

S J Connelly v Byron Shire Council - [2009] NSWLEC 1068

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Land and Environment Court

of New South Wales

CITATION: [S J Connelly Pty Ltd v Byron Shire Council \[2009\] NSWLEC 1068](#)

PARTIES:

APPLICANT
S J Connelly Pty Ltd

RESPONDENT
Byron Shire Council

FILE NUMBER(S): 10868 of 2008 and 10869 of 2008

CORAM: Hussey C - Taylor C

KEY ISSUES: DEVELOPMENT APPLICATION :- Subdivision:
flooding implications, filling, access arrangements,
construction certificate application

**LEGISLATION
CITED:** [Environmental Planning and Assessment Act 1979](#) ,
[Environmental Planning and Assessment Regulation
2000](#) ,
[Threatened Species Conservation Act 1995](#) ,
State Environmental Planning Policy No 44 – Koala
Habitat Protection.

CASES CITED: Dem Gillespies v Warringah Council [2002] NSWLEC
224,

**DATES OF
HEARING:** 19, 20, 21 Jan 2009

**DATE OF
JUDGMENT:** 9 March 2009

**LEGAL
REPRESENTATIVES:** APPLICANT
Mr P. Tomasetti, SC
Instructed by Mr M. Young
of bourke love mccartney

RESPONDENT
Mr A. Seton, solicitor
of Marsdens Law Group

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Hussey C and Taylor C

9 March 2009

**10868/10869 of 2008 S J Connelly Pty Ltd V Byron Shire
Council**

JUDGMENT

1 These proceedings arise from the council's refusal of the following development applications at Suffolk Park, Byron Bay:

A) Appeal No 10868/2008; is an appeal against the refusal of a development application (DA) proposing the creation an additional 17 residential lots + community lot within a community title subdivision containing private roads.

B) Appeal No 10869/2008; is an appeal against council's deemed refusal to issue a Construction Certificate (CC) for a previously approved development of this land.

2 The parties agreed that both matters be heard concurrently, although the applicant was prepared to stand aside the CC application pending the outcome of the DA appeal.

3 Prior to the lodgement of this DA, development consent was granted by way of consent orders (consent 1991/453) in 1992 for an overall subdivision of this land to basically create 214 allotments, generally in accordance with a designated plan by Supbrook Pty Limited Development Proposal (SDP).

4 This consent allowed for future medium density development of the area now the subject of this appeal. It also noted filling on the eastern part of the land, including the Tallow Creek watercourse area, which would be subject to permission being granted for the removal of trees.

5 The subject land is part of "Planning Unit 12" (PU12). The consent 1991/453 allowed for the extension of Road 17 and the construction of a new cul-de-sac Road 17A, to provide access and services to the land. This land is situated adjacent to an obvious natural watercourse that has flora identified as an endangered ecological community (EEC).

6 The current DA proposes the subdivision of this part of PU12 into 17 community-titled residential lots to be serviced by a private road network. Insofar as a number of contentions for this DA were initially raised by council, conferencing by the parties reduced the outstanding issues to:

- Suitability of filling the site,
- Flooding impacts,
- Climate change considerations.
- Access provisions.

7 The Court notes that the other issues identified initially concerning ecological impacts and pedestrian and bicycle access across the site, were not pursued by the council.

8 The CC appeal relates to councils refusal of the detailed engineering works that could be undertaken pursuant to consent 1991/453. However, the detailed engineering plans relate directly to the current DA layout and not the original "future Medium Density development" development. The following contentions were identified for this appeal:

- The CC application is inconsistent with development consent 1991/453.
- The CC proposes excessive filling in the floodplain.
- Unsatisfactory stormwater and flood management components of the application.
- The private road concept, including its geometric design is unacceptable because of risks to traffic movements and it denies council and the general public access to the watercourse area and adjoining active reserve areas.

The site.

9 Suffolk Park is a residential area located to the south of Byron Bay and the site is situated within the “Baywood Chase” estate, at the eastern end of Dehnga Place. The development site is described as Lot 6 in DP 1115281 (formerly part of Lot 305 in DP 1101778). It has a total area of 3.235 ha.

10 The land slopes from the west at approximately RL 8.0 AHD near the existing section of Dehnga Place, to approximately RL 4.0 AHD on the eastern, low-lying watercourse area. It contains a regenerating Broad-leaved Paperbark-Coastal Cypress community, which has a developing littoral rainforest component. The community currently represents an Endangered Ecological Community being “Swamp Scelerophyl forest on coastal floodplains”.

The proposal

11 The DA proposes the creation of 17 residential allotments with variable areas and a community lot, which are generally in the order of 650 sq m. It also proposes the extension of Dehnga Place by a private road system comprising Road A with a 12m road reserve and 6m carriageway and Road B with a 9.5m (variable) reserve and 4m carriageway. This road system is to be maintained under a community title scheme.

12 The proposal involves filling of a significant section of the site to provide cross-falls on the new allotments that comfortably transition to the existing allotments. Along the watercourse area and part of the southern residential boundary it is proposed to construct retaining walls up to 2.4m in height, to contain the filling. The overall length of these retaining walls is approximately 276m.

13 The development includes a detention basin behind the retaining wall adjacent to lot 16, which incorporates an outlet structure into the watercourse environs.

Planning controls

14 The following planning controls are relevant.

- *Environmental Planning and Assessment Act 1979* .
- *Environmental Planning and Assessment Regulation 2000* .
- *Threatened Species Conservation Act 1995* .
- *State Environmental Planning Policy No 44 – Koala Habitat Protection*.
- *North Coast Regional Environmental Plan* .
- *Byron Local Environmental Plan 1988* . Under this LEP the land is zoned 2(a) Residential and the subdivision is permissible with consent pursuant to cl 10. Clause 24 contains provisions for development of flood liable land.
- *Byron Development Control Plan 2002 (DCP)* , which contains the following relevant sections Part B – Subdivision, Part G – Vehicle Mitigation and Management and Part M – Fire Mitigation and Management.
- *Suffolk Park Development Control Plan No 9 (DCP 9)* , under which Part 4 – Environmental Design Subdivision and Part 5 – Environmental siting is relevant.

15 Detailed evidence on behalf of council was presented by:

- Mr S Doolan, consulting water engineer,
- Mr R Begovic, council's development engineer.

16 For the applicant detailed evidence was presented by:

- Mr M Gibson, consulting water engineer.
- Mr R Sargent, consulting engineer
- Mr T Emery, consulting engineer.

A) Appeal No 10868 of 2008

Drainage/flooding issues.

17 The threshold issue identified by the council concerns the flooding impacts arising from the development. In particular council is concerned about the adoption of appropriate flood modelling applications to assess the flooding impacts because the land is situated within the Low to Medium flood hazard category.

18 The assessment of this issue is subject to the following provisions of cl 24 of the LEP.

24 Development of flood liable land

(1) This clause applies to flood liable land.

(2) Notwithstanding any other provision of this plan, a person shall not erect a dwelling house, or any other building, or carry out filling or construction of levees on land that is flood liable, except with the consent of the council.

(3) The council shall not consent to the erection of a building or the carrying out of a work on flood liable land unless:

(a) the council is satisfied that:

(i) the development would not restrict the flow characteristics of flood waters,

(ii) the development would not increase the level of flooding on other land in the vicinity.

19 Accordingly, the impacts arising from the development were assessed during the proceedings using two Tuflow modelling scenarios. In 2002 a report by Water Studies Pty Ltd (Exhibit 6) using the Tuflow Modelling Software edition 2002 was carried out for the Byron Shire Council to assess flood risks on Tallow Creek. Mr Gibson, the applicant's expert undertook the modelling on behalf of the Council. In 2007, Mr Gibson undertook a new modelling assessment of the flood risks that might arise from the new development proposal using the most recent, updated 2007 Tuflow modelling software. In addition, Mr Gibson compared the results from the 2007 software to the results derived from the 2003 version software (Exhibit C).

20 The essence of the contentions between the parties regarding flood risk is that the flood levels produced from the two versions (2003 and 2007) of the Tuflow modelling are different. The 2003 software produced a 400mm higher flood level than that in the 2007 version. The applicant relies

upon the 2007 version whereas the Council contends that the 2003 model results are more reliable and should be used to assess flood risk.

21 In order to understand the context of the differences between the parties it is useful to describe and explain the historical development of the software and its application by the Council in assessing previous developments within the catchment.

22 The 2002 model was calibrated by Mr Gibson to known flood debris marks that formed following the 1999 flood in the catchment, which was estimated to be 1:20 year annual recurrence interval (ARI) event. However, the model was never validated as is recommended by the 2005 NSW Floodplain Development Manual. This was because no flood event had occurred in the catchment following the 2002 report that enabled validation. The model was constructed using limited within catchment data (i.e. run-off and rainfall measurements) with the model relying upon data provided in the Australian Rainfall and Run-off manual. However, Mr Gibson stated that the 2002 model and report were as reliable as it could have been bearing in mind the lack of data at the time.

23 Subsequent to the 2002 modelling and report, in 2006 Mr Gibson on behalf of the Council, undertook a further assessment in the catchment to assess the impact of the filling and development of the sports field, which is immediately to the south and adjacent to the proposed development application. In undertaking this flood risk assessment Mr Gibson used the then current, updated Tuflow model (2006 version). The council accepted the findings of Mr Gibson's study, which showed that there would be some minor impacts arising from the sports field development. The sports fields have now been constructed.

24 As part of the DA, the subject of this appeal, Mr Gibson as an employee of MRG Water Consulting Pty Ltd undertook in 2007 a reassessment of the flood risks that may arise from the development on behalf of the applicant. In undertaking this assessment, Mr Gibson used the most up to date Tuflow model version available. This latest version, dated 2007, contained multiple updates and corrections to numerical routines that had known errors and inaccuracies in the previous versions.

25 The modelling results from 2007 produced a lower flood height than that derived from the 2003 software – refer to Table 1. The respondents consulting water engineer, Mr Doolan, said that it is more appropriate to use the original flood model results even they do not include updates and numerical corrections, or any recent land use changes (including the 2006 sports field development). The essence of his argument in support of the 2003 model version was that there is a need to bear in mind the risks and effects flooding may have on property and that the 2003 version is more valid as it has been calibrated and was implemented in line with the NSW Floodplain Development Manual.

Table 1

Modelling results for the 1: 100 year flood (1 % AEP) from the 2003 and 2007 versions of the Tuflow model. Results include the existing conditions, plus the predicted effects of climate change on the catchment (40 % increase in rainfall intensity) on existing conditions and on post-development scenarios. Data are taken from Exhibit C. The locations A, B, C are shown in Attachment A, which has been adapted from exhibit B & 14).

Locations

within the catchment	Tuflow Model Version	Existing conditions, existing climate - flood height (m)	Existing conditions plus climate change - flood height (m)	Developed conditions plus climate change - flood height (m)
A (node 1840)	2003	5.289	5.517	5.531
	2007	4.788	5.167	5.169
B (node 1820)	2003	5.201	5.524	5.54
	2007	4.788	5.167	5.169
C (node 1860)	2003	5.289	5.518	5.531
	2007	4.913	5.167	5.169

26 Mr Gibson stated that in applying the 2007 model to the catchment he correlated the results of his most recent model with those of 2003 to try and ascertain if there are significant discrepancies and errors given the difference in the results (Table 1). This correlation was undertaken in the same area where the 2003 model was calibrated, which also shows little topographic variation.

27 On completion of his investigations into the veracity of the 2007 model results, Mr Gibson drew the conclusion that the 2007 software “updates but does not destroy the calibrations in the 2003 model, which means it is valid and acceptable to use”.

28 Mr Gibson stated that it is best practice to use new updated versions of model software and to include major land use changes when undertaking an assessment of flood risk.

29 In June 2005 a flood event affected the Tallow Creek catchment which resulted in the flooding of Beech Drive, adjacent to the dam and approximately 300 m to the north of the proposed development site. Both the consulting water engineers agreed that neither the 2003 nor the 2007 versions of the software predicted the overtopping of Beech Drive. They said that this may indicate a limitation of the models or there was a blockage in the drainage system (e.g. the 3 x 900 mm pipes at the outlet of the stormwater basin adjacent to Beech Road) that caused overflow of stormwater. In either case, this incident indicates that there is a degree of uncertainty in the models’ capacity to accurately predict such events.

30 Therefore, because neither the 2003 nor the 2007 model have been validated it is difficult to assess with certainty, the accuracy of either of the model results. However, we find that the more inclusive approach undertaken by Mr Gibson is preferable. Mr Gibson’s model used the updated software that removed known errors, incorporated recent land use changes within the catchment and correlated the 2007 results to the 2003 results. Consequently, we find that the 2007 model results are more likely to be reliable, though still potentially inaccurate.

31 The alternate flood level contour results from the modelling are shown on the plan at attachment A. The applicant’s 2007 flood contour line is closer to the watercourse and it forms the alignment for the retaining wall. The alternate 2003 flood contour line preferred by Mr Doolan is

approximately 30 – 40m to the west and it traverses the proposed lots 8, 9, 16, 17 and 18. Its adoption would not permit the DA in its current form.

32 It is apparent then that there are two main consequences from a major flooding event. The first is that the subject land may experience some flooding based on the 2003 modelling and secondly flooding may be directed onto other properties due to the removal of storage space on the subject site.

33 The Court has no doubt that in the first instance; the subject land will not be inundated in any case, if the retaining walls are built and the land filled. However, the retaining walls may divert and increase flooding of other downstream properties by reducing the available flood storage area, if the 2003 modelling prediction was to be realised.

34 In this regard, the Court notes that the flood level differences in the model will principally affect the properties at the eastern margins (the area of low hazard of flood fringe) of Tallow Creek valley. Although there is likely to be little or no serious erosive flow at the margins of flood waters, the 2003 Tuflow modelling shows that in the event of 1:100 ARI year event, properties on the eastern edge of Tallow Creek will be flooded should floodplain filling take place as per the development proposal.

35 The assessment of the impacts of potential flooding also involved consideration of *climate change implications*. This matter is addressed in terms of council's policy application, which provides for the consideration of a climate change scenario of "40% increase in rainfall and corresponding increase in tailwater levels". The engineers agree that this is appropriate in the circumstances and have applied this to the modelling.

36 With the inclusion of the agreed climate change factors, the 2003 flood modelling predicts that there will be increases in flood heights of 24 mm at locations A, B and C on the plan at attachment A. In contrast, the 2007 flood model predicts an increase of only 2 mm at each of these locations in the post development scenario. Nevertheless, both modelling results indicate the development will increase the flood levels to some extent in the 1%AEP flood event and this must be considered in light of cl 24 of the LEP.

37 Also of relevance, Part K of the DCP contains the local controls for flood liable lands. The stated objectives include:

- *To reduce the impact of flooding and flood liability on individual owners and occupiers,*
- *To reduce private and public losses resulting from flooding...*

38 The associated controls require a detailed report demonstrating that the development will not increase the flood hazard or flood damage to other properties. Although this is generally not required for the flood fringe.

39 As previously stated, both flood modelling results indicate that the development will increase flood levels to some extent, which does not satisfy cl 24. Whilst the proposed retaining wall will protect the residential area of the development in the design flood event, it is likely additional risks arising from floodplain filling and diversion by the retaining wall will be borne either downstream or on the western margins.

40 The Court's finding on this flooding issue is based on the fact that the site is situated in a flood-liable area, which has a low – medium hazard risk and where parts of the eastern section will be subject to inundation in the 1% AEP design storm. Whilst the Court is inclined to accept the 2007 modelling approach, nevertheless there are risks because that modelling has not been validated and is therefore not completely reliable.

41 The modelling results are also dependent on the climate change assumptions adopted by council and applied by the engineers. No details on the formulation of this policy were presented to the Court and in these circumstances the consequences of future climate change, in terms of speed and magnitude has to be regarded as uncertain. This then imposes further limitations on the reliability of the modelling.

42 Therefore, where the development controls seek to not increase flood hazards or risks, then the Court considers a cautious approach appropriate. Such an approach would encourage a development design that was sympathetic to its environmental context and share any unforeseen flooding risks, such as the 2005 flooding event.

43 In these circumstances, the Court considers a more responsive design would follow the natural contours of the land and maintain flood storage areas, rather than impose the substantive retaining wall structure, which is likely to deflect stormwater onto other properties, in extraordinary events if the 2003 modelling scenario occurs. A sympathetic design could likely maintain the perimeter road adjacent to the watercourse, as part of the flood storage area in major flood events, which would have the consequence of sharing any flood risks. The proposed DA does not achieve this.

44 Based on the evidence presented, the Court does not consider that this site is suitable for the form of development proposed.

Access provisions

45 This issue was raised initially in the context of the provision of adequate pedestrian, bicycle and vehicular access across the site. In this regard the Court notes the applicant's agreement to provide a footpath/cycleway along the eastern portion of the site, adjacent to the retaining wall. Subject to an appropriate and safe design, this concession most likely satisfies part of this issue, although the alignment would encroach into the EEC.

46 Apart from this, the council opposes the creation of the private access road system. This is on the basis that consent 1991/453 provided for the extension of Road 17 and construction of Road 17A as conventional public roads. This outcome would allow convenient public access, including regular service vehicle access to the site. Also, the public roads would allow general public access to the adjoining reserve lands for recreational and maintenance purposes.

47 Many of the practical engineering aspects of the private road system can be addressed according to the evidence in the joint engineers report. Nevertheless the Court is not satisfied that this form of road system, which includes a significant change in alignment, is generally consistent with the overall intent of the current consent, which was to allow free public access through PU12 to the adjoining reserve and watercourse area. As the private roads would significantly restrict this, and no specific details of the how the change in road status would be presented were submitted, this is considered a negative aspect of the proposal.

Ecological issues

48 As noted previously, council did not press the ecological issues. However the Court considers it necessary to assess the impact of any development on the native vegetation, within the flood liable watercourse environs on the eastern part of the site, prior to granting any consent. This area comprises the Endangered Ecological Community (EEC) “Swamp Scerophyll forest on coastal floodplains”, which warrants appropriate conservation.

49 In the context of the surrounding development, the Court does not consider that the construction of the substantive retaining wall in such close proximity to the EEC provides a satisfactory interface and this is a further negative aspect of the proposal.

Other issues

50 The evidence presented to the Court raised concerns about the merits of the proposal in terms of the suitability of the site for the particular development. This concern arises due to the extent of the proposed filling (approximately 2m high) that is required to secure the new lots and the extent of the associated retaining wall. This retaining wall has an overall length of approximately 276m along the eastern boundary and the southern boundary, adjacent to the playing fields.

51 It is apparent from the engineering plans in exhibit A that this filling is in part, to achieve attractive new lots that have relatively flat cross-falls that are consistent with the existing lots. However those lots are not contained by retaining walls, similar to that proposed. Instead the existing residential allotments generally follow the natural contours of the land.

52 This approach of following the natural contours is also evident at the stormwater dam, which is an attractive water element that adjoins the site to the north. The dam construction includes an earth embankment wall adjacent to the watercourse that has grass batters in the order of 1:4. There is a footpath along the top of this wall that allows public access between the main road entry to the estate in Beech Drive and the active open space area adjoining the southern boundary of the subject land. The batters form a relatively natural transition to the EEC area. This is in contrast to the intrusive retaining wall.

53 The Court considers that effectiveness and amenity impacts, particularly visual impacts of the proposed retaining wall is a relevant s79C consideration matter that requires adequate assessment prior to the grant of any consent.

54 On the basis of the evidence and observations at the view, it is apparent that the watercourse area is substantially vegetated and it contains fauna and flora warranting protection. This is notwithstanding some of the provisions of consent no. 1991/453, which purported to allow some filling of this area.

55 It is also apparent that the active playing areas adjoining the site to the south are well maintained and utilised. There are various access points to the play areas and this includes earth tracks through the subject property generally along the proposed retaining wall alignment that link the playing areas to the lake embankment connection to Beech Drive. As such this informal linkage incorporates attractive views of natural features of the landscape.

56 Whilst the Court notes the applicant's preparedness to formalise a pathway along this alignment, its location is limited due to the retaining wall and adjacent EEC vegetation. Consequently any such pathway would be in close proximity to the 2m high masonry retaining wall, above which would be parking facilities and presumably large dwelling houses. The Court considers the inclusion of the proposed retaining wall is a foreign element in the landscape, which introduces unsatisfactory visual, amenity and possibly safety impacts in major flood events.

57 In this regard, DCP 9 contains development control guidelines to achieve a variety of aims including:

- *to take advantages of the variety of land forms and drainage patterns to provide a range of innovative subdivision designs, housing types and residential development designs to give Suffolk Park its own identity and uniqueness.*
- *minimise and control flooding by appropriate drainage controls and works.*
- *minimise engineering works associated with roadworks, drainage and individual allotment development.*
- *control development in such a way that the integrity of the Tallow Creek wetlands system are maintained and not affected by any new development.*

58 Whilst the Suffolk Park DCP does not specifically show public access across the subject land, nevertheless the Court considers there is probably a considerable public interest benefit in providing a satisfactory pathway across the site.

59 Accordingly, the Court does not consider the proposal satisfies adequately the aforementioned DCP aims, particularly to minimise engineering works associated with drainage, and that these issues should be addressed prior to any grant of consent.

(B) Appeal No 10869/08 – Construction Certificate

60 The subject CC plans were lodged pursuant to consent 1991/453 to enable the civil works to proceed. However, these detailed engineering plans are based on the current DA lot layout for 17 Torrens title lots, rather than any medium density development configuration shown in the SDP. They address specific details of a number of construction matters including:

- Earthworks involving site filling, the formation/grading and construction of the new internal roads of reinforced concrete design.
- Construction of stormwater road drainage, its connection to a detention basin and its outlet structure into the watercourse area.
- The construction of approximately 276m of retaining wall up to 2.6m in height.
- The construction of 2 sets of reinforced steps along the retaining wall leading to the watercourse area.
- Construction diversion drains and erosion/sediment control devices.

61 Insofar as this CC application was not determined by council, a number of issues were identified with the threshold issue concerning the proposals consistency with the prior consent 1991/453. The Courts examination of that consent shows that it was for a residential subdivision into 214 allotments and associated infrastructure generally in accordance with the 'Supbrook Development Proposal' plan (SDP).

62 Accordingly, the subject land is within the area designated area PU 12. The consent allowed, in respect of this area, for the extension of public Road 17 and construction of a new public Road 17A, which was to provide access to the “future medium density land” development. However the CC plans propose works for the 17 lot low density community title development.

63 Various aspects of the engineering details in the CC have been addressed in the joint engineering report (exhibit G) by Mr J Begovic, Mr R Sargent and Mr T Emery.

64 Consequently, the Court has assessed this appeal on the following basis that according to section 109C a **construction certificate** is:

A certificate to the effect that work completed in accordance with specified plans and specifications will comply with the requirements of the regulations referred to in section 81A(5).

65 Section 109K of the EPA & Act then allows appeals in the following circumstances.

109K Appeals against failure or refusal to issue Part 4A certificates

(1) An applicant for:

(a) a construction certificate, or

(b) a final occupation certificate, or

(c) a subdivision certificate,

may appeal to the Court against a consent authority's (or, in the case of a subdivision certificate for subdivision that is not the subject of development consent, a council's) decision to refuse to issue such a certificate or to issue a construction certificate subject to conditions.

66 Section 109F deals with restrictions on the issue of construction certificates as follows:

109F Restriction on issue of construction certificates

(1) A construction certificate must not be issued with respect to the plans and specifications for any building work or subdivision work unless:

(a) the requirements of the regulations referred to in section 81A (5) have been complied with, and

67 Section 81A refers to the effects of development consents and commencement of development. In sub-section (5) reference is made to the regulations that apply to subdivisions.

68 Division 2 of the EP&A Act Regulations lists the following requirements for construction certificates.

139 Applications for construction certificates

(cf clause 79A of EP&A Regulation 1994)

(1) An application for a construction certificate:

(a) must contain the information, and be accompanied by the documents, specified in Part 3 of Schedule 1, and...

69 Regulation 140 allows for more details as follows:

140 Certifying authority may require additional information

(cf clause 79B of EP&A Regulation 1994)

(1) A certifying authority may require the applicant for a construction certificate to give the certifying authority any additional information concerning the proposed building or subdivision work that is essential to the certifying authority's proper consideration of the application.

(2) Nothing in this clause affects the certifying authority's duty to determine an application for a construction certificate.

70 Relevantly section 145 deals with the compliance of the CC with the development consent and BCA as follows:

145 Compliance with development consent and Building Code of Australia

(cf clause 79G of EP&A Regulation 1994)

(2) A certifying authority must not issue a construction certificate for subdivision work unless the design and construction of the work (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent.

(3) Subclause (1) (b) does not apply to the extent to which an exemption is in force under clause 187 or 188, subject to the terms of any condition or requirement referred to in clause 187 (6) or 188 (4).

71 The procedure for determining the CC application is stated in Reg 142. Reg 146 then requires compliance with the development consent as follows.

146 Compliance with conditions of development consent

(cf clause 79H of EP&A Regulation 1994)

A certifying authority must not issue a construction certificate for building work or subdivision work under a development consent unless each of the following have been complied with:

(a) each condition or agreement requiring the provision of security before work is carried out in accordance with the consent (as referred to in section 80A (6) of the Act),

(b) each condition requiring the payment of a monetary contribution or levy before work is carried out in accordance with the consent (as referred to in section 94 or 94A of the Act),

(c) each other condition of the development consent that must be complied with before a construction certificate may be issued in relation to the building work or subdivision work .

72 Regulation 147 details the form of a construction certificate and Reg 161 lists certain matters that may be required to be satisfied, as follows.

161 Certifying authorities may be satisfied as to certain matters: section 1090

(cf clause 79V of EP&A Regulation 1994)

(1) This clause applies to the following matters:

(a) any matter that relates to the form or content of the plans and specifications for the following kind of work to be carried out in connection with the erection of a building or the subdivision of land:

(i) earthwork,

(ii) road work, including road pavement and road finishing,

(iii) stormwater drainage work,

(iv) landscaping work,

(v) erosion and sedimentation control work,

(vi) excavation work,

(vii) mechanical work,

(viii) structural work,

(ix) hydraulic work,

(x) work associated with driveways and parking bays, including road pavement and road finishing,

(b) any matter that relates to the external finish of a building.

(2) Any requirement of the conditions of a development consent that a consent authority or council is to be satisfied as to a matter to which this clause applies is taken to have been complied with if a certifying authority is satisfied as to that matter .

73 Part 3 of the Regulations dealing with construction certificates lists the information to be included in any construction certificate application. Of particular relevance in this matter, section 6 specifies the documents to accompany such application including:

Part 3 Construction certificates

6 Documents to accompany application for construction Certificate

(1) An application for a construction certificate must be accompanied by the following documents:

(a)...

(b)...

(c) if the development involves subdivision work, appropriate subdivision work plans and specifications,...

(4) Appropriate subdivision work plans and specifications referred to in subclause (1) (c) include the following:

(a) details of the existing and proposed subdivision pattern (including the number of lots and the location of roads),

(b) details as to which public authorities have been consulted with as to the provision of utility services to the land concerned,

(c) detailed engineering plans as to the following matters:

(i) earthworks,

(ii) roadworks,

(iii) road pavement,

(iv) road furnishings,

(v) stormwater drainage,

(vi) water supply works,

(vii) sewerage works,

(viii) landscaping works,

(ix) erosion control works,

(d) copies of any compliance certificates to be relied on.

74 It is quite apparent from these regulations that the certifying authority must be satisfied on certain matters, particularly section 145(2) that the development is not inconsistent with the consent and there is reasonable compliance with the requirements of the conditions of consent as per Reg 161 (2).

75 In this matter, the threshold question to be determined is whether the CC is not inconsistent with the development consent.

76 Accordingly, condition 1 in consent 1991/453 refers to the “Suffolk Development Plan”, wherein the subject land appears as a conceptual approval of a new Road 17A to service future ‘medium density development’. It does not in the Court’s assessment, contain any details of the form of medium development, such as the location of individual dwellings or their specification. These details would be required to enable derivation of associated construction plans to enable construction of this part of ‘PU 12’ development.

77 In the absence of such details, the Court does not consider this CC can arise from consent 1992 /453. Instead, a further detailed development application would be required and consent granted before any construction certificate could be granted for this area of land.

78 Insofar as the CC has been lodged on the basis of the current DA, the Court does not consider that this subdivision layout proposal satisfies the “not inconsistent with” considerations regarding consent 1991/453.

79 The meaning of ‘consistent with’ and associated matters has been previously dealt with in a number of cases, including the matter of *Dem Gillespies v Warringah Council* [2002] NSWLEC 224 by Bignold J as follows:

70. With the benefit of the survey of the decided cases on the meaning that has been given to the word “*consistent*” in clauses in planning instruments that require an opinion by the consent authority that a proposed development be “*consistent with the zone objectives*”, I would for myself, conclude that the word “*consistent*” appearing in **cl 12(3)(b)** of the LEP, assumes its ordinary and natural meaning. That meaning in my respectful opinion is **not confined** to the notion of the proposed development “*not being antipathetic*” to the desired future character of the Locality.

71. The dictionary meaning of the word “*antipathetic*” (eg the **Macquarie Dictionary**: “*having a natural antipathy, contrariety or constitutional aversion*”) indicates a far stronger, but narrower, connotation than the connotation of the word “*inconsistent*”. Clearly, there can be an “*inconsistency*” with a stated object which does **not** involve any element of “*antipathy*” to that object.

72. When Clarke JA in *Coffs Harbour Environment Centre Inc* stated at 193 that whatever be the precise ambit of provisions in a local environmental plan which prohibited all development “*unless the Council was satisfied that the carrying out of the development is generally consistent with one or more of the stated objectives of the zone*” (and concurrently permitted development other than that which was prohibited) “*the provisions do not permit an antipathetic development...*”, his Honour was simply propounding the view that he had already expressed at 192 that the construction under land zoned “*Public Recreation*” of a sewerage treatment plant “*could not possibly be regarded as being compatible with public recreational use of the land*”. His Honour had deliberately eschewed any attempt to define the ambit of the relevant planning provisions and his conclusion that they did not permit the carrying out of “*antipathetic*” development was nothing more than postulating an obvious and unarguable proposition that such a development could **not** qualify as being “*generally consistent*” with the zone objectives.

73. Accordingly, it is clear in my opinion that whereas something that is antipathetic to a stated object is obviously inconsistent with that object, antipathy is not a true synonym of inconsistency and the meaning of inconsistency is not to be confined to the meaning of antipathy. Inconsistency can arise without any antipathy.

74. On the other hand, “*compatibility*” in my judgment may reasonably be regarded, a synonym of “*consistency*” and the meanings of these words is very similar, although in *Coffs Harbour Environment Centre* Clarke JA at 192 rejected as “*too expansive*” an argument that “*consistent*” meant “*compatible*” and one of the dictionary meanings of the latter word was “*mutu*

ally tolerant ”. I would respectfully agree with Clarke JA’s conclusion that that particular meaning of “ *compatible* ” was too expansive in the context of its application to the statutory provision requiring the consent authority’s opinion that the proposed development be “ *generally consistent* ” with the zone objective. However, the primary dictionary meaning of “ *compatible* ” (the **Macquarie Dictionary** : capable of existing together in harmony) is in my judgment, both apt and applicable to the interpretation of the word “ *consistent* ” in its context in **cl 12(3)(b)** of the LEP.

75. In so concluding, that the ordinary and natural meaning of the word “ *consistent* ” in its statutory context is to be applied as being appropriate to the true meaning of **cl 12(3)(b)** I have had regard to the function and effect within the LEP of the Locality Statements and of those components of such Statements that state the “ *desired future character* ” of each of the localities. I have earlier drawn attention to the particular provisions of the LEP that either incorporate or contain reference to the Locality Statements and those components of those Statements that state the Desired Future Character of each of the localities. The function within the LEP of the Locality Statements is self-evidently significant. I have also had particular regard to **cl 18** earlier recited where **subclause (2)** declares that “ *compliance with development standards, however, does not guarantee that the development is consistent with...the desired future character of the locality* ”. This provision, in my opinion, is a reinforcement, and perhaps even an apt commentary upon, the true effect of the joint operation of the requirements of **cl 12(2)(b)** and **cl 12(3)(b)** .

76. Finally, and perhaps most importantly, I have had regard to **cl 3** of the LEP which expressly states the purposes of the LEP and in particular to purpose (b) which “ *describes the desired characters of the localities that make up Warringah and relate the controls on development to the achievement of the desired characters of those places* ” (my emphasis). This particular provision, is in my judgment, of considerable importance inasmuch as it confirms the legitimacy of according to the word “ *consistent* ” in its context in **cl 12(3)(b)** its ordinary and natural meaning, in preference to a meaning (eg “ *not antipathetic* ” as pressed by the Applicant’s argument) which “ *would not best meet the purposes* ” (cf “ *objects* ”) stated in the LEP: see **s 25(3)** of the *EP&A Act* which states:

(3) Where a provision of an environmental planning instrument is genuinely capable of different interpretations, that interpretation which best meets the aims, objectives, policies and strategies stated in that instrument shall be preferred.

77 For the foregoing reasons, I am quite unable to accept the Applicant’s argument that the word “ *consistent* in its context in **cl 12(3)(b)** means “ *not antipathetic* ”. Rather I would hold that it has its ordinary and natural meaning (eg as in the Macquarie Dictionary: “ *1. agreeing or accordant; compatible; not self-opposed or self-contradictory; 2. consistently adhering to the same principles, course etc* ”).

80 However, it seems to the Court that the application of the test in s 145(2) for a subdivision construction certificate should be of a more restrictive nature. Any discretion about any consistency

or compatibility with the qualitative objectives of a subdivision development application should have been determined prior to issue of the consent. The consent then fixes the new subdivision lot boundaries, the general alignment of new roads or access ways, the position of drainage corridors and other servicing arrangements.

81 The achievement of the integrity of the consent then depends on the associated CC plans /specifications being compatible with and substantially conforming with the development consent layout and conditions. It does not appear reasonable that a CC for a subdivision should modify in any significant way the consent. On this basis, the Court considers if the CC for a subdivision does not substantially conform with the consent, then this is a ground for refusal, as in this matter.

82 In this regard, the DA proposes the creation of 17 individual allotments, serviced by a private road, which is within a community title system. As these lots have proposed areas ranging from 610 sq m to 792 sq m, they represent a low density development, which the Court does not consider is consistent, or in conformity with the form of a 'future medium density' consent.

83 Furthermore, the overall concept of DC 1991/453 is to create a public road system to provide access and service to the overall estate. This is the case with Road 17 that has been constructed and provides the lead-in Road No 17A, which is similarly designated. The proposed change in this road alignment from a cul-de-sac to a loop road with spur, the reduction in pavement width and the change in status from a public road to a private road, which restricts public access and represents a significant departure from the intent of the development consent.

84 Consequently the Court does not consider this CC satisfies section 145 (2), or that a CC should be able to significantly amend a development consent as in this matter. The CC application fails on this test.

85 If however, this approach is wrong, the Court considers there are other outstanding matters that would lead to the rejection of the CC based on the requirements of the regulations. This is on the understanding that the CC plans should provide sufficient specificity to enable the necessary works to be undertaken to achieve the intent of consent 1993/453.

86 The various regulations refer to the submission of specific engineering details but these required details have not been provided to the Court in sufficient detail to allow the issue of the CC by the Court and reference is made to some of the deficiencies as follows.

87 *Road works*; The CC shows the horizontal and vertical road alignments but it is for narrower private roads that depart from the DCP controls. Whilst the engineers agree the roads are generally satisfactory nevertheless further amendments are required to include a 10m radius in the cul-de-sac and road widening is required to meet RFS requirements. The Court does not consider it appropriate to condition these matters. Instead the CC plans should be final, which the current CC plans are not. The construction of these private roads is of a reinforced concrete specification for which the structural certification has not been submitted. This is also required as part of the CC certification.

88 *Road drainage*; The roads include stormwater reticulation with various sized pipes. The supporting details and engineering certification for this drainage design has not been submitted.

89 *Detention tank*; The CC includes a significant detention tank incorporated into the structure of the retaining wall. However no supporting certification documentation has been submitted regarding the adequacy of its sizing, outlet flows and structural integrity.

90 *Structural works*; The CC provides for the construction of approximately 276m of reinforced concrete retaining wall, up to 2.4m in height. However no specific certification from a structural engineer has been provided to the Court.

91 *Service infrastructure*; The CC plans include the sewage reticulation, water and electricity reticulation layouts typical fire/ domestic water supply connection and metering details. Whilst these plans look impressive, no supporting details of their adequacy have been provided to the court as required by the Part 3 – 6 4(b) regulation.

92 *Specification*; The Court presumes that a detailed construction specification would form part of the CC. None was provided for the Courts consideration.

93 In summary, the Court does not consider that sufficient detailed information has been submitted to allow the approval of this CC and therefore it should be refused.

Findings

94 Having considered the evidence, the submissions and undertaken a view, the Court does not consider this DA merits consent. Insofar as the threshold issue in the DA appeal concerns the flooding impacts, the Court is generally satisfied to accept the 2007 modelling application (as updated), rather than the original 2002 version, as the most appropriate method to represent “best practice” at this time. This application indicates that there will be a marginal increase in the flood level in the order of 2mm (subject to modelling tolerances), which is not consistent with cl 24 of the LEP.

95 However, the reliance of these modelling results is qualified on the basis that the modelling was undertaken with limited local flooding details thereby preventing it being validated. Also of concern is the evidence of the flooding experienced in 2005, which is not consistent with the modelling and remains unexplained. Furthermore, the climate change factor is “a best estimate”, which could result in other considerable adjustments in the future.

96 Considering these limitations and uncertainties, the Court considers a cautious approach should be adopted by relying on estimated flood levels, which minimise flooding risks to persons and both the subject property and other external properties in this catchment. Whilst the construction of the retaining wall along the 2007 flood line certainly eliminates the flooding risks to the subject property, it consequently reduces the flood storage area in a major event and likely transfers this risk to other properties.

97 In this regard, the flood level contours in exhibit B shows a separation distance of some 40m between the applicant’s level and alignment of the retaining wall to that submitted by council. Taking into account the potential flood storage area that would be eliminated by the retaining wall in a major flood event, the Court does not consider this a reasonable balance between the competing private and public interests, allowing for the limitations of the modelling.

98 Directly associated with this, the Court also has significant concerns about the suitability of this development on the site, in terms of the amenity impacts of the substantive retaining wall, particularly its interface with the EEC, as mentioned previously.

99 The Court accepts that the parties have not had the opportunity to address on the associated issues of the extent of lot filling and amenity impacts of the retaining wall. Accordingly these findings are presented prior to any orders being made to allow limited further submissions in this regard.

100 The Court also has reservations about the suitability of the proposed private roads, based on the joint engineers evidence that the roads would need to be widened in sections to satisfy RFS requirements. This would change the lot layout, with unknown consequences at this stage. In this regard, the Court relies on the agreement of the engineers that the CC plans are not sufficiently complete to allow approval. It also appears that the public interest would be well served by allowing public access to the EEC and adjoining open space land to the south of the subject land, as indicated in consent 1991/453 that shows Road 17A adjoining the reserve.

Conclusions

101 Final orders on Appeal 10868 of 2008 are stayed for a period of 14 days from the date of this judgement to allow the parties to make arrangements for any further submissions on the other issues raised.

102 With regard to the CC appeal, the Court does not consider the submitted details are consistent with, or compatible with consent 1991/453 and therefore this application does not comply with Regulation 145 (2), nor does it provide the necessary details for approval. In these circumstances this CC application fails.

Court orders

103 The Court orders in respect of Appeal No 10869 Of 2008:

1 The appeal is dismissed.

2 The application for a construction certificate (CC) for civil works at Lot 6 DP 1115281 Dehnga Place, Suffolk Park is refused.

R Hussey M Taylor
Commissioner of the Court Commissioner of the Court
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