

Responses to Questions on Notice

Received at the 26 May 2022
Ordinary Meeting of Council

A handwritten signature in dark blue ink, appearing to read "Mark Arnold".

Mark Arnold
General Manager

QUESTIONS WITH NOTICE

1 Fill for Urban Development3

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Question with Notice No. 1.0 Fill for Urban Development

File No: I2022/588

At Council's Ordinary Meeting held on 26 May 2022, John Anderson submitted the following question which was taken on notice:

Given that the primary function of Council staff is to inform elected Councillors of relevant background factors, would said staff be so kind as to unambiguously clarify:

- 1) relevant current policy regarding fill*
- 2) relevant powers of private certifiers to toy with policy, statute management plans etc*
- 3) whether staff understand the concept of "full and frank disclosure"?*

Response Director Sustainable Environment and Economy:

Staff responses follow:

- 1) relevant current policy regarding fill*

DCP 2014 Chapter B14 addresses Excavation and Fill requirements for development on land zoned pursuant to LEP 2014. Maximum excavation and fill of 1.0m (or 2.0m where required for car parking or swimming pools) is permitted by the Prescriptive Measures of the DCP. One of the Prescriptive Measures requires that "any development application that seeks consent to fill land within the flood planning area will need to have regard to the provisions contained within Chapter C2 Areas Affected by Flood".

Excavation and fill to a depth exceeding 1.0m may still satisfy the requirements of the DCP if it can be demonstrated that the Objectives and Performance Criteria have been sufficiently addressed.

Chapter C2 provides that "Council will not support filling beneath the footprint of the proposed development unless it is demonstrated that it will not adversely impact on the floodplain". Also "filling outside the building footprint generally will not be permitted, other than for driveways and/or pedestrian pathways immediately adjoining the walls of the building".

DCP 2010 Chapter 1 Part K – Flood Liable Lands applies to land zoned pursuant to LEP 2010 and contains the same wording as Chapter C2 of DCP 2014 as referenced above.

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The following catchment-based flood studies are relevant to DCP 2014 and DCP 2010:

1. Belongil Creek Catchment

The Belongil Creek Floodplain Risk Management Study and Plan dated March 2015 provides that fill may be used to meet minimum floor level requirements.

2. Marshalls Creek Floodplain Management Plan (1997)

The Marshalls Creek Floodplain Management Plan was adopted by Council on 25 November 1997. Section 6.2 identifies management practices for South Golden Beach and Ocean Shores North including “place a moratorium on filling individual lots until sufficient investigation has been undertaken to identify and quantify appropriate stormwater ponding points”.

It is noted that the “Fern Beach” estate was filled to be above the 1% flood level as acknowledged within the Marshalls Creek Floodplain Management Plan Report – November 1997 prepared by Paterson Consultants Pty Limited.

Therefore, staff are of the view that the moratorium on fill is no longer applicable to the “Fern Beach” estate.

3. North Byron Floodplain Risk Management Study and Draft Plan

The North Byron Floodplain Risk Management Study and Draft Plan dated October 2020 largely replaced the Marshalls Creek Floodplain Management Plan (1997). However, the Marshalls Creek Floodplain Management Plan is still applicable to the area located north of Kallaroo Circuit in Ocean Shores.

The North Byron Floodplain Risk Management Study and Draft Plan dated October 2020 recommends that DCP 2014 be “updated to include areas where fill is prohibited to ensure future development does not cause an unacceptable impact”.

These areas include:

- Floodways
- Area northwest of Jubilee Avenue to the Brunswick River, Mullumbimby
- East of Jubilee Avenue, Mullumbimby
- East of Queen Street, Mullumbimby
- South Mullumbimby near Dalley Street and Argyle Street
- Near Chinbible Creek, Mullumbimby
- Future industrial development south of Towers Drive, Mullumbimby
- Area near Aloota Crescent, Ocean Shores

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The following recommendations were also made in regard to Billinudgel:

- Maximum development footprint of 50% of the total lot area,
- Maximum fill level set to the 1% flood + 0.5m freeboard, although minimum habitable floor levels greater than this may still apply

Further, “the recommended no fill zones from the 1997 Marshalls Creek Flood plain Management Plan are not recommended for inclusion in DCP 2014”.

It is noted that, to date, DCP 2014 has not been updated to reflect the above recommendations.

4. Tallow Creek Floodplain Risk Management Study and Plan

The Tallow Creek Floodplain Risk Management Study and Plan 2009 (updated in 2015) provides that “filling of land within the flood planning level is allowable for a development at the discretion of Council, provided that the filling will not adversely affect other land in the vicinity”. The study and plan identifies a fill exclusion zone in South Tallow Creek between Broken Head Road and Tallow Lake. Fill exclusion zones are also identified within the Central Tallow area, West of Broken Head Road and East of Coogera Circuit, and also within the Tallow Lake area.

2) relevant powers of private certifiers to toy with policy, statute management plans etc

Functions of certifiers are specified in Section 6.5 of the *Environmental Planning and Assessment Act 1979* and, for building work, include issuing construction certificates, carrying out inspections, and issuing occupation certificates.

Requirements for certifiers when issuing construction certificates are provided in the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. Sections 19 and 20 of this regulation require that a certifier must not issue a construction certificate for building work under a development consent unless the design and construction of the building is consistent with the development consent and they have demonstrated that all conditions of the development consent required to be complied with before a construction certificate may be issued have been complied with.

Once a certifier has issued a Construction Certificate, this certificate then becomes part of the development consent in accordance with Section 4.16(12) of the EP&A Act.

Only the NSW Land and Environment Court can declare, by order, that a Construction Certificate is invalid in accordance with Section 6.32 of the EP&A Act “if the plans and specifications or standards of building work or subdivision work specified in the certificate are not consistent with the development consent for the building work or subdivision work”. Proceedings for such an order must be brought to the Court “within 3 months after the issue of the certificate”. No such order can be made for an occupation certificate.

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Certifiers are also bound by the requirements of the *Building and Development Certifiers Act 2018* and regulation. Section 45 of this Act provides that NSW Fair Trading may take disciplinary action against certifiers on a number of grounds including breaches of legislation, incompetence, carrying out work in a manner that is not in the public interest etc. Any person may lodge a complaint with Fair Trading regarding the conduct of a certifier. Fair Trading may take disciplinary action against a certifier including fines, imposing conditions on their registration, suspend or cancel their registration, or disqualification either temporarily or permanently.

3) *whether staff understand the concept of “full and frank disclosure”?*

Yes. The Code of Conduct for Council Staff 2022 applies to staff in this regard.