

ITEM NO. 4

FILE NO: 16-2011-638-1

**DEVELOPMENT APPLICATION FOR TWO LOT SUBDIVISION AT NO. 456
FULLERTON COVE ROAD FULLERTON COVE**

**REPORT OF: BRUCE PETERSEN - MANAGER ENVIRONMENTAL & DEVELOPMENT
PLANNING**

GROUP: SUSTAINABLE PLANNING

RECOMMENDATION IS THAT COUNCIL:

- 1) Refuse Development Application 16-2011-603-1 for the reasons contained below:
 - The development is concluded to be prohibited development as it is inconsistent with clause 12 of the Port Stephens Local Environmental Plan 2000.

BACKGROUND

The purpose of this report is to present a development application to Council for determination, called to Council by Cr MacKenzie.

The development application proposes the two (2) lot subdivision of rural land at 456 Fullerton Cove Road, Fullerton Cove.

The development site is zoned 1(a) – Rural Agriculture and currently contains a Dual Occupancy.

Key issues associated with the development are:

- Permissibility of the development under the Port Stephens Local Environmental Plan 2000 (LEP);
- Bushfire.

The subject site was originally subject to development application 16-2003-2173-1, lodged on the 4th December 2003 proposing a 2 lot subdivision of the site. The development was ultimately refused on the 25th September 2008 as it was considered to constitute prohibited development as the subdivision was contrary to the provisions of Clause 12 of the LEP.

Subsequent to the refusal, the applicant has made representation to Council with respect to the potential to subdivide the property and has received written advice consistent with the original refusal on 30th April 2009, 29th April 2010 and verbal advice. On each occasion the advice has been clear that any subdivision of the site would need to be carried out in accordance with the controls contained within Clause 12 of the LEP.

The current application was lodged on the 7th September 2011 and is considered to be prohibited development as the subdivision of rural land is prohibited except in

certain circumstances where permitted by Clause 12. Clause 12 is discussed elsewhere in this report.

The intention of the subdivision is understood and is also noted to be consistent with the surrounding subdivision layout. Council staff have explored all avenues practical to arrive at the applicants desired outcome, however current provisions in the Port Stephens Local Environmental Plan 2000 present a legal impediment to the subdivision of the subject allotment to separate the titles of the two existing dwellings.

FINANCIAL/RESOURCE IMPLICATIONS

Should Council adopt the recommendation and refuse the development application, the applicant may appeal to the Land and Environment Court. Defending the Councils determination would have financial implications.

If Council rejects the recommendation and supports the subdivision of rural land contrary to the provisions of the Port Stephens Local Environmental Plan 2000, the decision could be subject to challenge, via a Section 123 breach of the Environmental Planning and Assessment Act, 1979.

It should also be noted that the merit assessment of the proposal which has been undertaken of the proposal, (not fully complete due to the status of the development being prohibited under the Port Stephens Local Environmental Plan 2000) concludes that there are merit based issues with the proposal.

LEGAL, POLICY AND RISK IMPLICATIONS

The development application is inconsistent with the Port Stephens Local Environmental Plan 2000, specifically Clause 12, and as such is considered to be prohibited development.

Having consideration to Council's standard risk Matrix and considering all factors the risk of determining the application by way of approval, contrary to the provisions of the Port Stephens Local Environmental Plan, is calculated at possible and catastrophic.

SUSTAINABILITY IMPLICATIONS

Includes Social, Economic and Environmental Implications

Approval of the subdivision of rural land would be contrary to the provisions of the Port Stephens Local Environmental Plan 2000.

While it is noted that the creation of an additional dwelling entitlement may result in some positive social impacts in the immediate area, the proposal is prohibited under the Port Stephens Local Environmental Plan 2000.

No adverse economic implications have been identified.

While it is noted that the creation of an additional dwelling entitlement may result in some positive short term economic impacts in the immediate area, the proposal is prohibited under the Port Stephens Local Environmental Plan 2000.

No adverse environmental implications have been identified.

CONSULTATION

In accordance with Section A1.9 of DCP 2007, no notification or advertising of the proposal was required to be undertaken.

OPTIONS

- 1) Adopt the recommendation.

ATTACHMENTS

- 1) Locality Plan;
- 2) Assessment.

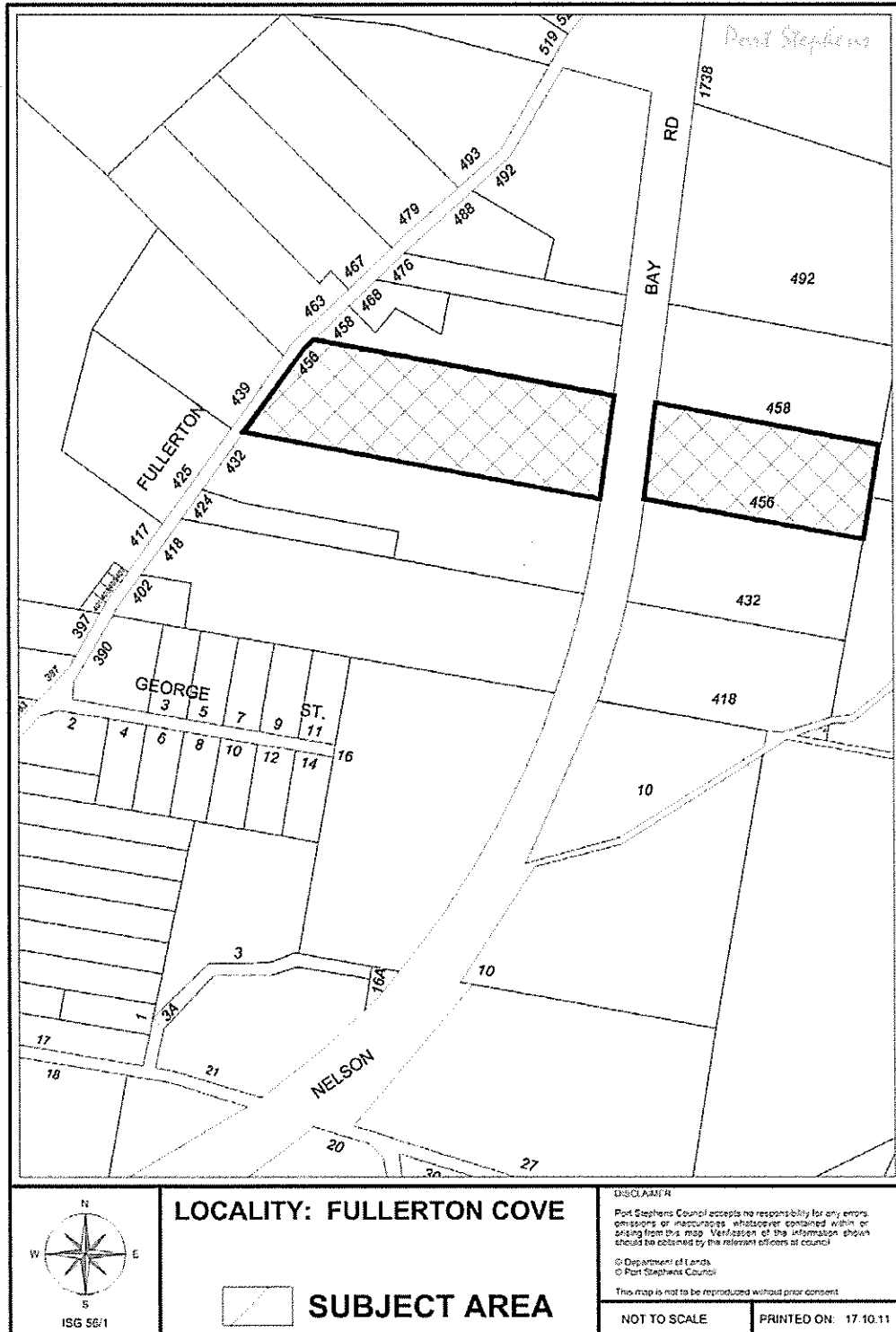
COUNCILLORS ROOM

- 1) Subdivision Plans;
- 2) Statement of Environmental Effects.

TABLED DOCUMENTS

Nil.

ATTACHMENT 1 LOCALITY PLAN



ATTACHMENT 2

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 development application proposes a two (2) lot subdivision of land zoned 1(a) – Rural Agriculture. The site currently contains a rural dual occupancy and the subdivision proposes to facilitate each dwelling being on a separate title.

THE APPLICATION

Owner	Mrs J M Joy & Ms D J Brooks
Applicant	Mr M J McDougall
Detail Submitted	Statement of Environmental Effects Plan of Subdivision

THE LAND

Property Description	Lot 1 DP 997897
Address	456 Fullerton Cove Road Fullerton Cove.
Area	10.34 ha
Dimensions	Generally rectangular
Characteristics	flat, currently occupied by a Rural Dual occupancy. The allotment is severed by Nelson Bay Road to the rear of the site.

THE ASSESSMENT

1. Planning Provisions

LEP 2000 – Zoning	1a) – Rural Agriculture Relevant Clauses 11, 12
Development Control Plan	Section B1 – Subdivision and Streets Section B2 – Environmental and Construction Management
State Environmental Planning Policies	SEPP71 – Coastal Protection

Discussion

Environmental Planning and Assessment Act 1979

Clause 91

The development is considered to be integrated development under the provisions of the Environmental Planning and Assessment Act 1979. Specifically, the development requires a Bushfire Safety Authority to be issued under the provisions of Section 100B of the Rural Fires Act, 1997.

Given the development is prohibited under the Port Stephens Local Environmental Plan 2000, and the applicant indicated on 12th October 2011 that it was their intent to not supply the relevant information until such time as support for the proposal had been received from Council, the development has not been granted a Bushfire Safety Authority.

Rural Fires Act 1997

Under the provisions of clause 91 of the Environmental Planning and Assessment Act 1979, the application is considered to be "Integrated Development". A referral to the NSW Rural Fire Service is required to be submitted with the application, however the applicant indicated on 12th October 2011 that it was their intent to not supply the relevant information until such time as support for the proposal had been received from Council.

The application is unable to be determined by way of approval without a Bushfire Safety Authority being issued by the NSW Rural Fire Service.

State Environmental Planning Policies

SEPP 71 Coastal Protection

Policy 71 aims to protect and manage the New South Wales coast and foreshores and requires certain development applications in sensitive coastal locations to be referred to the Director-General for comment, and it identifies master plan requirements for certain development in the coastal zone.

The proposal of a subdivision will not impact on the foreshore and it is not seen as the type of development that needs to be assessed under policy 71 at a state level. As such the application is acceptable under Policy 71.

Port Stephens Local Environmental Plan 2000

Clause 11 – Rural Zonings

Under the provisions of Clause 11, Subdivision of Rural land is permitted by clause 12.

Clause 12 – Subdivision of Rural Zones Generally

Clause 12 sets the development guidelines for the subdivision of land within the Rural 1(a) zoning. Clause 12 states;

12 Subdivision within rural zones generally

- (1) A person must not subdivide land within any rural zone except:*
- (a) for any of the following purposes:*
 - (i) the opening or widening of a public road,*
 - (ii) to change a common boundary with an adjoining allotment, but not so as to create additional allotments,*
 - (iii) consolidation of allotments,*
 - (iv) rectification of any encroachment on any existing allotments,*
 - (v) the creation of allotments corresponding to the parts into which a single allotment is divided by a public road, or*
 - (b) for the purpose of the creation of an allotment or allotments intended to be used for any one or more of the purposes (excluding dwelling-houses or dual occupancy housing) for which it may be used with or without the consent of the consent authority, or*
 - (c) in the case of land within a Rural Small Holdings zone—as permitted by clause 13.*
- (2) Subdivision of land for a purpose specified in subclause (1) (a) does not have the effect of precluding development of the land for any purpose for which it might have been developed immediately prior to the subdivision (except in so far as the land has been taken for a road as referred to in subclause (1) (a)).*

The main issue revolves around permissibility. The applicant seeks to undertake a 2 lot subdivision of rural land. Clause 12 of the LEP prohibits subdivision, except for certain circumstances. The options outlined below to are pathways to achieve the end result or creating two new entitlements.

1) Road Severance.

Clause 12 (1)(a)(v) allows for the subdivision of rural land by Road severance. While the subdivision of the land by road severance could be achieved, the land east of Nelson Bay Road would have no legal access. A future boundary adjustment to achieve the proposed lot configuration could not be undertaken as following road severance the newly created allotments do not share a common boundary to adjust.

Using road severance would not lawfully separate the titles of the dwellings and would result in an allotment without legal access.

2) Managers Residence

Clause 12(1)(b) allows for the subdivision of Rural Land for an approved use. To go down this submission/assessment, the applicant would need to demonstrate that the use of the land justifies the need for a managers residence. This property would not have a dwelling entitlement and the managers residence could only remain while the use continued. This scenario is typically fraught with difficulty and is practically not ideal to manage in perpetuity. To this end, the Department of Planning and Infrastructure has detailed performance provisions in the Standard Instrument LEP as a guide that managers/rural workers dwellings need to meet to ensure legitimacy and warrant demand.

Under the proposed subdivision, no managers residence or approved use has been applied for and it is considered questionable that any potential use of the site would be of the scale that justifies the need for a managers residence.

3) Rural Subdivision

The straight subdivision of Rural land to create two allotments with a dwelling entitlement is not permissible under the LEP and as such is considered to be prohibited development.

Port Stephens Development Control Plan 2007

The application has been assessed against the relevant provisions of Port Stephens Development Control Plan, 2007, as follows:

B1 – Subdivision and Streets

The application has been assessed against the applicable provisions of Port Stephens Development Control Plan, 2007 – Subdivision and Streets, as follows:

DCP Control	Control	Applicable	Compliance
B1.2	Types of Subdivision	Yes	Yes
B1.3	Site Analysis	Yes	Yes
B1.4	Topography and Views	Yes	Yes
B1.5	Street and Block Layout - Residential	N/A	N/A
B1.6	Footpath and Cycleways	N/A	N/A
B1.7	Parks and Open Space	N/A	N/A
B1.8	Lot Layout	Yes	Yes
B1.9	Street Trees	N/A	N/A
B1.10	Infrastructure	Yes	Yes

Comments:

The application is considered satisfactory with regards to B1 – Subdivision and Streets. Notwithstanding this, the provisions of the Port Stephens Local Environmental Plan 2000 take precedence over the provisions of Development Control Plan 2000 and the development is considered to be prohibited development.

2. Likely Impact of the Development

The development as proposed is not considered to result in a development contrary to the provisions of the Port Stephens Local Environmental Plan 2000, specifically Clause 12 – Rural Subdivision. The proposed development will further fragment land zoned for agricultural purposes and as such should not be supported.

3. Suitability of the Site

The development site is zoned 1(a) – Rural Agriculture and within this zone subdivision is only permissible in accordance with clause 12 of the LEP2000. The subdivision as proposed is inconsistent with the provisions of clause 12 as it seeks to create an additional allotment with a dwelling entitlement.

As the development is a form of Rural Residential subdivision suited to a Rural Small Holdings zoned allotment of land, it is considered that the subject site is not suitable for the development as proposed.

Despite being a form of prohibited development, it is noted that the subdivision pattern sought by the development is consistent with the general layout of the locality.

4. Submissions

In accordance with Section A1.9 of DCP 2007, no notification or advertising of the proposal was required to be undertaken.

5. Public Interest

It is considered to be contrary to the public interest to subdivide agriculturally zoned land contrary to the provisions of the Port Stephens Local Environmental Plan 2000, given the Port Stephens Local Environmental Plan 2000 originally went through a rigorous and robust community exhibition period. It is considered to be not in the public interest to endorse developments contrary to publically accepted planning provisions in the Local Environmental Plan.