5.0

SEPP 1 OBJECTIONS

5.1

GENERAL PLANNING PRINCIPLES AND FEATURES SURROUNDING THE USE OF SEPP 1

The State Planning Policy No 1 (***SEPP 1***) is a document of State-Wide significance. SEPP 1 came into force in October 1980 with the express intention of providing flexibility in the application of planning controls in LEP's (development standards) where strict compliance with the standard is unreasonable or unnecessary. The most recognised aspect of the SEPP 1 is the greater flexibility of LEP controls which in turn reduce the need for councils to prepare minor draft LEP's to vary development standards.

Clause 3 of the Policy clearly identifies the aim as to provide flexibility in the application of planning controls by virtue of development standards in circumstances where strict compliance with those standards would in any particular case, be unreasonable or unnecessary and would tend to hinder the attainment of the objects of the E.P. & A Act 1979, specified in *Section 5(a)(i) and (ii).*

These objects specified in *Section 5* of the Act are set-out below:

5(a)(i) the proper management, development and conservation of natural and man made resources' including agricultural land, natural areas, forests, minerals, water, cities, towns, and villages for the purpose of promoting the social and economic welfare of the community and better environment.

(ii) the promotion and co-ordination of the orderly and economic use and development of land.

Since the inception of the E.P.& A. Act in 1979 and the introduction of SEPP 1 in October 1980, a clear direction has emerged in the decision making process surrounding development, i.e. *"Flexible Planning"* or the *"Merit Approach"*. The Land and Environment Court has also endorsed the approach that each case should be determined on its own merits.

With respect to the current application, both of the proposed allotments do not fully comply with the relevant development standard. As the variations are greater than 10% the Council must obtain the concurrence of the Director-General of the DoP, to vary the standard prior to granting consent.

The use of SEPP 1 in this instance highlights the inadequacies in the existing planning controls which are not conducive to the proper and preferred longer term land use outcome, having regard to the nature of existing and surrounding development. The Land and Environment Court ***(LEC)*** has the power to uphold a SEPP 1 objection without the concurrence of the Director General by reason of *Section 39 (6)* of the *Land and Environment Court Act 1979*.

There is no mention of the words "major" or "minor" in the SEPP No.1. What is required of the consent authority, whether it be Council or the Court, is consideration **of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case.**

The flexibility in planning, referred to in *Clause 3* of the policy, is not achieved by substituting for a development standard another inflexible rule such as the permitted variation. Therefore it does not matter what the numerical qualification on the variation sought turns out to be.

The decision of Lloyd J in the matter of *Winten Property Group Limited –v- North Sydney Council [2001] NSW LEC 46* establishes the following relevant principles which must be reviewed before a SEPP 1 Objection can be upheld:

1. That the requirement is a development standard.
2. That compliance with the underlying objective of the standard will nonetheless be achieved.
3. Consistency with the aims of SEPP 1 is maintained, particularly in regard to satisfying the objects of the Act.
4. That the objection establishes compliance with the standard is, in the circumstances, unreasonable and unnecessary.
5. That the objection is well founded.

The definition of *"development standard"* is found in *Section 4* of the Act and is set out below in so far as it relates to ***Clauses 14(2)* of the WSC LEP 1991.**

> ***"development standards"*** *means provision of an environmental planning instrument or regulation in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development including, but without limiting the generality of the foregoing requirements or standards in respect of:*
>
> *(a)* ***the area,*** *shape or frontage* ***of any land****, the dimension of any land, building or works, or the distance of any land, building or work, from specified point:*
>
> *(b) the proportion or percentage of the area of a site which a building or work may occupy,*
>
> *(c) the character, location,, bulk, scale, shape, height, density, design or external appearance of a building or work;*
>
> *(d) the cubic content or floor space of a building,*
>
> *(e) the intensity or* ***density of*** *the use of* ***any land****, building or work,*
>
> *(o) such other matters as may be prescribed.*

A more recent decision is *Wehbe v Pittwater Council [2007] NSWLEC 87;* a decision of Preston CJ. In this judgement, the Chief Judge does not say that *Winten* is wrong. The judgement confirms the *Winten* decision that to upholding a SEPP 1 objection is a prerequisite which must be satisfied before consideration of merit issues.

In *Wehbe* the Chief Judge examines five (5) ways of establishing that compliance is unreasonable or unnecessary which can be summarised as:

1. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

2. To establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

3. To establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

4. To establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

5. To establish that *"the zoning of particular land"* was *"unreasonable or inappropriate"* so that *"a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land"* and that *"compliance with the standard in that case would also be unreasonable or unnecessary"*.

As to the fifth way; the Chief judge stated that,

> "*care needs to be taken not to expand this fifth way of establishing that compliance is unreasonable or unnecessary beyond its limits. It is focused on "particular land" and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the particular land is found to be unreasonable or inappropriate. If the particular land should not have been included in the particular zone, the standard would not have applied, and the proposed development would not have had to comply with that standard. To require compliance with the standard in these circumstances would be unreasonable or unnecessary*".

The following objection, relevant to the current application reflect both judgements.

5.2

OBJECTION UNDER STATE ENVIRONMENTAL PLANNING POLICY No 1 DEVELOPMENT STANDARDS

PROPOSED TWO LOT RURAL SUBDIVISION OF ATTACHED DUAL OCCUPANCY AT No 75 & 75A BERKELEY ROAD GLENNING VALLEY

This objection is lodged under State Environmental Planning Policy No 1 ***(SEPP 1)*** to show that non compliance with the development standard relating to the two lot subdivision of Lot 111 DP 777284 No 75 & 75A Berkeley Road, Glenning Valley, resulting in an existing dwelling being retained on each of the proposed allotments is unreasonable and unnecessary in the circumstances of the case.

1) WHAT IS THE DEVELOPMENT STANDARD APPLICABLE TO THE LAND ZONED 7(f) ENVIRONMENTAL PROTECTION

The development standard is the subdivision provision of *Clause 14(2) of WSC LEP 1991 (as amended);*

> *"14(2) Except as provided by sub-clauses (3) and (4), a person shall not subdivide land to which this clause applies so as to create an allotment having an area of less than:*
>
> *(a) in the case of land within Zone No 1 (c), 7 (a), 7 (d), 7 (e), 7 (f) or 7 (g)—40 hectares,"*

This provision provide that a minimum allotment size of 40 ha is required for any allotment created in a subdivision of land with a 7(f) Environmental Protection zoning.

The proposed subdivision will result in the creation of two allotments (proposed Lot 111) containing an area of 6770 m² and proposed Lot 1112 containing an area of 1821 m², both of which are zoned 7(f) Environmental Protection, which represents a respective, 98.31% and 99.55% variation to the standard of *Clause 14(2)* that applies to this zone.

2) WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD APPLICABLE TO THE LAND ZONED 7(f) ENVIRONMENTAL PROTECTION

The object of the development standard which is designed to complement the environmental characteristics of the land, is to support the single zone objective, being to restrict the type and scale of development which will be carried out on land adjoining major noise generators (or other development with similar detrimental impact) to that compatible with such environments. The intention being to protect the industrial zoned land of the Berkeley Vale Industrial Estate.

This is achieved by providing a minimum 40 ha allotment size for a lot created in the subdivision involving land containing a 7(f) Environmental Protection zone, which is also recognised as being of sufficient area, capable of sustaining a dwelling and curtilage with negligible impact on the environment.
The subject land which is covered by the 7(f) Environmental Protection zone, falls within the historically identified, noise constraint catchment of the Berkeley Vale Industrial Estate.

3) IS COMPLIANCE WITH THE DEVELOPMENT STANDARD APPLICABLE TO THE LAND ZONED 7(f) ENVIRONMENTAL PROTECTION UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE.

Compliance with the development standard applying to the subdivision is considered unreasonable and unnecessary in the circumstances of the case because the following reasons demonstrate that;

- The underlying purpose is not relevant to the proposal and as a consequence compliance is unnecessary;
- Although the approvals granted by Council in the period from the introduction of the zone complied with the statutory provisions of the EPI, these developments, in particular dwellings encroaching onto the 7(f) Environmental Protection zone, contrary to the original intent. This in effect resulted in the abandoning or destroying of the standard as it applies to the subject land, thereby setting a precedent and hence continual compliance of the standard over the subject land is unreasonable and unnecessary; and.
- The 7(f) Environmental Protection zoning is considered unreasonable and inappropriate (in so far as it relates to the subject lot), therefore the 40 hectare development standard applying to the subject land is unreasonable and unnecessary and that compliance with the standard in this case would be unreasonable and unnecessary:

a) Sections 1.6, 3.1 and 3.3 of this SEE assessed the origin of the 7(f) Environmental Protection zoning and various historical and current day acoustic reports and opinions. In particular, The Acoustic Group (see ***Appendix F1***) which concluded, that in respect to noise impact from and upon the industrial area to the north, no restriction would be placed upon the use of the land for residential purposes.

The industrial noise controls, (in so far as they apply to the subject land) have been undermined, are now somewhat redundant and cannot be relied upon in terms of a modern day planning control document for the subject land. Therefore the application of a 7(f) Environmental Protection zoning is considered *"unreasonable or inappropriate"* and should not be applied to the subject land. Therefore the standard is inappropriate and to require compliance in the circumstances of the current proposal would be unnecessary and unreasonable.

b) Despite the plethora of assessments, EPA policies and legislation since amendment 105 and the Council acknowledgement that the acoustic climate has shifted substantially since the 1980 initial assessment, no strategic review of the EPI has been undertaken in respect to selected zone boundary locations for the 7(f) Environmental Protection zone, based on noise impact contours, (to maintain relevance of the development standard), therefore the continued application of this zone over the subject land is unnecessary and inappropriate.

c) The proposal with existing dwelling is considered compatible with the surrounding environment including the Berkeley Vale Industrial Estate.

d) Although the development standard for the 7(f) Environmental Protection zone is not met in this instance the zone objective (applicable to other lands within the noise development constraint contour) is not at risk. This is due to the inappropriate application of the noise constraint contour over the subject land, which has been confirmed by the acoustic consultant's opinion as obsolete, following a review and assessment of the application of the control in the locality.

e) The type and scale of development is considered compatible with the surrounding approved and developed immediate environment of similar scale and density.

f) The development would have no adverse social or economic effect as it will result in no nett increase in the existing land occupation density.

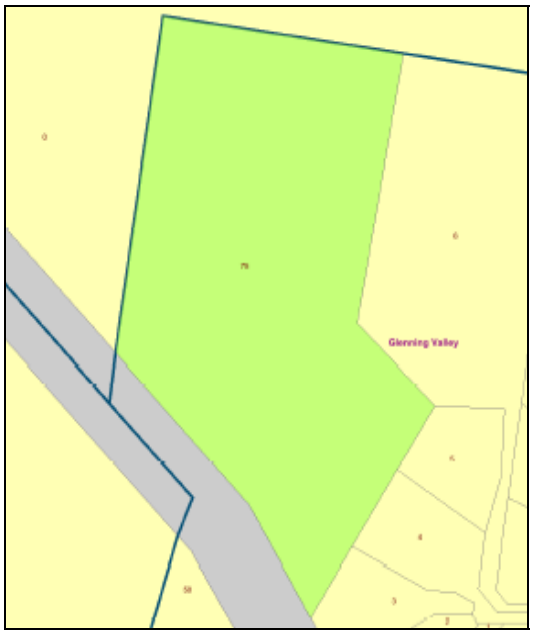
g) The existing and likely future amenity of the neighbourhood will not be adversely affected by the proposal.

h) As supported by the bushfire report (see *Section 4.0* and relevant *Appendices*) the existing development faces minimal risk from natural hazards such as bushfire and measures can be implemented to address existing and future impacts of traffic noise, resulting in a superior living environment for the existing dwellings.

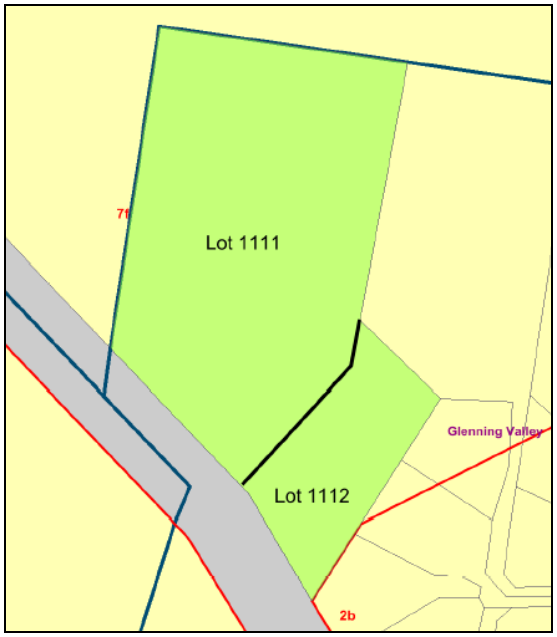
i) The underlying purpose of the 7(f) Environmental Protection zone as it applies to the subject land is not relevant to the proposal (as confirmed by the acoustic consultant's assessment and opinion) and as a consequence, compliance with the standard is unnecessary.

j) In so far as the subject land is concerned, the 7(f) Environmental Protection zoning is inappropriate, therefore the 40 hectare development standard applying to land containing this zone is unreasonable and unnecessary and that compliance with the standard in this case would be unreasonable and unnecessary.

Enclosure 2



Existing Lot 111

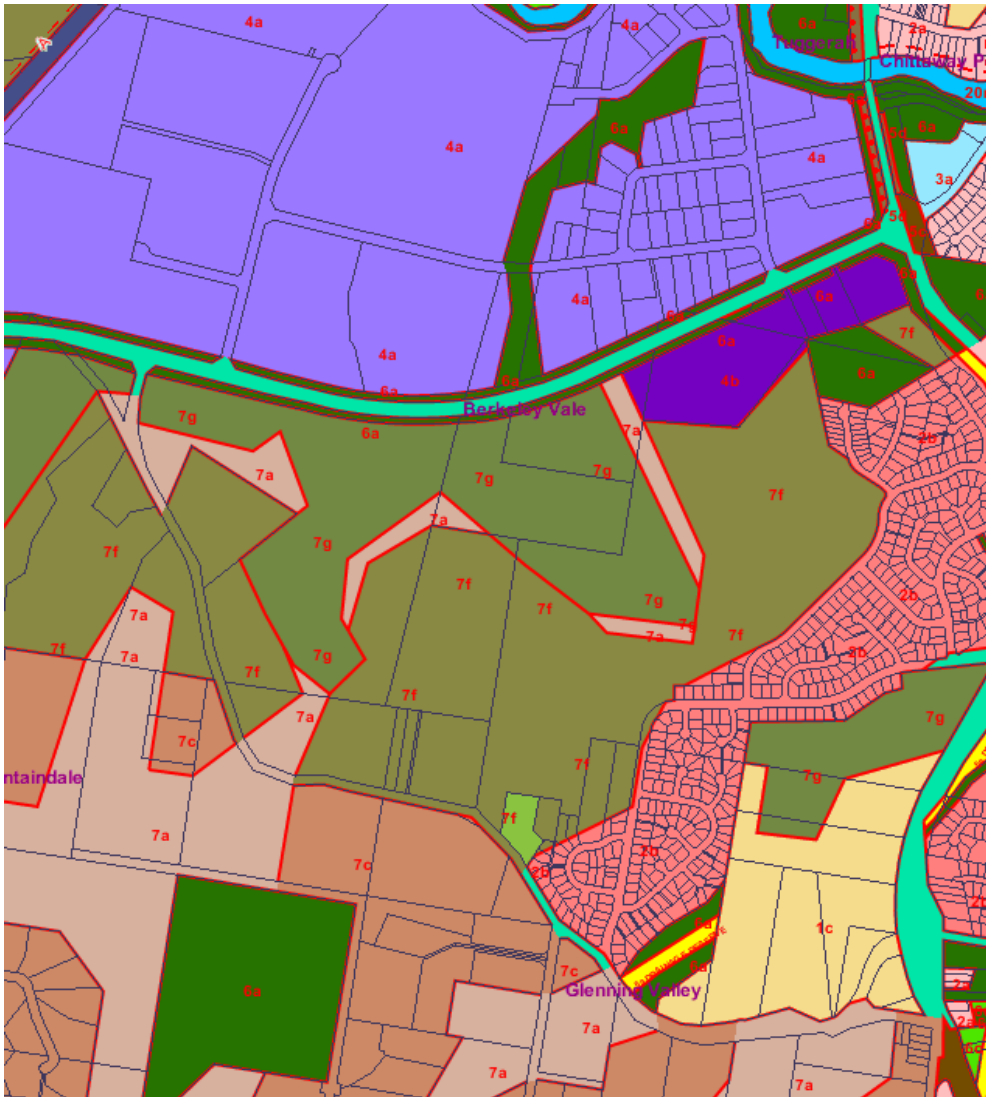


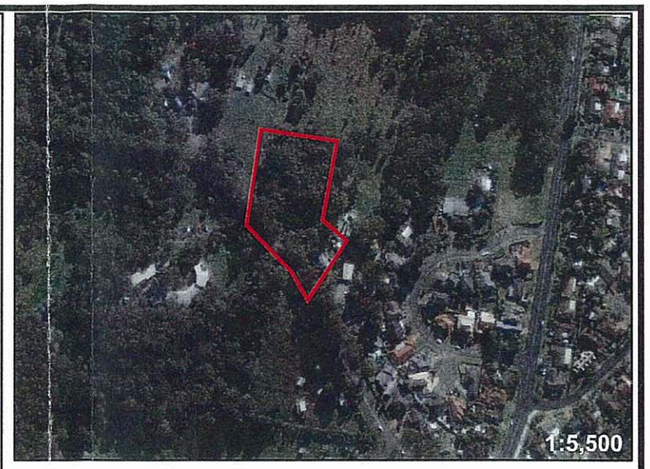
Proposed Lots 1111 and 1112

Enclosure 3 **Close-up view of subject land clearly depicting dual occupancy and outbuildings**

Enclosure 4

Zone boundary with coloured polygons. Subject site in lower centre of view (light green), industrial zone top of view (blue) with 7(f) zone in middle of view (mid green)





Legend

- Subject Ste
- Building
- Asset Protection Zone

Dual occ 291/93
- 8,591m²
- 40Lg
- 98 & 99.5% variation

N

ubject Site boundary subject to final survey

TRAVERS
environmental consultants

Bushfire & Environmental Consultants
38A The Avenue, Mt. Penang Parklands,
Central Coast Highway, Kariong NSW 2250
Ph (02) 4340 5331 Fax (02) 4340 2151
e-mail: bushfire@traversenvironmental.com.au

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Original plan produced in A3 colour

Drawing No.	7208	Date	
Drawn By	TM/KF	11/02/08	
Amendment		Date	
A			
B			
C			

Schedule 1 -
Bushfire Protection Measures

Berkeley Road, Glenning Valley

Lot - 111, DP - 777284