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FLOODPLAIN RISK MANAGEMENT IN THE URBAN CONTEXT

FLOODPLAIN PLANNING: — HOW TO STAY OUT OF COURT AFTER THE NEXT BIG FLOOD

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1. INTRODUCTION

Both authors find it surprising that local councils in NSW seem to spend such little time in court as a result of their actions or inactions relating to flooding. Whilst the requirements of the *Floodplain Management Manual* (or its predecessor, the *Floodplain Development Manual*) seem clear, it has been the authors' experience that very few councils embrace their statutory responsibilities vigilantly when considering (or ignoring) floodplain management planning.

The purpose of this paper is to describe a council's floodplain planning responsibilities and suggest how they can be implemented in a manner that may limit its legal liability, but yet remain practical. Neither of the authors are lawyers but rather they are floodplain management consultants with planning and engineering backgrounds, each with over 15 years of relevant experience. A large part of this experience has come from assisting over 20 councils with the implementation of floodplain planning in their local government area (LGA). The paper therefore is not intended as a substitute for a Council obtaining proper legal advice but it might help decide what questions to ask your legal advisers and where to direct your floodplain planning efforts.

In addition, the paper outlines a strategic approach to floodplain planning through the formulation of a floodplain development control plan (DCP) for an LGA. It is noted that the State Government is currently reviewing the plan making process embodied in the Environmental Planning and Assessment Act (see PlanFirst Discussion Paper: DUAP, 2001) but the principles we outline could readily be transferred to alternate statutory plan models. Such plans are commonly a principal outcome of the floodplain risk management process outlined in the Manual, particularly as engineering solutions become less viable.

2. LEGAL RESPONSIBILITY AND INDEMNITY

2.1 Background

In the 1970s and early 1980s, the State Government had the principal responsibility for floodplain planning. A statewide 100 year flood planning level was applied. Local councils were relatively immune from liability in relation to floodplain development. But the furor over floodplain mapping in the late 1970's to early 1980's changed that. In 1984 the Government's Flood Policy was introduced and the baton was handed to local government. A merit based approach was introduced allowing each local council to weigh flooding considerations along

with other planning factors when making decisions. At the same time, the state-wide 100 year flood standard was disbanded.

A key concession in the transfer of responsibility for floodplain management to local government however was the commitment by Government to introduce legislation to protect councils and other public authorities and their staff against claims for damages, provided they acted in accordance with the Government's policy at that time.

Consequently, in January 1986, the Local Government Act was amended to provide immunity from liability in respect of:

- ▶ 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
- ▶ 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.

The immunity applied not only to councils but also to their employees and other authorities and their employees.

These provisions, which were originally introduced through Section 582A of the Local Government Act, have been largely replicated in Section 733 of the Local Government Act, 1993. Most importantly this indemnity extends to the making of a DCP or other planning instruments, determination of development consents, advice in Section 149 Certificates, and other council functions including constructing flood mitigation works.

The indemnity offered by the Act is real and in the authors' opinion is necessary and should not be overlooked or taken for granted. When the next large flood happens in your LGA, watch out! Floods cause enormous distress, personal hardship, and economic damage and may result in loss of life. Where such losses may have been adversely influenced by the past actions or inactions of your council, individual and class actions against the council are a real possibility. We suspect that a major reason that such actions have not been common in the past is that few understand the system sufficiently, except those that represent potential targets for litigation.

2.2 Selection of the FPL — Don't Leave Yourself Exposed

One area where a council's indemnity is most necessary has to do with the selection of the flood planning level (FPL). Whilst it has been Government policy since 1984, many Council officers and Councillors are unaware that the state-wide 100 year FPL has been disbanded and Councils are now responsible for selection of their own FPL's. If you have been using the old standard by default, you are still responsible.

As you are no doubt aware, floods bigger than the flood planning level can and do occur (eg Wollongong August 1998, Coffs Harbour 1996, Nyngan 1990, Katherine 1998). When this happens, it is reasonable to expect that a section of the community will question why they were not protected by the council adopting a higher FPL.

Indeed these communities are often under the misapprehension that their newly built residence was "flood free" and are confused as to why any authority could have "got it so wrong" when a wall of water passes through their living room. Council needs to be careful as to what impression they create through the wording in their planning controls. For example, does the wording imply they will require property to be protected from all "flooding", which could be literally interpreted to be to the extent of probable maximum flood (PMF) flooding, or some alternate standard such as the 100 year FPL. We are certainly not saying that councils should

broadly adopt the PMF as the FPL but they must adopt a process that allows the community to understand and accept the residual risks between the PMF and their adopted FPL.

This process is the essence of the merit based approach outlined by the Manual which requires the balancing of economic, environmental and social considerations with substantial community involvement to determine the level of protection required and the consequent level of risk they are willing to accept. This is an exceptionally difficult task but one which fundamentally is the foundation to the indemnity provided to councils by the Local Government Act.

Its therefore important that councils understand what indemnity they have and act accordingly to minimise their legal exposure.

2.3 The 'Good Faith' Defence

Section 733(4) of the Act clearly spells out that a Council is considered to have acted in good faith (and therefore have indemnity) if it has acted substantially in accordance with the principles contained in the "relevant manual", such "manual" now being of course the *Floodplain Management Manual 2001*.

Most importantly, it has been the authors' experience that legally such provisions are interpreted to mean that the process spelled out in the Manual must be followed to provide the most substantial basis for a defence. This process is clearly explained in Chapter 2 of the Manual and involves the formation of a Floodplain Risk Management Committee and the preparation of various studies and other activities leading to the preparation and implementation of a Floodplain Risk Management Plan.

In layman's terms, the best defence a Council has is to have diligently prepared and implemented a Floodplain Risk Management Plan, and be acting in accordance with it. Unfortunately few councils have developed and implemented plans in accordance with the Manual, and often those which have Plans, have often only considered works and failed to assess FPL's, Section 149 Certificates, flood awareness initiatives and wider floodplain planning issues.

2.4 Interim Policies

The 1986 *Floodplain Development Manual* provided councils with an important concession. It provided for the development and adoption of an interim local flood policy as a means of directing development decisions until such time as a Floodplain (Risk) Management Plan was prepared and implemented. This, we understand, was in recognition that such plans may take a few years to prepare and that there needed to be a mechanism to allow councils to rely on the indemnity provisions of the Act in the interim.

It has been the authors' experience that many or most Councils have relied heavily on these concessions and have failed to follow through with the 'process' and have not prepared, or taken any serious action towards preparing, a Floodplain Risk Management Plan. Such interim policies were never intended to be substitutes for properly formulated plans and councils which still have such interim flood policies (i.e. any flood policy which has not been developed as part of the Floodplain Risk Management Plan process) could be exposed to potential liability.

Further with the introduction of the *Floodplain Management Manual* in 2001, it appears that the concession of interim policies, which was offered in the previous Manual, has now been formally withdrawn. Thus all councils which still have interim policies (and those few councils which don't even have interim policies) would be well advised to take immediate action to follow 'the process' outlined in the Manual, and move towards the preparation and implementation of a Floodplain Risk Management Plan.

3. DEVELOPING A FLOODPLAIN DCP FOR YOUR LGA

3.1 Why Develop a Floodplain DCP ?

A fundamental principle of floodplain risk management is to assess development applications when dealing with the issue of flooding within a strategic framework. This strategic framework is provided by a floodplain risk management plan and applications should not be considered in isolation or individually (i.e. the 'ad-hoc' approach). For this to happen however, it is essential that relevant sections of the floodplain risk management plan are translated into councils' DCPs, local environmental plans (LEPs) and other flood related policies. In the authors' experience, the most effective way to do this is through the preparation of a floodplain DCP for the whole LGA.

Such a DCP could provide a number of advantages, including:

- ▶ providing detailed controls for development of land affected by all potential floods;
- ▶ allowing the strategic planning outcomes of the floodplain risk management plan to be documented and to guide future development within the floodplain;
- ▶ providing guidance and greater certainty for developers as to what forms of development are appropriate within specific areas of a floodplain;
- ▶ avoiding 'ad-hoc' development assessments based on local flood considerations and in the absence of a strategic assessment of the entire floodplain;
- ▶ providing a consistent approach over the whole LGA, comprising various catchments and possibly various floodplain risk management plans;
- ▶ use as a valuable flood awareness tool to alert the community to the flood risk;
- ▶ providing a comprehensive basis to the issuing of Section 149(2) notifications under the Environmental Planning and Assessment Act, which basically requires admission in regard to a policy or controls, which may restrict development because of flooding;
- ▶ encouraging development and use of land which is compatible with the flood hazard.

3.2 Integration of DCP with other Planning Instruments

While the DCP can provide the appropriate basis for incorporating the majority of detail development control recommendations that may be adopted by a Floodplain Risk Management Plan, there are matters which must be dealt with by Council's LEP (or in some cases a Regional Environmental Plan). Such matters include:

- ▶ objectives which recognise the validity and importance of the issue of flooding in the development assessment process;
- ▶ clear definitions which are consistent with other documents such as the DCP and the Floodplain Risk Management Plan;
- ▶ prohibition of particular land uses in parts of the floodplain where the hazard is high or extreme. In these areas, there may be no potential to consider the hazard

acceptable when assessed in balance with other planning criteria or possible ameliorative measures.

A recurring example of the inadequate interpretation of flooding considerations in planning documents is associated with the definitions adopted. We have sighted numerous planning documents throughout NSW which imply an intention to require protection from "flooding", suggesting protection from all flood risks (i.e. inclusive of the PMF). A closer look however reveals that the implementation of the controls provides protection from only risks associated with a 100 year flood. The possibility of floods greater than a 100 year event affecting newly constructed dwellings approved under a planning instrument which implied full protection (and in the absence of a Floodplain Risk Management Plan) is not so remote. Consequently the possibility of a Council experiencing difficulty in substantiating a 'good faith' defence of their assumed indemnity as provided by the Local Government Act, is also not so remote, in our view.

3.3 Further Background and Examples of DCPs

The authors have prepared numerous floodplain DCPs over the last seven years. These range from those applicable to a single catchment (e.g. Eastern Creek floodplain at Blacktown), to those applicable to a whole LGA (e.g. Liverpool LGA) or even those which are applied to a number of adjacent LGAs (e.g. WESROC and UPRCT).

For further details of the philosophy behind the preparation of such DCPs and examples of DCPs already prepared, visit www.bewsher.com.au or contact the authors directly.

3.4 Inclusion of a Number of Floodplains within One DCP

By writing the DCP in a generic format, it is possible to have a DCP applying to the whole LGA but still preserving differing outcomes within individual floodplains. In this manner the "merits based" approach espoused in the *Floodplain Management Manual* is not compromised.

A key component of such DCPs is a planning matrix for each floodplain. This matrix specifies the development controls which are to be tied to land use types within each floodplain management area of the floodplain (see paper entitled "*Changing Our View of Floodplain Planning*" at www.bewsher.com.au). In the case of the recent draft floodplain DCP developed for Wollongong City Council for example, which currently has three floodplain risk management studies under way and a number planned for the near future, separate planning matrices could be developed for each major floodplain whilst retaining consistent terminology and approach to floodplain management over the whole LGA.

It must also be recognised that the preparation of the matrices will occur at different times and some areas may have such minor flooding issues that a flood study may never be prepared. In this instance when a catchment specific matrix has not been prepared (or is waiting to be prepared) it is suggested that another matrix covering 'all other areas within the LGA' be prepared.

The format for DCPs will vary between councils and over time. Some councils have a preference for 'stand alone' DCPs in which case a Floodplain Risk Management DCP would take the form of a separate document. Some councils have a preference for a singular comprehensive DCP applying to all planning issues throughout the LGA. In this instance, floodplain risk management issues could form a discreet section in this document. The current trend in planning is to move to singular planning policy documents which incorporate both LEP and DCP type provisions, in which case floodplain risk management issues would need to be similarly incorporated. The format should not be a constraint to achieving the floodplain risk management objectives of the State Government policy and Manual, nor to a council satisfying its 'good faith' obligations to achieve indemnity from possible legal claims.

3.5 How to Account for Overland Flow

In contrast to the previous *Floodplain Development Manual*, stormwater inundation now comes within the auspices of the *Floodplain Management Manual* and needs to be considered along side river flooding. (The new Manual refers to stormwater inundation as 'local overland flooding'). A major issue with 'local overland flooding' however is that there is often a much poorer understanding of the extent of property affection than in the case of river flooding. It may also be impractical to attempt to quantify and map the full extent of potential local overland flooding across a whole LGA, particularly one that is substantially developed. Coping with this lack of information is discussed in the next section.

3.6 What to do When Information is Not Available for the Whole LGA

A common argument to refute the ability of a Council to formulate a set of controls to assess the flooding issues (particularly local overland flooding) is that they do not have sufficient information and mapping regarding the extent of flooding within their LGA. When considering the purpose of the planning controls and the common practice of councils, such an argument seems nonsensical.

Councils have a statutory responsibility to deal with development applications (DAs) and to take into consideration the issue of flooding when doing so. Accordingly councils typically have a process of accepting DAs, identifying issues, referring them to various professionals in council for assessment of those issues (e.g. the flood engineer), requesting additional information from the applicant (e.g. a flood study) and then making decisions regarding the acceptability of the proposal. The acceptability of the proposal should be based on a properly formulated Floodplain Risk Management Plan, but is often dealt with on an ad hoc basis or crudely with reference to a floor level standard equal to the 100 year event, while the broader floodplain risk management issues remain unsatisfactorily resolved.

Where it is impractical to produce flood hazard mapping for an area, we see little reason why Councils cannot codify the process they follow and provide greater certainty and consistency in the process. That is, councils can produce development controls to outline circumstances where further investigation of potential flood hazards may be warranted, the process to procure these investigations and the criteria for assessment of the DA once the information is available. Such a process is outlined in Figure 1.

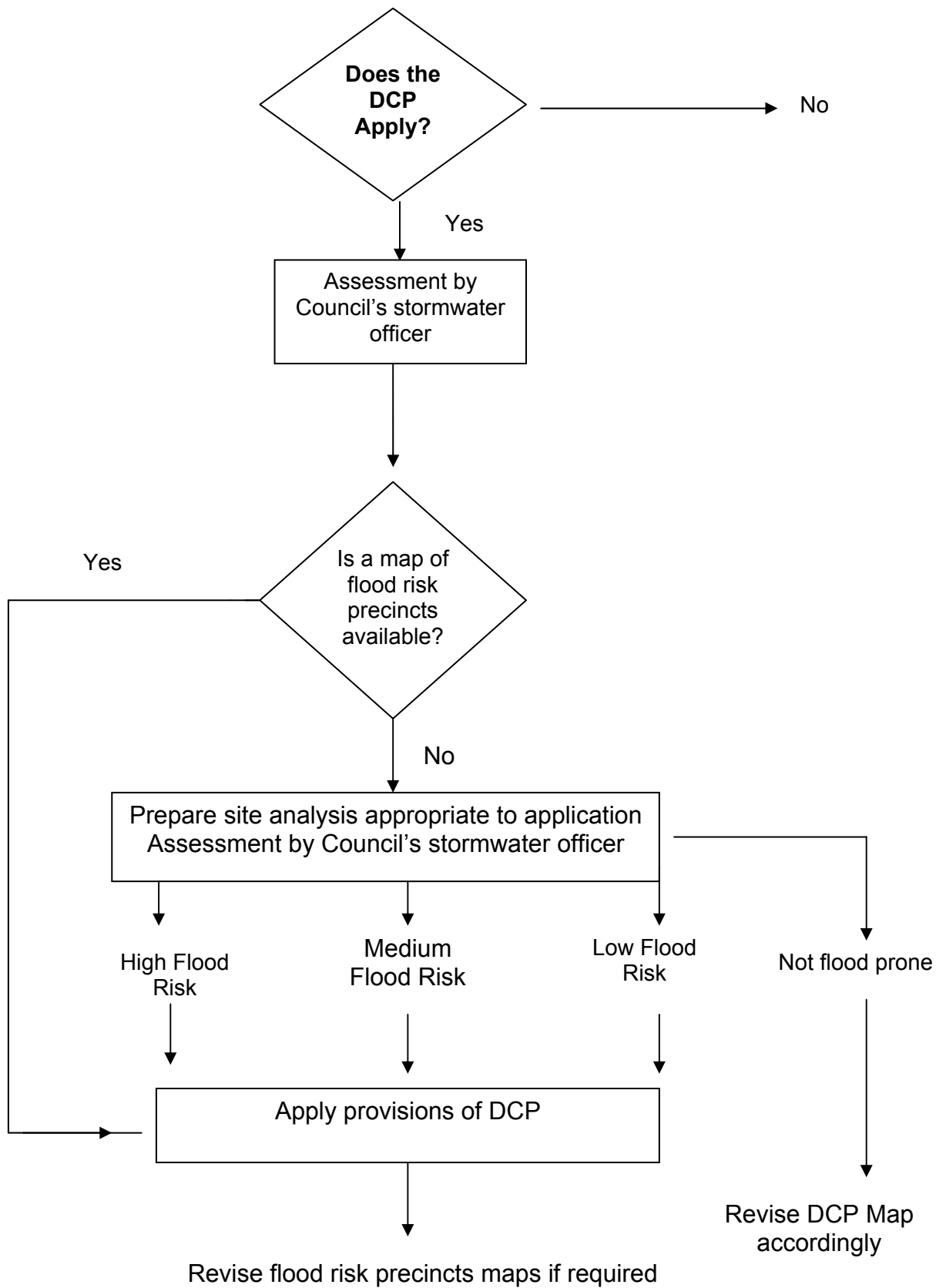
One obvious criticism of such an approach is that it may incorrectly identify the potential for concern, leading to a political backlash or legal action against Council. The objective would be to ensure Councils are conservative in requesting further information so that no potentially flood affected properties are missed even if some are found to be unaffected. This is unlikely to be different to the informal process followed by the majority of Councils. The political consequences must also be weighed against professional responsibilities and the political and financial consequences of legal action brought by someone whose property, approved in the absence of appropriate formal controls, is flooded.

3.7 Notifications on S149 Certificates and Other Flood Awareness Issues

The authors have previously written a number of papers relating to flood notations on Section 149 Certificates and flood awareness initiatives. Time and space restricts a full discussion of these issues in this paper. Again readers are referred to www.bewsher.com.au for copies of a number of relevant papers.

As discussed above, the preparation of a comprehensive floodplain DCP is by itself a flood awareness tool. Notification of the existence of the DCP would be required on

FIGURE 1: PROCESS FOR APPLICATION OF DCP



Section 149(2) Certificates. Where maps showing the application of the DCP has been prepared for the whole LGA, councils have the option of notifying all owners or only those affected by the mapping, on the Section 149 Certificates. Given the political sensitivities of such notifications, the former alternative may be more acceptable to some councillors.

However, the authors believe a council should be proactive in disclosing known flood hazards to the community. Whilst there is clearly a moral obligation to do so, many council risk managers also confirm that councils have a duty of care to disclose all flood risk information to the public. This extends beyond a reactive role (i.e. only providing information when asked) to a proactive role. There are various methods available through which a council can proactively make flood information available to the community. The preparation and regular distribution of flood certificates (as described in the paper, “*Using Flood Certificates to Raise Flood Awareness*” — see www.bewsher.com.au) is one such means.

Readers should also be aware that the *Floodplain Management Manual* provides much clearer guidance on the use of flood notations on Section 149 Certificates than was provided in the previous manual. Typical examples of notation on Section 149(2) and 149(5) Certificates are provided in the new Manual.

Whilst Section 149 Certificates have an important role under the Environmental Planning and Assessment Act and are required to be provided to all property purchasers, the authors believe they are an ineffective community education tool in themselves. They can, however, form an important component of an overall program to raise the community’s flood awareness.

Councils which rely solely on the Section 149 Certificate to advise of known flood risks, in the authors’ view, fall well short of their obligations.

4. SUMMARY AND CONCLUDING COMMENTS

We believe that the State Government Flood Policy and the merit based principles espoused by the Manual provide an innovative, flexible and responsible means of dealing with floodplain risk issue in NSW. As the outcomes of the process outlined by the Manual today relate substantially to land use planning matters, the responsibility for floodplain risk management logically must be borne by local government having regard to their role as consent authority for the majority of development in NSW. It is not an easy role and councils have been given some indemnity against potential legal action in satisfying this role provided they act in ‘good faith’. The question is can all councils claim they satisfy the tests of ‘good faith’

As alluded to in this paper, some questions councils may ask themselves (or their legal advisers) when auditing their performance in floodplain risk management could include:

- ▶ Does Council have floodplain risk management plans covering the LGA? Are the strategic outcomes of the plans embodied in Council’s planning instruments?
- ▶ Has Council been proactively advising the community of the known floods to which they may be exposed?
- ▶ Does Council still rely on an ‘interim policy’?
- ▶ Does Council have a sound basis for the principles of the policy (e.g. a 100 year FPL) which is understood and accepted by the community?
- ▶ Where this is the case, is it still appropriate for Council to rely on an ‘interim policy’?

- ▶ Do Council's planning controls imply that development will be protected from all flood risks?
- ▶ Does Council have a consistent and community accepted approach for dealing with DAs which bring to their attention flood risks not previously formally identified (particularly local overland flooding)?

Such questions may be difficult to address in the political atmosphere of local government. However failure to address them runs the risk that a council will be held to account in the courts, when the flood dice are thrown and a disaster does occur.