

cw-CS3 Amendment of Clause 4.2A of WLEP 2010 to Ensure Dual Occupancies are Prohibited on Undersized Lots in Rural and Environmental Protection Zones.

Reference: 5901
Responsible Officer: Group Manager Strategic and Assets

PURPOSE

Council has recently been made aware of a loophole in the current wording of Clause 4.2A of WLEP 2010 that excludes dual occupancy development from the provisions of the clause, thereby permitting dual occupancy development on undersized lots in rural and environmental protection zones.

This report recommends that Council prepare a Planning Proposal for Gateway Determination to amend Clause 4.2A to include dual occupancy development as prohibited development on undersized lots in rural and environmental protection zones.

BACKGROUND

Council recently received LUA14/0035 for the proposed erection of 17 dual occupancies on undersized lots on E3 Environmental Management zone land between Berrima and New Berrima. The applicant argues that Clause 4.2A of WLEP 2010 only prohibits dwelling houses on undersized lots and not dual occupancies, as they are separately defined under WLEP 2010 and that definition does not 'link' them to dwelling houses. A separate report is included in this agenda on LUA14/0035, which recommends refusal of the development application for reasons outlined in that report.

DETAILS OF PROPOSAL

Clause 4.2A controls the minimum lot size development standard for dwelling houses in the Rural and Environmental Protection zones.

Currently Clause 4.2A of WLEP 2010 is worded as follows:

4.2A Erection of dwelling houses on land in certain rural and environmental protection zones

- (1) The objectives of this clause are as follows:
 - (a) to minimise the introduction of unplanned rural residential development, and
 - (b) to enable the replacement of lawfully erected dwelling houses in rural zones.
- (2) This clause applies to land in the following zones:
Zone RU1 Primary Production,
Zone RU2 Rural Landscape,
Zone RU4 Primary Production Small Lots,
Zone E3 Environmental Management,
Zone E4 Environmental Living.

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- (3) Development consent must not be granted for the erection of a dwelling house on a lot in a zone to which this clause applies, and on which no dwelling house has been erected, unless the lot is:
 - (a) a lot that is at least the minimum lot size specified for that lot by the Lot Size Map, or
 - (b) a lot created before this Plan commenced and on which the erection of a dwelling house was permissible immediately before that commencement, or
 - (c) a lot resulting from a subdivision for which development consent (or its equivalent) was granted before this Plan commenced and on which the erection of a dwelling house would have been permissible if the plan of subdivision had been registered before that commencement, or
 - (d) an existing holding.

Note. A dwelling cannot be erected on a lot created under clause 9 of State Environmental Planning Policy (Rural Lands) 2008 or clause 4.2.

- (4) Despite any other provision of this clause, development consent may be granted for the erection of a dwelling house on land in a zone to which this clause applies if:
 - (a) there is a lawfully erected dwelling house on the land and the dwelling house to be erected is intended only to replace the existing dwelling house, or
 - (b) the land would have been a lot or a holding referred to in subclause (3) had it not been affected by:
 - (i) a minor realignment of its boundaries that did not create an additional lot, or
 - (ii) a subdivision creating or widening a public road or public reserve or for another public purpose.

- (5) In this clause:

existing holding means all adjoining land, even if separated by a road or railway, held in the same ownership at the time of lodging a development application for the erection of a dwelling house under this clause:

- (a) in relation to land to which the former *Bowral Planning Scheme Ordinance* applied—on 8 October 1954, or
- (b) in relation to land to which the former *Interim Development Order No 1—Shire of Wingecarribee* applied—on 18 January 1963, or
- (c) in relation to land to which the former *Burradoo and Environs Planning Scheme Ordinance* applied—on 23 July 1965, or
- (d) in relation to land to which the former *Shire of Mittagong Planning Scheme Ordinance* applied—on 16 February 1968,

and includes any other land adjoining that land acquired by the owner since the date mentioned in paragraph (a), (b), (c) or (d).

Note. The owner in whose ownership all the land is at the time the application is lodged need not be the same person as the owner in whose ownership all the land was on a stated date.

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It is noted that the clause refers only to dwelling houses and does not include reference to dual occupancy development.

The definition of 'dwelling house' under WLEP 2010 states:

dwelling house means a building containing only one dwelling.

Note. Dwelling houses are a type of **residential accommodation**—see the definition of that term in this Dictionary.

'Dual occupancy' and the associated 'dual occupancy (attached)' and 'dual occupancy (detached)' are defined under WLEP 2010 as follows:

dual occupancy means a dual occupancy (attached) or a dual occupancy (detached).

Note. Dual occupancies are a type of **residential accommodation**—see the definition of that term in this Dictionary.

dual occupancy (attached) means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling.

Note. Dual occupancies (attached) are a type of **dual occupancy**—see the definition of that term in this Dictionary.

dual occupancy (detached) means 2 detached dwellings on one lot of land, but does not include a secondary dwelling.

Note. Dual occupancies (detached) are a type of **dual occupancy**—see the definition of that term in this Dictionary.

dwelling means a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

Although both dwelling houses and dual occupancy are forms of 'residential accommodation' and, although it is commonly understood that a 'dual occupancy' development relates to a 'dwelling house', neither the definitions, nor Clause 4.2A, establish that relationship under WLEP 2010. In the absence of such a relationship, Clause 4.2A needs to be amended to specifically refer to dual occupancy development as well as dwelling houses.

Should Council resolve to prepare a Planning Proposal to amend Clause 4.2A, Council will liaise with the Department of Planning & Infrastructure and Parliamentary Counsel's Office to confirm the most appropriate wording to correct the clause.

PLANNING CONSIDERATIONS

Should Clause 4.2A remain as it currently is, Council may receive other applications for dual occupancies on undersized lots in rural and environmental protection zones.

Legal advice was sought from Council's panel solicitors who have confirmed that Clause 4.2A requires amendment, should Council wish to prevent further development applications being lodged seeking approval for the erection of dual occupancies on undersized lots in rural and environmental protection zones.

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STATUTORY PROVISIONS

Wingecarribee LEP2010 (WLEP 2010)

A Planning Proposal is required to amend Clause 4.2A of WLEP under the Gateway process introduced in July 2009. The gateway process has the following steps:

Planning Proposal - the relevant planning authority (Council) is responsible for the preparation of a planning proposal, which explains the effect of and justification for the plan. If initiated by the Minister (rather than the local council which is mostly the case) the Minister can appoint the Director-General of the Department of Planning or a joint regional planning panel to be the relevant planning authority.

Gateway - The Minister (or delegate) determines whether the planning proposal is to proceed. This gateway acts as a checkpoint to ensure that the proposal is justified before further studies are done and resources are allocated to the preparation of a plan. A community consultation process is also determined at this time. Consultations occur with relevant public authorities and, if necessary, the proposal is varied.

Community Consultation - the proposal is publicly exhibited (generally low impact proposals for 14 days, others for 28 days). A person making a submission may also request a public hearing be held.

Assessment - The relevant planning authority (Council) considers public submissions and the Proposal is varied as necessary. It is noted that clause 58 of the EP&A Act allows Council to vary, at any time, its Proposal as a consequence of its consideration of any submission or report during community consultation or for any other reason. Council may also resolve to not proceed with the Planning Proposal under this clause.

If the Planning Proposal does proceed, Parliamentary Counsel then prepares a draft local environmental plan (the legal instrument).

Decision - With the Minister's (or delegate's) approval the plan becomes law and is published on the NSW Legislation website.

Development Control Plans (DCPs)

No change is required to Council's DCPs with the amendment of Clause 4.2A.

State Environmental Planning Policies (SEPPs)

State Environmental Planning Policies (SEPPs) are a set of Environmental Planning Instruments with which Council must comply, where relevant, when considering amendments to WLEP 2010.

The proposed amendment to Clause 4.2A will be consistent with the following relevant SEPPs as published by the NSW Government:

SEPP (Rural Lands) 2008

The aims of the SEPP are:

- (a) *to facilitate the orderly and economic use and development of rural lands for rural and related purposes,*

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- (b) *to identify the Rural Planning Principles and the Rural Subdivision Principles so as to assist in the proper management, development and protection of rural lands for the purpose of promoting the social, economic and environmental welfare of the State,*
- (c) *to implement measures designed to reduce land use conflicts,*
- (d) *to identify State significant agricultural land for the purpose of ensuring the ongoing viability of agriculture on that land, having regard to social, economic and environmental considerations,*
- (e) *to amend provisions of other environmental planning instruments relating to concessional lots in rural subdivisions.*

In its current form Clause 4.2A does not meet the above aims of the SEPP, as the proliferation of dual occupancies developments on undersized lots in rural and environmental protection zones has the potential to:

- undermine strategically planned orderly and economic development of rural lands,
- has no regard to the development and protection of rural lands for the purpose of promoting the social, economic and environmental welfare of the State,
- has no ability to prevent land use conflicts, as unplanned rural residential development can occur in the form of dual occupancies on any lot size in rural and environmental protection zones,
- has no regard to environmental considerations, especially in respect of onsite waste disposal as many undersized lots in rural and environmental protection zones are not serviced by Council's reticulated sewerage systems.

Thus, by amending Clause 4.2A to include dual occupancies in the same manner as it currently applies to a dwelling house, WLEP 2010 will be consistent with the aims of the SEPP.

SEPP (Sydney Drinking Water Catchment) 2011

This SEPP requires that development consent cannot be granted unless the proposal will have a neutral or beneficial effect on water quality. Notwithstanding, the cumulative impact of unplanned rural residential development has the potential to impact on water quality as many of the dual occupancies that are likely to be approved on undersized lots in rural and environmental protection zones, which will be reliant on on-site sewage disposal systems.

Any current development application lodged with Council for such development will require assessment by the Sydney Catchment Authority (SCA).

Thus, by amending Clause 4.2A to include dual occupancies in the same manner as it currently applies to a dwelling house, WLEP 2010 will prevent the proliferation of dual occupancies in rural and environmental protection zones, which will significantly reduce the potential risk of cumulative impacts on water quality from on-site waste management systems. It will also prevent a significant number of applications being referred unnecessarily to the SCA.

Section 117 Directions

The Minister for Planning, under section 117(2) of the Environmental Planning and Assessment Act 1979 (EP&A Act) issues Directions that Council must follow when preparing Planning Proposals. The Directions cover the following broad categories:

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1. employment and resources
2. environment and heritage
3. housing, infrastructure and urban development
4. hazard and risk
5. regional planning
6. local plan making.

The Planning Proposal to amend Clause 4.2A is considered to be consistent with the 6 broad categories of the s117(2) Directions as follows:

1. Employment and Resources
 - 1.1. Business and Industrial Zones – Not relevant
 - 1.2. Rural Zones – this planning proposal is consistent with this direction as it does not propose to rezone land from a rural zone to a residential, business, industrial, village or tourist zone.
 - 1.3. Mining, Petroleum Production and Extractive Industries – Not relevant
 - 1.4. Oyster Aquaculture – Not relevant
 - 1.5. Rural Lands – This Planning Proposal is considered to be consistent with this direction, as it will enable WLEP 2010 to be more consistent with the provisions of the SEPP (Rural Lands) 2008 by prohibiting dual occupancy development from undersized lots in rural and environmental protection zones.
2. Environment and Heritage
 - 2.1. Environment Protection Zones - This Planning Proposal is considered to be consistent with this direction, as it will enable WLEP 2010 to be more consistent with the provisions of the SEPP (Rural Lands) 2008 by prohibiting dual occupancy development from undersized lots in rural and environmental protection zones.
 - 2.2. Coastal Protection – Not relevant
 - 2.3. Heritage Conservation – Not relevant
 - 2.4. Recreation Vehicle Areas – Not relevant
3. Housing, Infrastructure and Urban Development
 - 3.1. Residential Zones – Not relevant
 - 3.2. Caravan parks and Manufactured Home Estates – Not relevant
 - 3.3. Home Occupations – Not relevant
 - 3.4. Integrated Land Use and Transport – Not relevant
 - 3.5. Development Near Licensed Aerodromes – Not relevant
 - 3.6. Shooting Ranges – Not relevant
4. Hazard and Risk
 - 4.1. Acid Sulfate Soils – Not relevant
 - 4.2. Mine Subsidence and Unstable Land – Not relevant
 - 4.3. Flood Prone Land – Not relevant
 - 4.4. Planning for Bushfire Protection – Not relevant
5. Regional Planning
 - 5.1. Implementation of Regional Strategies – The Planning Proposal is considered consistent with this direction, as it has been assessed as being consistent with the Sydney-Canberra Corridor Regional Strategy under Section B (3) of his report.

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- 5.2. Sydney Drinking Water Catchment – The Planning Proposal will be forward to the Sydney Catchment Authority for comment prior to lodgement with the Department of Planning and Infrastructure for Gateway determination.
- 5.3. Farmland of State and Regional Significance of the NSW Far North Coast – Not relevant
- 5.4. Commercial and Retail Development along the Pacific Highway, North Coast – Not relevant
- 5.5. Revoked
- 5.6. Revoked
- 5.7. Revoked
- 5.8. Second Sydney Airport: Badgeries Creek – not relevant
6. Local Plan Making
 - 6.1. Approval and Referral Requirements – The Planning Proposal is considered to be consistent with this direction as the proposed amendment to Clause 4.2A will not create any provisions requiring concurrence, consultation or referral of development applications to a Minister or public authority. In fact the effect of the proposed amendments will result in less developments applications requiring other public authority concurrence, especially in respect of the SCA and NSW RFS.
 - 6.2. Reserving Land for Public Purposes – The Planning Proposal is consistent with this direction does not create, alter or reduce existing zonings or reservations of land for public purposes.
 - 6.3. Site Specific Provisions – Not relevant
7. Metropolitan Planning
 - 7.1. Implementation of the Metropolitan Plan for Sydney 2036 – Not relevant

CONSULTATION

External Referrals

The Gateway Determination would identify what referrals to public authorities are required.

Internal Referrals

Legal advice was sought from Council's panel solicitors who have confirmed that Clause 4.2A requires amendment, should Council wish to prevent further development application being lodged seeking approval for the erection of dual occupancies on undersized lots in rural and environmental protection zones.

Community Consultation

Community consultation will occur as set out in the Gateway Determination.

SUSTAINABILITY ASSESSMENT

• **Environment**

Should Clause 4.2A of WLEP 2010 remain as is, the take up of dual occupancy developments, as unplanned rural residential development, has the potential for cumulative impacts over time on the quality of the natural environment, in particular water quality, as most under sized lots in rural or environmental protection zones are not serviced by Council's reticulated sewer system. Further, issues in regard to appropriate asset protection zones for bush fire protection may result from the removal of vegetation that would have

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otherwise not required removal. Such impacts need to be assessed on an individual basis, but could have cumulative impacts over time on habitat and biodiversity.

- **Social**

Unplanned rural residential development in the form of a proliferation of dual occupancy development could have significant impact on the demand for social services, i.e. requests for community facilities such as playgrounds, community parks and halls in currently un-serviced rural localities that currently do not require such services.

- **Broader Economic Implications**

Unplanned rural residential development could also place unforeseen demand on Council's road system through the need to improve the standard of unsealed or unformed roads due to an increase in traffic from new development. This would ultimately lead to an increase in costs to Council and the community. Similarly increased demands on the provision of water, sewer and stormwater infrastructure services could increase Council's costs in this regard.

- **Culture**

An amendment to Clause 4.2A to prevent unplanned rural residential in the form of dual occupancies is unlikely to have any negative impacts on aboriginal and non-aboriginal culture and heritage preservation.

- **Governance**

Should a positive Gateway Determination be issued by the DP&I, compliance with the requirements of the Environmental Planning & Assessment Act 1979 (EP&A Act), EP&A Regulations and the requirements of the Gateway Determination will ensure that due process is followed by Council in implementing the proposed amendment to WLEP 2010.

RELATIONSHIP TO CORPORATE PLANS

The potential for proliferation of dual occupancy development on undersized lots in rural and environmental protection zones will be contrary to many of the goals and objectives of Wingecarribee Shire Community Strategic Plan 2031+ as follows:

Leadership

1.1.1 Ensure systems and processes are in place to achieve mutual trust and collaboration.

Comment: Currently, the fact that dwelling houses are not permissible and dual occupancies are on under sized lots in rural and environmental protection zones has the potential to break down trust and collaboration between Council, the community and developers. The breakdown in trust could result from dual occupancy developments occurring where no residential development types were thought not to be permissible.

People

2.3 Services and facilities are provided locally to meet the needs of our community.

Comment: Council's services and facilities for the community are planned around identified growth areas, such as infill residential development, green field residential release areas and some planned rural residential development. Unplanned rural residential development on a significant number of historically undersized lots in rural and environmental protection zones in the form of dual occupancies, has the potentially to compromise the funding ability of planned services and facilities.

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Places

3.2.1 *Retain the rural landscape between towns and villages*

Comment: Unplanned rural residential development has significant potential to erode the rural landscape between the towns and villages of the Shire. Dual occupancy development on historically undersized lots would create in fill residential development that was thought not to be permissible in these locations.

Environment

4.1 *Wingecarribee's distinct and diverse natural environment is protected and enhanced*

Comment: Unplanned rural residential development in rural and environmental protection zones has the potential to create negative impacts on the natural environment. Such impacts could include increased risk to water quality through onsite sewage systems, increased risk of the loss of biodiversity through the removal of vegetation to cater for dual occupancy dwellings and the provision of adequate bushfire protection.

Economy

5.2 *The 'Southern Highlands' is a recognised tourist destination throughout Australia.*

Comment: Unplanned rural residential development in rural and environmental protection zones has the potential to erode the unique rural landscapes of the Shire. These landscapes are part of the Shire's tourism attractiveness. Thus a significant factor to attracting tourism business to the local economy could be significantly eroded or lost over time.

BUDGET IMPLICATIONS

There are no cost implications to Council as the Planning Proposal will be undertaken by Council staff.

RELATED COUNCIL POLICY

There are no other Council policies relevant to the Planning Proposal other than those previously mentioned in the body of this report.

OPTIONS

There are two options available to Council as follows:

Option 1

Resolve to prepare a Planning Proposal for Gateway Determination to amend Clause 4.2A of WLEP 2010 to include the prohibition of dual occupancies on undersized lots in rural and environmental protection zones.

Option 2

Do nothing – Clause 4.2A of WLEP 2010 remains the same.

Option 1 is the recommended option as it will prevent the proliferation of unplanned rural residential development in the form of dual occupancies on under sized lots in rural and environmental protection zones, between the towns and villages of the Wingecarribee Shire.

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ATTACHMENTS

There are no attachments to this report.

RECOMMENDATION

THAT the Planning Proposal to amend Clause 4.2A of Wingecarribee Local Environmental Plan 2010 to include the prohibition of dual occupancy development on undersized within rural and environmental protection zones, be prepared and forwarded to the NSW Department of Planning and Infrastructure for a Gateway Determination under section 55 of the Environmental Planning & Assessment Act 1979.
