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Dear Madam/Sir

**REVIEW OF COUNCIL REPORT  
CONSISTENCY WITH SECTION 117 DIRECTION – 4.3 FLOOD PRONE LAND  
PLANNING PROPOSAL TO INCREASE FSR ON FLOOD PRONE LAND**

**Commission**

1. Auburn City Council has commissioned Bewsher Consulting and Grech Planners to jointly review an internal Council report, prepared to meet the Director-General's Requirements in relation to satisfying Section 117 Direction 4.3 Flood Prone Land. The report relates to a planning proposal from Council which seeks to increase floor space ratios (FSRs) on flood prone land across various locations within the LGA.
2. The report which is the subject of our review is entitled "*Consistency with s.117 Direction 4.3 Flood Prone Land – Report to satisfy the Director-General or delegate that the planning proposal is consistent with s.117 Direction 4.3 Flood Prone Land*" (prepared by Council and dated January 2012).

**Documents Considered**

3. For the purposes of undertaking our review, we have examined the following documents provided to us in a brief from Council:
  - Auburn City Council report with regard to consistency with the s.117 Direction, dated January 2012, as noted above;
  - Appendix A to the 2012 report – "*Status of the measures of the Haslams Creek FRMP*";
  - Appendix B to the 2012 report – "*Stormwater Drainage component of Auburn DCP 2010*";
  - Appendix C to the 2012 report – "*Gateway Determination from the DP&I*";
  - Appendix D to the 2012 report – "*Planning Proposal to increase FSRs on certain land across the LGA*";

- the *“Haslams Creek Floodplain Risk Management Study and Plan, Final Report”*, dated January 2003, prepared for Council by Bewsher Consulting Pty Ltd. (Note that the signatories to this letter were significant contributors to the Study and Plan, as well as the Stormwater Drainage component of Auburn DCP 2010);
  - the NSW Government *“Floodplain Development Manual”* (FDM), dated April 2005;
  - *“Local Planning Direction – 4.3 Flood Prone Land”*, issued by the DP&I on 1 July 2009, in accordance with s.117(2) of the *Environmental Planning and Assessment Act, 1979*; and
  - the Auburn Local Environmental Plan 2010 (LEP 2010).
4. We note that the Haslams Creek FRMP was prepared in accordance with the Floodplain Development Manual (FDM) published in 2001. We rely on only the 2005 Manual referred to within the s.117 Direction. We do not consider that the differences in the Manuals are of any significant consequence to our review, but discuss some differences below.

## Background

5. A planning proposal prepared for Council by BBC Consulting Planners (dated September 2011) was submitted to the DP&I. The planning proposal sought to increase the FSR of certain land zoned R4 High Density Residential and B4 Mixed Use, in accordance with a series of resolutions of Council in 2010. The planning proposal applies primarily to areas within and adjacent to town centres or other areas currently identified for higher density housing. These lands are, in part, flood prone, including those within the Auburn and Lidcombe Town Centres and the Berala locality.
6. The planning proposal notes that the land is constrained by environmental factors including flooding, and that there is a recommendation for a range of technical studies that will investigate these potential land constraints, subject to receipt of a Gateway Determination (page 12, item j). The planning proposal concluded that the LEP amendment would be consistent with s.117 Direction 4.3, on the basis that it supports the principles of the FDM and does not change land use permissibility or flood-related development controls (page 19).
7. The Gateway Determination, issued by the DP&I by letter dated 28 November 2011, states the following:
- “It is noted that the planning proposal is inconsistent with s.117 Direction 4.3 Flood prone Land, in that a significant increase in development is proposed on land within a Flood Planning Area. In order to overcome this inconsistency the planning proposal is to be amended to satisfy the Director General’s delegate that the proposal is consistent with the principles and guidelines of the Floodplain Development Manual 2005 and has been prepared in accordance with a floodplain management plan.”*
8. We note that the Gateway Determination also acknowledges that Council is to prepare a number of technical studies and is encouraged to expedite the preparation of a *“detailed Urban Design Density Study”*, which would review maximum building height controls. The determination also encourages Council to

prepare *“detailed Heads of Consideration and/or a Development Control Plan, which should also be exhibited with the planning proposal”*.

9. Council subsequently prepared the internal report (dated January 2012), which has been issued to us for review, in order to satisfy the Director-General’s or delegate’s requirements with regard to s.117 Direction 4.3.

#### **Section 117 Direction – 4.3 Flood Prone Land**

10. The objectives of this Direction are twofold:

- “(a) to ensure that development of flood prone land is consistent with the NSW Government’s Flood Prone Land Policy and the principles of the Floodplain Development Manual 2005, and*
- (b) to ensure that the provisions of an LEP on flood prone land is commensurate with the flood hazard and includes consideration of the potential flood impacts both on and off the subject land.”*

11. We do not reproduce the Direction in full, but note the following pertinent provisions:
  - applies to a planning proposal that alters a *“provision”* that affects flood prone land, in addition to alterations to zones (Clause 3);
  - planning proposals to give effect and be consistent with the NSW Flood Prone Land Policy and FDM 2005, as amended by the *“Guideline on Development Controls on Low Flood Risk Areas”* (Clause 5);
  - a planning proposal must not contain provisions that apply to flood planning areas and *“... permit a significant increase in the development of the land, likely to result in substantially increased government spending on flood mitigation measures, infrastructure or services”* (Clause 6); and
  - may be inconsistent with the Direction only if the Director-General (or nominated officer) is satisfied that the proposal is in accordance with a Floodplain Risk Management Plan (FRMP) prepared in accordance with the principles and guidelines of the FDM, or the inconsistencies are of *“minor significance”* (Clause 9).

#### **Haslams Creek FRMP**

12. While the Haslams Creek FRMP was prepared prior to the FDM 2005, this remains a plan which we consider to be prepared generally in accordance with the principles and guidelines of the current FDM 2005. A primary difference is that the FDM 2005, as amended by the *“Guideline on Development Controls on Low Flood Risk Areas”* (Department of Planning Circular PS 07-003, dated 31 January 2007) restricts the imposition of flood-related controls on residential development on land above the 100 year flood (plus freeboard), without *“exceptional circumstances”* approval from Government. The Auburn DCP 2010 Flood Risk Management Controls (Section 6.0) were originally adopted prior to the 2007 Guideline, and are therefore saved from this restriction. However the Auburn 2010 LEP Flood Maps cover a flood planning area which appears inclusive of land up to the PMF (i.e. inclusive of the Low Flood Risk Precinct) consistent with the area of application of the DCP. The LEP contains general controls in Clause 6.3 for all development types within the flood planning

area (including residential). In order to prevent any future challenge to the legitimacy of the LEP, Council may wish to review the advices by relevant government agencies provided during the exhibition of draft LEP 2010 and the necessity to lodge an application for "*exceptional circumstances*" in respect of these controls.

13. The Haslams Creek Risk Management Study and Plan (FRMS&P) applies only to a part of the Haslams Creek catchment. The study area for which flood risk mapping was undertaken relates only to the major creek and trunk drainage systems upstream (i.e. south) of the M4 Motorway (FRMS&P, page 1). However, in order to provide a basis for management of all floodplains in the LGA, DCP controls were prepared with a common preamble, objectives and general policies, with specific controls for each floodplain contained within a planning matrix. A planning matrix of controls was recommended for the Haslams Creek catchment that could, in the interim, apply throughout the LGA, which was subsequently adopted by Council and is now incorporated in DCP 2010. When undertaking FRMPs in the future for other catchments, alternate specific DCP controls could be adopted.
14. The 2012 Council report notes that all land the subject of the planning proposal and also subject to flooding, is located within the Haslams Creek catchment (page 5). Whilst this is correct not all of these lands are in part of the catchment where flood risk mapping has been carried out. For example the Newington lands which are immediately adjacent to the Haslams Creek channel but are downstream of the M4 Motorway may well be flood prone but no flood risk mapping has been undertaken for this area as far as we are aware. As such the management of its flood risks were not considered in the FRMS or the FRMP. Consequently any inconsistencies with s.117 Direction 4.3 in respect of these lands could not be assessed to be in accordance with an FRMP, and would only be acceptable if considered to be of "*minor significance*" (which they may be shown to be, after further assessment).
15. The Haslams Creek FRMP recommends the adoption of a graded set of planning controls produced in accordance with the approach described as the "*planning matrix approach*". This approach provides for the division of the floodplain into different risk precincts, and the management of future risk by identifying the preferred distribution of land uses within the floodplain, and planning controls for where development is permitted.
16. For the purposes of assessing the planning proposal, the planning matrix provides an important strategic planning tool, by identifying where certain land uses within the Haslams Creek floodplain would be considered unsuitable from a flood risk management perspective. Generally, residential development, and therefore an increased intensity of residential development, is considered unsuitable in the High Flood Risk Precinct (FRP). The exception to this would be redevelopment which achieves a reduction in flood risks (both to property and persons) meeting the definition of "*concessional development*" as specified by Section 6.0 of the Auburn DCP 2010.

## **Findings of Review**

17. We agree that the planning proposal could permit a significant increase in the development of land within the flood planning area, and that this would be inconsistent with s.117 Direction 4.3. We also agree that this inconsistency in the planning proposal requires the Director-General (or a nominated officer) to be satisfied that the planning proposal is in accordance with an FRMP. In addition, we

are of the view that the provisions of the planning proposal can be inconsistent where determined to be of "*minor significance*".

18. The Haslams Creek FRMP does not cover all lands in the planning proposal, which are also located within a flood planning area. This area includes all land up to and including the PMF and is categorised in accordance with the FRMP as land within either a Low, Medium or High FRP, whether such land has been mapped or not.
19. Further assessment of any flood prone lands in the planning proposal which are outside the coverage of FRMP, such as the Newington lands, needs to be carried out to determine whether the inconsistencies with the s.177 Direction in respect of such lands are of "*minor significance*".
20. Insofar as the planning proposal provides for increased residential development (and therefore, an increased number of persons and property) that could be at risk due to flooding, it would be inconsistent with the Haslams Creek FRMP, where located within a High FRP. The exception would be where the increased FSR would only lead to redevelopment that would be able to demonstrate a reduced flood risk to both persons and property.
21. The 2012 Council report concludes that the increase to the FSR on flood-affected land will not result in an increased risk (implicitly to both persons and property), as the application of the DCP flood planning controls at the DA stage would ensure this. Further, this report concludes that "*in areas of high flood risk such as Lidcombe, the application of the controls will effectively prevent new development from realising the higher FSRs*" (page 19).
22. While we understand Council's reasoning, we cannot conclude that an increase in FSRs on land identified as being within a High FRP would be in accordance with the Haslams Creek FRMP, in the manner in which the broadly applied increased FSRs are proposed. The argued justification that any realisation of the increased development potential provided by the planning proposal within the High FRP would not eventuate because of the ultimate application of the DCP controls, begs the question as to why propose the high FSRs on this land in the first place? This could be because of a preference to provide a simplistic regime of planning controls which we would generally support, but this does not alter the conclusions required to be reached in the application of the s.117 Direction.
23. While the DCP could limit further development in the High FRP, an amendment of LEP 2010 to increase the applicable FSR (and consequently development potential) of this land could be misunderstood and unnecessarily lead to conflict at the DA stage.
24. Notwithstanding the above, we appreciate the objectives behind the planning proposal go beyond flood risk management considerations. A more refined planning approach with greater attention given to the flood prone sites could provide the outcome sought by Council. Accordingly, we would recommend that the following approaches could be considered by Council in order to provide for the satisfaction of s.117 Direction 4.3(9) on the basis of being in accordance with a FRMP or of "*minor significance*".
25. Approach 1 – Revise the Planning Proposal:
  - (a) the FSR Map contained within the planning proposal be refined to generally exclude areas within the High FRP. We would recommend that this criterion

be a consideration of the *Urban Design Density Study* required by the Gateway Determination, which could identify only building platforms, which are suitable for urban design as well as flooding reasons, for increased FSR (and possibly height). One means of 'removing' these areas might be to consider land filling and upgrading of evacuation arrangements to allow these areas to be reclassified in the Medium or Low FRPs;

- (b) the *Urban Design Density Study* could incorporate some minor building envelope intrusions within the High FRP, provided that this component is not greater than that permitted by the existing planning controls. Importantly this would be on the understanding that the DCP controls would permit redevelopment in such areas only as "*concessional development*" (i.e. where a net reduction in risk to persons and property was achieved) within the High FRP;
- (c) the building envelopes identified by the *Urban Design Density Study*, located on flood prone land, be the subject of a flood hydraulics assessment, to determine that such redevelopment would not lead to additional significant flood impacts to other areas within the floodplain;
- (d) the emergency management implications of the planning proposals on the operations of the SES in the locality, be assessed risks to life are not being exacerbated. We note that many of the recommendations of the FRMP have still not been implemented almost a decade after its adoption, including those relating to emergency management and the raising of public awareness concerning flooding. Further the preparation of a site specific emergency management plan (as a condition of consent) may not always be an appropriate means of managing the risks to life, particularly in High FRPs.

26. Approach 2 – Revise the FRMP:

The alternative to the above would be for Council to seek an amendment to the Haslams Creek FRMP in accordance with the processes provided by the 2005 FDM. The process for amending the FRMP should include a review of the planning proposal, and have regard to the acceptability of any potential additional risks to persons and property, in accordance with the merit-based approach of the FDM. This should be the subject of public consultation and consideration by Council's Floodplain Management Committee, before a recommendation could be made to Council. While the matters to be considered would be narrow, the time required for the process could be reasonably lengthy. Notwithstanding, any decisions of Council which vary from the Haslams Creek FRMP should be verified through this process in order to ensure the maintenance of indemnity provided by s.733 of the *Local Government Act, 1993*.

27. Any future hydraulic assessments, including those which might be part of the approaches suggested in Paragraphs 25 and 26, should also have regard to climate change considerations, in accordance with more recent guidelines and directions of the State Government. Areas in the lower parts of the catchment are likely to experience higher flood levels due to rises in the water levels of the Parramatta River, and all parts of the catchments may experience higher flood levels due to increased rainfall intensities. Lands such as those at Newington will likely experience the biggest rise in flood level as a result of climate change.

## Conclusions

28. In its current form the planning proposal is inconsistent with the Section 117 Direction 4.3 Flood Prone Land. In our opinion the inconsistency cannot be maintained having regard to Clause 4.3(9) of the Direction which relate to the planning proposal being either:
  - (a) in accordance with the Haslams Creek FRMP; or being
  - (b) of "*minor significance*".
29. Further, in our opinion, the most significant inconsistency relates to the proposal to increase development intensity with the High FRP which by definition is an area "*where most development should be restricted*" because of its significant flood risks (FRMS&P, page 41).
30. It may be possible to maintain inconsistency of the planning proposal with the s.117 Direction if the proposal could be modified as discussed in Paragraph 25 above or a revised FRMP could be prepared as set out in Paragraph 26.
31. The flood risks associated with any of the proposed lands which are beyond the extent of Council's flood risk mapping need to be considered. Where these lands are flood prone, any inconsistencies with the s.117 Direction should be assessed to see if they are of "*minor significance*" (which they may well be).
32. As part of the two approaches suggested in Paragraphs 25 and 26 above, the potential implication of climate change on flood risks should be assessed. Whilst it is important that this be considered, it may nevertheless not have a significant bearing on the viability of the planning proposal.
33. It appears Auburn LEP 2010 imposes controls which are inconsistent with the January 2007 "*Guideline on Development Controls on Low Flood Risk Areas*" and which can only be sustained through an application for "*exceptional circumstances*". Although largely unrelated to the current review, Council should review this issue and determine the need to make such an application.

Should you have any questions with regard to the above, please contact the undersigned.

Yours faithfully

**BEWSHER CONSULTING PTY LTD**



**Drew Bewsher**  
**Director**

**GRECH PLANNERS PTY LTD**



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