Murray River Council

7 March 2025

Attn: Jessica McFarlane
Manager Development Services

Re: 10.2021.196.1 - 17 Parkman Avenue – Modification Application

Dear Jessica,

We act on behalf of the landowners of 17 Parkman Avenue, Barham. This letter seeks approval to modify the conditions of the above Development Consent for a 9 lot Torrens Title Subdivision.

The applicant formally requests that this modification be determined at a full Council meeting.

Introduction

In 2021, the applicant sought approval for a 9 lot Torrens Title residential subdivision at 17 Parkman Avenue, Barham.

Council staff, acting under delegation, approved DA 10.2021.196.1. The DA included the following conditions which are aimed at ensuring a satisfactory level of flood protection for future owners of the lot:

> ***Condition 31 – Conveyancing Act 1919 Instruments***
>
> *A copy of an instrument prepared in accordance with the Conveyancing Act 1919, must be submitted with the application for a Subdivision Certificate for Council's endorsement.*
>
> *The instrument must contain the following:*
>
> *A restrictive covenant on all residential allotments requiring the floor level of all habitable rooms be constructed at least the height of the Flood Planning Level (500mm above the 1 in 100 flood event level) applying to the site. The restriction must be in favour of Murray River Council.*
>
> *A copy of an instrument prepared in accordance with the Conveyancing Act 1919, must be submitted with the application for a Subdivision Certificate for Council's endorsement.*
>
> *The wording of the covenants/restrictions must be to the satisfaction of Council prior to the release of the Subdivision Certificate.*

Condition 43 – Height of allotments

Prior to the release of the Subdivision Certificate, the Applicant must supply Council with an appropriate survey detailing all lots have been constructed to the relevant Flood Planning Level height (i.e. 500mm above the 1:100 ARI flood event).

For the reasons outlined in this submission, it is considered that the conditions imposed on the Development Consent go beyond the requirements of the Murray River Development Control Plan, the Barham Flood Study, and the Barham Floodplain Flood Risk Management Study and Plan, resulting in unreasonable and unnecessary costs on the developer which will undoubtedly reduce the affordability of the allotments when they are brought to market.

This modification seeks Councils approval to modify conditions 31 and 43 of the development consent. Specifically, the following modifications are sought (changes in red).

Condition 31

A copy of an instrument prepared in accordance with the Conveyancing Act 1919, must be submitted with the application for a Subdivision Certificate for Council's endorsement.

The instrument must contain the following:

A restrictive covenant on all residential allotments requiring the construction of a building pad and driveway access to at least the height of the 1 in 100 year flood level (77.0m AHD) and the floor level of all habitable rooms be constructed at least the height of the Flood Planning Level (~~500mm~~ 300mm above the 1 in 100 flood event level) applying to the site. The restriction must be in favour of Murray River Council.

A copy of an instrument prepared in accordance with the Conveyancing Act 1919, must be submitted with the application for a Subdivision Certificate for Council's endorsement.

The wording of the covenants/restrictions must be to the satisfaction of Council prior to the release of the Subdivision Certificate.

Condition 43 - Height of allotments

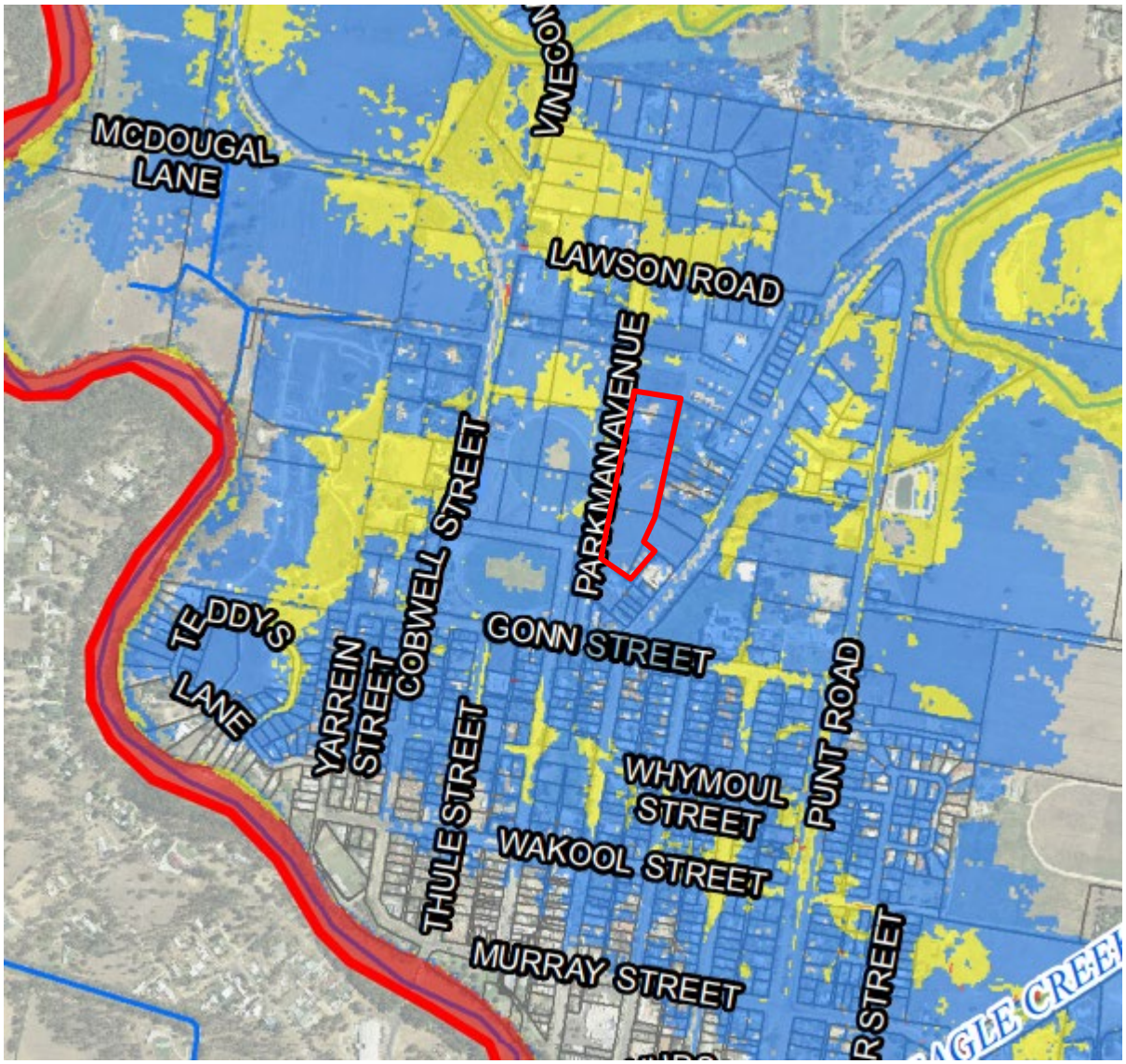
~~Delete Condition 43 which requires the entire subdivision to be filled to 500mm above the flood height.~~

It is proposed to delete condition 43 as the amended condition 31 provides certainty to Council that a suitable flood free building pad and access will be established as part of the future development of each lot.

Background

By way of background, the Barham Flood Study (2013) and Barham Floodplain Risk Management Plan (2017) identifies the site as being subject to flooding during the 1 in 100 year flood (1% AEP). The relevant flood category is Low hazard Flood Fringe.

Figure 1 – Barham Floodplain and Risk Management Plan, GHD 2017 – Site outlined



'Flood Fringe' represents areas of relatively low depth flooding. According to the Barham Floodplain Risk Management Study and Plan, *"These flooding conditions pose risks associated with property damage, however pose little or no risk in relation to injury or, worst case scenario, loss of life"*.

Despite the wording of condition 43 (which requires filling of all lots to 500mm above the 1% AEP), Council has since clarified via email that it will accept filling of the lots to the 1% AEP level of 77.0m AHD. Based on current ground levels, this would require a fill depth of between 0.1 and 0.5m across the entire 2.4ha estate.

Price Merrett Consulting has estimated that approximately 2,200 cubic metres of solid fill or 3,080 cubic metres of loose fill would be required to comply with condition 43. A Truck and dog can carry 12 cubic

metres of soil and on that basis, this would equate to a minimum of 183 loads of fill at a substantial estimated cost of $140,000.

Acre Town Planning has made enquiries with Council's Planning Department in relation to condition 43 of the Development Consent. Assessing officers have advised that the requirement to fill the lots hasa arisen from Clause B.2.4 (12) of the Wakool DCP which states as follows:

> *"Subdivision within the Flood Fringe: Residential subdivision will only be permitted where any lot to be created is above the Flood Planning Level or is protected from a flood by other measures (e.g. levee banks) and the creation of such lot will not create the potential for increased intensity of development on flood liable land."*

Notwithstanding the above provision, it is understood that other more recent subdivisions in more flood susceptible areas of the town have not been required to fill to the 1% AEP. This includes a recent 45 lot subdivision in Armstrong Drive (DA 10.2023.329.1, approved **7 June 2024**) which included land identified as both Flood Fringe and Flood Storage (i.e. a greater level of flood hazard than the subject site).

Council has indicated that this decision was made to ensure consistency with an earlier stage of development within the same estate which also did not include a requirement to fill lots to the 1% AEP. This demonstrates the inconsistent application of Councils DCP provisions relating to subdivision within the flood fringe.

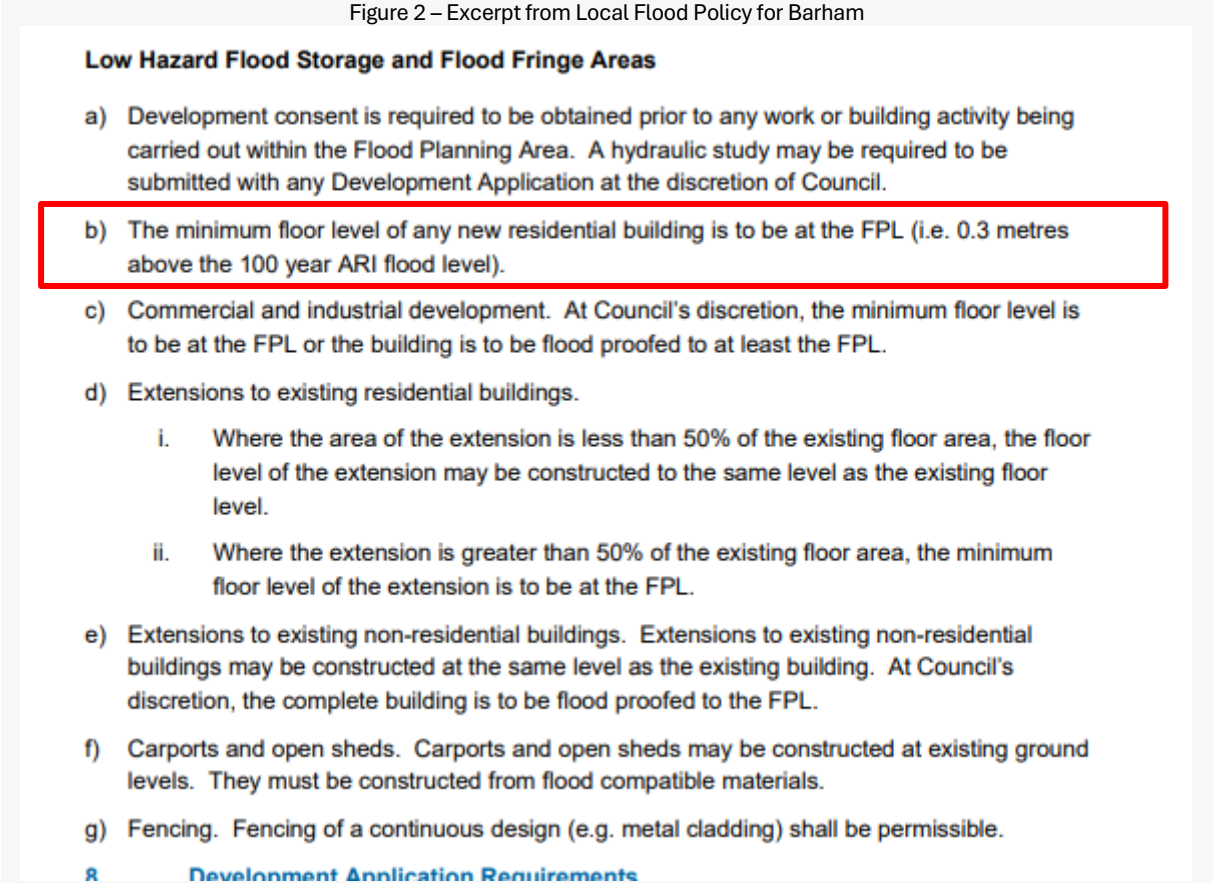
Justification for Proposed Modifications

Fill requirement is inconsistent with 2017 adopted Flood Policy

The flood planning provisions of the Wakool DCP 2013 were created in 2013. This was prior to the adoption of the *Barham Flood Risk Management Study and Plan* (BFRMSP) in 2017 which is a comprehensive review of flood characteristics in the Barham Township. The BFRMSP makes recommendations for controls to be adopted into Councils DCP.

Appendix A of the BFRMSP provides a draft local Flood Policy which was ultimately adopted by Council. The relevant provisions of the Flood Policy are included at figure 2 below. The policy sets requirements for minimum floor levels within the Low hazard flood fringe area but does not include any requirements to fill land to the 1% AEP (see extract at figure 2 below).

Figure 2 – Excerpt from Local Flood Policy for Barham



Low Hazard Flood Storage and Flood Fringe Areas

a) Development consent is required to be obtained prior to any work or building activity being carried out within the Flood Planning Area. A hydraulic study may be required to be submitted with any Development Application at the discretion of Council.

b) The minimum floor level of any new residential building is to be at the FPL (i.e. 0.3 metres above the 100 year ARI flood level).

c) Commercial and industrial development. At Council's discretion, the minimum floor level is to be at the FPL or the building is to be flood proofed to at least the FPL.

d) Extensions to existing residential buildings.

   i. Where the area of the extension is less than 50% of the existing floor area, the floor level of the extension may be constructed to the same level as the existing floor level.

   ii. Where the extension is greater than 50% of the existing floor area, the minimum floor level of the extension is to be at the FPL.

e) Extensions to existing non-residential buildings. Extensions to existing non-residential buildings may be constructed at the same level as the existing building. At Council's discretion, the complete building is to be flood proofed to the FPL.

f) Carports and open sheds. Carports and open sheds may be constructed at existing ground levels. They must be constructed from flood compatible materials.

g) Fencing. Fencing of a continuous design (e.g. metal cladding) shall be permissible.

8 Development Application Requirements

Page 32 of the BFRMSP states:

> *"Council's DCP should be updated to incorporate the Local Flood Policy including the FPA map, the Hazard Category map and the Hydraulic Category map. Flood based development controls are to apply to the FPA."*

It appears that this update was never made to the DCP, meaning the current DCP does not reflect the latest adopted policy and recommendations for managing Barham's floodplain. As a result, Condition 43 of DA 10.2021.196.1 imposes requirements beyond what is outlined in the Council's Flood Risk Management Plan, which is considered unreasonable.

Fill requirement is excessive and will reduce available flood storage

The requirement to fill the entirety of the allotments is considered to be excessive given the hydraulic category of the site ('flood fringe') and the low hazard it presents. The nine allotments created by the subdivision are substantial in size varying between 2,200sqm and 3,900sqm. The size of the allotments provides ample opportunity for a dwelling to be established on a fill pad whilst also retaining areas on site that could accommodate some degree of flood storage (in areas away from the dwelling) during a flood event without posing a threat to property.

Introducing fill is advised against by NSW Floodplain Guidelines. The SES Guideline for subdivision design in flood prone areas "*Designing Safer Subdivisions"* warns against introducing large scale filling

to create a uniform ground level over a large site and instead recommends that where a building pad is used to bring the dwelling above flood height it has been designed to the shape of the dwelling as closely as possible to minimise impact on the floodplain.

The guideline provides these objectives to meet when requiring fill for floodplain management:

> *Determining the appropriate volume and elevation of filling is the key issue, with the objectives being to:*
>
> - *provide a building platform which does not significantly increase the flood hazard at the development site, including those in rarer flood events;*
> - *minimise flood impact for the surrounding floodplain users;*
> - *provide direct evacuation access to existing flood free (higher) ground; and*
> - *facilitate normal drainage provisions for the fill area during times of flood.*

The intent to fill the whole site is inconsistent with the SES Guidelines and indeed is contrary to the objective to "minimise flood impact for the surrounding floodplain users" as it will reduce storage in the floodplain but also potentially change the natural flows of stormwater over the site, which may have unintended consequences in a storm event.

This is echoed in the letter provided under separate cover from hydraulic consultants, *Water Technology* dated 5 March 2025 which states:

> *"…minimising the required fill to building pads and access and egress routes only would provide a more appropriate solution to limit risk to causing adverse impacts."*

Water Technology's advice concludes:

> *"The Subject Property is within the estimated 100 year ARI flood extent, within an area of flood fringe and the Flood Planning Area, within this area the Flood Planning Level should be used to guide development by setting floor levels. While filling of building pads and access routes will provide improved flood protection and enable residents to safely evacuate their dwellings filling of the entire property is unnecessary to reduce these risks.*

Finished floor level of 500mm is an invalid condition

Condition 31 of DA 10.2021.196.1 requires that a covenant be placed on the title requiring all future dwellings to be built 500mm above the flood height. However, this exceeds the requirements of both Clause B.2.4 (9)(a) of the *Wakool Development Control Plan 2013* and the more recently adopted Local Flood Policy in the BFRMSP, which requires that habitable rooms of dwellings within the Barham urban area are built **300mm** above the 1% AEP (see excerpts at figure 3 and 4 below).

Figure 3 – Excerpt from clause B.2.4(9)a of Wakool DCP 2013

9) Residential development outside of a controlled levee bank

a) Floor levels of all habitable rooms or rooms with connection to sewer infrastructure must not be lower than:

i) 300mm (freeboard) above the Flood Planning Level in the urban areas of Barham and Moulamein

Figure 4 – Excerpt from Adopted Local Flood Policy in BFRMSP 2017

b) The minimum floor level of any new residential building is to be at the FPL (i.e. 0.3 metres above the 100 year ARI flood level).

Section 4.15 (3A) of the *Environmental Planning and Assessment Act 1979* prevents Council from enforcing conditions that are more onerous than development standards listed in the relevant Development Control Plan:

> (3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—
>
> (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development.

In light of the above, we conclude that condition 31 is an invalid condition. A modification is sought to amend this condition to require dwellings be built **300mm** above the flood height in line with the requirements of Councils Development Control Plan and the adopted Local Flood Policy.

Significant cost of fill will reduce affordability of lots and impact on viability of project

The Murray River Housing Strategy has identified this subdivision as a component in its projections for the future supply of housing in Barham. As such, this development is important to meet the region's demand for housing and plays a vital role in fulfilling the needs of the local community. At an estimated cost of $140,000, the cost of the fill has potential to add an additional $15,500 to the cost of each individual lot (on average) reducing affordability for future lot purchasers. Given current housing affordability crises and cost of living pressure, it is a very real prospect that a higher lot cost could reduce the potential pool of buyers, threatening the viability of the project. This is particularly the case when other recent subdivisions in Barham have no requirement to fill to the 1% AEP and therefore similar sized lots in other estates may be able to be offered to the market at a more competitive price point.

Alternative pathways achieve the same outcome

The key outcome that Council is aiming to achieve in applying the two subject conditions is to ensure that all residential development is built at Flood Planning Level to ensure dwellings are not inundated in a flood event. The applicant supports this requirement and is willing to achieve this through reasonable measures.

This same objective can be achieved through the proposed covenant on title requiring:

- Purchasers to construct their own building pad and access driveways to the 1 in 100 ARI flood level of 77.0m AHD.

- Ensuring that any habitable development is built with a floor level at the flood planning level (300mm above the 1 in 100-year flood height).

This will also allow flexibility in the location of the building pad and future dwellings, while maintaining a degree of flood storage on the substantial sized allotments.

Council as the consent authority has the power to consider the controls of the DCP flexibly. Indeed, the *Environmental Planning and Assessment Act 1979* requires that Council consider development controls in their DCP flexibly, and consider alternative solutions that achieve similar objectives:

> (3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—
>
> (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development.
> (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

The landowners proposed alternative of requiring future owners to fill their own building pad and access driveway to the 1% AEP provides an appropriate and reasonable outcome for both Council and the developer and is the most fair and equitable solution given other larger subdivisions within the township have not been asked to fill to the height of the 1% AEP.

The proposed modification remains consistent with DCP requirements

The below table details how the objectives of **Section B.2.4 Flood Planning** of the Wakool DCP will be met by the proposed modification.

DCP OBJECTIVE	JUSTIFICATION
A) to minimise any increased risk to human life from flooding;	This is achieved by the proposed covenant on the land which will ensure future owners build their own building pad and vehicular up to the 1-in-100-year flood level and any future dwelling will be constructed with a floor level that is at least the height of theflood planning level. This approach gives future owners the flexibility to position their building pad where they choose, while minimizing the impact on the natural topography of the land.
B) to minimise any additional economic and social costs arising from damage to property from flooding that are greater than that which can reasonably be managed by the property owner and general community;	The proposed covenant on title provides adequate protection to minimise economic and social costs arising from damage to property during a flooding event. The modifications to conditions will continue to ensure that a building pad and access driveway is provided at the 1% AEP and the future dwellings achieve a suitable 300mm freeboard. This will ensure all habitable development will not be inundated by flooding in a 1 in 100 ARI event. The Wakool DCP does not apply flooding controls onto ancillary development such as

	sheds, garages and carports and therefore there should be no requirement to provide a building pad for these structures.
C) to permit development only where there is either a controlled levee system or effective warning time and reliable access available for the evacuation of an area potentially affected by floods;	The site is suitable for development as Barham receives at least one week of warning time in advance of a major flood peak (page 31 BFRMSP). This, combined with the requirement that the vehicular access is built at the 1 in 100 year flood level, is ample time to facilitate evacuation prior to a flood event.
D) to avoid detrimentally increasing the potential flood affectation on other development or properties (except where levee banks are approved by council);	The proposed amendment is more likely to achieve this, as minimising the amount of fill on such a large subdivision would maintain a degree of flood storage on each of the lots, better maintaining the flood storage capacity of the floodplain and reducing the potential for impacts to adjoining properties. As noted earlier in this report, this is supported by Water Tech (provided under separate cover) who have advised: "*minimising the required fill to building pads and access and egress routes only would provide a more appropriate solution to limit risk to causing adverse impacts"*
E) to ensure construction methods and materials are compatible with flooding and flood conveyance.	The proposed modification will not impact the operation of this objective.

Conclusion

This submission has outlined:

- The requirement to fill the entirety of the estate to the 1% AEP is inconsistent with Councils adopted Local Flood Policy (2017) which only places requirements on the floor level of dwellings, not ground levels.
- The DCP requirement to fill new subdivisions within the flood fringe to the height of the 1%AEP is being inconsistently applied to subdivisions in flood liable areas of the Barham Township, resulting in an unequitable situation amongst developers. It is also considered that the DCP control is outdated given the more recently adopted flood policy which does not include any requirements for minimum ground levels.
- The requirement to fill the entirety of the estate is contrary to SES and NSW Guidelines which generally seeks to discourage filling within floodplains. A more appropriate solution to limit impacts on flood storage and flood behaviour would be to limit fill to a building pad and access and egress routes only. This is supported by attached advice from hydrology consultants, Water Technology.
- Condition 31 of the DA 10.2021.196.1 which requires dwellings to be constructed 500mm above the 1% AEP is not a valid condition as it exceeds the requirements of both the DCP and the adopted Local Flood Policy. This should be modified to require a 300mm freeboard.
- The requirement to fill the entirety of the estate will add significantly to the cost of the development, reducing the affordability of the lots and potentially impacting the viability of project.
- The modifications sought to the conditions of the consent provide an alternative solution that will achieve a satisfactory level of flood protection while also reducing the potential for impacts on the broader floodplain.

In summary a more flexible approach should be considered to allow the project to move forward, ensuring the timely delivery of much-needed housing for the Barham community.

I trust this information is of assistance and provides sufficient justification in consideration of the proposed modification to the consent for **DA 10.2021.196.1**. Should you have any questions, please do not hesitate to contact the undersigned on 0447 314 359 or *e.noakes@acretp.com.au*.

Yours faithfully,

Eliza Noakes

Senior Town Planner

NOTE

The Wakool DCP defines the Flood Planning Level as the 1 in 100 year flood level. In the NSW Floodplain Management Manual the Flood Planning Level is defined as the 1 in 100 year flood level + freeboard. For the purposes of this letter "Flood Planning Level" will be used as defined by the NSW Floodplain Management Manual, unless quoting from the Wakool DCP or otherwise stated.