



IRF22/4346

## Gateway determination report – PP-2022-4155

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Planning Proposal No. 41; Subdivision of certain dual occupancy properties

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# Acknowledgment of Country

The Department of Planning and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

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**Table 1 Reports and plans supporting the proposal**

Relevant reports and plans
Attachment A – Planning Proposal
A1 – Planning Proposal Report (November 2022)
A2 – Letter Requesting Gateway Determination (30 November 2022)
A3 – Council Report and Resolution (24 November 2022)
A4 – Letter from Resident
A5 – Council Report and Resolution (23 June 2022)
A6 – Model Council LEP Clauses
A7 – Lane Cove Local Planning Panel Advice (8 November 2022)

# 1 Planning proposal

## 1.1 Overview

**Table 2 Planning proposal details**

<b>LGA</b>	<b>Lane Cove</b>
<b>PPA</b>	Lane Cove Council
<b>NAME</b>	Planning Proposal No. 41 - Subdivision of certain dual occupancy properties
<b>NUMBER</b>	PP-2022-4155
<b>LEP TO BE AMENDED</b>	Lane Cove Local Environmental Plan 2009
<b>ADDRESS / DESCRIPTION</b>	All dual occupancies registered in the Lane Cove LEP 2009 R2 Low Density Residential zone on or before Thursday 16 June 2022
<b>RECEIVED</b>	30/11/2022
<b>FILE NO.</b>	IRF22/4346
<b>POLITICAL DONATIONS</b>	There are no donations or gifts to disclose and a political donation disclosure is not required
<b>LOBBYIST CODE OF CONDUCT</b>	There have been no meetings or communications with registered lobbyists with respect to this proposal

## 1.2 Objectives of planning proposal

The planning proposal contains objectives and intended outcomes that adequately explain the intent of the proposal. The primary objective of the planning proposal is to amend the Lane Cove LEP 2009 to permit subdivision of certain dual occupancy dwellings registered in the R2 Low Density Residential zone, on or before Thursday 16 June 2022, to subdivide their properties. Refer to section 1.3 of this report for the proposed additional subclause. The intended outcomes in addition to this objective are:

- 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 was the date Council published its 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.

The objectives of this planning proposal are clear and adequate.

## 1.3 Explanation of provisions

The planning proposal seeks to amend the following Lane Cove LEP 2009 clause by the addition of a subclause (*blue text* represents the added subclause):

### **4.1A Subdivision of dual occupancies**

*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 different lots.*

*(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.*

The planning proposal notes the permission applies despite the current prohibition under LEP Clause 4.1A. Council states 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 the property expenses between the joint owners. It is also claimed it will permit owners of company titled dual occupancies to be able to obtain finance or equity release from a banking institution or other lender. All other planning controls applying to the sites will remain unchanged.

The planning proposal contains an explanation of provisions that adequately explains how the objectives of the proposal will be achieved.

The Department recommends the proposed subclause to contain an additional condition adopting the model Clause as proposed in the Willoughby LEP 2012 to ensure each resulting subdivided lot only contains one dwelling.

## 1.4 Site description and surrounding area

The planning proposal applies to dual occupancy dwellings within the Lane Cove LEP 2009 R2 Low Density Residential zone that align with the proposed subclause 2 as proposed in section 1.3 of this report above.

## 1.5 Mapping

The planning proposal does not propose amendments to any of the maps in the Lane Cove LEP 2009. A condition has been attached for Council to provide mapping of the potentially impacted properties where practical.

## 1.6 Background

A history of the proposal is outlined in the table below:

**Table 3 Overview of planning proposal background**

Date	Background
<b>Local Context</b>	
The planning proposal is the result of a submission by a local resident to Council ( <b>Attachment A4</b> ) claiming that following the 2019 Banking Royal Commission, most lenders [banks] will no longer accept Company Title or similar as security for finance.	
<b>Legislative Context</b>	
15 December 2017 (Lane Cove LEP 2009 Amendment 24)	<ul style="list-style-type: none"> <li>Lane Cove Council introduced Clause 4.1A of <i>Lane Cove LEP 2009</i> regarding subdivision of dual occupancies (refer to section 1.3 of this report).</li> <li>This total prohibition of subdivision of dual occupancies is a long-standing policy of Council.</li> <li>As a result of the clause, the owner of a dual occupancy in an R2 zone in Lane Cove can only subdivide to create separate lots of 550sqm, requiring a minimum lot area of 1100sqm.</li> </ul>
<b>Historic Context</b>	
10 March 1995	Lane Cove LEP 1987 was amended (Clause 4(2)) to exclude SEPP 25 from applying to the LEP. SEPP 25 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'.
24 May 1996	Lane Cove LEP 1987 was amended (Clause 9C(2)) to prohibit dual occupancy development "under certain circumstances" to prevent lots smaller than 750sqm (attached) or 900sqm (detached).
15 December 2017	Lane Cove LEP 2009 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.

## 2 Need for the planning proposal

The planning proposal is the result of addressing the concerns of a local resident (**Attachment A4**) in relation to the 2019 Banking Royal Commission. Council initially resolved to prepare a more limited proposal aiming to permit strata subdivision of dual occupancies only under company title (**Attachments A5**). The current planning proposal was the result of the Lane Cove Local Planning Panel (LPP) reviewing the initial proposal (**Attachment A7**) and concluding it did not meet the strategic merit test.

The current planning proposal was derived from the proposed clause suggested by the LPP and provides a more inclusive proposal that was subsequently supported by Council on 24 November 2022. This greater inclusion seeks to permit subdivision of all dual occupancy dwellings approved in the R2 zone on or before Thursday 16 June 2022. Council suggests this amendment will apply to approximately 30 dual occupancy properties within the Lane Cove LGA that are not subdivided.

The planning proposal provides three alternative model clauses (**Attachment A6**) that attempt to achieve the objectives and outcomes.

Council notes the planning proposal will be amendment 41 to the Lane Cove LEP 2009. The planning proposal does contain some references to being amendment 40 however this is outdated.

## 3 Strategic assessment

### 3.1 Regional Plan

The planning proposal provides a general assessment of the planning proposal against relevant aspects of the Greater Sydney Region Plan.

The proposal seeks to increase supply of higher density housing, provide more affordable housing and more housing choice. The proposal aims to encourage some land-owners to unlock the equity in their dual occupancies (especially company-titled), enabling retired landowners to be able to afford to remain in their otherwise potentially unaffordable homes in the location of their choice.

### 3.2 District Plan

The Lane Cove LGA is within the North District and the Greater Sydney Commission released the North District Plan on 18 March 2018. The plan contains planning priorities and actions to guide the growth of the district while improving its social, economic and environmental assets.

The planning proposal is partly consistent with the priorities of the plan, providing a general assessment against the plan that is outlined in section 3.1 of this report above.

The Department is satisfied the planning proposal gives effect to the District Plan in accordance with section 3.8 of the *Environmental Planning and Assessment Act 1979*.

### 3.3 Local

The proposal states that it is consistent with the following local plans and endorsed strategies. It is also consistent with the strategic direction and objectives, as stated in the table below:

**Table 4 Local strategic planning assessment**

Local Strategies	Justification
Lane Cove Local Strategic Planning Statement (LSPS)	<p>The Lane Cove LSPS was endorsed by the Greater Sydney Commission on 27 March 2022. The LSPS sets the 20-year direction for housing, transport, employment, recreation, environment and infrastructure for the Lane Cove LGA.</p> <p>The key local planning priority of the LSPS relevant to the planning proposal is:</p> <p><b>Planning Priority 5</b></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.</i></p> <p>The planning proposal is considered to be consistent with the LSPS as it encourages certain land-owners to unlock equity or to finance repairs or alterations, having the potential to make housing in effect more affordable. The proposal acknowledges this only applies to current owners and could possibly make the purchase of housing more expensive.</p>



Local Strategies	Justification
Lane Cove Local Housing Strategy (LHS)	<p>The Lane Cove LHS, adopted by Council on 19 July 2021 and endorsed by the Department on 14 September 2021, sets out the direction for housing in the Lane Cove LGA to 2036.</p> <p>The planning proposal is considered to be partly consistent with the LHS as it 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>The planning proposal recognises the LHS focuses on the R3 and R4 zones and discourages pursuing other proposals “unless they <u>substantially</u> achieve priorities related to affordable housing”. The proposal does not substantially achieve this.</p>

### 3.4 Local planning panel (LPP) recommendation

The original planning proposal supported by Council on 23 June 2022 was considered by the Lane Cove Local Planning Panel on 8 November 2022 (**Attachment A7**) where it was unanimously supported in the following amended form in the following recommendation:

*That Clause 4.1A of the Lane Cove Local Environmental Plan 2009 regarding the subdivision of dual occupancy development, be amended to read as follows:*

“4.1A

(1) 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, except in accordance with subclause (2).

(2) Development consent may be granted to the subdivision of land on which a dual occupancy is erected or being erected subject to meeting the following conditions:-

- (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 375 square metres.*

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(The Panel also recommended that Council gives consideration to revising its Local Strategic Planning Statement and its Local Housing Strategy to bring those policies into harmony with the Planning Proposal.

The LPP recommended support for the amended proposal for the following reasons:

1. *The Panel is concerned that the Planning Proposal in its original form is limited to those dual occupancies under Company Title under the Corporations Act 2001, thereby disadvantaging those dual occupancies which have not gone down that path.*

2. *The Planning Proposal as recommended above introduces equity to the owners of all existing and approved dual occupancy developments (i.e. approved on or before 16 June 2022).*
3. *The Planning Proposal as proposed in its original form fails to meet the strategic merit test.*
4. *The Planning Proposal as recommended above will not lead to an influx of dual occupancy development applications generally, since it is limited to existing dual occupancy developments or to those falling under the proposed sub clause 4.1A(2).*

## 3.5 Section 9.1 Ministerial Directions

The planning proposal's consistency with relevant section 9.1 Directions is discussed below:

**Table 5 9.1 Ministerial Direction assessment**

Directions	Consistent	Reasons for Consistency or Inconsistency
6.1 Residential Zones	Yes	<p>This direction aims to encourage variety and choice of housing types for existing and future housing needs, make efficient use of existing infrastructure and services and ensure new housing has appropriate access to infrastructure and services, and minimise the impact of residential development on the environment. The direction also requires that a planning proposal must not contain provisions which will reduce the permissible residential density of land.</p> <p>The planning proposal is considered to be consistent with objective 3.1 (a) of this direction "to encourage a variety and choice of housing types to provide for existing and future housing needs" as it supports choices previously made by landowners to develop dual occupancies.</p>

## 3.6 State environmental planning policies (SEPPs)

The consistency of the planning proposal with the SEPPs is discussed in **table 6** below:

**Table 6 Assessment of planning proposal against relevant SEPPs**

SEPPs	Requirement	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
SEPP (Exempt and Complying Development Codes) 2008	This policy aims to provide streamlined assessment processes for development that complies with specified standards.	Not Applicable	The planning proposal is not applicable as the lot area requirements for the proposed subdivision defer to the LEP controls.
SEPP (Housing) 2021	On 26 November 2021, 5 SEPPs were consolidated into one SEPP. The consolidated SEPP aims to deliver a sufficient supply of safe, diverse and affordable housing.	Yes	The SEPP aims to enable the development of diverse housing supported by the <i>Low Rise Housing Diversity Design Guide</i> , by which complying development is only permitted where the LEP permits subdivision.

## 4 Site-specific assessment

### 4.1 Environmental

The planning proposal relates to existing and currently under construction dual occupancy development and will have no environmental impact. Additionally, the proposal will not alter the desired or existing character of development in R2 zones throughout the Lane Cove LGA, as it will not amend the built form controls that apply to dual occupancy development, only applying as outlined to dual occupancies intended for separate occupation.

The prohibition of dual occupancies to date has been aimed at maintaining a low density character of the R2 Residential zone to support the existing consistent subdivision pattern. The LEP allows a minimum lot size of 550 sqm in the R2 Low Density Residential zone.

For the purposes of dual occupancy development, a lot must be not less than 750sqm for an attached dual occupancy and 900 sqm for a detached dual occupancy.

Therefore, currently a dual occupancy development in the R2 zone can only be subdivided if the minimum lot size is greater than 1,100sqm so that it can create two separate lots of 550sqm each. Although dual occupancies are currently permissible and can be constructed on minimum lots sizes of 750sqm for attached and 900sqm for detached, they can not be subdivided as the LEP prohibits subdivision of dual occupancies.

Council has undertaken some analysis to provide detail of dual occupancy approvals to date. There are approximately 4 properties that would be restricted under company title within the LGA. The remainder of approved dual occupancies in the LGA which have been approved are compliant with the dual occupancy minimum lot size controls (min 750sqm) and are of strata subdivided (15%)

The provisions in the *Exempt and Complying Development - Codes SEPP* would not enable subdivision of dual occupancy developments to be considered.

### 4.2 Social and economic

As the planning proposal is to change the subdivision status of existing housing only, there are no social impacts to consider.

As acknowledged by Council, the proposal is the result of a submission received by a local resident (**Attachment A4**) outlining economic concerns for owners of dual occupancy properties under company title following the 2019 Banking Royal Commission. The proposal addresses this “unfair” financial circumstance by enabling all owners of existing dual occupancies to subdivide their properties under the proposed subclause.

### 4.3 Infrastructure

The planning proposal relates to changing the subdivision status of existing and currently under construction dual occupancy housing only, there will therefore be no infrastructure impact.

## 5 Consultation

### 5.1 Community

Council proposes a community consultation period of 28 days with a note that the Gateway determination may find that due to the minor nature of the proposal that no public exhibition is required or only 14 days exhibition is required.

### 5.2 Exhibition

The LEP plan making guidelines (Sept 2022) recommends a 20 working day public exhibition for standard planning proposals. It is considered that this exhibition period should be applied and extended should exhibition commence within the holiday period.

Given the nature of the proposal, no agency consultation is considered necessary during the public exhibition period. Council has not proposed to consult with any agencies.

## 6 Timeframe

Council proposes a 10 month time frame to complete the LEP.

The Department recommends a time frame of **9 months** to ensure it is completed in line with its commitment to reduce processing times, and to allow for Council to update the proposal based on the pre-exhibition conditions that have been recommended throughout this report.

As such, from the date of the Gateway determination, the planning proposal must be:

- exhibited within **3 months**; and
- reported to Council for a recommendation within **6 months**.

Conditions to the above effect is recommended in the Gateway determination.

## 7 Local plan-making authority

Council has advised that it would like to exercise its functions as a Local Plan-Making authority.

As the planning proposal is a local planning matter the Department recommends that Council be authorised to be the local plan-making authority for this proposal.

## 8 Assessment summary

The planning proposal is supported to proceed with conditions for the following reasons:

- it will have minimal environmental, social and economic impact, and a positive economic impact on those properties under company title;
- will enable subdivision of dual occupancies that satisfy the proposed subclause criteria to address the concerns of company title dual occupancy owners and will ultimately benefit all relevant owners across the R2 zone;
- supports the delivery of diverse housing in the Lane Cove LGA where subdivision is a proven intended use of the current dual occupancy
- it retains Council's current policy not to permit further new subdivision in the R2 zone.

Based on the assessment outlined in this report, the proposal must be updated before consultation to:

- include an additional subclause condition consistent with, or similar to the Willoughby LEP 2012 model Clause 4.1C (1)(c) clarifying that each resulting lot is to have one dwelling on it;
- include mapping, if practical, showing which properties meet the subclause condition may be affected by this planning proposal;
- provide a more accurate estimation of the number of dual occupancy properties within the Lane Cove LGA that meet the proposed LEP subclause criteria;
- refer to the most recently issued 9.1 Ministerial Directions of 1 March 2022; remove revoked Directions; and
- amend the LEP timeline based on the issuing of the Gateway determination.

## 9 Recommendation

It is recommended the delegate of the Minister determine that the planning proposal should proceed subject to the following conditions:

1. Prior to public exhibition, the planning proposal is to be updated to address the following:
  - (a) Include an additional proposed subclause condition g) consistent with, or similar to, the Willoughby LEP 2012 model Clause 4.1C (1)(c) specifying that each resulting subdivided lot is to only have one dwelling on it;
  - (b) Provide a more accurate estimation, where practical, of the number of dual occupancy properties within the Lane Cove LGA that meet the proposed LEP subclause criteria;
  - (c) include an explanation of how Council expects landowner to prove they have consent for their dual occupancy development to meet the subclause conditions;
  - (d) Include updated references to the Section 9.1 Ministerial Directions issued on 1 March 2022; and
  - (e) Include an updated project timeline to ensure completion in a timely manner based on the issuing of the Gateway determination.
2. Public exhibition is required under section 3.34(2)(c) and clause 4 of Schedule 1 to the Act as follows:
  - (a) the planning proposal is categorised as standard as described in the *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021) and must be made publicly available for a minimum of 20 working days; and
  - (b) the planning proposal authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021).

Exhibition must commence within **3 months** following the date of the gateway determination.
3. No consultation is required with public authorities or government agencies under section 3.34(2)(d) of the EP&A Act.
4. A public hearing is not required to be held into the matter by any person or body under section 3.34(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
5. The planning proposal must be reported to Council for a final recommendation **6 months** from the date of the Gateway determination.
6. The LEP should be completed within **9 months** of the date of the Gateway determination.

*Derryn John*

13/1/2023

Derryn John

Manager, Place and Infrastructure, North District

*Brendan Metcalfe*

19 January 2023

Brendan Metcalfe

Director, North District

Assessment officer

Matthew Rothwell

Planning Officer, North District

8275 1066