

21 February 2014

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Dear Sir,

**Lewisham VPA Review - Meriton & Marrickville Council
78-90 Old Canterbury Road, Lewisham**

1.0 BACKGROUND

On 15 March 2012 the Planning Assessment Commission (as delegate of the Minister for Planning and Infrastructure) approved a Concept Plan (MP08_0195) for a proposed mixed use residential, retail and commercial development at 78-90 Old Canterbury Road, Lewisham, and in doing so imposed conditions necessitating preparation of a voluntary planning agreement (VPA) to formalise delivery of developer contributions to Marrickville Council (**Council**) in respect of the proposed development.

Subsequently, the developer, Meriton Property Services Pty Ltd (**Meriton**) and Council have conducted extensive discussions aimed at reaching agreement on the works to be included in the VPA and the extent to which those works should offset the Section 94 contributions payable. However, the parties have failed to agree upon these matters and the VPA remains unresolved.

This has led to Meriton lodging with the Department of Planning and Infrastructure (**Department**), on 28 October 2013, MP08_0195 MOD 5 which seeks to mandate the various works, the scope of such works, and the extent to which the works are to offset the Section 94 contributions payable.

The Department has engaged Michael Collins and Associates (**MCA**) to undertake a detailed analysis of Meriton's proposed modifications to the VPA requirements in order to assist the Department in resolving a VPA between Marrickville Council and Meriton.

2.0 SCOPE OF WORK

MCA's role is to determine the reasonableness of contributions requirements and offsets being sought for the purpose of a VPA taking into consideration the following:

- the proponent's modification to the Concept Plan approval (MP08_0195 MOD 5);
- Council's response to the modification request;
- Council's relevant Section 94 Contributions plan; and
- Any other relevant or material considerations.



In undertaking this assignment, MCA is required to liaise with both Meriton and Council on the Department's behalf before preparing an analysis of the position of each party and providing detailed advice in the form of draft report to the Department (including recommendations and alternatives to resolve the matter).

MCA provided its draft report to the Department on 3 February 2014. The Department forwarded the draft report to both Council and Meriton and sought their respective comments. Both parties submitted their comments to the Department on 13 February 2014 and these were passed on to MCA for consideration prior to finalising the Report. MCA has considered and responded to those comments in compiling this final report.

We now have pleasure to provide our final report to the Department.

3.0 CONCEPT APPROVAL PLANNING HISTORY

On 15 March 2012 the Planning Assessment Commission (as delegate of the Minister for Planning and Infrastructure) approved a Concept Plan (MP08_0195) for a proposed mixed use residential, retail and commercial development at 78-90 Old Canterbury Road, Lewisham, and in doing so imposed conditions necessitating preparation of a voluntary planning agreement (VPA) to formalise delivery of developer contributions to Council in respect of the proposed development. Conditions A3 and 20 of the Concept Approvals are the relevant conditions and these are set out as follows:

Voluntary Planning Agreement

A3 Prior to the submission of any future application under Part 4 of the Act the Proponent shall provide written evidence to the Director General that it has entered into a Voluntary Planning Agreement with Marrickville Council, in consultation with Transport for NSW, with terms outlined in the EA, PPR and Revised Statement of Commitments including:

- upgrade of Hudson Street*
- embellishment and dedication of public open space to the north of Hudson Street*
- upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, Lewisham railway station and surrounding residential areas; and*
- other parts of the site that will be upgraded, embellished, constructed or dedicated to Council.*

Section 94 Contributions

20. Future applications shall be required to pay developer contributions to the Council towards the provision or improvement of public amenities and services. The amount of the contribution shall be determined by Council in accordance with the requirements of the Contributions Plan current at the time of approval. A VPA with Council may off-set Section 94 Contributions.

Other relevant conditions of the Concept Plan approval include the following:

Central Open Space

B3. The "central open space" must have a total area not less than 3000m² and the area north of Hudson Road must have a minimum width of 20m (excluding on-street parking and adjacent footpath). At least 50% of the "central open space" must receive a minimum of 2 hours solar access in mid winter.

Car Parking

9. Future Development Applications are to demonstrate that a minimum of 13 on-street car parking spaces will be provided within the Hudson Street road reserve adjacent to the public open space.

Public Open Space

11. *Future Development Applications shall provide a minimum of 3,000m² of publicly accessible open space. Through site links and drainage reserves should not be included as open space provision. All public and private open spaces shall be clearly defined and functions identified.*
12. *Future Development Applications shall provide for the embellishment and dedication of the public open space north of Hudson Street to Council in accordance with the terms of the VPA between the proponent and Council.*

Brown Street

14. *Future Development Applications shall provide for a suitable treatment of the portion of Brown Street between Building Envelopes C and F to prohibit vehicular movements and provide a landscaped pedestrian through site link. The proponent shall endeavour to obtain approval to close this portion of road reserve and embellish this area as public open space.*

Public Access

15. *Future Development Applications shall clearly set out the mechanism for creating rights of public access to the:*
 - (a) *private road adjacent to the light rail corridor,*
 - (b) *All publicly accessible areas of open space and through site links,**with the relevant instrument/s to be executed prior to commencement of the occupation/use of the development.*

Linkages to the Lewisham railway station and Lewisham West light rail stop

16. *Future Development Applications shall provide for new and/or upgraded pedestrian connections between the site and Lewisham railway station and the Lewisham West light rail stop in consultation with Council and RailCorp in accordance with the terms of the VPA.*

Railcorp Requirements

26. *Future Development Applications shall address RailCorp's requirements in relation to:*
 - (e) *Pedestrian connections*

Future Development Applications shall demonstrate upgraded and/or new pedestrian pathway between the site and Lewisham railway station and Lewisham West light rail stop.

On 13 February 2013 the Planning Assessment Commission approved a modification to Condition A3 by way of MP08_0195 MOD 2. This modification altered the requirement for the VPA to be finalised ahead of detailed development applications being lodged with Marrickville Council. The modified Condition A3 is as follows:

Voluntary Planning Agreement

- A3 *Prior to the submission of any future application under Part 4 of the Act ~~Proponent shall provide written evidence to the Director General that it has entered into~~ **negotiations shall be underway with respect to a Voluntary Planning Agreement with between the Proponent and** Marrickville Council, in consultation with Transport for NSW, with terms outlined in the EA, PPR and Revised Statement of Commitments including:*

- *upgrade of Hudson Street*
- *embellishment and dedication of public open space to the north of Hudson Street*
- *upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, Lewisham railway station and surrounding residential areas; and*
- *Other parts of the site that will be upgraded, embellished, constructed or dedicated to Council.*



On 5 July 2013, the Planning Assessment Commission approved further amendments to the approved Concept Plan by way of MP08_0195 MOD 1. The amendments relate to building footprints, access arrangements to onsite parking, open space, building heights, building use and conditions and the Statement of Commitments. None of the approved amendments directly impact upon the conditions relating to the VPA.

On 25 October 2013, Meriton lodged an application for further amendments to the approved Concept Plan by way of MP08_0195 MOD 4. This application seeks to modify Condition B3 by reducing from 50% to 30% the amount of open space having 2 hours of sunlight, thus it does not directly impact upon the conditions relating to the VPA. The application is presently being assessed by the Department of Planning and Infrastructure.

On 28 October 2013, Meriton lodged an application for further amendments to the approved Concept Plan by way of MP08_0195 MOD 5. This application seeks to amend both Conditions A3 and 20, thus it directly impacts upon the conditions relating to the VPA. The application is presently being processed by the Department of Planning and Infrastructure and is a major element in MCA's Scope of Work which is further discussed in Sections 9 and 10 of this Report.

On 12 November 2013, Meriton lodged an application for further amendments to the approved Concept Plan by way of MP08_0195 MOD 6. This application seeks to modify Condition 11 by removing the requirement that through site links and drainage reserves should not be included as open space provision, thus it does not directly impact upon the conditions relating to the VPA. The application is presently being assessed by the Department of Planning and Infrastructure.

4.0 SYDNEY EAST JOINT REGIONAL PLANNING PANEL HISTORY

Following Concept Plan Approval, Meriton lodged a detailed development application (DA201200588) with Marrickville Council in relation to the project. Because of the financial size of the project, the Sydney East Joint Regional Planning Panel is the consent authority.

On 13 July 2013, the Sydney East Joint Regional Planning Panel refused the development application on a number of grounds. The Panel also noted that *'while there have been negotiations between the applicant and the council on a Voluntary Planning Agreement, there are no indications that the parties are nearing agreement'*.

5.0 VOLUNTARY PLANNING AGREEMENTS

Planning agreements came into existence in 2005 and their purpose is to extend the means by which planning authorities may obtain development contributions to be applied for the provision of public amenities and public services and for other public purposes. A public purpose includes the provision of public amenities and services, affordable housing, transport and other infrastructure, the funding of recurrent expenditure, the monitoring of the impacts of development and the conservation or enhancement of the natural environment.

Use of a VPA normally allows the introduction of a variety of public benefit measures, supplied and funded by the developer, that might be considered as outside Council's normal Section 94 Contributions Plan (such as affordable housing) and the value of these measures to the community often well exceed the value of established S94 Plan contributions.



The Department notes (in PS 05-003) that voluntary planning agreements are likely to be particularly useful for large scale developments that have longer time frames, are likely to be developed in stages, and in situations where the developer has a key interest in delivering public infrastructure.

However, an interesting change of emphasis is contained in PS 11-007 in which the Department notes that voluntary planning agreements are only likely to be useful for large scale developments that have longer time frames, are likely to be developed in stages, and in situations where the developer has a role in delivering public infrastructure (underlining by MCA).

As planning agreements may wholly or partly exclude the application of S94, the alternative development contributions framework is based upon Section 94 or Section 94A of the EP&A Act. This framework is based upon an established set of contribution items and contribution rates which have been established, costed and approved by a council for a particular area.

Notwithstanding these observations, Condition A3 of the Concept Plan approval (MP08_0195) prescribes that a VPA be entered into between Meriton and Marrickville Council.

6.0 MCA'S REVIEW APPROACH

Condition 20 of the Concept Plan approval requires Council's current S94 Contributions Plan to be applied to this development. A VPA with Council may off-set Section 94 Contributions.

In the ordinary course of a review such as this, MCA would review the current S94 Contributions Plan and calculate the cash contributions that will be required to be paid by Meriton in respect of the development. MCA would then review the works in Meriton's modification application 08_0195 MOD 5 which have been suggested by Meriton as contributing a material public benefit. Any works assessed as having a material public benefit would provide an offset against the developer's obligation to pay the Council the assessed cash contribution.

However, in conducting our review, MCA has been presented with some critical uncertainties in relation to the project which prevent an exact financial quantification/tabulation of Meriton's S94 obligations to Council in the manner described above. The uncertainties include:

- (a) The development yield - precise number of apartments, the apartment mix and the non-residential floor space that the project will comprise. This uncertainty is created by the current lack of development approval applying to the project. (MCA notes that on 11 July 2013 the Sydney East Joint Regional Planning Panel refused Meriton's Stage 1 development application DA201200588 on various grounds and it is likely to be several months before the JRPP will consider a revised development application);
- (b) The list of works suggested by Meriton as contributing a material public benefit has not been agreed by Council.
- (c) The scope of works for some of the works suggested by Meriton as contributing a material public benefit has not been agreed by Council (and resolving this is beyond MCA's professional expertise);
- (d) The cost estimates provided by Meriton for the various works have not yet been independently confirmed or agreed by Council (and resolving this is beyond MCA's professional expertise);



Faced with these uncertainties, MCA's approach to this review is to adopt (ie, take at face value) Meriton's information in relation to each of the above items. This does not constitute or imply endorsement or support of such information by MCA, it merely provides a useful pathway for conducting the review and quantifying/tabulating Meriton's S94 obligations.

Our primary task is to assess the principle of each issue in contention – that is, to assess whether material public benefit arises from any of the proposed works.

Our secondary task is to then apply our assessment of the principle to Meriton's information (ie, the development yield, items of work, scope, cost) in order to provide a financial quantification of each assessed principle. We note that the secondary task in effect provides a 'S94 Calculation Template' which can respond to any changes in (a), (b), (c) or (d) above as a result of any future development approvals and/or negotiations between Meriton and Council and which, in turn, will guide the finalisation of the VPA. The S94 Calculation Template is attached as **Annexure A** to this Report.

In relation to the issue of material public benefit, the approach that MCA has adopted is to consider whether any of the proposed works constitute works in kind under Council's S94 Plan (as they constitute part of Council's S94 public works program), or whether alternatively, they constitute the provision of public facilities (within the intent of that definition) that are not part of Council's public works program. Further discussion on this particular issue occurs in Section 10 further below.

To facilitate the review, MCA has closely analysed the correspondence and submissions made by the parties to the Department. In particular, we have reviewed Meriton's modification application MP08_0195 MOD 5 dated 28 October 2013 and Council's submission to the modification application dated 28 November 2013. We also conducted meetings with both Meriton and Council to clarify elements of each party's submissions and to discuss the basis of their respective claims. A meeting with Meriton was conducted on 16 December 2013 whilst a meeting with Council officers was held on 20 December 2013. Both parties have supplied MCA with additional information following the meetings.

7.0 MARRICKVILLE COUNCIL'S S94 CONTRIBUTIONS PLAN

Which is the Relevant Contributions Plan?

Condition 20 of the Concept Plan approval (MP08_0195) states that *"Future applications shall be required to pay developer contributions to the Council towards the provision or improvement of public amenities and services. The amount of the contribution shall be determined by Council in accordance with the requirements of the Contributions Plan current at the time of approval. A VPA with Council may off-set Section 94 Contributions."*

The "Contributions Plan current at the time of approval" will be the Marrickville Section 94/94A Contributions Plan 2013 (**Contributions Plan 2013**), which was only recently approved by Marrickville Council (on 3 December 2013). This Plan supersedes (but does not repeal) the previous Marrickville Section 94/94A Contributions Plan 2004 (**Contributions Plan 2004**).

It is noted that all of Meriton's previous representations and correspondence with Marrickville Council and the Department in respect of the VPA have used Contributions Plan 2004. However, that Contributions Plan is now superseded and Contributions Plan 2013 is the relevant Contributions Plan for the purposes of the VPA. In correspondence with MCA, Meriton has accepted this situation.



Contributions Plan 2013

Contributions Plan 2013 provides a detailed description of the program of public works that are required to meet increased residential, commercial, retail and industrial demand within the Marrickville LGA to 2031. Council has identified four types of public works, and the capital cost apportionment, to new development. These are summarised in Table A below.

Table A

Recreation Facilities Total Cost 102,435,000 Apportioned to development 82,328,080	Includes both active and passive open space, indoor sport and recreation facilities, aquatic centres, cycle paths, footpaths and public spaces.
Community Facilities Total Cost \$35,000,000 Apportioned to development \$11,968,176	Includes facilities provided by Council such as general purpose built space to be used by the community on a short term basis or occupied by community groups, childcare facilities including long day care and before and after school care, libraries and arts and cultural facilities.
Traffic Facilities Total Cost \$5,450,000 Apportioned to development \$2,145,060	Includes local area traffic management schemes (review and implementation), local roadworks and traffic management and measures adjacent to regional roads, and intersection upgrades.
Plan Administration (2%) Total Cost \$2,857,700 Apportioned to development \$1,928,826	Includes the cost of administration and maintenance of Contributions Plan 2013 in particular, for the preparation of subsequent modified or amended versions of the Plan, the regular reviews of the Plan required by legislation, the studies, research and investigations required to monitor and review the Plan, and the specialist development contributions Council staff and consultants costs associated with administering the Plan.
Total Cost of Contributions Plan 2013 Total Cost \$145,742,700 Apportioned to development \$98,370,142	

Table A indicates that new development will be required to contribute \$98,370,142 (or 67.5%) towards the total public works cost of \$145,742,700. The balance, of \$47,372,558 will be funded by Council.

Contributions Plan 2013 sets out the various contribution rates (see Table 1.1 on page 8) that are to be applied to new development in the Marrickville LGA in order to fund the costs of the public works apportioned to new development. The relevant sections of Table 1.1 are reproduced in Table B below.

Table B

Use		Occupancy	Recreation Facilities	Community Facilities	Traffic Facilities	Road/Access Dedication	Plan Admin	Total
Residential Units and Secondary Dwellings	1-Bedroom	1.31	\$ 9,780.21	\$ 1,456.73	\$ 212.05	\$ -	\$ 228.98	\$ 11,677.96
	2-Bedroom	2.02	\$ 15,080.93	\$ 2,246.26	\$ 241.29	\$ -	\$ 351.37	\$ 17,919.85
	3-Bedroom	2.88	\$ 21,501.52	\$ 3,202.58	\$ 277.85	\$ -	\$ 499.64	\$ 25,481.60
	4 + Bedroom	3.74	\$ 27,922.12	\$ 4,158.91	\$ 350.97	\$ -	\$ 648.64	\$ 33,080.64
Retail	Per 100m ² GFA	1/20m2	\$ 7,465.81	\$ 312.54	\$ 2,611.40	\$ -	\$ 207.79	\$ 10,597.54
Industrial	Per 100m ² GFA	1/100m2	\$ 1,493.16	\$ 62.51	\$ 731.19	\$ -	\$ 45.74	\$ 2,332.60

Where the contribution amount shown in the right-hand 'Total' column exceeds \$20,000, the applicable contribution shall be \$20,000. This is because the NSW Government has capped the amount that councils can levy developers unless agreement can be obtained from IPART to exceed the cap. The cap affects the levy rate in Contributions Plan 2013 for 3- and 4-bedroom apartments and dwellings, as well as dwelling houses. Council has resolved to seek IPART's agreement to exceed the contributions cap but this has not yet occurred.

8.0 S94 CONTRIBUTION CALCULATION

Having regard to the cap and the contribution rates shown in Table B, MCA has calculated the S94 cash contribution payable in respect of the development. This is shown in Table C.

Table C

S94 Calculation Using Contributions Plan 2013							
Assumes all development will be approved before 30 June 2014 (otherwise annual indexation applies)							
		Recreation Facilities	Community Facilities	Traffic Facilities	Plan Admin (2% of base contributions)	Total Contribution	
Step 1	Rates shown in Contributions Plan 2014						
	- 1-Bedroom unit	\$9,780.21	\$1,456.73	\$212.05	\$228.98	\$11,677.97	
	- 2-Bedroom unit	\$15,080.93	\$2,246.26	\$241.29	\$351.37	\$17,919.85	
	- 3-Bedroom unit	\$21,501.52	\$3,202.58	\$277.85	\$499.64	\$25,481.59	
	- Retail (per 100m ² GFA)	\$7,465.81	\$312.54	\$2,611.40	\$207.80	\$10,597.55	
Step 2	Proportional rates on 3br apartments after applying \$20K cap		84.38%	12.57%	1.09%	1.96%	100.00%
		\$16,876.12	\$2,513.64	\$218.08	\$392.16	\$20,000.00	
Step 3	Adjusted Rates after allowing \$20k cap						
	- 1-Bedroom unit	\$9,780.21	\$1,456.73	\$212.05	\$228.98	\$11,677.97	
	- 2-Bedroom unit	\$15,080.93	\$2,246.26	\$241.29	\$351.37	\$17,919.85	
	- 3-Bedroom unit	\$16,876.12	\$2,513.64	\$218.08	\$392.16	\$20,000.00	
	- Retail (per 100m ² GFA)	\$7,465.81	\$312.54	\$2,611.40	\$207.80	\$10,597.55	
Step 4	Apply S94 rates to subject development						
	- 1-Bedroom unit	141	\$1,379,009.61	\$205,398.93	\$29,899.05	\$32,286.15	\$1,646,593.74
	- 2-Bedroom unit	208	\$3,136,833.44	\$467,222.08	\$50,188.32	\$73,084.88	\$3,727,328.72
	- 3-Bedroom unit	13	\$219,389.58	\$32,677.35	\$2,835.03	\$5,098.04	\$260,000.00
	- Retail (per 100m ² GFA)	226	\$16,872.73	\$706.34	\$5,901.76	\$469.62	\$23,950.45
	Total Contribution	362	\$4,752,105.36	\$706,004.70	\$88,824.16	\$110,938.68	\$5,657,872.91



It is important to note that the calculation in Table C uses Meriton's proposed development yield and mix of 362 apartments and 226m² of retail as shown in DA201200588 (which was refused by the Joint Regional Planning Panel). The total contribution is \$5,657,872.91, however, if the development yield and/or mix changes in future development consents, the S94 contribution will change accordingly.

S94 Credits for Existing Demand

Contributions Plan 2013 (see Apportionment, page 29) notes that "under the provisions of Section 94(1), Section 94 contributions can only be charged where a development will or is likely to require the provision of or increase the demand for infrastructure". Hence, any contributions leviable under Contributions Plan 2013 will need to be moderated by a credit to reflect the existing demand from the former development at the subject property.

In this regard, Council has advised MCA that Meriton would receive a credit for the industrial floor space that was formerly on the site in accordance with the rates contained in Contributions Plan 2013.

This is a sensible approach and although the buildings on the site are now demolished, a site survey and area measurements undertaken by JBW Surveyors Pty Ltd for Meriton indicates that the former uses comprised industrial space as well as ancillary commercial offices and two cottages that were used for residential purposes. MCA considers that the S94 credit should extend to the commercial and residential uses as these have been independently verified by site survey.

We have carried out the appropriate calculations to arrive at a credit of \$309,043.98. The calculations are shown in Table D below.

Table D

Calculation of S94 Credit for Existing Development Calculation Using Contributions Plan 2013								
		Existing Development Details	Occupancy	Recreation Facilities	Community Facilities	Traffic Facilities	Plan Admin (2% of base contributions)	Total Contribution
Step 1	Existing use is as Light Industrial							
	Site area 13,130m ²	13,130						
	GFA's provided by Survey							
	Industrial GFA	6,740.9						
	Commercial GFA	1,186.2						
	Residential x 2 cottages	2						
Step 2	CP 2013 - S94 rate for industrial GFA		1/100m ²	\$1,493.16	\$62.51	\$731.19	\$45.74	\$2,332.60
	CP 2013 - S94 rate for commercial GFA		1/100m ²	\$7,465.81	\$312.54	\$1,462.39	\$184.81	\$9,425.55
	CP 2013 - S94 rate for dwelling houses	66.6m ² & 117.7m ²	2.86	\$16,692.79	\$2,486.33	\$428.72	\$392.16	\$20,000.00
Step 3	Contribution required for industrial GFA	6,741	67.409	\$100,652.42	\$4,213.74	\$49,288.79	\$3,083.10	\$157,238.04
	Contribution required for commercial GFA	1,186.2	11.862	\$88,559.44	\$3,707.35	\$17,346.87	\$2,192.27	\$111,805.93
	Contribution required for residential	2	2	\$33,385.57	\$4,972.67	\$857.44	\$784.32	\$40,000.00
	Total contribution (credit) for existing use	7,927		\$222,597.43	\$12,893.75	\$67,493.10	\$6,059.69	\$309,043.98

Net S94 Contribution Payable

The Net S94 cash contribution payable is the S94 contribution calculation (Table C) less the credits that are available for the existing demand arising from the site (Table D). The Net S94 cash contribution payable, on a category-by-category basis, is shown in Table E below.

Table E

Calculation of Net S94 Contribution after allowing credits for Existing Development					
	Recreation Facilities	Community Facilities	Traffic Facilities	Plan Admin (2% of base contributions)	Total Contribution
S94 Contribution as calculated	\$4,752,105.36	\$706,004.70	\$88,824.16	\$110,938.68	\$5,657,872.91
Less S94 Credit for existing development	\$222,597.43	\$12,893.75	\$67,493.10	\$6,059.69	\$309,043.98
Net S94 Contribution Payable	\$4,529,507.93	\$693,110.95	\$21,331.06	\$104,879.00	\$5,348,828.93

We again make the point that the calculation in Table C uses Meriton's proposed development yield and mix of 362 apartments and 226m² of retail as shown in DA201200588, however, if the development yield and/or mix changes in future development consents, the Net S94 contribution will change accordingly.

9.0 WORKS PROPOSED UNDER MP08_0195 MOD 5

Meriton and Council have conducted extensive discussions since November 2012 aimed at reaching agreement on the works to be included in the VPA and the extent to which those works should offset the Section 94 contributions payable. However, the parties have failed to agree upon these matters and the VPA remains unresolved.

Consequently, Meriton is unable to obtain development consent for the project and in this regard MCA notes that the Sydney East Joint Regional Planning Panel, in refusing Meriton's detailed development application (DA2101200588) in July 2013, cited the lack of a concluded VPA as one of the reasons for refusing the Development consent.

This has led to Meriton lodging with the Department, on 28 October 2013, MP08_0195 MOD 5 (**MOD 5**) which seeks to mandate the various works, the scope of such works, and the extent to which the works are to offset the Section 94 contributions payable.

The main elements of Meriton's MOD 5 request are summarised below:

Upgrade of Hudson Street

Scope: To give certainty to the scope of works for the Hudson Street upgrade, Meriton proposes that the upgrade should occur 'generally in accordance with AT&L Drawing SKC23 Issue P5.

Offset: Meriton seeks an offset of 50% of the value of the upgrade works against the S94 contributions payable.

Embellishment and dedication of Public Open Space to the north of Hudson Street

Dedication:

Scope: Meriton proposes that this open space, being a minimum of 3,000m², be dedicated to Council.

Offset: Meriton is not seeking any offset against the S94 contributions payable for such dedication.



Embellishment:

Scope: Meriton has not proposed a scope of works for the embellishment of the public open space so an appropriate scope of work is required. Meriton has subsequently supplied MCA with a set of three (3) landscape drawings by Sturt Associates (Landscape Concept Plan DA-1220-01 rev B, Detail Concept Plan DA-1220-02 rev B, and Playground and Picnic Area DA-1220-03). These drawings provide a general scope of work which can be costed. MCA has not received confirmation from Council that these works would provide an adequate and appropriate embellishment of the public open space.

Offset: Meriton seeks an offset of 100% of the value of the embellishment works against the S94 contributions payable.

Upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, and to Lewisham railway station and surrounding residential areas

Scope: To give certainty to the scope of works for this item, Meriton proposes that the upgrade/embellishment should occur generally in accordance with AT&L Plan SKC10 Issue P1. Note that for clarity Meriton proposes to limit the scope to links 'from the site'.

Offset: Meriton seeks an offset of 100% of the value of the upgrade/embellishment works against the S94 contributions payable.

Stormwater, footpath and road upgrade works in Brown Street and William Street

Scope: To give certainty to the scope of works for this item, Meriton proposes that the upgrade works should occur generally in accordance with AT&L Plan SKC22 Issue P4.

Offset: Meriton seeks an offset of 50% of the value of the Brown Street stormwater works and 50% of the value of the footpath and road upgrades to William and Brown Streets against the S94 contributions payable.

Stormwater works in McGill Street

Scope: To give certainty to the scope of works for this item, Meriton proposes that these works should occur generally in accordance with AT&L Drawing SKC23 Issue P5.

Offset: Meriton seeks an offset of 100% of the value of these works against the S94 contributions payable.

Upgrade and realignment of the trunk drainage infrastructure

Scope: To give certainty to the scope of works for this item, Meriton proposes that these works should occur generally in accordance with AT&L Drawing SKC22 Issue P4 and SKC23 Issue P5.

Offset: Meriton seeks an offset of 50% of the value of these works against the S94 contributions payable.

Offsets

Meriton proposes that the VPA must offset Meriton's S94 cash contribution payable in accordance with the above percentages.

Timing of the VPA

Meriton proposes that the VPA must be entered into prior to the issue of the Occupation Certificate of the last residential tower.

VPA Consultation

Meriton proposes that the requirement that Transport for NSW be consulted during the preparation of the VPA be deleted.

10.0 ASSESSMENT OF MATERIAL PUBLIC BENEFIT

As discussed in Section 6.0, there is contention between Meriton and Council as to the extent to which each of the above proposed works constitutes a material public benefit.

MCA's primary task in undertaking this work is to assess the principle of each issue in contention and form a view as to the extent, if any, that the works represent a material public benefit. In carrying out this task MCA has examined and adopted some overriding principles which are discussed below.

Material Public Benefit Defined

Contributions Plan 2013 contains the following provisions (refer page 27) in relation to material public benefits:

"Council may at its discretion consider accepting from an applicant the offer of a material public benefit for the full or partial satisfaction of section 94 contribution or section 94A levy requirements.

The material public benefit may constitute part of Council's public works program in which case it is termed works in kind. It may however be the provision of public facilities that are not part of Council's works program such as the construction of amenities, the provision of part of a building or the embellishment of open space."

Contributions Plan 2013 defines Public Benefit as a benefit enjoyed by the public as a consequence of a development contribution. Public Facilities is defined as infrastructure, facilities, amenities and services.

In accordance with the above, MCA is mindful that Council would ordinarily assess any proposed works to determine whether a material public benefit will arise, and in doing so would consider:

- (a) whether the material public benefit is works in kind (as they constitute part of Council's public works program), or alternatively,
- (b) whether the material public benefit constitutes the provision of public facilities that are not part of Council's public works program.

MCA considers that this distinction is important for the reasons expressed in the following section.

No Cross-Category Credits for Works in Kind

In relation to (a) in the previous section, the question arises in relation to works in kind, as to whether Contributions Plan 2013 may, or may not, entitle the developer to receive a credit for its overachievement on one item of public work which could then be used to offset its cash contribution requirements on other S94 public works.

Marrickville Council has advised MCA that its policy is to generally limit the value of any works in kind offsets to the particular category of infrastructure being provided, and not to allow any overachievement of such value to act as a credit against the developer's cash contribution obligations under a different category of public work.



Council argues that allowing cross-category credits would lead to a deficit in one or more categories and a shortfall in total funding under the Plan.

Relevantly, in dealing with S94 contributions and voluntary planning agreements, Contributions Plan 2013 (Section 2.12) provides that Council *“will consider an appropriate level of overall contribution (underlining by MCA) and what measures are required to mitigate or compensate for the impact of development in making decisions as to what will be an acceptable level of contribution in the circumstance of each case”*.

Furthermore, Contributions Plan 2013 (Section 2.11), consistent with the EP&A Act, allows the pooling of contributions received by Council so that they may be applied progressively toward the provision of the public facilities and services set out in this Plan. However, *“the pooled money will be repaid so that it can be applied towards its original purpose within a reasonable time.”*

These provisions, together with the categorisation of works listed in Contributions Plan 2013, the nature of the works, and the way that the contribution rates are categorised, lead MCA to the view that any works in kind offset in excess of 100% of the contribution required within one category should not act as a credit (or subsidy) for another category.

Whilst not specifically referenced in Contributions Plan 2013, it is clear that the system of categorisation established within the Plan (as demonstrated in Tables A and B above) is designed to ensure that Council’s capital works program is achievable across all its program of public works. Accordingly, MCA has determined that, when awarding a works in kind offset for any particular public work in relation to this project, no cross-category credits should apply.

This issue is required to be addressed as Meriton, in its previous VPA Offers to Council, has adopted the principle of cross-category credits.

Conversely, in relation to (b) in the previous section, MCA considers that should a material public benefit arise that constitutes the provision of public facilities that are not part of Council’s public works program, it would be appropriate for Council to offset the value of these works against the total net cash contribution payable after the value of any works in kind had been taken into account.

MCA’s reasoning is based upon an expectation that Council would need to be satisfied that the public facility provides a substantial benefit to the community (eg, in terms of relevance, quality and scale) and that this benefit warrants Council accepting the works as fulfilling the intent of the S94 Plan notwithstanding a reduction in expected cash contributions.

Material Public Benefit Parameters

Meriton in its MOD 5 application to the Department has nominated an apportionment of material public benefit to each of the various proposed works. MCA has taken these nominated apportionments as being Meriton’s preferred outcome and we have therefore not sought to arrive at apportionments that would be more generous to Meriton.

Similarly, at MCA’s request, Marrickville Council has indicated its preferred apportionment of material public benefit for each proposed item of work and we have therefore not sought to arrive at apportionments that would be more generous to Council.

This approach establishes the boundaries of the assessment undertaken by MCA.



Stormwater Drainage Review by Evans & Peck

The existing stormwater drainage system in the area of the site consists of a covered channel and a pipe which extends from Old Canterbury Road to the light rail corridor. The infrastructure more or less bisects the site and is protected by a drainage easement owned by Council.

Meriton proposes that this system be replaced with a three element system comprising a 525mm twin-pipe system across the site from Brown Street to the light rail corridor, a 1,650mm twin-pipe system within the new public open space to the north of Hudson Street, and the new private north-south road, and an overland flow path along the new public open space discharging onto the light rail corridor.

Meriton maintains that the proposed system will improve the existing flood mitigation along Old Canterbury Road from upstream existing properties and provides a connection for the southern portion of the McGill Street precinct which currently flows along Hudson Street and discharges into the light rail corridor.

In its MOD 5 application, Meriton argues that its new stormwater drainage infrastructure will constitute a community benefit and accordingly, a 50% offset should apply to the cost of the new infrastructure. In addition, Meriton argues that a 100% offset should apply to that part of the new system serving the McGill Street precinct.

Council maintains that Meriton has failed to distinguish between infrastructure and facilities that are the required as a direct consequence of the development and those which are necessary to service the wider community. Council considers that in order to claim benefits to the wider community, Meriton should provide evidence to substantiate and quantify the benefits and to whom these apply, but that this evidence has not been provided by Meriton.

The Department sought independent expert advice on these matters from Evans & Peck who were commissioned to determine the reasonableness of the claimed public benefit in Meriton's MOD 5 application.

Evans & Peck's *Stormwater Drainage Review, 31 January 2014*, assesses whether the stormwater drainage design for the development provides any benefit to the community, in terms of flooding, and whether, as a result of any public benefit resulting from the construction of the system, Marrickville Council should bear any cost related to the drainage scheme construction.

The following summary is extracted and condensed from pages 11 and 12 of Evans & Peck's Review. The full Evans & Peck Review report is attached as **Annexure B** to this report.

- *Any redirection of the overland flow around the site is only necessary to meet the needs of the proposed development and has no intrinsic public benefit. The requirement for diversion of flows around the southern side of the site arises from the layout of the proposed development and all costs for the drainage scheme (with the exception of the pipe system in the north of the site as discussed below) should be attributed to Meriton.*
- *Were it not for the nature of the proposed development, overland flow would continue to drain in a north-westerly direction across the site even if a 'replacement' pipe system was installed. The purpose of the diversion of overland flow around the site is to allow the proposed development to occur without the encumbrance of an overland flow path through the site.*



- *Evans & Peck consider that there is some (limited) merit to Meriton's claim as it relates to reduction of flood levels in the vicinity of William Street and Brown Street. In this area it appears that the proposed scheme is that same as that assessed in the Cardno Discussion Paper and therefore the modelling results are likely to be the same. The results of the flood modelling provided in the Cardno Discussion Paper indicate that in William Street and Brown Street there are demonstrable benefits to the community in terms of reduced flood levels in the larger flood events (20 and 100 year ARI).*
- *The results of the flood modelling provided in the Cardno Discussion Paper indicate that in William Street and Brown Street there are demonstrable benefits to the community in terms of reduced flood levels in larger flood events. Evans & Peck consider that a portion of the cost of the construction of this section of the drainage system should be borne by Council (estimated to be in the order of \$40,000).*
- *With the exception of flood levels at William Street and Brown Street, Meriton has not demonstrated the public benefit of the proposed stormwater drainage scheme for the Lewisham Estate in Lewisham.*

The assessment by Evans & Peck is relevant to three items of infrastructure for which Meriton is claiming an offset against the S94 contributions payable by the project. These are:

- The Brown Street Stormwater works (Meriton's cost estimate \$177,066) for which Meriton proposes a 50% offset. Evans & Peck assess that a portion of the cost of these works (estimated to be \$40,000) is a community benefit.
- The Stormwater Works in McGill Street (Meriton's cost estimate \$116,766) for which Meriton proposes a 100% offset. Evans & Peck assess that no portion of these works is a community benefit.
- The upgrade and realignment of the trunk drainage infrastructure (Meriton's cost estimate \$1,939,620) for which Meriton proposes a 50% offset. Evans & Peck assess that no portion of these works is a community benefit.

MCA has incorporated Evans & Peck's assessment into its own assessment of the material public benefit of these items, as is explained in the following section.

MCA's Assessment

MCA is mindful that a VPA would normally (and particularly for a transit oriented development) allow the introduction of a variety of public benefit measures, supplied and funded by the developer, which might be considered as outside Council's normal Section 94 Contributions Plan. The value of these measures to the community often well exceeds the value of established S94 Plan contributions as they can deliver targeted public benefits over and above measures to address the impact of the development on the public domain.

Consistent with this, Condition A3 of the Concept Plan Approval requires the implementation of a VPA *".....with terms outlined in the EA, PPR and Revised Statement of Commitments....."*.

The Environmental Assessment (EA), Preferred Project Report (PPR) and the Revised Statement of Commitments contain a number of undertakings by the developer to either commit to or investigate various works that could be included in a VPA (with appropriate offsets), in particular:



- As a 'minimum', the list of works nominated in Condition A3. This is noted in MP08_0195 EA (Section 5.2.2) and lists, 'as a minimum' (MCA's emphasis), the various works which are more or less the subject of the MOD 5 application. The word 'minimum' implies other works will be included in the VPA. We note that Condition A3 uses the term 'including';
- A pathway to Lewisham Station partly on Railcorp land, a pedestrian bridge and land dedication to improve pedestrian access between the site and Lewisham Station. This initiative is noted in various documents including: MP08_0195 EA (Section 4.2.3), PPR (Tables 1, 2, 7, 10), SoC (Access); MP08_0195 MOD 1 SoC (Access);
- Investigations into community and cultural facility opportunities including public art, community meeting places etc. This initiative is noted in various documents including MP08_0195 PPR (Table 10), SoC (Community and Cultural); MP08_0195 MOD 1 SoC (Community and Cultural).

However, the latter two initiatives, which would have produced significant targeted public benefits over and above measures to address the impact of the development on the public domain, are no longer being considered - with the exception of a public art budget of \$150,000. MCA notes that the second initiative was resisted by Railcorp and in any event would seem physically impossible to implement.

The effect of this is that Meriton's MOD 5 application neither strongly nor unambiguously commits to a range of public works outside of Council's S94 Contributions Plan that will be of material public benefit, and that would reasonably be the subject of a VPA. There are no offers of public facilities, community spaces, new roads, bridges, recurrent funding of public initiatives etc which would ordinarily promote the need for a VPA.

Rather than espousing a broader range of public works ambitions along the lines ordinarily expected of a major transit oriented development, Meriton's approach is based upon acknowledging its obligations under Council's S94 Contribution Plan and then seeking offsets for its project related infrastructure that it considers meets a 'material public benefit' test.

This approach is not inconsistent with Condition 20 of the Concept Plan Approval which notes that "*A VPA with Council may off-set Section 94 Contributions*". However, the invitation for potential offset contained in Condition 20 directly links to the material public benefit issue – and whether the offset constitutes works in kind, or alternatively, constitutes the provision of public facilities (of a suitable relevance, quality and scale) that are not part of Council's public works program.

In this regard, MCA has considered each of the proposed public works contained in MOS 5 and has determined the material public benefit issue as follows.

Upgrade of Hudson Street (Meriton's cost estimate \$1,206,568)

- Meriton proposes an offset of 50% of the value of the upgrade works against the S94 contributions payable. Meriton's view is that the upgrade works are intended specifically to link Old Canterbury Road to service the Lewisham West light rail stop.
- Council proposes no offset on the grounds that there is no material public benefit. Council's view is that the Hudson Street upgrade works are fundamental to the proposed development and are caused by Meriton's project requirements rather than creating a broader public benefit.



- MCA agrees with Council's view and considers that no offset should apply.

Reasoning

- MCA considers that, absent the light rail project, the proposed upgrade works to Hudson Street would still be required as a necessary part of Meriton's project approval, including the roundabout and the slip lane parking.
- We have formed this view following a detailed review of the original Concept Plan application and documents and the substantial design changes that were required to be made to the project following the public exhibition and the Department's analysis of the project, all of which elevate the importance of Hudson Street to the project. These documents do not offer any compelling rationale that Hudson Street should be upgraded or embellished to a particular standard to service the light rail stop.
- MCA notes that the Department's Major Project Assessment (at Section 5.4 Public Benefit) makes no mention of the public benefit of the Hudson Street upgrade, but is insistent that the upgrade be included in the VPA.
- We have also examined the Concept Plan Approval for the light rail extension (MP10_0111) which promotes light infrastructure solutions for access and supporting connections to the various light rail stops. No particular infrastructure requirements are identified for Hudson Street in the Concept Plan Approval. Transport for NSW is supportive of the proposed design and facilities for Hudson Street.
- With Hudson Street located centrally within the McGill Street Precinct, it would usually be incumbent upon the respective developers, as part of winning their development approvals, to improve the quality of Hudson Street to facilitate the additional vehicular and pedestrian demand on Hudson Street caused by their developments. In this regard, the proposed scope of work for Hudson Street is a response to the proposed Meriton development and further work to the southern side of Hudson Street is likely to be required as part of a future development consent for that site.
- Consistent with this rationale, MCA notes that Council's Contribution Plan 2013 does not include any allowances for street upgrades in Precinct 45 (the McGill Street Precinct), rather it anticipates that such upgrades are to be 100% developer funded (Table 4.2.2 on page 77).
- MCA considers that there will be some public benefit arising from the Hudson Street upgrade. Many development consents require privately funded works beyond a project site, usually adjacent to the property, to ameliorate the impact of private development on the public domain (eg, asset renewal or expansion) and these works usually provide a public benefit unfunded by the community. However, in most cases the public benefit is not material or has an esoteric or unquantifiable quality. MCA categorises Meriton's proposed Hudson Street upgrade works in a similar manner.
- MCA notes that Council has not yet endorsed the proposed scope of works for the Hudson Street upgrade. MCA's view is that the proposed scope of works represents an appropriate solution for the project (rather than an appropriate solution for the light rail stop). Should the parties agree that additional works to Hudson Street are desirable to specifically support or enhance access to the light rail stop (eg bike racks, pedestrian overpasses etc, these could be included in the scope without cost to Meriton.



- We consider that the VPA should provide for the upgraded Hudson Street, including the roundabout and the slip lane parking, to be dedicated to Council as road to the extent not already existing, in accordance with Condition 9 of the Concept Plan approval.

Determination

- MCA determines that Meriton's proposed upgrade of Hudson Street does not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- We consider that the VPA should provide for the upgraded Hudson Street, including the roundabout and the slip lane parking, to be dedicated to Council as road to the extent not already existing, in accordance with Condition 9 of the Concept Plan approval.
- MCA concurs with Meriton that the scope of works for the Hudson Street upgrade should occur generally in accordance with AT&L Drawing SKC23 Issue P5. Should the parties agree that additional works to Hudson Street are desirable to specifically support or enhance access to the light rail stop (eg bike racks, pedestrian overpasses, etc), these could be included in the scope as an offset to Meriton's overall net cash contribution requirements (as they would constitute public facilities that provide a substantial benefit to the community in terms of relevance, quality and scale).
- In applying this determination to MCA's S94 Calculation Template at Annexure A, the relevant category in Council's Contribution Plan 2013 is 'Traffic Facilities'. As per Table E above, Meriton's gross contribution for Traffic Facilities under the Contributions Plan is \$88,824. Meriton is entitled to an existing development credit of \$67,493, making Meriton's net S94 contribution obligation \$21,331.
- After dealing with this item, Meriton's cash contribution obligation for Traffic Facilities remains as \$21,331 as per Table E.

Embellishment and dedication of Public Open Space to the north of Hudson Street

Dedication:

- Meriton proposes that this open space, being a minimum of 3,000m², be dedicated at no cost to Council. Meriton is not seeking any offset against the S94 contributions payable for such dedication.
- Council agrees to accept the dedication at no cost.
- There is no issue for MCA to determine.

Embellishment (Meriton's cost estimate \$1,692,222)

- Meriton has not proposed a scope of works in its MOD 5 application for the embellishment of the public open space so an appropriate scope of work is required. Meriton has subsequently supplied MCA with a set of three (3) landscape drawings by Sturt Associates (Landscape Concept Plan DA-1220-01 rev B, Detail Concept Plan DA-1220-02 rev B, and Playground and Picnic Area DA-1220-03). These drawings provide a general scope of work which can be costed.



- MCA has not received confirmation from Council that these works would provide an adequate and appropriate embellishment of the public open space. Rather, Council has made a number of comments to MCA suggesting improvements to the general drawings, design and planting schedule. It can be assumed from these comments that Council is likely to be generally agreeable to Meriton's design approach to the public open space but that a number of improvements and/or refinements will be required before Council can confirm its endorsement.
- Meriton seeks an offset of 100% of the value of the embellishment works against the S94 contributions payable. Council agrees to the 100% offset.

Determination

- MCA determines that Meriton's proposed upgrade of the public open space constitutes a material public benefit under Council's Contributions Plan 2013. The works can be classed as works in kind as Council's S94 Plan includes provision for these types of works.
- MCA considers that the scope of works for the embellishment of the public open space should occur generally in accordance with the set of three (3) landscape drawings by Sturt Associates (Landscape Concept Plan DA-1220-01 rev B, Detail Concept Plan DA-1220-02 rev B, and Playground and Picnic Area DA-1220-03). Council should formally review the proposed layout of the public open space and the associated works and endorse a final set of drawings and specification for the required works.
- Should additional works or costs to the public open space be required by Council to enhance the quality of the space, these can be included in the scope as a further offset to Meriton's net cash contribution requirements in the category of Recreation Facilities.
- In applying this determination to MCA's S94 Calculation Template at Annexure A, the relevant category in Council's Contribution Plan 2013 is 'Recreation Facilities'. As per Table E above, Meriton's gross contribution for Recreation Facilities under the Contributions Plan is \$4,752,105. Meriton is entitled to an existing development credit of \$222,597, making Meriton's net S94 contribution obligation \$4,529,508.
- The current estimated cost of the works is \$1,692,222. Meriton is entitled to the full offset which leaves Meriton with a remaining S94 obligation of \$2,837,286 for Recreation Facilities. Further improvement and/or refinement of the public open space specification by Council may have the effect of reducing this obligation.

Upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, and to Lewisham railway station and surrounding residential areas (Meriton's cost estimate \$184,874)

- In relation to the pedestrian and cycle access links to the Lewisham West light rail stop, Meriton proposes an offset of 100% of the value of the embellishment works against the S94 contributions payable. Council is agreeable to a 100% offset for these on-site works. The parties agree that the cost of the access links to Lewisham West light rail stop is included in the embellishment of the publicly dedicated open space, thus there is no need for MCA to make an additional determination of this matter.



- For clarity however, MCA notes that in addition to these links passing through the publicly dedicated open space they also pass through the publicly accessible private open space within the project. These latter works are to be provided by Meriton at its cost as they are part of the private expenditure related to the project.
- In relation to the pedestrian and cycle access links to Lewisham railway station and surrounding residential areas (\$184,874), these works are all off-site. Meriton proposes an offset of 100% of the value of the embellishment works against the S94 contributions payable. Council proposes an offset of 50% on the basis that, as a transit-oriented development, these works are a consequence of the development and provide access to and from the site for its future occupants as well as the wider community.
- MCA agrees with Council's view and reasoning and considers that a 50% offset should apply to these off-site works.

Determination

- In relation to the on-site works relating to pedestrian and cycle access links from the site to Lewisham West light rail stop, MCA determines that these costs should be offset 100%. MCA notes that these costs relate to the pedestrian and cycle access infrastructure located within the publicly dedicated open space. These costs are included in the embellishment costs for the public open space which are also offset 100% against the S94 contributions payable.
- In relation to the pedestrian and cycle access links that pass through the publicly accessible private open space within the project, these works should be funded by Meriton at its cost as they are part of the private expenditure related to the project.
- In relation to the off-site works being the pedestrian and cycle access links from the site to Lewisham railway station, MCA determines that a 50% offset should apply to these works on the basis that it is reasonable for 50% of these works to be assessed as expenditure related to private development, and 50% as constituting a material public benefit under Council's Contributions Plan 2013. The 50% constituting the material public benefit cannot be classed as works in kind as the Council's S94 Plan does not include provision for these works. However, it can be classed as the provision of public facilities (being the embellishment of open space) that are not part of Council's public works program. MCA determines that the 50% offset should be treated as the provision of public facilities and that the offset should therefore apply 'cross category'.
- MCA notes that the scope of work contained in AT&L SKC10 Issue P1 is agreed between the parties (being Option 1 preferred by Council).
- MCA considers that Meriton's requested clarification in MOD 5 to limit the scope of work to links 'from the site' in respect of both sets of access links is reasonable.
- In applying this determination to MCA's S94 Calculation Template at Annexure A, MCA considers that the relevant category in Council's Contribution Plan 2013 is 'Traffic Facilities'. MCA notes that Meriton's net S94 contribution obligation for 'Traffic Facilities' is \$21,331. The current estimated cost of the works is \$184,874 and a 50% offset is \$92,437. Meriton is entitled to the full offset which leaves Meriton with a credit of \$71,106 in this category which (using the cross category approach in this instance) may be used to offset its net cash obligations in other categories.



**Stormwater, footpath and road upgrade works in Brown Street and William Street
(Meriton's cost estimate \$549,535)**

- Meriton proposes an offset of 50% of the value of the Brown Street stormwater works (\$177,066) and 50% of the value of the footpath and road upgrades to Brown and William Streets (\$372,469) against the S94 contributions payable. Council proposes no offset for any of these works.
- In relation to the Brown Street stormwater works (\$177,066), Meriton's claim for a 50% offset is based upon Meriton's proposal to increase the stormwater capacity so as to capture the Brown, William and McGill Streets stormwater which Meriton suggests is a material public benefit. Meriton proposes that Council, in any future redevelopment of the northern precinct could then seek reimbursement of these costs as part of that future redevelopment.
- Council proposes no offset on the grounds that the proposed stormwater configuration is a direct result of Meriton's design and would not otherwise be required to be carried out.
- Evans & Peck consider that there is merit to Meriton's claim as it relates to reduction of flood levels in the vicinity of William Street and Brown Street. The results of the flood modelling indicate that in William Street and Brown Street there are demonstrable benefits to the community in terms of reduced flood levels in the larger flood events (20 and 100 year ARI). Evans & Peck consider that a portion of the cost of the construction of this section of the drainage system should be borne by Council (estimated to be in the order of \$40,000).
- Notwithstanding this, for the reasons further stated below, MCA agrees with Council's view that there should be no offset.
- In relation to the footpath and road upgrade works in Brown and William Streets (\$372,469), Meriton's claim for a 50% offset is based upon an acknowledgement that Meriton's proposal to upgrade Brown and William Streets will benefit the project but will also benefit the surrounding community. Meriton proposes that Council, in any future redevelopment of the northern precinct could then seek reimbursement of these costs as part of that future redevelopment.
- Council proposes no offset on the grounds that the proposed road and footpath upgrades are the usual types of ancillary works expected from new large scale development and should not result in public benefit exemptions. Council argues that the substantial increase in foot and related traffic arising from the development also supports the need for footpath works adjacent to the site.
- MCA agrees with Council's view and considers that no offset should apply.

Reasoning

- Firstly, in relation to the Brown Street stormwater works, MCA acknowledges that Evans & Peck consider there is merit to Meriton's claim and that a portion of the cost of the construction of this section of the drainage system should be borne by Council (estimated to be in the order of \$40,000).



- However, in MCA's view there are compounding issues here which go beyond the analysis provided by Cardno, Meriton and Evans & Peck. The main stormwater drainage line & easement which presently bisects the northern part of the site is proposed to be relocated to the new public open space north of Hudson Street, which will be dedicated to Council. (This is despite Condition 11 of the Concept Plan approval which requires that drainage reserves should not be included as open space provision).
- Whilst Council is agreeable in concept to the relocation of the stormwater drainage line to the new public open space area north of Hudson Street(SKC22, 23, 25), the effect of doing so transfers an existing 'blight' on Meriton's land to land not owned by Meriton, without commercial compensation. MCA understands that the existing drainage easement is owned by Council yet there has been no commercial offer by Meriton to Council in return for Council extinguishing the easement and agreeing to relocate it to the new public open space. Council has pointed this out to Meriton in correspondence.
- The relocation of the easement allows Meriton to undertake significant design efficiencies on the site as well as avoiding the costs associated with building near/over such assets.
- MCA considers that Meriton's proposal that Council should allow the offset and then seek reimbursement from future development of the northern precinct amounts to recognition that such works should be 100% funded by the developer and that Council could facilitate this by acting as a 'banker'. However it is not Council's role to act as a 'banker', especially in circumstances where the proposed works are not part of Council's S94 Plan.
- In any event, MCA considers that in the absence of any commercial offer to Council for the transfer of the easement from Meriton land to Council land, it is commercially unreasonable for Meriton to pursue any offsets for the proposed stormwater upgrades.
- Having regard to the above, MCA determines that Meriton's proposed Brown Street stormwater works do not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- Secondly, in relation to the footpath and road upgrades to William and Brown Streets, MCA considers that these works are of the same ilk as the Hudson Street upgrade. It is incumbent upon the developer, as part of winning its development approvals, to improve the quality of Brown and William Streets to facilitate the additional demand on these streets caused by the project. Put simply, the proposed works would not occur without the need for the project and the proposed scope of work for Brown and William Streets is a response to the proposed Meriton development.
- MCA considers that Meriton's proposal that Council should allow the offset and then seek reimbursement from future development of the northern precinct amounts to recognition that such works should be 100% funded by the developer and that Council could facilitate this by acting as a 'banker'. However it is not Council's role to act as a 'banker', especially in circumstances where the proposed works are not part of Council's S94 Plan.



- Consistent with this rationale, MCA notes that Council's Contribution Plan 2013 does not include any allowances for street upgrades in Precinct 45 (the McGill Street Precinct), rather it anticipates that such upgrades are to be 100% developer funded (Table 4.2.2 on page 77).
- MCA considers that there will be some public benefit arising from footpath and road upgrades to Brown and William Streets. Many development consents require privately funded works beyond a project site, usually adjacent to the property, to ameliorate the impact of private development on the public domain (eg, asset renewal or expansion) and these works usually provide a public benefit unfunded by the community. However, in most cases the public benefit is not material or has an esoteric or unquantifiable quality. MCA categorises Meriton's proposed Brown and William Street footpath and roadworks upgrade works in a similar manner.
- Having regard to the above, MCA determines that Meriton's proposed footpath and roadworks upgrade works in Brown and William Streets do not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.

Determination

- MCA determines that Meriton's proposed Brown Street stormwater works do not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- MCA determines that Meriton's proposed footpath and roadworks upgrade works in Brown and William Streets do not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- Meriton proposes that the upgrade works should occur generally in accordance with AT&L Plan SKC22 Issue P4. Council has agreed 'in concept' to the scope of the drainage works, however, Council should be afforded the opportunity to concur that the proposed roadworks scope is an adequate response to the proposed development.

Stormwater works in McGill Street (Meriton's cost estimate \$116,766)

- Meriton proposes an offset of 100% of the value of the McGill Street stormwater works against the S94 contributions payable. Council proposes no offset for these works.



- Meriton's claim for a 100% offset is based a design that will capture the catchment associated with McGill Street and the future stormwater generated from the redevelopment of the McGill Street precinct south of Hudson Street. Meriton argues that the proposed works provide no direct benefit to Meriton's project, however they will enable the redevelopment of the southern McGill Street precinct in the future. Meriton proposes that Council, in any future redevelopment of the northern precinct could then seek reimbursement of these costs as part of that future redevelopment.
- Council proposes no offset on the grounds that the proposed works are the result of Meriton's reconfiguration of drainage within the area which necessitates changes to the McGill Street stormwater and in the absence of Meriton's proposed design these stormwater works would not be required.
- Evans & Peck assess that, with the exception of the Brown Street stormwater works, Meriton has not demonstrated the public benefit of the proposed stormwater drainage scheme for the Lewisham Estate in Lewisham.
- MCA agrees with Council's and Evans & Peck's views and reasoning and considers that no offset should apply. In any event MCA considers that these works constitute the usual types of minor ancillary works expected from new large scale development that are essentially project related. If, as Meriton suggests, the works are not necessary to be undertaken, it should be available to Meriton to delete the works rather than pursue an offset for project works that aren't necessary.
- MCA considers that Meriton's proposal that Council should allow the offset and then seek reimbursement from future development of the southern McGill Street precinct amounts to recognition that such works should be 100% funded by the developer and that Council could facilitate this by acting as a 'banker'. However it is not Council's role to act as a 'banker', especially in circumstances where the proposed works are not part of Council's S94 Plan.

Determination

- MCA determines that Meriton's proposed McGill Street stormwater works do not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- Meriton proposes that the upgrade works should occur generally in accordance with AT&L Drawing SKC23 Issue P5. Council has agreed 'in concept' to the scope of the drainage works. If, as Meriton suggests, the works are not necessary to be undertaken, it should be available to Meriton to delete the works rather than pursue an offset for project works that aren't necessary.

Upgrade and realignment of the trunk drainage infrastructure (Meriton's cost estimate \$1,939,620)

- Meriton proposes an offset of 50% of the value of the major trunk drainage works to convey stormwater from Old Canterbury Road to the light rail corridor against the S94 contributions payable. Council proposes no offset for any of these works.



- Meriton maintains that while the diversion and delivery of this new infrastructure will facilitate delivery of the project, the design requirements to enhance the capacity of the new system well beyond the capacity of the existing system to accommodate existing catchment-wide drainage and flooding issues should be recognised in the VPA. Meriton argues that the new infrastructure will mitigate flooding on Old Canterbury Road, mitigate flooding in the rail corridor and facilitate redevelopment of the land south of Hudson Street. Meriton states that the works benefit the entire catchment of approximately 21ha, while the site is only 1.3ha demonstrating that the site should not be responsible for bearing the full cost of this public infrastructure.
- Council proposes no offset on the grounds that the proposed stormwater configuration is a direct result of Meriton's design and would not otherwise be required to be carried out.
- Evans & Peck assess that, with the exception of the Brown Street stormwater works, Meriton has not demonstrated the public benefit of the proposed stormwater drainage scheme for the Lewisham Estate in Lewisham.
- MCA agrees with Council's and Evans & Peck's views and considers that no offset should apply.

Reasoning

- MCA notes Evans & Peck's assessment that any redirection of the overland flow around the site is only necessary to meet the needs of the proposed development and has no intrinsic public benefit. The requirement for diversion of flows around the southern side of the site arises from the layout of the proposed development and all costs for the drainage scheme (with the exception of the pipe system in the north of the site) should be attributed to Meriton. Evans & Peck consider that the purpose of the diversion of overland flow around the site is to allow the proposed development to occur without the encumbrance of an overland flow path through the site.
- In addition to the Evans & Peck assessment, in MCA's view there are compounding issues here which go beyond the analysis provided by Cardno, Meriton and Evans & Peck. The main stormwater drainage line & easement which presently bisects the northern part of the site is proposed to be relocated to the new public open space north of Hudson Street, which will be dedicated to Council.
- Whilst Council is agreeable 'in concept' to the relocation of the stormwater drainage line to the public open space area north of Hudson Street, the effect of doing so transfers an existing 'blight' on Meriton's land to land not owned by Meriton, without commercial compensation. MCA understands that the existing drainage easement is owned by Council yet there has been no commercial offer by Meriton to Council in return for Council extinguishing the easement and agreeing to relocate it to the new public open space. Council has pointed this out to Meriton in correspondence.
- Additionally, the relocation of the easement allows Meriton to undertake significant design efficiencies on the site as well as avoiding the costs associated with building near/over such assets.
- MCA considers that in the absence of any commercial offer to Council for the transfer of the easement from Meriton land to Council land, it is commercially unreasonable for Meriton to pursue any offsets for the proposed stormwater upgrades.



- We also note that in the ongoing discussions with Council in relation to the VPA up to 17 September 2013 (MOD 5 Annexures 2 & 3) this item was not included by Meriton as a financial offset against the S94 cash contribution liability. Rather, it was included as a non-cash item to demonstrate to Council that the overall value of Meriton's VPA offer was well in excess of Council's S94 Contributions requirements for the site. Whilst never previously including this item as a financial offset in the VPA discussions, Meriton's MOD 5 application now seeks a 50% offset for these works.

Determination

- Having regard to the above, MCA determines that the upgrade and realignment of the trunk drainage infrastructure from Old Canterbury Road to the light rail corridor does not constitute a material public benefit under Council's Contributions Plan 2013. It cannot be classed as works in kind and in any event the S94 Plan does not include provision for these works. Alternatively, it cannot be classed as a material public benefit that constitutes the provision of public facilities (in terms of relevance, quality and scale) that are not part of Council's public works program. Rather, it is expenditure related to private development.
- Meriton proposes that the trunk drainage works should occur generally in accordance with AT&L Drawing SKC22 Issue P4 and SKC23 Issue P5. Council has agreed 'in concept' to the scope of the drainage works.

Closure and Embellishment of Brown Street South

- Whilst this issue is not part of Meriton's MOD 5 application, MCA considers that, for clarity, it should be dealt with in this review as it will constitute a component of the VPA.
- Condition 14 of the Concept Plan approval requires that *'Future Development Applications shall provide for a suitable treatment of the portion of Brown Street between Building Envelopes C and F to prohibit vehicular movements and provide a landscaped pedestrian through site link. The proponent shall endeavour to obtain approval to close this portion of road reserve and embellish this area as public open space.'*
- This part of Brown Street is a publicly dedicated street owned by Council. Closure and embellishment in accordance with Condition 14 will require a commercial agreement between Council and Meriton.
- MCA understands that Council has agreed to close Brown Street and sell it to Meriton 'at no cost to Meriton' in return for:
 - (a) Meriton preserving the former road as publically accessible private open space, and
 - (b) Meriton funding (with no offset) the embellishment of the former road to an appropriate open space standard, including providing the required pedestrian and cycle links which pass through the affected land (Option 1).

Offsets

Meriton proposes in its MOD 5 application that the VPA must offset Meriton's S94 cash contribution payable in accordance with the percentages indicated. The following table summarises the public benefit offsets determined by MCA.

Table F

Proposed Infrastructure	Material Public Benefit Offset		
	Meriton's Proposed Offset	Council's Proposed Offset	MCA's Determination
Upgrade of Hudson Street	50%	0%	0%
Dedication of 3,000m ² of public open space at no cost	Agreed	Agreed	Agreed
Embellishment of 3,000m ² of public open space	100%	100%	100%
Upgrade/embellishment of pedestrian and cycle links to Lewisham West light rail stop (on-site works)	Included in embellishment of public open space	Included in embellishment of public open space	Included in embellishment of public open space
Upgrade/embellishment of pedestrian and cycle links to Lewisham railway station & surrounds (off-site works)	100%	50%	50%
Upgrade/embellishment of stormwater works to Brown Street	50%	0%	0%
Footpath and road upgrades to Brown and William Streets	50%	0%	0%
Stormwater works in McGill Street	100%	0%	0%
Upgrade and realignment of trunk drainage from Old Canterbury Road to the light rail corridor.	50%	0%	0%

Timing of the VPA

- In its MOD 5 application, Meriton proposes that the VPA must be entered into prior to the issue of the Occupation Certificate of the last residential tower.
- MCA considers this timing is not in accord with industry practice. Such timing is commercially unreasonable and, if permitted, could have the effect of frustrating the eventual completion of the VPA. Usually a VPA is finalised ahead of a project development application being lodged with the consent authority. Consistent with this, the Sydney East Joint Regional Planning Panel, when refusing DA201200588, noted that *'while there have been negotiations between the applicant and the council on a Voluntary Planning Agreement, there are no indications that the parties are nearing agreement'*.
- MCA considers that the finalisation of the VPA could occur quite quickly. MCA recommends that the parties be required to finalise and enter into the VPA along the lines promoted in this report, within one month of the Department's request or in accordance with such other timing as deemed reasonable by the Department.
- MCA also recommends that Meriton be requested to put its MOD 5 application on hold pending the finalisation of the VPA.

VPA Consultation with Transport for NSW

- Condition A3 of the Concept Plan approval requires that a VPA be entered into ‘....in consultation with Transport for NSW, with terms outlined in the EA, PPR and Revised Statement of Commitments including..... upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, Lewisham railway station and surrounding residential areas;...’
- Meriton proposes that the requirement that Transport for NSW be consulted during the preparation of the VPA be deleted.
- MCA notes that Railcorp’s submission on the Concept Plan application (dated 11 January 2011) proposed “.....an investigation of improving the existing pedestrian path network between the development and Lewisham Station....to improve pedestrian permeability to the proposed Greenway and Light Rail stop....”. Condition A3 is a response to this submission.
- MCA notes that the proposed scope of work to improve the pedestrian network is to be generally in accordance with AT&L Plan SKC10 Issue P1. This plan has received concurrence from Council but MCA is unsure if Railcorp has also given its concurrence.
- Accordingly, the requested deletion should not occur unless and until Transport for NSW has provided its consent for such deletion.

11.0 S94 CALCULATION TEMPLATE

As discussed in Section 6, MCA’s primary task is to assess the principle of each issue in contention – that is, to assess whether material public benefit arises from any of the proposed works.

Our secondary task is to then apply our assessment of the principle to Meriton’s information (ie, the development yield, items of work, scope, cost) in order to provide a financial quantification of each assessed principle. We note that the secondary task in effect provides a ‘S94 Calculation Template’ which can respond to changes as a result of any future development approvals and/or negotiations between Meriton and Council and which, in turn, will guide the finalisation of the VPA.

MCA has prepared a S94 Calculation Template and this is attached as **Annexure A** to this Report.

12.0 CONCLUSION

Based on our analysis and review, MCA has concluded that Meriton’s MOD 5 application neither strongly nor unambiguously commits to a range of public works outside of Council’s S94 Contributions Plan that will be of material public benefit, and that would reasonably be the subject of a VPA. There are no offers of public facilities, community spaces, new roads, bridges, recurrent funding of public initiatives etc which would ordinarily promote the need for a VPA.

Rather than espousing a broader range of public works ambitions along the lines ordinarily expected of a major transit oriented development, Meriton’s approach is based upon acknowledging its obligations under Council’s S94 Contribution Plan and then seeking offsets for its project related infrastructure that it considers meets a ‘material public benefit’ test.



In particular, the Evans & Peck Stormwater Drainage Review assesses that there is generally no public benefit associated with the stormwater drainage works proposed by Meriton for the project, but rather, they are works required by Meriton to accommodate the layout of the development.

MCA has concluded that Council is not being unreasonable in its requirements for the VPA, including the offsets proposed by Council.

MCA recommends to the Department that a VPA be promptly concluded between the parties along the lines promoted in this report. The issues are neither complex nor, in most instances, of material financial extent (for either party).

We trust this report is suitable for your purposes, however should you have any query or wish to discuss any aspect, please do not hesitate to contact the writer.

13.0 DISCLAIMER

We note that this report has been prepared for the purposes of the Department and not for the purposes of either Council or Meriton. MCA will not be held liable to any other parties. In particular, no legal relationship or accountability exists between MCA and either Council or Meriton.

In preparing this report, MCA has relied upon data, surveys, analyses and other information provided by the Department, Council and Meriton. Except as otherwise stated in this report, MCA has not verified the accuracy or completeness of such data, surveys, analyses, or other information.

MCA assumes no responsibility for any loss or damage suffered by any party other than the Department arising from matters dealt with in this report, including, without limitation, matters arising from any negligent act or omission of MCA, or for any loss or damage suffered by any other party in reliance upon the matters dealt with and opinions and conclusions expressed in this report.

14.0 PARTIES REVIEW OF MCA'S DRAFT REPORT

The above report was submitted in draft form to the Department for its consideration on 3 February 2014. The Department forwarded the draft report to both Marrickville Council and Meriton and sought their respective comments. Both parties submitted their comments to the Department on 13 February 2014 and these have been passed on to MCA for consideration prior to finalising the Report.

This section deals with the matters raised by both parties and MCA's consideration of those matters in finalising its report.

Matters Raised By Meriton

Material Public Benefit Defined / No Cross-Category Credits for Works in Kind (Pg 12)

MCA have incorrectly reviewed the context of which negotiations were proceeding with regard to the application of Council's Section 94 Plan. Both parties had agreed to exclude the application of Section 94 through the VPA at our meeting on 9 September 2013 which is addressed in our subsequent offer dated 17 September 2013 that has been included in our application for MOD 5.

This was agreed to provide Council with the flexibility to utilise the remaining cash contribution. This is a common approach on many of the VPA's we enter into with Council's across the Sydney metropolitan region where the ability to gain credits between categories is a well-established approach to deliver broader public benefits. On page 12 of its report, MCA accepts that the S94 Plan allows Council to utilise its discretion to allow the offset of works that provide a material public benefit and this is the basis on which negotiations were proceeding.

However, MCA outlines that Council has advised "its policy is to generally limit the value of any works in kind offsets to the particular category of infrastructure being provided, and not to allow any overachievement of such value to act as a credit against the developer's cash contribution obligations under a different category of public work". This advice which is adopted by MCA throughout their assessment contradicts all previous negotiations and agreements between the parties. MCA's assessment should be revised to be consistent with the discussions that all items are capable of being offset to a degree based on the material public benefit generated. Discussion on the degree of material public benefit is discussed below on key items in which we do not agree with MCA's determination.

MCA's Comment

It is correct that Marrickville Council desires the VPA to exclude the application of section 94 such that any monies payable to Council will be a cash contribution under the VPA. As pointed out by Meriton, the exclusion of S94 from voluntary planning agreements is a common practice amongst Councils in return for material public benefit, thus effectively permitting cross category credits to apply. Consistent with this, MCA's Report at page 13 states:

".....MCA considers that should a material public benefit arise that constitutes the provision of public facilities that are not part of Council's public works program, it would be appropriate for Council to offset the value of these works against the total net cash contribution payable after the value of any works in kind had been taken into account.

MCA's reasoning is based upon an expectation that Council would need to be satisfied that the public facility provides a substantial benefit to the community (eg, in terms of relevance, quality and scale) and that this benefit warrants Council accepting the works as fulfilling the intent of the S94 Plan notwithstanding a reduction in expected cash contributions."

Any material public benefit must be assessed within the context of Council's Section 94 Plan.

The core issue is the extent of the VPA offer by Meriton and whether it can be judged as constituting a material public benefit (eg, in terms of relevance, quality and scale). MCA's assessment is that Meriton's VPA offer does not constitute a material public benefit and hence the principle of no cross category credits should apply.

Stormwater Drainage Review by Evans and Peck / Upgrade and Realignment of the trunk drainage infrastructure (Pg14 and Pg24)

We maintain that that the relocation of the drainage system generates a material public benefit that was not considered as part of the MCA report, particularly with regard to the nexus for the relocation. The following comments are made for consideration in revising the draft MCA Report:

- *The system has not “only” been relocated to facilitate the development, but to align the infrastructure with the proposed central open space which is consistent with Council’s DCP and as per the drainage design in Cardno’s 2011 report identified in Condition 7 of the Concept Approval. Both MCA and Evans and Peck continually revert to the relocation facilitating “Meriton’s design”, however they both disregard that the Concept Approval took direct guidance from Council’s McGill Street Masterplan which formalised the zoning and DCP controls for the site. This is reiterated in the determination of MOD 4 which states that the Concept Approval was closely aligned with the McGill Street Masterplan (refer to Part 9.45 of Council’s DCP). The DCP aligns the public open space with the future light rail station and places buildings (and associated basements) over the existing infrastructure. Consequently the need to realign the proposed drainage infrastructure has been dictated by Council’s DCP, not “Meriton’s Design”.*

Accordingly, the nexus for relocation is predominantly generated by Council’s DCP and the degree of apportionment should reflect the very low proportion of stormwater flow from the site into the system (approx. 6%) and substantial additional cost to amplify the system as outlined in our original application for MOD 5.

- *MCA suggest we should be offering commercial compensation to Council for moving the public drainage system (as a “blight”) into future public land. However, the report does not recognise that the existing easement and drainage pipe traversing Meriton’s land is inadequate and results in stormwater flows that floods adjoining private land putting property and life at risk. The commercial benefit to Council is that relocation and amplification of the system will remove their uncontrolled existing upstream stormwater flow from traversing and flooding existing land with a new and substantially amplified piece of infrastructure which will appropriately contain all stormwater flows within public land. The “integration” of stormwater flows and public open space is promoted in Council’s own Water Sensitive Urban Design (WSUD) Policy. The substantial benefit to Council generates material public benefits that should be reflected in the VPA through an offset to the cost of these works.*

Importantly, both MCA and Evans & Peck do not appreciate or misunderstand the planning principles of nexus that have overtime been established through the Land and Environment Court and objectives of the Environmental Planning and Assessment Act 1979. Simply put, the new pipe and associated infrastructure has been amplified to catch upstream flows. The pipes have been designed to capture 96% of upstream stormwater flows and by virtue of this alone, we should be getting credits to this amount. Notwithstanding this, we are accepting a lower amount of 50%, which is more than reasonable as outlined in our letters to the Department of Planning dated 28 October 2013 and 15 November 2013.

MCA’s Comment

In relation to the first point, MCA does not accept that the nexus for the relocation and amplification of the trunk drainage system is predominantly generated by Council’s DCP and that the degree of apportionment should reflect the very low proportion of stormwater flow from the site into the system (approx. 6%).


Evans & Peck were engaged by the Department to assess whether the stormwater drainage design for the development provides any benefit to the community, in terms of flooding, and whether, as a result of any public benefit resulting from the construction of the system, Marrickville Council should bear any cost related to the drainage scheme construction. Evans & Peck independently assessed this issue and concluded that the nexus for relocation and amplification is Meriton's design.

In relation to the both the first and second points, Council disagrees with Meriton's assessment of the existing and proposed future stormwater system. In particular, Council considers that:

- the existing system ensures that minor flood events are contained within the existing pipe whilst major flows follow an overland flow path over Meriton's property (being a low point that sits above the existing pipe). The existing risk to property and life is acceptable as the majority of flooding and overland flows are contained within an industrial site.
- Meriton's proposal involves removal of the existing pipe and overland flow path with relocation to a higher point. In other words, in order to cater for Meriton's preferred development design, the pipe and overland flow path require reinstatement at another less suitable position from a flood perspective. This relocation of Council's assets results in the development site becoming flood free (Meriton's benefit) and flooding on the adjacent public roads, reserve and some adjacent properties becoming slightly worse (Council burdened) for both the 1 in 20 and 1 in 100 year storm event (refer to results in section 4.3 of Cardno's Flood Analysis below).
- In these circumstances, Meriton is altering the stormwater situation within the property and the surrounding catchment and should carry the cost of doing so, even if the new pipe is larger than the old (being a consequence of Meriton's design requirements to try and maintain the status quo in terms of flood impacts on adjacent properties). Council is more than happy for the existing stormwater pipe/flow path to remain as it is.

MCA considers that, as Council does not acknowledge a material public benefit in these works, it is open to Meriton to re-scope its trunk drainage infrastructure to suit the specific requirements of the project.

8

 **Cardno**
Shaping the Future

4.3 Results

The estimated 100 year ARI flood extents and depths are shown in **Figure B8**. Flood level differences in comparison with the 100 year ARI flood levels are given in **Figures B9**, the 20 year results are shown in **Figure B10** and **B11**. The results show:

- The proposed scheme results in a local increase in the peak 100 year ARI flood level in Old Canterbury Road of 0.1 m ie. from 12.4 m AHD under Existing Conditions to 12.5 m AHD under Future Conditions. This impact does not extend to any buildings and does not result in any additional over floor flooding;
- The proposed scheme results in a local increase in flood levels at the corner of Brown Street and William Street. There are some uncertainties regarding the existing flood levels at this location due to complexity of flow behaviour through buildings that had been constructed over the overland flow path. Notwithstanding this, there are differences to Existing Conditions within the road corridor of up to 0.24 m. The impact on properties is less than 0.2 m and additional floor level survey was undertaken to confirm that there was no existing buildings will be impacted by these changes. Buildings in this vicinity have a freeboard above the peak 100 year level greater than 0.77m under Future Conditions;
- There are some minor increases to peak depth of flooding on Old Canterbury Road adjacent to the site during the 20 year ARI. event This location is already experiences inundation on a regular basis and this minor increase is not considered significant;
- While **Figure B9** shows some local increases in peak flood levels within the Light Rail corridor at the end of Hudson Street this appears to be associated with the representation of the flood wall in the model and will be adjusted in future modelling.

Upgrade of Hudson Street (Pg16)

We raise significant contention with this item and it remains perplexing that neither Council nor MCA consider that the upgrade to Hudson Street generates any material public benefit to the existing community. The existing community will have a direct nexus and benefit in using Hudson Street as listed below.

- The future development does not rely on the provision of parking within Hudson Street.*
- The widening and reconstruction of the Hudson Street includes the provision of public parking to support the light rail station and future open space for the existing community. We have lodged a DA with the Council to widen Hudson Street to address urgent need for Transport for NSW (TfNSW) to provide adequate vehicular/pedestrian access, ancillary parking, disabled parking and kiss and ride facilities to support the operation of the light rail service. A letter from RailCorp (refer to Annexure 1) outlines the need for these Works to support the light rail system.*

It is disconcerting that the MCA Report seemingly makes the light rail system “absent” in its reasoning. The urgent need for the road upgrade is dependent on Meriton dedicating land and facilitating the works which clearly creates a significant material public benefit to the existing community.

- The existing quality and capacity of Hudson Street is inadequate (refer to photo 1 and 2) and does not facilitate adequate facilities for vehicles to drop off passengers and turn around without reversing into oncoming traffic. While there is also a benefit to the development of both Meriton’s land and the southern portion of the McGill Street precinct, there is a definitive public benefit associated with the works and a nexus created by the adjoining light rail system.*
- In providing no offset, MCA disregard that the southern portion of the McGill Street precinct should contribute 50% of the costs. Standard practice by other Councils is that we construct half the road only and they come in later and finish the other side if not redeveloped by an adjoining development proposal. Alternatively, an arrangement may be put in place whereby we construct the entire road and Council pay half the cost. This was recently done in Warriewood with Pittwater Council. MCA suggest that further work is “likely” to the southern side of the road, however this would only be minimal (i.e. footpaths and driveway cross-overs) given the entire road is being reconstructed. MCA is not correct.*

We maintain that there is tangible and undeniable material public benefit generated by the upgrade works to Hudson Street. Given this benefit and Council’s ability to recover costs through S94 or other VPAs from future development to the south of the Hudson Street, we believe that the works should be offset as proposed at a minimum of 50%.

MCA’s Comment

In relation to points 1 to 3, MCA considers that, absent the light rail project, the proposed upgrade works to Hudson Street would still be required as a necessary part of Meriton’s project approval, including the roundabout and the slip lane parking.

We have formed this view following a detailed review of the original Concept Plan application and documents and the substantial design changes that were required to be made to the project following the public exhibition and the Department’s analysis of the project, all of which elevate the importance of Hudson Street to the project.

These documents do not offer any compelling rationale that Hudson Street should be upgraded or embellished to a particular standard to service the light rail stop. In particular, reference is made to Meriton's response to the Submissions on the Preferred Project Report dated 30 November 2011 by Planning Ingenuity:

- At Page 3 – Council's McGill Street Masterplan envisaged dual streets on either side of the central park (one way in and one way out). Meriton responded by advising that the proposed Concept Plan has a dual carriageway, which from a traffic flow perspective achieves the same outcome. In addition, the proposed arrangement is considered to be superior as it will encourage a higher proportion of pedestrians to move past the shopfronts.
- At Page 7 – the Traffix recommendation was that consideration should be given to the potential for additional visitor parking on-street within the confines of the site..... Meriton's response was that on-street parking is now provided adjacent to Hudson Street.
- At Pages 8 & 9 - the development proposes the creation of a new road along the western side of the site. It shall be demonstrated that a MRV can service the site adequately by the provision of the appropriate vehicle templates. A cul-de-sac shall be provided at the end of the new public road along the western boundary. Meriton's response was that a cul-de-sac is now provided at the end of Hudson Street suitable for use by up to an 8.8m MRV.

In addition, MCA notes that the Department's Major Project Assessment (at Section 5.4 Public Benefit) makes no mention of the public benefit of the Hudson Street upgrade, but is insistent that the upgrade be included in the VPA.

We have also examined the Concept Plan Approval for the light rail extension (MP10_0111) which promotes light infrastructure solutions for access and supporting connections to the various light rail stops. No particular infrastructure requirements are identified for Hudson Street in the Concept Plan Approval. Transport for NSW is supportive of the proposed design and facilities for Hudson Street as is demonstrated by the email from Transport for NSW dated 13 January 2013.

Put simply, the light rail project benefits from the proposed Hudson upgrade, but is not the reason for them.

In relation to point 4, the Concept Plan Approval clearly establishes the scope of work required to be undertaken by Meriton in relation to Hudson Street to adequately serve the project.

Stormwater Works in McGill Street (Pg23)

As outlined in previous submissions and discussions with MCA, this piece of drainage infrastructure was specifically included as a public benefit to address the uncontrolled existing flow of stormwater emanating from the southern portion of the McGill Street precinct.

This item was never disputed by Council until the submission of MOD5 and is superfluous to the works required for the proposed development. If there is to be no available offset, Meriton would ordinarily seek to remove this element from the VPA, which can be completed as part any future development application for the southern precinct. Given our discussion above on Hudson Street, we accept a 50% offset for these works.

MCA's Comment

MCA notes that Meriton would ordinarily seek to remove this element of the VPA if there is to be no available offset. Notwithstanding this, Meriton is now proposing a 50% (instead of 100%) offset. MCA's determination of this issue (page 24 of this report) is consistent with Meriton's view in that if, as Meriton suggests, the works are not necessary to be undertaken, it should be available to Meriton to delete the works rather than pursue an offset for project works that aren't necessary.

Timing of VPA (Pg27)

We do not accept that MOD 5 be put on hold while the VPA is finalised. Meriton lodged this application to seek certainty as it is now over 12 months to arrive at this point.

MCA's Comment

This is for the Department to determine.

VPA Consultation with Transport for NSW (Pg28)

The need to consult with Transport NSW was directly related to the pedestrian bridge which has been accepted by all stakeholders as irrelevant and impossible to construct. This is recognised in the MCA report on page 16. However, MCA continue to seek Transport NSW's involvement. There is no need for Transport for NSW to be involved in the negotiations for the VPA which is between Council and Meriton. Transport NSW will be consulted as necessary through the approval processes and where it involves their land.

MCA's Comment

MCA notes that the proposed scope of work to improve the pedestrian network is to be generally in accordance with AT&L Plan SKC10 Issue P1. This plan has received concurrence from Council but MCA is unsure if Railcorp has also given its concurrence. Accordingly, the requested deletion should not occur unless and until Transport for NSW has provided its consent for such deletion.

Submission by Marrickville Council on MCA's Draft Report

Council has other issues with the VPA proposed by Meriton which fall outside MCA's brief and understandably were not canvassed by MCA, namely:

1. *Council's expectation is that VPAs will deliver a monetary value that exceeds the S94 otherwise payable. The reasons for this are that:*
 - (a) the offsets may have a value calculated by a quantity surveyor but the developer will build them with all the economies of scale associated with those works being delivered as part of a larger whole;*
 - (b) the developer will build and deliver the public infrastructure in a staged fashion whereas S94 is paid up-front and in a lump sum; and*
 - (c) the community should share in the financial benefit that the developer receives from providing physical infrastructure pursuant to a VPA as opposed to paying S94.*

Council officers consider that fifteen per cent would be an appropriate premium to share in the benefits the developer receives.



2. *The public open space offering remains unacceptable from Council's viewpoint as it creates little attraction for the wider community to use it. It will serve more as private open space. Council requires the park to have a broader community appeal and this could be served by the provision of a community space adjacent to the park with associated toilets. In June 2013 the proponent rejected this request on the basis that the community space was not an approved use under the concept plan approval. Given that this would have been a minor modification and that the proponent was at that time seeking to modify aspects of the concept plan approval (and is now up to modification 6) this is a clear demonstration of the proponent's unwillingness to seek a mutually acceptable VPA outcome. Documentation concerning the above issue was provided to MCA as part of its investigations and is Attachment 1 to this letter.*

Council would have no concern with offsetting the value of the facility from the VPA value that is determined as per the premium identified above.

As a VPA is voluntary, Council understands that neither Meriton nor Council can be forced to accept any particular offer. However, it would be beneficial if the PAC approval were modified to reflect the offset position worked out by MCA and embed a need to address Council's concerns regarding the end value of the VPA when compared to S94 and the need for a community space.

MCA's Comment

In relation to the first point, MCA's considers that Council's proposal is neither practical nor conforms to accepted industry practice.

As discussed in this report, MCA is mindful that a VPA would normally (and particularly for a transit oriented development) allow the introduction of a variety of public benefit measures, supplied and funded by the developer, which might be considered as outside Council's normal Section 94 Contributions Plan. The value of these measures to the community often well exceeds the value of established S94 Plan contributions as they can deliver targeted public benefits over and above measures to address the impact of the development on the public domain.

Inherent in the usefulness of a VPA is, on the one hand, the assessed community value of infrastructure either not normally capable of (or in excess of) that deliverable by a Council; and on the other hand, the commercial value to a developer of undertaking infrastructure works which may have an independently assessed value in excess of the cost to the developer and a timing value in the staged delivery of the agreed works.

A VPA usually exhibits these characteristics and is the result of bona fide negotiations between the parties having regard to the subject matter of the VPA. These commercial dynamics should not be curtailed or interfered with by mandating outcomes (eg 15% margins over cost as suggested by Council) that may potentially undermine the ultimate usefulness of a VPA.

Put simply, as a VPA is voluntary, the respective parties will not (and probably should not) enter into a VPA unless it makes good commercial sense to do so.

In relation to this particular project, MCA has previously noted that, rather than espousing a broader range of public works ambitions along the lines ordinarily expected of a major transit oriented development, Meriton's approach is based upon acknowledging its obligations under Council's S94 Contribution Plan and then seeking offsets for its project related infrastructure that it considers meets a 'material public benefit' test.

In view of the assessed lack of public benefit that would ordinarily promote the desirability of a VPA with this project, MCA's view is that, absent the Concept Approval requiring a VPA, the failure of the VPA negotiations between Council and Meriton would ordinarily lead to a S94 Planning Agreement. This remains an outcome available under Meriton's MOD 5 application should to the parties and the Department wish to consider it.

In relation to the second point, the background is that prior to May 2013, Council had expressed ongoing concerns regarding the public quality and amenity of the public open space and had suggested that a built-form community space and public toilets (dedicated to Council's ownership) should be incorporated into one of the buildings to improve the public amenity. In May 2013 Meriton undertook to consider incorporating a community space into the project subject to negotiating the appropriate value, and showed Council a plan with 144.2m² of community facility and a public toilet of 9.4m². The community facility would occupy the southern frontage of Building C, looking onto the public open space. Meriton confirmed this facility in its letter to Council dated 5 June 2013 but warned that it was unfunded. In a letter to Council dated 19 June 2013, Meriton deleted the community space on the grounds that the Concept Plan Approval does not permit such a land use. Council expressed concerns and noted that, in any event, a modification to the Concept Approval could easily be prepared.

In relation to Council's S94 Contributions Plan, Meriton's estimated S94 obligation for Community Facilities is \$693,111 (see Annexure A). Should such a community facility be provided under a VPA (ie, by agreement between Meriton and Council), MCA would regard this as meeting the objective material public benefit tests of quality, relevance and scale. Accordingly, any cost of delivering this facility which is valued in excess of \$693,111 should attract 'cross category' credits.

15.0 MCA'S FINAL CONCLUSION

MCA has considered the issues raised by both parties. MCA does not wish to change the substantive content of this Report nor our assessment of the issues.

We present this final report for the Department's consideration.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Mike Collins', with a stylized flourish at the end.

Mike Collins
Director



ANNEXURE A

S94 Contribution & Material Public Benefit (MPB) Calculation Using CP 2013 - Version 3 February 2014									
Parties	Meriton's Position	Marrickville Council's Position	MCA's Recommended Outcome (Overall Calculation Approach: each S94 element treated individually - no cross category credits)						
Overall Calculation Approach	Holistic Apportionment (total costs only)	Individual Apportionment (each S94 element treated individually)	Recreation Facilities	Community Facilities	Traffic Facilities	Road Access Dedication	Plan Admin (2% of base contributions)	Other Works	Total Contribution
S94 Contribution Required (Per Contributions Plan 2013)	\$5,657,873	\$5,657,873	\$4,752,105	\$706,005	\$88,824	not required	\$110,939	\$0.00	\$5,657,873
Works Proposed To Be Carried Out By Meriton									
Upgrade of Hudson Street									
Meriton's Cost Estimate	\$1,206,568				\$1,206,568				\$1,206,568
Assessment of Material Public Benefit (%)	50%	0%			0%				0%
Assessment of Material Public Benefit (\$)	\$603,284				\$0				\$0
<u>Shortfall in S94 Contribution</u>					<u>\$0</u>				<u>\$0</u>
Embellishment of 3,000m² of public open space to the north of Hudson Street									
Land Dedication to Council 3,000m²									
Meriton's Cost Estimate	\$0		\$0						
Assessment of Material Public Benefit (%)	0%	0%	0%						
Assessment of Material Public Benefit (\$)	\$0		\$0						
Embellishment of 3,000m² Open Space									
Meriton's Cost Estimate	\$1,542,222		\$1,542,222						
Assessment of Material Public Benefit (%)	100%	100%	100%						
Assessment of Material Public Benefit (\$)	\$1,542,222		\$1,542,222						
Public Art within 3,000m² Open Space									
Meriton's Cost Estimate	\$150,000		\$150,000						
Assessment of Material Public Benefit (%)	100%	100%	100%						
Assessment of Material Public Benefit (\$)	\$150,000		\$150,000						
Sub Total for Section 2									
Meriton's Cost Estimate			\$1,692,222						\$1,692,222
Assessment of Material Public Benefit (%)			NA						NA
Assessment of Material Public Benefit (\$)			\$1,692,222						\$1,692,222
Upgrade or embellishment of pedestrian and cycle access links to the Lewisham West light rail stop, Lewisham railway station and surrounding residential areas.									
Cycle & pedestrian links to light rail stop									
Meriton's Cost Estimate	included in open space				included in open space			included in open space	
Assessment of Material Public Benefit (%)	100%	100%			100%			100%	
Assessment of Material Public Benefit (\$)					included in open space			included in open space	
Cycle & pedestrian links to Lewisham station & surrounding residential areas									
Meriton's Cost Estimate	\$184,874				\$184,874				\$184,874
Assessment of Material Public Benefit (%)	100%	50%			50%				50%
Assessment of Material Public Benefit (\$)	\$184,874				\$92,437				\$92,437
4. Other parts of the site that will be upgraded, embellished, constructed or dedicated to Council.									
Brown Street closure & embellishment									
Meriton's Cost Estimate	\$1		\$0						\$0
Assessment of Material Public Benefit (%)	100%	0%	0%						0%
Assessment of Material Public Benefit (\$)	\$1		\$0						\$0
Brown Street Stormwater Works									
Meriton's Cost Estimate	\$177,066							\$177,066	\$0
Assessment of Material Public Benefit (%)	50%	0%						0%	0%
Assessment of Material Public Benefit (\$)	\$88,533							\$0	\$0
McGill Street Stormwater Works									
Meriton's Cost Estimate	\$116,766							\$116,766	\$0
Assessment of Material Public Benefit (%)	100%	0%						0%	0%
Assessment of Material Public Benefit (\$)	\$116,766							\$0	\$0
Footpath & road upgrades to William and Brown Streets									
Meriton's Cost Estimate	\$372,469				\$372,469				\$0
Assessment of Material Public Benefit (%)	50%	0%			0%				0%
Assessment of Material Public Benefit (\$)	\$186,235				\$0				\$0
Major drainage works from Old Canterbury Road to Rail Corridor									
Meriton's Cost Estimate	\$1,939,620							\$1,939,620	\$0
Assessment of Material Public Benefit (%)	50%	0%						0%	0%
Assessment of Material Public Benefit (\$)	\$969,810							\$0	\$0
SUMMARY									
S94 Contribution required for Project	\$5,657,873	\$5,657,873	\$4,752,105	\$706,005	\$88,824	not required	\$110,939	\$0	\$5,657,873
Less S94 Credit for former industrial land use (see Table 1)	\$320,284	\$309,044	\$222,597	\$12,894	\$67,493	not required	\$6,060	\$0	\$309,044
Net Assessed S94 Contribution, after allowing credits	\$5,337,589	\$5,348,829	\$4,529,508	\$693,111	\$21,331		\$104,879	\$0	\$5,348,829
Assessed Material Public Benefit of Works undertaken	\$3,841,725	\$1,784,659	\$1,692,222		\$92,437	not required		\$0	\$1,784,659
Cash Shortfall Required to be paid to Council	\$1,495,865	\$3,564,170	\$2,837,286	\$693,111	\$71,106	not required	\$104,879	\$0	\$3,564,170



ANNEXURE B



NSW Department of Planning and Infrastructure

Lewisham Estate

Stormwater Drainage Review

31 January 2014

Table of Contents

1	Introduction.....	1
1.1	Location	1
1.2	Document Review.....	2
1.3	Concept Approval Conditions	2
1.4	Marrickville Council DCP.....	3
2	Stormwater Drainage Investigation	4
2.1	Meriton	4
2.2	Marrickville Council	5
2.3	Flooding and Drainage	6
3	Conclusion	11

List of Figures

- Figure 1: Site Location Plan
- Figure 2: Existing Trunk Drainage System
- Figure 3: Flood Modelling Reference Points
- Figure 4: Flood level differences due to existing blocked conditions compared to unblocked conditions

List of Tables

- Table 1: Flood Level Results (m AHD) - 5 Year ARI
- Table 2: Flood Level Results (m AHD) - 20 Year ARI
- Table 3: Flood Level Results (m AHD) - 100 Year ARI

Version Control

Revision	Date	Author	Reviewed by	Comments
0	24/01/2014	H Price/A Tourle	S Perrens	Issued to DP&I for review
1	30/01/2014	H Price/A Tourle	S Perrens	Amended to address to DP&I comments
1	31/01/2014	H Price/A Tourle	S Perrens	Final

1 Introduction

Evans & Peck has been engaged by the NSW Department of Planning and Infrastructure (DP&I) to determine the reasonableness of the claimed public benefit of the proposed stormwater drainage design for Meriton's Lewisham Estate in Lewisham taking into consideration:

- Meriton's modification to the Concept Plan approval; and
- Marrickville Council's response to the modification request.

This report assesses whether the stormwater drainage design for the development provides any benefit to the community, in terms of flooding, and whether, as a result of any public benefit resulting from the construction of the system, Marrickville Council should bear any cost related to the drainage scheme construction.

1.1 Location

This report relates to the Lewisham Estate, located at 78-90 Old Canterbury Road, Lewisham. The site is bounded by Longport Street, Brown Street, William Street, Old Canterbury Road, Hudson Street and the light rail corridor to the west. The site is located within the Marrickville Council local government area. Figure 1 shows the site location plan.



Figure 1: Site Location Plan

1.2 Document Review

This review assessment is based on the following documents:

- (a) NSW Government Planning Assessment Commission Determination and Concept Approval for Proposed Mixed Use Development at 78-90 Old Canterbury Road, Lewisham (MP08_0195) (5 March 2012);
- (b) Assessment of Strategic Flood Management Options for Lewisham Estate – Discussion Paper (Cardno, 14 August 2013);
- (c) Letter from Meriton (Walter Gordon) to DP&I (Chris Wilson), 78-90 Old Canterbury Road, Lewisham - Section 75W – Amendment to Condition A3 and 20 (MP08-0195_MOD5), (15 November 2103);
- (d) Letter from Marrickville Council (Tim Moore) to DP&I (Mark Brown), Ref 4580, Section 75W Modification to the Concept Plan MP08_0195 Old Canterbury Road, Lewisham - Seeking approval to amend Conditions A3 and A20 (28 November 2013);
- (e) Letter from Sydney Water (Fernando Ortega) to Meriton (Shener Dursun), Lewisham Estate – Proposed Drainage Works (18 December 2013);
- (f) Letter from RailCorp (Kevin Sykes) to Meriton (Shener Dursun), Owners Consent to Lodgement for Early Works within the Light Rail Corridor adjoining 78-90 Canterbury Road, Lewisham (19 December 2013);
- (g) Email from Transport for NSW (Jeremy Kidd) to Meriton (Matthew Lenartz), Plans to Upgrade Hudson Street (Hudson Street Works DA) (13 January 2014);
- (h) Marrickville Council Development Control Plan 2011, Section 2.22 Generic Provisions - Flood Management.
- (i) Lewisham Estate, 78-90 Old Canterbury Road, Lewisham - Flood Management Report (Cardno ITC, May 2011);
- (j) Letter from Meriton (Walter Gordon) to DP&I (Chris Wilson), 78-90 Old Canterbury Road, Lewisham - Section 75W – Amendment to Condition A3 and 20 (MP08-0195, Modification Application (28 October 2103);
- (k) Letter from Meriton (Matthew Lennartz) to DP&I (Chris Wilson), Voluntary Planning Agreement, 70-90 Old Canterbury Road, Lewisham (17 September 2103).

1.3 Concept Approval Conditions

The Planning Assessment Commission (PAC) Determination and Concept Approval (MP08_0195) (March 2012) sets out the terms of approval for the concept plan for the Lewisham Estate. Conditions relevant to this report are reproduced in the sections below.

1.3.1 Schedule 2: Part A - Terms of Approval

Condition A3 Voluntary Planning Agreement

Prior to the submission of any future application under Part 4 of the Act the Proponent shall provide written evidence to the Director-General that it has entered into a Voluntary Planning Agreement with Marrickville Council, in consultation with Transport for NSW, with terms outlined in the EA, PPR and Revised Statement of Commitments including...other parts of the site that will be upgraded, embellished, constructed or dedicated to Council"

1.3.2 Schedule 3: Future Environmental Assessment Requirements

7: Flood Levels

Future Development Applications shall comply with the Cardno Flood Management Report dated 30.11.11 and consider and address any recommendations in any Council adopted Flood Study and relevant state policies at the time of lodgement of the application to demonstrate the finished floor levels of the buildings will be above the probable maximum flood levels for the site and the development will not adversely impact on any surrounding property (including the light rail corridor) by redirection of flood waters or loss of flood storage.

The Cardno Flood Management Report (30 November 2011) and Discussion Paper (14 August 2013) are reviewed in Section 2.3 below.

20: Section 94 Contributions

Future applications shall be required to pay developer contributions towards the provision or improvement of public amenities and services. The amount of the contribution shall be determined by Council in accordance with the requirements of the Contributions Plan current at the time of approval. A VPA with council may offset Section 94 Contributions.

1.4 Marrickville Council DCP

The flood related controls in Marrickville Council's Development Control Plan (DCP) 2011, Section 2.22 Generic Provisions - Flood Management apply to land identified as being flood prone on the DCP flood map. This subject site is not located within the extent of the flood prone land shown on the DCP flood map however the general objectives and controls are applicable to this type of development.

The flood related objectives of the DCP are:

- O1 To maintain the existing flood regime and flow conveyance capacity
- O3 To avoid significant adverse impacts upon flood behaviour

Controls listed in Section 2.22.5 of the DCP include that the applicant must demonstrate:

- C2 i. That the development will not increase the flood hazard risk to other properties and details have been provided of the structural adequacy of the buildings works associated with the development with regard to the effects of possible floodwaters.

2 Stormwater Drainage Investigation

2.1 Meriton

Meriton's Modification Application (dated 28 October 2013) sets out the concept plan modification which includes a proposed 50% offset for the cost of the major drainage works included in the VPA. The basis for the 50% offset is that:

- *The proposed system will improve the existing flood mitigation along Old Canterbury Road from upstream existing properties;*
- *The proposed development only contributes 6% of flows in the 100 year even and 6% of flows in the 20 year event;*
- *In a 20 year event, 90% of flows are generated upstream of the site; and*
- *Accommodates stormwater flow and provides a connection for the southern portion of the McGill Street precinct which currently flows along Hudson Street and discharges in the light Rail Corridor”.*

In its letter to DP&I (dated 15 November 2013), Meriton states that the basis of this offset is that there will be “*substantial upgrades to accommodate upstream flows that are not accommodated by the existing system traversing the development site*”. Meriton states that there are benefits to the broader public including provision of “*adequate drainage and appropriate connections*” which was not previously provided by the existing drainage system. Meriton claims that the proposed drainage system is seen as “*not inconsistent with the provisions of Condition A3 of the Concept Approval which outlines that other parts of the site that will be upgraded, embellished or dedicated to council as items that should be included in the VPA*”.

Meriton states that “*the proposed system requires substantial amplification (and costs) beyond the capacity of the existing system to accommodate flows upstream of the subject site in accordance with council Policy.*”

The “council policy” referred to is assumed to be Marrickville Council's DCP, the requirements of which are outlined in Section 1.4. The email from Council to Meriton (Annexure 1 to Meriton's letter dated 15 November 2013) requests that a flood report be submitted with the future DA that includes the following items:

- assess the change in flood risk to surrounding properties from the proposed drainage works;
- assess the overland flow paths for safety (ie V x D) relationship; and
- tabulated HGL calculation which details the pit loss coefficients used at each pit and the down[stream] tailwater levels used.

The Meriton letter (dated 15 November 2013) claims that “*the upstream flows account for approximately 90% of the stormwater passing through the system in major events. The nexus for this amplification is not created by the proposed development which will only contribute to 6% of flows in major storm events.*”

The drainage scheme proposed in Meriton's letter (dated 15 November 2013) involves the following key elements:

- demolition of the existing covered section of canal;
- construction of a new piped drainage system (2 x 525 mm dia RCP) running under the development site from Brown Street to North-West Street connecting via a junction pit to the existing 900 mm dia pipe draining under the light rail corridor to the Hawthorne Canal;
- construction of a new overland flow channel along the northern side of Hudson Street discharging to the light rail corridor;

- construction of a new piped drainage system (2 x 1,650 mm dia RCP) along the northern side of Hudson Street and North-South Street (2,400 x 900 mm box culvert) connecting via a junction pit to the existing 900 mm dia pipe draining under the light rail corridor to the Hawthorne Canal.

Meriton's proposed system "*realigns the existing stormwater infrastructure through the proposed central open space placing the infrastructure in public land and removing the need for an easement over the development site*".

In order to cost a comparative base case replacement of the existing scheme, without the improvements to the drainage system described above, Meriton has assumed that the existing system traversing the site could be replaced by a 900 mm dia pipe located in Hudson Street and North-South Street, connecting to the existing 900 mm dia pipe draining under the light rail corridor to the Hawthorne Canal. This scheme is shown in Annexure 3 of the Meriton letter.

The existing trunk drainage system in the area of the site consists of a 1,193 x 1,219 mm covered channel and a 900 mm pipe, as shown in Figure 2 (reproduced from Annexure 8 of Meriton's Modification Application).

No hydraulic calculations were provided to support the claim that 'replacement' existing scheme would be equivalent to the actual existing system.

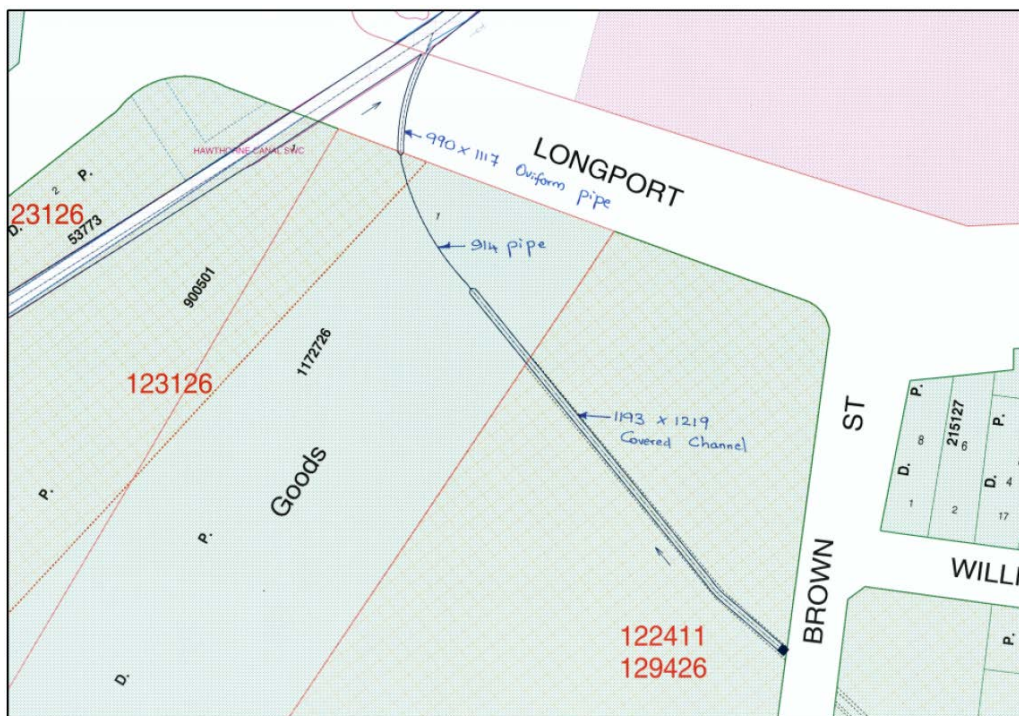


Figure 2: Existing Trunk Drainage System

The cost differential between the proposed scheme and the 'replacement' existing scheme is used as the basis for Meriton's claim of a 50% offset for the stormwater drainage costs.

2.2 Marrickville Council

The letter from Marrickville Council to DP&I dated 28 November 2013 (item (d) in Section 1.2) sets out Council's response to Meriton's request to amend Conditions A3 and A20, relating to the requirements for a voluntary planning agreement, of the Concept Approval (Meriton letter dated 28 October 2013).

Marrickville Council's response in relation to the modification is summarised as follows:

- Condition A20 of the Concept Approval states “A VPA with council may off-set Section 94 Contributions”, indicating there is no requirement for Marrickville Council to include offsets in the concept approval conditions.
- Meriton has failed to “*distinguish between infrastructure and facilities that are the required as a direct consequence of the development and those which are necessary to service the wider community.*” In order to claim benefits to the wider community, Meriton should provide evidence to substantiate and quantify the benefits and to whom these apply. This has not been provided by Meriton.
- Council is unwilling to agree to the modified terms requested by Meriton in their letter dated 15 November 2013 (item (c) in Section 1.2). They will support the “*payment of ordinary contributions pursuant to Council's Section 94 plan and that infrastructure and facilities required as a consequence of the development be separately conditioned without the potential for an off-set.*”

2.3 Flooding and Drainage

The key technical documents in relation to the matters considered in this report are:

- Flood Management Report (Cardno, May 2011);
- Discussion Paper (Cardno, August 2013);
- Annexure 8 of the Modification Application (Cardno, October 2013).

These documents set out the assumptions, parameters and results of hydraulic modelling undertaken by Cardno.

2.3.1 Approach

The approach adopted by Cardno was to utilise the existing TUFLOW hydraulic model of Hawthorne Canal and its tributaries (originally prepared by WMAwater) to establish the benchmark flooding regime and then to modify the model to represent the proposed Lewisham Estate development, run the model and assess the impacts of the planned development on flooding.

The Discussion Paper provides flood modelling results at the following reference points:

- HC1 Hawthorne Canal opposite Hudson Street (west of the site)
- HC2 Hawthorne Canal upstream of Longport Street (west of the site)
- LR1 Lewisham Light Rail Station (light rail corridor west of the site)
- LR2 Light Rail Upstream of Longport Street (light rail corridor west of the site)
- B1 Intersection of Brown and William Street north of the site
- W6 6 William Street (adjoining property north of the site)
- W4 4 William Street (adjoining property north of the site)
- W2 2 William Street (adjoining property north of the site)
- CR Centreline of Old Canterbury Road (upstream to the east of the site)
- H24 South-west corner of 24 Henry Street (adjoining property, upstream to the east of the site).

The locations of these reference points are shown in Figure 3 below, reproduced from the Cardno Discussion Paper.

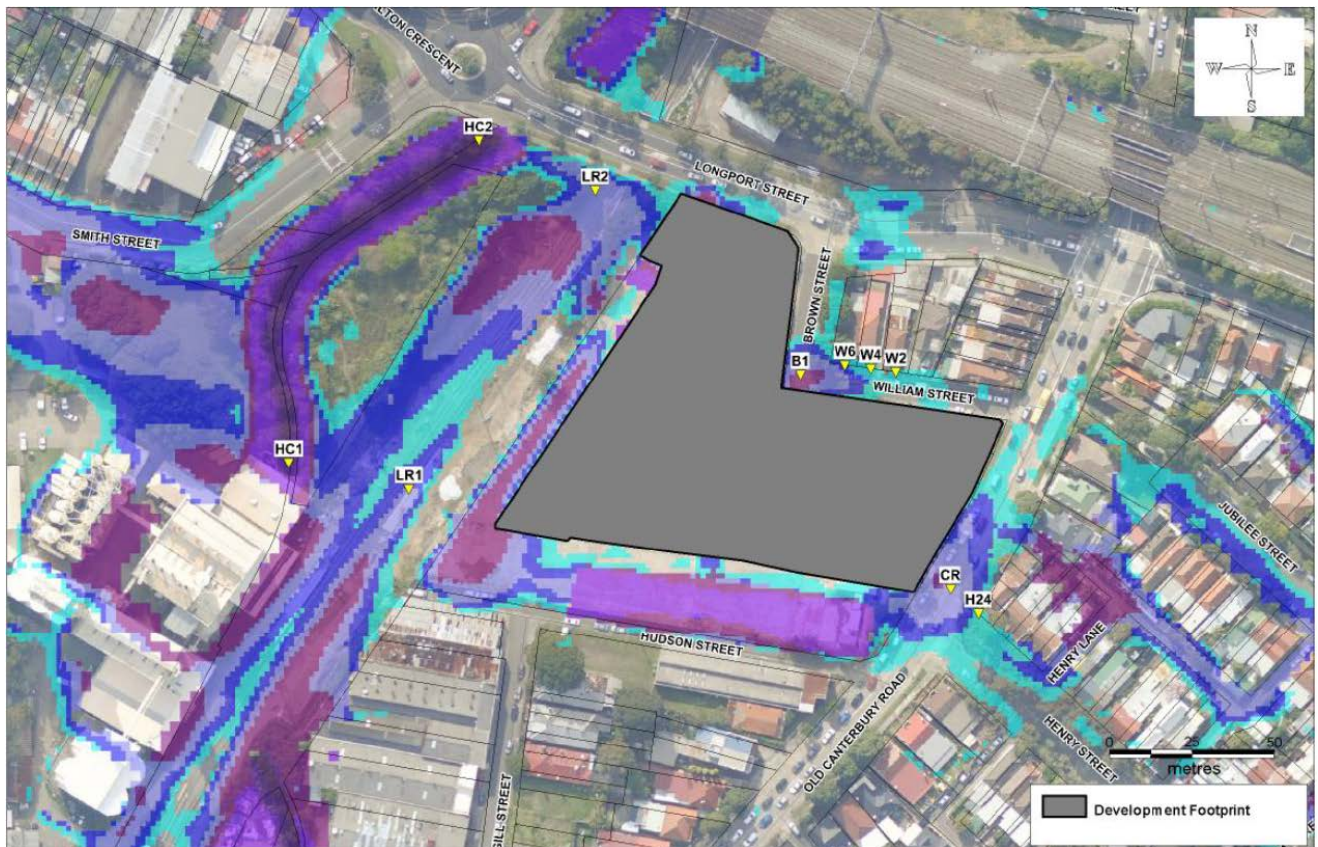


Figure 3: Flood Modelling Reference Points

2.3.2 Existing Conditions

As the site previously had no formal overland flow path Cardno were not able to determine where stormwater would flow and therefore two existing scenarios were modelled:

- unblocked – overland flow occurs through the buildings located on the site between William Street and the Light Rail corridor (as assumed by WMAwater);
- blocked – existing buildings on the site would block any overland flow forcing ponding upstream of the site at the corner of Brown Street and William Street and in Old Canterbury Road.

The differences in the 100 year ARI flood levels due to the blocked scenario compared to the unblocked scenario are shown graphically on Figure 9 of the Discussion Paper (reproduced as Figure 4 below). It can be seen that flood levels upstream of the development site, particularly in William and Brown Streets and near Old Canterbury Road, are increased by the blockage caused by the buildings. The downstream flood levels in the Hawthorne Canal are reduced due to the retention of water in the flood storage area created upstream of the pre-existing buildings on the site.

Evans & Peck has viewed the areal photos of the site available in NearMap and consider that the extent of the buildings would have created a substantial blockage to flood flows across the site. Therefore, Evans & Peck consider that the most representative scenario for ‘existing’ conditions (i.e. conditions prior to the current proposed development) is the blocked scenario. The analysis of the results provided below is based on this scenario.



Figure 4: Flood level differences due to existing blocked conditions compared to unblocked conditions

2.3.3 Developed Conditions

The following developed scenarios are assessed in the Discussion Paper:

- Future – proposed stormwater drainage scheme (Figures 11A and B);
- Scheme A - variation on the 'Future' scheme to reduce flooding on Old Canterbury Road (Figure 17); and
- Scheme B - a second variation on the 'Future' scheme to further reduce flooding on Old Canterbury Road (Figure 22).

The above schemes are shown on SKC22 and SKC23 issue P1 in the Discussion Paper. The quality of the figures is not adequate to identify pipe sizes. It is not stated in the Meriton letter (15 November 2013) which, if any, of the three stormwater drainage schemes analysed in the Discussion Paper is the proposed scheme shown in Annexure 2 (SKC 22 issue P4 and SKC23 issue P5) and costed in Annexure 4. It appears that the Discussion Paper is based on a scheme with one pipe in Hudson Street, whereas the scheme in the Meriton letter (15 November 2013) has two pipes. Therefore the flood level results provided in the Discussion Paper may not be applicable to the proposed scheme documented in the Meriton letter (15 November 2013).

2.3.4 Results

The following tables show the 5, 20 and 100 year ARI flood level results from the Cardno Discussion Paper. The colour coding provided in the Discussion Paper has been adjusted to reflect the changes in flood level with reference to the existing blocked scenario (instead of the ranges of existing conditions provided in the Discussion Paper).

Table 1: Flood Level Results (m AHD) - 5 Year ARI

Conditions	HC1	HC2	LR1	LR2	B1	W6	W4	W2	CR	H24
Flood Levels										
Existing (blocked)	6.79	6.27	10.45	9.61	10.87	12.95	12.51	13.17	12.24	12.46
Existing (unblocked)	6.80	6.28	10.46	9.63	10.86	12.95	12.51	13.17	12.24	12.46
Future	6.82	6.31	10.41	9.68	11.26	13.06	12.51	13.17	12.62	12.63
Scheme A	6.83	6.32	10.41	9.72	11.20	13.03	12.51	13.17	12.44	12.50
Scheme B	6.81	6.29	10.40	9.65	11.20	13.03	12.51	13.17	12.36	12.47
Difference compared to existing (blocked) conditions (mm)										
Future	30	40	-40	70	390	110	0	0	380	170
Scheme A	40	50	-40	110	330	80	0	0	200	40
Scheme B	20	20	-50	40	330	80	0	0	120	10


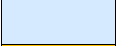




Table 2: Flood Level Results (m AHD) - 20 Year ARI

Conditions	HC1	HC2	LR1	LR2	B1	W6	W4	W2	CR	H24
Flood Levels										
Existing (blocked)	7.30	6.86	10.59	9.68	11.46	13.17	12.55	13.17	12.32	12.48
Existing (unblocked)	7.47	7.16	10.60	9.76	10.91	12.95	12.51	13.17	12.31	12.48
Future	7.49	7.18	10.60	9.80	11.49	13.19	12.56	13.17	12.73	12.73
Scheme A	7.49	7.18	10.60	9.80	11.28	13.07	12.52	13.17	12.61	12.61
Scheme B	7.46	7.14	10.59	9.76	11.24	13.04	12.51	13.17	12.45	12.50
Difference compared to existing (blocked) conditions (mm)										
Future	190	320	10	120	30	20	10	0	410	250
Scheme A	190	320	10	120	-180	-100	-30	0	290	130
Scheme B	160	280	0	80	-220	-130	-40	0	130	20

Table 3: Flood Level Results (m AHD) - 100 Year ARI

Conditions	HC1	HC2	LR1	LR2	B1	W6	W4	W2	CR	H24
Flood Levels										
Existing (blocked)	8.53	8.29	10.68	9.75	12.03	13.53	12.95	13.41	12.39	12.50
Existing (unblocked)	8.60	8.37	10.68	9.87	11.12	13.00	12.51	13.17	12.37	12.50
Future	8.63	8.40	10.68	9.91	11.62	13.28	12.64	13.18	12.81	12.81
Scheme A	8.63	8.41	10.67	9.91	11.46	13.17	12.55	13.17	12.73	12.73
Scheme B	8.62	8.40	10.67	9.89	11.38	13.13	12.53	13.17	12.53	12.56
Difference compared to existing (blocked) (mm)										
	100	110	0	160	-410	-250	-310	-230	420	310
	100	120	-10	160	-570	-360	-400	-240	340	230
	90	110	-10	140	-650	-400	-420	-240	140	60

Legend:

	Lower than range of existing conditions flood levels
	Within range of existing conditions flood levels
	10 – 50 mm higher than existing conditions flood levels
	60 – 100 mm higher than existing conditions flood levels
	100 – 150 mm higher than existing conditions flood levels
	Greater than 150 mm higher than existing conditions flood levels

The results show that with the implementation of the drainage schemes proposed in the Discussion Paper:

- Hawthorne Canal (HC1 and HC2): flood levels would be increased in the 5, 20 and 100 year ARI flood events (with significant increase in the 20 year ARI event);
- Light Rail (LR1): would be subject to either a reduction or negligible impact on flood levels in the 5, 20 and 100 year ARI flood events;
- Light Rail (LR2): flood levels would be increased in the 5, 20 and 100 year ARI flood events (with significant increase in the 100 year ARI event);
- Brown Street (B1): flood levels would be increased significantly in the 5 year ARI, but either decrease or show negligible impact in the 20 and 100 year ARI events;
- William Street (W2, W4 & W6): flood levels would be reduced or be subject to negligible impact in the 5, 20 and 100 year ARI events, with the exception of the 5 year ARI event at W6, where flood levels would be increased by up to 110 mm;
- Old Canterbury Road and 24 Henry Street (CR & H24): would be subject to significant increases in flood levels in the 5, 20 and 100 year ARI flood events

The results indicate that in some areas, for example William Street, Brown Street and the southern portion of the Light Rail, there would be demonstrable benefits to the community in terms of reduced flood levels in the larger flood events (20 and 100 year ARI).

At locations HC1 and HC2 at the Hawthorne Canal, the northern section of the Light Rail (LR2), Old Canterbury Road (CR) and Henry Street (H24), flood levels would increase as a result of the schemes assessed by Cardno in the Discussion Paper.

As noted in Section 2.3.3 above, the schemes assessed by Cardno in the Discussion Paper involve a single pipe running along the northern side of Hudson Street (size not visible on Figures 11A and 11B in the Discussion Paper) whereas the proposed scheme documented and costed in Meriton's letter (15 November 2013) includes twin 1,650 mm dia pipes. No hydraulic analysis has been presented to demonstrate the effect of these pipes on flood levels in Old Canterbury Road and Henry Street. It is possible that this scheme **might** alleviate the increase in flooding at reference points CR and H24 identified in Tables 1 – 3 above, however this cannot be confirmed based on the information provided by Meriton.

2.3.5 Flood Hazard

The Discussion Paper does not provide any assessment on changes in flood hazard (V x D) for the overland flow paths, as requested by Council. Due to the increase in flood levels at Old Canterbury Road and Henry Street, it can be assumed that flood hazard would increase in these locations, however this has not been quantified. Conversely, with the reduction in flood levels at William Street and Brown Street, flood hazard would be expected to decrease in these locations.

3 Conclusion

Meriton claim that *“the upstream flows account for approximately 90% of the stormwater passing through the system in major events. The nexus for this amplification is not created by the proposed development which will only contribute to 6% of flows in major storm events.”*

Evans & Peck consider that the origin of the floodwater draining towards the site is not a relevant argument. The location of the site and the surrounding topography dictates that stormwater runoff drains towards the site. If Meriton wishes to develop the site and provide appropriate amenity within the site, it needs to provide cross drainage, preferably by a combination of piped drainage for minor flows (say 5 – 20 year ARI) and overland flow paths for major flows and provide a factor of safety for any future climate change effects.

Meriton claims that under existing conditions the covered Sydney Water channel makes no allowance for a formalised overland flow path for flows which exceed the capacity of the conduit. The proposed development seeks to provide a formalised overland flowpath to convey the 100 year ARI flows from the localised catchment east of Old Canterbury Road to the Light Rail corridor and Hawthorne Canal. Meriton claims that the formalisation of this overland flow path is a public benefit and should therefore be partially funded by Council. Meriton states that *“the proposed system requires substantial amplification (and costs) beyond the capacity of the existing system to accommodate flows upstream of the subject site in accordance with council Policy.”*

Meriton states that there will be *“substantial upgrades to accommodate upstream flows that are not accommodated by the existing system traversing the development site”*. Meriton states that there are benefits to the broader public including provision of *“adequate drainage and appropriate connections” which was not previously provided by the existing drainage system*.

Evans & Peck consider that it not fully possible to assess this claim as it appears that the scheme documented in Meriton’s letter (dated 15 November 2013) is different from the schemes assessed in the Cardno Discussion Paper (August 2013).

In addition, Meriton has not demonstrated that the ‘replacement’ existing scheme used as the base case for the cost assessment is an adequate representation of the actual existing system. No hydraulic calculations have been provided to demonstrate that the ‘replacement’ scheme would have a similar capacity to the existing drainage system.

Notwithstanding, replacement of the existing system with a 900 mm piped system around the southern and western boundaries of the site (as shown in Annexure 3 of Meriton letter dated 15 November 2013) would still lead to a situation in which significant overland flows would need to be conveyed from Old Canterbury Road to the Light Rail corridor near Longport Street. The flood analysis by Cardno indicates that the natural overland flow route would be in a north-westerly direction across the proposed development site. Any redirection of the overland flow around the site is only necessary to meet the needs of the proposed development and has no intrinsic public benefit. The requirement for diversion of flows around the southern side of the site arises from the layout of the proposed development and all costs for the drainage scheme (with the exception of the pipe system in the north of the site as discussed below) should be attributed to Meriton.

Evans & Peck consider that there is some (limited) merit to Meriton’s claim as it relates to reduction of flood levels in the vicinity of William Street and Brown Street. In this area it appears that the proposed scheme is that same as that assessed in the Cardno Discussion Paper and therefore the modelling results are likely to be the same. The results of the flood modelling provided in the Cardno Discussion Paper indicate that in William Street and Brown Street there are demonstrable benefits to the community in terms of reduced flood levels in the larger flood events (20 and 100 year ARI).

Any cost sharing arrangement related to reduction of flooding in William Street should take account of the fact that, in order to develop the site in the proposed manner and provide appropriate flood immunity within the site, Meriton would need to provide cross drainage. The cost sharing

arrangement should reflect the incremental cost of installing a larger drainage system than would be required to maintain existing conditions outside the site. This could be expected to be the incremental cost resulting from a larger size of pipe, but not the construction of the trench or the pipe laying which would be necessary to serve the purposes of the development. Based on the rates provided in Annexure 4 of Meriton's letter (15 November 2013), the difference in rate between the construction of a single 525 mm dia pipe and twin 525 mm dia pipes is \$800/m (including excavation, bedding, shoring etc). Over the 50 m length of pipeline required between Brown Street and North-South Street, this would amount to \$40,000.

In summary:

- The fact that the proposed development will only contribute to 6% of flows in major storm events is not a relevant argument.
- The requirement for amplification of the existing system to accommodate flows upstream of the site arises from Meriton's desire to develop the site and therefore the cost to upgrade the system should be generally borne by Meriton.
- Meriton has not demonstrated that the 'replacement' existing scheme used as the base case for the cost assessment is an adequate representation of the actual existing system. No hydraulic calculations have been provided to demonstrate that the 'replacement' existing scheme would have a similar capacity to the actual existing drainage system.
- Were it not for the nature of the proposed development, overland flow would continue to drain in a north-westerly direction across the site even if a 'replacement' pipe system was installed. The purpose of the diversion of overland flow around the site is to allow the proposed development to occur without the encumbrance of an overland flow path through the site.
- The scheme proposed in Meriton's letter (dated 15 November 2013) does not appear to have been assessed in the Cardno Discussion Paper (August 2013) and therefore it is not possible to identify future flood levels and behaviour as a result of the development with certainty.
- The results of the flood modelling provided in the Cardno Discussion Paper indicate that in William Street and Brown Street there are demonstrable benefits to the community in terms of reduced flood levels in larger flood events. Evans & Peck consider that a portion of the cost of the construction of this section of the drainage system should be borne by Council (estimated to be in the order of \$40,000).
- With the exception of flood levels at William Street and Brown Street, Meriton has not demonstrated the public benefit of the proposed stormwater drainage scheme for the Lewisham Estate in Lewisham.

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