Summary

Draft Sutherland Shire Council LEP 2013: Issues in upper Woronora River valley

The upper Woronora River valley is a State declared future regional public open space. Existing dwellings may be sold on the open market or acquired by the State on owner's initiation. Other undeveloped areas in the valley have always had restrictive zoning.

1. Sutherland Council has zoned existing family homes to prohibit existing uses that are supposedly guaranteed in State law. A local provision does not alter this and makes no reference to existing uses as specified and required by State law. This:
   - Is inconsistent with superior State law and in that respect, cannot be given Parliamentary consent
   - Is inconsistent with DOP directions for treatment of existing uses in the Standard Planning Instrument
   - Subverts the intentions of the Land Acquisition (just terms and compensation) Act
   - Creates hardship for existing families
   - Has no basis in planning

2. Sutherland Council has differently zoned immediately adjoining and undeveloped land in the Woronora Valley for significant new development. This is:
   - Inconsistent with the zoning of the existing homes
   - Inconsistent with the regional public open space policy and a permanent negation of long standing State policy
   - A very large windfall for those owners

3. Consultation has been seriously deficient. There has been:
   - False and misleading advice to existing residents
   - False and misleading advice to all Councillors and to the full Council
   - No consideration by Council of the substantive issues raised
   - Nil transparency on the accommodative zoning of undeveloped lands

In those respects, the draft LEP is inconsistent within itself, inconsistent with superior law, inconsistent with State policy and does not comply with the Standard Planning Instrument. It strips existing residents of their existing use rights and completely destroys the possibility that the Woronora valley can ever be a regional open space.

Recommendations

1. **Zone E2 be amended to specify as allowable (with consent) the applicable existing uses specified in the State Environmental Planning and Assessment Regulation 2000 (Part 5 Existing Uses).**
2. **The zoning of E3 allowing development of private lands in future regional open public space be changed to E2 (as amended) consistent with the future use.**
3. **Notwithstanding 1&2 above, consistent zoning and planning be applied in the upper Woronora river valley**

10/2/14
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Submission to the Independent Inquiry into draft Sutherland Shire LEP, 2013

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This submission concerns the upper Woronora River and its valley going up to an escarpment on the eastern and western shores and going from approximately the housing called Deepwater Estate on the downriver end and past the area upriver called The Needles. The area was designated in the 1970s by the State Government as future regional public open space.

Development existing on the river was a housing estate on the western shore, dating from 1914 and called Shackles Estate. Those houses are bought by the State on the request of the owners and may otherwise be traded freely on the open market. Compulsory acquisition is not envisaged by either State or Council. Only 13 households remain (plus a couple on the upriver eastern side in the same situation). This writer has lived in Shackles Estate from before these events. New development was restricted, but rebuilding and alterations to existing dwellings has at various times been allowed under various previous zoning and Interim Development Order arrangements, with and without formal area restrictions. The State Environmental Planning and Assessment Regulation 2000 (Part 5 Existing Uses) clarified existing use rights and clearly allows for the rebuilding, alteration or extension of an existing dwelling (without a mandated numerical restriction on area). In preparing LEPs under the Standard Template, DOPI advice to Councils (eg Planning Circular PS 06-007, 31 March 2006) concerning existing use rights was that existing uses should be identified and written in as allowable uses to the appropriate zoning definition in the Standard Template, which has been drafted on the assumption this would be done. This is shown by Item 4 (Prohibited uses) of each zoning definition: “any other development not specified in item 2 or 3”. What is not specified is prohibited.

Adjoining and directly behind the Shackles Estate strip going up the escarpment are a number of undeveloped private land holdings and I will discuss these later. Most of the eastern shore and valley is in public hands.

Sutherland Shire LEP 2013 (SSLEP) assigns a zone of E2 to Shackles Estate but has not added to the zoning template to take account of existing uses, in contrast to its treatment of all other zonings. Consequently, in zone E2 existing uses are prohibited uses. The second exhibited version of the Plan did not alter that wording but the Mayoral Minute 6/13-14 July 2013 (item 30) makes a specific local provision that identifies each property and allows alterations and additions up to a limit of $30m^2$ or 10% of gross floor area (with Council approval). This was not agreed by the residents and it is not in any way a re-instatement of existing use rights, which specify no such area restriction in the case and also allow rebuilding (with Council approval). The use of a local provision in this manner rather than the clear and direct Standard Template as it was intended is inappropriate, inconsistent and lacks transparency.

Our first submission is that, in respect of the Woronora River valley, the SSLEP has not been prepared in accordance with the Environmental Planning and Assessment Act 1979 (specifically, the State Environmental Planning and Assessment Regulation 2000 (Part 5 Existing Uses). Further, it has not been prepared in accordance with the requirements of the Standard Instrument and the advice from DOPI on treatment of existing uses. The Local Provision inserted into Mayoral Minute 6/13 is inappropriate and the definition of zone E2 needs to be altered to specify as allowable the existing uses specified in superior State Regulation.

I will return to the process followed by Council in this and the following matter but I must now refer to the undeveloped private land holdings directly behind and adjacent to Shackles Estate. These lands occupy the larger part of the valley on the western side and are acknowledged even by Council to be of environmental and public space value at least equal to Shackles Estate.

Downriver, to the northern end of the strip of valley, a zone of E2 has been assigned. But the southern half of this strip, and arguably the most environmentally important, has been given a zoning of E3. This specifically allows (with consent) bed and breakfast accommodation, dwelling houses, dual occupancies, health consulting rooms, home businesses, home industries, and secondary dwellings (among other things). These are all new development which was otherwise prohibited in previous zonings for this area. While Council has restricted sub-division it is clear that entirely new development will take place in an area of future regional public open space proposed by the State.

Our second submission is that the zoning of lands to allow new development in future regional public open space is inconsistent with its future use. It is inconsistent with State policy and it is inconsistent with the zoning that has been applied to Shackles Estate. It is an inappropriate provision contained within the SSLEP.

There is a simple and obvious course that Council has refused consideration:

1. **Alter the zoning definition for zone E2 to explicitly refer to the applicable existing use rights as defined by the State Planning and Assessment Regulation 2000.**
2. **Zone all of the upriver valley E2, as amended in (1.).**

This submission has been prepared on the assumption that State policy remains in place to ultimately declare the valley a regional public open space. The writer is not privy to any discussion between Council and DOPI to reverse that policy. However, a zoning of E3 to undeveloped land is a *de facto* effective reversal of an established State policy and needs to be openly considered as such. Should, contrary to the writer's understanding, the State be considering a reversal then planning consistency clearly requires the same considerations must apply to the remaining Shackles Estate properties.

I turn now to the process by which the SSLEP was developed in regard to the upper Woronora valley. This was unfinished business from the 2003 Sutherland draft LEP. The 2003 drafts attempted to zone our private homes as public open space, raising exactly the same issues as have arisen now. The intervention of the then Mayor, Clr Ken MacDonald resulted in the area

being withheld from the LEP and consequently the previous rural zoning remained in place. We were solemnly promised that full prior consultation would occur in the future. It did not. Various residents tried to obtain information when the first Draft 2013 exhibition was held. They were given misleading and conflicting advice. Questions were not answered. The senior officer responsible stated that he had no knowledge of existing use rights matters and that we should rely on the advice of our own lawyers. The same officer in 2003 had advised residents that Council could spend more on lawyers than us.

A small delegation took our concerns to our senior Ward Councillor, Clr Steve Simpson. (currently the Mayor) He showed me the advice he had received from his Officers. It was grossly misleading. A short time later, the then Mayor Clr Johns wrote to a resident (Doug Patterson) also relying on that advice. We had no option but to respond and attempt to correct the record. That is the origin of the attached correspondence. In its course we were obliged, on two separate occasions, to write to all Councillors to correct the information being provided to them, including Council meeting papers. This is lengthy reading and I do apologise. However it gives some insight into the planning approach taken to this small part of SSLEP2013. It is indisputable: the Council administration was well aware of the conflicts with State law and policy and was prepared to mislead not only residents but Councillors and the full Council. A large variety of reasons have been advanced to explain the quite different planning treatment that has been applied to the Upper Woronora river valley. None of them make much sense and the attached correspondence shows it. At a meeting on (15/12/13) with Clr Simpson, Mr Rayner and Mr Carlon it became clear that in the end, their claim was that their hands were tied by the State on the major issues of existing uses and conflicting zonings. My response is that it is not credible that a State Department should require a Council to act in conflict with an existing superior State law and policy administered by that very Department. However my request for evidence was ignored and I was instead invited in form letter terms to make a submission to your enquiry.

The timeline for the attached correspondence is as follows:

1. File clr simpson intro. 26/4/13 A letter from me to our senior Ward Councillor, who met us and showed us officers' advice that was misleading.
2. File mayor to doug. 26/4/13. A letter to a Shackles Estate resident, Mr Doug Patterson, from Mayor Johns prepared on the basis of similar advice.
3. File gp reply mayor2doug. 19/5/13. My response rebutting the false advice being supplied to Clrs Simpson and Johns.
4. File Mayor2 Anna . 13/6/13 Another letter from Mayor Johns to another resident, Anna Hauch repeating previous misleading advice and adding further falsehoods.
5. File gp reply mayor2 anna. 20/6/13 This is a comprehensive rebuttal including the false account given by Council of the land Acquisition (Just terms and compensation) Act.
6. File julia2simpson. 27/6/13 This letter from another Shackles Estate resident, Julia Munro, addressed a long phone conversation she had with Clr Simpson.
7. File gp2all clrs. 4/7/13 Concerned at the extent of the misleading advice and refusal to address the substantive issues, I sent this letter to all Councillors.
8. File: GPsubmission. 28/4/13 My original submission to the first exhibition. Also my submission to the second exhibition with the addition of the summary which heads this submission to the Independent Inquiry.

9. File gp2simpson. 17/7/13. Clr Simpson asked for my comments on the draft officers' response to all submissions concerning Shackles Estate.
10. File 61 Shackles estate officers' response. 29/7/13 The advice given to Council at its meeting of 29 July 2013 and forming the basis of Mayoral Minute 6/13-14, part 30: with respect to chapter 61: zoning of Shackles estate.
11. File Briefing2 all clrs. 26/7/13 This was a briefing I sent to all Councillors in a last minute attempt to correct the misinformation they were receiving.
12. File mayor2aug. 2/8/13 Confirmation by Mayor Johns of the results of the Council meeting of 29 July 2013.
13. File gp2 simpson meeting. 12/12/13 On 5/12/13 we met with now Mayor Simpson, Mr Rayner and Mr Carlon, who blame the State.
14. File simpson2 gp. 23/12/13 An invitation to make a submission to your Inquiry.

After the Council meeting of 29 July 2013 the Shackles Estate residents collectively wrote via their local MP Melanie Gibbons to the Minister for Planning and Infrastructure requesting a review of this aspect of the SSLEP2013 and copied to Belinda Morrow, senior planner DOP and Don Colagiuri, NSW Parliamentary Counsel, whose interest is the inconsistency with superior State law. This however was overtaken by media reports on other matters and the current Inquiry announced.

Conclusion

The specific matter of the zonings in the upper Woronora river valley falls squarely within the Independent Inquiry's Terms of Reference. Council was well aware and has acknowledged that this particular part of SSLEP2013 was not prepared in accordance with the Environmental Planning and Assessment Act 1979 (and its regulations). The Zoning definition E2 is inconsistent and inappropriate and item 30 of the Mayoral Minute 6/13-14 is similarly inappropriate and does not re-establish existing use rights guaranteed by higher State law. The zoning of E3 for other privately owned lands in the valley is inconsistent with the State policy of public regional open space for the area.

Recommendations

1. **Zone E2 be amended to specify as allowable (with consent) the applicable existing uses specified in the State Environmental Planning and Assessment Regulation 2000 (Part 5 Existing Uses).**
2. **The zoning of E3 allowing development of private lands in future regional open public space be changed to E2 as amended consistent with the future use.**
3. **Notwithstanding 1&2 above, consistent zoning and planning be applied in the upper Woronora river valley**

26/4/13

Sutherland draft LEP and Shackles Estate

Dear Steve

I am writing on behalf of the householders of Shackles Estate. We have serious issues regarding its effects on us.

Could I ask that you meet a small delegation of residents to discuss the issues? I propose it comprise Graham (Jim) Meyer, retired school teacher, who you know, Julia Munro, retired local solicitor, and me, retired non-entity. Jim will ring you to see if an arrangement to meet can be arranged but I will here try to summarise the issues as we see them.

I firstly have to say that getting credible information from Council officers has proved impossible. We have been given clearly conflicting advice from different officers and when asked about these inconsistencies, Mr Carlson simply replied that we must rely on our legal advisers. This rings alarm bells and echoes an “unofficial” comment on the occasion of the 2004 draft LEP which attempted to zone us as public open space. When confronted with the fact that this was unlawful, the response was that "we can spend more on lawyers than you". I mention this because I know that you are aware of wrongdoing in the past administration of the Woronora valley, its escarpment and Shackles Estate (and past abuse of legal process by Council administrators).

As you know, there are about thirteen households left on Shackles Estate. We have lived here for many decades (myself for well over 40 years). It has been our family home. We have raised families here to the third generation. In the absence of a proper compulsory acquisition, we are going to be here for a long time yet and generations to come. Let me also emphasise that the existence of a small number of discrete houses is an asset to the river and its environment. We have the same rights attaching to ownership of real property as everyone else and view with the gravest concern systemic attempts to artificially suppress the value of our greatest family asset.

The draft LEP zones us as E2 Environmental conservation. Sutherland's interpretation of this zoning is particularly sparse in comparison to other Councils. Under item 2 "Permitted without consent", Sutherland, at its own discretion, has added "nil". Compare this with Lake Macquarie DLEP 2013, which has added "Exempt development" and crucially "Home occupations" to this very item of the template.

If one looks at Sutherland's interpretation of zone E3 we find that home occupations are permissable without consent in that zoning.

Returning to Sutherland's interpretation of E2, item 3 "permitted with consent" Council has added: environmental facilities, environmental protection works, flood mitigation works, information and education facilities and roads. But it does not list additions to existing dwellings nor rebuilding after fire - these have been important understandings in our relationship with Council, going back to the days of the Skinner letter.

Lake Macquarie's interpretation of E2 item 3 "Permitted with consent" in contrast, has a long list added at its discretion and includes dual occupancies (attached), dwelling houses and secondary dwellings (attached).

Item 4 of zone E2 "Prohibited" is largely black letter State template. Its final clause is "Any other development not specified in item 2 or 3."

Thus the core of our concerns is that under the Sutherland draft LEP, occupation of our own homes must be a prohibited activity and the activities formerly permitted with consent are now prohibited also. Please note that our properties are not under compulsory acquisition, are able to be sold on the open market and thus the Land Acquisition (Just terms and compensation) Act 1991does not apply. We are now in a situation where a

buyer, on examining our zoning, will find that occupation of the home they are considering buying is in fact a prohibited activity. This is an improper and unlawful use of Council powers to suppress the value of our homes. We are fully aware of course that those provisions of the DLEP are in deep conflict with superior laws. Council officers know that also. I get back to that previous “unofficial” comment: "we can spend more on lawyers than you". I emphasise: this draft contains unlawful provisions. It is a deliberate administrative wrongdoing of a most serious kind.

I believe that most Councillors will receive representations concerning the strictness of Sutherland's interpretation of zone E2, which has little difference in effect to Zone E1, covering public lands. E2 amalgamates a number of previous zonings which allowed dwelling houses as permissable with consent but now prohibits them. This would involve many owners other than us.

For our part, what is absolutely essential is that zone E2 be amended so that:

Item 2. permitted without consent to read "home occupation"; and
Item 3, permitted with consent to include "development of existing dwellings; rebuilding existing dwellings".

If this is not possible, the only option is for us to be placed in zone E3, which does permit those activities. What is quite clear is that Zone E2 as written is clearly not viable, is inconsistent with our existence here and indeed, is inconsistent with superior law as well as the plain facts. We live here and have all the rights of property owners under Australia’s rule of law.

There is another serious inconsistency that you need to be aware of. The justification for the ultimate acquisition of Shackles Estate was the so-called Escarpment Policy: no visible development as seen from the river. The failure of this policy is evidenced by the Council-approved development along the escarpment clearly visible to all on the river. As you are aware, zone E3 allows some development including dwelling houses. Large areas of the escarpment directly behind Shackles Estate (from a line extended from Marsden Road south to about the needles) are zoned E3, allowing development clearly visible from the river. There is a clear inconsistency here. Occupation of our existing homes is prohibited. The State Government is buying houses in the name of a now defunct policy whilst Council is allowing directly adjoining development in an unspoiled area at least as environmentally sensitive as ours and in direct conflict with the stated policy. Consistency requires that the area be zoned E2 as amended above, along with us. The only other consistent alternative is that we be zoned E3. **There is a serious case that the zoning of these properties as drafted is anomalous and can be subject to appeal on any number of grounds.**

I am sorry to have to burden you with this issue but we all believe that the time is long past when it should have been resolved. We have suffered greatly as the innocent witnesses to the unsavoury, petty, self interested interactions of major developers, Sutherland Council's administration and the State Government. The result has been massive siltation, environmental damage including feral weed infestation and antisocial activities on those stretches of river with no nearby occupied homes. The administration of this area is a long history of continuing wrongdoing and the current draft LEP continues firmly in the tradition.

Please feel free to copy this message to both the General Manager and Mr Carlson for their response and advice, and if you wish, to other Councillors or the Mayor. I am sure I do not need to emphasise that this is an extremely serious matter and does require the attention of senior officers who have no business deliberately drafting provisions in open conflict with superior law. This matter will not rest until resolved.

I have attached this letter in Word file for ease of viewing or printing.

My best regards

Gary Price

Sutherland Shire COUNCIL

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File Ref: CRMS: 772154485

Mr Doug Patterson
Email: dougpatterson@bigpond.com

26 APR 2013

Dear Mr Patterson

Thank you for your email of 16 April 2013 in relation to the draft Sutherland Shire Local Environmental Plan 2013 and your property at 155 Woronora River Frontages.

Under the draft Plan, the property is identified for acquisition for Regional Open Space purposes by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning & Infrastructure). Consequently, the land is proposed to be zoned E2 Environmental Conservation, as this is the most appropriate standard land use zone in the Standard Instrument Order. The objectives of this zone include the protection, management and restoration of the ecological, scientific, cultural or aesthetic values of land to which the zone is applied. Through the application of this zone to the land along the Woronora River, it is envisaged that the Woronora River frontage will be conserved.

Under the proposed E2 zone, a dwelling house is not permissible in the zone. An existing dwelling house may be categorised as an 'existing use' under the Environmental Planning & Assessment Regulations 1994. The Regulation contains provisions (Clauses 41-44) which permit an existing use to be enlarged, expanded, intensified, altered, extended or rebuilt, subject to development consent.

These controls are largely the same as the existing planning controls applying to the land, ie Sutherland Shire Local Environmental Plan 2000, and the land is also identified for acquisition by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning and Infrastructure). Under the controls, a dwelling house is permissible in the zone, provided that it is erected on 2 or more hectares of land and used in conjunction with agriculture, an animal establishment or rural industry. The controls make specific provision for an existing dwelling house to be enlarged or altered with development consent. Specific provisions limit the height and floor area of a dwelling house.

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In summary, although a dwelling house is no longer permissible on the land under the draft Plan 2013, there are provisions for the extension of existing dwellings under the Regulations. These require a development application to be submitted, which relies on the establishment of 'existing use rights'. The property remains identified for acquisition.

I hope that this provides information relating to the permissibility of your existing home as well as the mechanism available for any future alteration or extension of the dwelling. Should you require any further information, please contact to Environmental Planning Unit on 9710 0800.

Yours sincerely

26/4/13

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The Mayor
Councillor Kent Johns
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Dear Councillor Johns

On Sat 4 May your colleague Cr Simpson met a small delegation to discuss the draft LEP, specifically the western escarpment lands of the Woronora River and the adjoining riverfronts, Shackles Estate. The delegation of residents of Shackles Estate comprised Julia Munro (retired local solicitor), Graeme Meyer (retired schoolteacher) and myself (retired nobody). Cr Simpson gave freely of his time and we appreciate it. We left on the basis that he would investigate further and gave me a copy of Mr Carlon's advice to him. I have also seen a letter to Mr Doug Patterson of 26 April signed by yourself but clearly drafted on the basis of similar advice.

The advice is seriously misleading and causes the gravest concerns.

1. **Existing use rights and zone E2.**

   As defined in the LEP, existing uses are prohibited activities. That is what is there in the words.

   Mr Carlon asserts: "The existing use right provisions sit above the LEP at a higher statutory level. As a result they are not referred to in the LEP."
   This is simply misleading. Firstly, the very next zone, E3 explicitly spells out the existing use rights applicable to that zone. Secondly, zone E2 does indeed refer to existing use rights - it asserts that they are among the prohibited activities, inconsistent with the higher statutory level. The inconsistency is quite explicit. For uses permitted without consent, Council itself has added "nil". This was not required by the State Government, it was inserted deliberately by Council officers.

   You need to be very clear about this: Council has been given a draft that has been knowingly and deliberately written in direct conflict with superior law. Nobody can claim they did not know.

   It is understatement to say that this is administratively and legally inappropriate. It is an invitation for appeals in many, many jurisdictions. One does not deliberately make a specific regulation in conflict with superior law and then rely on that superior law to over-rule that very regulation. It is literally against the law. I am appalled that senior officers in any arm of government should consider such action. It is deliberately unsound. Clearly no risk analysis was done. It fails all administrative and legal tests, it is unethical, self interested and an egregious abuse of process.

   Our homes are not under any form of compulsory acquisition. They may be bought and sold on the open market. There are no restrictions as to sale or disposal and any such restriction must trigger the provisions of the Land Acquisition (just terms and compensation) Act 1991. Yet here are Council Officers engaged in a deliberate enterprise to actively devalue our homes.

Our homes carry all the rights of property under Australian law. That includes State law. As it is written, zone E2 applied to us is in direct conflict with that law. It cannot stand. Either zone E2 must be altered to explicitly acknowledge and enumerate existing rights or we must be placed in zone E3 as the most appropriate zone. Those are the options.

Mr Carlon's ingenuous suggestion that Rural Zone 1A be resurrected is of course entirely inappropriate to the template the State Government has given, and does not solve the problem – it too is open to appeal. It is designed to fail.

2. Blame the State

The gravamen of Mr Carlon's advice is that all of this has been imposed by the State Government and Council's hands are tied. That is incorrect. Council has been given a template that it may fill in as appropriate to the circumstances on the ground. The conflict with State law is entirely Council's hand. When the DOP wrote to Council (3 June 2008) that E2 zoning would be appropriate to Shackles Estate, it had clearly not been informed that Council intended itself to define E2 in a manner inconsistent with both State law and with the fact on the ground that existing uses did indeed exist and would certainly be asserted. It is unlikely that a State Department would knowingly support a proposal in direct conflict with a State law administered by itself.

3. Anomalous zoning of adjacent lands

In policy terms, this the far more important issue. Senior Council officers seem to be going to some lengths to "delink" the anomalous zoning of adjacent lands from Shackles Estate. That too is incorrect. They are indissolubly linked. An E2 zoning of Shackles Estate alongside an E3 zoning for the adjacent land will certainly result in appeal – whether or not Zone E2 is altered to acknowledge existing use rights.

The land in question has the same environmental, visual and policy values as Shackles Estate. The main difference is that it is more environmentally precious, has never been developed and carries no existing use rights. It is especially sensitive because it is in the unspoiled upper reaches of the river, and is a major habitat and wildlife corridor. Council now proposes it be newly developed, at the same time as the same Council is unlawfully writing out existing uses of existing residents. The inconsistency is wondrous to behold.

Whilst the DOP has been buying up developed properties on the riverfront in the name of the Escarpment Policy (Development should not be visible from the river), Council has long been approving new development on the escarpment visible from the river. Now however, it proposes new development immediately adjacent to Shackles Estate and up the escarpment. This is especially anomalous because similar adjoining land further downriver has indeed been zoned E2. All the land from riverfront up the escarpment must be treated equally, with the same zonings and allowable uses. That was always the rationale. The zoning of those adjacent lands as E3 is an abandonment of both the escarpment policy and any ultimate aim to make the valley regional open space. These are key areas for future regional open space, and Council is allowing new development in them.

If Council were serious about regional open space it would zone the adjacent lands up the escarpment as E2 (as amended to acknowledge existing uses). However, what is very clear is that notwithstanding which zoning is applied it must be consistently applied.

Let there be no misunderstandings. Inconsistent and anomalous zoning will be appealed and the end result may well be E3 zoning for all parts of the river valley not yet in public hands.

4. Conclusion

Let me stress to you that the residents support the policy of ultimately making the river valley a regional open space. Its value is obvious to us and the reason we live here. However, we are not under any form of compulsory acquisition, and until we are, we have exactly the same property rights in law as anybody else. That includes NSW law. Nor do we have issue with an E2 zoning that explicitly acknowledges existing use rights and is applied consistently. What we do not intend to tolerate is inconsistent zoning in direct conflict with NSW law. That is what your Council is being asked to approve.

Let me express my disappointment it has come to this. We have been the unfortunate witnesses and victims of grave administrative wrongdoings. Most households hold bulky files. We had high hopes when Council changed in 2003 that a more professional administration would emerge. You have an excellent reputation as an administrative reformer and I think the results are on show elsewhere in the Shire. I value very highly the administrative arts but I sincerely regret to say they have not been on show to the residents of Shackles Estate. LEP 2013 is proof positive of that. You and Councillor Simpson have been seriously and deliberately misled on the matter.

We are seeking a resolution acceptable to all parties. It is very simple.

1. **All land behind Shackles Estate and up the escarpment be zoned E2, consistent with stated policy and the zoning of the immediately adjacent Shackles Estate.**
2. **The definition of zone E2 be altered to give explicit acknowledgement to all existing uses, consistent with the State Environmental Planning Act and Regulations.**

We regard the two as indissolubly linked.

I have written in similar terms to Cr Simpson and will in due course but in the light of further advice, to all Councillors. In the meantime, I have no objections if this letter is shown to Messrs Carlon, Brunton and Raynor for their considered response – on the strict proviso that I be given a right to reply well prior to any Council consideration of these matters.

My best regards

Gary Price

Sutherland Shire COUNCIL

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File Ref: CRMS: 772180045

Mr Gernolf & Mrs Anna Hauch
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Dear Mr & Mrs Hauch

Thank you for your email of 3 June 2013 on the draft Sutherland Shire Local Environmental Plan 2013 (SSDLEP2013) and your property at 361 Woronora River Frontages. I note your concern about the future of your home and want to assure you that your views will be considered by Council as it finalises the draft plan.

Under Sutherland Shire Local Environmental Plan 2000, land fronting the Woronora River (western side) is currently zoned 1(a) Rural. It is noted that, generally, this land is not used for rural purposes and many of the lots do not benefit from any legal vehicular access, having access from the river only.

Generally dwelling houses are only permitted on large lots (2Ha) or in conjunction with agriculture or a rural industry. However, SSLEP2000 also contains specific provisions that allow an existing dwelling house to be altered or extended.

SSLEP2000 identifies this land for acquisition by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning & Infrastructure) and accordingly land along the river has been progressively acquired by the State as it becomes available. The intention is that this area will become part of a network of regional open space along the Woronora River. As part of the preparation of the draft plan, the State has reconfirmed its intention to purchase the land.

Under State legislation, the Minister has the power to compulsory acquire the land however, based on past practice, the Minister is unlikely to pursue compulsory acquisition. Acquisition can also occur at the owner's request. Acquisition and the agreed property value is governed by the Land Acquisition (Just Terms Compensation) Act 1991. Land is valued as if the land was not zoned for open space purposes. Accordingly, existing owners should not suffer decreases in property values as a result of the proposed rezoning.

During the preparation of SSDLEP2004 and SSLEP2006, there was significant community concern regarding the existing use and future alterations and additions to dwellings on the Woronora River Frontages. Given the unresolved zoning and land use issues, these properties were excluded from SSDLEP2004 and deferred from SSLEP2006.

Cont'd...2/-

Draft SSLEP2013 must identify land to be acquired for Regional Open Space purposes by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning & Infrastructure). The Department of Planning requires that land which is reserved for a public purpose, including open space, which has not yet been acquired and used for its intended public purpose is to be zoned according to its intended future use. For that reason, the land is proposed to be zoned E2 Environmental Conservation, as this is the most appropriate standard land use zone in the Standard Instrument Order. The objectives of this zone include the protection, management and restoration of the ecological, scientific, cultural or aesthetic values of land to which the zone is applied. Through the application of this zone to the land along the Woronora River, it is envisaged that the Woronora River frontage will be conserved and brought into public ownership.

Under the proposed E2 zone, a dwelling house is not permissible in the zone. However, existing lawfully constructed and occupied dwellings can rely on the benefits of 'existing use' rights under State law, the Environmental Planning & Assessment Act 1979. The Act's associated Regulations contain provisions which permit an 'existing use' to be enlarged, expanded, intensified, altered, extended or rebuilt, subject to development consent. The 'existing use' right provisions sit above local environmental plans at a higher statutory level. As a result they are not referred to in the draft SSLEP2013. Consequently, the draft plan does not prevent you from continuing to occupy your home.

Having read your submission and many others raising similar issues I will ensure that this aspect is specifically looked at by Council with the view of arriving at an outcome more acceptable to the residents of the Woronora River Frontages.

Yours sincerely

Councillor Kent R Johns
Mayor

13/6/13

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20/6/13
The Mayor
Councillor Kent Johns
Locked bag 17
Sutherland NSW 1499

20/6/13

Dear Councillor Johns

Anna showed me your reply of 13 June to her representations of 3 June concerning the proposed zoning of Shackles Estate homes in the draft Sutherland Shire Local Environment Plan 2013. I have the gravest concerns that a number of critical assertions are highly misleading.

Let me start with the proposition well known to be false to the Officer that drafted the letter. It is the last part of the second last paragraph concerning existing use rights. After referring to the fact that existing use rights sit at a higher statutory level, above local environment plans, the assertion is made that "As a result they are not referred to in the draft SSLEP2013". This is quite incorrect. They are referred to throughout the draft SSLEP2013. In the case of Zone E2 they are referred to in the negative. The final specific of item 4, *prohibited uses*, states "any other development not specified in items 2 or 3". This is a clause required by the State Government. Item 2, *uses permitted without consent* reads "nil". On any interpretation, Zone E2 prohibits the occupation of existing dwelling houses. It is explicit. The template Council has been given requires the itemisation of permitted uses. Anything not itemised is prohibited. This is illustrated by the fact that the very next zoning, E3 has under its item 2, *permitted without consent* "home occupations" and item 3, *permitted with consent*, proceeds to list among other things, the existing use rights applicable. The other zones proceed in similar fashion. So do other Councils. We have drawn Councillor Simpson's attention to the Lake Macquarie DLEP2013. For Zone E2, item 2, *permitted without consent*, Lake Macquarie has specified "Exempt development as provided in schedule 2; Home occupations". For item 3 a large range of uses are permitted with consent, including bed and breakfast accommodation, dual occupancies (attached), dwelling houses and secondary dwellings (attached) among other things.

This is a serious matter for us. Existing use rights are itemised throughout draft SSLEP, except for Zone E2 which prohibits them. It is there in black and white.

Apart from the simple fact that deliberately writing a legal instrument in direct conflict with superior law is literally unlawful, we have other serious concerns with this. The first is that our existing use rights are no longer rights at all. They may be challenged and the authority for challenging them is written explicitly in Zone E2. It matters not that expensive lawyers must be engaged to appeal to a higher court with certain success. It is another case of "we can spend more on lawyers than you". This is not hypothesis. It has happened. Our existing use rights have been denied by Council Officers and on many occasions. In one case it took a special act of parliament to allow a house burnt down to be rebuilt. In another, it took three years to get a modest addition approved (Counsellor Simpson's assistance is gratefully acknowledged by the home owner). The denial of existing use rights has been systemic over many decades. The practice can only increase under Zone E2.

The second serious concern is its effect on the market value of our homes, in most cases the major family asset. These are properties that we have been guaranteed may be bought and sold on the open market and that is an essential element of the voluntary buyback scheme. That is what has always been presented to us as a guarantee of fair dealing, and restrictions in this regard are incompatible with the scheme. It becomes quite something else when an interested party sets out to manipulate the market on which the assessment of market value depends. The State Government has not attempted to impose restrictions on market dealings but Sutherland Council has. In years past,

Council Officers have warned off potential buyers. Unreasonable restrictions in violation of existing use rights have turned away buyers. There has not been a private sale for a couple of decades. There is no effective market for these properties and value has been degraded compared to what an effective market may indicate. Market value is impossible to assess. Under Zone E2, a potential buyer need only look at the zoning certificate to learn that the occupation is prohibited of the home they are considering. No further inquiry is necessary. There has been a systematic enterprise to suppress the market and the market value of these homes and that is highly relevant to the misleading account of the Land Acquisition (just terms and compensation) Act 1991 contained in the letter. I will return to that, but there a number of other falsehoods that I must draw to your attention.

In the final paragraph of page 1, referring to SSDLEP2004 and SSLEP2006 the letter refers to the "significant community concern regarding the existing use and future alterations and additions to dwellings on the Woronora River frontages". I can speak as a direct witness. The only significant community concern was expressed by the residents themselves and it was because Council was then proposing that their private family homes be zoned as Public Open Space. Like today's version of Zone E2 , this was an administrative malfeasance and in direct conflict with superior law. After the plan was exhibited, we had numerous training and fitness groups jogging through our back yards. They said that Council had said they could and that it was public open space. As has been the case for SSDLEP2013, we made representations direct to our senior Ward Councillor and the Mayor, Councillor Ken McDonnell. We did not go to the media. We did not spread it around. We put our case and made our arguments, as we have done now. It was because of the merit of our representations and nothing else that the properties were deferred from the SSLEP2006. Ex-Councillor McDonnell will confirm this and I have the documentation. The final paragraph of page 1 is entirely false.

I turn now to the sly and misleading statements of paragraph 1 that "this land is not used for rural purposes and many of the lots do not benefit from any legal vehicular access, having access from the river only". Firstly please note that Shackles Estate was one of the first land subdivisions in the Sutherland area, it was properly and legally done according to the law of the day and the legal purpose was for the building of residential cottages on single blocks of land. It pre-dates the Local Government Act. I have lived here since 1972. The access tracks were long pre-existing even then and would probably pre-date the application of the Local government Act to the area. Residents negotiated with other relevant landholders of the time concerning the building of those tracks. In my own case, we had negotiated with the then landowner, Parkes Development for the sale to us as a Co-operative of users. Full agreement was reached and contracts prepared. Parkes then advised that Council had made threats to it and had to reluctantly withdraw. I have the documentation. There were similar occurrences for other access tracks. That is not the end of it. When the Council approved ridge development was occurring (resulting in major siltation of the river - we have photos) the principal of the development company (Warren Johns of Scepter Holdings) made threats direct to us that if not paid a large sum of money, he would cut off our access. Despite the demand for alleged compensation being a clear contravention of at least the Telecommunications Act, Council officers "helpfully" offered to act as a go-between and issued demands for money on behalf of the developer. Currently serving senior officers were involved. I have the documentation. Ex-Councillor McDonnell was a witness and Mayor Ian Swords was advised. We of course, having the benefit of legal advice, did not in the end pay. These threats were repeated by the same developer in other areas of Shackles Estate and those residents, feeling they had no other option, did pay.

Let me also emphasise: these tracks are essential infrastructure, they are essential to water, sewage, electricity and telecommunications supply to the above mentioned ridge development. They are also essential to fire fighting. That ridge development is extremely vulnerable to firestorm conditions running up the ridge and the tracks are central to any firefighting in the event of bushfire.

I turn now to the crux of the letter, the misleading account of the Land Acquisition (just terms and compensation) Act 1991 (the Act).

The objects of the Act (my emphasis) are:

> (a) to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be <u>not less than the market value of the land (unaffected by the proposal) at the date of acquisition</u>, and
> (b) to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale, and

(c) to establish new procedures for the compulsory acquisition of land by authorities of the State to simplify and expedite the acquisition process, and
(d) to require an authority of the State to acquire land designated for acquisition for a public purpose where hardship is demonstrated, and
(e) to encourage the acquisition of land by agreement instead of compulsory process.

Please note that the market value of the land is central and constitutes the floor for the assessment of compensation. Sections 55 and 56 say (my emphasis again):

55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

(a) the market value of the land on the date of its acquisition,
(b) any special value of the land to the person on the date of its acquisition,
(c) any loss attributable to severance,
(d) any loss attributable to disturbance,
(e) solatium,
(f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

56 Market value

(1) In this Act:**"market value"** of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):

(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired, and
(b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired, and
(c) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law.

(2) When assessing the market value of land for the purpose of paying compensation to a number of former owners of the land, the sum of the market values of each interest in the land must not (except with the approval of the Minister responsible for the authority of the State) exceed the market value of the land at the date of acquisition.

Firstly note the minor point that regarding 56(c), under Zoning E2, the occupation of our pre-existing homes is prohibited by the minor law and the onus is on us to prove in higher law that our existence here is lawful. This should not be.

Secondly, note the importance of the "willing but not anxious buyer" for the assessment of the basis of compensation and that this is the only basis for the subsequent steps. Under Zone 2, there can be no buyers, willing, anxious or not. Market value is now unassessable, by the deliberate actions of Council. Shackles Estate is pretty much a unique situation. What is allowed in Zone 2 must be the basis for any subsequent evaluation of value. There has been a systematic degradation of both the market and market value by Council. It has been progressively lowering the floor by imposing restrictions on existing use rights. It matters not that this is directly in conflict with superior law. What matters is what a “willing but not anxious buyer” will pay.

Council’s behavior in the past but most especially Zone E2 is a sharp and dishonest practice aimed directly at the

subversion of the Act. The statement in the letter is that: “Land is valued as if the land was not zoned for open space purposes. Accordingly, existing owners should not suffer decreases in property values as a result of the proposed rezoning.” Note the lovely ambiguity as to what is actually the alleged basis or floor of valuation and the exquisitely subtle difference between “zoned for open space” and “the proposed rezoning”. The fact is, this is an entirely misleading (but rather clever) statement. I repeat: Zone E2 is aimed at the subversion of the objects of the Act.

I have previously expressed my concern that you are being deliberately misled by your senior officers concerning this matter, and I fear, the related proposal to allow new development on the escarpment itself on land critical to the regional open space strategy. The policy contradictions are clear and your letter to Anna is clear and further proof of all those concerns. I know you did not write it. You relied on your advisers. They have very deliberately misled you and your letter has certainly inflamed the situation greatly. Far from the soothing effect intended, it has highlighted the peril we face from sly and sharp Officers. It is simply not believable and in direct conflict with the evidence before our eyes. We are extremely concerned that Council Officers have been issuing false and misleading briefings and I believe that putting them into a letter to be signed by the Mayor constitutes a clear and present danger to your own reputation.

Finally, let me remind you of what is probably the far more important concern that we have expressed concerning the related proposal to allow development of the escarpment lands on the western upriver side. This is completely undeveloped land that is of major environmental importance. It is an essential wildlife corridor. It is central to the regional open space strategy and Council will be permanently removing any possibility that it can be a part. While we have expressed our concerns and sought more detail from Officers, no response whatever has been forthcoming. There has been absolutely no transparency on this. Council is allowing new development on immediately adjoining lands to Shackles Estate of equal or greater importance. The contradiction is startling.

As I said previously, our preference is to put our case calmly and directly to you and to our senior Ward Councillor and to have it decided on its merits. That would not appear to be possible given that your own advisers have no hesitation in placing for your signature such a misleading letter. We cannot compete with that. I would appreciate your most urgent advice. Council will shortly be deciding these matters and I am afraid that in defence of our own interests we may have no alternative but to inform all Councillors of the systemic dishonesty on the part of Council Officers in regard to these matters and that they are being very seriously misled.

Yours sincerely

Gary Price

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27/6/13
Counsellor Steve Simpson
Locked bag 17
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Dear Steve

Once again thank you for meeting with us to discuss the proposed rezoning of Shackles Estate and for your taking the time to discuss the matter with me by phone.

During the course of that conversation you said that you were prepared to propose an amendment to the draft description of Zone E(2) but that your proposed amendment, while recognising the existing rights of the residents involved, would not be as proposed by Gary Price and agreed to by the other residents.

While appreciating your proposed intervention on our behalf I will formally add my request to you to accept the amendment proposed by us for the following reasons in addition to the ones already raised to you.

This has been a long running issue. The last proposed zoning for Shackles Estate was a Public Open Space zoning which did not even recognise the existence of our homes within the zone. Now we have a proposed zoning which describes their occupation as a prohibited use.

This does not provide a final and satisfactory solution to the zoning issue. Nor is it by any means a satisfactory solution to the administration of the river valley in accordance with long standing policy. We feel that now is the time when, with common sense and goodwill on the part of all parties concerned, it can be resolved.

I am confounded by the claim that because existing use rights are part of superior law they should not (need not?) be included in the zoning. They do need to be included in the zoning and the Department of Planning (DOP) Guidelines and the Standard Planning Instrument (SPI) are absolutely explicit.

Surely if rights exist they should be displayed in any public document that relates to them. That is the entire point of the SPI and its Guidelines.

If the reason they are not included is to force the residents to resort to litigation to enforce these rights it is onerous, contrary to natural justice, an abuse of process, contravention of the Environmental Planning and Assessment Regulations 1994 (clauses 41-44 concerning existing uses), and a contravention of the very Guidelines and principles of the SPI.

It is also a waste of public funds. Ratepayers, taxpayers and ourselves are being subjected to unnecessary expense. Extensive legal actions and public enquiries will be required to rectify what Council is well aware is a wrongful determination.

In this regard I would instance my neighbour who needed to have an Act of Parliament passed to allow him to rebuild after his house was destroyed by fire. Surely a great waste of public resources and a needless source of suffering to him!

It is unacceptable to have to argue our rights based on assurances that they exist and therefore do not need further explicating. Any such assurances have no standing in law. The zoning does.

On any normal reading the current proposal prohibits what superior legislation requires. I would also draw your attention to D.O.P. Planning Circular PS 06-007. I quote:

> *"The Department will be issuing guidelines shortly on the consideration of existing use when developing new LEP provisions, and for the assessment and approval of proposals with existing use rights.*
>
> *Where feasible, councils will be encouraged to identify development that would have existing use rights and include 'permitted additional uses' on that land in their LEP, so that the land use is no longer prohibited (in effect, remove existing use rights)"*

It is clear from this that the zoning has been prepared in direct contravention of the intention of DOP Guidelines. The SPI specifically embodies those principles in Item 4 of every zoning.

Since the State Government now pays the total costs involved in any voluntary resumptions it is difficult to understand why Council has chosen not to follow State legislation and Guidelines.

I once again thank you for your good offices on our behalf and I would be most grateful if you would provide us with a copy of your proposed amendment at the earliest available opportunity to enable us to consider how to finally achieve a zoning which will enable all parties to feel that a just and reasonable conclusion has been reached and to obviate any need for third parties to become involved .

Please be very clear: The preparation of LEPs under the SPI require the determination of existing uses applicable and their explicit inclusion in the zoning definition. Anything not permissible is prohibited. That is absolutely and clearly stated in Item 4 (prohibited uses) of every zoning definition in the SPI and in the Planning Circular quoted above.

That is exactly what Gary Price's recommendation does. It explicitly identifies the existing uses and applies them to the SPI. Any variation from that is a contravention of both superior law and the directives from the DOP.

We are indeed privileged to live in a civil society under the rule of law. Those laws are directly contravened by the DLEP. We appeal to you to rectify this before further ratepayers' funds are wasted by this pointless exercise.

Yours sincerely

Julia Munro

Encl: recommendation

Cc: Counsellor Kent Johns

Ref: LP/03/252376

Comments on Sutherland draft LEP 2013
Zoning definitions and anomalies on upriver Woronora River valley and escarpment

<u>Recommendation 1</u>: All land directly behind Shackles Estate and up the escarpment be zoned E2, consistent with stated policy regarding new development visible from the river.

<u>Recommendation 2</u>: The definition of zone E2 be altered so that:
Item 2: permitted without consent to read "home occupation"
Item 3: permitted with consent to include "development of existing dwellings; rebuilding existing dwellings"

Introduction: the area concerned

This concerns the western side of the Woronora river valley and escarpment. The area takes in the strip of lands on the riverfront known as Shackles Estate and the lands behind it up the escarpment. It begins at the start of Shackles Estate (opposite Deepwater Estate which is on the Eastern side of the river) and goes south until the end of the navigable section of the river past the area known as The Needles. The issues are the zonings and their definitions for both Shackles Estate and the lands directly behind up the escarpment. The latter in particular has extremely high environmental value, is a major wildlife corridor, is relatively unspoiled and has never had development. Shackles Estate was developed in the early decades of the 20th century (subdivided 99 years ago). Although it supported a community of over 150 households until the 1970s it is now mostly State Government owned due to a "buyback on request" policy initiated chiefly by Council in a deal with the State Government at that time. There remain 13 houses, of full Torrens Title and all the rights that go with it under the rule of Australian law. There are no restrictions as to sale or disposal. Thus the the Land Acquisition (just terms and compensation) Act 1991does not apply.

There is an intergovernmental policy governing development of this area. It is called the Escarpment Policy and in essence it dictates that no *<u>new</u>* development visible from the river be allowed. It was the rationale of the buyback policy that *<u>existing</u>* development be incrementally bought on the open market or on request in support of the Escarpment Policy. Householders of Shackles Estate support the Escarpment Policy but it is a policy in ruins due entirely to past Council actions disowning the above mentioned agreement. Major new development, chiefly by a particular developer on the rim of the escarpment clearly visible from the river has been allowed from the start of Shackles Estate to about a line drawn from Marsden Road, Barden Ridge to the river. The draft LEP proposes to continue escarpment despoliation to the navigable end of the river.

Anomalous zoning

Under the draft LEP, the land directly behind Shackles Estate and up the escarpment south of that line is to be zoned E3. Zone E3 specifies that home occupations are permissible without consent and among the *<u>new uses</u>* allowed with development consent are: bed and breakfast accommodation; dwelling houses; dual occupancies; health consulting rooms, home businesses; home industries and secondary dwellings.

These are inconsistent with the Escarpment Policy. These lands must be zoned E2 as is Shackles Estate and the remaining undeveloped escarpment lands north of the Marsden Road line.

Recommendation 1: All land directly behind Shackles Estate and up the escarpment be zoned E2.

The stated policy demands that this land be zoned exactly the same as Shackles Estate. The E3 zoning specified in the draft is anomalous and will most likely be subject to appeal. The appeal will most likely come from those remaining owners of vacant land in Shackles Estate who will rightly argue that they should be treated the same as those directly adjacent. The result may well be that Shackles Estate itself may be zoned E3 by court, allowing new development on vacant, undeveloped land, as will be allowed immediately adjacent under the Draft LEP. Whatever the result, what is certain is that these lands and Shackles Estate must have the same zonings and restrictions and allowable uses. Nothing else is defensible. They have equal environmental and visual and policy value.

Zone E2: unlawful and an abuse of legal process

Shackles Estate and all households within have been zoned E2. Under uses permitted without consent, Council itself has specified "nil". A few uses are permitted with consent, such as environmental protection works or flood mitigation but no mention is made of development or rebuilding of *existing* facilities. A large number of developments are specified as prohibited and the State Government requires that any other developments not specified as permissible are prohibited.

Thus a key concern is that under the draft LEP, occupation of our own homes is prohibited.

This is unlawful, it is dishonest and it is an egregious abuse of power and legal process.

The Council officers who drafted this are fully aware that this is inconsistent with superior law.

It is deliberate and it is an abuse of the powers of the Local Government Act. It caps four decades of systemic administrative wrongdoing, inappropriate relationships between senior Council officers and major developers and disputes between Council and State Government. The result has been massive siltation, environmental damage on a large scale, weed infestation and anti-social activities on those stretches of river with no nearby homes. The current draft LEP continues this long tradition. To repeat:

The definition of Zone E2 as interpreted by Council officers is directly and deliberately in conflict with superior law.

As witness to this, note the Council's explicit addendum to uses permitted without approval: "nil". It is a deliberate negative, in contrast to zone E3 which explicitly allows home occupation without approval.

The superior law is the State Environmental and Planning Regulations 1994, which allows, not only an existing use, such as home occupation without permission but also, with permission, an existing use to be enlarged, intensified, altered, extended or rebuilt. These are basic rights and go to the heart of the rule of law for property ownership. A key question is: why are they so explicitly and deliberately denied in Sutherland's interpretation of zone E2?

Why is zone E2 so obviously in conflict with superior law?

A potential buyer examining the zoning definition will find that occupation of the house they are considering buying is prohibited. It matters not that they can hire lawyers to enforce their right. The very need means they are not interested. The primary purpose here is to devalue a property council may or may not be interested in at some indeterminate time in the future. It is a dishonest abuse of the powers of the Local Government Act. A junior officer of Council, considering a development application will look at the zoning and refuse. It will require a court order to even gain consideration. It does now. That has been the history here. It has taken years to get straightforward development approvals. This is not a speculation for the future. Senior officers have involved themselves systematically to the detriment of existing landholders and to the advantage of major developers. The examples are many and over decades and continuing. Rights that require a phalanx of lawyers to exercise are not rights at all.

It is utterly essential that the basic rights laid out in the superior Regulations be explicitly acknowledged. The current draft explicitly denies them – unlawfully so. It is an example of a major administrative wrongdoing – one of many in the ongoing history of this area.

<u>Recommendation 2</u>: The definition of zone E2 must be altered so that:
Item 2: permitted without consent to read "home occupation"
Item 3: permitted with consent to include "development of existing dwellings; rebuilding existing dwellings"

Conclusion: need for an independent enquiry into the pattern of development at the edge of the escarpment

Senior Council officers have a culture that what they cannot do lawfully they may do without consequences unlawfully. Zone E2 as interpreted and the zoning inconsistencies referred to above are examples as was the attempt in 2003 to zone private homes in Shackles Estate as public open space with neither consultation nor compensation. It has been explicit in the statement by a senior officer that "we can spend more on lawyers than you". It is abuse of legal process. History is suggestive of worse. It is systemic and it is long running. Residents support a suitably independent and competent review of the actions of Council and its decisions in this area, specifically in relation to the development of the escarpment, inconsistency with stated policy, environmental consequences and the deals and relationships between Council and its officers and developers relating to the area proposed to be zoned E3 discussed above and previous escarpment developments. Shackles Estate residents would assist such an enquiry but they cannot cooperate with any internal inquiry in which they can have neither trust nor confidence.

28/4/13
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3/7/13
Councillor Bruce Walton
Sutherland Shire Council

Dear Councillor Walton

Re: Sutherland DLEP: Western side of upriver Woronora and escarpment

I will try to summarise the situation revealed by the attached documents. The area includes the strip of riverfront lots starting from about Shackles Road and continuing upriver, called Shackles Estate. I think my concerns would be confirmed by all the families living here.

Our concerns also include the escarpment immediately behind Shackles estate which is of special environmental and regional space importance but is being zoned for new development.

About 13 family households remain in Shackles Estate which was originally subdivided in 1914. Over the past 4 decades there has been a gradual voluntary buyback by the State government of what was originally over 150 households. Compulsory acquisition has never been an option and we have always been assured at the State level that no restrictions on private sales would be imposed. The buyback is voluntary, and at "market". Development was restricted and amounted to enlargement or rebuilding of existing dwellings. These were what are defined as existing uses under the Environmental Planning and Assessment Regulations 1994 (41-44).

In essence our problem is that DLEP2013 zones us as E2, a zoning which Council has quite deliberately drafted as extinguishing existing uses. Among other things, it means that the occupation of our own homes is a prohibited activity. It is in direct contravention of the above regulations.

It is also in direct contravention of the guidelines for the preparation of Standard Planning Instruments such as DLEP2013. The Department of Planning has been very clear. I quote DOP Planning Circular PS 06-007:

> *"The Department will be issuing guidelines shortly on the consideration of existing use when developing new LEP provisions, and for the assessment and approval of proposals with existing use rights.*
>
> *Where feasible, councils will be encouraged to identify development that would have existing use rights and include 'permitted additional uses' on that land in their LEP, so that the land use is no longer prohibited (in effect, remove existing use rights)"*

DLEP2013 removes existing use rights yet does not explicitly state them in zone E2. Anything not stated as permissible is prohibited. DLEP2013 does in fact follow those guidelines in all other zonings but E2. Zone E2 has been drafted, deliberately, in direct contravention of both State legislation and the guidelines for the preparation of DLEPs under the Standard Planning Instrument.

Let me stress to you that we support the policy of making the river valley a regional open space. However we are not under any form of compulsory acquisition. The State government has been clear that it is not on the agenda. Council is not contributing to the acquisition program. These are our family homes. We have all the property rights in law as anybody else. We do not have an issue with an E2 zoning that explicitly states the appropriate existing use rights, as is required under NSW law and guidelines.

What Council is being asked to approve is in direct conflict with superior law. It is unlawful.

The only advice Council has given has been false and misleading. That this is so is clear and unequivocal in the letters that I have attached to this message. Absolutely no material response has been forthcoming on the matters we have raised. We are being asked to believe the unbelievable and our legal advice is very clear.

We appeal for your support to rectify this before further ratepayers' funds are wasted by this pointless exercise. It requires a simple amendment to bring the zoning into conformity:

***Reword zone E2**. Items 1 and 4 to remain as is. Items 2 and 3 to read as follows (underlined is new wording):*

2. Permitted without consent
Home occupations and existing uses.
3 Permitted with consent
Alterations; Extensions; Rebuilding of existing dwellings; Environmental facilities; Environmental protection works; Flood mitigation works; Information and education facilities; Roads.

I would ask you to support that amendment. It is vitally important that the zoning definition explicitly identify the existing uses and apply them directly to the Standard Planning Instrument that the State government has given Councils to work with. Vague statements of intent to respect existing residents have absolutely no standing under the planning framework.

Let me mention what is probably the far more important concern that we have expressed concerning the related proposal to allow development of the escarpment lands on the western upriver side. This is completely undeveloped land that is of major environmental importance. It is an essential wildlife corridor. It is central to the regional open space strategy and Council will be permanently removing any possibility that it can be a part. While we have expressed our concerns and sought more detail from Officers, no response whatever has been forthcoming. There has been absolutely no transparency on this. Council is allowing new development on immediately adjoining lands to Shackles Estate of equal or greater importance. The contradiction is startling.

I appeal to you to look very carefully at the Council's own proposal to allow development in the upper Woronora valley. It is environmental vandalism.

I have attached to this email a word file copy (GP2BW) of this letter plus the following:

Wordfile of my formal submission to Council. (GP submission)

Wordfile of my recommendation as above, with notes. (GP recommendation)

PDF file of Mayor's letter to a resident Doug Patterson. (Mayor2Doug)

Wordfile of my response to that letter and to advice that Councillor Simpson received from Council officers. (GP reply Mayor2Doug)

PDF file of Mayor's letter to resident Anna Hauch. (Mayor2Anna)

Wordfile of my response to that letter. GP reply Mayor2Anna)

Wordfile of a response by another resident, Julia Munro, to a conversation she had with Councillor Simpson. Julia is a retired solicitor who had her own practice in the Shire. (Julia2Steve)

I am sorry to have to ask of you all this, but we have been given no alternative.

My very best regards

Gary Price

17/7/13
Dear Steve

Thank you for the opportunity to comment on the review of submissions on SSLEP2013 for Shackles Estate. Firstly I assume that it is a very rough draft, but even so, major problems of substance are immediately evident. I will confine myself to the main issues.

Existing uses

The most significant issue concerns existing uses. The fact that zone E2 prohibits the existing uses allowed under superior law has not been contested. The Department of Planning has been quite explicit about how Councils should deal with existing uses under the Standard Instrument.

D.O.P. Planning Circular PS 06-007 says:

> *"The Department will be issuing guidelines shortly on the consideration of existing use when developing new LEP provisions, and for the assessment and approval of proposals with existing use rights.*
>
> *Where feasible, councils will be encouraged to identify development that would have existing use rights and include 'permitted additional uses' on that land in their LEP, so that the land use is no longer prohibited (in effect, remove existing use rights)"*

This has been very clearly implemented by DOP in the Standard Instrument with the compulsory provision on all definitions of zones that any use not listed as permissible is prohibited. All councils are required to identify existing uses and include them as permitted uses. Sutherland has done this for every other zoning but ours. Other councils have done it for all zones. Sutherland has not. Indeed, reading your adviser there is no indication whatever that the author is even aware of the DOP instructions on dealing with existing uses. It is a significant omission and highly misleading to the reader.

I repeat: the Standard Instrument requires councils to identify existing uses and write them in to the appropriate zoning.

Thus the proposal to include a "local provision" essentially reproducing the old rural zone is particularly perplexing. Firstly, it is quite unclear just what "local provision" actually means. Whatever it means, it does not comply with the instructions for preparing this LEP. It would appear to be designed to be rejected at the DOP level. It is quite unacceptable. Existing uses are very clearly stated in the relevant Regulations. They are very simple. It is not difficult to write them in to the definition of each zoning as has been done everywhere else. Why has it not happened in this particular case? Having a voluntary buyback is entirely irrelevant.

Effects on property values and valuations under the Land Acquisition (just terms and compensation) Act 1991

I dealt extensively with this matter in my letter to the Mayor of 20 June 2013 in response to his advice to resident Anna Hauch of 13 June 2013. The account of the above Act in that advice was misleading, as is this current advice. Owners both past and present have suffered decreases in property values as a result of administrative actions by the council. Zone E2 subverts the objects of the Act by further lowering the baseline of valuation. These are not properties subject to compulsory acquisition. There are no restrictions to sale on the open market. The baseline in a voluntary acquisition is market value, and Council is rigging

the market. It is acting against the objects of the Act. The statement that “existing owners should not suffer decreases in property values as a result of the proposed rezoning” is simply unsupportable.

Rezoning of land adjoining Shackles Estate

Your adviser admits that the land adjoining has the same environmental, ecological and open space value as Shackles Estate itself. The sole difference is that Shackles Estate has been identified for voluntary acquisition. This is completely irrelevant. What is relevant is that the land adjoining has had no previous development and thus has no existing use rights. Your reviewer has dwelt on the restrictiveness of the previous zoning for the adjoining land, which is similar to the new zoning proposed for Shackles Estate. Why not the same zoning as Shackles Estate? What has carefully not been mentioned to you is the permissiveness of the proposed new zoning for these lands directly adjacent to Shackles Estate. Remember that under E2, all existing uses are prohibited whereas under E3 for the adjoining lands the following major new developments are permissible:

E3 zone uses

Home occupations are permissible without consent in E3 as long as they meet the requirements in the LEP.

The following uses can be carried out in E3 with development consent:

- *bed and breakfast accommodation*
- *boat sheds*
- *dwelling houses*
- *dual occupancies*
- *environmental protection works*
- *flood mitigation works*
- *health consulting rooms*
- *home businesses*
- *home industries*
- *recreation areas*
- *roads*
- *secondary dwellings*

All other uses not listed above are prohibited in this zone.

Major new development is proposed for the adjoining lands in stark contradiction of the restrictive zoning for Shackles Estate. This is despite the admitted fact that they have similar policy values. They are entirely comparable yet council is proposing greenfield development which must forever remove any possibility of a regional open space encompassing the Woronora valley. It is an explicit abandonment of the very policy under which the acquisition of Shackles Estate was undertaken. This is occurring at the same time that already existing dwellings in Shackles Estate are being denied existing uses. It is a clear inconsistency. Both should have the same zoning, whether one has been identified for voluntary acquisition or not. The voluntary acquisition was put in place purely because there were already existing family homes in Shackles Estate but not in the adjoining lands.

The justification of the permissive zoning on the lands adjacent Shackles Estate is simply not credible and amounts to the overturning of long standing policy to retain the Woronora valley in an undeveloped state. Your adviser on this matter is deeply misleading.

DOP advice to Council

Your adviser refers to advice of the Department of Planning Land management Branch. I have a copy of that advice and it is not as your adviser purports it to be. In contrast to your adviser's contention that DOP proposed an E2 zoning for Shackles Estate, the DOP letter of 3 June 2008 by Deidre Stewart clearly states that the proposal came from Council, not DOP and that the DOP support for that proposal was conditional on the final views of the Sydney East Planning Team. Furthermore, it is completely clear that DOP did not appreciate that Council's own proposal was to explicitly render existing uses prohibited, in direct contravention of DOP's own Regulations and instructions for the preparation of Standard Instruments such as SSDLEP2013.

Conclusion

The sole justification that has been offered by your council adviser is that Shackles Estate is under a voluntary acquisition program. That is no justification of either the prohibition of existing uses nor for the contradictory zoning of the adjacent lands. That the properties can be acquired by voluntary sale to a State agency, or just on the market, is entirely irrelevant. These are basic property rights.

The proposition advanced by your adviser that basic legal rights, such as existing uses and just compensation are all in some kind of abeyance simply because of a voluntary acquisition program is contempt of the law of this land. It is market rigging and damage has already been done to the values that must be the basis of any valuation for acquisition, compulsory or not. It must not be compounded.

I must remark on the lack of quality of the advice being given to you, the Mayor and Council itself. The issues identified in submissions have not been addressed at all. There are half truths, misleading proposals and falsehoods. No matter raised in my correspondence with you and the Mayor has been dealt with. You will recall that the Mayor signed two letters giving clearly wrong advice to residents. Those untruths are simply being repeated.

I am extremely concerned, not just for the Woronora valley, but the whole of Sutherland Shire that the advice you are getting from your officers is misleading and dishonest. If this is being repeated across the DLEP, Sutherland Shire has a major problem of administrative culture and probity that urgently needs to be dealt with. It is never acceptable that officers mislead in the manner that has occurred in this case.

We have made simple suggestions that avoid the problems while maintaining policy integrity. They have been completely ignored. They are:

1. Shackles Estate and the adjoining lands must be treated the same. If Shackles estate is given E2 zoning so too must the adjacent lands. If the adjacent lands are given E3, so too must Shackles Estate. Our preference is for E2 for both.
2. If E2 zoning is given it must explicitly include existing uses as permissible. This is required under State law and the guidelines for preparation of SSDLEP2013 under the Standard Instrument.

Gary Price
17 June 2013

61. Shackels Estate

20 submissions (some from same owners) were received where the primary cause for objection is that the draft plan does not explicitly permit dwellings in the Shackels Estate (Woronora River Frontages) and residents see this as a loss of rights impacting on land values.

Summary of Issues

The main concern of most landowners making submissions on this issue is to ensure that existing dwellings are formally acknowledged by way of permissibility within the zone and not based on existing use rights. Residents want dwellings to be explicitly permissible to provide certainty that the residents can continue living in and rebuild/alter existing dwellings. Submissions state that the DSSLEP2013 provides no support for the use of existing use rights on their property. A submission also claims that the drafting on the plan is "deliberately written to conflict with superior law, an act which fails all administrative and legal tests, is unethical, self interested and an egregious abuse of the process".

Most of the residents' submissions expressed concern that land values would be likely to be depressed as a result of the proposed zone changes. The submissions suggest that DSSLEP2013 gives no indication that property owners will be adequately compensated for their properties in the case of an acquisition. Several submissions raised concerns regarding the compulsory acquisition of their property.

A number of submissions noted that there was a lack of consultation between council and landowners.

Several submissions request that the land adjoining Shackels Estate should be rezoned from the proposed E3 Environmental Management Zone to E2 Environmental Conservation given the high ecological value of the land. It is claimed that zoning adjacent land E3 is irrational and an abandonment of the State's escarpment policy and any aim to make the valley regional open space.

Analysis of Issues

<u>Background Information</u>

The zoning history of the Shackels Estate is a result of its unique location. In 1916 a river access only subdivision of 298 lots was released. A number of the lots were developed for basic housing. Upon gazettal of the County of Cumberland Scheme in 1946 the land was zoned as green belt which still permitted dwelling houses with approval. In February 1961, the zoning was altered to only allow new dwellings on lot

areas of 5 acres or more and this was followed in 1964 by the State Planning Authority (SPA) assuming consent authority powers. In 1966 council resolved to prohibit further development in Shackels Estate upstream of the public reserve on Bruce Road. As a result of the 1966 resolution council purchased some of the properties. In 1970 council proposed an Interim Development Order (effectively a LEP) to zone the land non urban but opposition from the landowners compelled council to leave the area undetermined. In 1973, then President Skinner announced a scheme for the purchase of land in the Estate in conjunction with the State Planning Authority. Interim Development Order 31 was made in 1977 and stopped buildings being replaced even where they had been destroyed by fire.

In order to preserve an open space environment in the Woronora River Valley the Department of Planning (DP&I) acquired Woronora River Frontage properties at the owner's initiation. Following acquisition, the lands with buildings erected on them were demolished by council as part of council's agreement to accept care, control and management of the land.

Given community opposition, the Shackels Estate was excluded from the Sutherland Shire Planning Scheme Ordinance 1980. During the preparation of Sutherland Shire Local Environmental Plan 2000, council recognised that residents had concerns regarding the use of dwellings at the Shackels Estate. As a result, under SSLEP2000, the area was zoned 1(a) Rural. Under this 1(a) Rural zoning the following controls applied:

26 What controls apply to dwelling houses in the 1(a) Rural zone?

(1) A dwelling house may be erected in the 1(a) Rural zone only with development consent, and only if the dwelling house is:

> *(a) on 2 hectares or more of land, and*
>
> *(b) used in conjunction with agriculture, an animal establishment or rural industry.*

(2) Existing dwelling houses in the Rural 1(a) zone may be enlarged or altered with development consent.

(3) Any dwelling house erected or enlarged in the Rural 1(a) zone must comply with the following:

> *(a) height must not exceed 7.2 metres to any point on the uppermost ceiling and 9 metres to the highest point on the roof, and*

(b) gross floor area must not increase by more than 30m2 or 10% of the existing gross floor area, whichever is the lesser, or exceed a maximum floorspace of 300m2 (inclusive of any ancillary buildings).

27 Acquisition of land zoned 1(a) Rural

The owner of any allotment in the 1(a) Rural zone, which has a frontage to Woronora River (as identified on the maps), may request the Minister administering the Environmental Planning and Assessment Act 1979 to acquire the land. On receipt of the request, the Corporation under the Act shall acquire the land.

The effect of the rural zone is that residents could rebuild, enlarge or alter their dwellings with development consent with the acquisition responsibility resting with the State.

During the preparation of SSDLEP2004 and SSLEP2006, there was significant community concern regarding the existing use and future alterations and additions to dwellings on the Woronora River Frontages. Given the unresolved zoning and land use issues, these properties were excluded from SSDLEP2004 and deferred from SSLEP2006, effectively re-instating the controls that applied to dwelling houses in the Rural 1(a) zone under SSLEP2000.

The Draft Sutherland Shire Local Environmental Plan 2013 has been prepared using the Department of Planning and Infrastructure's Standard Instrument Template. As a result, council is restricted by the zones contained in this template. With regards to the zoning of the Shackels Estate, council, under the advice of the Department of Planning and Infrastructure's Land Management Branch, zoned the land as E2 Environmental Conservation. The application of this E2 is deemed to be the most appropriate as it requires the acquisition of these properties under the new plan and contains objectives to preserve the natural environment of the area.

Draft SSLEP2013 must identify land to be acquired for Regional Open Space purposes by the Corporation under the Environmental Planning and Assessment Act (the Minister for Planning and Infrastructure). The Department of Planning requires that land which is reserved for a public purpose, including open space, which has not yet been acquired and used for its intended public purpose is to be zoned according to its intended future use. For that reason, the land is proposed to be zoned E2 Environmental Conservation, as this is the most appropriate standard land use zone in the Standard Instrument Order.

The objectives of this zone include the protection, management and restoration of the ecological, scientific, cultural or aesthetic values of land to which the zone is applied. Through the application of this zone to the land along the Woronora River, it is

envisaged that the Woronora River frontage will be conserved and brought into public ownership which is consistent with the long term vision for the land.

Under the DSSLEP2013, the permissible uses for the E2 Environmental Conservation zone include:

Environmental facilities; Environmental protection works; Flood mitigation works; Information and education facilities and Roads.

The E2 zone does not permit the construction of, or alterations and additions to, dwellings in this zone. However, the land owner can rely on existing use rights under the Environmental Planning and Assessment Act, 1979 to rebuild or make alterations and additions to a dwelling. Existing use rights rely on the land owner demonstrating that the use was lawfully commenced and not abandoned over time. The existing use right provisions sit above the LEP at a higher statutory level. As a result they are not referred to in the LEP. Existing Use Rights are established through Section 103 of the Environmental Planning and Assessment Act, 1979 where it is explicitly stated that nothing in the Act or an environmental planning instrument prevents the continuance of an existing use.

The Environmental Planning and Assessment Regulations 1980 Section 41 then clarifies further by stating that: an existing use may, subject to this Division, (a) be enlarged, expanded or intensified, or (b) be altered or extended, or (c) be rebuilt.

Where land used for dwelling houses was lawfully commenced, and where that use has not been abandoned over time, the Act and Regulations establishes the right of land owners to continue to occupy and improve their dwellings. The LEP does not have to specifically make dwellings permissible in this case. There is no error in drafting as suggested by the submission.

<u>Rebuilding/alterations to existing dwellings</u>

As highlighted in the submissions, the proposed E2 zone and the prohibition of dwellings has caused significant concern to residents. The residents want certainty that they can continue to develop their properties.

Given the degree of concern, it is considered appropriate that the draft plan be amended so that existing dwellings can be altered or rebuilt rather than leaving residents to rely on existing use rights legislation. It is considered that best way to achieve this is to include a local provision for the E2 Environmental Conservation zone reproducing the controls which applied to the land under the SSLEP2000 1(a) Rural zone (outlined above) within the DSSLEP2013. This would allow the ongoing use and improvements of dwellings within the zone.

It is not recommended that dwellings be made a permissible use in the E2 zone because this would apply to all other land where the zone has been applied. The E2 zone is generally applied to land that is protected for its environmental conservation value and as such dwellings would be inappropriate.

It should be noted that given that the Crown is the acquisition authority, the Minister may not ultimately accept a clause which will result in the further capitalisation of land identified for acquisition.

Compulsory Acquisition and Property Values

Properties identified as regionally significant sites for acquisition (such as those in Shackels Estate), must be acquired by the Minister administering the Environmental Planning and Assessment Act 1979 rather than by council. This plan does not contain provisions for compulsory acquisition. However, the acquisition of this land is the responsibility of the State Government. The Minister has the power to compulsory acquire the land however, based on past practice, the Minister is unlikely to pursue compulsory acquisition.

Acquisition can also occur at the owner's request. The agreed property value is governed by the Land Acquisition (Just Terms Compensation) Act, 1991 and accordingly, existing owners should not suffer decreases in property values as a result of the proposed rezoning.

Rezoning of the land adjoining Shackels Estate

The land to the rear of Shackels Estate has a wider permissibility than the Woronora River Frontages. Under the SSLEP2006 the adjoining land was zoned Zone 17b Environmental Protection (Low Impact Rural). Under this zone the following uses were permitted with consent:

apiculture, dwelling houses ancillary to another permissible use, pedestrian access to facilitate the recreational use of the land concerned, roads, scientific research associated with native habitats, utility installations (except for gas holders or generating works), wildlife refuges.

The differing zoning proposed between the Shackels Estate and the adjoining land is largely attributed to the State Government's acquisition responsibility for the Woronora River Frontages. The land adjoining the Shackels Estate has high ecological value but has not been identified for acquisition. Consequently, the E3 Environmental Management Zone has been proposed as this is deemed to be the most comparable to the 17b Environmental Protection (low Impact Rural) zone under the SSLEP2006. The E3 zone is for land with special ecological, scientific, cultural or aesthetic attributes or

environmental hazards/processes requiring careful consideration and management to ensure development is compatible with these values. This land is deemed to be suitable for a limited range of development.

Notification

Council's records indicate that all owners of properties within the Shackle's Estate on Woronora River were sent letters advising them of the Draft Local Environmental Plan 2013. The letters were sent to the same address as those used for the rate notices. This plan was on exhibition for a period of 6 weeks between the 17th of March and the 1st of May.

Response to Issues

The draft plan identifies this land to be acquired for Regional Open Space purposes by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning and Infrastructure). State policy also requires that land which is reserved for a public purpose, including open space, which has not yet been acquired for its intended public purpose is to be zoned according to its intended future use. For that reason, the draft plan proposed that the land be zoned E2 Environmental Conservation, as this is the most appropriate standard land use zone in the Standard Instrument Order. It is recommended that the E2 Environmental Conservation zoning be retained.

In order to remove the need for residents to rely on existing use rights and afford them the ability to enlarge and make alterations to existing dwellings, it is recommended that council include a local provision for the E2 Environmental Conservation zone. This local provision simply reproduces the controls which applied to the land under the SSLEP2000 1(a) Rural zone, within the DSSLEP2013. The local provision reads as follows:

X.XX (clause yet number to be established) This clause applies to Woronora River Frontage: No. 197, Lot 87 DP8754; No 199-201, Lots 88 and 89 DP8754; No. 185, Lot 81 DP8754; No. 177, Lot 77 DP8754; No. 155-157, Lots 70-71 DP8754; No. 141, Lot 63 DP8754, No.53, Lot 21 DP8754; No 305, Lot 134 DP8755; No. 307, Lot 135 DP 8755; No. 361, Lot 157 DP 8755; No. 445, Lot 198 DP 8755; and No. 70-72 Tirto St,Lot 219-220 DP 8755 (privately owned lots with existing houses), being privately owned land with an existing dwelling, fronting the Woronora River, and zoned E2 Environmental Conservation.

(2) Despite any other provision of this plan, an existing dwelling house in the E2 Environmental Conservation zone subject to this clause, may be enlarged or altered with development consent. Any existing dwelling house altered or enlarged must comply with the following:

(a) height must not exceed 7.2 metres to any point on the uppermost ceiling and 9 metres to the highest point on the roof, and
(b) gross floor area must not increase by more than 30m2 or 10% of the existing gross floor area, whichever is the lesser, or exceed a maximum floorspace of 300m2 (inclusive of any ancillary buildings).

SSDLEP2013: Urgent briefing to Councillors

26/7/13
Dear Councillor

The Report you have been given (item 61) concerning Shackels Estate and all lands in the upper Woronora valley does not address the matters raised by residents. All Councillors received copies of letters detailing these concerns (email from Gary Price of 4 July 2013). The Report in fact compounds the problems, seeks to institute a further derogation of their rights and is of questionable legality.

Existing uses

The most significant issue concerns existing uses. Zone E2 applied to the homes in Shackels Estate prohibits all existing uses, including the occupation of our homes. This is in direct conflict with superior law. It is unlawful. The Report's statement that existing uses are not referred to in the DLEP is false. They are referred to in all other zones except E2. The Department of Planning has been quite explicit about how Councils should deal with existing uses under the Standard Instrument. D.O.P. Planning Circular PS 06-007 says:

"The Department will be issuing guidelines shortly on the consideration of existing use when developing new LEP provisions, and for the assessment and approval of proposals with existing use rights. Where feasible, councils will be encouraged to identify development that would have existing use rights and include 'permitted additional uses' on that land in their LEP, so that the land use is no longer prohibited (in effect, remove existing use rights)"

Under the Standard Instrument Template, all councils are required to identify existing uses and include them as permitted uses in the zoning definition. Sutherland has done this for every other zoning but E2. Other councils have done it for all zones, including E2.

Thus the proposal to include a "local provision" essentially reproducing the old rural zone is contradictory of existing uses clearly stated in State law, including occupation of existing homes. It does not comply with the instructions for preparing this LEP and the Standard Instrument. It has questionable standing in law. Existing uses are very clearly stated in the relevant Regulations. They are very simple. It is not difficult to write them in to the definition of each zoning as has been done everywhere else. Why has it not happened in this particular case? Existing uses are a basic right of property, irrespective of whether it may be sold at the owner's initiation to a State instrumentality, or on the open market.

Effects on property values and valuations under the Land Acquisition (just terms and compensation) Act 1991

This was dealt with extensively in the letter to the Mayor of 20 June 2013 in response to his advice to resident Anna Hauch of 13 June 2013. Councillors were sent copies of both. Zone E2 subverts the objects of the Act by further lowering the baseline of valuation. These are not properties subject to compulsory acquisition. Owners may sell their properties on the open market if they so choose. Under the Act the baseline in a voluntary acquisition is market value, and Council is manipulating the market. It is against the objects of the Act.

Rezoning of land adjoining Shackles Estate

The Report admits that the land adjoining has exactly the same environmental, ecological and open space values as Shackles Estate itself. The sole difference is that Shackles Estate has been identified for voluntary acquisition. This is completely irrelevant. What is relevant is that the land adjoining has had no previous development and thus has no existing use rights. The Report has dwelt on the restrictiveness of the previous zoning for the adjoining land, which is in fact similar to the new zoning proposed for Shackles Estate. Why not the same zoning as Shackles Estate? What has carefully not been mentioned to you is the permissiveness of the proposed new zoning for these lands directly adjacent to Shackles Estate. Under E2, all existing uses are prohibited whereas under E3 for the adjoining lands the following major new developments are permissible:

E3 zone uses: Home occupations are permissible without consent in E3 as long as they meet the requirements in the LEP. The following uses can be carried out in E3 with development consent:

bed and breakfast accommodation; boat sheds; dwelling houses; dual occupancies; environmental protection works; flood mitigation works; health consulting rooms; home businesses; home industries; recreation areas; roads; secondary dwellings

All other uses not listed above are prohibited in this zone.

Major new development is proposed for the adjoining lands in stark contradiction of the apparently unlawfully restrictive zoning for Shackles Estate. This is despite the admitted fact that they have the same policy values. They are entirely comparable yet council is proposing greenfield development which must forever remove any possibility of a regional open space encompassing the Woronora valley. It is an explicit abandonment of the very policy under which the acquisition of Shackles Estate was undertaken. This is occurring at the same time that already existing homes in Shackles Estate are being denied existing uses. It is a clear inconsistency. Both should have the same zoning, whether one has been identified for voluntary acquisition or not. The voluntary acquisition was put in place because there were already existing family homes in Shackles Estate but not in the adjoining lands.

This DLEP seeks to overturn long standing policy to return the upper Woronora valley to an undeveloped state.

DOP advice to Council

The Report refers to advice of the Department of Planning Land Management Branch. Residents of Shackels Estate have copies of that advice and it is not as the Report purports it to be in the following regards. In contrast to the Report's contention that DOP proposed an E2 zoning for Shackles Estate, the DOP letter of 3 June 2008 by Deidre Stewart clearly states that the proposal came from Council, not DOP and that the DOP support for that proposal was conditional on the final views of the Sydney East Planning Team. Furthermore, it is completely clear that DOP did not appreciate that Council's own proposal was to explicitly prohibit existing uses, in direct contravention of DOP's own Regulations and instructions for the preparation of Standard Instruments such as SSDLEP2013. No State instrumentality is competent to knowingly issue advice in direct conflict with its own Act and Regulations.

Also the statement that "State policy also requires that land which is reserved for a public purpose is to be zoned according to its intended future use" is inconsistent and contravenes State laws when applied to developed land,.

Conclusion

The sole justification that has been offered by the Report is that Shackles Estate is under a voluntary acquisition program. That is no justification of either the prohibition of existing uses nor for the contradictory zoning of the adjacent lands. That the properties can be acquired by voluntary sale to a State agency, or just on the market, is entirely irrelevant. These are basic property rights.

The proposition advanced by the Report that basic legal rights, such as existing uses and just compensation are all in some kind of abeyance simply because of a voluntary acquisition program is contempt of the law of our land. It is contrary to the whole concept of the Land Acquisition (Just terms and Compensation) Act. It is market manipulation and damage has already been done. It must not be compounded.

The issues identified in submissions have not been addressed at all. The Report appears to be at odds with the correct legal position. No matter raised in correspondence with the Mayor has been dealt with. You will recall that the Mayor signed two letters giving clearly inadequate advice to residents. This is simply being repeated.

Residents have made simple suggestions that avoid the problems while maintaining policy integrity. They have been completely ignored. They are:

1. Shackles Estate and the adjoining lands must be treated the same. If Shackles estate is given E2 zoning so too must the adjacent lands. If the adjacent lands are given E3, so too must Shackles Estate.

2. If E2 zoning is given it must explicitly include existing uses as permissible. This is required under State law and the guidelines for preparation of SSDLEP2013 under the Standard Instrument.

Gary Price
Ph: 9543 2224
26 July 2013

Sutherland Shire COUNCIL

Office of the Mayor

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2 AUG 2013

Mr Gary Price
Grprice2@gmail.com

Dear Mr Price

Thank you for your emails of 17 & 20 June 2013 in relation to the draft Sutherland Shire Local Environmental Plan (SSLEP) 2013 and the properties along the Woronora River frontage. I again note your concern about the future of your home and want to assure you that your views will be considered by Council as it finalises the draft plan.

As you know, land along this part of the Woronora River has been progressively acquired by the State to become part of a network of regional open space. In accordance with State policy, the draft plan identifies this land to be acquired for Regional Open Space purposes by the Corporation under the Environmental Planning & Assessment Act (the Minister for Planning & Infrastructure). State policy also requires that land which is reserved for a public purpose, including open space, which has not yet been acquired for its intended public purpose is to be zoned according to its intended future use.

For that reason the draft plan proposed that the land be zoned E2 Environmental Conservation, as this is the most appropriate standard land use zone in the Standard Instrument Order. The objectives of this zone include the protection, management and restoration of the ecological, scientific, cultural or aesthetic values of land to which the zone is applied.

I understand that the main concern of the remaining landowners is to ensure that existing dwellings are formally acknowledged by way of being permitted within the proposed zone and that dwelling alterations and extensions also be permitted and not based on existing use rights. Essentially you are seeking for the current controls to remain in place.

I have requested that staff advise me how an alternative solution to that exhibited can achieve this aim, but still fit within the framework provided by the Standard Instrument format.

I have been advised that it is preferable to tailor a solution that satisfies your specific concerns rather than permitting dwelling houses in the E2 Environmental Conservation zone generally. That would result in substantial new development in inappropriate locations and for that reason I cannot support dwelling houses as a permissible use in the E2 zone.

However, in order to straightforwardly retain the ability for your existing dwellings to be occupied as well as being enlarged or altered, I have been advised by staff that a local provision could be included in the draft plan for the E2 Environmental Conservation zone. This local provision would simply reproduce the controls which currently apply to existing dwellings under the SSLEP2000 1(a) Rural zone and transfer them to the draft SSLEP2013. The special clause that has been drafted would read as follows:

"X.X E2 Environmental Conservation zone
(1)This clause applies to Woronora River Frontage: No. 197, Lot 87 DP8754; No 199-201, Lots 88 and 89 DP8754; No. 185, Lot 81 DP8754; No. 177, Lot 77 DP8754; No. 155-157, Lots 70-71 DP8754; No. 141, Lot 63 DP8754, No.53, Lot 21 DP8754; No 305, Lot 134 DP8755; No. 307, Lot 135 DP 8755; No. 361, Lot 157 DP 8755; No. 445, Lot 198 DP 8755; and No. 70-72 Tirto St, Lot 219-220 DP 8755 (privately owned lots with existing houses), being privately owned land with an existing dwelling, fronting the Woronora River, and zoned E2 Environmental Conservation.
(2) Despite any other provision of this plan, an existing dwelling house in the E2 Environmental Conservation zone subject to this clause, may be enlarged or altered with development consent. Any existing dwelling house altered or enlarged must comply with the following:
(a) height must not exceed 7.2 metres to any point on the uppermost ceiling and 9 metres to the highest point on the roof, and
(b) gross floor area must not increase by more than 30m2 or 10% of the existing gross floor area, whichever is the lesser, or exceed a maximum floorspace of 300m2 (inclusive of any ancillary buildings)".

This clause transfers the current controls as requested by you and other owners.

On Monday 29th July 2013, the clause was endorsed by Council (Mayoral Minute No. 6/13-14) as an amendment to the draft plan.

Council resolved to submit the amended plan to the Minister for Planning and Infrastructure to facilitate the re-exhibition of the amended draft plan.

The amended draft plan will be exhibited for public comment shortly. Please refer to Councils website for updates on the draft plan. It is noted that before SSLEP 2013 is finally made by the Minister it will be evaluated by NSW Government agencies to ensure that it can be legally executed.

If you require any further information please contact the Environmental Planning Unit on 9710 0800.

Yours sincerely

Councillor Kent R Johns
Mayor

2/8/13.

Councillor Steve Simpson
Mayor
Locked bag 17
Sutherland NSW 1499

Gary Price
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61 2 9543 2224
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12 December 2013

Dear Councillor Simpson

Sutherland draft LEP and upper Woronora river

I write to thank you, Mr Rayner and Mr Carlon for meeting with Julia Munro, Jim Meyer and myself on Thursday 5 December at Council to discuss zonings in the upper Woronora valley in the 2013 draft LEP.

I believe the meeting resulted in increased understanding on both sides but a number of issues remain unresolved and to assist our understanding I will be asking for further information later in this letter.

Regarding matters of agreement:

1. We now understand that the right to occupy our homes is absolute, assuming they were rightly occupied in the first place, and that zoning information to potential purchasers and Section 149 certificates is clear and unambiguous as regards to right of occupation of existing dwellings. We thank Mr Carlon for clearing that up.

2. We understand you agreed to amend the specific Local Provision for zone E2 regarding the existing dwellings in Shackles Estate in order to allow rebuilding of existing dwellings, consistent with the EPA Regulations on existing uses. As we agreed, Mr Meyer will write in due course to remind you of this.

Regarding matters requiring further consideration:

a. We understand that you did not agree to amend the Local Provision referred to in 2 above to remove the restrictions on the allowable area of alterations and extensions. We did not spend much time discussing this, but Mr Carlon referred to the historical origins of the restrictions. That is correct – they relate to the Interim Development Orders of the 1970s. They were imposed well before existing use rights were clarified in the EPA Regulations. The restrictions are now inconsistent with the current Regulations which specify the circumstances in which such restrictions are imposed. The circumstances are a change in existing use, which does not apply in the case of Shackles Estate. We ask you to again consider this matter. Mr Carlon claimed that the purpose of the Local Provision was to reinstate the existing use rights that are prohibited by E2 zoning. The EPA Regulations contain no restrictions in our case on area of enlargement, alteration or extension for existing uses and we ask that the Local Provision properly reflect the superior regulations. Councils have flexible and effective powers to refuse inappropriate enlargements these days.

Regarding matters of disagreement and need for further information:

I. We have grave concerns about Council's proposal to write in the first place a zoning that prohibits existing uses, seemingly in conflict with the superior Regulations on existing uses in the Environmental and Planning Assessment Act. It is a course of action that would also appear to be in conflict with Department of Planning and Infrastructure advice and directions regarding the treatment of existing uses, and indeed, in conflict with the wording and intent of the Standard Instrument, reflected for example in the final provision concerning prohibited matters of every Zoning definition. There is a clear intent that what is not specified as allowable is prohibited and that allowable uses must be listed.

These concerns are not allayed by the convoluted proposal to re-write some existing uses back in via a lesser Local Provision. A number of reasons have been given by Council Officers as to why it is alleged in this case to be not possible to openly and transparently write existing uses in to the Zoning definition itself, as is done elsewhere. They are not persuasive reasons. They include the claim that this would be tantamount to allowing new developments in future Regional Open Space and in other areas proposed to be zoned E2. That is false. Contrary to the repeated claims of Officers, we have not asked for permission to build new dwellings, only the legislatively superior existing use rights of existing dwellings. Another is that the State requires that properties scheduled for purchase must be zoned *the same* as the intended use. That is false. Council must make determinations *consistent* with the future use. Another is that State directives require the Council to treat properties subject to ultimate State purchase differently in regards to existing uses and that Council's hands are tied by the State. That would appear to be inconsistent with EPA Regulations.
We may be mistaken and if so, would be grateful for correction. Would you please arrange for Mr Carlon to send to us a copy of the State or Departmental advice or direction on which he relies when he asserts that it is forbidden in the specific case of Zone E2 or Shackles Estate to explicitly allow existing uses in the zoning definition?

II. We also have concerns about the zoning of E3 that has been given to other privately owned, vacant and undeveloped property on the upriver, western side of the Woronora valley, adjoining Shackles Estate. The area is part of the future regional open space which the acquisition of Shackles Estate was meant to secure. It is of at least equal public and environmental value as Shackles Estate but has not previously been developed, unlike Shackles Estate which dates from 1914. So far as this writer knows, no significant existing use rights apply behind the remaining Shackles Estate properties and up the western side of the valley. Zone E3 proposes new development there, including dwelling houses, dual occupancies, bed and breakfast accommodation, health consulting rooms, home businesses and industries, and secondary dwellings. This would appear not to be consistent with future use as regional open space. Any decisions as to new development would properly be a matter of State policy.
We now understand, thanks to our discussions, that subdivisions of less than 20ha are not permissible. However, we also understand that pre-existing lots of less than 20ha which were not able to be developed previously will now be able to be developed within future regional open space. We understand that land clearing and roadworks have already commenced (Leader, 10 December 2013).
Mr Carlon has said that his hands are again tied by the State which has imposed a requirement of economic use. We may be mistaken in thinking that development of the kind proposed is incompatible with the future use. Would Mr Carlon please send us a copy of the State or Departmental advice or directive on which he relies?

From our extensive correspondence with the previous Mayor and yourself you know that we have grave concerns about the treatment of the upper Woronora valley in the DLEP. Our meeting on 5th December resolved some minor issues but it remains the case that existing use rights for the few Shackles Estate homes that are left still appear not to be properly and fully dealt with and the inconsistencies of the adjoining zoning in the future regional open space remain unexplained. To assist us to fully understand we would greatly appreciate further advice and information as we have requested above.

Yours sincerely

Gary Price

Sutherland Shire COUNCIL

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Mr Gary Price
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23 DEC 2013

Dear Mr Price Gary

Thank you for your letter of 12 December 2013 concerning the draft Sutherland Shire Local Environmental Plan (SSLEP) 2013 and the proposed provisions affecting the land at Shackels Estate. Council is aware of your position regarding the provisions contained in the draft SSLEP2013 and its effect on the land at Shackels Estate.

You may be aware that the Minister for Planning &Infrastructure has announced that there will be an Independent Review into the draft SSLEP2013. The terms of reference for the review will see the panel:

1 Assess and advise whether Council has prepared the draft SSLEP2013 in accordance with the Environmental Planning & Assessment Act 1979.
2 Advise on the appropriateness of the provisions contained within the second exhibited version of the draft Plan.
3 Examine the 75 changes made to the draft Plan by the Mayoral Minute No. 6/13-14 dated 29 July 2013.
4 Undertake public hearings, including receiving oral submissions by representatives of community groups.
5 Consider submissions and representations made during the public hearings or received by the Panel.
6 Report to me the findings arising from the review and the public hearings and provide recommendations to me as applicable.

The review will take an objective and independent look at a wide range of issues including the draft LEP's provisions and the processes used to prepare it. The community will be able to make submissions on any aspect of the second exhibited version of the draft plan, which was released for public comment from 17 September to 1 November 2013.

You may like to consider making a submission to the independent review. Please note that for the purposes of the Independent Review, you would need to make a separate submission. The Independent Review Panel will not be considering the submissions made to Council during the public exhibition process.

Submissions to the Independent Review Panel are being coordinated by the Department of Planning & Infrastructure. Details on how to register to attend the hearings, address the panel or make a written submission are available at www.planning.nsw.gov.au/sutherlandlepreview.

Yours sincerely

Steve Simpson

Councillor Steve Simpson
Mayor