



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Lark v Shellharbour City Council [2015] NSWLEC 1535</b>
<b>Hearing dates:</b>	27 October, 7 December 2015
<b>Date of orders:</b>	18 December 2015
<b>Decision date:</b>	18 December 2015
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Fakes C
<b>Decision:</b>	Appeal dismissed
<b>Catchwords:</b>	MODIFICATION APPLICATION: Flood prone land; flood planning level; finished floor levels – as conditioned/ as built.
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Shellharbour Local Environmental Plan 2013
<b>Cases Cited:</b>	Galandon Pty Ltd v Narrabri Shire Council (1983) 51 LGRA Meck v Waverley Council (2) [2005] NSWLEC 363 Moto Projects (No.2) Pty Ltd v North Sydney Council [1999] NSWLEC 280 North Sydney Council v Michael Standley & Associates Pty Ltd [1998] NSWSC 163; (1998) 97 LGERA 433 Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Mitchell Lark (Applicant) Shellharbour City Council (Respondent)
<b>Representation:</b>	Applicant: Mr M McMahon (Solicitor) Respondent: Mr A Seton (Solicitor)
	Solicitors: Applicant: M.E. McMahon & Associates Respondent: Marsdens Law Group

**File Number(s):**

10779 of 2015

## JUDGMENT

- 1 COMMISSIONER: In February 2012 Shellharbour City Council granted consent to Development Application No. 456/2011 for the demolition of an existing garage and construction of a second detached single storey dwelling and Torrens Title subdivision at 20 Arcadia Street, Warilla (the site). Consent was granted subject to the imposition of conditions.
- 2 The applicant seeks to modify conditions of consent that require all future habitable floors to be constructed to a minimum level of 3.21m Australian Height Datum (AHD) and replace that figure with the as-built levels of 3.03m AHD – 3.05m AHD. A Modification Application 456/2011-2, made pursuant to s 96 of the *Environmental Planning and Assessment Act 1979* (EPA Act) was lodged with council on 25 May 2015.
- 3 The Class 1 Application filed with the court on 4 September 2015 appeals the deemed refusal of that Modification Application. The appeal is made under s 97AA of the EPA Act. The applicant amended the Modification Application and it was eventually approved by council. Despite this, the appeal to the court remains. The relevant background to this matter is discussed from [16].
- 4 The matter commenced on site as a mandatory conciliation under s 34AA of the *Land and Environment Court Act 1979* (Court Act). As there was no agreement between the parties the conciliation was terminated in accordance with s 34AA(2)(b)(ii) of the Court Act.

### **The site and its locality; susceptibility to flooding**

- 5 The site is located within the suburb of Warilla on the eastern side of Lake Illawarra, to the north of Elliot Lake, and to the west of Bensons Creek and the Pacific Ocean It is on the western side of Arcadia Street, Warilla. Garages for the two dwellings on the site are accessed from Arcadia Street.
- 6 The land is zoned Zone R3 Medium Density Residential under the provisions of *Shellharbour Local Environmental Plan 2013* (SLEP).
- 7 The site is located within the Elliot Lake Catchment and is flood prone land. This lake is included in council's adopted 'Elliot Lake - Little Lake Flood Study' (the Flood Study). The site is affected by both the 1 in 100 year flood and the Probable Maximum Flood (PMF). Being located on flood prone land, cl. 6.3 Flood Planning in SLEP applies.

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Specifically, the site is located in a Medium Flood Risk Precinct as defined in council's adopted Development Control Plan – Chapter 24 Floodplain Risk Management (SDCP-FRM). The most recent flooding information from the Flood Study provides a design 1% Annual Exceedence Probability (AEP) water level of 2.71m AHD and Probable Maximum Flood level of 3.93m AHD for the site. The site's location within a Medium Risk Precinct requires a freeboard of 0.5m above the 1% AEP. Therefore the applicable Flood Planning Level for the site is 3.21m AHD.

- 9 The immediate locality is low lying and flood prone, with the closest land unaffected by flooding approximately 250m to the west of the site in Shellharbour Road. The closest flood evacuation route is approximately 650m long through local and feeder roads to a flood free location close to the intersection of Shellharbour Road and Terry Avenue.
- 10 Surrounding development comprises mostly low density residential dwellings of between one and two storeys. A number of these dwellings were constructed before the implementation of the current controls and have been constructed with habitable floor levels below the prescribed flood planning level.

### Relevant background and planning controls

- 11 In order to understand the key issues in this matter, it is necessary to highlight the principal planning controls and policies and the actions of the parties.
- 12 As the site is on land at or below the flood planning level, clause 6.3 Flood planning – SLEP is a key consideration. It states:
  - (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 to development on land to which this clause applies unless the consent authority is satisfied that the development [relevantly]:
    - (a) is compatible with the flood hazard of the land, and
    - (b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development and properties, and
    - (c) incorporates appropriate measures to manage risk to life from flood, 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 by the NSW Government in April 2005, 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.

13 The Floodplain Development Manual defines ‘freeboard’ as:

Provides reasonable certainty that the risk exposure selected in deciding on a particular flood chosen as the basis for the FPL [flood planning level] is actually provided. It is a factor of safety typically used in relation to the setting of floor levels, levee crest levels, etc. (See Section K5). Freeboard is included in the flood planning level.

14 The other relevant material includes Chapter 24 – Floodplain Risk Management in Shellharbour Development Control Plan (SDCP). The Elliot Lake – Little Lake Catchment is referred to. Relevant objectives of this Chapter are:

4. Reduce the risk to human life and damage to property caused by flooding through controlling development on land affected by potential floods.

5. Provide detailed controls for the assessment of applications lodged in accordance with the *Environmental Planning and Assessment Act 1979* on land affected by potential floods.

9. Deal equitably and consistently with applications for development on land affected by potential floods, in accordance with the principles contained in the Floodplain Development Manual as amended, issued by the NSW Government.

15 The specific and detailed development controls for various forms of development in low, medium and high flood risk areas are included in Schedule 1, Appendix 11.8, SDCP. For residential development in medium flood risk areas, habitable floor levels must be equal to or greater than the 1 in 100 year API flood level plus 0.5m freeboard.

16 As the development site is on flood affected land, the construction of the second dwelling was subject to the following conditions of consent:

**B10 Minimum Floor Level**

*All future habitable floors must be constructed to a minimum level of 3.21m Australian Height Datum (AHD). Garage floor level to be no lower than 2.71m AHD. Details are to be submitted with the Construction Certificate application.*

**B11 Flood Compatible Materials**

*Any portion of the building subject to inundation, i.e. below 3.21m AHD must be built from flood compatible materials. Compliance with Appendix 1 of the Shellharbour City Council Floodplain Risk Management Development Control Plan is required or with the requirements of a qualified building consultant. Details are to be submitted with the Construction Certificate application.*

**D6 Survey Certification**

*A survey certificate signed by a Registered Surveyor, shall be submitted for approval when the formwork for the main floor area is completed. This certificate shall certify that any habitable floor will be constructed to a minimum level of 3.21m, Australian height Datum.*

17 A Construction Certificate No. 256/14 was issued by Accredited Construction Services Pty Ltd on 25 July 2014. The construction of the new dwelling is almost complete however the floor levels do not comply with the requirements of conditions B10 and B11. Condition D6 was not complied with. The as-built finished floor levels are between 0.16-0.18m below the prescribed 3.21m AHD being the 1% AEP level plus 0.5m freeboard.

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On 25 May 2015 Mr Lorenzo Nizza, on behalf of the applicant, lodged an Application for Modification of Development Consent with the council. The proposed modifications are described as:

Proposed new brick wall to laundry and front entry to required height. Install featured deck to laundry and entry with stairs if required.

- 19 A letter to council's General Manager from Mr Peter Lockhart, a Civil Engineer, dated 8 May 2015 which accompanied the modification application notes that after reviewing the survey plans for the work as constructed for the new dwelling, while the garage floor complies with the consent, the habitable floor level is between 0.16 and 0.18m below the floor level specified in the development consent. Mr Lockhart suggests that in order to provide the habitable area of the residence with protection up to a level of 3.21m AHD, the entry points to the residence be protected by 'bunds'. Such a 'bund' could be provided by a masonry edging to the front and side porches and the rear deck so that the level of the top of the edging is 3.21m AHD.
- 20 The Planning and Assessment report prepared by council's assessing officer in September 2015 summarises the making and progress of the modification application (Exhibit 4, Tab 13).
- 21 The Modification Application was amended on 25 August to allow the Subdivision Certificate to be released prior to the issue of the Occupation Certificate, and to remove flood mitigation structures comprising bunding from the application. Council approved the amended Modification Application 456/2011- 2 on 14 September 2015 subject to the following:
- Include an additional condition within F6 Restriction – General; to specify land is subject to flood inundation and floor level restrictions as outlined in the Elliot Lake/Little Lake Flood Study and as required by Notice of Determination No. 456/201.
  - New Condition G4 Occupation of Unit 2 must not occur until the final Occupation Certificate has been issued.
- 22 The reasons for the imposition of the new condition G4 are:
1. To minimise any possible adverse environmental impacts of the proposed development.
  2. To ensure that the amenity and character of the surrounding area is protected.
  3. To ensure that the design and siting of the development complies with the provisions of Environmental Planning Instruments and Council's Codes and Policies.
  4. To ensure that the development does not conflict with the public interest.
- 23 On 4 September 2015 the applicant filed a Class 1 Application with the court appealing the council's (then) deemed refusal of the Modification Application. The Class 1 Application included the original Notice of Determination and conditions of consent, the Application for Modification originally submitted to council, the letter from Mr Lockhart, a

response to an enquiry from the applicant in regards to flooding from council's Design Engineer, and three plans with various elements highlighted in green with hand written notations identifying the type and nature of the bund walls.

- 24 The Applicant filed a Statement of Facts and Contentions on 28 September 2015 confirming that the appeal is based on the original modification application seeking to modify the original consent and including the flood protection/ bunding measures proposed by Mr Lockhart. The applicant's contentions state:
1. As a result of a mistake the finished floor levels have been constructed between 0.16 and 0.18 [m] below the levels required in the development consent.
  2. The "bunds" are a practical way of reversing the effect of that mistake.
  3. Regulation 154(b) under the *Environmental Planning and Assessment Regulation 2000* provides that an occupation certificate must not be issued unless the design and construction of the new building "are not inconsistent with the development consent in force" but that concession is only available if the development consent was issued on or after 1 March, 2013. (This consent was 15 February, 2012).
  4. The appeal should be upheld so that the certifier can issue an occupation certificate.
- 25 Based on the Class 1 Application and the Applicant's Statement of Facts and Contentions, council's Statement of Facts and Contentions filed and received by the Court on 19 October 2015 (Exhibit 1) raised six contentions as to why the appeal should be refused, summarised as:
1. Not substantially the same development.
  2. Inadequate, unclear and inadequately detailed plans.
  3. Failure to meet the objectives of the zone.
  4. Unacceptable flood risks.
  5. Reasonable access to dwelling.
  6. Public interest.
- 26 The matter commenced on site as a mandatory conciliation under s 34AA of the *Land and Environment Court Act 1979* (Court Act). There were no objectors and the site was inspected.
- 27 The Court and the parties were assisted by Mr Lockhart, the applicant's Civil Engineer, and Mr Adam De Clouett, council's Team Leader - Water Engineering and Design. The engineers prepared a Joint Expert Report. Mr Anthony Randall, council's Team Leader -Planning, prepared an expert report and attended the conciliation.
- 28 The object of the site inspection was to gain a better understanding of the flood protection measures/ bunding proposed by Mr Lockhart and their relationship to the finished floor levels. The practical consequences were discussed as was the need to ensure that what was proposed complied with the Building Code of Australia (BCA). As neither engineer could provide that advice, leave was granted for the applicant to provide a report from a BCA consultant to council for review. The matter was adjourned for a further conciliation.

- 29 Further to the Court's directions, it appears that on 20 and 23 November 2015 the applicant supplied the council with further plans and an undated letter prepared by Mr Craig Hardy [not tendered]. This material was reviewed by Mr Greg Moore, an engineer and council's Senior Building Assessment Officer; his expert report is Exhibit 7.
- 30 Mr Moore's report sets out in detail the requirements of the National Construction Code (NCC), formerly known as the BCA. He states that the NCC is also informed by the Australian Building Codes Board (ABCB) *Standard for Construction of Buildings in Flood Hazard Areas*. In particular Mr Moore cites NCC Objective O2.1 and Performance requirement P2.12 Construction of buildings in flood hazard areas.

Objective O2.11 is to:

- (a) safeguard people from injury caused by structural failure; and
- (b) safeguard people from loss of amenity caused by structural behaviour; and
- (c) protect other property from physical damage caused by structural failure.

Performance requirement P2.12 – Construction of buildings in flood hazard areas

(a) A building in a flood hazard area must be designed and constructed, to the degree necessary, to resist flotation, collapse or significant permanent movement resulting from the action of hydrostatic, hydrodynamic, erosion and scour, wind and other actions during the defined flood event.

(b) The actions and requirements to be considered to satisfy (a) include but are not limited to:

- i. flood actions; and
- ii elevation requirements; and
- iii foundation and footing requirements; and
- iv requirements for enclosures below the flood hazard level; and
- v requirements for structural connections; and
- vi material requirements; and
- vii requirements for utilities; and
- viii requirements for occupant egress.

- 31 He states that there are two methods of providing building solutions that satisfy the performance requirement P2.12; either selecting the 'Deemed to Satisfy' provisions or by providing an 'Alternative Solution'. Mr Moore then lists the steps required for Alternative Solutions.

- 32 In assessing the material provided by the applicant, Mr Moore states that as the proposal does not comply with the Flood Planning Level, the Deemed to Satisfy provisions cannot be used. It appears that the details provided by the applicant included water proofing of the external walls, installation of bunds and sealing of weep holes. Mr Moore concludes that the measures do not comply with the NCC/BCA or ABCB Standard and are not therefore a lawfully compliant method of reversing the mistake. He also notes that the proposal does not include an appropriately formatted 'Alternative Solution' and therefore that avenue is unavailable. Mr Moore does not support the solutions.

- 33 The applicant subsequently engaged Mr John Forrest, a Consulting Engineer, to assess the material provided, including Mr Moore's report, in order to comment on the applicability or not of an 'Alternative Solution' in accordance with the BCA/ National Construction Code 2015 (NCC).
- 34 Mr Forrest's report dated 6 December 2015 (Exhibit B) applies the assessment methodology for an Alternative Solution in accordance with the requisite codes and guidelines including the ABCB 2012 Standard: *Construction of Buildings in Flood Hazard Areas*. He agrees with Mr Moore that bunding is unsatisfactory and proposes that the alternative solution is the as-built floor levels.
- 35 The matter resumed on 7 December 2015. The applicant sought leave to amend the appeal to rely on Mr Forrest's report. This was not opposed by the council. Given the applicant's late submission of Mr Forrest's report, the engineers were given time to discuss the report. Despite the further discussion there was no agreement and the conciliation was terminated and the matter proceeded to a hearing in accordance with s 34AA(2)(b)(ii).
- 36 With leave granted to amend the application, council presses the following contentions:
- The modified development is not substantially the same as the development for which consent was originally granted as the floor levels were a material and essential feature of the original consent.
  - 3. The proposal does not meet the objectives of Zone R3 Medium Density Residential under the provisions of Shellharbour Local Environmental Plan 2013 (SLEP).
  - 4. The flood risk to life and property associated with the proposed modification is unacceptable because it is inconsistent with the relevant controls in SLEP and FRM DCP.
  - 6. The proposed modification is not in the public interest as the design response does not meet public expectations of development at the site.
- 37 My understanding of the amended application is to modify conditions of consent that require all future habitable floors to be constructed to a minimum level of 3.21m Australian Height Datum (AHD) and replace that figure with the as-built levels of 3.03m AHD – 3.05m AHD. This is to enable an Occupation Certificate to be issued.

### Expert evidence

- 38 In court, expert evidence was provided for the applicant by Mr Forrest and Mr Lockhart and for the council by Mr Moore and Mr De Clouett. While not required for cross-examination, Mr Randall, council's planner, prepared an expert report (Exhibit 5). Mr Lockhart and Mr De Clouett prepared a joint report (Exhibit 6).
- 39 Mr Forrest stated that he did not visit the site but prepared his report based on reports, plans and photographs supplied to him and the relevant codes and standards. He agreed with Mr Seton that he is not a flood engineer but is a structural engineer. In his opinion, and using the terminology used in the ABCB Standard, the Defined Flood Event (DFE) [the 1 in 100 year/ 1% AEP flood] type is backwater low velocity flooding

to a maximum depth at the site of 0.57m which is an area external to the building and not including the habitable rooms which will remain dry during the DFE. Mr Forrest marked up a plan to the relevant contours in order to illustrate this. Mr Forest considers that wave action will be negligible to minor. While he accepts that the as-built level includes a freeboard of 320mm and not the requisite 500mm freeboard, in his opinion it is an acceptable Alternate Solution and no additional works are required.

40 Mr Forrest opined that even if a flood occurred at council's flood design level, the building's structural integrity would be maintained, there would be safe egress from the dwelling to the street and only cosmetic damage would occur; that is to the wall linings, skirting boards, floor coverings etc. He stressed that the focus of the NCC/BCA/ACBC Standard is on structural integrity and safe egress. Mr Forrest agreed with Mr Seton that as a professional engineer he would have recommended the building be built in accordance with council's controls but he also stated that by applying the standards creatively and assessing the risk, the objectives of the controls could nonetheless be achieved by an innovative solution. While he agreed that this is a retrospective solution and not innovative, Mr Forrest maintained his opinion that the finished floor levels will ensure no structural damage occurs and approving these levels will not compromise the integrity of council's policies.

41 Mr Moore deferred consideration of flooding impacts to flood engineers.

42 In their joint report at paragraphs [2.5.2] – [2.5.3], Mr Lockhart and Mr De Clouett disagree as to whether the proposal is inconsistent with the objectives and requirements of cl. 6.3 SLEP and Chapter 24 and Appendix 11 SDCP.

43 Mr De Clouett is of the opinion that by not meeting the standards in these controls, the property remains vulnerable to over floor flooding and would not meet a reasonable person's expectations in regards to the likely ongoing damages associated with such flooding. In his view this may make it difficult for future owners to gain and maintain flood insurance. Mr De Clouett considers that a reasonable person would expect that a new dwelling constructed in a flood prone area would meet the requisite minimum requirements for habitable floor levels set by the council. Apart from property damage, Mr De Clouett also raises concerns over the safety of future occupants attempting to evacuate the building during times of flooding.

44 In the joint report Mr Lockhart considers that the floor level only varies by up to 180mm from the prescribed level and it remains above the 1 in 100 year flood level and below the PMF level. Therefore, in his opinion, the site is still subject to flooding and likely to attract applicable insurance costs. Mr Lockhart opines that evacuation will still be expected to take place at the same time as if the floor level were 180mm higher.

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Mr Lockhart is a structural engineer with some experience in stormwater and drainage; under cross-examination he agreed with Mr Seton that he is not a flood engineer. Mr Lockhart stated that while his advice would have been to construct the floor levels to include a freeboard of 500mm he agreed with Mr Forrest that there would be little wave action generated from Arcadia Street and the 320mm of freeboard would be sufficient in the circumstances.

- 46 Mr De Clouett does not agree about the potential wave action in the street; in his opinion a car moving down Arcadia Street, which is a flow path for flood waters, would push a bow wave that could push water into the front of the property. In answer to a question from Mr Seton, Mr De Clouett stated that even if wave action were removed from the consideration, reducing the freeboard to about 300mm could not be justified as there are many other factors to consider. In his opinion the 500mm freeboard also allows for factors such as localised hydraulic events, blockages, accuracy of survey data, changes in rainfall patterns, high tides, the cumulative impact of development that does not require consent – including cut and fill, and uncertainty in the flood data used in studies. Mr De Clouett stated that the current Flood Study does not factor in climate change or changes in sea level.
- 47 In answer to a question from Mr McMahon about flexibility in setting the extent of freeboard, Mr De Clouett stated that Shellharbour City Council has consistently adopted 500mm which is based on most uncertainties expected across the State. He considered that if there were circumstances where a lower level could be applied, it would need to be supported by a Floodplain Risk Management Study, the production of which is a lengthy process and which does not yet exist.

## Submissions

- 48 Mr McMahon for the applicant contends that the resolution of the matter turns on the reasoning behind the 500mm freeboard, which he submits is a figure quoted as ‘typical’ in the guidelines. He relies on Mr Forrest’s report that the 320mm of freeboard provided by the as-built habitable floor levels is an appropriate Alternate Solution.
- 49 Mr McMahon cites former CJ McClelland in *Galandon Pty Ltd v Narrabri Shire Council* (1983) 51 LGRA. That case involved an appeal against a condition of development consent that required the floor level of a proposed motel on flood prone land at Narrabri to be constructed 500mm above the 1 in 100 year flood level. This would have necessitated extensive filling of the land with 20,000m<sup>3</sup> of earth and construction of retaining walls etc. At p. 12, in upholding the appeal His Honour states:

The Schmiedes, like most inhabitants of Narrabri, are prepared to take their chances with the elements. This is shown by their willingness to indemnify the council by executing a deed which, whatever its shortcomings as against their successors in title would, at least according to legal advice given to them, be enforceable against them. If there were a likelihood or even strong possibility that the construction of a motel on

such a site on ground level would create a real danger of loss of life it would be contrary to the public interest that it be so constructed. However, I am satisfied on the evidence that such a danger is so miniscule that it can be disregarded.

I do not believe that the condition appealed against is fair or reasonable and it is clear that, though it was imposed in accordance with council policy adopted in accordance with the advice of the Water Resources Commission, it was tainted by the consideration of legal immunity to which the council, as I have previously decided, was not entitled to have regard. The appeal against condition 1 is upheld.

- 50 In applying this finding to the site, Mr McMahon relies on an email sent by Mrs Lark to council's assessing officer on 20 July 2015 which states in part:

At this point, the issue of flood isn't a significant concern of ours, and as a point of interest, 5 or so years ago there was a flood in the Illawarra caused by a king high tide and torrential rain that was dubbed the 100 year flood. A number of houses in Warilla went under, cars were seen floating down Shellharbour Road and there was a fatality when a man was swept away into the storm water drain. My father has run a business on Shellharbour Road for over 30 years and said it was by far the worst he has ever seen. We were living in the residence at that time and water did not encroach our lawn or our home, or our neighbours, and our end of Arcadia Street remained safe.

- 51 Mr McMahon submits that in the event of a flood that may enter the dwelling it would only lead to superficial/ cosmetic damage, not structural damage and the applicant's appeal should therefore be upheld.
- 52 In regards to the contention that the proposal is not substantially the same as the development for which consent was originally granted, Mr McMahon cites Tuor C in *Meck v Waverley Council (2)* [2005] NSWLEC 363 in which the Commissioner considered the approaches in *North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163; (1998) 97 LGERA 433 and *Moto Projects (No.2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 and other frequently cited cases involving s 96 modification appeals. While his submissions were very brief, Mr McMahon contends that when development as proposed is considered against the development as approved it is essentially and materially the same and therefore should be assessed on its merits.
- 53 On whether the approval of the modification would result in an unacceptable precedent, Mr McMahon argues that if anything, this case would be an example of why the levels should be right in the first place.
- 54 Mr Seton for the council submits that a threshold matter in these proceedings, being a requirement of s 96(1A)(b) and s 96(2)(a) of the EPA Act, is whether or not what is being assessed is substantially the same as the proposal for which consent was originally granted in 2012. In pressing council's contention and particulars, he contends that the floor levels of the dwelling, being based on the Flood Planning Level for the site, were a material and essential feature of the original consent such that it was necessary for the imposition of specific conditions of consent in order to ensure the development was constructed in accordance with those floor levels. This includes condition D6 requiring a survey at formwork stage. Mr Seton maintains that the

difference between the approved development and the proposed modified development involves a material and substantial change to the way in which the development as approved is to be carried out.

55 Mr Seton cites Bignold J in *Moto Projects (No.2)* at [59], [55], [60], [64] at [67] in regards to circumstances where the focus may be on a critical element of a proposal. For example at [64] His Honour states [in part]:

64. Although it is well established that the comparative task required to be undertaken to satisfy the requirement of s 96(2)(a) involves a comparison of the **whole** of the developments being compared, that fact does not eclipse or cause to be eclipsed a particular feature of the development, particularly if that feature is found to be important, material or essential. ...

56 In this regard, Mr Seton maintains that changing the habitable floor levels to 160-180mm below the required level results in a development that is not substantially the same and, as such, the Court has no power to approve the modification application.

57 However, if the matter is to be assessed on its merits, Mr Seton asserts that the appeal should nonetheless be dismissed. In considering the requirements in cl. 6.3 SLEP, Mr Seton contends that approval cannot be granted as the proposal is incompatible with the flood hazard of the land and does not minimise the risk to property; the clause clearly defines the requirement for 500mm freeboard. Similarly, he submits that Chapter 24 – Floodplain Risk Management – SDCP includes the Elliot Lake Catchment, refers to the principles contained in The NSW Government’s Floodplain Development Manual, and therefore the accompanying Guidelines, and specifies, in Appendix 11, the requirement for 500mm freeboard, and as such there is no cogent reason to permit a recently constructed dwelling to have habitable floor levels below the clearly specified flood planning level or any identifiable constraint that suggests that a variation should be applied. Mr Seton maintains that the fact that the dwelling has already been constructed is not a reason to permit a variation, and while he feels sorry for the owners who are content to live with the risk, development consent runs with the land and therefore it is unreasonable to impose that risk on future owners. He presses the agreement of the applicant’s engineers that they would recommend dwellings in flood prone areas to be built to the specified levels.

58 In reply to Mr McMahon’s citing of *Galandon*, Mr Seton notes that this is a 1983 decision which predates the NSW Floodplain Development Manual and the other applicable controls and standards and as such should not be given any weight.

59 In regards to an approval setting an unacceptable precedent, Mr Seton argues that others may seek similar concessions which in the longer term results in cumulative impacts that are likely to lead to future costs for both individuals and the community.

## Findings

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Before considering the specific issues raised in the remaining contentions, I must deal with the jurisdictional issue raised by s 96(2) of the EPA Act as it is determinative of the appeal. If the application fails this jurisdictional test, I have no power to grant consent to the application even if I determine that the proposed modification merits consent.

61 In *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 at [54] to [56], [61] and at [62] and [64] (in part) Bignold J states:

54. The relevant satisfaction required by s 96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.

55. The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

56. The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

61. Because the requirement of s 96(2)(a) calls for an ultimate factual finding on the primary facts of the case, only illustrative assistance is to be gained from consideration of other cases involving their own factual findings on the relevant satisfaction required by s 92(2)(a)(or its antecedent, s 102(1)(a)).

62. Reference to those cases indicates that environmental impacts of proposed modifications are relevant to the ultimate factual finding...

64. Although it is well established that the comparative task required to be undertaken to satisfy the requirement of s 96(2)(a) involves a comparison of the *whole* of the developments being compared, that fact does not eclipse or cause to be eclipsed a particular feature of the development, particularly if that feature is found to be important, material or essential....

62 In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, Stein J states:

Turning to the issue of s. 102(1)(a). Is the proposed modified development substantially the same development as that in the development consent (as already amended)? In my opinion 'substantially' when used in this section means essentially or materially or having the same essence. The applicant for modification bears the onus of showing that the modified development is substantially the same, see [citations omitted].

63 In this matter the applicant appears to be relying on the fact that apart from the habitable floor levels, the proposal is substantially the same development as that to which consent was originally granted; no expert planning evidence was adduced to address this contention. I find Mr McMahon's reference to *Meek* to be of little assistance as the circumstances of that matter were significantly different to this matter before me.

64 The council's position is that the setting of the habitable floor levels at the height established by SLEP and SDCP was an important, material and essential element of council's assessment process and ultimate determination of the original development application. In his expert report, Mr Randall considers the process of comparison – both qualitatively and quantitatively (Exhibit 5 [2.2.26] – [2.2.2.8]). He states that qualitatively

the floor levels are non-compliant with the required FPL in a Medium Hazard Flood environment and quantitatively the levels range from 38%-43% below the FPL. In Mr Randall's view, this means that the application is not substantially the same.

65 In this case, the factual circumstances of the site are that it is located in land identified and mapped in council's Elliot Lake – Little Lake Flood Study as flood prone and is therefore land to which both cl. 6.3 SLEP and Chapter 24 with Appendix 11 (including Schedule 1) SDCP apply. These clauses make it very clear that the floor level of habitable rooms in residential developments in medium flood risk areas must be equal to or greater than the 100 year ARI flood level plus freeboard. The freeboard is specified in both controls to be an additional 500mm. The 500mm freeboard is consistent with the 0.5m identified in the NSW Floodplain Development Manual and the accompanying 'Guideline on Development Controls on Low Flood Risk Areas – Floodplain Development Manual' as the 'typical' level for residential development.

66 It is clear that amongst other things, the council in its 'Residential Infill Development Control Plan Checklist' (Exhibit 4 Tab 1) states that the floor levels had been designed accordingly and development consent was conditioned to comply with council's flood policy. The stamped approved plans show the finished floor level of the living room at 3.31. The conditions of consent in contention are unambiguous.

67 While the proposed modification concerns only one element of the whole, given the facts and circumstances of this matter I accept Mr Seton's submissions that the floor levels of the dwelling, being based on the Flood Planning Level for the site, were a material and essential feature of the original consent. On the evidence before me it is highly unlikely that council would have approved the original development application had the as-built levels been proposed.

68 Therefore on this basis I find that the modified development as proposed is not substantially the same as the original development approved in 2012. As s 96(2) is not satisfied, the Court has no power to grant consent.

69 However, if I am wrong in this I also find that the proposal fails on its merits when assessed against the matters to be considered in s 79C of the EPA Act. In this regard I find that the proposal does not comply with the requirements in cl. 6.3 SLEP. I am not satisfied that the proposed development is compatible with the flood hazard of the land which has been established by the Lake Elliot – Little Lake Flood Study and further considered in SLEP – Chapter 24 and Appendix 11. Therefore as subcl. 6.3(3)(a) is not met, consent cannot be granted.

70 As stated above, the relevant parts of SLEP and SDCP are consistent with each other and with the NSW Floodplain Development Manual and Guidelines. While the Manual at cl. 1.1.2 provides for a flexible merit based approach to be followed by councils when dealing with development on flood prone land and a merit based approach to selection

of appropriate flood planning levels, it also requires councils to be responsible for the determination of those planning and development controls including flood planning levels. Further on p. 5 of the Manual, in promoting effective floodplain risk management at a strategic planning level it states:

Case-by-case decision making cannot account for the cumulative impacts on flood behaviour and risks, caused by individual developments or works. This form of ad hoc assessment contravenes the principles of the manual.

- 71 In essence, the applicant's case is an example of an ad-hoc approach to remedy an avoidable mistake and is also inconsistent with objective 9, Chapter 24 – SDCP which is to deal equitably and consistently with development on flood affected land. I don't propose to give any weight to former CJ McClelland's findings in *Galandon* as I agree with Mr Seton that floodplain planning has advanced considerably since 1983.
- 72 I accept the uncontested evidence of Mr De Clouett that Shellharbour City Council has consistently applied the 500mm requirement for freeboard. His evidence at [46] of the many contingencies freeboard is designed to cover was persuasive, as was his statement that the current FPL does not account for climate change or sea level rise. Mr De Clouett's evidence must be preferred over both Mr Forrest's and Mr Lockhart, neither of who are flood engineers and who both agreed as engineers that they would advise building in accordance with council's controls. I find Mr Forrests' marked up plan of little assistance as it does not include the required freeboard and therefore does not account for any of the contingencies freeboard is designed to cover. The consistently applied adopted council controls must also be preferred over the anecdotal evidence of Mrs Lark of one flood event, it being only one of the major flood events listed in the Executive Summary of the Elliot Lake – Little Lake Flood Study (although I have no doubt that it reflects her experience of that flood).
- 73 Similarly, while the building may remain structurally sound after a 1 in 100 flood, the Defined Flood Event in Mr Forrest's evidence and within his area of expertise, the ABCB Standard makes it clear in the preface to that document that the Standard is not a stand-alone solution to mitigating safety risks associated with flooding and other comprehensive measures are required. Clause 2.4 of the Standard requires that unless otherwise specified by the appropriate authority, which in this case is the council, the finished floor level of habitable rooms must be above the Flood Hazard Level (FHL). FHL is defined in the Standard as the defined flood level plus the freeboard. Therefore council, as the appropriate authority, has specified its FHL for the site at 3.2m AHD, which is consistent with the requirements of the ABCB Standard.
- 74 Finally, in regards to the Public Interest, I adopt Mr De Clouett's statement at [41] of this judgement that a reasonable person would expect that a new dwelling in a flood prone area would be constructed to the applicable controls and standards. I find that it is not in the public interest to allow the modification proposed by the applicant.

## Conclusions and orders

75 While I empathise with the applicant's position and accept the situation is very distressing for him and his wife, the approach required of the Court is to consider the evidence and apply the relevant Acts, Environmental Planning Instruments, planning controls, policies and standards to the facts and circumstances of the appeal before the Court. Having done so, on the basis of my conclusion that the proposed development is not substantially the same as the original approved development and on its merits, the Orders of the Court are:

- (1) The appeal is dismissed.
- (2) Modification of Development Consent 456/2011-2, lodged on 15 February 2015 and as amended during the proceedings, to modify Development Consent 456/2011 determined on 15 February 2012, is refused.
- (3) The exhibits are returned.

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**Judy Fakes**

**Commissioner of the Court**

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Decision last updated: 21 December 2015