

Planning Proposal No. 41

Subdivision of certain dual occupancy properties

November 2022



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Overview

Purpose

This Planning Proposal, prepared by Lane Cove Council, seeks to permit subdivision of certain dual occupancy dwellings that were approved by development consent or complying development certificate in the R2 zone on or before Thursday 16th June 2022.

Council originally resolved at its 23 June 2022 meeting (**AT-1** and **AT-2**) to prepare a more limited planning proposal to permit strata subdivision of dual occupancies only under company title. This proposal was in support of the view that

“the owner or potential owner of company-title residences [experience great difficulty in obtaining] finance or equity release from a banking institution or other lender, due to recent universal changes in lending policy.” (AT-2)

On 8 November, Lane Cove Local Planning Panel (LPP) reviewed this proposal and concluded that “in its original form [the original Planning Proposal] fails to meet the strategic merit test.” Furthermore, such a selective amendment “disadvantages those dual occupancies which have not gone down that path” [of using company title to create defacto subdivision], and have remained unsubdivided.

As a result, the Panel suggested amending the wording to the original LEP amendment in order to “introduce equity to the owners of all existing dual occupancies approved prior to 16 June 2022:”

At its 24 November meeting, Council considered this advice and resolved the more inclusive Planning Proposal presented here.

Local Context

In a submission by a local resident (see **AT-3**) to Council, it has been claimed that following the *2019 Banking Royal Commission*, most lenders [banks] will no longer accept Company Title or similar as security for finance. Accordingly, the resident sees this as “unfair” on dual occupancy owners under company title.

Legislative Context

- On December 15, 2017, Council introduced into its LEP Clause 4.1A of *Lane Cove Local Environmental Plan 2009* regarding subdivision of dual occupancies, which states:

Despite any other provision of this Plan, development consent must not be granted to the subdivision of land on which a dual occupancy is erected or proposed to be erected if the subdivision would result in the dwellings that comprise the dual occupancy being located on separate lots.

- This total prohibition of subdivision of dual occupancies has been a long-standing policy of Council’s (See Historic Context below). It was aimed at maintaining the desired low density character of the R2 residential zones in particular. That is, to support the existing, consistent subdivision pattern.
- The minimum Lot size in the R2 zone is 550 square metres.

- Clause 4.1 (4A) states that:

Despite subclause (3), the size of a lot for the purposes of a dual occupancy must not be less than—

- (a) for dual occupancy (attached)—750 square metres, and*
- (b) for dual occupancy (detached)—900 square metres.*

- As a result of the above two controls, the owner of a dual occupancy in an R2 zone in Lane Cove is only able to subdivide to create separate lots of 550 square metres. That is, to subdivide a lot of a minimum area of 1100 square metres. Otherwise, a dual occupancy may be built upon 750sqm or 900sqm lots, but not subdivided.

- Note Under clause 6.2 of the *Environmental Planning & Assessment Act 79*:

The meaning of “subdivision” of land

“(1) For the purposes of this Act, subdivision of land means the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition.”

Note Under LEP Dictionary:

“dual occupancy” [attached or detached] means 2 dwellings on one lot of land, but does not include a secondary dwelling.

- Note that Clause 4.1A is not subject to a 4.6 objection:
“(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
(ca) clause 4.1A,”

Historic Context

State Environmental Planning Policy 25 (SEPP25) was in force during the 1990s, and expressed the State government’s objective at the time in part to encourage dual occupancies as a form of infill development, to counter ‘urban sprawl’.

Lane Cove LEP 1987 on March 10, 1995, was amended (Clause 4(2)) to exclude SEPP 25 from applying to the LEP. This was part of a more general resistance to dual occupancies among Sydney councils.

Lane Cove LEP 1987 on May 24, 1996, was amended (Clause 9C(2)) to prohibit dual occupancy development “under certain circumstances” (to prevent lots any smaller than 750sqm (attached) or 900smw (detached)).

Lane Cove LEP 2009 on December 15, 2017, was amended (Clause 4,1A) to prevent any subdivision that would result in the dwellings that comprise the dual occupancy being located on separate lots.

Assessment Context

Dual occupancies (approx. 1995 – 2022)			Pre-1999	Post-1999	Totals
Approved	plus Subdivided	(15% Strata; 85% Torrens)	29	1	30
	Not Strata / Torrens subdivided	No subdivision title	4	21	25
		Company titled	1	3	4
Refused			4	6	10
Withdrawn			5	1	6
Totals			43	32	75

Analysis of the 75 dual occupancies applied for in Lane Cove LGA over an approximate period from 1995 to 2022 reveals that approval of subdivision of dual occupancy was very common (29 out of 43 were successful). Post-1999, as a result of the historical trend of Council's growing opposition to permitting sub-divided dual occupancies, it became almost impossible to obtain subdivision of an approved dual occupancy (1 out of 32). During this time, 3 of the 4 company-titled dual occupancies identified were created. Approved dual Occupancies were generally compliant in being on land a minimum of 750sqm in area as required under LEP Clause 4.1 (4A).

1. Objectives and intended Outcomes

1.1. Objective

To amend the Lane Cove LEP 2009 to permit subdivision of certain approved dual occupancy dwellings that were registered in the R2 zone on or before Thursday 16th June 2022. Analysis above suggests this applies to approximately 30 dual occupancy properties within Lane Cove LGA that are not subdivided.

1.2. Intended outcomes

- To permit owners of dual occupancies approved in the R2 zone of Lane Cove local government area on or before Thursday 16th June 2022 to subdivide their properties..
- to prevent "an influx of dual occupancy development applications generally" by limiting permission to existing dual occupancy developments or to those falling under the proposed sub clause 4.1A(2)") approved prior to the date of 16 June 2022. This date was when Council published its original intention to amend the LEP to permit strata subdivision of R2 dual occupancies currently approved and registered under company title.
- To retrospectively only allow subdivision of buildings that were originally intended for separate occupation.

2. Explanation of provisions

The intent of this Planning Proposal is to amend the Lane Cove LEP 2009 Clause 4.1A by the addition of a subclause stating that despite the prohibition on subdivision of land containing a dual occupancy (subclause 1):

(2) Development consent may be granted to the subdivision of a lot on which a dual occupancy is erected or proposed to be erected on condition that this applies to:-

- a) the land is in Zone R2 Low Density Residential; and*
- b) the dual occupancy had been erected, or the building work for the erection of the dual occupancy had commenced, on or before 16 June 2022; and*
- c) the erection was, or is being carried out, under a development consent or complying development certificate granted on or before 16 June 2022; and*
- d) the plans approved by the development consent or complying development certificate show parts of the building as being intended for separate occupation; and*
- e) the subdivision would create lots that substantially correspond with the parts shown on those plans as being for separate occupation; and*
- f) the size of each lot resulting from the subdivision is not to be less than 375sqm.*

Note: This permission applies despite the current prohibition under LEP Clause 4.1A of granting subdivision of land on which a dual occupancy is erected or proposed to be erected, and where the subdivision would result in the dwellings that comprise the dual occupancy being located on separate lots.

Note: The intent of the additional local provision is to make it potentially possible for current or future owners of currently approved dual occupancies to subdivide their land. Should owners take advantage of subclause 2, this permits greater facility in dividing property expenses between the joint owners, such as Council rates and agency accounts. It is also claimed that it will permit owners of company-titled dual occupancies to obtain finance or equity release from a banking institution or other lender. All other planning controls applying to the sites will remain unchanged.

3. Justification of strategic and site-specific merit

3.1. Introduction

This section provides a detailed assessment of the proposal's strategic and site-specific merit to determine whether the Planning Proposal should be supported.

3.2. Strategic Merit

The proposal has minimal strategic merit. Refer to Sections A and B in Table 1 below.

Question	Consideration
Section A – need for the planning proposal	
1. <i>Is the planning proposal a result of an endorsed LSPS, strategic study or report?</i>	Partly. Notice of Motion - <i>Duplex Property Title in Lane Cove R2 Areas</i> (Councillor report to Council meeting 23 June 2022) (AT-2) The <i>Local Housing Strategy</i> supports dual occupancies, which “provide options for smaller families”, but recognises that FSR controls “limit low density options for smaller families”. However, the LPP advises (AT-8) “that Council gives consideration to revising its Local Strategic Planning Statement and its Local Housing Strategy to bring those policies into harmony with Planning Proposal No. 40.”
2. <i>Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?</i>	Yes. By permitting <i>only retrospective</i> subdivision of dual occupancies (approved prior to 16 June 2022), this prevents a sudden increase in applications to construct dual occupancies by R2 land-owners of lots of a minimum of 750 square metres. See AT-4 for alternative model clauses: <u>Alternative 1:</u> The Randwick LEP model: permits strata/torrens subdivision of DAs for dual occupancies made up until the time of the Royal Commission (July 22018). Presumably, developers would be aware of the upcoming issue once the Commission began. This is counter to Lane Cove Council’s history of opposition to strata/torrens subdividing of any dual occupancies. Note the strata area is not less than 180m ² , and the torrens area is 200m ² (if no minimum size is specified). <u>Alternative 2:</u> The Willoughby LEP model: offers a 5-year waiting period after a dual occupancy is created using company title. Final lot size is 350sqm. Again, this very broad-reaching approach is counter to Lane Cove’s general opposition to dual occupancies. <u>Alternative 3:</u> The Hills LEP model: offers a very carefully conditioned window for subdivision of company-titled dual occupancies created prior to the Royal Commission and clearly always intended as dual occupancies. Effectively, The Hills model is recommended for Lane Cove.
Section B – relationship to the strategic planning framework	
3. <i>Will the planning proposal give effect to the objectives and actions of the applicable regional</i>	Partly. Relevant objectives of <i>A Metropolis of Three Cities</i> , and the <i>North District Plan</i> seek to increase: <ul style="list-style-type: none"> • supply of higher density housing; and • more affordable housing; and

Question	Consideration
<i>or district plan or strategy (including any exhibited draft plans or strategies)?</i>	<ul style="list-style-type: none"> • more housing choice. <p>Although the proposal seeks merely to permit existing dual occupancies to subdivide, it does however, by enabling and so encouraging some land-owners to unlock the equity in their dual occupancies (especially company-titled), enable those retired landowners to be able to afford to remain in their otherwise potentially unaffordable homes in the location of their choice.</p>
4. Is the planning proposal consistent with a council LSPS that has been endorsed by the Planning Secretary or GSC, or another endorsed local strategy or strategic plan?	<p>Partly. The <i>Lane Cove Local Housing Strategy</i> (July 2021) seeks to increase affordable housing, although it focusses on the R3 and R4 zones. It discourages pursuing other proposals “unless they <u>substantially</u> achieve priorities related to affordable housing”. This proposal does not substantially achieve this.</p> <p>The LHS also aims to encourage medium density housing, again focusing on the R3 zone. It is supportive of proposals “encouraging smaller medium density housing that is targeted to smaller and downsizing households.” However,</p> <p><i>“Given the low take up of dual occupancies in the Lane Cove LGA, development would be contingent on site specific and market factors being overcome, such as site constraints, potential lot consolidation and individual landowner preference.” (p72)</i></p> <p>While not directly supporting the current Planning Proposal, the LHS supports dual occupancies as a desirable means of possibly increasing more affordable housing supply. But only as a source of future housing diversity.</p> <p>Planning Priority No.5 of the <i>Lane Cove LSPS</i> aims to:</p> <p><i>“plan for the growth of housing that creates a diverse range of housing types and encourages housing that is sustainable, liveable, accessible and affordable” (p25)</i></p> <p>As stated above in No.3, by encouraging certain land-owners to unlock equity or to finance repairs or alterations (e.g. granny flats), the proposal has the potential to make housing in effect more affordable. However, this only applies to the current owners. Planning proposal No.40 may it may not make purchase of housing any cheaper, and quite possibly more expensive.</p> <p>A similar response applies to <i>Liveable Lane Cove 2036</i>, which is Council’s Community Strategic Plan.</p>
5. Is the planning proposal consistent with any other applicable State and regional studies or strategies?	Not inconsistent.
6. Is the planning proposal consistent	<p>Yes. Potentially relevant SEPPs are:</p> <ul style="list-style-type: none"> • <i>State Environmental Planning Policy (Exempt and Complying</i>

Question	Consideration
with applicable SEPPs?	<p><i>Development Codes) 2008:</i> - Not applicable to this proposed amendment. Lot area requirements defer to the LEP.</p> <ul style="list-style-type: none"> <i>State Environmental Planning Policy (Housing) 2021</i> – aims to “enable the development of diverse housing”. It is supported by the <i>Low Rise Housing Diversity Design Guide</i>, by which complying development is only permitted where the LEP permits subdivision.
7. Is the planning proposal consistent with applicable Ministerial Directions (section 9.1 Directions)?	<p>Not applicable to Section 9.1 Directions 1.1 to 2.5, and 3.2 to 7.10. However, under:</p> <ul style="list-style-type: none"> <i>3.1 Residential zones.</i> The proposal is not inconsistent with the objective of Direction 3.1(a) “to encourage a variety and choice of housing types to provide for existing and future housing needs.” It is not inconsistent insofar as it supports choices previously made by land-owners to build dual occupancies.

3.3. Site-specific Merit

Refer to Sections C, D and E in Table 2 below. Site-specific merit is not relevant to a proposal to amend subdivision permissibility across an entire zone.

Question	Consideration
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 because of the proposal?	N/A because the proposal is to change the subdivision status of existing housing only.
9. Are there any other likely environmental effects of the planning proposal and how are they proposed to be managed?	N/A because the proposal is to change the subdivision status of existing housing only.
10. Has the planning proposal adequately addressed any social and economic effects?	<p>Not applicable.</p> <p>As the proposal is to change the subdivision status of existing housing only, it will have no effect on items or places of non-Aboriginal or Aboriginal cultural heritage. Nor will it affect the number of jobs or housing growth, nor impact existing social infrastructure, nor the need for public open space, nor existing retail centres. There are no proposed public benefits.</p>
Section D – Infrastructure (Local, State and Commonwealth)	

Question	Consideration
11. Is there adequate public infrastructure for the planning proposal?	N/A because the proposal is to change the subdivision status of existing housing only.
Section E – State and Commonwealth Interests	
12. What are the views of state and federal public authorities and government agencies consulted in order to inform the Gateway determination?	The views of State and Commonwealth public authorities will be known when formal consultation has occurred in accordance with the Gateway determination of the Planning Proposal.

4. Community Consultation

No consultation has been undertaken with state agencies or authorities nor with other key stakeholders during the pre-lodgement stage.

Community consultation will take place after Gateway determination, and should be consistent with the Lane Cove *Community Participation Plan 2019*, Page 8 of which states that the minimum time for exhibition is:

28 days (or as specified by the Gateway Determination, which may find that due to the minor nature of the proposal that no public exhibition is required or only 14 days exhibition is required)

5. Project timeline & attachments

5.1. Timeline

This Planning Proposal is a **Standard** Category because it:

“refers to any one or more of the following proposed LEP amendment types, including an amendment:

- That relates to altering the principal development standards of the LEP”*

Stage (+Benchmarks)	Timeframe and/or date
Consideration by council (of LPP advice)	November 2022
Gateway determination (25 days)	December 2022
Commencement and completion of public exhibition period (28 days)	January-February 2022
Consideration of submissions (21 days)	March 2022
Post-exhibition review and additional studies (63 days)	April –May 2023
Submission to the Department for finalisation (where applicable) (55 days)	June 2023

Gazettal of LEP amendment	August 2023
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5.2. Attachments

- AT-1 [Council Report 23 June 2022](#)
- AT-2 [Council Resolution 23 June 2022](#)
- AT-3 [Letter from John Edwards](#)
- AT-4 [Three model councils.](#)

AT-1 Planning Proposal No. 41 (November 22022)

AT-2 Report 23 June 2022 meeting

AT-3 Minute 23 June 2022 meeting

AT-4 Letter from resident

AT-5 Three model councils

AT-6 Report 24 November 2022 meeting

AT-7 Minutes 24 November 2022 meeting

AT-8 Advice – Local Planning Panel.