

## Item 10: Operations

### 10.1 Land Acquisition for Drainage Easement - Part Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660 Bombira

REPORT BY THE MANAGER, INFRASTRUCTURE PLANNING  
TO 19 APRIL 2023 ORDINARY MEETING  
GOV400103, COU500013

#### RECOMMENDATION

##### That Council:

1. receive the report by the Manager, Infrastructure Planning and Manager Property and Revenue on the land acquisition for drainage easement servicing new land subdivisions at Bombira;
2. resolve to acquire easement rights over approximately 3.4ha of land traversing Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660 for the purpose of drainage by agreement with the land owner at a compensation price determined by appropriate independent valuation plus or minus 20 percent;
3. arrange the preparation, lodgement and registration of appropriate subdivision plans related to the easement on Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660;
4. construct a drain within the easement to direct the flows through Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660 to discharge at the downstream natural water course, including the demolition and re-establishment of boundary fencing to make stock-proof;
5. amend the budget to allocate amounts for the purchase of easement rights and construction of drainage channels to service Bombira, funded from unrestricted cash, as follows:
  - 2022/23 - \$300,000
  - 2023/24 - \$1,100,000
6. approve an exemption from tender, in accordance with Section 55(3)(i) of the Local Government Act 1993, for the drainage channel construction works, noting that a satisfactory result would not be achieved by inviting tenders;
7. note the reason why a satisfactory outcome would not be achieved by inviting tenders is that the land owner requires that their company complete the works on land they own;
8. authorise the General Manager to finalise negotiations with the land owner, including the construction contract price and contract terms;

9. **authorise the General Manager to finalise negotiation terms with the land owner to create the easement and subsequently enter into a Heads of Agreement with the land owner to record the parties' agreement in respect to the terms on all relevant matters concerning the easement and the compensation to be paid;**
  10. **authorise the General Manager to finalise negotiations with the land owner the terms of a construction licence and enter into a licence deed with the land owner to construct the drain ahead of registration of the easement;**
  11. **authorise the General Manager and the Mayor, if required, to complete and execute all documentation, in relation to the registration of the drainage easement on the plan of subdivision and Certificates of Title for Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660; and**
  12. **authorise the Common Seal of Council be affixed to all documentation, where necessary, in relation to the registration of the drainage easement on the plan of subdivision.**
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## Executive summary

The stormwater management strategy provided by the developer of the residential development site the subject of DA0152/2015 and MA0033/2016 ("Bombira") relies on the stormwater captured from much of the developed site being directed to a single on site detention basin where it is treated for water quality before being discharged, for storms up to a 1 in 100 year event, at flow rates no greater than pre-development flows onto the downstream properties via a pre-existing swale where it extends until it meets a recognised water course.

No easement exists over the downstream properties securing the right for drainage. The downstream land owner has raised concern with respect to the potential for land erosion, giving rise to a future potential claim for nuisance. Since Council is now responsible for the ongoing maintenance of the completed Bombira on site detention basin and drainage network Council must now acquire the drainage easement over the downstream properties and arrange for the construction of a properly designed drainage swale within that easement to safely convey the stormwater generated from the Bombira catchment to discharge at the recognised water course.

This report seeks Council approval to acquire the easement under "Just Terms" and allocate a budget of \$1,400,000 + GST for the costs associated with:

- finalisation of the design,
- acquire and create the easement through registration of a plan of subdivision with Land Registry
- the construction of the drainage swale and associated crossings necessary to maintain property access; and
- drain, clean out and make good the Bucholtz Park on site detention basin.

This report also seeks Council support for exemption from tendering the earthmoving and construction works due to '*extenuating circumstances*', as provided for under s55(3)(i) of the Local Government Act 1993 (LG Act), so that the drainage swale and associated access crossing works are awarded to a single contractor. The contractor is the land owner who has provided quoted construction rates that have been verified by an independent Quantity Surveyor as being fair and reasonable in the current construction market.

## Disclosure of Interest

Nil

## Detailed report

A swale ("Swale") was constructed some time ago by Mr Max Walker ("land owner") on Lot 5 DP1181765 (Lot 5), being part of the land known as 33 Robert Hoddle Grove, Bombira. The purpose of the Swale was to protect Lot 5 from inundation by directing stormwater collected from the undeveloped upstream land discharging onto Lot 5 and then convey it through Lot 61 DP1181768 and Lots 1-2 DP1062660 until it meets a recognised watercourse. This land is grazing land and zoned RU4 Primary Production Small Lots.

There now exists to the north and directly upstream of Lot 5 the residential development site known as "Bombira", the subject of the development consent DA0152/2015 and its subsequent modifications MA0016/2016, MA0033/2016, MA0029/2017 and MA002/2019. Six stages of this development have now been completed and are partially occupied. Another two stages are at construction.

Condition 20 of the Bombira development consent requires:

*"The applicant is to submit a Drainage Report prepared in accordance with the Institution of Engineers publication Australian Rainfall and Runoff (2001) for approval prior to the release of the Construction Certificate. The report must demonstrate that stormwater runoff from the site is not increased beyond the existing undeveloped state up to and including a 100-year ARI. All storm water detention details including analysis shall be included with the drainage report.*

*Note: Post development flows must not exceed pre-development flows up to and including the 100 year ARI event. Any additional works required to satisfy this condition will be entirely at the developer's cost.(AMENDED MA0033/2016)".*

In response to this condition the developer provided to Council the Bombira Estate Stormwater Management Report dated 19/11/2019 ("Cardno Report").

The Cardno Report aims to direct as much of Bombira Estate's runoff to a single on site detention ("OSD") basin located at what is now known as Bucholtz Park, Joseph Place Bombira. The report demonstrated by detailed modelling that the proposed OSD basin would, for storm events up to and including a 100 year ARI, attenuate peak runoff to at or below pre-development (existing) rates and treat the collected stormwater for water quality (as required under condition 22 of the development consent) before discharging to the swale existing on downstream properties described above.

Prior to the issuing of the Construction Certificate for Stage 4 of Bombira, the stage within which the OSD would be located, the Owner of Lot 5 raised complaint to Council in regard to the proposed Bombira development and requested that the construction of the subdivision stages not be approved due to drainage issues through his property.

On 09/12/2019 Council provided a letter in response to the complaint received from the owner of Lot 5 which in part stated:

*"Given that the application for a Construction Certificate (CC) is in accordance with an existing and valid Development Approval Council cannot legally defer or delay the issue the CC being sought in the near future.*

*Council is proceeding with assessment of the CC on the basis that the application complies with the requirements of the amended Development Consent.”*

At around that time Council had sought a technical peer of the Cardno review of the stormwater management plan from a suitably qualified consultant, GHD. The conclusion from the peer review was that the Cardno Report sufficiently addressed the requirements of the development consent condition 20 for most aspects, supporting the 09/12/2019 letter.

On 21/01/2020 Council issued the construction certificate CCC0036/2020 approving the construction of Stage 4 Bombira, including the OSD basin.

Following the issuing of the Bombira Stage 4 construction certificate Council received a letter dated 18/03/2020 from an engineering consultant, on behalf of the land owner, notifying of their concerns arising the Cardno report, specifically:

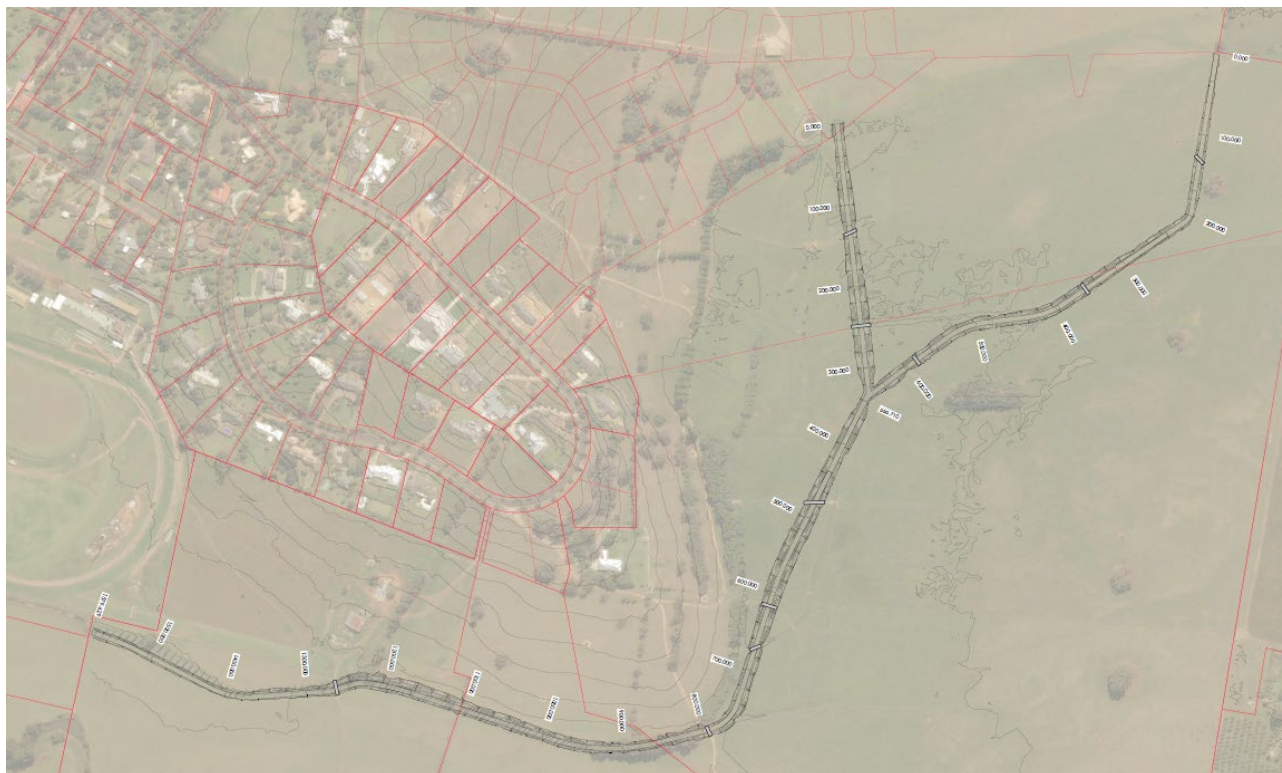
*“No easement exists over our clients’ land to receive and allow the passage of concentrated stormwater over their property from the Bombira Estate. With no legal protection to ensure the passage of stormwater is protected and not impeded, the function of the detention basin outlet may be severely compromised and may not function as designed, leading to substantial rectification costs that Council will ultimately be responsible for.*

*There is no existing watercourse at the outlet location of the detention basin to discharge stormwater into. No watercourse is marked on the topographic maps near the detention basin outlet location. Existing small farm diversion banks have been constructed near the basin outlet that convey small amounts of stormwater to the South, but these are considerably undersized to cope with the expected inflow of stormwater from the new basin outlet. They are also dependent on the existing land use (as farming land) as they were constructed as an overflow diversion bank leading from an existing dam. These banks may be altered to suit the future land use when the land is further developed. With no legal protection to allow the passage of stormwater through our client’s land there is no way for stormwater to safely be conveyed through the site.”*

On 30/09/2020 the linen plan was released confirming transferring ownership of the OSD basin and maintenance to Council.

It is recommended Council obtain easement through Lot 5, Lot 61 DP1181768 and Lots 1-2 DP1062660 and construct a drainage channel to mitigate the risk of potential for legal claim of nuisance to the downstream property i.e. the potential for localised erosion and flooding over the land and preserve the Bombira drainage function into the future.

Council has engaged a consultant engineer to study and produce design for the drainage channel. This design comprises a drainage channel extending from the Bombira OSD basin through the downstream properties as well as a branch channel to take stormwater developed from Lot 15 DP1194019 to the north of Bombira (the subject of a 46 lot subdivision under DA0109/2016). This, in concept, results in a total of approximately 2.1km of drainage channel, however further design development may see the total length of channel reduce.



### **Creation of Rights for Drainage Easement**

The acquisition of rights for the purposes of a drainage easement impacts a total of 3.4ha of land traversing Lot 5 DP1181765, Lot 61 DP1181768 and Lots 1-2 DP1062660 (“easement”).

Staff have made contact with the land owner of Lot 5, who is also the land owner of the other affected property to discuss terms that would satisfy both parties for acquisition by agreement in line with Land Acquisition (Just Terms Compensation) Act 1991, that is:

- a) The creation of easement is to be carried out by Agreement between Council and land owner, the registration of which will cause the easement to be dedicated as a drainage easement in favour of Council;
- b) In consideration of the easement, Council agrees to pay, and the land owner agrees to accept, the compensation amount as determined by property valuation undertaken by a Certified Practising Valuer (“Valuer”). It is also estimated a budget of \$26,000 is required for the costs of survey and legal costs associated with the acquisition and registration of the Subdivision Plan.

*Note: Should design development result in a shorter length of channel the purchase price for the land will reduce.*

Given the Subdivision Plan registration process will take some time it is proposed that a construction license be entered into between Council and the land owner to establish legal ability for Council’s construction of the channel to occur ahead of the easement registration (weather permitting).

### **Construction of the Drainage Channel**

Engineering designs have been provided in enough detail to cost the works required to create the drainage channel and associated structures. The owner of the property is an earth moving contractor who is to undertake the works via an exemption from tender under the Local Government Act 1993. To establish costs the owner has provided rates to Council that have been independently verified.

The construction cost as provided for by the land owner requires a budget be made available for the cost of construction of the drainage channel. The construction budget comprises costs for:

- Site establishment and sediment controls;
- Channel construction, including the excavation and disposal of approximately 15,000m<sup>3</sup> of soil over the 2.1km length of channel
- Provision of property access crossings over the channel in strategic locations.
- Reseeding / vegetation of the excavated channel to establish the sides and base.

Council engaged a quantity surveyor, GHQS Pty Ltd, to provide an independent assessment of the construction rates provided from the land owner. The findings of the assessment is that the rates provided are fair and reasonable. Council may therefore accept that these rates represent fair value in the current market.

Note there is an opportunity for this cost to reduce if further design development of the drainage channel sees a reduction in overall channel length.

## Community Plan implications

<b>Theme</b>	<b>Protecting Our Natural Environment</b>
Goal	Provide total water cycle management
Strategy	Maintain and manage water quantity and quality

## Strategic implications

### Council Strategies

Not Applicable

### Council Policies

Land Acquisition and Disposal Policy  
Procurement Policy  
Tendering Guidelines for NSW Local Government – October 2009'

### Legislation

Local Government Act 1993  
Local Government (General) Regulation  
Land Acquisition (Just Terms Compensation) Act 1991

## Financial implications

The total costs associated with this project is estimated at \$1,174,882. A contingency of \$217,488 is suggested to be added to cover the costs of any unknowns and variations encountered during the project as well as draining and cleaning out the OSD basin. It is therefore recommended that a total budget of \$1.4 million be made available for the project and the budget be amended to include for the following:

- FY22/23                      \$300,000
- FY23/24                      \$1,100,000

Funding for the project will come from Council's unrestricted cash balance.

*Note: Council cannot amend the development contributions plan (CP) to recover the cost of acquisition and construction of the section of channel which services development for which consent has already been granted. To that end since consent has been issued for Bombira (DA0152/2015 and its subsequent modifications) as well as for Lot 15 DP1194019, the benefitting development lot to the north of Bombira (DA0109/2016) the costs are not recoverable. However there may be the opportunity to recover costs through s7.11 contributions to the proportion that other future developments which will benefit from the drain.*

Budget Year	Operating Performance Ratio	Own Source Revenue	Building & Infrastructure Renewal
2022/23	-	-	X
2023/24	-	-	X
Future Years	X	-	X

Operating performance ratio decreases in future years due to ongoing maintenance costs associated with the drainage swale post completion of construction.

Building & Infrastructure Renewal ratio deteriorates with the acquisition and construction of the new drainage asset.

## Associated Risks

### Legal risk

In the absence of drainage easement over the properties downstream of the Bucholtz Park OSD there is no legal protection against risk of claims in tort (nuisance) should downstream property ever be affected by the Bombira outflows as well as there is no legal protection for Council to ensure that the drainage function of the drainage swale to be constructed through Lot 5 and downstream property is not altered or interfered with in any way which may cause impediment to the drainage system.

To mitigate this risk and provided appropriate legal means of drainage, it is necessary for Council to acquire easement for drainage over the property.

### Public health & safety

On site detention basins are not designed to hold water for extended periods. Due to the nature of construction of this basin and the lack of downstream easements this detention basin does hold water during periods of extended wet weather. Part of this project is to modify the outlet of the detention basin so it performs as intended. There is children’s playground in the vicinity of the basin that present a risk if water is detained for extended periods.

### Procurement risk

Given the cost estimate of construction, the Local Government Act 1993 requires a process of open tender unless an exemption applies.

The Local Government Act – 1993 Section 55 (3)(i) provides;

*A contract where, because of **extenuating circumstances**, remoteness of locality or unavailability of competitive or reliable tenderers, a council decides by resolution (which states the reason for the decision) that a satisfactory result would not be achieved by inviting tenders.*

A satisfactory outcome will not be achieved by inviting tenders for the construction work as the land owner has clearly expressed the ability and desire of his earth moving company to undertake the works on land that he owns and will not allow others to undertake work on his land.

This satisfies the test that there are sufficiently different circumstances to constitute 'extenuating circumstances' under s55(3)(i) of the Local Government Act and that Council may form the opinion that a satisfactory result would not be achieved by inviting tenders. The risk that Council will not receive fair value in negotiating construction costs directly with the land owner has been mitigated by having an independent Quantity Surveyor review the costs and has found them to be appropriate when compared to current market rates.

RAY KEARNS  
MANAGER, INFRASTRUCTURE PLANNING

JULIAN GEDDES  
DIRECTOR OPERATIONS

9 March 2023

*Attachments:* 1. Confidential Memo - Bombira Land Acquisition for Drainage Easement.  
(Confidential - separately attached)

APPROVED FOR SUBMISSION:

BRAD CAM  
GENERAL MANAGER