

Submission
No 89

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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18 March 2009

The Director
Standing Committee on State Development
Parliament House
Macquarie St
Sydney NSW 2000

Dear Sir/Madam

**LEGISLATIVE COUNCIL STANDING COMMITTEE ON STATE DEVELOPMENT –
INQUIRY INTO THE NSW PLANNING FRAMEWORK**

Please find attached Fairfield City Council's submission to the above Inquiry. Please note that the issues outlined in the submission have been endorsed by Council.

Council would be happy to provide further clarification on any of the issues outlined in this submission.

Please contact the undersigned on 9725 0214 for any further information.

Yours sincerely



Andrew Mooney
Senior Strategic Land Use Planner



Submission to Legislative Council Standing
Committee on State Development

New South Wales Planning Framework

March 2009

1. Executive Summary

The contents of this submission have been endorsed by Council and focus specifically on the *Terms of reference 1(d): Climate change and natural resources issues in planning and development controls.*

Fairfield City Council's concerns relate to a critical anomaly under the planning framework (not identified in other submissions made to the inquiry to date) restricting the capacity of Councils to apply controls on development affected by low risk flooding, contrary to the principles of the NSW Floodplain Development Manual (FDM) – 2005. There is also a question as a result of this arrangement of the subsequent degree of protection afforded to Councils under s.733 of the NSW Local Government Act 1993 covering liability and flooding issues.

On the 31 January 2007, the Dept. of Planning implemented critical changes to the Environmental Planning and Assessment (EP&A) Regulation 2000 and Section 117 Directions issued under the EP&A Act in relation to flood prone land.

The principle outcome of this action is that on the one hand (under the FDM), Councils are required to assess and consider the impacts on development from floods greater than 100yr floods and up to probable maximum floods (also known as the low risk flood area), whilst on the other (under the EP&A Regs and 117 Directions), Councils are now severely curtailed in applying controls to residential development (excluding group homes) affected by these flood events.

An associated guideline issued with the above changes indicated that *“unless there are exceptional circumstances, councils should adopt the 100-year flood as the flood planning level for residential development”*.

Fairfield City Council is also concerned that the Department of Planning has issued the guideline without information or detail being provided on what constitutes “exceptional circumstances” and that moreover, the change has been made in a disjointed fashion outside the original scope and operation of the FDM.

Furthermore, in following this path, it would appear that the Department has failed to consider the context and implications of s.733 of the NSW Local Government Act, which prescribes councils with a duty of care in ensuring that all residential development is adequately safeguarded from flood hazards, regardless of the degree of risk.

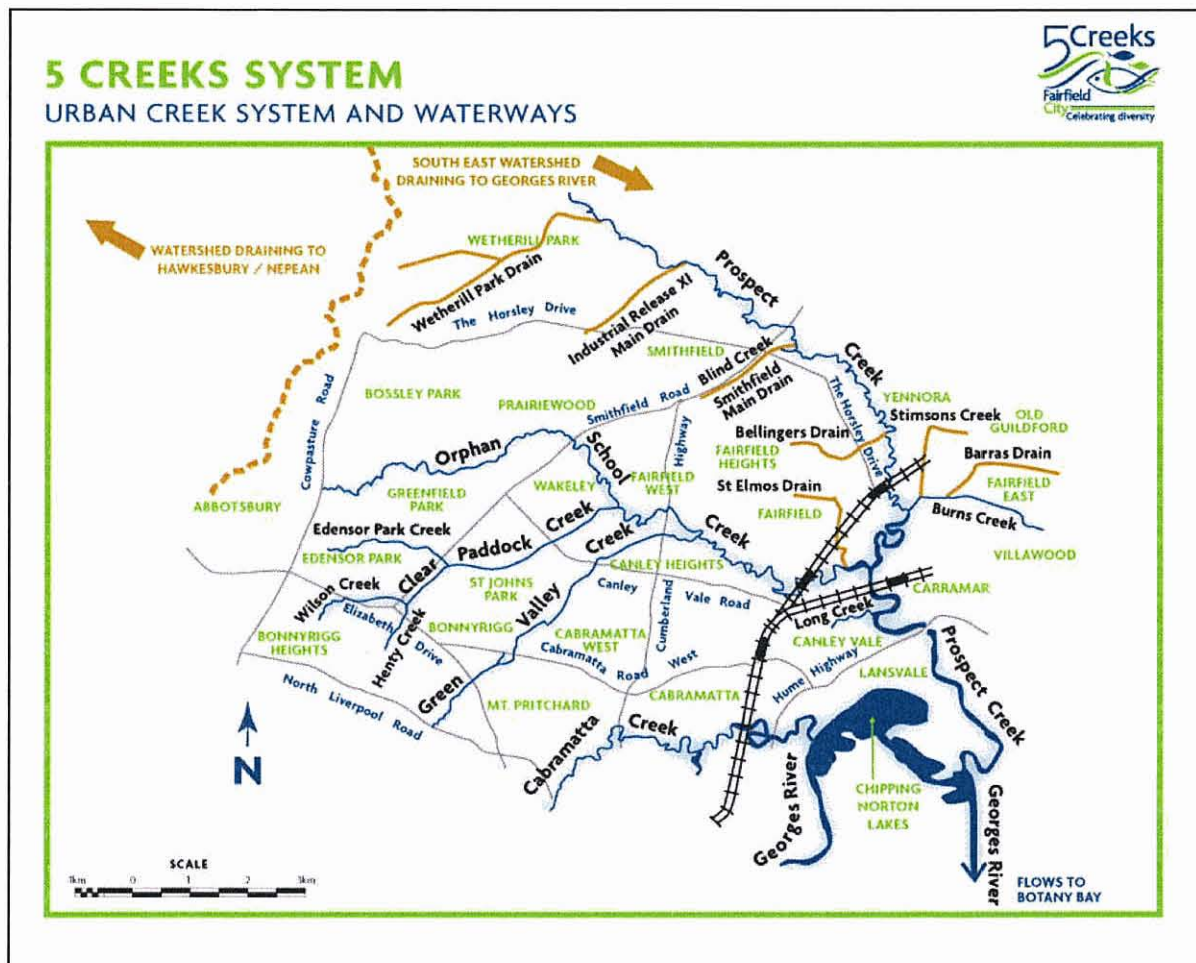
As such the current planning framework fails to take into account a host of issues in relation to management of general residential development within low risk flood areas as outlined in this submission. This includes the potential for an increase in the intensity and frequency of floods as a result of climate change.

The changes made to the planning framework in 2007 also failed to have regard to the scope of actual measures (which are not that onerous on development) required to provide minimum safeguards for people affected by low risk flooding and risks generated if these measures are not applied.

2. Background – Nature of flooding issues in Fairfield City

The established urban areas of Fairfield City are located in the upper reaches of the Georges River Catchment and contain a number of tributaries that feed into the Georges River.

In particular there are 5 principle creeks (figure below) that traverse areas of the City east of the Sydney Regional Parklands that give rise to potential flood risks for much of the established urban areas of the City from both mainstream and overland flooding.



Fairfield City Council has dedicated considerable resources toward dealing with flood risks in the City in the following areas;

- Membership of the Georges River Floodplain Catchment Committee comprising Liverpool, Bankstown and Sutherland Council's, Department Natural Resources, State Emergency Services and Community representatives to develop a consistent approach toward flood risk management in the Georges River Catchment.
- Coordination and preparation of the Georges River Flood Risk Management Study and Plan.
- Extensive community consultation with property owners falling within flood liable land.
- Preparation of detailed planning controls for development which is within flood liable land. Note, these controls also have 'merit' or 'performance' based aspect which allows proponents to present a case (e.g. as a result of a site specific flood study) for variation of prescriptive controls.
- On going detailed flood studies for various catchments in Fairfield City affected by mainstream and overland flooding.
- Carrying out of a range of flood mitigation works across the City.
- Detailed information and advice on s.149 (planning) certificates which provide owners and purchasers of property with up-to-date information on various classifications of flooding, including low, medium and high risk flood areas.

3. NSW Floodplain Development Manual & Probable Maximum Floods

The NSW Floodplain Development Manual was introduced by the State Government in 2005 and recommended that NSW Council's adopt a 'risk management' approach in relation to development which is within flood liable land from either 'mainstream' (e.g. creeks) and overland flooding.

The parameters of 'risk management' are not defined under the Manual, however the scope of flood liable land is defined as including properties affected by floods up to and including the 'Probable Maximum Flood' (PMF). The term PMF is further defined as the "Largest flood that could conceivably occur in a particular location". At Fairfield City the extent of the PMF flood incorporates the outer boundary of the "low flood risk precinct".

In 2005, following completion of the Georges River Floodplain Risk Management Plan and Study (carried out under the auspices of the Georges River Floodplain Catchment Committee) Council introduced new development controls for flood liable land which included requirements for residential development affected by low risk floods.

In effect the requirements on residential development in low flood risk areas are minimal. The more onerous requirement relates to residential development in the low risk flood precinct in close proximity to a medium risk precinct where there is a requirement for habitable rooms to be constructed above the 100 year flood level plus an additional height (known as freeboard) of 500mm.

It should be noted that the costs for residential development in meeting the freeboard requirement are not considerable and can be readily factored into the design process.

Under the NSW FDM, consideration needs to be given to the issue of adequate evacuation during floods. In the case of higher density residential development in a low flood risk area, this can be readily met by ensuring appropriate ramp design for basement car parks, ensuring there are adequate evacuation measures (such as access to an upper floor above the potential flood level) and strategies, such as information on how to evacuate a building.

In applying controls to development in low risk flood precincts, Council has closely followed the provisions of the FDM. In doing so, it is understood it has substantially addressed its obligations of 'duty of care' and liability in relation to flood risk management as outlined under the next section.

4. NSW Local Government Act – Duty of Care

S.731-733 of the NSW Local Government Act 1993 covers the issue of liability for Councils when performing duties under the Local Government and other relevant Acts.

In relation to flood liable land, s.733 states as follows;

(1) *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.*

and.....

(3) *Without limiting subsections (1) and (2), those subsections apply to:*

- (a) the preparation or making of an environmental planning instrument or development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, under the Environmental Planning and Assessment Act 1979, and*

(4) *Without limiting any other circumstances in which a council may have acted in good faith, a 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 most recently notified under subsection (5) at that 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,*

In conforming to the framework of the NSW Floodplain Development Manual (as outlined in the previous section), Council is also pursuing its obligations of duty of care under the Local Government Act in relation to flood liable land.

5. Changes to Planning Legislation in 2007

In early 2007, the Dept. of Planning issued a guideline, which effectively restricted the capacity of councils to apply controls to residential dwellings (excluding group homes and seniors living housing) located in a low flood risk precinct unless a case for exceptional circumstances can be mounted.

Associated amendments were also made to s.117 Directions issued under the EP&A Act which linked this restriction to preparation of a local environmental plan, that rezones land or introduces a provisions, such as local clauses, relating to flood prone land.

Council has recently furnished advice to the Dept. of Planning (clarifying the status of Councils current controls on residential development in low risk flooding areas). The key issue in this advice is that the current controls are considered both valid and relevant under the current planning framework based on the following key points;

- Flood studies prepared by Council underpinning controls on residential development have been prepared in accordance with the NSW Floodplain Development Manual 2005.
- The DCP controls on residential development in low risk flooding areas were adopted by Council in November 2005, well before the changes were introduced by the Dept. of Planning in 2007.
- Council has not prepared any LEP related flood controls which apply to residential development in low risk flood affected areas since the changes to the legislation.

6. Councils Concerns with current arrangements.

As a result of the amendments introduced by the Dept. of Planning in 2007, a number of concerns and uncertainty now exists for councils in NSW in relation to flood plain risk management and protection afforded from liability on flooding matters as follows;

- The Dept. of Planning has not provided any clear criterion on what constitutes 'exceptional circumstances' and there has been no attempt to undertake holistic integration of this requirement into the framework of the NSW Floodplain Development Manual. In this regard it would appear the Dept. of Planning has acted outside the realms of the Manual and created uncertainty regarding the degree of protection afforded to Councils from liability if a case for exceptional circumstances cannot be clarified or agreed upon.

- Recent climate change modelling and advice from the Intergovernmental Panel of Climate Change (IPCC) indicates that the frequency of precipitation extremes is expected to increase “almost everywhere”. As such the potential for larger ensuing floods also increases. Based on the precautionary principle, action needs to be taken to ensure all forms of residential development affected by flooding need be afforded the best available level of protection from flooding. This includes residential development affected by low risk flooding.
- There are high levels of uncertainty and unknown factors regarding individual site circumstances, including information about the individual circumstance site occupants affecting by low risk flooding e.g. elderly or people with poor understanding/knowledge about the impacts of flooding. In this regard the potential for risks to human life still remains in low flood risk areas.
- Under the Dept. of Planning guidelines, controls will still apply to the residential categories of ‘group homes’ and ‘seniors living’ in low risk areas. In Fairfield City these are not common stand alone, forms of development. However, there are numerous instances of ‘seniors’ living throughout low risk flooding areas of the City in private residential dwellings, both in individual or family circumstances. The aggregate number of seniors living in this situation is likely to be much higher than those living in purpose built seniors housing. In this regard there is a major inconsistency and misconception in the guideline regarding the level of protection afforded to the seniors housing in low risk areas
- Significant areas of Fairfield City affected by low risk flooding have been mailed a community notification pack, advising of various studies being carried out; the proposed flood risk mapping; and details of the proposed planning controls. Ten community workshops were also held, and were all relatively well received. In this regard in Fairfield City there has been demonstrated community acceptance of applying controls to residential development in low risk flood precincts. It is not clear whether this factor is incorporated into the case for exceptional circumstances although it is clear Council has endeavoured to address its duty of care on this issue.
- The exclusion of controls on residential development between the 100 year flood and PMF extents would principally have the effect of not requiring floor level and similar controls on residential development in the “shadow zone” (i.e. in that part of the floodplain between the 100 year extent plus 500mm freeboard) which would apply in exactly the same manner to residential development within the 100 year flood extent. More critically, there would be an absence of consideration on an integrated and comprehensive basis of evacuation issues for all residential development across the floodplain

- The alternative of defining the “Low Flood Risk” precinct as that area above the 100 year flood plus 0.5m freeboard would have the effect of increasing the number of properties that would be categorised as “Medium Flood Risk”, and therefore subject to more stringent development controls.

7. Recommendations.

It is hoped this submission highlights critical inconsistencies between the relevant provisions of the NSW Planning Framework relating to planning and management of residential development affected by low risk floods and provisions of NSW Floodplain Development Manual and NSW Local Government Act 1993 on this issue.

In light of the above, Fairfield City Council's key recommendations to the Inquiry are as follows;

1. That the Inquiry endorse further assessment and review of this issue, with the view of remedying inconsistencies between relevant provisions of the NSW Environmental Planning and Assessment Regulation, s.117 Directions (issued under the Environmental Planning and Assessment Act), associated guidelines and NSW Floodplain Development Manual – 2005, in relation to planning for and management of residential development affected by low risk flooding.
2. That the review of the NSW Planning Framework on this issue ensure that Council's in NSW are afforded appropriate protection from liability from flooding impacts in accordance with the provisions of s.733 of the NSW Local Government Act.

Council would be pleased to provide further clarification on any of the issues outlined in this submission. Please contact either Andrew Mooney (Senior Strategic Planner – ph: 9725 0214) or Nilmini De Silva (Natural Systems Manager – ph: 9725 0881) in the first instance.