

NSW Department of Planning & Environment  
Attention: Graham Towers – Team Leader, Southern Region

By email only: [wollongong@planning.nsw.gov.au](mailto:wollongong@planning.nsw.gov.au)

Dear Graham

### **Resubmission of Planning Proposal (PP032) - Clause 6.5**

I refer to the above Planning Proposal (PP) which was originally forwarded to the Department on 26 February 2018. Following consultation with the NSW Office of Environment and Heritage (OEH) and the Department to clarify the intent of the PP, I am pleased to provide a copy of a revised PP (**Attachment 1**).

This letter provides further information in support of the PP and reconfirms its intent to rectify a wording anomaly of Clause 6.5.

### **Background**

In a report prepared to the Special Development Committee of the Council on 17 July 2013 the following recommendation was made in relation to the draft of the Council's standard instrument principal local environmental plan (which was then known as Draft Shoalhaven Local Environmental Plan 2013):

<b>Issue</b>	<b>Recommendation</b>
Need to include a Clause to deal with residue rural or similar land resulting from the subdivision of the URAs under the draft LEP. A number of the lots that form the new Urban Release Areas (URA) are proposed to have a split zoning of rural and residential and subdivision will require the creation of lots smaller than the minimum lot size specified for rural land (this has been raised as a specific issue at Mundamia URA). Discussions have been held with DP&E who have advised that other Councils have had this issue and have included an additional Clause in Part 6 to cover the situation.	Request that the DP&E include an additional Clause in Part 6 to deal with residue land resulting from the subdivision of the URAs under the draft LEP.

*Extract from Special Development Committee Report – 17 July 2013, Table 13.14 – Summary of Issues and Recommendation, p. 48.*

The Special Development Committee of the Council passed the following resolution on 17 July 2013:

*that the Special Development Committee, in accordance with its delegated authority, request that the Department of Planning and Infrastructure include an additional Clause in Part 6 to deal with residue land resulting from the subdivision of the URAs under the draft LEP.*

Draft Shoalhaven Local Environmental Plan 2013 was subsequently made as Shoalhaven LEP 2014 and commenced operation on 22 April 2014. Shoalhaven LEP 2014 relevantly included at the time of its commencement (and currently includes) Clause 6.5.

### Clarification of Intent

The intent of the Clause is to allow the non-urban (RU1, RU2, E2 or E3) portion of land parcels zoned part urban/part non-urban to be subdivided apart from the URA, creating a residual lot (what is left over) that would not be subject to the detailed planning requirements for URAs under Part 6 of the LEP.

The current wording of the Clause only applies to land mapped as 'URA, which in all URAs apart from Badgee Lagoon, includes only the urban zoned land. The amendment is minor in nature as it seeks to rectify a wording anomaly in Clause 6.5 of Shoalhaven LEP 2014 to enable the original intent of the Clause to be carried out/realised.

### Legal Advice

Since meeting with the Department on 17 May 2018 Council obtained legal advice in respect of the Clause and whether it has been drafted in a way that aligns with Council's 2013 drafting instructions, included in **Attachment 2**. Council also sought advice to confirm whether or not the current wording of the Clause is operable.

The advice confirmed that Clause 6.5(1) has no application to the subdivision of land that is not within a mapped "URA". As a result, the Clause only has effect as intended in the Badgee Lagoon URA, which does not accord with the intention in the recommendation made by Council staff to the Special Development Committee of the Council on 17 July 2013 and forwarded to DP&E. The intention of the recommendation was for the Clause to apply to all URAs, to enable the non-urban portion of a lot that is part of an URA to be subdivided to create a non-urban residue lot less than the prescribed minimum lot size.

The legal advice found that the Clause does not accord with the intention in the recommendation made by Council staff (and resolved) to the Special Development Committee of the Council on 17 July 2013. Under the current wording, it is therefore impossible to create a residual lot in five (5) of the six (6) URAs as per the original intent.

The advice identified a minor wording omission from the drafting of the Clause, which would be necessary to include to reflect the intention in the recommendation made by Council staff to the Special Development Committee on 17 July 2013. In order to make the Clause operable, the PP seeks to insert the words "that is partly or wholly within" to Clause 6.5(1) so the Clause reads as follows:

- 1) Development consent may be granted for the subdivision of land that is partly or wholly within an Urban Release Area to create a lot of a size that is less than the minimum size shown on the [Lot Size Map](#) in relation to that land or less than the minimum lot size permitted for the land immediately before it became, or became part of, an URA if the lot is comprised entirely of land in one or more of the following zones (the **residual lot**):

- a. Zone RU1 Primary Production,
- b. Zone RU2 Rural Landscape,
- c. Zone E2 Environmental Conservation,
- d. Zone E3 Environmental Management.

In order to clearly reflect the original intention, the legal advice suggested that Clause 6.5(2) would also need to be deleted.

Clause 6.5(2) currently reads as follows:

- 2) Development consent may be granted for the erection of a dwelling house on a residual lot.

The advice suggested that in order to preserve the power to grant consent in relevant/appropriate situations to the erection of a dwelling house on a lot created under Clause 6.5(1) in circumstances where the erection of a dwelling house was permitted with consent on the lot prior to the plan of subdivision being registered, the following provision would need to be included in Clause 4.2D(3) of the LEP:

cd) is a residue lot created under Clause 6.5(1) on which the erection of a dwelling house was permissible immediately before the plan of subdivision creating the lot was registered.

However, it is considered inappropriate for dwelling houses to be permissible on every resultant residual lot, particularly given the environmental and agricultural sensitivities of land within the zones prescribed by the Clause (RU1 Primary Production, RU2 Rural Landscape, E2 Environmental Conservation and E3 Environmental Management). A review of all the potential residue lots which could be created through this amendment found that there are certain residue lots which would be suitable for a dwelling entitlement, which could meet existing provisions under Clause 4.2D(3)(a) (where it meets the minimum lot size) or Clause 4.2D(5) (there is already a lawfully erected dwelling house on the land) without any further amendments through this PP.

This review of all potential residue lots is included in revised mapping in the PP. A couple of lots previously identified as "Lots considered to have potential for dwelling entitlement" on maps provided by Council to DP&E have been removed due to their location in a future road reserve, or future long term living area (Meroo Meadow) which could be dealt with under the existing split zones Clause.

We look forward to your assistance in advancing this PP. If you need further information about this matter, please contact Molly Porter, on (02) 4429 3596. Please quote Council's reference 57476E (D19/124634).

Yours faithfully



**Gordon Clark**  
**Strategic Planning Manager**  
05/06/2019

Attachments:

- 1. Revised Planning Proposal
- 2. Drafting Instructions