



PITTWATER COUNCIL

## Agenda

### Council Meeting

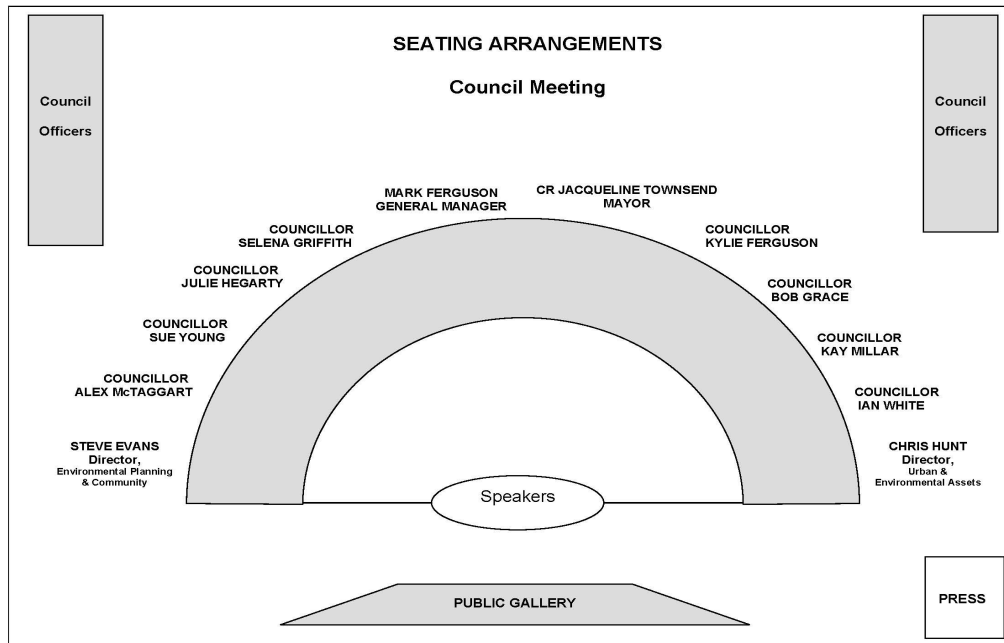
Notice is hereby given that a Council Meeting of Pittwater Council will be held at Mona Vale Memorial Hall on

***6 May 2013***

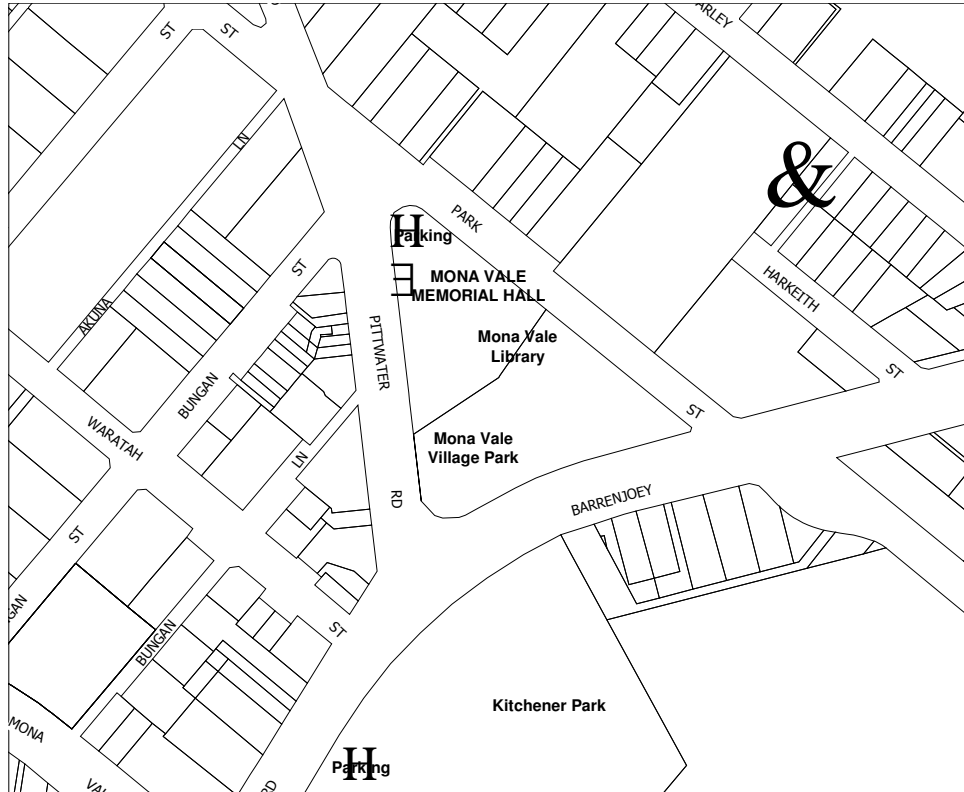
Commencing at 6.30pm for the purpose of considering the items included on the Agenda.

Mark Ferguson  
**GENERAL MANAGER**

## Seating Arrangements



## Meeting Location



All Pittwater Council's Agenda and Minutes are available on the Pittwater website at [www.pittwater.nsw.gov.au](http://www.pittwater.nsw.gov.au)

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## **Acknowledgement of Country**

**Pittwater Council honours and respects the spirits of the  
Guringai people.**

**Council acknowledges their traditional custodianship of  
the Pittwater area.**

## **Statement of Respect**

**Pittwater Council promotes and strives to achieve a climate of respect  
for all and endeavours to inspire in our community shared civic pride by  
valuing and protecting our unique environment, both natural and built,  
for current and future generations.**

**We, the elected members and staff of Pittwater Council, undertake to  
act with honesty and integrity, to conduct ourselves in a way that  
engenders trust and confidence in the decisions we make on behalf  
of the Pittwater Community.**

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## IMPORTANT NOTE FOR COUNCILLORS

The Council has received Confidential Legal Advice in relation to the matters listed below which is attached as **Appendix 1 to Councillor's Agenda on yellow paper**. It is important that Councillors read these confidential documents prior to determining the matters. Should the Council wish to consider the Confidential Advice during the course of the meeting, the following procedure should be followed:

1. Any persons wishing to address the Council are invited to address the Council in Open Session, so that the general (non-confidential) issues relating to the matter are debated in Open Session.
2. Should the Council wish to consider the Confidential Advice at any time during the debate, the Council should resolve into Committee of the Whole in Closed Session in accordance with Section 10A(2)(g) of the Local Government Act 1993, and debate the Confidential Advice and any related issues in a Closed Forum, with the Press and Public excluded. The Council does not have to make any resolution whilst in Committee of the Whole in Closed Session.
3. Following conclusion of the Confidential discussion concerning the Confidential Advice the Council should resolve back into Open Session to continue the debate as required, excluding any reference to the Confidential Advice. Once again it is noted that the debate in Open Session should centre around the general (non-confidential) issues associated with the matter.
4. The Council should then determine the matter in Open Session.

The Reports on the items below are listed in Open Session in the Agenda:

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C10.3	Minutes of the Sydney Coastal Councils Group Ordinary Meeting of 16 March 2013	57

Mark Ferguson  
**GENERAL MANAGER**



# Council Meeting

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## **Appendix 1: Confidential Items**

### **CONFIDENTIAL CLAUSE**

*This report is **CONFIDENTIAL** in accordance with Section 10A(2)(g) of the Local Government Act 1993, which permits the Council to close the meeting to the public for business relating to the following: -*

- (g) Advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.*

Confidential Legal Advice - Implementation of the NSW Government Coastal Management Reforms - Liability Issues Arising from Selection of Sea Level Rise Benchmarks

Confidential Legal Advice - Minutes of the Sydney Coastal Councils Group Ordinary Meeting of 16 March 2013

**The Senior Management Team  
has approved the inclusion of  
all reports in this agenda.**

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## Council Meeting

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### 1.0 Apologies

Apologies must be received and accepted from absent Members and leave of absence from the Council Meeting must be granted.

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### 2.0 Declarations of Pecuniary and Conflict of Interest including any Political Donations and Gifts

**Councillors are advised of the following definitions of a "pecuniary" or "conflict" of interest for their assistance:**

- \* Section 442 of the Local Government Act, 1993 states that a "pecuniary" interest is as follows:

*"(1) **[Pecuniary interest]** A Pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated.*

*(2) **[Remoteness]** A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter."*

**Councillors should reference the Local Government Act, 1993 for detailed provisions relating to pecuniary interests.**

- \* Council's Code of Conduct states that a "conflict of interest" exists when you could be influenced, or a reasonable person would perceive that you could be influenced by a personal interest when carrying out your public duty.

**Councillors are also reminded of their responsibility to declare any Political donation or Gift in relation to the Local Government & Planning Legislation Amendment (Political Donations) Act 2008.**

- \* A reportable political donation is a donation of:
  - \$1,000 or more made to or for the benefit of the party, elected member, group or candidate; or
  - \$1,000 or more made by a major political donor to or for the benefit of a party, elected member, group or candidate, or made to the major political donor; or
  - Less than \$1,000 if the aggregated total of the donations made by the entity or person to the same party, elected member, group, candidate or person within the same financial year (ending 30 June) is \$1,000 or more.

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### 3.0 Confirmation of Minutes

“Councillors are advised that when the confirmation of minutes is being considered, the only question that can arise is whether they faithfully record the proceedings at the meeting referred to. A member of a council who votes for the confirmation of the minutes does not thereby make himself a party to the resolutions recorded: **Re Lands Allotment Co (1894) 1 Ch 616, 63 LJ Ch 291.**”

Minutes of the Council Meeting held on 15 April 2013.

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### 4.0 Public Addresses

The following guidelines apply to any person addressing a Council / Committee meeting in relation to an item on the Council / Committee meeting agenda:

1. *A member of the public may be granted leave to address a meeting of Council or a Committee, where such a request is received by the General Manager no later than 3.00pm on the day of the meeting. This is subject to:*
  - (a) *A maximum of up to six speakers may address on any one item, with a maximum of three speakers in support of the recommendation in the report, and three speakers in opposition.*
  - (b) *A limitation of three minutes is allowed for any one speaker, with no extensions.*
  - (c) *An objector/s to a development application is to speak first with the applicant always being given the right to reply.*

*Exceptions to these requirements may apply where:*

- (a) *The Meeting specifically requests that a person be interviewed at a meeting.*
  - (b) *The Meeting resolves that a person be heard at the meeting without having given prior notice to the General Manager*
2. *Once a public/resident speaker has completed their submission and responded to any Councillor questions, they are to return to their seat in the public gallery prior to the formal debate commencing.*
3. *No defamatory or slanderous comments will be permitted. Should a resident make such a comment, their address will be immediately terminated by the Chair of the meeting.*
4. *Council's general meeting procedures apply to Public Addresses, in particular, no insults or inferences of improper behaviour in relation to any other person is permitted.*
5. *Residents are not permitted to use Council's audio visual or computer equipment as part of their address. However, photographs, documents etc may be circulated to Councillors as part of their address.*

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<b>5.0</b>	<b>Councillor Questions on Notice</b>
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Nil.

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<b>6.0</b>	<b>Mayoral Minutes</b>
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Nil.

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<b>7.0</b>	<b>Business by Exception</b>
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Items that are dealt with by exception are items where the recommendations contained in the reports in the Agenda are adopted without discussion.

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<b>8.0</b>	<b>Council Meeting Business</b>
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<b>C8.1</b>	<b>General Manager Elected President of Local Government Managers Australia</b>
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**Meeting:** Council

**Date:** 6 May 2013

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**STRATEGY:** Business Management

**ACTION:** Provide strategic and operational advice and support to management

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**PURPOSE OF REPORT**

To advise Council that General Manager, Mark Ferguson has been elected National President of Local Government Managers Australia (LGMA).

**1.0 BACKGROUND**

1.1 In February 2013 I was elected National President of LGMA for the period commencing 21 May 2013, for a 12 month period. I had previously been a Board member since 2008. The LGMA is the Professional Association for Local Government professionals in Australia. Individuals are members of each state branch office located in each capital city in Australia. The states are represented by the Federation at a National level. It was established in 1936 as the Institute of Municipal Administration. Its key roles are:

- Advocacy on the part of the Local Government Managers and to advance the profession.
- Advance Excellence in Local Government Management through knowledge, improvement and workforce development.
- International Relations and Development Programs.

1.2 Some of the organisation's key initiatives in recent years have been:

- Establishment of Australian Centre of Excellence for Local Government (ACELG) in collaboration with the University of Technology Sydney (UTS) and other universities.
- Australian Local Government Management Challenge.
- 2010 Year of Women in Local Government.
- Annual Local Government Congress.

1.3 I had previously also served as the NSW President for 4 years from 2008-2012

1.4 The National Office is located in Melbourne. The position is honorary.

1.5 The professional obligation will be to attend:

- Quarterly Board meetings in a capital city.
- Monthly phone conferences with the National Executive.
- Attendance at International Conferences in Boston, USA (ICMA), York, UK (Solace) and New Zealand (SOLGM)
- National Congress attendance.
- General advocacy.

1.6 Board meeting attendance and international travel will be at the LGMA's expense.

## **2.0 ISSUES**

- 2.1 The role will provide professional development opportunities and opportunities to promote Pittwater Council. It will require some domestic and international travel at LGMA's expense.

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## **RECOMMENDATION**

That Council note the General Manager, Mark Ferguson, has been elected as National President of the LGMA for a 12 month period from 21 May 2013.

Mark Ferguson  
**GENERAL MANAGER**

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<b>C8.2</b>	<b>Minutes of the Audit &amp; Risk Committee Meeting held on 16 April 2013</b>
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**Meeting:** Council

**Date:** 6 May 2013

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**STRATEGY:** Business Management

**ACTION:** Maintain and service Council's range of Committees

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## **PURPOSE OF REPORT**

To present to Council the Minutes of the Audit & Risk Committee for the meeting held on 16 April 2013.

### **1.0 BACKGROUND**

1.1 Council approved the establishment of an Internal Audit Committee at its meeting held on 16 November 2009. The Committee plays a pivotal role in the governance framework to provide Pittwater Council with independent assurance and assistance on risk management, control, governance and external accounting responsibilities. This Committee was subsequently renamed the Audit & Risk Committee. The original Audit & Risk Committee Charter required the Committee to report to Council "at least annually".

1.2 At its meeting on 15 February 2012, the Audit & Risk Committee resolved that:

*Minutes of the Audit & Risk Committee Meetings are to be reported to Council on a quarterly basis and so be placed on the public record.*

and

*The Audit & Risk Committee Charter ... to be reviewed and revised by the Committee ... and submitted for approval by Council at the first availability.*

As a result the Audit & Risk Committee Charter was revised to reflect quarterly reporting to Council.

1.3 Council endorsed an updated Audit & Risk Committee Charter at its meeting held on 16 April 2012.

### **2.0 ISSUES**

2.1 Per the revised Audit & Risk Committee Charter the Minutes of the Audit & Risk Committee Meetings shall be reported to Council on a quarterly basis.

### **3.0 SUSTAINABILITY ASSESSMENT**

#### **3.1 Leading an Effective & Collaborative Council (Governance)**

The Audit & Risk Committee plays a pivotal role in the governance framework to provide Council with independent assurance and assistance in the areas of risk management, control, governance and external accountability responsibilities.



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#### **4.0 EXECUTIVE SUMMARY**

- 4.1 The Audit & Risk Committee has resolved to amend their Charter so that Minutes of quarterly meetings are reported to Council and so be placed on the public record. As such, a copy of the Minutes of the Audit & Risk Committee Meeting held on 16 April 2013 is at **Attachment 1**.
- 

#### **RECOMMENDATION**

That the Minutes of the Audit and Risk Committee Meeting held on 16 April 2013 be noted.

Report prepared by  
Karen Farquhar - Internal Auditor

Paul Reid  
**MANAGER, CORPORATE STRATEGY & COMMERCIAL**

# Minutes

## *Audit & Risk Committee Meeting*

held in the 3<sup>rd</sup> Floor Conference Room at  
Pittwater Council, Warriewood on

**16 April 2013**

Commencing at 5.07pm



## **ATTENDANCE:**

### **Members**

Mr John Gordon (Chair)  
Mr Robert Dobbie  
Cr Julie Hegarty  
Cr Bob Grace

### **The following Council Officers (non-voting)**

Mr Mark Ferguson, General Manager  
Mr Paul Reid, Manager, Corporate Strategy & Commercial  
Mr Mark Jones, Chief Financial Officer  
Mr Chris Tubridy, Team Leader IT  
Ms Karen Farquhar, Internal Auditor  
Mr Jeremy Wardell, Principal Officer, Risk & Developer Contributions  
Ms Pamela Tasker, Administration Officer / Minute Secretary

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**Audit & Risk Committee**

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***Attachment 1: Action Item Summary***

**Notes:**

1. The Audit & Risk Committee (A&RC) Meeting commenced at 5.07pm and concluded at 7.30pm.
2. Mr Gordon was appointed as Chair.
3. Mr Gordon extended his appreciation on behalf of the Committee to the previous Chairman, Mr Neil Adams, and the former Internal Auditor, Ms Renaldi Steyn, for their past contribution.

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## **1.0 Apologies**

Nil.

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## **2.0 Declarations of Conflict of Interest / Pecuniary Interest**

Nil

**Note:**

The External Committee Members have undertaken to provide Council with a list of Committees, Boards and other interests in which they are involved for the purposes of identifying potential Conflicts of Interest.

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## **3.0 Confirmation of Minutes**

### **COMMITTEE DECISION**

That the Minutes of the A&RC Meeting held on 21 November 2012, copies of which were circulated to all members be and are hereby confirmed as a true and accurate record of that meeting.

(Cr Hegarty / Mr Gordon)

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### ***Procedural Motion (COMMITTEE DECISION)***

That the Committee first move to consider Item 6.3 – IT Hardware & Software Controls Audit.

(Mr Gordon / Cr Hegarty)

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## **6.0 Report on Internal Audit Activities**

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### **6.3 IT Hardware & Software Controls Audit**

**Proceedings in Brief**

The Chief Financial Officer and the IT Team Leader addressed the Committee on this item.

**Action Items – IT Hardware & Software Controls Audit:**

- *IT Strategic Plan to be circulated to Committee members*
- *Update on the IT Management Strategy to be brought to the August 2013 Meeting*

---

**COMMITTEE DECISION**

That the report be noted and that the IT Team Leader and Chief Financial Officer be thanked for their presentation.

(Mr Gordon / Cr Hegarty)

**Note:**

The IT Team Leader left the meeting at 5.58pm.

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***Procedural Motion (COMMITTEE DECISION)***

That the Committee now move to consider Item 5.0 – Report on Risk Management.

(Mr Gordon / Cr Hegarty)

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**5.0 Report on Risk Management**

**Proceedings in Brief**

The Principal Officer, Risk & Developer Contributions, addressed the meeting on this item.

**Action Items – Report on Risk Management:**

- *The Enterprise Risk Management Plan is to be brought to the August 2013 meeting for noting*
- *The Enterprise Risk Management Plan and Policy is to be endorsed by Council once finalised*
- *The top 10-20 risks are to be reported at future meetings*
- *An overview of the Occupational Health & Safety system is to be brought to the May 2013 meeting*

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**COMMITTEE DECISION**

That the report be noted and that the Principal Officer, Risk & Developer Contributions, be thanked for his presentation to the Committee.

(Cr Hegarty / Mr Gordon)

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### ***Procedural Motion (COMMITTEE DECISION)***

That the Committee now move to consider Item 4.0 – Matters Arising & Action Items from Minutes.

(Mr Gordon / Cr Grace)

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## **4.0 Matters Arising & Action Items from Minutes**

### ***Proceedings in Brief***

The Internal Auditor addressed the meeting on this item.

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## **6.0 Report on Internal Audit Activities**

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### **6.1 Issues Register: Progress on Audit Recommendations**

#### ***Proceedings in Brief***

The Internal Auditor addressed the Committee on this item.

#### **Development Applications:**

The NSW Department of Planning & Infrastructure White Paper (proposed State Government Planning Legislation) was released today (16 April 2013). Any changes to Council's policy relating to development applications being called to Council will follow review of the new legislation.

#### **Lakeside Caravan Park Best Practice Audit:**

A new management team will commence next month. The personnel changes together with seasonal issues have resulted in delays to the finalisation on this task. However, significant improvements in the management and profitability of the caravan park have been noted over the past year.

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### **6.2 Review of Controls Relating to Ghost Employees**

#### ***Proceedings in Brief***

The Internal Auditor addressed the Committee on this item.

#### ***Action Items – Review of Controls Relating to Ghost Employees:***

- ***Review of Payroll reconciliation procedures to be conducted and reported to the Committee on completion***

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## **6.4 Internal Audit Self Assessment**

### **Proceedings in Brief**

The Internal Auditor addressed the Committee on this item.

The Committee noted that the Risk Management and Internal Audit functions are separate roles. As both are relatively new roles within Council, the individual responsibilities and areas of collaborative and independent function are still being negotiated.

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## **6.5 Draft Strategic Audit Plan 2013-2015**

### **Proceedings in Brief**

The Internal Auditor addressed the Committee on this item.

### **Action Items – Draft Strategic Audit Plan 2013-2015:**

- ***A further update on the Draft Strategic Audit Plan to be brought to the 2013 May meeting***
- ***A Fraud Review to be conducted and brought to the 2013 May meeting***
- ***A link to the 'fraud diagnostic' to be provided to Committee members***

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### **COMMITTEE DECISION**

That the report on Internal Audit Activities be noted.

(Mr Gordon / Cr Hegarty)

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## **7.0 Complaints Register**

### **Proceedings in Brief**

The General Manager addressed the Committee on this item.

### **Action Items – Complaints Register:**

- ***The Complaints Handling Procedures Manual has been completed and will be brought to the May 2013 meeting***
- ***The General Manager is to advise on procedures relating to complaints against Councillors***



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## **8.0 General Business**

### **8.1 Kimbriki Resource Recovery Centre**

The invitation to the CEO of Kimbriki was previously deferred pending the appointment of the new Audit & Risk Committee.

#### **Action Items:**

- ***The CEO of Kimbriki is to be invited to attend the May 2013 Meeting for discussion on management of the Kimbriki Resource Recovery Centre***

### **8.2 External Auditors**

#### **Action Items:**

- ***The external auditors to be invited to attend the May 2013 Meeting to provide an overview of the current Audit Plan***

### **8.3 NSW Council Financial Sustainability Ratings (FSR)**

The Chief Financial Officer addressed the meeting and advised that Pittwater Council obtained a sound rating with a neutral outlook which is considered very good by NSW Treasury. This places Council in the top 20% statewide.

#### **Action Items:**

- ***The CFO to provide a copy of the report to Committee Members***

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## **9.0 Proposed Meetings Schedule**

The next Meeting of the Audit & Risk Committee is now scheduled to be held on Wednesday, 29 May, 2013.

**THERE BEING NO FURTHER BUSINESS THE AUDIT & RISK  
COMMITTEE MEETING CLOSED AT 7.30PM ON  
TUESDAY, 16 APRIL, 2013**

**ACTION ITEM SUMMARY:**

- *IT Strategic Plan to be circulated to Committee members*
- *Update on the IT Management Strategy to be brought to the August 2013 Meeting*
- *The Enterprise Risk Management Plan is to be brought to the August 2013 meeting for noting*
- *The Enterprise Risk Management Plan and Policy is to be endorsed by Council once finalised*
- *The top 10-20 risks are to be reported at future meetings*
- *An overview of the Occupational Health & Safety system is to be brought to the May 2013 meeting*
- *Review of Payroll reconciliation procedures to be conducted and reported to the Committee on completion*
- *A further update on the Draft Strategic Audit Plan to be brought to the 2013 May meeting*
- *A Fraud Review to be conducted and brought to the 2013 May meeting*
- *A link to the 'fraud diagnostic' to be provided to Committee members*
- *The Complaints Handling Procedures Manual has been completed and will be brought to the May 2013 meeting*
- *The General Manager is to advise on procedures relating to complaints against Councillors*
- *The CEO of Kimbriki is to be invited to attend the May 2013 Meeting for discussion on management of the Kimbriki Resource Recovery Centre*
- *The external auditors to be invited to attend the May 2013 Meeting to provide an overview of the current Audit Plan*
- *The CFO to provide a copy of the report to Committee Members*

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**Community, Recreation and Economic Development Committee**

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**9.0            Community, Recreation and Economic Development  
Committee Business - Nil**

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**Natural Environment Committee**

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**10.0           Natural Environment Committee Business**

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## **C10.1 Public Exhibition of Careel Creek (Avalon) Flood Study**

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**Meeting:** Natural Environment Committee

**Date:** 6 May 2013

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**STRATEGY:** **Risk Management Co-ordination**  
Land Use and Development

**ACTION:** Develop plans to mitigate/control, wherever possible, risks associated with hazards  
Progress and implement program for flood risk management studies  
Implement and periodically review plans to mitigate/control wherever possible, risks associated with natural hazards

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### **PURPOSE OF REPORT**

1. To ensure compliance with the NSW Government Flood Prone Land Policy and accompanying Floodplain Development Manual (2005)
2. To seek approval to undertake the consultation process for the notification of affected property owners (public exhibition of the Careel Creek (Avalon) Flood Study).
3. To provide an overview of the mapping of properties in the Careel Creek Catchment potentially affected by flooding (both mainstream and overland flow).
4. To apply updated Section 149 Planning Certificate advices to the properties affected by the new mapping within the Careel Creek Catchment.

### **1.0 BACKGROUND**

#### **1.1 NSW Government Flood Prone Land Policy and Floodplain Development Manual (2005)**

Under the NSW Government's Flood Prone Land Policy, management of flood prone land is primarily the responsibility of Councils. The primary objectives of NSW Government Flood Prone Land Policy are to:

- reduce impact of flooding on owners and occupiers of flood prone property;
- reduce existing and future private and public losses resulting from floods;

The NSW Government's Floodplain Development Manual (April 2005) details the Flood Prone Land Policy and establishes the Floodplain Risk Management Process followed by Council. Provided Councils utilise the framework provided by the Floodplain Risk Management Process and they have acted in good faith, Councils can receive indemnity under Section 733 of the Local Government Act, 1993. The Policy specifies a staged process:

- Establish a Floodplain Working Group
- Data Collection
- Flood Study
- Floodplain Risk Management Study
- Floodplain Risk Management Plan
- Implementation of the Floodplain Risk Management Plan

This responsibility extends to preparing Flood Studies and Floodplain Risk Management Studies and implementing Floodplain Risk Management Plans. Management actions include applying flood-related planning controls, raising flood awareness and supporting flood emergency responses.

Council's flood-related planning controls, including the Flood Risk Management Policy for Development in Pittwater, are contained in Pittwater 21 Development Control Plan (DCP). The key outcomes of the Pittwater Flood Risk Management Policy are as follows:

- protection of people;
- protection of the natural environment;
- protection private and public infrastructure and assets

The Careel Creek Floodplain Working Group has been set up to satisfy the first stage of Floodplain Risk Management Process. Pittwater Council has followed this process for the Careel Creek catchment in order to manage the risk from flooding and is currently nearing completion of the Flood Study phase.

## **1.2 Types of Flooding in the Local Government Area**

Flooding is defined as all types of inundation including the overtopping of natural or artificial banks of streams, rivers, estuaries, lakes or dams (ie. mainstream flooding) and overland flooding, tidal flooding and coastal inundation from raised sea levels. The Floodplain Development Manual recognises that both 'mainstream' flooding and 'overland' flooding should be considered together in floodplain risk management.

The Draft Careel Creek Flood Study (2013) has identified properties affected by 3 types of flooding:

1. Fluvial flooding from Careel Creek,
2. Tidal flooding from Pittwater Estuary and
3. Flooding from Overland Flow Paths.

## **1.3 Previous flood Studies and flooding in the Careel Creek Catchment**

Pittwater Council has been updating the 1999 Careel Creek Drainage Catchment Flood Study, which is now more than 10 years old. The updated flood study looks at current catchment conditions, the potential impacts of climate change, overland flow paths and utilises the most up-to-date topographical data and floodplain modelling techniques.

The Careel Creek Catchment Flood Study is being carried out on Pittwater Council's behalf by consultants WMAwater.

In the past, flooding in the Careel Creek catchment has caused property damage and posed a hazard to people around the Avalon shops.

There have been several recorded instances of flood-producing storms in the Careel Creek Catchment, including those that occurred in 1973, 1975, 1984, 1987, 1989, 1990, 1997, 1998 and 2008.

In 1999 a Drainage Catchment Flood Study was completed by Lawson and Treloar, in 2000 the Floodplain Management Study was completed, followed by the Floodplain Risk Management Plan (2002), and Blockage and Development Scenarios Floodplain Modelling Study in 2005.

## 2.0 ISSUES

### 2.1 Methodology

In accordance with the Floodplain Development Manual, Council is completing the Careel Creek (Avalon) Flood Study Update (with WMA Water). This study used two-dimensional (2-D) hydraulic computer modelling to calculate flood levels, flood depths, flow velocities, flood hazard, and hydraulic categories for a range of design flood events within the Careel Creek (Avalon) Catchment up to the Probable Maximum Flood (PMF), this included overland flow paths. The impacts of climate change were also analysed.

Using the results from this study, flood hazard maps, flood levels and velocities and Flood Planning Levels were calculated for each property in the Careel Creek catchment to be used in the development assessment process.

Following the review of the Preliminary Draft Report by Council Staff, the Office of Environment and Heritage (OEH), as well as a presentation to the Careel Creek Floodplain Working Group, Council is now in receipt of the Draft Final Report for Public Exhibition for the Careel Creek (Avalon) Flood Study Update (March, 2013).

### 2.2 Study Findings

The updated flood study has identified 920 properties at risk in the 1% AEP flood event (These numbers are however, reduced further when the 0.15m minimum 1% AEP peak flood depth is placed on flooding identified as overland flow).

One of the evacuation centres has also been identified as being inundated in the 1% AEP flood event. The critical duration for the majority of the catchment was also found to be 2 hours, however the 1 hour storm duration was found to be critical in the PMF event, therefore the catchment (along with the village centre) is prone to flash flooding.

**Table 1** summarises the number of properties that are predicted to be flooded within the Careel Creek Catchment for different design flood events.

Design Events	Number of Properties Impacted by Flooding within the Careel Creek Catchment			
	Residential	Commercial	Industrial	TOTAL For each Design Flood Event
<b>PMF</b>	939	90	5	<b>1034</b>
<b>0.2% AEP (500yr ARI event)</b>	871	80	8	<b>956</b>
<b>0.5% AEP (200yr ARI event)</b>	862	79	5	<b>946</b>
<b>1% AEP (100yr ARI event)</b>	838	77	8	<b>920</b>
<b>5% AEP (20yr ARI event)</b>	838	78	5	<b>921</b>
<b>20% AEP (5yr ARI event)</b>	815	74	4	<b>893</b>

*Table 1: Properties Affected By Flooding within the Careel Creek Catchment (any depth)  
These numbers are reduced further when the 0.15m minimum 1% AEP peak flood depth is placed on flooding identified as overland flow.*

## Climate Change

Rainfall sensitivity results - in open channel reaches of Careel Creek each incremental 10% increase in rainfall results in a 0.05m to 0.2m increase in flood peak. In overland flow areas, the impact is less significant, with impacts of between 0.02m and 0.07m for each 10% rainfall increase.

Sea level rise sensitivity results - the sea level rise scenarios were found to not have a significant effect on peak flood levels, except in the most downstream reaches of the catchment (i.e. north of Barrenjoey Road crossing). Upstream of Barrenjoey Road the peak 1% AEP flood levels for existing conditions are above 3m AHD, and therefore are not significantly changed even under the 2100 scenario, which has a peak tailwater of 2.4m AHD.

## Flood Planning Level

For assessment of Category 1, a 0.5m vertical freeboard was applied to the mainstream 1% AEP levels, and this flood surface was stretched over the digital terrain model to determine the additional extents affected by this freeboard. For Category 3 Major (overland flow greater than 0.3m deep) a 5m horizontal buffer was applied to the modelled flood extent as freeboard. For Category 2 and Category 3 Minor (less than 0.3m flow depth) no freeboard was applied to the 1% AEP levels.

Where Category 1 coincides with Category 2 or Category 3, Category 1 was given precedence. Where Category 2 and Category 3 coincide, Category 3 was given preference.

## Properties at Risk Analysis

Table 38 of the Flood Study provides a summary of properties potentially inundated by over-floor flooding.

## Road Inundation and Access Impacts

Table 40 of the Flood Study shows the estimated duration of road inundation and the criterion resulting in maximum inundation time at various locations. This shows that the duration of inundation is less than 2 hours however should be treated as indicative only.

### **2.3 Differences between the previous and current Careel Creek Flood Studies**

The 2013 Careel Creek Catchment Flood Study supersedes the 2012 DRAFT Overland Flow Flood Study for those properties identified within the Careel Creek Catchment only. The 2013 Flood Study is more detailed than the 2012 Overland Flow Flood Study and incorporates local drainage, detailed floor level survey, more refined modelling and is calibrated to a number of recorded rainfall events.

Properties in the 1999 Careel Creek Flood Study could only be identified and classified as either Category 1 or Category 2 (due to the limitations of the 1999 flood model). Properties in the DRAFT Overland Flow Flood Study were only classified as Category 3. However, as a result of the 2013 Careel Creek Catchment Flood Study, properties have been identified as either Category 1, 2 or 3 (Overland Flow).

The change to the number of properties impacted by each flood category is mainly as a result of the changes in computer modelling technology from the 1999 flood study, which can provide more detailed flood extents and depth mapping for the entire catchment, not just the defined creek channels.

The changes to the Overland Flow properties which have increased from 290 properties in the 2012 Draft Overland Flow Flood Study to 339 in the 2013 Careel Creek Catchment Flood Study, is due to more detailed modelling, the incorporation of drainage and floor level surveys, and some properties previously classified as Category 1 now being changed to a Category 3 classification, following more detailed analysis.

*Note:*

- *Category 1 Flood Classification (Low Hazard and High Hazard)* — where the lowest point of the property is affected by the Flood Planning Level (FPL) (1% AEP + 0.5m vertical freeboard).
- *Category 2 Flood Classification* — where the lowest point of the property lies above the FPL but below the level of the Probable Maximum Flood.
- *Category 3 Flood Classification* refers to properties generally located outside the Primary Floodplain Areas that are affected by flooding hazards associated with major stormwater drainage systems, drainage easements and/or overland flow paths.
- High and Low Hazard categories are determined in accordance with Appendix L of the NSW Floodplain Development Manual, the relevant section of which is shown in Figure 2 within Council's Flood Risk Management Policy for Development in Pittwater (Appendix 8 of Pittwater 21 DCP)

A property with a Category 3 Flood Classification may also have a Category 1 or Category 2 Flood Classification and/or a tidal/estuarine inundation risk classification.

**Attachment 1** illustrate the different properties identified from the previous flood studies (Careel Creek Flood Study, 1999, and Overland Flow 2012), and the current 2013 Careel Creek flood study). Note: the 2013 Careel Creek Flood Study only investigated those properties within the boundary of the Careel Creek Catchment. Properties outside this boundary were not taken into consideration. Properties identified in Attachment 1 outside the red boundary line please refer to the 2012 Draft Overland Flow Mapping and Flood Study.

## 2.4 Community engagement to date

In accordance with the Floodplain Development Manual, a rigorous community engagement strategy was developed as part of this project. For the current study, the following community engagement activities have been undertaken to date:

- an initial letter of introduction was sent to residents, property owners and stakeholders within the catchment on the 8 June 2012. Accompanying the letter was a copy of Council's existing Flood Hazard Map for the Careel Creek Catchment (from the original Flood Study, 1999) and an information brochure. The letter also called for Expressions of Interest for community members to become involved with the Careel Creek Floodplain Working Group to be established to assist Council with the Flood Study;
- a website has been developed by WMAwater to outline the latest information and progress on the flood study, as well as ways that the community can get involved.
- establishment of a Careel Creek Floodplain Working Group comprising four community members with a number of state agencies including, Office of Environment and Heritage (OEH) and State Emergency Services (SES) and Sydney Water. The initial meeting was held on 30 October 2012;
- brochure/flyer and questionnaire to residents and stakeholders in June 2012; and
- Careel Creek Floodplain Working Group meeting on 21 March 2013 to present the Draft Report.



In accordance with Council's community consultation policy, a rigorous Community Engagement Plan has been developed as part of the 2013 flood study.

The Community Engagement Plan associated with the release of all information associated with this project is crucial to ensure:

- community understanding of the potential flood damage that can be caused from flooding;
- community acceptance for the need to identify the potential for flooding and the need to apply appropriate flood-related development controls;
- community understanding of the reason for the changes;
- the reduction of the potential for misinformation and community angst;
- compliance with the 2005 Floodplain Development Manual and maintenance of Council's indemnity under Section 733 of the Local Government Act.

Given these community engagement objectives, the following tasks are proposed during the 5 week public exhibition period:

- public exhibition of the Draft Careel Creek (Avalon) Flood Study Report,
- development of 'Frequently Asked Questions and Answers';
- development of specific page on Council's website with relevant intra and external links;
- written correspondence from the General Manager to all affected landholders advising them of the Draft Flood Study and how to view the maps and submit comments. This written correspondence would include a copy of the Frequently Asked Questions together with links to the relevant page on Council's website;
- three days of telephone call-back facility which will allow one-on-one answering of questions;
- three days of community one-on-one information sessions, where property owners can sit down face-to-face with a member of the Project Team to discuss any issue they have on the Careel Creek (Avalon) Flood Study report, and/or changes to their 149 certificates;
- notice in Manly Daily and associated media release.

The next stage for this project is for Council to resolve to place the Draft Final Report on public exhibition. There are no statutory requirements for the exhibition period for flood risk management studies; however a 5 week period has been selected as a reasonable timeframe (based on experience from other flood study reports).

## **2.5 Update of Advice on Section 149 Planning Certificates, and Flood Hazard DCP Maps**

Under Section 149 the *Environmental Planning and Assessment Act 1979*, Council must provide a Planning Certificate that specifies matters that relate to the land. Schedule 4 Part 7A of the *Environmental Planning and Assessment Regulations 2000* provides the information relating to flood related development controls that must be specified on the Section 149 Planning Certificate.

Those additional properties identified through the updated flood study, and not currently notated as flood affected will have their s149(2) planning certificates updated.

- Those identified as Category 1 or Category 3 will have changes to their s149(2) planning certificates advising that "...The land in question is subject to flood related development controls for the purposes (where permissible) of dwelling houses, dual occupancies, multi dwelling housing or residential flat buildings. The land in question is also subject to flood related development controls for any other purpose..."

- Those properties identified as Category 2 and either - dwelling houses, dual occupancies, multi dwelling housing or residential flat buildings - will NOT be subject to flood related development controls.
- 294 properties (only impact from the Flood Planning Level (FPL) to the Probable Maximum Flood (PMF) – Category 2 affected properties), will have changes to their s149 planning certificates advising that “...The land in question is not subject to flood related development controls for the purposes (where permissible) of dwelling houses, dual occupancies, multi dwelling housing or residential flat buildings (not including development for the purposes of group homes or seniors housing). The land in question is subject to flood related development controls for any other purpose...”

## 2.6 Updating Council's Flood Policy

As a result of the Careel Creek Flood Study, it has been identified that Council's Flood Risk Management Policy for Development in Pittwater (Appendix 8 of Pittwater 21 DCP) will require amending (**Attachment 2**).

The 2013 Careel Creek Catchment Flood Study identified both mainstream flooding and flooding from overland flow paths. As a result of these two different flood types being identified Council's Flood Risk Management Policy for Development in Pittwater will require updating to incorporate the following:

The key changes include:

- The refinement of the Flood Category definitions, to:
  - **Flood Category 1 Areas-** Properties identified on the Flood Hazard Maps and located within Primary Floodplain Areas where the lowest point of the property is affected by the Flood Planning Level (FPL) (1% AEP flood level plus 500mm Freeboard). Flood Category 1 areas are further defined under flood hazard subcategories.
  - **Flood Category 2 Areas-** Properties identified on the Flood Hazard Maps where the lowest point of the property lies above the Flood Planning Level but below the level of the Probable Maximum Flood.
  - **Flood Category 3 Areas-** Properties generally located outside or adjacent to the Primary Floodplain Areas that are affected by flooding hazards associated with major stormwater drainage systems, local overland flow paths or drainage easements. Flood Category 3 Areas are further defined under the subcategories of Overland Flow Path – Major and Overland Flow Path – Minor.
- The refinement of the Flood Planning Level definitions for the flood categories to:
  - **Flood Planning Level (FPL) -** Flood levels selected for planning purposes, as determined in Floodplain Risk Management Studies and incorporated in Floodplain Risk Management Plans. For Pittwater, from the Flood Planning Level is the 1% AEP flood level, plus the addition of a Freeboard (refer Figures 3 and 4) as follows:
    - For Flood Categories 1 and 2 – 500mm Freeboard
    - For Flood Category 3 – Overland Flow Path – Major – 5m horizontal buffer, with minimum floor level to be at or higher than 500mm above the 1% AEP plus the 5m horizontal buffer
    - For Flood Category 3 – Overland Flow Path – Minor – no Flood Planning Level but minimum floor level to be at or higher than 300mm above the 1% AEP
- Outlining the Definition of Overland Flow:
  - **Overland Flow Path – Major -** is defined as any land that has a 1% AEP peak flood depth of overland flow greater than 0.3m.
  - **Overland Flow Path – Minor -** is defined as land that has a 1% AEP peak flood depth of overland flow greater than 0.15m and less than 0.3m.

These changes to the Flood Policy are required, to ensure consistency throughout all of Council's current, draft and future Flood Studies, Flood Risk Management Studies and Flood Risk Management Plans. They also reflect the input Council has acquired from the Office of Environment and Heritage (OEH).

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### **3.0 SUSTAINABILITY ASSESSMENT**

#### **3.1 Supporting & Connecting our Community (Social)**

The overarching aims of this project have been to:

- increase safety for residents and businesses during large flood events;
- increase the community's resilience and reduce the social dislocation that can be caused by large flood events.

#### **3.2 Valuing & Caring for our Natural Environment (Environmental)**

Floodplain risk management plans are formulated through the balancing a wide range of social, economic and environmental issues. So although this Flood Study focuses on the natural hazard of flooding, understanding how all measures will interact with the natural environment is an integral part of the next stage, the Flood Risk Management Study and Plan.

#### **3.3 Enhancing our Working & Learning (Economic)**

One of the key outcomes of the NSW Government Flood Prone Land Policy and espoused in Council's Flood Risk Management Policy is the 'protection of private and private infrastructure and assets'. By ensuring that properties impacted by flooding are identified, and that there are adequate flood-related development controls in place, this will reduce future flood damages across not on the Careel Creek Catchment, but the whole of the Pittwater community.

#### **3.4 Leading an Effective & Collaborative Council (Governance)**

- 3.4.1 This project has been undertaken to ensure compliance with the requirements of the NSW Government Flood Prone Land Policy and accompanying Floodplain Development Manual (2005).
- 3.4.2 With the primary responsibility for the management of flood risks resting with local councils, this project has been carried out in accordance with the NSW Flood Prone Land Policy and accompanying Floodplain Development Manual. This can provide Council with indemnity under Section 733 of the Local Government Act.
- 3.4.3 Community engagement is an essential part of the NSW Flood Prone Land Policy. A successful communication strategy is essential to ensure the community understands the project and the risks associated with overland flow flooding.
- 3.4.4 Communication of risks from natural hazards increases community awareness thereby reducing the potential risk to life and property.

#### **3.5 Integrating our Built Environment (Infrastructure)**

Following adoption of the flood study, a floodplain risk management study and plan can then be prepared (subject to Grant Funding). Councils can then qualify for grant funding from various government agencies to assist in the implementation of the plan for on-the-ground works to reduce flood risk.

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#### **4.0 EXECUTIVE SUMMARY**

- 4.1 Pittwater Council has been updating the 1999 Careel Creek Drainage Catchment Flood Study, which is now more than 10 years old. The updated flood study looks at current catchment conditions, overland flow, incorporates climate change and utilises the most up-to-date topographical data and floodplain modelling techniques.
- 4.2 The NSW Government Flood Prone Land Policy highlights that the primary responsibility for floodplain risk management rests with Local Councils. The NSW State Government has prepared the *Floodplain Development Manual* (2005) in accordance with its Flood Prone Land Policy to guide Local Councils in the management of their flood risks.

The Floodplain Development Manual states that both 'mainstream' flooding and 'overland' flooding should be considered together in floodplain risk management.

Provided Councils utilise the framework provided by the Floodplain Development Manual, and they have acted in good faith, Councils can provide themselves with indemnity under Section 733 of the Local Government Act, 1993.

- 4.3 The primary aim of the current Careel Creek Flood Study was to prepare a map of all properties predicted to be affected by both mainstream and overland flooding within the Careel Creek Catchment.

The 2013 Careel Creek Catchment Flood Study supersedes the 1999 Careel Creek Flood Study and the 2012 DRAFT Overland Flow Flood Study for those properties identified within the boundary of Careel Creek Catchment only.

With the overarching aim of increasing safety for residents and businesses by managing the future damages from floods, the public exhibition of the Careel Creek flood study will be an invaluable resource for:

- applying for grant funding from the state government to complete the next stage – the flood risk management study and plan, which will identify and prioritise future risk mitigation and management measures;
- identification of properties that are subject to development controls related to both mainstream flooding and overland flooding;
- identification of properties that are subject to flood notations on Section 149 Certificates.

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#### **RECOMMENDATION**

1. That the Careel Creek Flood Study – Draft for Public Exhibition — Volume 1: Report and Volume 2: Maps and Figures (WMA Water, April 2013 (tabled at meeting) be placed on public exhibition for a minimum period of 28 days with submissions invited from the community.
2. That the Section 149 Planning Certificate for the properties identified as flood prone as a result of the Draft Careel Creek Flood Study Update, are updated for those identified as Category 1, Category 2, and Category 3.

3. That relevant registered community groups within the Careel Creek Catchment and the owners of properties identified as being Flood Prone as a result of the Draft Careel Creek Flood Study be notified in writing advising them of the following information:
  - the Careel Creek flood study and mapping;
  - the inclusion of a notation on their Section 149 Planning Certificate advising that the land is subject to flood-related development controls.;
  - the inclusion a copy of a Frequently Asked Questions Brochure and links to the relevant pages on Council's website to provide additional information about the project;
    - the period of public exhibition and the invitation to provide written comments by the close of the exhibition period;
    - the details of the community information sessions to be held during the exhibition period.
4. That the following proposed amendments to Pittwater 21 DCP be placed on statutory public exhibition for a minimum 28 days with submissions invited from the community:
  - Appendix 8 — Flood Risk Management Policy for Development in Pittwater (**Attachment 2**).

Report prepared by

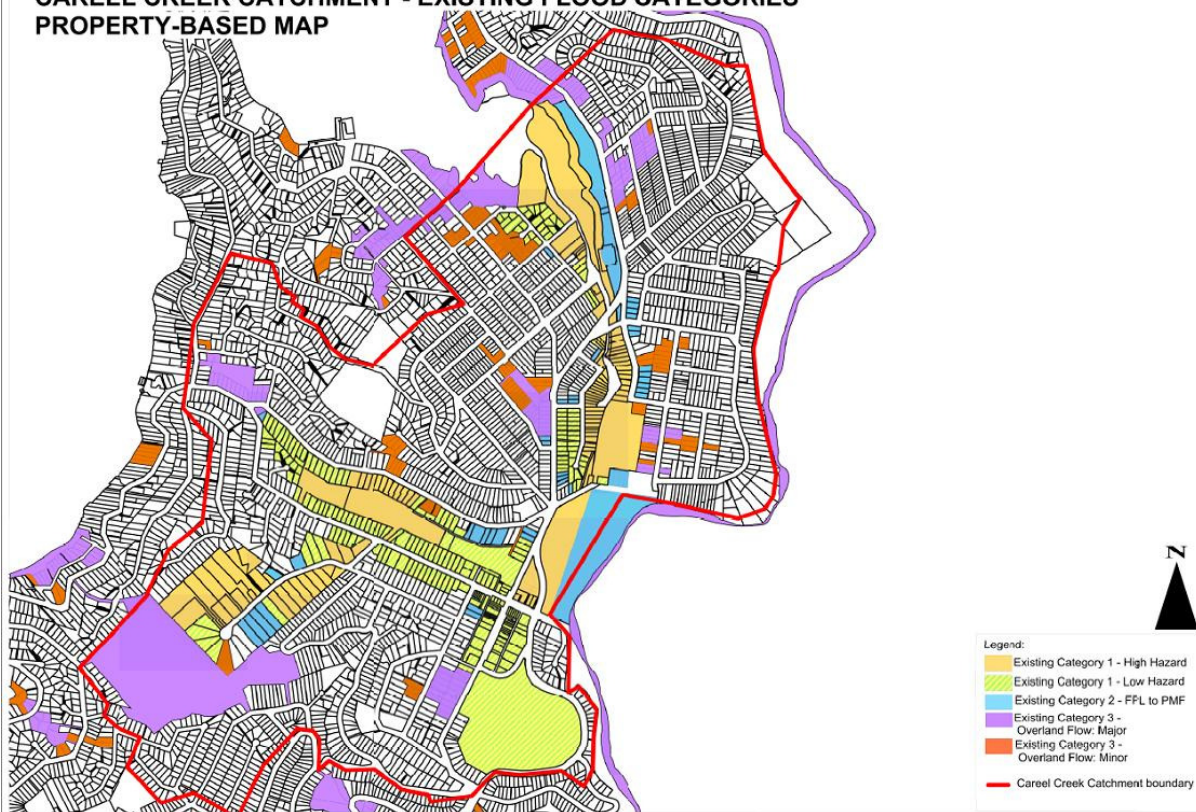
Melanie Schwecke

**PROJECT LEADER – WATER MANAGEMENT**

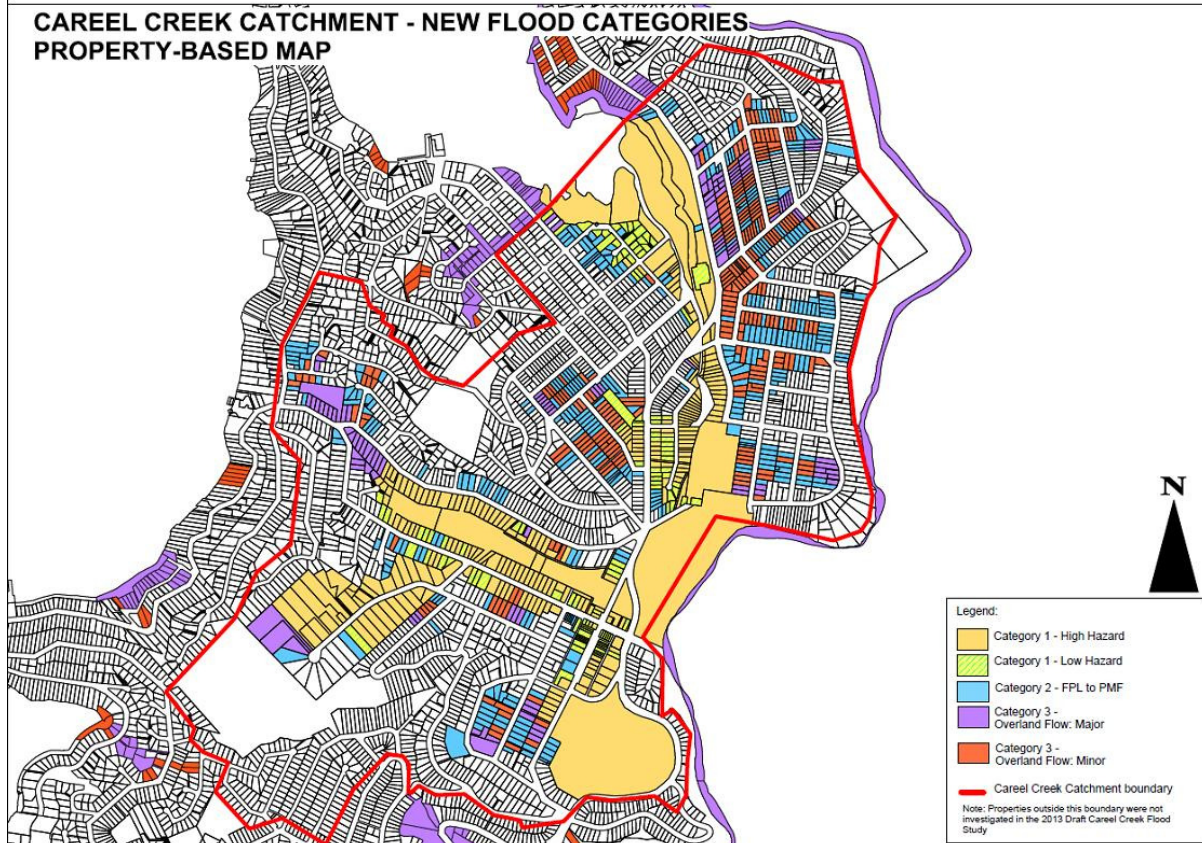
Jennifer Pang

**MANAGER – CATCHMENT MANAGEMENT AND CLIMATE CHANGE**

### CAREEL CREEK CATCHMENT - EXISTING FLOOD CATEGORIES PROPERTY-BASED MAP



### CAREEL CREEK CATCHMENT - NEW FLOOD CATEGORIES PROPERTY-BASED MAP





Proposed amendments to text shown with *blue* wording (additional text) or ~~striking through~~ (removal of text)

## **Appendix 8**

# **Flood Risk Management Policy for Development in Pittwater**

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## 1.0 INTRODUCTION

The Flood Risk Management Policy for Development in Pittwater (the Policy) establishes the flood risk management approach for development or activities on land affected by flooding within the Pittwater Local Government Area (LGA).

At the strategic level, it enables the consideration of social, economic, ecological, cultural and flooding issues to determine actions for **strategic management** of flood risk, through the formulation and implementation of Floodplain Risk Management Plans.

At the property-specific level, the Policy sets **development controls**, such as minimum floor levels, building location within the site, structural stability, and flood proofing etc. to manage flood risk.

## 2.0 THE POLICY STATEMENT

Development must be undertaken in accordance with the acceptable risk management criteria defined in this document for a design project life, taken to be 100 years, unless otherwise justified by the applicant and acceptable to Council. These criteria are based on those contained in the NSW Government Floodplain Development Manual (April 2005), and Planning Circular PS07-033 (January 2007) which supports the NSW Government's Flood Prone Land Policy.

The primary method of flood risk management for development in the Pittwater LGA is through the application of development controls under Part 4 and environmental assessment under Part 5 of the Environmental Planning and Assessment Act 1979 (EP&A Act) (a Part 5 Assessment). A flood risk management review may also be generated by an application for a Building Certificate for any development on lands that have been identified as being flood prone.

Once the flood risk management measures have been identified on the land, it is the owner's responsibility to ensure that these measures are properly maintained for the design project life of the development.

## 3.0 OBJECTIVES

The objectives of this Policy are:

- (a) To ensure that flood processes (affecting development or likely to be affected by development) are adequately investigated and documented by applicants or proponents of activities prior to the lodgement of any development application or Part 5 Assessment to carry out any development/activity subject to this Policy, or wherever an application is lodged for a Building Certificate; and
- (b) to establish whether or not the proposed development or activity is appropriate to be carried out having regard to the results of flooding investigations; and
- (c) to ensure effective controls exist to guarantee that a development is carried out in accordance with the requirements of this policy; and
- (d) to ensure that the preparation of flood related information and certificates required to be lodged by this Policy are carried out by suitably qualified professionals with appropriate expertise in the applicable areas of engineering; and
- (e) that developments are only carried out if flood processes and related structural engineering risks are identified and can be effectively addressed and managed for the life of the development at an acceptable level of risk.

## 4.0 APPLICATION OF THIS POLICY

- a) The **strategic management** component of this Policy relates to all people, private and public companies, public authorities, whom interact, practise, reside, or own assets within flood prone land in the Pittwater LGA, and Council in its management of its flood prone lands.

The **development controls** in this Policy address both flood and structural engineering requirements relating to flood issues only. (Separate structural requirements will also apply to the erection of any structure in accordance with the Building Code of Australia (BCA) and best engineering practice).

- b) The development controls apply to each of the following:
- (i) Land identified on Council's Flood Hazard Maps
  - (ii) Utility companies, public authorities or their agents, where designing and undertaking works within the Pittwater LGA that may be affected by flood processes, or which may impact upon flood processes.
  - (iii) Development Applications that include properties not identified on the Flood Hazard Map but lie within 10m from the bank or edge of a major drainage system, creek, local overland flooding area, overland flowpath or drainage easement.

## 5.0 DEFINITIONS

### 5.1 Definitions

*Note: For an expanded list of definitions, refer to:*

- (i) *the Glossary contained within the NSW Government Floodplain Development Manual – April 2005 edition.*
- (ii) *Pittwater 21 Development Control Plan.*

**1% AEP flood / 1% AEP flood level** – See Annual Exceedance Probability

**100 year ARI flood / 100 year ARI flood level** – See Average Recurrence Interval

**5% AEP flood / 5% AEP flood level** – See Annual Exceedance Probability

**20 year ARI flood / 20 year ARI flood level** – See Average Recurrence Interval

**Annual Exceedance Probability (AEP)** - The chance of a flood of a given or larger size occurring in any one year, usually expressed as a percentage. The 1% AEP means that there is a 1% chance (that is, one-in-100 chance) of the corresponding flood discharge or larger occurring in any one year. In relation to the economic life of structures, there is a 26% chance of the 1% AEP event occurring in a 30 year period, a 40% chance of occurrence in a 50 year period and a 63% chance within a 100 year period.

**Architect** – An architect who is a Registered Architect with The Royal Australian Institute of Architects, with at least 5 years of relevant professional experience, and has an appropriate level of professional indemnity insurance.

**Average Recurrence Interval (ARI)** – The long-term average number of years between the occurrence of a flood as big as or larger than a particular flood. ARI is an alternative to AEP to express the likelihood of occurrence of a flood event. For example, a 100 year ARI will occur, on average, every 100 years.

**Australian Height Datum (AHD)** - A common national surface level datum approximately corresponding to mean sea level. All flood levels and ground levels are quoted based on Australian Height Datum.

**Australian Rainfall and Runoff – A Guide to Flood Estimation** – published by the Institution of Engineers, Australia (1998).

**Basement Carpark** - Carpark set below natural ground level.

**Carport** – Carport structure having at least one side open to allow the ingress of water.

**Council's Web Site** – [www.pittwater.nsw.gov.au](http://www.pittwater.nsw.gov.au)

**First Floor Additions** - The next building level above the Ground Floor.

**Flood Advice for Property** – Refers to the information available from the 'Flood and Estuarine Levels Tool' on Council's Web Site for each Flood Affected Property in Pittwater and may include levels for the 1% AEP flood, the Probable Maximum Flood (PMF) and the Flood Planning Level, together with the Flood Category, Provisional Flood Hazard Classification and flood velocities for the 1% AEP flood and the PMF.

**Flood Affected Properties** - Properties on land susceptible to flooding up to the Probable Maximum Flood.

**Flood Category** - The three Flood Category Areas within the Pittwater LGA are determined as follows:

- **Flood Category 1 Areas**- Properties identified on the Flood Hazard Maps and located within Primary Floodplain Areas where the lowest point of the property is affected by the Flood Planning Level (FPL) (1% AEP flood level plus 500mm Freeboard). *Flood Category 1 areas are further defined under flood hazard subcategories.*
- **Flood Category 2 Areas**- Properties identified on the Flood Hazard Maps and located within Primary Floodplain Areas where the lowest point of the property lies above the Flood Planning Level but below the level of the Probable Maximum Flood.
- **Flood Category 3 Areas**- Properties generally located outside or adjacent to the Primary Floodplain Areas that are affected by flooding hazards associated with major stormwater drainage systems, local overland flow paths or drainage easements. *Flood Category 3 Areas are further defined under the subcategories of Overland Flow Path – Major and Overland Flow Path – Minor.*

**Flood Hazard** – Flood Hazard is a term used to determine the safety of people and property and is based on a combination of flood depth (above ground level) and flood velocity for a particular sized flood. Flood Hazard is classified as either Low Hazard or High Hazard.

In **High Flood Hazard** areas, there is a possible danger to personal safety, able-bodied adults would have difficulty wading and there is the potential for significant structural damage to buildings. In **Low Flood Hazard** areas, able-bodied adults would have little difficulty wading and nuisance damage to some structures would be possible.

The method for determining Provisional Low and High Hazard Categories is outlined in the NSW Government's Floodplain Development Manual (2005)(the Manual). Figures from The Manual have been reproduced in this Policy as Figures 1 and 2. Figure 1 shows approximate relationships between depth and velocity of floodwaters and the resulting risks. The information shown on Figure 1 has been used to determine the Provisional Low and High Hazard Categories shown on Figure 2.

**Flood Hazard Classification** – Council applies either a Low Flood Hazard Classification or a High Flood Hazard Classification to Category 1 *and 3 (Overland Flow)* properties only:

- ~~Category 1 (High Hazard) – the lowest point of the property is affected by the Flood Planning Level (FPL) and some part of the property is subject to High Flood Hazard in a 1% AEP flood;~~
- ~~Category 1 (Low Hazard) – the lowest point of the property is affected by the Flood Planning Level (FPL) and no part of the property is subject to High Flood Hazard in a 1% AEP flood;~~

The Flood Hazard Classification is determined using the method for calculating 'Provisional Hydraulic Hazard Categories' outlined in the NSW Government's Floodplain Development Manual, as shown on Figure 2. The 'Transition Zone' shown on Figure 2 is considered to be High Hazard in Pittwater. The 1% AEP flood is used to determine Council's Flood Hazard Classification. The term 'Undefined Hazard' is used for Category 1 Properties where the Flood Hazard Classification has not been determined.

**Flood Level** – the height of a flood quoted to Australian Height Datum (AHD). The depth of floodwaters at a particular location can be calculated by the difference between the flood level (height of a flood) (in AHD) and the ground level (in AHD).

**Flood Hazard Maps** – Maps that depict Flood Categories and Hazard Classifications for all identified properties within the Pittwater LGA. The maps form part of the Pittwater 21 Development Control Plan and are available on Council's Web site.

**Flood Planning Level (FPL)** - Flood levels selected for planning purposes, as determined in Floodplain Risk Management Studies and incorporated in Floodplain Risk Management Plans. For Pittwater, from the Flood Planning Level is the 1% AEP flood level, plus the addition of a Freeboard (refer Figures 3 and 4) as follows:

- a) For Flood Categories 1 and 2 – 500mm Freeboard
- b) *For Flood Category 3 – Overland Flow Path - Major – 5m horizontal buffer, with minimum floor level to be at or higher than 500mm above the 1% AEP plus the 5m horizontal buffer*
- c) *For Flood Category 3 – Overland Flow Path - Minor – no Flood Planning Level but minimum floor level to be at or higher than 300mm above the 1% AEP*

**Flood Prone/Liable Land** - Land susceptible to flooding up to Probable Maximum Flood (PMF) event.

**Flood Proofing – Dry** - Measures that protect a building from the entry of floodwaters by sealing a building's exterior walls and other floodwater entry points.

**Flood Proofing – Wet** - A combination of measures incorporated into the design, construction and/or alteration of buildings, structures and surrounds, to enable a building or structure to withstand forces due to floodwater ingress and passage, whilst remaining structurally sound, to mitigate flood damages.

**Flood Risk Management Report** - A technical report of adequate qualitative and quantitative detail addressing the management of flood risk, *emergency response* and other criteria (where applicable) as it affects the subject property and its surrounds within the floodplain. The report is to be prepared by a suitably qualified Water Engineer and in conjunction with a Structural Engineer (where necessary) to satisfy the requirements as set out by this Policy.

**Flood Storage Area** - Those parts of the floodplain that are important for the temporary storage of floodwaters during the passage of a flood. The extent and behaviour of flood storage areas may change with flood severity, and loss of flood storage can increase the severity of flood impacts by reducing natural flood attenuation.

**Flood Study** – A technical study that defines the nature and extent of the flood problem, including flood flows, flood depths, flood hazards, flood extents, flood behaviour and other flood risks.

**Flood Velocity** – The speed of floodwaters, usually quoted in metres per second (m/s). A flood velocity of 2m/s (about 7km/h) relates to a High Flood Hazard regardless of the depth of the floodwaters.

**Floodplain Risk Management Study and Plan** – A study, which follows the Flood Study that determines and considers options and measures to manage the flood risk, taking into account social, economic and ecological factors. The Floodplain Risk Management Plan publicly exhibits the preferred options and measures and is formally adopted by Council after public exhibition (incorporating any necessary revisions due to public comments).

**Floodplain Volume** – The volume of water (in cubic metres) occupied by a flood over a particular area.

**Floodway** - Those areas of the floodplain where a significant discharge of water occurs during floods and are often aligned with naturally defined channels. Floodways are areas that, even if only partially blocked, would cause a significant redistribution of flood flow, or a significant increase in flood levels.

**Freeboard** - The factor of safety usually expressed as a height above a particular flood level. Freeboard tends to compensate for factors such as wave action, localised hydraulic effects and sensitivity of flood modelling data.

~~The value for the freeboard for Flood Category 1 and Category 3 (Overland Flow Path – Major) is 500mm.~~

**Local Overland Flooding** - Inundation by local run-off rather than overbank discharge from a creek, estuary or lake.

**Major Drainage System** - The major drainage system conveys stormwater flow from major catchments and may involve:

- The floodplains of original watercourses (which may now be piped, channelised or diverted), or sloping areas where overland flows develop along alternative paths once system capacity is exceeded; and/or
- Water depths generally in excess of 300mm in a 1% AEP design storm (as defined in Australian Rainfall and Runoff — A Guide to Flood Estimation). These conditions may result in risks to personal safety and/or property damage to assets; and/or
- Major overland flowpaths through developed areas outside of defined drainage systems.

**Minimise Risk** - It is recognised that, due to the many complex factors that can affect a site within the floodplain, the flood risk for a site and/or development cannot be completely removed. It is, however, essential that risk be minimised to at least that which could be reasonably anticipated by the community in everyday life. Further, landowners should be made aware of the reasonable and practical measures available to them to minimise risk as far as possible. Hence where the Policy requires that “an acceptable level of risk” be achieved or where measures are to be taken to “minimise risk” it refers to the process of risk reduction. The Policy recognises that development within a risk-managed floodplain does not lead to complete risk removal as this is not meaningfully achievable.

**Open Carpark Areas** – Carparking facilities that are not enclosed so as to allow the free flow of floodwaters.

*Overland Flow Path – Major - is defined as any land that has a 1% AEP peak flood depth of overland flow greater than 0.3m.*

*Overland Flow Path – Minor - is defined as land that has a 1% AEP peak flood depth of overland flow greater than 0.15m and less than 0.3m.*

**Probable Maximum Flood (PMF)** - The largest flood that could conceivably occur at a particular location, usually estimated from probable maximum precipitation. (refer Figures 3 and 4)

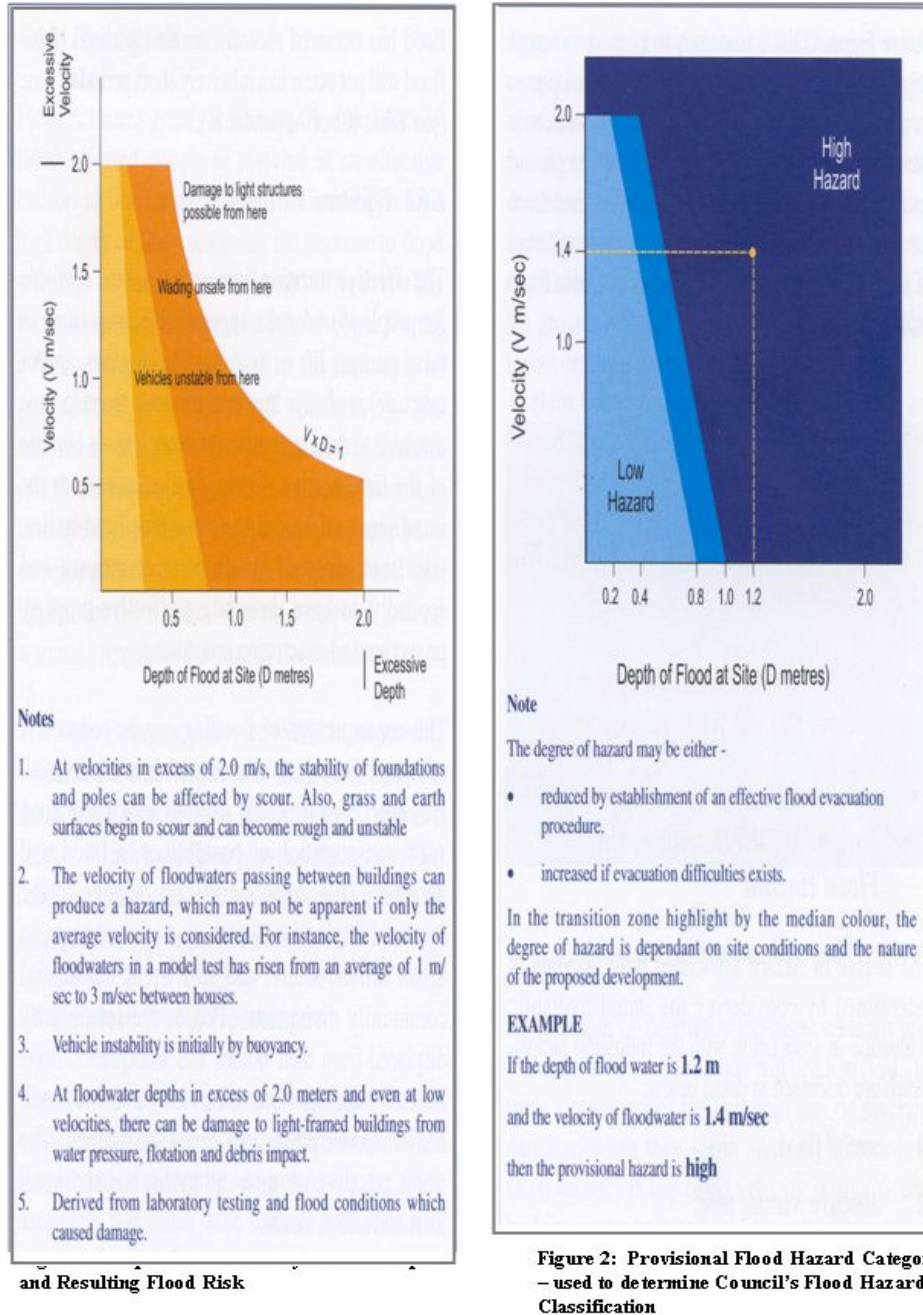
**Primary Floodplain Areas** - Identified flood prone areas within the catchments of: Narrabeen Lagoon (foreshore), Nareen Creek (North Narrabeen), Warriewood Valley, Mona Vale/Bayview, Newport Beach, Careel Creek(Avalon), and Great Mackerel Beach.

**Special Flood Protection Land Use** – Includes land uses that would be particularly vulnerable during a flood. Special Flood Protection Land Use includes Seniors Housing – SEPP (Seniors Living) 2004, child care facilities, hospitals, nursing homes, and educational facilities.

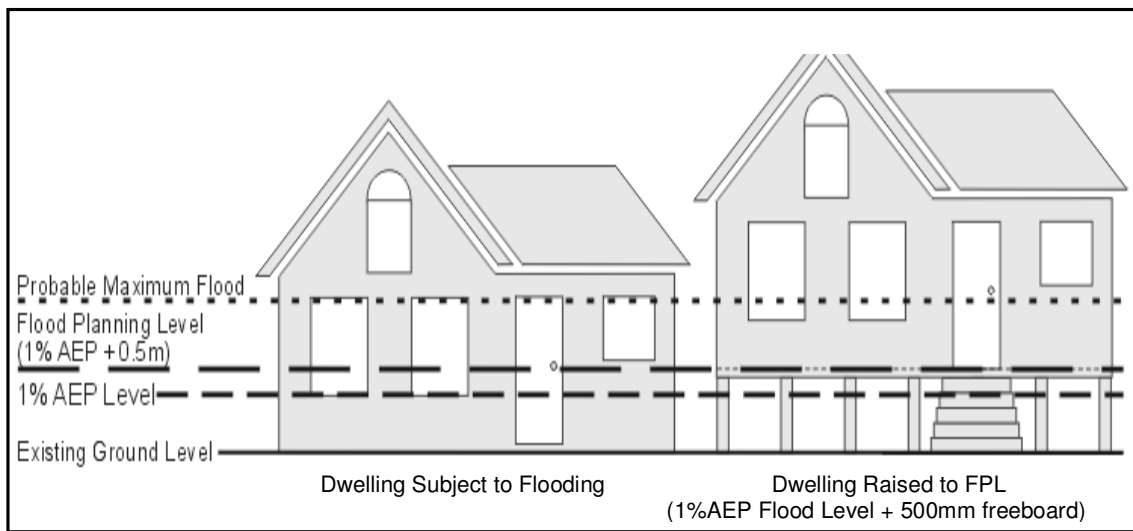
**Structural Engineer** - A structural engineer who is a registered professional engineer with chartered professional status (CP Eng) with structural engineering as a core competency, and has an appropriate level of professional indemnity insurance.

**Water Engineer** - A civil or environmental engineer who is a registered professional engineer with chartered professional status (CP Eng) specialising in the field of hydrology/hydraulics, as it applies to floodplain management, and has an appropriate level of professional indemnity insurance.

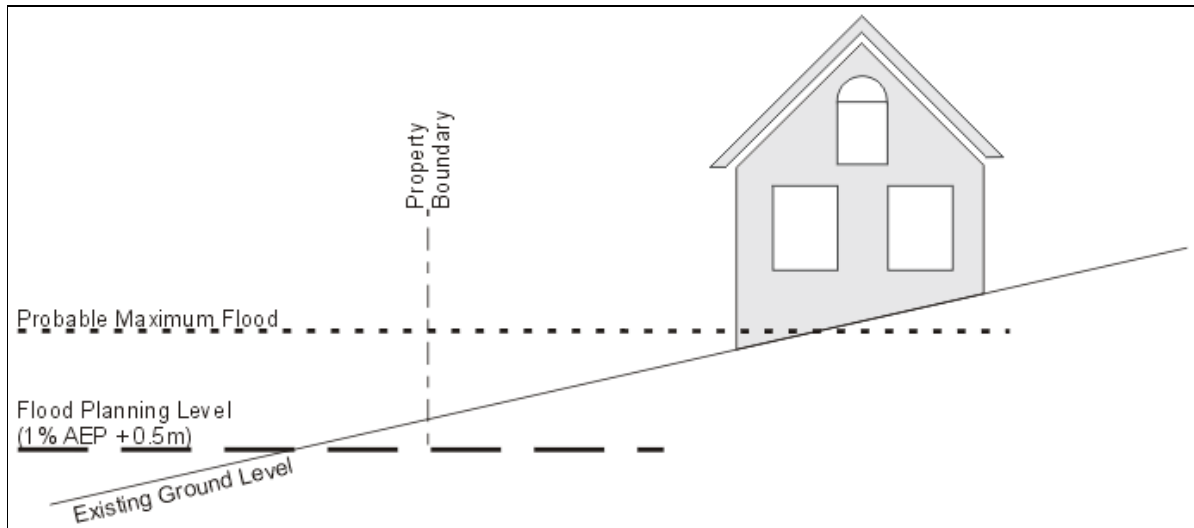
## 5.2 Figures – Diagrammatic Representation of Hazard Classification.



(Source: Floodplain Development Manual (NSW Government, 2005))



**Figure 3: Diagrammatic Representation of Flood Levels – Property in Floodplain – Flood Category 1 (Not to Scale)**  
 — lowest point of the property is affected by the Flood Planning Level (FPL).



**Figure 4: Diagrammatic Representation of Flood Levels – Property in Floodplain – Flood Category 2 (Not to Scale)**  
 — lowest point of the property lies above the Flood Planning Level (FPL) but below the level of the Probable Maximum Flood (PMF).



## 6.0 FLOOD INFORMATION

### 6.1 Council Held Flood Information

Flood information is available from Council as follows:

(i) Flood Hazard Maps – available from Council's website

Properties defined as being flood affected have been mapped for Pittwater LGAs floodplain areas:

- Narrabeen Lagoon (foreshore)
- Nareen Creek – North Narrabeen
- Mona Vale/Bayview
- Newport Beach
- Careel Creek - Avalon
- Great Mackerel Beach
- Warriewood Valley
- *Overland Flow*

For the purposes of flood planning, the mapping of flood affected properties is defined in the following way:

- **Flood Category 1 Areas-** Properties identified on the Flood Hazard Maps and located within Primary Floodplain Areas where the lowest point of the property is affected by the Flood Planning Level (FPL), (1% AEP flood level plus 500mm freeboard). Within Flood Category 1 areas, a Flood Hazard Classification of **high hazard** and **low hazard** areas is assigned for planning purposes.
- **Flood Category 2 Areas-** Properties identified on the Flood Hazard Maps and located within Primary Floodplain Areas where the lowest point of the property lies above the Flood Planning Level but below the level of the Probable Maximum Flood.
- ***Flood Category 3 Overland Flow Path – Major Areas-*** Properties identified on the Flood Hazard Maps that have a 1% AEP peak flood depth of overland flow greater than 0.3m. Within Flood Category 3 - Major areas, a Flood Hazard Classification of **high hazard** and **low hazard** areas is assigned for planning purposes.
- ***Flood Category 3 Overland Flow Path – Minor Areas-*** Properties identified on the Flood Hazard Maps that have a 1% AEP peak flood depth of overland flow greater than 0.15m and less than 0.3m. Within Flood Category 3 - Minor areas, a Flood Hazard Classification of **high hazard** and **low hazard** areas is assigned for planning purposes.
- **Warriewood Valley -** Flood-properties within the Warriewood Valley land release subject to the Warriewood Valley Water Management Specification.

*Some properties may be affected by more than one Flood Category. If this occurs, the Flood Category that takes precedence for the purposes of satisfying the development controls is as follows:*

- *Flood Category 1 (all subcategories) takes precedence over Flood Category 3 (all subcategories) and only Flood Category 1 development controls need to be satisfied.*
- *Flood Category 3 (all subcategories) (for Dwelling House, Secondary Dwelling, Dual Occupancy, and Multi-Unit Housing Development) takes precedence over Flood Category 2 (for Dwelling House, Secondary Dwelling, Dual Occupancy, and Multi-Unit Housing Development) and only Flood Category 3 development controls need to be satisfied.*
- *Flood Category 2 (all Development **except** Dwelling House, Secondary Dwelling, Dual Occupancy, and Multi-Unit Housing Development) takes precedence over Flood Category 3 – Overland Flow Path – Minor for floor levels of Special Flood Protection uses only. Both Flood Category 2 and Flood Category 3 – Overland Flow Path – Minor development controls need to be satisfied.*

Applicants will need to seek their own professional advice to determine flood levels and flood hazards for these areas.



Council progressively updates further detailed mapping for all flood affected properties as the information becomes available.

(ii) Flood and Estuarine Enquiry Service (Flood Advice for Property) – available from Council's website

Flood Advice for Property information for individual land identified on the Flood Hazard Maps is available on Council's web site, using the 'Flood and Estuarine Levels Tool', and provides the 1% AEP flood level, Flood Planning Level (FPL), Probable Maximum Flood (PMF) level and associated flood parameters for all Flood Category 1, 2 and 3 properties. The flood levels provided through the Flood and Estuarine Level Enquiry Service are conservative levels based on the most upstream point of the land (i.e. the point on the land at which the highest flood level occurs). Further details of the derivation of the flood level information are contained in the document *Pittwater LGA Flood Planning Database* (Lawson & Treloar, 2004). (Available on Council's web site)

Applicants may also seek their own professional advice on flood levels. For land of a complex nature in terms of topography or existing development, applicants may also need to seek their own professional advice.

Council is progressively seeking the best available flood information through the process of updating of its flood studies using the latest technology and improved survey data. This will enable the database to be reviewed and updated, as required, to reflect the most up to date outcomes and best available information.

(iii) Flood Studies, Floodplain Risk Management Studies and Plans – available from Council's Library

There are various Flood Studies, Floodplain Risk Management Studies and Flood Risk Management Plans adopted by Council for the Primary Floodplain Areas in the Pittwater LGA. A number of new documents are also in preparation as well as further updates to existing documents to incorporate latest technology for flood assessments, improved survey data, changes within the floodplain, and other information that was not previously available for the original studies.

(iv) NSW Government Floodplain Development Manual (April 2005) – available from Council's Library.

## **6.2 Council Issued Certificates Under Section 149, EP&A Act**

Council issues Section 149 certificates under the Environmental Planning and Assessment Act 1979 [Clause 279 and Schedule 4(7A) of the Regulations to the EP&A Act]. The primary function of the Section 149 Certificate Notation is as a planning tool for notification that the land is affected by a policy that restricts development due to the likelihood of a risk, in this instance, flood hazard.

Part of Council's statutory responsibility is to update Section 149 Certificates as new information, that poses a risk to the community, becomes available.

## **6.3 Independently Derived Flood Information**

Independent flood information may be sought from a suitably qualified Water Engineer, at the expense of the individual applicant, in relation to any of the information currently available from Council, or on information not currently provided by Council.

It is the responsibility of the applicant to submit the independent flood information and assessment to Council in the form of a technical Flood Risk Management Report of adequate qualitative and quantitative detail addressing flood level information, the management of flood risk and other criteria (where applicable) as it affects the subject land and its surrounds.

#### **6.4 Independently Derived Flood Information**

Independent flood information may be sought from a suitably qualified Water Engineer, at the expense of the individual applicant, in relation to any of the information currently available from Council, or on information not currently provided by Council.

### **7.0 FLOOD RISK MANAGEMENT MEASURES**

The management of flooding and its impacts in the Pittwater Local Government Area is undertaken through the implementation of Flood Risk Management Measures as developed within Floodplain Risk Management Plans.

These measures can apply broadly to all flood prone land in Pittwater and have specific requirements for the individual floodplain areas as detailed in the individual Floodplain Risk Management Plans.

The Floodplain Risk Management Plans, as they are developed for each catchment, will provide specific implementation strategies for each floodplain.

Examples of Flood Risk Management measures are as follows:

#### **(i) Property Modifications Measures**

- Identification of flood affected properties through the production and implementation of the Flood Hazard Maps (also referred to as Flood Affected Property Maps).
- Section 149 Certificate notations for flood affected properties.
- Development Controls through Pittwater 21 Development Control Plan and this Policy.

#### **(ii) Community Awareness and Emergency Response Measures**

- Provision of Flood Level information to property owners and prospective purchasers.
- Community Flood Information through media releases, Information Brochures and Workshops.
- Assist combat agencies (such as the State Emergency Service) in Emergency Response Management through emergency planning.

#### **(iii) Flood Modification Works**

- Implementation of flood modification works (e.g. detention basins, levees, drainage amplifications etc.) as developed within specific Floodplain Risk Management Plans, depending on the availability of Council funding and resources.

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<b>C10.2</b>	<b>Implementation of the NSW Government Coastal Management Reforms</b>
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<b>Meeting:</b>	Natural Environment Committee	<b>Date:</b>	6 May 2013
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**STRATEGY:**    **Beach & Coastal Management**  
Risk Management Co-ordination  
Sustainability & Climate Change Co-ordination  
Land Use and Development

**ACTION:**        Provide planning, design, investigation and management of beaches, coastline and estuaries.  
Ongoing compliance with Council's statutory obligations and to properly discharge Council's common law duty of care to the community when managing risks.  
Co-ordinate review of LEP/DCP to include sustainability and climate change initiatives and provisions.  
Respond to reforms in Planning process and advocate on behalf of Council.

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## **PURPOSE OF REPORT**

To provide Council with an update on recent actions designed to implement the NSW Government's Stage 1 Coastal Management Reforms as well as the measures proposed to assist in the preparation of the foreshadowed Stage 2 Coastal Reforms.

### **1.0 BACKGROUND**

- 1.1 On 3 December 2012, Council received a report dealing with the Stage 1 Coastal Management Reforms proposed by the NSW Government.
- 1.2 Amongst other provisions, the Stage 1 Reforms repealed the NSW Sea Level Rise Policy Statement (2009) as well as the Sea Level Rise Planning Benchmarks that were contained in the Policy, amended the *Coastal Protection Act 1979* (CP Act) and sought to clarify what information in regard to projected sea level rise impacts councils should include on planning certificates.
- 1.3 Amendments to the CP Act and its Regulation commenced on 21 January 2013. An updated interim Code of Practice also commenced at this time to reflect some of the changes to the CP Act.
- 1.4 The Office of Environment & Heritage (OEH) acknowledged that a new Code of Practice would need to be prepared and exhibited in order to implement all the changes to landowner temporary coastal protection works on beaches now allowable under the Stage 1 Reforms.
- 1.5 A consultation draft of the new "Code of Practice under the *Coastal Protection Act 1979*" was exhibited for a two week period with a submission closing date of 19 April 2013.
- 1.6 The short turn-around time for the submission precluded the matter from being formally reported for the consideration of Council. A copy of the submission is appended to this report as **Attachment 1**.

## **2.0 ISSUES**

### **2.1 Stage 1 Reforms**

Actions currently underway or about to be commenced by the OEH and the Department of Planning and Infrastructure (DOPI) include:

- finalising the new “Code of Practice under the *Coastal Protection Act 1979*” after consideration of submissions received as well as amending the *Coastal Protection Regulation 2011* to give effect to the new Code;
- revising the “Guidelines for Preparing Coastal Zone Management Plans” to remove all references to the Sea Level Rise Policy Statement and sea level rise benchmarks, which will then be gazetted for the purposes of the CP Act and the *Local Government Act 1979* (LG Act);
- releasing an updated version of the “Flood Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Flood Risk Assessments” to remove all references to the Sea Level Rise Policy Statement and sea level rise benchmarks;
- releasing previous advice from the Crown Solicitor’s Office on the potential liability of councils as it related to temporary coastal protection works and sea level rise projections;
- exhibiting consultation draft guidelines for mapping open coast hazards that will replace the existing document known as “Coastal Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Coastal Risk Assessments”;
- exhibiting a consultation draft “Guide for Authorised Officers under the *Coastal Protection Act 1979*” once the Code of Practice is finalised;
- exhibiting a consultation draft “Guide to the Statutory Requirements for Emergency Coastal Protection Works” once the Code of Practice is finalised;
- exhibiting a consultation draft guideline for estuary inundation mapping that will replace the existing document known as “Flood Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Flood Risk Assessments”; and
- releasing a planning circular to provide guidance to coastal councils on sea level rise advice that should be included on planning certificates to replace Planning Circular PS-11-001 that was revoked on 21 January 2013.

### **2.2 Advice from Council’s Insurer**

Statewide Mutual, on behalf of its member councils, has obtained legal advice regarding liability issues arising from selection of sea level rise benchmarks (see Confidential Section in this Agenda).

The advice provides details of the Coastal Management Reforms and their legal implications for coastal councils in the absence of clear guidance from OEH.

One of the major recommendations of the advice is that local councils should continue applying the sea level rise benchmarks as set out in the now revoked NSW Sea Level Rise Policy Statement.

In this regard, Pittwater Council has previously endorsed the NSW Sea Level Rise Policy Statement and independently adopted the sea level rise planning benchmarks contained therein for strategic planning purposes.

### **2.3 Stage 2 Reforms**

Stage 2 Coastal Reforms are intended to focus on improving support for coastal councils and landowners within the context of the NSW Government's current reforms to local government and the NSW planning system.

As the New Planning System for NSW anticipates managing coastal hazard risks by way of a single coastal policy to replace SEPP71 - Coastal Protection, the NSW Coastal Policy 1997, NSW Coastal Design Guidelines and existing Ministerial Coastal Directions, it is unclear as to how the coastal reforms will integrate with and inform the new planning system when each is currently evolving in isolation.

At the request of the Minister for the Environment, the Coastal Expert Panel has commenced conducting specialist workshops on the Stage 2 Coastal Reforms in order to consult with a range of stakeholders as to how the government may best improve coastal legislation, policy, regulation and management practices in NSW.

The Expert Panel will prepare questions and accompanying information to be distributed to stakeholders and will receive written submissions to assist in their deliberations. Consultation information will be circulated to coastal councils shortly.

### **2.4 Submissions from Stakeholders**

A considerable volume of material including coastal planning and management guidelines is likely to be exhibited by state agencies for stakeholder comments in the near future.

The compressed timeframes for exhibition and receipt of submissions are unlikely to coincide with Council's meeting cycle and consequently it will be difficult to report all submissions for the consideration and endorsement of Council.

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## **3.0 SUSTAINABILITY ASSESSMENT**

### **3.1 Supporting & Connecting our Community (Social)**

Communication of the risks associated with natural coastal hazards, particularly those hazards likely to be exacerbated by sea level rise, can raise community awareness thereby reducing the potential risk to life and property and increasing the overall resilience of our coastal communities.

### **3.2 Valuing & Caring for our Natural Environment (Environmental)**

Evaluating and accommodating projected climate change in coastal planning and management strategies can help to reduce potentially devastating impacts upon inter-tidal ecosystems, groundwater dependent ecosystems, wetlands, riparian corridors, beach ecosystems, water quality and coastal foreshores.

### 3.3 Enhancing our Working & Learning (Economic)

By ensuring that adequate planning and management provisions are in place to address the risks associated with natural hazards, especially those likely to be exacerbated by climate change, governments can not only conserve the recreational and environmental values of beaches but also reduce uncertainty surrounding the development potential of affected properties and thereby increase opportunities for development investment.

### 3.4 Leading an Effective & Collaborative Council (Governance)

In preparing policies and development controls to accommodate changing future risks associated with sea level rise impacts, coastal councils will need to be mindful of their duty of care in appropriately managing risks to life and property in order to gain indemnity under the provisions of section 733 of the *Local Government Act 1979*.

### 3.5 Integrating our Built Environment (Infrastructure)

Council will need to determine appropriate strategies to manage current and future risks associated with natural coastal hazards to enable development to proceed on affected lands in the Pittwater LGA whilst it remains reasonable and feasible to do so.

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## 4.0 EXECUTIVE SUMMARY

- 4.1 The NSW Government has introduced a range of legislative, policy and planning changes, known as the Stage 1 Coastal Management Reforms, for the ongoing management of the NSW coastal zone.
- 4.2 Reforms announced on 8 September 2012 included amendments to the *Coastal Protection Act 1979* to better enable private property owners to undertake temporary coastal protection works on their own properties and public land, repealing the NSW Sea Level Rise Policy Statement 2009 (including the sea level rise planning benchmarks) and clarifying the type of information that Councils should provide on s149 certificates in regard to sea level rise impacts.
- 4.3 Together with proposed amendments to the NSW Planning System and interim planning reforms already in progress, the coastal management reforms announced as Stage 1 and those proposed for Stage 2 will fundamentally change the roles and responsibilities of local government in managing current and future risks associated with hazards in the coastal zone.
- 4.4 The short turn-around time for the preparation and lodgement of comments in response to coastal reform consultation draft documents, soon to be released by state agencies, may preclude these submissions from being formally reported for the consideration of Council prior to their lodgement.

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## RECOMMENDATION

1. That the actions proposed by the Office of Environment & Heritage and the Department of Planning & Infrastructure to implement the Stage 1 Coastal Reforms be noted.
2. That the submission sent in response to the consultation draft of the Code of Practice under the *Coastal Protection Act 1979* be endorsed.
3. That where a short exhibition period for consultation draft documentation does not coincide with Council's meeting cycle, the General Manager be authorised to approve future submissions to state agencies and the Coastal Expert Panel in regard to the Stage 1 & 2 Coastal Reforms.
4. That all submissions be reported to Council for consideration and notation as the implementation of the NSW Coastal Reforms progresses.

Report prepared by  
Paul Hardie – Principal Officer – Coast & Estuary

Jennifer Pang  
**MANAGER, CATCHMENT MANAGEMENT AND CLIMATE CHANGE**



**Submission on**  
**Draft Code of Practice**  
**under the**  
***Coastal Protection Act 1979***

**19 April 2013**



## 1.0 Introduction

In response to an invitation from the Office of Environment & Heritage (OEH), this submission provides commentary from Pittwater Council in regard to the Consultation Draft of the Code of Practice under the *Coastal Protection Act 1979* (Draft Code).

Council thanks the Department for the opportunity to submit comments on the Draft Code and trusts that this submission will be accepted in the manner in which it is intended, that is as constructive feedback on a difficult and complex coastal management issue.

Pittwater Council has a keen interest in ensuring that all aspects of the NSW Government's Stage One Coastal Management Reforms are effective and workable, particularly as both Mona Vale Basin Beach and Bilgola Beach, located within the Pittwater LGA, are scheduled as Authorised Locations in the current Code as well as the Draft Code.

This submission will address the main changes between the consultation Draft Code and the current Code and in particular those changes highlighted in the covering email dated 5 April 2013 from the Office of Environment and Heritage (OEH).

## 2.0 Schedule of Authorised Locations

The Draft Code now schedules some 24 beach locations along the NSW coastline as Authorised Locations for the placement of temporary coastal protection works, an increase of 10 locations over the existing Code of Practice. Like the existing locations, the additional beaches include areas where properties and infrastructure are at risk from coastal erosion under current climatic and sea level conditions.

As the coastal locations with beach-front properties most at risk from erosion and therefore likely to sustain the highest levels of damage from any given storm event, it is disappointing that the NSW Government persists in promoting sandbag revetments as a viable means by which affected individual landowners can expect to protect their properties.

By increasing the number of eligible locations and assisting affected landowners to more readily install 'temporary' protection works, the NSW Government is also further entrenching private property rights over public interests and pre-determining the coastal risk management options (i.e. seawalls or revetments) that will be acceptable at these locations.

A far more strategic land use planning approach is required that considers the cumulative, longer term effects of coastal protection measures on public interest values such as natural beach systems, biodiversity and recreational amenity.

The nomination of Authorised Locations is based wholly on the protection of existing at risk private material assets, with no consideration of the broader environmental and public interest values, let alone as to whether these trade-offs are acceptable to the affected coastal communities.

### 3.0 Removal of Safety Requirements

The current Code outlines safety requirements for placing, maintaining and removing works in relation to sections 55P(2)(f), 55R(1)(d) and 55VC(1)(b) of the *Coastal Protection Act 1979*, consisting of General Requirements as well as Safety Requirements under Storm Conditions. These requirements are highly relevant and specific to the particular type of temporary coastal protection works that are the subject of the Code of Practice.

The NSW Government proposes that these Safety Requirements be removed from the Draft Code and that landowners should manage safety risks under the provisions of the *Work Health and Safety Act 2011*.

As these requirements are neither explicit nor adequately addressed in the *Work Health and Safety Act 2011* it is difficult to understand how landowners will be better served by their removal from the Code of Practice.

Of more concern, given that landowners are now able to place works at any time on public or private land, is the removal of safety requirements applying to storm conditions and the loss of salutary advice regarding the need to seek professional engineering opinion should damage occur to the works or site conditions change unexpectedly during construction.

Other issues previously raised by Council in regard to the safety aspects of temporary works include the unresolved matters of occupier's liability where no lease, licence or other estate applies to the subject public land and the public liability exposure associated with protection structures built on public land that have not been formally approved or certified.

In view of the removal of any conditions of consent or permit approval to undertake temporary coastal protection works on private property, it is unclear as to why the safety requirements explicit in the current Code have not been included in the Draft Code. Proponents of such work may not be adequately guided by the provisions of the *Work Health and Safety Act 2011*, particularly in regard to the exigencies of working on a dynamic and actively eroding coastal beach site.

### 4.0 Increasing the Allowable Height of Works

The Draft Code allows sandbag revetments to be constructed to a maximum height of 2.2 metres from the base of the erosion escarpment, up from the 1.5 metre maximum height specified in the current Code. The allowable height of works being increased in line with the recommendations of the Water Research Laboratory (WRL), engaged by OEH to provide qualitative advice regarding the use of sandbags for coastal protection purposes.

Whilst a revetment height of 2.2 metres may provide a marginally greater degree of protection to an erosion affected property during a minor coastal storm event, the deficiencies inherent in the structures as defined by the draft Code, e.g. no excavation for the toe, limited sandbag volume and insufficient crest height, makes it highly likely that these works will be largely ineffectual or will fail completely during a severe coastal storm or series of storms.

At most of the Authorised Locations the extent of beach erosion likely to cause damage to property located on the beach-front often results in erosion escarpments several times higher than the allowable height of 2.2 metres and usually occurs as the result of successive storm events.

When further erosion likely to cause property damage occurs, a 2.2 metre high wall will either be readily over-topped if built at the toe of an erosion escarpment or easily under-mined if the crest of the works determines the level at which the structure is founded.

The use of sand-filled geotextile containers as both temporary and permanent coastal protection measures has been criticised by a number of authors, including Gordon et al. (2011), Lord et al. (2011), Nielsen et al. (2011) and Nielsen et al. (2012) due to their susceptibility to multiple failure modes particularly when not properly designed and engineered.

Unfortunately, the promotion of sandbag revetments as a viable coastal protection measure appears to have influenced some landowners to utilise the technology for permanent protection purposes as demonstrated by the Meridian Resort development application for a sandbag seawall some 6 metres high and over 200 metres long at Old Bar Beach near Taree.

Acceptance that private landowners have a right to defend material assets in the face of changing coastal hazards also precludes the public from involvement in the decision making process and stymies contemplation of alternate, more viable longer term management solutions to coastal hazard risks.

By promoting sandbag revetments with the design shortcomings inherent in the generic design specified by the Draft Code, the NSW Government is not only raising false expectations amongst the affected landowners that the allowable works will protect their properties, but also placing neighbouring properties and the public beach at greater risk of damage due to end erosion effects and other off-site erosion impacts.

## **5.0 Temporary Works Placed in Front of Existing Works**

The current Code requires that “temporary coastal protection works must not be placed at any location where other coastal protection works (whether lawfully placed or not) exist.” The removal of this requirement from the Draft Code has the effect of allowing temporary works to be placed seaward of any existing works at an Authorised Location.

At both Authorised Locations in the Pittwater LGA (Bilgola Beach and Mona Vale Basin Beach) the large majority of erosion prone private properties have some form of existing coastal protection works. Many of these structures already extend seaward of the private property boundaries into the public beach area. This situation is not uncommon at other Authorised Locations.

Under these circumstances, any temporary protective works installed “in front” of an existing structure would be constructed wholly on public beach-front, thereby further reducing the area of beach available for public use. Another consequence is likely to be an increase in off-site beach erosion impacts as a result of end erosion effects and wave interaction with haphazardly aligned structures in the active beach zone.

The lack of appropriate civil enforcement provisions in the *Coastal Protection Act 1979* will oblige coastal councils to continue to seek redress by way of self help remedies through the Orders process or debt recovery provisions available through existing regulations in order to have structures removed and damaged public beaches restored.

Allowing temporary protection works to be placed seaward of any existing works at Authorised Locations will result in greater potential for erosion damage to public beach areas, loss of public access and further alienation of recreational public open space.

## **6.0 Specification for Sand and Geotextile Bags**

As long as the sand used in the sandbags is sourced from outside of the affected beach system, is uncontaminated and of a colour and texture similar to that of the existing sand at the beach, Council raises no objections to a relaxation of the sand specification in the Draft Code.

Council supports the elimination of the use of smaller woven polypropylene bags for temporary works on the basis that they may be more readily damaged than the non-woven geotextile bags and have a greater likelihood of failure with potential for the bag fabric to become an environmental pollutant.

With respect to the stipulation that all sandbags have a volume of 0.75 cubic metres when filled, where the works are proposed to be installed completely within the boundary of private property, Council would prefer that the bag volume be specified by a competent coastal engineer to best suit the circumstances and conditions experienced at the subject beach location.

## **7.0 Conclusion**

Because temporary works are permitted to remain on public land for up to two years and may remain indefinitely on private land (by definition, therefore, not temporary works) there is great potential for these structures to cause adverse off-site impacts to both the beach and neighbouring properties.

In good faith, Council could not support or endorse the installation of such works unless they had been supervised and independently certified by a competent coastal engineer.

The permit arrangements for the temporary works on public land are inadequate to address the potential environmental impacts that may be caused by the works and Council is further concerned that the community is denied any opportunity to comment on works to be installed on public beach-front land.

Furthermore, Council believes that the 'self help' nature of the associated orders process is also inadequate to guarantee a satisfactory outcome for affected public beaches, should remedial actions become necessary.

The State has extensive powers available to it to facilitate changes in land use and development to respond to changing hazard risks in the coastal zone. Pittwater Council trusts that public interest values in this regard will be properly balanced against the property rights of private landowners during deliberations on the Stage 2 Coastal Management Reforms and the New Planning System for NSW.

## **8.0 References**

Gordon, A.D., Lord, D. B., Nielsen, A. F. (2011) " NSW Coastal Protection Act – A Disaster Waiting to Happen", 20<sup>th</sup> NSW Coastal Conference (Tweed Heads).

Lord, D.B., Nielsen, A.F. and Gordon, A.D. (2011) "Permissible Emergency Coastal Protection Works in NSW – A Coastal Engineering Perspective", 20<sup>th</sup> NSW Coastal Conference (Tweed Heads).

Nielsen, A.F. and Mostyn, G (2011) "Considerations in Applying Geotextiles to Coastal Revetments", Australian Geomechanics Society and NSW Maritime Panel – Coastal and Marine Geomechanics Symposium: Foundations for Trade (Sydney).

Nielsen, A.F., Salim, A., Lord, D.B., Withycombe, G. and Armstrong I. (2012) "Geotechnical Aspects of Seawall Stability with Climate Change", 21<sup>st</sup> NSW Coastal Conference (Kiama).

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<b>C10.3</b>	<b>Minutes of the Sydney Coastal Councils Group Ordinary Meeting of 16 March 2013</b>
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**Meeting:** Natural Environment Committee

**Date:** 6 May 2013

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**STRATEGY:** Beach & Coastal Management

**ACTION:** Strategic Initiative - Partner with other councils, SCCG and Catchment Management Authorities to integrate and complement regional initiatives

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## **PURPOSE OF REPORT**

To advise Council of the Minutes of the Sydney Coastal Councils Group (SCCG) Ordinary Meeting held on 16 March 2013 and hosted by Woollahra Council.

### **1.0 BACKGROUND**

- 1.1 The SCCG is a forum to promote co-ordination between the 15 member councils on environmental issues relating to the sustainable use and management of the Sydney urban coastal environment.

### **2.0 ISSUES**

#### **2.1 Item 7.1 – Legal Advice – “Mapping and Responding to Coastal Inundation”**

Delegates received a presentation from Ms Kirsten Gerathy, a partner at HWL Ebsworth Lawyers, outlining the legal advice in regard to the Mapping and Responding to Coastal Inundation Project prepared on behalf of the SCCG by the CSIRO – (See Confidential Section of this Agenda)..

HWL Ebsworth Lawyers was commissioned by SCCG and asked to consider what, if any, are the obligations of individual councils on receipt of the coastal inundation mapping prepared for the LGAs of each SCCG member council. The project was launched in October 2012 and electronic copies of the inundation mapping were distributed to each member council shortly thereafter.

The legal advice provided was in general terms only and highlighted some of the uncertainties that coastal councils now faced when trying to manage coastal hazard risks under a changing NSW legislative framework.

In essence the advice suggests that a member council will need to determine how and to what extent the CSIRO mapping information should be used, if at all. Proper consideration should be given to the mapping information before a council determines its position and any decision not to adopt, release or use the mapping information should be based upon a sound and justifiable position.

The CSIRO mapping information for the Pittwater LGA is currently under review by Cardno to determine as to whether the mapping is as detailed and comprehensive as the draft foreshore floodplain mapping already prepared for Pittwater Council by that consultancy.

Once the draft Guidelines for Mapping Open Coast Hazards has been finalised and released by the NSW Government, a similar review process will be undertaken to evaluate the inundation impacts on the Pittwater open coast as defined by the CSIRO mapping information

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### **3.0 SUSTAINABILITY ASSESSMENT**

No sustainability assessment required

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### **4.0 EXECUTIVE SUMMARY**

- 4.1 The minutes of each Sydney Coastal Councils Group meeting are reported for the information of Council at the request of the SCCG Executive Committee.
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### **RECOMMENDATION**

1. That the Minutes of the SCCG Ordinary Meeting of 16 March 2013 (appended as **Attachment 1**) be noted.
2. That the outcome of the Cardno review of the coastal inundation mapping prepared for the SCCG by the CSIRO be reported for the consideration of Council in the course of completing the Pittwater Foreshore Floodplain Mapping of Sea Level Rise Project.

Report prepared by  
Paul Hardie, Principal Officer – Coast & Estuary

Jennifer Pang  
**MANAGER – CATCHMENT MANAGEMENT & CLIMATE CHANGE**

**LIST OF ACTIONS FROM THE ANNUAL GENERAL MEETING  
16 March 2013**

The table below is intended to provide delegates with a summary of the meeting. Actions for delegates to complete prior to the next meeting have been highlighted in bold

Item	Action	By Whom	Due by
5.0	<b>Business Arising</b> <ul style="list-style-type: none"> <li>• <b>SCCG – City of Sydney Hosting Contract</b> Full Group endorse the Executive Committee recommendation that they be authorise to finalise the draft hosting contract with the City of Sydney on behalf of the SCCG with outcomes reported back to the next Full Group meeting.</li> <li>• <b>Governance of Sydney Waterways</b> The EO and Prof Thom to report back at next meeting on outcomes of meeting with Roads and Maritime Services, Dept. of Planning and Crown Lands.</li> <li>• <b>SCCG Water Recycling Handbook for Councils</b> the SCCG Water Recycling Handbook for Councils be available to member Councils over the coming months with the final published document to be tabled for delegates information at the next meeting.</li> </ul>	Executive / EO	April
		EO / Prof Thom	15 June
		SCPO	15 June
6	<b>Correspondence</b> <ul style="list-style-type: none"> <li>• <b>Container Deposit System</b> The Secretariat follow up SCCG correspondence to Federal Minister for the Environment and NSW Minister for Education regarding CDS</li> <li>• <b>Annual Invitation for SCCG Consultation with Member Councils</b> The Delegates to follow up the SCCG Annual invitation for SCCG consultations letter so to determine if there was interest in their Council for a presentation.</li> </ul>	SCPO	April
		ALL	ASAP
7.1	<b>Presentation</b> <ul style="list-style-type: none"> <li>• <b>Legal Advice – ‘Mapping and Responding to Coastal Inundation’</b> (Ms Kirston Gerathy - Partner - HWL Ebsworth Lawyers) The legal advice now be formally forwarded to Member Councils for their consideration.</li> </ul>	EO	March (Completed 19 March)
8.1	<b>SCCG Annual Survey 2012 – Results Report and Workshop</b> <ol style="list-style-type: none"> <li>1) Delegates workshop specific topics within the project and capacity building subject areas prioritised in the survey.</li> <li>2) Any additional key recommendations and actions be discussed for potential implementation (including outcomes from the workshop).</li> <li>3) The SCCG 2013 Action (s) Plans be adapted to incorporate the Annual Survey recommendations and actions from both the Technical Committee and Full Group</li> <li>4) the workshop results be written up, combined with results from a similar workshop conducted at the recent Technical Committee meeting and incorporated into the SCCG Capacity Building program of activities 2013-2014.</li> </ol>	ALL ALL EO / SCPO SCPO	March 5 April

Item	Action	By whom	Due By
8.2	<b>Provision of SCCG Funding Guide 2013</b> 1) The final guide be formally sent to Member Councils for their utilisation and placed on the SCCG web site for more general access. 2) <b>Delegates assist to highlight the availability and continuous improvement of the SCCG Funding Guide,</b> 3) The SCCG produce the 2014 Funding Guide by March 2014.	CPO  ALL  CPO	March (Completed 18 March) March / April 15 March
9.1	<b>NSW Reforms to Coastal Management in NSW</b> 1) the EO report back on final member council consideration of continuing to apply NSW sea level rise benchmarks at the next meeting.	EO	15 June
9.3	<b>SCCG Coastal Adaptation Pathways Projects</b> 1) SCCG CAP program outputs to be formally disseminated within Member Councils. 2) SCCG develop and implement a specific capacity building training program to promote uptake of the outputs of the program by Member Councils. 3) The draft capacity building program be tabled at the next SCCG Technical Committee in 2013 for consideration.	PO-CCA  PO-CCA / CPO (Secretariat)  PO-CCA	April / May  April / May  2 May
9.4	<b>SCCG Grant Programs Update</b> 1) The Group write to Member Councils informing them of the recent SCCG grant success for:  <ul style="list-style-type: none"> <li>Emergency Management Planning - a Health Check for Local Government.</li> <li>Sydney Harbour Coastal Zone Management Plan – Stage 1 Scoping Study.</li> </ul>	Secretariat	April
9.5	<b>MINI WORKSHOP - SCCG National Coastal Zone Advocacy Programs</b> 1. SCCG participate in the 'National Coastal Advocacy Alliance, supporting the National Coastal Policy Initiative including: i. A collaborative national response to coastal planning and management involving all three tiers of government. ii. An intergovernmental agreement defining the roles and responsibilities of each tier of government in relation to the coastal zone. iii. A national coastal policy that addresses the challenges facing the coast zone through a national coastal commission and accompanying Act 2. SCCG request all registered political parties to outline their policy positions in relation key coastal management issues as determined by the Group. 3. Delegates workshop and define the key SCCG Policy positions for consultation of national political parties. 4. Outcomes of the workshop be reviewed and incorporated in to the draft policy document to be tabled at the June SCCG meeting for consideration of adoption prior to distribution to political parties for response.	SCCG  SCCG  ALL  EO / SCPO	2013  >15 June  16 March  April / May
14.1	<b>2013 Meeting dates</b> Saturday 15 June 2013 at 12 noon (City of Sydney) Saturday 21 September (AGM) 2013 at 12 noon (to be determined) Saturday 7 December 2013 at 12 noon (City of Sydney)	ALL	15 June 21 Sept 7 Dec
14.4	<b>Next meeting</b> The next meeting of the Group by held on 15 2013 at City of Sydney Council (pending confirmation).	ALL	15 June



**SYDNEY COASTAL COUNCILS GROUP Inc.  
MINUTES FOR THE ORDINARY MEETING  
HELD ON SATURDAY 16 MARCH, 2013  
AT WOOLLAHRA COUNCIL**

**IN ATTENDANCE**

Cr. Brian Troy	City of Botany Bay
Cr. Mark Castle	City of Botany Bay
Cr. Irene Doutney	City of Sydney
Cr. Cathy Griffin	Manly Council
Cr. Barbara Aird	Manly Council
Cr. Tony Carr	North Sydney Council
Mr. Peter Massey	North Sydney Council
Mr. Paul Hardie	Pittwater Council
Cr. Geoff Stevenson	Randwick Council
Mr. Stephen Kerr	Rockdale Council
Cr. Sue Heins	Warringah Council
Cr. Sally Betts (Mayor)	Waverley Council
Cr. Leon Gottsman	Waverley Council
Cr. Wendy Norton	Willoughby Council
Cr. Greg Levenston	Woollahra Council
Cr. Elena Kirillova	Woollahra Council
Cr. Andrew Petrie (Mayor)	Woollahra Council (part of meeting)
Mr. Tom O'Hanlon	Woollahra Council (part of meeting)
Ms. Cathy Edwards-Davis	Woollahra Council (part of meeting)
Mr. Chris Munro	Woollahra Council
Dr. Judy Lambert AM	Honorary Member
Mr. George Copeland	Honorary Member
Mr. Phil Colman	Honorary Member
Mr. Geoff Withycombe	SCCG (EO)
Mr. Stephen Summerhayes	SCCG (SCPO)
Ms. Rachael Buzio	SCCG (CPO)
Dr. Ian Armstrong	SCCG (PO CCA)

**1. OPENING**

The meeting opened at 12.30pm. Cr. Griffin (Chairperson) welcomed delegates to the Meeting and paid respects to traditional owners. Cr Griffin thanked Woollahra Council for hosting the meeting and introduced the Mayor of Woollahra Councillor Cr. Andrew Petrie who welcomed delegates and provided the following introduction:

*Good afternoon and welcome to Redleaf. If this is your first time to our historic Council Chambers, I hope you are enjoying our hospitality and for those familiar faces amongst the crowd, it is good to see you again.*

*Well, just one look out the window over the terrace to the water and we are reminded of why we are all here and participating in the Sydney Coastal Councils Group. We are bound together by one common bond – water. Be it coastal and estuary. Water defines the character of our local areas. It plays a huge role in why people choose to live and play in our local government areas, it shapes our planning and development decisions and it bestows on us a huge responsibility.*

*As Mayors or leaders within our organisation we have a very important asset to manage and protect for our current population and future generations.*

*Whatever your personal views are on climate change, the fact is your Council will be called on to hold a public position on coastal changes and to be part of change management. We all need to be well informed on issues specific to our local area and on some issues we may need to be on the same page. I hope you find today's meeting is worthwhile.*

## 2. APOLOGIES

Cr. Linda Kelly	Leichhardt Council
Cr. Jacqueline Townsend (Mayor)	Pittwater Council
Cr. Selena Griffith	Pittwater Council
Cr. Shane O'Brian (Mayor)	Rockdale Council
Cr. Peter Towell	Sutherland Council
Cr. Lynne Saville	Willoughby Council
Cr. John Mant	City of Sydney Council
Cr. Linda Scott	City of Sydney Council
Cr. Vanessa Moskal	Warringah Council
Emeritus Professor Bruce Thom AM	Honorary Member
Mr. George Cotis	Honorary Member

**Resolved that the apologies be received and noted.**

**Councils not represented at the meeting**  
Hornsby, Leichhardt, Mosman, Sutherland.

### • INTRODUCTION TO NEW 'INTERACTIVE' BUSINESS PAPERS

The SCPO, Stephen Summerhayes provided delegates with a brief review of the new formatted SCCG electronic business papers. (If delegates are still having challenges please contact the SCPO)

## 3. DECLARATION OF PECUNIARY INTERESTS

**Resolved that there was no declaration of pecuniary interests.**

## 4. CONFIRMATION OF MINUTES

### 4.1 Minutes of the Ordinary Meeting of the SCCG held on 8 December 2012 at the City of Sydney Council.

**Resolved that the Minutes of the Ordinary Meeting of the SCCG held on 8 December 2012 at the City of Sydney Council be confirmed.**

### 4.2 Minutes of the Technical Committee Meeting of the SCCG held on 6 December 2012 hosted by Waverley Council at the Bondi Surf Life Saving Club.

**Resolved that the Minutes of the Technical Committee Meeting of the SCCG held on 6 December 2012 at the Bondi Surf Life Saving Club be received and noted.**

### 4.3 Minutes of the Technical Committee Meeting of the SCCG held on 14 February 2013 hosted by Botany Bay City Council.

**Resolved that the Minutes of the Technical Committee Meeting of the SCCG held on 14 February 2013 hosted by Botany Bay City Council be received and noted.**

## 5. BUSINESS ARISING

Delegates were referred to the Business arising from the last minutes with the list of actions from the last meeting attached to the meeting memorandum.

- **SCCG – City of Sydney hosting contract**

The EO noted that a meeting is scheduled with the City of Sydney on 26 March. Following initial discussions few changes to the previous contract are envisaged with some changes to hosting fees rising with CPI etc.

**Resolved that** the Full Group endorse the Executive Committee recommendation that they be authorise to finalise the draft hosting contract with the City of Sydney on behalf of the SCCG with outcomes reported back to the next Full Group meeting.

- **SCCG Water Recycling Handbook for Councils**

The EO noted that this program is taking longer than anticipated and that the document will not be launched at the meeting. However it will be available to member Councils over the coming months with the final published document to be tabled for delegates information at the next meeting.

**Resolved that** the SCCG Water Recycling Handbook for Councils be available to member Councils over the coming months with the final published document to be tabled for delegates information at the next meeting.

All other actions either completed or to be addressed as agenda items later in the meeting.

## 6. CORRESPONDENCE

### 6.1 Sent and Received Correspondence

**Resolved that** the circulated "sent" and "received" correspondence be received and noted.

### 6.2 SCCG correspondence from the last meeting (including responses where available)

- i. **Annual Reports:** Letter to Member Councils, Mayor and GMs providing SCCG Chairperson's and EO's annual reports and Strategic Plan Implementation Monitoring Report
- ii. **NSW Reforms to Coastal Management** Letter to Member Councils encouraging the continued application of the former NSW Sea Level Rise benchmarks. (See Item 9.1)
- iii. **Container Deposit System**
  - a) Letter to State and Federal Environment Ministers urging support for CDS at the next COAG meeting in April highlighting the impact that plastic containers has on the marine environment.
  - b) Letter to the NSW Minister for Education to inquire on what school education and change behaviour programs are underway to reduce plastic use and increase recycling.

The EO informed the meeting that no response has been received.

#### iv. Annual Invitation for SCCG Consultation with Member Councils

In the interest of keeping member councils informed and actively engaged in SCCG activities we have again written formally to members inviting an opportunity to meet with the SCCG Executive Committee delegates and the Executive Officer.

The EO informed the meeting that presentations were so far scheduled with Manly, Warringah, and City of Sydney. Delegates were asked to chase this invitation to determine if there was interest in their Council for a presentation.

**Resolved that** the Delegates to follow up the SCCG Annual invitation for SCCG consultations letter so to determine if there was interest in their Council for a presentation.

### 7. PRESENTATION

#### 7.1 Legal Advice – ‘Mapping and Responding to Coastal Inundation’

(Ms Kirston Gerathy - Partner - HWL Ebsworth Lawyers)

Ms Kirston provided a review of the legal advice commissioned by the SCCG for the SCCG project.  
[www.sydneycostalouncils.com.au/Project/Mapping\\_and\\_Responding\\_to\\_Coastal\\_Inundation](http://www.sydneycostalouncils.com.au/Project/Mapping_and_Responding_to_Coastal_Inundation)

Hard copies of the advice were distributed. The presentation included a review of the sections of the advice:

- Background,
- Qualifications on the advice
- Information in an evolving statutory framework
- Coastal Protection Act 2012
- Revocation of Sea level Rise Policy Statement
- Stage 2 of the Coastal Planning Reforms
- The CSIRO Mapping Information
- Use of Mapping Information
- Statutory Provisions Concerning Disclosure of Mapping Information
- Negligence and Duty of Care
- Statutory Immunities – Section 733 of the LG Act and Section 149(6) of the EPA Act
- Good Faith
- Concluding Remarks

**Resolved that:**

- 1) The presentation be heard and considered at the meeting.
- 2) Ms Gerathy be thanked for their attendance and presentation.
- 3) The legal advice now be formally forwarded to Member Councils for their consideration.

### 8. ADMINISTRATIVE MATTERS

#### 8.1 SCCG Annual Survey 2012 – Results Report and Workshop

Proceedings in Brief

The aim of the annual survey is to enable the SCCG Secretariat to identify what SCCG activities have assisted Member Councils and importantly to identify additional avenues and activities to further enhance this assistance.

The SCPO presented a summary of the Survey Results Report together with a series of recommendations for consideration and discussion.

The survey Questionnaire listed 9 key capacity building/project subject areas which Member Councils previously identified as important. To prioritise future activities, in the survey, participants rank ordered this list with the results being: 1) Climate Change, 2) Integrated Coastal Zone Management, 3) Law and Policy, 4) Emergency Risk Management, 5) Biodiversity, 6) ESD, 7) Communications, 8) Vegetation, 9) Social media.

A workshop was conducted to delve further into the needs of Representatives and increase the resolution of results by identifying specific topics within each of the above subject areas (including relevant elements and deliverables/outcomes).

Delegates working in groups were asked to identify the first and second order issues of need under these nine areas of focus. The EO noted that results of the workshop will be written up, combined with results from a similar workshop conducted at the recent Technical Committee meeting and incorporated into the SCCG Capacity Building program of activities 2013-2014.

**Resolved that:**

- 1) The Report be received and noted.
- 2) Delegates workshop specific topics within the project and capacity building subject areas prioritised in the survey.
- 3) Any additional key recommendations and actions be discussed for potential implementation (including outcomes from the workshop).
- 4) The SCCG 2013 Action (s) Plans be adapted to incorporate the Annual Survey recommendations and actions from both the Technical Committee and Full Group
- 5) the workshop results be written up, combined with results from a similar workshop conducted at the recent Technical Committee meeting and incorporated into the SCCG Capacity Building program of activities 2013-2014.

## 8.2 Provision of the SCCG Annual Funding Guide 2013

### Proceedings in Brief

The SCCG Secretariat has produced the SCCG Annual Funding Guide, 2013. The Guide presents details of the over 100 funding opportunities available under a variety of grant programs for Councils, communities, businesses and individuals.

**Resolved that:**

- 1) The Funding Guide be received and noted.
- 2) The final guide be formally sent to Member Councils for their utilisation and placed on the SCCG web site for more general access.
- 3) Delegates assist to highlight the availability and continuous improvement of the SCCG Funding Guide, and
- 4) The SCCG produce the 2014 Funding Guide by March 2014.

## 9. REPORTS

### Reports 9.1 – 9.4 FOR CONSIDERATION

#### 9.1 NSW Reforms to Coastal Management in NSW

##### Proceedings in Brief

##### • Update on the reforms

The EO noted that on 11 March OEH had provided the Group with an update on the reforms. A report was subsequently created and distributed at the meeting. This included brief updates on:

- a) the commencement of the revised Coastal Protection Act on 21 January.
- b) Notification that consultation on the Code of Practice to occur shortly
- c) Expert Panel review of the coastal hazard mapping guide
- d) Delays of the SES roles and responsibilities brochure due to recent floods
- e) Finalisation of draft report regarding the proposed Technical Advice Centre business case
- f) NSW Coastal Panel current consideration of a DA for a geobag seawall at Old Bar
- g) Stage 2 of the reforms 'will be developing in the coming months in the context of the planning and local government reforms'.

##### • SCCG Consideration of Sea Level Rise Benchmarks

At the SCCG Full Group Annual General Meeting held on 8 December 2012 a detailed report on the Coastal Reforms was considered by delegates. Full Group delegates subsequently resolved:

##### **Resolved that:**

- 1) The report be received and noted.
- 2) In light of the nature and implications of the Stage 1 NSW Coastal Reforms, the Group write to Member Councils encouraging them to continue to apply the former NSW Sea Level Rise Policy Statement, considering the Department of Environment, Climate Change and Water 2009 Technical note: Derivation of the NSW Government's sea level rise planning benchmarks.
- 3) The Group inform the Minister for Local Government of the above resolution.
- 4) The Secretariat provide an update and outcomes report at the next meeting.
- 5) Through discussion, the SCCG determine any additional actions to address Member Council issues and concerns regarding the NSW Coastal Reforms.

The EO reviewed outcomes of all Member Councils responses to date. Pittwater, Randwick and Willoughby Councils have so far resolved to continue to apply the NSW Sea Level Rise Benchmarks with other Councils to put relevant reports to Council in March or April. The EO will report back on final outcomes at the next meeting.

##### **Resolved that:**

- 1) The report be received and noted.
- 2) the EO report back on final member council consideration of these matters at the next meeting.
- 3) Through discussion, the SCCG determine additional actions to address Member Council issues and concerns.

## 9.2 SCCG Capacity Building Program & Engagements Report

### Proceedings in Brief

The Secretariat is working with Member Councils to ensure the SCCG Capacity Building Program meets their needs. To assist this, a report from the Coastal Projects Officer on the Capacity Building Program and other activities is a standing item on all Technical Committee and Full Group meeting agendas. The CPO presented an update that included:

- Outcomes and recommendations from SCCG Summerama 2013
- Review of the successful SCCG Marine Biodiversity Forum (12 March)
- Review of the SCCG Capacity Building Program 2013

The EO noted the success of the 2013 SCCG Summerama program and thanked the CPO for her substantial efforts in her first year running the program.

**Resolved that the report be received and considered.**

## 9.3 Finalisation of the SCCG Coastal Adaptation Pathway Projects

### Proceedings in Brief

SCCG CAPs projects:

- 1) "Prioritising Coastal Adaptation and Development Options for Local Government";
- 2) "Demonstrating Climate Change Adaptation of Interconnected Water Infrastructure";
- 3) "Assessment and Decision frameworks for Existing Seawalls".

As resolved, the Project Officer provided a detailed update on the progress of each project(s) progress including launch of final project outputs and next phases of the programs including related capacity building programs.

All materials have now been forward to the Commonwealth to finalise the grants with the exception of the final seawall report. The final draft of this report is currently being edited incorporating comments of the national Technical Reference Group and consultation as part of next week's project launch in Rockdale.

The partnership project with Sydney Water, the "Demonstrating Climate Change Adaptation of Interconnected Water Infrastructure" has been completed with final documentation sent to all Member Councils and Cooks Catchment councils who participated in the case studies.

The final 'public' launch of the CAPs program is still being held up and will not occur until the Federal Minister launches outcomes across the 13 national projects.

### **Resolved that:**

- 1) the report be heard and considered.
- 2) SCCG CAP program outputs to be formally disseminated within Member Councils.
- 3) SCCG develop and implement a specific capacity building training program to promote uptake of the outputs of the program by Member Councils.
- 4) The draft capacity building program be tabled at the next SCCG Technical Committee in 2013 for consideration.

## 9.4 SCCG Grant Programs Update

### Proceedings in Brief

The report included in the business papers includes details of: a) recently submitted grant applications (2013) b) recent successful grant applications c) current SCCG grant programs underway d) recently completed and acquitted grant programs.

The SCPO and the PO briefly reviewed the recently successful SCCG grant applications.

- **Emergency Management Planning - a Health Check for Local Government**

SCCG in partnership with ANU, and supported by UNSW, NSW SES, MPES, and LGSA, has successfully secured funding under the Natural Disaster Resilience Program; NSW State Emergency Management Projects 2012-2013. The project is to begin in March.

The goal is to improve Local Government activities in all aspects of Emergency Management (Prevent/Prepare/Respond/Recover). By working closely with Local Government and the major combat agencies we will explore current practice in NSW and review best practice approaches from other States and Internationally. A key element is the building of resilience, both organisationally and within the community, to provide adaptive and flexible responses to emergencies. The project will also investigate limitations and opportunities for Local Government practice due to other areas and responsibilities of Emergency Management.

- **Sydney Harbour Coastal Zone Management Plan – Stage 1 Scoping Study**

The SCPO informed delegates that the SCCG has recently been awarded \$30K under the NSW Estuary Management Program. The SCPO noted that this grant is supported by cash contributions from (the former) Sydney Catchment Management Authority (\$10K), City of Sydney Council (sponsoring agent) \$10K and the SCCG providing \$10K in-kind (total \$60,000).

The scoping study will form the first step of the preparation of a CZMP for Sydney Harbour and as such will identify the scope of the CZMP and to identify and prioritise issues. The study will have recourse to the OEH's Technical Brief for Preparation of a Coastal Zone Management Plan and Guidelines for Preparing Coastal Zone Management Plans.

**Resolved that:**

- 1) the report be received and considered.
- 2) The Group write to Member Councils informing them of the recent SCCG grant successes.

### **DELEGATE WORKSHOP**

### **NEW ITEM**

#### **"MEMBER COUNCILS ROUND TABLE UPDATES & ISSUES DISCUSSION"**

A facilitated session was held to provide Member Councils via their elected delegates an opportunity to update delegates on Councils' activities and discuss outstanding issues that are in line with the SCCG Strategic Plan ie issues under the Group's Six Strategic Outcome statements:  
See: <http://sydneycoastalcouncils.com.au/sites/default/files/strategicplan2010-2014.pdf>

**Resolved that:**

- 1) Delegates be provided with 5 minutes to address relevant updates and issues
- 2) SCCG action in response be determined or referred to the SCCG Executive Committee for further consideration.



## 9.5 MINI WORKSHOP - SCCG National Coastal Zone Advocacy Programs

### Proceedings in Brief

In the lead up to the Federal Government election (14 September) it is proposed that SCCG will be active in various national advocacy programs. These will include:

- a) Consider formally participating in the *National Coastal Advocacy Alliance* supporting the 'National Coastal Policy Initiative' together with other key coastal organisations to campaign encouraging effective, whole of government effort to achieve a sustainable future for our coast and its communities.
- b) SCCG request all registered political parties to outline their policy positions in relation to key coastal management issues as determined by the Group.

After some discussion it was agreed to participate in the National Coastal Advocacy Alliance.

A workshop was facilitated where delegates worked in groups to determine key issues that they thought the SCCG should be requesting all registered political parties to outline their policy positions in relation to. Outcomes of this workshop will be reviewed and incorporated into the draft policy document to be tabled at the June meeting for consideration of adoption prior to distribution to political parties for response.

#### **Resolved that:**

1. the report be received and considered.
2. SCCG participate in the 'National Coastal Advocacy Alliance, supporting the National Coastal Policy Initiative including:
  - i. A collaborative national response to coastal planning and management involving all three tiers of government.
  - ii. An intergovernmental agreement defining the roles and responsibilities of each tier of government in relation to the coastal zone.
  - iii. A national coastal policy that addresses the challenges facing the coast zone through a national coastal commission and accompanying Act
3. SCCG request all registered political parties to outline their policy positions in relation to key coastal management issues as determined by the Group.
4. Delegates workshop and define the key SCCG Policy positions for consultation of national political parties.
5. Outcomes of the workshop be reviewed and incorporated in to the draft policy document to be tabled at the June SCCG meeting for consideration of adoption prior to distribution to political parties for response.

### **Reports 9.6 – 9.10 FOR INFORMATION ONLY**

**Resolved that** reports for 'information only' be received and noted (pending inquiry).

- 9.6 **Technical Committee Report** (Dec and Feb Meetings)
- 9.7 **Beachwatch & Harbourwatch Programs Update** (Nov – Jan)
- 9.8 **Local Land Services Update** (formerly known as Hawkesbury Nepean Catchment Management Authority's Update)
- 9.9 **NSW Department of Primary Industries Aquatic Biosecurity & *Caulerpa taxifolia* Report**
- 9.10 **Key Activities Report for November 2012 – February 2013**

## 10. SCCG SUBMISSION

- Mineral Exploration Licence by Sydney marine Sands Pty Limited under the Commonwealth Offshore Minerals Act 1994.

Resolved that the submission be received and noted.

## 11. TREASURER'S REPORT

### 11.1 Finance Statements for period 30 June 2012 to 31 January 2013

Resolved that the financial statements for the period 30 June 2012 – 31 January 2013 be received and adopted.

## 12. GENERAL BUSINESS

### 12.1 Remaining 2013 Meeting dates / Next Meeting

Dates	Location
• Saturday 15 June 2013 at 12 noon	(City of Sydney)
• Saturday 21 September (AGM) 2013 at 12 noon	(Member Council) (NEW DATE)
• Saturday 7 December 2013 at 12 noon	(City of Sydney)

### 12.2 Items for Press Release

Resolved that items for press release be considered.

### 12.3 Agenda items for the next SCCG meeting

Resolved that delegates suggest additional agenda items including presentations for the next SCCG meeting proposed for 15 June 2013 starting at 12 noon.

### 12.4 Next Meeting

Resolved that the next meeting of the Group be held on 15 June 2013 at the City of Sydney (pending confirmation).

Cr Griffin closed the meeting and thanked delegates for their attendance and contributions.

The meeting closed at 3.45pm.

Confirmation of Minutes: .....

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**Council Meeting**

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**11.0          Adoption of Community, Recreation and Economic  
Development Committee Recommendations**

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**12.0          Adoption of Natural Environment Committee  
Recommendations**

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**Appendix 1 - Confidential Items**

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***Confidential Advice***

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**Confidential Legal Advice**  
**Implementation of the NSW Government Coastal Management Reforms**  
**– “Liability Issues Arising from Selection of Sea Level Risk**  
**Benchmarks”**

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**LEGAL ADVICE**

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**Item No:** C10.2

**Matter:** Legal Advice - Implementation of the NSW Government Coastal Management Reforms – “Liability Issues Arising from Selection of Sea Level Rise Benchmarks”

**From:** Jennifer Pang – Manager – Catchment Management & Climate Change

**Meeting:** Natural Environment Committee

**Date:** 6 May 2013

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The abovementioned matter is listed as Item No. C10.2 in Open Session in the Agenda.

Confidential Legal Advice is attached.

Jennifer Pang  
**MANAGER – CATCHMENT MANAGEMENT & CLIMATE CHANGE**

## Implementation of the NSW Government Coastal Management Reforms – “Liability Issues Arising from Selection of Sea Level Rise Benchmarks”

### Statewide Mutual

Managed by: Jardine Lloyd Thompson Pty Limited

ABN 51 644 247 443

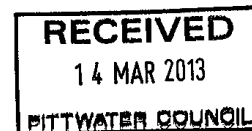


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13 March 2013

The General Manager  
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MONA VALE



Dear Sir,

### LIABILITY ISSUES ARISING FROM SELECTION OF SEA LEVEL RISE BENCHMARKS

Following a request from a Member Council, the Board of Management sought advice from DLA Piper on the effect that a change in an individual Council's amendment to its Sea Level Rise Benchmark.

Council would be aware that the NSW Government recently announced a rejection of the sea level rise planning benchmarks for 2050 and 2100 which were set out in the NSW Sea Level Rise Policy Statement, adopted by the Labor Government in 2009 (**the Policy**). DLA Piper has provided the following advice and recommendations, which are supported by Statewide Mutual's Board of Management.

The Office of Environment & Heritage (**OEH**) has indicated the policy has been rejected in order for it to be replaced with an approach to sea level rise more responsive to local conditions.

For the reasons set out below:

- lll) DLA Piper recommend Councils not move away from the benchmarks set out in the NSW Sea Level Rise Policy Statement until further guidance is given by OEH as to what new approach for sea level rise planning is to be adopted. The OEH says this information will become available to local Councils '*in due course*' and will likely involve amendment to the relevant manual. However, no timeframe has been given.
- mmm) DLA Piper consider that in the absence of compelling data supporting a benchmark significantly less than those set out in the Policy Statement, Council will likely limit statutory defences otherwise available to it in any liability claim concerning the issue of the appropriateness of the benchmark selected.
- nnn) If Council obtains its own independent advice to support the selection of a benchmark different from that in the Policy Statement, it could rely upon that advice and adopt the benchmark set out in it. However, the benchmark would then need to be reconsidered when the OEH published its recommendations.

In considering the issues with sea level rise benchmarks, it is also necessary and relevant to consider the coastal protection reforms as a result of the introduction of the *Coastal Protection Amendment Act 2012 (the CPA Act)* on 21 January 2013.

### COASTAL PROTECTION REFORMS

- 715. On 12 September 2012, the State Government introduced a Bill which proposed significant changes to the current legislation allowing private property owners to carry out emergency coastal protection works where erosion is likely or imminent. The Bill was aimed at allowing the works, which

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do not require development consent, to be carried out in less urgent circumstances and with more limited involvement of local Councils as coastal authorities.

716. A series of other reforms was flagged, including a new approach to the recording of coastal risks affecting private property, and to benchmarks used for predicting sea level rise.

**"Stage 1 Coastal Reforms" and the Coastal Protection Amendment Act 2012**

717. The 2011 amendments to the *Coastal Protection Act 1979 (the Act)* sought to improve arrangements for managing coastal erosion risks. Amongst the changes, a new Part 4C of the Act was introduced to provide a regime for the construction of 'emergency coastal protection works' (ECPWs) by private citizens, without the requirement of a development consent under the *Environmental Planning and Assessment Act 1979 (the EP&A Act)*.

718. The 2013 CPA Act does away with ECPWs in favour of 'temporary coastal protection works' (TCPWs). TCPWs are able to be installed without the current requirement for ECPWs, namely that erosion be occurring, imminent or it be reasonably foreseeable that beach erosion is likely to impact a building.

719. Instead, TCPWs are allowed on land simply where the purpose is to reduce the impact or likely impact from wave erosion on that land. Relevantly, protection of land alone is sufficient (a building is not required).

*Authorisation by coastal authority*

720. Under the previous legislation, ECPWs required authorisation by an authorised coastal officer, whether on private or public land. The authorisation was in the form of a certificate which specified how the ECPWs must be placed.

721. For works on private land, such authorisation is no longer required. However for works on public land, a certificate is still required. A certificate has the effect of authorising the holder to use and occupy the public land to place and maintain the TCPWs. A certificate requires the authorising officer to be satisfied all reasonable measures have been taken and will be taken to avoid using or occupying the public land" and to ensure reasonable public access remains.

722. As with ECPWs, TCPW certificates can be conditional and will be taken to include a condition that the holder of the certificate take all reasonable measures to:

- avoid damage to assets and vegetation on the public land;
- minimise risks to the public on the public land; and
- minimise disruption of the public use of the beach.

*Duration of works*

723. The CPA Act removes the specification that ECPWs remain for no longer than 12 months. Instead, under the new regime, TCPWs are allowed to remain for up to two years, after which development consent under the EP&A Act is required. There is no restriction on placing TCPWs on more than one occasion at a site (as was the case for ECPWs). At this stage it is not certain how the legislation intends to prevent TCPWs being repeatedly removed and replaced in order to avoid the requirements for lodgement of a DA.

*Nature of works*

724. There was no amendment changing the requirement that works must be imported sand or sand-filled geobags. However, the Minister has indicated amendments will be made to the Code of Practice which provides technical specifications on how and where TCPWs are placed, including a restriction on the height of TCPWs. Currently there is a height restriction of 1.5 metres. We understand the OEH is presently receiving advice on the appropriateness of that height restriction.

725. With the enactment of these amendments, the Minister emphasised the limited role of TCPWs in providing protection in stating:

*"...temporary coastal protection works involving sandbags will, by their nature, only provide protection from erosion during minor storm events. We are not under any illusion this is a measure to deal with major storm events. It is certainly a temporary protection measure."*

*Permanent protection works*

726. The CPA Act does not make any changes to legislation dealing with development applications for permanent coastal protection works. The suggestion in some media that the CPA Act is, therefore, a rejection of the policy of planned retreat, is misleading. Applications for permanent protection works will still be dealt with by consent authorities under the applicable planning instruments.

**Penalties**

727. The CPA Act reduces the maximum penalty for temporary erosion protection works inconsistent with the legislation to \$247,500 for corporations and \$123,750 for individuals. The daily penalties for continuing offences are also halved as are the penalties for non-compliance with orders for removal.

**Categorisation of coastal risks to land**

728. The amendments remove those parts of the Act and the *Coastal Protection Regulation 2011* which provide for the categorisation of land by the Minister on the basis of 'coastal hazard risk category' which is then notified on an EP&A Act section 149(5) planning certificate.

729. However, the categorisation of land on this basis was only provided for in circumstances once Coastal Zone Management Plans had been adopted. Accordingly, if no CZMP had been adopted, this amendment had no practical application.

**Sea level rise policy**

730. In addition to the CPA Act, the Government announced a rejection of the sea level rise planning benchmarks for 2050 and 2100, which are set out in the NSW Sea Level Rise Policy Statement (**the Policy**) adopted by the Labor government in 2009.

731. The OEH indicated the Policy had been rejected in order for it to be replaced with an approach to sea level rise more responsive to local conditions. The OEH cited research indicating uncertainty in the rate of change of sea level and stated the preferred approach was to establish an expert advice centre able to provide independent advice to Councils. This included the development of a standardised methodology for mapping predicted sea level rise.

732. The OEH stated that where Councils are currently utilising the benchmarks for 2050 and 2100 in their mapping, these benchmarks are now to be taken to be the Council's adopted projection rather than a State government directive.



733. The rejection of the Policy is questionable given the Policy has not been replaced with any alternative guidance as to how Councils should cater for predicted increases in sea level rises. The OEH website continues to provide links to organisations including the CSIRO, the Bureau of Meteorology and the IPCC which provide information on past and predicted sea level rises but no guidance is given on how this raw data should be applied.
734. *In the absence of such guidance, it is prudent for Councils to continue applying the sea level rise benchmarks as set out in the NSW Sea Level Rise Policy Statement. As a matter of practice, this means Councils should apply planning controls which have been adopted on the basis of the benchmarks.* Similarly, Councils should give consideration to the benchmarks when assessing developments where the benchmarks have not yet been incorporated into the relevant planning instrument.
735. If this approach is taken, Councils are likely to have the benefit of section 733 of the *Local Government Act 1993* which provides a defence in civil liability claims as follows:
- (2) *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 in the coastal zone being affected by a coastline hazard (as described in a manual referred to in subsection (5) (b)) or the nature or extent of any such hazard, 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 so affected.*
736. Relevantly, a presumption of good faith operates under section 733 if Council is shown to have acted "substantially in accordance with the principles contained in the relevant manual most recently notified" (section 733(4)).
737. The only 'relevant manual' for the purposes of section 733(2) has not yet been amended to reflect the change in policy position. This manual, being 'Guidelines for Preparing Coastal Zone Management Plans', continues to provide as follows:
- CZMPs should support the goals and objectives of the...NSW Sea Level Rise Policy Statement 2009 (page 1);
  - CZMPs should be prepared considering the NSW Coastal Planning Guideline: Adapting to Sea Level Rise (page 4); and
  - A CZMP which addresses coastal ecosystem management is to include a description of...projected climate change impacts on estuary health (section 55C(f) of the Coastal Protection Act 1979). This is to include incorporation of the sea level rise benchmarks from the NSW Sea Level Rise Policy Statement 2009 (page 10).
738. Although this guidance relates specifically to the drafting of a CZMP, other planning decisions where the benchmarks can be applied would arguably be consistent with the manual. Therefore, in order to be afforded the protection of section 733, Councils should continue to apply the benchmarks despite the statements of the Minister and OEH that they are no longer NSW Government policy.
739. In addition, by adopting this course, Councils would be able to avail themselves of defences under the *Civil Liability Act 2002*, in particular sections 43 and 43A to demonstrate their actions were reasonable and in accordance with the practice of other local Councils.
740. **Accordingly, we recommend Councils not move away from the benchmarks until further guidance is given by OEH as to a new approach for sea level rise planning.**

741. As stated by the Minister and OEH, it is suggested that this information will become available to Councils in due course and will likely involve amendment to the relevant manual referred to above. No timeframe has been given and we believe it may be some way off given the generality of the statements made so far.

742. If a Council was to adopt a benchmark significantly less than those set out in the Policy, it places itself in a position where it may not be able to successfully rely upon the defences in the *Civil Liability Act 2002* and the *Local Government Act 1993*. If this course is to be considered by Council, it would need to obtain compelling advice to support the benchmark it decided to select. To further protect itself and demonstrate the reasonableness of that decision, we would recommend the advice be obtained from an independent third party and supported by the necessary scientific data.

#### **Coastal zone management plans**

743. On the basis of the CPA Act and the changes in Policy, the Government announced Councils will be given an extended opportunity to finalise their coastal zone management plans (CZMPs). This is made necessary by the removal of categories of coastal risk which were previously provided for in CZMPs. Similarly, the rejection of the sea level rise policy and the commitment to providing new information on sea level rise means this will be something Councils will need to consider in preparing CZMPs.

744. Certification of CZMPs currently before the Minister has been suspended. Further changes in respect of legislation and policy dealing with CZMPs have been foreshadowed as part of the Stage 2 reforms. This suggests the suspension will continue until these reforms are introduced. No timeframe has been provided for the Stage 2 reforms.

#### **Conclusions**

745. The key amendments to the CPA Act are:

- a. Coastal erosion protection works are able to be installed by private property owners on private land without the need for authorisation by a local authority. Local authority certification would still be required for works on public land.
- b. Installation of works does not require an imminent erosion event but rather can be installed for the purpose of prevent an actual or likely impact of wave erosion on land.
- c. The works can remain for up to two years without a development consent being obtained. However, local authorities will retain powers to order removal where the works cause an adverse impact on neighbouring public or private land.
- d. Private property owners who install the works are responsible for maintenance of the works.
- e. Detail on the nature of the works is to be provided in the form of a Code of Practice, including locations where the works will be permissible. However, the works will remain limited to sand or sand-filled geobags.

746. Arguably the reforms also have the effect of suspending coastal planning currently being undertaken by Councils.

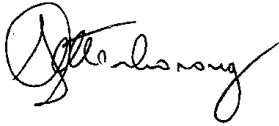
747. The rejection of sea level rise benchmarks and the removal of coastal risk land categorisation in CZMPs creates a level of uncertainty as to how local Councils should proceed in drafting and implementing planning policies. Although the Government has foreshadowed a new approach to dealing with the risk, including by provision of assistance in gathering relevant scientific data on coastal erosion and climate change, the statements so far suggest this is some way off.

748. In respect of sea level rise benchmarks:

- a. until the pending guidance is provided by the OEH, we recommend local Councils continue applying the sea level rise benchmarks as set out in the NSW Sea Level Rise Policy Statement. As a matter of practice, this means Councils should apply planning controls which have been adopted on the basis of the benchmarks. Similarly, Councils should give consideration to the benchmarks when assessing developments where the benchmarks have not yet been incorporated into the relevant planning instrument. In doing so, Council should be able to avail themselves of defences under the *Civil Liability Act 2002* and *Local Government Act 1993* in response to liability claims;
- b. we consider that in the absence of compelling data supporting a benchmark significantly less than those set out in the Policy Statement, Councils will likely limit statutory defences otherwise available to them in any liability claim concerning the issue of the appropriateness of the benchmark selected;

If a Council has obtained its own independent advice to support the selection of a benchmark different from that in the Policy Statement, it could rely upon that advice and adopt the benchmark set out in it. However, the benchmark would then need to be reconsidered when the OEH has published its recommendations

Yours faithfully



John Attenborough  
Executive Officer,  
Statewide Mutual

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**Confidential Legal Advice**

**Minutes of the Sydney Coastal Councils Group Ordinary Meeting of 16  
March 2013 – “Mapping and Responding to Coastal Inundation”**

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**LEGAL ADVICE**

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**Item No:** C10.3

**Matter:** Legal Advice - Minutes of the SCCG Meeting of 16 March 2013 –  
“Mapping and Responding to Coastal Inundation”

**From:** Jennifer Pang – Manager – Catchment Management & Climate Change

**Meeting:** Natural Environment Committee

**Date:** 6 May 2013

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The abovementioned matter is listed as Item No. C10.3 in Open Session in the Agenda.

Confidential Legal Advice is attached.

Jennifer Pang

**MANAGER – CATCHMENT MANAGEMENT & CLIMATE CHANGE**

**Minutes of the Sydney Coastal Council Groups Ordinary Meeting of 16 March 2013 –  
“Mapping and Responding to Coastal Inundation”**

HWL  
EBSWORTH  
LAWYERS

Our Ref: KMG: 232917

8 March 2013

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Dear Sir,

**CSIRO Sea Level Rise Hazard Mapping - Hazard Mapping Information In A Changing Legislative Framework**

You have asked us to consider how the release of the CSIRO's sea level rise coastal inundation mapping information commissioned by the Sydney Coastal Council Group (SCCG) (the **Mapping Information**) may affect Coastal Councils (**Councils**). In particular, you have asked us to consider what, if any, are Councils' obligations on receipt of the information, and whether the disclosure or use of the information, or decisions not to do so, poses risks.

Our comments are sought in general terms only and by reference to the changing legislative framework, including the Government's Stage 1 Coastal Planning reforms and the foreshadowed Stage 2 amendments.

**1. Background**

- 1.1 In 2009 the SCCG received a funding grant to undertake the "mapping and responding to coastal inundation project." The CSIRO undertook the sea level rise mapping analysis and the Mapping Information has been provided by SCCG to its individual member councils. During the period the mapping project was being undertaken, the NSW Sea Level Rise Policy Statement 2009 (**SLR Policy**) which specified sea level rise planning benchmarks was in place.
- 1.2 Further, the NSW Coastal Planning Guidelines: Adapting to Sea Level Rise August 2010 ("**Planning Guidelines**") were issued to provide guidance as to how sea level rise is to be considered in land use planning and development assessment. Amendments affecting the Environmental Planning and Assessment Act 1979 ("**EPA Act**") were also made in respect of matters to be included as notations on section 149 planning certificates.
- 1.3 The Department of Planning issued Planning Circular PS-11-001 on 24 January 2011 in respect of the amendments to the planning certificate requirements. The purpose of the circular was to provide guidance and recommendations to coastal councils on notations relating to coastal hazards and lands that are affected by sea level rise.

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- 1.4 As of 8 September 2012, the SLR policy has been abandoned as State Government policy. The State "is not intending to release a new sea level rise policy".<sup>1</sup> Planning Circular PS-11-001 was revoked on 21 January 2013. There is as yet no replacement circular.
- 1.5 The Planning Guidelines remain in force; however both the Department of Planning and Infrastructure (DOPI) and the Office of Environment and Heritage (OEH) have advised that the Guidelines for preparing Coastal Zone Management Plans (CZMP Guidelines) which replaced the Coastal Manual, and Planning Guidelines will be revised as part of the coastal planning reforms. In the interim the websites for both agencies contain a notation: "*reference to the NSW sea level rise planning benchmarks in these documents should be taken as referring to council's adopted sea level rise projections*".<sup>2</sup> We are not however aware of any revisions to the CZMP Guidelines or Planning Guidelines which give force to the change in the reference.
- 1.6 In retiring the SLR Policy, the Government has expressed the position that "Council's need the flexibility to consider local conditions when determining local future hazards."<sup>3</sup> To assist local government authorities in setting their local sea level rise projections, OEH advises on its website:

*The Office of Environment and Heritage (OEH) has links on its sea level rise web page to make publically available information from reputable sources (e.g. CSIRO) on the range of sea level rise projections. OEH is also developing guidelines for coastal hazard mapping, which underpins the hazard information only here as is a guide provided by councils to local communities.*

*Councils should consider information on historical and projected future sea level rise which is widely accepted by competent scientific opinion. This may include information in the chief scientist's report and information available from the OEH sea level rise web page.*

## **2. Qualifications On This Advice**

- 2.1 As you would appreciate, it is exceptionally difficult to advise on specific issues such as obligations, duty of care, liability, negligence and good faith in such a general context. Obligations, potential liability and exposure in tort are highly fact dependent.
- 2.2 To evaluate or advise on the obligations or potential risks to your individual member Councils is beyond the scope of this advice. It would require an understanding of the particular factual matrix and documents held by each council. Accordingly, we provide our comments on the express understanding that they are matters of general observation only and should not be relied on absent detailed tailored advice, appraised of all of the facts. Individual circumstances will be critical and material.

## **3. Information in an evolving statutory framework**

- 3.1 Councils receive, generate and are the repositories of vast amounts of information including information commissioned by third parties and landowners about coastal risks and SLR. In the ordinary course of business, councils are required to provide information on a range of subjects. In some circumstances, the recipient of the information may seek to hold the council liable for the accuracy of the information or the effect that the information has on their property. We understand local government is concerned as to its responsibility and potential exposure around the dissemination and application of hazard risk information.
- 3.2 In this context, the primary concerns include whether releasing the information or the making of a decision relying on that information may be an actionable cause of a loss, for example if

<sup>1</sup> See OEH Stage 1 Coastal Reforms, Q&A's updated 21 January 2013

<sup>2</sup> <http://www.environment.nsw.gov.au/coasts/stage1CoastRefQaA.htm>

<sup>3</sup> See <http://www.environment.nsw.gov.au/climateChange/sealevel.htm> and <http://www.planning.nsw.gov.au/adapting-to-sea-level-rise>

<sup>3</sup> OEH Stage 1 Coastal References, Q&A's updated 21 January 2013

the market value of affected properties falls. Similarly whether failure to disclose information pertaining to risk could create other liabilities if land is developed or occupants of developed land are affected by natural hazards, which a council had data about but did not communicate to the public. To put it another way, could a council be considered to be negligent if it released information that may cause a land owner an economic loss? Further, could an aggrieved constituent, sue the council if they suffered other damage due to hazards identified in the Mapping Information.

- 3.3 Information held by local government authorities is by and large accessible to the public. There are statutory requirements to maintain certain information on publicly accessible registers and access to information entitlements under the *Government Information (Public Access) Act 2009 (GIPA Act)*. Documents which are not otherwise excluded from production are discoverable in legal proceedings.
- 3.4 To appreciate the Councils' position in relation to the Mapping Information, the uses to which it could be applied and the general areas of potential risk, it is necessary to understand the current state of the coastal planning and hazard management framework.

#### 4. Coastal Protection Amendment Act 2012

- 4.1 Stage 1 of the NSW Coastal Planning Reforms saw the introduction of the *Coastal Protection Amendment Act 2012 (Amendment Act)* which commenced on 21 January 2013. The Amendment Act made a number of changes to the *Coastal Protection Act 1979 (CP Act)*.
- 4.2 The three main objects of the Amendment Act as identified in the Explanatory Note to the Amendment Act in its Bill form can be summarised as follows:
- (a) to ensure that land owners can more easily place sandbags on and adjacent to beaches in order to reduce the impact of wave erosion;
  - (b) to remove regulation making power and the associated regulation imposing requirements for councils to include coastal hazard risk category information from coastal zone management plans on section 149 Certificates; and
  - (c) to reduce excessive penalties for offences relating to temporary works placed for the protection of properties.

#### 5. Revocation of the Sea Level Rise Policy Statement

- 5.1 As part of the Stage 1 Reforms, the State retired the SLR Policy as government policy, due to projected sea level rise uncertainty and the evolving nature of the science.
- 5.2 During the second reading speech of the Amendment Act, whilst in its Bill form, the Minister advised that the Government would be developing a state-wide hazard methodology for councils to use for consistent coastal hazard mapping. The methodology was to be prepared during the Stage 2 reforms.
- 5.3 Dispensing with the SLR policy has some consequences. The SLR Policy specified coastal risk areas and sea level rise planning benchmarks which were expressly incorporated into a number of Ministerial guidelines including:
- (a) *Guidelines for Preparing Coastal Zone Management Plans (CZMP Guidelines)* published by the Department of Environment Climate Change and Water (as it then was)<sup>4</sup> which replaced the coastal manual.
  - (b) *NSW Coastal Planning Guideline: Adapting to Sea Level Rise 2010 (Planning Guidelines)* published by the Department of Planning, which Councils were directed

<sup>4</sup> which are relevantly guidelines for the purpose of section 733 of the *Local Government Act 1993* having been published in the NSW Government Gazette on 22 February 2011.

to use in best practice strategic planning processes for preparation of Local Environment Plans (**LEP's**) and for development assessment.

- 5.4 Model coastal clauses for the Standard Instrument LEP were based upon those coastal risk areas and sea level rise benchmark concepts incorporated into the CZMP Guidelines and the Planning Guidelines.
- 5.5 Further, the 2011 Planning Circular on section 149 certificates made recommendations as to notations to be included on planning certificates, having regard to the SLR Policy and benchmarks.
- 5.6 Under s55D of the CP Act, Councils are obliged to prepare any draft Coastal Zone Management Plans in accordance with the CZMP Guidelines.
- 5.7 The CZMP Guidelines presently expressly state that Coastal Zone Management Plans should be prepared considering the Planning Guidelines and rely on the now retired SLR benchmarks.
- 5.8 The CZMP Guidelines prescribe 10 coastal management principles which local government authorities must consider when preparing and implementing CZMPs and in strategic planning. Principle 1 requires consideration of *"the objects of the Coastal Protection Act 1979; the goals, objectives and principles of the NSW Coastal Policy 1997 and the NSW Sea Level Rise Policy Statement 2009."*
- 5.9 Coastal Management Principle 1 in the Planning Guidelines requires consideration of the assessment and evaluation of coastal risks *taking into account the NSW sea level rise planning benchmarks.*
- 5.10 The retired SLR policy constituted a criterion of the cognate guidelines and policies which had been adopted by the State and which have some statutory weight as they are variously called up and required to be implemented by the EPA Act, and the *Local Government Act 1993 (LG Act)*.
- 5.11 The CZMP Guidelines and Planning Guidelines remain requirements to be taken into account by local government for a variety of purposes. Councils are presently without endorsed sea level rise projections to use in their hazard management, land use planning and development assessment, until they formally adopt their own projections within local confines.
- 5.12 There is a possibility that Councils may adopt their own sea level rise planning benchmarks prior to the completion of the second stage of the coastal planning reforms. The OEI website notes councils may need to make decisions on interim or transitional arrangements until sea level projections are formally adopted by a council.
- 5.13 In this context, statements on the DOP and OEI websites to the effect that references in both those Guidelines to the SLR Policy and benchmarks, should be taken to be references to a council's adopted sea level rise projections may also have some flow on consequences, in terms of potential liability exposure and the availability of the statutory indemnities against liability, for example in section 733 of the LG Act. Whilst we have identified this possibility, detailed exploration of the possible impacts on statutory immunities is beyond the scope of this advice and our brief.

## **6. Stage 2 of the Coastal Planning Reforms**

- 6.1 Stage 2 proposes other reforms including the foreshadowed state-wide methodology for hazard mapping. The methodology will be required to be tailored for individual local analysis and application
- 6.2 The Stage 2 reforms are directed in part at information and how councils manage and apply it. In light of these State policy changes, Councils' position in relation to the Mapping



Information and the broader implications for strategic planning and decision making, gain somewhat heightened significance.

- 6.3 Against this background the CSIRO has provided SCCG and through it, its member Councils, with the results of its "Modelling & Mapping of Coastal Inundation Under Future Sea Level Rise" data.

## 7. The CSIRO Mapping Information

- 7.1 The Mapping Information was not commissioned by any individual Council and as we understand it none of the Councils have as yet adopted the Mapping Information as policy.
- 7.2 Councils receive many documents, (including those commissioned and prepared by landowners and developers) about coastal risks and SLR. Whilst these are clearly not documents prepared by Council and may not reflect the Councils' adopted position, nonetheless these reports ultimately reside in the Councils' information repository and form a 'record' for the purpose of the GIPA Act.
- 7.3 The same could be said for the Mapping Information. Although we infer the Mapping Information has been prepared with a view to assisting Councils in determining their coastal inundation risks and SLR planning policy to be adopted, there is no statutory obligation requiring that Mapping Information must form a Council's adopted position.
- 7.4 One might ask what is the difference between the Mapping Information and any number of other documents received by Councils, commissioned by landowners in relation to coastal risks, such that the Mapping Information should be attributed higher significance. Arguably, the fact that the Mapping Information has been prepared by a credible scientific research organisation, to address inundation modelling on a regional basis could be distinguishing features.
- 7.5 The Mapping Information contains CSIRO copyright and disclaimer notations which Councils should consider and address in the event it is proposed to republish or utilise the Mapping Information. The discussion which follows is predicated on the assumption permission to use copyright material is given by CSIRO.
- 7.6 It is feasible that a Council might choose not to follow or use the Mapping Information in addressing issues or performing functions where coastal hazards and SLR arise as relevant matters for consideration. These documents nevertheless constitute Council records and are accessible by any person who submits an application under the GIPA Act. As explored in more detail below, having received the Mapping Information, to be prudent, Councils should give it proper consideration. If the reasoning justifying the Councils' stance not to apply or disclose the information is found to be inadequate or absent, loss is suffered and it is able to be argued the Councils' action was negligent, then there may be a risk exposure in liability. Again, the likelihood of exposure is entirely dependent on the factual matrix of any particular instance.

## 8. Use of Mapping Information

- 8.1 Information about hazards is required to inform Councils in the exercise of a number of functions. They include, but are not limited to:
- (a) strategic land use planning;
  - (b) asset and hazard management;
  - (c) development assessment; and
  - (d) providing information to stakeholders in relation matters that affect land.

8.2 In undertaking these functions, Councils will need to determine how and to what extent the Mapping Information should be used if at all. When making that determination, in very broad terms, Councils essentially have three options:

- (a) to release and/or utilise the information; or
- (b) to ignore or expressly decline to adopt or rely on the information; or
- (c) to decide to adopt the information or a variation of it.

Cogent reasons should inform decisions as to whether the approaches identified in (a), (b) or (c) are followed.

8.3 In this instance where the Mapping Information has been prepared by CSIRO it could be considered to be scientifically reliable. Having revoked the SLR policy, the State is suggesting Councils utilise CSIRO mapping as a tool when setting local sea rise projections.

8.4 This does not mean that any Council is required by legislation or obligated per se to adopt or use the Mapping Information. However, as it is in Councils' possession it would be prudent to have regard to it and give it proper consideration before determining that course. This could include considering and assessing the accuracy and reliability of any such information, and balancing competing scientific opinion or evaluating the Mapping Information against the foreshadowed state wide hazard methodology once released. Please note, these are indicative examples of the types of considerations which could be relevant. We do not suggest they are exhaustive and Councils should seek specific advice.

8.5 If having done that, a Council determines not to adopt, rely on or use it, then transparency in reasoning – that is, clearly stated, justifiable reasons for adopting that position should be provided and might assist in the defence of possible future claims.

8.6 Despite there being no express statutory requirement to adopt or apply the Mapping Information, credible information addressing coastal inundation affecting land may well be a matter that should be taken into account when assessing development applications pursuant to section 79C(1)(b) and or (c). Of course this is a question of weight and numerous factors are required to be balanced in such assessments. Similarly, such data would be relevant to strategic planning processes and asset management. As the Mapping Information has a credible scientific genesis and was prepared by a reputable organisation, on balance these observations apply irrespective of whether the Mapping Information is formally incorporated into a Council policy.

8.7 Although there may not be an obligation to adopt or apply the Mapping Information, the question whether there is an obligation to disclose or communicate the Mapping Information is affected by some different considerations.

## 9. Statutory Provisions Concerning Disclosure Of Mapping Information

9.1 We have considered whether there is any statutory obligation to release, use or adopt the Mapping Information. Legislative obligations to disclose certain risk information is set out in section 149(2) of the EPA Act, clause 279 and schedule 4 of the EPA Regulations. Clause 7 of schedule 4 provides a certificate issued pursuant to section 149(2) must include information:

*Whether or not the land is affected by a policy:*

- (a) adopted by the council, or
- (b) adopted by any other public authority and notified to the council for the express purpose of its adoption by that authority being referred to in planning certificates issued by the council, that restricts the development of the land because of the likelihood of land slip, bushfire, tidal inundation, subsidence, acid sulphate soils or any other risk (other than flooding).

- 9.2 Therefore, if a Council adopts the Mapping Information as a policy, or uses it to set sea level projections to be incorporated in strategic planning documents, the information must be noted on planning certificates issued pursuant to section 149(2) of the EPA Act.
- 9.3 In our view, until and unless Councils adopt any of the Mapping Information as a policy, there is no obligation at law for Councils to disclose the information in planning certificates pursuant to section 149(2).
- 9.4 The provisions in section 149(5) are different. Section 149(5) permits Councils to exercise their discretion to include advice on other relevant matters affecting the subject land including the dissemination of hazard risk information:

(5) *A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.*

- 9.5 Many councils expressly prescribe the additional types of information that will be provided should someone apply for a planning certificate under section 149(5), by publication of a 'form' for such applications. We have seen examples where an itemised list is included in the form and a schedule of fees provided. Doing so, whilst common practice, will not necessarily limit potential liability exposure in the event a Council has information about risks to land.
- 9.6 These provisions and the statutory immunities against liability in providing information are discussed in section 11 below.
- 9.7 Whether Councils have an obligation to disclose and communicate the Mapping Information or could be held liable for negligence under the common law will depend on a number of factors including the existence of a duty of care to disclose the information. We discuss this rather complex issue below and emphasise that the existence of a duty depends on particular circumstances. We cannot provide a response as to the risks of exposure in disclosing (or not) the Mapping Information that is applicable to all Councils in all circumstances, as each matter will turn on its own facts.

## 10. Negligence and Duty of Care

- 10.1 It is a well-established principle that:

*When statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered.<sup>5</sup>*

- 10.2 In many respects the loss caused as a result of the disclosure or use by Councils of the Mapping Information is purely financial. The Mapping Information relates to the impacts of inundation incorporating sea level rise projections for the future. There has been some judicial reluctance to allow damages for 'pure economic loss' as a result of negligence, if proven. In broad terms it must be established before a Court that there is a special relationship in which a Council owes the plaintiff a duty of care.
- 10.3 The decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 (*Woolcock Street*) sets out the five "salient features" that may give rise to a duty of care to avoid economic loss as follows:
- (a) reasonable foreseeability of loss;
  - (b) indeterminacy of liability;

<sup>5</sup> *Caledonian Collieries Ltd v Spiers* (1957) 97 CLR 202

- (c) autonomy of individual;
  - (d) vulnerability to risk; and
  - (e) knowledge of the risk and its magnitude.
- 10.4 Exploration of all of these features in the context of considering the release of Mapping Information or its use by Councils in decision making is beyond the scope of this advice. However, taking vulnerability to risk as an example, a landowner could be said to be particularly vulnerable to the Council's action. The landowner cannot protect itself from how the market reacts to the release of information. The existence of a duty of care requires however analysis of all features, not just one in isolation.
- 10.5 Correspondingly, as the Councils are in possession of the information and frequently are the only source of such or certain information for stakeholders (for example section 149 certificates) there is an arguable proposition that credible and scientifically reliable information ought to be disclosed (following proper consideration), to the public. Indeed, the failure to disclose information affecting land of which a local government authority was aware has resulted in numerous examples of council's being held liable for loss. We have examined some of the relevant cases in section 12 (see also footnote 9).
- 10.6 Whilst there may be some situations where a council owes a duty of care to a landowner that is not to say that a council always owes a duty of care (and in any event each case would need to be assessed on its own facts). The broad spectrum of councils' powers, statutory functions and obligations play a role in the balancing exercise.
- 10.7 If no consideration is given to the Mapping Information prepared by CSIRO or a Council decides not to release or apply it, without demonstrably justifiable reasons, then there is the potential for risk exposure in the event a loss is occasioned and the Council was ultimately found to be negligent.
- 10.8 Once again in relation to a duty to avoid economic loss, each case will turn on its own facts and we cannot make a general comment that will apply to all circumstances.
- 10.9 In our view, suppressing the Mapping Information because of a fear of incurring liability for economic loss will not avoid a duty of care or liability, if one exists.
- 10.10 Further, we do not consider it would be reasonably open to defend a future claim for damages caused by the manifestation of a hazard such as inundation on the basis the information was not communicated to the public, as the authority determined such information may cause economic loss to present landowners. Even if there could be said to be a duty of care in respect of economic loss, that would not displace a duty (where one exists) in respect of exposure to hazards as a general proposition.
- 10.11 As a matter of policy, the legislature has recognised that public authorities should not bear an unnecessary burden for the natural effects of coastal hazards and sea level rise. In this regard there are various statutory immunities available to Councils in respect of what they may do with the Mapping Information. These immunities are commonly known as the good faith immunities.
- 11. Statutory Immunities - Section 733 of The LG Act And Section 149(6) of The EPA Act<sup>6</sup>**
- 11.1 Section 733 of the LG Act operates, insofar as the law permits, to protect councils from liability in respect of any action, omission or advice given in relation to the likelihood of any land in the coastal zone being affected by a coastline hazard - provided the council has acted in 'good faith'.
- 11.2 Relevantly, section 733(2) provides:

<sup>6</sup> See also section 731 LG Act and sections 42-46 of the Civil Liability Act

- (2) *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 in the coastal zone being affected by a coastline hazard (as described in a manual referred to in subsection (5) (b)) or the nature or extent of any such hazard, 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 so affected.*

11.3 Section 733(4) provides:

- (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.* (emphasis added)

11.4 Section 733(5) provides:

- (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, or*
  - (b) *a manual relating to the management of the coastline...*
- (8) *In this section:*

***coastal management works** includes the placement and maintenance of emergency coastal protection works.*

***manual** includes guidelines.*

- 11.5 The presumption of good faith provided in section 733(4) is predicated on the relevant advice, action or omission being undertaken substantially in accordance with the manual referred to in subsection 5(b). The manual was repealed and replaced by the CZMP Guidelines as a consequence of the 2010 coastal reforms. The CZMP Guidelines were published in the NSW Government Gazette for the purposes of section 733(5)(b) on 25 February 2011. They contain principles, some of which are predicated on the State's SLR Policy and sea level rise benchmarks. That policy has been revoked, and local government is expected to adopt its own projections for local circumstances.
- 11.6 Many coastal councils have not yet done so (presumably as their position had been informed by the SLR Policy). The foreshadowed state-wide methodology does not presently exist and the state agencies websites advise that reference in the CZMP Guidelines to the SLR Policy and benchmarks within that document (and the Planning Guidelines) should be taken as references to a council's adopted sea level rise projections. The lacuna is readily apparent.
- 11.7 The section 733 presumption of good faith is rebuttable and the ability to rely on it can in any event, be displaced on an examination of the specific facts. To rely on section 733 immunities, a council will need to demonstrate they have nonetheless advised, acted or omitted to act, in good faith. The concept is discussed in section 12 below.
- 11.8 Whilst there is no general prophylactic to protect a Council from any exposure to potential actions, it follows that Councils **may** be better placed to consider the Mapping Information in the first instance and then determine whether it is to be adopted by Council before releasing it. We say may as the counter proposition is that being in possession of scientifically credible information, even if not formally adopted as a policy, the Council should disclose it when

providing information to the public and take it into consideration when exercising functions (such as development assessment and planning) where questions of hazard risk and impact due to inundation are relevant.

- 11.9 Should the Council resolve to adopt the information and to publish it by way of a policy, then a public exhibition process would ultimately give the policy greater weight in development assessment processes and land use appeals.<sup>7</sup> It will also become information required to be disclosed in a planning certificate under s149(2).<sup>8</sup>
- 11.10 As noted above, Councils have statutory obligations in relation to the release of information in the form of section 149 planning certificates. Given that people rely on the information contained in planning certificates and that they are unable to acquire that information elsewhere, Councils have a duty to exercise reasonable care that the information given is accurate and/or not misleading.
- 11.11 Presently, Councils are likely to be at lesser risk in relation to information provided under section 149(2) because the EPA Regulations dictate what must be included. Liability doesn't arise where a public authority carries out statutory requirement, even if it has financial implications for some land owners, provided that it is carried out with reasonable care. However, 149(5) invokes Councils discretionary powers in relation to the dissemination of hazard risk information affecting land.
- 11.12 Sections 149 (5) & (6) of the EPA Act provide for an immunity against liability, insofar as the law permits, where advice is provided in good faith:
- (6) *A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5). However, this subsection does not apply to advice provided in relation to contaminated land ...*
- 11.13 We understand Councils may be concerned with whether they have an exposure to landowners in respect of economic losses which may arise through the disclosure of information on planning certificates. Conversely they have been held to have a competing duty as the holders and controllers of information concerning hazards, and have incurred liability for failure to provide any or accurate information on a section 149 certificate<sup>9</sup> (see discussion in section 12 below).
- 11.14 There may be an area of uncertainty insofar as obligations to disclose in circumstances where Council's have not adopted the Mapping Information as a policy. There is an example in which a council was found not to be liable (in the specific circumstances) where information of which the council was aware, but which had not been adopted as a policy, was not disclosed. The better view is that credible and reliable information which affects land should be disclosed and care should be taken to ensure it is not technically misleading.
- 11.15 In *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94, a developer relied on information in a s149 planning certificate, a letter from the council's solicitors and a conversation with the council's director of planning in relation to whether there were any impediments to developing the land. None of the information relied on disclosed the fact that the council was the recipient of a Risk Assessment Study (RAS) which recommended that council establish a Risk Reduction Zone in which the land was situated.
- 11.16 The RAS was prepared by the Department of Planning under commission from the Southern Sydney Region Organisation of Councils of which the appellant was a member council. It addressed potential risks to land and residential development due to the significant number of industrial and similar land uses in the area. The section 149 planning certificate was issued in 1993. The RAS was received by the council in 1985 and, although it was aware of

<sup>7</sup> *Stocklands v Manly Council* [2009] NSWLEC 1145

<sup>8</sup> See Clause 7 of Schedule 4 to EPA Regulations

<sup>9</sup> For example, *Wollongong City Council v Fregnan* [1982] 1 NSWLR 244; *Mid Density developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 209; *Port Stephens Shire Council v Booth* (2005) 148 LGERA 351

the recommendations, council acted contrary to the recommendations by approving development applications until after 1996. The developer's projects were approved in 1994.

- 11.17 The Court of Appeal held that there was no obligation on the council to disclose the RAS because it had not adopted it as a policy.<sup>10</sup>
- 11.18 By way of analogy, there may be an argument that unless and until Councils adopt the Mapping Information as policy, the Mapping Information might not be considered to be *advice on such other relevant matters affecting the land of which it may be aware* in the sense required by s149(5). Whilst Councils may be aware of the matter, they may not consider that the Mapping Information *affects the land* for some reason or another.
- 11.19 Such arguments however will turn on the particular facts of each case and must be treated with caution. Careful consideration will need to be given as to whether the hazards identified in the Mapping Information "affects the land" and whether thus is a matter which should be disclosed. In our view (and subject to the discussion above about giving proper consideration to the Mapping Information) the better argument is that such information "affects the land" and should be disclosed to be prudent, even if the Mapping Information is not adopted as a policy.
- 11.20 The question of obligations to disclose matters known to affect land (enabling landowners then to make their own informed decisions) is a different question to whether a Council is obligated to adopt, apply or act on that information.
- 11.21 We note also that the *Civil Liability Act 2000* also provides for some immunities and defences to Councils and other public authorities.<sup>11</sup> Examination of those provisions is outside the scope of SCCG's request for advice. Please let us know if you would like us to deal with those specific provisions.

## 12. **Good Faith**

- 12.1 The term 'good faith' is not defined in either the EPA Act or the LG Act. However the concept has undergone judicial consideration in cases alleging negligence against public authorities.
- 12.2 The concept of good faith was examined in *Mid Density developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 209 (**Mid Density**). In *Mid Density*, good faith was examined where a council officer, in completing a section 149 planning certificate, had relied on his own knowledge instead of searching the council's records which would have revealed that the property was subject to the risk of flooding. The Court held that:

*A party in the position of the council cannot be said to be acting in good faith within the meaning of the EPA Act, if it issues a s 149 certificate where no real attempt has been made to have recourse to the vital documentary information available to the council, and the council has no proper system to deal with requests for information of the type in question. Indeed, in the present case, as counsel for the appellant emphasised, the council officer whose responsibility it was to deal with the request for information consciously ignored the very records which would have supplied it.*

- 12.3 Their Honours also stated that, when considering the immunity for actions relating to flood advice:

*The statutory concept of 'good faith' with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority.*

<sup>10</sup>Per Fitzgerald AJA in *Jazabas* at 241

<sup>11</sup> See ss43 to 44 of the Civil Liability Act 2002 where public authorities are not liable for a breach of statutory duty unless the breach is so unreasonable that no other reasonable public authority would have acted so.

- 12.4 In *Armidale City Council v Finlayson* [2000] FCA 330, the council had not disclosed that the land in question had been severely contaminated, when the council was well aware of this contamination as it had attempted to compel the previous owners to remediate the site. The failure to disclose this information did not involve a genuine consideration of the risk. The Court held that council to have:

*simply failed to apply their minds to the question whether the contamination ought to be investigated so as to determine whether it required remediation. They did nothing effective about its implications. No serious attempt was made by Council to remedy the situation, although effective measures were possible.*

- 12.5 In *Port Stephens Shire Council v Booth* (2005) 148 LGERA 351, the council had issued a planning certificate which contained information regarding the land's exposure to airport noise from nearby airforce operations. The information in the planning certificate regarding the level of noise exposure (ANEF contour) was framed in a misleading way. The planning certificate also failed to disclose a report containing relevant information which was intentionally withheld from staff by the council's Mayor. The council argued that the further report was withheld because its findings were "doubtful". The Court disagreed with the council holding:

*In the present case, the failure to take reasonable care went beyond failure to have recourse to available information....It was plainly relevant to the staff's appreciation of potential noise affectation and thus the need for more full and accurate disclosure of ANEF zoning, and at the corporate level withholding relevant material for unknown and apparently private purposes is an impediment to proof of good faith.*

...

*There was not a casual act of negligence, but the systemic failure earlier described. In my opinion, the Council has not shown that it provided the advice concerning aircraft noise exposure in good faith.<sup>12</sup>*

- 12.6 Some general principles can be distilled from the cases in relation to good faith:
- (a) good faith requires more than just an honest attempt (or honest ineptitude);
  - (b) councils cannot "hide behind" an argument that the Mapping Information is doubtful, without proper consideration of its reliability;
  - (c) it is not a duty to guarantee that the data is accurate but a duty to act reasonably in ensuring that the data is as accurate as possible and the information communicated is not misleading; and
  - (d) each case will turn on its own facts.
- 12.7 In our view the cases in relation to good faith indicate that where Councils have been provided with the Mapping Information which has been prepared by a credible scientific organisation, Councils would be better placed to err on the side of caution and disclose the information as a "matter affecting land" pursuant to s.149(5). Provided there is a proper consideration of the Mapping Information and the material available to determine whether any doubt as to accuracy or scientific reliability is genuinely held and how it is relevant to the land in question, it is more likely that such disclosure would attract the statutory good faith immunities than where the Mapping Information is not disclosed.
- 12.8 We reiterate Councils are under no express statutory obligation to formally adopt the Mapping Information as their SLR projections or as policy (although see discussion concerning s.79C EPA Act above). However, in order to reduce future exposure, Councils

<sup>12</sup> Important as information held within the Council organisation can be implied or inferred to be "known".



should ensure proper consideration is given to the Mapping Information before determining a position on it.

- 12.9 Any decision not to adopt, release or use the Mapping Information should be based on sound grounds and provide a clearly justifiable position. If following release of the stage 2 reforms incorporating a hazard mapping methodology a Council for credible reasons determines to set different projections, those reasons should be documented and transparent.
- 12.10 Irrespective of process, if reasons are later found wanting, there may still be a risk of liability.

### **13. Concluding Remarks**

- 13.1 The retirement of the SLR Policy and Stage 1 Coastal Reforms has left Councils to determine their own SLR projections. The Government has not yet finalised the remainder of the reforms that will formalise the methodology for doing so. Presently the state agencies suggest recourse can be made to CSIRO SLR maps as one source of information.
- 13.2 In our view the immunities afforded under either the section 733 of the LG Act or section 149(6) of the EPA Act may be better preserved where Councils take the Mapping Information into consideration in the exercise of functions where issues as to exposure to Coastal inundation are relevant even if the Mapping Information is not formally adopted as policy.
- 13.3 Formal adoption of the Mapping Information as policy would render it information that Councils are statutorily obliged to include in planning certificates under section 149(2) and be a matter for consideration under section 79C (subject to questions of weight).
- 13.4 Councils are not necessarily obliged to adopt the Mapping Information or otherwise take action in respect of applying it. However, a decision not to do so should be informed by proper consideration and supported by cogent readily transparent reasoning to preserve, insofar as possible, councils position in defence of future claims. If reasoning is absent or inadequate and loss is suffered which is held to be as a consequence of negligence, then there may be some exposure.
- 13.5 The fact that councils are not statutorily obliged to adopt the Mapping Information as policy or otherwise take action in respect of it does not affect any obligation to disclose the information on say a section 149(5) certificate. The better argument is that it comprises 'advice on such other relevant matters affecting the land' of which councils are aware and should be disclosed. The terms of any such notation on a planning certificate should be carefully drafted.
- 13.6 There may be some benefit in Coastal Councils collectively assessing and, if considered appropriate, relying on the CSIRO Mapping Information to assist with the evaluation of benchmark guidelines as part of the Stage 2 Reforms.
- 13.7 We again emphasise that the existence of actionable duties of care and potential liability for negligence, including the exercise of statutory functions and duties, are dependant on individual facts and circumstances. Thus our comments must be understood as generalisations only and should not be relied on for any purpose other than general commentary.
- 13.8 Councils should seek specific advice informed by their individual circumstances. Such advice would prudently involve Council's insurers.

We trust the above is of assistance. Should you have any queries please contact Kirston Gerathy of our office.

Yours faithfully  
**HWL Ebsworth**



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