

Land and Environment Court

New South Wales

Case Title: Ison v Richmond Valley Council

Medium Neutral Citation: [2012] NSWLEC 1167

Hearing Date(s): 1 and 2 May 2012

Decision Date: 19 June 2012

Jurisdiction: Class 1

Before: Tuor C

Decision:

1. The appeal is dismissed.
2. The development application for restoration works to an existing dwelling at 237 Pacific Highway, Broadwater, is refused.
3. The exhibits, except Exhibit 11, may be returned.

Catchwords: DEVELOPMENT APPLICATION - "restoration" works to an existing dwelling. Whether the building is an existing dwelling and the development is for restoration works. Whether the proposed works satisfy the requirements for development on flood liable land

Legislation Cited: Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Act Model Provisions 1980
Land and Environment Court Act 1979
North Coast Regional Environmental Plan
Richmond River Local Environmental Plan 1992
State Environmental Planning Policy No 71 - Coastal Protection

Cases Cited: Blackmore Design Group Pty Ltd v North Sydney Council [2001] NSWLEC 279

Richmond Valley Council v Ison [2011]
NSWLEC 142
Stockland Development Pty Ltd v Manly
Council [2004] NSWLEC 472
Terrace Tower Holdings Pty Limited v
Sutherland Shire Council 2003 NSWCA
Wollondilly Shire Council v 820 Caivdor
Road Pty Ltd [2012] NSWLEC 71
Wollongong City Council v Vic Vellar
Nominees Pty Ltd (2010) 178 LGERA 445

Texts Cited:

Category: Principal judgment

Parties: Rodney Harold Ison (Applicant)
Richmond Valley Council (Respondent)

Representation

- Counsel: Counsel
Mr M McCall, barrister (Applicant)
Ms A Pearman, barrister (Respondent)

- Solicitors: Solicitors
Walters Solicitors (Applicant)
Hannigans Lawyers (Respondent)

File number(s): 10952 of 2011

Publication Restriction:

JUDGMENT

- 1 This is an appeal under the s97 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Richmond Valley Council (council) of a development application (DA2012/055) for "proposed restoration works to an existing rural dwelling" at 237 Pacific Highway, Broadwater (site).

- 2 The key issues in dispute between the parties are whether:
- (i) the derelict building on the site is an existing dwelling,
 - (ii) due to the extent of works, the development is for a new dwelling or restoration of an existing dwelling.
 - (iii) the site is unsuitable for residential development due to potential flooding impacts.
- 3 The contention raised by council that the site was unsuitable for residential use due to its dangerous location adjoining the Pacific Highway was resolved by a condition of consent requiring the provision of a safety barrier.

Site and its locality

- 4 The site is located on the western side of the Pacific Highway on the fringe of the village of Broadwater. The site is irregular in shape with an area of 5,236 sq m. It is currently occupied by a derelict building which was previously used as a dwelling house. The building has been constructed over different periods and is mostly made of weatherboard with an iron roof and timber floorboards. An asbestos cement addition is located in the north west corner of the building. The original floor level of the building was RL3.26 m but part of the building is now located on the ground. The ground levels on the site vary between RL1.65 m and RL2.8 m. The building is setback about 7.1-7.5 m from the Pacific Highway and about 1.7 m from the eastern boundary of the site.
- 5 To the north, the site adjoins a single storey dwelling (239 Pacific Highway) and another derelict dwelling (341 Pacific Highway). These three properties have frontages to the Richmond River. Broadwater Public School is located on the eastern side of the Pacific Highway opposite the site. The surrounding area to the north and east is predominantly rural land. Development to the south in Broadwater Village is predominantly residential.

Background and proposal

- 6 The history of the site is complicated and not agreed between the parties. However, based on the evidence of Mr Ison, the owner of the property, and council's Bundle of Documents the following is a summary of the background to the application.
- 7 Mr Ison purchased the site in 1976. He operated a bus business on the property for over 30 years and lived in the dwelling with his family until about 1998. He continued to stay in the dwelling on weekends to look after the buses.
- 8 In 1993, the council approved a Building Application (114/93) for "house alterations and repairs" in accordance with plans and specifications. The works were commenced (date unknown) but no final inspection was undertaken or Occupation Certificate issued.
- 9 In 2002, council received two complaints regarding the condition of the 'vacant block'. It issued a Notice of Intention to Issue an Order requiring vegetation on the site to be reduced in height.
- 10 The parties agree that for the purpose of this appeal, the house was capable of being used as a dwelling house until 2005. At this time, a vehicle travelling north on the Pacific Highway hit the south east corner of the dwelling. As a result of the accident, the dwelling was moved off its foundations and other damage occurred. The dwelling has since been vandalised, exposed to the elements and has not been occupied. Since the accident, Mr Ison has stayed on the site, usually in his car, from time to time. Mr Ison does not recall any significant flooding of the site during his ownership.
- 11 From 2006 to 2011, the council has issued various orders to demolish and remove the building from the site. A detailed history of the Orders and Mr

Ison's actions is set out in the decision of Pepper J in *Richmond Valley Council v Ison* [2011] NSWLEC 142. Her Honour vacated the hearing of an appeal in which the council sought an order that Mr Ison comply with the terms of a demolition order dated 21 December 2010 under s121B of EPA Act. In vacating the appeal, Pepper J ordered that a development application be lodged in respect of any proposed development on the property by no later than 16 September 2011.

- 12 The development application was lodged on 15 September 2011. The application seeks consent for "proposed restoration works to an existing rural dwelling" with an estimated cost of works of \$45,000. The application is accompanied by a Statement of Environmental Effects (SEE), a plan entitled "Existing Residence at 229-237 Pacific Highway Broadwater" (the plan) and a structural engineering report prepared by Mr R Griffiths (Engineering Report). The plan does not accurately show the building, which currently exists on the site, nor does it distinguish between the proposed works and the exiting building. The works to repair the structure are described in the SEE and the Engineering Report as:

reconstruction of the footings and jacking the structure, and to do this substantial areas of the floorboards would need to be lifted and replaced to gain access. In addition,, some regions of cladding would need to be removed and replaced to allow rectification of any damaged frame connections. Rewiring, re-plumbing and new drainage connections would almost certainly be required.

- 13 The parties agree that the works proposed require development consent. The application was refused by council on 21 September 2011 for the following reasons:

- (i) Lot 1 DP 909857 is identified as being wholly located within a 'High Floodway' hazard category in accordance with Council flood modelling (2011) and residential development is prohibited in High Floodway areas as described by the Mid Richmond Management Plan (2004); and*
(ii) The risk to life and property of future occupants of the restored dwelling from the impact and effects of flood is such that the habitable occupation of the dwelling is not supported.

- 14 The appeal against council's refusal was lodged on 20 October 2011. A conciliation conference under s34 of the *Land and Environment Court Act 1979* was held on 13 February 2012. The parties did not reach agreement and the conciliation conference was terminated.

Planning framework

- 15 The site is in Zone No 1(a) Rural (Prime Agricultural Land) under *Richmond River Local Environmental Plan 1992* (LEP1992). Dwelling houses are permissible with consent.
- 16 LEP 1992 adopts the *Environmental Planning and Assessment Act Model Provisions 1980* (Model Provisions). These include the following definitions of relevance to the application:

***dwelling** means a room or suite or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.*

***dwelling-house** means a building containing 1 but not more than 1 dwelling.*

- 17 The site is an existing holding and under cl 14(1)(g) the erection of a dwelling house is permissible despite the site being below the minimum allotment size of 40ha.
- 18 Clause 29 of LEP 1992 is entitled "Development of flood liable land". It provides:

- (1) This clause applies to flood liable land as indicated by the 1:25,000 Topographic Map Series produced by the Central Mapping Authority held by the Council.*
- (2) A person shall not carry out filling or construction of levees on flood liable land except with the consent of the Council.*
- (3) A person shall not erect a building or carry out work on flood liable land unless the Council is satisfied that:*
- (a) the development would not unduly restrict the flow characteristics of flood waters, (b) the development would not unduly increase the level of flooding on other land in the vicinity, (c) the structural characteristics of any building or works, the subject of the application, are capable of withstanding flooding, and (d) the building is adequately flood proofed.*

(4) *The Council may require the floors of habitable rooms of a building to be erected at a height which is sufficient, in its opinion, to obviate the frequent flooding of the building.*

- 19 The parties agree that the site is flood liable land. Section 2.17 of *Richmond River Development Control Plan No 8 - Development Standards* (the DCP) commenced in September 1999. It provides controls for sites subject to flooding which include the requirement that the floor level of habitable rooms in residential buildings be 500 mm above the 1 in 100 year flood event identified in the then draft Mid Richmond Flood Study and that consideration must be given to the Floodplain Management Manual.
- 20 A number of policy documents are relevant considerations in assessing the criteria in cl 29 of LEP 1992 and the suitability of the site under s79C. These include: *Flood Plain Management in Australia - Best Practice Principles and Guidelines* published by the CSIRO, known as the SCARM Report 73 (SCARM 2000); NSW Floodplain Development Manual 2005 which contains the Flood Prone Land Policy. These documents establish the framework for the preparation of Flood Plain Risk Management Plans. The Mid Richmond Floodplain Risk Management Plan 2004 (FRMP) was adopted by Council on 17 February 2004. The FRMP was initially based on a flood model undertaken in 1999. Under the FRMP the site was in the flood hazard category of High Isolation Hazard (HIH).
- 21 The Richmond River Flood Mapping Study (the Study) was completed in April 2010. It undertook more detailed mapping of flood events and included two climate change scenarios. As a result of the Study, council resolved on 15 June 2010 to adopt new flood modelling with Climate Change Scenario 3 (+900mm sea level rise +10% increase in rainfall intensity) as the appropriate criteria to incorporate into flood mapping for the Richmond River Floodplain. The council also resolved to continue to use the FRMP in conjunction with the new design flood levels. This has resulted in a revised flood hazard category for the site of High Floodway Hazard (HFH).

- 22 The Flood Planning Matrix for development in rural areas (Flood Matrix) in the FRMP provides that land categorised as HIH may be considered for development of habitable buildings subject to certain controls which include that the floor level of new habitable buildings be greater than or equal to the 1 in 100 year flood level plus 0.5m. It also provides controls for the floor level of extensions. The Flood Matrix in the FRMP provides that land categorised as HFH is unsuitable to be used for habitable buildings.
- 23 The FRMP includes property modification measures, including voluntary house purchase for existing houses in HFH areas and voluntary house raising. However, no dwellings were identified as being in the HFH area in the FRMP in 2004 and therefore voluntary house purchase was not recommended. This has not been amended in response to the Study and the revised flood hazard categories. The two adjoining houses (239 and 241 Pacific Highway) are identified as being eligible for voluntary house raising under the FRMP but not the house on the site. Again, this measure has not been amended in response to the updated flood hazard category.
- 24 *Richmond Valley Local Environmental Plan 2012* (LEP 2012) and *Richmond Valley Development Control Plan* (DCP 2012) commenced on 21 April 2012. LEP 2012 includes a savings provision (cl 1.8A), which provides that development applications made and not finally determined before the commencement of the plan "must be determined as if this Plan had not commenced". LEP 2012 is a relevant consideration under Section 79C(1)(a)(ii) of the EPA Act. As LEP 2012 has been made, it is imminent and certain and therefore should be given considerable weight. However, the savings provision also has work to do.
- 25 The decision of Lloyd J in *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279 addresses the role of a savings provision in a planning instrument that has commenced. His Honour at [30] states:

Whether one applies the test of "significant weight", or "some weight", or "considerable weight" or "due force" or "determining weight" to the later instrument is not, however, the end of the matter. The savings clause still has some work to do. The proposed development is a permissible development by dint of the savings clause. In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith. Various expressions have been used to define this concept, but the approach which has been favoured in the Court of Appeal is to ask whether the proposal is "antipathetic" thereto (Coffs Harbour Environment Centre Inc v Coffs Harbour City Council (1991) 74 LGRA 185 at 193).

- 26 Further, Mason P in the decision of the Court of Appeal in *Terrace Tower Holdings Pty Limited v Sutherland Shire Council* 2003 NSWCA 289 at [59] said:

The transitional provisions require LEP 2000 to be taken into account, albeit on the basis that it is not to be regarded as "made". The obvious intent is that the consent authority may look at those provisions of LEP 2000 that are pertinent to the zone and the proposed development.

- 27 Clause 6.5 of LEP 2012 deals with flood planning. It provides:

*(1) The objectives of this clause are as follows:
(a) to minimise the flood risk to life and property associated with the use of land, (b) to allow development on land that is compatible with the land's flood hazard, taking into account projected changes as a result of climate change, (c) to avoid significant adverse impacts on flood behaviour and the environment.
(2) This clause applies to land at or below the flood planning level.
(3) Development consent must not be granted for development on land to which this clause applies unless the consent authority is satisfied that the development:
(a) is compatible with the flood hazard of the land, and (b) is not likely to significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and (c) incorporates appropriate measures to manage risk to life from flood, and (d) is not likely to significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and (e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.
(4) A word or expression used in this clause has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0), published in 2005 by the NSW Government, unless it is otherwise defined in this clause.*

(5) *In this clause, flood planning level means the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metre freeboard.*

- 28 *State Environmental Planning Policy No 71 - Coastal Protection (SEPP 71)* applies to the site. It requires that certain matters are to be taken into account in the determining a development application (cl 7) which include "the suitability of development given its type, location, and design and its relationship with the surrounding area" (cl 8). *North Coast Regional Environmental Plan* (North Coast REP) provides matters that should be included in the preparation of local environmental plans, including flood hazards. Council did not raise contentions in relation to these instruments.

Evidence

- 29 The Court visited the site and heard expert structural evidence from Mr R Griffiths, for the applicant, and Mr F Spinoza, for the council. Mr C Catalano, for the applicant and Mr N Collins, for the council, provided expert advice on flooding issues.

Is the development prohibited

- 30 The Statement of Facts and Contentions filed by council on 23 December 2011 included:

Contention 1 - Impacts of Flood

The site is identified as being wholly within a "High Floodway" hazard category in accordance with Council flood modelling 2011 and residential development is prohibited in High Floodway areas as described by the Mid Richmond Floodplain Risk Management Plan (2004).

Contention 4 - Existing Use Rights Extinguished.

The existing dwelling on the site has not been used as a dwelling since Septemebr 2005 and, as such, any existing use rights under s 106 of the Environmental Planning and Assessment Act have been extinguished.

- 31 The Amended Statement of Facts and Contentions filed on 22 February 2012 retained Contention 1 (as Contention 2) and deleted Contention 4. During the hearing, council sought and was granted leave to amend Contention 2 to read as follows:

Contention 2 - Impacts of Flood

The site is identified as being wholly within a "High Floodway" hazard category in accordance with Council flood modelling 2011 and residential development is unsuitable.

- 32 Mr McCall, for the applicant, submits that cl 29 of LEP 1992, the requirements of the FRMP and the current flood category of the site have the effect of prohibiting the use of the building and land for residential purposes. He submits that the site therefore has existing use rights under s106 of the EPA Act.
- 33 Ms Pearman, for the council, in her oral submissions stated that cl 29 of LEP 1992 requires a merit assessment and is not a prohibition; therefore existing use rights are not created. Although, her supporting written submissions refer to "the proposal...being in flood liable land ...is prohibited by cl 29(3) of the LEP, with any work being prohibited, unless the provisions of that clause are satisfied." The expert evidence also referred to residential use being prohibited on the site.
- 34 Given the confusion relating to the use of the word "prohibited" it is necessary for me to address whether cl 29 is a prohibition. The wording of cl 29(3) requires satisfaction of certain matters. If these matters are satisfied consent may be granted, if they are not satisfied consent cannot be granted. The clause does not say that residential development on land in a HFH area is prohibited. Although, clearly the nature of the flood hazard is a relevant consideration in determining whether the criteria are satisfied and consent can be granted.
- 35 The FRMP is an adopted policy of council and consistent with the decision of McClellan CJ in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 it can be given weight under s 79C(1)(e) of the EPA Act. The FRMP is a relevant matter when considering whether the matters in cl 29(3) have been satisfied. However, it is not determinative of the application. The requirement that habitable buildings are unsuitable development in HFH is a matter to be considered, but it is not a prohibition.

Satisfaction will also depend upon other considerations such as the circumstances of the case, the nature of the proposal and the characteristics of the site. The satisfaction of cl 29 relies on a merit assessment of the proposal and is not an outright prohibition, which would preclude any further merit assessment.

- 36 I indicated during the hearing that if I found that cl 29 were to be a prohibition, I would require further submissions (and evidence) to establish whether there are existing use rights given questions of whether the use of the house has been abandoned. The house has not been habitable and has not been used for residential purposes at least since 2005 and the applicant, for health and personal circumstances, does not appear to have responded to Notices and Orders issued by the council between 2006 and 2010. As I have found that cl 29 is not a prohibition, it is not necessary for the parties to spend time and money establishing whether there are existing use rights. Even if it were to be established that there are existing use rights, the suitability of the site given the flooding issues would be relevant considerations in the assessment of the application regardless of whether the provisions of cl 29 apply.

Is the building an existing dwelling

- 37 The Amended Statement of Facts and Contentions include:

Contention 1 - New Development

The proposed development is effectively a rebuild not a restoration of the dwelling and, as such, is subject to the planning instruments of a new dwelling.

- 38 Ms Pearman submits that the building on the site is not an "existing dwelling" and that the development for which consent is sought is therefore not a "restoration" of an existing dwelling but rather a rebuild or a construction of a new dwelling. Ms Pearman referred to the established case law on dwellings to support her submission. She submits that it is a question of fact as to whether a particular building fits into the definition of "dwelling" in the Model Provisions adopted by LEP 1992. (see *Townsend v*

Lake Macquarie City Council [2004] NSWLEC 38 at [19], *Wyong Shire Council v Aldi* (2000) 112 LGERA 85 at [18], *Wollongong City Council v Vic Vellar Nominees Pty Ltd* (2010) 178 LGERA 445 at [33]).

39 Ms Pearman referred to the decision of Lloyd J in *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd* [2012] NSWLEC 71 where at [19] his Honour noted:

It is self-evident that there are two limbs to the definition of dwelling -

[1] a room or suite of rooms occupied or used as a separate domicile, or

[2] a room or suite of rooms so constructed or adapted as to be capable of being occupied or used as a separate domicile

40 Lloyd J summarised some of the relevant cases which conclude that a building will not fit into the second limb of the definition of "dwelling" in the absence of a kitchen, bathroom and laundry facilities.

41 His Honour then dealt with the first limb of the definition and found that "the place that a person uses as his domicile does not necessarily have to contain the facilities that one would normally find in a house".

42 In *Wollongong City Council v Vic Vellar Nominees Pty Ltd* (2010) 178 LGERA 445, Biscoe J considered whether a partially constructed dwelling met the definition of an "existing dwelling house".

43 His Honour found at [31] that in considering the authorities a dwelling-house has to have not only accommodation for sleeping but kitchen, bathroom and lavatory facilities, if not also laundry facilities. Further at [50] he states that the word "existing" before "dwelling-house" means or emphasises that the dwelling house must be constructed with those facilities, not partially constructed with some of those facilities missing.

44 His Honour held at [51] and [52] that "the present state of the building is the relevant state by reason of the use of the word "existing" to describe

the dwelling-house a de minimus exception that minor things that still need to be done may be no impediment to a conclusion that rooms are a "dwelling" and that the building is an "existing dwelling-house". To that extent the fact for determination involves a question of degree".

- 45 Ms Pearman submits that the "current state the building is not an existing dwelling and has not been a dwelling for some time".
- 46 Mr McCall submits that *Vic Vellar* is distinguishable from the current case as it involved a different provision for a different purpose in a different planning instrument with different circumstances. The building has been used as a dwelling for a number of years and with "restoration" this use will continue.
- 47 Although Mr Catalano's evidence relies heavily on the building being an "existing dwelling", the agreed position of the structural experts is that the building has no functioning kitchen, bathroom or laundry and is not habitable and considerable works are required for the building to once again be "capable of being used as a separate domicile". The building therefore does not meet the second limb of the definition of "dwelling". While the building has been occupied and used as a separate domicile in the past, this has not occurred since at least 2005. The building therefore does not meet the first limb of the definition of "dwelling". On its facts, I accept Ms Pearman's submission that the building is not an existing dwelling.
- 48 However, other than clarifying the description of the development for which consent is sought, very little turns on the distinction of whether the proposal is "restoration", "repair", "rebuilding" or a "new dwelling". Clause 29(3) of LEP 1992 applies equally to the erection of a building and to the carrying out of work on flood liable land and requires satisfaction of certain criteria. The criteria are relevant to any building or work independent of its use, although clearly residential use of flood liable land is more sensitive

due to the issues of safety to people not just to property. It is these criteria that must be satisfied for consent to be granted, which is discussed below.

Flooding

- 49 The flooding experts agree that the site is subject to flooding from the Richmond River and the designated flood hazard across the entire site is HFH. Mr Catalano does not dispute the predicted flood levels at the site, which include a peak flood level of RL3.3 m for the 20 year event, RL 4.4 m for the 100 year event and a Probable Maximum Flood (PMF) of RL8.6 m.
- 50 Flooding at the site can reach depths of up to 1.1 m over the existing floor level in a 100 year ARI and up to 5.3m in extreme (PMF) flood events. Velocities in parts of the site are in excess of 2m/s for both these floods.
- 51 While the experts agree that the floor level requirement for a dwelling is based on a 100 year event plus 500 mm freeboard (RL 4.9m), they disagree on the relevance of the PMF. Mr Collins stated that the site is located at the junction and near a constriction in the Richmond River which results in a significant difference between the 1 in 100 level and the PMF as well a high velocities. He noted that in a PMF the depth of flood would be 5.3m above the existing floor level of the house. He recognised that the 100 year event is the minimum standard but that current best practice requires a consideration of risk to life in all flood events, including the PMF. Due to the deep and fast flowing waters the site is extremely unsafe and dangerous for residential development.
- 52 Mr Catalano stated that the PMF event has an extremely rare occurrence normally considered to have a probability of less than one in one million years. The normal requirement is for houses to be set above the 100 year event with freeboard and it is not uncommon that a PMF would cause over floor flooding. Due to the rarity of such an event, he considered the risks associated with a PMF to be low.

- 53 The experts disagree on the utility of house raising in this location. Mr Collins considered that it may be impractical due to the velocities and large depth of flood possible. He notes that SCARM 2000 (sB.3.4) states that "house raising is a suitable mitigation measure usually only for low hazard areas". In his opinion, any house raising proposal should be supported by a risk assessment and a workable emergency management plan. He held similar opinions about any waterproofing proposal.
- 54 Mr Collins noted that even if the floor level were raised to RL4.9 m to be above the 100 year floor level, there would remain issues with debris and velocity of flow causing structural damage to the house. He did not consider that the wire mesh safety fence proposed by Mr Griffiths to "catch debris" before it hits the house would withstand the debris load or that an alternate construction involving "major engineering works" would normally be used with a house.
- 55 Mr Catalano relies on the house being an "existing dwelling". In which case, there is no requirement that its "restoration" comply with contemporary flood standards. However, he supports voluntary improvements to the house to lesson the flood risk, such as flood proof construction, raising the floor level and the provision of a safety fence.
- 56 Mr Collins and Mr Catalano agree that the Richmond River is not a flash flood event and there is sufficient time to evacuate. However, Mr Collins was concerned that the escape route along the highway north and south of the site is cut off as frequently as 1 in 5 years. The closest higher safe ground is 2 km to the south in Broadwater. Evacuation would be difficult and dangerous and because the highway is cut off early it is likely that every time there was the possibility of a moderate flood event evacuation would be necessary. This would lead to "false alarm" evacuations and ignoring warnings.

57 Both experts agree that there is little utility in evacuation plans for individual houses and that these should be prepared on a wider scale to ensure a consistent approach between council, emergency services and the community. However, Mr Collins considered that in the absence of an evacuation plan for Broadwater, if the proposal were to be approved, a requirement for an evacuation plan should be included as a condition.

58 Mr Catalano considers that because the house is existing, its "restoration" would not increase the burden on emergency services. Improvement to its structural integrity, waterproofing and house raising would reduce the burden. Mr Collins considered that because the house had been uninhabited for at least seven years there would be an increased burden on emergency services.

Structural

59 Mr Spinaze and Mr Griffiths agree that the building is not habitable and that it has no functioning kitchen, bathroom and laundry.

60 Mr Spinaze stated that the development application did not provide sufficient detail to understand the extent of the works proposed to "restore" the building to a habitable condition. He had therefore visited the site and prepared a schedule of works which include:

- moving the building back to its original location,
- jacking the structure,
- reconstructing the footings,
- removal and replacement of floor boards,
- removal and replacement of some areas of cladding,
- rectifying damaged frame connections,
- re-plumbing and new drainage connections,
- reconnection to the water supply,
- reconnection to on-site waste disposal, electricity and phone; and

- restoring the original habitable floor level of 3.26 AHD (the applicant has accepted a condition that it be raised to RL4.9m.

61 Mr Griffiths generally agreed with the schedule of works. Both experts accept that the works are extensive but the precise scope is unknown until the repair works are undertaken. They agree that it is possible that during the lifting and moving of the building back to its original position, further structural damage may occur to the building, although Mr Griffiths believes any damage will be minor.

62 Mr Spinaze and Mr Griffiths agree the simplest, most economical and best option to meet Australian standards would be to demolish the structure and to rebuild.

63 Mr Spinaze and Mr Griffiths agree the repaired building, whether at its original level or at a raised level of 0.5m above the 100 year flood event, is likely to suffer significant damage and possibly collapse in a 100 year flood event.

64 Mr Griffiths recommended the construction of a 1.5 m high chain mesh safety fence for a length of about 10.5 m near the southern end of the building to prevent debris hitting the house. Mr Spinaze disagreed that such a barrier would be able to withstand the load of accumulated debris and log impacts, particularly given the velocities of the water experienced on the site. He referred to the evidence of Mr Collins regarding the velocity of water and that the forces on any structure on the site were significantly greater than on other land nearby.

65 The experts agreed that a concrete wall 1.8 m high along the length and around the corners of the house could be designed to withstand the loads that may result from water, debris and log impacts. However, Mr Spinaze considered such an engineered solution was not characteristic of

residential development and that he had never seen a deflection barrier of this construction designed for a house.

66 Mr Griffiths and Mr Spinaze considered that a concrete barrier was not likely to deflect water onto the highway, school or houses to the north but that the precise impacts could not be determined without hydraulic modelling.

67 The flood experts did not consider the option of providing a concrete barrier. The final design of such a structure and the implication for the flow characteristics or the level of floodwater have not been assessed.

Findings

68 The parties agree that development consent is required for the proposed works. The structural experts agree that the house is not habitable and on the extent of works required for it to be capable of being used as a dwelling. These works are extensive and the experts agree that the simplest, most economical and best option to meet Australian standards would be to demolish the structure and to rebuild it. The flooding experts agree on the flood hazard of the site, including the predicted flood levels and velocities.

69 The key question before the Court is whether the proposed works satisfy the criteria in cl 29(3) of LEP 1992. Clause 29(3) applies to the carrying out of work and the erection of a building. Whether the works for which consent is sought are classified as "restoration", "rebuild" or a "new building", clause 29(3) is a relevant consideration.

70 In assessing the proposal, Mr Catalano relies heavily on the premise that the building is an existing dwelling and that its restoration will maintain or, through works such as raising the floor level, reduce the risk posed by the flood hazard. Mr Collins focuses on the extent of works that are required for the building to once again be used as a dwelling and concludes that,

despite these works, a habitable building cannot mitigate the flood hazard of the site.

71 In Mr Collins' assessment of the criteria in cl 29(3)(a) and (b), he accepts that the proposed works would not unduly restrict or increase flood waters beyond what the original house would have done. His principle concern is that the proposal will not meet the criteria in cl 29(3)(c) and (d). In his opinion, even with the works, including raising the floor level, the dwelling would not withstand flooding or be adequately flood proofed, even in the 1 in 100 year event.

72 Mr Spinaze and Mr Griffiths agree that the "restored dwelling", whether at its original level or at a raised level, is likely to suffer significant damage and possibly collapse in a 100 year flood event. They agree that a barrier may be able to be designed that could withstand the forces and collect or divert debris and logs from the house. However, the final design of such a structure and the implications for the flow characteristics of floodwaters or the level of floodwater have not been assessed and the flooding experts did not consider this option. Furthermore, the wall would not address the impacts of any flood above the 1 in 100 year level, which I accept should also be considered given the characteristics of flooding on the site. Even if the site has no history of significant flooding the potential and consequences of such an event should be assessed.

73 Mr Collins is further concerned that as the building has not been habitable for a number of years, if it once again becomes a habitable dwelling it will place increased demands on emergency services. Again, Mr Catalano relies on the premise that the building is an existing dwelling and would have been included in any emergency planning that has occurred. This would appear not to be the case as the Flood Information Enquiry, in the Statements of Evidence of Mr Spinaze and Mr Catalano notes "*Existing Site Information Original January 1998 survey - house has not been*

occupied for a number of years." The evidence of Mr Ison is that he has not lived in the house on a permanent basis since about 1998.

74 I therefore accept Mr Collins' evidence. The works proposed in the application, and agreed to by the structural engineers, do not satisfy the criteria in cl 29(c) and (d) of LEP 1992 that *the structural characteristics of any building or works..... are capable of withstanding flooding*, or that *the building is adequately flood proofed*. The proposed works would also not be consistent with the objectives of LEP 2012. While the floor level can be conditioned to meet the requirements of the DCP, I am not satisfied that this would ensure adequate safety for the future occupants of a dwelling or protection for the dwelling itself. In considering the FRMP and the amendments resulting from the Study, I find that the site is unsuitable for the proposed development.

75 The extent of works proposed and required by conditions, including raising the house, a safety barrier to the road for traffic hazards and a safety barrier for flood hazards, as well as the significant cost likely to be involved are further indication that the site is unsuited to the proposed development.

Order

1. The appeal is dismissed.
2. The development application for proposed restoration works to an existing rural dwelling at 237 Pacific Highway, Broadwater, is refused.
3. The exhibits, except Exhibit 11, may be returned

Annelise Tuor
Commissioner of the Court
