

**FLOODING AND STORMWATER INUNDATION NOTATIONS  
- THE SECTION 149 DILEMMA**

by

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## **ABSTRACT**

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Certificates issued under Section 149 of the Environmental Planning and Assessment Act, 1979 provide details to prospective property purchasers about zonings and other council policies which may affect the land. The inclusion of notations relating to flooding from natural streams or stormwater inundation from man made drainage systems has involved other councils in large damages claims.

The paper discusses the requirements of the Act, community attitudes, moral issues and the legal liability of councils for the release of flooding and stormwater inundation information.

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## SUMMARY

Certificates issued under Section 149 of the Environmental Planning and Assessment Act, 1979 provide details to prospective property purchasers about zonings and other council policies which may affect the land. The inclusion of notations relating to flooding from natural streams or stormwater inundation from man made drainage systems has involved councils in large liability claims.

This paper discusses the requirements of the Act, community attitudes, moral issues and the legal liability of councils for the release of flooding and stormwater inundation information.

## 1. INTRODUCTION

### 1.1 Background

The law requires that when property is sold in NSW the Vendor must attach to the contract documents a copy of a certificate issued by the local council under S149(2) of the Environmental Planning and Assessment (EP&A) Act, 1979. This does not apply to Certificates under S149(5) of which the purchaser if prudent should avail himself. Unfortunately however because S149(5) certificates are not required to be attached to contracts for sale of land, and because of the higher fees involved for issuance of the certificate, S149(5) certificates are generally not obtained by prospective purchasers.

The Act states that councils shall include upon the 149(2) certificate, amongst other things, an answer to the following question:

*"Whether or not the council has by resolution adopted a policy to restrict the development of the land by reason of the likelihood of land slip, bushfire, tidal inundation, subsidence or any other risk".*

The word "shall" imposes an mandatory obligation upon councils to answer each and every question in Schedule 2 of the Regulations to the Act of which the above question is one. It must always be remembered that the above question relates only to adoption of a policy and not to flooding or inundation information as such.

Section 149(5) of the Act states that Council may

*"Include advice on such other relevant matters affecting the land of which it may be aware".*

This does not impose upon councils an obligation to disclose such information as it is at each council's discretion. It is on this Certificate that often councils are requested by the community to provide information on flooding and/or stormwater inundation. In supplying this information councils have left themselves open to litigation and in some cases hefty damages.

Given the above issues, councils may ask themselves the question "why provide information that we are under no obligation (except perhaps moral) to provide and at the same time expose ourselves to the chance of litigation" ?

### 1.2 Terminology

Unfortunately there are no clear or accepted definitions of "flooding" and "stormwater inundation" however it seems

from decided cases and common usage that the following could be accepted for the purpose of this paper:

flooding: - inundation resulting from the overflow of rivers, streams and natural waterways.

stormwater inundation: - inundation from piped drainage systems, man made channels and direct surface runoff inundation.

The only precise definition is that of "FLOOD" as contained in the Floodplain Development Manual (Reference 5.4), ie:

*"Relatively high stream flow which overtops the natural or artificial banks in any part of a stream or river".*

The operation of this definition only applies to floodplain land and not to land in general.

There is considerable legal argument about what constitutes a stream or river. A recent judgement in the NSW Court of Appeal (Reference 5.2) provides some precedent in determining if a watercourse can be regarded as a river or stream and therefore qualify for liability protection, ie.:

- § dictionary definitions, should not be used;
- § a watercourse does not need defined banks and permanent water to qualify for liability protection provided it can be shown to be, or have been, in the path of natural watercourse;
- § a small drain can be regarded as a stream provided it can be shown it is, or once was, a natural watercourse;
- § liability protection applies to river and streams which have been modified by engineering works provided that when the watercourse is considered as a whole the engineering works have not been so radical as to create a new thing and destroy the original.

### **1.3 Community Attitudes**

It is important at this stage to clear up any confusion or misunderstanding which the community may have in respect of S149 Certificates. S149(2) certificates only identify if a policy on flooding exists and do not include information on whether the land is physically subject to flooding.

On S149(5) certificates which make provision for physical flooding information councils may provide information on flooding and stormwater inundation but are under no obligation to do so, as stated above. Given that the supply of such information could lead to litigation in certain cases, many councils choose not provide this data on S149(5) certificates. The lack of notations on S149(5) certificates, whilst within the requirements of the law, may be interpreted by the community to imply that the property does not have a flooding/inundation problem, when in fact this may not be the case. (A system by which councils indicated the extent and accuracy of flooding/inundation data on the certificate without actually providing the data may help to resolve this confusion).

To add to the confusion many councils in NSW view the release of information on S149 certificates differently. In some areas the council considers they are morally bound to provide some information on flooding. Legal opinion however is that their sentiments, no matter how noble, do not constitute a defence to the providing of misleading, incomplete or inaccurate information.

Community confusion about S149 certificates is also not helped by the fact that the terms "flooding" and "stormwater inundation" are often used interchangeably in urban situations.

## **2. MORAL ISSUES**

It is often argued that councils have a moral obligations to give out any flood information that they have. While there may be agreement that a moral obligation exists the nature of that obligation may vary between the parties involved. Buyers believe councils have a moral obligation to inform the public if there has been even a whisper that flooding has occurred. Sellers maintain that councils have a moral obligation to keep their dealings with council on flooding, confidential.

When it is discovered that land which was previously thought to be flood free is at risk of flooding, property values may be impacted immediately. Unless it impacts on them directly, most people agree that this latent "fault" with the property should be made public. Some may argue about the time of release of the information. Owners of such properties wish that the information had been known before they purchased (and was thus reflected in a lower purchase price). Alternatively they may argue that the information should be withheld until after they have had time to sell the property. Release of the flooding information will generally always disadvantage someone (eg. current owner) whilst giving advantage to others (eg. future owners). Rarely will the release of such information be welcomed by all parties.

Residents who have reported flooding argue that the disadvantage caused by release of their flooding information to the public is discriminatory. Their neighbours who were also flooded, but had not reported the problem, would not be disadvantaged because the flooding would not be known to council and therefore not disclosed.

Others consider that because councils collect rates from the community there is a moral obligation to give flood information as one of the services paid by the community. Others argue that as trustees of money provided by the community council has a moral obligation to protect those funds from unnecessary expenditure on litigation or excessive insurance premiums. As councils are service organisations it is unacceptable to refuse to assist the public. It is necessary however to consider carefully the type of assistance given.

If councils do decide to release information to the public it could be argued that councils should treat all property owners with equity, as far as possible. Thus information of a consistent type and accuracy should be released for all properties in a catchment at the same time. This may necessitate a council carrying out additional investigations to extend limited historical data for a particular flood event, to cover all properties in the catchment.

### **3. LIABILITY FOR INFORMATION**

#### **3.1 Disclaimer**

A summary of legal opinions, advice and readings is presented in this section. The views expressed are those of the authors and may not necessarily reflect those of their employers. The information should not be used by others without seeking independent legal advice.

#### **3.2 Types of Information It Is Safe to Give**

Councils are safe in giving information which has been supplied by other government or semi-government authorities such as the Dept of Water Resources, Dept of Public Works, Water Board etc.

#### **3.3 Information Given by Individual Councils**

In some cases councils may survey the extent of a flooding or inundation problem during or after an event. Whilst this may appear to be safe and done in good faith, there is always a human element involved in both the original survey/investigation and its subsequent compiling/dissemination to the public. The risk of negligent acts or omissions in the providing of this information should be weighed against the other factors discussed in this paper.

#### **3.4 Unsafe Provision of Information**

In many cases councils receive inundation information from rate payers or occupants of properties and note their records accordingly and in some cases may make an inspection without taking measurements or carrying out an investigation. To provide information in 149(5) certificates based upon such information invites danger as there may be no real proof of correctness.

#### **3.5 "Good Faith" Defences**

S149(6) of the EPA Act 1979 and S733 of the Local Government Act 1993 make provision for the "good faith defence". If flooding information is given in "good faith" then this is a defence to any court action taken in respect of the providing of such information.

This has to be looked at in the light of Shaddock's case (Reference 5.6) in which Judge Sir Henry Gibbs equated

councils with persons who carry on the business of providing information to the public and thus owe a duty to exercise reasonable care that the information given is correct. This means not only does council have to make sure that the physical information in the original instance is correct but has also to ensure that the method of compiling and distributing of the information by any applicant is thorough and efficient.

In a recent case in the NSW Court of Appeal (Reference 5.7) found that in not providing all relevant information it had in its possession the council was liable and could not plead the good faith defence successfully. The court described good faith as designed to strike a balance between the interests of the public authority supplying the information and the interest of the person receiving the information. The court disregarded the assumption that the "good faith" test operated to leave the council liable only in respect of dishonesty.

### **3.6 Section 733 of Local Government Act 1993**

This section repeats in intent and almost in verbiage the provisions of S582A of the old Act and refers to the "Manual" relating to the management of flood liable land. It is the only section dealing with certificates in the new act. This means that the Gazette notification of acceptance of the manual (the last being the Floodplain Development Manual 1986) ties the S733 to the contents of this manual in which is found a definition of good faith which is in essence complying with the contents of the manual.

It must be noted that S733 refers to exemption from liability in respect of flood liable land. The manual gives a definition of "flood" as noted above. This would indicate that S733 does not apply to stormwater inundation. This conclusion is based on a QC's opinion and the apparent lack of pleadings to this effect in the Mid Density Case (Reference 5.7) as well as the wording of the Section itself.

### **3.7 Freedom Of Information.**

Freedom of information (FoI) legislation does not guarantee access to flooding/inundation information held by council.

Under the FoI Act, people have a right to access to all documents relating to their "personal affairs". This would include plans and specifications, building applications and the building consent. People do not have the right of access to inspection reports, internal office correspondence, council reports and recommendations.

Request for flood information, sub-division or drainage information and information on adjoining properties does not fall within the definition of "personal affairs" so there is no right of access.

### **3.8 Vendors Duty of Disclosure and Mortgagee Requirements on Loans**

The majority of applications for certificates under S149(2) and S149(5) of the EP&A Act arise from transfer of property by sale or mortgage of property.

Under contracts for sale of land the Vendor has a duty of disclosure which includes the attachment of a S149(2) certificate showing the zoning of the land. Under current legislation the vendor has no duty to disclose a defect in the quality of a property, even if the defect affects its value. Providing there is no active concealment of a defect mere silence by a vendor does not constitute fraud (Reference 5.3).

A purchaser cannot rescind a contract merely because the vendor failed to disclose the existence of a defect such as flooding. The purchaser must rely on his own inquiries and cannot rely on non-disclosure by the vendor, unless there is a false or misleading statement which would be subject to S53(A) (1) (b) of the Trade Practices Act 1974 (Reference 5.5)

In summary, any misleading statement by a vendor about flooding of the land could give grounds for rescission of a contract. Since disclosure of flooding is not obligatory, non-disclosure of flooding is not grounds for rescission of a contract.

Purchasers need to protect themselves by making pre-contract enquires. In making such enquires many purchasers are not aware that S149(2) certificates provide policy information and may not disclose any flooding/inundation information known to council. This misunderstanding may divert some from making further enquires or requesting a S149(5) certificate.

#### 4. CONCLUSIONS

- (a) There is considerable confusion in the community over the release of flooding and stormwater inundation information on S149(2) and S149(5) certificates.
- (b) Where property is to be purchased, if there is any risk of flooding or stormwater inundation, purchasers should make additional pre-purchase inquiries or investigations after receipt of S149(2) and S149(5) certificates.
- (c) Councils are not obliged to disclose or provide flooding or inundation information on S149(2) or S149(5) certificates.
- (d) Councils can disclose information provided by outside Authorities e.g. Water Board etc. without risk of incurring liability.
- (e) Whilst there is a "good faith defence" available in respect of the release of flooding information, it would seem to vary with the facts. Carelessness, or negligent acts or omissions may negate any such defence.
- (f) In general the public have no right of access to flooding or stormwater inundation information under the Freedom of Information Act.
- (g) There are differences in the meanings of the terms "flooding" and "stormwater inundation" which affect the legal indemnity offered to councils in respect of the release of such information.
- (h) Decided cases indicate that councils may be at risk if they provide flooding or stormwater inundation information due to the possible inaccuracies in the information itself and/or any deficiencies in the dissemination process.
- (i) There are moral arguments favouring both the release and the withholding of flooding and stormwater inundation information from the public. If councils decide to release information, it can be argued that the information should be of a consistent type, cover all properties in a catchment and be released at the same time.

#### 5. REFERENCES

- 5.1 Irish, H.P. Procedure Manual for Councils on the Freedom of Information Act, 1989 Local Government and Shire Association 1989
- 5.2 Provincial Insurance Australia Pty Ltd vs Consolidated Wood Products Pty Ltd, 1991. The Supreme Court of New South Wales Court of Appeal, Appeal from Commercial Division.
- 5.3 Lang, A. G. Vendor Duty of Disclosure New South Wales Conveyancing law and Practice Float Australia Limited 1986.
- 5.4 Public Works Department. Flood Plain Development Manual New South Wales Government 1986
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- 5.6 L Shaddock and Associates vs The Council of the City of Parramatta, 1981. High Court of Australia
- 5.7 Mid Density Developments Pty Ltd vs Rockdale Municipal Council, 1993. High Court of Australia