

DEVELOPMENT ASSESSMENT REPORT - 062/11DA

BOUNDARY ADJUSTMENT - 53 COXS RIVER ROAD LITTLE HARTLEY NSW 2790

1. PROPOSAL

Council is in receipt of a Development Application 062/11 from B & C Marshall for a boundary adjustment on land known as Lot 54 DP 1061006 and Lots 51 & 52 DP 1035370, Wards Road, Megalong Valley NSW.

The proposal includes a SEPP1 objection to request the following:

- Lot 51 DP 1035370 currently **43.37ha** adjusted to **2ha**;
- Lot 52 DP 1035370 currently **40.14ha** adjusted to **2.03ha**; and
- Lot 54 DP 1031006 currently **269.20ha** adjusted to **346.68ha**.

Lots 51 & 52 currently have grazing licence over a portion of each lot to allow for the utilisation of the land for grazing of cattle in B & C Marshall's favour. Accordingly, this boundary adjustment is requested to allow ownership of the land covered in those licences to be transferred to B & C Marshall, which would result in the creation of 2 smaller allotments, each retaining the existing dwelling on Lots 51 & 52. Lot 54 also retains a dwelling and ancillary buildings.

The proposal was notified to adjoining and adjacent land owners for a period of 14 days in which no submissions were received.

The proposed 'boundary adjustment' would effectively be creating 2 concessional allotments and a large residual lot. However, there are no current provisions within the LEP that allows for the creation of concessional lots. Further the SEPP (Rural Lands) 2008 specifically states in Clause 9(3) that subdivision for agricultural purposes can not be undertaken to create lots smaller than the minimum lot size if an existing dwelling would be on the lot and that SEPP (Rural Lands) a State Environmental Planning Policy 1- Development Standards objection can not apply to this standard.

2. SUMMARY

To assess and recommend determination of 062/11 DA. Recommendation will be for refusal.

3. LOCATION OF THE PROPOSAL

Legal Description : Lot 54 DP 1061006 and Lots 51 & 52 DP 1035370
Property Address : Wards Road, Megalong Valley NSW 2790

4. ZONING: The land is zoned 1(a) Rural (General) in accordance with Council's current planning instrument, being Lithgow City Local Environmental Plan (LEP) 1994.

5. PERMISSIBILITY: The development is **not considered permissible** under Lithgow City Council's Local Environmental Plan 1994 Clause 12, as the

development is creating two allotments of 2ha. This development does not comply with the following statement:

(2) Creation of “40 hectare allotments”

The Council may consent to a subdivision of land within Zone No 1 (a) if each allotment to be created by the subdivision will have an area of not less than 40 hectares.

However, a SEPP1 objection has been submitted in regards to this development standard and is discussed further in this report.

5.1 POLICY IMPLICATIONS (OTHER THAN DCP’s)

Nil.

5.2 FINANCIAL IMPLICATIONS (eg Section 94)

Nil.

5.3 LEGAL IMPLICATIONS

Rural Fires Act 1997

The development is considered to be integrated under this act (via Section 91 of the EP & A Act 1979). Accordingly the approval of the Rural Fire Service (RFS) is required prior to Council being in a position to determine the application. Approval from the Rural Fire Service has been obtained and is discussed later in this report under “submissions made in accordance with the act”. The RFS had no concerns pertaining to the proposal and advised the General Terms of Approval accordingly.

Environmental Planning and Assessment Act 1979

In determining a development application, a consent authority is required to take into consideration the matters of relevance under Section 79C of the *Environmental Planning and Assessment Act 1979*. These matters for consideration are as follows:

It is noted that although this application is for a ‘boundary adjustment’, subdivision is defined under Clause 4B of the *Environmental Planning & Assessment Act 1979* which states: ‘Subdivision of land means the division of land into two or more parts’. This definition does not specify that the number of parts being created must be greater than the original ‘land’. Accordingly, a boundary adjustment falls within this definition and is considered to be a subdivision.

5.3.1 Any Environmental Planning Instruments

Lithgow City Local Environmental Plan 1994

LEP 1994 – Compliance Check		
	Clause	Compliance
9	1(a) zoning table	No
11	General Considerations for development in rural zones	No
12	Subdivision in Zone 1(a)	No
30	Land subject to bushfire hazards	Yes

Comment:

In regards to Clause 9 the proposal does not ‘provide for the separation of conflicting land uses’. In this proposal, the applicant would be creating 2 rural residential style

allotments that could potentially conflict with the surrounding agricultural/rural land without an adequate land buffer separating the residential land uses. The agricultural/rural land uses may potentially include grazing, agricultural machinery, cropping, intensive agriculture and other rural uses.

In regards to Clause 11 the proposal is required to be assessed in regards to 'future expansion of settlements in the locality'. Therefore, it could be highlighted that the land was previously subdivided to allow better management of land into 3 lots of 40has and the residual allotment of 269.2ha. Currently, the proposal is requesting that two of these allotments now be reduced to 2ha to allow the management of the land back to the original owners for use of grazing. It could be considered that the owners of the residual allotment may further subdivide into more 40ha allotments under the LEP and use the additional land from this proposal, to do so. Therefore, it could be considered that the owner may then allow for further boundary adjustments on all 40ha allotments created once dwellings were established on each individual allotment, if this proposal was approved. It would not be appropriate to allow a development of this type be approved without the consideration of other similar developments that would attempt a smaller lot size outcome.

The development does not comply with 12(1) as the land has been previously subdivided and does not comply with 12(2) being the minimum allotment size of 40ha. No further subdivision of the land can be considered unless it meets the requirements of 12(2). Additionally the proposal can not be considered under 12(6) as Council would not be satisfied that 'agricultural production will be viable on any proposed allotment that will have an area less than 40ha'. This is due to 2 of the allotments being only 2ha and for rural residential purposes.

State Environmental Planning Policy (Rural Lands) 2008

SEPP (Rural Lands) 2008 – Compliance Check		
Clause	Compliance	
8	Rural Subdivision Principles	No
9	Rural Subdivision for Agricultural Purposes	No
10	Matters to be considered in determining development applications for rural subdivisions or rural dwellings	No

Comment:

In regards to Clause 8, it is considered the proposal would be increasing 'rural land fragmentation' and creating 'land use conflicts, particularly between residential land uses and other rural land uses'. This is through the creation of two rural residential style allotments of 2ha in an area where 40ha or greater is required for rural purposes. The proposed strategy for the future of the area is also identified as for rural land uses with a minimum of 40ha (as outlined in the adopted Lithgow City Land Use Strategy 2010-2030). This highlights that there are no future plans for large lot residential zoning in this locality as demand is low and infrastructure within the locality is limited.

In regards to Clause 9 (3), A subdivision for agricultural purposes can not be undertaken to create lots smaller than the minimum size 'if an existing dwelling would, as a result of the subdivision, be situated on the lot'. The two allotments that would be smaller than the 40ha would retain dwellings if the subdivision was approved and therefore is not compliant with this clause. Additionally, under Clause 9(5), a SEPP1 objection 'does not apply to a development standard under this clause' and therefore cannot be varied. The development does

not comply with Clause 9 given the proposed smaller allotments to be created by the applicant through a SEPP1 objection, would retain dwellings.

In Clause 10 (3) the proposal will effect the 'predominant land uses in the vicinity of the development' given the proposal is creating two rural residential style allotments surrounded by rural land uses and 'is likely to be incompatible' due to a lack of land buffer around each dwelling. The land is 'not situated within a rural residential zone', any there are no measures to mitigate land use conflicts.

Council obtained legal advice on the matter by forwarding both arguments for assessment. The following legal advise was made in the correspondence:

- 'the two proposed undersized lots which would result from the proposed subdivision would both contain an existing dwelling contrary to Clause 9(3) of the SEPP'
- Clause 9(5) of the SERPP provides that State Environmental Planning Policy No 1- Development Standards does not apply to a development standard under this Clause, therefore Council cannot approve the proposed development.
- We agree that in the circumstances, Council should not proceed to assess the SEPP1 objection to Clause 12(2) of the LEP.

State Environmental Planning Policy No.1 Development Standards

SEPP (Rural Lands) 2008 – Compliance Check		
	Clause	Compliance
3	Aims & Objectives	Yes
7	Consent may be granted	No

Comment: The objection is not well founded as detailed above. It is considered that the SEPP1 objection could not be accepted in this instance.

5.3.2 Any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority

Nil.

5.3.3 Any Development Control Plan

Nil.

5.3.4 Any planning agreement that has been entered into under Section 93F, or any draft planning agreement that a developer has offered to enter into under Section 93F?

No.

5.3.5 Any matters prescribed by the regulations that apply to the land

There are no demolition works, rebuilding or extension of the building is proposed as part of this application.

5.3.6The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

Adjoining Landuse:

The surrounding development is typical of rural developments with agricultural pursuits. The scale of the proposal is minimal however could potentially create land use conflicts between residential and rural land uses. The proposal does not consistent with the aims and objectives of the zone by create residential allotments. It is considered that adjoining land uses are significant contributing factor to the non compliance of this proposal.

Services:

All services are existing to each blocks being electricity, telecommunications, effluent management systems, rainwater tanks and access to each allotment from Council roads. There are no foreseen impacts on services, other than the expectation of better services due to allotments being of residential size i.e. road upgrades.

Context and Setting:

The proposed development will be located within an established rural general area and could have an impact on the context and setting of the area. The area is for agricultural pursuits and ancillary dwellings and not for purely residential land uses. The development has not been designed to complement existing features of similar development in the area as it creates allotments of 2ha when surrounding lots are predominantly 40ha or larger.

The proposal does not comply with Council's recently endorsed Land Use Strategy (LUS) retaining the minimum lot size of 40ha within the 1(a) Rural (General) zoning.

The adopted LUS recommends the retention of minimum allotment size of 40ha for 1(a) Rural (General) zoning within the area of Megalong Valley until 2030. Therefore, no changes in regards to allotment sizes in the future are proposed in this area and the application is not consistent with the strategic principles. This document has now been accepted by the Department of Planning for the drafting of the new Local Environmental Plan. However, as this has not reached the public consultation phase for the actual LEP, there is some doubt as to whether this is a formal matter for consideration under Section 79C. Therefore, the information is noted and will not form the basis of any determination.

5.3.7 The Suitability of the site for the development

The surrounding land uses are for rural pursuits, therefore, the size and nature of the development would not be consistent with those in the surrounding area. The site is not considered to be suitable and may affect the amenity and rural viability of the area.

5.3.8 Any submissions made in accordance with this Act or the Regulations

The proposal was sent to the Rural Fire Service (RFS) and The Sydney Catchment Authority (SCA), for commenting with recommendations outlined as below. The proposal was also sent to adjoining neighbours and placed on public display in Councils Administration Building for a period of 14 days in which no submissions were received.

Rural Fire Service

This response is to be deemed a bush fire safety authority as required under section 100B of the 'Rural Fires Act 1997' and is issued subject to the following numbered conditions:

1. The development proposal is to comply with the subdivision layout identified on the drawing prepared by Anderson Surveying numbered 11245, dated 5 October 2011.

General Advice- consent authority to note

This approval is for the subdivision of the land only. Any further development application for class 1, 2 & 3 buildings as identified by the 'Building Code of Australia' must be subject to separate application under section 79BA of the EP & A Act and address the requirements of 'Planning for Bush Fire Protection 2006'.

Sydney Catchment Authority

I refer to your letter received 1 December 2011 requesting the concurrence of the Chief Executive under Clause 11 of the *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011* (the SEPP) with a proposal for a 3-lot boundary adjustment/ subdivision.

The subject property, which has been inspected by the Sydney Catchment Authority (SCA), is located within the Warragamba catchment which forms part of Sydney's water supply.

The proposal seek to excise 2-hectare lots containing dwellings from each of two existing 40-hectare rural residential lots (Lots 51 and 52 created ~2000), and merge the residual parts of these lots with the larger Lot 54 to form a 346.7 ha lot. The proposal should not result in any new dwellings, onsite wastewater systems, access or fencing as these are already in place, with the onsite wastewater systems fully contained in the proposed 2-hectare lots.

It is noted that the proposed subdivision development is subject to a SEPP1 objection in relation to the 40 hectare minimum lot standard for the zone.

While no Water Cycle Management Study has been prepared for the proposed development, however, a Statement of Environmental Effects (incorporating a SEPP 1 Objection) prepared by Nexus Environmental Planning Pty Ltd (dated 6 October 2011) has been considered in the assessment of the application.

Based on the SCA's site inspection and the information provided, the proposed development has been assessed by the SCA as being able to achieve a neutral or beneficial effect on water quality provided appropriate conditions are included in any development consent and are subsequently implemented. Should the SEPP 1 Objection be upheld, the Chief Executive would concur with Council granting consent to the application, subject to the following conditions:

General

1. The lot layout of the subdivision shall be as shown on the sketch showing the proposed plan of subdivision prepared by Anderson Surveying Pty Ltd (dated 5/10/11). Any revised lot layout or staging of the subdivision shall be agreed to by the Sydney Catchment Authority.

Reason for Condition 1 - The Sydney Catchment Authority has based its assessment under the State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 on this version of the subdivision.

5.3.9 The public interest

There have been no issues raised from the public regarding planning issues.

6. DISCUSSION AND CONCLUSIONS

The proposal is not considered to comply with the relevant provisions of the applicable Environmental Planning Instruments. The proposal is considered to impact upon the environment and potentially upon the amenity of the locality. As such it is recommended that development be refused with reasons outlined below.

7. ATTACHMENTS

Nil.

8. RECOMMENDATION

THAT development application 062/11DA is refused for the following reasons:

- The proposal does not comply with Lithgow Local Environmental Plan 1994, Clause 9 and 12.
- The proposal does not comply with *State Environmental Planning Policy (Rural Lands) 2008*, Clause 8, 9 & 10.

Report prepared by:.....Supervisor:.....

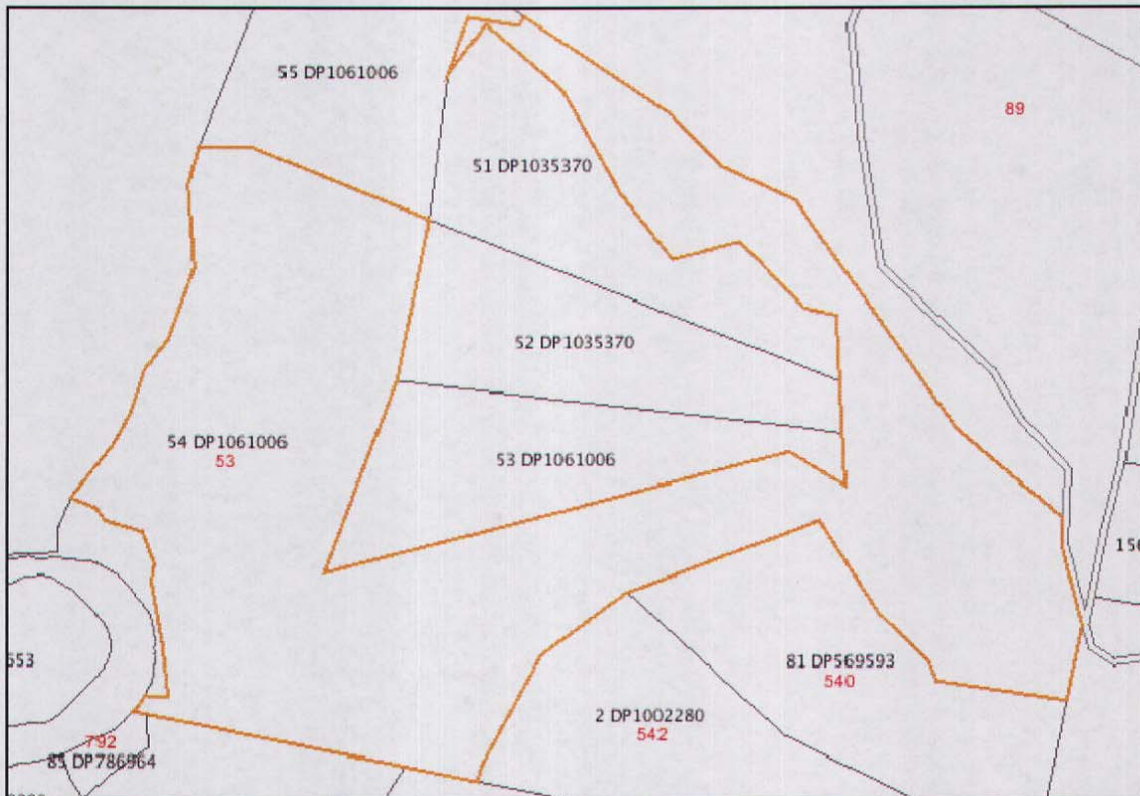
Dated:.....Dated:.....

Current land configuration



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Figure 2: An aerial photograph showing the Site with Lot 54, DP 1061006 highlighted.



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Proposed land configuration

This Is A Reprint Of A Scanned Image

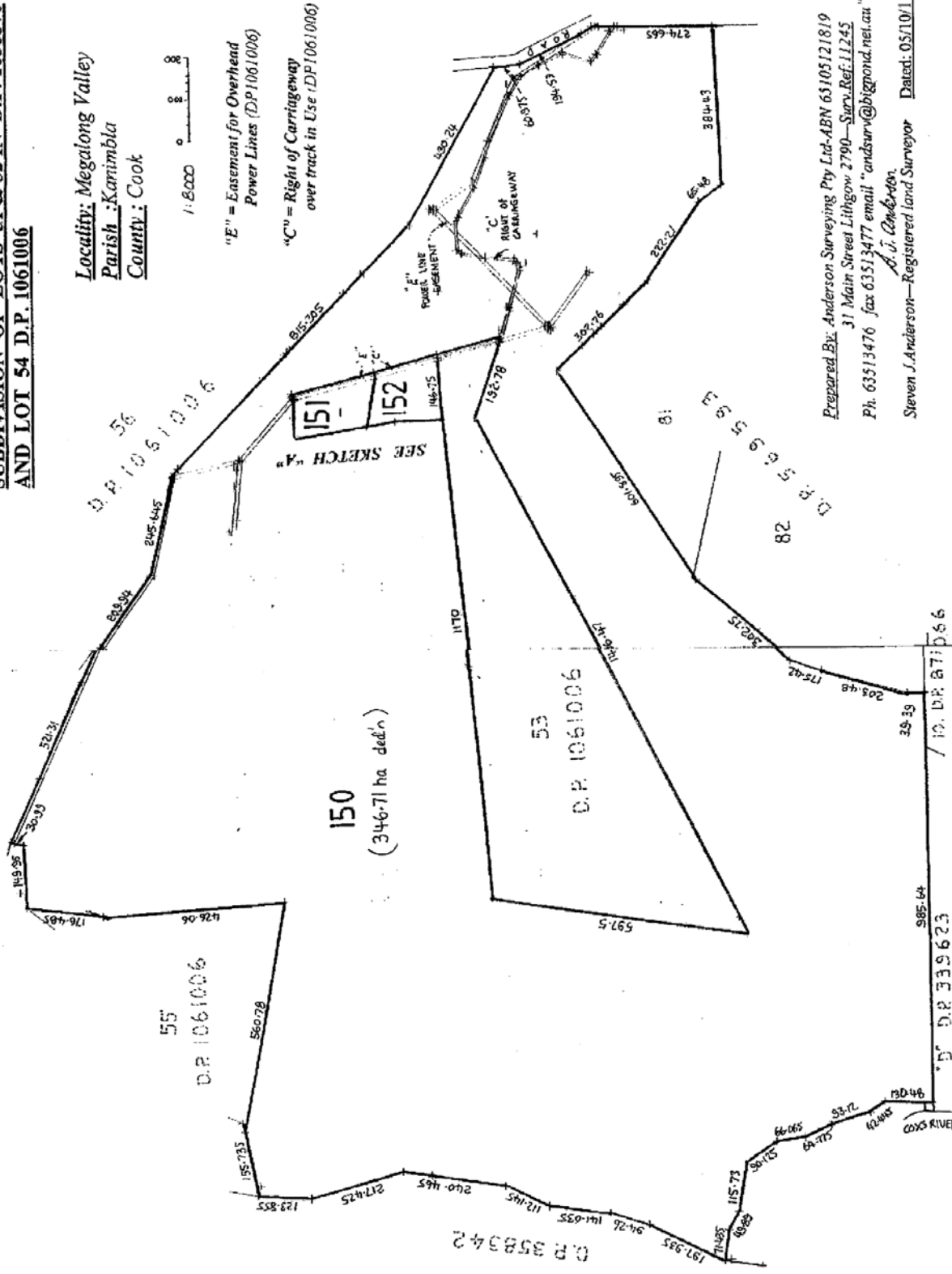
**SKETCH SHOWING PROPOSED PLAN OF
SUBDIVISION OF LOTS 51 & 52 IN D.P. 1035370
AND LOT 54 D.P. 1061006**

Locality: Megalong Valley
Parish: Karimbla
County: Cook

1:8000

"E" = Easement for Overhead
Power Lines (D.P.1061006)

"C" = Right of Carriageway
over track in Use (D.P.1061006)



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S. J. Anderson
Steven J. Anderson—Registered Land Surveyor Dated: 05/10/11

Not Approved Yet