

11.4 PLANNING PROPOSAL TO INTRODUCE A MINIMUM LOT SIZE FOR THE CONSTRUCTION OF DUAL OCCUPANCIES IN R2, R3 AND B4 ZONED LAND

File Number: 10619#610

EXECUTIVE SUMMARY

- The purpose of this report is to seek Council's support to finalise the planning proposal in the manner described in this report.
- The planning proposal seeks to amend *Wollondilly Local Environmental Plan 2011* to include minimum lot size requirements for the construction of dual occupancies in R2 Low Density Residential, R3 Medium Density Residential, and B4 Mixed use zones and also proposes to include a maximum lot size for the construction of a dual occupancy in the same zones.
- This matter was reported to Council at its Ordinary Meeting of the 20 May 2019. Council resolved to defer this matter due to uncertainty around the proposed maximum lot size.
- Following the May meeting, Council officers have identified, that the Low Rise Medium Density Code only prescribes a minimum lot size for a dual occupancy, and not a maximum lot size and therefore a dual occupancy can be approved as Complying development on land greater than 1400 square metres, despite any provision in Council's LEP.
- It is recommended that Council:
 1. Finalises the dual occupancy minimum lot size planning proposal and the amendment of *Wollondilly Local Environmental Plan 2011*.
 2. Forwards the planning proposal to the Department of Planning & Environment in accordance with Section 3.36 of the *Environmental Planning and Assessment Act, 1979*.
 3. Notifies persons who made submissions of Council's decision.
 4. Writes to the Department of Planning & Environment expressing concern with the Low Rise Medium Density Housing Code and advocating for the inclusion of the following:
 - A maximum lot size requirement for the construction of a Dual Occupancy under the SEPP
 - Appropriate land based exclusions for developments on land without reticulated sewer or not supported by the appropriate infrastructure
 - The construction of kerb and guttering for Dual Occupancy development or within a resultant subdivision.

REPORT

1. Background

On 6 July 2018, the NSW Department of Planning & Environment introduced the Low Rise Medium Density Housing Code in NSW ('Medium Density Code'). The Medium Density Code was added to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, which is a state wide policy that enables certain types of development to be undertaken as either exempt or complying development. The Medium Density Code allows certain development types including Manor Housing, Terrace Housing and Dual Occupancy Development to be undertaken as Complying Development in zones where they are permitted under Council's Local Environmental Plan.

Council has identified the ability for landowners to undertake a Dual Occupancy as Complying Development under the new Code as being an area of particular concern.

In order to be carried out as a Complying Development application, the development must meet a list of pre-determined development standards contained in the Code. Clause 3B.8 (1) of the Medium Density Code includes the minimum area that a lot must satisfy in order for a Dual Occupancy to be undertaken as Complying Development and states the following:

- (1) *The area of the lot must not be less than whichever is the greater of the following:*
- (a) *400m²,*
 - (b) *the minimum lot area specified for dual occupancies in the environmental planning instrument that applies to the land concerned.*

Wollondilly Local Environmental Plan 2011 (WLEP 2011) does not currently include a minimum lot area that is required to construct a dual occupancy. The new Code would therefore allow Dual Occupancies (attached or detached) to be undertaken as Complying Development on a lot as small as 400 square metres in the Shire. WLEP 2011 sets a minimum lot area that is required for the subdivision of an existing Dual Occupancy but does not set a minimum lot area for the construction of a new Dual Occupancy.

Council's Development Control Plan currently includes controls that require a lot to be a minimum area of 800 square metres to construct an attached dual occupancy, and an area of at least 975 square metres to support a detached dual occupancy, however this will not carry any weight under the new Code and the minimum 400 square metre lot area would prevail.

Accordingly, the Medium Density Code would allow dual occupancies on R2, R3 and B4 zoned lots which are far smaller in size than what Council's current controls allow. The report to Council in June, 2018 (Attachment 1) identifies the possible increase in dwelling yield that could result in each town and village in the Shire from the Code compared with the yield that could be generated if Council's current planning controls were applied. In summary the results show that overall the Code could result in approximately 2,368 additional dwellings under the minimum lot size prescribed by the Code, compared to the current minimum lot size applied in Council's planning controls.

2. Proposed changes to the Wollondilly Local Environmental Plan 2011

Council has current controls for both the minimum and maximum lot size for dual occupancy developments contained within the Wollondilly Development Control Plan 2016. It is proposed to include the existing controls within the Development Control Plan in *Wollondilly Local Environment Plan 2011*.

These provisions are found within control 2 clause 3.16 of Volume 4 of the Wollondilly Development Control Plan 2016 and state:

- (2) *Dual occupancy development shall only be permitted on lots which:*
- *Have an area no less than 975m² and no greater than 1400m² where a detached dual occupancy is proposed.*
 - *Have an area no less than 800m² and no greater than 1400m² where an attached dual occupancy is proposed.*

It is proposed to include these requirements in the LEP. The planning proposal includes adding the following clause into the LEP:

"(1) This clause applies to land within Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone B4 Mixed Use.

- (2) *Dual occupancy development shall only be permitted on lots which:*
- (a) *in the case of an attached dual occupancy - have an area no less than 800 square metres and no greater than 1400 square metres, or*

- (b) *in the case of a detached dual occupancy - have an area no less than 975 square metres and no greater than 1400 square metres.*
- (3) *If a development application has been made before the commencement of this Clause in relation to land to which this clause applies and the application has not been finally determined before that commencement, the application must be determined as if this Clause had not commenced."*

Wollondilly Council was one of a number of Council's who received a deferral from the operation of the Low Rise Medium Density Code until 1 July, 2019. On 30 August 2018 and 24 May 2019, Council requested a further deferral of 12 months from the operation of the Code to enable this planning proposal to be finalised before the commencement of the Code and also to ensure that the commencement of the Code aligns with the LEP review currently being undertaken by Council. At the time of writing this report a decision from DPE on whether to extend the deferral period was still pending.

If Council adopts the minimum lot sizes for the construction of a dual occupancy described above, but decides not to adopt a maximum lot size, then the current maximum lot size will remain in the DCP. The control regarding the maximum lot size could only be removed through a formal amendment to the DCP. There is also likely to be an increased ability for an applicant to vary the control if it is only contained in the DCP and not included in the LEP as a DCP cannot contain more onerous controls than what an LEP provides.

3. Distinction between a Dual Occupancy and a Secondary Dwelling

In considering the subject planning proposal, it is important to distinguish between a dual occupancy (commonly known as a duplex) and a secondary dwelling (commonly known as a granny flat). A dual occupancy refers to two dwellings, either attached or detached, built on one parcel of land. A dual occupancy is commonly referred to as a duplex and under clause 4.1A(2) of the *Wollondilly Local Environmental Plan 2011*, once built, a dual occupancy is able to be subdivided with the result being each dwelling on its own parcel of land.

A secondary dwelling is a self-contained dwelling that is secondary to the principal dwelling and can also be either attached to the main dwelling or detached. A secondary dwelling is what is commonly referred to as a granny flat. Secondary dwellings have planning restrictions in relation to their floor space, and can be either 60m² or 25% of the size of the principal dwelling in accordance with the provisions of the *Wollondilly Local Environmental Plan 2011*. Unlike a Dual Occupancy, a secondary dwelling and a principal dwelling are **NOT** able to be subdivided onto individual titles.

The key differences between a Secondary Dwelling and a Dual Occupancy are provided in the table below:

Dual Occupancy	Secondary Dwelling
Is commonly referred to as a Duplex.	Is commonly referred to as a Granny Flat.
Refers to two dwellings on one lot.	Refers to two dwellings on one lot, however, the Secondary Dwelling must be the lesser size.
A dual occupancy is not bound by any maximum floor area controls under Council's LEP.	A Secondary Dwelling is limited in floor area. The total floor area of the Secondary Dwelling is required to be no greater than 60 square metres or 25% of the total floor area of the main dwelling (whichever is greater).
Each dwelling is able to be subdivided onto its own title after construction.	A Secondary Dwelling is not able to be subdivided onto its own title after construction and must remain on the same lot as the Principal Dwelling in perpetuity.

Each dwelling requires its own access and services.	A Secondary Dwelling does not require its own access and services.
A dual occupancy development is required to pay Developer Contributions to Council under Council's current Contributions Plan.	A Secondary Dwelling currently is not charged Developer Contributions under Council's Contributions Plan.
Until now, there has been no ability to undertake a Dual Occupancy as Complying Development. A Dual Occupancy in any zone has required a development application to obtain approval. The Low Rise Medium Density Housing Code which was introduced in July, 2018 enables a Dual Occupancy to be undertaken as Complying Development provided that the development is permitted in the relevant zone under a Council's LEP.	A Secondary Dwelling can be undertaken as Complying Development in zones R1 General Residential, R2 Low Density Residential, R3 Medium Density Residential, and R4 under <i>State Environmental Planning Policy (Affordable Rental Housing) 2009</i> subject to meeting the specific development standards in that policy. The ability to undertake a secondary dwelling as a Complying Development under the SEPP in the relevant zones has existed since the introduction of the SEPP in 2009.
A Dual Occupancy is typically used to increase the landowners return on the land.	A secondary dwelling is typically used to provide accommodation for a relative or small family.

A secondary dwelling is permitted in all residential and rural zones in the Shire, as well as the B4 Mixed Use Zone and certain environmental zones. The subject proposal will not impact on any landowner's ability to undertake a secondary dwelling on their land. The planning proposal does not propose any changes to the current requirements in Council's LEP or DCP for secondary dwellings and will not change the ability of any landowners to undertake a Secondary Dwelling as Complying Development under the Affordable Rental Housing SEPP. The planning proposal only proposes to introduce a minimum and maximum lot size for the construction of Dual Occupancies in R2, R3 and B4 zones in the Shire and will reflect the current controls in Council's DCP.

4. Proposed maximum lot size for a dual occupancy development

It is proposed to include the existing controls relating to the minimum and maximum lot sizes for dual occupancy development that are currently contained in Council's Development Control Plan into the *Wollondilly Local Environmental Plan 2011* as described above. This includes the current requirement that no dual occupancy development would be permitted on land greater than 1400 square metres in R2, R3 and B4 zoned land. At the May Council meeting, discussion occurred surrounding the maximum lot area, and further detail is provided below.

4.1 History of the 1400 square metre maximum lot size

The current maximum lot size of 1400 square metres for dual occupancy developments in the R2 and R3 zones was first included in DCP No. 50 (Residential Development) in 2002. DCP No. 50 supported WLEP 1991 and was repealed on 23 February 2011, when WLEP 1991 was replaced by WLEP 2011.

Under WLEP 1991, the minimum lot size for the subdivision of land within the residential towns and villages in the Shire was not determined by a minimum lot size map. Rather, a minimum lot size for residential zones was provided in DCP 50 and prescribed a minimum lot size of 700 square metres (provided that reticulated sewer was available) across all residential villages in the Shire.

It is understood that the reason for imposing a 1400 square metre minimum lot size for the construction of a dual occupancy was to ensure that larger lots in the residential villages were dealt with via a conventional subdivision application where Council has a greater control over the lot layout and to ensure that the subdivision patterns of existing towns is retained. It was also considered that battle-axe subdivisions of large lots sterilises them for development in the future. The control has been retained in Council's DCP since DCP 50 was repealed.

4.2 Reasons for retaining the 1400 square metre maximum lot size

The reasons for retaining the maximum lot size as part of the current planning proposal are detailed below:

- The planning proposal involves replicating the current controls in Council's DCP (which have applied since 2002) relating to both the minimum and maximum lot size for the construction of a dual occupancy and inserting them in the LEP so that they have more statutory weight and can reduce the impacts of the State Governments new Low Rise Medium Density Housing Code by preventing unplanned housing growth. Given that Council only received a one year deferral from the commencement of the Code, the short timeframe in which this planning proposal has had to be finalised has meant that a comprehensive review of an alternate maximum lot size has not been able to be undertaken, however, if the maximum lot size is removed altogether or it is significantly increased there will be several negative impacts as detailed below
- Council's data shows that there are currently 1685 lots in the Shire in R2 and R3 zoned areas which are greater than 1400 square metres (including 1582 in the R2 zone and 103 in the R3 zones). Of these 1685 lots, 1607 (including 1551 R2 zoned lots and 56 R3 zoned lots) can be subdivided based on the current minimum lot size provisions for the relevant lots under the LEP. This equates to approximately 95% of lots

The figures show that the high majority of lots zoned R2 and R3 that are over 1400m² are able to be subdivided under the existing controls and the development of these lots would not be sterilised if the maximum lot size were applied in Council's LEP given that the opportunity to subdivide under existing controls already exists and will remain upon completion of the planning proposal. Of the small number of lots in the residential zones above 1400 square metres which are not able to subdivide may be able to rely on a clause 4.6 variation in Council's LEP to undertake a dual occupancy on a larger lot if sufficient planning merit exists for the development.

NOTE: *It is important to note that these figures are estimates only, as the results were obtained by taking the central point of each lot to identify the land zone and minimum lot size. Lots that have multiple land zones or multiple lot size restrictions will only be counted on the zone that is located at the central point. However, the approach is considered sufficient to demonstrate the likely number of lots affected by the proposal.*

- As noted above, 1607 lots would still be capable of lodging a conventional subdivision application if the 1400 square metre maximum lot size for a Dual Occupancy were adopted. It would be far more favourable if landowners are able to apply for a conventional subdivision of land rather than construct a dual occupancy on larger lots, so that Council is able to negotiate the orderly subdivision pattern of existing towns and villages.

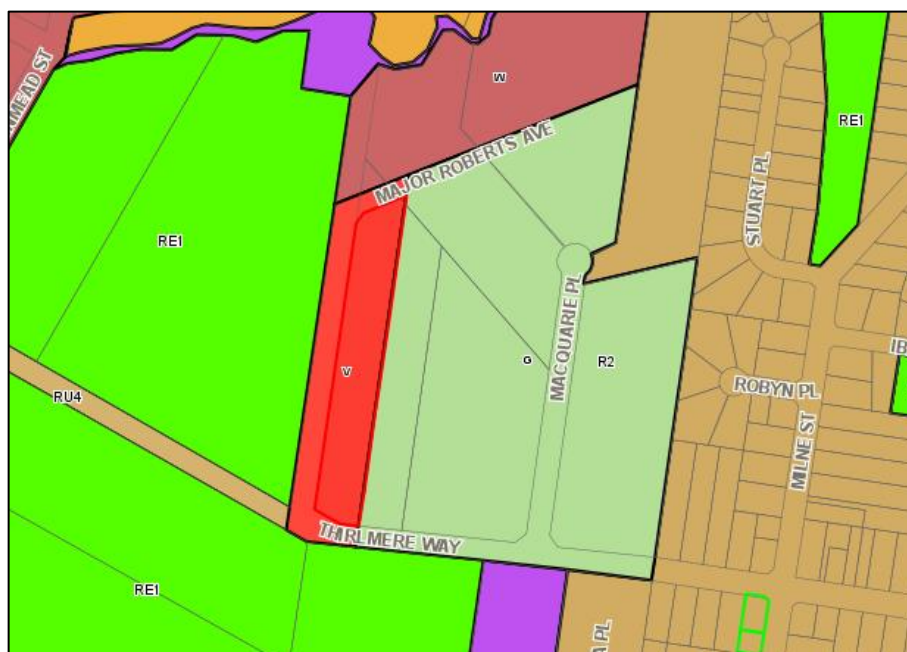
It is noted however, that the Low Rise Medium Density Code only prescribes a minimum lot size for a dual occupancy, and not a maximum lot size. On that basis, a landowner may be able to construct a dual occupancy as a Complying Development Application under the Code on land which is greater than 1400 square metres, despite any provision in Council's LEP. It is therefore recommended that Council writes to DPE Codes team requesting that the controls in the Low Rise Medium Density Housing Code be amended so that the development standards for dual occupancies under the Code also reflect the maximum lot area for the construction of a dual occupancy under any Environmental Planning Instrument.

This would ensure that any landowners on larger lots undertake a conventional subdivision rather than a dual occupancy. If a dual occupancy were constructed on larger lots as a Complying Development Application under the Code, then Council has no ability to impose any requirements regarding the provision of kerb and gutter, footpaths, street lighting, or connection to appropriate services. Alternatively, if a dual occupancy could not be undertaken

on these larger sites and the site were required to be developed through a conventional subdivision application, then Council would have the ability to impose these requirements through consent conditions.

It is also acknowledged that there are lots within the 800 to 1400 square metre range in the R2 and R3 zones which have insufficient infrastructure to support medium density development via a Code based approval process. In this regard it is recommended that Council write to DPE requesting that the Codes require the construction of kerb and guttering for dual occupancy development or within a resultant subdivision.

- More recently, Council have determined planning proposals which involve rezoning land on the edge of existing villages should retain larger lot sizes on the edge of the development to act as a buffer between higher density residential development and rural zones, and to maintain the distinction between villages. An example of this can be found over the page at the West Tahmoor site which was rezoned as part of the Picton Tahmoor Thirlmere Urban Lands Planning Proposal.



Legend (min. lot size)

Red (V) = 2000m²

Light green (G) = 450m²

Figure 1: Major Roberts Avenue Tahmoor

The West Tahmoor No. 3 Planning Proposal sought to reduce the minimum lot size of the western portion of the above site (in red) to a 450 square metre minimum lot size in line with the rest of the site (identified in light green and marked G in figure 1). This proposal was refused by Council, and the existing 2000 square metre minimum lot size remained (identified in red and marked V in figure 1). This decision was made to provide a buffer between the RE1 zoned recreation land and the smaller lots to the east. It also assisted in providing a transition between the village of Tahmoor, and the village of Thirlmere immediately to the west of this site.

If Council did not impose a maximum lot size for dual occupancy developments to accompany the minimum lot size within the LEP, areas with larger minimum lot sizes that act as transitions between higher density residential areas and lower density rural zones, and between villages could potentially be lost to dual occupancy developments.

Unsewered Land

The New Code does not exclude one and two storey Dual Occupancy development and medium density housing from being undertaken on unsewered land. There are some residential zoned areas in the Shire such as Yanderra where reticulated sewer has not yet been made available to the residential area of the township.

For areas such as Yanderra, which contains land zoned R2 but does not have reticulated sewer available, a person may obtain a Complying Development Certificate for a one or two storey Dual Occupancy on this land without appropriate sewerage services being available. WLEP 2011 currently prohibits Dual Occupancy development on unsewered land, however, this will have no weight upon commencement of the SEPP. It is therefore a recommendation of this report that Council write to the Department of Planning and Environment requesting appropriate land based exclusions for development on land which does not have reticulated sewer available.

5. Conclusion

It is considered that the maximum lot size for dual occupancy developments as currently contained in Council's Development Control Plan has achieved good outcomes for Wollondilly Shire since its introduction in 2002 in DCP 50. The maximum lot size is considered necessary given its operation in restricting the subdivision of areas containing larger minimum lot sizes, which act as crucial buffers between higher density residential land and lower density rural land, and as buffers in development between the existing villages.

Options Moving Forward

Council's options are:

1. Resolve to support the planning proposal as outlined in this report
2. Resolve to support the planning proposal in a form different to what is outlined in this report
3. Resolve not to support the planning proposal.

Option 1 is the recommendation of this report.

ATTACHMENTS

1. **June 2018 Report to Council - Pre gateway Determination** 
2. **May 2019 Report to Council - Post Exhibition** 

RECOMMENDATION

That Council:

1. Finalises the dual occupancy minimum lot size planning proposal and the amendment of Wollondilly Local Environmental Plan 2011.
2. Forwards the planning proposal to the Department of Planning & Environment in accordance with Section 3.36 of the Environmental Planning and Assessment Act, 1979.
3. Notifies persons who made submissions of Council's decision.
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 - (c) The construction of kerb and guttering for Dual Occupancy development or within a resultant subdivision.