



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

Land and Environment Court of New South Wales

You are here: [AustLII](#) >> [Databases](#) >> [Land and Environment Court of New South Wales](#) >> [2008](#) >> [\[2008\]](#)
NSWLEC 1188

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[Download\]](#) [\[Context\]](#) [\[No Context\]](#)
[\[Help\]](#)

← Iramoo → Flyer Pty Ltd v Berrigan Shire Council [2008] NSWLEC 1188 (21 May 2008)

Last Updated: 23 May 2008

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION:

← Iramoo → Flyer Pty Ltd v Berrigan Shire Council [\[2008\]](#) [NSWLEC 1188](#)

PARTIES:

APPLICANT

← Iramoo → Flyer Pty Ltd

RESPONDENT

Berrigan Shire Council

FILE NUMBER(S):

10756 of 2007

CATCHWORDS:

Development Application :- Rural subdivision, minimum lot size, non-contiguous lot, protection of agricultural land

LEGISLATION CITED:

[Environmental Planning and Assessment Act 1979](#)

Berrigan Local Environmental Plan 1992

CORAM:

Hussey C

DATES OF HEARING:

09/04/2007

JUDGMENT DATE:

21 May 2008

LEGAL REPRESENTATIVES

APPLICANT

Mr S. Burchett, barrister
Instructed by Mr B. Halliday
of B G Halliday Solicitors Pty Ltd

RESPONDENT

Ms S. Duggan, barrister
Instructed by Mr M. Rogers
of Kell Moore Solicitors Pty Ltd

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Hussey C

21 May 2008

10756 of 2007 ← Iramoo → Flyer Pty Ltd v Berrigan Shire Council

JUDGMENT

Background

1 This appeal was lodged against council's refusal of a development application for a 2 lot, rural subdivision at Tocumwal. The subdivision proposes a non-contiguous lot, with portions separated by approximately 8.5km. The issues identified by council concern:

Ability to register this form of subdivision;

The failure to protect, enhance or conserve the agricultural land,

Unacceptable environmental impacts due to additional clearing, soil degradation, bushfire protection clearing and possible pollution of the Murray River.

The Site

2 This site is described as Lot 150 DP 1074674 and Lot 21 in DP 1109568 . The combined area is 307.1 sq m and comprises:

Lot 21, which is the residue of an earlier 3 lot subdivision. It has an area of 17.75 ha and frontage to the Murray River. This lot is flood liable and is generally vegetated with semi-matured red gum regrowth, which presents a bush fire risk.

Lot 150, which has an area of 289.3ha and located some 8.5km by trafficable road, or 4km by unmade road from Lot 21. This lot is primarily used for grazing and adjoins irrigated farming land to the south, which is located within a levee system. It also adjoins general grazing land to the north.

The Proposal

3 The proposed subdivision involves the creation of:

Lot 151; which comprises the non-contiguous parcels of land with a land size of 120 ha (i.e. Lot 21 area of 17.75 + 102.25 from Lot 150).

Lot 152; residue of Lot 150 with a remaining area of 187.1 ha.

Planning Controls

4 ***Berrigan Local Environmental Plan 1992***. Under this LEP the land is within the 1(a) General Rural zone where the objective of the zone is to promote the proper management and utilisation of resources by:

(a) *protecting, enhancing and conserving:*

(i) *agricultural land in a manner which sustains its efficient and effective agricultural production potential,*

(ii) *soil stability by controlling and locating development in accordance with soil capability,*

(iii) *forests of existing and potential commercial value for timber production and other values,*

(iv) *valuable deposits of minerals, coal, petroleum and extractive materials by controlling the location of development for other purposes in order to ensure the efficient extraction of those deposits,*

(v) *trees and other vegetation in environmentally sensitive areas where the conservation of the vegetation is significant to scenic amenity, recreation or natural wildlife habitat or is likely to control land degradation,*

(vi) *water resources for use in the public interest,*

(vii) *areas of significance for nature conservation, including areas with rare plants, wetlands and significant wildlife habitat, and*

(viii) *places and buildings of archaeological or heritage significance, including aboriginal relics and places,*

(b) *preventing the unjustified development of prime crop and pasture land for purposes other than agriculture,*

(c) *facilitating farm adjustments,*

(d) *minimising the cost to the community of:*

(i) *fragmented and isolated development of rural land, and*

(ii) *providing, extending and maintaining public amenities and services, and*

(e) *providing land for future urban development, for future rural residential development and for future development for other non-agricultural purposes, in accordance with the need for that development.*

5 Clause 10 describes the general considerations for development in rural zones including:

(a) *the present use of the land, the potential use of the land for the purposes of agriculture and the potential of any land which is prime crop and pasture land for sustained agricultural production,*

(g) *where the land is within Zone No 1(a) and within 400 metres of the bank of the Murray River, the effect of the development of the riparian lands of that river.*

6 Clause 11 deals with subdivision of land generally and requires identification of any allotment to be used primarily for agricultural purposes and those intended primarily for the purpose of a dwelling house.

7 Clause 12 deals with subdivision for the purpose of agriculture in the Zone No 1(a) on the following basis:

(1) *The Council may consent to the creation of an allotment of any area if the Council is satisfied that the proposed allotment will be used for the purpose of agriculture.*

(2) *The Council shall not consent to the creation of such an allotment if the proposed allotment has an area of less than 120 hectares and there is already a dwelling house of the proposed allotment.*

(3) *Despite subclause (2), the Council may consent to the creation of one, (but not more than one,)*

allotment having an area of less than 120 hectares, which the Council is satisfied will be used for the purpose of agriculture, from an existing holding on which a dwelling house stands if that dwelling house is lawfully erected on the land on or before the appointed day.

8 Clause 24 contains the controls for flood liable land and clause 25 deals with bushfire hazards.

9 **Murray Regional Environmental Plan No 2 – Riverine Land.** This REP has relevance in determining impacts on the riverine land particularly with regard to the flood liability of the land, land clearing for agricultural purposes and the potential for land degradation and resultant impact on water quality and biodiversity.

The Evidence

10 Detailed evidence was presented by:

- Mr J Laycock; Council’s consulting planner,
- Mr M Ryan; Agricultural consultant,
- Mr B Mitsch; Applicant’s consulting planner/surveyor.

11 The submission for the applicant is that the subdivision is to facilitate the land being mainly used for agriculture by way of cattle grazing and forestry. It was acknowledged that a future application could be made for a dwelling on the land as the proposal satisfies the 120 ha minimum lot size.

12 Mr Mitsch provided a history of the land owners intention for the subject land to be used for enjoyment and lifestyle in combination with the primary purpose of agricultural activities. Mr Mitsch also referred to other planning documents dealing with agriculture and associated rural lot sizes. However no specific evidence was presented on the proposed agricultural or forestry activities.

13 Against this, Mr Ryan undertook an agricultural suitability assessment, from which he concluded that the proposed apportionment of non-contiguous lots for intended agricultural use would detract from the agricultural worth of the current lots.

14 This assessment addressed the following factors:

- Climatic data for the locality;
- Soils and topography,
- Land class and capability. Based on the Rural Land Evaluation Manual (RLEM), he considers both lot 21 and 150 are Class 4 land, which is defined as:
Class 4 – land suitable for grazing and not suitable for cultivation, agriculture is based on native pastures or improved pastures relying on minimum tillage techniques. The overall level of production is low. Environmental constraints make agriculture uneconomic.

15 For the agricultural assessment, Mr Ryan assumed the grazing could be based on a steer trading enterprise as cattle are the preferred livestock in the region due to their inherent ability to manage more heavily timbered vegetation and ease of management in flood liable areas. However he notes that for economic assessment purposes sheep returns are similar to cattle returns when the same level of management skill is assumed. So that the type of livestock used for the assessment does not materially influence the assessment outcomes.

16 In the assessment, Mr Ryan estimated the subject lands carrying capacity at 1.5DSE/ha for Lot 150 and 1.0DSE/ha for Lot 21. This allowed the gross margins to be calculated.

17 This methodology resulted in the following Table 1.0:

Table 1.0 Economic Comparison between Current and Proposed Scenarios

	Current	Proposed
Lot Scenario	Lot 150-1.5	Lot 21 -1.0 DSE Lot 152 -1.5

	DSE	DSE	Lot 151	-1.4 DSE
Area (ha)	289	181	87	120
Carrying Capacity - Steers	48	23	11	8
GM Return	\$9,746	\$406	\$6,295	\$3,655
R & M - yards, fences and water based on assumed infrastructure lifespan	\$251	\$307	\$342	\$824
Rates	\$1,070	\$1,144	\$800	\$1,500
Insurance	\$200	\$100	\$200	\$200
Labour	\$1,680	\$1,200	\$1,680	\$1,680
Overhead Expenses	\$3,201	\$2,751	\$3,022	\$4,204
EBIT	\$6,545	(-\$2,344)	\$3,273	(-\$549)
Market Value	\$180,625	\$156,644	\$116,875	\$220,394
Infrastructure required				
- Stockyards	\$8,373	\$5,017	\$8,373	\$13,390
- Fencing	-	\$2,352	\$3,024	\$5,376
- Tanks	-	\$1,000	-	\$4,000
- Pumps	-	\$950	-	\$1,900
- Piping	-	\$400	-	\$800
- Troughs	-	\$500	-	\$2,000
Total	\$8,373	\$10,219	\$11,397	\$27,466
EBIT YIELD	3.5%	(-1.4%)	2.6%	(-0.2%)

18 From this, he undertook a comparison of the relative market value, EBIT (earnings before interest and tax) and infrastructure requirements for the current and proposed lots.

19 Mr Ryan's conclusion is that:

"4.1 The proposed sub-division reduces economic return from agriculture to a level where it may be unviable to use for agricultural purposes and hence reduces the agricultural worth of the land.

Apropos the land, in its current form, does have agricultural worth;

4.2 It is my opinion that if the sub-division of proposed Lot 151 was approved the infrastructure requirement for Lot 21 for continued purposes of agriculture would be cost prohibitive and therefore the entire area of proposed Lot 151 incorporating Lot 21 would not be conducive to use for agricultural purposes.

4.3 Given the agricultural potential of Lot 21 and Lot 150 there would be no benefit from dividing a larger management unit into two smaller management units. The inclusion of a smaller management unit as non-contiguous parcel of land provides little agricultural worth and reduces efficiencies for management for agricultural purpose."

20 Apart from this, Mr Laycock assessed the planning issues based on his extensive experience in land use and development planning, particularly within the agricultural context. From his reference to the LEP, he acknowledged that proposal satisfies some of the zone objectives. Nevertheless, he does not support the proposal based on the following opinions:

There is little farming strategy in an agricultural sense to justify the subdivision to create a distant association of one lot to another given that both lots are currently in the same ownership. Accordingly the proposal does not represent "proper management and utilisation" of agricultural land as a resource nor "sustain" the "efficient and effective agricultural production potential" of the land.

The proposal does not satisfy the objective of facilitating farm adjustments because it does not promote the proper management and utilisation of resources, in this case the agricultural resource.

The proposal does not satisfy the objective concerning *fragmentation and isolated development of*

rural land. This occurs because the underlying intent of this part of the assessment consideration is to minimise the creation of lots less than the minimum specified lot size for that zone. In this case, the area of the northern parcel of proposed Lot 151 will be 102.2 ha, which represents an undesirable fragmentation of rural land as the extent the parcel on is greater than the width of a road or other such feature.

The approval of the subdivision resulting in the creation of Lot 151 would give it an 'as of right' dwelling entitlement. This could be exercised by locating a dwelling on the high amenity southern portion of the proposed Lot 151 adjoining the Murray River, which is currently excluded because Lot 21 has insufficient area. This outcome would likely significantly reduce this portions availability or any agricultural purpose, leaving the other northern portion (187.3 ha) for agriculture. In the absence of any substantive evidence on the proposed agricultural undertakings, then the proposal does not satisfy the provisions of clause 12 of the LEP.

Conclusions

21 Having considered the evidence, the submissions and undertaken of view I do not consider this application merits consent.

22 It is apparent to me that the planning controls endeavour to preserve and enhance agricultural land use opportunities in the 1(a) General Rural zone. The controls specify that the minimum lot size for subdivision of land in this area is 120 ha. Furthermore, the controls provide that any subdivision application identifies the land use primarily for agricultural purposes and that intended for the purpose of a dwelling house.

23 In my assessment, the applicant has not provided a satisfactory response to this requirement. However, both Mr Ryan and Mr Laycock have undertaken detailed assessments, which results in their opinions that this proposal does not adequately satisfy development controls.

24 Insofar as quantitative aspects of Mr Ryan's assessment were challenged, I am nevertheless satisfied that his overall methodology adequately addresses the issues concerning the management and utilisation of agricultural land in a matter, which sustains its efficient and effective agricultural production potential. In my assessment, the challenges to the DSE and potential earnings were of a relatively minor nature, which does not substantially affect the final sustainability result.

25 Notwithstanding this, I accept that the there may be different methods of classifying the land, however I am satisfied it has agricultural usage potential.

26 This agricultural utility is mainly attributed to the carrying capacity of Lot 150, as shown in Table 1. The proposal would significantly reduce its size and consequently reduce its potential agricultural yield according to this economic assessment, on which I rely. This is in the absence of any specific agriculture details or business plans from the applicant.

27 Furthermore, the proposal would likely incur the additional fencing infrastructure establishment and maintenance and introduce undesirable, inconvenient and unrealistic arrangements for servicing and watering the stock if they are regularly required to travel from Lot 152 to Lot 151 and back.

28 I also consider Mr Laycock's planning assessment is reliable. He does not consider the proposal adequately satisfies the planning controls for retention of agricultural land and consequently does not support its approval.

29 I acknowledge his concern that a likely outcome is that the dwelling entitlement conferred on Lot 152 would significantly reduce its agricultural utility and likely cause other environmental issues for any future dwelling. When a subdivision allows a future dwelling entitlement, albeit subject to merit, I consider this is a relevant consideration in terms of the economic and orderly development of land, particularly agricultural land.

30 However portion of Lot 151 is significantly constrained for future dwelling house development because of its proximity to the Murray River, vegetation cover, bushfire risk and soil cover. In this regard, I note Mr Burchett's submission that if the approval facilitates an eventual application for a dwelling, meeting the specific requirements for protection of the river in the LEP, this can only further enhance and protect the scenic and recreational value of the riverfront.

31 But I do not consider there was sufficient compelling evidence to support this. Instead it seems to me that the proposal is more likely to offend the zone objective (a) (v).

32 In the ultimate, I also do not consider this proposal adequately satisfies the zone objectives to promote proper management of this agricultural land by protecting, enhancing and conserving its agricultural potential. Instead, the proposal would fragment it and the substantial separation of at least 4km between the 2 portions does not represent economic or orderly development in my opinion. If the primary purpose for the development of this land is for agricultural usage, this is best achieved by retaining Lot 150 intact, based on Mr Ryan's evidence, which I rely on.

33 This results in the refusal of the application.

Court Orders

1 The appeal is dismissed.

2 Development Application No 95/07/DA/DS for a 2 lot subdivision of Lot 150 DP 752304 and Lot 21 DP 1109568 Tocumwal is refused.

3 The exhibits may be returned except for 3, 4 and A.

R. Hussey
Commissioner of the Court
ljr



LAND & ENVIRO COURT
DEVELOPMENT-APPLICATIONS
LEGAL-COSTS

Our ref: R90/1046-02 – Out 17417

21 July 2009

Mr Mike Rayner
General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

TWEED SHIRE COUNCIL	
FILE No.	LGSA-GENERAL
Doc. No.
REC'D	23 JUL 2009
ASSIGNED TO:	RAYNER, M
HARD COPY	<input type="checkbox"/>
IMAGE	<input checked="" type="checkbox"/>

Dear Mr Rayner,

Re: Berrigan Shire Council – Request for Assistance with legal costs

Berrigan Shire Council has approached the Associations for assistance with legal costs in litigation in which it has been involved.

Summary of Facts

Berrigan Shire Council had refused a Development Application by Iramoo Flyer Pty Limited that sought to subdivide two existing rural lots to create two alternative lots. The subdivision would have resulted in two individual lots separated by approximately 8.5 kilometres.

A Class 1 application was filed in the Land and Environment Court by the owner of the property, Iramoo Flyer Pty Limited, seeking to review the merits of council's refusal of the development application and council elected to defend the appeal.

Council has consistently maintained that defending this application was paramount to ensuring the avoidance of the land owners along the Murray River seeking to consolidate smaller parcels of land adjacent to the river with non contiguous allotments for the purpose of creating dwelling entitlements.

In other words, if this development application was approved it would have opened the floodgates on similar applications which would arguably result in detrimental impact on the riverine environment.

Council argue that this has significant implications for all councils because if the appeal were to be successful it would have created a range of uncertainty for councils such as:

1. Where non-contiguous lots cross boundaries, which council determines the application?
2. How would performance based standards, such as minimum area requirements be managed?
3. Do non-contiguous lots have any limitations?

Council further argue that the matter was of so great a significance to the Department of Planning that the Department has now introduced a Rural Lands SEPP that goes some way to addressing the issues raised by this matter.

Although council was successful in the matter, the Court ordered that each party pay their own costs.

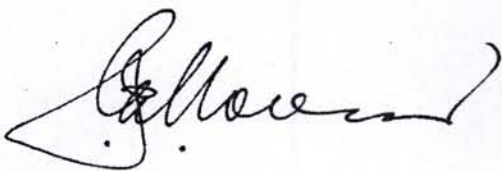
The Joint Committee of the Associations have considered that the significance of this decision and it was decided that it was sufficiently important to all councils to warrant the giving of support.

The Council incurred the sum of \$66,848.62 in defending its position. Your Council's proportion of this amount, calculated in accordance with the formula used to determine your Association fees, is \$758.69. Attached is the invoice, and the Associations appreciate your consideration to contribute towards these legal costs.

You can read about the judgement at:

<http://www.austlii.edu.au/cgiin/sinodisp/au/cases/nsw/NSWLEC/2008/1188.html?query=^berrigan> but should you have any questions or require further information, please contact Frank Loveridge at frank.loveridge@lgsa.org.au or 02 9242 4125.

Yours sincerely



Bill Gillooly
Secretary General



**Local Government
Association of NSW**

ABN: 49 853 913 882
GPO Box 7003 SYDNEY NSW 2001
Level 8 28 Margaret Street SYDNEY NSW 2000
Tel: (02) 9242 4000 Fax (02) 9242 4111
www.lgsa.org.au lgsa@lgsa.org.au



Shires Association of NSW

Tax Invoice

Invoice Number 56556
Date 21/07/09

Invoice to:

Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

TWEED SHIRE COUNCIL	
FILE No.
Doc. No.
REC'D	23 JUL 2009
ASSIGNED TO:
HARD COPY <input type="checkbox"/>	IMAGE <input type="checkbox"/>

Customer Code	Customer Reference
ZZTWEE	

Item Code	Item Description	Invoice Quantity	Per	Price	GST	Amount
BERR	Berrigan Shire CI Legal Assistance Call	1		758.69	0.00	758.69

Your share of Council contributions re: Berrigan Shire Council's legal costs incurred in the defence of litigation in the Land & Environment Court

Attn: The General Manager

Terms: 30 Days Invoice Date

Total Includes GST of 0.00

**Total
758.69**

Payment to: LGSA NSW BSB: 062005 Account No. 00090198