



Land and Environment Court  
New South Wales

---

Case Name:	Depot Ventures Pty Ltd v Shoalhaven City Council
Medium Neutral Citation:	[2025] NSWLEC 1091
Hearing Date(s):	19, 20 and 21 November 2024
Date of Orders:	21 February 2025
Decision Date:	21 February 2025
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	<p>The Court orders:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted to development application DA23/1693; RA23/1003, PPSSTH-304 for 14 lot subdivision, including creation of a conservation lot, and construction of multi-dwelling housing (32 dwellings) on proposed lots 6 and 9, and associated civil works, earthworks and vegetation clearing at Depot Road, West Nowra being lot 425 in DP 720906, Rainford Road, West Nowra being lot 426 in DP 720906 and part of Depot Road reserve subject to the conditions of consent in Annexure A.</p> <p>(3) All exhibits are retained.</p>
Catchwords:	DEVELOPMENT APPEAL –Torrens title subdivision – whether appropriate to identify individual existing trees on the site analysis plan – impact on amenity and environment – biodiversity – floor space ratio control in Development Control Plan – orders
Legislation Cited:	<p>Biodiversity Conservation Act 2016, s 7.13</p> <p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.17, 8.7</p> <p>Local Government Act 1993, s 49</p>

Shoalhaven Local Environmental Plan 2014

Cases Cited:	90 Croatia Properties Pty Ltd v Liverpool City Council [2021] NSWLEC 1177 Davies v Penrith City Council [2013] NSWLEC 1141 Shoalhaven City Council v Southern Cross Community Housing Ltd [2010] NSWLEC 1306 Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167
Texts Cited:	Shoalhaven Development Control Plan 2014 Logan River Tree Farm, “Bag and Plant Size Information” <a href="https://www.loganrivertreefarm.com.au/bag-sizes/">https://www.loganrivertreefarm.com.au/bag-sizes/</a> accessed 17 February 2025 Saving Our Trees – Marrickville municipality, “She Oaks versus Silky Oaks” <a href="https://savingourtrees.wordpress.com/tag/she-oak/#:~:text=Developers%20like%20to%20plant%20Casuarinas,the%20water%20from%20any%20rain">https://savingourtrees.wordpress.com/tag/she-oak/#:~:text=Developers%20like%20to%20plant%20Casuarinas,the%20water%20from%20any%20rain</a> accessed 17 February 2025
Category:	Principal judgment
Parties:	Depot Ventures Pty Ltd ABN 36 629 583 811 (Applicant) Shoalhaven City Council (Respondent)
Representation:	Counsel: A Pickles SC (Applicant) R O’Gorman-Hughes (Respondent)  Solicitors: HWL Ebsworth (Applicant) BAL Lawyers (Respondent)
File Number(s):	2023/461205
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* (EPA Act) being an appeal against the refusal of Development Application DA23/1693; RA23/1003, PPSSTH-304 seeking consent for development as detailed at [4] – [7] below

(Proposed Development). The Proposed Development seeks consent over a number of sites legally described as lot 425 DP 720906 (52 Depot Road) and lot 426 DP 720906 (no formal street address) and part of the Depot Road Reserve as depicted in Fig 1 below (the Site).



Figure 2. Aerial photo of the subject development site, source: Nearmap / Figure 1 Amended SEE

Fig 1: the Site

- 2 The Respondent has provided owners consent dated 21 November 2024 to the making of the development application in relation to the road reserve adjoining Lot 425 DP720906 (Ex 11) and the parties have subsequently notified the Court by email dated 28 January 2025 of an agreed factual development in respect of the land to which the development application relates as follows:

“On 21 January 2024, Council unanimously determined to sell the triangular parcel of land fronting Depot Road to the Applicant.

Specifically, it was unanimously resolved that Council:

1. Approve the road closure under section 38D of the Roads Act 1993 for the unused surplus road reserve adjoining Lot 425 DP 720906, Depot Road, West Nowra, as shown on Figure 1 to this report and subject to final survey, by notice in the NSW Government Gazette.

2. Classifies the closed section of road as operational land following public notice of the proposed classification under the Local Government Act 1993.

3. Authorise the sale of the closed road to the registered proprietor of the adjoining land being Lot 425 DP 720906 for the amount of \$425,000 (excluding GST), if applicable, including adjustment to the sale price after final survey and authorise the Chief Executive Officer to complete negotiations including acceptance of offer for purchase based on the final survey.

4. Endorse that the costs incurred with the road closure and sale comprising legal, conveyancing, valuation and survey expenses will be met by the applicant.

5. Direct the net land sale proceeds to the Strategic Property Reserve and be used for the purposes expressed in section 43 of the Roads Act 1993

6. Require that the lot to be created with formal road closure be consolidated in title with Lot 425 DP 720906.

7. Authorise the Common Seal of the Council of the City of Shoalhaven to be affixed to any document required to be sealed and delegate authority to the Chief Executive Officer to sign any documentation necessary to give effect to this resolution."

3 In light of the Council's decision above, the parties have considered whether any changes should be made to their respective proposed conditions of consent. Both parties agree that no changes are required.

4 The Proposed Development is described as follows in the Amended Statement of Facts and Contentions (ASOFAC) filed 13 September 2024 (Ex 1):

- (1) Torrens title Subdivision of the Site into 14 lots (2 lots for construction of multi-dwelling housing, 10 vacant lots and 1 lot for stormwater detention and treatment basins and 1 lot for vegetation conservation).
- (2) Construction of 2 x multi-unit dwelling housing developments containing a total of 32 dwellings and associated landscaping as follows:
  - (a) Superlot 6 to contain 17 dwellings.
  - (b) Superlot 2 to contain 15 dwellings.
- (3) Civil and infrastructure works, comprising:
  - (a) Construction of one public road ("Albert Street", currently unformed and owned by Crown Lands).
  - (b) Half road reconstruction of Depot Road (currently a local road owned by Shoalhaven City Council).
  - (c) Site grading and levelling.
  - (d) Construction and dedication of a perimeter loop road referred to as "Road No.01" and "Road No 2" in the Subdivision Plan.



- (e) Construction of one stormwater detention basins (proposed lot 14).
- (4) Clearance of 2.14ha of native vegetation, including hollow bearing trees.
- 5 I reproduce below at Fig 2 an image from the Statement of Environmental Effects prepared by Craig and Rhodes dated August 2024 (Ex B, Tab 2) (SEE). This image clearly illustrates the layout of the Proposed Development, although it is noted that the boundaries of proposed lot 10 is proposed to be further amended by agreed condition 5(b) adjusting the boundary between proposed lot 13, proposed lot 10 and Road 1 from a right angle to follow a 29m buffer to the BAL 29 line on lot 9 as shown on the Bushfire Mitigation Plan dated 19 November 2024 prepared by SET Consultants in order to achieve the required Asset Protection Zone (APZ) while minimising encroachments into the conservation land (Ex 12).

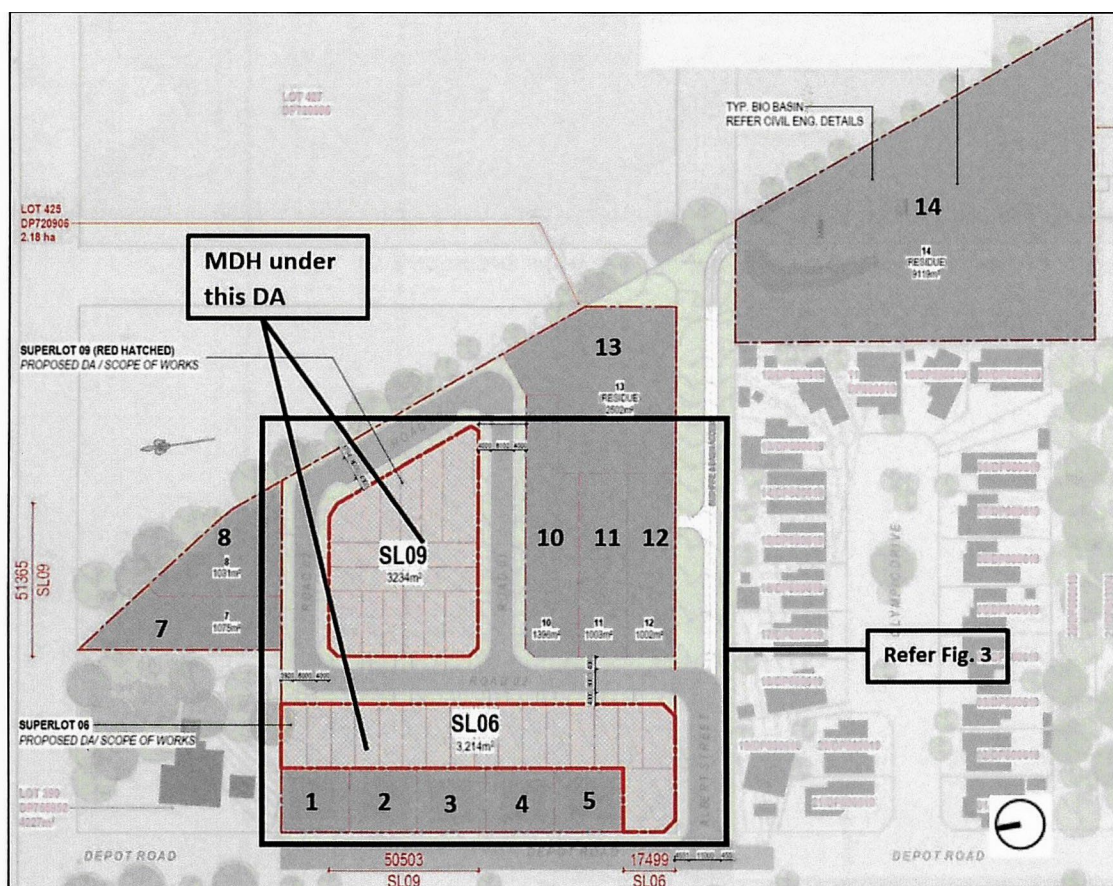


Figure 2: Excerpt showing subdivision layout and multi-dwelling housing location

Fig 2: Reproduced Fig 2 from p 8 of the Statement of Environmental Effects prepared by Craig and Rhodes dated August 2024 (Ex B, Tab 2)

- 6 The Addendum to the SEE dated 5 November 2024 (Ex C, Tab 2) clarifies further that lot 13 is proposed to be retained by the landowner and lot 14 is

proposed to be dedicated to the Respondent pursuant to s 49 of the *Local Government Act 1993* (LGA) including the stormwater detention and treatment basins.

7 The Respondent refers to proposed lots 1 through to 12 as “development lots”. (Transcript 21 November 2024, p 194 at par 15) however I note that no development apart from subdivision and tree removal is sought on lots 1-5, 7-8 and 9-12. Put another way, no construction or earthworks, other than on the periphery is proposed on lots 1-5, 7-8 and 9-12 (see Bulk Earthworks Plan Drawing 407-222-DA-0051 Rev G dated 19 Nov 2024 (Bulk Earthworks Plan) (Ex C, Tab 5)).

8 The ASOFAC provides that the DA has not yet been determined by the Southern Regional Planning Panel (SRPP) and at par 1.11 provides that

“1.11 The Amended DA was publicly advertised and notified in accordance with Shoalhaven City Council's Community Participation Strategy between 16 August 2024 and 13 September 2024. One submission (objection) was received.”

9 Following the filing of joint expert reports the Applicant sought to amend the Proposed Development by Notice of Motion heard and granted prior to the hearing on Monday 11 November 2024.

10 The proceedings commenced on site where two objectors gave evidence of their concerns regarding safety in a bushfire emergency. The Court has the benefit of the evidence of the bushfire experts and their agreements as to incorporating conditions of consent including complying with the Bushfire Mitigation Plan. I will briefly address bushfire safety because it was a contention raised by the Respondent (ASOFAC, Contention 2) and a concern raised by the objectors. I have had regard to the Bushfire Joint Expert Report (JER Bushfire) at pars 17 to 19 which I reproduce as follows:

“17. The experts acknowledge that pursuant to section 8.14 of the Environmental Planning and Assessment Act 1979, the Court now functions as the consent authority. To assist the Court the experts have directly considered complies with Planning for Bush Fire Protection 2019 and provide an expert opinion of whether the proposal has addressed / satisfied contentions 2 and 6 of the Amended Statement of Facts and Contentions, filed on 13 September 2024.

18. Both experts agree that both contentions can be addressed by the supplementary information set out in this JER and the application of the agreed conditions at Annexure K.

19. Both experts acknowledged that the proposed development includes the construction of a bushfire and bio-retention basin access road within the Albert Street Road Reserve, extending to the eastern interface of the development. The access road is designed with a 4.5m wide carriageway, incorporating an RFS-compliant turning head at its eastern extent, adjacent to the basin. A strategically positioned passing/staging bay has been provided adjacent to proposed Lot 12, to avoid any impact on identified habitat-bearing trees or threatened vegetation. This bay offers several benefits, including providing a designated area for an RFS fire appliance to park, connect to the hydrant, and operate safely, without obstructing the passage of additional RFS appliances. Furthermore, the passing/staging bay enhances the turning capacity for RFS fire appliances, facilitating efficient access to the eastern interface of the development.”

- 11 I have also had regard to the JER Bushfire at pars 61 and 62 which I reproduce as follows:

“61. Both experts agreed that the development as amended by the relevant annexures and the recommended conditions of consent provided in Annexure J has adequately addressed and satisfied the relevant specifications and requirements of Planning for Bush Fire Protection 2019.

62. Both experts agree that where the Court, acting in the capacity of the consent authority, elects to approve the development application it should include the agreed conditions at Annexure J.”

- 12 The Respondent no longer presses contention 2 and I am satisfied that this contention is resolved as set out by the bushfire experts extracted above.
- 13 After hearing from the objectors, the parties and experts walked with the Court along the unformed Albert Street from Depot Road and from this location the parties pointed out the flowering Nowra Heath Myrtle, proposed to be protected as agreed between the expert ecologists in accordance with the blue dots on the Vegetation Retention Plan Drawing 407-22GIS L06 [00] Rev 7 prepared by Colliers dated 23 October 2024. One of the hollow bearing trees, to be retained in accordance with the green dots on the Vegetation Retention Plan, was also pointed out as well as the location of the proposed fire truck passing bay. The site inspection then continued by walking along the electricity transmission easement along the rear of the Site and then back to Depot Road traversing proposed lots 7 and 8. Following a short drive, the parties, experts and the Court viewed the medium density development at 30 Cavanagh Lane noting its design and the exotic landscaping. The parties were unable to identify the

location of any bus stop during any part of the site view. I will come back to the relevance of the bus stop when I consider the conditions of consent in dispute at [89].

- 14 The Respondent provided the Court with a written outline of submissions (RWS) noting that following the Applicant's amendments to the design of the Proposed Development, the majority of contentions in the ASOFAC are either no longer pressed by the Respondent or are able to be resolved by conditions of consent. In that regard, the parties were not able to agree on the final form of Draft/Proposed Conditions of Consent and in accordance with my directions, they each filed competing versions of conditions and short written submissions as to why their version of the conditions should be preferred. I will come back to the Draft/Proposed Conditions of Consent at [89]. The Applicant also provided the Court with Written Submissions (AWS) and both parties made oral closing submissions as recorded on the transcript.
- 15 The Court was assisted by the following Joint Expert Reports:
  - (1) Traffic Joint Expert Report filed 22 October 2024 (Ex 8) prepared by Scott Haylett for the Respondent and Ken Hollyoak for the Applicant.
  - (2) Planning Joint Expert Report filed 22 October 2024 (Ex 7) prepared by Nick Gunn, Town Planner for the Applicant and Jeff Mead, Town Planner for the Respondent (JER Planning).
  - (3) Ecology Joint Expert Report filed 16 October 2024 (Ex 5) prepared by Rebecca Goodwin for the Applicant and Ben Coddington for the Respondent (JER Ecology).
  - (4) Civil Engineering Joint Expert Report filed 16 October 2024 (Ex 6) prepared by Frank Carrozza for the Applicant and Scott Haylett for the Respondent.
  - (5) JER Bushfire filed 15 October 2024 (Ex 3) prepared by David Cannon for the Applicant and Stuart McMonnies for the Respondent and a Supplementary Bushfire Joint Expert Report filed 20 November 2024 (Ex 4).
- 16 The Respondent submits that the Proposed Development should be refused because the contentions remaining in dispute result in impacts on amenity and the environment which are unacceptable. The Respondent summarises the unresolved contentions are related to the two following issues:
  - (1) Design, layout and built form including the failure to identify the existing trees on the development lots (contentions 4, 11(c) and 12).



(2) The exceedance of the floor space ratio (FSR) control (Contention 9).

- 17 In response to the first issue, the Applicant submits that as all trees are proposed to be removed except on lots 13 and 14, there is firstly, no requirement to identify each and every tree and secondly, there is nothing to gain from a merit assessment in that exercise. The Applicant submits at par 87 of AWS that:

“It is not appropriate to view the development of super lots 6 and 9 in isolation given that approximately 9,000m<sup>2</sup> of vegetation is proposed to be retained in Lot 13; the dedication of land in Lot 14 to the Council and draft conditions have been agreed which allow for the retention of trees within the APZ of Lots 1-5, Lots 7-8 and 10-12”

- 18 In response to the second issue, the Applicant’s case is that there is no evidence of adverse impact on the amenity from the FSR exceedance and that the concern about the non compliant FSR is confined to tree retention and that achieving a compliant FSR would not have any impact on the inability to retain trees because of the earthworks required for the medium density housing.
- 19 Both issues pressed by the Respondent are matters of merit about which the Town Planning experts were unable to reach agreement. Much of the evidence overlaps or to some extent conflates the two matters because at the core of each of the two issues is the Respondent’s expert town planner’s opinion regarding the ability or otherwise to undertake a merit assessment in regard to tree retention on the development lots.
- 20 I deal first with design, layout and built form at [22] and I consider the impacts of the Proposed Development on the environment by the design, layout and built form and whether these are resulting from the failure to identify the individual existing trees in the Site Analysis Plan. In doing so, I set out my reasons why I reach the conclusion that the contention is not supported by the evidence and does not warrant the refusal of the Proposed Development on merit grounds.
- 21 I will then deal with density and the exceedance of the FSR control (Contention 9) at [68] setting out my reasons why I conclude that the evidence does not support a finding that the Proposed Development should be refused.

**Impact on the environment by the design, layout and built form of the Proposed Development and whether these are resulting from the failure to identify the individual existing trees in the Site Analysis Plan**

- 22 This first issue revolves around the Respondent's concern as to the adequacy of the Site Analysis Plan. Contention 4 of the ASOFAC is titled "Subdivision Layout and Design – Impact on natural environment" and provides that:

"The layout and design of the proposed subdivision fails to respond to, and minimise the impact on, the natural environment and the likely impacts of the proposed development on the environment are not acceptable"

- 23 There are seven particulars including at particular (a) that:

"The amended application fails to include a detailed site analysis, prepared in accordance with Section 5.1 of Chapter G1 of SDCP 2014, that properly appraises the existing site conditions."

and at (c) acknowledges that:

"Within proposed development lots, the proposed development involves the clearance of all vegetation on site to accommodate the subdivision and multi-dwelling housing".

- 24 I have already noted the reference to development lots by the Respondent includes lots 1 through to 12 and that the Applicant has since agreed to a draft condition which allows for the retention of trees within the APZ of lots 1-5, lots 7-8 and 10-12. In that regard, I note proposed condition 25 Bushland – Management Plan which requires the preparation of a Bushland Management Plan (BMP) prior to clearing vegetation to, inter alia, "avoid or minimise impact on vegetation including process for minimising vegetation removal within the APZ for lots 1-5 and 10, 11 and 12."
- 25 I have considered the terms of Section 5.3.1, Chapter G11 of the Shoalhaven Development Control Plan 2014 (SDCP) which is referred to at particular (d) of Contention 4 in the ASOFAC and the terms of the SDCP Performance Criteria P38.1, P38.4 and P38.5, and the terms of the SDCP Acceptable Solutions A38.1 and A38.3 which are noted in the balance of the particulars of Contention 4.
- 26 The criticism by the Respondent revolves around the fact that the "application itself provides little indication of what trees are proposed to be removed or where they are on the development lots" (RWS at par 4).

27 The Respondent submits in closing that there should be some focus on the expression used in the SDCP “within the land being developed” and that confirms that no concern is raised by Council regarding the conservation lot, that is, the Respondent is not concerned about the Applicant not going through the:

“... pointless exercise identifying every single tree in the conservation lot, but what this provision requires is that the trees within the land being developed need to be shown on a site analysis and that's to inform the site design. Without that, we just don't know whether there might have been trees that could have been retained with a more sensitive design.” (Transcript 21 November 2024, p 194 at par 45).

28 The Respondent submits that the requirement of the SDCP is for a site analysis which informs the design and layout which shows “existing trees and vegetation within and adjacent to the land to be developed”. The Respondent's case is that the amendments to the development application have addressed the biological constraints (as evidenced by the agreements reached between the experts in the Ecology JER) on the Site by choosing the location of the developable portion, but that “this does not immunise the proponent from the need to address the requirements of the DCP relating to planning considerations affecting the land to be developed.” (RWS at par 12). The Respondent relies on the planning principle in *Davies v Penrith City Council* [2013] NSWLEC 1141 regarding impacts from poor design “An impact that arises out of poor design is assessed more harshly than one that doesn't”. This planning principle does not greatly assist the Court in determining this appeal because it gives guidance on assessing impacts of poor design *on neighbouring properties*.

29 The Respondent also relies on the decision of *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167 at [75], [99] and [100], for the proposition that a development control plan has to be considered as a “fundamental element” in or a “focal point” of the decision making process in determining an application for consent. The Respondent submits that the requirement to apply controls flexibly does not mean they do not have work to do. The Respondent is referring here to the provisions in s 4.15(3A) of the EPA Act which provides in full as follows:

(3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and
- (c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, **standards** include performance criteria.

- 30 I accept the interpretation of s 4.15(3A) of the EPA articulated by the Respondent and in that regard, I find that the phrase “as appropriate” which appears numerous times throughout the identified SDCP provisions has some work to do. I give my reasons now why I find that, in the circumstances of this Site and the Proposed Development, is it not necessary or *appropriate* to include such detail of identifying each existing tree on the development lots in order to adequately understand the existing site conditions in the Site Analysis Plan. Put another way, in the circumstances of this Site and the Proposed Development, it is not appropriate to go the extent of identifying each individual tree proposed to be removed. My reasons appear below.

*Site analysis controls SDCP – Chapter G1, Section 5.1*

- 31 Chapter G1 of the SDCP relates to “Site Analysis, Site Design and Building Materials” and provides “controls for the management of the natural and built environment ... [including] site analysis and building materials ...” and provides controls particularly for Site analysis plans at Section 5.1. The context (Section 3) of these controls in the SDCP is as follows:

“A site analysis assists in considering the characteristics of the site and adjacent or adjoining sites at the outset of the design process, as well as any constraints or opportunities to ensure that these are reflected in the design. An effective site analysis plan can assist in implementing long-lasting sustainable building design principles, such as solar passive design to increase energy efficiency and solar access, ultimately resulting in long-term environmental and financial savings.”

- 32 Performance criteria P1.2 of Section 5.1 in Chapter G1 of the SDCP provides that “[t]he site analysis informs the site design and layout” and Acceptable Solution A1.3 provides that “[t]he proposed site layout responds to and implements the findings of the site analysis plan prepared in accordance with A1.1 and A1.2”.
- 33 Acceptable Solution A1.1 provides that “[a] site analysis plan is provided with a development application that shows the following, *as appropriate*” (emphasis added):
- (1) Constraints.
  - (2) Opportunities.
  - (3) Context.
- 34 Acceptable solution A1.2 provides that “[f]or development other than for a single dwelling house ... a development application must detail, *as appropriate*” (emphasis added):
- (1) Topographical features such as slope, existing natural trees and vegetation and opportunities for the creation of views and vistas.
  - (2) The character of any adjacent public land/reserves, particularly the location of mature trees in relation to the proposed development.
- 35 An example of a site analysis plan and an example of a site development plan are included in the SDCP and the Applicant draws the Court’s attention to the fact that trees are depicted as individual trees and also in ‘clumps’ or groupings in the examples.
- 36 The Applicant submits, and I agree, that the words “as appropriate” in the SDCP provisions set out above have some work to do (Transcript 21 November 2024, p 183 at par 43). The Respondent’s submission is that particular (a) of Contention 4 is the contention that the Council relies on requiring the Site Analysis Plan, which the Council contends requires the individual tree survey. It is my opinion that the Respondent asks the wrong question, that is, “[c]an you identify where in the application the Applicant identifies what trees are being removed?” This is the wrong question because none of the language in the SDCP controls regarding the Site Analysis Plan reflects or requires an identification of trees to be removed. The SDCP provisions for site analysis relate to informing design and site layout.

- 37 I reproduce from the transcript as follows (Transcript 21 November 2024, p 195 pars 5 and 15):

“COMMISSIONER: [...] This is A1.1 has the words "as appropriate". Do you have any submissions in relation to that phrase? Mr Pickles drew my attention to A1.2, on folio 25, which has "as appropriate", before the semi-colon, and I note that A1.1, which is the one you're relying on also has "as appropriate".

O'GORMAN-HUGHES: Yes. It wouldn't, for example, require a detailed analysis of every single tree within the conservation lot because that lot has been kept. The macro or big picture exercise that's been done by the experts with respect to that is what's appropriate for that land, but it is appropriate, in my submission, to do the more detailed exercise of analysing specific trees where the land itself has been developed, and we went through the exercise with Mr Mead this morning where he was asked where, in the DCP are there indications that you might want individual trees mapped, rather than just a very big map of the site saying where the more ecologically sensitive vegetation is located, and he did that in a very thorough and methodical way.”

- 38 The updated Arboricultural Assessment Report (Ex C, Tab 12, p 16) is consistent with the evidence of Mr Gunn and at Ex C Tab 5 is the Bulk Earthworks Plan DWG 0051 Rev G which shows cut of up to 2m and fill of up to 2m. The architectural plans show that the medium density dwelling housing is to be benched on a concrete building pad and levelled. The Applicant explains as follows:

“Accordingly, given the multi dwelling houses are stepped to follow the contours of the site, some cut and fill and retaining walls are necessary. The requirement for concrete building pads to accommodate attached medium density housing makes stepping and the attendant retaining walls inevitable and demonstrates that retention of existing trees is not possible in this area; especially when one considers that to retain any one tree would require the avoidance of its TPZ which can be many metres in diameter.” (Applicant's written submissions, par 86)

- 39 I accept that it is not appropriate to view the development of super lots 6 and 9 in isolation given that approximately 9,000m<sup>2</sup> of vegetation is proposed to be retained in Lot 13; the dedication of land in Lot 14 to the Council and draft conditions have been agreed which allow for the retention of trees within the APZ of lots 1-5, lots 7-8 and lots 10-12.
- 40 I accept that the Site is not flat as amply demonstrated in the civil engineering drawings, Ex B Tab 4 and I have had regard to the longitudinal section through Albert Street and the number 1 road Sheet 40722C DA0201 Rev C – the proposed road follows the topography because the cut and fill is minimal.



- 41 The Applicant relies on the decision of Commissioner Fakes in *Southern Cross Community Housing Ltd v Shoalhaven City Council* [2010] NSWLEC 1306 regarding design of a development and tree retention – which can be done in two ways. You could either spread houses across the entire site and try to protect individual trees or you can do what the applicant has done after a proper analysis of the site and retain the most significant vegetation on lots 13 and 14, and provide a new landscape plan that is suited to requirements of APZs for bushfire purposes, suited to the requirements of medium-density living and suited to the design of the dwellings, with a new landscape plan, which is exactly what the applicant has done. (Transcript 21 November 2024, p 187 at par 24).
- 42 Mr Mead does not complain about the bulk and scale of the buildings, his oral evidence is recorded in the Transcript 21 November 2024 p 154 at par 13: “As I said in the joint report, I don't have - I don't raise issue with the architecture of the buildings and so on. My issue relates to vegetation ...”.
- 43 For this reason, I conclude that the inclusion or exclusion of the stairs in the calculation of gross floor area (GFA) is of no consequence and I do not need to make any finding on whether “common vertical circulation” includes or exclude stairs which are common to the floors (Transcript 21 November 2024, p 188 at par 35). Put another way, the issue of common vertical circulation does not have any impact on my determination to grant consent because the inclusion or exclusion of the stairs in the calculation of GFA has no environmental impact nor influence the assessment of the Proposed Development on merit. I come back to FSR exceedance at [70] in the context of the second issue.

#### *Subdivision SDCP*

- 44 The ASOFAC also refers to objective (i) of the SDCP Section 5.3.1 in Chapter G11 – Subdivision Layout and Design – Topography, Natural Landform/Environment and Vegetation (Contention 4, particular (d)). In addition, particular (e) of Contention 4, contends that the proposed subdivision does not take the Land's natural opportunities into consideration contrary to Performance criteria P38.1 and at particular (f), that the lot layout does not

retain significant vegetation and natural areas contrary to Performance Criteria P38.4.

45 The purpose of Chapter G11 of the SDCP is to guide the efficient subdivision of land and buildings in the Shoalhaven local government area and the context is to encourage subdivision “that is well designed and minimises infrastructure costs”.

46 Specific objectives of subdivision layout and design controls at Section 5.3 of Chapter G11 of the SDCP are to:

- “i. Minimise the impact of subdivision on the natural environment and landscape setting.
- ii. Retain existing mature trees where practicable to provide shade and reduce the heat island effect.
- iii. Enhance development by screening and providing colour, texture and spatial definition.
- iv. Provide linkages between natural and developed areas”

47 Performance criteria P38.1 provides that “[t]he subdivision and lot design takes into consideration the site’s natural opportunities and constraints.”

48 Performance criteria P38.4 provides that “[t]he lot layout retains significant vegetation and natural areas and minimises soil erosion.”

49 For completeness, I note that Performance criteria P38.5 provides that “[t]he subdivision layout responds to site characteristics, setting, landmarks and views through street and open space areas.”

50 Acceptable Solution A38.1 provides that the subdivision lot design positively responds to:

“ ...

- Special features such as trees, including identification of mature stands of trees to be retained and supplementary planting shade trees.”

51 I am satisfied that the evidence before the Court does not support this contention. There is ample evidence that there has been significant consideration of the site’s natural opportunities and constraints and that as a result the layout has been designed to retain all of the vegetation as agreed between the expert ecologists and located the medium density housing where the vegetation is less significant.

52 Mr Gunn in the JER Planning (Ex 7) at par 33 opined that “no opportunity exists to retain vegetation in consideration of the very nature of medium density development”. In cross examination Mr Gunn accepted that he had not seen any survey showing the location of trees on the Site within the development lots.

53 At pars 29 to 30 of the JER Planning Mr Gunn explains:

“... the proposal was amended to retain the entirety of the endangered Swamp Sclerophyll Forest and the majority of the ‘high significance’ vegetation ...”.

54 Mr Mead in the JER Planning at pars 13 to 26 stated that:

- (1) the proposal does not respond to a detailed site analysis and instead involves the clearing of virtually all of the vegetation in the developed lots;
- (2) the planting within the lots is sparse and will take many years to reach the estimated mature heights;
- (3) the application does not provide building envelopes for all of the lots that give light to the need to remove virtually all vegetation; and
- (4) the application does not meet the requirements of the SDCP.

55 Mr Mead expressed an opinion regarding the proposed landscaping as being “sparse” and taking “many years to reach the estimated mature heights” which is not supported by the evidence. I have referred to the specifications in the landscape drawing LDA-401 Rev G (Ex B, tab 6) and note firstly the proposed landscaping with feed trees for the threatened species. Secondly, I note that the proposed street trees and residential trees are specified as 100L pot size. The pot size gives a good idea of the maturity of the plant proposed to be planted, in this case many of the proposed street trees are identified to be *Allocasuarina Littoralis* or Black She-Oak. A simple google search reveals the following:

100 Litre Bags	4 handles – 1 person can drag and manoeuvre, or trolley
Height of Bag: 60 cm	Width of Bag : 50 cm
Approximate Weight: 100kg	Minimum plant age: 3 years
Recommended hole size for planting:	Depth: 75 cm Width: 60 cm

Logan River Tree Farm, "Bag and Plant Size Information"  
<https://www.loganrivertreefarm.com.au/bag-sizes/>

"Developers like to plant Casuarinas at new housing developments because they grow very fast & need no care. They can reach a good height within 3 years & they thrive in very poor soil & semi-arid areas so they can cope with only the water from any rain."

Saving Our Trees – Marrickville municipality, "She Oaks versus Silky Oaks"  
<https://savingourtrees.wordpress.com/tag/she-oak/#:~:text=Developers%20like%20to%20plant%20Casuarinas,the%20water%20from%20any%20rain>

- 56 Accordingly, I do not give any weight to Mr Mead's opinion regarding the so called 'sparse' landscaping taking 'many years to reach maturity'.
- 57 The Respondent relies on the decision of Walsh C in *90 Croatia Properties Pty Ltd v Liverpool City Council* [2021] NSWLEC 1177 (90 Croatia) and submits that:

"... in dismissing the appeal, Walsh C accepted the importance of tree retention to filter views of the electricity infrastructure; that it was reasonable to expect that design for multi dwelling housing, and the more flexible capacity to provide for dwelling placement, access and services in this form of development, provided an enhanced capacity to retain some or the more important tree groups on the site; and that the presence of high quality mature trees should have been integrated into the planning for the proposal, rather than ignored (at [74]-[75]).

In this case, the applicant's failure to even identify the trees to be removed on the development lots so as to inform a design that might allow for their retention, in breach of the DCP controls, warrants refusal." (RWS at pars 23 and 24).

- 58 The Respondent speculates that "it may well be that if there's a stand of particularly significant mature trees, then the development could be adjusted to try and preserve those mature trees." (Transcript 21 November 2024, page 197 at par 16). I do not accept the Respondent's submission that the Applicant has ignored the presence of high quality mature trees for the reasons set out by the Applicant in submissions. There is ample evidence of consideration and assessment of the location and type of significant vegetation on the Site and that this has led to and informed the design of the Proposed Development. The Biodiversity Development Assessment Report (BDAR), the Bulk Earthworks Plan Rev G, Ex C, the landscape plans Rev G Ex B and the Ecology JER (Ex 5) all lead me to this conclusion.

59 I adopt the reasons given by the Applicant, in submissions in reply (Transcript 21 November 2024, page 208 at par 30), which distinguish the decision of Walsh C in *90 Croatia*:

- (1) Although the Proposed Development is a residential subdivision, the Site is not “a parcel of hitherto rural land which was largely cleared of trees” and “it is understandable when you have a scattering of trees in what is otherwise cleared land, there is a desire to protect individual trees”;
- (2) The Proposed Development does not seek to clear all of the trees on the Site. It is proposed to protect “two large swathes of the Site which will have all of the vegetation protected”
- (3) Unlike 90 Croatia where at [45] “the original arboricultural impact assessment made a premature assumption that the development would be prioritised over tree retention”, the Proposed Development has informed the appropriate location in which tree retention should occur in the areas of highest biodiversity;
- (4) The design outcome of the Proposed Development is informed by the BDAR and the agreement of the ecology experts as to the significance of the vegetation and that the most significant vegetation on the Site is to be preserved.

60 The ecology experts in Ex 5, agree that the Proposed Development seeks to avoid, minimise and offset impact to vegetation on Site. In Ex 5, regarding Acceptable Solution A38.1 at par 4.1, titled “Points of Agreement – BC & RG”, on p 6, the expert ecologists quote Contention 4, namely “The amended application fails to include a detailed site analysis, prepared in accordance with Section 5.1 of Chapter G1 of SDCP 2014, that properly apprises the existing site conditions” and in response to particulars (a) and (c), they say at pars 5 and 6:

“Ecological constraints of the site are assessed ... This has informed the revised layout ... Hollow-bearing trees and the threatened Nowra Heath Myrtle are shown as retained. This particular is resolved with a condition requiring a restriction on title for the relevant lots ensuring the proposed retention, as well as all traits to be retained meeting RFS, APZ standards at the rear of lots 10, 11 and 12.”

61 The Applicant submits at p 186 of the Transcript of 21 November 2024 that:

“Mr Mead then studiously ignores chapter G4 which is a whole section of the DCP which relates to tree vegetation and management, and it addresses itself by reference to the biodiversity and conservation SEPP and so because this land is affected by that SEPP and under that SEPP requires a BDAR, you can take it that all of the controls under this part have been complied with, even though 5.16.6 on p 107 would suggest that all trees in an urban area need to

be assessed. That has to be taken in an appropriate and sensible way on a site as heavily treed as this one, because that's not the expectation for the site, because it will retain all the trees.

I can understand where, on a site where you've got a few trees, in an urban area, where you might have regard to and take account of all the trees, but that's not this case. Then we go to - and, of course, you have to read these provisions in the context of the Biodiversity Conservation Act which says that if you do the BDAR, you don't need to further address that question. Then the other provisions which Mr Mead wished to rely upon, such as p 161, P44:

"Take into account the relevant constraints, including topography, significant trees and vegetation."

- 62 I have had regard to the BDAR prepared by Biosis dated 5 August 2024 (Ex B at Tab 8) which addresses design at p 49 and I reproduce in full as follows:

"The Site Plan is the result of a lengthy investigative and assessment process to avoid and minimise impacts on biodiversity values at the regional scale, site scale, and project scale. ... The results of these assessments were incorporated into each stage of the development footprint design process ... Avoidance measures through the design phase included:

Reduction in number of lots, ...

The proposed development footprint has been selected and positioned within areas of lower biodiversity value, including high condition vegetation and cleared land within the subject land, and avoidance of moderate condition EEC.

The final development footprint has been designed to retain a large number of hollow-bearing trees ...

The final development footprint has been designed to avoid feed trees for the Glossy Black Cockatoo ...

Redesign for avoidance of 0.41 ha of remnant native vegetation consistent with an EEC within the southern portion of the development site, and restricting impacts to 2.14 ha of native vegetation.

Review of all Nowra Heath Myrtle and hollow bearing trees within the development footprint by the project engineer and arborist to determine which stems could be retained as part of the landscape design for the development. This resulted in the redesign of the subdivision to retain 30 Nowra Heath Myrtle stems and 17 hollow-bearing trees within the development footprint. The final development footprint will result in the removal of three Nowra Heath Myrtle stems and 12 hollow-bearing trees within the development footprint.

Containing required APZs within the development site and not overlapping the EEC, to avoid further impacts to native vegetation."

- 63 The Applicant submits that when assessing this Proposed Development, the Court does so having regard to s 7.13 of the *Biodiversity Conservation Act 2016* (BC Act) and submits that the effect of s 7.13 of the BC Act is that having taken into consideration the impacts of the development on the biodiversity values in the BDAR, the Court is not required to further consider the likely



impact of the Proposed Development on biodiversity values. “This is a powerful indicator that the loss of vegetation on parts of the site where the BDAR has identified loss of vegetation has already been taken into account in that assessment and need not be considered further.” (AWS at par 72).

- 64 The Applicant submits that Mr Mead is not an ecologist and that the Court would prefer the agreement of the ecologists, which supports Mr Gunn’s opinion that the Proposed Development has been informed by the constraints of the Site.

### **Findings and conclusions on the first issue: Site analysis**

- 65 I accept the reasons given by the Applicant that the design, topographical constraints and tree vegetation and management have all be considered in the site analysis of the existing conditions of the Site to the extent that they are appropriate. I also accept that the Court is tasked with determining the merits of the design in accordance with the Proposed Development. I reject Mr Mead’s proposition regarding the design of the Proposed Development that notwithstanding that the ecologists, civil engineers and bushfire consultants have considered the constraints of the Site, that planning considerations have been ignored to the extent he identifies, namely in relation to the vegetation retention. (Transcript 21 November 2024, p 155 at par 155).

- 66 I find that Mr Gunn appropriately relies on civil engineering expertise in relation to the earthworks required and that changes to the FSR to bring the Proposed Development in compliance with the SDCP control would not have any consequence on the earthworks and therefore would have no consequence on potential tree retention (see below at [80]). Accordingly, in the context of this matter, it is not *appropriate* to undertake a tree by tree analysis of the development lots in circumstances where tree retention, beyond the identified hollow tree retention agreed between the ecologists, is not feasible. I am also satisfied that the exercise of undertaking a tree by tree analysis would not have resulted in any significant change in the design of the Proposed Development because of the balancing of the planning controls and the other ecological, bushfire and topographical constraints of the Site.

67 For these reasons, the Respondent's contentions are not supported by the evidence and they do not support a conclusion that the Proposed Development be refused for the failure to include in the site analysis identification of every single tree on the development sites, for similar reasons given by the Respondent regarding the pointless nature of doing so for the conservation lots. In the circumstances of this Proposed Development, such an inclusion of existing trees on the development lots would not have provided any additional information or assistance to the Court in the assessment of the Proposed Development, because it is known that the Proposed Development seeks the removal of all of the trees in the development lots as a result of the earthworks required. In reaching this conclusion I have had regard to the compliant landscape plans and the overall compliance with the development standards and other controls of the SDCP.

**The second issue: The exceedance of FSR (Contention 9)**

68 I now turn to the second planning issue which the Respondent described in the RWS at par 3(b) as "the exceedance of the floor space ratio control (contention 9)". The contention 9 as drafted in the ASOFAC is that the development will likely result in poor amenity for occupants and neighbours, and impacts on streetscape and character, due to the high density of the proposed multi-dwelling housing component of the development. This Contention 9 is further particularised in the ASOFAC as follows:

"(a) The maximum density for multi-unit dwelling housing developments on sites zoned R1 General Residential Zone is a Floor Space Ratio (FSR) of 0.5:1: SDCP 2014, Chapter G13, Section 5.1.2.

(b) Superlots 6 and 9 provide for FSRs of 0.54:1 respectively which does not comply with the DCP requirements. The excessive density results in reduced opportunities for landscaping, lack of relief in the streetscape built form and lack of separation between private open spaces to medium density dwellings.

(c) The density of development on the proposed individual lots should comply with the DCP standard. The proposal does not include indicative built form for the housing lots proposed."

69 The experts agree that the Proposed Development, with an FSR of 0.57:1 exceeds the FSR of 0.5:1 by 14% (JER Planning at pars 51-54). There was some discussion between the parties as to the method of calculation of the FSR and whether the stairs within each dwelling ought not to be included in the

calculation of the gross floor area GFA which would reduce the non-compliance to 0.54:1.

- 70 At the outset, it is relevant that the FSR control is not a development standard and that compliance with the control set out in the SDCP is not a jurisdictional prerequisite to the granting of consent to the Proposed Development. I deal with this contention as a merit assessment and as such, the disagreement between the parties as to whether the proposed FSR is 0.54:1 or 0.57:1 is not determinative in and of itself for the reasons given above at [43]. Instead I consider and focus on the impacts as contended by the Respondent, namely as articulated by Mr Mead, whether the breach of the density control prevents the Proposed Development from achieving the objects of the control and at par 58 of the Planning JER (Ex 7) Mr Mead states (emphasis added):

“In my opinion, the breach of the density control can be directly related to the extent of building and the removal of vegetation. There is no site condition or contextual cue in the locality which supports density in excess of the DCP control, particularly where in my opinion, **the impacts of the development are significant**. In my opinion a compliant density would likely provide **opportunity for additional tree retention and replacement planting**. While in my opinion, the proposal is unlikely to positively contribute to the existing or desired future character from a landscape and vegetation point of view, the opportunities for a contextual response would increase with a compliant FSR. In its current form, the proposal does not minimise adverse impacts.”

- 71 It was not clear what the so-called significant impacts referred to by Mr Mead are. I look at these in the context of the objectives in Section 5.1.2 of Chapter G13 of the SDCP as particularised in Contention 9 of the ASOFAC.
- 72 The Applicant submits in closing as follows:

“Then on the question of density, the primary proposition is that the council asserts, and Mr Mead, in particular, asserts, that the outcome in terms of loss of trees is a direct consequence of the density. That can't be right in the context of an exceedance of an FSR which is only .04 or .07:1 greater than the DCP control. Even less, can that be said, in circumstances where Mr Mead agreed that the landscaped area requirements were met, the private open space requirements were met, the shadow analysis and solar access requirements are met, and the height and setbacks of the buildings under the controls are met. How could it then be said that the density is reflective of an excessive amount of footprint?

As Mr Mead agreed, you could actually comply, not by changing the footprint so as to preserve any more trees, but simply by removing a bedroom from the upper level of each building. You don't change anything. He's not complaining about the bulk and scale of the buildings. So what is it that that would change? Then you'll take into account this fact, the council's assertion

of .57:1 is based upon an assumption that one should include the stairs. The fact of the matter is, the definition of gross floor area in the LEP says you exclude an area used for common vertical circulation such as lifts and stairs. What that means is, that's a definition which uses the inclusive words, and the inclusive words are included in the word "common vertical circulation". (Transcript 21 November 2024, p 188 at pars 11-31).

- 73 Chapter G13 of the SDCP provides controls for medium density and higher density residential development and at Section 3 Context includes the following statement:

"The impact of a proposal on the amenity of adjoining properties is to be a principal consideration of applicants when preparing a development application."

- 74 The specific objectives of the Density controls in Section 5.1.2 are to:

i. Minimise adverse impacts of higher density development in residential areas.

ii. Ensure that the bulk and scale of new development is compatible with existing streetscape amenity and the existing or desired future character of the area."

- 75 Mr Mead indicates that "variation to the FSR would be exercised where it can be demonstrated that the objectives of the control can be met." (JER Planning, at par 56).

- 76 Mr Gunn, in the JER Planning, addresses the first objective of Section 5.1.2 of the SDCP at pars 60-62. He says that the first objective is achieved because:

"the development is designed to locate low density residential lots at the site's periphery where it directly interfaces with existing low-density development. The medium-density component is located internally, so as not to directly interface with existing streetscape and thus minimise impacts."

- 77 I accept Mr Gunn's evidence that once detached dwellings are constructed on the low-density lots, the medium density product will mostly not be visible. It is not contradicted that existing low-density dwellings will interface with new dwellings of similar density (in the case of lots 1-5) or a lower density (in the case of lots 10-12). The only multi-dwelling house (unit 6.01) which will have direct interface with Depot Road has been designed as a detached dwelling on a larger plot of 370m<sup>2</sup> and I accept that "it will appear as a standalone, detached house, in order to reflect the existing low-density character." (JER Planning, par 62).

78 Mr Gunn deals with the second objective at pars 63-64 and notes at par 65 that the performance criteria “seeks to ensure bulk and scale “on the perimeter of the development site” is compatible with the bulk and scale of the existing locality and sympathetic with the streetscape. Again, the layout ensures the perimeter is low-density and therefore sympathetic to the existing context.” At par 66 Mr Gunn concludes as follows:

“In my opinion, the variation to the FSR Acceptable Solution is justified as the proposal satisfies the objectives and the performance criteria by locating low density development at the site’s periphery to reflect the existing low-density character.”

79 Mr Gunn goes further at par 67 and provides his opinion that “no significant negative amenity impacts result, noting that the proposal is compliant with the minimum private open space (POS) requirements, minimum landscape requirements and minimum solar access requirements. Indeed, a number of the proposed townhouses will be provided with POS significantly in excess of the minimum.” Relevantly, Mr Gunn, at pars 70-71 of the JER Planning states:

“70. In my opinion, the FSR variation is not directly related to the vegetation removal. The Acceptable solution could be achieved by deleting approximately 250m<sup>2</sup> of floorspace within each superlot. However, there is no reason to believe that this would somehow allow for the retention of significant, or indeed any, additional vegetation. It is noted that Lots 1-5 have no built form proposed yet they too are not able to retain vegetation owing the earthworks requirements to prepare buildable lots.

71. In my opinion, strict compliance of Superlot 6 & 9 MDH with the FSR control would be extremely unlikely to lead to additional vegetation retention or have any significant beneficial impact on the context, noting the townhouses, being internal to the development site, will have limited interface with the existing dwellings and streetscape under the ultimately development scenario.”

80 Mr Gunn’s opinion is based upon the ongoing advice he received from the civil engineer that there would not be a reduction of the earthworks if the footprint were to be shrunk by 5% or 10%. That is, that notwithstanding any effort to reduce the density, the earthworks, largely driven by the road and the ability to put houses on the lot in the middle, which is lot 9, would be the same regardless. Mr Mead accepted the proposition that to build this development to this design and he does not suggest that the earthworks would be any different.

81 I conclude that the removal of vegetation is a consequence of the earthworks, not a consequence of the non compliance with the SDCP FSR control.

82 On the question about density, the Applicant refers to Mr Mead's suggestion that "the ability to retain vegetation appears not to have been appraised" (JER Planning, at par 18, Ex 7) and I accept the submission at par 86 of the AWS that this is not correct because the Applicant seeks approval for a design for the Proposed Development on the Site, that is, the whole of the Site. I agree that it is inappropriate to view the development of superlots 6 and 9 in isolation. The design of the Proposed Development retains vegetation on lot 13, dedicates lot 14 to the Council and conditions are agreed to retain trees within the APZ of lots 1-5, lots 7-8 and lots 10-12. The balance of the Site is to be developed and results in the inability to retain vegetation on the development sites for the following reasons:

- (1) Bulk earthworks plan (Ex C, Tab 5, DWG 0051 Rev G) shows cut of up to 2m and fill of up to 2m;
- (2) Architectural plans show that the medium density housing is to be benched on a concrete building pad and levelled (Ex C, Tab 3 DA300); and
- (3) The multi-dwelling houses are stepped to follow the contours of the Site.

83 The Applicant submits that Mr Mead:

"just seems to assert you could do a different design. We're not here to address that question. We're here to address this design and there's no basis upon which he could assert that you would put the development in a different part of the site. You wouldn't, for obvious reasons, because of the biodiversity constraints." (Transcript 21 November 2024, p 190 at par 6).

84 The Applicant submits that the Court should have regard to the underlying zoning of the Site and that none of the objectives seek the retention of vegetation. The Objectives of R1 – General Residential in the Shoalhaven Local Environmental Plan 2014 are as follows:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To identify land suitable for future urban expansion.

85 The Applicant submits at par 89 of the AWS that:

"Council has identified the Site as being suitable for future urban expansion; just as it has identified land at 20 and 30 Cavanagh Lane to be suitable for urban expansion. Urban expansion invariably requires removal of vegetation.



The land at 20 and 30 Cavanagh Lane also removed large track of vegetation, but retained a small portion (see Ex F). However, the removal of vegetation is done on this development in a sensitive way. Substantial large areas of high significance are avoided (including areas with the greatest number of Nowra Heath Myrtle and Hollow Bearing Trees), and the future landscaping specifically incorporate feed trees for threatened species.”

- 86 I reach the conclusion that the Proposed Development is consistent with the desired future character of the area because the land zoning of the Site is R1 – General Residential, permitting a greater density than that permitted in the adjacent land zoned R2 and because of the emerging character of the locality seen on the Site view along Cavanagh Lane which has a similar greater density compared to the surrounding lower density. I find that the Proposed Development is more compatible with the existing character and streetscape, compared with the Cavanagh Lane developments, because of the proposed landscaping.
- 87 As I have indicated earlier, this contention deals with an FSR control prescribed by the SDCP and is not a development standard. Accordingly, I find that on merit there is no warrant to refuse the Proposed Development. The evidence does not establish any amenity impact in circumstances where, as Mr Mead agreed, landscaped area requirements were met, the private open space requirements were met, the shadow analysis and solar access requirements are met, and the height and setbacks of the buildings under the controls are met.

## **Conclusion**

- 88 I conclude, for the reasons given above that the Respondent’s contentions pressed during the hearing were not sufficiently supported by the evidence to warrant the refusal of the development application and that on balance I find on merit that the appeal can be upheld and the development application determined by the granting of consent subject to conditions of consent. This now just leaves the consideration of the terms of conditions of consent.

## **Conditions of consent**

- 89 The parties were unable to agree on a set of Draft/Proposed Conditions of Consent. Council’s Draft/Proposed Conditions of Consent were tendered late on the second and final day of hearing (Ex 10). The parties were formally

directed to file by 4 pm Friday 22 November 2024 the final version of conditions with any competing conditions between the parties that are not agreed, and a short comment or submission as to which version is to be preferred. In that regard I have considered the filed conditions of the Respondent marked Ex 12 and the filed conditions of the Applicant marked Ex K, both filed 22 November 2024.

90 There are four conditions about which the parties were unable to reach agreement and they each filed written submissions on 22 November 2024 regarding the following conditions:

- (1) Condition 5(a) Management of Conservation Lot – amalgamation of lots 10 and 13.
- (2) Condition 86(d) Positive Covenant – Environmental Management – limited to the word “Development” versus “The erection of a dwelling”.
- (3) Condition 90(c) Shared Path – Design Standards – whether to extend footpath beyond the frontage of the Site on Depot Road.
- (4) Condition 140 Maintenance Period of WSUD Devices – 3 years versus 1 year.

*Amalgamation of lots 10 and 13 – Condition 5(a)*

91 The Respondent relies on the terms of s 4.17(1)(g) of the EPA Act which permits the requirement to amalgamate lot 13 into lot 10 and submits that the amalgamation is appropriate to ensure bushfire safety and that the biodiversity benefits of retaining lot 13 for conservation can be achieved and enforced. The Respondent submits that:

“The amalgamation of Lot 13 with lot 10 would ensure that lot 13

- has a compliant building envelope outside of the 29kW/m<sup>2</sup> requirement for bushfire safety [Exhibit 4 para 30];
- would be less likely to attract an application for residential development as it would no longer be a vacant allotment;
- would support the monitoring, management and enforcement of lot 13 for conservation purposes.”

92 The Applicant relies on the first JER Bushfire (Ex 3) where the fire engineers agreed that either:

- (1) A suitable legal mechanism should be placed over lot 13 to ensure no residential development can occur unless a building envelope compliant with the 29kW/m<sup>2</sup> requirement is demonstrated: pars 14-15 of Ex 3; or

(2) Lot 13 would need to be amalgamated with a lot that contains a compliant building envelope: at par 16 of Ex 3.

93 The Applicant submits that the first option is appropriate and is achieved by condition 86(a) which provides that a positive covenant must stipulate that no development other than environmental protection works may take place within the conservation area on proposed lot 13. The Applicant further submits that (AWS p 1):

“There are two further problems with condition 5(a). First, it will unfairly burden a future residential lot owner, in circumstances where the obligations should fall on the owner of lot 13 (which is the Applicant). Second, the drafting of this condition, requiring the amalgamation of lots 10 and 13, will have the effect of sterilizing the proposed residential development over lot 10 because of the operation of condition 86(a). This is an absurd outcome and has never been the position of either of the parties.”

94 I agree with and accept the submissions of the Applicant and find that condition 5(a) as sought by the Respondent should be deleted.

*Positive covenant on lots 10, 11 and 12 and the word “development”- Condition 86(d)*

95 The Respondent relies on the agreement recorded by the ecology experts at p 6 of Ex 5 that there be conditions on the approval including “... building envelopes clearly demarcated so that future buyers can prepare a DA within these constraints with no further tree removal required.” The Respondent submits that (RWS p 1):

“The restriction required by condition 85 will ensure that any future development proposed on the balance of the site would be subject to assessment and consideration by the Council. This is appropriate given the ecological and bushfire constraints of the site. If further development was considered suitable the covenant could be amended and the conditions of this consent modified pursuant to s 4.17(b) [of the EPA Act].”

96 I accept and agree with the Applicant’s proposed change of wording from “development” to “the erection of a dwelling” because the word development is too broad to limit to a building envelope. The change of wording does not impact on the purpose of the condition which is to ensure that the future dwelling is located within the building envelope to limit the ecological impacts of any dwelling and ensure compliance with the APZ requirements. The Applicant’s wording is consistent with conditions 123 and 124 which is restricted to dwellings.

*The footpath - Condition 90(c)*

- 97 Contention 23(d) of the ASOFAC appears in Part B4 of the ASOFAC titled “conditions that could be resolved through conditions of consent.” I presume and understand that this heading should read “Contentions that could be resolved through conditions of consent”. Contention 23 is titled “Paths” and particular (d) reads:

“A 2m wide footpath must be constructed from the development to the Cavanagh Lane intersection to provide adequate connection from the development to public transport.”

- 98 The Civil Engineering JER (Ex 6) merely responds to contention 23(d) with “Agreement – experts agree that this contention can be dealt with through an agreed condition of consent.” The Applicant does not agree with and seeks the deletion of the condition sought by the Respondent at condition 90(c) which reads as follows:

"A 2.0 metre wide concrete footpath constructed from the development to the Cavanagh Ln intersection to provide adequate connection from the development to public transport."

- 99 The Applicant agrees to a condition that there be a 2.0 metre wide footpath on the frontage of the Site in the terms of condition 90(b) but not to the extent of the Cavanagh Lane intersection in the terms of conditions 90(c).
- 100 The Respondent submits that the basis on which the condition is sought was because of the location of the bus stop on the street (Transcript 21 November 2024, p 192 at par 20). During the Site visit neither of the parties were able to point out the location of any relevant bus stop and during closing submissions the Respondent sought leave to tender evidence of the location of the bus stop noting “I don’t personally know where the bus stop is” (Transcript 21 November 2024, p 192 par 25) . I made a note on the transcript to expect evidence as to the location of the bus stop that is relevant to conditions 89(c) and the Respondent provided a Nowra/Shoalhaven bus network map, an aerial photograph with a yellow marking and an extract of the Nowra/Shoalhaven bus network map which I have marked Ex 13.
- 101 Mr Gunn did not have an opinion on whether the occupants of the Proposed Development should have a footpath providing access to the nearest bus stop in Cavanagh Lane (Transcript 21 November 2024, p 112 at par 49) whereas Mr

Mead states that it would be highly beneficial for future residents (Transcript 21 November 2024, p 113 at par 10).

102 The bus route evidence (Ex 13) does not identify the location of any bus stops only the route identified as route 106 Nowra to West Nowra. I have had a look on the free TripView Lite app and searched Sydney & Regional Buses by route and have satisfied myself that the West Nowra to Nowra via University of Wollongong Shoalhaven Campus (Loop Service) is the same as the route 106 in Ex 13 and I have observed that there are no bus stops on Cavanagh Lane however there is a bus stop indicated by a red pin icon shown on Depot Road past the Cavanagh Lane intersection travelling south identified as “West Nowra 2541183 Depot Rd after Maybush Way”. This location is not a location the parties were able to identify on the site view and is located beyond the yellow marking on the aerial photograph in Ex 13. There is no distance or length or other dimensions indicated in Ex 13 in order to ascertain the impact of imposing condition 90(c) on the Applicant.

103 The Respondent submits that the condition is clearly imposed for a planning purpose and relies on SDCP Chapter G11, Section 5.1.4 Pedestrian and Cyclist Network where P18.2 fourth dot point provides that as a performance criteria:

“A pathway network and hierarchy is developed:

...

To improve access to public transport ...”

104 Acceptable Solution A18.1 is that:

“Footpaths and/or cycleways are provided to connect existing/planned facilities as identified in:

...

Pedestrian and Access Mobility Plan”.

105 The Pedestrian and Access Mobility Plan (PAMP), a public document, identifies a shared user path along Depot Road as a planned facility. This is not a facility for which contributions are required under condition 31 “Local Infrastructure Contribution – Multi-Dwelling Housing” or condition 119 “Local Infrastructure Contribution – Subdivision”. The Respondent submits that (RWS p 2):

“The condition [90(c)] is similar to that imposed on the multi-dwelling housing development at 20 Cavanagh Lane, which the Court inspected during the site inspection. Condition 30 of Exhibit J, being the consent for that site (DA23/1796), requires a footpath to be constructed along the development frontage and to Doreen Circuit, being the next intersection beyond the immediate frontage of the development.

The condition fairly and reasonably relates to the development. The development will result in a significant increase to the number of residents living on Depot road beyond the extent of the current bus route.”

106 The Applicant was unable to contradict the Respondent’s submissions.

107 I conclude that the condition 90(c) should be imposed but only to the extent of the next intersection beyond the immediate frontage of the development, namely to Olympic Drive, for the reasons given by the Respondent quoted above.

*WSUD Devices maintenance period – condition 140*

108 The parties were unable to agree whether the maintenance period for the water sensitive urban design (WSUD) be for 3 years or 1 year. The Respondent seeks a term of 3 years while the Applicant seeks to limit the obligation to maintain the WSUD to a period of 1 year.

109 The Respondent relies on the SDCP Chapter G11, Section 6.10 which requires a defects liability and maintenance period shall be at least 3 years for WSUD Devices and submits that (RWS p 2) “[t]he 3-year period allows for the landscaping to be fully established within the bioretention basis and minimises the change of risk of damage to the bioretention basis from the building phase of the development.”

110 The Applicant seeks to support to limit the maintenance period to only 1 year notwithstanding acknowledging the SDCP provision submitting that the 3 year period is unreasonably long relying on the 1 year period of the maintenance bond at condition 137 together with the fact that the WSUD devices will be constructed to Council’s standards (conditions 104 and 105) and certified to have been constructed accordingly (conditions 136, 137 and 141).

111 I find that the maintenance period for the WSUD should be for a period of 3 years as per the SDCP Chapter G11, Section 6.10.



112 In summary, for the reasons given above, I conclude that development consent is to be granted with the contested conditions being resolved as follows:

- (1) Condition 5(a) Management of Conservation Lot – amalgamation of lots 10 and 13 to be deleted;
- (2) Condition 86(d) Positive Covenant – Environmental Management – to include the phrase “The erection of a dwelling”;
- (3) Condition 90(c) Shared Path – Design Standards – should be imposed but only to the extent of the next intersection beyond the immediate frontage of the development, namely to Olympic Drive.
- (4) Condition 140 Maintenance Period of WSUD Devices to be for a period of 3 years.

**Orders:**

113 The Court orders:

- (1) The appeal is upheld.
- (2) Development consent is granted to development application DA23/1693; RA23/1003, PPSSTH-304 for 14 lot subdivision, including creation of a conservation lot, and construction of multi-dwelling housing (32 dwellings) on proposed lots 6 and 9, and associated civil works, earthworks and vegetation clearing at Depot Road, West Nowra being lot 425 in DP 720906, Rainford Road, West Nowra being lot 426 in DP 720906 and part of Depot Road reserve subject to the conditions of consent in Annexure A.
- (3) All exhibits are retained.

**E Espinosa**

**Commissioner of the Court**

\*\*\*\*\*

**Annexure A**

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.