
BACKGROUND PAPER FOR COUNCILLORS

NORMAN GRIFFITHS OVAL SYNTHETIC SURFACE

Friends of NORMAN Griffiths - 1 January 2021



TABLE OF CONTENTS

1. INTRODUCTION AND SUMMARY

Contents

Summary Of Environmental Issues

Summary of Governance Issues

Further Assistance

2. LEGAL FRAMEWORK AND LIABILITY

What are Council's environmental obligations?

What is a Review of Environmental factors (REF)?

Are there legal liabilities if we breach our environmental obligations?

3. ENVIRONMENTAL ISSUES

1. Failure To Apply the Precautionary Principle

2. Impact Of Ongoing Maintenance of Synthetic Turf

3. Impact on the Fire Risk to the STIF

4. Impact on Flood Risk

5. Impact on Listed Threatened Species and Ecological Communities

6. Impact Arising from Migration of Infill or Plastics

7. Conclusions From Deficiencies Discussed

4. GOVERNANCE ISSUES

A. National Parks and Wildlife Service Involvement

B. Third Party Grants to Offset Higher Cost of Synthetic Surface

C. No tender

D. Circumvention of KMC's procedures for assessment of environmental impacts

E. Integrity of Draft REF Report and Process

F. Misrepresentations to Councillors about the environmental review process

G. Community Consultation and Transparency

H. Serious Analysis of Alternatives to Synthetic Turf

I. The Stokes Report

5. ACTIONS COUNCILLORS COULD CONSIDER

I. Responsibility

II. Community Consultation

III. Advice to Councillors

IV. National Parks and Wildlife Service (NPWS)

V. Further Environmental Investigations Required

VI. New REF

VII. Delay Until Alternatives Properly Analysed

1. INTRODUCTION AND SUMMARY

This document provides background information for Councillors of Ku-ring-Gai Council (KMC) about a proposal to construct a synthetic sportsfield and associated stormwater mitigation at Norman Griffiths Oval in West Pymble (“the Proposal”).

Contents

You should be concerned about the Proposal because:

- A. Of serious deficiencies in assessing its **environmental impact**. This is discussed in Section 3.
- B. Even if you are not concerned about the environmental impact, the process by which the Proposal has been progressed raises fundamental **governance issues** which you should not ignore. This is discussed in Section 4 below.
- C. Even if you are untroubled by the environmental and governance issues, you should be concerned about your personal **legal liability**. You as a Councillor may face serious personal legal liabilities, and KMC may breach the law. These legal risks are discussed in Section 2.

Section 5 below suggests the actions you should consider.

Summary Of Environmental Issues

The environmental assessment of the Proposal is set out in the Draft REF (**Attachment 1**). Even a cursory glance at this superficial 25-page document shows it falls well below the standard for an REF accepted by Councils in the past (including KMC). Councillors who are in any doubt about this should compare the Draft REF in Attachment 1 with the equivalent REF for a synthetic surface for the Bob Campbell Oval (**Attachment 2**, 120 pages excluding appendices) and Gardiner Park (**Attachment 3**, 100 pages excluding appendices). [Section 4.E]

In relation to the critical environmental issue of the impact of the Proposal on the endangered ecological community known as the Sydney Turpentine Ironbark Forest (STIF), there has been a complete absence of investigation. KMC have informed us there do not exist “any documents created by KMC or its employees or consultants considering or relating to the impact of the Proposal on the Sydney Turpentine-Ironbark Forest in Bicentennial Park”. For other synthetic ovals where there was a *lesser* threat to endangered species, Councillors should examine the documents which show the level of investigation appropriate - Bob Campbell Oval (**Attachment 4**, 46 pages) or reports previously commissioned by KMC for far less complex proposals - for example, the Biodiversity Assessment for North Turramurra Recreation Area, Stages 4 & 5 (**Attachment 5**, 193 pages) or even the report by Hayes on the impact on the STIF of a much more benign development of the Aquatic Centre in Bicentennial Park adjacent to the Norman Griffiths Oval (**Attachment 6**, 46 pages). There are risks of harm to several other threatened species apart from the STIF (Black-hooded Sun Orchid, the Powerful Owl, microbats).[Section 3.5]

KMC Staff spent two years attempting to mitigate the flood risk of the proposal and advised Council not to proceed - “due to the site complexities it was determined that the project was simply not viable. Major site constraints such as the oval being a flood detention basin, limiting size or space to achieve flood immunity whilst maintaining a full-size field, environmental factors and visual connectivity with

the surrounding Bicentennial Park implicated prohibitive costs to achieve the conversion". The Director of Strategy and Environment, Mr Watson, said a synthetic sportsground was "fundamentally incompatible" with the site. The Councillor who headed the Flood Management Committee, Mr Clarke, said "Norman Griffith is impossible to flood risk".

Yet within months of that conclusion, Council resolved to proceed. There is no document in existence (and none has ever been put before Council) explaining why something which *was* "not viable" (including because of "environmental factors"), was "fundamentally inconsistent" with the site, and which was "impossible to flood risk" could *now* proceed. This fundamental environmental risk has simply been dismissed and disregarded in the REF.

One of the most important environment risks is the risk a flood would wash the entire synthetic surface and perhaps in excess of 100 tons of granulated cork infill downstream into the STIF and the Lane Cove National Park. KMC position is that a 2% AEP flood risk (1 in 50 years) would cause it to abandon the Proposal and would be likely to "significantly affect the environment", but a 1% AEP risk (1 in 100 years) is acceptable and is not "likely to significantly affect the environment". This is arbitrary and untenable and, we believe, unlawful. KMC is simply unable, with the extraordinarily high level of confidence required, to distinguish between a design plan which had a 1% AEP and that having only a 2% AEP. These conclusions are based on historical rainfall data ending in 1987 (34 years old). Given the assessments being made relate to flood likelihoods over a 50- or 100-year period in the future, the process of climate change makes the predictability and variability of infrequent extreme weather events highly problematic. Even more revealingly, no qualified expert has provided such an opinion, and the two experts KMC has retained have not done so (Jacobs and BMT). Councillors should understand that these risks are cumulative - a 1% per annum risk is a 10% risk over the life of the synthetic surface, or given the life of the retaining tanks is indefinite, then a 1% annual risk of flooding, over time is a certainty that there will ultimately be a "significant impact" on STIF which by definition faces "an extremely high risk of extinction in the wild in the immediate future". [Section 3.4]

Other issues which have not been fully assessed are the migration of the cork infill from the synthetic field into the surrounding environment and waterways as a result of use, wind and rain [Section 3.6]; the increase in bushfire risk from the synthetic oval [Section 3.3]; and the leeching into surrounding waterways of chemicals, algicides and herbicides used to maintain the synthetic turf [Section 3.2].

Another way of objectively showing the Draft REF is inadequate is to note that the environmental factors which the National Parks and Wildlife Service, when consulted by KMC, said should be considered in assessing the Proposal have not been considered in the REF.

Summary of Governance Issues

The progress of the Proposal raises the following governance issues:

- ❖ **Loss of Promised Funding To Defray Extraordinary Cost** - Council approved the Proposal after being assured its extraordinary cost (more than \$3m) would be offset by almost \$1 million in third-party grants. There is reason to believe that the amount of those grants has fallen by \$0.7m, and Council has never been clearly and explicitly informed of this. If this information has been concealed from them it may, and could still, cause Council to abandon the Proposal. [Section 4.B]
- ❖ **Establish Procedures Ignored** - Procedures and processes established by KMC for the assessment of the environmental impact of a proposal (and which had been completed for other synthetic ovals by KMC) were not completed (called a "Potential Impact Assessment" or PIA). This may be

because Council admits an earlier “PIA Process” for a proposal at Norman Griffiths Oval was “abandoned..due to environmental and aesthetic impacts”. [Section 4.D]

- ❖ **“Corrupted” Process for Obtaining REF** - The processes involved in obtaining the draft REF raise serious governance issues. The firm selected to undertake the REF was unqualified and did not have the required ecological expertise. That firm has a disqualifying conflict of interest and is now retained not by KMC directly, but is paid and is answerable to the contractor, who has an obvious financial interest in the Proposal proceeding without delay regardless of its environmental harms. The fee paid for the Draft REF would not have allowed a proper analysis of the Proposal - it funded only 10-18 hours of work. The Draft REF was based on favourable assumptions (not incorporated in the specifications for the design of the oval). The firm provided KMC with an opinion in writing before being given the information necessary to conduct an analysis to support that opinion. The Draft REF is a “cut and paste” of a previous REF for a “splash park” developed by the Canterbury Bankstown Council and contains critical passages which do not analyse Norman Griffiths Oval, but features of this “splash park”. Though the Draft REF remains to be finalised, there is no suggestion that substantial further work will be done. [Section 4.E]
- ❖ **Council Misled** - Councillors have been misled in documents provided for their meetings about the progress of the environmental assessment of the Proposal. [Section 4.F]
- ❖ **No Community Consultation** - The planned and agreed 4–6-week period for community consultation after the finalisation of designs appears to have been abandoned without explanation. [Section 4.G]
- ❖ **No Alternatives Considered** - The Draft REF shows there has been no analysis or consideration of the lower cost alternative of replacement with natural turf which takes into account new best practices which dramatically improve performance. [Section 4.H]
- ❖ **No Competitive Tender** - After the scope of the Proposal was revised, staff recommended the Proposal be advanced without inviting fresh tenders “due to the current deadlines for the grant funding”. Thus ultimately there was no competitive tender even though the justification for avoiding it (that grant funding would be lost) has proved to be illusory. The cost of the project has blow out \$409,000 since the tender process was abandoned. [Section 4.C]
- ❖ **Council’s Resolution Ignored** - Council’s resolution approving the Proposal directed that the National Parks and Wildlife Service (NPWS) should be “consulted throughout the development of the project” as a guarantee the environmental risks would be properly evaluated and mitigated. This has not occurred. Further, the environmental considerations which the NPWS advised should be considered have not been considered in the Draft REF [Section 4.A]

Summary of Actions Councillors Should Consider

Section 5 is the most important in this document. It is short and is not summarised further here. It is not too late to take these actions simply because KMC has entered into a contract, and indeed that contract does not affect Councillors legal obligations. [Section 2]

Further Assistance

If any Councillors want more detailed information on any issues, or any supporting documentation relating to them, or verification of any assertion we have made, we are happy to provide it. Please initially contact Dale Crosby on email dalecrosby99@gmail.com or mobile 0421 627 669.

2. LEGAL FRAMEWORK AND LIABILITY

What are Council's environmental obligations?

There are two types of environmental obligations which the Proposal must satisfy.

Firstly there are obligations under the NSW Environmental Planning and Assessment Act, 1979 (EPA). That Act requires that:

- ❖ Council “*examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of*” the Proposal (Section 5.5(1)). Courts have said this is the most fundamental and “pivotal” obligation in all of environmental law. The word “likely” here means only “a real chance or possibility” and does not have to be “more probable than not”.¹
- ❖ Council obtain an “environmental impact statement” if the Proposal “*is likely to significantly affect the environment*”. The word “significantly” means “important” or “more than ordinary”² or a “'important', 'notable' or 'weighty' or 'more than ordinary' ” effect on the environment.³

Secondly, there are obligations under Commonwealth and State legislation to protect “biodiversity” (threatened species (animals) and endangered ecological communities (plants)). This legislation is the Commonwealth Environmental Protection and Biodiversity Conservation Act, 1999 (EPBC) and the NSW Biodiversity Conservation Act, 2016 (BCA).

Under the EPBC, Council must refer the Proposal to the Commonwealth Minister for the Environment if it “*has, will or is likely to have*” a “significant impact” on an “critically endangered ecological community”⁴ or, under the BCA, if the Proposal “is likely to have an adverse effect on the extent of the ecological community” or “is likely to substantially or adversely modify the composition of the ecological community” such that “its local occurrence is likely to be placed at risk of extinction”.⁵ Guidelines say a “significant impact” is “an impact which is important, notable or of consequence” and to be “likely” is it not necessary for it to be probable but to be “a real and not remote chance or possibility”.⁶

What is a Review of Environmental factors (REF)?

A Review of Environmental Factors (REF) is a document which is prepared to ensure that there has been a complete and accurate assessment of the environmental impacts of a Proposal. It is then used to allow Council to comply with its legal obligations set out above, and also prove that those obligations have been complied with.

There are some laws and guidelines which govern how the REF is prepared including:

- Clause 228 of the Environmental Planning and Assessment Regulations;

¹ Jarasius v Forestry Commission of NSW (1988) 71 LGRA 79 at 94; Drummoyne Municipal Council v Roads and Traffic Authority of NSW at 163; Bailey v Forestry Commission of NSW (1989) 67 LGRA 200 at 211

² Jarasius v Forestry Commission of NSW at 93-4

³ Bailey v Forestry Commission of NSW at 211

⁴ EPBC Act, 1999, s18(5)

⁵ BCA, s7.2(1)(a), s7.3(1)(b)

⁶ *Matters of National Environmental Significance, Significant impact guidelines 1.1*

(https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf)

- Commonwealth guidelines issued under the EPBC entitled *Matters of National Economic Significance, Significant Impact Guidelines 1.1*

Are there legal liabilities if we breach our environmental obligations?

It is a breach of the law not to comply with the environmental obligations set out above, and there are civil penalties, and in many cases ordinary citizens can go to Court to complain of breaches and seek remedies.

In the case of the Commonwealth biodiversity law (EPBC) we believe Councillors could face **personal civil penalties of up to \$1.1m and criminal penalties of up to 7 years** if the Proposal “results or will result” in, or “is likely to have”, a significant impact on the Sydney Turpentine Ironbark Forest (STIF).⁷ This would appear to mean that if at any time in the future it transpires that the Proposal “results” in significant damage to the STIF, Councillors may then be personally liable even if they did not intend harm (if they were reckless as to whether the contravention occurred and failed to take reasonable steps to prevent it when they were in a position of influence).

Isn't it legally too late to re-open these issues? Hasn't KMC signed a contract?

If KMC has already signed a design and construct contract, isn't it too late to consider these issues? Will we expose the Council to being sued by the contractor? The answer is almost certainly NO.

Firstly, these duties are statutory duties. KMC cannot be relieved of them by signing a contract.

Secondly, the Courts have ruled these duties do not cease once you have approved an activity, or even begun construction. The duty to “fully consider environmental factors” continues until the activity is completed, that is until 2023 on the present timetable. So for example, the Courts have said of duty in Section 5.5(1):

*“There is no reason to restrict the duty....to any time frame in relation to an activity...A matter affecting or likely to affect the environment that first came to the attention of a determining authority after it had commenced to carry out the activity could not be ignored on that account....The reach of [the duty] extended beyond the time that work on the activity commenced to the time during which it was being carried out”.*⁸

Thirdly, while we have not seen the contract KMC has signed, it is a practical certainty that that contract is conditional on KMC approving a final design and approving a final REF and being satisfied that the Proposal meets its environmental obligations. We would therefore expect KMC to have freedom to terminate the Proposal if it does so because of environmental concerns.

Fourthly, even if the contract does not permit KMC to withdraw, such a contract would be arguably unlawful if it obliged KMC to breach its statutory duties. Those parts of the contract may be void or voidable.

⁷ Section 18A, and Part 17, of EPBC

⁸ Transport Action Group Against Motorways Inc v RTA [1999] NSWCA 196 at Para 70, 157

3. ENVIRONMENTAL ISSUES

On 15 June and 21 September 2021 KMC resolved to enter into a contract to design and construct the Proposal. On both occasions, KMC were informed that “*An initial Review of Environmental Factors has been undertaken for this project and this will be revised once the design is complete*”. KMC have provided us with a draft Review of Environmental Factors (dated April 2021 authored by Willow Tree Planning) (the Draft REF) which they say was the document referred to.⁹ It is **Attachment 1**.

This section sets out the deficiencies in that Draft REF. Those deficiencies are so serious they will result in breaches of KMC's legal obligations under Part 5 of the EPA, the EPBC and the BCA. We believe those breaches may give rise to liabilities for Councillors, staff of KMC and Council itself.

1. Failure To Apply the Precautionary Principle

The draft REF fails to apply the precautionary principle where required by law.

In relation to any listed ecological community, a principle which is part of environmental law, called “the Precautionary Principle”, requires that if there are threats of serious or irreversible environmental damage then lack of full scientific certainty is not a reason to ignore a potential environmental impact and “decision makers should be cautious”¹⁰. The precautionary principle “effectively reverses the normal burden of proof from an objector to the proponent of an activity [KMC]”.¹¹

The Precautionary Principle must be applied in any REF and is described in the applicable Commonwealth Guidelines under the *Environmental Protection and Biodiversity Conservation Act, 1999*¹² as follows:

If there is scientific uncertainty about the impacts of your action and potential impacts are serious or irreversible, the precautionary principle is applicable. Accordingly, a lack of scientific certainty about the potential impacts of an action will not itself justify a decision that the action is not likely to have a significant impact on the environment...

..you should not conclude that a significant impact is not likely to occur because of management or mitigation measures unless the effectiveness of those measures is well-established (for example through demonstrated application, studies or surveys) and there is a high degree of certainty about the avoidance of impacts or the extent to which impacts will be reduced.

An action is likely to have a significant impact on a critically endangered or endangered ecological community if there is a real chance or possibility that it will: reduce the extent of an ecological community...adversely affect habitat critical to the survival of an ecological community...modify or destroy abiotic (non-living) factors (such as water, nutrients, or soil) necessary for an ecological community's survival, including reduction of groundwater levels, or substantial alteration of surface water drainage patterns...cause a substantial reduction in the quality or integrity of an occurrence of an ecological community, including, but not limited to...causing regular mobilisation of fertilisers, herbicides or other chemicals or pollutants into the ecological community which kill or inhibit the growth of species in the ecological community...

⁹ GIPA03021 Application, and email and other correspondence in relation thereto

¹⁰ *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270 at 282-3

¹¹ G. Bates *Environmental Law In Australia*, 8th Edition, Para [7.55]; see *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10. Square brackets added.

¹² *Matters of National Environmental Significance, Significant impact guidelines 1.1*

(https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/neg-guidelines_1.pdf)

2. Impact Of Ongoing Maintenance of Synthetic Turf

What is our Concern?

The cork synthetic surface specified for the Proposal requires regular maintenance which uses chemicals, algacides or herbicides. These are likely to leach into waterways and also affect surrounding fauna and flora.

The physical setting of the Proposal makes this an acute concern. Norman Griffiths Oval is at the head of Quarry Creek which flows through Biccenennial Park, into Lane Cove National Park and thence into the Lane Cove River.¹³



Caption

KMC Environmental Assessments

KMC has not examined that concern because it wrongly believed no maintenance which would give rise to such run-off was required.

For example, KMC asserted “the main ecological benefits of synthetic turf” included the elimination

¹³ See Page 4 of BTM *Norman Griffiths Oval – Flood Risk Investigation*, June 2020

of “toxic fertilisers and chemicals”¹⁴ and “summarised” the advice on maintenance of synthetic fields of the WA Department of Sport and Recreation as:

“Synthetic sports fields require maintenance at two levels. On a day-to-day basis they require sweeping and replenishing the infill. On a periodic basis high use areas may require replacement”¹⁵

In fact, the document referred to contradicts that claim observing maintenance practices recommended include periodic treatment for moss and algae by application of “moss-killer and/or algaecide” and weeds with “domestic weed killer”¹⁶

The KMC Director of Strategy and Environment, Mr Watson, told the KMC:

Councillor Ngai: “...if ..we had cork and cork is basically made out of tree bark wouldn't we eventually have all sorts of weeds and other things growing and wouldn't we need to spray some sort of pesticides..?”

Mr Watson: “..that's not my understanding of the way cork surfaces work. I imagine they have a similar maintenance type regime as the rubber so they get raked or swept every month or so....I don't understand that we spray anything on synthetic fields...we don't spray anything on them..they stay largely as they are”

....

Councillor Smith: “..Director Watson also referred to there being no sprays or anything required on a synthetic oval. My understanding is there is certain types of grasses that do need to be sprayed and it does need to be treated as it ages, is what my understanding is....I am happy for Watson to answer that”

Mr Watson: “..I have made my statements, made on the best knowledge I have and I am not going to confirm or deny or argue with Councillor Smith about something I don't purport to know about..”¹⁷

Draft REF

The Draft REF does not examine this possible impact.

Ryde Council has installed cork infill at a synthetic oval at ELS Hall Park. Our conversations with those involved in maintaining that surface raise real concerns about the impact and volume of the chemicals used.

3. Impact on the Fire Risk to the STIF

What is our Concern?

The Sydney Turpentine Ironbark Forest (STIF) is listed as a “critically endangered” ecological community under the EPBC and BCA.¹⁸ That means it is “facing an extremely high risk of extinction in the wild in the immediate future”.¹⁹

The NSW Rural Fire Service classifies Bicentennial Park as bushfire prone, and every few years there are major bushfires in the surrounding area with consequent danger to the STIF arising from floating

¹⁴ KMC Agenda 19/11/19, page 527 (first dot point), 528 (point (4))

¹⁵ KMC Agenda 19/11/19, page 528

¹⁶ <https://www.dlgsc.wa.gov.au/department/publications/publication/natural-grass-vs-synthetic-turf-study-report>

¹⁷ KMC Meeting 19/11/19 at 59 minutes and 1 hour and 20 minutes

¹⁸ <http://www.environment.gov.au/cgi-bin/sprat/public/publicshowcommunity.pl?id=38https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Scientific-Committee/Determinations/2019/sydney-turpentine-ironbark-forest-final-determination-CEEC.pdf?la=en&hash=25B534BBC97EB38056E2CE5FB7385F842A48A0EF>

¹⁹ EPBC Act, s182(1)

embers on high-temperature days.

The Proposal materially increases the fire risk to the STIF.

Firstly, it removes the natural turf area of the Norman Griffiths Oval which serves as the major “asset protection zone” for the STIF.

Secondly, it replaces it with a surface whose flammability and radiant-heat characteristics pose a new and serious bushfire risk to the STIF. Synthetic surfaces are “heat sinks” - studies have found synthetic surface temperatures up to three times greater than natural turf, reaching almost 93 degrees C in some conditions. The synthetic surface therefore compounds the bushfire risk to the STIF, as bushfires (and the threat of embers) usually occur on days when extreme high temperatures are experienced which are the conditions in which the synthetic surface will reach maximum temperatures. Further, the components of synthetic surfaces include polyethylene and polypropylene and nylon group polymers and solvents and adhesives, and when exposed to an ignition source these may be prone to melting and ignition. Studies show synthetic surfaces have melting and ignition points well below the temperatures of glowing embers blown in front of an advancing bushfire (and are even more likely to ignite if exposed to radiant heat from a fire front or flame contact).²⁰ In other words, the synthetic surface may ignite when embers land on it, providing fuel for an intense chemically-driven fire directly adjacent to the STIF.

As an increase in the bushfire risk would pose a direct and immediate existential threat to the STIF, the precautionary principle is unquestionably legally applicable

Clause 228 of the EPA regulations requires the draft REF to examine this concern.²¹

Draft REF

The draft REF entirely fails to address this concern of the bushfire risk to the STIF.²² (The discussion in the draft REF focuses entirely on bushfire hazard to an “adjoining heritage item” which does not exist).

4. Impact on Flood Risk

What is our Concern?

The Proposal poses an unacceptable flood risk which would cause serious damage to the environment.

KMC Environmental Assessments

After two years investigation of possible works to mitigate the flood risk (including a large below ground detention tank on which the Proposal is based), KMC staff advised Council not to proceed - “due to the site complexities it was determined that the project was simply not viable. Major site constraints such as the oval being a flood detention basin, limiting size or space to achieve flood immunity whilst maintaining a full-size field, environmental factors and visual connectivity with the

²⁰ GHD *Living Turf Fire Benefits Study – Literature Review*, April 2020, especially Section 3.3-3.6

²¹ See for example, “(c) any environmental impact on the ecosystems of the locality...(g) any endangering of any species of animal, plant or other form of life, whether living on land, in water or in the air, (h) any long-term effects on the environment...(j) any risk to the safety of the environment”

²² Page 13 of Draft REF

surrounding Bicentennial Park implicated prohibitive costs to achieve the conversion”.²³ The Director of Strategy and Environment, Mr Watson, said a synthetic sportsground was “fundamentally incompatible” with the site²⁴. The Councillor who headed the Flood Management Committee, Mr Clarke, said “Norman Griffith is impossible to flood risk”.²⁵

KMC and its experts (Jacobs & BMT) assessed the flood risk to the oval because there would be catastrophic damage if the surface and the entire infill were washed into the surrounding waterways and environment by a flood (“the infill material being dislodged if not completely exported off the site.”²⁶). KMC asked the experts it retained whether the mitigation works proposed ensured “flood immunity” for the oval in the 2% AEP (that is, a 1 in 50-year event, or a 2% per annum risk of flood). In simple language, taking an extreme rainfall event expected to occur only once in every 50 years, would the oval be flooded?

KMC staff stated that a risk at a 2% AEP level was “unacceptable”. Director of Strategy and Environment, Mr Watson said:

*“...its ordinary practice that a number of Council officers would sign off on an REF and in the event of the export of that material into the creek, if that was deemed to be environmental harm, it may well be the officers who have signed that REF would be personally responsible for prosecution and there has been precedent in that respect in the past. So the question was put to me was 'Was I happy with a 2% chance every year that large amounts of material could be exported offsite?' and my answer to that is 'No'. I don't consider that to be acceptable”.*²⁷

However, in October 2020, when KMC decided to proceed with the Proposal which was substantially the same as one previously rejected, Mr Watson said a 1% AEP risk was acceptable:

*“...the big difference between when this matter was first considered by Council and when it was more recently considered by Council earlier this year was that we designed that tank and that system for a 1% event rather than for a 2% event, so that we are expecting though we can never guarantee very little movement if any offsite, hopefully none”.*²⁸

However, there is no advice from a qualified expert that the mitigation measures incorporated in the Proposal reduce the flood risk to the oval to a 1% AEP.²⁹ Further, the design of the Proposal has not been completed, and so it is difficult to see how a conclusion about its flood risk at 1% AEP could have been arrived at.

Draft REF

The Draft REF deals with the flood risk issue by describing, in two attachments, the “details of the proposed stormwater mitigation” (Appendix 1) and “a set of Civil engineering plans” provided “to illustrate the proposed bulk earthworks and stormwater design” (Appendix 2). KMC have informed us that Appendices 1 and 2 do not exist and did not exist at the time the Draft REF was provided to KMC.³⁰

²³ Agenda KMC Meeting 9/4/19, page 65

²⁴ Director of Strategy and Environment, Mr Watson, Recording of KMC Meeting 19/11/19

²⁵ Head of Flood Management Committee, Mr Clarke, Recording of KMC Meeting 19/11/19

²⁶ KMC Meeting 19/11/19 at 41 minutes, at 51 minutes

²⁷ Recording of KMC Meeting 19/11/19 at 1.31 and following

²⁸ Recording of KMC Meeting, 20/10/20 at 1 hour 1 minute and following.

²⁹ No such advice appears in the expert reports commissioned from BMT or Jacobs, and in response to a information request, KMC admits that no other advices from the expert exists post-dating those reports

³⁰ Written communication from KMC dated 26 July 2021

Then, referring to the non-existent Appendices 1 and 2, the Draft REF asserts

*“the proposal involves excavation to fit the detention tanks underground, with the fill to be used to raise the field by 500mm, this will ensure it is above the flood line and to prevent inundation of the field”*³¹ and *“allow for stormwater to be captured beneath the fields”*³²

Finally, the Draft REF then says “The Ku-ring-gai project manager will be responsible for ensuring the design is of a high standard and meets the relevant requirements outlined in this REF”.³³

In summary, the Draft REF's conclusion that the flood risk is not a likely significant environmental harm is based on two Appendices which do not exist; is in fact an assumption (of the form “If we assume X [the field will never be “inundated”], then we conclude X [there is no flood risk]”) which is said to be the “responsibility” of the Project Manager; and the assumption is false. Neither KMC (or its Project Manager) has ever asserted or claimed the assumption is or will be true. In fact, the formal design and construction specification in the tender documents does not require the design to achieve any AEP flood risk whatsoever.³⁴

The Draft REF analysis of the flood risk is meaningless. Courts have repeatedly condemned REFs which are superficial, subjective or non-informative,³⁵ “paying no more than 'lip service' to the obligation” to conduct a proper examination.³⁶

Other Observations

KMC position is that a 2% AEP flood risk would cause it to abandon the Proposal, but a 1% AEP risk is acceptable. As KMC is not proposing an “environmental impact statement” under s5.7 of the EPA, this necessarily means KMC believes a 1% AEP flood risk is not “likely to significantly affect the environment” but a 2% AEP flood risk is “likely to significantly affect the environment”. That is highly contentious. Rather, it seems the correct legal analysis is that this is a significant effect on the environment which warrants an “environmental impact statement” under s5.7 of the EPA to properly and expertly assess it.

KMC's position would be untenable unless KMC could, with an extraordinarily high level of confidence, distinguish between a design plan which had a 1% AEP and that having only a 2% AEP. We do not believe KMC can do so for the Proposal. **Firstly**, no qualified expert has provided such an opinion, and the two experts KMC has retained have not done so (Jacobs and BMT). **Secondly**, such an assessment is based on historical rainfall records, and emerging trends in the data. Given the assessments being made relate to flood likelihoods over a 50- or 100-year period in the future, the process of climate change makes the predictability and variability of infrequent extreme weather events highly problematic. We doubt the level of confidence required is obtainable.³⁷ We note that the modelling in the expert report on which KMC is relying in its design process (the Jacobs Report)

³¹ Draft REF, page 4

³² Draft REF, page 5, and similar statements at page 17

³³ Draft REF, page 14

³⁴ See *Design & Construction Works Specifications*, April 2021 issued by KMC in the tender for the works on the Norman Griffiths Oval.

³⁵ *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402; *Schaffer Corp Ltd v Hawkesbury City Council* (1992) 77 LGRA 21

³⁶ *Willoughby City Council v Minister administering the National Parks and Wildlife Act* (1992) 78 LGERA 19 at 29

³⁷ The data on which the experts retained by KMC relied ultimately came from Australian Rainfall and Runoff 1987 (see Section 3.6 of Jacobs Report, *Norman Griffiths Oval Flood Assessment*, March 2017), and the data limitations of that are discussed at Book 1, Chapter 4 of the present Australian Rainfall and Runoff Guidelines.

utilises 1987 rainfall data – that is, it is based on rainfall data which is 34 years old and excludes the entire period in which climate change has begun to dramatically affect weather patterns. Furthermore it was a recommendation of the flood experts that the analysis be updated with the newly available 2016 rainfall data - “*The flood assessment was undertaken using the 1987 [data] and it is recommended that the flood immunity requirements for the playing field with the mitigation should be confirmed using 2016 [data] in the later stages of this design*”.³⁸ This has not been done. **Thirdly**, the precautionary principle means that any uncertainty weighs against the Proposal. The Guidelines require that “you should not conclude that a significant impact is not likely to occur because of management or mitigation measures unless the effectiveness of those measures is well-established (for example through demonstrated application, studies or surveys) and there is a high degree of certainty about the avoidance of impacts or the extent to which impacts will be reduced”³⁹.

A further deficiency of the KMC position (that a 1% AEP flood risk is acceptable and does not trigger s5.7 of the EPA, or the EPBC) is that it fails to take into account the environmental harm of concern is to a “critically endangered ecological community” such as the STIF. The Courts have said “significance” varies with the nature of the harm apprehended.⁴⁰ A 1% per annum risk is a 10% risk over the life of the synthetic surface or given the life of the retaining tanks is indefinite, then a 1% annual risk of flooding, over time is a certainty that there will ultimately be a “significant impact” on STIF. In other words, what may be an acceptable risk to property is unacceptable given the irremediable nature of the environmental harm (namely, damage to the STIF which has been found to be facing “an extremely high risk of extinction in the wild in the immediate future”⁴¹).

5. Impact on Listed Threatened Species and Ecological Communities

What is our Concern?

The Proposal poses significant harms to threatened species and endangered ecological communities listed under NSW and Commonwealth biodiversity legislation.

We believe the Proposal is likely to have a significant adverse effect or impact on:

- the STIF, which is a “critically endangered ecological community” under NSW and Federal legislation;
- *Thelymitra atronitida* (Black-hooded Sun Orchid) which is critically endangered under NSW legislation.
- *Ninox strenua* (the Powerful Owl) which is listed as “vulnerable” under NSW legislation.
- several species of microbats. *Saccolaimus flaviventris*, *Scoteanax rueppellii*, *Falsistrellus tasmaniensis*, and *Micronomus norfolkensis* are listed as threatened species.

KMC Environmental Assessments

In making its decision to proceed with the Proposal, KMC was not informed of any potential impact on threatened species or ecological communities. KMC has informed us that there is no document in existence in which its employees or consultants have considered the impact of the Proposal on STIF.⁴²

³⁸ Conclusion in Section 9 of the Jacobs Report

³⁹ *Matters of National Environmental Significance, Significant impact guidelines 1.1*

⁴⁰ *Palm Beach Protection Group Incorporated v Northern Beaches Council* [2020] NSWLEC 156 at Para 261(i)

⁴¹ EPBC Act, s182(1)

⁴² Correspondence concerning GIPA Application GIPA020/21

Draft REF

The Draft REF identifies two appendices which contain “an Arboreal Impact Assessment” (Appendix 3) and a “benchmark Environmental Status Report” (Appendix 4) which are said to have been “undertaken” and “prepared”.⁴³ The Draft REF then concludes “As outlined in these reports, the proposed works will occur adjoining an EEC, and have been designed to ensure there is no loss of trees or impact on the EEC....as such, the proposed works are not anticipated to result in adverse impacts on the biodiversity or any ecological community”.⁴⁴ The draft REF then denies any impacts under Clause 228 (c), (f), (g), (h) and (i) on the same basis that “The proposal will not involve the removal of any trees....therefore, no native vegetation, threatened species or other matters of environmental significance would be affected by the proposal”.⁴⁵

In fact, KMC have confirmed that Appendices 3 and 4 do not exist and did not exist when the draft REF was provided to KMC.⁴⁶ The relevant conclusions in the draft REF are specifically based on those (non-existent) appendices. This obviously makes the conclusions of the draft REF meaningless.

Furthermore, the conclusions of the draft REF are clearly deficient in that they rest on the proposition that if native vegetation or fauna are not directly affected, there is no harm apprehended (to put it simply, if the STIF is not directly cut down, the Proposal poses no harm).

But it is well settled by caselaw that consideration should not be limited to the site of the Proposal but extends to “the geographic location in which it is to be carried out and the area of which it is physically a part”⁴⁷ including “proximity to an area that is ecologically significant”.⁴⁸ The Courts have said “the 'environment' includes not only those areas that are likely to be directly affected by the activity but also those areas that are likely to be indirectly affected. To this end, the environment includes not only the area in which the activity is proposed but also the geographical locality of which it is physically a part”.⁴⁹

It is also well settled by caselaw that the impacts which must be considered include not only direct, but indirect impacts on the surrounding area. So the Courts have said “Effects include both direct, indirect and cumulative effects. Direct effects caused by an activity occur at the same time and the same place as the activity. Indirect effects caused by the activity may be later in time or further removed from the activity. A cumulative impact is an impact of the activity when added to past, present and reasonably foreseeable future activities”.⁵⁰

Other Observations

In fact, no systematic assessment has been made by KMC or Willow Tree Planning of whether the Proposal has a **direct** impact on threatened species or ecological communities. We are aware that the Proposal does directly impact on the entire identified local population of one listed critically endangered species under NSW legislation (Thelymitra atronitida, the Black-hooded Sun Orchid).

Other parts of this document we have discussed the likelihood of **indirect** adverse impacts on listed

⁴³ Draft REF, page 8 & 15, underlining added

⁴⁴ Draft REF, page 15, underlining added

⁴⁵ Draft REF, page 17-18

⁴⁶ Correspondence with KMC relating to GIPA 03021

⁴⁷ Kivi v Forestry Commission of NSW (1992) 47 LGRA 38 at 47; Jarasius v Forestry Commission of NSW (1988) 71 LGRA 79 at 92; Bailey v Forestry Commission of NSW (1989) 67 LGRA 200 at 212

⁴⁸ Palm Beach Protection Group Incorporated v Northern Beaches Council [2020] NSWLEC 156 at Para 261(i)

⁴⁹ Palm Beach Protection Group Incorporated v Northern Beaches Council [2020] NSWLEC 156 at Para 261(l)

⁵⁰ Palm Beach Protection Group Incorporated v Northern Beaches Council [2020] NSWLEC 156 at Para 261(k)

threatened species and ecological communities from flood, fires, the chemicals used in maintaining the synthetic surface, and migration of infill or plastics.

Another indirect impact about which we are especially concerned is that it is likely that the Proposal will fundamentally change the hydrology of the area leading to changes in soil moisture, and patterns of surface and groundwater flow affecting the STIF. The changes which are likely to have hydrological implications (on soil moisture, surface water drainage flows and groundwater movement) include :- the destruction of the natural oval which functioned as a flood storage basin; the installation of a new detention tank and outlet system; large scale earthworks and embankments; altered drainage capacity underneath the field leading into Quarry Creek; changed landscaping around the field; changed inlets around the field; removal of existing pathways and construction of new pathways; a number of specific things which are likely to affect areas north or above the oval including a sandstone retaining wall on the northern side of the field together with a concrete pathway and a new sandstone seating wall and earthworks and embankments to intercept flows onto the field; and finally the synthetic surface itself which will increase the volume and velocity of run-off from the oval, which had previously been released by gradual run-off and evaporation. It should also be noted that the flood expert who was engaged by KMC to review the concept underlying the Proposal focused on the flood levels on the oval as such. The expert report reveals that flood levels in areas surrounding the oval containing STIF were changed by the Proposal, and in many cases, they were subject to higher water levels, which is indicative of changed hydrological conditions for the STIF.⁵¹

No expert has been retained to examine the long-term effect of these changes on the STIF. The Guidelines require such an investigation⁵², and in its absence, the precautionary principle requires the Proposal not proceed. The Courts have insisted that environmental effects are not to be disregarded merely because they are difficult to identify or quantify.⁵³

Clause 228 (f) & (g) of the EPA Regulations require systematic assessment of direct and indirect impacts on threatened flora and fauna.

6. Impact Arising from Migration of Infill or Plastics

What is our Concern?

The Proposal is likely to cause significant environmental harm as over the longer-term cork infill and micro-plastics migrate into the surrounding environment as a result of normal use, wind and non-flood rainfall events.

This is an acute concern as, given the site, any migration is likely to feed into Quarry Creek and the Lane Cove River and National Park.

Clause 228 (i) and (l) require investigation of “any degradation of the quality of the environment” or “any pollution of the environment”.

⁵¹ Jacobs Report, Maps 28ff and Appendix 2

⁵² *Matters of National Environmental Significance, Significant impact guidelines 1.1* (“An action is likely to have a significant impact on a critically endangered..ecological community if there is a real chance or possibility that it will: ...adversely affect habitat critical to the survival of an ecological community....modify or destroy abiotic (non-living) factors (such as water, nutrients, or soil) necessary for an ecological community’s survival, including reduction of groundwater levels, or substantial alteration of surface water drainage patterns...”)

⁵³ Gray v Minister of Planning [2006] NSWLEC 720 at [138]

KMC Environmental Assessments

Installation of synthetic sportsgrounds in Australia, including synthetic fields installed by KMC, have seen evidence emerge of environmental harm from the migration of infill and micro-plastics into the surrounding environment. For example, it has been reported that:

“New research by the Australian Micro-plastic Assessment Project (AUSMAP) with Northern Beaches Council, funded by NSW’s Environment Protection Authority, has found 80% of the waste entering stormwater drains adjacent to sports fields with synthetic surfaces was black crumb (recycled tyres used for the base of these fields) and micro-plastics from artificial turf - compared to 5% in areas without these playing fields”⁵⁴

KMC commissioned a report by students at Macquarie University examining migration of infill and micro-plastics at Charles Bean Oval (crumb rubber infill) and Ryde LGA Oval (cork infill). The findings of that report included that:

“A considerable amount of plastic grass and rubber infill is found off the field and around playing field exits. There is evidence that the infill material (rubber and cork) and plastic grass are carried by stormwater as they occur in stormwater channels. As the materials are light it is possible wind/maintenance can mobilise and transport materials from the playing fields”⁵⁵

Draft REF

As discussed above in relation to flood risk, the Draft REF assumed that the synthetic surface would be above the flood line by referring to Appendices 1 and 2 (which did not exist). The draft REF then reasoned that “the proposed works will ensure that the synthetic field are above the flood level to ensure that there is no particulate run off from the synthetic fields that would impact on the water quality”.⁵⁶ The draft REF also referred to the mitigation strategy of installing stormwater traps to capture gross pollutants - “A stormwater trap is also in situ at Quarry Creek to further limit any potential downstream affects”.⁵⁷

The analysis of the draft REF is deficient. Firstly, it rests on the assumption that the synthetic surface will be 100% flood-proofed and therefore there is “no particulate run off”. The KMC has never asserted that any design they might adopt could ensure this, and the contract for the design work does not specify that any design has to meet such a requirement.⁵⁸ Secondly, it only addresses migration as a result of flood waters. The concern that requires to be addressed is the migration risk from normal use, wind and non-flood water events. Thirdly, it relies on gross pollutant traps to be installed to capture particulate runoff. There is no evidence available that the gross pollutant traps will capture any or all of water-borne infill runoff. Willow Tree Planning did not possess details of the specifications of the gross pollutant traps proposed, or the specification of the cork infill proposed, and so could not assess whether those traps would capture cork infill of that specification. The manufacturers specifications of the gross pollutant traps obtained by us from KMC on their face do not suggest they would capture cork infill.

Overseas studies estimate 120 tonnes of infill is used in a typical synthetic sportsground, and normal

⁵⁴ <https://www.ausleisure.com.au/news/nsw-planning-minister-to-investigate-alternatives-to-synthetic-grass/>

⁵⁵ Bishop & Karimi, *Investigation into Solid Pollutants Exported From Artificial Playing Fields*, Macquarie University, November 2019, page 2

⁵⁶ Draft REF, page 14, 4, 17

⁵⁷ Draft REF, page 17

⁵⁸ See *Design & Construction Works Specifications*, April 2021 issued by KMC in the tender for the works on the Norman Griffiths Oval.

use causes infill migration of approximately 4% a year (5 tonnes).⁵⁹

The Macquarie University student study, and KMC's ongoing experience with synthetic fields installed, gives rise to a concern that migration of infill and micro-plastic may pose a significant environmental harm. There is reason to believe the specification of cork as an infill will increase migration as it is more lightweight and buoyant than rubber. Neither KMC or Willow Tree Planning have undertaken the most elementary analysis of quantity of infill which might migrate off site. For example, cork infill surface has been installed at Ryde LGA Oval and our conversations with those responsible for its upkeep lead us to believe that very large amounts of infill are migrating into the surrounding environment. The quantity of infill migrating offsite could readily be ascertained by finding out the amount of additional cork infill which is being added to the field on an annual basis to replace the missing cork infill.

Nor has there been any analysis of how long cork infill will persist in the environment, and the impact during contamination on flora and fauna. A leading international manufacturer of cork states that “Cork infill is very resistant with strong durability, almost unalterable and imperishable”.⁶⁰ Expert evidence is that plastics are often sprayed on the cork.⁶¹

7. Conclusions From Deficiencies Discussed

The draft REF does not satisfy s5.5 of the EPA because it does not “*examine and take into account to the fullest extent possible*” the “real chance or possibility”:

- that the maintenance regime for the synthetic surface would result in the release into the surrounding environment of chemicals causing environmental damage to waterways (including Quarry Creek and the Lane Cove River) and surrounding fauna and flora.
- of an increase in the bushfire risk to the STIF.
- of the flood risk arising from the Proposal affecting the environment, and the STIF.
- of direct and indirect harm to listed threatened species and endangered ecological communities
- of migration of cork infill and micro-plastics into the surrounding environment due to normal use, wind and water run-off.

The same concerns, often combined with the proper application of the precautionary principle, mean the Proposal “*is likely to significantly affect the environment*” (that is, this is a “more than ordinary” or a “important or notable effect on the environment”) and an “environmental impact statement” is required under s5.7 of the EPA. The KMC position that a 1% AEP flood risk is acceptable, but a 2% AEP risk would cause it to abandon the Proposal, of itself should trigger the requirement for a “environmental impact statement”.

The Proposal must be referred to the Commonwealth Minister for the Environment under the EPBC because it has, will or is likely to have a “significant impact” (that is, “an impact which is important, notable or of consequence” and is “a real and not remote chance or possibility”) on an “critically endangered ecological community”.

⁵⁹ European FIFA study on synthetic turf at https://ms.my.facebook.com/DavidShoebridgeMLC/videos/143663207721006/?_so=_permalink&_rv=_related_videos.

⁶⁰ <https://amorimcorkcomposites.com/en-us/materials-applications/sport-surfaces/infill/>

⁶¹ Dr Scott Wilson, of the Macquarie University Department of Earth and Environmental Sciences says that many cork infills are sprayed with polyurethane to keep them in place or enhance water resistance (45 minutes onwards at https://ms-my.facebook.com/DavidShoebridgeMLC/videos/143663207721006/?_so=_permalink&_rv=_related_videos).

4. GOVERNANCE ISSUES

The process for approving and progressing the Proposal was seriously deficient. This was the result of the powerful influence of the soccer clubs over Council and tied grants they procured if and only if a synthetic surface was installed at Norman Griffiths Oval. While we accept that those clubs were motivated by an honest interest in advancing their sport, the result has nevertheless been that the process has been “corrupted”. The deficiencies in the process raise fundamental governance issues.

We would highlight the following governance issues.

A. National Parks and Wildlife Service Involvement

When KMC resolved to proceed with the Proposal, Councillors unanimously amended the resolution to add the requirement that *“The National Parks and Wildlife Service, as a stakeholder, be consulted throughout the development of the project”*⁶².

Councillors commented that the involvement of NPWS gave them the comfort to proceed with the Proposal given the real environmental risks. NPWS was consulted before that Council meeting and provided a written submission stating “NPWS are in support of an upgrade to the sports field but do have concerns regarding and operation of the synthetic field” and went on to list a series of “environmental considerations” which “need to be considered” (and have not in fact been considered by KMC).⁶³ NPWS manages the adjoining National Park downstream of the Norman Griffiths Oval and has considerable expertise in assessing the environmental risks to threatened species and endangered ecological communities.

It was therefore integral to the Council’s approval of the Proposal that NPWS be “consulted throughout the development of the project” as a guarantee that the environmental risks would be properly evaluated and mitigated.

In fact, we are advised that there has been no consultation with NPWS between the passing of that resolution and the final version of the draft REF. Further, overwhelmingly the environmental facts NPWS said should be considered have not been considered in the Draft REF.

As a principle of governance, is it acceptable to you as a Councillor that the clear basis on which Council approved the Proposal to address environmental risks has been ignored by KMC staff?

B. Third Party Grants to Offset Higher Cost of Synthetic Surface

When Council resolved to proceed with design and construction of the Proposal on 20/10/20, it was told that approximately \$1 million would be contributed by third party grants. Specifically, it was said:⁶⁴

“As separate from Council’s contribution (funded and unfunded), an additional \$928,765 has been contributed towards the Norman Griffiths Sportsground project as follows:

⁶²KMC Minute , 20/10/20

⁶³ Letter from NPWS to Guy Thomas of KMC dated 21/09/20, obtained by request under Government Information (Public Access) Act, 2009

⁶⁴ KMC Agenda 20/10/20

❖ West Pymble Football Club.	\$100,000
❖ Northern Suburbs Football Association.	\$132,425
❖ Category 3 Office of Liquor and Gaming.	\$500,000
❖ NSW Asian Cup Legacy Fund.	\$150,000
❖ Local Sport Program.	\$26,340
❖ Stronger Communities Programme.	<u>\$20,000</u>
<i>Total</i>	\$928,765

It is apparent that the third-party grants of almost \$1 million were the decisive factor which persuaded a majority of the Council to approve the Proposal. Staff told Council in the Agenda Papers that *“This \$928,765 is a significant contribution from external sources which cannot be easily overlooked in the reprioritisation of Council capital works”*.⁶⁵ Further, the Director of Strategy and Environment, Mr Watson's told Council *“...it has got to be pointed out that the money that the soccer club has brought to the table is nearly a million dollars and that is only available for a synthetic field so that in the event that the council decides not to do a synthetic field their funding wouldn't be available for a turf upgrade and the cash money the council has available would borderline cover a turf upgrade without the complex drainage issues of the site being resolved..”*.⁶⁶

The Agenda for the KMC Council Meeting on 20/9/21 now shows funding only from the West Pymble Football Club and the Northern Suburbs Football Association.⁶⁷ In other words, we are concerned that the third-party grants which Council were told had “been” contributed may have fallen by \$696,340.

If that is correct, information has been presented in such a way as to conceal from Councillors that the majority of the third-party grants have disappeared - Councillors were not told clearly and explicitly that third party grants had been lost; nor were they told the total amount of the third-party grants so they could see the total had fallen. The only way Councillors could discover the third-party grants had been lost was if they recalled from one page of the Agenda from 12 months previously that six sources of the grants had been identified, whereas now only two sources were mentioned.

As a principle of governance, is it acceptable to you as a Councillor that Council be induced to approve a proposal by being told it would be largely funded by third party grants, and then the proposal be implemented without drawing to Council's attention that the contributions they had relied on were no longer available? Is it acceptable to you that at no time since the approval of the Proposal more than a year ago has the Council been told explicitly and clearly in writing that about \$700,000 of the approximately \$1 million of the third-party grants which it had been told “had been contributed” to defray the costs may have disappeared?

C. No tender

When Council approved the Proposal in October 2020 its estimated cost was \$3.2m.⁶⁸ Council was informed on September 2021 that its cost had blown out \$409,000 to \$3.6m.⁶⁹ Other than multi-year waste disposal contracts, this appears to be the second largest contract KMC has ever entered into (certainly since 2014).⁷⁰

⁶⁵ KMC Agenda 20/10/20

⁶⁶ Recording of KMC Meeting, 20/1/20 at 1 hour 8 minutes and following

⁶⁷ KMC Agenda 20/9/21

⁶⁸ KMC Agenda 20/10/20

⁶⁹ KMC Agenda 20/9/21

⁷⁰ See KMC Contract Register (online)

The blow-out in the cost of the project occurred after it was decided not to put it to tender. The Proposal was put to tender in April 2020, but by the time the tenders were received, staff chose to change the terms and scope of work for the tender. Staff then successfully sought Council's approval not to "invite..fresh tenders", but to negotiate a contract with whomever they chose. The justification staff gave for not inviting a "fresh tender" was "due to the current deadlines for the grant funding".⁷¹ Ultimately, that grant funding seems to have ceased to be available.

As a principle of governance, is it acceptable to you as a Councillor that KMC's second largest contract ever was signed (and continues to be advanced) without a competitive tender, when the stated justification for avoiding a tender no longer exists and has proven to be illusory?

D. Circumvention of KMC's procedures for assessment of environmental impacts

KMC has established processes and procedures by which it usually assesses the environmental impact of a proposal. It appears that in this case, Council has avoided those established procedures.

For example, KMC has an established procedure to meet its obligations under Part 5 of the EPA "to take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of an activity" by completing a standardised detailed and lengthy form called a "Potential Impact Assessment" (PIA).

KMC admits it has not completed a PIA for the Proposal.⁷² That this was a departure from Council's established procedures is shown by the PIA Form itself, and also by the fact that several months earlier when considering a proposal to install a synthetic oval at Rofe Park Mimosa Sportsground a PIA was completed and provided to Councillors.⁷³

After referring to its use to satisfy Part 5 of the EPA, the PIA Form states succinctly why this established process for preparation of a PIA exists, and the dangers and risks of failing to complete a PIA for a project:

*"This PIA has been designed to guide environmental impact assessment staff with appropriate delegation through consideration of all potential impacts of an activity and to consider the scale and significance of any potential impacts. The PIA assessment is used to determine whether a proposed activity should proceed, be modified, or should be undertaken and what mitigation measures should be put in place. The benefits of undertaking the PIA include: It demonstrates the legal requirements of **due diligence** and protects individuals and Council from potentially significant penalties...It provides senior management and stakeholders (eg community groups, residents) with a mechanism to quickly identify whether environmental management is being adequately undertaken within the organisation, hence enabling Council to make more informed decisions in relation to environmental and community expectation"*⁷⁴

KMC have now also admitted they had "commenced" a "PIA process" for a proposal for a synthetic surface at Norman Griffiths Oval which was "abandoned due to environmental and aesthetic impacts".⁷⁵

⁷¹ Minutes of KMC, 15/6/21

⁷² Letter from KMC dated 28/6/21

⁷³ KMC Agenda 19/11/19

⁷⁴ KMC Agenda 19/11/19

⁷⁵ Letter from KMC dated 28/6/21

This gives rise to a concern that KMC's established procedure to ensure all environmental impacts were fully examined (namely preparation of a PIA), which had been complied with a few months before in relation to another proposal for a synthetic oval at Mimosa Sportsground, was not undertaken precisely because of an awareness of its serious and adverse environmental impacts (evidenced by the "commencement" and then "abandonment" of an earlier "PIA Process" "due to environmental... impacts").

As a principle of governance, is it acceptable to you as a Councillor that KMC's established procedures for protection against environmental harms and liabilities are ignored without explanation when inconvenient?

E. Integrity of Draft REF Report and Process

Comparison With Other REF Reports for Similar Projects

The Draft Review of Environmental Factors is attached (**Attachment 1**). This is the final and third draft of this document. This is the document relied upon at the two meetings of Council when the entry into the contract for the Proposal was approved, and of which the KMC Agenda said "*An initial Review of Environmental Factors has been undertaken for this project and this will be revised once the design is complete*".⁷⁶ We are advised that no further work has been done on the REF since its date (13 April 2021).

Even the most cursory glance at this slim and superficial 25-page document shows it falls well below the standard for a REF which has been accepted by Councils, including KMC, in the past. Councillors who are in any doubt about this should compare the Draft REF with the equivalent REF for synthetic surfaces for the Bob Campbell Oval (**Attachment 2**, 120 pages excluding appendices) and Gardiner Park (**Attachment 3**, 100 pages excluding appendices). The present proposal is arguably more difficult to assess than those other synthetic surfaces, and unquestionably poses more difficult issues in relation to threatened species and ecological communities.

Even comparison of those documents does not convey how inadequate the Draft REF is because it fails to show the lack of supporting reports by ecological specialists. So for example, in the case of the present Proposal, KMC have informed us there do not exist "any documents created by KMC or its employees or consultants considering or relating to the impact of the Proposal on the Sydney Turpentine-Ironbark Forest in Bicentennial Park". This complete absence of investigation of ecological impacts may be compared with the supporting report on them for the Bob Campbell Oval (**Attachment 4**, 46 pages) or reports previously commissioned by KMC for far less complex proposals - for example, the Biodiversity Assessment for North Turrumurra Recreation Area, Stages 4 & 5 (**Attachment 5**, 193 pages) or even the report by Hayes on the impact on the STIF of a much more benign development of the Aquatic Centre in Bicentennial Park adjacent to the Norman Griffiths Oval (**Attachment 6**, 46 pages).

The Process for Obtaining the Draft REF

We also have very serious concerns relating to aspects of the process KMC have adopted in obtaining the REF, including:

- ❖ The Firm Chosen to do the REF:- In the past, when KMC required a REF for a project such as this it directly retained a large specialist firm with ecological expertise. Willow Tree Planning is not

⁷⁶ On the 15/6/21 and 20/9/21

such a firm.⁷⁷ Its expertise is in planning. Its capability statement does not include work of this sort,⁷⁸ nor does its client list suggest it is retained for this type of work. The author of the report has no ecological or environmental expertise.⁷⁹ We can find no evidence that KMC has ever retained this firm for such work in the past.

- ❖ The Structure Chosen For the REF:- Willow Tree Planning was chosen, retained and managed in their preparation of the draft REF not by the division of KMC having expertise and responsibility for environmental issues, but by staff in the Operations Division (who have no such expertise). Further, though KMC retained Willow Tree Planning to produce the draft REF, it has now insisted as part of its contract with the successful contractor that the contractor retain Willow Tree Planning to finalise the REF - in August 2021 KMC told the contractor Council required that it engage “*the environmental consultant to complete the Review of environmental factors (REF). Council issued a draft REF as part of the tender package and there is a requirement for a final report to be completed against the final design*”.⁸⁰
- ❖ Conflicts of Interest - Willow Tree Planning have a disqualifying conflict of interest. Their letter of retainer dated 22 March 2021 show they were retained for services well beyond the preparation of the REF, including town planning services. Further, that initial conflict of interest is now fatally compounded as the draft will be finalised by Willow Tree Planning acting not for KMC but, as a sub-contractor to, and at the direction of, the contractor, TurfOne, who have an obvious financial interest in the Proposal proceeding, and doing so without delay, regardless of its environmental harms.
- ❖ Fee Arrangement:- The fee agreed for Willow Tree Planning in practice guarantees that they will be unable to prepare a satisfactory REF for the Proposal. The proposal is complex and requires multiple issues to be investigated. At the hourly rate specified in their retainer letter, the fee permitted a maximum of 10-18 hours to be spent on research, analysis and writing a draft.
- ❖ Reliance on assumptions:- KMC allowed Willow Park Planning to prepare the REF on the basis that certain critical assumptions would be true of the Proposal, whereas KMC know that those assumptions are unrealistic and indeed, KMC has not incorporated them in the tender specifications for the design and construction of the Proposal e.g. the assumptions as to flood risk and migration of infill.
- ❖ Conclusions Provided to Client Before Expert Received Information or Undertook Analysis:- The documentary record shows that Willow Tree Planning provided KMC with an opinion in writing before being given the information necessary to conduct an analysis to support that opinion. Further, Councillors of KMC relied on the draft REF in making their decision to proceed with the Proposal when it was reliant on these untested assumptions and unsupported conclusions.
- ❖ Manifest Inadequacies:- it is manifest from its face that the report is a “cut and paste” of a previous REF for a “splash park” developed by the Canterbury Bankstown Council. It contains critical passages which do not analyse Norman Griffiths Oval, but features of this “splash park”, and the conclusion still refers to a “splash park”.⁸¹

⁷⁷ See <https://willowtreeplanning.com.au/services/>

⁷⁸ See https://willowtreeplanning.com.au/wp-content/uploads/2021/08/WT_Capability-Statement_2021_Final_compressed-compressed.pdf

⁷⁹ <https://willowtreeplanning.com.au/team/sally-prowd/>

⁸⁰ Email from Craig Robert's to TurfOne on 5/8/21

⁸¹ See extracts from drafts of the REF at Attachment 7

The correspondence with the contractor shows an intention to finalise the draft REF “against the final design”. There is no suggestion in any document that substantial further work will be done to complete the REF, and none has been done in the 8 months since it was completed. Nor will any shortcomings of the process be cured by saying the draft REF will be reviewed to reflect new information before being finalised. Such a revision of an advanced draft will in no way ensure that the further investigations which are legally necessary (described in §) are undertaken.

As a principle of governance, is it acceptable to you as a Councillor that reliance is being placed on an REF when the process by which it was obtained has been revealed to have fundamental shortcomings which might be expected to affect its integrity?

A Final Concern

[Why have KMC staff failed to follow established procedures and complete a PIA (section §), and why have they adopted such an unusual process for obtaining a draft REF? We cannot *know* why they have done this, but it is possible to *speculate* on a very disturbing scenario.

We know that KMC staff worked for two years to try and solve the problems of installing a synthetic oval.⁸² At the conclusion of that process, they advised Council not to proceed⁸³ and the Director of Strategy and Environment, Mr Watson, said a synthetic sportsground was “fundamentally incompatible” with the site⁸⁴.

What if persons to whom KMC staff answered subsequently *insisted* that the Proposal proceed? How would staff, who *knew* that the Proposal posed significant environmental and other dangers, and perhaps breached environmental law, choose to advance the Proposal so as to protect themselves in such circumstances? One could speculate that they would have to avoid completing a PIA or a detailed ecological assessment, because they knew it could not be satisfactorily completed, and they refused to be personally involved in a fraudulent and dishonest assessment. One could speculate that they would ensure no staff with ecological or environmental expertise were involved in preparing a REF by handing that responsibility to the operations staff, who had no such expertise. One could speculate that operations staff would then select a firm to do the REF who was not properly qualified and had no ecological expertise and ask for draft conclusions based on favourable and untested “assumptions” and a paucity of information. Having secured a favourable draft REF, so as to distance staff further, KMC would not directly retain the expert to finalise the draft REF, but insist the contractor retain the expert and produce a satisfactory REF.

What is disturbing is this is exactly what KMC staff have done - they have taken a very unusual course which is consistent with what would be done by staff acting under duress who knew the Proposal posed significant environmental dangers. We cannot *know* whether this was their motivation, but what other possible motivation is there for staff involving itself in a such an unusual and differently structured process?]

F. Misrepresentations to Councillors about the environmental review process

On the most generous view of the facts, when they approved the Proposal, Councillors were misled about the review of its environmental impacts. Specifically:

⁸² See § above

⁸³ Agenda KMC Meeting 9/4/19, page 65

⁸⁴ Director of Strategy and Environment, Mr Watson, Recording of KMC Meeting 19/11/19

- ❖ on 20 October 2020 when it resolved to proceed with the Proposal, Councillors were misled about the existence of a Potential Impact Assessment (PIA) for the Proposal, and what that PIA showed. Council was told “Council has completed a preliminary environmental assessment. Based on the completed preliminary environmental assessment and knowledge of the project, the assessment has been adequately completed and the conclusion as to the likely environmental impact of the project is reasonable”. In fact, a PIA did not exist, and KMC has admitted “there is no PIA for the current proposal”.
- ❖ When it resolved to enter into contractual negotiations, KMC was misled about the existence of a REF for the Proposal, and what that REF showed. Council was told “An initial Review of Environmental Factors has been undertaken for this project and this will be revised once the design is complete”. KMC has now provided us with the Draft REF which it says was the document referred to (Attachment 1). The above quoted statement is misleading and incomplete. The Draft REF makes favourable environmental conclusions based on identified information which in most cases had not been provided to the expert and in most cases did not even exist.
- ❖ When briefed on the results of community consultation, Councillors were told “NPWS were in support however they have noted some environmental considerations to be incorporated into design and ongoing operations of the site”. In fact, KMC was misled. NPWS said in writing that “NPWS are in support of an upgrade to the sports field but do have concerns regarding construction and operation of the synthetic field” and went on to list a series of “environmental considerations” which “need to be considered” (and have not in fact been considered by KMC).

G. Community Consultation and Transparency

Community Consultation

There were complaints of inadequate community consultation (disrupted by Covid lockdowns) before the Proposal was approved in October 2020.

Subsequently, in August 2021 KMC insisted, when negotiating with contractors, that the contract and their plans make “allowance for a further 4-6 weeks in the design program to allow for [a] community consultation period”, and those contractors formally agreed to this.⁸⁵

KMC have refused to confirm that community consultation will take place⁸⁶ and a works schedule for the Proposal suggest the period of community consultation has been abandoned.⁸⁷

Information and Transparency

Other Councils installing synthetic surfaces have committed to a high level of transparency and have made available on their websites almost all relevant document - see for example Lane Cove Council’s disclosure of information on the Bob Campbell Field (<https://www.lanecove.nsw.gov.au/CurrentIssues/Pages/BobCampbellOval.aspx>) and Bayside Councils disclosure for Gardiner Park (<https://www.bayside.nsw.gov.au/guides/news/gardiner-park-faqs#-project-update-archive-and-frequently-asked-questions->).

⁸⁵ Email from Craig Robert’s 5/8/21

⁸⁶ Email to McKee dated §

⁸⁷ Work Schedule for Design and Construction RFT9-2021 dated 10 November which shows design finalised by 22/12/21

Despite written requests,⁸⁸ KMC has refused to make meaningful information and documents available. The community has had to use the *Government Information (Public Access) Act* to get the most basic information.

As a principle of governance, is this standard of transparency and information disclosure, and this attitude to meaningful community consultation, acceptable to you as a Councillor?

H. Serious Analysis of Alternatives To Synthetic Turf

The Draft REF contains the analysis of alternatives to the Proposal at page 6, Section 3.6. The only alternatives considered area “Do Nothing” and ‘Development of An Alternative Site’.

There has been no analysis or consideration given (in the draft REF or any other KMC document we are aware of) to replacement with natural turf which takes into account new best practices which dramatically improve performance and would overcome many of the shortcomings with the existing surface.

As a principle of governance, is it acceptable to you as a Councillor that a decision on a \$3.6m capital expenditure could be approved without professional and thorough analysis of better or cheaper alternatives?

I. The Stokes Report

In November 2021, the NSW Department of Planning Industry and Environment released a comprehensive study of the use of synthetic surfaces in public spaces (referred to in this document as the ‘Stokes Report’.

The report highlighted the “lack of community consultation required to install synthetic fields, as no development application is required, combined with a propensity for the projects to be funded via government and sporting grants.”

The report concluded that:

- Best practice natural turf design and maintenance has the potential to improve the capacity of existing natural turf fields to support increased sporting use.
- Lack of available information on best practice construction and maintenance of natural turf fields influences and constrains council decision making.
- Information about recent innovations and best practice for natural turf are not well known or commonly used.
- Advances in technology are enabling more targeted maintenance and management of natural turf to reduce energy consumption and costs and maintain capacity.

A key action from this report was direction for the “NSW Chief Scientist and Engineer to further investigate the impacts (of synthetic field developments), and any alternatives that can be used in our parks and public spaces to support development of the state’s first set of guidelines”. A report from the Chief Scientist is expected in 2022.

[Click here to view the report](#)

⁸⁸ Letter to KMC, July 2021

5. ACTIONS COUNCILLORS COULD CONSIDER

If Councillors are in any way concerned by the legal, environmental or governance issues we have raised, they could consider a number of actions listed below.

We believe the very minimum actions which Councillors should take to meet their responsibly to discharge their duties honestly and diligently would be actions I-IV. We believe other actions are reasonably required - action V (some of these are alternative to the minimum actions). We believe it is desirable that Councillors consider the more far-reaching actions V-VI (some of these are alternatives to the other actions listed).

Possible actions Councillors could consider include (some of these are obviously alternatives):

I. Responsibility

If the Proposal proceeds in its current form, to ensure that staff accept responsibility for their actions, Councillors should **insist** that the “Part 5 Certification” (which states that the REF is satisfactory and the legal obligations under the EPA have been complied with) should be personally signed by the General Manager, Mr McKee and the Head of Strategy and Environment, Mr Watson.

If the Proposal proceeds in its current form, Councillors should also **insist** that some appropriately qualified person certify and take responsibility for the assumption underlying the whole Proposal, namely that it the final design has a 1% or lower AEP flood risk (1 in a 100 years) at a high level of confidence.

There is NO reasonable objection to these actions.

II. Community Consultation

Councillors should insist that following completion of the design phase, final plans and a finalised REF be subject to the 4-6 week period of community consultation as had been planned and contracted for (see Section 4.G above). We can see no objection to this as Council had planned for this.

III. Advice to Councillors

Councillors should insist, before advancing the Proposal further, that an outside expert be retained to undertake a quick review of the process by which the Proposal has been approved and progressed (governance, financing and cost) and whether environmental issues seem to have been properly addressed. The expert should be experienced in local government and ecological issues, and should be appointed by and answerable to Councillors, not staff. Given the concerns we have raised, if Council want to proceed with the Proposal in its current form, we believe it would be reckless for Councillors not to take this reasonable step before proceeding further (see Section 4.E above).

IV. National Parks and Wildlife Service (NPWS)

Councillors should insist that in accordance with Council’s original resolution, NPWS be asked to review the draft or final REF and to provide any comments it may have on whether all environmental risks have been adequately assessed or mitigated.

V. Further Environmental Investigations Required

We believe that KMC cannot lawfully proceed with the Proposal unless and until it has undertaken further investigations.

This is because the Courts have said the duty to “examine...to the fullest extent possible” likely environmental impacts under s5.5(1) of the EPA creates a Prasad-like duty to inquire, that is, a legal duty to make inquiries where there is information that is readily available or centrally relevant⁸⁹.

Furthermore, the operation of the precautionary principle and Commonwealth Guidelines under the EPBC mean that KMC cannot proceed without removing any uncertainty about environmental harm to listed threatened species or ecological communities.

Based on the discussion of each of the risks above, Councillors should insist on further investigations including:

- ❖ in relation to the ***risk from chemicals used in the maintenance of the turf (see 3.2 above)***:
 - precise identification of the chemicals used to maintain the turf.
 - studies by qualified experts of the effect of those chemicals on terrestrial and aquatic environments. Dr Scott Wilson of Macquarie University has relevant expertise on the impact of contaminants from synthetic surfaces on aquatic environments.
- ❖ In relation to the ***bushfire risk to the STIF (see 3.3 above)***:
 - expert study of the flammable and heat absorbent characteristics of the specific synthetic surface to be installed.
- ❖ In relation to the ***flood risk (see 3.4 above)***:
 - advice from a qualified expert that the mitigation measures incorporated in the Proposal reduce the flood risk to the oval to a 1% AEP, and advice on the level of confidence and reliability attached to such a conclusion, having regard to the age and quality of the rainfall data on which it is based, and the likely impact of climate change over the 50-100 year life of the facilities constructed by the Proposal.
- ❖ In relation to the risk to ***threatened species and ecological communities (see 3.5 above)***:
 - analysis by an expert of the direct and indirect impacts of the Proposal on threatened species and endangered ecological communities including the STIF, the black-hooded sun orchid, the Powerful owl and various microbats.
 - analysis by a biologist specialist in the STIF (assisted by hydrological analysis) that the changed hydrology caused by the Proposal will have no adverse effect on the STIF.
- ❖ In relation to the risk of ***migration of infill or plastics*** into the surrounding environment (see 3.6 above):

⁸⁹ Fullerton Cove Residents Action Group Incorporated v Dart Energy Limited [2013] NSWLEC 38 at [142-145]; Prasad v Minister of Immigration and Ethnic Affairs (1985) 6 FCR155

- analysis of the quantity of infill which might migrate off site, having regard to the specific specification of the cork infill, which is likely to be buoyant and lightweight.
- analysis by an expert of how long cork infill will persist in the environment, and the impact it might have on flora and fauna.
- analysis of the effectiveness of any “filtration systems” or “gross pollutant traps” in relation to cork infill of the precise specifications proposed.

VI. New REF

Councillors should insist that given the quality of the REF and shortcomings in the process by which it was produced which could be expected to affect its integrity (see Section 4.E), a new firm be retained to complete a REF on the Proposal.

VII. Delay Until Alternatives Properly Analysed

Councillors should insist on a delay, and that KMC not approve a final REF or take steps to make the contract unconditional until and unless it has been presented with a detailed analysis of a natural turf alternative which takes into account new best practices which improve performance and would overcome many of the shortcomings with the existing surface.