

<b>JRPP No:</b>	<b>2009HCC011</b>
<b>DA No:</b>	<b>DA 37503/2009</b>
<b>PROPOSED DEVELOPMENT</b>	<b>Proposed: Boundary Adjustment/Resubdivision - Consolidate 6 into 5 lots (Integrated &amp; Designated) - JRPP on LOT: 2 DP: 543150, LOT: 92 DP: 755257, LOT: 1 DP: 779387, LOT: 2 DP: 779387, LOT: 67 DP: 665348, LOT: 1033 DP: 1106937, 5365, 5333, 5375, 5349, 5335 &amp; 5323 Wisemans Ferry Road SPENCER</b>
<b>APPLICANT:</b>	<b>Montgomery Planning Solutions</b>
<b>REPORT BY:</b>	<b>Fred Dobbs - Gosford City Council</b>

*The following item is defined as a planning matter pursuant to the Local Government Act, 1993 & Environmental Planning & Assessment Act, 1979.*

## **EXECUTIVE SUMMARY**

### **Background**

At its meeting held 18 March 2010 the JRPP resolved as follows:

*"That the determination of the application be deferred to enable Council to obtain legal advice regarding the permissibility of the proposed subdivision under Clause 20(1)(b) of IDO 122 or other provision of the IDO. Should the legal advice indicate that the proposed subdivision is permissible, then the applicant be requested to outline in a submission to Council Officers how the proposal would provide a net environmental benefit to the locality."*

### **REPORT**

In relation to **Part 1** of the resolution the following information is provided

Council has sought and obtained advice that concludes on balance that the Court is likely to find that subdivision of the subject property into lots having an area of less than 40 ha is prohibited development in this zoning.

In relation to **Part 2** of the resolution regarding net environmental benefit to be demonstrated by the applicant, the abovementioned advice obtained by Council has supported Council's original assessment. The application therefore cannot be approved by the consent authority in the manner proposed and the applicant was therefore not requested to provide any further information.

**Attachments**     Report to JRPP - 18 March 2010

**Tables Items**     Nil

### **Recommendation**

The recommendation of Council contained in the report to the JRPP meeting of 18 March 2010 be adopted.

# REPORT TO HUNTER & CENTRAL COAST JOINT REGIONAL PLANNING PANEL

**TITLE**            **DEVELOPMENT APPLICATION NO. 37503/2009**  
**APPLICANT: MONTGOMERY PLANNING SOLUTIONS**  
**PROPOSED: BOUNDARY ADJUSTMENT/RESUBDIVISION - CONSOLIDATE**  
**6 INTO 5 LOTS (INTEGRATED & DESIGNATED) - JRPP ON LOT: 2 DP:**  
**543150, LOT: 92 DP: 755257, LOT: 1 DP: 779387, LOT: 2 DP: 779387, LOT:**  
**67 DP: 665348, LOT: 1033 DP: 1106937, 5365, 5333, 5375, 5349, 5335 & 5323**  
**WISEMANS FERRY ROAD SPENCER.**  
Directorate:        Environment and Planning  
Business Unit:     Development

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*The following item is defined as a planning matter pursuant to the Local Government Act, 1993 & Environmental Planning & Assessment Act, 1979.*

## **EXECUTIVE SUMMARY**

### **Reason for Referral to Joint Regional Planning Panel (JRPP)**

The proposal is designated development and under Clause 13B(1)(e) of SEPP (Major Projects) Amendment (Joint Regional Planning Panels) 2009.

### **Assessing Officer**

F W Dobbs

### **Application Received**

08/10/2009

### **Proposal**

Re-subdivision of 6 existing lots into 5 new lots.

### **Zone**

7(a) Conservation & Scenic Protection (Conservation) - IDO122

### **Area**

Lot 92 DP 755257	= 26.10 ha (Vacant)
Lot 1033 DP 1106937	= 15.82 ha (Contains recently approved existing dwelling)
Lot 2 DP 543150	= 00.2776 ha (Vacant)
Lot 67 DP 665348	= 16.13 ha (Vacant)
Lot 1 DP 779387	= 16.48 ha (Contains original existing dwelling)
Lot 2 DP 779387	= <u>03.45 ha (Vacant)</u>
TOTAL	= 78.2926 ha

### **Public Submissions**

One (1)

## **Pre-DA Meeting**

Not Held

## **Political Donations**

None Declared

## **Relevant Statutory Provisions**

- 1 Environmental Planning & Assessment Act, 1979 – Section 79C
- 2 Local Government Act 1993 – Section 89
- 3 State Environmental Planning Policy No 1 - Development Standards
- 4 State Environmental Planning Policy (Major Development) 2005
- 5 State Environmental Planning Policy 71 - Coastal Protection
- 6 Draft Gosford Local Environmental Plan 2009
- 7 IDO 122 - Clauses 5(3), 5(4) and 20
- 8 SREP 20 - Hawkesbury - Nepean River
- 9 Rural Fires Act 1997
- 10 DCP 89 Scenic Quality
- 11 DCP 138 - Public Notification of Development Applications
- 12 DCP 130 - Subdivision of Rural & Non-Urban Land
- 13 DCP 155 - Single Dwellings & Ancillary Structures
- 14 DCP 159 Character

## **Key Issues**

- 1 Interim Development Order No 122
  - Objectives of Zone
  - Character
  - Common Ownership - Clause 22
  - Permissibility - Clauses 18 & 20
  - Insufficient information
- 2 Draft Gosford Local Environmental Plan 2009
- 3 Engineering Issues
- 4 Environmental and Tree Management Issues
- 5 Effluent Disposal Issues
- 6 Provisions of DCP 130 - Subdivision of Rural & Non-Urban land
- 7 Provisions of DCP 155 - Single Dwellings & Ancillary Structures
- 8 Comments from the Rural Fire Service
- 9 Comments from NSW Office of Water
- 10 Comments from RTA
- 11 Climate change and sea level rise
- 12 Public Submission

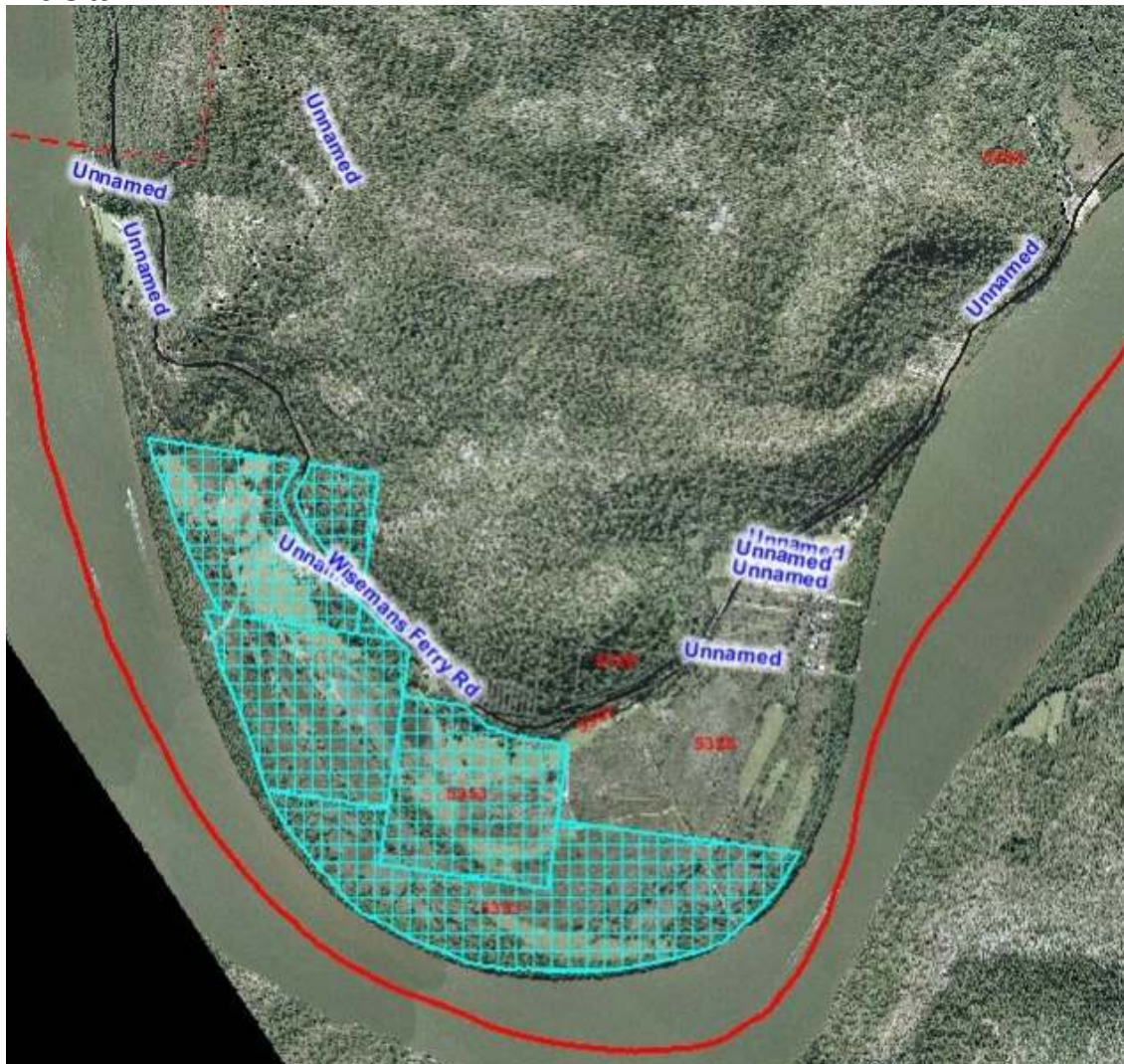
## **Recommendation**

Refusal

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## REPORT

### The Site



### Site Description

The site is located between Wisemans Ferry Road and the Hawkesbury River approximately 8 kilometres upstream from the village of Spencer. The subject site comprises six (6) lots with a total area of approximately 78.3 hectares. Most of the site is located below the 1:100 year flood line of RL 3.8 AHD. Approximately 20% of the total site running approximately parallel with Wisemans Ferry Rd is heavily vegetated with varying slopes up to 30%. The remainder of the total site (approximately 80%) is substantially cleared floodplain which, as indicated by the applicant, has been "slashed/mown" and "used for livestock grazing for many years".

## The Proposal

The proposal is to re-subdivide the land into five (5) new lots as follows:

Proposed Lot	Proposed Area
1	20.5ha (Existing dwelling & outbuildings)
2	5.8ha (Vacant)
3	16.3ha (Vacant)
4	17.6ha (Existing dwelling & Shed)
5	18.1ha (Vacant)
<b>TOTAL</b>	<b>78.3ha</b>

The current application does not formally include applications to construct dwellings on the three (3) proposed vacant lots. If this application for subdivision were approved, future applications for proposed dwelling houses on the vacant proposed lots would be required to be submitted as a designated development under the provision of Clause 22 of IDO 122.

## Assessment

This application has been assessed using the heads of consideration specified under Section 79C of the Environmental Planning & Assessment Act 1979, Council policies and adopted Management Plans. The assessment supports refusal of the application and has identified the following key issues which are elaborated upon for Council's information.

### Interim Development Order 122

#### a Objectives Of Zone

Clause 5(3) of Interim Development Order No 122 stipulates that consent must not be granted for development of land within the prescribed zone, unless the objectives of the zone have been taken into consideration in conjunction with the objectives of the Local Government Act 1993, pertaining to Ecologically Sustainable Development.

The objectives of Zone No. 7(a) are:

- (a) the conservation and rehabilitation of areas of high environmental value;
- (b) the preservation and rehabilitation of areas of high visual and scenic quality in the natural landscape;
- (c) the provision and retention of suitable habitats for flora and fauna;
- (d) the prohibition of development on or within proximity to significant ecosystems, including rainforests and estuarine wetlands;
- (e) the provision and retention of areas of visual contrast within the City, particularly the "backdrop" created by the retention of the ridgelines in their natural state;
- (f) the provision of opportunities for informal recreational pursuits, such as bushwalking and picnics, in appropriate locations;
- (g) the minimisation or prohibition of development so that the environmental and visual qualities of the natural areas are not eroded by the cumulative impact of incremental, individually minor developments;
- (h) the minimisation or prohibition of development in areas that are unsuitable for development by virtue of soil erosion, land slip, slope instability, coastal erosion or bushfire hazard.

Insufficient information, plans and details have been submitted regarding effluent disposal, tree removal, scenic quality, access and flooding to determine whether the proposal is consistent with the stated objectives of the Conservation 7(a)-IDO122 Zone as well as being consistent with the principles of Ecologically Sustainable Development, as specified within the Local

Government Act 1993. Further details regarding the deficiencies in the application are provided below in the various sections of the report detailing relevant specific issues.

**(Refer refusal reason 5)**

b Character

Clause 5(4) of Interim Development Order No 122 stipulates that the Council must not grant consent for development unless it has taken into consideration the character of the development site and the surrounding area, where, for the purpose of this provision, character means the qualities that distinguish each area and the individual properties located within that area.

DCP 159 is applicable in the assessment of character. However Council has not yet prepared existing and desired character descriptions for outlying rural localities such as Spencer. Notwithstanding this, any development proposal is required to comply with the objectives of DCP 159 - Character which are as follows:

- Protect and enhance environmental character that distinguishes Gosford City's identity, and;
- Enhance the City's identity by development that displays improved standards of scenic, urban and civic design quality.

For areas which contain no prepared local character statement Council relies upon the provisions of DCP 89 - Scenic Quality to provide a basis as to whether a particular development proposal complies with the requirements of desired character and therefore the requirements of Clause 5(4) of Interim Development Order 122.

The site is located within the Upper Hawkesbury Geographic Unit of DCP 89 which is identified as having a State level of significance. The landscape character is identified as a broad but steep sided mature river valley which meanders through the floodplain. Development objectives of DCP 89 include the following:

- Retain and enforce existing provisions contained within instruments and policies relating to the location and appearance of development within this geographic unit.
- Encourage new buildings to blend into the existing natural environment with darker colours being preferred.
- Development Applications should aim to prevent the creation of further development outcomes which create additional detracting elements.
- Proposals for clearing of land should be assessed against the scenic quality guidelines contained within the DCP

The proposal is a subdivision of the land. The applicant has indicated that *"no trees are to be removed for the purposes of the subdivision/boundary adjustment. However, figures 14 & 15 of the "Flora & Fauna report prepared by Wildthing Environmental Consultants identify the trees which are required to be removed in the future for dwelling and driveway construction."*

The information provided regarding tree removal is insufficient and / or incomplete. All trees to be removed are **not** identified. Access-ways need to be constructed as the sites will eventually have dwelling houses erected upon them. This will result in clearing of vegetation including trees for access roads, APZ's and effluent disposal areas. The impact of the required tree removal on scenic quality is unable to be assessed as proposed tree removal has not been adequately identified and quantified.

**(Refer refusal reason 8)**

c Common Ownership - Clause 22

All existing lots are adjoining and were held in the same ownership on 18 February 1977. Under the provisions of Clause 22 of IDO 122, the land therefore has one building entitlement subject to consolidation of the lots unless the application is submitted as designated development for a dwelling house on each lot

Existing Lot 1 DP 779387 contains the original existing dwelling. Existing Lot 1033 DP 1106937 contains a recently constructed dwelling approved as a designated development by Council on 05/10/2005. The other four (4) lots that are part of the current subdivision proposal are vacant.

d Permissibility - Clauses 18 and 20

Clause 18(3)(a) of IDO 122 requires a minimum area of 40 hectares for new lots.

Clause 20(1)(b) of IDO 122 permits boundary realignments with consent where the application is to make an adjustment to a boundary between allotments, being an adjustment that does not involve the creation of any additional allotments and does not confer any additional building or development rights.

Notwithstanding the fact that one less allotment is proposed to be created as a result of the proposal, the size, shape, area, length and position of the new boundaries are completely different to the existing allotment layout. Having regard to this, the proposal constitutes a "subdivision" within the meaning of the Environmental Planning and Assessment Act, 1979. (Refer *Jansen v Shoalhaven City Council and Department of Urban Affairs and Planning No 10420 of 1997-Murell AJ*).

With regard to the above, Clause 20(1)(b) cannot be utilised in the manner proposed in the application. Accordingly the application has been assessed as a subdivision proposal. The proposal **does not** comply with the required minimum lot size of 40 hectares contained within Clause 18(3)(a) of Interim Development Order No 122, with proposed lots varying between 5.8ha and 20.5ha.

The applicant has not lodged an objection under State Environmental Planning Policy No 1 with regard to the variation proposed, therefore the application does not comply with the development standard of Clause 18(3)(a) of IDO No 122.

**(Refer refusal reasons 1, 2 & 3)**

e Insufficient information

It has been established above that Clause 20(b) cannot be used in the manner proposed. Assessment staff have however attempted to conduct a merit assessment of the application.

The application does not include proposed dwelling houses on the three (3) vacant lots. Suggested building envelopes for proposed future dwelling houses on the proposed vacant lots are included on the submitted plans. **The intention is to submit dwelling house applications in the future**, either by the current owner or future prospective purchasers. Whether or not the land can sustain three (3) additional dwelling houses and comply with the objectives of the Conservation 7(a) Zone needs to be established at the subdivision stage. **If this is not established, approval to the current application would either be a "nonsense" as the lots may be incapable of sustaining dwelling houses or may "lock" Council into approving dwelling houses on inappropriate sites.** This could be the case if the vacant lots were sold to prospective purchasers who would have a reasonable expectation that dwelling houses would be approved, particularly as any subdivision consent would be recent.

The applicant has been either unwilling and / or unable to submit sufficient information to establish that each of the vacant sites can sustain a dwelling house. A number of issues including access, flooding, effluent disposal, tree removal and impact on scenic quality are insufficiently addressed to determine whether the site can sustain three (3) additional dwellings. **(Refer refusal reason 8)**

## **Draft Gosford Local Environmental Plan 2009**

The application has been assessed under the provisions of Draft Gosford Local Environmental Plan 2009 in respect to zoning, development standards and special provisions. The assessment concluded the proposal is inconsistent with the Draft Plan as follows:

- The minimum area for subdivision is 40 hectares.
- There is no provision for creation of new lots less than 40 hectares as proposed.

**(Refer refusal reason 10)**

## **Engineering Issues**

The following comments have been provided by Councils Senior Development Engineer and Flooding Engineer:

### *"Flooding and Drainage"*

*The proposed boundary realignment incorporates an existing 6 parcels of land identified as affected by the Hawkesbury River floodplain. It is acknowledged the proposal reduces the number of lots however the development should still be considered with regard to current standards and best floodplain management practice. At present, the existing southern lot (L92 DP755257) fronting the Hawkesbury River can only be used for passive purposes and would not have a suitable dwelling house site. Should a development be proposed on the property, a significant amount of information and works would be required in order to address the flooding requirements.*

*Council has an adopted flood study ("The Lower Hawkesbury River Flood Study") prepared by Australian Water and Coastal Studies (1997) for the Hawkesbury River, which identifies flood levels and velocities for this reach of the river. Council does not have a Floodplain Risk Management Plan (FRMP) for this area. Without a FRMP, development controls have not been considered taking into account cumulative impacts on the floodplain.*

*The Hawkesbury River 1% AEP flood level varies throughout the reach of the river impacting on the development sites. The 1% AEP flood event upstream of L1 DP779387 is RL 3.9m AHD and RL 3.5m AHD near the eastern boundary of Lot 92 DP755257. The "Lower Hawkesbury River Flood Study" (AWCS, 1997) has also identified average maximum velocities for the 1% AEP flood event throughout the reach of the creek. For the appropriate channel sections these velocities range from 2.4m/s (at a 1% AEP flood level of RL 3.9m AHD) to a velocity of 0.7m/s (at a 1% AEP flood level of RL 3.5m AHD). Depths of flood water in excess of 1 metre at zero velocity, or at minimal depth with velocities in excess of 2m/s; are considered high hazard in accordance with The NSW Floodplain Development Manual (DIPNR, 2005) (Appendix L, Figure L2 - Provisional Hydraulic Hazard Categories).*

*In the area where the application proposes to locate a building, this envelope significantly extends into the 1% AEP floodplain area where the average overbank velocity is 1m/s. The survey plan (Ref: 02084 - A(1C) dated 2/2/2009) specifies a level of RL 2.27m AHD at the building envelope. The corresponding flood level for the area is **RL 3.8 m AHD**, resulting in the building envelope area being affected by a depth of floodwater up to 1.53 metres and well within the hydraulic high hazard category. The building should either be relocated to land above **RL***



**3.8m AHD** or located on a fill platform which would create the need for a flood study to determine the cumulative impacts of development on the floodplain.

The two (2) proposed driveways do not comply with any of the options available within Council's "Guidelines for Providing Access to Rural Properties Affected by Flooding". Flood depths should not exceed 200mm across the driveways.

The driveway accessway for the proposed Lot 3 crosses a minor watercourse. It is acknowledged the catchment for this watercourse is relatively small, however the velocities of flows from this catchment may be substantial. This watercourse crossing should be designed to provide safe vehicular access and designed in accordance with GCC's "Design Specifications for Survey, Road and Drainage Works". No design has been submitted.

Survey details have not been provided for the entirety of the sites and the evaluation of the minor watercourses has not occurred with regard to the potential overland flow impacts on the proposed building envelopes or driveways. Determination of overland flow supported by calculations is required to assess the proposed subdivision.

I cannot support the proposal with regard to the information submitted to Council.

#### Vehicular access

The applicant has provided revised details of vehicle access to proposed Lots 2 & 3. The proposed access to proposed Lot 2 has a substantial section with grades in excess of 30%, which is considered excessive and unacceptable. In addition, the proposed accesses to proposed Lots 2 & 3 have sections that are located on land affected by the 1% AEP flood event and considered high-hazard. This is also unacceptable.

#### The following information is required before further assessment:

1 In order to adequately assess the flooding aspects relating to the proposed subdivision, the following information should be provided:

- Calculation and determination of overland flow paths, velocities, depths and extents.
- Amended plans detailing all driveways located on land with safe vehicular access and to a maximum of 200mm of floodwater.
- Amended plans detailing all building envelopes located on land naturally above the 1% AEP floodplain.

OR

- Calculation and determination of overland flow paths, velocities, depths and extents.
- Amended plans detailing all driveways located on a fill platform with safe vehicular access and to a maximum of 200mm of floodwater.
- Location of all building envelopes on a fill platform above the 1% AEP flood level;
- An engineering hydrological and hydraulic flood report detailing the existing and proposed 1% AEP flood profiles as relevant to the proposed subdivision. Minimum details shall include the 1% AEP flood plan and regular cross-section profiles, catchment plan, stormwater long section, hydraulic grade line, stormwater flows & velocities, and any mitigation works proposed to alleviate flooding. The analysis, design and report shall be prepared and certified by a suitably qualified and experienced civil engineer, and be carried out in accordance with the procedures recommended in 'Australian Rainfall and Runoff – A Guide to Flood Estimation' by The Institution of Engineers Australia and GCC Design Specifications for Survey, Road and Drainage Works.
- The flood study would be required to consider the cumulative impact of development on the floodplain for that reach of the Hawkesbury River.

- *The flood study would also require consideration of scour, erosion, slip and debris with relation to any fill platform.*

*Note 1: An Environmental Impact Assessment must accompany the flood report where it is proposed to modify the existing 1% AEP flood profile.*

*Note 2: Any structures or fill within the floodplain will require a flood study, as detailed above.*

**2 Plans demonstrating that acceptable vehicle access to proposed lots is achievable within the following constraints:**

- *Longitudinal grades not to exceed 26.8%. (Equivalent to 15 degrees as required under "Planning for Bushfire Protection").*
- *Where the longitudinal grades exceed 25%, a design statement from a suitably qualified civil engineer with recommendations on the type of construction and surface treatment for the proposed driveways to render them safe and serviceable in all weather conditions.*
- *3% driveway cross-fall.*
- *Suitably sized concrete lined drainage channels adjacent to the driveway.*
- *Satisfy flood access requirements to the proposed Lots.*
- *Satisfy rural property access requirements in accordance with NSW Rural Fire Service "Planning for Bush Fire Protection", including but not limited to grades, widths, vertical clearances, turning heads, passing bays, etc.*

*Note: The plans must also show the location and extent of cut & fill, suitably sized drainage channels, proposed retaining walls, safety devices, etc., identification and location of all trees that will require removal or be affected by the proposed works associated with constructing the vehicle access ways / driveways. This information is required in order that a proper assessment of the environmental impacts can be carried out."*

**Comment**

The above information required by Council's Senior Development Engineer and Flooding Engineer has not been requested from the applicant for the following reasons:

- The proposal does not comply with the minimum lot size.
- The planning assessment of the proposal indicates that it cannot be approved.
- The applicant has by letter to Council dated 1 February 2010 requested referral of the information submitted to date together with Council's assessment to the Joint Regional Planning Panel "without further delay".

**Comments from Council Tree Management Officer**

Council's Tree Management Officer provides the following comments:

- *"During the site inspection it was found that the new plan had not located or identified all trees likely to be effected by the proposal. It was noted that up to 10 native trees were found within each building footprint of lots 2 and 3, however plans show only 7 in each, some trees against the proposed driveway have not been included and the current roughly constructed access slightly differs from that as shown on plan.*
- *APZ's for the building foot prints will also require further tree removal.*

- *Figures 14 & 15 of the flora and fauna impact statement prepared by Wildthing Environmental Consultants relates to the original accessway proposal and **do not satisfactorily document which trees are to be removed** for the amended accessway, building footprints and APZ's. The method of simply marking trees to be removed on site with yellow spray paint is not sufficient. A plan must also reflect that information.*
- *As trees are likely to be very close to the construction of accessways, a method of tree protection must also be provided. It was noted on site that one tree appeared to have been mechanically damaged from recent works on the rough existing access to lot 2.*
- *The arborist report originally required by Council is required to enable completion of assessment of tree management issues."*

## **Environmental and Tree Management Issues**

Council's Environmental Assessment Officer provides the following comments:

### "Tree Removal

*The proposed environmental impact of this development has not been fully quantified and extent of tree loss is unknown. Figures 14 & 15 of the Wildthing report have not considered tree removal in respect to changes in driveway access nor have the trees been accurately fixed by land survey. Given any consent issued on these plans or amended proposed access plans it would be unclear what trees were approved to be retained or removed under the consent.*

*Based on unknown tree loss I reiterate my previous request for arboricultural details and concur with Council's Tree Assessment Officer that the following information is required to adequately quantify the impact of any future development of proposed lots 2 & 3:*

- *The applicant provides the arborist report as earlier requested by Council's Environment Officer; OR*
- *The applicant have their Environmental consultant provide a plan that accurately locates and identifies all trees to be removed for access, services, building foot prints and APZ's; and*
- *The plan must show individually numbered trees that correspond with an attached tree schedule; and*
- *All trees to be retained within 5m of construction zones are to be included on the tree plan and tree schedule, and will have tree protection methods as an annexure.*

### Section 5A of the EP&A Act 1979 - EEC River-flat Eucalypt Forest on Coastal Floodplain

*The Statement of Effect on Threatened Flora & Fauna (Wildthing Environmental Consultants, August 2009 has identified a vegetation community classified as Forest Red Gum Stand with pasture understorey from the subject site. This community corresponds to a disturbed example of the endangered ecological community known as River-flat Eucalypt Forest on Coastal Floodplain. A section 5A assessment of significance has not been conducted on this community for this proposal.*

**(Refer refusal reason 9)**

Sydney Regional Environmental Plan 20 - Hawkesbury - Nepean River (No. 2 - 1997)

*Site suitability for on-site disposal of effluent disposal is to be commented on by Council's Environmental Health & Building Surveyor. It is noted however that the proposed on-site disposal area for proposed Lot 3 appears to be located within the 1:100 year flood event area.*

*All proposed future development areas are well setback from mapped SREP 20 wetland 48 areas.*

The application is not supported as

1 *The environmental impact of the proposed subdivision has not been adequately quantified and additional information is required as follows:*

- An arborist report as earlier requested by Council's Environment Office,*

*OR*

- The applicant have their Environmental consultant provide a plan that accurately locates and identifies all trees to be removed for access, services, building foot prints and APZ's, and;*
- The plan must show individually numbered trees that correspond with an attached tree schedule, and;*
- All trees to be retained within 5m of construction zones, are to be included on the tree plan and tree schedule, and will have tree protection methods as an annexure.*

2 *A Section 5A assessment has not been undertaken for the endangered ecological community known as River-flat Eucalypt Forest on Coastal Floodplain.*

**(Refer Refusal reason 9)**

Comment

The information required by Council's Environment Officer and Tree Management Officer has not been requested from the applicant for the following reasons:

- The proposal does not comply with the minimum lot size.*
- The planning assessment of the proposal indicates that it cannot be approved.*
- The applicant has by letter to Council dated 1 February 2010 requested referral of the information submitted to date together with Council's assessment to the Joint Regional Planning Panel "without further delay".*

**Effluent Disposal Issues - Comments from Councils Environmental Health Surveyor**

Council's Environmental Health Surveyor has provided the following comments:

"1 *The high limitations stated in the Wastewater Report prepared by Larry Cook dated 19 August 2009 has identified certain limitations for an On-site Sewage Management System/s. The Conclusions and Recommendations also indicate specific limitations but include no background information regarding how the cited limitations (which include suitable land required buffer distances, landform and low permeability etc ) are to be resolved. It is noted the report contains inconsistencies particularly regarding Section 6.6.1 - "the soil profile and high water table is not suitable for wastewater absorption trenches, spray irrigation or drip irrigation".*

*The conclusion and recommendations clearly recommend disposal using the above methods. Relevant inconsistencies need clarification and further commentary is required*

*regarding the limitations to enable full comment by Council's Environmental Health Surveyor (Waste).*

- 2 *A site plan indicating the location of the effluent disposal areas/reserve areas, watercourses i.e. permanent or intermittent, Ecologically Endangered Communities and 100 year flood zone to support the proposed subdivision is required.*  
**(Refer refusal reason 8)**

### **Provisions of DCP 130 - Subdivision of Rural & Non-Urban Land**

This Development Control Plan applies to the subdivision of land within rural, conservation, scenic protection zones and any other non-urban zone within the City of Gosford.

The objectives of this Development Control Plan are as follows:

- a To ensure that lots created avoid, or make provision to minimise, the likely affect of natural hazards relevant to the locality, which could be detrimental to the proper use and enjoyment of the land.
- b To ensure that the size, shape, and characteristics of new lots are appropriate to the zoning and possible range of uses.
- c To protect the scenic value and natural habitats of rural land.
- d To ensure that new lots are in character with the locality and the specific landform, vegetation, soils and geology of the site.
- e To ensure the economic utilisation of land resources in the area.
- f To ensure the provision of an adequate building area, vehicular access and services on the site.

Due to the inadequate information submitted with the application or non-compliance with relevant requirements regarding flooding and access as outlined above, the proposal does not comply with the above objectives of DCP 130.

**(Refer refusal reason 6)**

### **Provisions of DCP 155 - Single Dwellings & Ancillary Structures**

Clause 9.3 of DCP 155 specifies a minimum setback from any public road adjoining the allotment of thirty (30) metres. The building envelope on proposed Lot 5 is located with a variable 6-8 metre setback. This proposed lot contains minimal usable land hence the necessity for variation of the setback requirement. The implications and impacts of the non-compliance with Council's thirty (30) metre minimum setback requirement have not been addressed in the documentation accompanying the application.

**(Refer refusal reason 7)**

### **Comments from Rural Fire Service (RFS)**

The site is located within a bushfire prone area and a Bushfire Safety Authority under Section 100B of the Rural Fires Act 1997 is required from the Rural Service (RFS). The RFS have issued the required Bushfire Safety Authority via letter to Council dated 16 November 2009.

Conditions issued by the RFS relate to the existing dwellings only. The RFS have incorrectly assessed the proposal as infill development and not as a subdivision. Council has not corresponded with the RFS seeking clarification of the S100B Bushfire Safety Authority and reassessment as a new subdivision as the proposal cannot be supported due to non-compliance with the 40 hectare minimum area requirement.

## **Comments from NSW Office of Water**

The NSW Office of Water have advised that a Controlled Activity Approval is not required regarding the proposal. Council has been requested to notify the Officer of Water should the proposal be varied in any way or more extensive works be proposed on waterfront land within 40 metres of the highest bank of the watercourse.

## **Comments from RTA**

The RTA have advised that there are no proposals that require any part of the property and there is no objection to the proposal.

## **Climate change and sea level rise**

Climate change and sea level rise have been considered in the assessment of this application.

Climate change and sea level rise will be felt through:

- increases in intensity and frequency of storms, storm surges and coastal flooding;
- increased salinity of rivers, bays and coastal aquifers resulting from saline intrusion;
- increased coastal erosion;
- inundation of low-lying coastal communities and critical infrastructure;
- loss of important mangroves and other wetlands (the exact response will depend on the balance between sedimentation and sea level change); and
- impacts on marine ecosystems.

Internationally there is a lack of knowledge on the specifics of climate change and the likely impact it will have on the subject development. Government action may mitigate the impact of climate change and the question of sea-level rise may be able to be addressed through the construction of containment works or through Council's policies that may be developed over time.

In the absence of any detailed information at present however, refusal of this application with regard to climate change and sea level rise is not warranted.

## **Public Submission**

One public submission was received in relation to the application. Those issues associated with the key issues have been addressed in the above report. The remaining issues pertaining to various concerns were addressed in the assessment of the application pursuant to the heads of consideration contained within Section 79C of the Environmental Planning and Assessment Act 1979.

A summary of the submission is detailed hereunder.

### **1 The application should be refused for the following reasons**

- **The land is zoned 7(a) conservation and has high environmental value.**
- **The site includes identified wetlands under SREP 20 - Hawkesbury-Nepean River**
- **The site contains two (2) EEC's and four (4) threatened fauna species**
- **Of 38 threatened fauna species considered in the Flora & Fauna Report, 19 were considered to have potential habitat resources in varying quadrants.**
- **It is important to retain the Forest Oak species within the asset protection zone.**

Comment

The matters raised in the submission refer to environmental issues associated with the zoning of the land and the potential impact upon threatened species. As detailed above the application contains insufficient information regarding a number of environmental issues to determine whether the environmental impacts of the proposal, including the potential for future dwelling houses are acceptable and sustainable. The applicant has not been required to provide any further information regarding environmental issues as the proposal cannot be supported in the form submitted and should be refused by the consent authority.

## **Conclusion**

The proposal is unsatisfactory for the following reasons:

- 1 **Classification of Development** - The proposal is a "subdivision" and not a "Boundary Realignment" as the shape, area, length and position of new boundaries are completely different when compared to the original allotments. The provisions of Clause 18(1)(b) of Interim Development Order 122 cannot therefore be utilised in the manner proposed.
- 2 **Future Dwellings** - The application contains inadequate information to assess the impact of future dwelling houses and whether or not dwelling houses would be sustainable. The applicant has basically argued that the proposal is a subdivision only which in itself has no impact and does not require tree removal etc. The consent authority must have regard to the potential future use of the land under the provisions of SREP 20 - Hawkesbury Nepean River and Interim Development Order No 122 which outline the objectives of the Zone. The potential future use of the land is dwelling houses on each lot and all issues relating to construction of dwelling houses must to be resolved at subdivision stage. If relevant issues regarding future dwelling houses are not resolved, the subdivision consent either becomes as "nonsense" consisting of lots that cannot be developed or built upon or may "lock" Council into approving dwelling houses on inappropriate sites.
- 3 **Draft LEP 2009** - Under the provisions of the Draft LEP 2009 which is on public exhibition from 10 February 2010 until 8 April 2010, the common ownership restrictions of Clause 22 of Interim Development Order No 122 will no longer apply. It is imperative, particularly regarding land zoned 7(a) Conservation, that new lots within subdivision proposals are capable of sustaining dwelling houses as dwelling houses created under the current proposal would no longer be "Designated Development" creating further pressure for Council to approve dwelling houses on inappropriate sites.
- 4 **Non-Compliance with a Deemed Environmental Planning Instrument** - The proposal does not comply with the statutory 40 hectare minimum site area requirement prescribed by Clause 18(3)(a) of Interim Development Order 122. The proposal, whether a boundary realignment or otherwise, will result in three additional dwellings on an area of land well below the statutory minimum, in circumstances where insufficient information has been provided to enable quantification and assessment of environmental consequences.
- 5 **State Environmental Planning Policy No 1 - Development Standards** - The applicant has not submitted an objection under the terms of SEPP 1 - Development Standards to the development standard of Clause 18(3)(a) of IDO No 122.
- 6 **Concurrence** - If an objection under SEPP No 1 had been submitted, the concurrence of the Director - Department of Planning, cannot be assumed, nor has it been granted in this instance. Council has no assumed concurrence relating to subdivisions carried out under Clause 18 of Interim Development Order No 122 proposing allotments below 40 hectares in area on land zoned 7(a) Conservation as outlined in the Departments of Planning's Circular B1.

- 7 **Endangered Ecological Community** - The Statement of Effect on Threatened Flora & Fauna (Wildthing Environmental Consultants, August 2009) has identified a vegetation community classified as Forest Red Gum Stand with pasture understorey on the subject site. This community corresponds to a disturbed example of the endangered ecological community known as River-flat Eucalypt Forest on Coastal Floodplain. A section 5A assessment of significance has not been conducted on this community for the proposal.
- 8 **Tree Removal, Impact on Visual Quality, Effluent Disposal, Access & Flooding** - The environmental impact of the proposed subdivision has not been adequately quantified and additional information is required regarding each of these issues, particularly in relation to the future use of the new allotments for the construction of dwelling houses.
- 9 **Designated Development / SREP 20 - Hawkesbury Nepean River** - The proposed subdivision is a designated development as the site contains wetlands mapped under State Regional Environmental Plan 20 - Hawkesbury Nepean River. The Director Generals requirements for preparation of an EIS dated 3 April 2008 specifically required consideration of relevant issues applicable under SREP 20. The Environmental Impact Statement makes no reference to the issue of this "trigger" for designated development.
- Clause 6(2) of SREP 20 requires the protection of environmentally sensitive areas to be enhanced through careful control of future land use changes and through management and remediation of existing uses. One of the strategies to achieve the required environmental protection requires "*new development in conservation area sub-catchments to be located in areas that are already cleared*". The proposal with regard to future dwelling houses does not comply with this requirement of SREP 20 and the issue of required clearing as indicated above has not been suitably addressed.
- 10 **Overdevelopment of the Site and Reasonableness of the Proposal** - The site contains a total area of approximately 78.3 hectares. Approximately 80% of the site area is floodplain below the 1% AEP. The remaining 20% of the site consists of relatively steep heavily vegetated slopes. Most of this steep vegetated area is concentrated on proposed lots 1 and 3 which each contain existing dwellings. Proposed lots 2, 4 and 5 contain small areas only where dwelling houses could potentially be located above the 1% AEP flood event. The reasonableness of the proposal is questionable with regard to the number of additional dwellings that would be located on the proposed new lots with issues relating to flood free access with compliant grades, effluent disposal, tree removal and scenic quality not being suitably quantified. Based on the information submitted to date it can only be deduced that the proposal represents an overdevelopment of the site with regard to the zoning and the usable area available on each of the vacant proposed lots 2, 3 and 5.
- 11 **Lot 2 DP 779387 adjoining Dharug National Park** - This part of the site is severed from proposed Lot 1 containing an existing dwelling house and various other structures by Wisemans Ferry Road. This lot is steep and covered with undisturbed native vegetation. The proposal is to consolidate this lot into proposed Lot 1 which does nothing to improve the usable area of proposed Lot 1. The most appropriate use of this site would be its inclusion in the adjoining National Park and it is recommended that any future subdivision application investigate this as a possible environmental offset and an alternative and more acceptable use of this lot.

Section 80(2) of the Environmental Planning and Assessment Act 1979 requires that "*the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.*"

With regard to the circumstances of this case, the proposed development is not supported for the above reasons and is contrary to the objects of the Environmental Planning and



Assessment Act 1979 so as to provide for the orderly and proper development of land and is recommended for refusal.

**Attachments:** No

**Tabled Items:** No

## **RECOMMENDATION**

A The Joint Regional Planning Panel as consent authority refuse consent to Development Application No. 37503 for the proposed Boundary Adjustment / Re-subdivision - Consolidate 6 into 5 lots on LOT 2 DP 543150, LOT 92 DP 755257, LOT 1 DP 779387, LOT 2 DP 779387, LOT 67 DP 665348, LOT 1033 DP 1106937, No 5365, 5333, 5375, 5349, 5335 & 5323 Wisemans Ferry Road SPENCER for the following reasons:

- 1 The proposal constitutes a "subdivision" of land and not a boundary adjustment as submitted by the applicant. Clause 20(1)(b) cannot therefore be utilised in the manner proposed.
- 2 The proposal does not comply with the minimum lot size of 40 hectares as prescribed by Clause 18(3)(a) of Interim Development Order 122.
- 3 The applicant has not submitted an objection under State Environmental Planning Policy No 1 or justification to vary the statutory minimum lot size for the 7(a) Conservation zone.
- 4 The concurrence of the Director General to the variation in the minimum lot size under SEPP No 1 of 40 hectares as prescribed by Clause 18(3)(a) of Interim Development Order 122 has not been issued.
- 5 Pursuant to Section 79C(a)(i) of the Environmental Planning and Assessment Act 1979, insufficient information has been submitted to determine whether the proposal is consistent with the stated objectives of the Conservation 7(a) Zone as specified therein by Clause 5(3) of Interim Development Order No 122.
- 6 Based on the information submitted the proposal does not comply with the objectives of DCP 130 - Subdivision of Rural and Non-Urban Land.
- 7 The building / envelope setback on proposed Lot 5 at 6-8 metres is substantially less than the minimum building setback of thirty (30) metres required under DCP 130 - Subdivision of Rural and Non-Urban Land. The implications and impacts of this non-compliance with DCP 130 have not been addressed in the submitted documentation.
- 8 Pursuant to Section 79C(b) of the Environmental Planning and Assessment Act 1979, insufficient information has been submitted in relation to effluent disposal, tree removal, scenic quality, access, flooding and proposed future dwellings
- 9 A Section 5A assessment has not been undertaken for the endangered ecological community known as River-flat Eucalypt Forest on Coastal Floodplain.
- 10 The proposal is inconsistent with the Draft Gosford LEP 2009 and approval of the proposal may prevent achievement of the aims of the draft LEP.
- 11 The relevant provisions of SREP 20 have been inadequately addressed within the submitted Environmental Impact Statement, particularly in relation to the potential for future dwelling houses.

- 12 With regard to future dwelling houses on proposed lots 2, 3 and 5 the proposal represents an overdevelopment of the site, particularly in view of the issues relating to flood free access with compliant grades, effluent disposal, tree removal and scenic quality which have not been suitably addressed and quantified.
  - 13 Having regard to the above reasons for refusal, the proposal is contrary to the objects of the Environmental Planning and Assessment Act 1979 as specified in Part 1, Section 5(a) therein, which provides for the orderly and proper development of land and ecologically sustainable development.
- B The applicant be advised of the JRPP decision and of their right to appeal to the Land and Environment Court within 12 months after the date of determination.
- C The objector be notified of the JRPP's decision.
- D The External Referrals be notified of the JRPP's decision.