



Planning Proposal – 713 Newline Road, Eagleton

**Proposed amendment to Schedule 1 of Port
Stephens Local Environmental Plan 2013**
Lot 11 DP881743, 713 Newline Road, Eagleton



FILE NUMBERS

Council: PSC2015-01071

Department: To be provided at Gateway Determination.

SUMMARY

Subject land: Lot 11 DP881743, 713 Newline Road, Eagleton

Proponent: LeMottee Group

Proposed Changes: Amendment to Schedule 1 of the Port Stephens Local Environmental Plan 2013 to allow dual occupancy development on the subject land

Zone: RU1 Rural Production

Area of land: Six (6) hectares

BACKGROUND

The land holder is seeking to change the approved use of a tourist facility and manager's residence to a detached dual occupancy on the subject land. However, under the Port Stephens Local Environmental Plan 2013, a dual occupancy is not permitted on the subject land as a minimum lot size of 20 hectares is required on land in the RU1 Primary Production Zone. The subject site is 6 hectares.

Previously, the proposed dual occupancy was also not permitted under Clause 14 of the Port Stephens LEP 2000, which prohibited dwelling houses and dual occupancy on lots, such as this one, that were created for another intended use. Furthermore, as discussed below, there is a convenient on the title of the property restricting its use for dual occupancy. The convenient was created at the time of the development application to restrict the use of the land.

In order to allow the proposed change of use, an amendment to Schedule 1 Additional Permitted Uses of the Port Stephens Local Environmental Plan 2013, to include development for the purposes of a dual occupancy on the subject land, is required.

In November 1998, approval was granted on the subject land for a tourist facility, manager's residence and subsequent subdivision, pursuant to Clause 12(b) of the Port Stephens LEP 1987, which, at the time, allowed for the subdivision of rural land for an approved use other than dwellings. As such,

the subdivision did not result in an additional dwelling entitlement. The development consent required the land to be burdened by an 88B instrument restriction under the *Conveyancing Act 1919*, prohibiting a dwelling or duplex (Condition 6 of L1055/98).

The tourist facility included a water-ski school and associated tourist lodge. However, the business became unviable in 2003 due to changes made by the Department of Land & Conservation, Waters Authority and Council regarding the use of waterways.

A Mayoral Minute dated 28 July 2009 resolved to initiate an amendment to Clause 14 of the Port Stephens LEP 2000 to enable the permissibility of dwellings on allotments created for approved uses prior to the appointed date (being 29 December 2000). Clause 14 dealt with dwelling houses and dual occupancies in Rural Zones. This amendment sought to allow the proposed change of use however it did not proceed. The matter was considered through the preparation of the principal LEP (PSLEP2013), but was not included because the LEP sought to transition the existing provisions into the standard instrument template, without any significant policy change. As such, a standard minimum lot size for rural land use was applied.

Since this time, the land holder has lodged numerous development applications seeking a change of use from tourist facility and manager's residence to dual occupancy. These applications have been refused as dual occupancy is prohibited under previous and current LEPs.

At its meeting on 10 March 2015, Council refused a development application for a change of use from tourist facility to dual occupancy due to the proposed development being prohibited under the LEP 2013. However, at this time, Council indicated support for the applicant to lodge a planning proposal seeking an amendment to Schedule 1 to allow the use of the existing buildings for dual occupancy. Council also resolved to waive any fees associated with the planning proposal.

Should the planning proposal be supported, a new Development Application seeking a change of use to a dual occupancy will need to be lodged. Further, as there is an operational consent over the land which prohibits dual-occupancy/dwellings on the subject lot (condition 6 of L1055/98), a Section 96 application must also be lodged (concurrently) seeking the removal of this condition. The 88B instrument restriction will also need to be removed from the title of the property.

SITE

The planning proposal relates to Lot 11 DP881743, 713 Newline Road, Eagleton. **Figure 1 – 713 Newline Road** (Page 3) identifies the site.

PART 1 – Objective of the proposed Local Environmental Plan Amendment

The planning proposal aims to allow detached dual occupancy as an additional permitted use on Lot 11 DP881743, 713 Newline Road, Eagleton.

PART 2 – Explanation of the provisions to be included in proposed LEP

Under the provisions of the PSLEP 2013, a dual occupancy is only permissible on land in the RU1 Zone where it has a minimum size of 20ha. The subject site is approximately 6 ha.

In order for the proposed dual occupancy to be permitted, an amendment to Schedule 1 Additional Permitted Uses of the PSLEP 2013 is required as follows:

The proposal will be implemented by an amendment of the Port Stephens Local Environmental Plan 2013 by adding the following to Schedule 1 – Additional Permitted Uses:

X Use of certain land at Newline Road, Eagleton

- (1) This clause applies to land at Newline Road, Eagleton, being Lot 11 DP881743
- (2) Development for the purpose of a detached dual occupancy is permitted with consent.

PART 3 – Justification for the Planning Proposal

SECTION A – Need for the Planning Proposal

1. Is the planning proposal a result of any strategic study or report?

No. The Planning Proposal is the result of a development application that sought a change of use of an existing tourist facility and managers residence to a dual occupancy on the subject land. Under the Port Stephens Local Environmental Plan 2013 (the LEP), the proposed change of use is not permissible and the application was refused. However, Council resolved to encourage the proponent to lodge a planning proposal to enable an additional permitted use of the site.

The dual occupancy is a prohibited use, and the subdivision and existing buildings were specifically approved for a tourist facility, with a covenant restricting their use as a dwelling / dual occupancy. Furthermore, additional development in rural areas increases the potential for land use conflict between the rural residential land and agricultural pursuits and increases demand for services in remote areas. For these reasons, it is considered that the proposal has limited strategic justification, despite the minimal environmental impacts of the change of use.

2. *Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?*

Under the provisions of the LEP 2013, a dual occupancy is prohibited on the subject land. An amendment to Schedule 1 is required in order for the existing buildings on the land to be used as a dual occupancy. In this instance, an amendment to Schedule 1 is the best means of allowing a dual occupancy on the subject land, as it will not change the use of other rural land.

3. *Is there a community benefit?*

The proposal will have minimal social or economic benefit to the community.

SECTION B – Relationship to Strategic Planning Framework

4. *Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?*

Lower Hunter Regional Strategy

The approved use of the site for a tourist facility is no longer viable. The planning proposal will allow the existing buildings on the site to be used as a detached dual occupancy. No additional development will be permitted as part of this proposal and it will create a viable use for the land.

The planning proposal is inconsistent with the objectives of the LHRS, which seeks to limit new dwelling entitlements in Rural Zones. However, it is consistent with the applicable Sustainability Criteria. An assessment of the planning proposal against the Sustainability Criteria is contained in **Attachment 3**.

5. *Is the planning proposal consistent with the local Council's Community Strategic Plan, or other local strategic plan?*

Integrated Planning and Reporting Framework

The Planning Proposal is a statutory planning document, which either directly or indirectly addresses a board range of measures contained within Council's integrated plans, such as Direction 11.1.1.2 – Prepare and review statutory plans.

Port Stephens Planning Strategy (PSPS)

The PSPS aims to ensure that current and future agriculture is not compromised by the fragmentation of rural land. It further aims to ensure that prime agricultural land and important rural landscapes are protected from undesirable development.

The planning proposal is consistent with the aims of the PSPS as it will not compromise agricultural land or provide provisions that will allow for its further fragmentation. Given that no further development potential will be created as it is proposed to change the use of the existing buildings, the proposal will have no impact on the rural vista in the area.

State Environmental Planning Policies

6. Is the planning proposal consistent with applicable state environmental planning policies?

There are no existing or draft SEPPs that prohibit or restrict the proposed development as outlined in this planning proposal. An assessment of relevant SEPPs against the planning proposal is provided in the table below.

Table 1: Relevant State Environmental Planning Policies

SEPP	Relevance	Consistency and Implications
SEPP 44 – Koala Habitat Protection	The SEPP encourages the conservation and management of natural vegetation areas that provide habitat for koalas to ensure permanent free-living populations will be maintained over their present range.	Part of the subject land contains Preferred Koala Habitat/cleared buffer area, however it is mostly cleared land and contains little vegetation. The location of the existing buildings is cleared land and the proposal does not include tree removal. The planning proposal will not impact upon koala habitat.
SEPP (Rural Lands) 2008	The SEPP aims to facilitate economic use and development of rural lands, reduce land use conflicts and provides development principles.	The proposal complies with the objectives of the SEPP as it provides for the most economically viable use of the land. The proposal will not impact on the surrounding rural land use.

Section 117 Ministerial Directions

7. Is the planning proposal consistent with applicable Ministerial Directions?

An assessment of relevant s.117 Directions against the planning proposal is provided in the table below.

Table 2: Relevant s.117 Ministerial Directions

Ministerial Direction	Aim of Direction	Consistency and Implications
1. EMPLOYMENT AND RESOURCES		
1.2 Rural Zones	The objective of this direction is to protect the agricultural production value of rural land.	The planning proposal is inconsistent with this Direction as it seeks to increase the permissible density in a rural zone. This inconsistency is considered to be of minor significance as it will provide a mechanism for the viable use of existing buildings on the site.
1.4 Rural Lands	The objective of this direction is to protect the agricultural production value of rural land and facilitate the economic development of rural lands for rural related purposes.	The planning proposal seeks to amend provisions applying to rural zoned land. However, the planning proposal will not impact on the economic viability of rural land.
2. ENVIRONMENT AND HERITAGE		
2.1 Environmental Protection Zones	The objective of this direction is to protect and conserve environmentally sensitive areas.	The planning proposal will have minimal environmental impact.
3. HOUSING, INFRASTRUCTURE AND URBAN DEVELOPMENT		
3.3 Home Occupations	The objective of this direction is to encourage the carrying out of low impact small businesses in dwelling houses.	Pursuant to the PSLEP 2013, Home occupation is permitted without consent in the RU1 Zone.
4. HAZARD AND RISK		
4.1 Acid Sulfate Soils	The objective of this direction is to avoid significant adverse environmental impacts from the use of land that has a probability	The subject site is identified as containing Acid Sulfate Soils. However, the planning proposal seeks to allow a change of use of existing

	of containing acid sulphate soils	buildings. As such, no works are proposed and ASS will not be impacted.
4.3 Flood Prone Land	The objectives of this direction are to ensure that development of flood prone land is consistent with the NSW Government's Flood Prone Land Policy and the principles of the <i>Floodplain Development Manual 2005</i> , and that the provisions of an LEP on flood prone land are commensurate with flood hazard and include consideration of the potential flood impacts both on and off the subject land.	The subject land is partially flood prone. However, the existing buildings are located above the 1:100 year floodplain.
4.4 Planning for Bushfire Protection	The objectives of this direction are to protect life, property and the environment from bush fire hazards, by discouraging the establishment of incompatible land uses in bush fire prone areas, to encourage sound management of bush fire prone areas.	The proposal is satisfies the requirements of Planning for Bushfire protection Guidelines 2006.
5. REGIONAL PLANNING		
5.1 Implementation of Regional Strategies	The objective of this direction is to give legal effect to the vision, land use strategy, policies, outcomes and actions contained in regional strategies.	The planning proposal is inconsistent with the LHRS as it seeks to increase dwelling density on rural land. The planning proposal is of minor significance and satisfies the 'sustainability criteria' contained in the LHRS. An assessment of the sustainability criteria is located at Attachment 3 .

6. LOCAL PLAN MAKING		
6.3 Site Specific Provisions	The objective of this direction is to discourage unnecessarily restrictive site specific planning controls.	The planning proposal is inconsistent with this Direction as it proposes site specific provisions. The proposal is of minor significance as the proposed site specific provisions will limit the land use changes to this specific site and not alter the rural zone.

SECTION C – Environmental, Social and Economic Impact

8. Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

No. The buildings already exist and therefore the proposal is unlikely to have any significant adverse impacts to the environment or surrounding rural amenity.

9. Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

No.

10. Has the planning proposal adequately addressed any social and economic effects?

The proposal will have minimal social and economic impacts.

SECTION D – State and Commonwealth interests

11. Is there adequate public infrastructure for the planning proposal?

The proposal will not generate a significant demand for additional public infrastructure.

12. What are the views of the State and Commonwealth public authorities consulted in accordance with the gateway determination?

The Gateway Determination will specify any government agency consultation requirements. Given the local nature and minimal impact of the proposal, it is unlikely that any agencies will have an interest in the planning proposal.

Part 5 - Details of Community Consultation

The planning proposal will be exhibited in accordance with the Gateway determination. Given the minor nature of the proposal, a 14 day exhibition period will suffice.

Notice of the public exhibition period will be placed in The Examiner. The exhibition material will be on display at the following locations during normal business hours:

- Council's Administration Building 116 Adelaide Street, Raymond Terrace
- Raymond Terrace Library, Port Stephens Street, Raymond Terrace
- Tomaree Library, Town Centre Circuit, Salamander Bay
- Council's website.

Part 6 – Project timeline

The planning proposal is expected to be reported to Council following the completion of the public exhibition period.

The following timetable is proposed:

	AUG15	SEPT 15	OCT 15	NOV 15	DEC 15	JAN 16	FEB 16
<i>Council consideration</i>							
<i>Gateway Determination</i>							
<i>Public Exhibition</i>							
<i>Council Report</i>							
<i>Parliamentary Counsel</i>							

Attachment 1 – Council Report and Minutes 10 March 2015

MINUTES ORDINARY COUNCIL – 10 MARCH 2015

ITEM NO. 1

FILE NO: 16-2014-222-1

DEVELOPMENT APPLICATION FOR A CHANGE OF USE FROM TOURIST LODGE AND MANAGERS RESIDENCE TO DETACHED DUAL OCCUPANCY DEVELOPMENT AT NO 713 NEWLINE ROAD, EAGLETON (LOT 11 DP881743)

**REPORT OF: MATTHEW BROWN – DEVELOPMENT ASSESSMENT AND COMPLIANCE
SECTION MANAGER
GROUP: DEVELOPMENT SERVICES**

RECOMMENDATION IS THAT COUNCIL:

- 1) Refuse Development Application 16-2014-222-1 for change of use from Tourist Facility to Detached Dual Occupancy Development at 713 Newline Road, Eagleton (Lot 11 DP 881743) for the following reasons:
 - a. The proposed development is prohibited under Clause 4.28 of Port Stephens Local Environmental Plan 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979);
 - b. The site does not satisfy the minimum lot size and other requirements for Dual Occupancy development on Rural Land under the Port Stephens Local Environmental Plan (LEP) 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979);
- 2) Council officers write to the owner/applicant encouraging them to lodge a planning proposal for consideration by NSW Planning and Environment to amend the Port Stephens LEP 2013 to enable an additional permitted use on the site (for purposes of a dual occupancy).

ORDINARY COUNCIL MEETING – 10 MARCH 2015

MOTION

040	Councillor Steve Tucker Councillor John Nell
	It was resolved that Council move into Committee of the Whole.

Cr Paul Le Mottee left at 5.31pm, prior to Item 1, in Committee of the Whole.

COMMITTEE OF THE WHOLE RECOMMENDATION

	Mayor Bruce MacKenzie Councillor Sally Dover
	That Council: 1) Refuse Development Application 16-2014-222-1 for change of use

	from Tourist Facility to Detached Dual Occupancy Development at 713 Newline Road, Eagleton (Lot 11 DP 881743) for the following reasons: c. The proposed development is prohibited under Clause 4.28 of Port Stephens Local Environmental Plan 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979); d. The site does not satisfy the minimum lot size and other requirements for Dual Occupancy development on Rural Land under the Port Stephens Local Environmental Plan (LEP) 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979; 2) Council officers write to the owner/applicant encouraging them to lodge a planning proposal for consideration by NSW Planning and Environment to amend the Port Stephens LEP 2013 to enable an additional permitted use on the site (for purposes of a dual occupancy). 3) Given Council has previously indicated support for this rezoning application via minute no 221 of 28 July 2009, and it was Council's understanding the proposal would be included in the comprehensive Local Environmental Plan (LEP), Council resolve that no fees are applicable for the planning proposal.
--	--

In accordance with Section 375A of the *Local Government Act 1993*, a division is required for this item.

Those for the motion: Mayor Bruce MacKenzie, Crs Peter Kafer, Chris Doohan, Steve Tucker, Geoff Dingle, John Nell, John Morello and Sally Dover.

Those against the motion: Nil.

MOTION

Cr Paul Le Mottee left the meeting at 6.04pm, prior to Item 1, in Open Council.

042	Councillor Chris Doohan Councillor John Nell It was resolved that Council: 1) Refuse Development Application 16-2014-222-1 for change of use from Tourist Facility to Detached Dual Occupancy Development at 713 Newline Road, Eagleton (Lot 11 DP 881743) for the following reasons: e. The proposed development is prohibited under Clause 4.28
------------	---

	of Port Stephens Local Environmental Plan 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979); f. The site does not satisfy the minimum lot size and other requirements for Dual Occupancy development on Rural Land under the Port Stephens Local Environmental Plan (LEP) 2013 (Section 79C(1)(a) of the Environmental Planning & Assessment Act 1979; 2) Council officers write to the owner/applicant encouraging them to lodge a planning proposal for consideration by NSW Planning and Environment to amend the Port Stephens LEP 2013 to enable an additional permitted use on the site (for purposes of a dual occupancy).] 3) Given Council has previously indicated support for this rezoning application via minute no 221 of 28 July 2009, and it was Council's understanding the proposal would be included in the comprehensive Local Environmental Plan (LEP), Council resolve that no fees are applicable for the planning proposal.
--	---

In accordance with Section 375A of the *Local Government Act 1993*, a division is required for this item.

Those for the motion: Mayor Bruce MacKenzie, Crs Peter Kafer, Chris Doohan, Steve Tucker, Geoff Dingle, John Nell, John Morello and Sally Dover.

Those against the motion: Nil.

BACKGROUND

The purpose of this report is to present to Council for determination development application 16-2014-222-1. The application has been called to Council by Councillor Jordan due to community interest. A copy of the call up form is included at **(ATTACHMENT 1)**.

Proposal

The application seeks to change the approved use of a tourist facility and managers residence to a detached dual occupancy under the Port Stephens Local Environmental Plan 2013 located at 713 Newline Road, Eagleton **(ATTACHMENT 2)**.

The key issue with the application relates to permissibility under the Port Stephens Local Environmental Plan 2013. Other impacts of the development are suitable and compliant with the relevant Development Control Plan (DCP) requirements. This is outlined in the Assessment **(ATTACHMENT 3)**.

Since 2006, Council staff have advised the owner/applicant on a number of occasions that the change of use is prohibited. A report to Council in 2009 resulted in the issue of a refusal. Council has previously advised via Council resolution it would support a planning proposal to change the zoning provisions to accommodate such a use.

Site History

Approval for a tourist facility, managers residence and a subdivision was granted pursuant to Clause 12(b) of the Port Stephens Local Environmental Plan 1987 (DA 1055/98) on 5 November 1998. This clause allowed for subdivision of rural land for an approved use, excluding dwellings, therefore did not include a dwelling entitlement.

The tourist facility was sought to be run as a water-ski school and associated tourist lodge. The site is burdened with an 88B instrument restriction under the *Conveyancing Act 1919* prohibiting a dwelling or duplex.

In 2006 the owners sought Council's approval to remove the restriction on the use of the land contained in the 88B instrument. The basis of the request related to changes to the way in which the water-ski school was able to operate, which the owner advised would render the business unviable.

In 2003, the Department of Land & Conservation, Waters Authority and Port Stephens Council undertook a joint investigation into stream bank erosion and the adoption of a new Boating Traffic Management Plan for the Williams River. Following this, Boating Traffic Management Plans were adopted which prohibit slow speed towing, including wakeboarding or knee boarding in the stretch of the river some distance either side of the subject site's frontage to the river. The owner advised that this impacted negatively on the business as novice skiers or wake boarders could not be trained properly without being able to access other areas on the river and requested removal of the 88B restriction.

At the time of the request, Council advised that the restriction could not be removed given a dwelling or duplex was prohibited under the Port Stephens Local Environmental Plan 2000 (as a result of the previous subdivision not being for this purpose).

In 2009, the owners lodged another development application for a change of use from tourist facility to dual occupancy and sought amendment to Clause 14 of Council's Local Environmental Plan 2000 to allow the development. The development application was also refused by Council as consent for the subdivision had been granted pursuant to Clause 12(b) of Port Stephens Local Environmental Plan 1987 on the basis that the new lot would only be for the tourist facility and development for a dual occupancy was prohibited.

Although the site is considered suitable for the proposed development from a merits perspective, the application cannot be supported given the proposal is not permissible under the Port Stephens LEP 2013. The purpose of this LEP provision is to minimise the fragmentation of agricultural land.

MINUTES ORDINARY COUNCIL – 10 MARCH 2015

Council officers have sought to assist the owner/applicant by seeking them to lodge a planning proposal requesting an amendment to the Port Stephens LEP 2013 to enable an additional permitted use on the site (for the purposes of a dual occupancy). If a planning proposal was lodged, Council officers have advised they would support making a submission to the NSW Planning & Environment for their consideration. |

FINANCIAL/RESOURCE IMPLICATIONS

The application could be potentially challenged in the Land and Environment Court. Defending Council's determination could have financial implications. |

Source of Funds	Yes/No	Funding (\$)	Comment
Existing budget	No		
Reserve Funds	No		
Section 94	No		
External Grants	No		
Other	No		

LEGAL, POLICY AND RISK IMPLICATIONS

The development application is prohibited under Council's Local Environmental Plan 2013 and is therefore not consistent with the requirements of Section 79C(a) of the *Environmental Planning & Assessment Act 1979*. |

Risk	Risk Ranking	Proposed Treatments	Within Existing Resources?
There is a risk that if the application is refused the determination may be challenged in the Land and Environment Court.	Low	Council is confident the assessment is robust and if required is able to proceed through the legal process.	Yes

SUSTAINABILITY IMPLICATIONS

Includes Social, Economic and Environmental Implications

Part of Council's role is to provide services and make decisions that enhance quality of life. The proposal seeks to return a viable use to the land and there are no social and economic implications for Council by allowing for provision of housing within buildings that currently exist on the land.

The Applicant advises that the current existing use was rendered inoperable as a result of concerns over boating and stream bank erosion of the Williams River.

MINUTES ORDINARY COUNCIL – 10 MARCH 2015

Both the manager's residence and tourist lodge (originally a dwelling) exist on the site. The site is well maintained and the proposal does not have any adverse environmental impacts nor will the development have any adverse social or economic implications. |

CONSULTATION

|The application did not require public notification in accordance with Council's policies. The application was referred to Council's building surveyors in accordance with Council's service level agreements. Consultation with the applicant and site inspection with the owners has taken place. |

OPTIONS

- |1) Adopt the recommendations;
- 2) Amend the recommendations;
- 3) Reject the recommendations. |

ATTACHMENTS

- |1) Councillor Call to Council Form;
- 2) Locality Plan;
- 3) Assessment;
- 4) Conditions/Reasons for refusal. |

COUNCILLORS ROOM

- |1) Statement of Environmental Effects;
- 2) Site Photos. |

TABLED DOCUMENTS

|Nil.

ATTACHMENT 1
COUNCILLOR CALL UP FORM

116 Adelaide Street, Raymond Terrace NSW 2324
PO Box 42, Raymond Terrace NSW 2324
DX 27300 LAKE MACQUARIE NSW 2324

Port Stephens COUNCIL

**CALL TO COUNCIL FORM
DEVELOPMENT APPLICATION**

I, Councillor Ken Jordan
require Development Application Number..... 16-2014-222-1
for a :change of use – tourist lodge to dual occ
.....
at 713 Newline Road, Eagleton.....
.....
to be subject of a report to Council for determination by Council.

Reason:

The reason for this call-up to Council is *so the*
applicant can do public
access and the Councillors
can do site visit.

Declaration of Interest:

I have considered any pecuniary or non-pecuniary conflict of interest (including political donations) associated with this development application on my part or an associated person. **I have a conflict of interest? Yes/No** (delete the response not applicable).

If **yes**, please provide the nature of the interest and reasons why further action should be taken to bring this matter to Council:
.....
.....
.....

Signed: .. Date: *20/1/2015*

0255 | Facsimile: 02 4987 3612
www.portstephens.nsw.gov.au | Web: www.portstephens.nsw.gov.au

ATTACHMENT 2
LOCALITY PLAN



ATTACHMENT 3
ASSESSMENT

The application has been assessed pursuant to Section 79C of the *Environmental Planning and Assessment Act 1979* and the following is a summary of those matters considered relevant in this instance.

THE PROPOSAL

The application is for a change of use from the approved tourist facility and managers residence to a detached dual occupancy under Port Stephens Local Environmental Plan 2013.

THE APPLICATION

Owner Applicant	Mr. G.A & Ms N M Wright Le Mottee Group
--------------------	--

THE LAND

Property Description	Lot 11 DP881743
Address	713 Newline Road, Eagleton
Area	The site has an area of 5.258ha.
Dimensions	The site has irregular dimensions, however, is generally rectangular in shape and has frontage to the Williams River.
Characteristics	Bushfire prone land, Acid Sulphate Soils (ASS) Class 5, Koala Habitat (cleared buffer/preferred), Prime Agricultural land (classes 1-3), Partially flood affected.

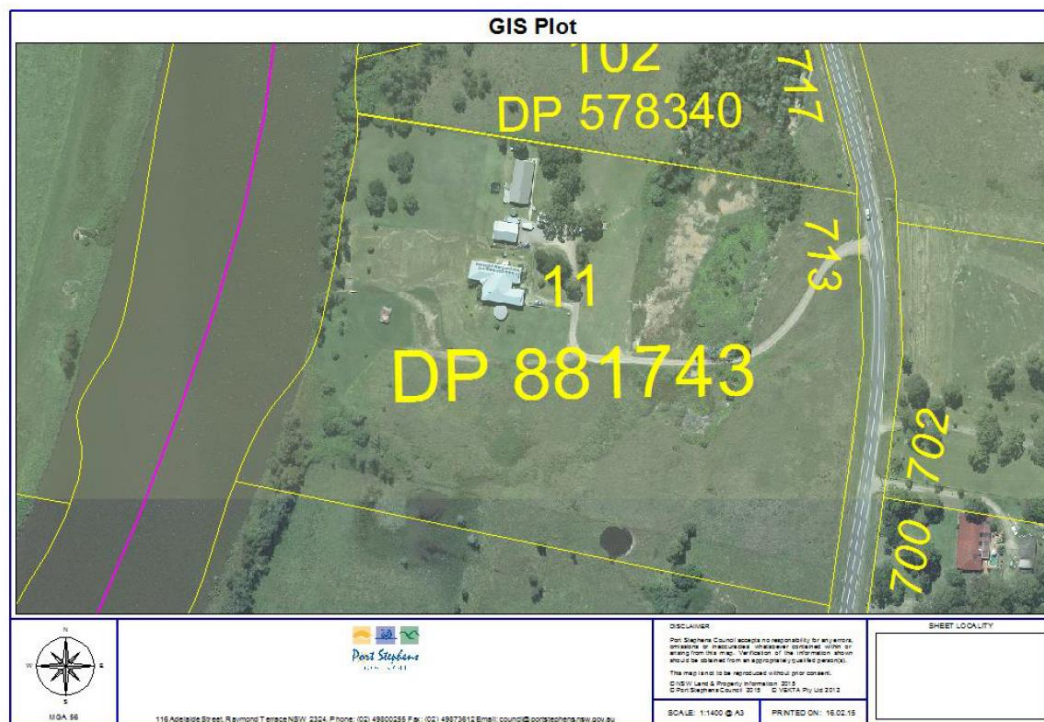


Figure 1 – Aerial Image of Development Site

THE ASSESSMENT

PLANNING PROVISIONS

Environmental Planning and Assessment Act 1979	s.79C Planning provisions Rural Fires Act 1997 (79BA)
State Environmental Planning Policies	State Environmental Planning Policy Rural Lands (2008) State Environmental Planning Policy No.44 – Koala Habitat Protection (and Port Stephens Comprehensive Koala Plan of Management)
Port Stephens Local Environmental Plan (2013)	Zone RU1 Primary Production Clause 4.2B Erection of dwelling houses on land in certain rural, residential and environmental protection zones Cl.7.1 Acid sulphate soils. Cl.7.10 – Williams River Catchment
Port Stephens Development Control Plan 2013	B2 Environment and Construction Management

B3 Parking and Traffic
B6 Single and Dual Occupancy Dwellings

Port Stephens Section 94 Plan

Section 94 contributions are not applicable as section 94 levies raised under DA 1055/98.

Statutory Acts and Regulations

***Environmental Planning and Assessment (EP&A) Act 1979* Section 79C – Planning Assessment**

An assessment under Section 79C of the EP& A Act 1979 has been undertaken throughout this report.

Rural Fires Act 1997 (Section 79B)

The proposed development is located on bushfire prone land (south east corner of the site only). The two existing building structures on site were in existence prior to the change of use to the mangers residence and tourist lodge in 1998. The change of use to a dual occupancy development is not a 'special fire protection purpose' under 100B of the *Rural Fires Act 1997* and the proposal is not integrated development under s.91 of the *EP&A Act 1979*. The site is clear of trees and is not within 100m of any significant vegetation. The site is also within 70m of the Williams River. The proposal therefore satisfies Planning for Bushfire Requirements 2006 and does not require referral to RFS, or any upgrades should Council elect to approve the dwelling.

State Environmental Planning Policies

State Environmental Planning Policy (Rural Lands) 2007

The proposal complies with the aims of this State Policy which include the facilitation of the orderly and economic use and development of rural lands for rural and related purposes. The approved use on the site is no longer viable and return of the site to a dual occupancy use will ensure the ongoing viability of land use having regard to social, economic and environmental considerations.

State Environmental Planning Policy No. 44 – Koala Habitat Protection and Port Stephens Comprehensive Koala Plan of Management (CKPoM)

State Environmental Planning Policy No.44 – Koala Habitat Protection, aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range and reverse the current trend of koala population decline.

The site is mapped as containing Preferred Koala Habitat/cleared buffer area (western and south western part of the site only). The site is mostly cleared and

contains little vegetation. The proposal does not include tree removal and the change of use to dual occupancy development will not impact upon koala habitat.

Port Stephens Local Environmental Plan (2013)

Zone RU1 Primary Production

The land is zoned RU1 Primary Production. The proposed development is not inconsistent with the objectives of the zone. Dwelling houses and Dual Occupancies are permissible forms of development under the provisions of the RU1 Zone, subject to compliance with the other provisions of the LEP.

Clause 4.2B Erection of dwelling houses on land in certain rural, residential and environment protection zones

Clause 4.2B(3) states that development consent must not be granted for the erection of a dwelling house on land to which this clause applies unless the land:

- (a) Is a lot that is at least the minimum lot size shown on the Lot Size Map under Port Stephens Local Environmental Plan 2013.

The current lot size is 5.258ha and therefore does not meet the minimum lot size of 20ha required under this Clause.

Alternatively, Clause 4.2B(3) states development consent can be granted for land in the RU1 Primary Production zone if it is a lot created before the Plan commenced that has an area of at least 4,000 square metres and on which the erection of a dwelling house was permissible immediately before that commencement.

This Clause does not apply because the original approval under Clause 12(B) of Port Stephens Local Environmental Plan 1987 for a Tourist Facility, Manager's Residence and Subdivision resulted in extinguishing the dwelling entitlement relating to this land.

The applicant provided an argument that the development should be permissible as the buildings were already in existence and clause 4.2B relates to the 'erection' of dwelling houses and dual occupancies. Council officers sought legal advice in this regard (from Local Government Legal) who confirmed that the term dwelling house encompasses both the development and use of the land (see case law *Dobrohotoff v Bennic [2013]*)

Furthermore, the Interpretations Act 1987 provides that in interpreting a provision of an Act the interpretation that would best achieve the purpose of object (whether or not that purpose is expressly stated) is to be preferred.

In this regard, the principle objective of Clause 4.2(B)3 is to minimise unplanned rural residential development. The objective is achieved by restricting new dwelling entitlements on land to which the clause applies. The objective of Clause 4.2B would be undermined if the clause were interpreted to allow Council to grant consent to a

change of use of a building for the purpose of a dwelling/dual occupancy. In addition an interpretation of Clause 4.2B that would allow a change of use to a building so as to create a primary dwelling entitlement is contrary to the objectives of the RU1 Primary Production zone. Therefore, legal advice confirmed that Clause 4.2B should be interpreted as if it was drafted as follows:

'development consent must not be granted for the erection of, or for the purpose of a dwelling house on land...'

Clause 7.1 Acid Sulphate soils

The subject site is identified as containing Acid Sulphate soils (ASS). No works are being undertaken as part of the proposal which is likely to lower the water table below. The proposal is therefore not inconsistent with the provisions of clause 7.1.

Clause 7.3 – Flood Planning

The site is partially flood prone, however, both of the buildings are located outside of the area on the site subject to flooding. In this regard, the proposed development is compatible with the flood hazard of the land and there will be no unsustainable impacts.

Clause 7.10 – Williams River Catchment

The objectives of this clause include environmental protection of the Williams River Catchment. The proposal will promote the sustainable use of the land and will have less impact than the existing approved use of the site given skiing and wakeboarding activities will no longer be undertaken within the river.

Port Stephens Development Control Plan 2013

B2 Environmental and Construction Management

The proposal does not result in adverse impacts to the environment. As detailed above, it is anticipated environmental impacts will decrease (bank erosion within the Williams River) as a result of a decrease in skiers and wakeboarders associated with the tourist facility.

B3 Parking and Traffic

The site provides for existing parking and access and is not considered to require further consideration under Port Stephens Development Control Plan 2013.

B6 Single and Dual Occupancy Dwellings

The two buildings currently exist on the site and comply with the relevant requirements for dwellings under the plan.

Section 94 Contribution Plan

Section 94 Levies were raised under DA 1055/98 at the time the land was subdivided and therefore are not applicable to the subject proposal.

Community consultation

Consultation with the applicant and site inspection with the owners has taken place.

Internal referrals

Building

The application was referred to Council's Building Surveying Team for review and it was identified that the proposal was satisfactory in regard to building matters.

Likely impacts of the development

The proposal does not present any significant adverse impacts to the environment or surrounding rural amenity.

Suitability of the site

There are no physical constraints on the site that make the land unsuitable for the proposed development. The site is well maintained, retains its rural character and amenity and is suitable for the proposed development.

Public interest

The development does not result in negative social, economic and environmental outcomes. Council has no significant issues with the proposed use of the site, however, the change of use is prohibited under Port Stephens Local Environmental Plan 2013.

**ATTACHMENT 4
REASONS FOR REFUSAL**

- 1) The proposed development is prohibited under Clause 4.2B of Port Stephens Local Environmental Plan 2013 (Section 79C(1)(a) of the *Environmental Planning & Assessment Act 1979*); and
- 2) The site does not satisfy the minimum lot size and other requirements for Dual Occupancy development on Rural Land under the Port Stephens Local Environmental Plan (LEP) 2013 (Section 79C(1)(a) of the *Environmental Planning & Assessment Act 1979*)

MAYORAL MINUTE

ITEM NO. 1

FILE NO:16-2009-165-1

AMENDMENT TO CLAUSE 14 OF THE PORT STEPHENS LOCAL ENVIRONMENTAL PLAN 2000

THAT COUNCIL:

Resolve to initiate a draft amendment to Clause 14 of the Port Stephens Local Environmental Plan 2000 to enable permissibility of dwellings on allotments created for approved uses prior to the appointed date.

BACKGROUND

Clause 14 – Dwelling houses and dual occupancy housing in Rural zones.

Clause 14 of the Port Stephens Local Environmental Plan, 2000 outlines the matters to be considered in the development of dwelling houses and dual occupancies within the Rural zones.

Clause 14 states inter alia;

(2) The consent authority shall not consent to the erection of a dwelling house or dual occupancy housing on an allotment of land to which this clause applies if;

(i) if the allotment was created before the appointed day – the consent authority is of the opinion that the allotment was intended to be used for any one or more of the purposes (other than the purpose of dwelling house or dual occupancy housing) for which it could have been used (with or without the consent of the consent authority) under the environmental planning instrument under which it was created,

Clauses 14(2)(i) and 14(2)(ii) serve specifically to prohibit the development of dwellings and/or dual occupancies on allotments that were created for another intended use (other than dwellings and/or dual occupancies).

Development Proposal

Council is in receipt of a Development Application (16-2009-165-1) proposing the change of use from Tourist Facility (Ski School) and Managers Residence to Dual Occupancy.

The Ski School was approved on 5th November 1998 by Development Consent L1055/98 which encompassed approvals for the use of the subject site for Managers Residence, Tourist Lodge, Subdivision and Water Ski School.

Consent condition Number 6 restricted the use of the site in the following way

The use of the proposed allotments is restricted pursuant to clause 12(b) of Local environmental Plan 1987 and accordingly no dwelling or duplex can be built on the proposed residue Lot1. The title of the relevant property shall be endorsed under Section 88B of the Conveyancing Act to give effect to this condition. In this regard Council shall be nominated as the sole authority permitted to alter/remove the endorsement.

This condition was reflected in the allotments 88B instrument, specifically in Terms of Easement or Restrictions secondly referred to in the plan.

The provisions of Condition 6 of Development Consent L1105/98, the Section 88B instrument for DP 881743 and Clause 12(b) of the LEP 1987 all serve to prohibit this development.

In June 2006, Council received correspondence requesting that the 88B be released by Council to allow a Dual Occupancy on the site. Council's Senior Development Planner responded on 28th August 2006 stating that this restriction on the title of the land could not be varied given that the original approval was granted pursuant to the provisions of Clause 12(b) of the Local Environmental Plan 1987.

Under the provisions of Council's current Planning Instrument, the Port Stephens Local Environmental Plan 2000, Clause 14 deals with dwelling houses and dual occupancies in the rural zone.

Given that the proposal for subdivision and Tourist Facility was approved under Clause 12(b) of the Port Stephens Local Environmental Plan 1987 development for the purposes of Dwelling House or Dual Occupancy Housing is prohibited by clause 14 of LEP 2000.

Hence to enable this request by the land owner to be considered for approval, a relevant amendment is required to the Port Stephens Local Environmental Plan 2000.

Attachment 3 – Sustainability Criteria assessment

Criteria	Comment
Infrastructure provision	The planning proposal will allow the land holder to lodge an application for a 'change of use' for existing buildings on the site. There is adequate infrastructure in place and the proposal will not generate additional infrastructure requirements.
Access	There is existing and adequate access to the site. The planning proposal and subsequent change of use will have a negligible impact on the existing road network.
Housing diversity	The planning proposal will provide additional housing supply in the LGA. However, this contribution is insignificant.
Employment lands	The planning proposal will not add to, or subtract from employment lands. The existing business on the site is no longer viable due to changes made to the way in which the river can be utilised. The planning proposal will allow an alternate, viable use of the land.
Avoidance of risk	The subject land is partially flood prone. However, the existing buildings are located above the 1:100 year flood level. The proposal satisfies the requirements of Planning for Bushfire protection Guidelines 2006. The proposal will not create land use conflict with adjoining development, which is predominately rural / rural-residential development.
Natural resources	The planning proposal will not impact on natural resources, including agriculture. The current approved use of the site for a tourist facility is no

	longer viable, and the proposed use for dual occupancy represents the most appropriate and viable use for the site.
Environmental protection	The planning proposal will have minimal environmental impact as the site is mostly cleared and contains little vegetation. No new buildings are proposed. The change of use could potentially improve conditions in the Williams River by decreasing the number of skiers and wakeboarders using the river in association with the tourist facility.
Quality and equity services	Government services in nearby Raymond Terrace can be easily accessed by future residents. The planning proposal will have negligible impact on existing services.