SUBMISSION BY THE

RURAL RESETTLEMENT TASK FORCE

ON THE

Draft STATE ENVIRONMENTAL PLANNING POLICY -
Dwelling Houses in Rural Areas (Multiple Occupancy)

(27 Sept. 1985)

1.0 The Association welcomes the long awaited release of the Draft Policy and hopes that the final gazettal and implimentation of the Policy will occur as soon as possible.

1.1 In general terms we support the broad Policy Objectives of the Draft in that it should enable Multiple Occupancy (M.O.) to occur in many areas of the State subject to strict environmental assessment. A number of comments specific to certain clauses of the Draft Policy follow. Our submission on Lismore Council's Rural Strategies Study is appended as a response to some Council suggestions that M.O. should be restricted to a miniscule portion of their Shire.

2.0 Clause 2. Aims, objectives, etc.
In Clause 2(a) delete "to be occupied as their principal place of residence".
Comment
What is gained or achieved by insisting on it being the "prinicipal" place of residence? How would council monitor this? A member may wish to study overseas for say two years; should this act disqualify the member from still being a member of an M.O.? Parents for example, may wish to take up a share, but not wish to reside until retirement or death of a partner. Any notion that this might mitigate against an agent developing solely for profit is hardly likely to be water- tight.

2.1 Clause 2(b) to read: "to enable people, and in particular the socially and economically disadvantaged, to...."
Comment
The aims and objectives should be strengthened by giving recognition to the "social" and "communal" aspects, along with the economic aspect, motivating this Policy!

2.2 Clause 2(d) to read: "to facilitate development of self generating forms of livelihood, and, to create opportunities for an increase in rural population in areas which are suffering or are likely to suffer from a decline in services due to population loss , and, to create oppurtunities for cultural diversity.

Comment
The aspect of "self help" needs to be acknowledged and facilitated. M.O. we submit, is sought because it is a practical, rewarding and challenging alternative to urban life. The aims of this Policy would be better directed to "quality of life" than attempting to fill underutilised services!

3.0 Clause 3(b). Excluded Land
For clarity we here break up the excluded land schedule into two parts viz. Part A, being the first four items ie. land under the N.P.W.S. Act, Crown Lands Act and Forestry Act, and Part B, being the balance ie. various protection zones.

3.1 We support the exclusion of the lands in Schedule 1 Part A from the Policy on the understanding that the inclusion of this list is here required as a legal techinicality.

3.2 We submit that Schedule 1 Part B, be deleted.
Comment
Where settlement is permissable within these zones we see that councils have adequate discretion to control any such development on its merits. This being the case it would be discriminatory to single out M.O. citizens. We can envisage a situation where M.O. settlement may be a more appropiate way of conserving the integrity of a sensitive zone than allowing private development!

3.3 If this recommendation is not acceptable then we urge that close attention be given to the list of zones and reasons given for their inclusion. These we submit, must all be scrupuliously defined. What for example, does "Conservation" and "Open space" in the present list mean? Failure to be specific in this regard would enable a "hostile" council to effectively exclude large portions of rural land from the benefit of this Policy. In the Lismore City Council area for example it appears that two existing (gazetted) M.O. fall within a proposed environmental protection zone. What would their future situation be in terms of planning legislation?

4.0 Clause 4. Interpretation
Add "'home industry' and 'home occupation' shall have the meanings given to these terms in the Environmental Planning and Assessment Model Provisions, 1980."
For comment see under Item 6.4 below.

4.1 Add "'economically disadvantaged person' means a person who is in receipt of a Health Care Card or otherwise, by choice or circumstance, does not have an eqivalently greater income".

Comment

To give definition to this term as used in the Aims and Objective, clause 2(b). We believe it is of value to recognise that there are those who "choose" to live in a simple manner.

Re the definition of 'dwelling'. Determination of what constitutes "separate" needs to be carefully and clearly addresed in the Manual. Would a kitchenette on an open verandah for example, be classed as a kitchen and thereby making the whole structure a separate "dwelling" for the purpose of this Policy? Such determination has important consequences for example, in establishing density under clause 8.

5.0 Clause 5. Relationship to other planning instruments

It is noted that clause 5(1) is designed in part, to ensure that S.E.P.P. No.1 will apply, and the example is given, that this could be used to vary the proposed 40 ha minimum land size. If the minimum of 40 ha is to be retained (note our proposal in clause 6(1)(b) below that the 40 ha minimum be deleted) then, it is our understanding that as a rule-of-thumb, S.E.P.P. No.1 could be used to permit say a 10% reduction. This would be insufficient to cater for those situations where for example, 20 ha is "the prevailing subdivision" size as allowed for in Circular 44.

5.1 Add at the end of Clause 5(2), "on the condition that such a plan provides more detailed and liberal controls than covered in this Policy."

Comment

If this is the intent of the Policy, then we submit with respect, that the Policy should state same to give it legal standing!

6.0 Clause 6(1)(a). Single Allotment

If a minimum area of 40 ha is to be retained (see clause 6(1)(b) below where we are in favour of dropping this requirement) then we are of the view that if a developer owns two or more parcels of land each with a separate title, and each comprising an area of 40 ha or more, we do not see the need to require the consolidation of the titles, provided it can be demonstrted that a subsequent separation of the parcels would not breach any other clause of this Policy eg. adequacy of water supply, density of development.

6.1 Clause 6(1)(b). Minimum area

We are of the view that there should be no minimum of 40 ha. Councils should be given the discretion to determine each application on its merits. This would permit greater flexibility and closer dovetailing between this Policy and the Dual Occupancy Policy. It will also accommodate the situation where the prevailing subdivision is for example, 20 ha.

6.2 6(1)(e). Prime crop land

The notion that "the council has determined" seems to imply that the council may accept, or reject, the advice of the Dept. of Agriculture. If this is what is intended, we submit that a "lash back" condition could arrise where the Dept. of Agriculture did not consider a particular proposal to be on prime crop land, but the council had other ideas about this! Rewording may remove any possible ambiguity on this account.

6.3 Clause 6(1)(f). Visitors Accommodation

We suggest that the statement in the glossy leaflet "schools, community facilities, workshops & visitors' accommodation are to be permitted" be included in the Policy.

6.4 Add a new clause 6(4), "'Home occupation' and 'home industry' shall be permissable land use."

Comment

This provision gives effect to Objective 2(d) in accordance with our proposed amendment. We understand that 'home industry' is not permissable use in Rural 1B zones. This provision would assist development of self-generating forms of livelihood not otherwise permissable. 'Home occupation' has been included here for the sake of clarity for the lay person not withstanding its availibility under s.35(c) of the Model Provisions.

6.5 Add a new clause 6(5) to the effect that nothing in this policy shall be construed as to restrict the State or Commonwealth Minister for Aboriginal affairs from implimenting any policy relating to aboriginal housing or resettlement.

Comment

This principle is proposed to acknowledge that special conditions may need to apply for example, in respect to traditional patterns of settlement in remote areas of the state.

7.0 Clause 7 Heads of Consideration

Re Clause 7(1)(j): What inference is to be drawn from a finding that the land is in a rural residential expansion area? Is it to be assumed that M.O. development is to be considered incompatable with rural residential development? If so, we would take exception to this concept.

7.1 Add a new clause 7(o), "The bona fides of the application in terms of, in particular, the Aims and Objectives of the Policy."

Comment

This clause relates to the bona fides of the application to ensure that it genuinely meets the spirit and letter of this Policy. It is suggested that where an application is made by an agent or a person who will not, or appears may not reside on the property in the long term then the council shall call for, examine, and take into account the following documentation and or statements as appear applicable in the particular circumstances:

* evidence that there is a communal organisation and that there is, or is to be, a communal decision making body,
* the aims and objectives of the organisation,
* constitution, articles and memorandum,
* trust deeds and the like,
* statement of distribution of any profit,
* statement of proposed transmission of decision making authority to the share holders generally,
* statement on the disbursement of any assets etc. in the event of the winding up of the organisation,
* statement on the obligations and entitlements of a shareholder generally, and in particular the organisation's rights in the event of a share holder wishing to leave or sell a share or a building.
* such other documentation or statements as the council may require.

7.2 It is submitted that the presentation of such data will not be onerous on a bona fide applicant and that it should readily reveal whether or not an application is in accord with the spirit of this Policy.

7.3 As a further safeguard the council should have the right to require, as a condition of approval, that the approval will lapse, if at the expiration of a stated period of time, specific conditions have not been fulfilled, or, development as applied for, has not occured. Such a practice would be analagous to a B.A. where corrective action can be insisted upon if construction is not in accordance with the approved application.

7.4 If a council comes to the view that an application is, or may be, of a "speculative" nature for personal profit then consideration could be given to having the land in question rezoned as a "rural residential" area. (To be approved this would then require the concurence of the D.E.P. If approved, strata titling would then be available to the developer).

7.5 Add a new Clause 7(p)(1) viz. "The effect of the proposed development on aboriginal relics and sites", and a further Clause 7(p)(2) viz. "comment on the proposed development by an aboriginal, if any, claiming to have traditional association with the land in question".

Comment

Clause 7(p)(1) provides for consideration of aboriginal relics and sites while Clause 7(p)(2) provides for comment by aborigines traditionally associated with the land in question.

7.6 There is widespread and strong support that this Policy recognise the existence of contemporary aborigines and respect for their attitudes towards the land. Not withstanding this it is not proposed that council's determining authority be diminished in any way. The principle is one of acknowledgement through consultation.

7.7 It is suggested that a request for comment by relevant aborigines be included in the advertisment placed pursuant to clause 10 of this Policy and consideration of this would surfice where the development is for four or more dwellings, and otherwise, comment sought from the local Aboriginal Land Council.

7.8 It is suggested that in the Manual that the list in clause 7(1) be consolidated with the other items in s.90 of the E.P.A. Act, so that applicants will hopefully be in a position to address, all the relevant heads of consideration in any D.A.

7.9 Re Clause 7(2). The inference appears to be from the wording that for three or less dwellings, a map is not required to accompany a D.A. Is this not at variance with s.77(3) of the L.G. Act where eg. the Lismore City Council requires that a map must accompany all applications? (See this council's D.A. form - not being a subdivision).

8.0 Clause 8. Density of Development

Re clause 8(1). Density should in our view, ideally be determined on the basis of the capacity of the land to carry the proposed development ie. taking into account eg. climate, topography, soil type, ground cover along with all the items listed in clause 7.

8.1 If the present basis of an arbitrary formula is to be retained then we are of the view that the first formula should be used for all properties, regardless of size. (This formula is considered to be satisfactory even where there is no minimum of 40 ha as we have proposed be the case, in 6(1)(b) above).

8.2 We do not see that there is a sound basis for reducing the density on larger holdings. Indeed some could exhibit an ability for a greater carrying capacity than a smaller holding! It seems reasonable to us to expect that development on large properties could sustain a retail shop etc. and as such rezoning as a "rural residential" area would appear to be appropiate. This process would then enable the density to be determined on the merits of the application. We further believe however, that the larger properties could get around the present formula by subdividing first and submitting seperate applications for each parcel!

8.3 In rounding off the number of dwelling it needs to be made clear that 0.5 is to be taken to the next whole number.

8.4 The present wording of Sub-clause (2) would require Council to consider the design of the individual dwellings before consenting to the Development Application (and Building Applications!). The intent of this clause however, could be preserved by allowing Councils to place a condition on a Development Approval to the effect that the dwellings subsequently approved shall not reasonably accommodate in total more people than the number calculated by multiplying that maximum number of dwellings by 4. We suggest that this clause be reworded accordingly to give effect to this concept.

9.0 Clause 9. Subdivision

We support Clause 6(1)(d) with its stipulation that at least 80% of the land be held in common ownership and Clause 9 with its provision to prohibit subdivision. Noel Hemmings, Q.C. however,in a Memorandum of Advice has expressed the view that principal legal structures in a Deed of Trust, or Articles of a Company, which specifically grant a member an exclusive right of occupancy to a portion of the land, do in fact constitute a subdivision within the meaning of the Local Government Act. The instructing solicitor, Mr. A. B. Pagotto has expressed the opinion that the Advice of Counsel would also cover "any community which granted a member exclusive right to occupy a dwelling (whether in writing, verbally or by way of a minute in the community records)".

9.1 If this interpertation is to pervail, then it follows that virtually all Multiple Occupancy communities may contain de facto subdivisions. If this is the case then it appears that either the Local Government Act should be amended or Clause 9(2) of the Draft Policy include a further Clause to the effect that sub-clause (1) of Clause 9 will not apply to a member of a community who is granted an exclusive right of occupation over his/her home site, provided the legal arrangments do not breach any provision of this policy including proposed new sub-clause 7(1)(o).

10.0 Clause 12. Contributions Under s.94

The wording of this clause we believe may be misconstrued to read that M.O. development will, under all circumstance, lead to an increased demand for services etc. We submit that it ought not be assumed that such development will result in an increased "cost" to council but that the situation be determined on its merits. The demand for example, may be minimal and not require the up-grading of the services, or, the service at the time, may be under-utilised. We recommend that the clause be reworded to be absolutely clear or, at least that the word "likely" is replaced with some other word such as "possible".

10.1 We consider that a contribution under s.94 should be limited in extent.

Comment

In Circular 23 to Councils on the application of s.94 (issued in 1981!) it is noted;

a. "the Court has been critical of the lack of research undertaken by Councils to justify their requirements." (Item 2).

b. "...that contributions be identified and justified ... particularly in terms of the nexus between the development and the services and amenities demanded by it." (Our emphasis) (Item 5).

c. "Any increase in development costs as a result of contributions under s.94 must be weighed against the wider community concern about access to housing. The Department's view is that there needs to be a compromise in the use of s.94 between the provision and establishment of services on the one hand and the cost to the ultimate consumer on the other." (Our emphasis) (Item 7).

d. "...the Department will be very concerned about the impact of the overall costs involved." (Our emphasis) (Item 8).

10.11 It appears in this regard that Councils have not heeded the contents in Circulars 23 and 42! We support the applicability of the following statements in the Discussion Paper and submit that they significantly bear on this issue.

a. "The results (of M.O. settletment) has been that the existing rural services and social infrastructure are again being utilised . Given the alternative that the new services would need to have been provided in the major urban areas, if the rural areas had not been resettled, then overall the community has benefited significantly ." (Our empahasis) (Discussion Paper p.2.)

b. "Applicants do not have the same ability to pay as more convential developers. This is largely because where there is subdivision of rural land, the market effect of the subdivision is that capital is generated, and this capital enables the developer to contribute to council's costs. M.O. does not of itself generate capital, and typical applicants have few resources that can be used to pay levies".(Discussion Paper p.32.)

10.12 We support in principle Clause 12 of the Draft Policy. In view of the history of councils tardy implimentation of Circulars 23 and 42 we urge that the necessary safeguards be taken to ensure that councis will in future, administer the application of s.94 in accordance with the spirit of the Policy.

10.13 We welcome the notion that "incentives should encourage the conservation of wildlife habitats within M.O. development and that this would for example, include omitting s.94 levies for open space." (Discussion Paper p.24).

10.14 We hence recommend that contributions under s.94 be limited in extent in accordance with the Guidelines set out in the Discussion Paper and as elaborated on pp.33-34 (-eg. a maximum of $1500. per dwelling for roads & bridges).

10.2 Councils should not impose road upgrading conditions under s.90 of the Act in addition to imposing a s.94 road contribution.

Comment

Our experience support that;

> "...contributions are too high. They reflect the actual cost to councils of upgrading existing facilities, rather than the additional wear and tear on those facilities caused by the proposed development itself." (Our emphasis) (Discussion Paper p.32.)

10.21 Direction is required to remove confusion (some say "mystification of the law"!) in respect to s.94 and the appropiate manner and extent of the requirement to upgrading roads. In a recent M.O. application for example, before the Coffs Harbour Shire Council road upgrading conditions were applied under s.90 but no s.94 contribution sought, while in the Kyogle Shire Council a s.94 contribution was sought (but no upgrading condition made under s.90), and in the Lismore City Council area it is the practice to make the normal s.94 charge and require a road upgrading condition under s.90. In each case the road upgrading condition under s.90 was to the value of hundreds of thousands of dollars! (Appeals to the court in some cases are pending).

10.22 (We also draw attention to the possible compensation claims that might be sought against a council if the Court should find that a council has acted improperly by overcharging for road upgrading under s.90!).

10.23 We support the D.E.P. Guideline for s.94 contributions in respect to roads and bridges;

> "Road improvement contribution (under s.94)...to apply instead of (and not in addition to) any specific requirement for local road upgrading which might be required under s.91(3)(a) and s.90(1)(j)".

and recommend that where a s.94 contribution is sought that no upgrading condition be sought under s.90 or s.91.

10.3 Since many M.O. communities develop slowly over a period of years, any contribution should be payable at the time a Building Application is submitted.

Comment

We support the statements in the Discussion Paper pp.33, 35 on the principle of "phased payments", and recommend its implimentation.

10.4 An alternative or "in kind" contribution should be provided to a financial contribution. We support the statements in both Circulars 23 and 42, "that contributions 'in kind'... could be an acceptable allternative" and draw attention to the fact that no council to date, appears to have heeded this advice! We therefor recommend implimentation of the proposal in the Discussion Paper;

> "The policy should include a provision claryfing that labour, or other contribution "in kind" should be acceptable, in lieu of land or monetary contributions." (Discussion Paper p.34.)

11. We support that there be guidelines for a uniform approach to determining Development Application fees as outlined in the Discussion Paper p.10 and recommend that provision be made in the S.E.P.P. or elsewhere, to achieve this.

12.0 Attention by ourselves and others, has over the years, been drawn to the fact that many communities have been waiting for six or more years for the introduction of Multiple Occupancy in their particular council area.

12.1 The policies under Circular 44 provided scope for legalisation of illegal development constructed prior to implimentation of M.O. legislation. (If anything, there are probably more illegal developments now than there were at the time when Circular 44 was introduced!). We hence strongly support that for "...those presently illegal developments which meet the criteria of the policy, legalisation should be possible", (Discussion Paper p.9.), and urge that recognition and appropiate provision for this be made in the S.E.P.P.

12.2 For the reasons identified in the Discussion Paper we do not seek retrospective approval for illegal structures as such, but rather that councils be obliged to consider the issuing of s.317(a)1 Certificates as a first option. Where a building does not comply with Ordinance 70 then it is suggested that councils be required to bring to the notice of home owners the provisions of s.317M of the L. G. Act. (Note in this regard that the Court, in Nicolson v. Lismore City Council recommended that more attention be paid to the use of s.317M for inovative design solutions. Demolition under s.317B should in our view, be an action of last resort).

12.3 A further option in this regard would be created by the speedy gazettal of amendment to s.317A to provide for the certification of structures built prior to D.A. approval. This amendment we understand is currently before the Minister for Local Government. We hence urge that the Minister for Planning and Environment seek of his colleague that the implimentation of this amendment be expidated as a matter of urgency.

12.4 With respect to tranisitional dwellings and the use of s.306(2) of the L.G. Act, it has been our experience that these where granted (and not all councils appear to be familiar with this provision) have usually been for a six month period with some option to extend to one year. This period is, in our view unrealistically brief and we consider has probably detered some owner-builders from bothering to apply at all.

12.51 We hence support the notion that "councils issue licenses for time periods sufficient to enable dwelling construction to take place for example two years, with option to renew up to a maximum of five years" (Discussion Paper p.11) as a more realistic proposal.

12.52 In respect to movable dwelling licenses under s.288A of the L.G. Act, as referred to in the Discussion Paper (p.11), it our view that an owner, or part owner of a property, when residing on the property, is not required to obtain a Movable Dwelling license by virtue of s.288A(7)ii read in conjunction with s.288A(9)(a).

13. We support the view that "councils should give development approval within a nominated dwelling area, without individual sites being specified in advance" (Discussion Paper p.12), but consider that this should apply to developments of any size.

14.0 Common ownership of the land

"Common ownership of the land" seems to us to be the corner stone of M.O. development and consider that clear acknowledgement of this principle ought to be expressed in the S.E.P.P.

14.1 The notions of "permanent group occupancy and management" (Discussion Paper p.6) and "principal place of residence" (Draft. Clause 2(a)), are not inappropiate of themselves, but we consider are not an adequate alternative to recognition of common ownership of the land in toto.

14.2 We note the arguements about ownership (Discussion Paper p.27) and the difficulty of "enforcing or monitoring" the existing policy. The practice of councils accepting a statutory declaration to the effect that at least 2/3 of the residents shall be shareholders seems to us not to have been onerous for new settlers or difficult for councils to administer.

14.3 It seems to us that stating this principle in the aims and objectives is important and worthwhile for its own sake and in addition will act at least as a psychological deterrent against inappropiate use of the policy by speculators. We hence recommend that such a provision be included in the S.E.P.P.

15. Due to the non strict applicability of existing land titles for M.O. we strongly support the view that a Cluster Titles Act be introduced. (Discussion Paper p.13). We ask that a draft be prepared by the D.E.P. and made available for public comment.

16. The Manual

We note and support the production of a Manual to accompany this policy. We ask however, that the Manual be given a status that is more than being just an advisory document. We are concerned for example, that the Guidelines for making a M.O. development application, prepared by the Grafton Office D.E.P. when presented as evidence in one court case were virtually dismissed by the court as having any credible force.

17. We would appreciate the opportunity of being able to comment on the revision of the draft policy and a draft of the Manual before these are published.

Reference

D.E.P. Multiple Occupancy In Rural New South Wales: A Duscussion Paper, D.E.P., Sydney, 1985.