

This decision has been amended. Please see the end of the decision for a list of the amendments.

Land and Environment Court New South Wales

Case Title:	Smith v Pittwater Council
Medium Neutral Citation:	[2013] NSWLEC 1145
Hearing Date(s):	17 May 2013
Decision Date:	21 May 2013
Jurisdiction:	Class 1
Before:	Brown C
Decision:	<ol style="list-style-type: none">1. The appeal is upheld.2. Development Application No N0136/11 for the construction of a Shop Top Housing development at 13 Gondola Road, North Narrabeen is approved subject to the conditions in Annexure A.3. The exhibits are returned with the exception of exhibits 1 and A.
Catchwords:	DEVELOPMENT APPLICATION: demolition of the existing structures and construction of a shop top housing development - potential risk to an individual who requires an ambulance during a flood event
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land Environment Court Act 1979 Pittwater Local Environmental Plan 1993
Category:	Principal judgment
Parties:	Margaret Smith (Applicant) Pittwater (Respondent)
Representation	

- Counsel: Mr G Green, solicitor (Applicant)
Mr M Staunton, barrister (Respondent)

- Solicitors: Solicitors
Pikes & Verekers Lawyers (Applicant)
King & Wood Mallesons (Respondent)

File Number(s): 11040 of 2012

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against refusal by Pittwater Council of Development Application No N01136/11 that seeks approval for
1. demolition of the existing structures on site,
 2. a shop top housing development comprising 6 apartments, 6 office units, a 2 storey café and lockable storage spaces,
 3. ground level parking comprising 15 car spaces, 3 accessible car spaces, a waste garbage room, car wash bay,
 4. associated landscaping works to the site and road reserve, and
 5. strata subdivision of the completed development.
- 2 The appeal was subject of a conciliation conference on 17 May 2012 under s 34 of the *Land Environment Court Act 1979*. As no agreement was reached, the conciliation conference was terminated pursuant to s 34(4)(a). The parties consented to me disposing of the proceedings forthwith pursuant to s 34(4)(b)(i) on the basis of what occurred at the conciliation conference pursuant to s 34(4)(b)(ii).

The site

- 3 The site comprises all lots of Strata Plan 46516 and is known as 13 Gondola Road, North Narrabeen. It is irregular in shape with a street frontage of 11.58 m to Gondola Road, 69.885 m to Verona Street and 11.58 m to Rickard Road and a western boundary of 76.2 metres. The site has a total area of 1,155 square metres.

- 4 The site is flat with an average RL of 1.822 m Australian Height Datum (AHD) and currently contains a single storey fibro cottage at the northern end and a 2 storey builder's supply building across the remainder of the site. The site is within North Narrabeen locality and the neighbourhood retail centre adjoining Pittwater Road.
- 5 The flood planning level for the site is 3.4 m AHD plus 0.7 m for climate change which equates to a flood planning level of 4.1 m AHD. The probable maximum flood (PMF) level is 5.1 m AHD, which incorporates only climate change impacts from sea level rise. This equates to up to 3.1 m depth of flooding during the PMF. The site is identified being Flood Category 1 - Low Hazard. The site and the locality are affected by both short duration (flash) flooding and long term flooding.

The contentions

- 6 The Council originally raised a number of contentions in relation to the development that included
 1. non - compliance with flood controls,
 2. unacceptable risk to life of future occupants,
 3. non - compliance with the intent of the Flood Plain Development Manual,
 4. unacceptable solar access and natural ventilation for future occupants,
 5. incompatibility with the local context and desired future character of the area, and
 6. inadequate information.
- 7 Following the submission of further information, the only remaining contention was the unacceptable risk to life of future occupants within the proposed building.

Relevant planning controls

- 8 The site is zoned 3(a) (General Business "A") under *Pittwater Local Environmental Plan 1993* (LEP 1993). The proposed development is permissible with consent the zone.
- 9 *Pittwater 21 Development Control Plan - Amendment 6* (the DCP) applies. Part B 3.13 Flow Hazard - Flood Category 1 Low Hazard - Shop Top Housing, Business and Light Industrial Development is relevant.

Risk to life of future occupants

- 10 The contention relating to the risk of life to future occupants (contention 2(b) 2(c) 2(e) and 2(f)) was addressed by Dr Daniel Martins for the applicant and Ms Louise Collier for the council. Both have extensive experience in issues associated with flooding. Dr Martins produced a report entitled "Loss of Life Assessment". Dr Martins and Ms Collier prepared a joint report on the issue of risk associated with the potential flooding of the site and Dr Martins' "Loss of Life Assessment" report.
- 11 They disagreed on the methodology for calculating risks and particularly the input data for calculating this risk. Their disagreement related to
1. whether it should be assumed all persons potentially residing at this site should be included in the assessment or whether some allowance should be made for factors such as, persons being on annual leave or away from the site,
 2. whether the quality of the shelter provided by the proposed building from the floodwater should be included in the assessment,
 3. whether the proposed flood alarms should be included in the assessment of any risk,
 4. whether the use of ambulance call out data should be considered as a fatality in all cases,
 5. whether every incident which occurs when sheltering in place should be considered a fatality,
 6. whether the correct method of measuring risk is risk to an individual or risk to a population,

7. should more frequent flooding events be considered, such as the 1 in 5 year event or the 1 in 50 year event, and
 8. what is the significance of the theoretical probability calculation.
- 12 A number of different assumptions were adopted and were calculated by Dr Martins to provide a range of risk malice outcomes. The factors considered appropriate by Ms Collier were:
1. 17 hours flooding duration,
 2. all occupants ignore the flood alarms,
 3. no allowance for time of day,
 4. no allowance for persons who may be away from the property,
 5. every incident that required an ambulance was considered fatal,
 6. no shelter quality effect, and
 7. every ambulance call-out was to a residential property.
- 13 For these assumption, Dr Martins calculates the loss of life risk at 1 in 435,187.
- 14 Dr Martins and Ms Collier agree that even without substantive academic literature on the appropriate risk level, a risk of 1 in 1,000,000 would be appropriate to apply in this case. On this basis, Ms Collier maintains that the development application should be refused although Dr Martens disagrees based on the suitability of adopting all Ms Colliers assumptions for the risk analysis.
- 15 Dr Martins provided further sensitivity calculations based on adjustments to some of the input assumption. These adjustments were consistent with what Dr Martins considered to be reasonable in the circumstances. For example, and using the same inputs as Ms Collier, except that factor 2 that stated "all occupants ignore flood alarms" were replaced with the assumption that "on average two persons ignore the alarm". In this scenario (called Martins 2), the risk analysis outcome was calculated at 1

in 7,833,377. Other risk analysis outcomes ranged from 1 in 678,892 to 1 in 259,676,478 depending on the different inputs into the equation.

- 16 Ultimately, the only issue between Dr Martens and Ms Collier is the potential risk to an individual who requires an ambulance during the flood event. I note that neither Dr Martens nor Ms Collier could identify any case of loss of life to an individual when an ambulance was required during a flood event. In considering the different approaches of Dr Martins and Ms Collier, I am satisfied that the development application should not be rejected on flood risk to an individual for a number of reasons.
- 17 First, pt 3 13 of the DCP does not require the risk analysis outcome sought by the council in this case. Second, the Flood Plain Risk Management Strategy relied on by the council in this case has not been exhibited or adopted by the council. Third, the council approach during the hearing of opposing shelter in place is not advocated in the DCP (see p 57.7). Fourth, the analysis carried out by Dr Martins requires assumptions to be made that could be unreliable. For example, given that no data is available from the Ambulance Service of New South Wales on the breakdown of callouts between residential and other land users and that all callouts cannot reasonably be assumed to be a fatality, then any conclusions based on Ms Colliers assumptions would have to be questionable. This is further highlighted in the calculations of Dr Martins sensitivity analysis where he uses different inputs to generate a very wide range of risks. Fifth, Dr Martens and Ms Collier agreed that despite a comprehensive literature search there are no studies that provide any guidance in assessing the risk for an individual or in the circumstances of this case. Sixth, Dr Martens and Ms Collier agree that even accepting the conservative inputs there is no issue with loss of life associated with flooding impacts in relation to the need for an ambulance to any person in the community or heart attack or stroke risks for any individual or any person in the community.

- 18 As there was no issue that the development complied with the requirements in pt B 3 13 of the DCP and that there are no planning reasons that warrant the refusal of the application, there is no basis why a development should not be granted subject to the agreed conditions of consent.

Orders

- 19 The orders of the Court are.
1. The appeal is upheld.
 2. Development Application No N0136/11 for the construction of a Shop Top Housing development at 13 Gondola Road, North Narrabeen is approved subject to the conditions in Annexure A.
 3. The exhibits are returned with the exception of exhibits 1 and A.

G T Brown

Commissioner of the Court

Amendments

10 Apr 2014 Typographical error '138/11' changed to '136/11' Paragraphs:
Order 2