



To help improve the natural areas around Tuggerah Lake, works are underway on the foreshore at Killarney Vale as part of the Estuary Management Plan. Pictured is one of three sites under construction.

# Business Paper

ORDINARY COUNCIL MEETING

**28 March 2012**



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# MEETING NOTICE

The **ORDINARY COUNCIL MEETING**  
of **Wyong Shire Council**  
will be held in the **Council Chamber**,  
**Wyong Civic Centre, Hely Street, Wyong** on  
**WEDNESDAY 28 MARCH 2012** at **5.00 pm**,  
for the transaction of the business listed below:

## OPENING PRAYER

## ACKNOWLEDGEMENT OF COUNTRY

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**11 QUESTIONS ON NOTICE ASKED**

At the conclusion of the meeting and at the discretion of the Mayor, Council may meet with staff in an informal, non-decision making mode for a period of no more than 30 minutes.

Michael Whittaker  
**GENERAL MANAGER**

## 2.3 DA/80/2012 - 2 Lot Subdivision

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TRIM REFERENCE: DA/80/2012 - D02922904

MANAGER: Peter Fryar, Manager Development Assessment

AUTHOR: Peter Meloy; Development Planner

### SUMMARY

An application has been received for a Torrens title subdivision of an existing detached dual occupancy development at 1 Howelston Road, Gorokan. The application has been examined having regard to the matters for consideration detailed in section 79C of the Environmental Planning and Assessment Act (EP&A Act) and other statutory requirements with the issues requiring attention and consideration being addressed in the report. The application is recommended for approval.

The reason this application is reported to Council is a result of a directive, by the Department of Planning and Infrastructure (DoPI) to all NSW Councils, that any applications that rely on a numerical variation under State Environmental Planning Policy No 1 (SEPP1) greater than 10% be reported to full Council for determination.

<b>Applicant</b>	Rolls and Associates Surveyors
<b>Owner</b>	Mr R and Mrs C Compton
<b>Application No</b>	DA/80/2012
<b>Description of Land</b>	1 Howelston Road, Gorokan
<b>Proposed Development</b>	Two-lot subdivision of approved detached dual occupancy
<b>Site Area</b>	702.8m <sup>2</sup>
<b>Zoning</b>	2(a) Residential
<b>Existing Use</b>	Detached dual occupancy development

### RECOMMENDATION

- 1 ***That Council, having regard to the matters for consideration detailed in Section 79C of the Environmental Planning and Assessment Act and other relevant issues, grant consent subject to the conditions detailed in the schedule attached to the report.***
- 2 ***That Council vary Clause 42D of Wyong Local Environmental Plan 1991 to permit the development.***
- 3 ***That Council assume the concurrence of the Director General of the Department of Planning for the use of State Environmental Planning Policy No 1 to vary the development standard of Clause 42D of Wyong Local Environmental Plan 1991 to permit the proposed development.***

**PRECIS**

- The application is for the Torrens title subdivision of an existing detached dual occupancy development.
- The site is zoned 2(a) Residential under the provisions of Wyong Local Environmental Plan 1991 (WLEP1991).
- Should the development application for the existing dual occupancy development included the subdivision of the buildings, Clause 42D(b) of WLEP1991 would have permitted the subdivision without reference to a variation of the minimum lot size.
- As the application for subdivision is separate to the application for the dual occupancy development, the proposal requires assessment using the provisions of SEPP1 to vary Clause 42D of WLEP1991.
- As a result of a directive by the DoPI to all NSW Councils, any applications that rely on a SEPP1 variation greater than 10% are required to be reported to full Council for determination.

**INTRODUCTION**

**The Site**

The site, known as Lot 29 DP 24194, is located on the eastern side of Howelston Road, approximately 40 metres north of that road's intersection with Marks Road at Gorokan. The two dwellings are located in an established residential area consisting of mainly single detached dwelling-houses. A small number of dual occupancy developments currently exist in those parts of the local area that are zoned Residential 2(a).



*Figure 1: Looking east towards the two detached dual occupancy dwellings from Howelston Road, Gorokan.*

### THE PROPOSED DEVELOPMENT

The applicant proposes the Torrens title subdivision of the existing lot to create two separate lots. Each proposed lot will contain one of the two detached dual occupancy dwellings. The applicant will achieve this by running an irregular property boundary through the property so that each dwelling has its own single-car garage and private open space consistent with the original dual occupancy development consent. Vehicular access to the separate garage at the rear of the dwelling on the front lot (Lot 291) will be formalised by the creation of a right-of-carriageway over the driveway for Lot 292 (see Attachment 3).

The area of each lot is proposed to be:

- Lot 291: 295.0m<sup>2</sup>
- Lot 292: 414.4m<sup>2</sup>

The apparent disparity in lot sizes is owed to a significant area, (approximately 150m<sup>2</sup>), of Lot 292 being devoted to the battle-axe handle which provides vehicle access to the garage on each of the lots. The two existing lots are currently zoned 2(a) Residential and the proposed subdivision requires a SEPP1 objection to be supported by Council to vary the development standard in Clause 42D of WLEP1991. This development standard requires a minimum lot size of 450m<sup>2</sup> in the 2(a) Residential zone. The applicant has submitted a formal SEPP1 objection as part of the development application (see Attachment 2).

### SUMMARY

#### Variation to Minimum Lot Size

Should the two dual occupancy development applications included the subdivision of the existing lot upon which the detached dual occupancy development was to be erected, Clause 42D(b) of WLEP1991 would have allowed Council to consent to the subdivision, now proposed in this separate application, without the need to consider a variation to the minimum lot size.

However, because the application for subdivision is separate from the application for the dual occupancy development, the provisions of WLEP1991 are such that Council must now assess the proposed subdivision supported by an objection under SEPP1 as the proposed lots are required to comply with the minimum lot size requirement.

The applicant has submitted reasons in support of the variations including that the subdivision is consistent with the prior consent for the dual occupancy development, no environmental impact will result from approving the variation, no additional housing entitlement would be created and the numerical variations are irrelevant given that the dual occupancy development has been approved and constructed.

In considering the circumstances of the case it is considered that the SEPP1 objection is well founded and that strict compliance with the 450m<sup>2</sup> minimum lot size development standard would be unnecessary and unreasonable in this instance.

### VARIATIONS TO POLICIES

Clause	42D
Standard	450m <sup>2</sup> minimum lot size
LEP/DCP	WLEP1991
Departure basis	Lot 291: 34.44%
	Lot 292: 7.91%

### HISTORY

05.06.2004: Development consent (DA/495/2004) granted on Lot 29 DP 24194, 1 Howelston Road, Gorokan for erection of a second dwelling to create a detached dual occupancy development.

### PERMISSIBILITY

The subject site is zoned 2(a) Residential. Clause 13 of WLEP1991 permits subdivision with development consent. Under the provisions of Clause 42D of WLEP1991 subdivision within the Residential 2(a) zone must not create lots that have an area less than 450m<sup>2</sup> unless the subdivision consent:

- “(a) is for the subdivision of land on which a dual occupancy building or detached dual occupancy was erected with consent pursuant to a development application lodged with the Council prior to 5 November 1997, or*
- (b) in the case of land within Zone No 2 (a), is granted concurrently with a development consent for a dual occupancy building or a detached dual occupancy on the same land and the subdivision will be carried out in conjunction with the dual occupancy development.”*

The proposed subdivision will create two lots with areas less than 450m<sup>2</sup>. The dual occupancy development was granted development consent in 2004. The subdivision of the detached dual occupancy development was not proposed to be undertaken concurrently with the detached dual occupancy development and a SEPP 1 objection is now required to enable the subdivision to be approved.

### RELEVANT STATE/COUNCIL POLICIES AND PLANS

The Council has assessed the proposal against the relevant provisions of the following environmental planning instruments, plans and policies:

- Wyong Local Environmental Plan 1991 (WLEP1991)
- State Environmental Planning Policy No 1 – Development Standards (SEPP1)
- State Environmental Planning Policy No 71 – Coastal Protection Zone (SEPP71)
- Gorokan District Development Contributions Plan

### ECOLOGICALLY SUSTAINABLE PRINCIPLES

The proposal has been assessed having regard to ecologically sustainable development principles and is considered to be consistent with the principles.



The proposed dual occupancy subdivision does not result in the disturbance of any endangered flora or fauna habitats and is unlikely to affect fluvial environments.

### **Climate Change**

The potential impacts of climate change on the proposed dual occupancy subdivision have been considered as part of the assessment of the application. Climate change includes consideration of such matters as potential rise in sea level; potential for more intense and, or, frequent extreme weather conditions including storm events, bush fires, drought, flood and coastal erosion; as well as how the proposed development may cope, combat or withstand these potential impacts. In this particular case, there were no matters that warranted further consideration.

### **ASSESSMENT**

Having regard for the matters for consideration detailed in Section 79C of the Environmental Planning and Assessment Act 1979 and other statutory requirements, and Council's policies, the assessment has identified the following key issues, which are elaborated upon for Council's information. Any tables relating to plans or policies are provided as an attachment.

### **THE PROVISIONS OF RELEVANT INSTRUMENTS/PLANS/ POLICIES (s79C(1)(a)(i-iv)):**

#### **Wyong Local Environmental Plan 1991 (WLEP 1991)**

The subject land is zoned 2(a) Residential under the provisions of WLEP1991. The relevant objective of the 2(a) zone is:

- “(a) to provide land primarily for detached housing generally not exceeding a height of 2 storeys and with private gardens in an environment free from commercial and other incompatible activities and buildings,”*

The primary objective of the zone is to provide land for residential housing, mainly in the form of detached dwellings but also allowing for other dwelling types that are permissible in the zone such as dual occupancy developments.

The dual occupancy development in question satisfies the objective in that both dwellings are single storey in height and provide private gardens for each dwelling in a location free from commercial and other incompatible activities and buildings. It is considered that the subsequent Torrens title subdivision of the dual occupancy dwellings is also consistent with the objective in that the subdivision facilitates the completion of the physical development of the land for a purpose that is consistent with the zone's objective.

#### **State Planning Policy No 1 – Development Standards (SEPP1)**

The aims and objectives of SEPP1 are to provide flexibility in the application of planning controls operating by virtue of development standards, in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.

## 2.3 DA/80/2012 - 2 Lot Subdivision (contd)

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Clause 6 of SEPP1 requires the applicant to provide a written objection to the development standard indicating why compliance with the standard is unreasonable or unnecessary in the circumstances of the case and to specify the grounds of the objection.

The applicant has submitted a formal SEPP 1 objection requesting Council's exercise the powers available under the provisions of SEPP1 to vary the 450m<sup>2</sup> minimum lot size development standard. This would enable consent to be granted to the proposed subdivision of the dual occupancy dwellings in the 2(a) Residential zone. The SEPP1 objection provides the following grounds for the objection:

- *"The proposed subdivision will not prejudice the residential environment.*
- *The proposed subdivision will not result in any additional traffic generation.*
- *The percentage and numerical variations are irrelevant as construction of the two dwellings has satisfied all of Council's relevant controls for this type of development.*
- *No additional housing entitlement would be created by the subdivision.*
- *No additional development rights would be created by the subdivision.*
- *The proposed subdivision layout is based on Council's approved development for the dual occupancy contained in development application DA/495/2004.*
- *No environmental impact will result from the carrying out of the subdivision because it is purely a "paper" subdivision created to define the boundaries for the buildings which have been approved and erected on the land.*
- *Dual occupancy development is permissible within the 2(a) zone and this subsequent paper subdivision only formalises what has already been approved and constructed."*

For these reasons the applicant believes that strict compliance with the 450m<sup>2</sup> minimum lot size development standard is unreasonable and unnecessary.

In addition to the above, his Honour, Justice Lloyd, outlined five questions in *Winten Property Group Ltd v North Sydney Council* [2001] NSW LEC 24 that should be considered when preparing and considering a SEPP1 objection. Council, in exercising its function as a consent authority, must be satisfied of all five matters before it upholds a SEPP1 objection. Satisfaction of all five questions identified in the *Winten* case ensures that a SEPP1 objection is well founded and that strict compliance with a development standard is unreasonable or unnecessary.

The five questions and the requisite responses are as follows:

*1. Is the planning control in question a development standard?*

Clause 42D of the WLEP 1991 is a provision within an environmental planning instrument which regulates the subdivision of land by imposing a minimum area lot size. It is therefore a development standard pursuant to Section 4 of the EP&A Act 1979.

## 2.3 DA/80/2012 - 2 Lot Subdivision (contd)

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### 2. What is the underlying object or purpose of the standard?

The purpose of Clause 42D is to provide residential housing and maintain the residential character of the 2(a) Residential zone by limiting the minimum size of new lots created through subdivision of existing parcels.

Single detached dwellings and dual occupancy developments are then permissible on lots created in compliance with the 450m<sup>2</sup> minimum lot size. Clause 45D further provides that dual occupancy subdivision applications lodged prior to 5<sup>th</sup> November 1997 for existing dual occupancy buildings or subdivisions applied for concurrently with the dual occupancy development are also eligible for approval within the 2(a) irrespective of the 450m<sup>2</sup> minimum lot size.

### 3. Is compliance with the development standard consistent with the aims of the Policy, and in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5 (a) (i) and (ii) of the Act?

Clause 3 of SEPP1 states that non-compliance with a development standard must not hinder the attainment of the objects specified in Section 5 (a)(i) and (ii) of the Act. Section 5 of the EP&A Act 1979 (EP&AA1979) states:

*“The objectives of this Act are;*

*(a) to encourage*

- i. the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, town and villages for the purposes of promoting the social and economic welfare of the community and a better environment;*
- ii. the promotion and co-ordination of the orderly and economic use and development of the land.”*

The proposed non-compliance with Clause 42D will not hinder the attainment of the objectives of the Act. To enforce strict compliance with Clause 42D in this instance would prevent the orderly and economic management and use of the land and the dwellings. The proposed non-compliance will strengthen the locality's social and economic welfare by facilitating residential development within the locality and by facilitating housing supply and housing diversity.

The non-compliance with the numerical requirement of a minimum lot size of 450m<sup>2</sup> will not result in development that is inconsistent with the aims and objectives of the WLEP1991. The subdivision of the land will maintain the orderly development of the land in the locality and complement the surrounding residential area. There are currently a significant number of dual occupancy developments approved for subdivision within the Wyong Shire with several located in the same locality as the subject property.

## 2.3 DA/80/2012 - 2 Lot Subdivision (contd)

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4. *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

The SEPP1 objection has demonstrated that the non-compliance in this instance does not jeopardise the amenity, streetscape character or orderly development within the local area. The site already has a detached dual occupancy development approved and erected on the site. Strict compliance with Clause 42D is not considered appropriate in this instance because the proposed subdivision:

- Will not prejudice the current residential environment;
- Will not generate any additional housing entitlement;
- Will not generate additional traffic having regard to the existing dual occupancy consents;
- Will not have any impact on amenity or place additional demands on services;
- Is the result of existing approved and constructed dual occupancy development; and
- Will facilitate the orderly and economic use of the land.

To not permit the subdivision of the two dual occupancy dwellings in the circumstances merely because the proposed lots do not satisfy a numerical requirement would be unreasonable given that the two dual occupancy dwellings already exist on site. If the applicant had sought approval for subdivision of the dual occupancy development at the time consent was sought for the dual occupancy development, consent could have been granted without reference to the 450m<sup>2</sup> minimum lot size.

5. *Is the objection well founded?*

The objection is well founded because the proposed subdivision will assist the orderly and economic approved use of the land.

The following five criteria have been considered, as determined by Chief Judge Preston in *Wehbe v Pittwater Council* (2007) NSWLEC 827 wherein the Chief Judge provided clarification of the criteria to be used by Councils when assessing a SEPP No. 1 Objection:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the Development standard are achieved notwithstanding non-compliance with the standard.*
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *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. *Establish that the zoning of the particular land was unreasonable or inappropriate so that the 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".*

## 2.3 DA/80/2012 - 2 Lot Subdivision (contd)

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In regard to the above criteria, the following responses are provided:

- The objective of the development standard is achieved as it will result in residential development consistent with the character and existing built form of the surrounding area.
- The underlying objective is not relevant to the development as other provisions within WLEP1991 permit the subdivision of land into lots of 450m<sup>2</sup> and then permit this type of proposed subdivision provided the application is submitted concurrently with the dual occupancy development application.
- The underlying objective would be thwarted, that is, the subdivision of the dual occupancy development could not occur if the standard was maintained in this instance.
- Council has previously granted consent to several existing dual occupancy developments in the Residential 2(a) zone where approval for subdivision was not currently sought with approval for the dual occupancy.

### **Reason for proposed variation:**

It is considered that the objectives of the WLEP1991 are being met by the proposed subdivision. The creation of the lots will maintain the residential amenity of the local area by sustaining two dual occupancy dwellings that satisfy Council's development criteria. Although smaller than the 450m<sup>2</sup> lot size required by Clause 42D, the proposed lots are large enough to provide adequate landscaping, private open space, on-site vehicle garaging and manoeuvring. In addition, the dwellings do not exceed the maximum floor space ratio or the maximum site coverage required on the individual lots to be created.

There are a growing number of residents who wish to have smaller properties to reduce maintenance and economic obligations. The Torrens title subdivision of the dual occupancy development will facilitate the provision of a wider range of housing options for the community.

Non-compliance with Clause 42D of WLEP1991 does not raise any matters of significance. The SEPP1 objection is considered to be well founded and, in this instance, strict compliance with the 450m<sup>2</sup> minimum lot size development standard contained in Clause 42D of WLEP1991 is unnecessary and unreasonable.

### **State Environmental Planning Policy No 71 – Coastal Protection (SEPP71)**

The site is within the coastal protection area covered by SEPP71 and as such, requires Council to consider the proposal against the several matters listed in clause 8 of SEPP71. Given the nature of this application it is considered that when assessed against these matters the proposed development is consistent with the relevant objectives of SEPP71. In particular, the development will not reduce public access to the foreshore and the visual impact of the existing dual occupancy dwellings will be unchanged by the proposed subdivision.

In addition, clause 15, "Effluent Disposal" and clause 16, "Stormwater" in SEPP71 prevent Council from consenting to any development that will dispose of untreated effluent or stormwater into Tuggerah Lake. The proposed development is essentially a paper subdivision of the existing approved physical development of the land and no untreated effluent or stormwater is proposed to be discharged into the lake as a result of this proposed subdivision.

In addition, the site is not within a "sensitive coastal location" as defined by SEPP71 therefore the provisions of clause 18 relating to the adoption of a master plan by the Minister do not apply.

### **Gorokan District Development Contributions**

The site is located within Council's adopted Gorokan District Development Contributions Plan. When Council granted development consent in 2004 for the dual occupancy development it imposed Section 94 contributions for the additional dwelling in accordance with this contributions plan. Council's records show that the appropriate contribution has been paid for the additional dwelling.

The current subdivision proposal does not create any additional housing entitlement and does not create any increased demand on services and, as a consequence, no additional contributions are applicable to the proposed subdivision.

### **THE LIKELY IMPACTS OF THE DEVELOPMENT (s79C(1)(b)):**

#### ***The relationship to the regional and local context and setting***

The relationship of the two existing dual occupancy dwellings will be unchanged by this proposed subdivision.

#### ***The access, transport and traffic management measures***

The proposed subdivision includes the creation of a right-of-carriageway over Lot 292 in favour of Lot 291. This right-of-carriageway will ensure that a legal and suitable vehicular access and manoeuvring area are provided for the owners and occupants of the dwelling on Lot 291 once the land is subdivided.

#### ***The impact on the public domain (recreation, public open space, pedestrian links)***

There will be no additional impact on the public domain caused by this proposed subdivision of the two existing dual occupancy dwellings.

#### ***The impact on utilities supply.***

There will be no increased demand on utilities supply caused by this proposed subdivision of the two existing dual occupancy dwellings.

#### ***The effect on heritage significance.***

The site of the two existing dual occupancy dwellings is not identified as an item of environmental heritage.

***Any effect on other land resources.***

The proposed dual occupancy subdivision will have no effect on other land resources.

***Any impact on the conservation of water.***

The proposed dual occupancy subdivision will have no impact on the conservation of water.

***Any effect on the conservation of soils or acid sulphate soils.***

The proposed dual occupancy subdivision will have no impact on the conservation of soils or acid sulphate soils.

***Any effect on quality of air and microclimate conditions.***

The proposed dual occupancy subdivision will have no impact on air quality and microclimate conditions.

***Any effect on the flora and fauna.***

The proposed dual occupancy subdivision will have no impact on flora and fauna.

***The provision of waste facilities.***

The waste collection arrangements approved in the original dual occupancy development consent will be unchanged by the proposed subdivision of the two dual occupancy dwellings.

***Whether the development will be energy efficient.***

The energy efficiency of each dwelling will be unaffected by the proposed subdivision.

***Whether the development will cause noise and vibration.***

The proposed dual occupancy subdivision will not be a source of noise or vibration.

***Any risks from natural hazards (flooding, tidal inundation, bushfire, subsidence, slip etc).***

The site is not identified as being subject to any natural hazard. However, the area is within a mine subsidence area and the proposed subdivision has been reviewed by the Mine Subsidence Board (MSB) which has approved the proposed subdivision.

***Any risks from technological hazards.***

No risk from any technological hazard has been identified in the assessment of the proposed dual occupancy subdivision.

***Whether the development provides safety, security and crime prevention.***

Safety, security and crime prevention will be unaffected by the proposed dual occupancy subdivision.

***Any social impact in the locality.***

The proposed dual occupancy subdivision will facilitate the orderly and economic management of the land and the existing dual occupancy dwellings. This is likely to have a small but positive social impact in the locality by facilitating the provision of a range of modern housing types within the area.

***Any economic impact in the locality.***

The proposed dual occupancy subdivision will likely have a positive economic impact in the locality by facilitating the separate ownership of each dwelling house which currently forms one land title.

***Any impact of site design and internal design.***

The proposed dual occupancy subdivision will have no impact on the site design or internal design apart from formalising the vehicular access and manoeuvring areas on the site as well as the servicing and drainage of each lot.

***Any impacts of construction activities (construction site management, protection measures).***

The proposed dual occupancy subdivision will involve no construction activities.

***Any cumulative impacts.***

The proposed dual occupancy subdivision will have no cumulative impacts.

**THE SUITABILITY OF THE SITE FOR THE DEVELOPMENT (s79C(1)(c)):**

***Whether the proposal fits in the locality.***

The application is for the “paper” Torrens title subdivision of an existing dual occupancy development which has previously been assessed as fitting within the locality. The proposed subdivision will have no impact on that original assessment.

***Whether the site attributes are conducive to development.***

The application is for the “paper” Torrens title subdivision of an existing dual occupancy development. The issue of whether the site attributes were conducive to the original dual occupancy proposal was assessed at the time when the original consent was granted for the development. The proposed subdivision will have no impact on that original assessment.

**ANY SUBMISSION MADE IN ACCORDANCE WITH THIS ACT OR REGULATIONS (s79C(1)(d)):**

***Any submission from the public.***

In accordance with the provisions of Clause 2.4 of Wyong DCP Chapter 70 – Notification of Development, the application was not notified as it is a subdivision arising from approved development.



***Any submission from public authorities.***

The site of the two dual occupancy buildings falls within a declared mine subsidence district and therefore requires the approval of the MSB as “integrated development” as defined in the EP & A Act 1979. In recognition of this the applicant sought and obtained approval from the MSB. The MSB’s approval is subject to two requirements, these being:

- (a) the number, size and boundaries of lots being substantially the same as shown on the approved plan; and
- (b) notification being made to the Board of any changes to lot numbering and of the registered DP number.

**THE PUBLIC INTEREST (s79C(1)(e)):**

***Any Federal, State and Local Government interests and community interests.***

The proposal for the subdivision of the two existing dual occupancy dwellings is considered to be of a positive community interest by facilitating the completion of modern housing that will add to the range of housing options for the local community.

**OTHER MATTERS FOR CONSIDERATION**

There are no further matters for consideration.

***Deeds of agreement etc.***

There are no deeds of agreement relevant to this proposed dual occupancy subdivision.

***Councillor Representations***

None.

***Political Donations or Gifts***

Any political donations or gifts disclosed?      No.

**CONCLUSION**

The proposed development is for the Torrens title subdivision of two existing dual occupancy dwellings. The development requires a SEPP1 objection to permit a variation to the minimum lot size development standard contained in Clause 42D of WLEP1991. The objection is supported given that compliance with the development standard is considered unreasonable and unnecessary in this instance. The application is therefore recommended for consent subject to suitable conditions of consent.

**ATTACHMENTS**

- |   |  |           |           |
|---|--|-----------|-----------|
| 1 | Draft Conditions of Consent              |           | D02925644 |
| 2 | Objection to Development Standard SEPP 1 |           | D02925725 |
| 3 | Plan of Proposed Subdivision             | Enclosure | D02925745 |

**Date:** 22 February 2012  
**Responsible Officer:** Peter Meloy  
**Location:** 1 Howelston Road, GOROKAN NSW 2263  
Lot 2 DP 534189  
**Owner:** Mr R D Compton and Mrs C M Compton  
**Applicant:** Rolls & Assoc Surveyors  
**Date Of Application:** 8 February 2012  
**Application No:** DA/80/2012  
**Proposed Development:** Two lot subdivision  
**Land Area:** 702.8m<sup>2</sup>

## PROPOSED CONDITIONS

### Approved Plans

- 1 The development is to be undertaken in accordance with the approved plan of subdivision, reference number 9071C prepared by Rolls and Associates Surveyors except as modified by any conditions of this consent.

### Prior to Release of Construction Certificate:

*The following conditions must be satisfied prior to the release of the Construction Certificate. Conditions may require the submission of additional information with the Construction Certificate Application. Applicants should also familiarise themselves with conditions in subsequent sections and provide plans in accordance with any design requirements contained therein.*

No conditions

### Prior to Commencement of Works:

*The following conditions must be satisfied prior to the commencement of site works, including any works relating to demolition, excavation or vegetation removal.*

No conditions

### Prior to Release of Subdivision Certificate:

*The following conditions must be satisfied prior to the release of a Subdivision Certificate.*

- 2 An application for a Subdivision Certificate must be submitted to and approved by the Council/Principal Certifying Authority prior to endorsement of the plan of subdivision.

- 3 The obtaining of a Section 307 Certificate of Compliance under the Water Management Act 2000 for water and sewer requirements for the development from Wyong Shire Council as the Water Supply Authority in accordance with Section 109J(1)(e) of the Environmental Planning and Assessment Act 1979 prior to issue of the Subdivision Certificate.
- 4 The certification by a Registered Surveyor, prior to issue of a Subdivision Certificate that all occupancies, domestic services, drainage lines and accesses are wholly contained within the respective lots and easements.
- 5 The plan of subdivision and Section 88B instrument shall establish the following easements and right-of-carriageway as shown on the approved plan of subdivision prior to the issue of the Subdivision Certificate:
  - Easements for overhang and maintenance over those parts of any building including walls, eaves, roof and guttering encroaching onto another lot.
  - Rights-of-carriageway of variable width in favour of Lot 291 over Lot 292.
  - Easements for services of variable width.
  - Easements for drainage of variable width.

### **Ongoing Operation:**

***The following conditions must be satisfied during use / occupation of the development.***

No conditions

## 1. SEPP 1 OBECTION

### 1.1 PROVISION OF CLAUSE 42 (D), WSC LEP 1991

The statutory provisions of Clause 42 contain a subdivision development standard (i.e. 450m<sup>2</sup> minimum lot size) that impedes the current proposal. We seek Council's support to exercise the powers available under SEPP 1 with the assumed concurrence of the Director of the Department of Planning to vary the standard to enable consent to be granted to the subject application for a two lot Subdivision in land zoned 2(a).

### 1.2 THE INTENT OF THE DEVELOPMENT STANDARD

The development standard was intended to support the objective of the zone. For the subject property, the 2 (a) Residential Zone was selected:

- (a) To provide land primarily for detached housing generally not exceeding a height of 2 storeys and with private gardens in an environment free from commercial and other incompatible activities and buildings, and
- (b) To provide for other uses, but only where they:
  - (i) Are compatible with the residential environment and afford services to residents at a local level, and
  - (ii) Are unlikely to adversely affect residential amenity or place demands on services beyond the level reasonably required for detached housing, and
- (c) To provide for home-based employment where such will not:
  - (i) Involve exposure to view from any public place of any unsightly matter, or any raw material, equipment, machinery, product or stored finished goods, or
  - (ii) Have a material adverse impact on residents.

### 1.3 THE PRINCIPLE OF SEPP 1

State Planning Policy No. 1 is a document of State-Wide significance, which gives Directions or devolves control on a State-Wide level. SEPP 1 came into force in October 1980 with the express intent to provide flexibility in the application of planning controls in Local Environmental Plans (LEP's) (development standards) where strict compliance with the standard is unreasonable or unnecessary. The most recognised aspect of SEPP 1 is the greater flexibility in application of LEP controls, which in turn reduce the need for councils to prepare minor draft LEP's to vary development standards.

The thrust behind SEPP 1 is to avoid the creation of unnecessary draft LEP's specifically designed to allow for variation of development standards, where these standards are considered unreasonable or unnecessary in the circumstances of the case. SEPP 1 is recognised as the appropriate mechanism for such variations in the approval process.

In this instance, once the objection under SEPP 1 is supported and development consent granted; the proposal may proceed without the necessary cumbersome exhibition and statutory requirements of gazette under the Local Environmental Plan process.

#### 1.4 APPLICATION OF SEPP 1 OBJECTIONS

Clause 3 of the Policy clearly identifies the aim as being to provide flexibility in the application of planning controls.

SEPP 1 may be invoked where it can be demonstrated that strict compliance with the relevant standards is unreasonable or unnecessary and would tend to hinder the objects specified in Section 5 (a) (i) and (ii) of the Environmental Planning and Assessment Act 1979 (EP&A).

The objects specified in Section 5 of the Act and the relevant objectives in this instance are to encourage:

"QUOTE ....."

- (i) A 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
- (vi) The protection of the environment etc ; and
- (vii) Ecologically sustainable development.

".....END OF QUOTE"

With respect to these objectives, my Application for a two lot Subdivision has demonstrated that:

- ❖ The proposed Subdivision Layout is based on Council's approved development for the Dual Occupancy defined in Development Application No. 495/2004.
- ❖ No environmental impact will result from the Subdivision, as it is purely a paper entity created to define boundaries for the physical buildings, which have already been approved and constructed on the land.

Furthermore:-

- ❖ The nature of the zoning of 2 (a) land is such that Dual Occupancy Development is permitted. Therefore as the creation of a two lot Subdivision resulting from the Dual Occupancy Development only formalises on paper what is already approved for construction, strict compliance with the Development Standard is unreasonable.

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".

The Land and Environment Court have endorsed the approach that each case should be determined on its merits. The individual merits of the current proposal have been outlined in this submission.

## 1.5 FEATURES SURROUNDING THE USE OF SEPP 1

Specific features surrounding the use of SEPP 1 that are relevant to the subject objection can best be Summarised by the following points:

- ❖ (a) It must be proved that the requirement is a Development Standard.
  - (b) The objection lodged by the applicant demonstrates that compliance with the standard in the circumstances is unreasonable and unnecessary.
  - (c) The objection is well founded.
  - (d) That the granting of consent is consistent with the aims of SEPP 1. Namely to provide flexibility in the application of planning controls operating by virtue of Development Standards in circumstances where strict compliance with those standards would in any particular case be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5 of the Act and summarised above.
- ❖ With respect to the definition of the term "Development Standard" this can be found under Section 4 of the Act and is set out below in so far as it relates to Clauses 42 of the Wyong LEP 1991.
- "QUOTE ....."
- "Development Standards" means provision of an environmental planning instrument in relation to the carrying out of 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 intensity or density of the use of any land, building or work,"
- ".....END OF QUOTE"
- ❖ The provisions may only be exercised where the objection would not undermine the fundamental planning controls in an Environmental Planning Instrument so that it was tantamount to an amendment to that instrument.
  - ❖ It is assumed for the purpose of the objection that the standard in question is appropriate and proper to be applied in general in a Council's area.
  - ❖ What is required of the authorities whether it be Council or the court in its consideration is whether compliance with a Development Standard is unreasonable or unnecessary in the circumstances of the case. SEPP 1 does not mention "minor" or "major" variations.

## 1.6 OBJECTION TO DEVELOPMENT STANDARDS UNDER THE PROVISIONS OF SEPP No.1 OF WSC LEP 1991 (AS AMENDED)

### (1) NAME AND ADDRESS OF OBJECTORS

### (2) PROPERTY DESCRIPTION

**Lot 29 DP 24194**  
**1 Howelston Road**  
**Gorokan NSW 2263**  
**Residential**

### (3) PROPOSED DEVELOPMENT AND/OR USE

***Two Lot Subdivision.***

### (4) DEVELOPMENT STANDARD TO WHICH THE OBJECTION RELATES

The Development Standard to which the objection relates is *the restriction on a minimum allotment size of 450m<sup>2</sup> created from the subdivision of land in the 2(a) Residential Zone*

### (5) ENVIRONMENTAL PLANNING INSTRUMENT WHICH SPECIFIES THE DEVELOPMENT STANDARD

Clause 42 (D) (b) of Wyong Shire Council LEP 1991 (as amended). Which defines the minimum subdivision requirement of the 2(a) Residential Zone to be 450m<sup>2</sup>.

### (6) PROPOSED VARIATION TO DEVELOPMENT STANDARDS

The Development Standard for which variation is sought relates to the 450m<sup>2</sup> minimum subdivision allotment area within the 2(a) Zone.

*The proposed subdivision relates to the creation of allotments containing 295.0 m<sup>2</sup> and 414.4 m<sup>2</sup> from an existing parcel containing 709.4 m<sup>2</sup>. These are a variation to the standard of Clause 42 (D) (b) which stipulates a 450m<sup>2</sup> minimum area.*

### (7) GROUNDS OF OBJECTION TO DEVELOPMENT STANDARD

- ❖ The underlying intention of the standard is reflected in the objectives for the zone, which is mainly to provide residential housing. Strict compliance with Clause 42 (D) is not considered appropriate in this instance because the subdivision proposal:-

- (a) Will not prejudice the residential environment;
- (b) Will not generate additional traffic having regard to existing dwelling entitlements approved with the Dual Occupancy Development;
- (c) Is a result of an existing approved and constructed housing development for Dual Occupancy;



(d) The percentage variation to the 450m<sup>2</sup> minimum development standard is small and in fact not relevant, as the construction of the two dwellings has satisfied all of Council's Development Standards for Dual Occupancy Development.

❖ The proposal compliments existing property development and simply formalises future Title ownership.

(a) No additional development rights are being created by the Subdivision.

(b) No additional housing entitlements are created by the Subdivision.

## 2. CONCLUSION

It is our professional opinion that the proposal to undertake a two lot Subdivision of the existing parcel as illustrated in my Application and described within this report, is consistent with the underlying objectives of the Wyong Shire LEP for the 2(a) Residential Zone. Particularly, having regard to the approved buildings that exist on the current parcel.

The proposal will not compromise the objectives of the zone or have a significant impact on the environment of the locality, particularly when one considers.

- ❖ The location and size of the existing parcels;
- ❖ The design and construction of the proposed new allotments in accordance with approved D.A. plans.
- ❖ The surrounding development and existing physical and environmental features;
- ❖ The ability of each allotment to sustain development including ability to dispose of waste and provide services and the overall negligible environmental impact of the proposal.

The Development Standard set out in Clause 42 (D) (b) of the Wyong Shire Council LEP 1991, imposes a planning standard that serves to prohibit the proposed Subdivision. This situation is a recognised anomaly within the LEP. However the proposal complies with the criteria for SEPP 1 objections, stipulated by the Director of the Department of Planning for variation to the Development Standard when considering Subdivisions in that:

- ❖ The Subdivision simply defines boundaries relative to approved and constructed dual occupancy buildings.
- ❖ The 450m<sup>2</sup> minimum development standard is not relevant, as Council has approved construction of the Dual Occupancy Development and the resulting individual open space areas and associated access requirements.
- ❖ The existing residential amenity is not compromised.

In this instance we contend that strict compliance with the Development Standard is unnecessary and unreasonable and would tend to hinder the attainment of the objects of the Act.

It is therefore requested that Council support the application and invoke the powers available under SEPP 1 by assuming the concurrence of the Director of the Department of Planning and grant consent to the application.

Yours Faithfully,



M.A. Rolls

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