

BOURKE SECURITIES PTY LTD AND DUBBO CITY COUNCIL

"DAISY HILL" DEVELOPMENT PROPOSAL

MEMORANDUM OF ADVICE

1. Bourke Securities Pty Limited ("Bourke") wishes to redevelop seven existing lots in an area known as Daisy Hill, but referred to in Council planning documents as Eulomogo Road. It lies about 10kms to the east of the Dubbo CBD and comprises about 430ha. As will appear, the land has already been rezoned for urban development and is capable of yielding about 70 lots if developed in accordance with the minimum lot area permissible in the respective zones. Bourke's proposal is to increase that yield to about 290 lots, an increase of 220 lots. Its proposal is broadly consistent with the existing zoning of the land, but will require some adjustment to the lot area subscript, or else a shift in zoning of three allotments comprising about 112ha from the R5 to R2 Zone.
2. Whether developed in its current or proposed zonings, the character of the development will remain the same: what is commonly called rural residential. The size of rural residential allotments depends in the first instance upon land capability which will fix the minimum area. Whether particular lots are developed to that area will in turn depend upon market demand, topography and environmental constraints. However, whether the area should be developed at all, and the timing of that development, is dependent on strategic planning considerations.
3. An impasse has developed between Bourke and Council's planners and its consultant, Hill PDA. Put shortly, Bourke wishes to develop the land for rural residential purposes, presently permissible under the LEP, but at higher densities than allowed. The proposal is opposed because it is said to be

contrary to Council's strategic planning decisions. In other words, it has been suggested that Bourke's development proposals undermine Council's planning strategy in a fundamental respect by contradicting the objective of directing growth to the west. Three further reasons have been advanced by Hill PDA against the proposal:

- a. there is no proven demand for rural residential lots additional to those which have already been released;
- b. Council infrastructure and services will be inefficiently allocated as a result of the proposal; and
- c. the use of adjoining land for primary production would be hindered.

There is no evidence at all to support reasons b. and c. I will deal with reason a. after discussing the principal objection. The land lies within the Troy Creek catchment, where salinity is an important environmental constraint which must be resolved before any land is developed for residential purposes. That is a constraint which applies to the development of the land whether in its current or proposed zoning.

4. Without seeking to minimise the significance of the other issues raised in opposition to the development proposal, I think that the principal concern is that it would undermine Council's planning strategy. Let me say immediately that I fundamentally disagree with this conclusion.
5. Council's strategy will not be affected at all by the location of rural fringe development, and it is clear from the face of the strategy that the location of that development depends upon land capability rather than in promoting the objective of rebalancing urban development in Dubbo towards the west. In the rural fringe areas, the critical matters are salinity and maintaining the rural buffer. So long as the development proposal meets those goals, it complies with the strategy. In fact, the strategy encourages rural fringe development in the eastern fringe because it provides another level of housing choice, allowing internal migration by existing residents and,

paradoxically, enabling environmental repair of areas which have been denuded of vegetation at what is now realised to be significant environmental cost. Well planned rural residential development can advance public goals at private cost, so long as it does not require diversion of Council resources for the construction of infrastructure and services. As I understand it, the Daisy Hill site is ideally located to conserve Council resources, but I must defer to those with specialised knowledge of these matters.

6. First, it is necessary to describe the subject land, its zoning history and the development proposal. I have done so in Table 1 below.

Table 1 – Zoning History and Proposals

Lot	Area	Former Zoning	Current Zoning	Proposed Zoning
316 DP754308} 317 DP754308}	124.4ha	2(e) Residential Country	R5 Large Lot Residential (8ha)	R5 Large Lot ¹ Residential (6ha)
64 DP754287	129.5ha	2(e) Residential Country	R5 Large Lot Residential (8ha)	R5 Large Lot ² Residential (1.5ha)
65 DP754287	65ha(e)	2(e) Residential Country	R5 Large Lot Residential (8ha)	R5 Large Lot ³ Residential (1.5ha)
661 DP565756	55ha(e)	2(e) Residential Country	R5 Large Lot Residential (8ha)	R2 Low Density ⁴ Residential (6,000m ²)
662 DP565756	10.11ha	2(e) Residential Country	R5 Large Lot Residential (8ha)	R2 Low Density ⁵ Residential (6,000m ²)
200 DP825059	47.23ha	2(d) Residential Cluster	R5 Large Lot Residential (1.5ha)	R2 Low Density ⁶ Residential (6,000m ²)
	430.64ha			

¹ For Lots 316 and 317, increases lot yield by 5 (from 15 to 20); no impact on strategy.

² The area of Lots 64 and 65 is about 195ha. Increases net lot yield by about 95 (from 23 to 118).

³ See FN 2 above.

⁴ The area of Lots 661 and 662 is about 66ha. Increases net lot yield by about 83 (from 8 to 91).

⁵ See FN 4 above.

⁶ For Lot 200, yield is increased on a net basis by 40 (28 to 68); no impact on strategy.

7. Council adopted its urban strategy in 2006, as a result of which the Dubbo LEP 1998 – Urban Areas (“the 1998 LEP”) was made. Despite its title, the LEP created rural zonings, and Zone 1(e) - Urban Expansion in which land of strategic value for future urban development was “parked” pending its release in accordance with the urban strategy (see cl.26(2)(a), 1998 LEP). All but one of the lots of the subject land was Zoned 2(e) – Residential Country, which was characterised by “moderately sized hobby farm allotments of 4-10ha in an area on the outskirts of the urban area”, and whose objectives provided “land and opportunities for a lifestyle with limited services and rural amenity on allotments which are of a size which enable hobby farming activities” (cl.41(1), (2)(a)). One of the properties within the subject land, Lot 64, had a minimum area of 4ha per lot and an average area of 6ha for the entire subdivision, but otherwise the minimum area for subdivision of the land was 8ha: cl.42. Lot 200, however, was Zoned 2(d) – Residential Cluster which was characterised by allotments with areas of between 1.5 and 2ha on the outskirts of the urban area, whose objectives were to provide “land and opportunities for residential development, with limited city services, in a rural setting on allotments of a size greater than could be provided in an urban environment and which enables semi-rural activities to be undertaken”: cl.39(1), (2)(a).
8. As the 1998 LEP was made as a consequence of the urban strategy, and as the subject land was deliberately zoned for residential development, with lot areas varying between 1.5 and 8ha, and not placed in the holding zone for future land release, or zoned rural, it is difficult to credit an argument that development of the land for lifestyles appropriate to the urban/rural fringe was disapproved by the strategy. On the contrary, this land was made available in 1998 for immediate development, and the seven lots were capable of yielding 74 lots (including seven existing lots) after subdivision for rural residential living. That was an express outcome of the strategy. As will appear, smaller lot sizes were dependent, not upon some grand over-arching policy of shifting the pivot point of the City to the west, but upon more practical concerns about the impact on salinity of smaller lot sizes. It is

nonsense to suggest that subdivision of this land would not have been approved if an application had been made after the 1998 rezoning. Assuming a Council refusal, the Land and Environment Court would have approved a subdivision proposal which respected the environmental constraints of the land, and would have rejected an argument that the subdivision was premature or contrary to the urban strategy. The Court would have taken the view that the subdivision was the outcome of that strategy and that strategic planning issues had been resolved when the 1998 LEP was made, favouring the residential development of the subject land for small lot rural residential living. Had the Minister wished to defer development, it should have been placed in a rural zone. If the release of 70 lots was in compliance with strategic policy in 1998 (and development rights were largely preserved in 2011), why would a higher yield contradict it? Where is the tipping point, where the yield would frustrate and deny development opportunities for residential subdivision in the west, or for that matter, anywhere in Dubbo?

9. When the 1998 LEP was replaced in 2011, the subject land was rezoned R5 – Large Lot Residential. All but Lot 200 had a minimum lot area of 8ha. The minimum area for Lot 200 was 1.5ha. The R5 Zone is a residential zone whose objectives include providing “residential housing in a rural setting” and ensuring “that large residential lots do not hinder the proper and orderly development of urban areas in the future”. It is not a primary production zone and the subject land is not identified as urban release area on the map, and so the land may be developed for its existing yield of 74 lots without having to contribute to or provide designated State public infrastructure or to await a DCP (see cl.6.1, 6.3, 2011 LEP).
10. In effect, the land has already been released for residential development and should not be regarded as rural land. However, it is not part of the urban environment of Dubbo: it sits on the fringe between the urban and rural areas of the City, but is impressed with the character, by its long-term zoning, of rural residential land.

11. Table 2 compares the lot yield after subdivision under existing zonings with the proposed zoning.

Table 2 - Comparison between Existing and Proposed Zoning⁷

Lots	Existing Yield	Proposed Yield	Increase	Possible Impact on Strategy Yield
316} 317}	15	20	5	No
64} 65}	23	118	95	Yes
661} 662}	8	91	83	Yes
200	28	68	40	No ⁸
Totals	74	297	223	

12. In the last column of the Table, I describe the possible impact of the increased yield under the proposed zoning on Council's urban strategy yields. The strategy assumed completion of 250 dwellings per year (UDS (A), p.34)), with a private sector supply level of 175 lots per annum (p.51). It is not entirely clear what assumption, if any, was made about the

⁷ All estimates:

- apply a routine formula to calculate the net yield which deducts the area needed for infrastructure (roads, drainage, parks, conservation corridors etc);
- assume that the subdivision design will be economically efficient and utilise the minimum lot area;
- assume that salinity issues can be avoided by good design without sacrificing yield given the low densities of residential occupation and the likelihood that building envelopes and landscaping will be prescribed at the subdivision approval stage, thereby optimising salinity management.

⁸ The existing strategy allows 74 lots to be created (of which 7 are existing lots), a net increase in dwelling allotments of 67. The increase in yield if Lot 200 is developed as proposed of 40 lots is insignificant, because no rational owner of the parcels would exhaust its existing entitlements on Lots 64, 65, 661 or 662 because that would preclude future denser subdivision. It follows that only Lots 316, 317 and 200 would be developed, with a gross proposed yield of 45 and net yield of 42 lots. As the strategy allows a yield of 74 gross and 67 net lots, the development of Lots 316, 317 and 200 at the proposed yield will have no effect on the strategy.

component of this demand which comprised urban fringe living. It was identified as a category (p.25), by reference to the Richmond and Firgrove Estates, the latter of which my client developed. However, the strategy found that 85% of the residential housing stock in Dubbo was detached suburban housing with full services located within a normal residential zoning within a radius of 5kms of the CBD, and "all other market segments or lifestyle preferences are serviced by the remaining 15% of housing stock at this time" (p.32). When the strategy was reviewed in 2006, it was found that the average annual increase since 1991 was 315 dwellings and there had been a significant fall in the average household size (p.31), so population increases could not be applied in a straight line to measure the demand for dwellings. It does not appear, however, that the demand for fringe urban lots was measured. This suggests to me that fringe urban development was not a significant factor in planning for urban expansion, except in so far as it might constrain the release of rural land for suburban development, and that increasing rural residential yields would have no impact on the strategy.

13. The absence of any specific examination of market demand and supply characteristics for rural residential development was also noted by a Council planner, Ms Watkins, at a meeting on 18 December 2009 with my client's planners, where she confirmed that "no specific land economic analysis was undertaken for small acre rural lifestyle living in the City in conjunction with preparation of the urban LEP" (Minutes, pp.3-4).
14. The first assessment of this aspect of the market was undertaken by Urban Economics on behalf of my client in a report dated 2 September 2010, the results of which have subsequently been confirmed by Urban Economics in its letters of 10 September 2010, 10 July 2012 and 3 October 2012. Its analysis established that there was a demand for about twenty rural residential lots per annum in the range 6,000m² to 10ha. That is less than 10% of the overall demand for dwelling lots and is sufficiently low to have little or no impact on the residential land strategy. The market for rural residential lots is a specialised submarket which is not substitutable. In other

words, an oversupply of rural residential lots will not reduce demand for urban dwelling lots as the class of purchaser is different. In economic terms, the supply and demand characteristics of the smaller market will have no effect on the larger one. Urban Economics has also undertaken a review of existing and proposed rural residential areas, and concluded that there is no appropriately designated land in Dubbo with the same qualities as the subject land and "there remains very limited choice of vacant residential lots of the range 6,000m² to 5ha, with the vast majority of lands with minimum lot size designations in this range being already occupied" (UE letter of 3 October 2012).

15. Hill PDA considered the Urban Economics' study, but disagreed with its assumption concerning population growth and subsequent demand for additional dwellings (Hill PDA report, February 2011, p.21). Subsequently, KPMG independently assessed Dubbo's population projections (Population Outlook for Dubbo City Council, 3 February 2012). It disagreed with Hill PDA's projections (which were based upon the Department of Planning's 2010 estimates). It found that they were skewed by data from the New South Wales drought period. As well, KPMG considered that continued employment opportunities and Dubbo's relative housing affordability compared with other centres in the central west were factors increasing demand and generating additional population. The earlier population projection of 45,500 by 2036 was more likely to be 51,550, according to KPMG. The author of the KPMG report is one of Australia's leading demographers, Bernard Salt, and I think it should be given weight. Despite the conservative nature of its predictions, Hill PDA recognised that declining household size and the ageing of the population contributed to the "healthy demand for rural residential lots particularly on the fringe of the urban area where supply is limited" (p.19).
16. Urban Economics argued that there was no land currently available on the market for rural residential purposes, to which Hill PDA said:

"Whilst this is relevant, land proposed to be zoned within the emerging LEP for this use must also be taken into consideration. In that regard as Tables 1 and 2 show there is ample supply of land that could accommodate this size of residential or rural lot (6,000 to 10ha) in the proposed residential release areas alone. There are 80 lots falling within this size bracket and the potential for 5,800 smaller lots to be merged to accommodate further demand should the market prove buoyant over the coming years" (p.21).

Hill PDA's report preceded the 2010 LEP which was then in draft. The report analysed two urban release areas, the north-west and south-west sub-districts in West Dubbo and south east Dubbo. Table 1 (p.12) showed 5,856 potential lots, all of which were Zoned R2 – Lot Density Residential, which is of course an urban or suburban zoning and not a rural residential one. Of those lots, 56 are shown as having a 5 or 10ha minimum lot size. In the south-east Dubbo urban release area, there were 1,049 lots, all of which were to be Zoned R2 – Low Density Residential, although 24 had been earmarked for 1.5 and 2ha minimum lot sizes. Using the corrected population projections and lot supply for this class of development, and bearing in mind that it is unlikely that sufficient infrastructure would be available to develop the areas with a larger minimum lot size until the inner urban areas with small lot sizes are first developed, there is only about five years supply of such land in the release areas, without impinging on the urban strategy which has deliberately earmarked the proposed smaller lots for detached housing in a suburban context. None of the areas to which Hill PDA refer adjoin an existing rural residential subdivision (unlike the subject land). It is highly unlikely in those circumstances that the larger lot land set aside in release areas will be capable of meeting market demand for this class of development. If I am correct in thinking that development of the larger lots in the release areas will be dependent upon the earlier development of smaller lots and the construction of significant infrastructure, including contributions to State infrastructure, then it does not seem to me that subdivision of the subject land would compete at all with the release of rural residential land in west and south-east Dubbo. The larger lots in those areas will come on the market, if at all given the apparent absence of

demand for them, much later than the subject land can be developed. I give no weight to Hill PDA's suggestion that further lots could be created by amalgamating land which has been zoned for suburban development. That is directly contrary to the strategy.

17. An objective of the urban strategy was:

"To provide small acre residential areas which efficiently and economically meet the needs of the community, but are located and designed so as to avoid conflicts with rural enterprises or the retention and management of rural resources for production, thus protecting the quality of life of residents" (p.15).

There was no suggestion at all in the strategy that the provision of these areas was competitive with or would undermine the take-up of urban residential allotments. The urban fringe development was identified as a separate segment of the housing market (p.15). It was characteristically not sewered with very low density providing a high degree of privacy and allowing recreational activities on the site or large housing if desired (p.25). Larger allotment rural residential living, the so-called 25 acre block, was characteristically unserviced and self-contained (p.27). These two types of residential living were part of the "urban fringe", a quite separate residential lifestyle and zoning from inner urban and suburban lifestyles (p.31).

18. The strategy divided the City into precincts surrounded by sub-districts. The overall goal of the strategy was to identify and protect established residential neighbourhoods and ensure enough land for future development within an expanding "urban land use framework" (p.46). Residential growth was to be focused into the central district by expanding the established urban structure of the city (p.46). The form of the city had been distorted by the eastward suburban push which was beginning to meet environmental conflicts and constraints and had shifted the centroid of the urban area to the disadvantage of the CBD (p.47). The purpose of the strategy was to correct this trend by making "more determined efforts ... to encourage expansion in West Dubbo, especially after the current decade" (p.47). The actions necessary to achieve that objective was to limit and consolidate the current

phase of “fully serviced residential development” emphasising East Dubbo within an urban edge (p.49) and to restrain supply of urban land on the east of the river in order to encourage residential expansion to the west (p.51). However, those goals were to be met by urban residential development, on fully serviced lots. That has nothing to do with rural residential development and this part of the strategy which favours the west over the east is irrelevant. After discussing urban development, the strategy then states:

“10 Other proposals within the strategy related to sustaining the range of lifestyle choices should be acted on where there is public acceptance. Numerically these proposals do not contribute very substantially to the supply equation and therefore can be addressed independently from the above” (p.52).

That is a reference to the urban fringe development and specifically to development within the Troy Creek catchment. In other words, confirming my earlier observations, land releases for rural residential development have no impact upon the strategy, which was designed to provide a supply pipeline of urban land favouring development to the west. Development of the urban fringe stands apart and was considered according to different principles.

19. The subject land falls within the eastern sub-district. It is described as the eastern sector of the urban fringe, and the ability to strengthen the definition of the urban edge and preserve the lifestyle related use of the area is described by the strategy as a “development opportunity”. Its future direction is that it “will be dominated by the City’s need to provide small acre lifestyle options” (p.92), a clear policy that the subject land is to yield or continue to yield rural residential housing lots. Indeed, one of the objectives is to consolidate its role in providing an opportunity for urban fringe and country lifestyles on small acreages. It has a remaining development potential for 580 lots and an ultimate capacity for 830 households. Apart from the fact that its role is to continue to provide urban fringe residential lots, two requirements are imposed on future development:

- a. it is not to interfere with the rural buffer area which separates urban from rural uses;
- b. subdivision must respect the environmental constraints such as dry land salinity and groundwater vulnerability (p.92).

There is then a discussion of the Eulomogo Road area, in which this policy is adopted:

"Allow no further development (subdivision) in the area ... pending the outcome of a dry land salinity study as outlined in the rural strategy" (p.93).

In the map of this sub-district, the subject land has two subscripts, one stating "no further development pending the adoption of a salinity strategy in this area" and the other "salinity issue no further development until resolved". The corollary is that, once resolved, further development will take place.

20. In my opinion, the intention of this strategy is to encourage and promote environmentally suitable development for small acreage rural residential lifestyle dwellings on this land once the salinity issue has been resolved. The constraints on future development depend not upon the overarching strategy of shifting development to the west but upon resolution of those issues. Nothing, in my opinion, could be clearer.
21. This interpretation is supported by the discussion of the other sub-districts. For example, the future role of the south-western sub-district is "dominated by the City's need to ensure it has land suitable for the long term residential expansion to the west", but no similar direction to constrain urban fringe development on the subject land is made. Indeed, the discussion of the south-western sub-district which had significant remaining development potential describes the market segments as suburban "long term" and urban fringe "possibly" (p.101). Urban fringe development is said to possibly be appropriate "in a pocket of fragmented land to the west of the future suburban area" (p.102) and Council is enjoined to "resist premature speculation pressure for urban fringe development in the future suburban residential area". Again, this supports my earlier observations that

development in the west in the urban release areas for urban fringe uses was very much a long term proposal and was probably dependent upon the earlier development of the suburban land.

22. This analysis is also reflected in Council's review of the strategy in 2006, where it recommended that there should be no intensification of existing development within the Troy Creek catchment until the salinity and groundwater issues had been assessed and resolved (p.64). There was no suggestion that land within the Troy Creek catchment should not be developed for rural residential purposes for any other reason, and in particular because it undermined the strategy to shift the City to the west. It follows that I disagree with Hill PDA's observation, adopted by Council's planners, that to develop this land would be contrary to either the strategy or its review (p.22).
23. In reviewing this material, I have not neglected the groundwater and salinity issues. The LEP has a groundwater vulnerability map. It clearly shows that the subject land is not affected, although much land which is also zoned for larger lots, is affected. As far as the salinity issue is concerned, Council has now prepared an urban salinity management plan and the Local Government Salinity Initiative has produced twelve booklets relating to salinity management, including building in saline areas. Orogen (September 2012) reported that part of the land has been investigated and found to have a low salinity hazard, which classification it expects will be shared with the remainder of the land (p.9). Rural residential development is consistent with managing the land to prevent future outbreaks of salinity if appropriate landscaping and water management techniques are adopted. I would expect that Council would, quite properly, refuse development consent for subdivision unless the application was accompanied by proposals to this effect.
24. In my opinion, salinity is no longer a barrier to the development of this land and so the subscript on the strategy plan for the sub-district may be notionally removed, and the land made available for redevelopment in

accordance with the strategy to supply the present needs of Dubbo for urban fringe development.

A handwritten signature in black ink, appearing to be 'T F Robertson', written over a horizontal line.

T F ROBERTSON SC

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24 May 2013