



Wyong
Shire
Council
CENTRAL COAST

Planning Proposal

Proposed Amendment to Clause 16 of the Wyong Local Environmental Plan, 1991

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Part 1 Objectives or Intended Outcomes

To amend Clause 16(1) of Wyong Local Environmental Plan, 1991 (WLEP 91), to enable the erection of a rural dwelling on existing allotments which do not comply with the minimum area requirement of their respective zones.

Part 2 Explanation of Provisions

Amend Clause 16(1) by adding the following text outlined in **bold** below:

“16 Dwelling-houses

- (1) Except as otherwise provided by this plan, one dwelling-house only may be erected, with the consent of the Council, on an allotment of land that was in existence on the appointed day or **that was created in accordance with a consent issued by Council and registered in accordance with the Real Property Act, 1900, or which with has** an area not less than the applicable minimum area specified in clause 14 (2) or (3) (b), within Zone No 1 (a), 1 (c), 7 (a), 7 (b), 7 (c), 7 (d), 7 (e), 7 (f), 7 (g) or 10 (a).”

Part 3 Justification

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 as a result of a decision in the NSW Court of Appeal (*Agostino v Penrith City Council* [2010] NSWCA 20), copy attached. The majority decision of the three judges in the NSW Court of Appeal resulted in advice being provided by Wyong Council's General Counsel in relation to the interpretation of Clause 14(2) and Clause 16(1) of Wyong Local Environmental Plan (WLEP 91), that the minimum area standards (as included in most LEP's in NSW) are now considered mandatory and require strict compliance. Councils are not entitled to apply the provisions of State Environmental Planning Policy (SEPP) No.1 – Development Standards to vary these provisions. Clause 14(2) and Clause 16(1) identify minimum area requirements for the subdivision of land and the erection of a dwelling house within rural and environmental protection zones.

WLEP 91 was gazetted on 15 February 1991. Since this time numerous development applications have been determined (by Council, the Department of Planning and Infrastructure and also the Land and Environment Court) which have created allotments comprising less than the relevant minimum area requirement, utilising the provisions of State Environmental Planning Policy (SEPP) No.1 – Development Standards. This process has long been considered entirely appropriate and in compliance with relevant statutory provisions.

As a result of the Court of Appeal Judgement, Council has no legal power to utilise the provisions of SEPP 1 to issue development consents for subdivisions which propose allotments below the minimum area requirement (Cl.14(2)) within the respective zone. Also, if challenged, any existing consent granted for these subdivisions may likely be considered not legally valid as the consent authority did not have jurisdiction (the power) to grant consent. It is clear that Council will be unable to consent to any further subdivisions which do not comply with the minimum area provision within the LEP. It also follows that where the minimum area requirement for the erection of a dwelling house (Cl.16(1)) cannot be met because the lot is undersize, SEPP 1 can not be utilised to grant consent for that dwelling house.

This situation is not unique to Wyong Shire, with ramifications extending throughout NSW. Many landowners have already built upon or have purchased vacant land affected by these provisions. In this regard, it is considered appropriate for Council to seek to facilitate future

dwellings on these allotments by amending WLEP 91, and to legalise those dwellings which have already been approved and erected. Draft LEP 2012 (SI LEP) will include Clause 4.2A, which will recognise existing subdivisions and dwelling entitlements approved before it comes into effect.

Whilst it is not clear how many allotments within the Shire may be affected by the decision of the Court of Appeal, it is likely that as WLEP91 has been in force for a period exceeding 20 years, they will number in the hundreds. It is not considered feasible to identify these allotments in a schedule to the LEP due to resourcing and the potential that not all allotments may be able to be identified. The preferred method is to modify the wording of the clause to capture all allotments approved by Council and registered under the Real Property Act, 1900, in addition to the existing inclusions.

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

The simplest method of permitting rural subdivision of the lands and the subsequent erection of rural dwellings on merit is considered to be an amendment to Clause 16(1) of the WLEP 91.

3. *Is there a net community benefit?*

The proposal has been considered against the evaluation criteria for the net community benefit test as detailed within the Draft Centres Policy. This evaluation is further detailed below. The following table provides a summary:

Evaluation Criterion	Consistency of the Proposal
Will the proposal be compatible with agreed State and regional strategic direction for development in the area (e.g. land release, strategic corridors, development within 800 metres of a transit node)?	The proposal is consistent with the Central Coast Regional Strategy, as it provides for rural residential housing choice on existing parcels of land created for this purpose within rural, scenic protection and conservation zoned lands. Further, it does not rezone rural or resource lands for rural residential uses.

Evaluation Criterion	Consistency of the Proposal
Is the proposal located in a global/regional city, strategic centre or corridor nominated within the Metropolitan Strategy or other regional/subregional strategy?	The proposal is not located in a global/regional city, strategic centre or corridor nominated within the Metropolitan Strategy or other regional/subregional strategy. Affected lots are within rural, scenic protection and conservation zoned lands.
Is the proposal likely to create a precedent or create or change the expectations of the landowner or other landholders?	Landowners and potential buyers would have an expectation that Council would be entitled to grant dwelling approvals on the affected lots. This amendment will restore that entitlement.
Have the cumulative effects of other spot rezoning proposals in the locality been considered? What was the outcome of these considerations?	The Proposal is not a spot rezoning, it is a Clause amendment not confined to a particular locality.
Will the proposal facilitate a permanent employment generating activity or result in a loss of employment lands?	No.
Will the proposal impact upon the supply of residential land and therefore housing supply and affordability?	The proposal will marginally increase the supply of rural residential land and housing supply. It is assumed that this will assist affordability.
Is the existing public infrastructure (roads, rail, and utilities) capable of servicing the proposed site?	Generally. This is a matter for due consideration during the Development Assessment process for the dwelling house.
Is there good pedestrian and cycling access?	Specific to relevant sites.
Is public transport currently available or is there infrastructure capacity to support future public transport?	Bus services are generally available to most localities within the Shire.
Will the proposal result in changes to the car distances travelled by customers, employees and suppliers? If so, what are the likely impacts in terms of greenhouse gas emissions, operating costs and road safety?	The amendment will address various disparate sites. Whilst it is not likely that the Clause amendment would have any significant impacts in terms of greenhouse gas emissions, operating costs and road safety, it is not possible to provide the analysis sought regarding this principle.

Evaluation Criterion	Consistency of the Proposal
Are there significant Government investments in infrastructure or services in the area whose patronage will be affected by the proposal? If so, what is the expected impact?	The amendment will address various disparate sites. It is not possible to provide the analysis sought regarding this principle.
Will the proposal impact on land that the Government has identified a need to protect (e.g. land with high biodiversity values) or have other environmental impacts? Is the land constrained by environmental factors such as flooding?	The lands have not been identified by the Government. These are matters for due consideration during the Development Assessment process for the dwelling house.
Will the proposal be compatible/ complementary with surrounding land uses? What is the impact on amenity in the location and wider community? Will the public domain improve?	The Clause amendment will restore development rights for rural dwellings. Compatibility is a matter for due consideration during the Development Assessment process for the dwelling house. There will be no significant impact on amenity in the location or wider community.
Will the proposal increase choice and competition by increasing the number of retail and commercial premises operating in the area?	No.
If a stand-alone proposal and not a centre, does the proposal have the potential to develop into a centre in the future?	No. Not considered to be a stand alone proposal.
What are the public interest reasons for preparing the draft plan? What are the implications of not proceeding at that time?	The public interest reasons for the draft plan are to restore development expectations and rights for the erection of rural dwellings on approved lots, following the decision of the NSW Court of Appeal (<i>Agostino v Penrith City Council [2010] NSWCA 20</i>). Not proceeding at this time would mean that the lots would not be recognised as existing lots with dwelling entitlements when draft WLEP, 2012 (SI) is gazetted later in 2013.

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)?*

The issues to be addressed by this LEP amendment are not specifically addressed by the Central Coast Regional Strategy. The amendment seeks to reinstate dwelling rights, existing and anticipated, prior to the judgement in *Agostino v Penrith City Council* [2010].

The following have some relevance:

Chapter 4 Centres and Housing states (page 21) under “Rural Residential Development” that “Existing rural residential development will continue to provide a choice of housing in the Region....opportunities for new rural residential development will be limited to those already provided in the Region and opportunities, if any, identified as a part of the North Wyong Structure Plan”. The proposed amendment would seek to preserve such opportunities, where variations to lot size provisions have enabled developments to occur.

Action 6.9 states “Ensure LEPs do not rezone rural and resource lands for urban purposes or rural residential uses unless agreement from the Department of Planning is first reached regarding the value of these resources.”

The amendment does not propose to rezone land, but to enable appropriate use of existing lots.

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

The Community Strategic Plan identifies 8 priority objectives, each supported by a range of actions. The Planning Proposal is assessed as follows.

1. Communities will be vibrant, caring and connected.

The proposed amendment affects lands within areas of existing rural residential, rural, scenic protection and conservation lands. Opportunities exist for new residents to participate in existing programs in the district, including community, business, sports, recreation, education and creative groups.

The Planning Proposal is consistent with the Wyong Shire-wide Settlement Strategy and the Central Coast Regional Strategy.

2. There will be ease of travel.

Bus services operate within most areas of the Shire. Car access to services and rail transport are also available, with services likely to improve as population expands over the life of the Strategy.

3. Communities will have a range of facilities and services.

The proposed development will result in the introduction of new residents who will contribute to cultural and community facilities, open space, sports and recreation facilities. Council is currently seeking to increase utilisation of many of its existing facilities.

4. Areas of natural value will be enhanced and maintained.

Assessment of the DAs for the dwellings would have determined the most appropriate sites with minimal environmental impact, thereby supporting this objective.

5. There will be a sense of community ownership of the natural environment.

Not relevant to this Proposal.

6. There will be a strong sustainable business sector.
Not relevant to this Proposal.

7. Information and communication technology will be world's best.
Not relevant to this Proposal.

8. The community will be educated, innovative and creative.
Not relevant to this Proposal.

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

State Environmental Planning Policy No 44 – Koala Habitat Protection

This SEPP aims to encourage the proper conservation and management of koala habitat in areas in order to maintain the viability of koala populations. The SEPP requires an assessment of each site to determine if it is potential koala habitat. Potential koala habitat is defined as areas of native vegetation where at least 15% of the total number of trees are prescribed koala feed trees. This issue is considered when assessing subdivision and dwelling DAs.

State Environmental Planning Policy No 55 – Remediation of Land

This SEPP introduces state-wide planning controls for the remediation of contaminated land. It establishes that land must be remediated if contaminated, to a standard suitable for the end land use. Clause 6 requires Council to obtain and have regard to a report specifying the findings of a preliminary investigation of the land carried out in accordance with the contaminated land planning guidelines. This issue is considered when assessing subdivision and dwelling DAs.

7. *Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?*

The proposal has been considered against the relevant Ministerial Section 117 Directions and is considered to be consistent with the relevant Directions as summarised below.

Number	Direction	Applicable	Consistent
Employment & Resources			
1.1	Business & Industrial Zones	N	N/A
1.2	Rural Zones	Y	Y
1.3	Mining, Petroleum Production and Extractive Industries	N	N/A
1.4	Oyster Aquaculture	N	N/A
1.5	Rural Lands	N	N/A
Environment & Heritage			
2.1	Environmental Protection Zones	Y	Y

Number	Direction	Applicable	Consistent
2.2	Coastal Protection	Y	Y
2.3	Heritage Conservation	Y	Y
2.4	Recreation Vehicle Areas	Y	Y
Housing, Infrastructure & Urban Development			
3.1	Residential Zones	N	N/A
3.2	Caravan Parks and Manufactured Home Estates	Y	N/A
3.3	Home Occupations	Y	Y
3.4	Integrating Land Use & Transport	N	N/A
3.5	Development Near Licensed Aerodromes	N	N/A
3.6	Shooting Ranges	N	N/A
Hazard & Risk			
4.1	Acid Sulfate Soils	Y	N/A
4.2	Mine Subsidence and Unstable Land	Y	Y
4.3	Flood Prone Land	Y	Y
4.4	Planning for Bushfire Protection	Y	Y
Regional Planning			
5.1	Implementation of Regional Strategies	Y	Y
5.2	Sydney Drinking Water Catchments	N	N/A
5.3	Farmland of State and Regional Significance on the NSW Far North Coast	N	N/A
5.4	Commercial and Retail Development along the Pacific Highway, North Coast	N	N/A
5.5, 5.6 & 5.7	REVOKED		
5.8	Second Sydney Airport: Badgerys Creek	N	N/A
Local Plan Making			
6.1	Approval and Referral Requirements	Y	Y
6.2	Reserving Land for Public Purposes	Y	Y
6.3	Site Specific Provisions	N	N/A
Metropolitan Planning			
7.1	Implementation of the Metropolitan Plan for Sydney 2036	N	N/A

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?*

The Clause amendment will restore development potential for rural dwellings on approved subdivision lots. The land use compatibility or potential for impact on critical habitat or threatened species, populations or ecological communities, or their habitats, are matters for consideration at the Development Assessment stage for subdivisions and for dwelling houses. There will be no additional impacts directly created through this Clause amendment.

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

The potential for any likely environmental effects in relation to subdivision and/or dwelling proposals are examined in accordance with s.79C of the EP&A Act when determining development applications. There will be no additional impacts directly created through this Clause amendment.

10. *How has the planning proposal adequately addressed any social and economic effects?*

Social

The decision in the NSW Court of Appeal (*Agostino v Penrith City Council [2010] NSWCA 20*), has resulted in Council having no legal power to utilise the provisions of SEPP 1 to issue development consents for subdivisions which propose allotments below the minimum area requirement (Cl.14(2)) within the respective zone. Also, if challenged, any existing consent granted for these subdivisions may likely be considered not legally valid as the consent authority did not have jurisdiction (the power) to grant consent.

It is clear that Council will be unable to consent to any further subdivisions which do not comply with the minimum area provision within the LEP. It also follows that where the minimum area requirement for the erection of a dwelling house (Cl.16(1)) cannot be met because the lot is undersize, SEPP 1 can not be utilised to grant consent for that dwelling house.

Landowners and potential buyers would have an expectation that Council would be entitled to grant dwelling approvals on the affected lots, some of which have building envelopes identified for that purpose on the Title Deed. This proposed amendment will restore the ability for Council to grant development consent. This will enable landowners to build the family home.

Economic

The inability to subdivide land and/or build a dwelling on the lands will have significant economic impact on the landowners. Lands have been purchased or held with an expectation that subdivisions or the erection of dwellings were likely to gain support and approval. This proposed amendment will restore the ability for Council to grant development consent.

Section D – State and Commonwealth Interests

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

The amendment will address various disparate sites. Affected lots are within rural, scenic protection and conservation zoned lands. The Clause amendment will restore development rights for rural dwellings. Compatibility with the land and the availability of public infrastructure are matters for due consideration during the Development Assessment process for the dwelling house.

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

[to be completed after Gateway Determination]

Part 4 Community Consultation

It is recommended that the proposal be publicly exhibited for a period of 28 days.

Notification of the public exhibition is recommended to be placed in the Central Coast Express Advocate and on Council's website, and a link attached to Council's new ePanel initiative.

Briefings of local Precinct Committees/Associations where rural and environmental protection zones are in existence is also proposed during the exhibition period.

The Planning Proposal, Gateway Determination, and any supporting materials will be made available on Council's website, at Council's Administration Building in Hely Street Wyong.

A public hearing is considered unlikely to be necessary.

Attachments and Supporting Documentation

Document	Attached
1. Wyong Local Environmental Plan 1991, Clause 16(1) - Amended	Yes
2. Section 117 Ministerial Directions Assessment	Yes
3. Council Report and Minutes	Yes
4. Copy of Judgement of NSW Court of Appeal (<i>Agostino v Penrith City Council</i> [2010] NSWCA 20).	Yes