

Council Reference: GT1/LEP/2000 Pt 3
Your Reference:

31 July 2012

Mr Kenneth Neff
Wooyung Properties
Level 54, Rialto
525 Collins Street
Melbourne VIC 3000

Dear Mr Neff

Consideration of Planning Proposal Concept over Lot 1 DP779817 and Lot 1 DP 408972 Wooyung Road, Wooyung, within the Tweed LGA for a 26 lot (25 dwelling-house) Community Title Subdivision

I refer to a meeting between Wooyung Properties Pty Ltd (Proponent), Council Executive staff and Tweed Councillors, in early July, at which a planning proposal concept for an amendment to the Tweed LEP 2000 to facilitate a community title subdivision was tabled.

I understand that Council agreed to accept the planning proposal concept for initial review and response and that document has been referred to me.

Upon completing an assessment I formed the view that the subdivision concept should not be supported. An alternative scenario demonstrating a greater sense of social responsibility, accountability and compliance with contemporary standards, through adoption of appropriate environmental mitigating strategies, could nevertheless be developed.

I have discussed my conclusion on the Proposal with Council's General Manager and Director Planning and Regulation and have their concurrence regarding the unsuitability of the proposal.

General Comments

A core issue that resonates through the Proposal and that consequently formed a major part of my review is the concept referred to as a *comparison of merit* assessment; a concept that is not widely used, tested or universally accepted within the NSW planning framework, a point acknowledged in the proposal:

"application of comparative merit in the consideration of a planning proposal has a weak presence in the NSW Planning System"

Advice was sought from Dr Steven Baveling (Barrister), as provided in Appendix C to the Proposal.

Dr Baveling's advice says with respect to justification of the Proposal that a consideration of the question about net community benefit would, in the present case, require a comparison of the merits of the proposed development against those of the development arising from Development Consent 88/640 and concludes that the concept of comparative merit is an appropriate method in this regard.

Neither Dr Berveling nor the Proposal provided any consideration about qualifying the reasonableness or specificity of the terms on which that concept should operate in this context, which would have assisted considerations of the proposal when it is plainly stated that it is:

"unlikely to be approved if assessed only on its environmental impacts and merits, due to the location of proposed dwellings in sensitive environmental areas"

A failure to consider a reasonably justifiable and logical basis for the concept's application has led in my view to an erroneous assumption or acceptance that the vagaries present in the interpretation and application of that concept can somehow veil a convenient interpretation in support of argument that maintaining an environmental impact through a different development scenario is acceptable providing that it does not exceed or not least equal that of consent 88/640. Even if this were accepted there has been no credible attempt to ascertain a realistic comparison between the impacts arising under that consent and those of the proposal sufficient to establish a justification on the net community benefit issue.

However, that argument is not accepted. Lifting that veil readily exposes a rationale and application of the concept that is flawed because of its failure to account for the planning and environmental considerations of the prevailing legislative context. A better practice would have been a planning exercise aimed at distilling the key issues arising against those considerations; weighing the benefits and opportunities of the two scenarios and establishing clear guidelines for applying the concept in a practical way. This is pertinent given the Proposal openly speaks of a development scenario that is unlikely to be permitted without acceptance of the comparative merit concept.

Even so, approaching the development of this land on a like for like impact scenario is unlikely to generate any traction at either the local or State government level.

Given what appears from the statements in the proposal to be a universal acceptance that consent 88/640 is not an environmentally sound development outcome there is likely to be merit in supporting a development scenario that firstly responds to the site characteristics and legislative framework, secondly assists with offsetting any lost investment, and lastly provides the incentive for the surrender of that consent.

Under those considerations any development of this site should be aimed at limiting the impact on the environment. Those that do not and depend solely for their support and existence on elastic concepts that are neither adequately developed or are not universally accepted within planning per se, but more specifically have no real sense of legislative or policy support for varying current standards, do not generally receive favourable consideration. This is not uncommon where uncertainty in the process prevails over the ability to make transparent and evidence based decisions.

A development of the cleared areas would present a more favourable option. This was also raised by the Department of Planning in their letter of 15 February 2011 to Landpartners Limited (Lismore) in response to their consideration of a 26 lot subdivision concept.

Occupying the available cleared land would have improved the overall environmental responsiveness of the development and would likely result in an observable change in the net community benefit from what appears to be a generally static, status quo comparison, (based on the level of investigation in the proposal) to a positive benefit

that might have otherwise served to justify the concept subdivision as an affirmative trade-off for the surrender of consent 88/640.

In that sense it is worth reiterating that a comparison of merit needs to be qualified in the proper sense, this I think, would also include an evaluation of how the impact of the consent 88/640 might reasonably be lessened.

Arguably, there does not need to be extensive water bodies or 'islands', an element that poses significant environmental impact, and consent 88/640 could be readily amended to remove that element.

I do not think that these considerations are too remote or extraneous to be factored into the overall merit comparison in a case such as this and likewise the 'economic viability', as referenced in the Proposal, which states that consent 88/640 is "probably the only economically viable utilisation of the land under the current planning regime" should also be taken into account and qualified.

Anecdotal indications in the market are that tourism development generally is not strong and the attractiveness of investment in new developments has dropped dramatically since hitting its peak in the Tweed during 2003-2007. This is likely to be compounded significantly by the high cost associated with constructing the development arising under consent 88/640, the ongoing cost of environmental compliance, and the probable marketing difficulty associated with less contemporary and isolated development like that approved under that consent.

Taking those factors into account should have prompted some level of assessment and discussion as to why a council in Tweed's position should contemplate reliance on an abstract concept like that proposed in the face of, and essentially with the purpose of defeating, competing environmental considerations and obligations.

I think it is important at this juncture to set out the difficulties inherent in an approach that is reliant on the comparative merit concept so that further communications can occur on a reasonable understanding of how environmental and planning issues need to be approached and the level of caution Tweed Council will apply in the treatment and application of that concept. I think that finding broad support for it would be difficult and accepting this reality may help with moving forward on a more acceptable concept and identification of the real issues.

Suffice to say that I agree with the statements in the planning proposal in that it is unlikely that this proposal would be approved based upon a merit assessment of its environmental impact, an impact that will not be readily avoided by that concept.

I trust this additional information is of assistance to you. Please do not hesitate to contact me directly should you wish to further discuss any aspect of this letter or should you wish to discuss possible options for the site.

Yours faithfully,

Iain Lonsdale
Coordinator Planning Reform