



Land and Environment Court
New South Wales

Case Name:	Mount Street 1 Pty Ltd v Sutherland Shire Council
Medium Neutral Citation:	[2023] NSWLEC 1607
Hearing Date(s):	3, 4, 5 and 30 May 2023
Date of Orders:	13 October 2023
Decision Date:	13 October 2023
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	<p>The Court orders:</p> <p>(1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the application for development consent detailed at pars [15] and [17] pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.</p> <p>(2) The written request pursuant to cl 4.6 of the Sutherland Shire Local Environmental Plan 2015 (SSLEP) to justify the contravention of development standard in cl 4.3 of the SSLEP is not upheld.</p> <p>(3) The appeal is dismissed.</p> <p>(4) Development application No DA21/1131 is determined by refusing consent to the application.</p>
Catchwords:	DEVELOPMENT APPEAL – warehouse and light industrial complex with 103 tenancies – contravention of maximum height of building development standard – constrained site - flood planning – easement – orders
Legislation Cited:	<p>Biodiversity Conservation Act 2016</p> <p>Environmental Planning and Assessment Act 1979, ss 3.16, 8.7, 8.15</p> <p>Environmental Planning and Assessment Regulation 2021, ss 38, 55</p> <p>Land and Environment Court Act 1979, ss 39, 40</p>

Standard Instrument (Local Environmental Plans)
Amendment (Land Use Zones) Order 2021
Standard Instrument (Local Environmental Plans)
Amendment (Land Use Zones) Order 2022
Sutherland Shire Local Environmental Plan 2015, cl
1.9A, 4.3, 4.6, 5.21, 6.1, 6.4

Cases Cited: Cracknell and Lonergan Pty Limited v Council of the
City of Sydney (2007) 155 LGERA 291; [2007]
NSWLEC 392
Cumerlong Holdings Pty Limited v Dalcross Properties
Pty Limited (2011) 243 CLR 492; [2011] HCA 27
Doe v Cogente Pty Ltd (1997) 94 LGERA 305
Natva Developments Pty Ltd v McDonald Bros Pty Ltd
& Ors [2004] NSWSC 777
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited
[2020] NSWLEC 115

Texts Cited: NSW Department of Planning and Environment, Draft
Shelter In Place Guidelines
Peter Butt, Butt's Land Law, Peter Butt, (7th edition,
2017, Thomson Reuters)
Sutherland Shire Development Control Plan

Category: Principal judgment

Parties: Mount Street 1 Pty Ltd ACN 648960070 (Applicant)
Sutherland Shire Council (Respondent)

Representation: Counsel:
T To (Applicant)
J Reid (Respondent)

Solicitors:
Mills Oakley (Applicant)
Sutherland Shire Council (Respondent)

File Number(s): 2022/163752

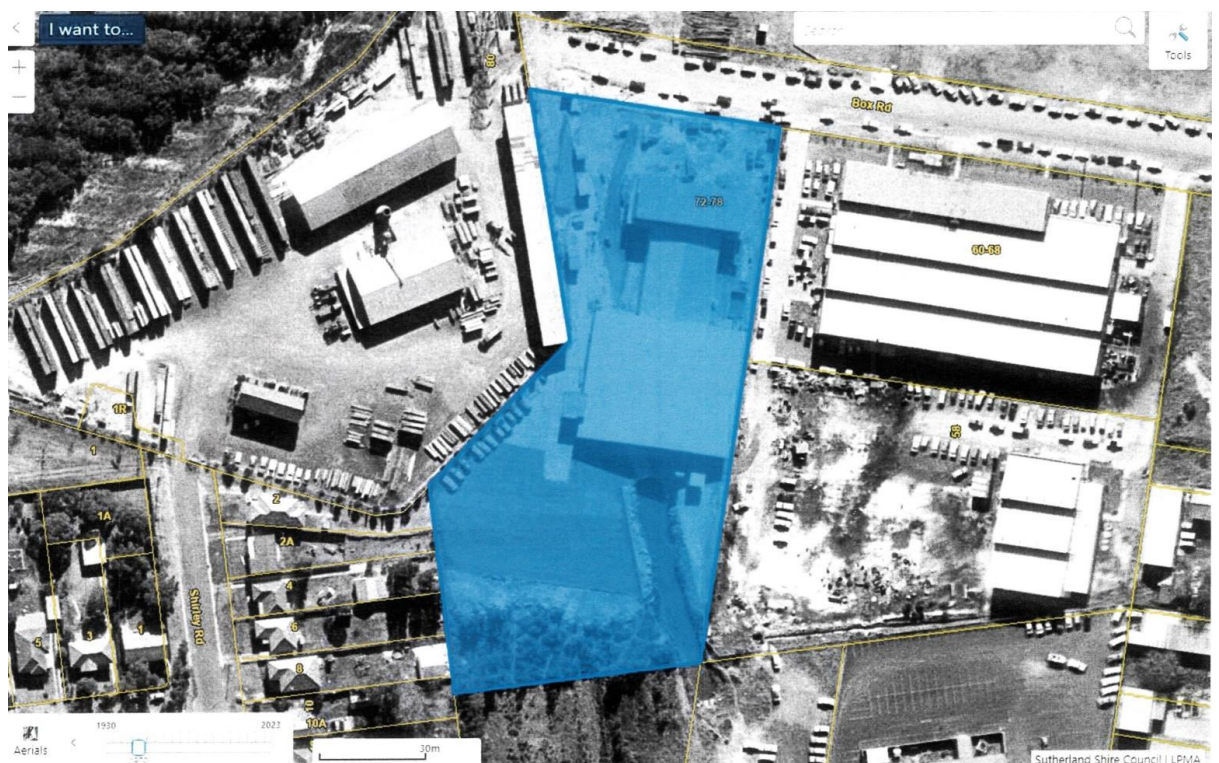
Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the refusal by South Sydney Planning Panel of Development Application DA21/1131 for the demolition of existing buildings and construction of a part 2 and 3 storey warehouse and light industrial complex (with each level also containing a part mezzanine) elevated above existing ground level and comprising 104 individual tenancies (the Proposed Development) at 72-78 Box Road, Taren Point legally described as Lot 44 in DP 8529 (the Site).
- 2 This case is about a proposal to demolish an existing large building built some time prior to 1970 over a registered drainage easement with an existing stormwater culvert and, to construct a new three level large industrial building over the same drainage easement on a site which is flood prone. As the Site has a number of constraints, it is useful to include a description of the Site in the context of those constraints. The Further Amended Statement of Facts and Contentions (FASOFAC) filed by the Respondent on 5 May 2023 (Ex 1) sets out a detailed description of the Site from which I have extracted the summary below. I also reproduce an image from the FASOFAC at Fig 1 being an aerial image of the current Site highlighted in yellow and outlined in red as well as at Fig 2 an aerial photograph from 1970 and finally an extract from the Site Plan for the Proposed Development at Fig 3.



Figure 1 – Aerial photograph of site in context – Site outlined in red



LEGEND

—	BOUNDARY LINE
- - -	SETBACK
—	ROAD
—	EASEMENTS
—	STIPULATING ENTRY

CASTING TREES
CASTING TREES
CASTING TREES

THE SEAL OF THE LAND AND ENVIRONMENT COURT
NEW SOUTH WALES

FILED ON
- 2 MAY 2025



Fig 3 Extract of Site Plan, Drawing TP00.01 Rev D (Ex C, Tab 2)

- 3 The Site has a total area of 11,430.6m² and is located close to the dead end of the Box Road cul-de-sac and is occupied by an existing large footprint warehouse building with a hard stand car parking space in the front portion along the western boundary. Vehicular access is provided through to the rear of the Site, which contains a number of sheds near the warehouse building. The Site generally slopes down from the south (rear of the Site) to the north (front of the Site) and for the majority of the Site, runoff on the existing Site flows overland to the driveway entry at Box Road.
- 4 The Site is burdened by a registered drainage easement (Ex 9, Tab 1) granted to The Council of Sutherland Shire to the benefit of Box Road, with a dimension of approximately 20m wide that runs diagonally across the Site and located as depicted in Fig 3. Within the drainage easement, at the south-eastern end, is an open, vegetated watercourse which leads into a box culvert approximately 4m wide that runs under the existing building and paved areas of the Site, then under Box Road to an open, vegetated watercourse on the other side of the road.
- 5 The box culvert has very limited flow capacity given that it has a twin 1800mm pipe outlet and its invert is low, with the majority of the pipe under water in normal high tides (Flood Emergency Response Plan (FERP), page 1, Ex N). It was observed on Site that the box culvert connects to twin pipes under Box Road and then discharges to an open channel adjacent to Gawley Oval and, ultimately, to the Georges River about 1.5km to the north of the Site.
- 6 The Site is flood prone and flood flows from the 5yr ARI flood event readily exceed the capacity of the box culvert, leading to most of the flood flows travelling overland. The existing building impacts the overland flow of water and together with the neighbouring building effectively constricts the flow path to a 5m 'pinch point' on the western boundary of the Site. The flow depths in various flood events is detailed in the FASOFAC (Ex 1) at paras 26 to 29 as follows:
 - (1) Flood depth on the Site in a 5yr ARI food event is in excess of 1m at the south-eastern corner and up to 0.5m elsewhere. The flows in this event on the site range from a Flood Hazard Level of H1 to H6.

- (2) In a 20yr ARI flood event, the flow across the Site generally exceeds 0.5m to over 1m for the rear third of the Site. The flows in this event on the Site range from a Flood Hazard Level of H1 to H6.
 - (3) In a 1% AEP flood event, the flow across the Site generally exceeds 0.5m to over 1m for nearly the rear half of the Site. The flows in this event on the site range from a Flood Hazard Level of H1 to H6, with approximately the rear half of the site having a Hazard Level of H3 to H6.
 - (4) In the PMF event, the flow across the Site generally exceeds over 1m for nearly the rear half of the Site and up to 1m at other portions of the Site, including the north-western corner. The flows in this event on the Site range from a Flood Hazard Level of H1 to H6, with approximately the rear third of the Site having a Hazard Level of H4 to H6, along with areas near the side boundaries.
- 7 Box Road is flood affected in all flood events above and including the 5yr ARI flood event, ranging from depths of up to 300mm in the 5yr ARI flood event up to 1m in the PMF flood event.
- 8 The open watercourse located at the south-eastern corner of the Site has a length of approximately 54m and contains Estuarine Swamp Oak Forest vegetation, consistent with the threatened ecological community Swamp Oak Floodplain Forest listed under the *Biodiversity Conservation Act 2016*.
- 9 The Site is categorised as being in a Class 3 Acid Sulfate Soil area under Sutherland Shire Local Environmental Plan 2015 (SSLEP) mapping and an Acid Sulfate Soil Management Plan is required pursuant to cl 6.1 of the SSLEP which I come back to at par [20].
- 10 The proceedings commenced on site and the Court heard from objectors (Ex 6) then undertook a view of the Site and surrounding adjacent land. In relation to the impact on residential properties (Contention 5, FASOFAC), the Planning Experts agreed at [86] of the Planning Joint Expert Report (Ex 2) that:

“The further amended plans ... contains notations that the windows within the western façade facing residential properties are to be fixed (and appropriately acoustically treated_ and have fixed angled louvres to prevent downward looking. The plans are also provide for a 2m high solid wall adjacent to the car park at the upper level, preventing light glare and noise from impacting adjoining residential properties. It is agreed that the plans ... resolve Contention 5.”
- 11 The Applicant submits that the Proposed Development seeks to *renew* the Site, with a high quality design of industrial building that caters for a wide range

of industrial and warehouse uses. The Applicant submits that the Proposed Development is;

“9. ... a site specific response to the existing flooding affectation is to remove the existing obstructing building, and to replace it with a sub-floor overland flow path for effectively the footprint of the industrial building – of about 50m in width, or 10 times the width currently afforded.

10. This design significantly improves flood impacts to the upstream catchment and surrounding properties, across a range of flood conditions.

11. The proposed design also facilitates, for the first time, a means for Council to readily access and maintain the box culvert and, in an extreme case, to even replace sections or the whole of it, should it prove necessary.

12. The ground floor of the building is elevated above existing ground levels – and is higher than the PMF flood level, including with climate change. The building is effectively flood proofed for even the most extreme event.

13. The result is an improvement in flood impacts for both the Site, the surrounding properties, and the wider upstream catchment, wholly consistent with the matters required under clause 5.21 of SSLEP.”

(Applicant written submissions, filed 5 May 2023, paras 9 to 13)

12 The Respondent's case is set out in the FASOFAC (Ex 1) and the Contentions pressed by the Respondent for determination by the Court are as follows:

- (1) Contravention of Building Height development standard (cl 4.3 SSLEP) (Contention 2).
- (2) Flooding (cl 5.21 SSLEP) in relation to safe occupation and efficient evacuation of people in all flood events and Stormwater Management (cl 6.4 SSLEP) in relation to development over the existing and proposed extended box culvert unacceptably impacting on Council's ability to enter and maintain or replace the ageing culvert in the future (contentions 3 and 4). I will refer to these as Site constraints and will encompass Contentions 9 and 10 which relate to overdevelopment of the Site in the context of these constraints and public interest (Contentions 9 and 10).

Expert evidence

13 The Court has the evidence and assistance from a number of experts in accordance with their respective Joint Expert Reports listed below and oral evidence during the proceedings. The Joint Expert Reports before the Court are as follows:

- (1) Planning Joint Expert Report (Planning JER) prepared by Aaron Sutherland for the Applicant and Kerry Gordon for the Respondent filed 31 March 2023 (Ex 2).

- (2) Flooding Joint Expert Report (Flooding JER) prepared by Mark Tooker for the Applicant and Louise Collier for the Respondent filed 6 April 2023 (Ex 4).
- (3) Stormwater Joint Expert Report (Stormwater JER) prepared by Sam Haddad for the Applicant and Louise Collier for the Respondent filed 18 April 2023 (Ex 5).
- (4) Environmental Joint Expert Report (Environmental JER) prepared by Peter Moore for the Applicant and Phillippa Biswell for the Respondent filed 18 April 2023 (Ex 3).

Amendments to the Proposed Development

14 The Proposed Development was amended by the Applicant on three occasions during the hearing. The first and third amendments attracted a costs order pursuant to s 8.15(3) of the EPA Act. The amendments are set out in the following paragraphs.

15 The first amendment was sought by the Applicant on the second day of the hearing, the Applicant moved on a Motion seeking leave to further amend the Proposed Development. The Applicant summarised the amendments to be in three groups, firstly a new “Subfloor Plan” to show the extent of the subfloor described as a ‘drainage or flood chamber’. The second group of amendments pertain to a series of internal changes to various units responsive to the particulars in contention 1 of the FASOFAC and the third group of changes is to provide some additional detailing for the upper western part of level 2 where it is closes to the Shirley Road property showing “Privacy Louvre Detail”. The Respondent did not have instructions to agree to these amending plans and the Court, exercising its authority under s 39 of the Land and Environment Court Act 1979 (LEC Act), agrees pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) to the Applicant amending the Development Application in accordance with the Affidavit of James Thomas Oldknow affirmed 2 May 2023 and 28 April 2023 and exhibit JTO1 to the 2 May 2023 affidavit being items (1) to (8) marked Ex C to these proceedings and exhibit JTO2 to the 28 April 2023 affidavit being items (9) to (14) marked Ex D to these proceedings, being the following documents filed with the Court on 2 May 2023:

- (1) Architectural Plans (up to Rev F prepared by Rothelowman dated 29 March 2023)

- (2) Amended Clause 4.6 Variation Request prepared by Sutherland & Associated Planning, dated March 2023
 - (3) Flood Emergency Response Plan prepared by Tooker and Associates, dated March 2023
 - (4) Work Method Statement for Maintenance and Replacement Works of Stormwater Culvert prepared by SGC dated April 2023
 - (5) Stormwater Concept Design Engineering Plans (up to Rev E)
 - (6) Culvert Replacement Work Plans (Rev E)
 - (7) Culvert Maintenance Traffic Management Strategy prepared by JMT dated 4 April 2023
 - (8) Site Waste Management Report prepared by Senica Consultancy Group dated 24 April 2023
 - (9) Response to Ecology Contentions 3(d), 9(e) and 11(c) prepared by Biosis dated 1 May 2023
 - (10) Biodiversity Assessment prepared by Biosis dated 1 May 2023
 - (11) Vegetation Management Plan dated 1 May 2023
 - (12) Structural Design Statement re 8m piling spacing, prepared by JBC Consulting dated 1 May 2023
 - (13) Civil contractor letter in support of Work Method Statement for Maintenance and Replacement Works of Stormwater Culvert, prepared by Chalojni Civil dated 1 May 2023
 - (14) Updated Blockage Report and Assessment prepared by Tooker and Associates dated 2 May 2023
- 16 The second amendment to the Proposed Development was on the third day of the hearing, 5 May 2023, when the Applicant sought to further amend the Proposed Development by changing the roof form to a pitched roof, and as the amendments were minor no costs order was made. The Respondent did not have instructions to agree to these amending plans and the Court, exercising its authority under s 39 of the LEC Act, agrees pursuant to cl 55 of the EPA Regulation to the Applicant amending the Development Application by the amended Plans consisting of 5 sheets (Ex H) as follows:
- (1) Level 2 Drawing TP01.05 P4
 - (2) Level 2 Mezzanine Drawing TP01.06 P4
 - (3) Roof Drawing TP01.07 P3
 - (4) Site Section Drawing SKO3.06 P2
 - (5) Site Section Drawing SK03.07 P1

- 17 The third amendment to the Proposed Development was on the fourth day of the hearing, 30 May 2023, when the Applicant sought to amend the Proposed Development and the Court, in exercising the functions of Sutherland Shire Council as the relevant consent authority, under s 39(2) of the LEC Act, agrees, under s 55(1) of the EPA Regulation, to the Applicant amending Development Application no DA21/1131 in accordance with the following documents filed with the Court on 24 May 2023:
- (1) Final Addendum letter Acid Sulfate Soils Investigation by Geosyntec Consultants, (Ex K);
 - (2) Final Acid Sulfate Management Plan (Rev 3), prepared by Geosyntec Consultants, dated 23 May 2023, (Ex J);
 - (3) Detailed Site Investigation and Acid Sulfate Soil Assessment, prepared by Geosyntec Consultants, dated 23 May 2023, (Ex L);
 - (4) Proposed Industrial Redevelopment Flood Emergency Response Plan, prepared by Tookers and Associates, dated May 2023 (Tracked changes Ex M and clean version Ex N);
 - (5) Building Manager's Office Sketch plan SK20230511, (Ex O);
 - (6) Diesel Generator Room/Location Panel Drawing 20230511.B, (Ex P); and
 - (7) Cl 4.6 Written Request prepared by Sutherland and Associates Planner, dated 17 May 2023 (Ex Q).
- 18 The Respondent tendered final agreed consolidated Proposed/Draft Conditions of Consent, subject to conditions 15D(iii), on 30 May 2023 (Ex 13). I come back to the conditions of consent at par [49].
- 19 I will address the jurisdictional prerequisites and set out my reasons for reaching the conclusion that development consent should not be granted for the Proposed Development. The jurisdictional prerequisites include acid sulfate soils (cl 6.1 SSLEP) (Contention 6, FASOFAC), the Site constraints relating to flood planning (cl 5.21 SSLEP) (Contention 3, FASOFAC), stormwater management (cl 6.4 SSLEP) (Contention 4, FASOFAC) and the context of the Site being burdened by an easement to drain water. The final jurisdictional prerequisite to be satisfied is the justification of the contravention of the maximum height of building development standard (cl 4.3 SSLEP) pursuant to cl 4.6 of the SSLEP (Contention 2, FASOFAC).

Acid Sulfate Soils (Contention 6, FASOFAC)

- 20 As the site is located in a Class 3 Acid Sulfate Soils area, assessment of presence and likely impacts on acid sulfate soils from the development is required in accordance with cl 6.1 of SSLEP, which at subclause (3) states that;

(3) Development consent must not be granted under this clause for the carrying out of works unless –

(a) an acid sulfate soils management plan has been prepared for the proposed works in accordance with the Acid Sulfate Soils Manual and has been provided to the consent authority, and

(b) the consent authority is satisfied that any disturbance of acid sulfate soils resulting from the works will be managed so as to minimise adverse impacts on natural waterbodies, wetlands, native vegetation, agriculture, fishing, aquaculture and urban and infrastructure activities.

- 21 The Environmental Experts provide the following helpful description in the Environmental JER (Ex 3) at [8] to [12]:

“The Site is categorised as being in a Class 3 Acid Sulfate Soil area under SSLEP mapping.

The site is located on disturbed terrain, meaning that the original soils have been either removed, disturbed or buried to a depth of at least 100cm. Below disturbed soils are original estuarine sediments.”

- 22 An Acid Sulfate Soils Management Plan (ASSMP) had been submitted to Council and the areas of contention now concentrate on whether that ASSMP is adequate and whether it has been prepared in accordance with the Acid Sulfate Soils Manual, and the experts agreed that the ASSMP required updating with new samples and agreed conditions of consent to be included in the proposed/draft conditions of consent.
- 23 The Applicant filed and tendered an updated ASSMP on 23 May 2023 (Ex J) and the Respondent agrees that that the updated ASSMP satisfies cl 6.1 of the SSLEP.

Site Constraint: Flooding and stormwater management (Contentions 3 and 4)

- 24 There are fundamental site constraints which the Respondent submits are reasons to refuse to grant consent to the Proposed Development. I will deal with flooding and stormwater first and I will then consider these in the context of the drainage easement.

Stormwater management, cl 6.4 of the SSLEP

25 Contention 4(a) relates to cl 6.4 of the SSLEP which at subclause (3) provides that development consent must not be granted to development on land to which this Plan applies unless the consent authority is satisfied that the development;

(a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and

(b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and (c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact.

26 I have had regard to the Stormwater JER (Ex 5) and that the Respondent was concerned about the impact of stormwater on adjoining land at 6 Shirley Road Taren Point. Ms Collier agrees that the letter dated 3 May 2023 from Mark Tooker of Tooker and Associates (Ex F) accurately identifies that the Shirley Road properties have a drainage line running south to north in the rear of the properties with insufficient capacity and is affected by tidal level because the ponding in the rear of the yards is at a level which matches the large ponded area over the industrial area in the 5yr ARI storm. Mr Tooker notes that any upgrade of the Shirley Road drainage system is a matter for the Shirley Road landowners. Mr Tooker goes on to conclude that the Proposed Development would reduce flood depths for all floods on the Shirley Road properties.

27 As Ms Collier's evidence was that the proposed pit and pipe drainage system was appropriate and was unlikely to be different even if the building was further setback from the western boundary, I find that there is no drainage related reason to require a greater setback from the western boundary and that the proposed setback complies with the 3m setback required by the Sutherland Shire Development Control Plan (SSDCP). The Court is satisfied that cl 6.4(3) of the SSLEP is satisfied because the stormwater drainage avoids any significant impact on adjoining properties.

Flood planning, cl 5.21 of the SSLEP

28 The Respondent contends that the Proposed Development is not suitable for the land when regard is had to cl 5.21(2) and (3) of the SSLEP. At Contention

3 in the FASOFAC (EX 1) relevantly, at particular (b) and (j), the Council contends that the FERP will not achieve safe occupation and efficient evacuation of people in all flood events, contrary to cl 5.21(2)(c) and (d) of the SSLEP.

29 Following the part-heard hearing on 3-5 May 2023, the Applicant prepared and filed an amended FERP (Ex N) to respond to the Further Amended Contention 3(j).

30 Flood planning cl 5.21 of the SSLEP is reproduced below with emphasis added as follows:

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 Floodplain Development Manual.

Floodplain Development Manual means the Floodplain Development Manual (ISBN 0 7347 5476 0) published by the NSW Government in April 2005.

(Emphasis added.)

- 31 The Respondent submits that the amended FERP (Ex N) and amended plans Building Manager's Office Sketch Plan SK20230511 (Ex O) and Diesel Generator Room Location SK20230511.B (Ex P) are

"said to respond to the criticism levelled by Council by providing:

- a. That a site manager be appointed (noting that the role may be performed by more than one person);
- b. A site manager's office is to be located on the fire stair landing between the ground and mezzanine levels, with an area of 8.7m²;
- c. An emergency equipment storage room is to be located on the fire stair landing between the ground and mezzanine levels, with an area of 14.58m² and stored;
- d. A diesel generator room, and a diesel generator at ground level for back up power;
- e. Installation of a battery operated defibrillator fixed to the wall on each floor next to the lift;
- f. Responsibilities of the site manager and the flood wardens are further articulated.
- g. The office has an area of 8.7m² and has no windows. There does not appear to be any commitment as to when or how long the site manager would

be present on the site, save that they are likely to be part of a 'large real estate company.'"

- 32 The Council presses the contention and submits that the Court could not be satisfied that the FERP incorporates appropriate measures to manage risk to life in the event of a flood and could not be satisfied that the proposal will result in the safe evacuation in the event of a flood having regard to the measures proposed and the scale of the development.
- 33 The Applicant maintains its primary position that the proposal is wholly consistent with the matters required under cl 5.21 of the SSLEP, including in respect of the safe occupation and efficient evacuation of people in the event of a flood.
- 34 As satisfaction of the matters in cl 5.21(2) of the SSLEP are a jurisdictional prerequisite, I have carefully considered the evidence paying particular attention to the divergence of expert opinions of Ms Collier for the Respondent and Mr Tooker for the Applicant regarding periods of isolation, and the proposed response in the event evacuation is not safe.

Flood Events

- 35 The Court heard evidence that in the Georges River flood rare event and the confluence of the Georges River flood rare event and the local flood rare event that access is likely to be cut to the property. Ms Collier's evidence is that the land could be isolated for a number of days and Mr Tooker's evidence was that it would be cut on a tidal basis, that is, the flood water would recede and then return giving a window of access to the Site, albeit no modelling of those events had been undertaken by Mr Tooker.
- 36 The Applicant submits that that having the ground floor elevated above existing ground levels, and higher than the PMF flood level, including with climate change, effectively "flood proofs" the proposed building for even the most extreme event. The Respondent accepts that the building may be flood proof however submits that the Court cannot be satisfied whether people will be safe in a PMF event because of the period of isolation and because of potentially confusing messaging or unsatisfactory arrangements proposed in the FERP.

37 A PMF, by definition in the SSDCP Chapter 40, Environmental Risk, “is the largest flood that could conceivably occur at a particular location, usually estimated from probable maximum precipitation”. (Ex 9, Tab 13, Page 15)

38 The Applicant submits that,

“in other words, refuge for pedestrians and vehicles within the proposal is provided above the PMF level at all times and as a result there is no risk of danger for occupants if required to ‘shelter’.”

(Applicant Written Submissions, 29 May 2023)

39 I will now consider the FERP (Ex N) and determine whether it satisfies cl 5.21 of the SSLEP, in particular cl 5.21(3)(c) namely “whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood”.

Are the evacuation risks appropriately managed

40 The Respondent submits that the fundamental difference between the parties in relation to the flooding issue generally is the isolation time for the Site, which is why the FERP is so important (Transcript 30 May 2023 page 7 at 45). In the context of a PMF event, the Respondent refers the Court to the Draft Shelter in Place Guidelines that have been published and exhibited but not yet made by the Department of Planning (Ex 11). The Respondent’s concern remains that the Applicant has not modelled the PMF from the Georges River event and the PMF where there is a confluence of those two matters.

41 The FERP at 5.2 titled “Flood Warning and Isolation Times” identifies that flood warning times are very short, within 40 mins in the 100ye ARI and within 15 mins in the PMF Box Road will be inundated. The issue is safety of use of Box Road by vehicles in flood events which directly impacts any period of isolation of the Site. Box Road will be unsafe for small cars and pedestrians in the 100 yr ARI for approximately 1.2 hours. The FERP states at 5.2 that;

“the worst case duration without vehicular access to Box Road (when floodwaters have reduced to RL 2m AHD) would be less than 3 hours and this would occur only for a very rare event.

To prevent any vehicles on the site driving into unsafe conditions, a gate across the driveway will be closed when unsafe conditions for small vehicles are experienced on Box Road, ie when the flood depth reaches 0.2m”

- 42 The FERP accurately identifies the agreed position that the proposed floor level at RL 3.8m AHD will be above the flood level with climate change in 2100 of RL 3.2m AHD and that “the flood risk area for the development is the inundation of Box Rd”. In the event of depth of water on Box Road being more than 300mm, a gate will close across the driveway to the Site preventing vehicles from leaving the Site. There is a designated emergency storeroom adjacent to the Site Manager’s office (Sketch Plan SK20230511 Building Managers Office, Ex O).
- 43 Ms Collier gave evidence that the period of isolation during that flood event will potentially be in the order of days.
- 44 Box Road is at 1.7m AHD and the peak flood level was agreed between the experts to be about 2.4m AHD and that that will increase with sea level rise up to potentially 3.3m AHD and the real difference between Ms Collier and Mr Tooker is that Ms Collier’s evidence is that there will be some floods where the Site is fully isolated and all road access is cut off for two to three days whereas Mr Tooker relies on the tidal basis of the flood leaving windows to evacuate. Ms Collier does not agree with Mr Tooker’s evidence regarding the tidal influence and her evidence is that that is not what occurs in large catchments, and that there was information of the Georges River further upstream that historical floods take 18 to 36 hours to pass through and will inundate surrounding roads for that period of time. Ms Collier gave evidence of her knowledge and experience of the Ballina floods to explain why she did not think that the tidal influence would have the effect that Mr Tooker relies on, namely because the flood wave drowned out the tidal signal. Mr Tooker has not modelled this confluence.
- 45 I prefer the evidence of Ms Collier in relation to tidal influence.
- 46 The other concern raised by the Respondent is that the reliance on tidal influence creating “windows” of opportunity to evacuate the Site via Box Road results in confusing and potentially dangerous messaging given as to when evacuation is to be triggered. The Respondent submits that the FERP does not manage that.

- 47 I accept Ms Collier's evidence and find that isolation event will occur somewhere between the 1 in 100 flood event and the PMF flood event as well as the range of flood events in between where Box Road will be cut off. The FERP identifies a procedure that is contrary to the Draft Shelter In Place Guidelines (Guidelines) which recommends shelter-in-place if the duration for flood inundation is less than 6 hours.
- 48 The Guidelines state that evacuation is the best way to keep people safe and "is always preferable" and that the "use of shelter-in-place as a flood risk management approach will require clear and regular communication and a robust community awareness for individuals to understand their level of risk and the triggers for associated actions." The Guidelines are consistent with Mr Tooker's approach in the FERP to the extent that Mr Tooker describes Box Road being prone to flash flooding and the Guidelines state that there can be a role for shelter-in-place approaches in flash flood catchments where "the time to flooding and flood duration are typically very short with minimal warning time... typically less than 6 hours".
- 49 The Respondent submits that the FERP does not provide an appropriate way to manage the Site in terms of shelter-in-place firstly because it will result in up to 103 separate tenancies sheltering in place for a period of time greater than 6 hours and secondly, "it is not appropriate to have somebody who is trained to deal and respond with that type of emergency that is not on site, and it would be left to those tenants who attend some training, warden training, over time to be there to coordinate and manage the emergency service on site during the period of isolation. ... in the event that the Court was minded to grant consent, the site manager really ought to be on site all the time" as sought by proposed consent condition 15D (iii) which reads "[a] site manager that meets the description in the approved FERP shall be on site at all times that any tenancy is occupied." The Applicant seeks the deletion of this condition. I do not agree that the proposed condition should be deleted and I give my reasons below.
- 50 The Respondent refers to the site manager as described in the FERP to be "some sort of unicorn position" however, I accept the Applicant's submission that there might actually be more than one person in that role at a particular

time which is expressly stated in the FERP at part 6 where, “[t]he role of site manager may be performed by more than one person as detailed in this plan”.

The Applicant submits that;

“the ‘confluence of the local flood event and the Georges River flood event’ will only (in theory) ever occur on the probability of 2x 1 in 1,000,000 year events occurring at the same time. It is this extreme unlikelihood that should be kept firmly in mind when the Court is evaluating the Respondent’s submissions and suggested condition for “a site manager that meets the description in the approved FERP shall be on site at all times that any tenancy is occupied” (see: Council’s proposed Condition 15Diii)).”

- 51 The Applicant’s position is that such a requirement is excessive and unreasonable, and on that basis, Condition 15Diii should not be imposed by the Court further, and the Applicant submits that this position is “made good by noting that the Respondent has not pointed to any environmental planning instrument, policy or approval that requires a site manager to be on site at all times that an industrial building is occupied for flood management purposes.”
- 52 The FERP sets out a complex emergency response plan in the event of flooding and having accepted Ms Collier’s evidence as to the potential for isolation of the Site for up to 1 to 3 days, and in any event, I find that in the range of flooding events between the 1% AEP and the PMF events, isolation of the Site is potentially longer than 6 hours. The responsibility to manage the Site leading to and during any shelter-in-place for the up to 103 tenancies proposed must fall on the Site Manager and the proposed consent condition 15D(iii) is reasonable and appropriate.
- 53 This is a finely balanced matter where even with the combination of the terms of the proposed condition 15D(iii) and the fact that there will be more than one person in the role of Site Manager, I remain troubled and conclude that I am not sufficiently satisfied that the Proposed Development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood as required by cl 5.21(3)(c) of the SSLEP.
- 54 Further, on a merit assessment, the flood prone nature of the land, together with the other constraints of the Site which I deal with below, the easement to drain water leads me to conclude that the Proposed Development is an overdevelopment of the Site and that development consent should be refused.

Site Constraint: Easement to drain water

- 55 The easement K218529 (Easement) was registered on title of the Site in 1966 (Ex 9) and the Applicant's case is that the easement does not stand in the way of a grant of consent.

Office of the Registrar-General /Src:GlobalX /Ref:dda2474002

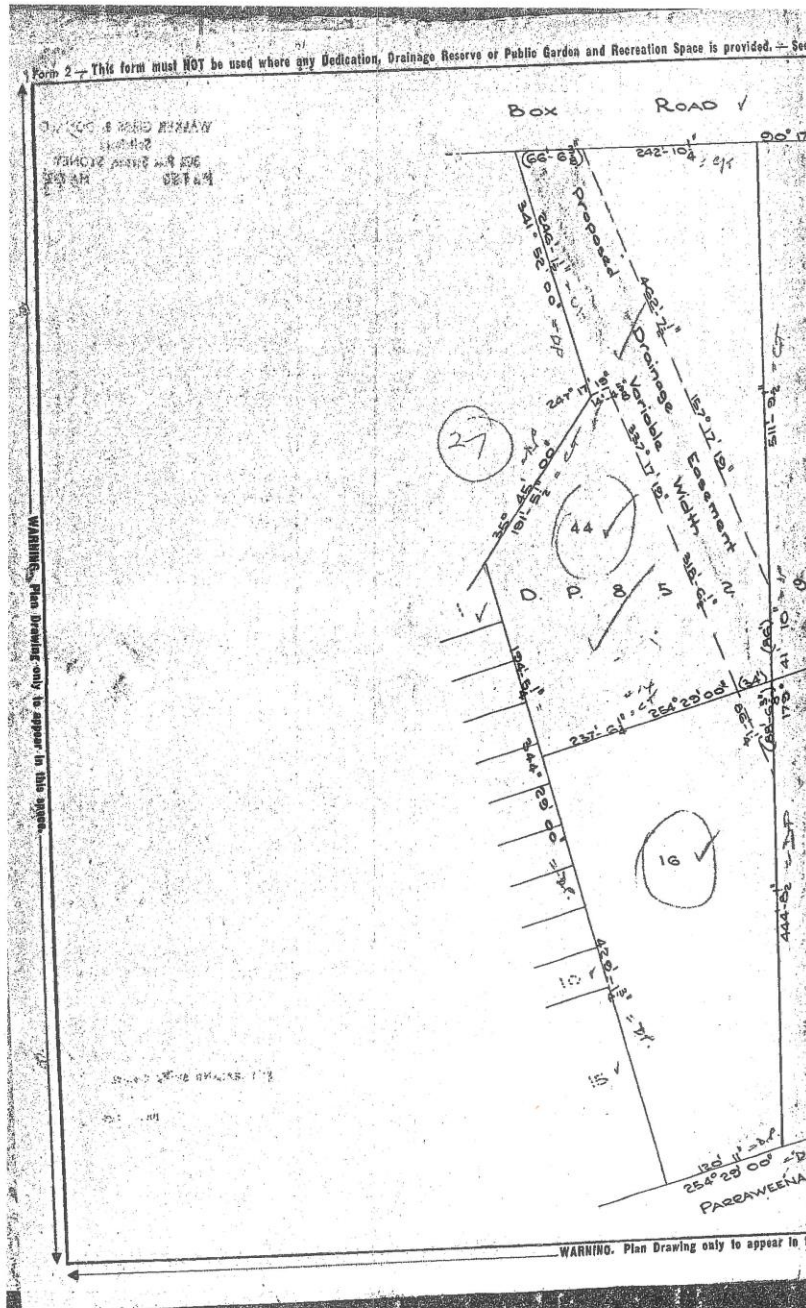


Fig 4 Plan of Drainage easement, Annex A to the Memorandum of Transfer and Grant of Drainage Easement Ex 9, folio 6 , Tab 1

- 56 The Proposed Development is not compliant with the location or the terms of the Easement and included works. The Respondent submits that the Easement expressly restricts development ‘of any kind or description’ without written consent of Council and impliedly restricts development that would restrict conveyance of surface and stormwater in, under or through the Site.

“An easement of that type is subject of clause 1.9A of the Sutherland Shire Local Environmental Plan 2015 (*Cracknell and Lonergan Pty Limited v Council of the City of Sydney* [2007] NSWLEC 392 at [38], or alternatively an easement that confers rights and interests on the Council as a public authority pursuant to cl 1.9A(3) of the LEP.”

(Respondent Written Submissions, para 5)

- 57 The Applicant submits as follows:

“86. The construction of the new section of culvert (at Council’s request) is, for a small part, outside the boundaries of the existing easement. The easement will need to be varied to provide the same rights of maintenance and access as for the existing portions. The applicant will propose a condition.

87. In opening, Council addressed on the basis that the easement would also be varied to enable the building over the culvert. This is not necessarily required. The terms of easement itself contemplates that Council may grant permission to build over the easement. Presumably that is what occurred for the existing building. The Court can exercise this function, under s39(2) of the Land and Environment Court Act 1979.

88. Although possibly unnecessary to decide, the restriction from building over the easement that is specified in the terms of the easement is also subject to clause 1.9A of SSLEP. *This is because the easement also in part contains a covenant restricting development.* Council submitted clause 1.9A was disapplied because of sub-clause (2)(a). This is not the case. The easement was purchased (as shown on the transfer instrument) and there is no evidence that demonstrates it was a covenant imposed by Council or was required – such as by dint of a condition. (Emphasis added)

89. By either route – the Court exercising the function to allow building, or the covenant not applying by reason of clause 1.9A, the easement does not stand in the way of a grant of consent.” (Applicant written submissions para 86)

- 58 Council does not consent to the variation to the Easement as proposed by the Applicant because;

“the Applicant does not merely seek the Court to exercise the Council’s discretion to permit building over the easement ‘in writing’, it seeks to vary the location of the easement and its terms. That would need to be done by releasing or varying the current Easement. The applicant has not provided a draft instrument for the Court’s consideration, and it is necessary to examine

the evidence and amended application to understand the changes sought.”
(Respondent Written Submissions, para 8)

- 59 The Respondent helpfully provides, in table format, the terms of the Easement that would need to be modified by the Proposed Development. I reproduce the table below:

Current right	Proposed amendment
Location of easement	There is no plan of the proposed new extent of the easement, however plans TP01.00A and TP01.01 F (Ex C, Tab 2) identify that the culvert extension will project outside of the easement boundaries to the west. There appears to be a suggestion in the town planning joint report Ex 2, p13 that the applicant offers a 50m overland flow path in the sub floor area, although the offer is unclear.
Building works over	The architectural plans show the extent of building over the easement.
Full and free right and liberty to make, layout, construct and forever use and maintain an open and/or piped and/or covered drain upon in through and/or under and/or over the strip	Rights to be constrained by built form, which will limit the type of machinery that may be

<p>of land forming the easement for the purpose of conveying and carrying off surface and stormwaters from Box Road.</p>	<p>used (and liberty to use the whole of the space) and restriction on hours that maintenance may be performed (proposed to be 8pm to 5.30 am per Ex C, Tab 5)</p>
<p>Right to remove and carry away all or any of the clay sand gravel stones and earth which shall be taken out of the strip of land and/or to use all or any part thereof in the making laying out and constructing the said drain and/or to leave the same or any part or parts thereof upon the said strip of land.</p>	<p>Rights to be constrained so as not to affect the structural integrity of the building.</p> <p>Right of temporary access to store items during maintenance works to be displaced. The applicant proposes that removal of up to 7 panels could be stored in the road reserve, alienating car spaces.</p> <p>If all panels are to be removed, they would have to be stored off site by Council, at its cost.</p>
<p>Full and free right and liberty to inspect the condition of and to cleanse maintain mend repair and/or relay and/or recover the said drain or any part or parts thereof and for such purposes or any of them at all reasonable times with surveyors workmen horses carts materials machinery and implements and</p>	<p>The times for use of the easement are intended to be restricted to 8 pm and 5.30am.</p> <p>The applicant proposes to utilise the area of the easement for</p>

<p>other persons and things to enter into and upon the said strip of land and to bring the place and leave thereon and/or remove therefrom all necessary materials machinery implements and things and to remove and carry away and/or use and/or leave as aforesaid all or any of the clay sand gravel stones and earth which shall be taken out of the said strip of land and to do all such acts and things as may be deemed by the Council as necessary.</p>	<p>commercial purpose and requires that items not be stored in the easement and make good the surface of the easement with road plates each day to enable use between 5.30am to 8pm.</p>
<p>Covenant by the owner of the land not to permit or suffer any act deed matter or thing whereby the said drain shall or shall be likely to become injured or damaged or whereby the Council shall be prevented from or hampered in constructing maintaining mending repairing or cleansing the said drain or any part or parts thereof</p>	<p>It is assumed a similar covenant is accepted, subject to the variation of terms.</p>
<p>Covenant by the owner of the land not to interfere with the free flow and passage of soil or water through the Easement.</p>	<p>The applicant seeks to restrict the free flow by the built form.</p>
<p>Covenant by the owner to make good any damage it causes</p>	<p>The covenant would be varied by permitting interference, subject to terms. It is anticipated the same damage warranty would apply.</p>
<p>Covenant by the owner not to erect or permit to be erected any building or other erection of</p>	<p>The applicant seeks the Court's permission,</p>

any kind or description over the said strip of land without Council's permission.	pursuant to s39(2) of the LEC Act to build over the Easement.
---	---

60 Finally, the Respondent submits that;

“notwithstanding the facultative powers conferred on the Court pursuant to s 39(2), the Court would not exercise the Council's discretion to permit the variation to the terms of the easement (or release and imposition of a new Easement) on the basis that it is not in the public interest to do so and that it will have the effect of permitting development that is incompatible with the flood function and behaviour on the land.” (Respondent's written submission, para 9)

61 I accept the Respondent's submission that consenting to the building over the Easement and consenting to a variation of the Easement would not, on balance, be in the public interest.

62 I will now consider the various statutory provisions starting with the SSLEP and then the LEC Act.

63 Starting with the SSLEP, cl 1.9A of the SSLEP provides as follows:

1.9A Suspension of covenants, agreements and instruments

(1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, *any agreement, covenant or other similar instrument that restricts the carrying out of that development* does not apply to the extent necessary to serve that purpose. [emphasis added]

(2) This clause does not apply—

(a) to a covenant imposed by the Council or that the Council requires to be imposed, or

(b) to any relevant instrument within the meaning of section 13.4 of the *Crown Land Management Act 2016*, or

(c) to any conservation agreement within the meaning of the *National Parks and Wildlife Act 1974*, or

(d) to any Trust agreement within the meaning of the *Nature Conservation Trust Act 2001*, or

(e) to any property vegetation plan within the meaning of the *Native Vegetation Act 2003*, or

(f) to any biobanking agreement within the meaning of Part 7A of the *Threatened Species Conservation Act 1995*, or

(g) to any planning agreement within the meaning of Subdivision 2 of Division 7.1 of the Act.

(3) This clause does not affect the rights or interests of any public authority under any registered instrument.

(4) Under section 3.16 of the Act, the Governor, before the making of this clause, approved of subclauses (1)–(3).

64 Powers of the Court on appeals is set out in s 39 of the LEC Act and provides as follows:

39 Powers of Court on appeals

(1) In this section, *appeal* means an appeal, objection, reference or other matter which may be disposed of by the Court in proceedings in Class 1, 2 or 3 of its jurisdiction.

(2) In addition to any other functions and discretions that the Court has apart from this subsection, *the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.* [emphasis added]

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.

(6) Notwithstanding any other provision of this section, if an appeal relates to an application made to a council within the meaning of the *Local Government Act 1993* or a consent authority within the meaning of the *Environmental Planning and Assessment Act 1979* and that council or consent authority may not approve of, consent to, or deal with, or grant a permission in respect of, the application except after consultation with, or with the concurrence or approval of, any person or body—

(a) the Court may determine the appeal whether or not the consultation has taken place and whether or not the concurrence or approval has been granted, and

(b) in a case where the concurrence or approval has been granted—the Court may vary or revoke any conditions imposed by that person or body or may impose any conditions that could have been imposed by that person or body.

(6A) (Repealed)

(7) The functions of the Court under this section are in addition to and not in derogation from any other functions of the Court.

(8) This section (other than subsection (5)) does not apply to proceedings under section 30 or 31 of the *Access to Neighbouring Land Act 2000*.

65 There are additional powers of the Court set out in s 40 of the LEC Act being provision of easements. I reproduce that section in full as follows:

(1) This section applies if—

(a) the Court has determined to grant or modify a development consent pursuant to proceedings on an appeal under the *Environmental Planning and Assessment Act 1979*, or

(b) proceedings on an appeal under the *Environmental Planning and Assessment Act 1979* with respect to the granting or modification of a development consent are pending before the Court (whether constituted by a Judge or by one or more Commissioners).

(2) The appellant may make an application to the Court for an *order imposing an easement* over land. (Emphasis added)

(3) The parties to an application under this section include the owner of the land to be burdened by the easement, and each other person having an estate or interest in the land, as evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900*.

(4) In dealing with an application under this section, the Court may exercise the jurisdiction of the Supreme Court under section 88K of the *Conveyancing Act 1919* and, in that event, section 88K of the *Conveyancing Act 1919* applies to the Court's exercise of that jurisdiction in the same way as it applies to the exercise of that jurisdiction by the Supreme Court.

66 The power under s 40 of the LEC Act extends to imposing an easement, not varying an existing easement and in any event, the power under s 40 of the LEC Act does not extend to the jurisdiction of a Commissioner in this Class 1 Appeal.

67 As the parties both rely on the effect of cl 1.9A of the SSLEP, it is relevant to consider its application to the Easement. Firstly, the SSLEP contains the provision of cl 1.9A, in accordance with s 3.16 of the EPA Act, (formerly s 28), which would allow a permissible development to take place notwithstanding any covenant to the contrary. This leads to the question of whether the Easement is a *covenant to the contrary* of otherwise permissible development.

68 I have referred to the text Butt's Land Law, 7th Edition Chapter 9 Easements at [9.850] and Chapter 10 Covenants Affecting Freehold Land at [10.980] Public Law: Overriding Planning Legislation (Butt's Land Law) which provides a helpful summary of the law noting however, that Butt's Land Law does not mention the High Court decision of *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492; [2011] HCA 27.

- 69 The decision of *Natva Developments Pty Ltd v McDonald Bros Pty Ltd & Ors* [2004] NSWSC 777 (*Natva*) deals with a right of carriageway (ROC) at [43] and [56] - [58] provides as follows:

“43 The parties do not dispute that the ROC in the present case is a “covenant ... imposing restrictions on development” within the scope of clause 26(1) since the rights created thereby have their source in an agreement or covenant and those rights, of their nature, must impose restrictions on the way in which Lot 41 can be developed: see *Doe v Cogente Pty Ltd* (1997) 94 LGERA 305, at 317 per Cowdroy AJ.

...

Conclusions as to s.28 Defence

56 The *EP&A Act*, in so far as it regulates the use of land in New South Wales, takes precedence over the rights of use which may be afforded under the *Real Property Act 1900* (NSW), the *Conveyancing Act* or the general law. This is because the *EP&A Act* is “concerned with land as a topographical entity, indifferently to its proprietorship”: *Hillpalm Pty Ltd v Heaven’s Door Pty Ltd* (2002) 55 NSWLR 446, at 449. Section 28 “is designed to facilitate development and to overcome impediments placed on development so as to avoid sterilisation of land and it recognises that the ultimate regulatory provisions in relation to the carrying out of development lie in the [EP&A] Act”: *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs & Planning & Anor* (1996) 90 LGERA 341 at 348 per Pearlman J.

57 Accordingly, a provision in a local environment plan or in a development consent may prevail over restrictive covenants or other private rights so as to render them pro tanto inoperative: see *Doe v Cogente* (supra) at para.14 and the authorities there cited.

58 In my opinion, the Defendants are correct in their submission that the strata subdivision consent, as amended by the further consent given on 5 March 1993, was a consent which, by virtue of Clause 26(1) Blacktown LEP and s.28 *EP&A Act*, rendered inapplicable the rights afforded to the owner of Lot 42 over such parts of the ROC as were designated as car parking spaces in Drawing Number 16161/11.”

- 70 *Cracknell and Lonergan Pty Limited v Council of the City of Sydney* (2007) 155 LGERA 291; [2007] NSWLEC 392 (*Cracknell*) at [38] provides as follows:

“38 An agreement or instrument does not “impose” a restriction on development unless the restriction is expressly stated or necessarily implied in the agreement or instrument: see *Application of Thompson*, unreported, Supreme Court of NSW, McLelland CJ in Equity, 25 October 1993, p 4.”

...

42 The transfer of the freehold, the grant of a lease, or *the grant of an easement in relation to land may prevent development on that land for practical reasons but the instruments effecting such dealings do not in terms impose restrictions on development* within the meaning of clause 44 of South Sydney Local Environmental Plan. [emphasis added]

43 The *Conveyancing Act* 1919 (s 88) specifies the requirements for the valid creation of easements and of restrictions arising under covenants or otherwise as to the user of any land. Section 88(1) expressly distinguishes an “easement” from a “restriction”.

...

46 ... Another construction is fairly open. The clause can and should be confined to restrictions of a negative nature imposed on development arising from the language of the agreement or instrument. It has no application where the agreement or instrument confers positive rights of ownership or use which would be interfered with by the development.”

- 71 Palmer J in *Natva* seems to have relied on the agreement between the parties whereas Preston CJ in *Cracknell* at [60] to [65] undertook an analysis of the decision of Cowdroy AJ in *Doe v Cogente Pty Ltd* (1997) 94 LGERA 305 (*Doe v Cogente*). Preston CJ observes at [66] that Cowdroy AJ’s decision was;

“...subject to appeal but the Court of Appeal not only did not determine the appeal on this ground (and hence did not affirm Cowdroy AJ’s decision on this point) but expressly stated that “It should not be assumed, however, that we endorse the reasoning of Cowdroy AJ on this issue”: *Cogente Pty Ltd v Doe* (1998) 98 LGERA 162 at 169.”

Preston CJ concludes at [67] that the decision of Cowdroy AJ in *Doe v Cogente* is wrong and should not be followed.

- 72 After *Cracknell*, the High Court had reason to consider s 28 of the EPA Act (now s 3.16) in the decision of *Cumerlong Holdings Pty Limited v Dalcross Properties Pty Limited* (2011) 243 CLR 492; [2011] HCA 27 where per Gummow ACJ, Hayne, Crennan and Bell JJ, it was held in the headnote that;

"Legislation which, by prescription of a particular manner and form for the making of planning instruments, operates to mitigate the extent of the interference by planning legislation with private property rights, should be read in light of the purpose of mitigating the derogation of private rights. *Application of Thompson* (unreported, NSW Sup Ct, McLelland CJ in Eq, No 3361 of 1993, 25 October 1993), approved.”

- 73 I consider the Easement to be an easement to which cl 1.9A(3) of the SSLEP applies however, if I were incorrect and instead I were to applying the analysis adopted by Preston CJ in *Cracknell* I would find as follows:

- (1) Is the Easement a covenant, agreement or instrument? Arguably yes;
- (2) Can the covenant, agreement or instrument be said to be ‘regulatory’? Arguably no; and
- (3) Does the covenant, agreement or instrument in terms expressly restrict development of the kind sought by the Proposed Development? Yes it

does restrict development of the kind sought by the Proposed Development.

- 74 The question, as reframed by Preston CJ in *Cracknell*, is whether the Easement that burdens the Site created by an “agreement, covenant or other similar instrument that restricts the carrying out of that development” within the meaning of cl 1.9A of the SSLEP? My conclusion to that question is in the affirmative when considering the relevant express terms of the Easement which provides as follows:

“The transferor hereby covenants with the Council that it the transferor will not
—
...

erect or permit to be erected any building or other erection of any kind or description of the said strip of land without the Council’s permission in writing being first had and obtained ...”

- 75 The Applicant submits that the Court can exercise the function of the Council to agree to building over an easement (Transcript 5 May 2023, page 53 at 25) pursuant to s 39(2) of the LEC Act which provides as follows:

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, *for the purposes of hearing and disposing of an appeal*, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal. [Emphasis added]

- 76 Although it may be that the Court’s function extends to the exercise of the Council’s discretion to consent to the building over the easement, I am not persuaded to do so.

- 77 The Applicant on 5 May 2023 submitted that it does not “shy from a need to vary the easement” and refers the Court to proposed consent condition 44 which reads as follows:

“44. Easements

Prior to the issue of any Occupation Certificate, the existing drainage easement (dealing No. K218529) must be varied to include the extended stormwater culvert as illustrated in red outline on the approved Ground (Level), Drawing No. TP01.01 (Revision F) prepared by Rothelowman dated 29 March 2023 and the overland flow path across the whole of the subfloor shown on drawing TP01.00 A prepared by Rothelowman dated 29 March 2023.

The varied easement is also to include the following terms:

- (a) access to the stormwater easement is to be made available at all time;
and

(b) the removal and replacement of the concrete slabs covering the culvert is to be carried out by the owner upon request from Council and at the full expense of the owner/s; and

(c) the owner/s acknowledge that access to the ground level units will be disrupted during certain types of maintenance work, which will be carried out at a time chosen by Council, subject to adequate prior warning (except in the case of emergency maintenance work)."

78 There is expert agreement in oral evidence during the proceedings that the life of infrastructure within the Easement is 50 years. The infrastructure, also referred to as the box culvert and pipes, was constructed sometime between 1966, when the Easement was registered on title, and 1970, by which time the existing building was constructed which means, if the infrastructure of the Easement, pipes etc was constructed in 1968, that infrastructure is now 55 years old. I accept the Applicant's submission that there is no evidence of any maintenance work by Council to the box culvert in the last 25 years, however it is the future maintenance, repairs or replacement of the box culvert or indeed any works within the strip of land that is relevant for the purpose of assessing and determining this appeal. I find that repair or replacement consisting of major work to the box culvert is likely in the near future in light of the experts' agreement that the infrastructure is currently at or close to end of life.

79 The Applicant relies on the Work Method Statement for the culvert, (Ex C Tab 5) in answer to Contention 4(b) of the FASOFAC (Applicant Written submissions at para 34-41). I accept that there is no effective access presently available to the box culvert to the extent of the Site over which is occupied by the existing building.

80 Particular C of the Contention identifies that replacement of the whole of the box culvert might take up to 6 months and require closure of the Site. The Applicant submits that;

"the Work Method Statement shows this is not required. The statement is directed to both minor maintenance access, as well as for major work, should that be needed. It shows that access can be provided to parts of the culvert, as needed, or even the whole." (Applicant submissions par 38)

81 The Applicant submits that;

"the location of the columns on the architectural plans are indicative. Their locations and details will be designed at the construction stage, with relevant structural engineering input. The potential for conflict will be readily resolved, as Mr Haddad confirmed." (Applicant submissions par 38).

82 The proposal is for removable panels to be placed on the ground floor above the area of the box culvert and that their removal would be carefully, and slowly carried out, with multiple workers including a truck or crane. The proposal does not adequately accommodate the storage of the panels, allowing for storage on site of a relatively small number of panels.

83 I find that the Easement does expressly restrict the carrying out of the Proposed Development. I conclude that notwithstanding the facultative powers conferred on the Court pursuant to s 39(2) of the LEC Act, the Court would not exercise the Council's discretion to permit the building over the Easement or to vary the terms of the Easement (or release and impose a new Easement) on the basis that it is not in the public interest to do so and that it will have the effect of permitting development that is incompatible with the flood function and behaviour on the land.

84 I conclude that the Proposed Development will not be in the public interest because;

- (1) An easement that benefits Council is for all intents and purpose an easement that benefits the public. The Council, does not consent to varying the Easement and the Proposed Development will vary the easement.
- (2) The existing building contravenes the terms of the Easement and the Proposed Development, although may result in some improvements to the existing conditions, will also contravene the terms of the Easement.
- (3) The Proposed Development will constrain the way in which the Council can maintain or renew the culvert and overland flow path in the public interest.
- (4) The measures required to be undertaken to access the culvert will result in an additional cost to the Council, which in turn is an imposition on the public purse.
- (5) The purported renewal of the Site by the Proposed Development may be an improvement to the existing status quo, however, this is a false economy because Ms Collier's unchallenged evidence is that if the terms of the Easement are complied with it would have a similar or greater improvement.

85 I find that the Proposed Development is not orderly development because;

- (1) The Terms of the proposed easement are not provided by the Applicant. This is left to a proposed condition of consent 44 and an element of uncertainty remains.

- (2) Maintenance, repair and replacement of the infrastructure within the Easement, which will consist of major works in the near future, is not incorporated or otherwise dealt with in a meaningful way which would inevitably result in a conflict of use of the Site potentially during construction or not long after construction is completed.

Is the contravention of the Height of Building development standard justified? (Contention 2)

86 The Site is subject to a Height of Building (HOB) development standard being a maximum height of building of 16m.

87 The Proposed Development contravenes the HOB development standard by 2.2m to 2.6m and the Applicant relies on a cl 4.6 written request (Written Request) to justify this contravention, prepared by Sutherland & Associates Planning, filed 24 May 2023 (Ex Q). The Applicant's submissions filed 5 May 2023, at para 14 and para 59 onwards address the Written Request and at para 14 submits that the breach of the height limit is a consequence of elevating the building.

88 The Planning experts agree that the further amended plans (Ex H) have resolved concerns in relation to the impact of the proposed building height breach upon the adjacent residential properties (JER Planning at [13], Ex 2). Ms Gordon's evidence is that in her opinion;

"the proposal breaches the building height control directly because of the inappropriate or poor design choices made for the development proposed on a highly constrained site. The type of development and its design represent a significant overdevelopment of what is a highly constrained site, resulting in an uncharacteristic height, bulk and scale as viewed from adjoining properties and the public domain, including from the public reserve opposite the site in Box Road." (JER Planning at [65])

89 At the part heard hearing on 4 May 2023, the Court was informed that the parties had become aware of recent amendments to the SSLEP on 26 April 2023 which arise in response to the Standard Instrument (Local Environmental Plans) Amendment (Land Use Zones) Order 2021 and Standard Instrument (Local Environmental Plans) Amendment (Land Use Zones) Order 2022. The parties are of the view that there has been a relevant change to the zoning objectives and these are reflected in the updated Written Request prepared by the Applicant's town planner (Ex Q).

- 90 The Respondent made oral submissions in closing on 5 May 2023 and the Respondent confirmed on 30 May 2023 that those submissions remain unchanged by the Written Request filed 24 May 2023 in the context of the amendment to the SSLEP which changes the zone of the Site from IN1 General Industrial to E4 General Industrial, as detailed in the table below at par [91].
- 91 The parties agree that the relevant changes to the SSLEP are summarised in the below table:

	Pre-26 April	Post-26 April (current)	Change ?
Zoning	IN1 General Industrial	E4 General Industrial	Yes
Zoning Objective s	<ul style="list-style-type: none"> • To provide a wide range of industrial and warehouse land uses. • To encourage employment opportunities. • To minimise any adverse effect of industry on other land uses. • To support and protect industrial land for industrial uses. 	<ul style="list-style-type: none"> • To provide a range of industrial, warehouse, logistics and related land uses. • To ensure the efficient and viable use of land for industrial uses. • To minimise any adverse effect of industry on other land uses. • To encourage 	Yes

	<ul style="list-style-type: none"> • To enhance the visual appearance of the employment area by ensuring new development achieves high architectural and landscape standards. • To minimise the impact of development in the zone on areas of environmental significance. 	<p>employment opportunities.</p> <ul style="list-style-type: none"> • To enable limited non-industrial land uses that provide facilities and services to meet the needs of businesses and workers. • To enhance the visual appearance of the area by ensuring new development achieves high architectural and landscape standards. • To minimise the impact of development within the zone on areas of environmental significance. 	
Max Height	16m	16m	No

<p>Height objectives</p>	<p>(a) to ensure that the scale of buildings—</p> <p>(i) is compatible with adjoining development, and</p> <p>(ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and</p> <p>(iii) complements any natural landscape setting of the buildings,</p> <p>(b) to allow reasonable daylight access to all buildings and the public domain,</p> <p>(c) to minimise the impacts of</p>	<p>(a) to ensure that the scale of buildings—</p> <p>(i) is compatible with adjoining development, and</p> <p>(ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and</p> <p>(iii) complements any natural landscape setting of the buildings,</p> <p>(b) to allow reasonable daylight access to all buildings and the public domain,</p> <p>(c) to minimise the impacts of</p>	<p>No</p>
---------------------------------	--	--	-----------

	<p>new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,</p> <p>(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,</p> <p>(e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,</p> <p>(f) to achieve</p>	<p>new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,</p> <p>(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,</p> <p>(e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,</p> <p>(f) to achieve</p>	
--	--	--	--

	transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.	transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.	
--	---	---	--

- 92 The Written Request addresses how the Proposed Development achieves the objectives of the E4 General Industrial Zone at pages 30 to 31, and how the Proposed Development achieves the objectives of the HOB development standard at pages 16 to 24.

Is it unreasonable or unnecessary to comply with the HOB development standard and does the Written Request adequately address this?

- 93 The Written Request relies mostly on the first of the five tests set out in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42], that is, to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- 94 The Respondent submits that although the Written Request undertakes an extensive assessment of compatibility of the Proposed Development in terms of its visual bulk, it does not address the desired future character and the Court is referred to the decision of Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 at [52] and [53]. The Respondent submits that where there is a zone interface with residential properties, an anomaly in the character of the area is the proposed car parking and vehicular circulation spaces on a roof element and, that;

“the Applicant has done that in this exercise of trying desperately to remove the visual impact from the Shirley Road properties by opening up that roof element so that the car parking is not covered to achieve the improvement in the visual impact for those properties, but without thinking about the dramatic change in character that the rooftop circulation space would create”.
(Transcript 5 May 2023 page 61 at par 15)

- 95 On balance, I am not satisfied that compliance with the HOB development standard is unreasonable and unnecessary because the introduction of an uncharacteristic feature is not consistent with the objectives of the HOB development standard.

Are there sufficient environmental planning grounds to justify the contravention of the HOB development standard?

- 96 The Applicant submits that the height breach is directly related to elevating the building to provide a sub-floor flow path and to provide a completely flood proof development above the PMF level. The Applicant further submits that the Proposed Development has benefits for surrounding development in the lessening of flood impacts, and the height breaching elements do not cause any adverse impacts.

- 97 At pages 26 to 29, the Written Request sets out the environmental planning grounds to justify the contravention of the HOB development standard to be the following:

- (1) Flood affectation
- (2) Impacts of Elements above Height Control
- (3) Compatibility with Context
- (4) Efficient Use of Land

- 98 The Respondent submits, and I accept, that the flood affectation environmental planning ground does not justify the contravention because, as Ms Collier comments in par 6 of attachment B to the Planning JER (Ex 4), which I reproduce as follows:

“I note that the Tooker report states that the removal of the buildings and spanning of the Site with a building with an undercroft area is reported to be the only solution that would provide the benefit offered to Council by the application, stating on page 3:

This is the only site in the flooded area with one owner which could provide the significant flood benefits by widening the flood overland flow path. This provides Council with a flood improvement not available for this location in any other way.

This is not the case. Whilst the site has one owner, the flood overland flow path could be widened by removing the existing buildings and not placing any obstructions over the drainage easement.”

- 99 I note that the impact of the elements above the height control remains outstanding to the extent that the acoustic impact has not been sufficiently demonstrated (Contention 11(i), FASOFAC) which I again refer to below at [102].
- 100 Efficient use of land is dubious to the extent that the Site is a constrained site and that the drainage easement is proposed to be entirely built over limiting the ability of the Council to access and maintain, replace or repair the infrastructure which is there for the benefit of Box Rd.
- 101 For these reasons I am not satisfied that the Written Request has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the HOB development standard.

Is it in the public interest because the Proposed Development achieves the objectives of the HOB development standard and the objectives of the zone?

- 102 The Respondent submits that the objective “to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion” has not been achieved by the Proposed Development because;
- “rather than minimising the impact of circulation of trucks and cars on that rooftop element, what the applicant has done is taken off the cover to achieve the visual impact requirement, pushed the built form back and, effectively pushed that activity to the western boundary ... the applicant has made a forensic decision not to provide the acoustic information that was sought by contention 11(i).” (Transcript 5 May 2023 page 61 at par 35).
- 103 The Court is not satisfied that the Applicant’s Written Request seeking to justify the contravention of the development standard in cl 4.3 of the SSLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the SSLEP and the Court is not satisfied that the Proposed Development would be in the public interest because it is not consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 104 As I have not formed the requisite state of satisfaction pursuant to cl 4.6 of the SSLEP, the Proposed Development must fail and the appeal dismissed.

Orders:

105 The Court orders:

- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the application for development consent detailed at pars [15] and [17] pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (2) The written request pursuant to cl 4.6 of the Sutherland Shire Local Environmental Plan 2015 to justify the contravention of development standard in cl 4.3 of the SSLEP is rejected.
- (3) The appeal is dismissed.
- (4) Development application No DA21/1131 is determined by refusing consent to the application.

E Espinosa

Commissioner of the Court

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.