MANGROVE MOUNTAIN AND SPENCER ADVISORY COMMITTEE

22 June 2023

COMMUNITY STRATEGIC PLAN 2018-2028

ONE – CENTRAL COAST IS THE COMMUNITY STRATEGIC PLAN (CSP) FOR THE CENTRAL COAST LOCAL GOVERNMENT AREA

ONE – CENTRAL COAST DEFINES THE COMMUNITY'S VISION AND IS OUR ROADMAP FOR THE FUTURE

ONE – CENTRAL COAST BRINGS TOGETHER EXTENSIVE COMMUNITY FEEDBACK TO SET KEY DIRECTIONS AND PRIORITIES

One - Central Coast will shape and inform Council's business activities, future plans, services and expenditure. Where actions are the responsibility of other organisations, sectors and groups to deliver, Council will work with key partners to advocate on behalf of our community.

Ultimately, every one of us who live on the Central Coast has an opportunity and responsibility to create a sustainable future from which we can all benefit. Working together we can make a difference.

RESPONSIBLE

WE'RE A RESPONSIBLE COUNCIL AND COMMUNITY, COMMITTED TO BUILDING STRONG RELATIONSHIPS AND DELIVERING A GREAT CUSTOMER EXPERIENCE IN ALL OUR INTERACTIONS. We value transparent and meaningful communication and use community feedback to drive strategic decision making and expenditure, particularly around the delivery of essential infrastructure projects that increase the safety, liveability and sustainability of our region. We're taking a strategic approach to ensure our planning and development processes are sustainable and accessible and are designed to preserve the unique character of the coast.

Good governance and great partnerships

G2 Engage and communicate openly and honestly with the community to build a relationship based on trust, transparency, respect and use community participation and feedback to inform decision making

There are 5 themes, 12 focus areas and 48 objectives

COMMUNITY STRATEGIC PLAN 2018-2028 FRAMEWORK

All council reports contained within the Business Paper are now aligned to the Community Strategic Plan. Each report will contain a cross reference to a Theme, Focus Area and Objective within the framework of the Plan.

Meeting Notice

The Mangrove Mountain and Spencer Advisory Committee of Central Coast Council will be held in the Committee Room, 2 Hely Street, Wyong and Remotely – Online, on Thursday 22 June 2023 at 12:00pm,
for the transaction of the business listed below:

1 Procedural Items

2 Reports

Administrator Rik Hart
Chairperson

1.1 INTRODUCTION: WELCOME, ACKNOWLEDGEMENT OF COUNTRY, APOLOGIES, DISCLOSURES OF INTEREST

Chairperson

Welcome, Acknowledgement of Country, Receipt of Apologies

We acknowledge the Traditional Custodians of the land on which we live, work and play.

We pay our respects to Elders, past, present and emerging and recognise their continued connection to these lands and waterways.

We acknowledge our shared responsibility to care for and protect our place and people.

1.2 PREVIOUS BUSINESS: CONFIRMATION OF MINUTES, REVIEW ACTION LOG

Chairperson

Attachments

1	Minutes of the Mangrove Mountain and Spencer Advisory Committee meeting held 11 April 2022	D15122306

Minutes

Mangrove Mountain and Spencer Advisory Committee

Date: 11 April 2022
Time: 4.05pm – 4.58pm
Location: Microsoft Teams
Chairperson: Rik Hart, Administrator
Coordinator: Edward Hock, Unit Manager Governance, Risk and Legal

Attendance

Members:	**Status:**
John Asquith	Present
Lillias Bovell	Absent
Gary Chestnut	Present
Joy Cooper	Present
Wolfgang Koerner	Present
Pam O'Sullivan	Apology
Margaret Pontifex	Apology
Stephen Rickards	Absent
Catherine Wade	Absent
Danny Willmot	Present
Staff:	
Rik Hart, Administrator	Present
David Farmer, Chief Executive Officer	Present
Alice Howe, Director Environment and Planning	Present
Edward Hock, Unit Manager Governance, Risk and Legal	Present
Zoie Magann, Meeting Support Officer	Present (left 4.30pm)

1 Introduction **4.05pm**

The chairperson, Administrator Rik Hart, welcomed the group and completed an Acknowledgement of Country and connection to land statement.

The Administrator noted the passing of one of the members, Dr Stephen Goodwin, in July 2021. Dr Goodwin was well known in the Mangrove Mountain community and beyond for his environmental advocacy, particularly regarding the Mangrove Mountain landfill. Dr Goodwin's partner, Marilyn Steiner, was also a valued member of this Committee and resigned following the passing of Dr Goodwin. The Administrator acknowledged the contributions of both Dr Goodwin and Ms Steiner, and thanked those who continue to campaign for the Central Coast community.

Action: Unit Manager Governance, Risk and Legal to progress recruitment for the vacancies in line with the appropriate procedure.

Minutes
Mangrove Mountain and Spencer Advisory Committee

The chairperson called for any disclosures of interest. The following disclosures were noted.

Gary Chestnut declared a less than significant non-pecuniary interest, as done so previously, as he is a former employee of Gosford City Council and during this employment he received and presented confidential information to Councillors, Senior Management, Council's Solicitors, Council's Barrister and Council's Senior Counsel.

Danny Willmott declared a less than significant non-pecuniary interest, as done so previously, as he is a former respondent in the legal case regarding Mangrove Mountain Landfill.

2 Previous business 4.10pm

The group confirmed the minutes from the previous meeting as noted below, which were distributed to members via email and uploaded to Council's website:

- Mangrove Mountain and Spencer Advisory Committee meeting held 28 January 2020

3 NSW Land and Environment Court in Verde Terra v Central Coast Council, and Central Coast Council v EPA NSW 4.11pm

Edward Hock (Unit Manager Governance, Risk and Legal) provided an update regarding the NSW Land Environment Court matters involving Verde Terra and the EPA, in which judgment was delivered on 25 March 2022.

4 General business 4:32pm

- Members formally moved recognition and appreciation for Council's effort in defending the proceedings, and Verde Terra's proposed large regional waste facility development.

Recommendation: That Council note the Mangrove Mountain and Spencer Advisory Committee's appreciation for Council's effort in the NSW Land Environment Court matters involving Verde Terra and the EPA.

- Committee members variously enquired about:
  - Council's knowledge of the outcome of prosecution proceedings related to illegal dumping at Spencer; and
  - Whether the recent flood events had seen any further illegal dumping at that location.

Action: Director Environment and Planning to provide response to the questions on notice regarding illegal dumping at Spencer.

Minutes

Mangrove Mountain and Spencer Advisory Committee

Central Coast Council

5 Close

Next meeting: To be confirmed after 22 April 2022

Meeting closed at 4:58pm

Minutes approved by the Coordinator and Chairperson on [insert date].

1.3 GENERAL BUSINESS

2.1 VERBAL REPORT ON COURT OF APPEAL DECISION IN VERDE TERRA V CENTRAL COAST COUNCIL

Edward Hock – Unit Manager, Governance Risk & Legal

Attachments

1⇩	Judgement - Verde Terra Pty Ltd & Ors v Central Coast Council & Anor [2023] NSWCA 121	D15725332

Court of Appeal
Supreme Court

New South Wales

Case Name:	Verde Terra Pty Ltd & Ors v Central Coast Council & Anor
Medium Neutral Citation:	[2023] NSWCA 121
Hearing Date(s):	1 September 2022
Decision Date:	2 June 2023
Before:	Ward P at [1]; White JA at [2]; Kirk JA at [49]
Decision:	Appeal dismissed with costs
Catchwords:	ENVIRONMENT AND PLANNING – Development application – Where parties settled earlier proceedings relating to breach of terms of development consent by consent orders – Where appellant now seeks to alter designated development without obtaining further development consent – Whether consent orders themselves render development "approved" – Whether consent orders merge in prior development consent so as to render development "approved" – Held that development not "approved" ENVIRONMENT AND PLANNING – Words and phrases – Approved development – Environmental Planning and Assessment Regulation 2000 (NSW) Sch 3, Pt 2, cl 35 JUDGMENTS AND ORDERS – Classification of orders – Classification of consent orders – Judgments in rem – Judgments in personam – Whether consent orders settling proceedings as to breach of terms of development consent operate in rem for the purpose of rendering development an approved development –

	Held that consent orders do not give rise to judgment in rem
Legislation Cited:	Environmental Planning and Assessment Act 1979 (NSW), ss 4.12(8), 8.8(2) Land and Environment Court Act 1979 (NSW), s 58 Environmental Planning and Assessment Regulation 2000
Cases Cited:	Anastasiou v Wallace [2020] NSWLEC 14 Duchess of Kingston's Case (1776) 1 Leach 146; 168 ER 175 Goucher v Clayton (1865) 11 LT 732 PE Bakers Pty Ltd v Yehuda (1988) 15 NSWLR 437 Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Environment Protection Authority (No. 9) [2022] NSWLEC 29 Verde Terra Pty Ltd v Central Coast Council; Central Coast v Environment Protection Authority (No. 10) [2022] NSWLEC 49 Wytcherley v Andrews (1871) LR 2 P&D 327
Texts Cited:	K R Handley, "Res Judicata: General Principles and Recent Developments" (1999) 18 ABR 214 K R Handley, Spencer Bower and Handley: Res Judicata (5th ed, 2019, LexisNexis)
Category:	Principal judgment
Parties:	Verde Terra Pty Ltd (First Appellant) Mangrove Mountain Landfill Pty Ltd (Second Appellant) Mangrove Properties (NSW) Pty Ltd (Third Appellant) Central Coast Council (First Respondent) Environment Protection Authority (Second Respondent)
Representation:	Counsel: P W Larkin SC with J Stuckey-Clarke and G Tsang (Appellants) S Free SC with M J Astill (First Respondent) Submitting appearance (Second Respondent) Solicitors: Ashurst (Appellants) MBM Legal (First Respondent)

File Number(s):	2022/00134465
Decision under appeal:	
Court or Tribunal:	Land and Environment Court of New South Wales
Citation:	[2022] NSWLEC 29
Date of Decision:	25 March 2022
Before:	Pepper J
File Number(s):	2019/101279

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 6 October 1998, the predecessor of the first respondent, Central Coast Council (**Council**), granted development consent to the predecessor of the first appellant, Verde Terra Pty Ltd (**Verde Terra**), to remodel and expand a nine-hole golf course at Mangrove Mountain by excavating part of the land upon which the golf course was situated, and backfilling it with waste materials. At the time development approval was granted, on 14 October 1998, the development was classified as a "designated development", within the meaning of section 77A of the *Environmental Planning and Assessment Act 1979* (NSW). The grant of development consent was predicated on the provision both of an environmental impact statement and of an opportunity to members of the public to object to the grant of any such consent.

In 2012, the Council's predecessor instituted proceedings in the Land and Environment Court against Verde Terra to remedy what it considered to be breaches of terms of the development consent regulating the extractive industry and waste facility on the subject land. Those proceedings were settled

by consent orders in August 2014. In a number of respects the works the subject of the consent orders differed from the works authorised by the development consent. It was common ground on appeal that although such works were not authorised by the development consent, the orders were lawfully made and both authorised and mandated the carrying out of the works.

On 21 December 2018, Verde Terra, by a new development application, sought to alter aspects of its prior development consent. Following a deemed refusal by the Council, on 1 July 2019, Verde Terra commenced both Class 1 and Class 4 proceedings in the Land and Environment Court. In the latter, Verde Terra sought, first, a declaration that it did not need further development consent to carry out the development of the landfill and golf course, and, secondly, a declaration that the landfill and golf course constituted an "existing or approved" development within the meaning of cl 35 of Pt 2 of Sch 3 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**). The primary judge made the first declaration but declined to make the second, the practical utility of which was suggested by Verde Terra to be excusal from the need to comply with requirements for consent to designated development as the amendments did not increase the total environmental impacts of the development the subject of the 2014 orders. Part of the primary judge's reasons for not so declaring were stated to be that, while the subject of consent orders, the development had not been approved by a consent authority. Her Honour also held that the 2014 consent orders operate as a judgment *in rem* in relation to the development that may now be carried out on the land pursuant to the 1998 consent, as they define the activity permitted to be carried out under that consent.

On appeal, the issues before the Court were:

(i) whether the primary judge erred in not holding that a development the subject of consent orders amounts to an "approved" development for the purposes of cl 35 of Pt 2 of Sch 3 to the EPA Regulation; and

(ii) whether the primary judge erred in not finding that the consent orders entered in August 2014 merged in the original development consent, so as to amount to an "approved development".

The Court (per White JA, Ward P and Kirk JA agreeing), dismissing the appeal with costs, held:

As to both issues:

(1) While consent orders and judgments by consent might give rise to a *res judicata* estoppel enforceable as between the participants in litigation, they do not give rise to a judgment *in rem* binding third parties: [37]-[43].

PE Bakers Pty Ltd v Yehuda (1988) 15 NSWLR 437, considered.

The Duchess of Kingston's Case (1776) 1 Leach 146; 168 ER 175; *Goucher v Clayton* (1865) 11 LT 732; *Wytcherley v Andrews* (1871) LR 2 P&D 327, cited.

(2) An "approved development" within the meaning of cl 35 of Pt 2 of Sch 3 to the EPA Regulation does not necessarily require approval from a consent authority but can include development authorised by court orders. That is not because the orders merge in the development consent but because the development approved by the orders would be binding on the world. As cl 35 affects third parties' rights, the "approved development" against which the environmental impact of the total development is to be assessed, is a development whose approval is binding on third parties. Here, because the 2014 orders were obtained by consent and thus were not binding on third parties, the development sought to be altered by Verde Terra does not answer the description of an "approved" development: [44]-[47].

JUDGMENT

1 **WARD P**: I agree with White JA.

2 **WHITE JA**: This is an appeal pursuant to s 58 of the *Land and Environment Court Act 1979* (NSW) from an order of the Land and Environment Court by which the primary judge (Pepper J) dismissed the appellant's application for a declaration that was sought in the following terms:

> "2. A declaration that the Mangrove Mountain Landfill & Golf Course constitutes 'development (whether existing or approved)' within the meaning of clause 35 of Schedule 3 of the EPA Regulation."

3 Section 4.10(1) of the *Environmental Planning and Assessment Act 1979* (NSW) ("the Act") (formerly s 77A) provides that "designated development" is

development that is declared to be designated development by an environmental planning instrument or the regulations.

4 Relevantly, for the purposes of the present appeal, cl 4(1) of the Environmental Planning and Assessment Regulation 2000 (NSW) provided that development described in Pt 1 of Sch 3 to the Regulation was declared to be designated development for the purposes of the Act unless declared not to be designated development by a provision of Pt 2 or 3 of that Schedule.

5 Part 1 of Sch 3 listed 34 industries, facilities, or activities that were prescribed as designated developments. They included extractive industries (cl 19) and waste management facilities or works (cl 32).

6 Clause 35 in Pt 2 of Sch 3 provided:

> "**Part 2 Are alterations or additions designated development?**
>
> **35 Is there a significant increase in the environmental impacts of the total development?**
>
> Development involving alterations or additions to development (whether existing or approved) is not designated development if, in the opinion of the consent authority, the alterations or additions do not significantly increase the environmental impacts of the total development (that is the development together with the additions or alterations) compared with the existing or approved development.
>
> **Note:** Development referred to in this clause is not designated development for the purposes of section 4.10 of the Act. This means that section 8.8 of the Act (Appeal by an objector) will not extend to any such development even if it is State significant development."

7 The Mangrove Mountain Memorial Golf Course is a nine-hole golf course at Mangrove Mountain. On 6 October 1998, the then Gosford City Council granted development consent pursuant to s 91 of the Act for the upgrading of the golf course from 9 holes to 18 holes. The development required excavation and backfilling with waste materials so as to remodel existing contours of the land to provide better playing conditions and to increase the capacity of existing water storage.

8 An application for development approval had been foreshadowed as early as 1991. The Council advised that a development application must be accompanied by a full environmental impact statement. Apparently, this was on the basis that excavation and back-filling with waste materials was

characterised as an extractive industry, and hence fell within one of the prescriptions of a designated development.

9 Development approval was granted on 14 October 1998. The approval was given pursuant to s 91 as integrated development. It is common ground that the development was also designated development. There were conditions of development consent that, amongst other things, the operations of the waste facility were to be carried out in accordance with a Landfill Environment Management Plan ("LEMP") that had been prepared by Perram & Partners and in accordance with the Environmental Impact Statement except where modified by any conditions of the consent and the requirements of any regulatory authority.

10 In 2003 and 2009 the Council approved applications to modify the terms of the development consent.

11 In 2012 the Council commenced proceedings in the Land and Environment Court against, amongst others, the appellant, Verde Terra Pty Ltd ("Verde Terra"). The Council alleged that Verde Terra had breached the terms of the development consent.

12 The primary judge was told that works began after 5 April 2002 and, from that time up until 31 October 2007, the landfill was operated by GH & Todd Pty Ltd. From 1 November 2007 the landfill had been operated by Verde Terra. Shares in Verde Terra were transferred to the current shareholders on 1 July 2011. Verde Terra admitted to substantive breaches occurring prior to 1 July 2011. It pleaded that, since on or about 1 July 2011, it had carried out development for the purposes of the extractive industry, the waste facility and remodelling of the golf course. It said that it had done so in accordance with the development consent.

13 The relief sought by the Council in its Further Amended Summons filed on 8 May 2013 included orders requiring Verde Terra to remove excess fill material on the land and grade the land to restore it to the finished land levels in accordance with the development consent to prepare it for its approved use as a golf course.

14 On 20 September 2013, the Council and Verde Terra entered into heads of agreement with a view to settling the proceedings. They provided a joint submission in support of proposed orders which they invited the Court to make by consent.

15 The joint submission described the development consent as having three parts, namely, an extractive industry, a waste facility, and golf course remodelling. One of the conditions of the development consent was that the operations of the waste facility be carried out in accordance with a specified Landfill Environmental Management Plan except as modified either by the conditions of the consent or the requirements of any relevant authority. The joint submission stated that there was no dispute between the Council and Verde Terra that there had been a breach of the Act and the parties' agreement would result in remediation of the site to achieve:

> "(a) A completed 18 hole championship golf course within a period of 10 years;
>
> (b) A specified design for the golf course;
>
> (c) A specified volume of space able to be filled with waste material;
>
> (d) Appropriate controls and monitoring during the course of the construction of the golf course to minimise risk of environmental harm through an appropriate Landfill Environmental Management Plan and Leachate Management Plan;
>
> (e) The lining and filling to industry best practice standards of the excavations referred to as Cells W, X, Y and Z;
>
> (f) The lowering of the mound fill in part of the site referred to as Area B to a more acceptable height; and
>
> (g) An increase in value of the subject land…"

16 The joint submission concluded:

> "57. The Consent Orders have been drafted to achieve the outcomes set out above with the inclusion of an amendment to Condition 43 of the Consent to enable sufficient waste being brought onto the land (55 truck movements per day on average) resulting in closure of the landfill and the construction of the golf course within a 10 year period.
>
> 58. Council is satisfied that Verde Terra Pty Ltd is able to complete the development.
>
> 59. We respectfully request this Honourable Court to make the Consent Orders contained in Annexure 'B'."

17 Condition 43 of the consent had limited truck movements to 14 per day.

18 On 29 August 2014, the primary judge made the orders sought by consent in the 2012 proceedings. The orders were relevantly as follows:

> "**THE COURT ORDERS THAT**
>
> Development Consent DA23042/1998 for the landfill and proposed remodelling of the Mangrove Mountain Golf Course on Lot 584 DP809570, Wiseman's Ferry Road, Mangrove Mountain shall be carried out in accordance with the following and pursuant to s.124 of the Environment Planning & Assessment Act 1979 (as amended):
>
> 1. The first and third respondents are to comply with the terms of the Amended Landfill Environmental Management Plan 2013 prepared by Consulting Earth Scientists (CES 110703-VDT-AR) ("the Amended LEMP 2013") subject to order 4 below.
>
> 2. The first and third respondents are to comply with the terms of the Leachate Management Plan 2013 prepared by Consulting Earth Scientists (CES 110703-VDT-60) ("the LMP 2013") subject to order 4 below.
>
> 3. The Amended LEMP 2013 and the LMP 2013 referred to in orders 1 and 2 cannot be further altered except to:
>
> (a) amend the documents to reflect the consequences for a 6m reduction in the Mound on Area B in lieu of a 7.4m reduction, and
>
> (b) subject to subparagraph (a), any future amendment will only occur with the consent of Gosford City Council pursuant to operation of the statutory process available under the Environmental Planning and Assessment Act 1979 (or any equivalent replacement statutory scheme in the future);
>
> 4. Works to be carried out on the subject land in accordance with the Amended LEMP 2013 and the LMP 2013 be as follows, and subject to the following conditions and timeframes:
>
> 4.1 6 metres of waste from the fill mound on Area B be moved to Cell W and a 2.4 metre thick permanent final capping be placed thereon to result in a maximum height for the final landform in Area B of RL341.4.
>
> 4.2 The removal of waste and capping of the mound on Area B as set out in subparagraph 4.1 shall be completed no later than 31 August 2017 and otherwise in accordance with the Amended LEMP 2013.
>
> 4.3 The time for completion of the golf course and closure of the landfill operation will be 10 years from the date of approval of the lining of Cell W by the Environment Protection Authority of NSW, and the granting of an amended Environment Protection Licence No 11395 to reflect the content of the Amended LEMP 2013 and LMP 2013, whichever last occurs.
>
> 4.4 The contours for the finished level of closure of the landfill and the golf course are set out in the golf course design by McKay & Sons Pty Limited which is Appendix Ill to the Amended LEMP 2013. The tolerance to the finished levels are plus 0.5 metres and minus 1.5 metres to enable best practice for the golf course design and are to be adjusted to reduce the Mound in Area B by 6m not 7.4m as shown, such plans to be delivered to all parties.

> 4.5 The total amount of VENM and ENM to be placed over the whole of the land outside the Regulated Area to construct the golf course referred to in 4.4 is 1,137,614m3. The operator of the landfill, and constructor of the golf course, shall deliver a survey of the whole of the land to Council and the EPA of NSW every six months until the golf course is completed when a final survey shall be delivered which demonstrates that there is 1,137,614m3 or less of VENM or ENM on the golf course outside the Regulated Area in situ.
>
> 4.6 The number of truck movements permitted in connection with the landfill operation and construction of the golf course will be 55 per day on average, and the operator of the landfill shall report quarterly to Council, on the periods ending 31 March, 30 June, 30 September and 31 December during the operation of the landfill and the construction of the golf course on the number of trucks transporting waste, VENM and ENM on a daily basis.
>
> 4.7 The total volume of waste material imported to the site to achieve the approved golf course design in the 10 years from the date of approval of the lining of Cell W and approval of the amended EPL 11395 will not exceed the volume required to fill 1,317,503m3 of space available for filling with waste, whether that space comprises void space created by excavations or whether it comprises air space between the existing ground level and finished ground levels (excluding capping) in the Regulated Area in accordance with the approved golf course design.
>
> 4.8 VENM and ENM can be imported to the site for the construction of the golf course to achieve the approved golf course design.
>
> 4.9 No VENM or ENM can be exported off the site.
>
> 4.10 The surveys to be given to the EPA pursuant to EPL no. 11395 shall be delivered to the Council within 7 days of delivery of the survey to the EPA."

19 In a number of respects the works the subject of the consent orders differed from the works authorised by the development consent. In particular, "…the scope, scale and size of the waste disposal operation envisaged to be carried out by the 2014 orders exceeds that approved by the 1998 consent…" (J[298]).

20 It was common ground on appeal that although such works were not authorised by the development consent, the orders were lawfully made and both authorised and mandated the carrying out of the works (*Anastasiou v Wallace* [2020] NSWLEC 14 at [19]-[23]).

21 Since the making of the 2014 consent orders, Verde Terra has not accepted further waste on the land (J[120]). The primary judge described various proposed amendments to the amended LEMP 2013 and the LMP 2013 and applications to vary the Environmental Protection Licence between 2014 and

2019 (at [82]-[119]). In short, on 21 December 2018, Verde Terra submitted to the Council a new development application described as a development of a regional landfill, supported by further revised versions of the LEMP and LMP. On 1 April 2019, Verde Terra filed a Class 1 application in the Land and Environment Court appealing from the deemed refusal of that application. On the same day it commenced the Class 4 proceedings that were determined by the primary judge on 25 March 2022. On 1 July 2019, the Council filed a Statement of Facts and Contentions in the Class 1 proceeding, in which it contended that the 2018 development application sought consent for designated development for alterations and additions for a use of the land for which there was no development consent as required (J[117]).

22 By its Further Amended Summons, Verde Terra sought, amongst other relief:

> "1. A declaration that no further development consent is required by the Applicant to carry out the Mangrove Mountain Landfill & Golf Course.
>
> 2. A declaration that the Mangrove Mountain Landfill & Golf Course constitutes 'development (whether existing or approved)' within the meaning of clause 35 of Schedule 3 of the EPA Regulation."

23 By Further Amended Cross-Summons, the Council sought, amongst other relief, a declaration that development consent was required to carry out the development referred to in orders 1 to 4 made on 29 August 2014.

24 The primary judge dismissed the Council's Cross-Summons and declared that:

> "…the applicant may lawfully carry out the works ordered by the Court on 29 August 2014 in proceedings 40900 of 2012 without the need to obtain further development consent and otherwise dismisses the further amended summons." (*Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Environment Protection Authority (No 10)* [2022] NSWLEC 49).

25 Verde Terra appeals against the primary judge's refusal to make the declaration sought in par [2] of the Summons.

26 "Mangrove Mountain Landfill & Golf Course" was defined for the purposes of the proceeding as the development the subject of the 1998 Consent as varied and/or required to be carried out in conformity with the 2014 orders.

27 On the question whether the development was "approved development" within the meaning of cl 35, the primary judge said:

> "[451] The works the subject of the 2014 consent orders are not, in my opinion, 'approved' development because in making those orders pursuant to s 124 of the EPAA the Court did not 'approve' the works. To find otherwise would render otiose s 124(3) of that Act, which permits the Court to adjourn proceedings while approval is obtained by a party in breach.
>
> [452] Only the consent authority had the power to 'approve' development. The Court merely determined that the works the subject of the 2014 consent orders remedied an existing breach of the EPAA. The making of the 2014 consent orders in no way modified the 1998 consent. The 'approved' development for the purpose of cl 35 is that authorised by the 1998 consent."

28 The primary judge rejected Verde Terra's submission that the development carried out on the land was an "existing" development within the meaning of cl 35 because consideration of the 2018 development application in the Class 1 proceedings was to be carried out without regard to past unlawful works and the unlawful use of land (at [456]).

29 Her Honour said:

> "[457] In my opinion, the VT parties' construction of 'existing' development should not be accepted. First, it would permit them to take advantage of the unlawful existing works that gave rise to a breach of the EPAA and the consequential making of the 2014 consent orders remedying that breach. Second, even if the 'existing' development was constituted by the works described in the 2014 consent orders, those works have not, as the evidence discloses, commenced in any substantive way."

30 Counsel for Verde Terra explained the perceived utility of the declaration sought. Counsel said that the application in the Class 1 proceedings before a Commissioner will be for approval for a new liner, some alterations to a cut-off trench and other relatively minor matters, that would nonetheless be alterations or additions to a development, whether existing or approved. The question is whether the development which is existing or approved is assessed by reference to the work the subject of the 2014 orders, or by reference to the 1998 development consent. Verde Terra will contend that the alterations and additions do not significantly increase the environmental impact of the development described in the 2014 orders. If the comparison with the approved development is to the development the subject of the 1998 consent (and presumably the 2003 and 2009 modifications to that consent), Verde Terra may face a harder task in persuading a Commissioner that the alterations or additions do not significantly increase the environmental impacts of the total development compared with the existing or approved development.

31 If the development for which approval is sought in the Class 1 proceedings is designated development, the development application should have been accompanied by an environmental impact statement (*Environmental Planning and Assessment Act 1979* (NSW), s 4.12(8)), the application should have been exhibited for a minimum of 28 days (cl 8 of Pt 1 of Sch 1). An objector dissatisfied with the determination of the consent authority could appeal to the court against the determination (s 8.8(2)).

32 Verde Terra's primary contention was that the development the subject of the 2014 consent orders was an approved development within the meaning of cl 35. It acknowledged that if it failed on that issue, it could not succeed on its argument in relation to existing development.

33 Verde Terra submitted that the development the subject of the 2014 consent orders was approved development on one of two grounds. The first ground was that the development was approved by the Land and Environment Court by the making of the 2014 orders which both permitted and required the work to be undertaken. It did not matter, so it was submitted, that the Court was not a consent authority.

34 The second ground (presented in oral submissions as the preferred ground) on which it was contended that the development was an approved development, was that the development provided for by the 2014 consent orders was within the scope of the 1998 consent, which had been approved by a consent authority. The Council had alleged breaches of the 1998 consent but the issues raised by those allegations had merged in the 2014 consent orders which defined the activity permitted to be carried out under the 1998 consent. The primary judge so held at pars [374], [375] and [416] in dismissing the Council's claim that a fresh development consent was required for the carrying out of the works the subject of the 2014 orders.

35 The primary judge said:

> "[374] In the present case, the 2012 proceedings concerned alleged breaches of the 1998 consent. The resolution of that dispute by the making of the 2014 consent orders pursuant to the power conferred upon the Court by s 124 of the EPAA turned upon a determination of, first, whether there was a breach of the Act, and second, whether the proposed 2014 consent orders were appropriate to remedy that breach. The 2014 consent orders specified how the

> development approved by the consent was to be carried out in light of its breach. In making the orders the Court therefore had to turn its mind to whether the works the subject of the 2014 consent orders were within the scope of the 1998 consent. If they were not, the Court would have had no power to make them.
>
> [375] The 2014 consent orders therefore act as a judgment that is both enforceable as against the parties to the orders insofar as, the Council submits, the orders direct the parties to the 2012 proceedings to carry out the works specified (creating rights *in personam*). The orders are also enforceable as against the world because no other activity than that specified in the 1998 consent and the 2014 consent orders can be carried out on the land (creating rights *in rem*). This is because, adopting the analysis in *Yehuda*, the 2014 consent orders operate as a judgment *in rem* in relation to the development that may now be carried out on the land pursuant to the 1998 consent; they define the activity permitted to be carried out under the 1998 consent.
>
> …
>
> [414] … In circumstances where the nature and purpose of the development approved by the 1998 consent was expressly referred to by the parties in their submissions to the Court on 29 August 2014 and also in the pleadings to the 2012 proceedings, the question of whether the works required under the remedial orders were within the 1998 consent was - rightly or wrongly - determined by the Court. This is apparent from the text of the 2014 consent orders which states that 'Development Consent DA23042/1998 for the landfill and proposed remodelling of the Mangrove Mountain Golf Course…shall be carried out in accordance with the following'…
>
> [415] To the extent that the Council contended that even if the 2014 consent orders gave rise to a *res judicata*, the *res* does not extend to either the totality or purpose of the development permitted by the 1998 consent, or the question of whether the works required under the remedial orders were within the scope of the 1998 consent, again, this contention must be rejected. As stated above, questions as to the purpose of the development or use of the land permitted by the 1998 consent were raised in the 2012 proceedings, that is, that consent was granted for the purpose of the use of the land as an extractive industry, as a landfill, and to remodel the golf course. This ultimately found expression in the chapeau to the 2014 consent orders.
>
> [416] Accordingly, having regard to the elements of the doctrine described above, in my opinion, the 2014 consent orders operate as a *res judicata* with respect to the issues raised by the Council against the VT parties in the VT proceedings. These issues have merged in the making of the 2014 consent orders by the Court and cannot now be agitated by the Council.

36 Verde Terra submitted that because the development referred to in the 2014 consent orders had been determined to fall within the scope of what was approved by the 1998 consent, it constituted "approved" development for the purposes of cl 35.

37 The primary judge was careful to say at [416] that the effect of the 2014 consent orders was to operate as a *res judicata* as between Verde Terra and

the Council. I do not agree with her Honour's observation at [375] that the orders operate as a judgment *in rem*.

38 Certain orders of the Land and Environment Court under the former s 124 and current s 9.46 of the *Environmental Planning and Assessment Act* will operate *in rem*, as well as *in personam*. That is, they will bind the parties and the whole world (*PE Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437 at 445-446). Had the 2014 orders been made by the Court after a contested hearing, rather than by consent, they would have operated *in rem*. But, contrary to the submissions of Verde Terra, orders made by consent will not give rise to a judgment *in rem* (K R Handley, Spencer Bower and Handley: Res Judicata (5th ed, 2019, LexisNexis) at [2.19]; *PE Bakers Pty Ltd v Yehuda* at 446).

39 In *Yehuda*, Hope JA, with the concurrence of Samuels and McHugh JJA, concluded that orders of the Land and Environment Court in earlier contested proceedings between the Council and the appellant precluded the appellant from contending in proceedings brought by Mr Yehuda that conditions of consent were invalid. This was because the orders operated *in rem.* Hope JA said:

> "I have expressed a view about the inconvenience of any other result. It may be complained that this overlooks the possibility that judgments in rem might be obtained by consent, or by fraudulent or collusive means, and the planning laws thus set at naught, especially since anyone can institute proceedings for the appropriate declarations. There seem to be two answers to this. First, a judgment in rem so obtained would not operate against the world or possibly anyone: *Spencer-Bower and Turner* (par 249 at 214); *Duchess of Kingston's Case* 2 Smith's LC, 13th ed, 644 at 651-652; *Halsbury's Laws of England,* 4th ed, vol 16, par 1553 at 1048-1049, and second the course adopted in this case of notifying the council would reasonably ensure that the matter was properly litigated."

40 The *Duchess of Kingston's Case* (1776) 1 Leach 146; 168 ER 175, was authority for the second of Hope JA's propositions and not authority that no *res judicata* arises from an order *in rem* made by consent.

41 Nonetheless there is clear authority cited in Spencer Bower and Handley, *Res Judicata* that, subject to statute, "There cannot be a judgment *in rem* by consent, although the parties may be estopped *inter se*" (*Goucher v Clayton* (1865) 11 LT 732; *Wytcherley v Andrews* (1871) LR 2 P&D 327 at 329; and

see also *Halsbury's Laws of Australia*, 190 - Estoppel, at par 190 (online at 22 May 2023) citing *Yehuda*).

42 There is no contrary statute applicable to this case.

43 Verde Terra submitted that Justice Handley departed from this view in an article published in the Australian Bar Review in 1999 (K R Handley, "Res Judicata: General Principles and Recent Developments" (1999) 18 ABR 214 at 215). Justice Handley there said that judgments by default or by consent are decisions of courts for the purpose of creating *res judicata* estoppels. His Honour was not there specifically referring to judgments *in rem.*

44 Accordingly, I would dismiss this ground of appeal. But the fact that the 2014 orders do not operate to bind the world is relevant to the construction of the words "approved development" in cl 35. The word "approved" is not defined. In one sense, the development the subject of the 2014 orders is approved, because the Land and Environment Court has mandated and directed it. This would satisfy a dictionary definition of "approved".

45 But "approved development" in cl 35 is to be read in its context of stipulating when potential third party objectors will not be entitled to be further heard in opposition to a proposed development because proposed modifications will not significantly increase the environmental impact of what has already been approved.

46 I do not accept that "approved" necessarily means approved by a consent authority. I would accept that if the 2014 orders had been made by the judge after a contested hearing so that they operated *in rem*, the development "approved" by the orders would fall within cl 35. That is not because the Council's cause of action merged in the judgment so that the development is to be taken to be within the 1998 development consent, but because the development approved by the orders would be binding on the world.

47 A prior approval of designated development by a consent authority is binding on the world (unless overturned on appeal). An approval by the Land and Environment Court of designated development after a contested hearing is binding on the world (again, subject to appeal). Either would fall within the

words “approved development” in cl 35. But as cl 35 affects third parties’ rights, the “approved development” against which the environmental impact of the total development is to be assessed, is a development whose approval is binding on third parties.

48 For these reasons I would dismiss the appeal, with costs.

49 **KIRK JA:** I agree with White JA.

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