



Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday, 19 September 2005*

Time: *6.00pm*

Outline Of Meeting Protocol & Procedure:

- The Chairperson will call the Meeting to order and ask the Committee/Staff to present apologies or late correspondence.
- The Chairperson will commence the Order of Business as shown in the Index to the Agenda.
- At the beginning of each item the Chairperson will ask whether a member(s) of the public wish to address the Committee.
- If person(s) wish to address the Committee, they are allowed four (4) minutes in which to do so. Please direct comments to the issues at hand.
- If there are persons representing both sides of a matter (eg applicant/objector), the person(s) against the recommendation speak first.
- At the conclusion of the allotted four (4) minutes, the speaker resumes his/her seat and takes no further part in the debate unless specifically called to do so by the Chairperson.
- If there is more than one (1) person wishing to address the Committee from the same side of the debate, the Chairperson will request that where possible a spokesperson be nominated to represent the parties.
- The Chairperson has the discretion whether to continue to accept speakers from the floor.
- After considering any submissions the Committee will debate the matter (if necessary), and arrive at a recommendation (R items which proceed to Full Council) or a resolution (D items for which the Committee has delegated authority).

Delegated Authority (“D” Items):

- To require such investigations, reports or actions as considered necessary in respect of matters contained with the Business Agendas (and as may be limited by specific Council resolutions).
- Confirmation of Minutes of its Meeting.
- Any other matter falling within the responsibility of the Urban Planning Committee and not restricted by the Local Government Act or required to be a Recommendation to Full Council as listed below:

Recommendation only to the Full Council (“R” Items):

- Such matters as are specified in Section 377 of the Local Government Act and within the ambit of the Committee considerations.
- Broad strategic matters, such as:-
 - Town Planning Objectives; and
 - major planning initiatives.
- Matters not within the specified functions of the Committee.
- Matters requiring supplementary votes to Budget.
- Urban Design Plans and Guidelines.
- Local Environment Plans.
- Residential and Commercial Development Control Plans.
- Rezoning applications.
- Heritage Conservation Controls.
- Traffic Management and Planning (Policy) and Approvals.
- Commercial Centres Beautification Plans of Management.
- Matters requiring the expenditure of moneys and in respect of which no Council vote has been made.
- Matters reserved by individual Councillors, in accordance with any Council policy on "safeguards" and substantive changes.

Committee Membership:

7 Councillors

Quorum:

The quorum for a committee meeting is 4 Councillors.

WOOLLAHRA MUNICIPAL COUNCIL

Notice of Meeting

15 September 2005

To: The Mayor, Councillor Andrew Petrie, ex-officio
Councillors Keri Huxley (Chair)
 John Comino
 Christopher Dawson
 Wilhelmina Gardner
 Geoff Rundle
 Isabelle Shapiro
 David Shoebridge

Dear Councillors

Urban Planning Committee Meeting – 19 September 2005

In accordance with the provisions of the Local Government Act 1993, I request your attendance at a Meeting of the Council's **Urban Planning Committee** to be held in the **Committee Room, 536 New South Head Road, Double Bay, on Monday 19 September 2005 at 6.00pm.**

Gary James
General Manager

Meeting Agenda

Item	Subject	Pages
1	Leave of Absence and Apologies	
2	Late Correspondence	
3	Declarations of Interest	

Items to be Decided by this Committee using its Delegated Authority

D1	Election of Deputy of Chairperson	1
D2	Confirmation of Minutes of Meeting held on 5 September 2005	2
D3	Councillor Representation of Working Parties to the Urban Planning Committee – 40.G	3

Items to be Submitted to the Council for Decision with Recommendations from this Committee

R1	Clause 25(2) – Woollahra LEP 1995 – 1064.G	8
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Item No: D1 Delegated to Committee
Subject: Election of deputy chairperson
Author: Les Windle - Manager Governance
File No:
Reason for Report: For the Committee to elect a Deputy Chairperson

Recommendation:

That Councillor _____ be elected as Deputy Chairperson of the Urban Planning Committee for the ensuing twelve months.

Background:

It has been the practice for the Committee to elect a Deputy Chairperson who can chair the meeting in the absence of the chairperson.

Les Windle
Manager Governance

Annexures:

Nil

Item No: D2 Delegated to Committee
Subject: **Confirmation of Minutes of Meeting held on 5 September 2005**
Author: Les Windle, Manager – Governance
File No: See Council Minutes
Reason for Report: The Minutes of the Meeting of Monday 5 September 2005 were previously circulated. In accordance with the guidelines for Committees' operations it is now necessary that those Minutes be formally taken as read and confirmed.

Recommendation:

That the Minutes of the Urban Planning Committee Meeting of 5 September 2005 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No: D3 Delegated to Committee
Subject: **Councillor Representation on Working Parties to the Urban Planning Committee**
Author: Allan Coker, Director Planning and Development
File No: 40.G
Reason for Report: To review the need for each of the working parties to the Urban Planning Committee.

Recommendation:

- A. That the review of each of the working parties to the Urban Planning Committee be noted, and the recommendations for the continuation and appointment of Councillors to each working party be adopted.
- B. That the Mayor be authorised to appoint the Councillor representatives to the Urban Planning Committee Working Parties as recommended.

Background:

At the Extraordinary Committee Meeting of Council of 7 September 2005 it was resolved:

- a. That a report be brought to the appropriate Committee to review the need for each of the other Committees and organisations having regard to the original purpose of the appointment.*
- b. That the Mayor invite expressions of interest from Councillors as to which other Committees and organisations they wish to serve on.*
- c. That subject to the outcome of the report and review in resolution (a) above, the Mayor be authorised to appoint the Councillor representatives to the other Committees and organisations.*
- d. That the existing appointees to other Committees and organisations remain until the report and review mentioned in (a) above is carried out.*

In accordance with this resolution the working parties to the Urban Planning Committee have been reviewed. The outcomes of this review are detailed in the following table.

It has been past practice for the Mayor of the day to appoint delegates and representatives to various external and internal committees, working parties and forums. It is recommended that this continue once the recommendations for each committee/working party are accepted.

Committees and Working Parties

Urban Planning related Sub Committees/Working Parties				
Committee Name	Review of Committee	Recommendation	Membership	Current members appointed
Strategic Planning Working Party	<p>This working party was established in September 2004 for the following purposes:</p> <p>“To provide input to projects within the Management Plan listed under the sub-activities of:</p> <ul style="list-style-type: none"> ▪ environmental planning ▪ heritage conservation ▪ urban design ▪ environmental protection <p>To report and make recommendations to Council on:</p> <ul style="list-style-type: none"> ▪ the scope and direction of projects within the sub-activities of the Management Plan mentioned above ▪ the need for additional projects ▪ priorities to be given to projects ▪ other matters of strategic planning interest to the Council and the community.” <p>The working party has been providing important and significant input into two major projects, namely the Neighbourhood Centres Strategy and the White City LEP/DCP. There will be a continuing need for this working party to see through these projects and to provide input into future environmental planning projects.</p> 	<p>Working party and Councillor representation continue.</p> <p>That all Paddington Ward Councillors be members for the White City project.</p>	9 Councillors	<p>The Mayor Cr Rundle, Crs Boskovitz, Cr Comino, Cr Dawson, Cr Excell, Cr Gardner, Cr Huxley, Cr Shapiro, Cr Shoebridge.</p> <p>+</p> <p>Cr Erlich, Cr Martin for White City considerations.</p>

Urban Planning related Sub Committees/Working Parties				
Committee Name	Review of Committee	Recommendation	Membership	Current members appointed
Oxford Street Paddington Working Party	<p>This working party has not yet met but was set up in response to a resolution of Council arising from a Notice of Motion on 25/7/05. The terms of the resolution are:</p> <p>“That a one year working party be formed, consisting of the Paddington Ward Councillors as appointed by the Mayor, and staff as appointed by the GM. Its task is to facilitate a strategic plan for Oxford Street commercial district and Council’s role in achieving this. The working party should report back to Council via the appropriate committee. In developing the plan, the working party should ensure it:</p> <ol style="list-style-type: none"> 1. reviews all existing management plan items and notices of motions concerning the Oxford Street commercial district; 2. conducts appropriate trader, resident and other stakeholder consultation, including a key stakeholders’ workshop to identify common aims, ideas and priorities; 3. identifies and costs any actions that should be taken by Council; 4. provides recommendations for inclusion in the 2006/7 management plan. 	Working party and Councillor representation continue.	7 Councillors	Mayor Cr Rundle, Cr Martin, Cr Huxley, Cr Erlich, Cr Boskovitz, Cr Shoebridge, Cr Gardener

Urban Planning related Sub Committees/Working Parties				
Committee Name	Review of Committee	Recommendation	Membership	Current members appointed
Double Bay Commercial Centre Working Party	<p>This working party was established as a consequence of a meeting with the Double Bay Chamber of Commerce on 5/8/05.</p> <p>At the Council meeting held on 8/8/05 Cr Sinclair King asked the Mayor to confirm arrangements for the establishment of the working party to look at various matters relating to the Double Bay Commercial Centre.</p> <p>The Mayor, in a memo of 26/8/05, appointed Councillors to the working party. However, this working party has not yet met.</p>	Working party and Councillor representation continue.	8 Councillors	Mayor Cr Rundle, Cr Dawson, Cr Sinclair King, Cr Walker, Cr Shapiro, Cr Petrie, Cr Gardener
Paddington DCP Working Party	<p>This working party was reconvened to review the Paddington DCP and has met on five occasions from 10 November 2004 to 5 April 2005.</p> <p>The working party has been providing input into to various aspects of the review including the consideration of new or revised controls for excavation, garaging, dormer windows, rear additions and landscaping.</p> <p>The working party will need to review the draft DCP when it is finalised and will have a role in the post exhibition process.</p>	Working party and Councillor representation continue.	6 Councillors	Mayor Cr Runlde, Cr Ehrlich, Cr Huxley, Cr Martin, Cr Gardner, Cr Shoebridge

Conclusion:

The working parties to the Urban Planning Committee should continue because they will provide a forum for important Councillor input into key environmental planning projects.

Allan Coker
Director Planning and Development

Annexures:

There are no annexures to this report.

Item No: R1 Recommendation to Council
Subject: **Clause 25(2) - Woollahra LEP 1995**
Author: Chris Bluett - Manager Strategic Planning
File No: 1064.G
Reason for Report: To respond to a decision of the Council made on 14 February 2005.
To obtain a decision to amend clause 25(2) of Woollahra LEP 1995.

Recommendation

That a draft local environmental plan be prepared to amend clause 25(2) in Woollahra LEP 1995 by making the disposal of stormwater from land to be developed a matter of consideration in the determination of development applications.

1.0 Background

Clause 25 of Woollahra LEP 1995 requires the Council to be satisfied about the provision of water, sewerage and stormwater systems *before* granting consent to a development application. Clause 25 states:+

25. Water, wastewater and stormwater systems

- (1) The Council must not grant consent to the carrying out of development on land or subdivision of land to which this plan applies for the purpose of a habitable building unless it is satisfied that adequate water and sewerage services will be available to the land it is proposed to develop.
- (2) The Council must not grant consent to the carrying out of development on land or the subdivision of land to which this plan applies for any purpose unless it is satisfied that adequate provision **has been made** (emphasis added) for the disposal of stormwater from the land it is proposed to develop.

A report on clause 25(2) of Woollahra LEP 1995 was considered by the Urban Planning Committee on 31 January 2005 (**annexure 1**). That report was prepared in response to two interrelated matters. The first matter concerned the decision of Justice Bignold handed down on 9 August 2004 in regard to a preliminary point of law for an appeal in the Land and Environment Court involving 20-22 Roslyndale Avenue, Woollahra (**annexure 2**). The second matter related to the preparation and approval of the Draft Stormwater Drainage Management Drainage DCP.

Justice Bignold's decision has the potential to impose significant implications on the assessment, determination and implementation of certain types of development applications affected by the operation of clause 25(2). These implications, which include significant additional costs towards the preparation, assessment and determination of applications, and associated major delays in the processing of applications, affect applicants and the Council. The decision also has significant implications for the operation of the Draft Stormwater Drainage Management DCP in its current construction, because the Draft DCP requires the use of gravity discharge of stormwater to Council's drainage system as the preferred method of stormwater disposal.

To satisfy clause 25(2) and the requirements of the Draft Stormwater Drainage Management DCP, drainage easements may be required over down-stream properties. However, as a consequence of Justice Bignold's decision, the fulfillment of this requirement could not be dealt with by condition of consent. Instead, it would be necessary to have the easement registered prior to consent being granted.

The report to the Urban Planning Committee meeting on 31 January 2005 included, on confidential sheets, legal advice from Brian Preston QC (**annexure 3**) and Deacons (**annexure 4**). This advice can now be re-circulated on plain sheets. Based on the advice and the implications for the assessment and determination of development applications, the report contained a recommendation to amend clause 25(2).

Mindful that the main appeal regarding No.20-22 Roslyndale Avenue had not been determined at the time, and wishing to have more information about the implications of clause 25(2) and alternate ways of managing it, the Committee formed a new recommendation which was adopted by the Council on 14 February 2005.

That the report to the Urban Planning Committee of 31 January 2005 about clause 25(2) of Woollahra LEP 1995 be deferred pending the outcome of the Land and Environment Court proceedings with respect to No 20-22 Roslyndale Avenue, Woollahra, and a further report then submitted to a future meeting of the Committee so that the committee can be provided with the following additional information:

1. *Detailed advice on the minimum legal and/or physical requirements to satisfy clause 25(2).*
2. *Details of all undetermined applications affected by clause 25(2), including details of how they are affected.*
3. *Should Council want to retain clause 25 (2), including with amendments, details of how it could be managed to minimise delays and costs.*
4. *The outcome of the Land and Environment Court proceedings with respect to No 20-22 Roslyndale Avenue, Woollahra.*
5. *The effects of retaining the existing clause 25(2) on applicants, including the legal and practical capacity to obtain satisfaction of clause 25(2), prior to a determination of a DA.*

We have obtained further advice from Brian Preston SC to assist in providing a response to the above five items, and to inform further options for dealing with clause 25(2). Mr Preston's advice (**annexure 5**) makes reference to various decisions of the Land and Environment Court and the Court of Appeal, including *Codlea Pty Ltd v Bryon Shire Council*.

The recommendation now submitted to the Council in this report has regard to the advice from Deacons and Mr Preston. Our approach is based on several points:

- separating the planning assessment and merits of an application from civil processes and actions that may be followed or taken by property owners
- removing costs to the Council and additional steps that would not be part of the application process, other than by the operation of clause 25(2)
- removing delays in the application processing system that are a consequence of clause 25(2).

2.0 Response to Council's decision of 14 February 2005

2.1 Detailed advice on the minimum legal and/or physical requirements to satisfy clause 25(2).

The advice we have obtained from Deacons and from Mr Preston in written and oral form, which takes into account the decision by Justice Bignold on the preliminary point of law for *Billgate*, addresses the minimum legal and physical requirements to satisfy clause 25(2). In summary the advice is:

- The Council can not grant consent until it is satisfied that adequate provision has been made for the disposal of stormwater from the land proposed to be developed.
- Where an easement over adjoining land is required to facilitate disposal of stormwater, the minimum legal requirement is a registered easement over the adjoining land, the terms of which provide for the drainage proposed.
- Council can not deal with the easement by way of a condition of consent. Registration will need to occur prior to consent being granted.
- A personal agreement between the property owners for an easement to be created at some future time will not be adequate because such an agreement may not be honoured by either party and will not be binding on a new owner or on a mortgagee who obtained possession of either property.
- The physical capacity of a stormwater system can be evaluated without structures and works being constructed, provided the legal entitlement to construct those structures and works is in force and effect prior to granting consent.
- A common sense and practical approach to using clause 25(2) does not require the construction of structures and works for the disposal of stormwater prior to the determination of a development application (including the granting of consent) for development that generates the stormwater.
- The Council may continue to impose a condition of consent requiring construction of drainage works provided there is a registered drainage easement, if one is required.

2.2 Details of all undetermined applications affected by clause 25(2), including details of how they are affected

Clause 25(2) must be considered in the assessment of all development applications. However, we assume the focus of the Council's resolution is on those applications affected by Justice Bignold's point of law interpretation. Therefore, we have only identified those current development applications that require easements over adjoining lands.

The list provides a current picture, but we emphasise that appeals to the Court and delays to the Council's assessment system are likely to continue if clause 25(2) is retained in its existing form.

In order to gauge the full affect of clause 25(2) Councillors should be aware of those applications that have proceeded to Court. We have therefore included two applications that have been determined since the last report to the Committee.

Where applications proceed to Court, the reasons for the appeal may lie solely in the inability to satisfy clause 25(2) or there may be other reasons resulting in the application's refusal. In the latter case it is not possible to attribute full costs of the appeal to issues relating to clause 25(2).

Application No.	Address	Type of Development	Comment and affect of clause 25(2)
DA516/2004	141 Victoria Road, Bellevue Hill	New dwelling house	DA deferred - stop-the-clock letter out, easement required
DA851/2004	44 Kings Road, Vaucluse	New dwelling house	DA to be refused - no easement, appeal on ground of clause 25(2) issue only is likely.
DA214/2004	163 Victoria Road, Bellevue Hill	New RFB	DA refused - planning and stormwater issues, including easement
DA479/2004	92 Drumalbyn Road, Bellevue Hill	Subdivision	DA refused. Appeal to L & E Court heard. Commissioner indicated he would approve the DA subject to an easement being created. Section 40 matter before the Court. Legal costs to date \$28,261
DA840/2004/1	124-126 Bellevue Road, Bellevue Hill	New RFB	Easement required, negotiations with neighbours failed, DA refused for Clause 25(2) and traffic reasons. Class 1 appeal before the Court (with judgement reserved). Section 40 application pending Court decision. Legal costs to date \$10,080
DA371/2005/1	128 Bellevue Road, Bellevue Hill	New RFB	Easement required. Applicant negotiating with neighbours who did not agree to easement required for DA for 124-126 Bellevue Road.
DA362/2005/	2 Cooper Park Road, Bellevue Hill	New dwelling house	Easement required. Further information from the applicant was received on 27/7/2005 indicating that there is no need for acquisition of a drainage easement. Technical Services considering DA.
DA172/2005	6 Tarrant Avenue, Bellevue Hill	New dwelling house	Easement required. Further information from the applicant was received on 19/8/2005 requesting exemption of a drainage easement. Technical Services considering the DA.
DA127/2005/1	12 Greenoaks Avenue, Darling Point	Alterations and additions to existing dwelling house	DA deferred - stop-the-clock letter out, easement required. Drainage infrastructure already exists but without formal easement. Negotiations with neighbours ongoing.
DA194/2005/1	10 Annandale Street, Darling Point	New RFB	DA deferred - stop-the-clock letter out, easement required. L&E Court (deemed refusal) appeal lodged. Negotiations with neighbours ongoing. Final legal costs unavailable to date.
DA23/2005	182 Old South Head Road, Vaucluse	New dwelling house	DA deferred - stop-the-clock letter out, easement required. Negotiations with neighbours likely to be successful.

2.3 Should Council want to retain clause 25(2), including with amendments, details of how it could be managed to minimise delays and costs

The issue here appears to relate to circumstances where a drainage easement is required over adjoining land. Hence, the ability to obtain such an easement prior to the granting of development consent may impose delays in processing a development application if an easement is not secured before lodgement. Costs may arise for Council where it becomes a party to proceedings in the Land and Environment Court commenced by the applicant. Section 2.5, below, mentions these proceedings.

For reasons set out in 2.1 and 2.5, the issue does not appear to be relevant to the construction of drainage works, since these works may be addressed by means of a condition of development consent.

Retaining clause 25(2) without amendments

Certain administrative steps may be introduced to forewarn applicants of the requirements of clause 25(2), particularly in cases where a registered drainage easement is needed. Pre-DA procedures, the DA Guide, DA forms and DA checklists can be strengthened to highlight these requirements. The objective is to secure the easement prior to lodgement of the DA thereby avoiding delays and additional costs during the processing and assessment stages.

Despite the purpose of these administrative steps, an applicant may decide to lodge an application without a registered easement or with the intention of providing the easement during the assessment process. In both cases delays in processing times will occur. Whilst stop-the-clock steps can be applied in the first instance, these require additional administration actions and cannot in the longer term guarantee submission of the required easement. Should the easement not be provided, the Council has no option other than to refuse the application. Such action may lead to an appeal by the applicant. Council would be drawn into the appeal as respondent and would incur legal costs and possibly other costs if additional expert evidence was required.

Amending clause 25(2)

The nature of the amendment will influence delays and costs. For instance, if through interpretation of the clause, despite its amendment, a registered easement is still required before development consent can be granted, delays and costs may be inevitable. However, if clause 25(2) was amended so that the requirement for an easement was not a pre-condition of a development consent, the delays and refusals currently occurring and the potential costs to the Council would be avoided. Section 3.0 of this report discusses such an amendment to clause 25(2).

2.4 The outcome of the Land and Environment Court proceedings with respect to No 20-22 Roslyndale Avenue, Woollahra

This appeal (10179 and 10180 of 2004) against the Council's refusal of two development applications for No.20-22 Roslyndale Avenue, Woollahra, was heard over four days commencing on 1 November 2004. The decision of Justice Bignold was handed down on 18 February 2005 (**annexure 6**). The appeal was dismissed and both applications were refused.

The Council raised compliance with clause 25(2) as one of seven issues in the case. Despite this, Justice Bignold's decision did not revisit clause 25(2) beyond a brief mention in his conclusion. He stated:

Since this conclusion is determinative of the present appeal, it is not necessary to consider the remaining issues debated at the hearing. In particular I do not think it necessary to determine the issue raised by the Council based upon cl 25(2) of the LEP. The reasons for my preliminary determination, I think, have said enough on this issue. Since my decision on the planning appeal is not favourable to the Applicant, it is not necessary to further explore any future phase of the present case which relies upon the grant of an easement pursuant to the *Land and Environment Court Act 1979*, s40.

Unfortunately, the second decision of Justice Bignold does not assist with the debate on whether clause 25(2) should be retained, amended or deleted.

2.5 The effects of retaining the existing clause 25(2) on applicants, including the legal and practical capacity to obtain satisfaction of clause 25(2), prior to a determination of a DA

Because of Justice Bignold's decision on the preliminary point of law, the operation of clause 25(2) in its existing state places obligations and limitations on applicants.

Applicants will be required to demonstrate that adequate provision has been made for the disposal of stormwater. One way of achieving this is through a stormwater drainage management plan.

Where it is required that stormwater disposal from a development be carried out by means of a pipe across an adjoining property, an easement will be required over that property. This requirement may apply to all building types, including dwelling-houses, and to a variety of development works ranging from alterations and additions to the construction of a new building.

The decision of Justice Bignold requires an easement to be registered before the Council can grant development consent. Therefore, the applicant must submit a registered drainage easement to Council as part of the development application. Preferably this should be done at the time of lodgement. For its part, the Council must be satisfied about the adequacy of the easement to provide for the disposal of stormwater. This may include an assessment of the terms of the easement, its location and its dimensions.

In the process of negotiating, drafting and registering the easement the applicant would incur costs, which may include legal and expert costs.

Where the applicant willfully fails to provide a registered easement, or is unable to secure the easement despite negotiation with an adjoining property owner, it would be open to Council to refuse the development application. Similarly, if there were extensive delays or uncertainty in obtaining a registered easement, assuming one had not been submitted with the development application, the Council could refuse the application.

Where, despite negotiation, an easement can not be obtained, there are two legal options available to the applicant.

Option 1

An application could be made to the NSW Supreme Court for the granting of an easement under section 88K of the *Conveyancing Act 1919*. Once a registered easement had been obtained, the applicant could then lodge a development application.

Option 2

The applicant could lodge an appeal with the NSW Land and Environment Court against the Council's refusal of the application or deemed refusal (where a decision is not made within 40 days of lodgement). In conjunction with that appeal the applicant could make a second application to the Land and Environment Court for an easement under section 40 of the *Land and Environment Court Act 1979*.

Under both options the applicant would incur legal costs and possibly expert costs. In the second option, the Council would incur legal costs and possibly expert costs when appearing as a respondent to the appeal. The Council's involvement in these proceedings would also affect staff work time and hence there would be a flow on affect with processing other development applications and dealing with other planning matters.

Justice Bignold, in either of his judgements, did not address the issue of physically providing the drainage works prior to granting development consent in order to satisfy clause 25(2). Despite this, it is worth noting that there are significant practical implications in meeting such a requirement.

- An applicant would need to construct drainage works at their cost without certainty that the development requiring those works would be granted consent.

- On-site demolition may be required before drainage works are constructed. As demolition requires development consent a two-staged process eventuates. Again, there would be no certainty that the application for construction of the building would be approved.
- Expansion of the development assessment process through separate applications for demolition and construction would have substantial impacts on staff workloads and on processing times for all applications.
- The owner of adjoining land may reasonably withhold consent for creation of an easement and construction of drainage works on the basis that there is no certainty that consent will be granted to the application to construct the building.

Mr Preston, in his advice of 9 August 2005 (**annexure 5**), has addressed the issue of providing the physical works prior to development consent. In his opinion clause 25(2) should be interpreted in a “common sense and practical” way so as not to require “the actual construction of the structures and works for the disposal of stormwater prior to the determination of the development application for the development that generates the stormwater.” (p.9)

In regard to the issue of constructing drainage works, the Council can continue to impose conditions for the works, provided there is a sufficient registered easement, where one is required. This approach would also apply in cases where easements were not required, that is where only on-site drainage works were required.

3.0 Options for clause 25(2)

Putting aside the manner in which it is currently expressed, the primary purpose of clause 25(2) is to ensure that adequate provision is made for disposal of stormwater from land that is developed. This is an environmental consideration that must be made as part of the development assessment. With this purpose in mind there are several options available to the Council.

Option 1 – retain clause 25(2) in its current form

Based on the implications arising from the decision of Justice Bignold in the preliminary point of law for *Billgate* we do not consider clause 25(2) should be maintained in its current form. There are clear cost implications for the Council and applicants as well as processing time implications. These implications are in our view unsustainable in the longer term. Therefore, we strongly recommend that clause 25(2) be amended or perhaps deleted.

Option 2 – delete clause 25(2)

In our report to the Urban Planning Committee on 31 January 2005 we submitted a view that clause 25(2) could be deleted without there being any resultant loss in the proper and effective consideration of stormwater disposal from a development site. Our view was based on the following points:

- Section 79C of the Act adequately deals with the assessment of stormwater disposal in four ways by requiring the Council to consider the following matters relevant to development proposals:
 - The provisions of any development control plan (section 79C (1)(a)(iii)). The Draft Stormwater Drainage Management Plan, once approved and in force, will be used where relevant to a development proposal under this head of consideration.
 - The likely impacts of that development, including environmental impacts on both the natural and built environment, and social and economic impacts in the locality (section 79C(1)(b)).
 - The suitability of the site for the development (section 79C(1)(c)).
 - The public interest (section 79C(1)(e)).

- The Act and Regulation allow the Council to require sufficient information for the proper assessment of a development proposal, which in turn may lead to a conclusion that development is environmentally acceptable and consent may reasonably be granted.
- Measures such as deferred commencement consents and conditions of consent can be used to ensure that adequate stormwater disposal is provided at certain stages of the development process. These measures are legally binding on applicants and their successors.
- Public input to the assessment process is maintained and issues of public concern can still be properly considered.
- Rights under civil law are not diminished.
- The Act and Regulation envisage that construction details can be provided and assessed at the construction certificate stage and therefore do not need to be resolved and in place before development consent is granted.

We maintain that deletion of clause 25(2) is a valid option.

Option 3 – amend clause 25(2)

If Council wishes to retain clause 25(2) we recommend an amendment that has the effect of removing the requirement for providing a registered drainage easement as a pre-condition of development consent.

Our approach is based on separating the environmental and merit considerations from the civil processes and actions that may arise from a development proposal. Mr Preston has provided advice on the civil processes available in the courts to obtain easements and the rights of owners under the relevant statutes, particularly the owners of land to be burdened by an easement. In particular, Mr Preston has addressed the issue of amending clause 25(2) and the considerations of the courts in making an order imposing an easement over land. He states:

The Courts will approach any application for an order that an easement be imposed over land with caution, having regard to the fact that a compulsory change of registered property rights is sought and this is not to be undertaken lightly: See *Durack v De Winton* (1998) 9 BPR 16, 403 at 16, 448.

The likelihood of a Court, either the Land and Environment Court under s.40 of the *Land and Environment Court Act* or the Supreme Court under s.88K of the *Conveyancing Act*, making an order imposing an easement over land will not be affected by the form of cl.25(2) of the LEP (either the existing form or the amended form as suggested) or any decision that the Council may have made on the merits of the development, the subject of the development application.

Accordingly, neither an amendment to cl.25(2) which makes consideration of the adequacy of the provision for the disposal of stormwater a matter for consideration, but not a pre-condition, nor the determination by the Council in any particular case to grant a consent conditional on the applicant obtaining an easement for the disposal of stormwater on the land proposed to be developed, ought to weaken either the Council's case or the case of the adjoining owner over whose land an easement is sought for disposal of stormwater from the land proposed to be developed.

Mr Preston has suggested in his advice of 24 July 2004 and 9 August 2005 that clause 25(2) can be amended so that the disposal of stormwater from a development site becomes a matter of consideration rather than a pre-condition to granting consent. We have drafted the following amendment using Mr Preston's advice:

25(2) When determining an application for development for any purpose the Council must take into consideration the means by which the development proposes to dispose of stormwater from the land to be developed.

Deferred commencement consent and staged development consent

In conjunction with options 2 and 3 the Council could use the provisions of sections 80(3), 80(4) and 80(5) of the Act to grant deferred commencement consent or consent to a staged development. Section 80(3) of the Act states:

(3) ***“Deferred commencement” consent***

A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.

Alternatively a staged development consent may be granted under provisions of sections 80(4) and (5):

(4) ***Staged development***

A development consent may be granted:

(a) *for the development for which the consent is sought, or*

(b) *for that development, except for a specified part or aspect of that development, or*

(c) *for a specified part or aspect of that development.*

(5) *A development consent referred to in subsection (4) may be granted subject to a condition that the development or the specified part or aspect of the development, or any thing associated with the development or the carrying out of the development, must be the subject of another development consent.*

In both cases the Council must carry out a proper consideration of relevant matters under section 79C of the Act prior to granting consent to a development application. This requires consideration of the relevant provisions of a local environmental plan and a development control plan that apply to the land being developed.

It is apparent through sections 80(3), 80(4) and 80(5) that having met the provisions of section 79C the Council may in certain circumstances restrict the operation of a consent until a matter has been carried out to its satisfaction or it can allow development to occur in stages.

4.0 Identification of income and expenditure

Preparation of a draft LEP can be undertaken using in-house resources. All costs associated with the preparation can be taken from the existing 2005-2006 budget.

5.0 Conclusion

Due to Justice Bignold’s interpretation of clause 25(2) significant implications arise with the processing of those development proposals that rely on the provision of drainage easements over adjoining lands. These implications include:

- Delays in processing times where easements have not been secured, despite all other aspects of the proposal being satisfactory.
- Costs to Council in responding to proceedings by applicants in the Land and Environment Court, particularly an application for an easement under section 40 of the *Land and Environment Court Act 1979*.

We do not consider the retention of clause 25(2) in its current form is sustainable due to these implications. Deletion of clause 25(2) or an amendment in the manner set out above are both valid options in our view. Either option may be used in conjunction with the deferred commencement or staged development consent provisions of the Act.

The legal advice supports deletion or amendment of clause 25(2). It also addresses the civil actions and processes that are open to property owners in the courts notwithstanding retention of clause 25(2) in its current form, its removal or its amendment. Importantly, Mr Preston advises that the “likelihood of a court...making an order imposing an easement over land will not be affected by the form of cl. 25(2) of the LEP (either the existing form or the amended form as suggested) or any decision that the Council may have made on the merits of the development, the subject of the development application.”

In the circumstances, we recommend an amendment to clause 25(2), but note that Council may also pursue deletion of the clause.

Chris Bluett
Manager Strategic Planning

Allan Coker
Director Planning and Development

Annexures

1. Report to Urban Planning Committee – 31 January 2005
2. Justice Bignold - Land and Environment Court judgement dated 9 August 2004 – preliminary point of law.
3. Advice from Brian Preston QC – 28 July 2004
4. Advice from Deacons – 30 August 2004
5. Advice from Brian Preston QC – 9 August 2005
6. Justice Bignold - Land and Environment Court judgement dated 18 February 2005