant.

41 The objective of C5 of Section 3.2 of the CCPG is “To ensure that the child care facility is compatible with the local character and surrounding streetscape.” In order to assess whether the Proposed Development is compatible with the local character and surrounding streetscape, I have referred to the evidence of the town planning experts to understand what is the character of the locality.

42 The town planning experts Mr Wood and Ms Sawrory set out their points of agreement in the Town Planning JER (Ex 3) at paras 1.1 to 1.14. Relevantly they agree and I find as follows:

- (1) The first floor play area is predominantly disguised from view (para 1.3)
- (2) The materials and finishes and use of a pitched roof is appropriate in a residential context (para 1.4)
- (3) The character of the locality is changing (para 1.5) and the locality is in transition with the Site and adjoining sites being “zoned R2 but have a dwelling density of 30 dwellings per Ha and have an additional permitted use for townhouses on this land. Therefore, the density contemplated by the controls is greater than a typical R2 zone.” (para 1.13)
- (4) There has been less redevelopment on the eastern side of Bridge Street (para 1.7) and redevelopment has been more focussed to the western side (para 1.13)
- (5) The character of the locality varies and at para 1.8 the following description is agreed:

“Older housing stock is 1-2 storeys with pitched roof forms and occupy smaller portions of the allotment owing to the larger lot sizes and adopt larger rear setbacks.

New housing stock is principally 2 storey semi-detached or detached dwellings that occupy substantial portions of the allotment which adopt smaller allotment sizes. Built forms are generally face brick and components of render and pitched roof forms are the prevailing roof design. Side setbacks are limited to what appears to be approximately 900mm to 1m at the ground level and generally increasing to the first floor and there is limited observed landscaping between dwellings. These newer forms align with the DCP provisions that encourage greater densities.”

- (6) Recently approved dual occupancy dwellings with flat rooves opposite the Site will form part of the character of the locality (para 1.6)

43 The expert Town Planners disagree on whether the bulk, scale and design of the Proposed Development is acceptable and compatible with existing and desired future character.

44 Ms Sarwary’s disagreement is set out commencing at para 1.43 of the Town Planning JER where she starts with a statement or conclusion that “the Proposal is a childcare centre which is a commercial use and is not considered compatible with the local

character and surrounding streetscape.” In oral evidence, Ms Sawrory confirmed that this concept of commercial use informed the remaining opinions expressed from paras 1.43 to 1.52 (Transcript 22 July 2025, p 100 at par 31).

45 I do not accept the conclusion by Ms Sawrory that commercial use is not compatible with the local character and surrounding streetscapes because the Land Use Table expressly provides that “centre based child care facilities” are permissible with consent in the R2 zone and to accept Ms Sawrory’s opinion would override the Land Use Table and render all commercial uses which are otherwise permissible in the R2 zone as being incompatible with the local character and surrounding streetscape which would be an absurd result. Further, the objectives of the R2 zone encourage supporting uses. For the purpose of considering compatibility with the local character and streetscape, I give no weight to the fact that the Proposed Development will be a commercial.

46 The Respondent submits that Ms Sawrory’s concerns of incompatibility relate to the following elements of the Proposed Development which I will deal with in turn:

- (1) The front setback (Transcript 22 July 2025, p 105) of the Proposed Development. The Precincts DCP provides a 4.5m minimum front setback for residential development and for child care centres a 6.5m minimum front setback is provided. Architectural Drawing A007 Ground Floor Plan Rev O dated 25 June 2025 (Ex C) was shown to Ms Sawrory and she agreed that the Proposed Development has variable setbacks to the front wall but that they are generally around 6 m and a little bit more at the southern end (Transcript 22 July 2025, p 105 at par 22). I am satisfied that the Proposed Development has an appropriate front setback.
- (2) Cantilevered first floor element at the rear. Ms Sawrory’s opinion is that “the external appearance and bulk and scale of the first floor as viewed from the streetscape is unacceptable” (para 1.51 JER). In cross examination Ms Sawrory agreed that insofar as there is a first floor arrangement with a balustrade to the first floor play area, there are examples of first floor balconies which were seen during the on site view further down on Bridge Street (Transcript 22 July 2025, p 105 at 47). This is in accordance with the observations made during the view of balconies is set out above at [22].
- (3) Excessive bulk and scale because the building is not sufficiently articulated or modulated. Notwithstanding her written evidence at par 1.48 of the JER regarding the width of the building and the streetscape presentation, Ms Sawrory was shown Architectural Drawing from Ex C during cross examination

and she did not disagree with the well-articulated building (Transcript 22 July 2025, p 107 at par 40) and she agrees that the design of the Proposed Development (Transcript 22 July 2025, p 106 from par 42):

- (a) has articulation along its frontage because the first floor is set back considerably from the ground floor;
 - (b) is further articulated with the shape of the wall on the left-hand side of the flooring, punctuated by windows and openings, and further articulated by the fact that the element over the driveway is itself considerable set back from the front building alignment; and
 - (c) presents with a module on the left-hand side that is consistent with a larger dwelling house form and a distinct module at the far right which is more consistent with a terrace or townhouse form.
- (4) Dominant and presents a cluttered appearance, therefore dominates the street and is inconsistent with the character. Ms Sawrery, however, agrees that what is proposed in terms of landscaping outcomes is going to be an improvement on the streetscape (Transcript 22 July 2025, p 110 at par 15).
- (5) Roof form on first floor. The Proposed Development has a pitched roof being compatible with the locality and surrounding streetscape however, Ms Sawrery's concern is limited to what she refers to as the 'hole in the donut' with a tree through it being "not typical of the existing nor the evolving character of the street" (para 1.44, JER). Ms Sawrery clarifies in cross examination that her concern is that a person on the street will be able to see the top of the tree that is planted in the first floor area protruding above the roof form and that notwithstanding that although the person on the street looking from the streetscape would perceive a similar arrangement if they were looking at a house that had a large tree planted in the backyard, her concern remains that it is "not a typical roof form". I do not accept that this alone is sufficient grounds to refuse consent because the balance of the presentation of the Proposed Development is compliant and otherwise comfortably compatible with the local character and the surrounding streetscape. I find that the mere visibility of the tree will not render the Proposed Development incompatible because it may just simply present to a person on the street no different to a large tree planted in the backyard of a house.

47 The Respondent submits that the cantilevered built form and the basement are not elements which warrant refusal but "it's those elements, combined with the other elements, that council says means that the character and streetscape presentation of this development is incompatible with the existing and desired future character." (Transcript 23 July 2025, p 164 at par 32)

48 I conclude that Ms Sawrery's evidence does not support a finding that the Proposed Development should be refused on the basis of particulars set out in Contention 1 for

the reasons given by Mr Wood.

49 Mr Wood, gives a thorough and detailed analysis of compatibility with the local character and surrounding streetscape in the JER planning from 1.20 to 1.21 by undertaking the test of compatibility set out in the Planning Principle articulated in *Project Venture Developments v Pittwater Council* (2005) 141 LGERA 80; [2005] NSWLEC 191 (*Project Venture*) from [22] to [31]. Mr Wood concludes at par 1.22 that on the basis of the components of height, setbacks and landscaping, he considers the proposal is compatible in terms of the matters contemplated by the Planning Principle.

50 There is agreement as to the visual catchment of the site, which is generally aligned with Fig 6 in the JER and there is also agreement that compatibility is different from sameness (JER at par 1.20). Roseth SC in *Project Venture* described this aspect of the Planning Principle at [22] as follows:

“There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

51 Mr Wood then expressly acknowledges that the built form of the Proposed Development is larger than existing residential development however “it is a function of the building typology” and that “given the density controls that apply” ... “if the child care centre proposal was not pursued there would be a minimum of 6 dwellings to be delivered on the site ...ultimately the extent of built form and intensity is contemplated to increase on this site and adjoining sites over time.”

52 In relation to desired future character I have also considered the decision of Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 where at paras [52]-[59] he sets out what is meant by desired future character.

53 I prefer and adopt the conclusion of Mr Wood at par 1.23 of the Town Planning JER that “given the proposal meets the relevant planning controls (height, FSR, setbacks, and the like) and given the density envisioned by the planning controls I consider the bulk, scale and form to be acceptable.”

54 I conclude that, after taking into consideration the provisions of the CCPG, the Contention 1 of the ASOFAC is not supported by the evidence and does not warrant the refusal of the Proposed Development.

55 I now move on to set out my reasons why after considering the impact of the Proposed Development on trees consent can be granted.

Impact on trees (Contention 5):

- 56 In closing submissions, the Respondent agreed that stormwater drainage pipes can be installed within the easement without unacceptable impacts on trees as set out in the Arboricultural Impact Assessment Report – Drainage Easement (Project No. G112, Revisions D, dated 4 July 2025) (Ex D).
- 57 The parties agree that the remaining impact on trees consideration has two elements to it being firstly, the broader question of tree removal on the Site situated within a growth centre precinct. The Applicant submits that the outcome on the Site itself is one that is entirely to be expected and an acceptable one (Transcript 21 July 2025, p36 at 39). That outcome, the Applicant says, has been mitigated by the proposed plantings and there is no criticism advanced by the Respondent on the quality of that planting or its appropriateness to provide canopy or shade. I also note the agreement by Ms Sawrory above at [46(4)] regarding the superior landscaping outcome in the context of character and streetscape. Accordingly, I find this broader question of tree removal on the Site to be resolved and I give my reasons at [60].
- 58 The second element to the consideration of the impact of the Proposed Development on trees is the more specific concern regarding the impact of the Proposed Development on two street trees, T2 and to a lesser extent to T1. The Applicant submits that the placement of the build has been informed by the likely limitations from existing trees and that after careful root mapping, the arboricultural advice is that there will be some short term impacts to T2 from the construction of the Proposed Development, but the long term viability will not be affected and the expected useful life of the trees will not be reduced.
- 59 I will deal with the broader issue first.

Removal of trees from the Site for the Proposed Development

- 60 The Arboricultural Impact Assessment (Project No. G112, Rev S, dated 6 May 2025) (Ex B, Tab 12) recommends the removal of 9 trees to facilitate the Proposed Development. Consent is sought to remove those trees pursuant to s 5.9(3) of the Precinct Plan.
- 61 The Arboricultural Impact Assessment identifies T5 and T6 as being of high landscape value and high retention value and the Respondent's expert, Ms Mackenzie, at par 70 of the JER (Ex B) states:

“The removal of those two large and significant trees might only be acceptable if the proposal could supply sufficient deep soil to support replacement trees that will achieve similar dimensions and provide meaningful canopy cover that will compensate for the substantial loss of native tree cover and the attendant intrinsic amenity and environmental and ecological benefits these tree currently provide.”

62 Ms Mackenzie accepts that replacement planting is proposed and that the proposed replacement canopy would be fairly similar (Transcript 22 July 2025, p 81 at par 23).

63 As a result of the similar replacement tree canopy proposed and the overall improved streetscape landscape outcome, I am satisfied that this part of the contention is resolved.

Impact of Proposed Development on Street trees T1 and T2.

64 Moving on to the specific concern of the impact of the Proposed Development on the two street trees T1 and T2 (Contention 5(c) ASOFAC) which are located on the verge and are of high landscape and high retention value.

65 The Proposed Development includes measures to protect and ensure the retention of street trees T1 and T2.

66 The front setback adopted by the Proposed Development is 6m on the north-western corner which is within the Tree Protection Zone (TPZ) of T2 being the street tree closest to the proposed new driveway. It is agreed that the figure of 15.6% is calculated as the proposed encroachment into the TPZ for T2 by the Proposed Development. The experts agree that there will be short-term impacts on T2 due to the excavation, compaction and soil level changes.

67 The experts also agree that T2 will have roots under the road.

68 The Applicant relies on the root mapping of T2 in Appendix to the Arboricultural Impact Assessment dated 16 May 2025 (Tab 12 of Ex B). At page 23 of the Arboricultural and Landscaping JER (Ex 4) there is disagreement on tree root loss for T2 and there is some disagreement between the experts regarding the long term impacts on T2. Ms Mackenzie's view is that the Proposed Development will have unacceptable impacts which will potentially cause T2 to no longer be viable.

69 The calculation of the TPZ by Ms Mackenzie as illustrated in Fig 2 of the Arboricultural and Landscaping JER (Ex 4) is relied on by Ms Mackenzie to support her opinion that if the development is setback to the 8.5 m mark, that the incursion within the TPZ would be acceptable in her view and that that is a supportable encroachment (Arboricultural and Landscaping JER, par 91). It is relevant that Ms Mackenzie accepts that the damage to the woody roots would be okay and that the main reason for the 8.5m

setback she proposes is to provide sufficient soil resources by providing contiguous soil area available to the tree for root growth and sustained tree health and longevity (Transcript 23 July 2025, p 156 at par 10).

70 The two experts determined the TPZ for T2 in accordance with the Australian Standard AS4970: Protection of trees on development sites (AS4970-2025), however they each arrived at different conclusions using the following methods:

- (1) Ms Mackenzie determined the Notional Root Zone (NRZ) and undertook a theoretical consideration of the matters listed in Clause 3.3.2 of AS4970-2025, whereas
- (2) Mr Tesoriero determined the NRZ and then undertook physical investigation with the 2 trenches and root mapping.

71 Ms Mackenzie did not undertake any physical investigation and does not question Mr Tesoriero's observations made during the root mapping.

72 Mr Tesoriero reports that no roots were found in Trench 2 and only 2 medium diameter and 5 small diameter roots found in Trench 1 and at para 97 of the Arboricultural and Landscaping JER confirms that:

"The findings indicated that very little root activity (both woody roots and fine, non-woody roots) occur along the alignment of proposed works which further assisted to inform the opinion that the impacts could be tolerated based on anticipated root loss from construction being minimal."

73 I do note also that at par 98 of the Arboricultural and Landscaping JER, Mr Tesoriero expressly addresses and comments on the "other considerations for potential impacts from TPZ encroachments at Section 3.3.4 (of AS4970-2009)" which I referred to above as the theoretical considerations by Ms McKenzie. I find that Mr Tesoriero also undertook the theoretical consideration and that it is incorrect and misleading for the Respondent to submit that Mr Tesoriero merely undertook the first step of calculating the TPZ in accordance with the formula and undertook a root mapping investigation. For this reason, I have preferred the evidence of Mr Tesoriero. Mr Tesoriero considered Ms Mackenzies' 'extrapolated TPZ' and said at par 100 of the JER that:

"the assumptions relied upon to obtain the extrapolated extension of the notional TPZ do not align with the physical findings of the exploratory root investigations whereby low levels of root activity were identified in the unrestricted area of deep soil within the front setback of the property."

74 There was some attention given by the parties to the update to the Australian Standard AS4970-2009: Protection of trees on development (AS4970-2009) with AS4970:2025 and relevant extracts of each are in evidence (Ex J). The main relevant differences are the introduction of the Notional Protection Zone and the changes to the types of encroachments. I set out a summary of the process for determining protection zones as set out in AS4970:2025 below:

- (1) Step 1 is in Clause 3.3.1: "The NRZ is the starting point for determining the TPZ. The TPZ should be determined using the considerations and encroachments

discussed below."

- (2) Step 2 is in Clause 3.3.2 to determine your TPZ, you take into account everything in 3.3.2. I note that when compared with Clause 3.3.4 of AS4970-2009, although they are substantially the same, there are some differences however, I am satisfied that there is sufficient evidence before the court to address all the considerations.
- (3) Clause 3.3.5 Moderate encroachment into the NRZ is greater than 10% and less than 20%:

"A project arborist shall be engaged to review the proposed impact and undertake any other necessary investigation *to address the factor listed in Clause 3.3.2* to demonstrate how the tree will remain viable. This may be through the implementation of suitable design measures and construction controls to mitigate impacts during the development process as part of a TPS and TPP. To avoid a net loss of soil area and volume, an are equivalent to the encroachment shall be incorporated into the TPZ, *unless the project arborist otherwise demonstrates that the tree will remain viable.*" [emphasis added]

- 75 I accept that the only relevant significant update to the AS4970-2025 from the 2009 version is that the threshold of a 'major encroachment' of a TPZ has been increased, from 10% to 20% (Clause 3.3.5 AS4970-2025) and that for present purposes the agreed calculated encroachment of 15.6% into the NRZ (formerly TPZ) of T2 by the Proposed Development is now within the new category of 'moderate encroachment' being 10% to 20%, introduced by the 2025 standard (Clause 3.3.6 AS4970-2025).
- 76 The Applicant submits that "the Australian Standard has not sought to identify that either a "moderate encroachment" or a "major encroachment" is unacceptable. It does not prescribe a consequence of classification into either category. Rather, the Standard then facilitates a merit assessment to consider the acceptability of that encroachment." (AWS par 64) I note that Clause 3.3.5 of AS4970:2025 provides for that assessment to consider the acceptability of the 15.6% encroachment into the NRZ of T2.
- 77 I prefer the evidence of Mr Tesoriero and I reject the submission by the Respondent that Mr Tesoriero "has not calculated the TPZ in accordance with the 2025 standard (because) he's just relied on the NRZ and he's done root mapping." (Transcript 23 July 2025, p 158 at par 42) Mr Tesoriero has done precisely what Clause 3.3.5 of the AS4970-2025 requires when a moderate encroachment into the NRZ is proposed by a development. The observations and expert opinions of Mr Tesoriero are based on actual physical investigation and "provide a sound evidentiary basis for the assessment by Mr Tesoriero about the likely impact on Tree 2 (JER, paras 98, 99 and 102), contrasting with the unsupported assumptions underlying Ms Mackenzie's approach." (AWS, par 77)
- 78 The evidence supports a finding that neither street tree T1 nor T2 is likely to be adversely affected so as to affect their long-term viability.
- 79 Having considered carefully the evidence of the experts, I find that the impact of the Proposed Development on T2 does not warrant refusal of development consent. I make this finding also noting the following agreed conditions of consent (Ex 10), which are

consistent with the Clause 3.3.5 of AS 4970-2025 insofar as they are “construction controls to mitigate impacts during the development”:

- (1) Condition 3.9 Tree Protection plan for T1 and T2 and including vegetation on adjoining land to be included in and form part of the Construction Management Plan.
- (2) Condition 3.10 Security Deposit for the protection of T1 (\$1,058.19) and for the protection of T2 (\$12,698.32) prior to any demolition works or the issue of a Construction Certificate to be held for 6 months after the issue of the final occupation certificate and the issue of a final report by the project arborist providing advice on the retained tree’s health and structure and to decide on any Bond return to the applicant.
- (3) Condition 9.9 Tree Protection – Detailed
 - (a) “No construction or excavation, including trenching for drainage shall occur within the structural root zone of any retained and protected tree .. on public road reserve or adjoining properties.”
 - (b) “Tree roots of greater than 50mm diameters are not to be removed, unless approved by an AQF5 qualified arborist or Project Arborist on site.”
- (4) Condition 12.15 Follow-up Arborist Report.

80 There is a disputed condition of consent proposed or offered by the Applicant regarding the Relocation of the Fire stairs on the northern boundary – Conditions 2.1.1A and 2.1.1B Ex 10 regarding drawings SK 001 and SK 002 (Ex L).

81 The Applicant submits that the option to relocate the fire stairs on the northern boundary closer to the driveway and to remove the pathway from the front setback in accordance with Ex L, is in an effort to respond to the concerns of Ms Mackenzie to provide sufficient soil resources by providing contiguous soil area available to the tree for root growth and sustained tree health and longevity (Transcript 23 July 2025, p 156 at par 10). According to Mr Tesoriero, which was not challenged, the change will result in a reduction of the TPZ encroachment for T2 from 15.6% to 13%. This option is offered by the Applicant by way of conditions 2.1.1A and 2.1.1B, “given that corresponding amendments would need to be made to other architectural, landscape and (potentially) stormwater plans.” (AWS, par 80)

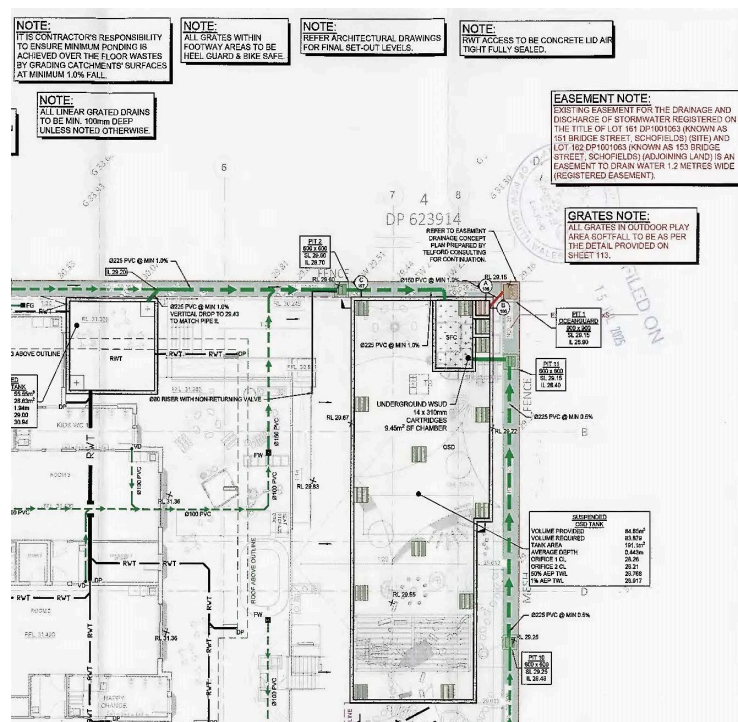
82 The Applicant clarifies that it is not seeking to amend the development application further by reference to Ex L. The applicant's position is “that the evidence as it sits from the arboriculture topic, renders it unnecessary to do so” (Transcript 23 July 2025, p 170 at par 16).

83 The Respondent submits that Ms Mackenzie's evidence is that the movement of the fire stairs further to the south “will make no material difference to the incursion into the TPZ” (Transcript 23 July 2025, p 161 at par 22) and that this is the reason the

84 On the basis of the evidence of Ms Mackenzie and the submissions of the parties, I do not propose to include conditions 2.1.1A and 2.2.1B as well as for the reason that it is not uncommon for what looks like a minor innocuous amendment to a development to have unintended consequences, and as such this proposed relocation of the fire stairs may also bring forward an unintended consequence which has not been assessed or considered by any of the experts.

85 The third and final issue in dispute between the parties relates to the ability to assess the environmental impacts arising from the disposal of stormwater from the Site through and to the adjoining land at 153 Bridge Street Schofield and into the north-western rail corridor.

86 The proposed management of stormwater on and from the Site is described in AWS at par 98, where stormwater flows are to be detained, and released in a controlled fashion, from the proposed on-site detention facility. The outlet of that facility is in the north-western corner of the Site, and is intended to convey released stormwater by way of a drainage pipe to be constructed, likely under a future development application. This description is readily discernible from the engineering drawings prepared by Telford Civil in Dwg 103 Rev D which I reproduce below at Fig 4. The future development application will seek consent to locate a pipe within an existing easement to drain water that benefits the Site.



- 87 Mr Bacha, expert stormwater engineer for the Applicant, accepts that the amount of stormwater which will flow as a result of the Proposed Development will be significantly more than what is presently on the Site by virtue of there being significantly more impervious area proposed than what currently exists.
- 88 The first particular of Contention 6 of the ASOFAC states the jurisdictional prerequisite to be satisfied that the development ensure the effect on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and the impact on water flow in a natural waterbody will be minimised: s 6.6 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP).
- 89 To satisfy this jurisdictional prerequisite, the Applicant relies on the following as part of the Proposed Development's stormwater management:
- (1) Stormwater controls including on-site detention (OSD) and rainwater tanks to direct stormwater runoff through those tanks for reuse and detention; and
 - (2) Ocean Guard Protect Filtration system for stormwater pits and tanks.
- 90 The Applicant further relies on the stormwater plans in Ex C in particular the Catchment Plan and MUSIC results at Drawing 109 Issue A, dated 15 May 2025 (Tab 3, Ex C) and MUSIC-Link Report (Tab 7 Ex C). The parties' engineering experts agree in the Engineering JER (Ex 5) that these plans and the MUSIC modelling results satisfied the requirements for neutral or beneficial effect on the quality of water entering a natural waterbody and minimised impact on water flow in a natural waterbody and for that reason I am satisfied that the jurisdictional prerequisite in s 6.6 of the Biodiversity and Conservation SEPP is satisfied. I will come back to my reasons for being satisfied of the other jurisdictional prerequisites of Chapter 6 of the Biodiversity and Conservation SEPP are satisfied at [128].
- 91 The contention 6 of the ASOFAC also refers to the terms of s 6.1 of the Precinct Plan, however, in closing submissions the Respondent confirmed that it does not press this element of contention 6 because the s 6.1 of the Precinct plan does not apply to this development because the stormwater infrastructure proposed is not public infrastructure but rather for the private benefit of the Site. (Transcript 23 July 2025, p 147 at par 5)
- 92 In determining whether to grant consent to the Proposed Development, the consent authority, in this case the Court, is required by s 4.15(1)(b) of the EPA Act to take into consideration "the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality." The Respondent submits that, consistent with the Court's decision in *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 (*Palm Lakes*), at [6], [30], [31] and [38], the Court is required to consider the likely impacts of the Proposed

Development, including those impacts of stormwater discharge on and through 153 Bridge Street and into the rail corridor. Preston CJ in *Palm Lakes* at [6] explains the application of ‘likely impacts of that development’ as follows:

“[6]. The phrase “the likely impacts of that development” embraces not only site specific impacts, being impacts of the proposed development on the development site, but also off-site impacts. Off-site impacts can be caused not only by the proposed development impacting adjoining or other land in an area of influence but also by some other development provided that the impacts of that other development have “a real and sufficient link” with the proposed development, such as where the impacts are caused by “some further undertaking that is ‘inextricably involved’ with the proposed development”: *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 101 and *Environmental Defence Society Inc v South Pacific Aluminium (No 4)* [1981] 1 NZLR 530 at 534-535.

- 93 The Respondent submits that the Court cannot defer the later consideration environmental assessment of those works by imposing a deferred commencement condition. The Applicant seems to agree that assessment of those works is required submitting that “although not proposed as part of this development”, the disposal of stormwater from the Site is “accepted to be a sufficiently connected matter to warrant consideration as to its likely impacts”: *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638; [2011] NSWCA 349.
- 94 I find, and the parties agree that consideration as to the likely impacts of the off site stormwater disposal is warranted in this case because it is sufficiently connected to the Proposed Development: *Palm Lakes* at [30].
- 95 The Applicant submits that consent is not sought for those off site stormwater disposal works and that as the concept drawings have been assessed for their feasibility and impacts, it is appropriate to be dealt with in the Deferred Commencement Condition quoted below. The Applicant seeks to distinguish *Palm Lakes* because here the Court has an existing easement as well as the details of the off site stormwater disposal options together with expert evidence confirming those options as being feasible from an engineering perspective.
- 96 Mr England proposed a Deferred Commencement Condition in the JER Engineering at p 7. The agreed terms of the Deferred Commencement Condition are set out at A1, A2 and A3 of the Draft/Proposed Conditions of consent (Ex 10) which I reproduce below in full as follows:

“DEFERRED COMMENCEMENT CONDITION

This deferred commencement consent shall not operate until the Applicant satisfies Council, in accordance with the *Environmental Planning and Assessment Regulation 2021*, in relation to the matters listed in the Part 1 condition.

Upon Council being satisfied as to the matters listed in the Part 1, Council will notify the Applicant in writing that the consent has been made operative subject to the conditions listed in Part 2.

Should Council not be satisfied as to the matters listed in the Part 1 condition within the specified timeframe, this deferred commencement consent will be rendered permanently inoperative.

Part 1 - Deferred Commencement Conditions:

A1. Pursuant to Section 4.16(3) of the *Environmental Planning and Assessment Act 1979*, deferred commencement consent is granted subject to the following:

a) Development consent is to be obtained which permits the drainage of stormwater from the site through 153 Bridge Street, Schofields to a point of discharge.

b) Written evidence must be provided to Blacktown City Council of a lawful entitlement to drain stormwater via 153 Bridge Street, Schofields and to the point of discharge.

c) The written evidence must establish that an easement has been created, or the existing easement modified (if required) as well as any agreement with Transport for NSW.

A2. The proponent must provide Blacktown City Council with written evidence demonstrating that the matters listed under Part A1 above have been satisfactorily addressed within 48 months of this determination or the consent will lapse.

A3. Upon satisfying the matters listed in Part A1 and A2, an operational development consent would then be issued by Blacktown City Council."

- 97 The Deferred Commencement Condition has 2 components, firstly obtaining the consent or permission from TfNSW and secondly, showing the evidence of the relevant permissions to the Respondent Council.
- 98 The off site stormwater disposal concept works are limited to under-boring along the alignment of the pipe to enable its construction within the existing easement at 153 Bridge Street, Schofield, with launch and removal pits at each end and, in Option C (Ex K), a 900mm x 900mm pit at the eastern end.
- 99 The Respondent is satisfied that the internal aspects of the stormwater design are adequate (Transcript 21 July 2025, p 19 at par 40). The parties' arborists assessed the impacts on the trees on the adjoining neighbouring land and did not raise any concern (Arboriculture JER, paras 113, 114, 117, 119 and 120). Similarly, Ms McKenzie confirmed in oral evidence that she was not concerned about impacts on those trees from these future works within the existing easement. Further, Mr England's evidence at p 10 of the JER Engineering is that he accepts that width of the existing easement is "sufficient to drain the proposed development provided that the drainage system can be connected to a viable downstream drainage system...".
- 100 The Respondent submits that it is not satisfied, and it says that the court cannot be satisfied, about how stormwater can adequately be drained from the Site in a manner which does not have an unacceptable environmental impact on the adjoining property and the railway corridor. The Respondent's overall submission is that there is insufficient information before the Court to undertake a proper environmental assessment of the likely impacts of each of the options put forward by the applicant (Transcript 23 July 2025, p 148 at par 15). "What the council says is that there is great

uncertainty about what the impacts of the various options put by the applicant will be, and that the Court can't be satisfied on what's before it, that those likely impacts are acceptable.” (Transcript 23 July 2025, p 149 at par 38).

101 The first aspect of the environmental aspect of the physical works is related to the existing easement and the second aspect relates to the lack of legal entitlement to drain water anywhere beyond the easement (Transcript 21 July 2025, p 19 at 50 and p 20 at 1 – 5).

102 For the reasons set out in [99] above, I am satisfied that the likely impacts of the off site stormwater disposal works within the existing easement for drainage of water have been assessed and I find that they are acceptable.

103 The Respondent tendered the Flooding Map (Ex 11) after the close of evidence because the rail corridor in the vicinity of the proposed discharge point in Option C (Ex K), is mapped as a low flood risk precinct and submits that that is a matter that TfNSW will be taking into account when it considers the safety and efficiency of its assets in terms of whether it will permit the direct discharge of water from the Proposed Development into the rail corridor and “there’s no certainty that TfNSW would accept that impact in the absence of an absorption trench which the Respondent notes was required to be provided by the owners of 153 Bridge Street Schofield.” (Transcript 23 July 2025, p 150 at par 5) Regardless of the certainty, the Respondent submits that there is not enough information to assess the environmental impact (Transcript 23 July 2025, p 150 at par 15). In relation to the Flooding Map at Ex 11 I note the following:

- (1) the Applicant’s Architectural Drawing titled “Calculations and LEP Controls” DWG A001 Rev O dated 25 Jun 2025, (Ex C) includes an extract of the Flood map as per Ex 11 but with the difference that the satellite overlay is included.
- (2) the same Flood map extract was included in the Rev A dated 14 May 2024 of the same drawing filed with the Class 1 on 10 September 2024.
- (3) Flooding was not raised as a contention by the Respondent nor was flooding raised as a concern by Ms England, Council’s stormwater expert.
- (4) The JER Engineering (Ex 5) includes the Historical Council File at Appendix G which includes a number of references to flooding. Mr England’s concern was limited to the legal right to discharge. He proposed the wording for the Deferred Commencement Condition and did not include any further flooding impact assessment.

104 Accordingly, I find that the low risk flood concern raised in closing by the Respondent has been considered to the necessary extent and not raised as a concern.

105 The Applicant submits, in reply, that the Respondent’s submission that there is insufficient information for the Court to be satisfied as to the likely impacts “just cannot be accepted against Mr England’s acceptance that the drainage in option A and C are feasible. I reproduce Option C (Ex K) below at Fig 5.

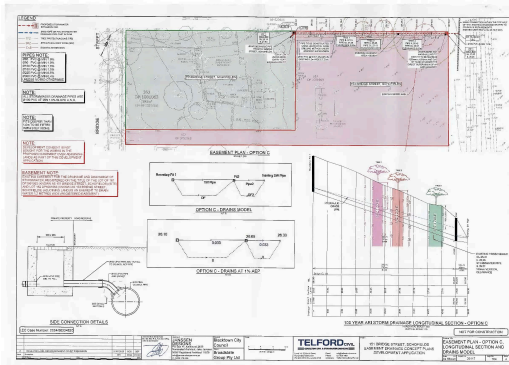


Fig 5: Ex K Option C for off-site stormwater disposal

- 106 I will now address the second aspect implied in Contention 6 at particulars (d) and (e) and as expressed by Mr England, namely that there is no “right to drain water” beyond the easement. The Applicant submits that considerations of legal permissions to drain have been wrongly conflated into the need to consider and assess the impact of stormwater disposal (AWS, par 105).
- 107 In opening, the Respondent helpfully explained that the 24 March 2025 letter from TfNSW is included in the Respondent’s Bundle of Document (Ex 2) because the Proposed Development, prior to amendment, sought consent for works on Lot 162 (153 Bridge St). The DA as it was then, was referred to State Rail pursuant to s 2.98 of the Transport and Infrastructure SEPP being development adjacent to rail corridors. The Respondent concedes that s 2.98 of the Transport and Infrastructure SEPP no longer applies given that the Applicant no longer proposes development within lot 162 (Transcript 21 July 2025, p 20 at 25). It is noted also, that the 24 March 2025 letter from TfNSW provides that by instrument of delegation, TfNSW “has been delegated to act as the rail authority for the heavy rail corridor operated by Sydney Trains, including infrastructure.”
- 108 Mr England states various times in response to Contention 6 in the JER Engineering (Ex 5) on pp 2 and 3 as follows:
- “The Council cannot be satisfied that stormwater can discharged from Lot 161 DP 1001063 to a legal point of discharge, a public drainage system or a receiving water.”
- and
- “The Council needs to be satisfied that stormwater can be discharged from the proposed development to a legal point of discharge, public drainage system or receiving waters prior to granting approval. The current plans do not show how stormwater can be legally discharged from Lot 161 DP 1001063.”
- 109 In response to Contention 6(e) Mr England notes, in the JER Engineering, the Applicant’s agreement to the imposition of a condition to obtain approval from TfNSW (Letter from TfNSW dated 24 March 2025) as follows:
- “The Applicant must ensure that all drainage from the development is adequately disposed of and managed and not allowed to be discharged into the rail corridor unless prior written approval has been obtained from Sydney Trains.”
- 110 At the time that letter from TfNSW was written and at the time the Engineering experts prepared the JER Engineering, the Applicant had put forward options A and B. During

- 111 the hearing, the Applicant included the third Option C (Ex K) reproduced above at Fig 5. During cross examination Mr England agreed that from an engineering perspective Options A, B and C were feasible, however the Court notes that the Applicant no longer relies on Option B. Mr England also agreed that the only concern he holds with Option C is the same matter of whether there is a sufficient set of legal rights to cover the discharge of water to the rail corridor (Transcript 22 July 2025, p 48 at par 36). Mr England said that the options proposed are feasible from an engineering perspective and that his opinion given in JER is limited to the legal rights.
- 112 I accept the Applicant's submission that Mr England's expert evidence in these proceedings is to be properly confined to his engineering expertise, namely the feasibility of the off-site stormwater disposal concept options, and accordingly I do not give any weight to his concerns regarding the issue of legal rights to drain.
- 113 The parties have since provided further correspondence from TfNSW dated 4 August 2025 (Ex 13) and 8 August 2025 (Ex O). The correspondence from TfNSW dated 4 August 2025 is in response to being provided the Option C Plan (Easement Plan – Option C, Longitudinal Section and Drains Model, Dwg 104 Issue A dated 21 July 2025 prepared by Telford Civil (Ex K)) and provides as follows:
- "I've received a response from my Sydney Trains stakeholder and note that **all existing conditions issued in our letter dated 24 March 2025 to DA-24-00513 ... are still applicable.***
- Regarding your enquiry, for all proposed options including Option C, Sydney Trains will not allow any drainage from the proposed development to be discharged into the rail corridor. Moreover, no connections to Sydney Trains stormwater drainage system will be permitted." [emphasis added]
- 114 The 24 March 2025 letter and the Attachment A conditions are included in the Proposed/Draft Conditions of Consent (Ex 10).
- 115 New evidence tendered 1 September 2025 includes a letter dated 7 August 2025 (Ex P) offering to address the existing instrument relied upon for the drainage of water from the Site and the acknowledgment that it is apparently "defective or insufficient for the existing or proposed purpose". The owners of 153 Bridge Street Schofields make a proposal in that letter "to regularise the situation", to the effect that a substitute easement could be negotiated between the parties including negotiating equal contribution to costs of "the annual licence fee payable to TfNSW for drainage to their site"
- 116 The correspondence from TfNSW dated 8 August 2025 (Ex O) is in response to a letter of the same date from the Applicant's solicitor which notes "it does not appear that you were briefed with the full information available to the parties, in relation to the existing context of the Site and the existing stormwater infrastructure already approved by Sydney Trains." The TfNSW response is that

“Sydney Trains will need to be consulted and provide relevant approval(s) if any changes to the existing drainage easement and stormwater design are proposed in the future.”

- 117 Both parties accept the need for and that the Proposed Development will not be possible without permission from TfNSW to discharge the stormwater into the rail corridor.
- 118 I accept that permission of TfNSW is required before the consent can become operative and I accept that, notwithstanding that TfNSW may be willing to consider granting such permission as evidenced in the correspondence in evidence, it remains the Applicant’s risk that permission may not be granted by TfNSW. Put another way, until and unless permissions is granted by TfNSW to dispose of stormwater into the rail corridor, in one way or another, the Applicant will not have the benefit of the consent for the Proposed Development.
- 119 The Applicant submits that the Court has before it sufficient evidence to consider the likely impacts of the Proposed Development insofar as stormwater and disposal is concerned.
- 120 I am satisfied with the expert evidence that options A and C are feasible from an engineering perspective.
- 121 Accordingly, I find that there is sufficient information before the court to assess the likely off-site impacts of the Proposed Development, as required by s 4.15(1)(b) of the EPA Act and as explained in *Palm Lakes*. In the present case, I have an understanding of the likely impacts of the off site stormwater disposal and have undertaken an evaluation of the likely impacts of the Proposed Development with that understanding. Unlike *Palm Lakes* the granting of consent subject to the deferred commencement condition pursuant to s 4.16(3) of the EPA Act does not defer for later consideration a complete environmental assessment of the off site stormwater disposal works, being a mandatory relevant matter for consideration pursuant to s 4.15(1)(b) of the EPA Act: *Palm Lakes* at [38]; *Eboli v Penrith City Council* [2024] NSWLEC 1320, Horton C at [47] and [48].

Jurisdictional prerequisites

- 122 There are a number of provisions relating to child care facilities in Ch 3 of the Transport and Infrastructure SEPP and the parties agree that the Proposed Development was not required to be referred to the Department of Education because it complies with matters such as the indoor and outdoor space requirements: cl 107 and 108 of the Education and Care Services National Regulations and as demonstrated by Drawings A014, A015 and A030, Rev O dated 25 June 2025 (Tab 1, Ex C).
- 123 Although the Site is not considered to be in or adjacent to a rail corridor or a busy road with ‘an annual average daily traffic volume of more than 20,000 vehicles (based on the traffic volume data published on the TfNSW website), the Environmental Noise Impact Assessment Report No. 7945-1.1R, Rev D, dated 14 July 2025, by Day Design (Tab 2, Ex C) assessed the Proposed Development as meeting the requirements outlined in

the relevant guidelines prescribed under ss 2.98, 2.100 and 2.120 of the Transport and Infrastructure SEPP, namely Development Near Rail Corridors and Busy Roads – Interim Guideline published by the NSW Government Department of Planning in December 2008, as advised by Planning Circular PS 21-018 issued by the Department of Planning and Environment on 2 December 2021.

124 Water quality jurisdictional prerequisites of Ch 6 of the Biodiversity and Conservation SEPP are satisfied (AWS p13) s 6.7 related to Aquatic Ecology and I am satisfied that the stormwater plans and MUSIC-Link Report prepared by Telford Civil (Tabs 3 and 7, Ex C) demonstrate that the Proposed development:

- (1) Will avoid or minimise any potential erosion impact based on the Sediment and Erosion Control Plan and Details (Drawing 111, Issue B, dated 7 May 2025 and Drawing 112, Issue A, dated 15 May 2025;
- (2) Will not have any adverse impact on terrestrial, aquatic or migratory animals or vegetation, or on wetlands that are not in the coastal wetlands and littoral rainforest area, or on aquatic reserves;
- (3) Will not involve the clearing of riparian vegetation;
- (4) Is not required to include adequate safeguards and rehabilitation measures to protect aquatic ecology;
- (5) Does not require a controlled activity approval under the *Water Management Act 2000* (NSW) or a permit under the *Fisheries Management Act 1994* (NSW); and
- (6) Will not require any additional measures to ensure a neutral or beneficial effect on the water quality of the waterbody.

125 Flooding is dealt with in s 6.8 of the Biodiversity and Conservation SEPP. The Site is not identified on the digital Flood Planning Map on the NSW Planning Portal. Having the benefit of the stormwater material referred to above, and in accordance with s 6.8(2) I am satisfied that if there is a flood, the Proposed Development will not release pollutants that may have an adverse impact on the water quality of a natural waterbody, and will not have an adverse impact on the natural recession of floodwaters into wetlands and other riverine ecosystems.

126 Having formed the requisite state of satisfaction for the relevant jurisdictional prerequisites and having undertaken the merit assessment of the Proposed Development in accordance with the evidence before the Court, I conclude that the appeal can be determined by granting development consent subject to conditions.

Orders:

127 The Court orders:

- (1) The appeal is upheld.
- (2) Development consent is granted to development application DA-24-00513 seeking consent for the demolition of existing structures, removal of vegetation and construction of a two-storey centre based child care centre to accommodate 130 children and 18 staff with basement car parking for 40 vehicles, associated site works, acoustic barriers/fencing and landscaping with proposed hours of operation of 7 am to 6 pm Monday to Friday at 151 Bridge Street, Schofields legally described as Lot 161 in DP 1001063 subject to the conditions of consent in Annexure A.
- (3) All Exhibits are retained.

E Espinosa

Commissioner of the Court

Annexure A (1.96 MB, pdf)

Amendments

15 October 2025 - Correction to layout of images

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Decision last updated: 15 October 2025