

Development Application Refused Due to Unsatisfactory Flood Management Strategies

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The recent decision of *Gardiner v Central Coast Council* [2022] NSWLEC 1007 emphasises the difficulties associated with proposed self-enforcement of flood management strategies.

Background

The applicant sought development consent from Central Coast Council ("**Council**") for a two-lot subdivision in a battle axe configuration. The site is located in close proximity to the Wyong River, and is prone to significant flooding. The site also constitutes a Flood Storage Area for the Flood Exclusionary Categories pursuant to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, and is situated in a High Hazard Area.

The land is situated within Precinct 2, requiring any proposal for subdivision to include a Performance Based Flood Risk Assessment Report establishing compatibility of the proposed development with the flooding characteristics of the site.

The applicant filed Class 1 appeal proceedings in the Land & Environment Court following a deemed refusal of the development application by Council. In its Notice of Contention, Council submitted lack of suitability of the site with the proposed development for three key reasons:

- Risks associated with flooding;
- Incompatibility of the site with site constraints; and
- Contrary to public interest.

Stay in Place Strategy

Whilst Council was not opposed to subdivision of the land, it submitted that consent was contingent upon the construction of a right of footway across adjoining land to facilitate evacuation in circumstances where the proposed driveway access to the site is unsafe. The applicant proposed an alternate flood strategy, relying on a "Stay in Place" protocol during a flood event. As opposed to evacuating from the site, such protocol provides that occupants of any proposed dwelling stay in place during a flood event until flood waters recede.

Is a Stay in Place Strategy satisfactory?

The Acting Commissioner concluded that the stay in place strategy proffered by the applicant would require absolute compliance, and lacks an adequate level of certainty should a flood event ensue.

In reaching this decision, the Court had regard to expert planning and engineering evidence based on information provided by flood engineers. Evidence provided by Council emphasised the lack of access to essential services during a flood event, stressing that intensification of the site poses a significant risk to life and damage to property. Council claimed that the additional allotment will become isolated during a flood, with no low hazard safe evacuation.

The Commissioner highlighted the complex nature of the proposal, asserting that there is no guarantee any future residents of the site would be aware of the costly requirements.

Importantly, the proposal was deemed unsatisfactory on the basis that the construction of an additional allotment within a flood prone zone will place a significant strain on emergency services, and potentially establish an undesirable precedent for additional subdivisions located in a flood prone area.

Council reinforced the importance of a self-enforcing flood strategy, raising concerns that the conditions proposed by the applicant impose an unfair obligation on Council to ensure continuing compliance.

The Commissioner shared Council's concern that the strategy relies on an excessive number of processes and procedures to minimise risk, and omits details as to who would be responsible for the ongoing maintenance of equipment were the property to be rented.

Conclusion

The Commissioner ultimately dismissed the appeal and refused the development application on the basis that a proposed flood strategy should be self-enforcing and the Commissioner was not satisfied that the Stay in Place Strategy could be.

The full decision can be read here: [Gardiner v Central Coast Council \[2022\] NSWLEC 1007](#)

