

EXTRACT FROM MINUTES OF THE ORDINARY MEETING OF KEMPSEY SHIRE COUNCIL

9TH JUNE 2009

RESOLUTION COMPLETED

DIRECTOR SUSTAINABLE DEVELOPMENT SERVICES REPORT

DSDS5

SECTION 82A REVIEW OF DETERMINATION

FILE: T6-07-76 PJC

{Folio No. 400762}

SUMMARY:

Reporting that additional information has been lodged for a section 82A Review of determination for the continued use of a dwelling at 154 Hughes Access, Collombatti.

SECTION 375A OF LOCAL GOVERNMENT ACT REQUIRES THAT A DIVISION BE CALLED IN RESPECT TO THIS REPORT

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Applicant: DEX Consulting Pty Ltd
Subject Property: Lot 7 DP1004018, 154 Hughes Access, Collombatti
Zone: Zone No. 1(a3)(Rural "A3" Agricultural Protection Zone).

DESCRIPTION:

Council at its meeting of 7th April 2009 considered an application made under section 82A of the *Environmental Planning and Assessment Act 1979* to review the determination of Development Approval No. T6-07-76 for the continued use of a dwelling at 154 Hughes Access, Collombatti. The application requested the condition of consent requiring the payment of section 94 contributions be deleted from the consent on the basis that the dwelling either has an existing approval or enjoys existing use rights, Council made the following resolution:

"That this matter be deferred for one month to allow the applicant to prove existing use rights."

Council files were made available to the applicant who has lodged additional information through correspondence to Councillors dated 28th April 2009.

[\(Appendix E – Page G36\)](#)

To assist in understanding the history of development which has occurred over the subject lands plans have been prepared which provide details of dwelling and subdivision (boundary adjustment) approvals [\(Appendix F – Page G42\)](#)

1. DEVELOPMENT APPROVALS:

Issue 1:

The 1985 Topographic Mapping Series field version dates to 1984 and incorporates 1980 aerial photographic information.

Comment:

This statement is agreed.

Issue 2:

The 1985 Topographic Map shows 2 buildings on Lot 7 DP1004018 one on Lot 6 DP1004018 and no building on portion 21 or 22 (now lots 201 and 202 DP707918).

Comment:

Whilst two (2) buildings are indicated, neither building is on the location of the subject dwelling.

Issue 3:

Correspondence claims old dwelling located on Lot 7 DP1004018 was rebuilt in 1981.

Comment:

The 1969 Topographic Mapping Series 1:25000 using 1969 aerial photography and field information shows the only existing buildings on portion 7 and none on the remaining lots in the existing holding (Portions 20, 21 and lot 1). Even if the buildings were the original homestead they were not located in the location of the subject dwelling and another dwelling currently exists in the location indicated on the topographic map.

Issue 4:

Timber dwelling completed 1986 by builder Noel Morley.

Comment:

No proof, or Statutory Declaration (with accompanying supporting information) has been provided and the applicant has been advised previously that DA approval was required since April 1981. If the dwelling was erected in 1986, no development consent was obtained as required.

Issue 5:

How can 2 dwellings be approved on Lot 202 DP707918 within one year?

Comment:

Only one dwelling approval was issued by Council specifically for Lot 202 DP707918. The 1981 approval was issued for the existing holding (Portion 7, 20 & 21) whilst the 1982 approval was issued solely for portion 20 now Lot 202 DP707918.

Issue 6:

Where are the dwellings on lot 202 DP707918 (previously portion 20), there is only one?

Comment:

Council has no record to confirm either commencement, and or completion of these dwellings nor has there been any information lodged by the applicant in support that council could act on. In any event this is not relevant of Council's considerations as the subject dwelling does not relate to Lot 202.

Issue 7:

The dwelling approved in 1984 was actually on former lot 7 and is the current dwelling of Mr Pratt.

Comment:

The 1984 development approval (1984 / 3) for a dwelling was for Portion 21 only (now lot 201 DP707918). The applicant owner was Harrison and the new owner since 2003 is Frederick. This application clearly relates to Lot 201 DP707918 and not Lot 7 DP1004018.

Issue 8:

There is an existing dwelling on lot 6 DP 1004018 (previously lot 1 DP190813).

Comment:

Council established on 14th March 1994 that there was an "existing use of a dwelling" constructed prior to 1969 on Lot 6 DP190813. Again this is not relevant to the subject dwelling.

Issue 9:

Council has a record of the approval for 3 dwellings plus original dwelling on Lot 1. The aerial photographs associated with topographic maps support this.

Comment:

Agreed, three (3) approvals for dwellings exist and are associated with portions 7, 20 and 21. However, approvals are associated with land parcel old portions 7, 20 and 21 (existing holding) whilst the remaining approvals are associated with single portions 20 and 21 only and do not relate to the site of the subject dwelling.

Issue 10:

If Council was concerned about the legality of the dwelling why not ask for details at subdivision stage.

Comment:

This application was for a boundary adjustment not an application to establish a dwelling entitlement.

Issue 11:

The applicant's Consultant states "that no new dwelling entitlement is being created in this case, as the dwelling exists and was approved in 1984."

Comment:

The development approval issued by Council in 1984 (1984 / 03) was to establish a dwelling on Lot 201 DP707918 (old portion 21) for a Mr Harrison. The current owner is Mr Frederick. There is no link between this 1984 application and the existing dwelling on Lot 7 DP1004018.

Conclusion:

It is apparent that Portion 7 now lot 7 DP1004018 has never had a dwelling entitlement nor has the applicant demonstrated that an existing use exists for the dwelling. Therefore S94 Rural Roads Contribution Plan and the Outdoor Recreation Contributions Plan apply.

2. SECTION 94 CONTRIBUTIONS**Issue 1:**

No work maps, plans or work schedules appended to the contribution plan required by regulation 27(1[h]) including council costs of works and staging.

Comment:

The plan states at 1.4 that the plan applies to all rural development in the Shire. While a map is not included, it is reasonable to assume the meaning of the statement describes the contribution catchment area sufficiently.

Works schedules and maps are only intended to provide sufficient information on intended works. There is however no prescribed form these should take in either the Act or Regulation. Therefore if sufficient information is provided in other forms or methods, that information is valid.

The Court has also held that the development of detailed works schedules for rural roads is unnecessarily given the unpredictable nature of development in large rural shires. Research has indicated many Shires are in a similar position to Kempsey with regard to a Rural Road CP, in that a detailed schedule of work is not available.

Issue 2:

Calculation re Collombatti Road and no calculation on Upper Collombatti Road.

Comment:

Calculations were provided for Collombatti Road from the Pacific Highway to Hughes Access. The 2001 calculations are from Pacific Highway to Wahroonga Place to Upper Collombatti Road then to Bilbo Place then in 2004 to Hughes Access.

Upper Collombatti Road is not in the calculation it is separate and not applicable to this development.

Issue 3:

The May 2000 Contribution Plan for Rural Roads is outdated.

Comment:

Council's Section 94 Planner is currently preparing a replacement Rural Roads Contribution Plan for 2009 release however the current CP sufficiently demonstrates the case to demand a contribution for road works, and clearly outlines the type of works to be undertaken (Section 3) and the process by which contributions are determined (section 4).

Issue 4:

How could a dwelling that has been in existence for 20 years now generate traffic and require road upgrading? Council should waive the contribution.

Comment:

The Land and Environment Court has consistent held that there is no power under the EP & A Act to issue a consent retrospectively. Therefore the consent relates to the continue use of the dwelling which must comply with current requirements. Council has the discretion not to charge in accordance with its CP, however it would be difficult to refuse requests to refund contributions paid by others in similar circumstances. This would also encourage people to erect dwellings illegally and Council would be creating an undesirable precedent.

RECOMMENDATION IMPLICATIONS:

- ***Environmental***

Nil

- ***Social***

Nil

- ***Economic (Financial)***

Nil

- ***Policy or Statutory***

Nil

- *Director's Review*

As stated, the onus is on the applicant to establish existing use rights or that valid approval was granted.

- The applicant has failed to demonstrate that the dwelling enjoys existing use rights;
- No approval has been granted which authorised the dwelling; and,
- As consent is required which is retrospective, Council's policy requires payment of a road contribution.

Director Sustainable Development Services recommendation:

- A. That the application to review Development Consent No. T6-07-76 to delete condition no. 8 be declined.
- B. That condition of consent no. 8 of Development Consent No. T6-07-76 be varied to read as follows:

Contribution to be paid towards provision or improvement of amenities or services within three (3) months from the date of this determination.

The particulars of the contributions levied pursuant to Section 94 of the Act are set out in the following table:

The specific public amenity or service in respect of which the condition is imposed.	The contributions plan under which the condition is imposed	Date of contributions plan
Rural Roads	Rural Roads Developer	May 2000
Open Space	Section 94 Contribution for Outdoor Recreation	Sep 2001

The above plans may be viewed during office hours at the Council Customer First Centre located at 22 Tozer Street West Kempsey.

The following contributions are current at the date of this consent. The contributions payable will be adjusted in accordance with the relevant plan and the amount payable will be calculated on the basis of the contribution rates that are applicable at the time of payment. The contribution rates for specific dates are available from Council offices during office hours. Payments will only be accepted by cash or bank cheque.

Schedule of Contributions pursuant to Section 94 of the Environmental Planning and Assessment Act 1979.

Public amenity or service	Unit type	No. of Units	Contribution Rate (Amount per Unit)	Contribution Levied	Date until which Contribution rate is applicable
Arterial Road (Collombati Road)	ET	1	\$9,836	\$9,836.00	30.6.09

Catchment Access Road (Hughes Access)	ET	1	\$2542	\$2,542.00	20.6.09
Outdoor Recreation	ET	1	\$441	\$441.00	20.6.09
TOTAL				\$12,819.00	

C. That the applicant be advised that Council is prepared to consider further representations in respect a mutually agreeable schedule of payments to reduce the financial burden.

MOVED:

*Moved: Cl. Green
Seconded: Cl. Walker*

That the Director Sustainable Development Services recommendation be adopted.

An AMENDMENT was MOVED:

*Moved: Cl. Saul
Seconded: Cl. Sproule*

That this item be listed for a works inspection.

2009. 391 The AMENDMENT was PUT to the MEETING and was CARRIED, became the MOTION and was CARRIED.

A Division on this decision resulted in the following votes.

F = Voted For
A = Voted Against

Bowell	F	Campbell	F	Green	F	Hayes	F	Saul	F	Snowsill	F
Sproule	F	Walker	F								

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28th April 2009

Ref: 438

General Manager & Councillors
 Kempsey Shire Council
 P.O. Box 78
 West Kempsey, NSW 2440

Dear Councillors,

**Re: T6-07-76, Dwelling Entitlement For Lot 7, DP1004018, 154 Hughes Access,
 Collombatti for Mr Colin Pratt.**

At the Council Meeting of 7th April, 2009 (DSDS 13), it was resolved that this matter be deferred for one month to allow research into relevant building approvals and other aspects.

I thank Council for the opportunity to carry out some research into this matter. Contrary to comments at the Council Meeting, it has not been possible to investigate the dwelling approval details until this time as the required records were not made available. Mr Pratt has been trying to gain this information from Council since February, 2007 when he was first advised Council had no record of his home approval. Despite even personal appeals to some Councillors he has not been given much help. The EP & A Act may place the onus of proof on the applicant, but it does not prevent some assistance or reasonable information being given. Research has also been hampered by the passage of time and the movement, illness or death of some of those involved since 1981.

The Report to Council Meeting of 7th April (DSDS 13) had a few anomalies:-

- I have been unable to find a copy of a topographical map dated 1981, but I have found one dated 1985, and it states it is based on aerial photography taken in 1980. The relevant date is 3rd April, 1981 so any map based on earlier photography is irrelevant.
- The 1985 topo map does show 3 buildings in the area – 2 on lot 7 and 1 on lot 1, DP 190813. There are no buildings shown on Portions 20 or 21 at that time (1985). Local

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knowledge is that the original old dwelling on Por 7 was south of the access track but was rebuilt in 1981 in its present position on top of the hill north of the track. The current dwelling on Lot 6 is a converted shed.

- According to the Report, Council records suggest:-
 - 1 dwelling, which was of “brick construction on a concrete slab”, was approved on 23-6-1981, without a locality plan. The report suggests this is now on Lot 202 (which was Portion 20). [It appears this dwelling is now actually on Lot 201.]
 - another dwelling was approved in 1982 and is said to be also on Lot 202,
 - and another was approved in 1984 on Lot 201 (former Por 21).

•) It is difficult to see how there could be 2 dwellings approved on Lot 202 within one year. How could this be? Was one a workers dwelling? There is only 1 dwelling on the property now? Was one of these approvals actually for current Lot 7? The lack of locality plans, inspections & details certainly leaves plenty of room for error in Council records.

•) If the dwelling approved in 1981 was actually the brick dwelling on current Lot 201 as it appears, where are the 2 dwellings on current Lot 202 (there is only 1)?

•) It appears the dwelling approved in 1984 and said to be on Lot 201, was actually on former Lot 7 and is the current dwelling of Mr Pratt. This new dwelling on the crest of a hill replaced an older dwelling to the south of the access track but also on Lot 7.

•) There was also always an old existing dwelling on Lot 6 (which was Lot 1, DP 190813).

- Research and discussion with local “old hands” confirms that prior to 1981 there were 2 dwellings on the existing holding as shown on the earliest topographic map.
- Therefore Council has records of the approval of three additional dwellings, plus the original dwelling on Lot 1. The current topographic map, aerial photos and inspection shows 4 dwellings in the area. Therefore all the current dwellings have approval, 3 by explicit Council approval and one as an existing dwelling prior to 1981.
- I have located the builder of Mr Pratt’s house, Mr Noel Morley. Mr Morley was engaged by the then owner Ian Ward, to complete the dwelling after a “Settler Cottage” kit was purchased and delivered to the site. Mr Morley recalls that the dwelling he completed in 1986, was intended to replace an older dwelling already on the property. The new building approval was granted by Council in the manner of the day, which was to approve a “cross on a map” with very limited details of the actual building or plans. The building was not required to be inspected by Council during construction or after completion.

- The report to Council of 7th April states that when the boundary adjustment was submitted in 1995, no dwelling was applied for. That is hardly surprising as the dwelling was already there and had been for 10 years. If Council were concerned about the legality of the dwelling, why not ask for details of it then, prior to the boundary adjustment?
- The application for boundary adjustment of 1995 has several notifications that there was an existing dwelling on each proposed lot, including Council's Planner Mathew Lynch.
- The application for boundary adjustment prepared by Registered Surveyor, Phillip Smith stated "*the existing farm house on Lot 1 (now lot 6) is built over existing boundary into Lot 7. Existing barn and stables adjacent to farm house are on Lot 7. New building built 1986 and on Lot 7 away from barn and stables.*" This clearly indicates that there were 2 dwellings in existence in 1995 when the boundary adjustment was submitted.
- One reason the subdivision was approved in 1996 was that there were 2 existing dwellings and no possible new dwellings or entitlements and no increased road traffic or impact.
- If any contributions were payable, they should have been as part of the consent for the boundary adjustment in 1996, but they were not as staff at that time recognised the 2 existing dwellings were acceptable and approved.
- The report says that the Sect 94 Plan allows for contributions to be levied in instances where a new dwelling entitlement is being created. Clearly no new dwelling entitlement is being created in this case, as the dwelling exists and was approved in 1984.

With regard to the road contributions, the Sect 94 Plan which is being used appears invalid:-

- There are no maps, plans or work schedules attached or included in the document as required by Reg 27 (1(h)) to indicate the specific amenities or services to be provided by Council, including costs of scheduled work and staging.
- Although I requested the details of work schedules, staging, maps, etc immediately after the April meeting, no information was provided until 29th April and I can only presume that the actual details do not exist as required by the Act.
- The calculations provided for Collombatti Rd are dated 13th May, 2004, for a 1km upgrade length in a distance of 6.23km between Bilbo Lane and Upper Collombatti Rd. I have been unable to locate Upper Collombatti Rd. Collombatti Rd is bitumen sealed for 1.8 km past Bilbo Lane, and Hughes Access is only another 1.8km further west.

- ① The calculations show a future development potential of only 4 lots, which pushes the rate per lot or dwelling up. There would appear to be much more than 4 existing lots between the end of existing bitumen and Chain of Ponds Rd, with areas above 80 ha and therefore subdividable, as well as existing holdings without dwellings, etc.
- ① The distances, number of lots and calculations are obviously in error.
- ① Council staff have suggested it is *"too onerous for a Council to provide a full itemised works schedule for rural roads given development can occur on a random basis."* That is not correct, as all other rural Council have proper current & transparent Sect 94 Rural Road Plans. In fact many rural Councils do not charge for individual new rural dwellings or lots, but only for extractive operations or developments with demonstrable traffic impact, as the benefits of increased rate income far outweighs the minimal and debatable contributions which are inequitable.
- ① Priorities for expenditure as required by Reg 27 (1(i)) are not shown in the current Sect 94 Plan.
- ① The Plan was apparently prepared in May 2000 and refers to several outdated documents, such as the 1997 Contributions Manual. There have been many major changes to Sect 94 since 1997 by the Dept of Planning which are not addressed.
- ① The Plan states it will be regularly monitored and updated, but clearly it has not been. The EP & A Act and Regs require updating and review at intervals of about 5 years. Dept Practice Notes state Plans should be reviewed at least every 5 years.
- ① The Plan refers to use of funds for "maintenance" which is expressly prohibited by Planning directions. Funds can only be spent on "capital" work not maintenance.
- ① The latest dwelling & population figures in the Plan are for 1997.
- ① The Plan states that all residential development should be served by a sealed road to reduce future maintenance costs for Council. It is unthinkable, and I believe not in Councils Road Strategy that bitumen will ever be extended the 5 km to the Collombatti Hall and certainly not down Hughes Access.
- ① It is not possible to calculate any contributions as there are no maps, costings or work schedule which is against Planning directions.
- ① There is therefore no "transparency" in the Plan as calculations cannot be made from it.
- ① The report states the Plan is available at the Customer First Centre, but it isn't. It is not on Councils Web Page either, which is against Planning directions.

- ① It is impossible to see how this dwelling, which has existed for at least 20 years could now generate traffic which would require upgrading of the access roads at a cost of \$12,378.
- ① Since February 1st, 2009 the maximum contribution Council can require for a dwelling is \$20,000, yet Mr Pratt has been levied almost \$13,000 for his 20 year old house.
- ① The Plan does permit (sect 3.1) a lesser standard of road in some circumstances where development potential is insignificant and this seems appropriate here.
- ① The Regs state that contributions may be disallowed or amended by the Court on appeal because it is **unreasonable in the particular circumstances of that case**, even if it was determined in accordance with the relevant contributions plan (or direction).
- ① 94 (2) A condition referred to in subsection (1) may be imposed only to require a **reasonable dedication or contribution for the provision, extension or augmentation** of the public amenities and public services concerned.
- ① It is certainly not REASONABLE to require such a large and nebulous contribution 28 years after the dwelling was approved.
- ① (6) If a consent authority proposes to impose a condition in accordance with subsection (1) or (3) in respect of development, the consent authority must take into consideration any land, money or other material public benefit that the applicant has elsewhere dedicated or provided free of cost within the area (or any adjoining area) or previously paid to the consent authority.
- ① As pointed out, Mr Pratt and previous owners have paid residential rates on the property for many years at an average of about \$320 per year. Over 28 years this amounts to \$8960.
- ① A reasonable outcome in the circumstances would be to waive the contribution for Collombatti Road and retain the others amounting to about \$3000.

The report states that Mr Pratt should pay the contribution within 3 months, but what if he is unable to? Will Council require him to demolish the house or lock him out? That would require a lengthy and costly legal process for what purpose? It would seem sensible to reduce the required contribution to a reasonable amount, which Council may get, rather than prolong the matter and not get any money.

There would be no precedent set unless someone else has exactly the same set of circumstances, ie an existing dwelling, 28 years old, with vague Council approval on an approved subdivision, for which Council overlooked the need for a dwelling entitlement.

Mr Pratt has already been required by Council to prepare plans of his house, submit an additional SEPP 1 application, bushfire assessment and other matters for an existing dwelling approved in 1984 and again as part of the 1996 boundary adjustment. I cannot see why Mr Pratt should be required to pay road contributions after all this time?

Mr Pratt bought the property in 2002 and although he has only limited records of the purchase, he does have a letter from Council dated 16th April, 2002, indicating that there were no noxious weed notices outstanding on the property. Presumably his Solicitor and the vendor's Solicitor made the usual enquiries of Council regarding the property at that time. If that was the case or at least when ownership was transferred, why didn't Council indicate then (in 2002) that the existing dwelling was not approved? The previous owners, W & J Maycock (who now live in Ireland) could then have clarified the situation.

On behalf of Mr Pratt, I request Council to reconsider the matter in accordance with Section 82A of the EP & A Act with a view to deleting or reducing the very onerous requirement for road contributions.

Yours Sincerely,



Mike Dutton

MIE Aust, CP Eng, Grad Dip Env Eng.



