



Land and Environment Court New South Wales

Case Name: **Congarinni North Pty Ltd v Nambucca Valley Council**

Medium Neutral Citation: [2024] NSWLEC 1141

Hearing Date(s): 13-14 December 2023

Date of Orders: 26 March 2024

Date of Decision: 26 March 2024

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The appeal is dismissed.
(2) Development Application No 2021/056 for the demolition of existing structures, bulk earthworks, construction of a seniors housing development comprising of 233 independent living units, ancillary recreational facilities, residential and visitor car parking, landscaping works, and civil infrastructure works including construction of roads, stormwater drainage and water supply works, at 24 Coronation Drive, Congarinni North, is refused.
(3) The exhibits, other than Exhibit 1, are returned.

Catchwords: DEVELOPMENT APPLICATION – seniors housing development – part of the site is flood affected land – the site is not suitable for the proposed development because a part sheltering in place strategy is not appropriate for seniors due to the vulnerability of the occupants and the likely duration of the isolation period

Legislation Cited: *Environmental Planning and Assessment Act 1979*, ss 4.15, 8.7
Land and Environment Court Act 1979, s 34

Nambucca Local Environmental Plan 2010, Sch 1, cl 2.5, 3, 5.21, 7.3

Standard Instrument (Local Environmental Plan)
Order 2006, cl 8

Cases Cited: BGP Properties Pty Ltd v Lake Macquarie Council
(2004) 138 LGERA 237; [2004] NSWLEC 399

Texts Cited: Nambucca Development Control Plan 2010

Category: Principal judgment

Parties: Congarinni North Pty Ltd (Applicant)
Nambucca Valley Council (Respondent)

Representation: Counsel:
N Eastman SC (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2022/356158

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No 2021/056 for the demolition of existing structures, bulk earthworks, construction of a seniors housing development comprising of 233 independent living units, ancillary recreational facilities, residential and visitor car parking, landscaping works, and civil infrastructure works including construction of roads, stormwater drainage and water supply works (the proposal), at 24 Coronation Drive, Congarinni North (the site), by Nambucca Valley Council (the Council).
- 2 The appeal was subject to conciliation on 21 June 2023, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated, pursuant to s 34(4) of the LEC Act.

Issues

- 3 The Council contends that the application should be refused because it has not been demonstrated that the site is suitable for the proposed development due to its flood risks, and that the occupants can be safely and efficiently evacuated in the event of a flood, with the following particulars:

“(c) While neither clause 7.3 of NLEP 2010 (now repealed) nor clause 5.21 of NLEP 2010 are strictly applicable to the subject development application, both contemplate that the consent authority would need to be satisfied that the proposed development incorporates appropriate measures to manage risk to life from flood prior to the grant of development consent, and further in the case of clause 5.21 that the proposed development will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood.

...

(e) After the proposed improvements to Coronation Road are implemented, the site will be isolated during floods of approximately 10% [annual exceedance probability] AEP, which is very frequent. Once isolated, occupants would be unable to leave by vehicle and emergency services including SES, fire and ambulance services, would have great difficulty in reaching the site.

(f) Within its Flood Planning Matrix, the Respondent classifies seniors housing as "sensitive uses and facilities". These types of uses require higher levels of assistance during periods of isolation or with evacuation during flood events.

(g) The site is not infill development and is located in a rural area with little community infrastructure. The potential adverse impacts of isolation are worsened in this environment. Placing up to 400 people in this situation is contrary to normal floodplain management practice.

(h) Approval of the development will increase the burden on the NSW State Emergency Service ("NSW SES"). This increased burden will on occasions involve flood rescues by NSW SES personnel to evacuate occupants who have medical or other emergencies. Across all NSW LGAs, developments which increase the burden on the NSW SES are contrary to normal floodplain management practice.

(i) Reliance on a private flood emergency response plan for the purposes of obtaining development consent at the site is contrary to the NSW Floodplain Development Manual (Section 3.6, A5, L5, N7.2).

(j) The Foreword to the Floodplain Development Manual states that "the NSW Government's Flood Prone Land Policy for floodplain developments promotes the use of a merit approach which balances social, economic, environmental and flood risk parameters to determine whether particular development or use of the floodplain is appropriate and sustainable". In applying this merit approach, the social and economic benefit of increased seniors housing for Macksville which results from the development cannot offset the large increased flood risks. This is because there is alternative flood free land to the south of Macksville in close proximity to the town which could be developed without any flood risk or increased burden on the NSW SES.

(k) The Foreword to the Manual also states that "the primary objective of the NSW Government's Flood Prone Land Policy is to reduce the impact of flooding and flood liability on individual owners and occupiers of flood prone property, and to reduce private and public losses resulting from floods". Approval of 260 233 seniors dwellings in a rural area isolated in a 10% AEP flood event is contrary to the Policy as it will increase personal safety risks and increase private and public flood losses.

(l) The SES has reviewed the amended application and stated in their February 2023 letter that the "NSW SES does not support the proposed development due to significant risk to life and increased risk transferred to emergency services." The development application does not satisfactorily address the concerns raised by the NSW SES.

(m) It has not been demonstrated that the proposed development incorporates appropriate measures to manage risk to life from flood, nor that the proposed development will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood."

- 4 The Council submitted that the issues raised regarding debris blockage that will occur for the culverts under the proposed Road 1 access way and its

potential impact on the existing flood behaviour and offsite impacts (Contention 8(c) of Ex 1) have been satisfactorily addressed by conditions of consent (Ex 14).

- 5 The Applicant characterised the remaining contention as whether or not a Flood Emergency Response Plan (FERP) is appropriate for the proposal.

The site and its context

- 6 The site has an area of 57.3 ha. The site is a rural property and is currently occupied by a dwelling house and farm shed, located on the western part of the property. The site is accessed from Coronation Road only.
- 7 The site is located on the north-western side of Coronation Road, close to the intersection with Wilson Road and Joffre Street. The waterway, Taylors Arm, a tributary of the Nambucca River, is on the opposite side of Coronation Road and flows in a north easterly direction into the Nambucca River. The town of Macksville is to the south-east of the site.
- 8 The site is legally described as Lots 155 and 188 in DP 755537.
- 9 Part of the site is flood affected. The Statement of Facts and Contentions (Ex 1) describes the site as follows:

“The southern and eastern parts of the property are predominately cleared grazing land rising from the eastern floodplain up to an elevated ridge which runs along the southern boundary.

Low land vegetation and wetland areas are located around the northern and western sides of the property.

Overhead electricity lines owned by Essential Energy and Transgrid are located within the site. The Essential Energy lines cross the wetland area at the north eastern part of the site, while the Transgrid power lines cross the open paddock in the eastern part of the site in a generally north-south direction.

Approximately two thirds of the site is flood affected. The 2017 Nambucca Shire Floodplain Risk Management Study identified that the lower parts of the site, which are generally located near the northern and eastern boundaries, are flooded in events more frequent than every ten years on average. Whilst this study did not map any more frequent events, anecdotal evidence

indicates that some flooding of the site occurs more frequently than every two years on average.

Depths of flooding in a 1% AEP event exceed 2m near Coronation Road at the eastern end of the site. The 2017 Nambucca Shire Floodplain Risk Management Study mapped this area as floodway and H5 Hazard category. The remainder of the site that is inundated is mapped as either flood storage or flood fringe, with H1 to H5 Hazard categories.

The main road access between the site and the town of Macksville, or other towns with medical and other community facilities, is frequently impassable due to flooding.”

Background

- 10 The application was lodged on 23 February 2021.
- 11 The background to the application, taken from the Council Assessment Report dated 23 February 2023 (Ex 2, f 147), is as follows:

“The site was the subject of a previously unsuccessful application for a site compatibility assessment in 2009. Subsequently a Planning Proposal was initiated in 2013 to amend the Nambucca Local Environmental Plan 2010 to include development for the purposes of seniors housing on the subject site in Schedule 1 – Additional Permissible Uses. A number of issues were raised and considered in the Planning Proposal assessment with the Department of Planning including flooding, rural land use conflict, bushfire, aboriginal cultural heritage and ecological. Council at its meeting of 27 October 2016, resolved to support the planning proposal and subject to agreement of the Department in relation to compliance/ consistencies with s9.1 directions. The amendment of the NLEP was subsequently gazetted.”

The proposal

- 12 The proposal is for 233 independent living units and community facilities located on the higher part of the site above the probable maximum flood (PMF) line (Ex F, tab 10). The proposed development is accessed via Coronation Road.
- 13 The Flood Emergency Response Plan (FERP) (Ex H) has been prepared by Martens & Associates Pty Ltd and is dated November 2023. The FERP identifies an evacuation route via Coronation Road to the local school which is located above the PMF event and is 2km from the site. The FERP has determined the evacuation rate to be 30 minutes to pack a vehicle and 90 minutes to evacuate the site of all vehicles. Dr Martens conceded in oral

evidence that the evacuation rate would be longer if a warning is issued during the night.

14 The FERP includes the following at 4.2 Shelter-in-Place Details:

“Every building of the proposed development is to be constructed above the PMR level of 9.75 mAHD. This would enable shelter-in-place as a flood emergency response for any people on site who did not leave prior to the evacuation route becoming inundated.

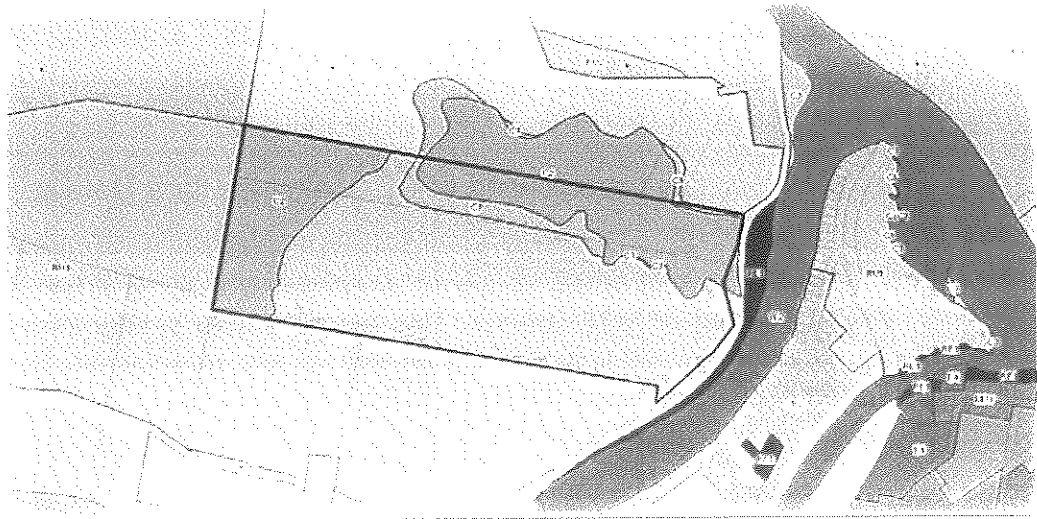
It is possible under prolonged and Extreme flooding that shelter-in-place duration could be up to around 5 days based on the analysis of long duration PMFs (refer Section 1.1). During the period of isolation residents will be in their own homes and will have access to the community and community facilities.

The following is to be provided to enable safe shelter-in-place:

1. PMF refuge is available in all dwellings and site buildings including the club house.
2. Each dwelling and the club house should maintain sufficient emergency kits including torch with spare batteries, portable radio with spare batteries, first aid kit, non-perishable foods, bottled water, prescription medications.
3. Site management should also have in their emergency kits 3 high visibility vests, non-slip footwear and a megaphone.
4. Since residents will be sheltering in their own homes, and the large club house is also available for any non-residents, there is more than adequate space for people to shelter up to 5 days.
5. Any persons sheltering-in-place shall not leave the site until the flood level indicator shows that flood waters on the site are no more than 3.0 mAHD.”

Planning framework relevant to the flooding contention

- 15 The site is zoned part C2 Environmental Conservation, part C3 Environmental Management and the bulk of the site is zoned RU1 Primary Production, pursuant to the Nambucca Local Environmental Plan 2010 (LEP 2010). Development for the purpose of seniors housing is permissible with consent on the site (cll 2.5 and 3 of Sch 1 to LEP 2010). The addition of cl 3 of Sch 1 was an amendment to LEP 2010 which commenced on 31 March 2017.



Zoning map from Ex 1, site outlined in red

16 The objectives of the zones, to which regard must be had, are:

C2

- To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.
- To prevent development that could destroy, damage or otherwise have an adverse effect on those values.

C3

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.
- To provide for a limited range of development that does not have an adverse effect on those values.

RU1

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To encourage diversity in primary industry enterprises and systems appropriate for the area.
- To minimise the fragmentation and alienation of resource lands.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.

17 Clause 5.21 Flood planning, which came into force on 14 July 2021, is in the following terms:

5.21 Flood planning

(1) The objectives of this clause are as follows—

- (a) to minimise the flood risk to life and property associated with the use of land,
- (b) to allow development on land that is compatible with the flood function and behaviour on the land, taking into account projected changes as a result of climate change,
- (c) to avoid adverse or cumulative impacts on flood behaviour and the environment,
- (d) to enable the safe occupation and efficient evacuation of people in the event of a flood.

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

- (a) is compatible with the flood function and behaviour on the land, and
- (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
- (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
- (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
- (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

- (a) the impact of the development on projected changes to flood behaviour as a result of climate change,
- (b) the intended design and scale of buildings resulting from the development,
- (c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,
- (d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

(4) A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.

(5) In this clause—

Considering Flooding in Land Use Planning Guideline means the Considering Flooding in Land Use Planning Guideline published on the Department's website on 14 July 2021.

flood planning area has the same meaning as it has in the Flood Risk Management Manual.

Flood Risk Management Manual means the Flood Risk Management Manual, ISBN 978-1-923076-17-4, published by the NSW Government in June 2023.

- 18 The former cl 7.3 of LEP 2010, which was removed from LEP 2010 on 14 July 2021, was in the following terms:

7.3 Flood planning

(1) The objectives of this clause are as follows—

- (a) to minimise the flood risk to life and property associated with the use of land,
- (b) to allow development on land that is compatible with the land's flood hazard, taking into account projected changes as a result of climate change,
- (c) to avoid significant adverse impacts on flood behaviour and the environment.

(2) This clause applies to land at or below the flood planning level.

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development—

- (a) is compatible with the flood hazard of the land, and
- (b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and
- (c) incorporates appropriate measures to manage risk to life from flood, and
- (d) will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and

(e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.

(4) A word or expression used in this clause has the same meaning as it has in the NSW Government's Floodplain Development Manual published in 2005, unless it is otherwise defined in this clause.

19 I accept the parties' agreed position that neither cll 7.3 nor 5.21 of LEP 2010 apply to the proposal, as it was lodged on 23 February 2021 (cl 8 of the Standard Instrument (Local Environmental Plan) Order 2006: Ex 2, f 365). The Applicant accepts the Council's position that the clauses represent a best-practice approach to flood management and can be a useful tool for assessment despite not having strict legal or jurisdictional application.

20 The Nambucca Development Control Plan 2010 (DCP 2010) (Ex 2, tab 58) applies to the proposal. The following text is included A4.3 Flood Prone Land:

"Clause 7.3 of NLEP 2010 outlines the restrictions that apply to any development of flood prone land.

The development of flood prone land must be in accordance with Council's Floodplain Risk Management Plan. Plans are required to show the 1% Annual Exceedance Probability (AEP) flood level affecting any proposed development. The proposed building envelopes, vehicle access and stock refuge areas are to avoid flood prone areas..."

21 The Council's Floodplain Risk Management Study (Ex 2, tab 60) includes the following at 6.5.3 Evacuation Planning:

"Description

It may be necessary for some residents to evacuate their homes in a major flood. This would be undertaken under the direction of the SES who are the lead agency under the displan. Some residents may choose to leave on their own accord based on flood information from the radio or other warnings, and may be assisted by local residents.

Discussion

The main problems with all flood evacuations are:

- They must be carried out quickly and efficiently;
- They are hazardous for both the rescuers and the evacuees;

Residents are generally reluctant to leave their homes, causing delays and placing more stress on the rescuers and increasing the risk to the rescuers;

- The number of people to be evacuated;
- The mobility or special requirements to evacuated residents; and

Evacuation routes may be cut some distance from the residential areas and people do not appreciate the danger.”

NSW State Emergency Service submission

22 The NSW State Emergency Service (SES) provided comment on the application (Ex 2, tab 46), which included the following response:

“The NSW SES does not support the proposed development due to significant risk to life and increased risk transferred to emergency services...”

The development is a fundamental increase in risk to life for vulnerable members of the community on the floodplain.

Firstly, the NSW 2022 Flood Inquiry Recommendation 28 highlights that sensitive uses are known to have a higher risk to life and warrant the consideration of the impacts of even rarer flood events than the 1% AEP flood extent. This includes the impacts of essential services infrastructure disruption on the proposed development. The Inquiry continues on to recommend sensitive uses, including aged care facilities are situated on land outside the probable maximum flood (PRF) extent and essential services infrastructure is situated above the flood planning level to minimise disruption.

Secondly, the site becomes isolated in frequent (5%AEP) floods and can remain isolated for several days. It is partially left only an overland escape route, which would be unable to be relied upon given the demographics of the proposed population. The closest NSW SES Unit is located across both the Taylors Arm Branch of the Nambucca River and Tilly Will Creek making any incident at the proposed site more complex and hazardous...

Self-evacuation is highly improbable given the demographics of the proposed development, and the frequency at which the site becomes isolated. Unfortunately the peak height the flood will reach is not likely to be known by the time the site is isolated in larger flood events. The duration of isolation will not be known by the time the site is isolated also. This complicates any emergency preparation or response operation at the site.

‘Shelter in place’ strategy is not an endorsed flood management strategy by the NSW SES for future development. Such an approach is only considered suitable to allow existing dwellings that are currently at risk to reduce their risk, without increasing the number of people subject to such risk. The flood evacuation constraints in an area should not be used as a reason to justify new development by requiring the new development to have a suitable refuge above the PMF. Allowing such development will increase the number of people exposed to the effects of flooding.

Other secondary emergencies such as fires (exacerbated by lack of electricity and difficult to extinguish due to isolation) and medical emergencies may occur in buildings isolated by floodwater. During flooding it is likely that there

will be a reduced capacity for the relevant emergency services agency to respond in these times. Even relatively brief periods of isolation, in the order of a few hours, can lead to personal medical emergencies that have to be responded to...

People who are sheltering may change their minds and enter floodwater attempting to leave, into high hazard floodwater. This was observed in the Northern Rivers flooding in 2017 and 2022.

On the other hand, evacuation of vulnerable community members can be complex and result in trauma and other injuries. Therefore the location is not ideal for a Seniors Living Development...

The NSW SES is opposed to the imposition of development consent conditions requiring private flood evacuation plans rather than the application of sound land use planning and flood risk management.

NSW SES is the legislated authority responsible for ordering flood evacuation. This responsibility cannot be transferred to a reliance on a private evacuation plan..."

Submissions

- 23 The Council submitted that the independent living units and facilities are located above the flood planning level and the PMF, and no issue is raised regarding the design and layout of the seniors housing. The issue is that after the proposed improvements to Coronation Road are implemented, the independent living units will be isolated during floods of approximately 10% AEP and may remain isolated for up to 5 days with no suitable overland escape route. A 'shelter in place' strategy is not appropriate for seniors due to the likely duration of the isolation period and the nature of the occupants.
- 24 The Applicant submitted that the zoning of the land, which was done via a specific planning proposal in 2017, ought to be given significant weight. In *BGP Properties Pty Ltd v Lake Macquarie Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 (*BGP Properties*), McClellan CJ held, at [117], that the "more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects...".
- 25 The Council submitted that while seniors housing is permissible on the site, it does not mean that the application must be approved. The amending LEP permitting seniors housing on the site was made prior to the Nambucca Shire

Floodplain Risk Management Study dated June 2017 (Ex 2, tab 60) and the March 2021 and March 2022 floods which both exceeded the 10% AEP. *BGP Properties* is a neutral factor, and the heads of consideration under s 4.15(1) of the EPA Act extend beyond the *BGP Properties* consideration. There should be no expectation that a seniors housing development will be approved.

26 The Applicant submitted that nothing in the planning regime prevents the shelter in place strategy and the purpose of the planning provisions is to minimise and manage the relevant risks.

27 The Council submitted that seniors housing is inappropriate on this site for the following reasons:

- The independent living units will be isolated during floods that exceed the 10% AEP.
- The isolation period is likely to be 1-2 days and could be up to 5 days. The residents sheltering in place on a 'flood island' will be isolated from the community and social services. Carers will not be able to access the site.
- The flood hazard classification for the site is H5-H6 category (see Ex H, Figure 2 Flood hazard classification scheme). Seniors Housing is classified as a 'sensitive use', which is an unsuitable use in H5-H6 flood hazard classified areas, according to the planning matrix (Ex 2, f 631) referred to in the Flood Risk Management Study (Ex 2, tab 60).
- There is nothing in the FERP that indicates there will be medical support onsite during the isolation periods.
- A medical emergency during an isolation period will be a risk to life. The SES has a reduced capacity to respond to an emergency during an isolation period.

- If the warning is issued during the evening, Dr Martens' evidence is that the evacuation time will be extended.
- The peak height of the flood is not likely to be known at the time the residents have to make a decision about whether to evacuate, and so the residents will not know the likely duration of the isolation period if they choose to shelter in place.
- There is a potential for the flood warning system to fail, and/or for a communication outage, which is not capable of being addressed in the FERP.
- The primary strategy of sheltering in place in the FERP is inappropriate. The FERP will be in place for the life of the development.

28 The Applicant submitted that the FERP caters for door knocking to alert residents and so is not solely reliant on bulk text messaging to senior residents of the proposal.

Expert evidence

29 The Applicant relied on the expert evidence of Dr Daniel Martens (flooding), Daniel McNamara (planning), Brian Lees (civil engineering) and Vince Doan (traffic).

30 The Council relied on the expert evidence of Drew Bewsher (flooding), Daniel Walsh (planning) and Keith Williams (traffic).

31 The flooding experts prepared a joint report (Ex 8) and gave concurrent oral evidence. The flooding experts disagree as to whether the flood risks posed by the proposal are acceptable.

32 The flooding experts agreed that the site will be isolated during floods of approximately 10% AEP.

- 33 The flooding experts agreed that any development on the site will lead to some increase in burden on the NSW SES during floods that isolate the site. According to Dr Martens, the increased burden is managed by siting the dwellings above the PMF. According to Mr Bewsher, the increased burden on the SES posed by the proposal is excessive because the development is atypical.
- 34 In Dr Martens opinion, the FERP will form part of the overall site management plan for the community and this approach is common in NSW as is the requirement for a FERP as a condition of consent. In Mr Bewsher's opinion, FERPs help reduce personal safety risks, however, the use of a private FERP to obtain development consent, for development that could not otherwise obtain consent, is contrary to the Flood Risk Management Manual (Ex 12).

Consideration

- 35 The Council contends that the Applicant's proposal under the FERP, including whether to have a FERP at all, and a part shelter in place strategy under the FERP, is not acceptable.
- 36 The proposal is for 233 dwellings, which represents a likely population of 400 senior residents. Although the dwellings are all to be located at a level above the PMF, due to the low lying nature of the access road, the site will be isolated in a flood exceeding a 10% AEP event, at which times the proposal provides a shelter in place option for its senior residents who have not chosen to evacuate the site. Those senior residents will not have access to basic supplies or medical assistance that are not onsite during the isolation period. Those residents and the staff who remain on the site will be isolated and are not practically able to be evacuated if a medical emergency arises.
- 37 In the event of a flood in Macksville, each of the 400 senior residents of the proposal would need to decide whether to evacuate or to shelter in place. According to the FERP, the lead time for evacuation for residents, workers, visitors and contractors is 30 minutes to pack a vehicle and 90 minutes to evacuate the site of all vehicles (Ex 8, Appendix B, p 28) from the time orders

to evacuate are received. If the warning is issued during the evening, it is Dr Martens evidence is that the evacuation time will be extended. Senior residents would have very little time to make a decision about whether to evacuate, or whether to shelter in place. They would have to make the decision without knowing the length of the isolation period. I accept Mr Bewsher's evidence that some residents will be obliged to evacuate due to their personal circumstances, such as a medical condition (Ex 8, Appendix C, p 19). For the evacuation to be efficient and comply with the estimated times, those senior residents who choose to leave would have to make the decision to do so immediately upon receipt of orders to evacuate.

- 38 Under the FERP (Ex H, pp 25 and 26), each resident is to maintain their flood preparedness at all times by keeping a battery-operated radio, torch, spare batteries, non-perishable food, bottled water, and a week's supply of any prescription medications in their households. Residents should always be prepared to be isolated for up to 5 days. In my view, it is unlikely that 400 senior residents would manage to comply with this requirement at all times.
- 39 According to the FERP (Ex H, p 14), for flood affected properties in the Macksville CBD, the general strategy for evacuation is self-evacuation by private transport to friends/family outside of the impacted areas, with assembly areas established at Macksville High School (quoting the Nambucca Flood Plan). The SES submission states that self-evacuation is highly improbable given the demographics of the proposal and the frequency at which the site becomes isolated (Ex 2, tab 46).
- 40 According to the Nambucca Shire Floodplain Risk Management Study (Ex 2, tab 60), "Macksville [is a] low flood island and will need evacuation early. Events rarer than a 5% AEP event will result in floodwaters through the commercial and residential centre of town." The evacuation route for the proposal to reach the High School is via the town (Ex H, p 29 Figure 5 Adopted evacuation route).

- 41 Evacuation of the site is dependent on the availability of an effective access/exit route, that remains trafficable for sufficient time to evacuate people and their possessions (see Ex 2, f 441). Once the driveway is cut off as the floodwater rises, there is no pedestrian or vehicular access to or from the site. All these factors may complicate or impede an efficient evacuation of the site by those senior residents who choose to leave. The mobility or special requirements of the senior residents may also complicate or impede an efficient evacuation of the site.
- 42 Residents are generally reluctant to leave their homes, causing delays (Council's Floodplain Risk Management Study, referred to by DCP 2010). I accept and agree with Mr Bewsher's evidence that the FERP focuses on the logistics of evacuation and sheltering in place, and cannot address the human behavioural aspects and challenges of the proposal to have senior residents shelter in place during a flood event, such as when a resident or relative will risk driving through flood waters to reach their home or their loved one (Ex 8, Appendix C, p 20).
- 43 Mr Bewsher noted that the FERP does not address carers visiting the site, who may become trapped on the site, or are unable to access their patients during an isolation period (Ex 8, Appendix C, p 20).
- 44 Once it is no longer safe to leave the site, under the FERP (Ex H, p 27), the Chief Flood Warden or delegate is to issue a text message to all residents and workers to shelter in place in their residence or the communal club house. The SES submission states that a mass rescue may be required for the proposal if sewerage, power, medical or other emergencies occur during flooding. There are significant risks associated with mass rescue (Ex 2, tab 46).
- 45 According to the FERP (Ex H, p 14), "Floods are generally of short duration, but roads may be closed for several days". The FERP states that the duration of isolation may be up to around 5 days (Ex H, p 30). According to Mr Bewsher, since 2010, there have been four floods that were rarer than 10 year ARI. The two most recent of these floods were in March 2021 and March

2022. The duration of time that the floodwaters were above the level of the 10 year flood were 21 hours and 15 hours respectively (Ex 8, Appendix C, p 21). The March 2021 flood peaked at 2.92AHD.

- 46 I accept and agree with Mr Bewsher's evidence that seniors living represents a vulnerable cohort that is likely to require greater access to medical services when compared to the broader population (Ex 8, Appendix C, p 19). I accept and agree with his opinion that such a cohort cannot be expected to have the same proficiency with and access to internet and text services as the broader community (Ex 8, Appendix C, p 20).
- 47 I accept and agree with Mr Bewsher's evidence that the site's flood risk constraints are severe for a seniors housing development and the risk to life posed by the site's flood risk cannot be overcome through the provision of a FERP. In my view, Dr Martens unreasonably relies on the dwellings being above the PMF. This does not account for an elderly person changing their mind and deciding they want to evacuate after having committed to sheltering in place, or having a medical emergency, or needing supplies or assistance when those supplies or that assistance is not available onsite. According to the Floodplain Development Manual (Exh 2, f 450), a FERP is unreliable as a long term risk mitigation measure, because plans must be prepared using assumptions about conditions (environmental and organisational) that are expected to apply in the future and which may prove to be wrong or at least very different to the actual event. Floods are highly variable in frequency and severity, and this includes two critical planning assumptions, available flood warning time and likely consequences. If in an actual flood there is a significant variation between assumptions and reality, even a well written plan may fail unless intelligent on-the-day adaption is implemented.
- 48 On the basis of the evidence before me, I accept the Council's submission that the proposal's reliance of a FERP to mitigate and manage the flood risk is inappropriate for this development on this site. The SES submission states that a shelter in place strategy is not an endorsed flood management strategy by the SES for future development. Such an approach is only considered

suitable to allow existing dwellings that are currently at risk to reduce their risk, without increasing the number of people subject to such a risk. The SES is opposed to the imposition of consent conditions requiring private flood evacuation plans rather than the application of sound land use planning and flood risk management (Ex 2, tab 46).

- 49 Evacuation during major floods is undertaken under the direction of the SES because the SES is the lead agency under the disaster plan (displan), according to the Nambucca Shire Floodplain Risk Management Study 2017 (Ex 2, f 494), referred to under DCP 2010. For this reason, I have given weight to the SES submission quoted above at [22]. I accept and agree with Mr Bewsher's evidence that the proposal would unreasonably increase the burden on the emergency services through evacuation of the site, then rescue and resupply, and the increase in that burden will be significant and excessive due to the number of senior residents who evacuate the site, the number of residents likely to remain on the isolated site and their vulnerability when compared to the rest of the population.
- 50 A part shelter in place strategy for the likely isolation period during a greater than 10% AEP event is not appropriate for a vulnerable cohort such as seniors and people with a disability. I accept and agree with the Council's submission that the proposal is unsuitable for the site.
- 51 I accept the Applicant's submission that it may be appropriate to rely on a FERP for certain development, depending on the particular circumstances and facts of the proposal.

Conclusion

- 52 The Council's position, that the primary strategy under the FERP of senior residents sheltering in place during a flood event that isolates the site is inappropriate, is made out. The proposal is not compatible with the flood hazard of the land. The independent living units will be isolated during floods of approximately 10% AEP and may remain isolated for up to 5 days with no suitable overland escape route. A part shelter in place strategy is not

appropriate for this proposal due to the vulnerability of the occupants and the likely duration of the isolation period.

- 53 I am not satisfied that the site is suitable for the proposed development without an alternative overland accessway, pursuant to s 4.15(1)(c) of the EPA Act.

Orders

- 54 The orders of the Court are:

- (1) The appeal is dismissed.
- (2) Development Application No 2021/056 for the demolition of existing structures, bulk earthworks, construction of a seniors housing development comprising of 233 independent living units, ancillary recreational facilities, residential and visitor car parking, landscaping works, and civil infrastructure works including construction of roads, stormwater drainage and water supply works, at 24 Coronation Drive, Congarinni North, is refused.
- (3) The exhibits, other than Exhibit 1, are returned.

I certify that this and the preceding 18 pages are a true copy of my reasons for judgment.



Susan O'Neill

Commissioner of the Court
