

Our Ref: JAC:1069818

22 July 2021

**To the Residents**

Dear Resident

**Georges River Council ats Landgrowth One Pty Ltd ATF Landgrowth 001 Unit Trust  
Land and Environment Court proceedings no. 2021/00199083  
80 Boronia Parade, Lugarno**

**1. Introduction**

We act for Georges River Council (**Council**) in the abovementioned proceedings.

The proceedings have been commenced by Landgrowth One Pty Ltd ATF Landgrowth 001 Unit Trust (**Applicant**) in the Land and Environment Court (**Court**) against Council's deemed refusal of Development Application DA2021/0181 (**the Application**).

The Application seeks consent for the demolition of existing structures on and Torrens Title subdivision of the existing lot into thirty-one residential lots, construction of new roads, drainage and tree removal at 80 Boronia Parade, Lugarno (**the Site**).

We are instructed that you made a submission to Council in relation to the Application.

We are writing to you to advise you of the appeal, our appearance on behalf of Council, the status of the proceedings and the general process in appeals of this nature. This information is set out below.

**2. Involvement of Lawyers, Experts and Residents**

HWL Ebsworth is instructed by Council to act on its behalf in these proceedings. It is required to take its instructions from Council.

As Council is now legally represented, all correspondence and queries relating to this matter should be directed to our offices. Details are provided in section 5 of this letter for this purpose.

A preliminary review of the Application has indicated that at least the following areas of specialist expertise will be required in the proceedings:

- town planning;
- heritage;
- Aboriginal heritage;

Adelaide  
Brisbane  
Canberra  
Darwin  
Hobart  
Melbourne  
Norwest  
Perth  
Sydney

- ecology;
- arboriculture, i.e. loss of vegetation initially and going forward should any subdivision be approved;
- surveying /civil engineering; and
- traffic.

We have been instructed to brief highly qualified and experienced experts in each of these areas who often give evidence in the Land and Environment Court. The experts will in the first instance:

- carry out a review of the Application for the purposes of advising us and Council about the potential environmental impacts of the Proposed Development; and
- assist the Council in preparing a Statement of Facts and Contentions a document required to be produced by the Council which will form the basis of Council's case in the proceedings.

Experts in proceedings of this nature are bound by the Expert Witness Code of Conduct, link to which is contained at <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0418#sch.7>. The stated role of the expert is to assist the Court, rather than advocate for the expert's client. This means that the expert must give his/her opinion based on their particular field of expertise, rather than being a proponent for either the Applicant or the Council's over-riding interest in the proceedings.

The Court has, over many years, established strict rules and protocols around the role of resident objectors in Court proceedings such as these (class 1 development appeals). The residents are not separate parties to the proceedings and do not have the right to separate representation. Instead, the residents' objections form part of the Council's case before the Court. Submissions are generally summarised or categorised into groups and included in the SOFAC under the contention "public interest". The written objections are tendered to the Court as part of the Council's evidence (dealt with further below). Council has briefed us with written submissions sent to it by resident objectors as part of the DA assessment process.

### **3. Class 1 proceedings**

The Court has published information regarding environmental planning and protection appeals heard in its Class 1 jurisdiction (such as these proceedings).

A link to the Court's webpage with the above information is provided below:

<https://lec.nsw.gov.au/lec/types-of-cases/class-1---environmental-planning-and-protection-appeals.html>

The Court has also published a practice note which guides the process of these and sets out the procedures for the just, quick and cheap resolution of development appeals. A copy of the Court's Class 1 Development Appeals Practice Note can be found at the following link:

#### 4. Summary of the Court's process

In summary, the Court process will involve the following steps:

- (a) The proceedings are listed before a Registrar of the Court for the first directions hearing on 10 August 2021. This is an administrative process attended only by legal representatives of the parties. On that day it is likely orders will be made requiring:
  - (i) the Council to file a Statement of Facts and Contentions (**SOFAC**), being a statement which particularises the Council's contentions (issues) with the Application; and
  - (ii) listing the matter for a section 34 conciliation conference pursuant to section 34 of the *Land and Environment Court Act 1979* (**34 Conference**).
- (b) For your assistance, a guide to a SOFAC is contained in Schedule B of the abovementioned practice note.
- (c) The 34 Conference will be fixed by the Court on a date convenient to the parties, their experts and a Court Commissioner, sometime later this year. A 34 Conference is a process between the parties to the litigation (that is the Council and the Applicant) where the parties are required to conciliate/negotiate in good faith to seek to resolve and/or narrow the issues in dispute. Whilst a Commissioner of the Court presides over the 34 Conference, the Commissioner will not determine the matters in this part of the Court's process.

In pre-Covid times, this meeting would usually start on site with residents and experts in attendance with the Commissioner and the parties' legal representatives. Since the pandemic commenced last year, the Court has adopted a series of Covid-19 Policies to reflect the Public Health Orders in place from time to time. The current policy, adopted in June 2021, is contained at:

<https://www.lec.nsw.gov.au/lec/news-and-announcements/covid-19---requirements-for-attending-the-land-and-environment-c.html>

The Court has generally been running Section 34 Conferences over the Microsoft Teams App and, where a site view has not been possible because of Court policy, the parties submit photos and other visual aids to assist the Commissioner to understand the site and its locality. Prior to the pandemic, resident objector attendance was not limited in numbers. However, in more recent times, there have been limits imposed by the Court depending upon the Public Health Order existing at the time of the 34 Conference. We will advise you further about this closer to the 34 Conference date when the applicable Court policy will be known. In any event, the Court has a long-standing practice

of limiting the number of objectors who give oral evidence at a 34 Conference to six.

Therefore, whether the 34 Conference commences at the Site or via video link, residents are able to attend the first part of the meeting and a maximum of six residents will have the opportunity to speak to their concerns with the Application. The meeting will then move to the 'without prejudice' stage. The Council is required by law to participate in the 34 Conference in 'good faith' meaning to act sincerely and honestly to assist to narrow issues in dispute. The Applicant, the Council and the Commissioner are bound by law and Court rules that include confidentiality around the matters discussed in this 'without prejudice' part of the Conciliation. Only the parties, their experts and legal representatives can attend this part of the Conciliation. Residents or interested people, (i.e. non-parties), are not entitled to participate. We will however communicate with all resident objectors after the Conciliation and advise the outcome.

- (d) If no agreement is reached at the 34 Conference then the 34 Conference will be terminated and the matter will proceed to a contested hearing at a date to be fixed by the Court. We will notify you in this situation as this part of the process is open to the public. Covid rules will likely, again, dictate the physical manner of how this will happen. At the hearing, a Commissioner will proceed to hear evidence from experts and residents then after the parties' lawyers' submissions, proceed to ultimately determine the matter. At the hearing the Court seeks to have only six residents being permitted to again speak to their concerns with the Application. All written submissions made to Council during the development application assessment process will be tendered to the Court by Council, as evidence in the proceedings.

## 5. Next steps

We will write to you again at each stage of the proceedings updating you on the progress of the matter.

The next correspondence from us is likely to be advising you of the date of the 34 Conference and how you can be involved.

**In the meantime however as we are now acting for Council in these proceedings, Council requests that all communications regarding this matter be directed to our office at [80Boronia@hwle.com.au](mailto:80Boronia@hwle.com.au). All communications received will be responded to as quickly as possible, noting that there are over 250 submissions on this application. This process has been put in place to ensure seamless consolidation of residents' submissions. For clarity, it is not necessary for you to re-send your objection(s) that have been sent to the Council.**

You are also welcome to contact the undersigned by phone, if you have any queries or concerns.

We thank you for your interest and participation in these proceedings.

Yours sincerely



**John Cole**  
Partner  
HWL Ebsworth Lawyers

+61 2 9334 8676  
80Boronia@hwle.com.au

**James Fyfe**  
Solicitor  
HWL Ebsworth Lawyers

+61 2 9138 2276  
80Boronia@hwle.com.au