REPORT OF GENERAL MANAGER

DEVELOPMENT COMMITTEE

TUESDAY, 8 MAY 2001

PLANNING SERVICES

1. Gazettal Amendment No 180 (Penguins Head Road, Culburra Beach) Shoalhaven Local Environmental Plan 1985

# Advice has been received that LEP amendment No. 180 (LP312) Penguins Head Road, Culburra Beach was published in Government Gazette No. 64 on 6 April 2001 (Attachment ‘A’). The plan applies to Lot 2 DP 540254, Penguins Head Road, Culburra Beach. The aim of the plan is to correct an anomaly with the zoning of the land by rezoning the lots to Residential 2(a1) under Shoalhaven Local Environmental Plan 1985.

RECOMMENDED that the report of the General Manager (Planning Services) regarding gazettal of LEP amendment No 180 be received for information.

E J Royston
PLANNING SERVICES MANAGER

G A Napper
GENERAL MANAGER
2. **Subdivision Application for Twelve (12) Rural Lifestyle Lots, Lot 1 DP 732185 Little Forest Road. Owner: Marchello. Applicant: P W Rygate & West**

**File SF8930**

**PURPOSE OF REPORT**

A subdivision application for twelve (12) rural lifestyle allotments was determined by way of refusal on 19th March 2001. Subsequently, the applicant lodged an appeal in the Land and Environment Court and has also requested a review of the determination pursuant to the provisions of Section 82A of the Environmental Planning & Assessment Act, 1979. This report therefore is presented to Development Committee as required under the provisions of the Act and as the application raises policy issues.

**PROPOSAL**

# The applicant is seeking approval for the subdivision of Lot 1 DP 732185 Little Forest Road, which has an area of 41.72ha. All of the land is zoned 1(c) Rural Lifestyle Zone, and it is proposed to subdivide the land into 12 rural lifestyle allotments. The subject land contains a dwelling house and there are both cleared areas and areas vegetated with native bushland. See [Plan 1](#) for the existing lot layout and zoning.

# The proposed allotments vary in size from 1.77ha to 10ha, where 4 of the proposed allotments contain prime crop and pasture land, mapped as Class 3. See [Plan 2](#) for the proposed lot layout. Prime crop and pasture land as defined in the SLEP 1985 is

“land identified as class 1, 2 or 3 on a map entitled “Agricultural Land Classification” produced by the Department of Agriculture, dated 1986, and available for public inspection at the office of the Council, but does not include land which the Director-General of the Department of Agriculture has notified the Council in writing is not prime crop and pasture land.”

Under the provisions of Clause 12(3) of the SLEP 1985, the minimum lot size for subdivision of the Rural 1(c) land is 1 ha. Where it is proposed to fragment prime crop and pasture land, then each lot affected must contain at least 10 ha of prime crop and pasture land.

Under the provisions of the recently adopted DCP No. 72, a maximum density of 1 Lot per 10 hectares may be achieved on the northern side of Little Forest Road.
BACKGROUND

The development application was lodged on the 22nd September 2000, and the application was determined by way of refusal on 19th March 2001 following assessment. The key issues with this proposal include access to the subject land being from a currently unformed road reserve in private ownership and that part of the subject land contains prime crop and pasture land.

a. “The proposal is contrary to the provisions of Clause 12(3)(c) the Shoalhaven Local Environmental Plan, 1985 in that it is proposed to fragment prime crop and pasture land, and each lot containing prime crop and pasture land must contain 10 hectares of prime crop and pasture land.

b. The proposal is contrary to the provisions of the Environmental Planning & Assessment Act, 1979 in that the proposal includes a portion of land in private ownership (“Jarret Road”) and owners authorisation for the use of this land within the development has not been provided.

c. Legal and co-incidental practical access has not been provided to the proposal, particularly for those lots proposed to be accessed off Jarret Road.

d. The subject site is considered to be environmentally constrained in that there are areas of vegetation that Council considers to be significant under the provisions of Clause 12(2) that the proposal is likely to have a detrimental impact upon.

e. The proposal is considered to have an adverse impact on the public interest”.

ASSESSMENT

To accommodate the request to reconsider the determination, the application has been reassessed. The application has been reassessed under the relevant heads of consideration detailed in Section 79C of the Environmental Planning & Assessment Act, 1979. In the applicant’s request for the review of determination, two plans were prepared and submitted with alternative lot layouts and access in order to mitigate the grounds for refusal as issued.

Section 79C(1)(a) - Statutory considerations

State

There are no State Environmental Planning Policies that apply to the subject land or the proposal.

Regional

The provisions of the Illawarra Regional Environmental Plan No. 1 state that where it is proposed to subdivide prime crop and pasture land for dwelling houses, “the consent authority shall not grant development consent for any such subdivision unless it is satisfied that the creation of the new allotment will not significantly reduce the agricultural viability of the land from which it is subdivided”.

The subject land contains approximately 16 ha of prime crop and pasture land in the northern and eastern portion of the site, and the proposal is to subdivide this area into allotments with areas ranging from 1.8ha to 10ha. Approximately 38% of the subject land is prime crop and pasture land it is proposed to subdivide the Class 3 land into 4 allotments. This effectively fragments the prime crop and pasture land which would reduce its agricultural viability, thereby not complying with the provisions of the Illawarra Regional Environmental Plan No. 1.

Local

The subject land is zoned Rural 1(c) and 1(d) under the provisions of the SLEP 1985 and the objectives of the Rural 1(c) zone are:

- Provide for a range of rural lifestyles suited each area as an alternative to urban and village lifestyles development forms and servicing levels.
- Meet reasonable lifestyle needs of residents and provide adequate public safety in relation to bushfire, flooding, landslip & traffic while promoting and sustaining a high level of environmental quality in the zone.
- To integrate new and existing development and lifestyles so that conflicts between landuses and lifestyles are minimised and a high level of landscape quality is sustained.
- Foster agricultural use of prime crop and pasture land and provide for other small scale uses compatible with sustaining a rural lifestyle and adequate level of amenity in the zone.

In relation to the subdivision of land zoned Rural 1(c), Clause 12 of the SLEP 1985 contains the provisions for subdivision, specifically Clause 12(3) in relation to minimum lot size. Generally, the minimum lot size is 1 ha, however, where it is proposed to fragment prime crop and pasture land, then each lot proposed must contain at least 10 ha of prime crop and pasture land.

A recent Land and Environment Court decision has stated that the 10ha minimum is a prohibition and not amenable to the use of SEPP 1 (Tobin -v- Shoalhaven City Council – SF8850). The decision by Justice Sheahan was handed down on 19th April 2001. An appeal was lodged in the Land and Environment Court in relation to the subject application as a Deemed Refusal, as the application was not determined within 40 days. The application was subsequently determined by refusal for the reasons given in the background of this report. As the subject land contains prime crop and pasture land, the Tobin decision will apply to this case.

In this proposal for Marchello, it is proposed to subdivide land identified as Class 3 agricultural land, into four lots, thereby fragmenting the prime crop and pasture land. Consequently, the current subdivision does not comply with the provisions of the SLEP and in accordance with the Court’s decision, Council has no legal power to approve the plan.

More recently, Council has received a Section 117 Direction from the Minister of Urban Affairs and Planning in regard to the preparation of a Local Environmental Plan for lot densities in the 1(c) zones. In relation to this area, a density of 1 lot per 10 hectares of 1(c) zoned land is to be achieved. Given this density, the maximum number of lots that could be created from the subject land is 4 lots.

Section 79C (1)(b) – Likely Impact of Development

The likely impacts of the development need to be assessed including environmental impacts on both the natural and built environments and social and economic impacts in the locality.
Natural Environment

The subject land contains both vegetated and grazed areas. The adopted DCP No. 72 indicates that various areas of the site should be revegetated, particularly riparian buffers where there is to be a vegetation corridor 60 metres wide. This area contains some of the prime crop and pasture land that is currently used for grazing.

The provision of the main access to the site from the currently unformed Jarret Road is likely to have an adverse impact on the vegetation in that locality, and Council’s Threatened Species Officer recommends that alternative access be provided to the site.

In requesting the review of determination, the applicant submitted two alternative options for the subdivision of the land, one of these options indicated that the access to the development being provided from Little Forest Road. The plan also indicates that majority of the prime crop and pasture land can be contained within one allotment. While the option has provided information to ameliorate the grounds for refusal, it is considered that they present a development that is not the same as that which Council has issued a determination. It should be noted that the applicant has lodged a new development application for the proposal, prior to the adoption of DCP No. 72, presenting a proposal which aligns with one of the submitted options, however, the lot density does not comply with the requirements of 1 lot per 10 hectares of land.

Social and Economic Impacts

It is considered that the main social and economic impacts that arise from this proposal relates to lot density and traffic as raised in the received submissions objecting to the proposal.

The lot density does not comply with the adopted DCP No. 72, and supporting a proposal with such a significant variation is likely to lead to an erosion of Council’s planning principles with further requests from other applicants for similar variations.

In adopting the DCP No. 72, Council resolved, in part, that in relation to applications received prior to 26th September 2000, they be determined by staff who are to negotiate with the applicants or landowners in an endeavour to bring the densities as close as reasonable to the adopted DCP prior to determination.

Section 79C (1)(c) – Suitability of the Site for Development

The provisions of Clause 12 of the Shoalhaven Local Environmental Plan, 1985, indicate that the proposal contains areas that are environmentally constrained, particularly the unformed Jarret Road, which was proposed to be used as access for 11 of the 12 lots.

Section 79C (1)(d) – Submissions

Submissions made in accordance with the Environmental Planning & Assessment Act, 1979 or the Environmental Planning & Assessment Regulations need to be assessed. The adjoining and adjacent land owners were notified of the proposed development and invited to comment, and 11 submissions were received all objecting to the proposal of a number of grounds, including:
• Access to the subdivision from the unformed Jarret Road, where there is a large stand of mature Blue Gum trees.

Comment:

Access to the majority of the proposed lots is from the unformed road reserve, named Jarret Road. This reserve was created in a private subdivision registered in 1899. The road was not dedicated to the Crown at that time, and Council did not exist at that time. Therefore, the road is still in private ownership. The stand of Tall Blue Gum is considered to be significant vegetation under the provisions of Clause 12 of the SLEP, 1985, and therefore represents an environmental constraint on the proposal. An assessment under Section 5A of the EPA Act, 1979 was requested of the applicant, but was not submitted (an 8 part test). One of the alternative option plans submitted with the review request proposes to relocate the main access to the development to Little Forest Road. This has also been indicated on the subdivision application recently lodged by the applicant (SF9008), and a preliminary investigation in relation to access indicates that the access may be satisfactory.

• Bushfire

Comment

The subject land is considered to be in high category for bushfire risk due to the densely vegetated lands to the west. The land is mainly cleared and has been used for grazing purposes in the past. It is likely that each lot proposed would have been able to accommodate required fire protection zones on site without adversely impacting upon existing vegetation.

• Traffic

Comment

Traffic generation is an issue due to the increase in traffic off Jarret Road with 11 new dwellings generating approximately 90 - 110 traffic movements per day. The other concern raised here was the current construction of Little Forest Road. If any subdivision application for 1(c) rural lifestyle lots were to be approved by Council it is likely that road construction to a bitumen standard would be required as a condition of approval, until such time as a Section 94 plan has been formulated for the required road works.

• Watercourses

Comment

There are three intermittent water courses which traverse the site, and the applicant has indicated buffer zones of 40 metres on either side of these water courses as areas where
there is to be no disposal of effluent. Council’s Environmental Health Officer has assessed the proposal and indicated given the details in the submitted effluent disposal report that there should be suitable areas on site for the disposal of effluent without any adverse environmental consequences.

- **Density of Development**

  **Comment**

  The main issue that arises here is that the application is for twelve allotments and the Draft Development Control Plan as exhibited at the time (and subsequently adopted by Council) states a minimum lot density of 1 lot per 10 ha of land, resulting in a total of 4 allotments to be created from the subject land.

  **Section 79C (1)(e) – Public Interest**

  The proposal is contrary to the public interest, as it proposes to fragment prime crop and pasture land, thereby not complying with the objectives of the Rural 1(c) zone and the provisions of Clause 12(3) of the SLEP 1985.

  The proposal is also considered to be contrary to the public interest, as the lot density does not comply with the provisions of the adopted DCP No. 72 for Rural Lifestyle Zones, possibly leading to an erosion of Council’s planning principles. Council has adopted a policy to negotiate with applicant’s / landowners, in an endeavour to reduce the density proposed to as close as reasonable to the adopted DCP.

  **SUMMARY**

  This development application, SF8930, was refused for the reasons given in the Background section of this report. The applicant’s request for a review of the determination under the provisions of Section 82A has prompted the proposal to be reassessed.

  In light of the reassessment of this application, and the additional information submitted to Council with the review request, refusal is once again being recommended for the same reason previously detailed. While the application is proposing to fragment prime crop and pasture land, it does not comply with the SLEP, 1985 and Council has no legal ability to approve this subdivision. The resolution of 24th April 2000 requires that staff negotiate with a view to getting close to the densities outlined in DCP No. 72. While the applicant has presented an amended plan to Council showing alternative road access, and most of the prime crop and pasture land in one allotment, there is no reduction in the number of lots proposed.

  Council may have an option to seek to impose conditions of consent which address the issues of concern such as access, density, prime crop & pasture so that the subdivision would comply with the major concerns. However, legal advice in the past has been that Council in issuing approval where conditions require major modifications to a proposal, such that it could be viewed as not being the same application, should not be imposed such conditions. In this respect it is noted the applicant has lodged a new subdivision application with Council, where the access is from Little Forest Road, and all of the prime crop and pasture land is within one allotment. Again, the
proposed number of allotments is twelve, however the total number of lots under the adopted DCP No. 72 that may be created from this holding is 4.

In the circumstances there seems little option then to determine this review on the basis of the original proposal and consider any amended plans as part of the assessment for the new application.

**RECOMMENDED that**

a. The request to Review the Determination of the Development Application – SF8859, by way of refusal, pursuant to Section 82A of the Environmental Planning & Assessment Act, 1979, such determination being for the reasons identified in the report and as previously advised in Council’s Determination Notice dated 6th March 2001.

b. The applicant should be advised to address the issues raised in this report within the recently lodged subdivision application before Council (SF9008).
3. Development Application for a Home Activity (Earth Moving Business), Lot 72, DP 31267, 2 Buckland Street, Mollymook (Applicant: Cowman Stoddart Pty Ltd)  

**File DA00/2196**

**PURPOSE OF REPORT**

The purpose of this report is to advise Council of the receipt of Section 96 application DS00/1302 relating to Development Application 00/2196 for a home activity (earth moving business) at the subject site. The Section 96 application seeks a variation to Council’s Home Activity Policy in order to allow the storage and parking of earthmoving equipment on the subject land in association with the office use of the business approved under DA00/2196. It is also proposed that minor maintenance to the equipment occur on the site. The application relates largely to legitimising the existing operation temporarily, in order to provide sufficient time for the owners to investigate the economic viability of relocating the business. Council has received six (6) submissions objecting to the development. The application is reported as it involves a request for variation from policy.

**BACKGROUND**

Council first received a complaint regarding the operation of an earthmoving business at the subject site in 1998. Investigations into the matter at that time indicated that the operations could be considered as a ‘mobile business’, ancillary to the residential use of the site, and that no development consent was required. Further complaints and information regarding the operation of the earthmoving business were submitted to Council between 1998 and 2000, until in March 2000, it was considered sufficient evidence was available to determine that the commercial activity occurring from the site was not a purely mobile business. In March 2000, the owner of the subject land, was subsequently notified that the use of the subject land for a earthmoving business required Council’s Development Consent. The owner was also advised that it was unlikely that the storage of earth moving equipment at the site would receive approval due to Council’s Home Activity Policy, and the provisions of (SLEP) 1985 relating to home activities.

Council received Development Application 00/2196 in May 2000, for a home activity (earthmoving business) on the subject land. The application was submitted by the land owners planning consultants, Cowman and Stoddart Pty Ltd. In response to the public notification period for DA00/2196, Council received three (3) submissions objecting to the development. The basis of the submitted objections related to noise, fumes, unsightly appearance, and loss of residential amenity. Council in considering the provisions of SLEP 1985, Council’s Home Activity Policy, and the issues raised in objections, determined in July 2000, to approve the home office component of the application, but excluded the parking of the truck and plant equipment associated with the earthmoving business at the site under conditions of consent. The reasons given for excluding this component was that “the external component does not comply with Clause 35(2)(a) and (b) of SLEP 1985 by virtue of its unsightly appearance and the emission of noise and the resulting impact on residential amenity.”

Council continued to receive complaints after the above determination of Development Application 00/2196 concerning the storage of the truck and plant on the subject land. Complaints were also received about the parking of the truck and other equipment in the road reserve in front of an adjoining property, the unsightly appearance of the equipment, and the nuisance to adjoining property owners created by maintenance to the equipment. In response to the attempts of Council
staff to enforce the conditioned exclusion, the applicant has submitted a Section 96 application seeking to modify the relevant condition of consent. The application seeks to allow the storage and parking of a truck and other plant associated with the earthmoving business at the subject site. Minor maintenance to the truck and equipment is also proposed to occur on the subject land.

THE PROPOSAL

# The Section 96 application involves legitimising the storage and parking of the existing earthmoving equipment associated with the home office being operated from the site. A site plan is included in Attachment No.1 for information.

The applicant has confirmed that the business has operated from the subject land for the last twelve (12) years. The equipment associated with the business consists primarily of a five (5) tonne truck, a backhoe, a bobcat, and other associated items. The backhoe however will not be stored on site with the owner of the business leasing sufficient space to store the backhoe at the nearby Ulladulla Timber Yard.

Due to the configuration of the site and the existing buildings, the owner of the site has no option but to locate this equipment in the front setback to the dwelling adjacent to Buckland Street. The applicant has indicated they are seeking only a short term approval, as the owner / operators of the business are hoping to relocate their business to a more appropriate site when financially able.

THE SITE

# The property is Lot 72, DP 31267, 2 Buckland Street, Mollymook. The land has an area of approximately 1170m2. The subject site is identified in Attachment No.2 for information.

The site contains a three (3) bedroom, single storey dwelling. The site is entirely surrounded by residential properties.

The major physical constraint to the development is the configuration of the existing development, which requires the larger equipment and plant to be stored at the front of the site adjacent to Buckland Street. The maintenance to these items naturally must also occur at the front of the dwelling in full view to adjoining residents. Due to the slope of the site, minor maintenance (ie, oil changes to vehicles, changing tyres, etc) that require a relatively flat area, has previously been undertaken on the public footpath outside No.4 Buckland Street.

PUBLIC EXHIBITION

Council has received six (6) submissions objecting to the proposed amendment. The major reasons given for objection to the proposed amendment are as follows:

- **Not appropriate to have earth moving equipment parked and maintained in a residential area.**
- **Noise associated with the business.**
- **Storage of chemicals, fuel, oil on the site.**
- **Adverse visual impact.**
- **Applicant continually parks outside his property on the footpath adjoining the neighbours property.**
- **Fails to comply with Council’s Home Activity Policy**
• **Loss of residential amenity.**

In response to Council’s public exhibition period, submissions objecting to the development were received from the majority of adjoining and adjacent land owners.

The issues raised by submissions will be dealt with in the body of this report.

A sample of letters from the strongest objector forms attachment No 3.

**ASSESSMENT**

**Shoalhaven Local Environmental Plan 1985**

The subject site is zoned Residential 2(a1) under Shoalhaven Local Environmental Plan (SLEP) 1985. The objectives of this zone are to provide an environment primarily for detached housing and to ensure that the range of development permitted in the zone is compatible with the residential environment. The applicant has proposed that the storage and maintenance of earthmoving equipment on the site can be considered as a home activity. Home activities are permissible in the 2(a1) zone subject to Council’s development consent.

A Home Activity is defined under SLEP 1985 as:

“...any activity or pursuit carried on by a resident for personal gain from a dwelling or from a building or area within the curtilage of a dwelling-house or from an outbuilding located on a property in a rural location…”

While the proposed activity can be considered as complying with the above definition of a home activity as contained within SLEP 1985, Clause 35 of SLEP 1985 further defines the matters for Council consideration relating to home activities. In accordance with the provisions of Clause 35, Council must satisfy itself of a number of matters relating to the proposed home activity prior to approval. Amongst the major issues for consideration under Clause 35 are, that the activity or pursuit does not:

- interfere with the amenity of the locality by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, or otherwise;
- involve the exposure to view from any public place of any unsightly matter;
- require the provision of any essential service main of greater capacity than that available in the locality; and
- if the dwelling-house or dwelling concerned is situated within a residential zone (other than 2(e), involve the employment of persons other than the residents of the dwelling or dwelling house.

As stated previously, the application for storage of the earthmoving equipment when first assessed under DA00/2196, was not considered to comply with the first two dot points highlighted above, and this component of the application was excluded under conditions of consent.

**Council Policy – Guidelines for Home Activities**
The proposed activity is also covered by Council’s Policy – Guidelines for Home Activities. Council’s guidelines reinforce the matters contained within SLEP 1985 relating to home activities, and also provide a criteria to discern which activities are incompatible with the residential use of land. The criteria includes activities which involve motor repairs, spray painting, and panel beating as examples of activities which are likely to generate any of the following impacts:

- excessive or constant noise;
- output of fumes or odour;
- electrical interference with televisions and radio;
- unsightly external storage of materials; or
- appearance that conflicts with the surrounding land uses.

With regard to the above criteria, the application for storage and parking of the earthmoving equipment when assessed under DA00/2196, was not considered to comply with the above criteria, and is therefore at variance with Council policy. The proposed storage of equipment involves periodic noise from a variety of sources (vehicles, repairs and maintenance), the external storage of materials that are considered to be unsightly and which strongly conflicts with the surrounding residential land use.

**Section 96 Application**

The applicant in submitted the Section 96 application has provided the following reasons addressing Council’s reasons for excluding the storage and parking of the earthmoving equipment under Clause 35 of SLEP 1985 and Council’s Guidelines for Home Activities:

- *The owners home and front yard are well maintained as is their truck and equipment – the premises are not untidy.*
- *In many people’s view the truck is not a great deal more unsightly than caravans, recreational vehicles, large boats, etc, which are traditionally parked in front yards without recourse by Council.*
- *During much of the daylight hours the truck is off-site enabling the owner / operator to earn an living.*
- *All items are road worthy motor vehicles, not regarding by the general public to be “unsightly matter”.*

The applicant has also raised the issue of Council’s application of the its policy relating to home activities. The applicant notes that many tradespeople in the Shoalhaven work from home with vehicles similar to his clients, and that his client will expect Council to undertake similar action against other tradespeople throughout the Shoalhaven.

With regard to the major matters raised in submissions objecting to the development, the applicant has also provided the following responses for Council consideration:

**Inappropriate in a Residential Area**

*The Planning Report clearly outlines the limited nature of the use, albeit in a residential area. Almost no work is carried out on the site, which is predominantly used only for the overnight parking of a truck. The vehicle is little different in appearance to large boats, builders vans and trucks, Council vehicles (on-call) parked in streets, Telstra vans and the like.*
The premises are maintained in a neat and tidy manner and during most of the daylight hours there is no vehicle visible as it is working away from the property.

Loss of Residential Amenity

The truck is normally parked outside business hours in a small proportion of the front of the house and the premises are always tidy with no buckets or other unsightly materials lying around.

Output of Unpleasant Fumes or Odours

The truck only runs for up to 4 minutes before departure and only 2 minutes on return to keep noise to a minimum. No activities occur which could cause an odour problem.

Noise

There is minimal noise, with the truck leaving the site unladen. The whole process of loading and leaving the site takes no more than 4 minutes on the majority of days. On most days (90%) the backhoe is the machine used, and as such there is only a need to change machinery about one day in ten. When the backhoe needs a to be taken off the truck and replaced with the bobcat, there could be some noise or small disturbance for up to 10 minutes.

The truck is unladen, other than for the machine to be used on the day. It leaves and approaches the site slowly and does not need to make noisy gear changes or undertake heavy braking as grades are slight and speeds are low.

Visual Eyesore

This is a view of only a few. The premises are neat and tidy and the truck is in good working order (ie. clean, undamaged and in good repair). It is rarely at the site during daylight hours as Mr Wheatley is away from the site earning a living.

Storage of Oil, Fuel and Chemicals

There is a small quantity of oil (and fuel) kept in the garden shed 55 metres up the backyard, which is just used for oil changes in the vehicles. There are no chemicals kept on the premises except Mr Wheatley’s household cleaners.

A20 litre drum of fuel is kept for emergency’s only. No extra fuel is required as Mr Wheatley has an overnight key for fuel with Caltex and can refuel his vehicles at any time if required. The amount of fuel kept on site is no more than others keep for lawnmowers, and is much less than that kept for outboard motors for boats.

Compliance with Home Activity Policy

Mr and Mrs Wheatley are trying desperately to comply with the policy and needs of surrounding neighbours, with lesser working hours, little noise, no unsightly buckets or gear lying around. They need to save and eventually move to larger premises in the near future.

It is also considered that in these circumstances the use could be supported for a limited period with environmental controls in place (ie. landscaping, etc)
Comment

By far the main issues for consideration in this matter, is the appropriateness of the external storage, and minor maintenance to, the earthmoving equipment in the front setback of a property in a residential area. These issues would require a variation to Council’s Home Activity Policy which clearly discourages external storage, noise generating activities, and land uses which conflict with the surrounding area. The objections raised in submissions all relate to the various impacts associated with the proposed development on residential amenity, and can all be considered to be a by-product of allowing this type of activity to operate in that type of area.

The applicant proposes to mitigate the impacts of the development by strictly limiting the activities of the proposed development to within daylight hours, the introduction of landscaping adjacent the external storage area to screen the truck and associated equipment, and seeking approval for only a 2 year period to allow Council to re-assess this matter in the future.

The underlying objective of Clause 35 of SLEP 1985 and Council’s Home Activity Policy is to allow persons to work from home without damaging the residential amenity of the area. As highlighted within Clause 35 of SLEP 1985 and Council’s Home Activity Policy, actions that are considered to damage the residential amenity of an area can include noise, external storage, storage of unsightly goods, and land uses which conflict with the surrounding land use. In this regard it is not considered that the mitigating actions proposed by the applicant will be sufficient to protect the residential amenity of the locality particularly in the long term.

The number of complaints and submissions received by Council relating to the existing external storage and maintenance to the earthmoving equipment, also provides sufficient evidence that the adjoining and adjacent property owners have a clear perception that an adverse impact to their residential amenity is occurring due to noise, visual impact, etc, associated with this activity. For the reasons outlined above, it is not considered that a variation to Council’s Home Activity Policy can be supported.

Conclusion

Council received six (6) submissions objecting to the proposed amendment from the majority of adjoining and adjacent property owners. The objections raised relate to the negative impact upon residential amenity due to noise, visual impact and other associated impacts.

While is considered that the proposed modification does comply with the technical definition of a home activity as contained in SLEP 1985, it is not considered that the proposed modification complies with Clause 35 of SLEP 1985, nor Council’s Policy – Guidelines for Home Activities, due to location of the parking / storage / maintenance area adjacent to the street frontage, and the other associated impacts such as noise and appearance that clearly conflicts with the surrounding residential area. It is therefore not felt that the proposed variation to Council’s Home Activity Policy can be supported.

It is recognised however that the owner / operator of the earthmoving business has operated for a number of years from the site, and Council’s decision in this matter will have major logistically and financial implications for the property owner. It is therefore considered appropriate in this instance to provide the applicant with an appropriate time frame in which to relocate the storage and parking of the earthmoving equipment from the site. As this matter has taken approximately
12 months to resolve, it is recommended that the applicant be provided with an additional six (6) month period in which to relocate. During this 6 month period, Council will not take any action against the existing land use.

RECOMMENDATION

It is recommended that Council:

a) That, Council not vary its ‘Home Activity Policy’ and maintain that the variation request is contrary to the provision of C1.35(a) of Shoalhaven Local Environmental Plan 1985.

b) the section 96 application be determined under delegated authority.

c) That if the Section 96 application is refused under delegated authority a period of six (6) months be set for the operator of the earthmoving business to relocate the storage and parking of the equipment from the site.

PURPOSE OF REPORT

A subdivision application for seventeen (17) rural lifestyle allotments was determined by way of refusal on 6th March 2001. Subsequently, the applicant has requested a review of the determination pursuant to the provisions of Section 82A of the EPA Act, 1979. This report therefore is presented to Development Committee as required under the provisions of the Act and as the application raises policy issues.

PROPOSAL

# The applicant is seeking approval for the subdivision of Lot 4 DP 776946 Pointer Mountain Road, which has an area of 55.6ha. Approximately 35ha of the land is zoned 1(c) Rural Lifestyle Zone, and it is proposed to subdivide the land into 17 rural lifestyle allotments. The subject land is vacant and is mainly vegetated with native bushland. See Plan 1 for the proposed lot layout.

# The proposed allotments vary in size from 1.28ha to 2.89ha, except proposed lot 7 which has an area of approximately 22.2ha as it contains 20ha of land zoned Rural 1(d) General Rural. See Plan 2 for the existing lot layout and zoning.

Under the provisions of Clause 12(3) of the SLEP, 1985, the minimum lot size for subdivision of the Rural 1(c) land is 1 ha. Where it is proposed to fragment prime crop and pasture land, then each lot affected must contain at least 10 ha of prime crop and pasture land.

BACKGROUND

The development application was lodged on the 27th April 2000, and the application was determined by way of refusal on 6th March 2001 following assessment. The key issues with this proposal include the subject lands proximity to an operating piggery and part of the subject land contains prime crop and pasture land.

The application was refused for the following reasons:

a) The proposal is contrary to the objectives of the 1(c) Rural Lifestyle zone.

b) The proposal is contrary to the provisions of Clause 12(3)(c) the Shoalhaven Local Environmental Plan, 1985 in that it is proposed to fragment prime crop and pasture land.

c) The subject land contains areas that are considered to be environmentally constrained, containing areas of native vegetation, which have significant attributes that should be retained for flora and fauna conservation.

d) The proposal is likely to result in adverse social and amenity impacts as a result of odour and increased landuse conflict due to the proximity of the site to the existing piggery on the adjacent land.

e) The proposal is contrary to the public interest".
ASSESSMENT

To accommodate the request to reconsider the determination, the application has been reassessed. The application has been reassessed under the relevant heads of consideration detailed in Section 79C of the Environmental Planning & Assessment Act, 1979. In requesting a review of the determination, the applicant raised a number of questions relating to the legality of the piggery operation, and why have a number of concessional lot applications been approved within 1km of the piggery to date. There was no additional information supporting their proposal.

Section 79C(1)(a) - Statutory considerations

State

There are no State Environmental Planning Policies that apply to the subject land or the proposal.

Regional

The provisions of the Illawarra Regional Environmental Plan No. 1 state that where it is proposed to subdivide prime crop and pasture land for dwelling houses, “the consent authority shall not grant development consent for any such subdivision unless it is satisfied that the creation of the new allotment will not significantly reduce the agricultural viability of the land from which it is subdivided”.

The subject land contains approximately 6.1ha of prime crop and pasture land in the eastern part of the site, and the proposal is to subdivide this area into allotments with areas ranging from 1.28ha to 1.67ha. While there is not a large area of the subject site identified as prime crop and pasture land (approximately 11% of the total site area or 17.4% of the area of the 1(c) zoned land) it is proposed to subdivide the Class 3 land into several allotments. This effectively fragments the prime crop and pasture land which would reduce its agricultural viability, thereby not complying with the provisions of the Illawarra Regional Environmental Plan No. 1.

Local

The subject land is zoned Rural 1(c) and 1(d) under the provisions of the Shoalhaven Local Environmental Plan, 1985 and the objectives of the Rural 1(c) zone are:

- Provide for a range of rural lifestyles suited each area as an alternative to urban and village lifestyles development forms and servicing levels.
- Meet reasonable lifestyle needs of residents and provide adequate public safety in relation to bushfire, flooding, landslip & traffic while promoting and sustaining a high level of environmental quality in the zone.
- To integrate new and existing development and lifestyles so that conflicts between landuses and lifestyles are minimised and a high level of landscape quality is sustained.
- Foster agricultural use of prime crop and pasture land and provide for other small scale uses compatible with sustaining a rural lifestyle and adequate level of amenity in the zone.
The objectives of the 1(d) zone are:

- to provide opportunities for a range of rural land uses and other development, including those which by virtue of their character require siting away from urban areas;
- to recognise the potential for high intensity bush fire over wide areas of the zone and to ensure that development does not lead to significant risks to life or property from bush fire or to the implementation of bush fire mitigation measures which will have a significant environmental impact; and
- to ensure that wherever possible the location, design and management of development is consistent with:
  - the protection of important natural and cultural environments;
  - the conservation of renewable natural resources such as forests and prime crop and pasture land;
  - the maintenance of opportunities for economic development of important extractive resources;
  - minimising conflict between land uses; and
- any plans for public infrastructure provision or management.

The subdivision of land is permissible under the provisions of the Shoalhaven Local Environmental Plan, 1985. However, in relation to the land zoned 1(d) it cannot be created as a separate allotment within the proposal as there are specific provisions in Clause 11(5) of the SLEP, 1985 relating to the subdivision of land with dual zones, which states:

> Despite any other provision of this clause, the Council may consent to a subdivision that will create a lot of less than 40 hectares of land to which this clause applies where the proposed lot:

(a) has a lawfully erected dwelling-house situated on it; and
(b) adjoins land within a zone to which this clause does not apply which is within the same ownership as the proposed lot immediately before the creation of the proposed lot.

As there is no dwelling house on the land zoned Rural 1(d) there is no legal ability to create a separate allotment in that zone.

In relation to the subdivision of land zoned Rural 1(c), Clause 12 of the SLEP, 1985 contains the provisions for subdivision, specifically Clause 12(3) in relation to minimum lot size. Generally, the minimum lot size is 1 ha, however, where it is proposed to fragment prime crop and pasture land, then each lot proposed must contain at least 10 ha of prime crop and pasture land.

A recent Land and Environment Court decision has stated that the 10ha minimum is a prohibition and not amenable to the use of SEPP 1 (Tobin -v- Shoalhaven City Council – SF8850). The decision by Justice Sheahan was handed down on 19th April 2001.

In this proposal for McDonald, it is proposed to subdivide land identified as Class 3 agricultural land, which by definition under the SLEP 1985 is prime crop and pasture land. There are approximately 6.1ha of prime crop and pasture land on site, and approximately seven of the proposed lots contain identified Class 3 land, thereby fragmenting the prime crop and pasture land. Therefore, in accordance with the recent court judgement, the proposed lot layout is contrary to the provisions of the SLEP and beyond Council’s legal ability to approve.
The subject land is also considered to be environmentally constrained as defined in the provisions of Clause 12(2) in that there is vegetation on site, remnant rainforest vegetation, that is considered to be significant and worthy of retention.

One of the objectives of the Rural 1(c) zone is “to integrate new and existing development and lifestyles so that conflicts between landuses and lifestyles are minimised and a high level of landscape quality is sustained”. The subject land is adjacent to an allotment containing an operating piggery where effluent is often sprayed onto the adjoining paddocks of the piggery owner’s land. Comment received from the NSW Agriculture and EPA in relation to the proposal indicated that there should be a buffer around the piggery in order to limit development and reduce conflict with the existing agricultural landuse.

Council has received a Section 117 Direction from the Minister of Urban Affairs and Planning in regard to the preparation of a Local Environmental Plan for lot densities in the 1(c) zones. In relation to this area, a density of 1 lot per 10 hectares of 1(c) zoned land is to be achieved. Given this density, the maximum number of lots that could be created from the subject land is 3 lots. However, Council has resolved that staff are to negotiate with applicants / landowners in an endeavour to bring the lot densities as close as reasonable to the adopted DCP prior to determination for those applications lodged prior to 26th September 2000.

Section 79C (1)(b) – Likely Impact of Development

The likely impacts of the development need to be assessed including environmental impacts on both the natural and built environments and social and economic impacts in the locality.

Natural Environment

In relation to the natural environment, as previously mentioned there is vegetation on site that is considered to be worthy of retention. The applicant was notified of this, however the applicant was also advised that the matter of a buffer around the piggery and its likely impact on the proposed development needed to be resolved prior to the applicant being required to amend plans.

It was noted in both reports by Kevin Mills & Associates and Council’s Threatened Species Officer that the distribution of rainforest vegetation is very restricted on the subject site and generally in the Yatte Yattah, Milton / Ulladulla district. This suggests that the vegetation has significant environmental values and should be protected. It is acknowledged that attempts have been made to retain and protect this vegetation in the design of the proposal however these attempts are considered to be inadequate, particularly in relation to lot boundary location and road location.

It should be noted that the rainforest vegetation is not the only vegetation on site that is considered to be significant, there are also stands of Grey Ironbark on site which may provide suitable habitat for some of the threatened avifauna listed as endangered in the Threatened Species Conservation Act, 1995.
**Social and Economic Impacts**

As there have been a number of complaints about the odour emanating from the piggery land in the past, further subdivision may lead to increased complaint. In regard to the assessment of this subdivision proposal, it was deemed appropriate to have a consultant undertake an independent assessment of appropriate buffers around the piggery and land used for effluent disposal.

Douglas Nicolaisen & Associates Pty Ltd, based on the following brief prepared this assessment:

“Council is seeking an independent assessment of the necessity of a buffer to the piggery and effluent disposal areas, and the extent of any such buffer. Council is aware that odour, dust and other nuisance are dependent on the microclimate of the locality, prevailing winds etc”.

# The consultant concluded that given that the piggery operator, Mr Barry Day, indicated to the consultant his intention to operate at approximately 200 breeding sows, then the minimum buffer distance around the piggery and land used for effluent disposal is 1.32 km. This buffer would take in the whole of the subject land and all of the land zoned Rural 1(c) in the Pointer Road area. See Plan 2 Zones and 1.32km buffer.

The applicant disputes the need for such a buffer, as they consider that the piggery is not operating legally and has no continuing use rights under the provisions of the Environmental Planning & Assessment Act, 1979. The applicant indicates that the piggery was not operating at the time of the exhibition of the Rural Plan in 1997.

The legality of the piggery operation is a matter for separate assessment and discussion, however, preliminary staff assessment of the issue concludes that there would be the ability under continuing use provisions to operate at a maximum level of 100 sows without the requirement for a new development application. This is based on the provisions of the EPA Act, 1979 at the time of the lodgement of application for pig sheds in 1982. More than 100 sows at the time represented designated development under the Act and would have required the submission of an environmental impact statement. The piggery owner indicates that he has permission to have 200 sows on site, though the only evidence Council can provide for this assumption relates to old effluent disposal approvals from the EPA, where effluent can be disposed on Mr Day’s land for a maximum of 200 sows.

Council has previously investigated this issue and determined that continuing use rights existed. It has enshrined this position in the approval of additional sheds in 1982. Is should be further noted that Mr Day made representations regarding his piggery during the public exhibition of the draft 1(c) zones.

**Section 79C (1)(c) – Suitability of the Site for Development**

There are some environmental constraints which impact on the design of the proposed subdivision, and the subject land contains prime crop and pasture land which is proposed to be fragmented.

The environmental constraints include the areas of vegetation on site which are considered to be significant including the remnant rainforest vegetation and the Grey Ironbark stands and also the various water courses present environmental constraints.
Section 79C (1)(d) – Submissions

Submissions made also need to be assessed. The adjoining and adjacent land owners were notified of the proposed development and invited to comment, and 11 submissions were received all objecting to the proposal of a number of grounds, including:

- Access to the subdivision from the Princes Highway via Pointer Road – additional traffic impacts on road infrastructure.

  **Comment**

  If a proposal such as this were to be supported by Council one of two things would happen, either a Section 94 plan would be in place to facilitate the upgrading of the road and contributions required in a consent; or Council would require the road to be upgraded by the applicant to the site, likely to be from the Princes Highway. Upgrading of the road may include a bitumen sealed pavement.

- Density of proposed subdivision and impact on existing community.

  **Comment**

  Council resolved to negotiate with applicant’s who had lodged applications for 1(c) subdivisions prior to the 26th September 2000, however, the site contains prime crop and pasture land which is proposed to be fragmented, and this is the real issue.

- Adverse impact of residential intensification on existing agricultural pursuits – land use conflicts.

  **Comment**

  The main issue that arises here is the location of an existing piggery, which is adjacent to the subject land to the north-east. Both the NSW Agriculture and EPA have indicated that there should be no additional development within a 1 – 1.5km buffer from the piggery and effluent disposal areas. An independent assessment of appropriate buffers to the adjacent piggery indicates a minimum 1.32 km buffer zone. The whole of the subject land is within that 1.32 km buffer area. There was also concerns from other agricultural producers in the area that the increase in residential development would adversely impact on their pursuits through increased noise complaints etc.

- Loss of vegetation and fauna habitat.

  **Comment**

  The site is mainly vegetated with the exception of an area of cleared land in the north-east corner of the site. This cleared area also contains some prime crop and pasture land which is mapped as Class 3. Comments from Council’s Threatened Species Officer indicate that there is rainforest on site that should be retained. Council’s Threatened Species Officer indicated that the subdivision should be redesigned to avoid disturbance of this rainforest area.
• Domestic pets impacting upon rural land uses and native flora and fauna.

**Comment**

If Council were to support a subdivision proposal such as this, it would be usual to include conditions relating to the keeping of domestic pets on site, particularly cats and dogs. These conditions are more for the protection of native fauna rather than likely impacts on existing rural activities.

• Proposal is not in the public interest.

**Comment**

Additional development within one kilometre of the piggery is likely to result in increased noise and odour complaints, similar responses received in relation to other agricultural pursuits in the area, eg apiculture.

• Adverse impact on water quality.

**Comment**

Generally, there would be stormwater pollution control devices put into place prior to work commencing on a subdivision application, which would reduce sediment control impacting upon existing water courses.

**Section 79C (1)(e) – Public Interest**

As previously discussed, the proposal is likely to adversely impact upon the public interest, due to the sites location adjacent to an operating piggery, where effluent is disposed of adjacent to the common boundary. The resultant odour is quite strong and prevailing winds can carry the smell for some distance, resulting in complaints. While the piggery is operating, additional residential subdivision should not be supported within the buffer as indicated by the Environmental Protection Authority and NSW Agriculture.

The applicant has queried the number of subdivision approvals within one kilometre of the piggery since 1982, and there have been 20 concessional allotments and 7 residue parcels approved, most of these have been registered with the Land Titles Office. Several of these proposals were either owned by the piggery owner or the owner of the subject land. There does not appear to have been any comment made by NSW Agriculture in relation to the proximity of the piggery to any of these applications.

Further investigations and a policy position may be required for these existing lots, where dwellings can be legally approved. Council’s position with respect to the odour issue may need to be clarified particularly for purchasers of these lots.
SUMMARY

This development application, SF8859, was refused for the reasons given in the Background section of this report. The applicant’s request for a review of the determination under the provisions of Section 82A has prompted the proposal to be reassessed.

In light of the reassessment of this application, and the additional information submitted to Council with the review request, refusal is once again being recommended for the same reason previously detailed. While the application is proposing to fragment prime crop and pasture land under the SLEP, 1985 Council can not legally approve the subdivision. The lot density varies considerably from the adopted DCP, which states that a maximum of 1 lot per 10 hectares of 1(c) land can be achieved in this locality. Therefore, the total number of lots that may be created from this land is 3 lots, Council’s resolution is to negotiate towards this figure.

Notwithstanding the density provisions, the site’s proximity to the existing operating piggery is likely to generate additional complaints from the future residents of such a subdivision proposal, and the advice of the Environmental Protection Authority and NSW Agriculture in relation to no development within a 1.32 kilometre buffer should be adhered to.

It may be appropriate to in light of the consultant’s report, to further investigate the implications for existing approvals or lots, where dwellings can be considered, which are also affected by this odour impact.

RECOMMENDED that

a. the request to Review the Determination of the Development Application – SF8859, by way of refusal, pursuant to Section 82A of the Environmental Planning & Assessment Act, 1979, such determination being for the reasons identified in the report and as previously advised in Council’s Determination Notice dated 6th March 2001.

b. Staff further investigate the implications for existing approvals or lots, where dwellings can be considered and are effected by this identified odour impact.
5. **The prohibition of dogs and cats as a condition of Development Application Approval File 23139**

**Purpose of Report**

At its meeting of Tuesday 19th December 2000 Council resolved that:

*A further report be submitted to Council addressing the issue of totally prohibiting the keeping of dogs and cats as a condition of the Development Application Approval.*

This report provides information regarding Council’s approach to the setting of conditions of development consent and subdivision approval, and restrictions-as-to-user, regarding the keeping of domestic cats and dogs.

**Background**

As part of the *Draft Development Guidelines Policy for the keeping of Cats & Dogs in the City of Shoalhaven*, Council staff identified that such a policy should not apply to:

*any development where conditions of consent prohibit the keeping of domestic dogs and/or cats, or where such conditions require alternative management practices.*

The inclusion of this paragraph was considered necessary to maintain consistency with the issuing of development consents and subdivision approvals, because in some consents and approvals the keeping of domestic cats and dogs is regulated and/or prohibited.

Decisions regarding the nature of any conditions or restrictions imposed to regulate and/or prohibit domestic cats and dogs in developments and subdivisions are made on a case by case basis, and depend on the assessment of flora and fauna issues, including threatened species, as part of the development assessment process required by the *NSW Environmental Planning & Assessment Act 1979 (EP&A Act).*

The draft policy was exhibited between 30th August 2000 and 27th September 2000, and a workshop on the policy was held on 5th March 2001. The policy is still under review.

**Impacts of Cats and Dogs on Native Fauna**

There is abundant scientific literature to document the impacts of cats and dogs on native fauna. An annotated bibliography produced for the Australian National Parks and Wildlife Service provides a list of 150 references regarding the impacts of cats alone on native wildlife. This bibliography along with a brief bibliography regarding the impacts of feral dogs is available from Council’s Threatened Species Officer on request.

Both cats and dogs can predate on native fauna and compete with native predators for prey resources. Terrestrial fauna species are those most at risk from such impacts. In addition, domestic cats and dogs can interbreed with feral populations, thereby increasing recruitment in such populations. This can also affect the success of feral animal control programs.
Predation by the Feral Cat – A Key Threatening Process

The impacts of cats on native fauna have been recognised by the NSW Scientific Committee constituted under the *NSW Threatened Species Conservation Act 1995 (TSC Act)*. This Committee made a Final Determination to list *Predation by the Feral Cat Felis catus* as a Key Threatening Process on Schedule 3 of the *TSC Act* on 24th March 2000 (see Attachment ‘A’).

This Final Determination states, amongst other matters, that:

- **Cats occur in virtually all terrestrial habitats in Australia;**
- **Cats may be categorised as domestic, stray or feral;**
- **Individual cats can shift between categories in their lifetimes;**
- **The Feral Cat is carnivorous and capable of killing vertebrates up to 2-3 kg;**
- **Preference is shown for mammals weighing less than 220 g and birds less than 200 g, but reptiles, amphibians and invertebrates are also eaten;**
- **Several Endangered and Vulnerable species in NSW are currently threatened (by feral cat predation), including the…Little Tern Sterna albifrons;**
- **Larger species such as Southern Brown Bandicoots Isoodon obesulus and Brush-tailed Rock Wallabies Petrogale penicillata may also be at risk locally;**
- **Many other native species are potentially at risk of becoming threatened as a result of Cat predation. Small mammals such as rodents, dasyurids, burramyids and ground-nesting birds are at particular risk.**

All listed Key Threatening Processes must be considered by Council when deciding whether a development is likely to have a significant effect on threatened species, populations or ecological communities, or their habitats. This matter is discussed in detail in a latter part of this report.

National Parks & Wildlife Service Position

Officers of the NSW National Parks & Wildlife Service Southern Zone Threatened Species Unit (NPWS) have indicated that the NPWS:

- does not have a formal policy on the issue of imposing conditions and/or restrictions on the keeping of domestic cats and dogs;
- endorses responsible cat and dog ownership;
- recognises that there is potential for conflict between domestic cat and dog ownership and the conservation of threatened fauna at the urban/bush interface;
- endorses the imposition of appropriate conditions and/or restrictions on the keeping of domestic cats and dogs on a case by case basis, in circumstances where these potential impacts are identified.

Furthermore, a joint publication between the NPWS and the Shoalhaven Catchment Management Committee in 2000 entitled, *“Threatened Fauna of the Shoalhaven”*, recommends the imposition of restrictions on the keeping of domestic cats and dogs in new subdivisions as one of the Conservation Actions for a number of threatened terrestrial fauna species.
Legal Ability to Impose Conditions and Restrictions on Keeping Cats and Dogs

Land & Environment Court of NSW

The legal ability of a Council to impose conditions and restrictions on the keeping of cats and dogs has been considered by the Land & Environment Court of NSW in Appeal No: 10259 of 1998, Miltonbrook Pty Ltd v Kiama Municipal Council on 16th July 1998. This judgement is available from Council’s Threatened Species Officer on request.

In this judgement, Conciliation and Technical Assessor R.R Hussey upheld the appeal and found that:

*The s 102 modification to Condition 16(f) be allowed as follows:*

16(f) (a) *The keeping of cats and goats shall be prohibited on lots 101, 102, 103 and 104;*

(b) *The keeping of working dogs and cats shall be permitted on lot 100 but goats shall be prohibited;*

(c) *The keeping of dogs shall not be permitted on lots 101, 102, 103 and 104 unless:*

(i) they are restrained within the building envelope of each lot burdened by fencing caging enclosure, leashing or physical restraint during the hours between sunset and sunrise of each day;

(ii) *they are accompanied by responsible persons during daylight hours;*

(iii) *they are leashed or otherwise suitably restrained whilst outside each lot burdened or when the occupants of the allotment are not at home*

In essence, the assessor found that a Council required specific and detailed studies regarding the impacts of cats and dogs on native fauna before it could apply a blanket prohibition on the keeping of cats and dogs in the local government area. However, the assessor also found that if conditions of development consent relating to cats and dogs are to be imposed, then they should be reasonable and appropriate in planning terms considering the merits of the proposal.

In this case, the assessor:

- permitted the keeping of working dogs and cats on the residue allotment of the new subdivision;
- prohibited the keeping of cats on all of the new allotments; and,
- regulated the keeping and management of dogs on all of the new allotments.

In summary, no issue arose at the hearing as to the Council’s legal ability to impose conditions restricting the keeping of domestic pets.
The approach adopted by Shoalhaven City Council officers when considering the imposition of conditions and/or restrictions on the keeping of domestic cats and dogs is in accordance with the judgement of Assessor Hussey in that there is no blanket city-wide policy, with each case being considered on its merits. However, it should also be noted that the judgement discussed above pre-dates the listing of Predator by the Feral Cat Felis catus as a Key Threatening Process on Schedule 3 of the TSC Act, which is an additional consideration in Council’s approach, and which can provide even greater justification for imposing conditions restricting cats.

Council’s Solicitor

Advice from Council’s solicitor Mr Grant Gleeson of Morton and Harris indicates that Council has the legal ability under the EP&A Act to impose conditions of development consent and subdivision approval, and restrictions-as-to-user, regarding the keeping and management of cats and dogs (see Attachment ‘B’). Mr Gleeson advises that:

In certain circumstances Council may be justified in imposing as a condition of consent a prohibition on the keeping of certain types of domestic pets particularly in relation to development in identified areas of environmental sensitivity. However, each application will have to be determined on a case by case basis.

He also indicates that a policy framework would improve the ability of Council to defend the imposition of conditions regarding the keeping of domestic cats and dogs if challenged.

NSW Minister for Local Government

The NSW Minister for Local Government, the Hon. Harry Woods MP, issued a statement on 9th April 2001 indicating that Councils have no powers under the Companion Animals Act or the Local Government Act to issue a blanket order to all residents and ratepayers restricting the number of dogs and cats to a household (see Attachment ‘C’)

It is important to note that the Minister’s statement does not relate to the continuing ability of Councils to impose conditions and/or restrictions on dogs and cats when assessing development applications, including those for subdivision, in accordance with the EP&A Act.

Actions of Councils Adjoining Shoalhaven

Councils adjoining the City of Shoalhaven local government area were contacted in order to find out what they were doing in regard to the issue of imposing conditions and/or restrictions on the keeping of cats and dogs.

Whilst Eurobodalla Shire Council considers the potential impacts of predation by domestic cats and dogs on native fauna in development assessment, Council planners have indicated that there has not yet been an incidence where there has been a need to impose consent conditions regarding the keeping of domestic cats and dogs.

Wingecarribee Shire Council has imposed conditions regarding the keeping of cats and dogs in the past, but planning staff have indicated that there has not been a need to impose such conditions for some time.
On the other hand, planners at Kiama Municipal Council have indicated that they do impose conditions of development consent and subdivision approval restricting the keeping of domestic cats and dogs, especially in rural areas and in new rural residential subdivisions.

**Implications for Development Assessment**

**Statutory Responsibilities Under the Environmental Planning & Assessment Act (EP&A Act)**

Council assesses development applications in accordance with the provisions of the *EP&A Act*.

Objective 5(a)(vi) of the *EP&A Act* encourages the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities and their habitats.

Furthermore, when assessing development applications, including those for subdivision, Council must consider the potential impacts of any development on, amongst other matters, the natural environment, including native animals and plants, in accordance with Section 79C of the *EP&A Act*.

In addition, Council has a statutory responsibility under Section 5A of the *EP&A Act* to determine whether there is likely to be a significant effect on threatened species, populations, or ecological communities, or their habitats. In doing so, Council must answer eight questions set out in Section 5A and decide, amongst other matters:

*In the case of a threatened species, whether the lifecycle of the species is likely to be disrupted such that a viable local population of the species is likely to be placed at risk of extinction.*

and,

*Whether the development or activity proposed is of a class of development or activity that is recognised as a threatening process.*

**Assessment Of Impacts On Native Fauna Including Threatened Species**

Developments including subdivisions can involve increases in the numbers of cats and dogs kept in an area since the activity of keeping domestic cats and dogs is considered to be ancillary to many types of development. Since both cats and dogs are known to prey upon native fauna, there is a possibility that the keeping of these animals may affect the lifecycles of threatened species on or near a property to such an extent that viable local populations may be placed at risk of extinction.

Furthermore, any development where domestic cats may be kept can be viewed as a class of development or activity that is recognised as a key threatening process. This is because cats are known to shift between the categories of domestic, stray and feral within their lifetimes (as stated by the Scientific Committee), and because domestic cats may interbreed with the feral population and thereby assist recruitment.

These potential impacts are not considered to be particularly acute in urban areas where many domestic cats and dogs already exist, and where native terrestrial fauna populations are limited.
However, the impacts may be exacerbated in rural areas and in areas adjacent to conservation reserves, Crown Land or State Forests, where native terrestrial fauna populations are likely to be abundant. It is in this case where Council, in considering objective 5(a)(vi) of the EP&A Act, and the requirements of Sections 5A and 79C, sometimes imposes conditions or restrictions on the keeping of domestic cats and dogs, on a case by case basis.

**Impact Mitigation**

In order to discount the potential impacts of keeping domestic cats and dogs, Council would require targeted studies of terrestrial fauna populations on a property, and possibly in surrounding areas, involving trapping and predator scat collection and identification, before it could be satisfied that threatened terrestrial fauna species were not present.

These expensive studies can be avoided in cases where cleared areas already exist that can accommodate development, by imposing conditions and or restrictions on the keeping of domestic cats and dogs. Some developers even suggest this form of impact mitigation in order to limit the extent and intensity of the flora and fauna studies required for their proposals.

To date, Council has imposed conditions and restrictions prohibiting the keeping of domestic cats on some properties, but the keeping of domestic dogs has mainly been the subject of conditions regarding management, rather than total prohibition.

**Summary**

In accordance with the statutory provisions of the EP&A Act, Council imposes conditions and/or restrictions on the keeping of domestic cats and dogs in some developments, on a case by case basis.

The impacts of cats and dogs on native fauna are well documented, and *Predation by the Feral Cat Felis catus* has been listed as a Key Threatening Process on Schedule 3 of the TSC Act.

The NPWS encourages the use of conditions and/or restrictions on the keeping of domestic cats and dogs, because this can assist with the recovery of threatened species.

Council’s solicitor has advised that Council has the legal ability to impose such conditions and/or restrictions, and the matter has also been considered by the Land & Environment Court of NSW, which ruled that on new allotments of a particular subdivision, cats would be prohibited and dogs restricted. In addition, a policy framework will improve Council’s ability to defend such conditions if challenged.

Council uses a variety of information and studies, as well as statutory tools, to assess development applications and decide whether the imposition of conditions and/or restrictions regarding cats and dogs is required as impact mitigation for a development proposal.
Conclusion

The ability to impose conditions and/or restrictions, including prohibition, on the keeping of cats and dogs in some developments using a process of merit-based assessment, is a useful approach if Council is to continue to be able to meet its statutory obligations under Sections 5A and 79C of the NSW Environmental Planning & Assessment Act 1979. If this option were not available to Council, it would invariably lead to a situation where applicants were required to undertake more extensive studies to satisfy the requirements of the Threatened Species legislation.

RECOMMENDED that:

a) The report of the General Manager (Development & Environmental Services Manager) be received for information.

b) Council adopt the following Draft Policy Statement regarding the imposition of conditions and/or restrictions, including prohibition, on the keeping of domestic cats and dogs in some developments:

In undertaking the assessment of flora and fauna matters pursuant to the NSW Environmental Planning & Assessment Act 1979 and the NSW Threatened Species Conservation Act 1995, Council may impose conditions of consent, and/or restrictions on the keeping of domestic cats and dogs that may include prohibition in some developments, on a case by case basis, where:

i) targeted fauna studies to discount the presence of feral predators and/or threatened terrestrial fauna species and their habitats on a property and its surrounds have not been undertaken by the proponent;

and/or,

ii) a potential impact on threatened terrestrial fauna species and/or their habitats from cats and/or dogs is identified.

c) The above Draft Policy Statement be advertised in accordance with Council’s Community Consultation Policy.


Tim Fletcher
DEVELOPMENT AND ENVIRONMENTAL SERVICES MANAGER

G.A. Napper
GENERAL MANAGER
ADDENDUM REPORT OF GENERAL MANAGER

DEVELOPMENT COMMITTEE

TUESDAY, 8TH MAY 2001

CITY SERVICES / DEVELOPMENT & ENVIRONMENTAL SERVICES

6. Top of the Town Toilets – Deering Street, Ulladulla

This report has been submitted as an addendum report due to the need to seek legal clarification of issues that were not identified previously.

Introduction

Council has been investigating the establishment of public toilet facilities in the vicinity of the “Top of Town” shopping complex at the corner of the Princess Highway and Deering street, Ulladulla.

This project will lead to the construction of a public toilet on private land for public use and therefore the matter is reported to Council to resolve issues relating to the opportunity loss of 2 car-parking spaces.

An allocation of $35,000 has been made in the 1999/2000 Capital Works Program for the construction of the toilets.

History/Discussion

At the time of the initial consent for each development at the Top Of The Town each developer was required to provide toilets.

It was the practice of Council to require that large commercial developments be provided with toilet facilities to be made available to the public. Records confirm that in 1983 the White’s shopping complex was extended. At that time, Council determined that the development was of a scale which required that “the existing toilets shall be made available for public use during the hours of business”.

Patrons of other shopping facilities in the area, did not necessarily have access to similar facilities. Nearby proprietors have tended to direct their clients to the facilities provided at the White’s complex.

This practice, has resulted in a call for a dedicated public toilet facility to be provided at the top of the town.
As there is no public land in this vicinity to allow for the construction of public toilets, a suitable location was identified on Lot 9 in DP 21597 which is adjacent to Lot 4 (No 137) Princes Highway. Negotiations have since been held with the Whites being the owner of both lots 4 and 9.

The Whites have agreed in principle to enter into an agreement with Council for the establishment of a standard toilet building on their land subject to the following conditions:

1. Licence/lease agreement for 15 years
2. Peppercorn rental by Council
3. Credit for 2 car spaces that will be lost by the development
4. Some rebate for the rates for the property affected
5. Removal of D.A condition on the shops at 137 Princess Highway that existing toilets are provided for public use.
6. Council to be responsible for construction, cleaning and maintenance of the public toilets

These conditions seem reasonable and need to be negotiated as part of any legal agreement, however the request for the credit of 2 car-parking spaces needs to be resolved by Council.

The Whites have requested a credit of two (2) car spaces. In terms of the impact on parking provision on site, a two (2) space credit would have minimal impact as they have in excess of the required car parking provision needed to meet current requirements. There may be an issue of precedence, however, the land owner is, in effect, providing their land for a public use which is a somewhat unique situation.

Under the Section 94-contribution plan, a car-parking space is worth $9,938.35. Whilst Council could buy the land outright at an indicative estimate of $20,000, this cost would be outside the budget and would make the project un-viable.

**Summary**

The suggested way forward to ensure that the project continues is for Council to allow a credit of 2 car parking spaces for the premises as a result of the equivalent opportunity loss resulting from the construction of the public toilets.

If Council agrees with this approach, a variation under Section 96 of the Local Government Act would need to be made for the condition requiring public toilets to be provided on Lot 4 to be deleted and this application would need to be assessed on its merits.

**RECOMMENDED that Council agree to vary DCP18 (Car parking Code to allow a credit of 2 car spaces against car parking requirements in respect of any future redevelopment of Lot 9 DP21597 (No 41) Deering Street during the term of any lease/licence agreement with Council for the provision of public toilets located on the same site.**