

MS

JACK RILEY
DAVID M. RILEY
MATTHEW J. RILEY
ADAM D. RILEY
MELINDA L. CLARK

SOLICITORS & NOTARY

P.O. BOX 165, LISMORE, 2480
FACSIMILE (068) 21 8059
DX 7712 LISMORE

15 MOLESWORTH STREET,
LISMORE, N.S.W. 2480

TELEPHONE (068) 21 9000

OUR REF. MR:SS

YOUR REF. MR. SCOTT

22 November 1993

The General Manager,
Lismore City Council,
DX 7761
LISMORE

LISMORE CITY COUNCIL
RECEIVED

22 NOV 1993

FILE NO.
S/6-3-523-1

LETTER NO.
93-10024

ALOC.
PS

① Advice SE PP15 m/dec
② Multiple occupancy

Dear Sir,

RE: ADVICE ON SEPP 15. MULTIPLE OCCUPANCY OF RURAL LAND

We refer to the writer's numerous phone discussions with your Mr. Scott and enclose a copy of Counsel's Advice. Would you please peruse same and phone the writer to discuss at your convenience.

Yours faithfully,

BONDFIELD RILEYPer: 

Enclosure (3)

LOOSE PAPER to PS
File is out with PS
Delete as required & return to
ACTION CO. 12-1-94
RESUBMIT ON
Signed: _____

8th Floor
225 Macquarie Street
Sydney, N.S.W. 2000
Phone: 235-3033
Fax: 223-3515
DX 650 SYDNEY

19 November 1993

Messrs. I. G. Bondfield Riley & Fiford,
Solicitors,
DX 7712 LISMORE

Dear Sirs,

RE: ADVICE ON SEPP 15 MULTIPLE OCCUPANCY OF RURAL LAND
LISMORE COUNCIL

I refer to your letter of 3 November 1993, seeking my advice in respect of the proper construction of the aims, objectives, policies and strategies ("the aims") contained in clause 2 of the said Policy.

I advise as follows:

1. The aims of the Policy are specifically included to demonstrate what work the policy has to do. By this I mean that it assists the Council in understanding the subsequent statutory provisions and the proper construction to be applied to those provisions. That interpretation which best meets "the aims, objectives, policies and strategies stated in the Policy shall be preferred." (See s25(3) EPA Act 1979). The statutory provisions of s25 are, in effect, consistent with the common law "purposive approach" enunciated by the Courts (see Auckland Lai v. Waringah SC 58 LGRA 276).
2. Upon examination of clause 2 of the said Policy and as a matter of proper legal construction, the three subclauses must be read conjunctively. However, this does not, in my opinion, require that each of the said sub-clauses must be given equal weight in determining whether a particular development satisfies the said aims. In simple terms the consent authority is required to test the particular development forms against the complete aims and then form an opinion as to whether or not it satisfies those aims. Should the consent authority form the opinion that the objectives are not satisfied, it is clearly with power to refuse the application. In such circumstances a person dissatisfied may appeal (s.97 EPA Act) and by way of a hearing de novo the Court may overturn that decision. However, in such circumstances, the Court assumes the role of the Council and may adopt the same purposive approach.

On the other hand, should the Council approve development, after forming the opinion that the said aims are satisfied; such a decision of an administrative body may only be overturned where the Court is clearly shown that the Council's decision was not reasonably open to it and it was manifestly absurd or unreasonable. (See Minister v. Peko Wallsend 62 CLR 224).

Charge 8.123
1st Master
Sec No 2.

3. I understand from the material contained in my Brief that the central focus is clause 2(c)(iii) of the Policy wherein the aim is expressed to relevantly be to facilitate development, preferably in a clustered style, to create opportunities for an increase in the rural population in areas which are suffering or likely to suffer from a decline in services due to rural population loss. Again, as I understand the concern of Council, it is of the opinion that there are very few areas where there is the likelihood of a decline in services due to rural population loss. Rather, the position is that the Council area is a relatively high growth area. In such circumstances is Council empowered to simply reject the applications because the area is not one where there is the likelihood of rural population loss?
4. I opine that the Council is not able to use the particular aim as a blanket reason for refusal of development applications for Multiple Occupancy of Rural Land. It must be recalled that the particular purpose is permissible with the consent of Council and a particular aim cannot be used as a sole basis for rejection of development application. (See s25(2) EPA Act 1979.
5. This conclusion becomes evident when one looks at other environmental planning instruments which by separate clause link the permissible development to the said objectives. My instructing Solicitor may be aware of some environmental planning instrument which direct that the Council is not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the objectives of the zone. In Dach v. Yarrowluma S.C. 79 LGRA 220 at 224 the Court considered such a provision in circumstances where the particular development was permissible with consent but arguably inconsistent with the objectives. The Court relevantly held that such a clause is a matter that "more pertinently should be taken into account where the Council is required to exercise its discretion whether or not to grant or refuse a consent. It is nevertheless important to understand what the objectives of the planning instrument are. The Court accepts that the construction of the Local Environment Plan should be given a practical outcome consistent with the reasonable interpretation. The approach should not be over-technical."

Similarly the NSW Court of Appeal decision of Coffs Harbour Environment Centre v. Coffs Harbour C.C. 74 LGRA 185 at 193 considered the reverse situation where the tables provided that a particular purpose was "prohibited" unless the Council was satisfied that the carrying out of the development is generally consistent with one or more of the objectives of this zone." The Court held that as a matter of proper construction it could not be interpreted to permit an "anti pathetic development".

6. In the present circumstances there are no express provisions within the Policy which attempt to direct the Council not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the aims. In my opinion it follows that the Council is not empowered to use the particular objective (2)(c)(iii) as a basis for blanket rejections of development which is otherwise permissible with consent.
7. On proper construction of clause 2(c)(iii) the sub-clause only has work to do where there is identified suffering or likely suffering from a decline in services due to rural population loss. If no such areas are identified, Council is empowered to disregard that aim and thereafter determine the application, having regard to other statutory provisions. Where such areas are not identified, the particular sub-clause cannot be used as a basis for blanket rejection of such development applications. This is not in contradiction to my opening remarks that the sub-clauses must be read conjunctively. In brief, they are all required to be read and if they have no work to do they may thereafter be disregarded.

It is clear that the Council is otherwise empowered to refuse a development application for Multiple Occupancy of Rural Land pursuant to the Policy if it is of the opinion that other statutory provisions are not satisfied. Such statutory provisions may include the remaining aims contained in clause 2 of the Policy.

8. For the sake of completeness, I advise my instructing Solicitor that in circumstances where the Council is of the opinion that there is no likelihood of rural population loss in its area, it could seek exclusion from application of the Policy.

I would be pleased to discuss any aspect of this advice with my instructing Solicitor should the need arise.

Yours faithfully,



GREG NEWPORT

Should be
"marginalist"
✓ what about 76%?

JOHN D. WELLER

BARRISTER & SOLICITOR, VICTORIA
SOLICITOR, ATTORNEY & PROCTOR, NEW SOUTH WALES

Associate:

DAVID SPAIN

B.A., LL.B. (Hons.)
SOLICITOR, SUPREME COURTS OF
QUEENSLAND & NEW SOUTH WALES

Please address all correspondence in
this matter to:

Main Street
Stokers Siding, 2484.
Our Ref: DS

Telephone: (066) 779 333
Facsimile: (066) 779 488
International: (616) 779 333

21 July 1993

Peter Hamilton
Wallace Road
THE CHANNON 2480



BY FACSIMILE: (066) 85-7830

Dear Peter:

Re: SEPP #15

I refer to your request for advice as to whether or not the aim & objective in sub-sub-clause 2(c)(iii) of SEPP #15 is integral to any activation of clause 2 generally. We take the view that it is not: sub-sub-clause 2(c)(iii) is merely ancillary to the remainder of clause 2. It is an additional, severable objective of SEPP #15 rather than an integral, joint one.

Upon the most narrow "black-letter", positivist and literal construction of clause 2, there is nothing to indicate that the various usages of the word "and", so as to link its sub-clauses or sub-sub-clauses, is intended to have a strict conjunctive, rather than a liberal disjunctive, effect. Indeed, a literal construction would have to come to the opposite conclusion, since the clause opens with the words [NB: all in the plural number] "The aims, objectives, policies and strategies of this Policy are --". Were they correct who say that the elements of this entire clause were meant to be conjoined cumulatively and to enjoy zero severability *inter se*, then the quoted words could, logically, only have been in the singular number, for SEPP #15 could have had but one unified, albeit conglomerate, purpose!

Thus clause 2 as drafted passes the Literal test of interpretation, however, it is submitted that it also passes the other two tests: the "Golden Rule" and the "Purpose Rule". The "Golden Rule" requires that the entire statute be taken as a whole, giving the words their ordinary meaning, so as to attain a comprehension which avoids absurdity or inconvenience. The perversity of the proposed interpretation breaches the Golden Rule.

The "Purpose Rule" respects the context in which the rule was promulgated: what *mischief* does it attempt to remedy? Anyone with a knowledge of the historical development of Multiple Occupancy would have to agree that the *mischief* of rural population decline was only one among many defects sought to be amended. The aims and objectives in clause 2 are broad and general, however their spirit and intention is clear and this should not be constrained into virtual irrelevance by the employing of artificial technicalities.

Yours faithfully,

David Spain:

IN ASSOCIATION WITH:
WOODHAMS O'KEEFE & CO. SOLICITORS
545 St. Kilda Road,
Melbourne, Victoria, 3004.
Telephone: (03) 529 6177
Fax: (03) 510 7074

HENDERSON & ASSOC. SOLICITORS
Corporate Centre One,
Bundall, Qld. 4217.
Telephone: (075) 917 766
Fax: (075) 741 772

SYDNEY AGENT:
DEZARNAULDS FAWKES
111 Elizabeth Street,
Sydney, N.S.W. 2000.
Telephone: (02) 232 3222
Fax: (02) 235 1206

DISC July DFILE G93/00130DATE 15/7/93

The General Manager
Lismore City Council
PO Box 23A
LISMORE NSW 2480

Claire Aman

15 JUL 1993

G93/00130 CA:DT

NJ:CW: S/285

Dear Sir,

STATE ENVIRONMENTAL PLANNING POLICY NO. 15 - MULTIPLE OCCUPANCY
AIMS AND OBJECTIVES

I refer to your letter in which the views of the Department are sought with regard to interpretation of the aims and objectives of State Environmental Planning Policy (SEPP) No. 15.

2. The aims and objectives contained in clause 2 of the policy should be read conjunctively, as indicated by the penultimate use of "and". Multiple occupancy developments should therefore be consistent with all of the aims and objectives of the policy.

3. With regard to the Council's assessment of objective (c)(iii), the Department concurs with the view that such an objective is not highly applicable in the Lismore area.

4. The Council may find after further analysis of the capacity of SEPP 15 to address multiple occupancy needs in Lismore, that those needs are best accommodated through an amendment to Lismore LEP 1992. Such an amendment could reflect Lismore's particular land capabilities and servicing capacities.

5. I hope this information is of assistance.

Yours faithfully,



Malcolm Imrie
Deputy Manager
(Northern Regions)



Department of Planning

NORTHERN REGIONAL OFFICE

Mr. P. Hamilton
Pan-Community Council
PO Box 102
NIMBIN NSW 2480

N.S.W. Government Offices
49 Victoria Street,
Grafton 2460
P.O. Box 6, Grafton 2460

Telephone : (066) 42 0622 Ext:

Fax No. : (066) 42 0640

Contact :

27 AUG 1993

Our Reference : G93/00130 JC:DT

Your Reference :

Dear Mr. Hamilton,

STATE ENVIRONMENTAL PLANNING POLICY NO. 15 - MULTIPLE OCCUPANCY

I refer to your letter of 25th August, 1993 concerning the interpretation of clause 2(c)(iii) of State Environmental Planning Policy No. 15. I am advised the Department's letter of 15th July, 1993 to Lismore City Council in this matter has resulted in a change in the Council's administration of applications under the Policy.

2. The Department is unable to provide legal advice on the interpretation of environmental planning instruments. However, the following comments may be of assistance.

3. It was intended that paragraphs 2 and 3 of the previous letter (copy attached) should be read together. While a development proposal needs to satisfy all the aims and objectives, this is only to the extent to which they apply. Objective (c) relates to "facilitating development ... to create opportunities...". If, in the City of Lismore, there are not areas "...which are suffering or are likely to suffer from a decline in services due to rural population loss", then this objective need not be applied.

4. Pursuant to clause 25(2) of the Environmental Planning and Assessment Act, 1979 the aims and objectives of the Policy cannot be applied to prohibit development, which is clearly made permissible by other provisions of the Policy, such as clause 7(1).

5. I have noted your concern relating to the project brief for the proposed review of multiple occupancy. If necessary, this matter will be taken up with the successful tenderer.

G93/00130

- 2 -

6. I trust this clarifies the matter for you. A copy of this letter is being forwarded to the Council.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'Malcolm Imrie', with a stylized flourish at the end.

Malcolm Imrie
Deputy Manager
(Northern Regions)

c.c. Lismore City Council



Department of Planning

NORTHERN REGIONAL OFFICE

Mr. P. Hamilton
Pan-Community Council
PO BOX 102
NIMBIN NSW 2480

N.S.W. Government Offices
49 Victoria Street,
Grafton 2460
P.O. Box 6, Grafton 2460

Telephone: (066) 42 0622 Ext:

Fax No: (066) 42 0640

Contact: Leigh Knight

Our Reference: G93/00210 LK:DT

Your Reference:

7 APR 1994

Dear Mr. Hamilton,

REVIEW OF STATE ENVIRONMENTAL PLANNING POLICY NO. 15

I refer to your letter received on 22nd February, 1994 relating to the review of State Environmental Planning Policy No. 15 - Multiple Occupancy (MO) of Rural Lands.

2. With regard to your query as to the appropriateness of a council using a condition of development consent to prohibit subdivision of an MO, I must stress that it is not the Department's role to provide advice relating to legal interpretation of planning instruments. Should your organisation require any detailed interpretation you should consult your own legal advisor. However, the following may be of assistance to you.

3. Clause 8(1) of SEPP 15 provides that a council shall not consent to an application for an MO unless it consider that, among others,

"(a) the means proposed for establishing land ownership, dwelling occupancy rights, environmental and community management will ensure the aims and objectives of this Policy are met;"

Accordingly, Council should be satisfied prior to granting consent that objective 2(c)(ii) of the policy will be met. There should be no need to impose conditions prohibiting subdivision of the development if the proposal complies with the requirements of the policy.

- 2 -

0 | 4. A copy of your letter to the Department and the attached
0 | letter to Council has been forwarded to our consultants for
| consideration. With regard to your verbal request about the
| issue of separate certificates of title by the Land Titles
| Office, it would assist if you could provide the Department with
| a written outline of what advice you require and any information
| you may have in support of your request. Upon receipt of this
| information the Department will be in a position to contact the
| Land Titles Office for clarification. Alternatively, your
| organisation could contact the Land Titles Office direct.

5. I trust the foregoing information is of assistance. If you
have any enquiries, please contact Leigh Knight.

Yours sincerely,



Malcolm Imrie
Deputy Manager
(Northern Regions)

BONDFIELD RILEY

JACK RILEY
DAVID M. RILEY
MATTHEW J. RILEY
ADAM D. RILEY
MELINDA L. CLARK

SOLICITORS & NOTARY

P.O. BOX 165, LISMORE, 2480
FACSIMILE (066) 21 9059
DX 7712 LISMORE

15 MOLESWORTH STREET,
LISMORE, N.S.W. 2480

TELEPHONE (066) 21 9000

OUR REF. MR:SS

YOUR REF. MR. SCOTT

22 November 1993

The General Manager,
Lismore City Council,
DX 7761
LISMORE

LISMORE CITY COUNCIL RECEIVED	
23 NOV 1993	
FILE No.	
LETTER No.	ALLOS.

FAXED
22.11.93

Dear Sir,


RE: **ADVICE ON SEPP 15 MULTIPLE OCCUPANCY OF RURAL LAND**

We refer to the writer's numerous phone discussions with your Mr. Scott and enclose a copy of Counsel's Advice. Would you please peruse same and phone the writer to discuss at your convenience.

Yours faithfully,

BONDFIELD RILEY

Per: 

Enclosure (3) 

5/523 ?
93-10024

0190/4/ss

Greg Newport

Windeyer Chambers

8th Floor
225 Macquarie Street
Sydney, N.S.W. 2000
Phone: 235-3033
Fax: 223-3515
DX 650 SYDNEY

19 November 1993

Messrs. I. G. Bondfield Riley & Fiford,
Solicitors,
DX 7712 LISMORE

Dear Sirs,

RE: ADVICE ON SEPP 15 MULTIPLE OCCUPANCY OF RURAL LAND
LISMORE COUNCIL

I refer to your letter of 3 November 1993, seeking my advice in respect of the proper construction of the aims, objectives, policies and strategies ("the aims") contained in clause 2 of the said Policy.

I advise as follows:

1. The aims of the Policy are specifically included to demonstrate what work the policy has to do. By this I mean that it assists the Council in understanding the subsequent statutory provisions and the proper construction to be applied to those provisions. That interpretation which best meets "the aims, objectives, policies and strategies stated in the Policy shall be preferred." (See s25(3) EPA Act 1979). The statutory provisions of s25 are, in effect, consistent with the common law "purposive approach" enunciated by the Courts (see Auckland Lai v. Warringah SC 58 LGRA 276).
2. Upon examination of clause 2 of the said Policy and as a matter of proper legal construction, the three subclauses must be read conjunctively. However, this does not, in my opinion, require that each of the said sub-clauses must be given equal weight in determining whether a particular development satisfies the said aims. In simple terms the consent authority is required to test the particular development forms against the complete aims and then form an opinion as to whether or not it satisfies those aims. Should the consent authority form the opinion that the objectives are not satisfied, it is clearly with power to refuse the application. In such circumstances a person dissatisfied may appeal (s.97 EPA Act) and by way of a hearing de novo the Court may overturn that decision. However, in such circumstances, the Court assumes the role of the Council and may adopt the same purposive approach.

On the other hand, should the Council approve development, after forming the opinion that the said aims are satisfied; such a decision of an administrative body may only be overturned where the Court is clearly shown that the Council's decision was not reasonably open to it and it was manifestly absurd or unreasonable. (See Minister v. Peko Wallsend 62 CLR 224).

3. I understand from the material contained in my Brief that the central focus is clause 2(c)(iii) of the Policy wherein the aim is expressed to relevantly be to facilitate development, preferably in a clustered style, to create opportunities for an increase in the rural population in areas which are suffering or likely to suffer from a decline in services due to rural population loss. Again, as I understand the concern of Council, it is of the opinion that there are very few areas where there is the likelihood of a decline in services due to rural population loss. Rather, the position is that the Council area is a relatively high growth area. In such circumstances is Council empowered to simply reject the applications because the area is not one where there is the likelihood of rural population loss?
4. I opine that the Council is not able to use the particular aim as a blanket reason for refusal of development applications for Multiple Occupancy of Rural Land. It must be recalled that the particular purpose is permissible with the consent of Council and a particular aim cannot be used as a sole basis for rejection of development application. (See s25(2) EPA Act 1979.
5. This conclusion becomes evident when one looks at other environmental planning instruments which by separate clause link the permissible development to the said objectives. My instructing Solicitor may be aware of some environmental planning instrument which direct that the Council is not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the objectives of the zone. In Dach v. Yarrolumla S.C. 79 LGRA 220 at 224 the Court considered such a provision in circumstances where the particular development was permissible with consent but arguably inconsistent with the objectives. The Court relevantly held that such a clause is a matter that "more pertinently should be taken into account where the Council is required to exercise its discretion whether or not to grant or refuse a consent. It is nevertheless important to understand what the objectives of the planning instrument are. The Court accepts that the construction of the Local Environment Plan should be given a practical outcome consistent with the reasonable interpretation. The approach should not be over-technical."

Similarly the NSW Court of Appeal decision of Coffs Harbour Environment Centre v. Coffs Harbour C.C. 74 LGRA 185 at 193 considered the reverse situation where the tables provided that a particular purpose was "prohibited" unless the Council was satisfied that the carrying out of the development is generally consistent with one or more of the objectives of this zone." The Court held that as a matter of proper construction it could not be interpreted to permit an "anti pathetic development".

6. In the present circumstances there are no express provisions within the Policy which attempt to direct the Council not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the aims. In my opinion it follows that the Council is not empowered to use the particular objective (2)(c)(iii) as a basis for blanket rejections of development which is otherwise permissible with consent.
7. On proper construction of clause 2(c)(iii) the sub-clause only has work to do where there is identified suffering or likely suffering from a decline in services due to rural population loss. If no such areas are identified, Council is empowered to disregard that aim and thereafter determine the application, having regard to other statutory provisions. Where such areas are not identified, the particular sub-clause cannot be used as a basis for blanket rejection of such development applications. This is not in contradiction to my opening remarks that the sub-clauses must be read conjunctively. In brief, they are all required to be read and if they have no work to do they may thereafter be disregarded.

It is clear that the Council is otherwise empowered to refuse a development application for Multiple Occupancy of Rural Land pursuant to the Policy if it is of the opinion that other statutory provisions are not satisfied. Such statutory provisions may include the remaining aims contained in clause 2 of the Policy.

8. For the sake of completeness, I advise my instructing Solicitor that in circumstances where the Council is of the opinion that there is no likelihood of rural population loss in its area, it could seek exclusion from application of the Policy.

I would be pleased to discuss any aspect of this advice with my instructing Solicitor should the need arise.

Yours faithfully,



GREG NEWPORT

SEPP-15 Extract

other facilities and any other relevant matter, the dwellings comprise a single household.

Relationship to other planning instruments

6. Subject to section 74(1) of the Act, in the event of an inconsistency between this Policy and another environmental planning instrument, whether made before, on or after the day on which this Policy takes effect, this Policy shall prevail to the extent of the inconsistency.

Multiple occupancy

7. (1) Notwithstanding any provision in an environmental planning instrument concerned with the use of land for the purposes only of a dwelling or dwellings (as the case may be) in rural or non-urban zones, development may, with the consent of the council, be carried out for the purposes of three or more dwellings on land to which this Policy applies within such a zone where -

- (a) the land comprises a single allotment not subdivided under the *Conveyancing Act 1919* or the *Strata Titles Act 1973*;
- (b) the land has an area of not less than ten hectares;
- (c) the height of any building on the land does not exceed eight metres;
- (d) not more than 25 per cent of the land consists of prime crop and pasture land;
- (e) the part of the land on which any dwelling is situated is not prime crop and pasture land;
- (f) the development is not carried out for the purposes of a motel, hotel, caravan park or any other type of holiday, tourist or weekend residential accommodation, except where development for such purposes is permissible under the provisions of another environmental planning instrument in the zone;
- (g) slopes in excess of 18 degrees do not occur on more than 80 per cent of the land; and
- (h) the aims and objectives of this Policy are met.

(2) The council may consent to an application made in pursuance of this clause for the carrying out of development whether or not it may consent to an application for the carrying out of that development pursuant to any other environmental planning instrument.

(3) Nothing in subclause (1)(b) shall be construed as authorising the subdivision of land for the purpose of carrying out development pursuant to this Policy.

Statement of aims, etc, in environmental planning instruments

25. (1) An environmental planning instrument shall state the aims, objectives, policies and strategies whereby that environmental planning instrument is designed to achieve any of the objects of this Act.

(2) Except as provided by subsection (3), a statement referred to in subsection (1) does not affect the construction or effect of any other provision of the environmental planning instrument in which the statement is made.

(3) Where a provision of an environmental planning instrument is genuinely capable of different interpretations, that interpretation which best meets the aims, objectives, policies and strategies stated in that instrument shall be preferred.

(4) A failure to comply in any respect with subsection (1) does not affect the validity, construction or effect of an environmental planning instrument.

(5) This section does not apply in the case of a deemed environmental planning instrument.

Defined at s 4: deemed environmental planning instrument; environmental planning.

Objects of this Act

See s 5.

SEPP No 10—Construction to promote state objectives of policy and reduce scope for avoidance. See *North Sydney MC v Lyenko & Assoc Pty Ltd* noted under cll 6, 7 and 8 of SEPP No 10.

S. 98 Appeal by objector within 28 days
of determination and S 95

Greg Newport

Widener Chambers
8th Floor
225 Macquarie Street
Sydney, N.S.W. 2000
Phone: 235-3033
Fax: 223-3515
DX 650 SYDNEY

-2-

19 November 1993

Messrs. I. G. Bondfield Riley & Fiford,
Solicitors,
DX 7712 LISMORE

Dear Sirs,

RE: ADVICE ON SEPP 15 MULTIPLE OCCUPANCY OF RURAL LAND
LISMORE COUNCIL

I refer to your letter of 3 November 1993, seeking my advice in respect of the proper construction of the aims, objectives, policies and strategies ("the aims") contained in clause 2 of the said Policy.

I advise as follows:

1. The aims of the Policy are specifically included to demonstrate what work the policy has to do. By this I mean that it assists the Council in understanding the subsequent statutory provisions and the proper construction to be applied to those provisions. That interpretation which best meets "the aims, objectives, policies and strategies stated in the Policy shall be preferred." (See s25(3) EPA Act 1979). The statutory provisions of s25 are, in effect, consistent with the common law "purposive approach" enunciated by the Courts (see Auckland Lai v. Warringah SC 58 LGRA 276).
2. Upon examination of clause 2 of the said Policy and as a matter of proper legal construction, the three subclauses must be read conjunctively. However, this does not, in my opinion, require that each of the said sub-clauses must be given equal weight in determining whether a particular development satisfies the said aims. In simple terms the consent authority is required to test the particular development forms against the complete aims and then form an opinion as to whether or not it satisfies those aims. Should the consent authority form the opinion that the objectives are not satisfied, it is clearly with power to refuse the application. In such circumstances a person dissatisfied may appeal (s.97 EPA Act) and by way of a hearing de novo the Court may overturn that decision. However, in such circumstances, the Court assumes the role of the Council and may adopt the same purposive approach.

On the other hand, should the Council approve development, after forming the opinion that the said aims are satisfied; such a decision of an administrative body may only be overturned where the Court is clearly shown that the Council's decision was not reasonably open to it and it was manifestly absurd or unreasonable. (See Minister v. Peko Wallsend 62 CLR 224).

3. I understand from the material contained in my Brief that the central focus is clause 2(c)(iii) of the Policy wherein the aim is expressed to relevantly be to facilitate development, preferably in a clustered style, to create opportunities for an increase in the rural population in areas which are suffering or likely to suffer from a decline in services due to rural population loss. Again, as I understand the concern of Council, it is of the opinion that there are very few areas where there is the likelihood of a decline in services due to rural population loss. Rather, the position is that the Council area is a relatively high growth area. In such circumstances is Council empowered to simply reject the applications because the area is not one where there is the likelihood of rural population loss?
4. I opine that the Council is not able to use the particular aim as a blanket reason for refusal of development applications for Multiple Occupancy of Rural Land. It must be recalled that the particular purpose is permissible with the consent of Council and a particular aim cannot be used as a sole basis for rejection of development application. (See s25(2) EPA Act 1979).
5. This conclusion becomes evident when one looks at other environmental planning instruments which by separate clause link the permissible development to the said objectives. My instructing Solicitor may be aware of some environmental planning instrument which direct that the Council is not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the objectives of the zone. In Dach v. Yarrowluma S.C. 79 LGRA 220 at 224 the Court considered such a provision in circumstances where the particular development was permissible with consent but arguably inconsistent with the objectives. The Court relevantly held that such a clause is a matter that "more pertinently should be taken into account where the Council is required to exercise its discretion whether or not to grant or refuse a consent. It is nevertheless important to understand what the objectives of the planning instrument are. The Court accepts that the construction of the Local Environment Plan should be given a practical outcome consistent with the reasonable interpretation. The approach should not be over-technical."

Similarly the NSW Court of Appeal decision of Coffs Harbour Environment Centre v. Coffs Harbour C.C. 74 LGRA 185 at 193 considered the reverse situation where the tables provided that a particular purpose was "prohibited" unless the Council was satisfied that the carrying out of the development is generally consistent with one or more of the objectives of this zone. The Court held that as a matter of proper construction it could not be interpreted to permit an "anti pathetic development".

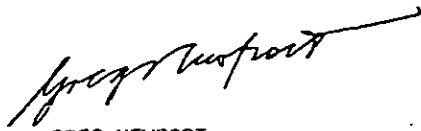
6. In the present circumstances there are no express provisions within the Policy which attempt to direct the Council not to grant consent unless it is of the opinion that the carrying out of the development is consistent with the aims. In my opinion it follows that the Council is not empowered to use the particular objective (2)(c)(iii) as a basis for blanket rejections of development which is otherwise permissible with consent.
7. On proper construction of clause 2(c)(iii) the sub-clause only has work to do where there is identified suffering or likely suffering from a decline in services due to rural population loss. If no such areas are identified, Council is empowered to disregard that aim and thereafter determine the application, having regard to other statutory provisions. Where such areas are not identified, the particular sub-clause cannot be used as a basis for blanket rejection of such development applications. This is not in contradiction to my opening remarks that the sub-clauses must be read conjunctively. In brief, they are all required to be read and if they have no work to do they may thereafter be disregarded.

It is clear that the Council is otherwise empowered to refuse a development application for Multiple Occupancy of Rural Land pursuant to the Policy if it is of the opinion that other statutory provisions are not satisfied. Such statutory provisions may include the remaining aims contained in clause 2 of the Policy.

8. For the sake of completeness, I advise my instructing Solicitor that in circumstances where the Council is of the opinion that there is no likelihood of rural population loss in its area, it could seek exclusion from application of the Policy.

I would be pleased to discuss any aspect of this advice with my instructing Solicitor should the need arise.

Yours faithfully,



GREG NEWPORT

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

Statement of aims, etc, in environmental planning instruments

25. (1) An environmental planning instrument shall state the aims, objectives, policies and strategies whereby that environmental planning instrument is designed to achieve any of the objects of this Act.

(2) Except as provided by subsection (3), a statement referred to in subsection (1) does not affect the construction or effect of any other provision of the environmental planning instrument in which the statement is made.

(3) Where a provision of an environmental planning instrument is genuinely capable of different interpretations, that interpretation which best meets the aims, objectives, policies and strategies stated in that instrument shall be preferred.

(4) A failure to comply in any respect with subsection (1) does not affect the validity, construction or effect of an environmental planning instrument.

(5) This section does not apply in the case of a deemed environmental planning instrument.

Defined at s 4: deemed environmental planning instrument; environmental planning.

Objects of this Act
Sec 5.

SEPP No 10—Construction to promote state objectives of policy and reduce scope for avoidance. See *North Sydney MC v Lyenko & Assoc Pty Ltd* noted under cl 6, 7 and 8 of SEPP No 10.

rest Graham

Environment & Development Services

Mr Juradowitch

June 16, 1993

NJ:CW:S/285

The Secretary
NSW Department of Planning
PO Box 6
GRAFTON NSW 2460

FILE COPY

Dear Sir,

**STATE ENVIRONMENTAL PLANNING POLICY NO 15
MULTIPLE OCCUPANCY AIMS & OBJECTIVES**

During the recent processing of a Multiple Occupancy Development Application, Council received a number of submissions raising the issue of compliance with the aims and objectives of State Environmental Planning Policy 15. A copy of these aims and objectives is attached.

It is Council's view that Multiple Occupancies should generally comply with the aims and objectives of the State Policy. Objectors have argued that Multiple Occupancy applications should meet all the aims and objectives of the Policy. Council is reviewing it's position and would appreciate receiving the Department's views on this matter.

The Department may wish to particularly consider Objective (c) (iii) which would appear to restrict Multiple Occupancies to areas in which they may create opportunities for an increase in the rural population, in areas which are suffering or are likely to suffer from a decline in services due to rural population loss. Very few localities in Lismore could be defined as static or in decline.

Yours faithfully

[Signature]
P T Muldoon
General Manager/Town Clerk

[Signature]

County of Drake
AND DISTRICT OF Grafton

Parish of Ogilvie
LAND BOARD DISTRICT OF Grafton

Occup License No.

Holding Eastern Division

56

~~Applied for and~~ ~~Section of the Land Board for the~~ ~~1923~~
R 55534 from Sale Notified 30.6.22

64 set 22.12.18. btr Hamilton Coking

Green Edge area under consideration for permanent disposal

Edge: R67904. for Public School. Not^d 23rd Sept. '38

in Edge J.H. Golding. Annual Lease 1923/3

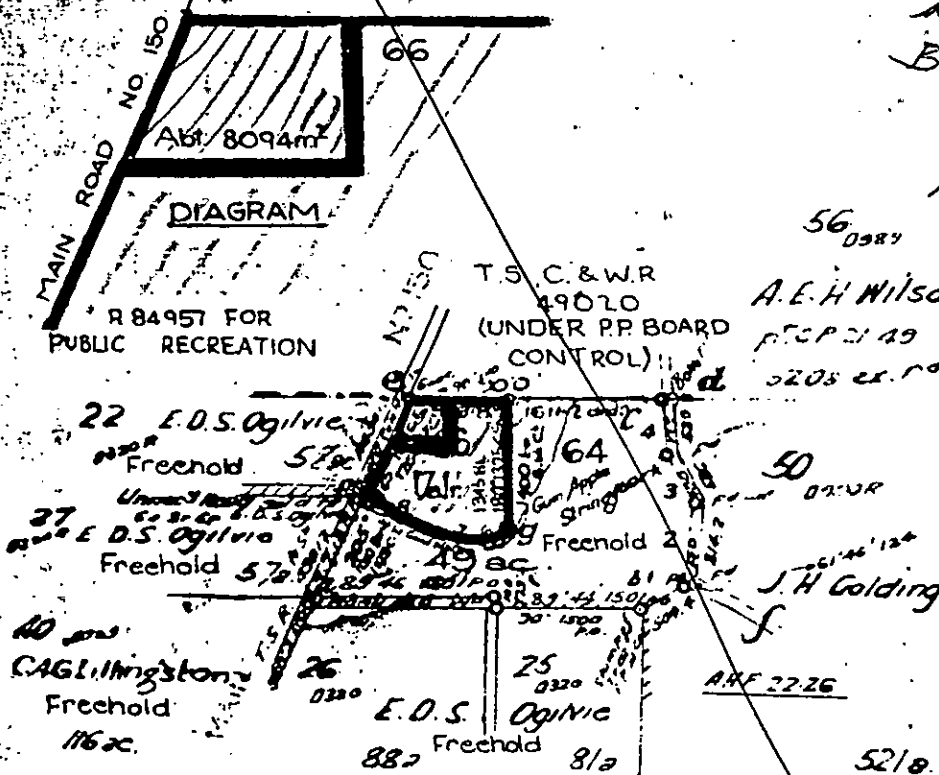
NC 75/13730

This divided site is
halfway between
Banyulgit & Takulam

Reservation recorded by
Lands Dept

56⁰⁵⁸⁹
A.E.H. Wilson

23/4/36



6A - 97150ac
6B - 02650ac
from P.P. 50

12 Hous 41.62

to Corners

for 64 acres owned by Sir J. G. Lindsay LB³/177 FB⁴ 1932
Plan re approved
Portion 6A for 49 acres } Sale R⁴ D. 97/61.4
Portion 6B for 17ac. 1r }

A. E. Harris
Actg Officer in Charge 27th Jan 31

5th Jan 23

Reference to

m 116 - 64 po.

116 - 50 64 po.

116 - 62.8 64

116 - 38.5 50 66

116 - 143 64 66

116 - 79 66

116 - 52 64 66

1 63 51 - 504 7

2 8 00 - 853 3

3 332 19 - 573 1

4 354 08 - 553 4

5 201 39 - 218 0

6 248 57 - 128 2

7 287 12 - 511 1

J. W. Close

22nd Jan 23

C. H. 21st March 1923

C. A. F. Middleton 21st March 1923

A. E. Harris 21st March 1923



Department of Planning

NORTHERN REGIONAL OFFICE

The General Manager
Lismore City Council
PO Box 23A
LISMORE NSW 2480

LISMORE CITY COUNCIL RECEIVED 15 JUL 1993	
FILE NO.	
LETTER NO.	ALLOC.

N.S.W. Government Offices
49 Victoria Street,
Grafton 2460
P.O. Box 6, Grafton 2460

Telephone : (066) 42 0622 Ext:

Fax No. : (066) 42 0640

Contact : Claire Aman

Our Reference : G93/00130 CA:DT

Your Reference : NJ: CW: S/285

15 JUL 1993

Dear Sir,

STATE ENVIRONMENTAL PLANNING POLICY NO. 15 - MULTIPLE OCCUPANCY
AIMS AND OBJECTIVES

I refer to your letter in which the views of the Department are sought with regard to interpretation of the aims and objectives of State Environmental Planning Policy (SEPP) No. 15.

2. The aims and objectives contained in clause 2 of the policy should be read conjunctively, as indicated by the penultimate use of "and". Multiple occupancy developments should therefore be consistent with all of the aims and objectives of the policy.

3. With regard to the Council's assessment of objective (c)(iii), the Department concurs with the view that such an objective is not highly applicable in the Lismore area.

4. The Council may find after further analysis of the capacity of SEPP 15 to address multiple occupancy needs in Lismore, that those needs are best accommodated through an amendment to Lismore LEP 1992. Such an amendment could reflect Lismore's particular land capabilities and servicing capacities.

5. I hope this information is of assistance.

Yours faithfully,

Malcolm Imrie
Deputy Manager
(Northern Regions)

1 from Sale Notified 30.6.22

2/18 John Hamilton Golding

the area under consideration for permanent disposal

04 for Public School Notd 23rd Sept. '38

Golding. Annual Lease 1923/3

NC 75/13

This donated a
halfway between
Banyulgel & T.

Reservation
Lands De

56
0989

A. E. H. Wilson

PTCP 21.49

520s ex. rd

R/84957 FOR
C RECREATION

T.S.C. & W.R
49020
(UNDER P.P. BOARD
CONTROL)

2 E.D.S. Ogilvie

Freehold 57ac

Unincorporated

E.D.S. Ogilvie

Freehold 57ac

Kingston

hold

ac.

E.D.S. Ogilvie

Freehold 88.2

8/2

50

09.00

J. H. Golding

A.H.F. 22.26

521.8 ex. rd

92150ac

09250ac

For 50

41.62

for 64 measured by Sir I G Lindsay LB 1977
Plan re-approved
Portion 64 for 49 acres } Calc B^KD
Portion 66 for 17ac. 1r.

A. E. Harris

Actg. Officer in Charge 27



Department of Planning

NORTHERN REGIONAL OFFICE

The General Manager
Lismore City Council
PO Box 23A
LISMORE NSW 2480

LISMORE CITY COUNCIL RECEIVED 15 JUL 1993	
FILE NO.	
LETTER NO.	ALLOC.

N.S.W. Government Offices
49 Victoria Street,
Grafton 2460
P.O. Box 6, Grafton 2460
Telephone : (066) 42 0622 Ext:
Fax No. : (066) 42 0640

Contact : Claire Aman
Our Reference : G93/00130 CA:DT
Your Reference : NJ:CW: S/285

15 JUL 1993

Dear Sir,

STATE ENVIRONMENTAL PLANNING POLICY NO. 15 - MULTIPLE OCCUPANCY
AIMS AND OBJECTIVES

I refer to your letter in which the views of the Department are sought with regard to interpretation of the aims and objectives of State Environmental Planning Policy (SEPP) No. 15.

2. The aims and objectives contained in clause 2 of the policy should be read conjunctively, as indicated by the penultimate use of "and". Multiple occupancy developments should therefore be consistent with all of the aims and objectives of the policy.

3. With regard to the Council's assessment of objective (c)(iii), the Department concurs with the view that such an objective is not highly applicable in the Lismore area.

4. The Council may find after further analysis of the capacity of SEPP 15 to address multiple occupancy needs in Lismore, that those needs are best accommodated through an amendment to Lismore LEP 1992. Such an amendment could reflect Lismore's particular land capabilities and servicing capacities.

5. I hope this information is of assistance.

Yours faithfully,

Malcolm Imrie
Deputy Manager
(Northern Regions)

Environment & Development Services

Mr Juradowitch

June 16, 1993

NJ:CW:S/285

The Secretary
NSW Department of Planning
PO Box 6
GRAFTON NSW 2460

FILE COPY

Dear Sir,


**STATE ENVIRONMENTAL PLANNING POLICY NO 15
MULTIPLE OCCUPANCY AIMS & OBJECTIVES**

During the recent processing of a Multiple Occupancy Development Application, Council received a number of submissions raising the issue of compliance with the aims and objectives of State Environmental Planning Policy 15. A copy of these aims and objectives is attached.

It is Council's view that Multiple Occupancies should generally comply with the aims and objectives of the State Policy. Objectors have argued that Multiple Occupancy applications should meet all the aims and objectives of the Policy. Council is reviewing it's position and would appreciate receiving the Department's views on this matter.

The Department may wish to particularly consider Objective (c) (iii) which would appear to restrict Multiple Occupancies to areas in which they may create opportunities for an increase in the rural population, in areas which are suffering or are likely to suffer from a decline in services due to rural population loss. Very few localities in Lismore could be defined as static or in decline.

Yours faithfully


P T Muldoon
General Manager/Town Clerk

I. G. BONDFIELD, RILEY & FIFORD
SOLICITORS & NOTARY

FAXED
3/6/93

JACK RILEY
N. J. FIFORD
DAVID M. RILEY
MATTHEW J. RILEY

P.O. BOX 165, LISMORE, 2480
FACSIMILE (066) 21 9059
DX 7712 LISMORE

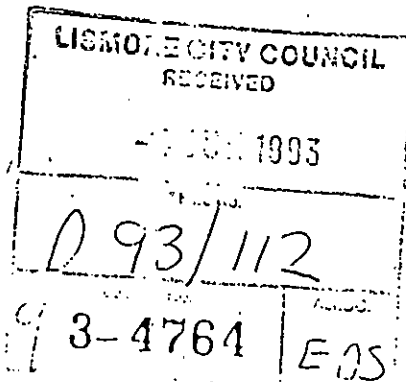
15 MOLESWORTH STREET, MS
LISMORE, N.S.W. 2480
TELEPHONE (066) 21 9000

OUR REF. MR:MI

YOUR REF. Attention: Mr. Scott

3 June, 1993

The General Manager/Town Clerk,
Lismore City Council,
DX 7761 LISMORE



Dear Sir,

RE: MULTIPLE OCCUPANCY DEVELOPMENT - LOT 41 D.P. 802597
- 136 DAVIS ROAD, WIGGILL

We refer to your letter of 18th instant and the writer's subsequent telephone discussions with your Mr. Scott.

We advise we have perused the material you have supplied to us including material received from the applicant after lodging the development application.

The writer has also discussed the matter with Mr. Newport of Counsel.

We advise that Council after proper consideration of the material supplied to it should form an opinion as to whether all the objectives comprised in SEPP 15 Clause 2 are able to be met. If Council is of the opinion that the aims and objectives comprised in Clause 2 of SEPP 15 can be met then Council may approve the development application so far as it satisfies the aims and objectives. Council's decision with respect to this aspect can only be set aside on appeal.

We do not believe that the application and material subsequently supplied to Council is sufficient for Council to form the view that the development would constitute a subdivision within the meaning of the Environmental Planning and Assessment Act nor the Local Government Act.

The proposed home improvement area of 10,000m2 in the application is clearly outside the definition of "home improvement area" under SEPP 15 Clause 5(1). The application of SEPP 1 regarding flexibility in the application of planning controls cannot be used to circumvent the definition of "home improvement area" in

Page 2
3 June, 1993
Lismore City Council,
RE: MULTIPLE OCCUPANCY DEVELOPMENT - LOT 41 D.P. 802597
- 136 DAVIS ROAD, JIGGI

Clause 5(1) of SEPP 15. We refer to Woollahra Municipal Council -v- Carr 62 LGRA at 263. This case is authority for the proposition that SEPP No. 1 cannot be used to vary a definition in a planning policy. Therefore, clearly the proposal for a "home improvement area" to exceed 5,000m2 is not permissible under SEPP 15 and Council has no power to approve the development in this regard.

We enclose copies of the relevant Certificates of Title which indicates that both parcels of land are currently owned by the same proprietors as tenants-in-common. From perusing these Certificates of Title alone we do not suggest that any inference can be drawn to indicate that the applicant is unable to comply with the provisions of Clause 2(b)(i) of SEPP 15.

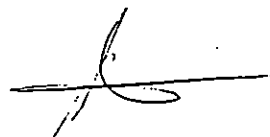
Council should note that it is not strictly necessary to place every reason for refusal of the development application in its Notice of Ground of Refusal to the applicant. If the applicant appeals, the hearing is a de novo hearing in which Council can raise further issues. Council should however be aware that if it believes that it does not have sufficient information in proper form before it to enable it to properly consider the application pursuant to the provisions of Environmental Planning and Assessment Act it should expressly indicate this fact as one of the reasons for refusal of the application. If Council does not expressly indicate this ground as a ground for refusal then on appeal Council may be precluded from arguing that it did not have sufficient information before it at the time it considered the application.

Council is also probably aware that it cannot grant a development consent subject to certain aspects being clarified at a later time. We refer Council to the case of Jungar Holdings Pty. Limited -v- Eurobodalla Shire Council and Ors. 70 LGRA at 79.

We believe this answers the questions raised by Council. Please telephone the writer if you have any further queries or questions regarding the matter.

Yours faithfully,
I.G. BONDFIELD, RILEY & FIFORD

Per:
Encl.



Call for freeze on multiple occupancy

Chairman of the Nimbin Ratepayers' and Progress Association Mr Don Johnston has called for a freeze on new multiple occupancy developments in the Lismore City Council area.

Mr Johnston said many multiple occupancies, some dating back to the early 1970s, still had not met council conditions and this needed to be rectified before new developments were approved.

Other residents also are concerned about the entrepreneurial push into multiple occupancy development, with agents advertising and selling land-shares, which the residents say abandons the original intent of the communities.

Multiple occupancy developments emerged after the Nimbin Aquarius festival of 1973. They were later authorised under legislation proposed by former Labour State Minister for Planning, Paul Landa, prior to the Environmental Planning and Assessment Act of 1980. They were seen as a viable way of providing accommodation for low-income earners who lived on shared land with like-minded people.

A former Lismore Alderman, Mr Johnston believes there is a place for multiple occupancy style development but is worried by the encroachment onto prime farm land.

He was a vocal objector to a recent development application at Nimbin Rocks which he had claimed exceeded the 25 percent prime agricultural land limit. It was later determined that the limit was not exceeded.

"I'm not against multi-

ple occupancies, but I am against them not abiding by the conditions, set down," Mr Johnston said.

"There are up to 60 in the Lismore area and some the council probably doesn't know about."

A shareholder on the Dingo Ridge community north of Nimbin, Ms Robyn Scott, agrees there should be a halt to new developments until all those already established have attempted to meet council conditions.

She also is concerned by the way many shares are sold to outsiders who do not hold the community vision of original settlers and who are incompatible with the isolated lifestyle.

"We had to change our constitution to stop the constant selling of shares which often led to abuses of the rights of existing owners," Ms Scott said.

"There must be a strong level of commitment between share holders or problems will occur."

Lismore chief planner Mr Nick Juradowitch said the council this year aimed to draw up a development control plan with stricter guidelines for multiple occupancies.

Mr Juradowitch said the plan would reflect local circumstances and community standards and the council would seek community input.

Mr Juradowitch said there was concern that once the communities were established some did not abide by development conditions and the council did not have the resources to fully monitor the situation.

He said three to four new multiple occupancies were approved each year.

NORTHERN STAR, SATURDAY, AUGUST 7, 1993. p62

Some time ago, the Lismore City Council decided to undertake a multiple occupancy review.

As a result, submissions were invited from any interested parties.

The council then invited those who had made submissions to a workshop on July 22.

Between 40 and 50 people attended, including councillors, staff and representatives of the Department of Planning, Agriculture Department, Water Resources and CALM.

The workshop was split into seven discussion groups and all aspects of existing multiple occupancy policies were debated.

This workshop and subsequent council decisions and regulations will shape the future for rural de-

Ratepayers' Corner

● A column by the Lismore and District United Ratepayers' Association

achieve a rural development policy that will serve ALL rural industry and residents.

If this means pressuring State and Federal governments for change then so be it.

It would seem a number of aspects of multiple occupancy policy are creating considerable concern for rural residents.

These include the provision of adequate water supply, inequitable rating and charges, the inability to

secure individual land title, with the resultant difficulty in financing or selling a multiple occupancy share.

However the greatest problem, as we see it, is on-site effluent disposal, and this applies to rural villages and rural properties, as well as multiple occupancies.

Until septic or alternate systems can be upgraded and/or monitored to the point where the dangers of river and catchment pollution have passed, the council should be loath to even consider any further expansion of the problem.

The Beard report certainly indicates there are major problems with septic and our water systems.

The workshop gave council planners many suggestions and we hope these are incorporated in a list of

options that will be presented to the community for further comment.

The council should not take the easy way out of just trying to relax regulations.

This may be tempting but it would not alter the present invidious situation where the council is faced with a no-win situation every time a multiple occupancy development application is lodged.

The council has the chance to achieve a fair and workable rural development policy, and should make the best of the opportunity.

The next meeting and the Lismore and District United Ratepayers' Association is August 25 at the Lismore Workers Club at 7.30pm. For more information contact Wayne Gregory or John Bertoli.