

7 July 2017

Our Ref: Submission

Department of Planning and Environment
Evelyn Ivinson – Team Leader Land Release
GPO Box 39
Sydney, NSW 2001

By email: Evelyn.Ivinson@planning.nsw.gov.au

Dear Evelyn,

RE: Submission - North West Priority Growth Area Land Use and Infrastructure Implementation Plan

GLN has been engaged by the owners of Lot 211, DP 830505, 36 Garfield Road, Riverstone, comprising the majority of the Riverstone West Precinct, to review the North West Priority Growth Area – Implementation Plan (the **Plan**) and related exhibition documents including an Explanation of Intended Effect (**EIE**) on proposed amendments to *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP)*.

The primary focus of the exhibition documents is on future housing development. Despite this, this submission reviews the exhibition documents in relation to the subject site (Lot 211) and provides comments to consider the impacts on the subject site to better facilitate future employment development within the Riverstone West Precinct.

The key issues that we have identified following a review of the exhibition material are summarised as follows:

- Applicable Development Control Plan for the Riverstone West Precinct.
- Amendment to Clause 20 of the Growth Centres SEPP to facilitate future development of the Riverstone West Precinct.
- Access to the Riverstone West Precinct
- Consideration of a Riverstone by-pass road to minimise impacts on the Riverstone town centre.

These issues are discussed below.

1. Applicable Development Control Plan

Currently the Riverstone West Precinct is subject to a standalone DCP – Riverstone West Precinct DCP 2009 (**DCP**). The Growth Centres Amending DCP 2017 (**Amending DCP**) identifies under 'Name and

application of this plan' (p.3) that '*This DCP applies to Precincts, or part of Precincts, within the Local Government Area where precinct planning has been completed, as shown in Figure 1*'. This plan includes the Riverstone West Precinct. However, the amending DCP doesn't seek to merge any existing controls from the Riverstone West DCP into the amending DCP.

It is recommended that this be clarified by having the amending DCP exclude the Riverstone West Precinct. Relevant controls relating to the Riverstone West Precinct are encompassed within a separate standalone DCP. Any proposed changes to that DCP should be separately exhibited for comment.

2. Amendment to Clause 20 of the Growth Centres SEPP

A Planning Proposal was lodged with the Department of Planning and Environment on 1 July 2015 to amend clause 20 of the Growth Centres SEPP. A copy of the Planning Proposal is attached at **Appendix A**. This Planning Proposal is still under assessment and has not yet been finalised.

There is now an opportunity to finalise this Planning Proposal and update the Growth Centres SEPP concurrently as part of the changes being made in relation to the Plan.

Clause 20(2) currently states:

Despite any other provision of this Policy (including any Precinct Plan), the consent authority must not grant consent for development on land to which this clause applies unless it is satisfied that the proposed development:

- (a) will be undertaken in a manner that is consistent with the Floodplain Management Strategy (being part of the Riverstone West Precinct Development Control Plan), and*
- (b) does not increase flood levels on adjoining properties in events up to the design 100 year recurrence flood, and*
- (c) limits any increases in flood velocities on adjoining properties in events up to the design 100 year recurrence flood to minor increases only, and*
- (d) is not likely to result in adverse flood impacts on adjoining properties (including during any construction stage of the proposed development).*

The NSW Land and Environment Court determined an appeal for a Development Application within the Riverstone West Precinct which proposed fill in accordance with the Precinct Planning documents [Case No. 10308 of 2014]. The Court considered the Floodplain Management Strategy (FMS) and Flood Impact Assessment (FIA) that was lodged in support of the DA which involved selective cut within Lot 211 and a net loss of floodplain storage below 17.3m AHD of 2.65 million m³. The Court noted in its decision that:

Subclause 20(2)(a) requires that the proposed development will be undertaken in a manner that is consistent with the Floodplain Management Strategy which is part of the RWDCP [Appendix C]. Therefore, the SEPP requires the application of the DCP. Notwithstanding the deficiencies in RWDCP (discussed elsewhere), the DCP in turn consistently requires demonstration of compliance with the SEPP. Apart from the exceptions noted below, we are generally satisfied that the applicant's detailed Floodplain Management Strategy, to the extent that this underpins the proposed development, complies with Appendix C of the RWDCP' [95].

The Court considered the wording of subclause 20(2)(b) within the Growth Centres SEPP as the key to whether consent could be granted to the proposed development. Senior Counsel for the applicant Riverstone Parade Pty Ltd submitted that 'does not increase' should be interpreted as 'does not materially increase' particularly given the sensitivities of modelling. However, the Court did not accept this interpretation.

In our view, subclause 20(2)(b) is the key to whether consent can be granted to the proposed development. This subclause requires the consent authority to reach a state of satisfaction that the proposed development ‘does not increase’ flood levels on adjoining properties up to the design 100 year recurrence flood. [96]

...

In our view ‘does not increase’ has the same meaning as ‘there will be no increase’. The ordinary meaning of ‘no’ (Macquarie Dictionary) in this context is “not in any degree”, and for ‘not’ – “a word expressing negation, denial, refusal or prohibition”. In our view, this subclause prohibits any development that would lead to an increase in flood levels on adjoining properties. There is no qualification of the word ‘increase’ other than a prohibition through the use of ‘not’. This is contrasted with the qualifications of the degree of flooding or level of impact allowed in subclauses (c) and (d).’ [97]

...

At [17] of the joint report, and confirmed in oral evidence, the experts agree that the proposed development will increase flood levels outside Lot 211 and therefore on adjoining properties; albeit the increase is less than 10 mm for most modelled flood scenarios, a figure acknowledged to be within the sensitivities of the models. While we note the dispute between the experts about the 100 year ARI Hawkesbury flood with a 20 year ARI Eastern Creek flood and its significance, the potential increase of this combination is 40 mm. Even if we accept Mr Thomas' considered and reasonable explanation of the rarity of this event and discard this combination, as there will be an increase in flood levels arising from the other modelled events, we cannot grant consent to the development application before us. [98]

The Planning Proposal was therefore lodged seeking to amend the wording within clause 20(2)(b) of the Growth Centres SEPP to redress its prohibitive interpretation and facilitate future development in accordance with the Growth Centres SEPP. The intention is to provide wording that ensures future development does not cause unacceptable flooding but allow development to proceed as envisaged through the initial rezoning process.

It is recommended that the Department finalise the Planning Proposal to amend clause 20 concurrently with other changes to the Growth Centres SEPP. This change will reduce uncertainty and facilitate future employment development within the Riverstone West Precinct that will jobs to support the significant increase in housing and population in the surrounding Precincts.

3. Access to the Riverstone West Precinct

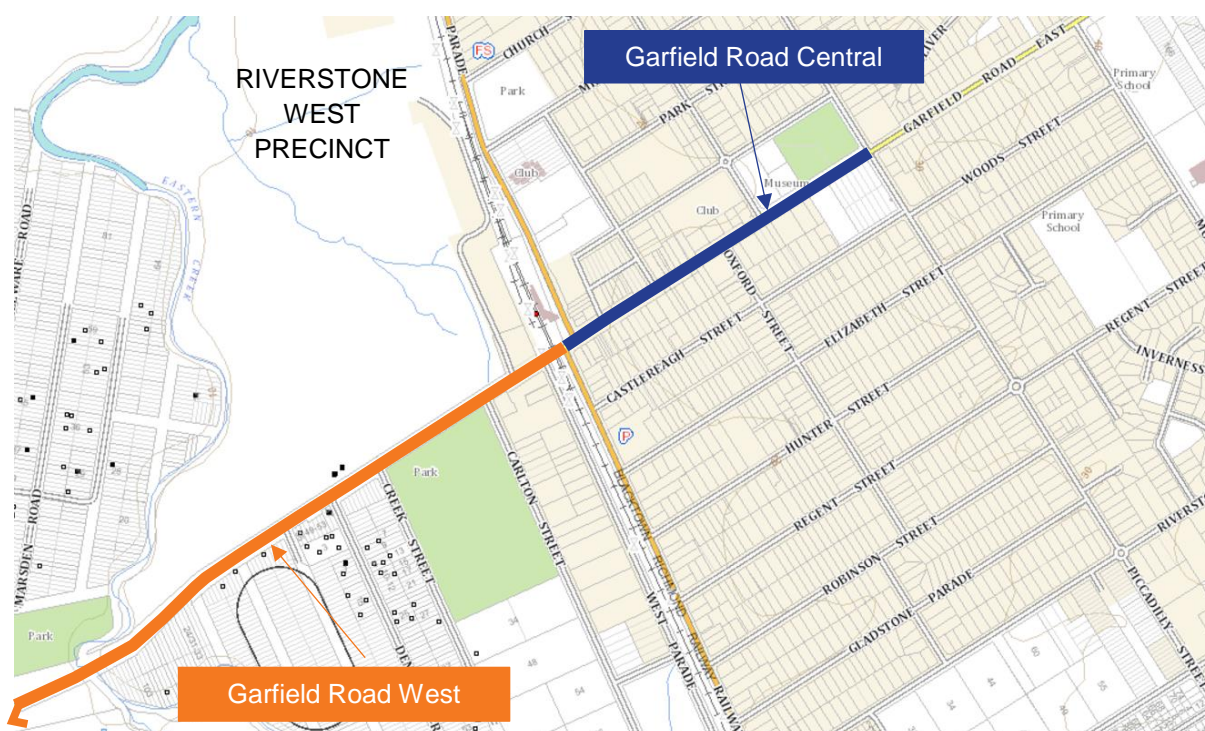
Vehicle access to the Riverstone West Precinct, is primarily provided via a railway level crossings to the east of the site off Riverstone Parade. Transport for NSW (Sydney Trains) has restricted access over the level crossing which limits access to the Precinct and its future development. Upgraded roads across the Richmond railway line, including Bandon Road and a by-pass connection (refer to Point 4 of this submission) are vital in providing connections into the Riverstone West Precinct and are paramount in facilitating future development.

Table 8 of the Plan identifies the timing and delivery of key infrastructure to facilitate access over the Richmond railway line. This is summarised in **Table 1** below.

Table 1 Timing and delivery of key transport infrastructure relating to Riverstone West Precinct

Infrastructure	Timing and delivery
Bandon Road	2026 – to be funded by the SIC
Garfield Road Central (Within Riverstone Central – Railway Terrace to 600m east at approx. Piccadilly Street)	2029– to be funded by the SIC
Garfield Road West (Richmond Road to Railway Terrace – 4km on existing)	2031 -- to be funded by the SIC

The location of the Garfield Road infrastructure works have been illustrated in **Figure 1**.



Source: Six Maps

Figure 1 Garfield Road Infrastructure works

As shown within **Table 1**, Bandon Road is identified as the first crossing over the Richmond railway line to be completed. This crossing is proposed to be delivered in 2026 in 9 years’ time. The Garfield Road upgrade is proposed to be delivered in three stages with Garfield Road Central and Garfield Road West straddling either side of the Richmond railway line. It is unclear how the delivery of this grade separated crossing will be achieved when the proposed works are split within two different packages of works to be delivered at different times.

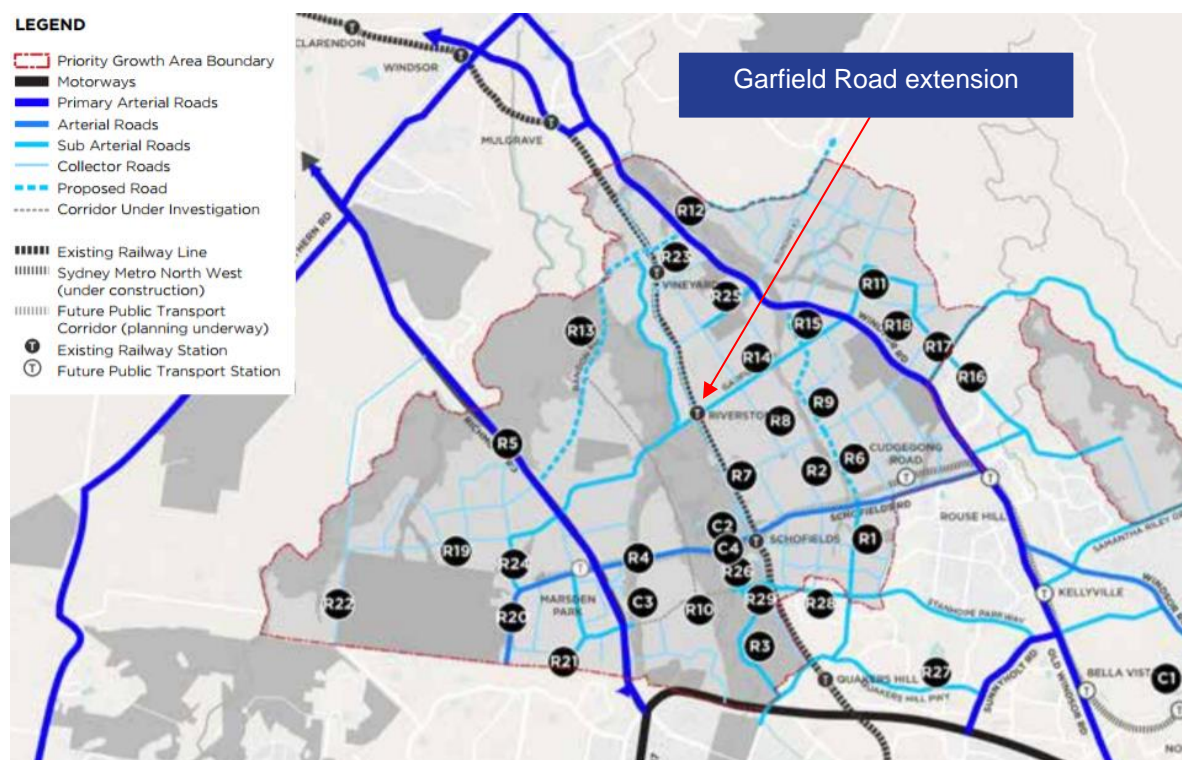
Until upgraded access over the Richmond railway line to the Riverstone West Precinct is provided, the future development of this Precinct for employment uses will be sterilised. This is due to limitations by Sydney Trains on the number of vehicles crossing the railway line. This is a critical issue for the future development of the Riverstone West Precinct which will provide employment generating uses and support the significant increase in housing in the surrounding Precincts. The timing and delivery of either Bandon Road or the alternative bypass road option outlined under point 4 of this submission needs to be brought forward to support this future development.

Both Bandon Road and the Riverstone West bypass are capable of being constructed now and

shouldn't be delayed until 2026 and beyond. This infrastructure is critical to unlocking development in the Riverstone West Precinct which was rezoned in 2009.

4. Consideration of an alternative Riverstone by-pass road

A key consideration related to traffic and transport infrastructure for the Riverstone area is the extension of Garfield Road over the Richmond railway line. This existing crossing is currently provided by way of a level crossing and is proposed to be upgraded as identified within the Plan (shown as 'R14' within Figure 20 Infrastructure Strategy (Transport)) - refer to **Figure 2** below.



Source: NWPGA Implementation Plan, p.38

Figure 2 Location of Garfield Road Extension

The proposed alignment of the Garfield Road extension relies on the provision of either a tunnel below, or a bridge over, the existing railway infrastructure. Both options have several flaws impacting the delivery of this infrastructure. These include:

- **Flooding**
This will limit the delivery of this extension road as a tunnel. If the extension is delivered as a bridge, it could limit the future potential to upgrade the railway infrastructure above the 1 in 100 year flood event.
- **Impacts to the connectivity of the town centre**
A tunnel or bridge would create a linear barrier through the town centre. This would reduce connectivity within the town centre, effectively creating a northern town centre and southern town centre. This is likely to have adverse impacts on the overall operation of the town centre and how people move throughout it.
- **Level difference and impacts on adjoining properties**
Both the tunnel and bridge option would require significant lead-in works to achieve the necessary clearances over or under the railway infrastructure. This is likely to result in various

issues for the future redevelopment of adjoining land including overlooking and privacy impacts, noise, solar access, air quality and access issues.

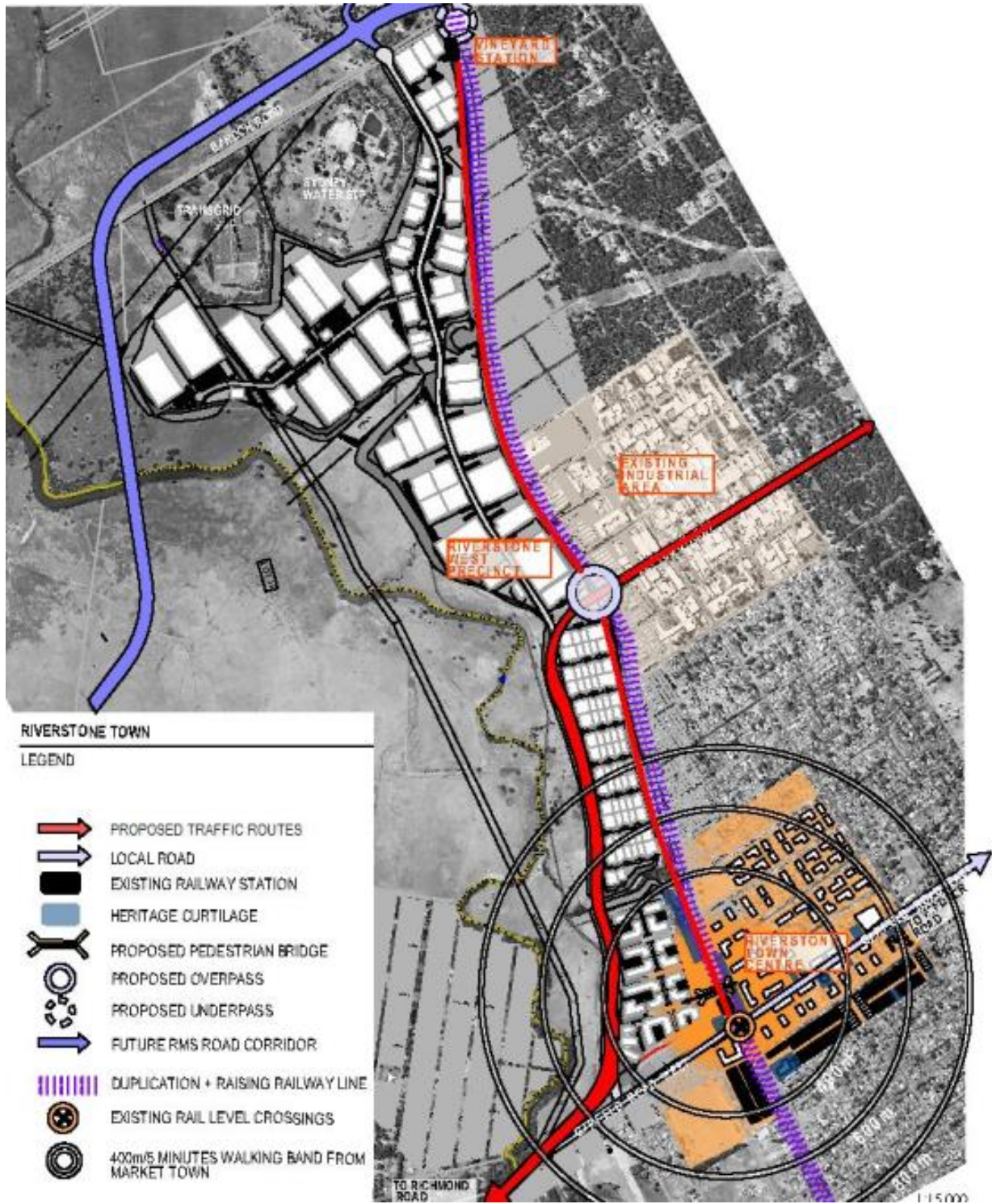
- Traffic impacts

The grade separated crossing over the Richmond railway line, if retained along the existing alignment of Garfield Road, would have significant traffic implications during construction. By constructing an alternate by-pass outside of the town centre, it would minimise impacts to the town centre and local traffic within the area.

An alternative to the Garfield Road extension along the existing road alignment would be to deliver this grade separated crossing further north which bypasses the town centre – refer to **Figure 3**. The benefits of this bypass option include:

- ✓ It would divert non-local traffic around the town centre through the Riverstone West Precinct onto a sub-arterial road proposed to be constructed through this Precinct.
- ✓ It resolves issues associated with dissecting the town centre and would retain the character and connectivity within the existing Riverstone town centre.
- ✓ The bypass option could be developed now. The owner of Lot 211 (Riverstone West Precinct) is keen to facilitate the delivery of this bypass to provide a better traffic and transport outcome for the area and to future employment uses within Riverstone West.
- ✓ The point at which the bypass crosses the railway infrastructure is not affected by the 1 in 100-year flood event. Therefore, unlike the railway infrastructure at the intersection with Garfield Road, it is unlikely that the railway will require lifting to address flood impacts in the future.
- ✓ The connection of this bypass into the Riverstone West Precinct is facilitated by a sub-arterial road already proposed as part of the Precinct Planning for this area.
- ✓ The bypass road would traverse through Industrial zoned land. This would limit impacts on future residential development and the potential redevelopment of the Riverstone town centre which is likely to include residential land uses (i.e. shop top housing).
- ✓ The levels proposed within the Riverstone West Precinct, which includes the construction of the sub-arterial road above the 1 in 100 flood event, would provide a more sympathetic transition compared with the current location at the intersection of Garfield Road and the railway line.
- ✓ It would minimise traffic impacts on the Riverstone town centre due to the construction of the bypass being separated from the town.

The bypass could be encapsulated within the Plan by including it within Figure 20 as an alternative option. Its recognition in the Plan would then facilitate further investigation into this bypass option, and provides more flexibility in resolving potential issues that will likely be experienced with the current alignment shown within the Plan.



Source: Martin and Ollmann Architects

Figure 3 Riverstone Town Centre bypass option

Conclusion

The Riverstone West Precinct, which was zoned for employment uses in 2009, will play a significant role in supporting the increase in housing in the surrounding North West Priority Growth Area Precincts. However, there are several issues preventing the development of the Precinct which the Department can assist to unlock as part of the proposed amendments. These issues are summarised as:

- Clarifying the applicable DCP for the Riverstone West Precinct.
- Finalising the current Planning Proposal to amend Clause 20 of the Growth Centres SEPP concurrently with the current suite of changes to the Growth Centres SEPP to facilitate future development within the Riverstone West Precinct.
- Reviewing the current transport infrastructure works to provide access across the Richmond railway line to the Riverstone West Precinct facilitate the development of the Precinct for employment uses.
- Consideration of a Riverstone by-pass road to minimise impacts on the Riverstone town centre and assist in providing access to the Riverstone West Precinct in a more timely manner.

Resolving these issues would assist in delivering much needed employment generating uses within the North West Priority Growth Area.

To date, these issues have resulted in a number of delays to the overall development of the Precinct. It is therefore recommended that the Department resolve these issues holistically with the other changes proposed to the Growth Centres SEPP to bring forward employment development in the Riverstone West Precinct.

Yours faithfully

GLN PLANNING PTY LTD



PIP HYDE
ASSOCIATE DIRECTOR

Planning Proposal

Amendment to clause 20 of the Growth Centres SEPP

Prepared for:

Sakkara

July 2015

Project No 10228



Planning Proposal

Riverstone West

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Date of Final Issue: 1 July 2015
File Path: R:\Projects\10228 Riverstone West PP\Report\GLN10228.doc
Project Manager: Paul Grech
Client: Sakkara
Project Number: 10228

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Document history and status

Version	Issued To	Qty	Date	Prepared by:	Reviewed by:
Draft	Sakkara	1-e	16.06.15	P Sanders	P Grech
Final	Department of Environment & Planning Sakkara	3-h + 1-e 1-h + 1e	01.07.15	P Sanders	P Grech

1 July 2015
GLN10228.doc

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1.0 Introduction

This Planning Proposal has been prepared by GLN Planning Pty Ltd (**GLN**) on behalf of Sakkara. It relates to the Riverstone West Precinct (**RWP**) and the adjoining lot to the west (lot 11) which is located in the Marsden Park North Precinct (the **subject site**).

This Planning Proposal is submitted to the NSW Department of Planning and Environment (**DPE**) to accompany a request to amend State Environmental Planning Policy (Sydney Growth Centres) 2006 (**Growth Centres SEPP**) in accordance with the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

The amendment relates to clause 20 of the Growth Centres SEPP – *Development on and near certain land at Riverstone West*. Clause 20 applies to properties identified within the Growth Centres SEPP – Development Control Map. The amendment aims to modify the wording of clause 20 to facilitate planned development within Lot 211, DP 830505.

This report concludes that the Planning Proposal should be supported and recommended for Gateway Determination.

1.1 Background

Rezoning of Riverstone West

The Riverstone West Precinct was formally rezoned by the Minister for Planning on 7 August 2009. The Riverstone West Precinct Development Control Plan (**DCP**), which is the accompanying precinct planning document providing guidelines for future development was then adopted by the (then) Director General of the DPE on 19 August 2009.

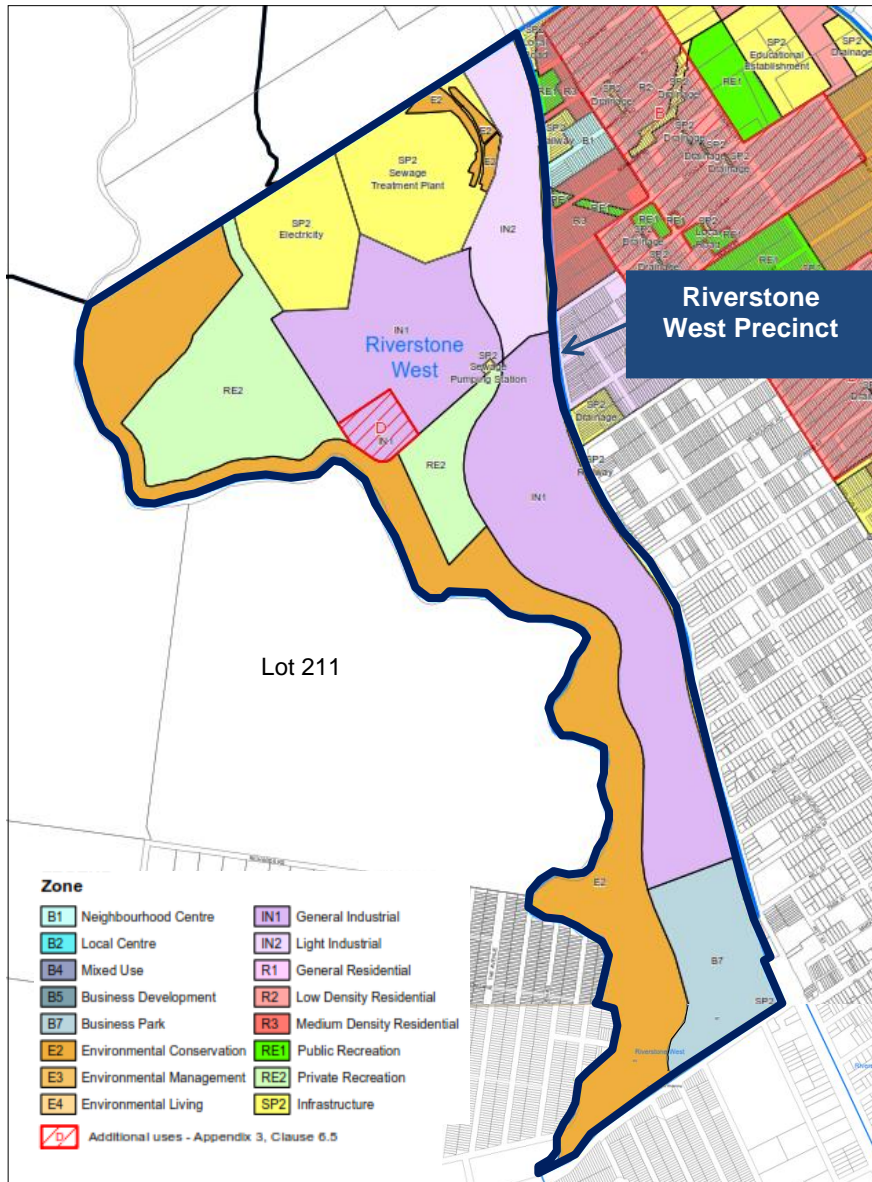
At the time the Riverstone West Precinct (**RWP**) was rezoned, it was held in common ownership with land in the adjoining Marsden Park North Precinct (Lot 11, DP 816720). Marsden Park North is yet to be rezoned for urban development. Following the rezoning of the RWP, the properties were sold separately by the Mortgagees of the previous owner.

Under clause 20 of the Growth Centres SEPP, a Floodplain Management Strategy (**FMS**) is required to be prepared in relation to both the RWP and Lot 11. However, these properties are no longer held by the same owner.

Planning Context

The RWP is zoned under Appendix 3 of the Growth Centres SEPP for various urban purposes as depicted by **Figure 1**. It was the first employment Precinct in the North West Growth Centre to be rezoned by the Government and is anticipated to provide around 12,000 jobs once developed.

The Precinct is ideally located with access to two railway stations (Vineyard and Riverstone). It is also close to major road connections within the immediate area including Garfield Road, Windsor Road, Richmond Road and a planned link road to the north of the Precinct, thereby providing excellent transport options.



Source: NSW Department of Planning and Infrastructure. Growth Centres SEPP

Figure 1 Land use zoning of RWP

The Precinct Plan for RWP was based on a flood storage loss of 2.65 million m³ once the Precinct is fully developed. This is acknowledged within Council's report relating to the appeal associated with DA-13-1845, dated 27 November 2014. Council's report provides a background and outlines assumptions made in relation to the net fill in the floodplain of the RWP. In particular it states at Section 2.5(a) and (b) of that report:

a. The DCP provides floodplain management controls in Appendix C and shows indicative sketches of the areas of cut and fill in Figures C2 to C4. These sketches are shown as contour plans and are not supported with indicative volumes of cut and fill. However they form the basis for filling of the floodplain as adopted by the Department of Planning and Environment for the site. The strategy in the DCP proposed the provision of compensatory flood storage within Lot 11 which adjoins the development site. Lot 11 is no longer available to the applicant to carry out compensatory excavation, as Lot 11 is now owned by a separate owner to the subject land.

b. Council was provided with a copy of the surface modelling used to establish the basis of Figures C2 to C4. An analysis of this information indicates that there will be a loss of about 2,650,000 m³ of flood storage for development of the full site. This loss of flood storage is a development principle that now underpins the Precinct Plan and DCP for the site. This means that this loss of flood storage has been accepted by the NSW Government, in principle, as a first layer of assessment of the proposal. However, the overall impact on the floodplain external to the site is the second layer of assessment.

Based on the outcome required by the RWP Precinct Plan, Development Applications have been lodged with Council for development within the RWP. These Development Applications are outlined below.

Development Application No.09-754

A Development Application (**DA**) (DA-09-754) was lodged on 15 April 2009 seeking approval for bulk earthworks with associated site compound, car parking, internal haul roads and tree removal in the north-eastern corner of the site. The proposal consisted of up to 640,000 cubic metres of cut and 560,000 cubic metres of fill with the excess fill to be stockpiled on-site.

Council implicitly considered this application 'minor' under clause 20(3) of the Growth Centres SEPP and that it would not result in unacceptable adverse flood impacts on adjoining properties and therefore a Flood Management Strategy was not required by Council. The DA was then approved by Council on 17 December 2009. That DA has now lapsed.

Development Application No.13-1845

The current owners lodged a DA (No.13-1845) on 30 September 2013 seeking approval for bulk earthworks, ground contouring, vegetation removal and extended hours of construction within the north eastern corner of the site. The proposal involved 1,400,000 cubic metres of cut to fill on-site and the importation of around 125,000 cubic metres of excavated natural material.

DA No.13-1845 was accompanied by a Floodplain Management Strategy (FMS). The FMS addressed all lands within the RWP and Lot 11, as required by clause 20 of the Growth Centres SEPP. The FMS concluded that the proposed final landform could facilitate planned development with no unacceptable flood impacts. This could be achieved without any earthworks within Lot 11 but involved a tailoring of the extent of the fill platforms and additional compensatory excavation within those parts of the RWP zoned for open space and environmental management.

The applicant subsequently lodged an appeal on 12 May 2014 against Council's deemed refusal of the DA under 97(1)(b) of the EP&A Act. The appeal was dismissed in the decision of *Riverstone Parade Pty Limited v Blacktown City Council [2015] NSWLEC (RWP appeal)*.

The issues outlined within the Statement of Facts and Contentions (**SoFC**) for the appeal are summarised below:

- Impacts on the floodplain
- Precedent and cumulative impacts
- Impact on traffic movements on the Vineyard Railway Level Crossing
- Inadequacy of the Flood Emergency Response Plan
- Source of fill.

As part of the appeal, the Court considered the FMS and a Flood Impact Assessment (FIA) that had been prepared to support the DA. The fill option assessed as part of the FMS and FIA involved selective cut within Lot 211 and a net loss of floodplain storage below 17.3m AHD of 2.65 Million m³. The Court noted within its decision that:

Subclause 20(2)(a) requires that the proposed development will be undertaken in a manner that is consistent with the Floodplain Management Strategy which is part of the RWDCP [Appendix C]. Therefore, the SEPP requires the application of the DCP. Notwithstanding the deficiencies in RWDCP (discussed elsewhere), the DCP in turn consistently requires demonstration of compliance with the SEPP. Apart from the exceptions noted below, we are generally satisfied that the applicant's detailed Floodplain Management Strategy, to the extent that this underpins the proposed development, complies with Appendix C of the RWDCP' [95].

The Court considered the wording of subclause 20(2)(b) within the Growth Centres SEPP as the key to whether consent could be granted to the proposed development. Senior Counsel for the applicant Riverstone Parade Pty Ltd submitted that 'does not increase' should be interpreted as 'does not materially increase' particularly given the sensitivities of modelling. However the Court did not accept this interpretation.

In our view, subclause 20(2)(b) is the key to whether consent can be granted to the proposed development. This subclause requires the consent authority to reach a state of satisfaction that the proposed development 'does not increase flood levels on adjoining properties up to the design 100 year recurrence flood.' [96]

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In our view 'does not increase' has the same meaning as 'there will be no increase'. The ordinary meaning of 'no' (Macquarie Dictionary) in this context is "not in any degree", and for 'not' – "a word expressing negation, denial, refusal or prohibition". In our view, this subclause prohibits any development that would lead to an increase in flood levels on adjoining properties. There is no qualification of the word 'increase' other than a prohibition through the use of 'not'. This is contrasted with the qualifications of the degree of flooding or level of impact allowed in subclauses (c) and (d).' [97]

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At [17] of the joint report, and confirmed in oral evidence, the experts agree that the proposed development will increase flood levels outside Lot 211 and therefore on adjoining properties; albeit the increase is less than 10 mm for most modelled flood scenarios, a figure acknowledged to be within the sensitivities of the models. While we note the dispute between the experts about the 100 year ARI Hawkesbury flood with a 20 year ARI Eastern Creek flood and its significance, the potential increase of this combination is 40 mm. Even if we accept Mr Thomas' considered and reasonable explanation of the rarity of this event and discard this combination, as there will be an increase in flood levels arising from the other modelled events, we cannot grant consent to the development application before us. [98]

The planning proposal seeks to amend wording within clause 20(2)(b) of the Growth Centres SEPP to redress its prohibitive interpretation. The intention is to provide wording that ensures proposed development does not cause unacceptable flooding but allows planned development to proceed as envisaged through the initial rezoning process under the Growth Centres SEPP in 2009.

Drafting amendments are also suggested to clause 20(2)(a) as part of this planning proposal to provide for consistency of interpretation between the Growth Centres SEPP and the DCP as the FMS does not form part of the DCP but states how the FMS should be undertaken and what it should contain.

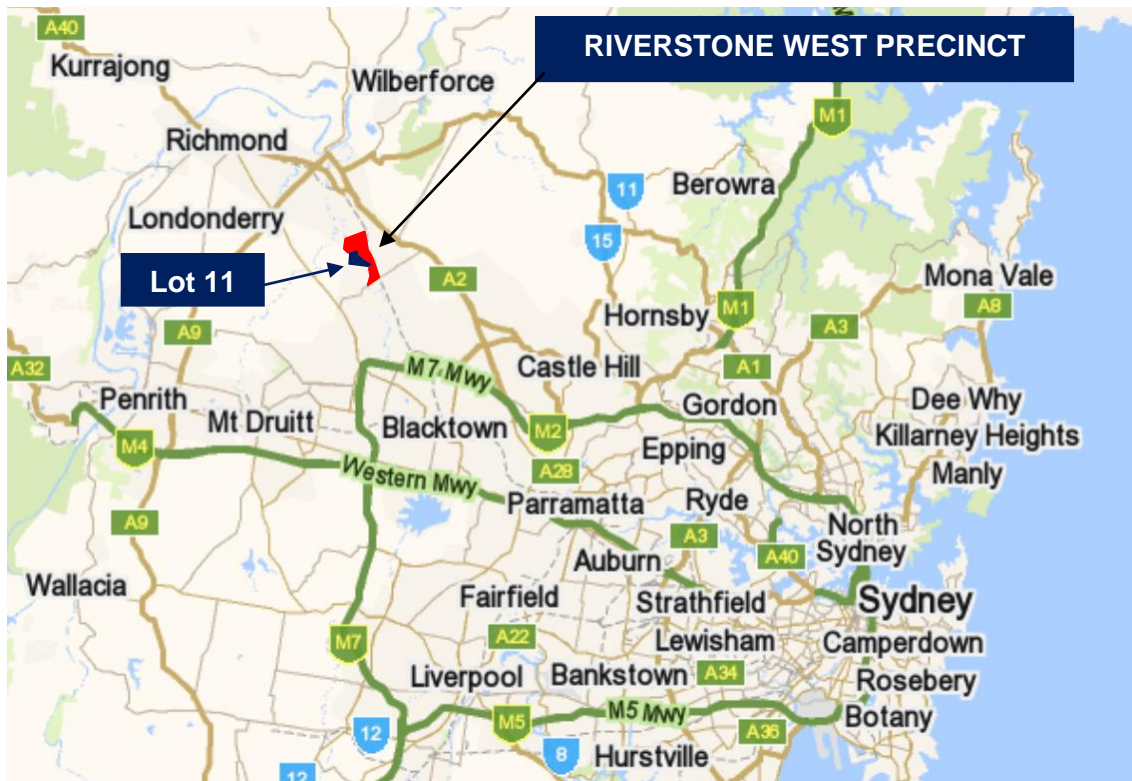
Drafting clarification would also assist future interpretation of clauses 20(2)(c) and (d) as discussed in section 4 below.

A full copy of the court decision is provided as **Appendix A**.

2.0 Site Analysis

2.1 Site Location

The subject site is situated within both the RWP and Marsden Park North Precinct (MPNP) which forms part of the NSW Government's North West Growth Centre. Both precincts are located within the north-west of the Sydney metropolitan area (Figure 1).



Source: Whereis

Figure 1 Location of the subject site

The site is approximately 52km north-west of the Sydney CBD, 15km to the north-west of the Blacktown CBD and 8km to the west of the Rouse Hill town centre. The area is largely comprised of grazing and agricultural type uses with some existing industrial uses and residential dwellings within the southern end of the Precinct.

The RWP was the first employment Precinct within the Growth Centres to be rezoned which occurred on 7 August 2009. The MPNP has been released for precinct planning by the Minister but is yet to be rezoned.

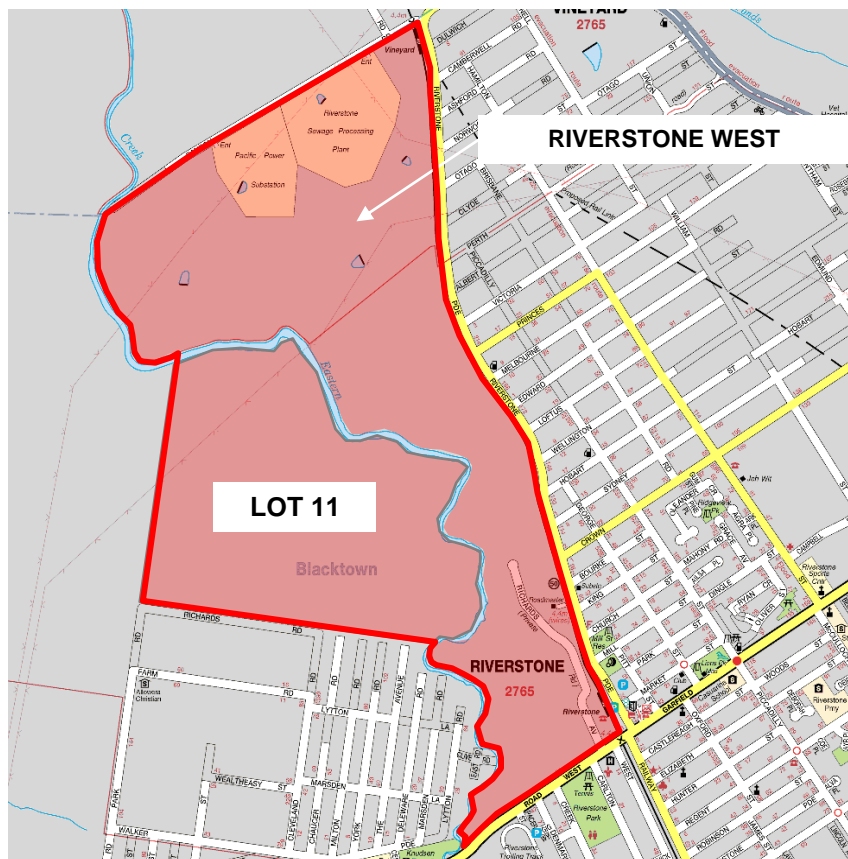
2.2 Site Description

The subject site forms part of the RWP and Marsden Park North Precinct and consists of six separate properties – refer to **Table 1**.

Table 1 Properties comprising subject site

Property	Details	Precinct
Lot 211, DP 830505	Sakkara's site (largest lot within the RWP)	Riverstone West
Lot 210, DP 830505	Transgrid Electricity Substation	Riverstone West
Lot 1, DP 598194	Transgrid	Riverstone West
Lot 1, DP 595977	Sydney Water Sewage Treatment Plant	Riverstone West
Lot 10, DP 736235	Heritage listed shop (4 Garfield Road West)	Riverstone West
Lot 11, DP 816720	Site adjoins the RWP to the west	Marsden Park North

The subject site adjoins the Richmond Railway line to the east, open grazing land and Richards Road to the west, Bandon Road to the north and Garfield Road West to the south as illustrated within **Figure 2**.



Source: UBD

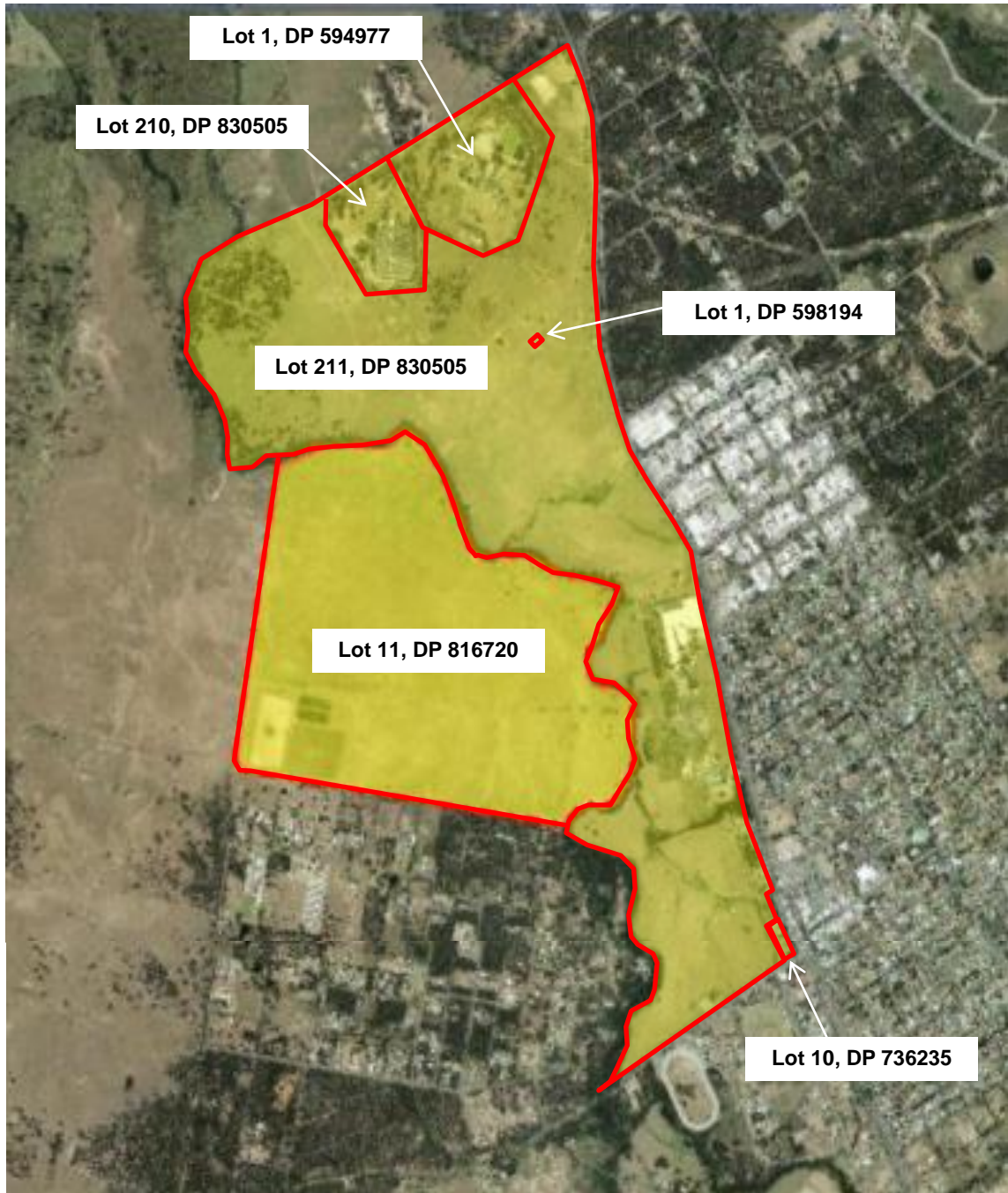
Figure 2 Subject site

The subject site has a total area of approximately 440 hectares. Various vehicle access points are provided to access each individual lot.

The largest parcel of land within the RWP is Lot 211. This lot contains a mix of existing uses. The site is largely grassed and has previously been used for animal grazing. In the southern end of the site, along Richards Road (private road), are existing residential dwellings that have local heritage significance. Centrally, along the eastern boundary are existing industrial buildings that are currently used by a logistics company (Roadmaster).

Three of the lots within the subject site are used for the provision of utilities. Each of these lots are located towards the northern end of the RWP. They include a Transgrid Electricity Substation (Lot 210, DP 830505 and Lot 1, DP 598194) and Sydney Water Sewage Treatment Plant (Lot 1, DP 595977).

There is an existing shop (Lot 10, DP 736235, 4 Garfield Road) located in the south-eastern corner of the site. This building has local heritage significance being described as the 'former Butcher's Shop'. Lot 11 is currently vacant and has previously been used for the grazing of animals.

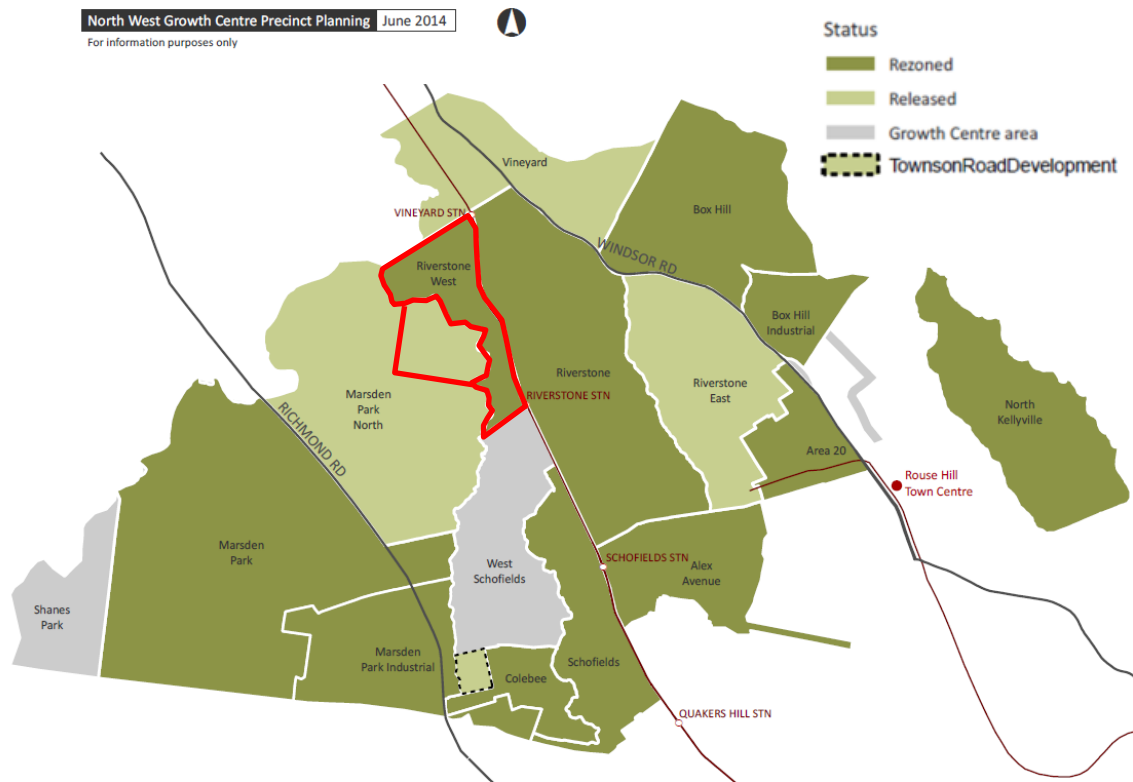


Source: Six Maps

Figure 3 Aerial view of subject site

2.3 Surrounding Development

The subject site adjoins a number of other North West Growth Centre precincts. The status of these precincts is illustrated within **Figure 4** below.



Source: Department of Planning and Environment

Figure 4 Status of North West Growth Centre Precincts

The surrounding areas to the north and west are primarily comprised of rural land holding and are used for grazing with smaller rural residential lots located in the south-west. To the south of the site are various recreational facilities (netball courts, cricket field and nets, football field and trotting track) and some established residential properties.

On the eastern side of the Richmond Railway is the Riverstone Precinct. This area is comprised of established residential properties, an industrial precinct and largely undeveloped residential zoned land within the northern end of the Precinct known as the 'scheduled lands'.

3.0 Current Planning Controls

3.1 Relevant Environmental Planning Instruments

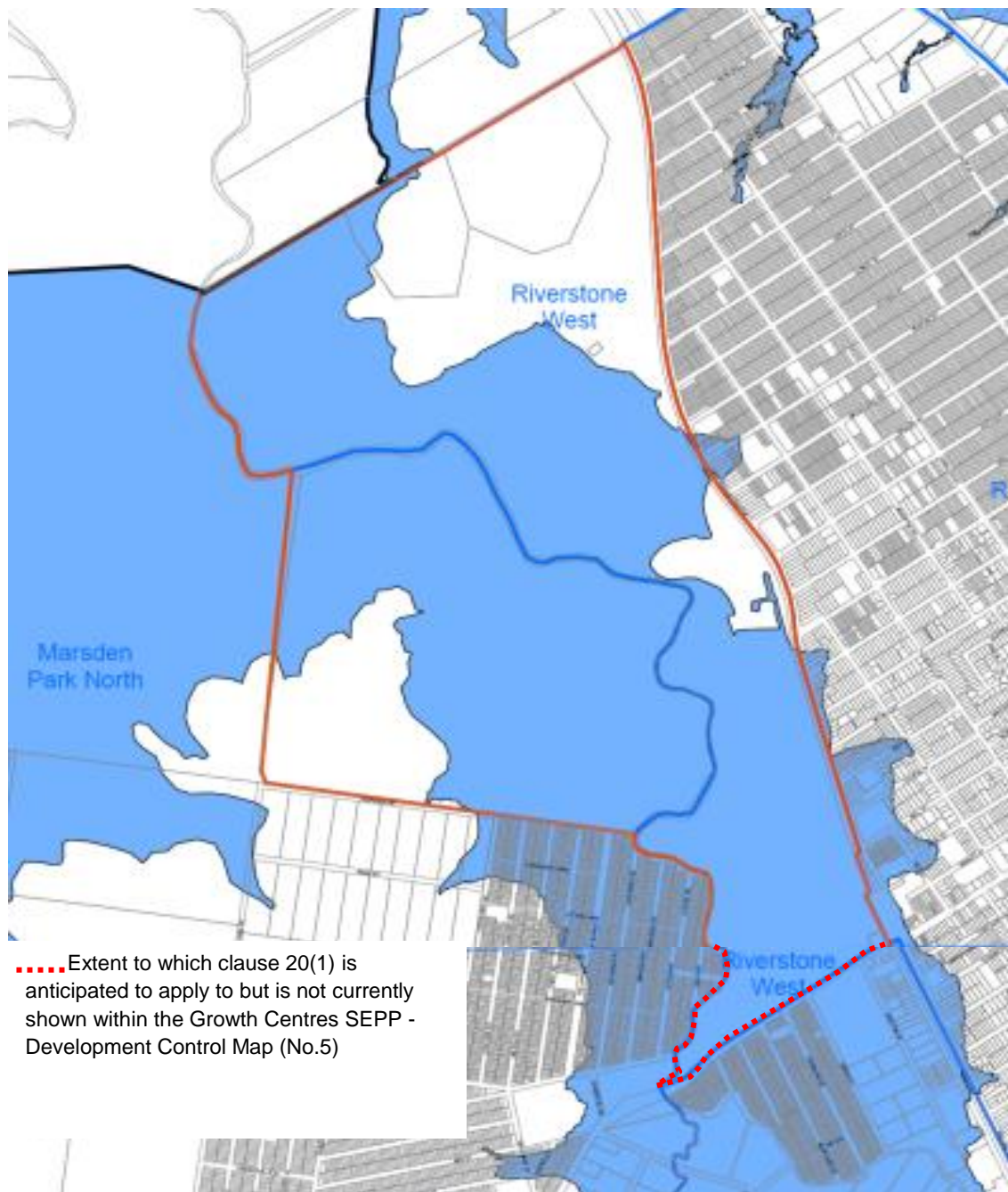
The principal planning instruments applying to the subject site are *State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP)* and *Blacktown Local Environmental Plan 1988 (BLEP 1988)*. While BLEP 1988 applies to part of the subject site (Lot 11), it is not relevant for the purposes of this Planning Proposal.

The subject site is based on the properties identified within the Development Control Map under the Growth Centres SEPP. This map identifies the area which clause 20(1) of the Growth Centres SEPP applies, being the subject site.

The relevant planning control proposed to be modified under this Planning Proposal is clause 20 of the Growth Centres SEPP. This clause applies to the subject site and is outlined within **Table 2**.

Table 2 Clause 20 of the Growth Centres SEPP

Clause	Matter	Requirement
20	Development on and near certain land at Riverstone West	<p>(1) This clause applies to the land shown outlined in red on the North West Growth Centre Development Control Map (Figure 5).</p> <p>(2) Despite any other provision of this Policy (including any Precinct Plan), the consent authority must not grant consent for development on land to which this clause applies unless it is satisfied that the proposed development:</p> <ul style="list-style-type: none"> (a) will be undertaken in a manner that is consistent with the Floodplain Management Strategy (being part of the Riverstone West Precinct Development Control Plan), and (b) does not increase flood levels on adjoining properties in events up to the design 100 year recurrence flood, and (c) limits any increases in flood velocities on adjoining properties in events up to the design 100 year recurrence flood to minor increases only, and (d) is not likely to result in adverse flood impacts on adjoining properties (including during any construction stage of the proposed development). <p>(3) This clause does not apply to development that the consent authority is satisfied is minor and will not result in unacceptable adverse flood impacts on adjoining properties.</p>



Source: NSW Department of Planning and Environment

Figure 5 Extract of Growth Centres SEPP – Development Control Map

The red line outlining the extent to which clause 20(1) applies is missing from Development Control Map - Map No.5 of the Growth Centres SEPP. This relates to the southern portion of the subject site and is considered to be a mapping error that could be updated as part of this Planning Proposal to clearly define this (shown as a dotted red line in **Figure 5**).

4.0 Planning Proposal

This section of the report outlines and discusses the components of this Planning Proposal in accordance with the Department of Planning and Environment's 'A guide to preparing planning proposals', dated October 2012. These components include:

- Objectives and Intended Outcome
- Explanation of Provisions
- Justification
- Community Consultation.

4.1 Objectives and Intended Outcome

The objectives of this Planning Proposal are to amend clause 20 of the Growth Centres SEPP relating to flood prone and major creeks lands and to clarify the land to which clause 20 applies. A tracked changes version of the proposed amendment to clause 20 is provided as **Appendix B**.

The intended outcomes of this Planning Proposal include:

1. To provide for consistency of interpretation between the Growth Centres SEPP and the DCP in relation to the FMS.
2. To permit development that does not materially increase flood levels outside of the RWP.
This will enable a merits based approach to be undertaken in relation to flood impacts within the RWP.
3. To remove the reference to 'design' within clause 20(2)(b) and clause 20(2)(c)
The reference to 'design 100 year recurrence flood' is unclear and should be removed. The different design flood scenarios are outlined within the DCP.
4. Clarify drafting of 20(2)(d) so that it is consistent with preceding clauses.
5. Update the Growth Centres SEPP– Development Control Map No.5 to identify the land to which clause 20(1) applies.

This is a housekeeping amendment to update a mapping error.

The intended outcomes of the Planning Proposal listed above will facilitate the anticipated outcome as envisaged under the DCP within the RWP to develop Lot 211 for future employment uses. It will also clarify the extent to which clause 20(1) applies.

4.2 Explanation of Provisions

The explanation of provisions provides a detailed statement of how the objective or intended outcomes are to be achieved through amending the Growth Centres SEPP.

4.2.1 How the Intended Outcome will be achieved

The proposed outcome of this Planning Proposal will be achieved by:

- 1) Amendment to the wording of clause 20(2)(a) of the Growth Centres SEPP as follows:
will be undertaken in a manner that is consistent with the Floodplain Management Strategy (prepared in accordance with the Riverstone West Precinct Development Control Plan)
- 2) Amendment to the wording of clause 20(2)(b) of the Growth Centres SEPP as follows:
does not materially increase flood levels on adjoining properties in events up to and including the 100 year recurrence flood event
- 3) Amendment to the wording of clause 20(2)(c) as follows:
limits any increases in flood velocities on adjoining properties in events up to and including the 100 year recurrence flood event
- 4) Amendment to the wording of clause 20(2)(d) as follows:
is not likely to result in materially adverse flood impacts on adjoining properties (including during any construction stage of the proposed development)
- 5) Amendment to Growth Centres SEPP - Development Control Plan Map No.5 to identify the extent to which clause 20(1) applies (housekeeping amendment).

The proposed amendment will facilitate future development in line with that envisaged within the Growth Centres SEPP and DCP.

4.3 Justification

4.3.1 Need for the Planning Proposal

The need for the proposed amendments relating to clause 20 arise from the RWP Court decision. The decision was based on an interpretation of clause 20 that is considered to be inconsistent with what was intended by the Growth Centres SEPP and an unnecessary barrier to achieving the planned outcome for RWP.

Appendix C of the RWP DCP (Figures C2 – C4) provides fill profiles to achieve a minimum ground level of 17.3 m AHD (the adopted 100 year ARI Hawkesbury Nepean flood level) that fits the DCP and zoning plans. The FMS submitted for the RWP identified a net loss of flood storage from all DAs in the Precinct to achieve this planned outcome of no greater than 2,650,000 m³. This loss of flood storage is acknowledged within Council's report relating to the appeal of DA-13-1845 dated 27 November 2014. Council's report identified that *'there will be a loss of about 2,650,000 m³ of flood storage for the development of the full site. This loss of flood storage is a development principle that now underpins the Precinct Plan and DCP for the site.'*

Based on the proposed works under DA (13-1845), there was an anticipated loss of 1,116,255 m³ of floodplain storage within the Precinct which was consistent with the FMS. However, the Court held that the interpretation of subclause 20(2)(b) was key to whether consent could be granted to the proposed development.

The need for the amendment is based on a technical interpretation by the Court of clause 20(2)(b) which prevents a merit based analysis of the flood impacts. In this regard, we note the following extracts from the Court's decision:

In our view, subclause 20(2)(b) is the key to whether consent can be granted to the proposed development. This subclause requires the consent authority to reach a state of satisfaction that the proposed development 'does not increase' flood levels on adjoining properties up to the design 100 year recurrence flood'. [96]

In our view, 'does not increase' has the same meaning as 'there will be no increase'. The ordinary meaning of 'no' (Macquarie Dictionary) in this context is "not in any degree", and for 'not' – "a word expressing negation, denial, refusal or prohibition". In our view, this subclause prohibits any development that would lead to an increase in flood levels on adjoining properties. There is no qualification of the word 'increase' other than a prohibition through the use of 'not'. This is contrasted with the qualifications of the degree of flooding or level of impact allowed in subclauses (c) and (d).' [97]

Both the Council and applicant flood experts engaged in the Court appeal agreed that the flood modelling showed that the proposed development could potentially lead to an increase in the 100 year ARI Hawkesbury River flood level of between 5 mm and 9 mm [70]. However, the Court could not be satisfied that there was no increase (literally interpreted as 0 mm) despite the experts agreeing that "the accuracies of flood models are traditionally considered to be 10 to 20 mm" [66] and the Court being generally satisfied with the FMS [95].

In relation to clause 20(2)(b) and (c) 'design' also caused some confusion and uncertainty in its interpretation. The flood modelling also considered 3 flood scenarios that recognised the potential for flooding of Eastern Creek concurrent with flooding of the broader Hawkesbury-Nepean River system as set out in clause 4 of 'Strategy Formulation Requirements' in Appendix C of the DCP:

- a. 100 year Eastern Creek (local) + 100 year Hawkesbury Nepean (**HN**) flooding.
- b. 100 year Eastern Creek (local) + 5 year HN flooding.
- c. 100 year Eastern Creek (local) + no HN flooding.

Despite the prescription within the DCP, in consultation with Council, it was agreed that a further scenario comprising the 100 year Eastern Creek (local) + 20 year Hawkesbury River (regional) flood scenario be considered (**100/20 combination**). As a result, this scenario was also modelled as part of the FIA. The results of the modelling of this scenario showed that the proposed development had the potential to cause an increase in peak flood levels outside the RWP for the 100/20 combination of up to 40 mm. However, this increase would only mean that peak flood levels for the 100/20 year combination would increase from 13.73 to 13.77 m AHD, which is more than 3.5 metres below the adopted 100 year ARI flood level of 17.3 m AHD as adopted for this area of the Hawkesbury-Nepean River system.

However, this scenario was argued by Council's expert as relevant because Clause 20 of the Growth Centres SEPP refers to the "design 100 year recurrence flood" which is undefined by the Growth Centres SEPP.

Council's lawyer in discussion regarding the Growth Centres SEPP and the DCP stated that "the phrase 'design 100 year recurrence flood' is not defined anywhere in the SEPP, the DCP or anywhere, but it has an understanding from the 2005 floodplain design manual of essentially being the 100 year ARI flood" [line 32, page 37 of the transcript of the decision].

Council's expert argued that the applicant had not explored whether the 100/20 combination flood is the worst case scenario. The applicant's expert argued that the 100/20 combination was rarer than the flood scenarios required to be modelled in the DCP and in any case produced a 100 year ARI flood level of 13.73 m AHD being well below the established HN 100 year ARI

flood level of 17.3 m AHD. The Court concluded the applicant's expert explanation was "considered and reasonable" [98].

Despite the above, in Court the experts agreed that "...a small refinement to the south-east corner of the fill footprint within Lot 211 would likely reduce the predicted flood level for the 100/20 combination to an acceptable (but unspecified) level." [69]. Consequently, to remove any uncertainty as to what flood scenarios are required to be assessed, the planning proposal includes the deletion of a reference to unspecified "design" flood event from clause 20. This will allow an assessment consistent with that required by the DCP and to deal with potential impacts associated with a 100/20 combination flood in assessing a detailed development application, being a matter determined capable of resolution.

In addition, it follows that clause 20(2)(d) should be also amended to include materially to enable a better measurement and assessment of adverse flood impacts. The inclusion of materially clarifies the drafting to better address the purpose of the clause.

This Planning Proposal seeks to amend the wording of clause 20 to facilitate a merits based approach to the flood impact assessment and the intended planning outcome for the RWP. This is consistent with the primary objective of the NSW Flood Prone Land Policy (NSW Floodplain Development Manual 2015, pg.1):

The primary objective of the New South Wales Flood Prone Land Policy, as outlined below, recognises the following two important facts:

- *flood prone land is a valuable resource that should not be sterilised by unnecessarily precluding its development; and*
- *if all development applications and proposals for rezoning of flood prone land are assessed according to rigid and prescriptive criteria, some appropriate proposals may be unreasonably disallowed or restricted, and equally, quite inappropriate proposals may be approved.*

The NSW Flood Prone Land Policy (NSW Floodplain Development Manual 2015, pg.2) specifically provides for:

- *a flexible merit based approach to be followed by councils, when dealing with development or redevelopment of flood prone land;*

These amendments are considered to provide the necessary framework within the Growth Centres SEPP to continue to require an appropriate and robust assessment of flood impact having regard to the site characteristics and planning context, without being unnecessarily constrained by a specific wording interpretation of clause 20.

Is the Planning Proposal as a result of any strategic study or report?

No.

This Planning Proposal seeks to amend the wording of clause 20(2) to enable a merit based approach to flood impacts to be undertaken. This is required to facilitate the planning outcome determined by the precinct planning studies that led to the rezoning of the RWP. The outcome will also be guided by the Growth Centres SEPP Precinct Plan, DCP and the FMS prepared by Worley Parsons dated 19th September 2014.

Is the Planning Proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

Yes. Amendments to the Growth Centres SEPP are required to enable development within the RWP to be considered where it results in no unacceptable adverse flood impacts.

4.3.2 Relationship to Strategic Planning Framework

- **Is the planning proposal consistent with the objectives and actions of the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategy)? A Plan for Growing Sydney**

The document titled 'A Plan for Growing Sydney' identifies the North West Growth Centre as a release growth area and includes objectives and actions to guide the development of this area.

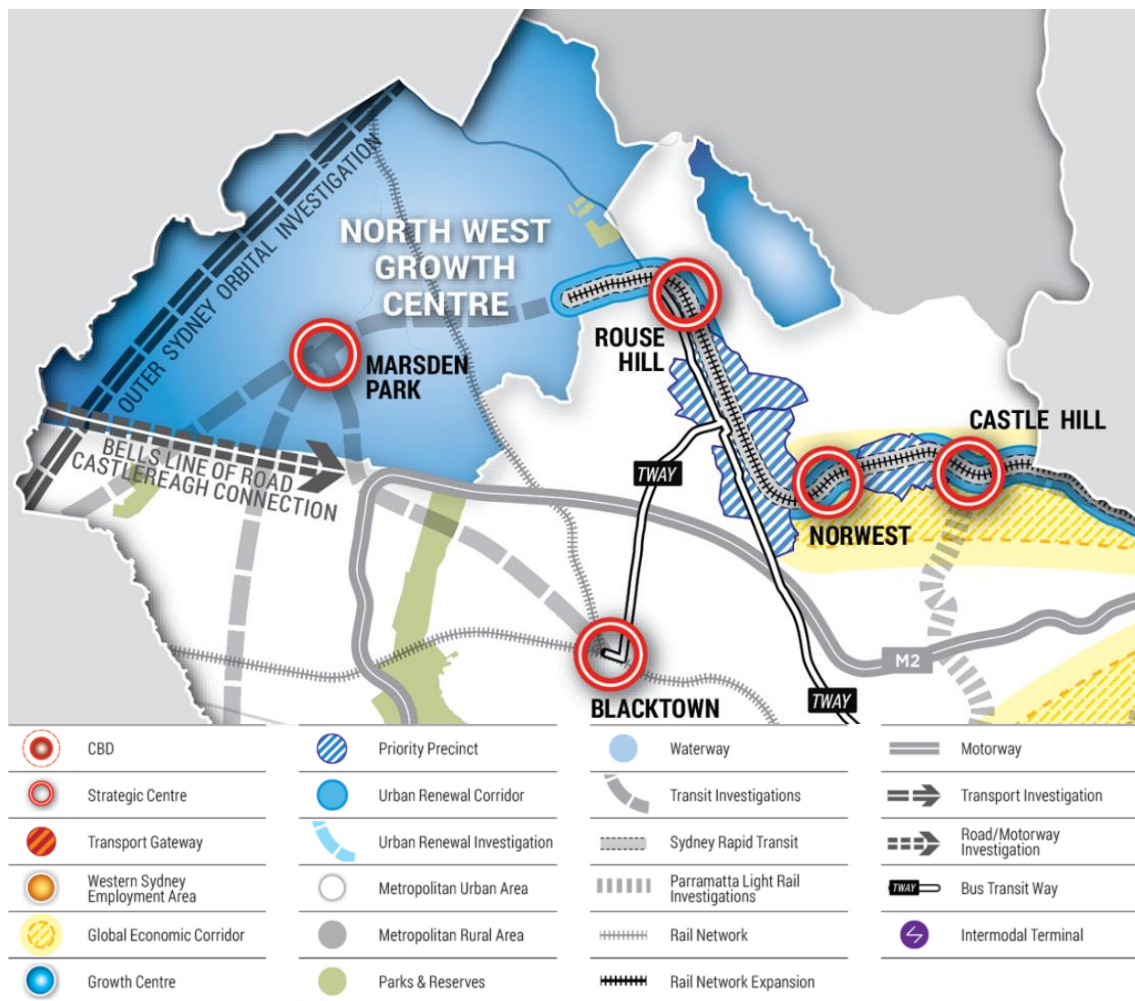
The Plan identifies the Riverstone West industrial zoned land with a transport investigation route traversing along the northern extent of the precinct. Once the RWP is developed, the employment opportunities will facilitate the Plan in that it will provide for jobs and support the overall growth of the Western Sydney Region.

- **West Central Subregion**

Riverstone West is identified within the Plan as being located within the West Central Subregion of Sydney – refer to **Figure 6**. While planning for the subregions is yet to be completed, the Plan provides guidance and overarching aims that will be further outlined as part of the detailed subregional plans.

The Planning Proposal is consistent with the objectives outlined for the West Central Subregion in that it will support the priority to create 'a competitive economy' through the development of business and industries at Riverstone West.

The Planning Proposal is consistent with the objectives of the strategy as it will support the future development of employment land uses within the North West Growth Centre and particularly the Riverstone West Precinct.



Source: Department of Planning and Environment

Figure 6 Extract from West Central Subregion Map

Is the Planning Proposal consistent with Council’s local strategy or other local strategic plan?

- Blacktown Planning Strategy 2036

The Blacktown Planning Strategy 2036 is Council’s key strategic land use planning document that will facilitate and manage future growth and development within the City of Blacktown to 2036. A key direction under the strategy is to promote employment growth in centres and employment areas.

The Planning Proposal is consistent with this direction and supports the development of the Riverstone West Precinct as a key employment precinct as identified within the Strategy.

Is the planning proposal consistent with applicable State Environmental Planning Policies?

A list of relevant State Environmental Planning Polices (SEPP) to this Planning Proposal has been reviewed within **Table 3**.

Table 3 Consistency with relevant State Environmental Planning Polices

SEPP	Policy	Comments
SEPP (Sydney Region Growth Centres) 2006	<p>Clause 20</p> <p>(a) will be undertaken in a manner that is consistent with the Floodplain Management Strategy (being part of the Riverstone West Precinct Development Control Plan), and</p> <p>(b) does not increase flood levels on adjoining properties in events up to the design 100 year recurrence flood, and</p> <p>(c) limits any increases in flood velocities on adjoining properties in events up to the design 100 year recurrence flood to minor increases only, and</p> <p>(d) is not likely to result in adverse flood impacts on adjoining properties (including during any construction stage of the proposed development).</p>	<p>The Proposal is considered to be consistent with the requirements of clause 20. However, following the judgement of the Court, the applicant is seeking to vary the wording of clause 20(2) under the Growth Centres SEPP to ensure consistency between the Growth Centres SEPP wording and the planned development for the RWP under the DCP.</p>
	<p>Aims</p> <p>The relevant aims of the Riverstone West Precinct (Appendix 3) include:</p> <p>(a) to make development controls for land in the Riverstone West Precinct within the North West Growth Centre that will ensure the creation of quality environments and good design outcomes.</p> <p>(d) to provide for innovative development in the Precinct that encourages employment and economic growth</p>	<p>The proposed amendments to the RWP relating to clause 20(2) will facilitate the aims of the RWP.</p> <p>The amendments will enable the full extent of the industrial and business zoned land to be developed without unacceptable adverse flood impacts to surrounding properties.</p>

This Planning Proposal is considered to be consistent with the State policy listed above.

Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?

The relevant s.117 directions to this Planning Proposal issued by the Minister for Planning, relevant to his Planning Proposal, and a statement of the consistency of this Planning Proposal are listed within **Table 4**.

Table 4 Compliance with Section 117 Directions

Direction		Consistency of Planning Proposal
1	Employment and Resources	
1.1	Business and Industrial Zones	This Planning Proposal will facilitate the planned development of the RWP, while ensuring that there remains a requirement to undertake an appropriate assessment of the flood impacts relating to development within the floodplain. Ultimately, these amendments will facilitate development within the Precinct and encourage employment growth with up to 12,000 jobs anticipated within the RWP once fully developed.
1.2	Rural Zones	Not applicable – the Planning Proposal does not seek to rezone the area currently zoned rural (i.e. Lot 11)
1.3	Mining, Petroleum Production and Extractive Industries	Not applicable
1.4	Oyster Aquaculture	Not applicable
1.5	Rural lands	Not applicable
2	Environment and Heritage	
2.1	Environment Protection Zones	Not applicable – this Planning Proposal does not seek any changes to the Environmental Protection zone (E2) within the site.
2.2	Coastal Protection	Not applicable
2.3	Heritage Conservation	Not applicable. An AHIP has been previously issued over the subject site. The existing local heritage items located in the south east of the site are not anticipated to be impacted by the proposed amendment to clause 20.
2.4	Recreation Vehicle Areas	Not applicable
3	Housing, Infrastructure and Urban Development	
3.1	Residential Zones	Not applicable
3.2	Caravan Parks and Manufactured Home Estates	Not applicable
3.3	Home Occupations	Not applicable
3.4	Integrating Land Use and Transport	Not applicable. This Planning Proposal does not seek to amend the zoning boundaries
3.5	Development Near Licensed Aerodromes	Not applicable
3.6	Shooting Ranges	Not applicable
4	Hazard and Risk	
4.1	Acid Sulphate Soils	Not applicable to this Planning Proposal.
4.2	Mine Subsidence and Unstable Land	Not applicable
4.3	Flood Prone Land	This Proposal does not seek to create, remove or alter a land use zoning affected by flood prone land. The

Direction		Consistency of Planning Proposal
		<p>Precinct has already been rezoned under the Growth Centres SEPP.</p> <p>This Proposal seeks to amend the wording of a policy relating to flood impacts. The amendment would enable an assessment to be undertaken on the impacts related to the proposed development to permit development that that did not have unacceptable adverse flood impacts on surrounding properties to be developed in line with the intended outcome for the RWP.</p>
4.4	Planning for Bushfire Protection	Not applicable.
5	Regional Planning	
5.1	Implementation of Regional Strategies	The Planning Proposal is consistent with the current aims outlined for the Central West Sub region under the Plan for Growing Sydney. Refer section 4.3.2 of this Planning Proposal.
5.2	Sydney Drinking Water Catchments	This Direction does not apply to Blacktown LGA.
5.3	Farmland of State and Regional significance on the NSW Far North Coast	This Direction does not apply to Blacktown LGA.
5.4	Commercial and Retail Development along the Pacific Highway, North Coast	Not applicable
5.8	Second Sydney Airport: Badgerys Creek	Not applicable
5.9	North West Rail Link Corridor Strategy	The NWRL Corridor Strategy and structure plans currently end at Cudgegong Road Station (Area 20 Precinct) and do not extend into the RWP.
6	Local Plan Making	
6.1	Approval and Referral Requirements	Not applicable
6.2	Reserving Land for Public Purposes	Not applicable
6.3	Site Specific Provisions	Not applicable
7	Metropolitan Planning	
7.1	Implementation of the Metropolitan Strategy	The Planning Proposal is consistent with <i>A Plan for Growing Sydney</i> and will facilitate employment growth within an area rezoned to provide employment opportunities. Refer section 4.3.2 of this Planning Proposal.

This Planning Proposal is consistent with the Directions as listed above.

4.3.3 Environmental, Social and Economic Impact

Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats will be adversely affected as a result of the proposal?

No. A review of impacts related to threatened species and habitats was undertaken at the rezoning stage with no significant impacts anticipated as a result of the proposed changes under this Planning Proposal.

Are there any other likely environmental effects as a result of the Planning Proposal and how are they proposed to be managed?

The amendments sought within this Planning Proposal are not considered to result in any other adverse environmental impacts.

Has the Planning Proposal adequately addressed any social and economic effects?

The benefits of amending the policy wording will facilitate the intended development within the Precinct which will provide for significant employment opportunities.

4.3.4 State and Commonwealth Interests

There are not considered to be any State or Commonwealth interests in this Planning Proposal other than ensuring general consistency with the State Policies as detailed above.

Is there adequate public infrastructure for the planning proposal?

This is not relevant to the Planning Proposal.

What are the views of State and Commonwealth public authorities consulted in accordance with the Gateway determination?

Where necessary, consultation with relevant State and Commonwealth public authorities can be undertaken as part of the exhibition of the Planning Proposal following Gateway Determination.

4.4 Mapping

An amendment to the Growth Centres SEPP – Development Control Map (No.5) is proposed as part of this Planning Proposal. This is required to clarify the extent of the land to which clause 20(1) applies as illustrated within **Figure 5**.

4.5 Community Consultation

It is expected that direction as to the nature and extent of the public exhibition will be given by the Minister as part of the Gateway Determination. No formal community consultation has been undertaken in relation to this Planning Proposal to date.

5.0 Summary and Recommendations

The submitted Planning Proposal seeks amendments to the Growth Centres SEPP to modify clause 20(2) to facilitate future development that will not cause unacceptable flood impacts on adjoining properties.

The proposal is in accordance with the objectives of a Plan for Growing Sydney and the West Central Subregion, applicable SEPPs and applicable Section 117 Directions. There are not considered to be any environmental, social or economic impacts arising as a result of the proposal with the benefits including:

- Facilitating employment growth within the RWP in line with the intended outcome for the area.
- Enabling development to proceed within a rezoned Growth Centre Precinct.

The proposal is consistent with the Growth Centres aims and the subsequent policies relating to the use of the RWP. The amendment will allow a more merits based approach to the assessment of flood impacts from development.

It is therefore concluded that this Planning Proposal be supported and the amendment to the SEPP be undertaken in accordance with the EP&A Act.

APPENDIX A

Court Decision





Land and Environment Court New South Wales

Case Title: Riverstone Parade Pty Limited v Blacktown City Council

Medium Neutral Citation: [2015] NSWLEC

Hearing Date(s): 8-11 December 2014

Decision Date: 9 January 2015

Jurisdiction: Class 1

Before: Fakes C, Speers AC

Decision: Appeal dismissed

Catchwords: DEVELOPMENT APPLICATION: Bulk earth works; flooding;

Legislation Cited: *Environmental Planning and Assessment Act 1979*
Threatened Species Conservation Act 1995
State Environmental Planning Policy (Sydney Regional Growth Centres) 2006
State Environmental Planning Policy (Sydney Regional Growth Centres) Amendment (Riverstone West Precinct) 2009

Cases Cited: *Dainford v Lamb* (1985) 3 NSWLER 255
Manning v Bathurst Regional Council & Others (No 2) [2013] NSWLEC 186

Texts Cited:

Category: Principal judgment

Parties: Riverstone Parade Pty Limited (Applicant)
Blacktown City Council (Respondent)

Representation

- Counsel: Applicant: Mr P Clay SC (Barrister)

Respondent: Mr D Miller SC (Barrister)

- Solicitors: Applicant: Landerer & Company, Solicitors
Respondent: Sparke Helmore Lawyers

File number(s): 10308 of 2014

Publication Restriction:

JUDGMENT

- 1 COMMISSIONERS: The applicant appeals Blacktown City Council's refusal of Development Application DA-13-1845 for Stage 1 bulk earthworks and associated activities on part of Lot 211, DP 830505, Riverstone (the site). The site is part of the Riverstone West Precinct, which in turn forms part of the NSW Government's North West Growth Centre.
- 2 The appeal is made under s 97(1)(b) of the *Environmental Planning and Assessment Act 1979* (the Act).

The site and locality

- 3 The Riverstone West Precinct comprises Lot 211 and three other lots owned by utility providers. Adjoining the northern portion of Lot 211 are a Sydney Water sewerage treatment plant and a Transgrid electricity substation.
- 4 Lot 211 has an area of approximately 228 ha and is bounded by Bardon Road to the north, the Richmond railway line to the east, Eastern Creek to the west, and Garfield Road West to the south.
- 5 The site, the subject of this appeal, is limited to the northern half of Lot 211. The former Riverstone meat works is located towards the southern end of the site. Vineyard railway station is located near the north-eastern

corner of the site. The township of Riverstone is to the east of the site on the eastern side of the railway line.

- 6 Lot 211 is primarily vacant and used for grazing.
- 7 The Riverstone West Precinct is surrounded by other identified precincts within the North West Growth Centre. Of relevance, in June 2014 the Minister released the precinct to the west, Marsden Park North, but it has not been rezoned for urban purposes. A parcel of land known as Lot 11 is located within this new precinct on the western side of Eastern Creek adjoining the Riverstone West Precinct.
- 8 A significant portion of the Precinct including the southern portion of the site is mapped as Flood Prone and Major Creeks Land in Sheet DVC_004, *State Environmental Planning Policy (Sydney Regional Growth Centres) 2006*. Relevantly, Eastern Creek forms the western boundary. The site is affected by flooding from Eastern Creek catchment flows as well as backwater inundation from the Hawkesbury-Nepean floodplain.

The proposal

- 9 The proposed development is described as Stage 1 and comprises:
 - Bulk earthworks and ground contouring;
 - Vegetation removal; and
 - Extended construction hours.
- 10 Essentially, the applicant is seeking approval for preparatory earthworks to facilitate the eventual development of the Precinct for industrial and commercial uses.
- 11 According to the Statement of Environmental Effects – Version 2 (SEE) (Exhibit A), the proposed earthworks are limited to an activity area of approximately 60 ha; generally in the northern section of the Precinct.

- 12 The SEE describes the proposal as the cutting, stockpiling and filling of part of the site to create a series of benches upon which future industrial development will occur. Approximately 1,400,000 m³ of on-site material is proposed to be cut from the higher northern portion of the site to be used to fill low lying areas in the southern and central portions. Another 125,000 m³ of excavated natural material (ENM) is to be sourced from projects such as the construction of the North West Rail Link.
- 13 The activity area will be retained by batters constructed to a maximum 1:4 gradient.
- 14 The height of the fill achieves a minimum level of RL 17.3.
- 15 The activity area provides for at least a 40 m buffer from Eastern Creek.
- 16 The proposed earthworks will remove all vegetation within the activity area. According to the SEE, this area is primarily comprised of land that has been 'biodiversity certified' under the *Threatened Species Conservation Act 1995* (TSC Act). The effect of this certification is that the proposal is not considered to have a significant impact on listed species, populations or communities and the requirement for further ecological assessment is removed. The vegetation in the non-certified areas does not comprise any threatened ecological communities listed under the TSC Act.
- 17 The applicant seeks approval for extended construction hours in order to enable the development to be carried out more efficiently and in a reduced time frame. The extended hours of construction are proposed to be from 6 am until 10pm – Monday to Saturday. No works are proposed on Sundays or Public Holidays.
- 18 An acknowledged inconsistency in the proposal is the staging plan in Appendix E of the Worley Parsons Flood Management Strategy which shows stage 1 to be more limited than the 'Stage 1' proposed in the DA.

The DA 'Stage 1' incorporates stages 1, 2 and 4 of the Worley Parsons FMS.

The Issues

- 19 At the time the Class 1 application was filed with the Court, the development was undetermined. Council subsequently determined and refused the DA on 3 December 2014.
- 20 The council contends that the proposed development should be refused for the following reasons:
- Unsatisfactory impacts on the floodplain – contention 1;
 - Precedent and cumulative impact – impacts of filling of the floodplain – contention 2;
 - Traffic impacts on the Vineyard railway level crossing – contention 3;
 - Inadequacy of the applicant's Flood Emergency Response Plan (FERP) – contention 4; and
 - Inadequate identification of the source (and quality) of fill to be used – contention 5.
- 21 The council accepts that the traffic-related issues and the adequacy of the FERP can be addressed through the imposition of conditions of consent.

Planning controls

- 22 *State Environmental Planning Policy (Sydney Regional Growth Centres) 2006* (SEPP – SRGC) applies. The SEPP was amended in 2009 by amending instrument *State Environmental Planning Policy (Sydney Regional Growth Centres) Amendment (Riverstone West Precinct) 2009*. The aims of the policy (in conjunction with amendments to the regulations under the Act relating to precinct planning) include:
- (a) to co-ordinate the release of land for residential, employment and other urban development in the North West and South West growth centres of the Sydney Region;

(c) to provide for comprehensive planning for those growth centres,

23 Clause 20 SEPP – SRGC applies to ‘Development on and near land at Riverstone West’. It states:

(1) This clause applies to the land outlined in red on the North West Growth Centre Development Control Map.

(2) Despite any other provision of this Policy (including any Precinct Plan), the consent authority must not grant consent for development on land to which this clause applies unless it is satisfied that the proposed development:

(a) will be undertaken in a manner that is consistent with the Floodplain Management Strategy (being part of the Riverstone West Precinct Development Control Plan), and

(b) does not increase flood levels on adjoining properties in events up to the design 100 year recurrence flood, and

(c) limits any increases in flood velocities on adjoining properties in events up to the design 100 year recurrence flood to minor increases only, and

(d) is not likely to result in adverse flood impacts on adjoining properties (including during the construction stage of the proposed development).

(3) This clause does not apply to development that the consent authority is satisfied is minor and will not result in unacceptable adverse flood impacts on adjoining properties.

24 The land to which clause 20 applies is shown on sheet DVC_004 and includes the Riverstone West Precinct and Lot 11 in the recently released yet to be rezoned Marsden Park North Precinct. North West Growth Centre Land Zoning Map - Sheet LZN_004, SEPP-SRGC shows the zoning of the portion of the Riverstone West Precinct relevant to the proposed development; notably, Lot 11 is land not zoned for the purpose of the North West Growth Centre and is shown beyond the North West Growth Centre Precinct Boundary.

25 Appendix 3 of the SEPP provides the land use and other planning controls resulting from precinct planning for the Riverstone West Precinct of the

North West Growth Centre. The development site is variously zoned IN1 – General Industrial, IN2 – Light Industrial and RE2 – Private Recreation. Earthworks are permitted with consent. Blacktown City Council is the consent authority for development within the Precinct.

- 26 Of relevance is Riverstone West Development Control Plan 2009 (RWDCP) prepared by the Department of Planning in 2009. It is assumed that this DCP applies as it is called up in cl. 20(2)(a) SEPP-SRGC, however the second paragraph in clause 1.1 Name of this Plan states:

This DCP was adopted by the Director General (or delegate) of the Department of Planning on (date to be inserted) and came into force on (date to be inserted).

- 27 Amongst other things, the purpose of RWDCP is to “consolidate and simplify the planning controls to ensure the orderly, efficient and environmentally sensitive development of the Riverstone West Precinct as envisaged by the North West Growth Centre Structure Plan, *State Environmental Planning Policy (Sydney Regional Growth Centres) 2006*... and as refined by the Riverstone West Indicative Layout Plan” (s 1.2.2).
- 28 Section 1.7.1 RWDCP sets out the development assessment process. Step 2 requires an applicant to prepare relevant Precinct-wide plans/ strategies identified in the table in s 1.7.3. Section 1.7.2 allows variations to development controls providing the applicant can demonstrate that the proposed development is consistent with the vision and development objectives for the precinct as well as the relevant objectives and controls in SEPP-SRGC.
- 29 Unusually, the table in s 1.7.3 does not indicate a requirement for a precinct-wide Cut and Fill Plan for earthworks development applications.
- 30 Section 1.7.3 goes on to provide the specific requirements for all precinct wide plans and strategies that must be submitted with a DA. Relevantly,

and amongst others, a Floodplain Management Strategy (FMS) and an Integrated Water Management Strategy are required.

31 In regards to the FMS, the DCP states:

The Floodplain Management Strategy (FMS) must comply with the requirements of Appendix C in this DCP.

The purpose of the FMS is to:

- Define existing flooding at the site and in the vicinity of the site in accordance with the *NSW Floodplain Development Manual, 2005* procedures:
- Determine the flood impacts on account of the proposed development, and investigate mitigation options which will input to the FMS;
- Develop a strategy that demonstrates flood impacts at the site and adjoining the site are managed in accordance with the requirements of the *Growth Centres SEPP Amendment (Riverstone West Precinct) 2009* and the development controls in Section 4.3 of this DCP; and
- Develop a Flood Emergency Response Plan (FERP) in consultation with the State Emergency Services (SES).

32 Section 2.2 Development Objectives, relevantly states:

The development objectives of Riverstone West are to [amongst other things]:

- 1) Maximise employment opportunities within Riverstone West for the local and regional communities
- 2) Ensure development does not cause any offsite flood impacts that are unacceptable to Council.

33 Section 4.3.2 considers Flood Management within the overall context of s 4.3 – Integrated Water Cycle Management. Of relevance are the following subclauses.

- 1) The management of floods must comply with *Growth Centres SEPP Amendment (Riverstone West Precinct) 2009* and demonstrate compliance with the requirements in Appendix C of this DCP.

- 2) The minimum fill level must be above the existing climate flood level (100 year Annual Recurrence Interval (ARI)) for commercial and industrial development. The future climate flood planning level will be determined through the Floodplain Management Strategy as described in Appendix C of this DCP. All buildings are to be constructed with a minimum floor level of 17.9 metres AHD.

34 RWDCP Appendix C – Floodplain Management Strategy is therefore relevant. This appendix outlines the specific requirements for the preparation of an FMS. The appendix states:

The land to which this strategy applies (the Subject Land) is Lot 211 DP 8300505 (located within the Riverstone West Precinct) **and** [emphasis added] Lot 11 DP 816720 Riverstone Parade, Riverstone located immediately to the west of the Precinct (refer Figure C).

35 The objectives of Appendix C are to:

- 1) Define existing flooding at the site and in the vicinity of the site in accordance with the *NSW Floodplain Development Manual, 2005, the Growth Centres Development Code* and Council procedures
- 2) Determine the flood impacts on account of the proposed development, and investigate mitigation options which will input into the Floodplain Management Strategy
- 3) Develop a strategy that demonstrates flood impacts at the site and adjoining the site are managed in accordance with the requirements of the *Growth Centres SEPP Amendment (Riverstone West Precinct) 2009, the Growth Centres Development Code* and the development controls in Section 4.3 of this DCP
- 4) Ensure that the Floodplain Management Strategy is supported by a Flood Emergency Response Plan and a **Cut and Fill plan** [emphasis added]
- 5) Ensure that the Floodplain Management Strategy addresses the specific requirements listed in Strategy Formulation Requirements in the Appendix of this DCP.

36 Amongst other things, the Strategy Formulation Requirements 2, 3 and 4 require studies of a wide range of possible flood events including as a minimum the 2 year ARI, 5 year ARI, 20 year ARI, 100 year ARI, 200 year ARI (approximate HHF [defined as the highest historical backwater flood

recorded in the Hawkesbury/Nepean Catchment, being the 1867 flood with a recorded level of 19.7 m AHD or 2.4 m above the current 100 year backwater level of **17.3 m AHD** for that catchment]), 500 year ARI and PMF [probable maximum flood – the largest flood that could conceivably occur at a particular location] events. In addition, the flood studies are to consider backwater flooding from the Hawkesbury River, flooding of Eastern Creek and any relevant tributaries. The requirements specify the combination of flooding events to be investigated.

- 37 Requirements 5-7 specify the use of 2-D flood modelling and list other parameters/ factors.
- 38 Requirement 8 requires that the flood studies shall investigate the cumulative effects of flooding – in accordance with the *NSW Floodplain Development Manual, 2005*. The developed scenario flood study must also include all proposed redistribution of flood flows on account of the proposed building platforms and other earthworks. Requirement 9 considers the impact of climate change.
- 39 Requirement 10 states:

For the proposed scenario and associated mitigation proposal relying on cut and fill in the floodplain, the proposed cut and fill extent and volumes shall be based broadly on Figures C2, C3 and C4, with minor adjustments to satisfy the performance specifications defined in the *Growth Centres SEPP Amendment (Riverstone West Precinct) 2009, the Growth Centres Development Code* and the development controls in Section 4.3 of this DCP

- 40 Requirement 11 states that a Staging Plan must be prepared to outline the staging of the earthworks for the precinct.
- 41 Requirement 11 specifies:

The flood studies shall investigate the impact of staging of the development and earthworks, and demonstrate compliance with the *Growth Centres SEPP Amendment (Riverstone West Precinct)*

2009, and the development controls in Section 4.3 of this DCP for each stage.

- 42 Figure C1 – shows the land to which the strategy applies – it includes the Riverstone West Precinct and Lot 11. Figure C2 shows preliminary cut and fill. Lot 11 is shown as primarily cut. Figure C3 depicts preliminary earthworks levels, and Figure C4 illustrates the preliminary cut and fill contours.
- 43 While the table in s 1.7.3 of RWDCP does not indicate a requirement for a Cut and Fill Plan for precinct-wide earthworks development applications, objective 4 in Appendix 3 [Flood Management Strategy] requires that the Floodplain Management Strategy to be prepared by an applicant be supported by a Flood Emergency Response Plan and a Cut and Fill Plan.
- 44 The objectives and controls for cut and fill are found in Section 4 of the DCP – Environmental Management under s 4.2 – Cut and Fill. Relevantly the objectives of cut and fill are to: provide a platform capable of supporting a range of business and industrial uses; minimise the impacts of earthworks on stormwater salinity and groundwater; manage flooding impacts in accordance with the requirements of the *Growth Centres SEPP Amendment (Riverstone West Precinct) 2009*; and ensure that any cut and fill does not adversely affect the conservation and rehabilitation of the riparian corridors.
- 45 In regards to the controls, they include:
- 1) A Cut and Fill Plan must be prepared in accordance with Table 4 in Section 1.7.3 [This is not specified in Table 4]
 - 2) Earthworks within the Subject Land (as shown in Figure C1 of Appendix C Floodplain Management Strategy of this DCP) are to be undertaken to achieve a balance between cut and fill in accordance with the Floodplain Management Strategy (FMS) as described in Appendix C of this DCP. The FMS will confirm the final Cut and Fill Plan, which is based on the Preliminary Cut and Fill diagram shown in Figure C2 of Appendix C.

3) The finished earthworks levels are to be generally in accordance with the Preliminary Cut and Fill contours shown in Figure C3 of Appendix C. The FMS will confirm the final cut and fill levels.

8) Earthworks associated with filling within the Precinct may be undertaken in accordance with the Staging Plan as required in Appendix C. DAs are to be lodged for each stage of the earthworks, and shall be supported by documentation that demonstrates conformance with the requirements of Appendix C.

10) The Staging Plan in the Floodplain Management Strategy must be updated if there is a deviation from the most recent staging plan in Appendix C.

11) Minimum cut and fill levels must comply with Figure 20. The slope between the designated levels shall be a maximum of three per cent.

46 Figure 20, referred to in cut and fill control 11, shows the boundaries of the Precinct and **does not** include Lot 11. The indicative cut level is +RL 33.5. The indicative extent of fill platforms shown in Figure 20 **does not** correspond to the preliminary cut and fill diagram in Figure C2 – Appendix C.

The hearing and evidence

47 The hearing commenced on site. The Court had the opportunity to hear from representatives of three local groups.

48 The Riverstone Chamber of Commerce supports the proposal on the basis that Riverstone needs investment and employment opportunities to avoid its demise, especially given the planned significant increase in the area's population.

49 The Blacktown and District Environmental Group and the Friends of Knudson Reserve raised concerns about the impacts that narrowing the floodplain and changes in velocity of flood waters may have on the riparian zone along by Eastern Creek. Amongst other things, the representatives discussed the absence of any designated conservation or wildlife corridor

along the western boundary of the site, the loss of Endangered Ecological Communities from this and other nearby sites and the known history of flooding in the area.

- 50 The site was inspected. The topography, existing infrastructure and other site features were observed.
- 51 The primary issue in this matter is the impact of the proposed earthworks on flood levels on adjoining properties in the locality, and within the wider catchment.
- 52 The parties' experts prepared joint reports: Mr Christopher Thomas, civil engineer and hydrologist with Worley Parsons prepared the applicant's Floodplain Management Strategy (the FMS) (Exhibit D) and Flood Impact Assessment (the FIA) (Exhibit C); Mr Andrew Bewsher, a hydrological and flooding expert, engaged by Blacktown City Council to review the relevant documentation and provide 'Floodplain Development Advice' (Exhibit 4); Mr Rhys Hardwick-Jones, an Associate of WMAwater Pty Ltd, a specialist in flood modelling, engaged by council to provide a 'Review of RMA-2 Modelling and Impact Assessment' (Exhibit 6); and Mr Steven Molino of Molino Stewart Pty Ltd, an expert in floodplain management, engaged by council to prepare a statement of evidence in regards to flood damages and flood emergency planning (Exhibit 2).
- 53 Mr Molino and Mr Thomas prepared a joint report on flood emergency response management issues (Exhibit 3). Mr Molino was not required to give oral evidence.
- 54 Mr Thomas, Mr Bewsher and Mr Hardwick-Jones prepared a joint report (Exhibit 9) on what they considered to be the key issues of: free drainage of cut areas, the significance of the local flood impacts, the quantum of the predicted increase in regional 100 year ARI flood level, the consequences of the regional flood impacts, and the methodology for assessing the cumulative flood impacts. These experts gave concurrent oral evidence.

The joint report discussed below refers to Exhibit 9. Mr Hardwick-Jones' evidence was limited to questions of modelling.

55 Apart from the individual and joint reports prepared by the parties' experts, Exhibit F is a report to council from council's Director – City Strategy & Development – Planning & Development in regards to the appeal before the Court. It provides some background to the assumptions made and positions taken by the parties' experts. Section 2.5 clauses a. and b. are particularly useful.

- a. The DCP provides floodplain management controls in Appendix C and shows indicative sketches of the areas of cut and fill in Figures C2 to C4. These sketches are shown as contour plans and are not supported by indicative volumes of cut and fill. However they form the basis for filling of the floodplain as adopted by the Department of Planning and Environment for the site. The strategy in the DCP proposed the provision of compensatory flood storage within Lot 11 which adjoins the development site. Lot 11 is now owned by a separate owner to the subject land.
- b. Council was provided with a copy of the surface modelling used to establish the basis of Figures C2 to C4. An analysis of this information indicates there will a loss of about 2,650,000 m³ of flood storage for development of the full site. This loss of flood storage is a development principle that now underpins the Precinct Plan and DCP for the site. This means that this loss of flood storage has been accepted by the NSW Government, in principle, as a first layer of assessment of the proposal. However, the overall impact on the floodplain external to the site is the second layer of assessment.

56 At 2.6 a. and b.:

- a. DA-13-1845 will result in a loss of floodplain storage of 1,116,255 m³ within the precinct. This is achieved by reshaping and evening out the site to create a suitable development platform and importing material from excavation work for the North West Rail Link.
- b. This is the Stage 1 DA for the precinct earthworks. Other DAs will be submitted later. However, the total impact of the net loss of flood storage within the precinct from all DAs should be no greater than the 2,650,000 m³ of lost flood storage endorsed by the DCP.

- 57 The basis of the assessment is the 1:100 year flood level of RL 17.3 mAHD.
- 58 Amongst other things, the experts considered the FMS. The joint report outlines the potential fill options for the Riverstone West Precinct considered in the FMS.
- Option 1 is based on the maximum fill extent defined by the Indicative Layout Plan [Figure 5 RWDCP] approved as part of the rezoning of Lot 211. It involves no cut within Lot 211 and the net loss of floodplain storage below 17.3 mAHD of 3.62M m³.
 - Option 2 is based on the same layout plan as Option 1 but considers floodway constraints and selective cut within Lot 211. It results in a net loss of floodplain storage below 17.3 mAHD of 3.74 M m³.
 - Modified Option 2 [considered during conciliation] involves selective cut within Lot 211 and a net loss of floodplain storage below 17.3 mAHD of 2.65M m³. This is the option assessed in the FIA – referred to in that document as the ‘updated development layout’.
- 59 The FMS modelled the combined probabilities of concurrent flood events required by the RWDCP: Eastern Creek 100 year ARI + Hawkesbury 100 year ARI; Eastern Creek 100 year ARI + Hawkesbury 5 year ARI; and Eastern Creek 100 year ARI with no concurrent flooding of the Hawkesbury. In addition, for completeness, Worley Parsons modelled a combination of a 100 year ARI Eastern Creek flood with a 20 year ARI Hawkesbury flood for option 1.
- 60 In order to determine the impacts of the proposal on local and regional flooding, Worley Parsons used an updated RMA-2 model as the primary basis for their calculations. The RUBICON (1999) model was used to compare peak flood levels generated by the RMA-2 model and validate the use of the RMA-2 model. The results of the RUBICON modelling were used to adjust the RMA-2 results (adjusted RMA-2).

- 61 In his review of the modelling, Mr Hardwick-Jones states that the Hawkesbury-Nepean system, including its tributaries of Eastern Creek and South Creek, is complex and difficult to model with the available technology. This is primarily due to the size and scale of the floodplain and the nature of the topography in the Richmond – Windsor area. He states that each of the available models –RUBICON and the RMA-2, has limitations when assessing flood behaviour in this region.
- 62 The RUBICON model is essentially a one dimensional model developed in the late 1980s/ early 1990s for the length of the Hawkesbury-Nepean River to the Warragamba Dam. The model is composed of a network of flow paths – each of which is represented by surveyed cross-sections. The model is limited in its ability to resolve flow behaviour in areas where complicated cross-flows occur.
- 63 The RMA-2 model is a two dimensional model developed in the late 1990s and updated since then to incorporate more of the catchment as more topographic data is collected. While the topographic data is more precise than the surveyed data used in the RUBICON model, the geographic extent of the RMA-2 model is more limited. The limitation of this model is that the impacts of flooding events outside the boundaries of the model, especially downstream, cannot be accurately assessed.
- 64 Notwithstanding the limitations of the models, all three experts agree that the modelling undertaken for the FMS and the FIA appears reliable and provides accurate estimates of the impact of the proposed development on flood levels and velocities under local flooding conditions. They agree that the changes in flood velocities due to the three options are likely to be small and consistent with cl. 20(2)(c) of SEPP – SRGC (Exhibit 9- [13]- [14]).
- 65 The joint report includes a number of tables summarising the predicted maximum rise in flood levels for both local and regional flooding derived

from the three models used for the range of flood events given in paragraph [59].

- 66 Mr Bewsher and Mr Thomas agree that the results of the modelling of the three local flood scenarios required by RWDCP indicate that there will be an increase in peak flood level outside Lot 211 of less than 10mm. The modelling for the 100 year ARI Eastern Creek flood with a 20 year ARI Hawkesbury flood (100/20) for option 1 indicates a possible increase of 40mm. It is agreed that the accuracies of flood models are traditionally considered to be 10 to 20mm.
- 67 The experts disagree about the relevance of the 100/20 combination. Mr Thomas considers this would only result in an increase locally to 13.77 mAHD – well below the adopted 100 year ARI flood level of 17.3 mAHD. He also maintains that such an event is very rare and highly unlikely because the two catchments have significantly different critical durations in that peak flooding of Eastern Creek occurs in about 9 hours and flooding of the Hawkesbury takes about 72 hours. That is, the peak flood from the Hawkesbury would not occur at Riverstone West until approximately 57 hours after the arrival of the peak generated by rainfall falling across the Eastern Creek catchment.
- 68 Mr Bewsher is of the opinion that the applicant hasn't demonstrated that this combination is the worst case scenario and that an assessment of rainfall patterns has not been undertaken to consider the impacts of locally heavy rain storms, for example embedded storms associated with an east coast low, across the catchment.
- 69 Despite their differences in regards to the significance of local flood impacts, Mr Bewsher and Mr Thomas agree that a small refinement to the south-east corner of the fill footprint within Lot 211 would likely reduce the predicted flood level for the 100/20 combination to an acceptable (but unspecified) level.

- 70 With respect to regional flood levels, all three experts agree there will be an increase as a consequence of the proposed development. The increase in levels for option 1 is agreed at no more than 12mm; for modified option 2, the experts consider the range is from 5mm to 9mm.
- 71 Mr Thomas and Mr Bewsher agree that the potential consequences of concern associated with an increase in regional flood levels are the number of additional dwellings that would be flooded above floor level as a consequence of a rise, and the resulting increase in flood damages.
- 72 Mr Thomas and Mr Molino prepared a joint report in regards to potential damages. The experts agreed that for each rise of 1mm in the regional flood level, there will be, on average, one additional house flooded above floor level with a tangible cost of between \$120,000 and \$420,000 per 1 mm increase. Mr Bewsher considers a more realistic order of damages to be around \$1M for each 1mm rise in the regional flood level.
- 73 Mr Thomas and Mr Bewsher agree that cumulative impacts of fill across the floodplain must be considered. The FMS includes an assessment of potential cumulative impacts in response to Item 8 Appendix C RWDCP – “developed flood studies should investigate the cumulative effects of flooding”. The FMS tabulated the estimated fill volumes for the development areas within the local floodplain. The development areas considered are Pitt Town, Windsor Downs, Marsden Park, Schofields, St Marys Release, Wilberforce and Riverstone West. The investigation found that the proposed development of the Riverstone West Precinct represents 83% of the total volume of predicted filling. In view of the predicted small increases in flood levels indicated by the flood modelling, the FMS found the cumulative impact of all possible development would be negligible.
- 74 Mr Bewsher is of the opinion that the cumulative impacts have not been assessed correctly and are not negligible because the extent of potential development within the Hawkesbury-Nepean floodplain is larger than the zoned land considered by the FMS and the consequences of even small

risers in the regional flood level are considerable and cannot be ignored. Mr Bewsher remains concerned that approval of the development would set a dangerous precedent for floodplain management in the Hawkesbury-Nepean Valley.

Submissions

- 75 The applicant contends that in view of the strategic aims of SEPP – SRGC, the Court should take a purposive approach in considering cl. 20(2) of SEPP-SRGC.
- 76 Mr Clay, for the applicant, asserts there are different standards applied to the relevant sub clauses (2)(b), (c), and (d). In addition, cl. 20(3) identifies another standard. Specifically, cl. 20(2)(b) states 'does not increase', cl. 20(2)(c) limits any increases to 'minor increases', and cl. 20(2)(d) states the proposed development must not result in 'adverse' flood impacts. Clause 20(3) considers minor development that will not result in 'unacceptable adverse' flood impacts.
- 77 In Mr Clay's submission, the key question to be answered is – what is the proper construction of the phrase in cl. 20(2)(b) -'does not increase flood levels'. It is his submission that this phrase means an increase in flood levels which is more than nominal, not trivial, not negligible and therefore material. He cites a number of cases to support this contention including *Dainford v Lamb* (1985) 3 NSWLER 255 at [268] where Powell J said in considering the phrase "affected substantially and adversely":

By adding the word "substantially" to a clause which would otherwise be operated if the relevant effect was anything more than just nominal, the draftsman was intending to indicate that, before the clause could operate, the relevant effect must be shown to be of real substance.

In *Manning v Bathurst Regional Council & Others (No 2)* [2013] NSWLEC 186, Pepper J at [63] and [71] in regards to the meaning of "unlikely to be affected" said:

[63]...In other words, "affect" is not to be construed to include any and all "effects" no matter how trivial, of a development...

[71]...The only applicable touchstone is one of materiality, or conversely, immateriality or triviality...

- 78 In regards to the application of cl. 20(2)(b) to the expert evidence, Mr Clay maintains that this only applies to adjoining properties and not to the broader region and that the agreed position of the experts was that the increase would be about 10mm which falls within the accuracy limits of the flood models. To that extent, the increase must be considered negligible or immaterial and therefore cl. 20(2)(b) is not offended and cl. 20(2)(d) is met. With respect to cl. 20(2)(c), the experts agree that the increase in velocity is likely to be minor and acceptable. While he agrees that the development is more than minor, Mr Clay asserts that the performance outcome of "will not result in unacceptable adverse flood impacts on adjoining properties" in cl. 20(3) is achieved by this proposal. In regards to the 100/20 combination of flood events and a possible increase of 40mm, Mr Clay maintains that the Court should accept Mr Thomas' evidence on the unlikely occurrence of such an event. He submits there is no evidence that this combination should be considered as the design flood level, which he asserts, is Mr Bewsher's view.
- 79 Mr Clay maintains that while cl 20(2)(a) requires the proposed development be undertaken in a manner consistent with the Floodplain Management Strategy in RWDCP, this implies broad compliance and a common sense approach that achieves the desired outcomes of the SEPP and DCP. To that end, the proposed cut and fill volumes should be based broadly on the relevant figures in Appendix C of RWDCP.
- 80 With respect to the regional flooding impacts of the proposal, Mr Clay contends that this is effectively a diversion as the DCP expects there to be some regional impact as it allows fill within the floodplain. He asserts that the emphasis in the SEPP and the DCP is on local flooding and there is no requirement to consider the cumulative regional impacts. Mr Clay

maintains the context must be the regional/strategic level set by the creation of a growth centre and any impacts must be offset against regional and broader community benefits. He contends that the regional impacts of adding 2.65M m³ to a floodplain in excess of 22,000 km² would have the equivalent impact of adding a few grains of sand to a glass of water.

- 81 Similarly, in regards to the cumulative impacts on the floodplain and likely precedent an approval would have, Mr Clay asserts that any approval will not create an expectation elsewhere in the growth centre as the NSW Government will determine what is appropriate for each precinct via a precinct-specific DCP. In this respect, he maintains that the applicant has formulated the development proposal by applying what is permitted by the RWDCP.
- 82 In summarising council's contentions, Mr Clay considers that to the extent necessary: contention 1 – impacts on the floodplain and contention 2 – precedent and cumulative impacts have been addressed. The applicant is prepared to accept conditions concerning contention 3 – traffic movements and the Vineyard level crossing and contention 4 – the adequacy of the Flood Emergency Response Plan. In regards to contention 5 – source of the fill, the applicant is prepared to accept a condition that specifies a qualitative condition rather than restricting the applicant to a particular source.
- 83 In essence, Mr Clay submits that there are some tensions between the planning instruments and controls, the Court's approach should be flexible and consider the bigger/ more strategic picture.
- 84 The applicant accepts that while there are some deficiencies in the Development Application such as the inconsistency between the staging plan shown in the FMS and the application before the Court, these do not warrant refusal of the appeal and could be easily rectified by the imposition of conditions or at worst, by the Court taking an "amber light" approach.

- 85 Mr Miller for the council submits that the application, when assessed against the requirements of s 79C of the Act, should be refused on a number of grounds.
- 86 In regards to cl. 20(2) SEPP-SRGC Mr Miller contends that: subclause (a) is capable of being achieved however the development application falls short; as subclause (b) is not satisfied, the Court must not approve the DA; as any increase in velocity of floodwaters is agreed by the experts as being minor, subclause (c) is met; subclause (d) doesn't specify flood levels and requires consideration of the construction stage, as the applicant has not modelled the impacts of the cut and fill proposed in the DA, satisfaction of this subclause is uncertain.
- 87 In considering cl. 20(2)(b) and Mr Clay's submissions, Mr Miller maintains that the phrase "does not increase" does not include any qualification that implies anything other than what it says, unlike subclauses (c) and (d). All experts agreed that the proposal would increase the flood levels on adjoining land. In regards to the cases cited, the words must be read in the context of the matter/ planning instrument being considered and that an adverb cannot be taken out of one clause and grafted onto another.
- 88 Council's view is that the development application is deficient in many ways as it does not fully meet the requirements of RWDCP. This includes: no modelling of any fill below the 17.3 mAHD level; no investigation of the impacts of the staging of the earthworks on flood level, and in particular, the impact of the earthworks the subject of the DA; and no current stormwater plan.
- 89 Mr Miller maintains that any suggestion that the DCP permits flood impacts is incorrect and elevates the DCP above the SEPP.
- 90 In regards to the regional flooding impacts and associated potential damages, Mr Miller contends that this is not a distraction and council's

concerns are entirely reasonable and responsible and the issue is an important matter for consideration under s 79C..

Consideration and findings

- 91 The main issue in these proceedings is the impact of the net increase in fill and subsequent loss of flood storage as a consequence of the proposed earthworks on local and regional flood levels.
- 92 Section 79C of the EPA Act requires us to take a number of relevant matters into consideration in our determination of this development application.
- 93 The starting point of our consideration must be SEPP-SRGC as this is the environmental planning instrument that applies to the site (s 79C(1)(a)(i)). Essentially, the aims of the SEPP are to co-ordinate the release and planning of land for urban development in an orderly and sustainable manner in Sydney's regional growth centres, including the North West Growth Centre.
- 94 Clause 20 - Development on and near certain land at Riverstone West – specifically applies to this development application. Clause 20(2) makes it clear that 'Despite any other provision of this Policy (including any Precinct Plan), the consent authority **must not grant consent** for development on land to which this clause applies **unless it is satisfied** of **all** four specified matters in subclauses (a), (b), (c) and (d).
- 95 Subclause 20(2)(a) requires that the proposed development will be undertaken in a manner that is consistent with the Floodplain Management Strategy which is part of the RWDCP [Appendix C]. Therefore, the SEPP requires the application of the DCP. Notwithstanding the deficiencies in RWDCP (discussed elsewhere), the DCP in turn consistently requires demonstration of compliance with the SEPP. Apart from the exceptions noted below, we are generally satisfied that the applicant's detailed Floodplain Management Strategy, to the extent that this underpins the

proposed development, complies with Appendix C of RWDCP. We acknowledge the applicant's acceptance of the deficiencies in the Development Application and council's agreement that most of these deficiencies can be dealt with by way of conditions.

96 In our view, subclause 20(2)(b) is the key to whether consent can be granted to the proposed development. This subclause requires the consent authority to reach a state of satisfaction that the proposed development '**does not increase** flood levels on adjoining properties up to the design 100 year recurrence flood'.

97 In this regard we prefer Mr Miller's submissions on the interpretation of the subclause (at [85]). In our view 'does not increase' has the same meaning as 'there will be no increase'. The ordinary meaning of 'no' (Macquarie Dictionary) in this context is "not in any degree", and for 'not' – "a word expressing negation, denial, refusal or prohibition". In our view, this subclause prohibits any development that would lead to an increase in flood levels on adjoining properties. There is no qualification of the word 'increase' other than a prohibition through the use of 'not'. This is contrasted with the qualifications of the degree of flooding or level of impact allowed in subclauses (c) and (d).

98 At [17] of the joint report, and confirmed in oral evidence, the experts agree that the proposed development **will** increase flood levels outside Lot 211 and therefore on adjoining properties; albeit the increase is less than 10mm for most modelled flood scenarios, a figure acknowledged to be within the sensitivities of the models. While we note the dispute between the experts about the 100 year ARI Hawkesbury flood with a 20 year ARI Eastern Creek flood and its significance, the potential increase of this combination is 40mm. Even if we accept Mr Thomas' considered and reasonable explanation of the rarity of this event and discard this combination, as there will be an increase in flood levels arising from the other modelled events, we cannot grant consent to the development application before us.

- 99 We also note the agreement between Mr Bewsher and Mr Thomas at paragraph [69] of this judgment that refining the fill footprint in the south-east corner of Lot 211 would probably reduce the predicted flood level for the 100/20 combination to an acceptable level, no modelling has been undertaken to demonstrate whether that acceptable level is still an increase, and or what the impact may be on the other specified combinations of flood events. Therefore, despite this agreement, we cannot be satisfied to the level required by cl. 20(2).
- 100 While modelling has been undertaken for the design 100 year recurrence flood, but not specifically up to that point as required by c. 20(2)(b), we do not see this particular element of the subclause as a matter warranting refusal.
- 101 Although we have determined that we cannot grant consent to the proposed development, we have considered the other subclauses and matters to be addressed under s 79C.
- 102 As the experts agree that the proposal limits any increases in flood velocities on adjoining properties to minor increases, we are satisfied that subclause 20(2)(c) is met.
- 103 On the face of it, the increases in flood levels on adjoining properties appear to be small however, as no modelling has been undertaken of the proposed stage 1 earthworks, we cannot be satisfied there will be any adverse flood impacts on those properties as a consequence of the proposed development. To this end, subclause 20(2)(d) is not met but could be with further modelling and assessment.
- 104 In regards to the regional impacts, the focus of cl 20(2) is on adjoining land and therefore local impacts. RWDCP appears to have a broader, more ambiguous focus. While Appendix C requires an FMS to consider local impacts, it must also be prepared in accordance with the *NSW Floodplain*

Development Manual 2005. The Manual does not specify the size of any study area however it provides a range of factors to consider in defining the study area. The Worley Parsons FMS considered it unrealistic to consider the entirety of the Hawkesbury-Nepean system given its massive size. The FMS investigated the impact on an area of about 98km² being the 'local' floodplain with a consistent 100 year ARI flood level equivalent to 17.3 mAHD'. In our view this is a reasonable approach.

- 105 Notwithstanding the disagreement between Mr Thomas and Mr Bewsher about the assessment of the cumulative impacts of the proposal on the floodplain, we note the experts' agreement (paragraph [70] of this judgment) that there will be an increase in flood levels at a more regional level. While this is a relatively minor increase, it will nonetheless have an economic impact and must be considered in the public interest under s 79C(1)(e). The SEPP provides no specific guidance in regards to regional impacts although applying the same logic to regional flooding as is given to local flooding in cl. 20(2)(b), we must similarly refuse the proposal on this basis. We also note the Development Objective (2) in RWDCP which is to "ensure development does not cause offsite flood impacts that are unacceptable to Council". On the evidence before us we cannot be satisfied that the offsite flood impacts would be acceptable.
- 106 Both the SEPP and s 79C(1)(a)(iii) require consideration of RWDCP.
- 107 It is fair to say that the drafting of RWDCP and to some extent the SEPP, has created challenges for the parties and for the Court. Indeed, there are many inconsistencies in RWDCP that don't engender great confidence in it, starting with the absence of the date of commencement and including others, such as cut and fill plans, that have been mentioned elsewhere in this judgment.
- 108 Significantly, RWDCP only applies to the land illustrated in Figure 1 – the Riverstone West Precinct and does not include Lot 11 on the yet to be rezoned precinct to the west. The DCP requires the preparation of

precinct-wide plans. However, cl 20 SEPP-SRGC applies to the Riverstone West Precinct and Lot 11 as does Appendix C in RWDCP, (referred to in cl. 20(2)(a) SEPP-SRGC) and presumes cut and fill earthworks – illustrated in Figures C2, C3 and C4 of the DCP. Our reading of cut and fill control (2) in s 4.2 of RWDCP is that the works within the Riverstone West Precinct and Lot 11 are to achieve a balance between cut and fill as indicated in Figure C2 of Appendix 3. The council report considers the loss of 2.65 million cubic metres of floodplain storage within the Riverstone West Precinct as a figure endorsed by the RWDCP and which therefore the council is prepared to accept (see [55]-[56] of this judgment), however, we cannot be so confident.

- 109 The inclusion of Lot 11 into some parts of the SEPP and DCP and not others presents great difficulties for a proponent and the consent authority given Lot 11 is in separate ownership and its status is uncertain. Indeed it is not clear that SEPP-SRGC currently applies to Lot 11 as the zoning map Sheet LZH_004 shows Lot 11 as being outside the boundary of the North West Growth Centre (see [24]). In our view, neither the 2009 amendment to the SEPP (occasioned by the creation and rezoning of the Riverstone West Precinct) nor the accompanying RWDCP, have been carefully drafted to avoid anomalies and inconsistencies or, if the anomalies are intended, explain them in any meaningful way.
- 110 In considering the submissions made on behalf of the chamber of commerce, we agree that the proposal is largely consistent with the aims and objectives of both the SEPP and the DCP. To the very limited extent to which environmental issues were canvassed, the proposal is unlikely to cause any unacceptable impacts on the riparian zone and the wildlife corridor. We note the proposed setback of any earthworks from Eastern Creek and the very minor increases in velocity of any floodwater. We also note that s. 1.4.3 RWDCP states that 16.3 ha of existing native vegetation is to be retained or offset within the precinct, 4.3 ha of which is to have Biodiversity Certification under the *Threatened Species Conservation Act, 1995*.

Orders

111 As a consequence of our findings, the Orders of the Court are:

- (1) The appeal is dismissed.
- (2) Development Application DA-13-1845 for Stage 1 bulk earthworks and associated activities on part of Lot 211, DP 830505, Riverstone is refused.
- (3) The exhibits except B and 5 are returned.



Judy Fakes

Commissioner of the Court



Ross Spears

Acting Commissioner of the Court

APPENDIX B

Tracked Changed- Proposed Amendments to Clause 20



PROPOSED AMENDMENTS TO CLAUSE 20 OF GROWTH CENTRES SEPP 2006

20 Development on and near certain land at Riverstone West

(1) This clause applies to the land shown outlined in red on the [North West Growth Centre Development Control Map](#).

(2) Despite any other provision of this Policy (including any Precinct Plan), the consent authority must not grant consent for development on land to which this clause applies unless it is satisfied that the proposed development:

(a) will be undertaken in a manner that is consistent with the Floodplain Management Strategy (~~being part of~~prepared in accordance with the Riverstone West Precinct Development Control Plan), and

(b) does not materially increase flood levels on adjoining properties in events up to and including the ~~design~~ 100 year recurrence flood, and

(c) limits any increases in flood velocities on adjoining properties in events up to and including the ~~design~~ 100 year recurrence flood to minor increases only, and

(d) is not likely to materially result in adverse flood impacts on adjoining properties (including during any construction stage of the proposed development).

(3) This clause does not apply to development that the consent authority is satisfied is minor and will not result in unacceptable adverse flood impacts on adjoining properties.