



general
purpose
committee

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section

environment

GENERAL PURPOSE COMMITTEE - ENVIRONMENT

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ITEM: 152 **Flood Forum Outcome - Planning Standards and Risk Disclosure****FILE NUMBER:** GC180/006 PT03;LEP11/96 PT01/EVD/ENF24LBX.V17

REPORT:

Council is referred to Item 148 in the Environment Section of this business paper.

Written advice has been received from Mr Peter McClellan, QC, on 23 June 1997 and is reproduced below:

“My instructing solicitor acts for Hawkesbury City Council. The Council administers an area which includes part of the Hawkesbury River catchment which has a history of flooding. The Hawkesbury River is effectively controlled by the Warragamba Dam which on occasions cannot hold all waters, causing flooding downstream. The Council has made provision in its planning controls for the protection of property from flood events. In Hawkesbury, I am instructed that, unlike surrounding councils which have adopted a 1:100 flood frequency level as the development standard, the Council has adopted a 1:60 year flood frequency level as the standard for residential property. I am also instructed that the Council permits building on land three metres below the defined standard, provided the habitable floor level is at the level defined by the standard.

The Council also takes steps to provide information in relation to flooding to the community. In particular, a Standard Flood Awareness document is provided with s 149 Certificates which identifies the relevant heights of floods within the Windsor area. In particular, it identifies that there is a risk of flooding above the Council’s Residential Floor Height Control and seeks to indicate the heights of historical flood events. The 1:100 year event is clearly identified as being in excess of the 1:60 event which reflects the adopted standard. A similar certificate, although with different levels, is provided in relation to property at North Richmond.

I am instructed that notwithstanding the Council’s efforts in disseminating this information with s.149 Certificates, there is a significant tendency for people involved in the property market (real estate agents, valuers, solicitors) to use Council’s Floor Height Standard as the major indicator of flood liability. A common assumption is made by persons whom it might be expected would have a more sophisticated understanding of the situation that if the floor height of a property is identified as being above the 1:100 year flood level it could be assumed to be flood free.

I am also instructed that in recent years there has been a major study by the State Government of the flooding impacts in the Hawkesbury catchment. This followed a suggestion that flood mitigation work should be carried out on Warragamba Dam which may have the consequence of lowering the relevant predicted flood level by a significant margin. I now understand that the State Government has decided not to proceed with the flood mitigation works and a committee has been formed to review the relevant flooding parameters within the catchment.

I have also been present at a meeting with members of the Council and other interested parties where the problems confronting the Council has been discussed. At that meeting two matters of particular concern were identified.

The first matter of concern is Council's responsibility for notifying the community of relevant information in relation to prospective flooding events. As I have indicated, the Council already pursues a policy of offering relevant information with s.149 Certificates and, I understand, other community information is provided in various forms. However, questions have arisen as to whether or not the Council has a duty to provide this information and whether a failure to comply with that duty could lead to liability in damages.

A second concern arises from the fact that the Council is continuing to administer a policy which reflects the 1:60 year flood frequency level. It has been suggested that the Council should raise this standard to a 1:100 year flood frequency level and a concern has been expressed that this might give rise to a liability for previous decisions permitting development. A further question has arisen as to whether or not the Council would be liable in negligence if it failed to apply the 1:100 year standard.

At the outset I confirm that, but for any statutory protection, a council will be liable in negligence for any failure to exercise care in relation to the giving of information or the approval of a development. These principles follow from the decisions of the High Court in a number of cases:

- : San Sebastian v Minister Administering Environmental Planning & Assessment Act 1979 (NSW) (1986) 162 clr 340;*
- Sutherland Shire Council v Hayman (1985) 157 CLR 424;*
- L.Shaddock & Associates Pty Ltd v Parramatta City Council [No.1] (1981) 150 CLR 225,*

and decisions of the Court of Appeal:

Woollahra Municipal Council v Sved (1996) 40 NSWLR 101

The decision in Alex Finlayson Pty Ltd v Armidale City Council; (1994) 123 ALR 155 is a decision of Burchett J in the Federal Court and establishes the principle that a council may be liable in damages for a negligent breach of its duty of care in respect of a decision to approve a development application. This decision may be the subject of an appeal, but reflects the present law.

There is a statutory protection provided for councils in relation to matters of flooding. Section 733 of the Local Government Act 1993 reflecting a section in the earlier Act, provides as follows:

'733. (1) [Flood liable land] A council does not incur any liability in respect of:

- (a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding; or
 - (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.
- 2. ...
- (3) Without limiting sub-sections (1) and (2), those sub-sections apply to:
 - (a) the preparation of making of an environmental planning instrument or development control plan, or the granting or refusal of consent to a development application under the Environmental Planning and Assessment Act 1979; and
 - (b) the granting or refusal of an application for the erection of a building under this Act; and
 - (c) the imposition of any condition in relation to an application referred to in paragraphs (a) or (b); and
 - (d) advice furnished in a certificate under Section 149 of the Environmental Planning & Assessment Act 1979; and
 - (e)-(g) ...
- (4) Without limiting any other circumstances in which a Council may have acted in good faith, the council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished or the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual recently notified under sub-section (5) at the time.
- (5) For the purposes of this section, the Minister for Planning may from time to time give notification in the Gazette of the publication of:
 - (a) a manual relating to the management of flood liable land; or
 - (b) ...'

Although this section has been given wide application (see Attrill & Anor v Richmond River Shire Council (1993) 30 NSWLR 122) it will not operate to protect a council which fails to act in good faith. That phrase has been interpreted by the Federal Court in Mid Density Development Pty Limited v Rockdale Municipal Council (1993) 44 FCR 290 where the Court held that the council did not act in good faith in supplying a certificate with respect to the flood liability of certain land in circumstances where it had failed to make internal inquiries before issuing a clear certificate. That decision establishes that before a council can rely on a good faith defence it must conscientiously apply itself to the task which it is undertaking.

In the present circumstances, certain conclusions are clear. I am satisfied that a duty falls upon the Council to disclose information in relation to prospective flooding when inquiry is made of it in this respect. It has a duty to provide this information with accuracy and in so far as it is appropriate, comprehensive material should be provided. Any information which is offered (and this is presently the situation as I understand it) should be accompanied by a warning that whatever may be a defined and managed level, a flood could always occur in excess of that level at any time.

Greater difficulties arise with respect to the consideration of development and building applications. It is clear that in considering those applications the Council has a duty of care to do so without negligence. But for the statutory protection, I would have been of the view that Hawkesbury Council would be at considerable risk if it continued to administer its flood policy by reference to a 1:60 year level. It would appear that at present such a standard is less than that which is commonly provided and does not reflect a general community standard.

However, s.733 provides protection where a council has acted in accordance with the principles contained in the manual relating to the management of flood liable land. The section operates so that if the manual has been applied a council, unless the contrary is proved, will be taken to have acted in good faith. I have reviewed the relevant manual which does not provide any arbitrary standard. Rather, it contemplates that a council will undertake a flood study which should be the precursor to the adoption of a flood standard. It must also carry out a flood plain management study as the precursor to a flood plain management plan. The manual points out that different circumstances may have the consequence that flood levels appropriate in one location may not be appropriate in another location. It contemplates that either between Local Government Areas or within Local Government Areas and more significantly within catchments, different levels may be appropriate depending upon the relevant circumstances. These circumstances may relate to the location of the site, is it in a flood way or merely on the periphery of the flood plain, the nature of the building proposed and the prospective risk to property and life in the event of major flood event. All of these matters need to be considered as part of the relevant study process and the results of the study considered when standards and policies are being adopted.

I am not fully aware of the investigation and analysis which has been done by the Council or by consultants on its behalf. However, in general I am of the view that provided the relevant steps in the Flood Plain Development Manual have been followed, it would be open to the Council, after proper consideration of all relevant factors, and particular circumstances to adopt either the 1:100 year flood level or some lesser level for parts of the flood plain. Clearly, if the Council was to adopt the 1:100 year flood level generally it could not subsequently be suggested that it was negligent. This follows from the fact that that level is the level accepted by all local authorities and is commonly applied by State Government bodies responsible for flooding situations. In departing from that level and adopting a lower standard, the Council must be careful to ensure that it follows the Manual and that the decision, even if it turns out ultimately to be inappropriate, was taken after proper advice. In this event the protection provided by s.733 of the Act would remain available.

The discussion so far relates to the adoption of the appropriate standard. Of course, once adopted the Council must consider that standard when considering an application for development of a particular site. That application will define the proposed use, design and access to any building. These factors may vary and the variations may have consequences for the safety of the building and its occupants in a time of major flood event. In my opinion the Council must ensure that, even if a standard has been adopted, it is not arbitrarily applied in relation to any particular situation. Each application must be considered on its merits and an appropriate decision made having regard to its particular characteristics as to whether or not the adopted standard is appropriate or some other level should be required. Only if this is done can the duty of care imposed on the Council be discharged.

In summary, I am of the view that the Council should ensure that any information which it has in relation to flooding matters is disseminated accurately through the Local Government Area. This will ensure that everyone who has access to the information will have an opportunity to appreciate their particular circumstances and make arrangements should their property be at risk of major flood event. It will also ensure that property owners are able to deal with their land with proper information as to flood liability. I appreciate this may have the consequence of diminishing the value of some property but do not believe the Council has any alternative.

With respect to the adoption of a flood level, I am of the view that the Council may, provided it properly discharges its obligations pursuant to s.733 of the Act, adopt whatever standard is appropriate in the circumstances. Although the adoption of the 1:100 year standard would probably discharge the Council's duty of care, if after appropriate study and consideration a less standard is considered appropriate, this could be adopted in particular circumstances. Having adopted a standard, the Council must carefully consider any particular application and make its decision having regard to the circumstances of the particular case."

RECOMMENDATION:

That written advice dated 20 June 1997 received from Mr Peter McClellan, QC, concerning flood levels be received.

ATTACHMENTS:

There are no supporting documents for this report.

oooO END OF ITEM 152 Oooo

ENVIRONMENT

Meeting Date: 24 June, 1997

Item: **153**

ITEM: 153 **New South Wales Sustainable Energy Authority - Energy Smart Homes Policy Program**

FILE NUMBER: GE020/061Pt01/EVD/ENF24LBX.V16

REPORT:

The Greenlight Consortium has been appointed by the New South Wales Sustainable Energy Authority to work with local government to deliver an energy efficient housing policy. Councillor David Baggs from Baulkham Hills Shire Council is a chartered architect and ESD consultant and part of the Greenlight Consortium.

The Energy Smart Homes Program will produce a model policy framework for implementation by Councils including:

- . Councillor and senior management briefing session where the economic, environmental and social implications of an energy efficient housing policy are presented.
- . Model Energy Efficient Housing Policy adapted for local variations.
- . Training of between half to two full days for all appropriate Council staff.
- . Resource documents including Energy Smart Homes Manual and brochures.
- . Support services including Internet Webpage, Faxback Service and Hotline.
- . Facilitation of a community forum providing energy efficiency housing information and displays.
- . Media release kit to assist local government.

Mr Baggs will be presenting the Energy Smart Homes Program to the General Purpose Committee.

RECOMMENDATION:

That the information concerning the presentation of the Sustainable Energy Development Authority's Energy Smart Homes Program be received.

ATTACHMENTS:

There are no supporting documents for this report.

oooO END OF ITEM 153 Oooo