



SEPP 1 Development Standards Variation Request

Myall Road, Hillsborough

Client: Landcom

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1 Introduction

This variation request under the provisions of the *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1) has been prepared by Elton Consulting on behalf of Landcom. It is submitted to Lake Macquarie City Council (Council) in support of a Development Application (DA) for the proposed subdivision of land along Myall Road, Hillsborough.

SEPP 1 provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The site is subject to the provisions of the *Lake Macquarie Local Environmental Plan* (LMLEP) 1984 and 2004 as the DA was lodged prior to the commencement of *Lake Macquarie Local Environmental Plan 2014* (LMLEP 2014). The part of the site subject of this SEPP 1 request was previously zoned 7(2) Conservation (Secondary) under LMLEP 2004. SEPP 1 – although repealed - applies as Lake Macquarie Council's LMLEP 2004 was not prepared in accordance with the Standard LEP Instrument.

The following assessment of the proposal against SEPP 1 provides the relevant justification to the modification of the minimum allotment size development standard under 'Schedule 2 Subdivision standards, Part 15 Zone 7(2) Conservation (Secondary)' of the LMLEP 2004.

The NSW Land and Environment Court and the NSW Court of Appeal have established principles under which an assessment authority can consider a variation to a development standard to be considered reasonable. These principles have been assessed to demonstrate that no unacceptable impacts will result from the proposed development. The key principles were established in the following Court cases:

» Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe)

In Wehbe, Preston CJ of the Land Environment Court provided relevant assistance by identifying five methods under which a variation to a development standard can be deemed suitable, and compliance with the standard is seen to be unreasonable or unnecessary. The five methods are as follows:

- 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- 3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**
4. the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The proposed development will be assessed using methods one and three to establish that the strict imposition of the development standard is unreasonable and unnecessary in this instance.

2 Proposed variation

2.1 Development standard to be varied

The development standard that is sought to be varied as part of this application is the minimum allotment size control under Schedule 2, Subdivision standards, Part 15 Zone 7(2) Conservation (Secondary) of LMLEP 2004, which sets out a 40 hectare (ha) minimum subdivision lot size for land in the 7(2) zone.

2.1.1 Site context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The site is located on both the northern and southern side of Myall Road Hillsborough, within the Lake Macquarie City Council Local Government Area (LGA). The site is located approximately 11km to the west of the Newcastle Central Business District (CBD).

The subject site adjoins the established residential areas of Garden suburb, Cardiff, Kotara and Hillsborough. The land is accessible to a number of retail precincts, transport connections, schools and other community facilities. Infrastructure surrounding the subject site includes:

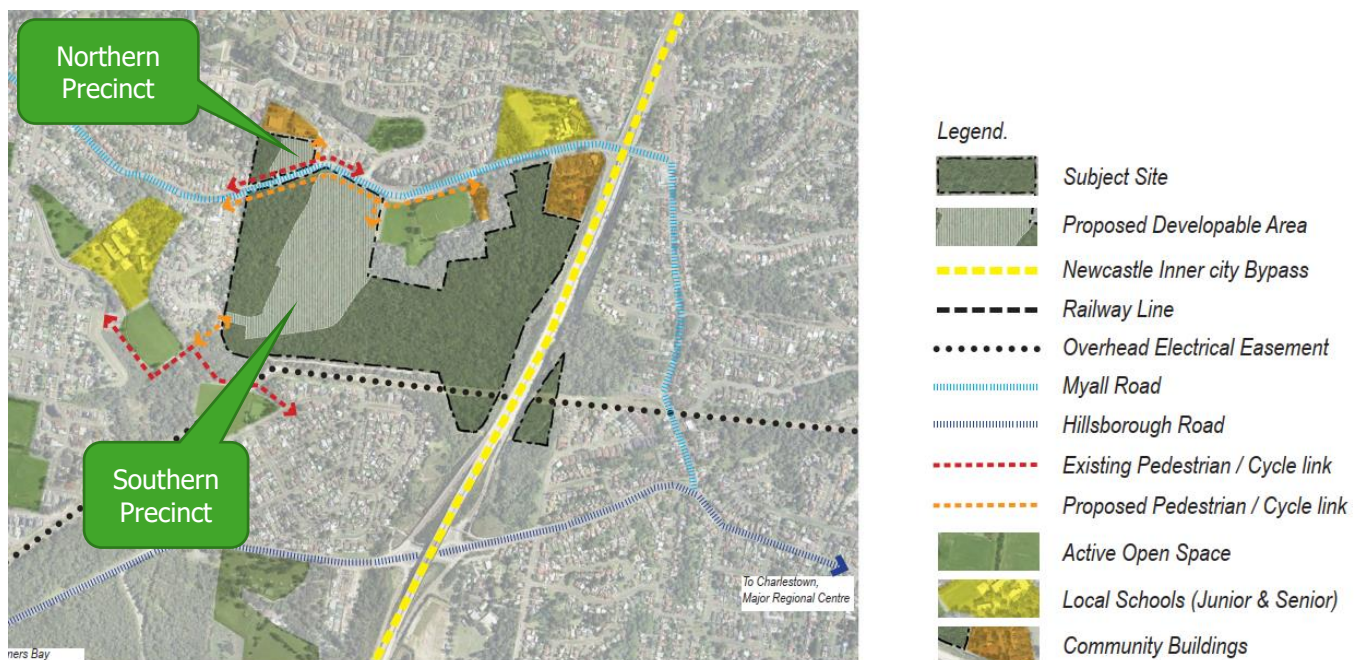
- » Cardiff shopping precinct and train station are 1.6km west of the site
- » Charlestown retail and business precinct is 2.7km south west of the site
- » Cardiff High School is 400m west of the site
- » Garden Suburb Primary School is 700m east of the site
- » Child care and other community facilities are all located within the nearby Cardiff shopping precinct and in surrounding localities including Charlestown and Kotara
- » Playing fields adjoin the site at its eastern boundary

The location of the site ensures access to prominent regional recreational facilities including the Newcastle CBD, beaches and Lake Macquarie.

The site is accessible to key employment areas including Charlestown, Kotara and the Cardiff industrial precinct. These areas are all located within a 10 minute drive from the subject land. In addition, the Newcastle CBD is located within 25 minutes' drive of the site.

The northern precinct consists of densely vegetated, undeveloped parcel of land 1.65ha in size. The site is bounded by a church/hall complex to the north, Reserved Road to the east, Myall Road to the south and residential properties to the west.

The southern precinct consists of a densely vegetated undeveloped parcel of land of approximately 37.15ha. The site is bounded by Myall Road to the north, existing residential properties to the south and west and a sports field and more undeveloped vegetated land to the east. A watercourse traverses the southern boundary of the site from east to west. The watercourse forms one of the tributaries of Winding Creek.

Figure 1 The site

2.1.2 Proposed development

The DA seeks to create:

- » Southern Precinct:
 - > 66 residential allotments
 - > 2 superlots suitable to accommodate future single or medium density housing
 - > 2 residue lots to be set aside for conservation purposes
- » Northern Precinct:
 - > 1 superlot suitable to accommodate future medium density/small lot housing
 - > 1 residue lot to be set aside for conservation purposes

It is also proposed to undertake associated subdivision works comprising site preparation and grading, tree removal, utilities augmentation, drainage, road construction and landscaping.

The development proposes to retain approximately 27.5ha of land, out of the total 38.8ha, for conservation purposes. This land will be protected under a Conservation agreement, made under the *Biodiversity Conservation Act 2016*. The conservation lots are shown in **Figure 2** below.

The scope of the project has been broken into two stages; Stage 1 and Stage 2:

- » **Stage 1** – The stage 1 works comprise those works south of the Myall Road intersection (intersection works excluded) and involves the creation of 68 residential lots. Construction includes general site regrading, retaining walls and roadways, along with the associated water, sewer, stormwater and electrical reticulation works.

There is potential for fencing to be included along the perimeter of the development, where there is an interface with offset lands. This may be required to identify the boundary of these lands. This can be applied as a condition of consent if required.

- » **Stage 2** – The stage 2 works comprise the extension of the existing subdivision to the north of the Myall Road intersection (intersection works excluded) and involves the creation of 21 small residential lots.

Construction generally consists of site regrading and new concrete access road along with the associated water, sewer, stormwater and electrical reticulation works.

Stage 2 development is not included in the proposed DA, only the creation of the offset lots and the superlot within the northern precinct.

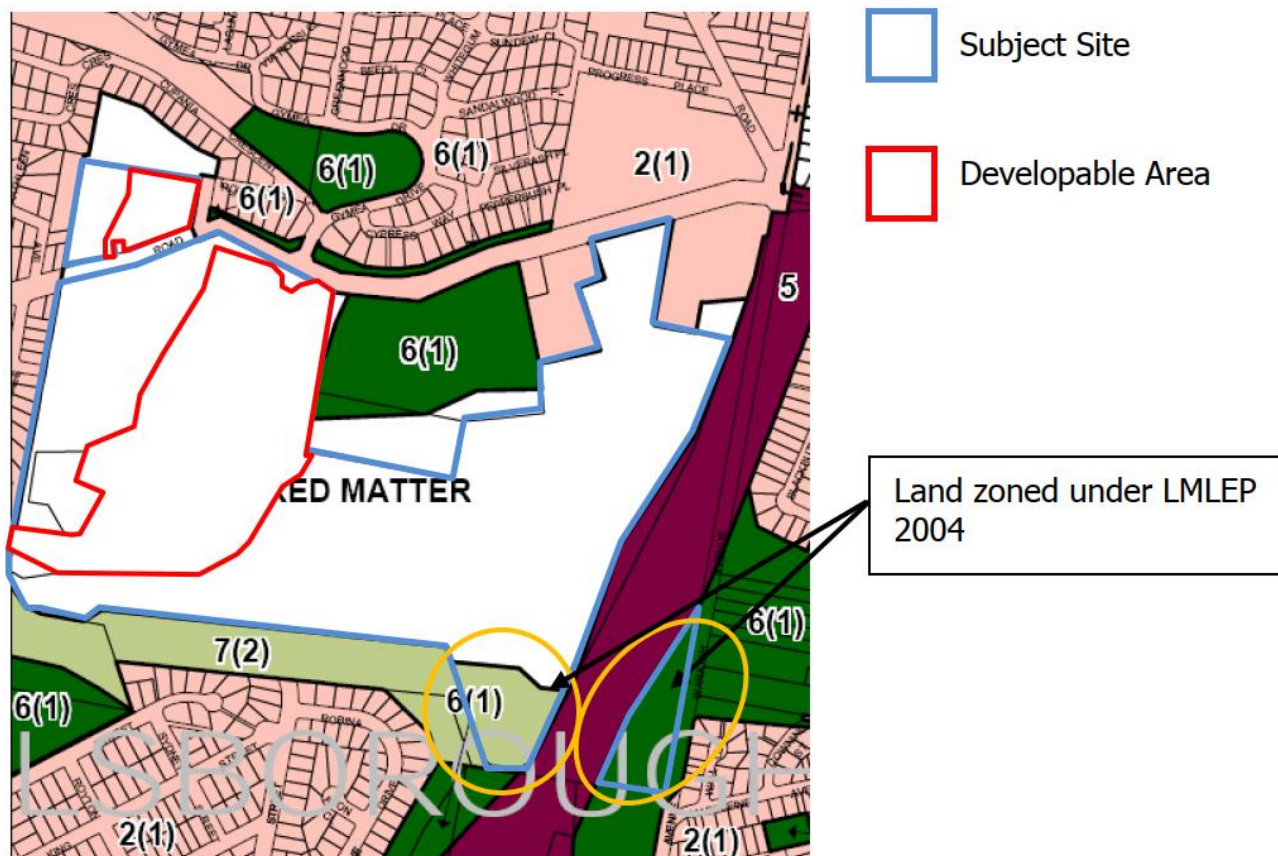
Figure 2 Conservation Lots



Source: Conacher Consulting

2.1.3 Extent of the variation

The proposed subdivision of the site to accommodate residential development and conservation land will impact the 1.6ha of 7(2) zoned land. The proposed subdivision cannot comply with 40ha minimum lot size provision applicable to the area of 7(2) zoned land and therefore contravenes the development standard. The area of 7(2) zoned land is shown in **Figure 3**.

Figure 3 7(2) zoned land

Source: LMLEP 2004 Land Zone Map 8

2.1.4 Is the planning control in question a development standard?

Development Standard is defined under Section 1.4 Definitions of the EP&A Act as follows:

"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- b) the proportion or percentage of the area of a site which a building or work may occupy,*
- c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- d) the cubic content or floor space of a building,*
- e) the intensity or density of the use of any land, building or work,*
- f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- h) the volume, nature and type of traffic generated by the development,*
- i) road patterns,*

- j) drainage,*
- k) the carrying out of earthworks,*
- l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- m) the provision of services, facilities and amenities demanded by development,*
- n) the emission of pollution and means for its prevention or control or mitigation, and*
- o) such other matters as may be prescribed.*

The minimum lot size prescribed under Schedule 2 of the LMLEP 2004 is clearly and unambiguously a development standard and has continually been applied in this manner by the consent authority.

3 Assessment of variation

3.1 Method 1

The objectives of the standard are achieved notwithstanding non-compliance with the standard

LMLEP 2004 does not provide objectives for the minimum allotment size controls set out in Schedule 2. However, Clause 4.1E of LMLEP 2014 provides the following guidance for variations to minimum lot sizes for biodiversity conservation. This is relevant to the subject site as the portion of the site to which the variation relates is not zoned E2 Environmental Conservation under LMLEP 2014. Clause 4.1E provides as follows:

4.1E Exceptions to minimum lot sizes for biodiversity conservation

- 1) ***The objective of this clause is to provide flexibility in the application of standards for the subdivision of land to be used for the purpose of long-term biodiversity conservation management.***
- 2) *Despite any other provision of this Plan, development consent may be granted to the subdivision of land to create a lot that is less than the minimum size shown on the Lot Size Map in relation to that land if the consent authority is satisfied that—*
 - a. ***the subdivision will facilitate the long-term biodiversity conservation management of the lot, and***
 - b. ***suitable arrangements have been, or will be, made for the long-term protection, conservation and management of the lot, and***
 - c. ***the subdivision will not create the opportunity for additional dwellings on any of the lots, and***
 - d. ***the subdivision will not require the clearing of any native vegetation other than native vegetation required to be removed for the long-term protection, conservation and management of the lot.***

The proposed development complies with all of the above provisions and meets the intended outcomes for land subject to biodiversity conservation. The proposed subdivision, will meet the objectives set out above despite the non-compliance with the minimum allotment size control. Strict compliance in this case would thwart the achievement of the above objectives. Therefore, it is considered that consent should be granted for the proposed development in spite of the non-compliance with the minimum lot size requirement.

3.2 Method 3

The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

Part 3, Clause 15 of the LMLEP 2004 provides the following objectives for Zone 7(2) Conservation (Secondary):

1 Objectives of zone

The objectives of this zone are to—

- a) ***protect, conserve and enhance land that is environmentally important, and***
- b) *protect, manage and enhance corridors to facilitate species movement, dispersal and interchange of genetic material, and*
- c) *enable development where it can be demonstrated that the development will not compromise the ecological, hydrological, scenic or scientific attributes of the land or adjacent land in Zone 7(1), and*

- d) *ensure that development proposals **result in rehabilitation and conservation of environmentally important land**, and*
- e) *provide for sustainable water cycle management.*

The proposed variation is considered to be consistent with the objectives of the 7(2) zone.

The proposed development involves a residential subdivision covering approximately 11.3ha of the site, with the remaining 27.5ha of the site to be retained in a conservation zone. The development footprint of both the northern and southern precincts has been developed following extensive studies into the biodiversity constraints of the site.

The proposed subdivision seeks to create conservation areas, together with appropriate biodiversity offsets to ensure that the proposed subdivision provides a good environmental outcome for the native flora and fauna located within the confines of the site.

The proposed variation is considered to be consistent with the objectives of the 7(2) zone, in that it will protect, conserve and enhance land that is environmentally important and will result in rehabilitation and conservation of environmentally important land.

Consequently, the proposed variation to the 40ha minimum lot size, which applies to the 1.6ha of land located in the 7(2) zone is considered acceptable, as the variation would result in an overall improved development outcome and would enable the retention of a substantial area of conservation land.

Strict compliance with the minimum lot size control would thwart achievement of the zone and LEP objectives, and is considered unnecessary in this instance, particularly as the objectives of the control are achieved despite the non-compliances.

Overall it is considered that the proposal will not result in a positive outcome, with substantial areas retained as conservation lands and biodiversity offsets. Biodiversity assessments have confirmed that the proposed subdivision would not have a detrimental impact on the threatened species identified within the site.

4 Environmental planning grounds to justify contravening the development standard

Under SEPP 1, The matters which shall be taken into consideration in deciding whether concurrence should be granted are:

- a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and
- b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

These are discussed below.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the minimum lot size in the 7(2) zone does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with Clause 4.1E of the LMLEP 2014.

The public benefit of maintaining the development standard

As demonstrated above, there is no significant public benefit in maintaining the development standard in terms of State and regional planning objectives. The proposed variation allows for the use of the land as a conservation area and a biodiversity offset. The proposed development is consistent with the future desired character of the area as well as the objectives of the zone. Strict compliance with the development standard is considered contrary to the public interest given the significant retention of conservation land.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the minimum lot size control as it applies to the part of the site zoned 7(2) conservation (Secondary).

5 Conclusion

The assessment above demonstrates that compliance with minimum subdivision lot size in the 7(2) Conservation (Secondary) zone contained in Schedule 2 of the LMLEP 2004 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded.

It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner. Notwithstanding the non-compliance, the proposed subdivision has been designed to ensure the conservation of a large portion of remnant bushland and natural environment.

It is unlikely the proposed variation is to result in any future precedents given the surrounding pattern of development, zoning, and desired future character of the area.

