



Land and Environment Court New South Wales

Case Name: **Ward v Port Stephens Council (No 2)**

Medium Neutral Citation: [2023] NSWLEC 1493

Hearing Date(s): 16-17 February 2022; 11 March 2022; 13 April 2022

Date of Orders: 31 August 2023

Date of Decision: 31 August 2023

Jurisdiction: Class 1

Before: Adam AC

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development application no. 16-2019-135-1, as modified during the course of the proceedings, for the construction of a single-storey dwelling house on an approved flood mound at 1 Swanreach Road, Hinton NSW 2321, is determined by the grant of consent, subject to the conditions in Annexure A.
(3) The exhibits are retained.

Catchwords: DEVELOPMENT APPLICATION – single storey dwelling house – refusal – s34AA – no agreement reached between the parties – development application modified to include flood refuge in attic – Court requested changes to draft conditions – amended conditions provided

Legislation Cited: Conveyancing Act 1919, s 88E
Land and Environment Court Act 1979, s 34AA

Cases Cited: Ward v Port Stephens Council [2023] NSWLEC 1423

Category: Principal judgment

Parties: Neil Andrew Ward (First Applicant)
Bronwyn Patricia Ward (Second Applicant)
Port Stephens Council (Respondent)

Representation:

Counsel:

M Staunton (Applicants)

H Irish (Respondent)

Solicitors:

Peter Evans & Associates Solicitors (Applicants)

Local Government Legal (Respondent)

File Number(s):

2021/285440

Publication Restriction:

Nil

JUDGMENT

- 1 The Applicants had applied to Port Stephens Council (Council) for development consent to construct a dwelling house at 1 Swanreach Road, Hinton NSW 2321, land legally defined as Lot 51 in DP 1250604. The dwelling house was to be a four bedroom, single-storey building. The Council refused the development application, and the Applicants appealed against the refusal.
- 2 The matter was allocated by the Court to a conciliation conference under s 34AA of the *Land and Environment Court Act 1979*. As no agreement was reached between the parties at the conciliation, the matter moved directly to a hearing.
- 3 In *Ward v Port Stephens Council* [2023] NSWLEC 1423 (the first judgment), the proposal is described in detail, and the evidence is summarised. (Readers are referred to the first judgment for full details.) I concluded that development consent should be granted but required that there be some changes to the draft conditions of consent which had been proposed. I requested that the parties address the specific conditions that I had identified, and either provide an agreed set of conditions, or if agreement were not reached, each parties' favoured wording for those conditions which remained in dispute. The parties were able to reach agreement and provided me with an agreed set of conditions.
- 4 Over time, the original application was amended in a number of ways of which the most important was the provision of a flood refuge in the attic. The refuge was designed to be above the level of the Probable Maximum Flood.
- 5 The clarifications and amendments that were sought were those in [311]-[331] (first judgment). The proposed/draft conditions agreed between the parties filed on 18 August 2023 have addressed the issues raised to my satisfaction.
- 6 The changes include in Condition 5.0(9) that a public positive covenant pursuant to s 88E of the *Conveyancing Act 1919* in favour of the Court be registered on title requiring compliance with the Flood Emergency Response

Plan (FERP) for the life of the development and the inclusion of a new condition as 6.0(3) providing for the ongoing review of the FERP.

- 7 A new condition 6.0(5) is introduced, which provides that “the approved dwelling must not be used for Short Term Rental”.

Final orders

- 8 The Court orders:

- (1) The appeal is upheld.
- (2) Development application no. 16-2019-135-1, as modified during the course of the proceedings, for the construction of a single-storey dwelling house on an approved flood mound at 1 Swanreach Road, Hinton NSW 2321, is determined by the grant of consent, subject to the conditions in Annexure A.
- (3) The exhibits are retained.

I certify that this and the preceding page are a true copy of my reasons for judgment.



P Adam
Acting Commissioner of the Court

Annexure A

DETERMINATION OF DEVELOPMENT APPLICATION BY GRANT OF CONSENT

Development Application No: DA16-2019-135-1

Development: Single storey dwelling on an approved flood mound.

Site: Lot 51 DP 150604, and known as 1 Swanreach Road, Hinton.

The above development application has been determined by the granting of consent subject to the conditions specified in this consent.

Date of determination: 31 August 2023

Date from which consent takes effect: Date the consent is registered on the NSW Planning Portal.

TERMINOLOGY

In this consent:

- (a) Any reference to a Construction, Compliance, Occupation or Subdivision Certificate is a reference to such a certificate as defined in the *Environmental Planning and Assessment Act 1979*.
- (b) Any reference to the "applicant" means a reference to the applicant for development consent or any person who may be carrying out development from time to time pursuant to this consent.
- (c) Any reference to the "site", means the land known as Lot 51 DP 150604, and known as 1 Swanreach Road, Hinton.

The conditions of consent are as follows:

DEFERRED COMMENCEMENT

The following are the Deferred Commencement condition(s) imposed pursuant to Section 4.16 of the Environmental Planning & Assessment Act 1979.

- (A) Pursuant to Section 4.16 of the Environmental Planning and Assessment Act 1979, a deferred commencement consent is granted to **DA 16-2019-135-1** subject to the following conditions of consent:
1. Details of the diesel generator for the proposed flood refuge shall be submitted to Council.
 2. A report from a qualified acoustic consultant shall be submitted confirming that the noise from the generator will not have an unacceptable impact on the amenity of the occupants of the refuge and the dwelling.
- (B) Written evidence that the matter identified in deferred commencement condition (A) (1) and (A) (2) above has been satisfied, must be submitted to Council within 24 months from the date of this development consent, failing which, this development consent **will lapse** pursuant to Section 4.53 (6) of the Environmental Planning and Assessment Act 1979.
- (C) This Development Consent will not operate until such time that the Council notifies the Applicant in writing that that deferred commencement consent condition (A) (1) above has been satisfied; and
- (D) Upon Council giving written notification to the Applicant that deferred commencement consent condition (A) (1) above has been satisfied, the development consent will become operative from the date of that written notification, subject to the following conditions of consent:

The conditions in the following sections of this consent shall apply upon satisfactory compliance with the above requirements and receipt of appropriate written confirmation from Council.

1.0 - General Conditions of Consent

The following conditions of consent are general conditions applying to the development.

- (1) **Approved plans and supporting documentation** – Development must be carried out in accordance with the following approved plans and supporting documentation (stamped by Council), except where the conditions of this consent expressly require otherwise.

Plan reference/ drawing No.	Name of plan	Prepared by	Date
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4059 Revision P6 2 of 7	Site Plan	Advantage	03.03.2022
4059 Revision P6 3 of 7	Floor Plan	Advantage	03.03.2022
4059 Revision P6 4 of 7	Roof/Flood Refuge Plan	Advantage	03.03.2022
4059 Revision P6 5 of 7	Elevations	Advantage	03.03.2022
4059 Revision P6 6 of 7	Elevations	Advantage	03.03.2022
Engineering Report	Port Stephens Engineers	Engineering Report	15.02.2022
7117 Mound-D 01 of 01	Plan Showing Proposed Mound	LeMottee Group	15.02.2019
Letter from Noble Hill Advisory		Noble Hill Advisory	12 May 2022

In the event of any inconsistency between the approved plans and the supporting documentation, the approved plans prevail. In the event of any inconsistency between the approved plans and a condition of this consent, the condition prevails.

Note: an inconsistency occurs between an approved plan and supporting documentation or between an approved plan and a condition when it is not possible to comply with both at the relevant time.

- (2) **Building Code of Australia** – All building work must be carried out in accordance with the BCA. In this clause, a reference to the BCA is a reference to that Code as in force on the date the application for the relevant Construction Certificate is made.
- (3) **Sign on building** – Except in the case of work only carried out to the interior of a building or Crown building work, a sign must be erected in a prominent position on the site showing the name, address and telephone number of the Principal Certifying Authority for the work, the name of any principal contractor and their after-hours contact number, and must contain a statement that unauthorised entry to the site is prohibited.

The sign must be maintained while the work is being carried out and is to be removed when the work is completed.

- (4) **Approval of OSMS under LG Act** - An approval under Section 68 of the *Local Government Act 1993* is to be obtained from Council for the installation of an onsite sewage management system (OSMS) prior to the issue of a Construction Certificate.

2.0 – Prior to Issue of a Construction Certificate

The following conditions of consent shall be complied with prior to the issue of a Construction Certificate.

- (1) **Construction Certificate** - The following information must be provided to the Certifying Authority with the Construction Certificate application:
- a) Amended plans including the provision for an all weather access driveway leading from the dwelling to Swanreach Road.
- (2) **Structural engineer's certificate** – A certificate must be prepared by a qualified Structural Engineer certifying that the building design is capable of withstanding the effects of flood waters, including immersion, structural stability, buoyancy, impact and loading from debris up to and including the future 1% Annual Exceedance Probability (AEP) event.

Details demonstrating compliance must be provided to the Certifying Authority.

- (3) **Soil, erosion, sediment and water management** – Before the issue of a construction certificate the applicant is to ensure that an erosion and sediment control plan is prepared in accordance with the following documents before it is provided to and approved by the certifier:
- Council's development control plan,
 - the guidelines set out in the NSW Department of Housing manual 'Managing Urban Stormwater: Soils and Construction Certificate' (the Blue Book), and
 - the 'Do it Right On-Site, Soil and Water Management for the Construction Industry' (Southern Sydney Regional Organisation of Councils and the Natural Heritage Trust).

The applicant must ensure the erosion and sediment control plan is kept on-site at all times during site works and construction.

- (4) **Long service levy** – In accordance with Section 34 of the *Building and Construction Industry Long Service Payments Act 1986*, the applicant must pay a long service levy at the prescribed rate to either the Long Service Payments Corporation or Council for any works that cost \$25,000 or more.
- (5) **Free flow of water** - The location and design of the proposed doors must allow free access and escape of floodwaters without causing damage to the building. Details demonstrating compliance must be provided to the Certifying Authority.

- (6) **Flood Risk Management Plan** – A Flood Risk Management Plan prepared by a suitably qualified Engineer must be provided to the Certifying Authority demonstrating compliance with the following:
- a) The design must show that the proposed development is capable of withstanding the effects of flood waters, including immersion, structural stability, buoyancy and impact and loading from debris up to and including the 1% Annual Exceedance Probability (AEP) event.
 - b) Certification that the approved flood mound under DA 16-2018-621-1 (and proposed development comprising the extension of the approved mound under DA 16-2018-621-1, dwelling and flood refuge within the attic is capable of withstanding the force of any flood waters experienced up to the Probable Maximum Flood Event (PMF).
 - c) Certification demonstrating that any damage to the proposed development sustained in a flood will not generate debris capable of causing damage to downstream buildings or property
 - d) Certification demonstrating that the rainwater tank, finishes, plant fittings and equipment and any other buoyant fixtures will be of materials and functional capacity to withstand the forces of floodwater in events up to and including the 1% AEP event including hydrostatic pressure, hydrodynamic pressure and buoyancy forces.
- (7) **Flood design measures** – Evidence of certification demonstrating that the following flood related design precautions have been adhered to in the design must be submitted to the Principal Certifying Authority:
- a) All materials stored at the site and capable of causing harm to the environment must be stored at a level not less than the *FPL* or suitable bunding must be placed around such materials to a minimum of the *FPL*;
 - b) All building materials, equipment, ducting, etc., below the *FPL* must be flood compatible and ducting must be provided with openings for drainage and cleaning;
 - c) All main power supply, heating and air conditioning service installations, including meters must be located above the *FPL*. All electrical equipment installed below the *FPL* must be capable of disconnection by a single plug from the power supply;
 - d) All electrical wiring below the *FPL* must be suitable for continuous submergence in water. All conduits below the *FPL* must be self-draining. Earth core leakage systems or safety switches are to be installed;
 - e) Wherever possible, the premises must be designed to ensure that plant, equipment, storage tanks or other fixtures or fittings liable to damage by floods are located above the *FPL* or be moveable to levels above the *FPL*. Should this not have the ability to occur, they shall be suitable for submergence in water and securely anchored to overcome buoyancy and movement. All storage tanks must be vented to an elevation above the *FPL*.

- (8) **Solar Power Battery System** – The plans shall be amended to provide details of the proposed solar powered backup battery system for the flood refuge which shall be generally in accordance with the letter from Solar Power Australia to Bronwyn Ward dated 3 March 2022.
- (9) **Roads Act Approval** – A Roads Act Application under Section 138 of the Roads Act 1993 is required for the following works to Swanreach Road. The following information must be provided to Council as Roads Authority with the Roads Act Application:
- a) Details of flood depth indicators at road low point/s from the site frontage through to the intersection of Hinton Road
Details demonstrating compliance must be provided to the Certifying Authority.
- Note. Under the Roads Act 1993, only the Roads Authority can approve commencement of works within an existing road reserve.

3.0 - Prior to Commencement of Works

The following conditions of consent shall be complied with prior to any works commencing on the development site.

- (1) **Notice of Principal Certifying Authority appointment** – Notice must be given to Council at least two days prior to subdivision and/or building works commencing in accordance with Clause 103 of the *Environmental Planning & Assessment Regulation 2000*. The notice must include:
- a) a description of the work to be carried out;
 - b) the address of the land on which the work is to be carried out;
 - c) the Registered number and date of issue of the relevant development consent;
 - d) the name and address of the Principal Certifying Authority (PCA), and of the person by whom the PCA was appointed;
 - e) if the PCA is an accredited certifier, their accreditation number, and a statement signed by the accredited certifier consenting to being appointed as PCA; and
 - f) a telephone number on which the PCA may be contacted for business purposes.
- (2) **Notice commencement of work** – Notice must be given to Council at least two days prior to subdivision and/or building works commencing in accordance with Clause 104 of the *Environmental Planning & Assessment Regulation 2000*. The notice must include:
- a) the name and address of the person by whom the notice is being given;
 - b) a description of the work to be carried out;

- c) the address of the land on which the work is to be carried out;
 - d) the Registered number and date of issue of the relevant development consent and construction certificate;
 - e) a statement signed by or on behalf of the Principal Certifying Authority to the effect that all conditions of the consent that are required to be satisfied prior to the work commencing have been satisfied; and
 - f) the date on which the work is intended to commence.
- (3) **Signs on site** – A sign must be erected in a prominent position on any site on which building work or demolition work is being carried out:
- a) showing the name, address and telephone number of the principal certifier for the work, and
 - b) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and
 - c) stating that unauthorised entry to the work site is prohibited.
- Any such sign is to be maintained while the building work or demolition work is being carried out, but must be removed when the work has been completed.
- Note:** This does not apply in relation to building work or demolition work that is carried out inside an existing building that does not affect the external walls of the building.
- (4) **Construction Certificate Required** – In accordance with the provisions of Section 6.7 of the *Environmental Planning & Assessment Act 1979 (EP&A Act 1979)*, construction or subdivision works approved by this consent must not commence until the following has been satisfied:
- a) a Construction Certificate has been issued by a Consent Authority;
 - b) a Principal Certifying Authority (PCA) has been appointed by the person having benefit of the development consent in accordance with Section 6.5 of the *EP&A Act 1979*; and
 - c) the PCA is notified in writing of the name and contractor licence number of the owner/builder intending to carry out the approved works.
- (5) **Home Building Act requirements** - Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the principal certifier for the development to which the work relates (not being the council) has given the council written notice of the following information — a)
- In the case of work for which a principal contractor is required to be appointed—
- (i) the name and licence number of the principal contractor, and
 - (ii) the name of the insurer by which the work is insured under Part 6 of that Act,

- b) In the case of work to be done by an owner-builder—
 - (iii) the name of the owner-builder, and
 - (iv) if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work is in progress so that the information notified becomes out of date, further work must not be carried out unless the principal certifier for the development to which the work relates (not being the Council) has given the Council written notice of the updated information.

- (6) **Payment of development contributions** - In the case of residential building work for which the *Home Building Act 1989* requires there to be a contract of insurance in force in accordance with Part 6 of that Act, that such a contract of insurance is in force before any building work authorised to be carried out by the consent commences.
- (7) **Erosion and sediment controls in place** – Before the commencement of any site or building work, the principal certifier must be satisfied the erosion and sediment controls in the erosion and sediment control plan, (as approved by the principal certifier) are in place until the site is rectified (at least 70% ground cover achieved over any bare ground on site).
- (8) **Rubbish generated from the development** – Where not already available, a waste containment facility is to be established on site. The facility is to be regularly emptied and maintained for the duration of works.

No rubbish must be stockpiled in a manner which facilitates the rubbish to be blown or washed off site. The site must be cleared of all building refuse and spoil immediately upon completion of the development.
- (9) **Site is to be secured** – The site must be secured and fenced to the satisfaction of the Principal Certifying Authority. All hoarding, fencing or awnings (associated with securing the site during construction) is to be removed upon the completion of works.
- (10) **All weather access** – A 3m wide all-weather vehicle access is to be provided from Swanreach Road to the building under construction for the delivery of materials and use by trades people.

No materials, waste or the like are to be stored on the all-weather access at any time.
- (11) **Public liability insurance** – The owner or contractor must take out a Public Liability Insurance Policy with a minimum cover of \$20 million in relation to the

occupation of, and works within, public property (i.e. kerbs, gutters, footpaths, walkways, reserves, etc.) for the full duration of the proposed works.

Evidence of this Policy must be provided to Council and the Certifying Authority.

4.0 - During Works

The following conditions of consent shall be complied with during the construction phase of the development.

- (1) **Hours of work** – The principal certifier must ensure that building work, demolition or vegetation removal is only carried out between:

7.00am to 5.00pm on Monday to Saturday

The principal certifier must ensure building work, demolition or vegetation removal is not carried out on Sundays and public holidays, except where there is an emergency.

Unless otherwise approved within a construction site management plan, construction vehicles, machinery, goods or materials must not be delivered to the site outside the approved hours of site works.

Note: Any variation to the hours of work requires Council's approval.

- (2) **Implementation of BASIX commitments** - While building work is being carried out, the applicant must undertake the development strictly in accordance with the commitments listed in the BASIX certificate(s) approved by this consent, for the development to which the consent applies.

- (3) **Toilet facilities** – Temporary toilet(s) must be provided and maintained on site from the time of commencement of building work to completion. The number of toilets provided must be one toilet per 20 persons or part thereof employed on the site at any one time.

The temporary toilet is to be either connected to the sewerage system or an approved septic tank or otherwise may be a chemical toilet supplied by a licensed contractor.

- (4) **Compliance with BCA** – All building work must be carried out in accordance with the requirements of the Building Code of Australia.

- (5) **Finished floor level** - The finished floor level of the dwelling must be a minimum level of Reduced Level 6.9metres Australian Height Datum in accordance with the approved plans.

A survey report prepared by a Registered Surveyor confirming that the finished floor level complies with the approved plans or floor levels specified by the

development consent, must be provided to Principal Certifying Authority prior to the development proceeding beyond floor level stage.

- (6) **Stormwater disposal** – Following the installation of any roof, collected stormwater runoff from the structure must be:
- a) Dispersed at ground level, so as not to be concentrated or create nuisance flows onto any buildings, or neighbouring properties. The discharge location must be at least 3m down slope of the building and 6m minimum clearance from receiving down slope property boundaries.

- (7) **Placement of fill** - Filling must not be placed in such a manner that natural drainage from adjoining land will be obstructed or in such a manner that surface water will be diverted.

Further, any alterations to the natural surface contours must not impede or divert natural surface water runoff so as to cause a nuisance to adjoining property owners.

- (8) **Cut and fill** – While building work is being carried out, the principal certifier must be satisfied all soil removed from or imported to the site is managed in accordance with the following requirements:

- (a) All excavated material removed from the site must be classified in accordance with the EPA's Waste Classification Guidelines before it is disposed of at an approved waste management facility and the classification and the volume of material removed must be reported to the principal certifier.

All fill material imported to the site must be Virgin Excavated Natural Material as defined in Schedule 1 of the *Protection of the Environment Operations Act 1997* or a material identified as being subject to a resource recovery exemption by the NSW EPA.

- (9) **Soil, erosion, sediment and water management** – All requirements of the Erosion and Sediment Control Plan or Soil and Water Management Plan must be maintained at all times during the works and any measures required by the plan must not be removed until the site has been stabilised.
- (10) **Offensive noise, dust, odour and vibration** – All work must not give rise to offensive noise, dust, odour or vibration as defined in the *Protection of the Environment Operations Act 1997* when measured at the nearest property boundary.
- (11) **Excavations and backfilling** – All excavations and backfilling associated with this development consent must be executed safely, and be properly guarded and protected to prevent them from being dangerous to life or property, and in accordance with the design of a suitably qualified Structural Engineer.

If an excavation extends below the level of the base of the footings of a building on an adjoining allotment, the person causing the excavation must: a) preserve and protect the building from damage; and

- b) if necessary, underpin and support the building in an approved manner; and
- c) give at least seven days notice to the adjoining owner before excavating, of the intention to excavate.

The principal contractor, owner builder or any person who needs to excavate and undertake building work, must contact "Dial Before You Dig" prior to works commencing, and allow a reasonable period of time for the utilities to provide locations of their underground assets.

This condition does not apply if the person having the benefit of the development consent owns the adjoining land or the owner of the adjoining land has given consent in writing to that condition not applying.

(12) **Completion of flood mound** – Following completion of the earthworks;

- (a) The final pad shape, levels and location is to be in accordance with the approved "Plan Showing Proposed Mound" (reference no. 7117 Mound-D, sheet 01 of 01, prepared by LeMottee Group and dated 15 February 2019) and will be confirmed by the submission of a detailed survey plan prepared by a Registered Surveyor. The detailed works as executed survey plan must be provided in accordance with Council's Infrastructure Specification to Council within 14 days of completion.
- (b) The mound is to be top dressed and seeded with grass species listed in Table 4 of the paper titled 'Quantifying the strengthening of soil by commonly used landscape plants and turf', by Todd Layt and Ian Paananen, July 2007 (<https://ozbreed.com.au/download/researchpapers/erosionpaper.pdf>)

(13) **Bush Fire Safety - Dwellings** - The site is located within a bushfire prone area and must comply with NSW Rural Fire Service document "Planning for Bushfire Protection 2019 and AS 3959 2018." Construction of Buildings in Bushfire Prone Areas' construction and the entire property must be managed as an 'Inner Protection Area' as outlined within Appendix 4 of Planning for Bushfire Protection 2019.

Details demonstrating compliance must be provided to the Certifying Authority.

(14) **Unexpected finds contingency (general)** – Should any suspect materials (identified by unusual staining, odour, discolouration or inclusions such as building rubble, asbestos, ash material, etc.) be encountered during any stage of works (including earthworks, site preparation or construction works, etc.), such works must cease immediately until a qualified environmental specialist has been contacted and conducted a thorough assessment.

In the event that contamination is identified as a result of this assessment and if remediation is required, all works must cease in the vicinity of the contamination and Council must be notified immediately.

Where remediation work is required, the applicant will be required to obtain consent for the remediation works.

5.0 - Prior to Issue of an Occupation Certificate

The following conditions of consent shall be complied with prior to the issue of an Occupation Certificate.

- (1) **Occupation Certificate required** - An Occupation Certificate must be obtained prior to any use or occupation of the development.

The Principal Certifying Authority must be satisfied that the development has been constructed in accordance with approved plans, specifications and conditions of this consent.

- (2) **Survey Certificate** – A Registered Surveyor must prepare a Survey Certificate to certify that the location of the building in relation to the allotment boundaries complies with the approved plans or as specified by this consent. The Survey Certificate must be provided to the satisfaction of the Principal Certifying Authority.

- (3) **Services** – Evidence is to be provided to Council demonstrating that the following reticulated services are available to each lot: a) Electricity;

b) Water;

c) Sewer; and

d) Gas (where available).

Should any of the above reticulated services not be available to the development site, a detailed statement is to be provided explaining why connection of the relevant service is not possible or practical.

- (4) **Flood Risk Management Plan** – A Certificate of Compliance prepared by a suitably qualified Flood engineer must be provided to the Principal Certifying Authority stating that all aspects of the Flood Risk Management Plan have been completed and/or implemented in accordance with the approved Plan.

- (5) **On-Site sewerage management inspection** – An onsite sewage management system/waste treatment device is to be installed and obtain approval to operate from Council in accordance with Local Government Act 1993 (Section 68A) prior to the issue of any Occupation Certificate

- (6) **Protection and certification of electrical services** – All power points, fittings, electrical connections and the incoming meter box are to be located above the Flood Planning Level (FPL) which is RL 6.2m.

Switches, light fittings and power points may be located below the FPL provided they are capable of being isolated by a single Residual Current Device (RCD) protected switch that is located above the FPL. Certification of these works are to be provided to the Principal Certifying Authority.

- (7) **Flood Emergency Response Plan** - A Flood Emergency Response Plan (FERP) for the proposed development must be provided to the Principal Certifying Authority. The FERP shall be generally in accordance with the Flood Emergency Response Plan Revision date 13 May 2022 filed with the Court on 16 May 2022 but must be updated to include the following as a minimum:

- a) A map of the proposed evacuation route to a suitable location above the Probable Maximum Flood (*PMF*) that provides adequate shelter from the storm, including the route direction and description and identification of the depth of floodwater along the evacuation route in the 1% Annual Exceedance Probability flood and *PMF* events;
- b) Specific trigger heights linked to the nearest river and tidal gauges used for flood warnings and the specific evacuation route cut-off times linked to the gauge height;
- c) Description of the specific flood inundation at the site and the relevant surrounding area, including flood depths, direction of flow, velocities, hazard and specific relevant vulnerabilities;
- d) Consideration of and strategies for, the needs of the elderly, disabled and vulnerable who may be on site and in particular a requirement that such persons be evacuated from the property immediately upon the issue of a flood warning
- e) A realistic time period for evacuation preparations linked to the trigger heights and evacuation route cut-off times, which includes:
 - Locating important papers, valuables etc., that will be evacuated
 - Locating and stacking possessions that are to be left behind, well above the predicted flood level
 - Dealing with all utilities such as electricity, gas, water, fuel, toilets, showers, wastewater system (including removal fuses) and moving pumps and machinery above the predicted flood level
 - Time to gather, identify and load animals (pets, livestock and other animals), including the possible need for additional assistance in handling your animals in an emergency.
- f) Determining the vehicular needs of the site to appropriately respond to the flood risk;
- g) A strategy for a night time flood emergency; and

- h) A strategy for effective flood risk management when the electricity, internet, telecommunications etc., are unavailable.
- i) A notification that the flood refuge in the attic is limited to a maximum of 5 persons and a requirement that the occupants of the dwelling house be reduced to 5 persons immediately upon the issue of a flood warning.

Note: Digital elevation data is available from Geosciences Australia, current flood studies are available on Council's website and river gauge/ tidal gauge data is available from the Bureau of Meteorology website.

- (8) **Rectification damage to public infrastructure** – The applicant must rectify any new damage to public infrastructure to the satisfaction of the Council as the Roads Authority.
- (9) **Positive Covenant** – A public positive covenant pursuant to s.88E of the *Conveyancing Act 1919* (NSW) in favour of Council shall be registered on title requiring compliance with the Flood Emergency Response Plan provided to the Principal Certifying Authority in accordance with 5(7) above for the life of the development.
- (10) **Completion of Roads Act Work** - All approved road, footpath and/or drainage works, including vehicle crossings, have been completed in the road reserve in accordance with the Roads Act Approval to the satisfaction of the Council as the Roads Authority.

6.0 – Ongoing Use

The following conditions of consent are operational conditions applying to the development.

- (1) **Residential air conditioning units** – The operation of air conditioning units must operate as follows:
 - a) be inaudible in a habitable room during the hours of 10pm – 7am on weekdays and 10pm to 8am on weekends and public holidays;
 - b) emit a sound pressure level when measured at the boundary of any neighbouring residential property, at a time other than those specified in (a) above, which exceeds the background (LA90, 15 minutes) by more than 5dB(A). The source noise level must be measured as a LAeq 15 minute; and
 - c) not discharge any condensate or moisture onto the ground surface of the premises or into stormwater drainage system in contravention of the requirements of the *Protection of the Environment Operations Act 1997*.

(2) **Flood Emergency Response Plan** - the Flood Emergency Response Plan provided to the Principal Certifying Authority in accordance with 5(7) above shall be complied with for the life of the development.

(3) **Ongoing Review of FERP** – The Flood Emergency Response Plan provided to the Principal Certifying Authority in accordance with 5(7) above shall be reviewed by the owner of the property following changes in the incidents of floods, or changes to the SES's process of issuing evacuation orders, or changes in other government policies that might generate a need to amend the FERP. The purpose of the review is to determine whether it is necessary or desirable to amend the FERP to ensure that the FERP takes into account or is consistent with such changes. Where it is determined that it is necessary or desirable to amend the FERP then the FERP shall be amended. Upon amendment of the FERP the amended FERP will become the approved FERP for the purpose of this consent.

The FERP must be made available to Council officers on request.

(4) **Solar Powered Battery System** – the solar powered battery backup system for the flood refuge which is required to be included in the development in accordance with condition 2(8) is to be maintained for the life of the development.

(5) **Short Term Rentals-**

a) **In this condition:**

i “*Short Term Rental*” means use of the dwelling to provide accommodation in the dwelling on a commercial basis for a temporary or short-term period

ii “temporary or short-term period” means a period of less than three (3) months.

b) The approved dwelling must not be used for Short Term Rental.

Advice Note(s):

(1) **'Dial Before you Dig'** – Before any excavation work starts, contractors and others should phone the “Dial Before You Dig” service to access plans/information for underground pipes and cables.

(2) **Dividing fences** – The erection of dividing fences under this consent does not affect the provisions of the *Dividing Fences Act 1991*. Under this Act, all relevant parties must be in agreement prior to the erection of any approved dividing fence/s under this consent.

Council has no regulatory authority in this area and does not adjudicate civil disputes relating to the provision of, or payment for, the erection of dividing fences. If there is a neighbour dispute about the boundary fence and you are

seeking mediation, you may contact the Community Justice Centre, or if legal advice or action is required, you may contact the Chamber Magistrate.

(3) **Aboriginal archaeological deposit** – In the event of any aboriginal artefact, object or structure being unearthed, all work must cease immediately in the affected area, Heritage NSW shall be informed of the discovery. Work must not recommence until the material has been inspected and permission has been given by HNSW to proceed.

(4) **Flood information is subject to change** – You are advised that flood information is subject to change if more accurate data becomes available to Council. It is the responsibility of the applicant to use the most up-to-date flood information. Prior to applying for a construction certificate, Council should be contacted to verify the currency of the flood information.

(5) **Flood Evacuation Plan** – A flood evacuation plan indicating that permanent, failsafe, maintenance free measures are incorporated in the development to ensure that timely, orderly and safe evacuation of people and potential pollutant material from the buildings on-site should a flood occur. Details demonstrating compliance must be provided to the Certifying Authority with the Construction Certificate application.

(6) **Responsibility for damage for tree removal/pruning** – The applicant is responsible for any damage caused to existing public utilities, footpaths or public roads during the cutting down, grinding, removal and disposal of the timber and roots. Care must also be taken by the applicant and the applicant's agents to prevent any damage to adjoining properties. The applicant or the applicants' agent may be liable to pay compensation to any adjoining owner if, due to tree works, damage is caused to such adjoining property.