

DA REPORT – AUGUST 2014 MEETING

MODIFICATION OF CONDITIONS

On the 23rd of May Council wrote to us after their May Council meeting notifying us that they made a decision to modify our telephone, electricity and road conditions and included a copy of the new conditions.

Telephone and Electricity conditions were modified:

We now only have to provide evidence of electricity and landline supply to the property, rather than the old condition which required supply to each individual building envelope/lot. The condition requiring an electricity easement on the property was deleted. Landline and electricity supply is already available at or close to our property's boundary and we previously submitted written evidence of this to Council, so these conditions have now been "put to bed". Supply to each lot is a typical condition imposed by Councils on sub-division developments; we are not a sub-division rather we are rural land-sharing development that comes up under SEPP 15 planning legislation. SEPP 15 does not require electricity and landline supply unless requested by us, the developer. The modifications of these conditions have resulted in significant financial savings to the community.

Road Conditions were modified:

- Illa Langi can now be an all-weather standard. However, previous conditions still exist for Illa Langi: we still need to dedicate Illa Langi road to Council. This dedication has to happen through Crown Lands who currently own the road. This dedication condition is the only condition that is worded as "prior to occupancy", so it is one we need to act on and is likely to take some time. Note Crown Lands notified us last October that they are proposing to transfer Illa Langi as well as all the Crown road leading from our Westgate Entrance to our Northgate entrance to Council (this is the road that connects the west side of the community to Red Hill and connects Red Hill to Nevertire road). We need some legal advice on the implications of this and any actions we need to take. Another condition that is still in place, is to enter into a deed of agreement with Council to maintain Illa Langi road into perpetuity.
- There is a new condition that requires us to enter into an agreement to maintain the Crown road from our west gate entrance to our north gate entrance into perpetuity. This deed of agreement and the one for Illa Langi need to be registered as a caveat on our property's title, so we need to get legal input on these agreements.
- Nevertire Road conditions still stand. We are still required to upgrade to a Class 3 Local Road, which is a 6 m wide seal road.

RECENT CORRESPONDENCE FROM COUNCIL REGARDING OUTSTANDING CONDITIONS AND NON-COMPLIANCE WITH CONDITIONS

In Council's correspondence on 23rd May they gave us 28 days and 90 days to comply with six conditions they regard as outstanding and threatened Class 4 proceedings in the Land Environment Court:

- Condition 3 – Council advised this relates to one outstanding DA application for existing structures at the Cooperative
- Condition 22 fire conditions – this condition involves a number of elements, most of which we had satisfied. In meetings Kirsty and Dave had with Council they highlighted they want a building on Red Hill Evaluation area as the most pressing outstanding element.
- Condition 4, 12, 13, 14 – cover all our road related conditions. Again in meetings with Council indicated its top priority is the Nevertire Road upgrade

The time frames given for some of the conditions are unrealistic and unreasonable, for example dedication of Illa Langi to Council by Crown Lands in 28 days and the Nevertire road upgrade completed and signed off in 90 days.

On the 23rd June Dave emailed Council and told them we were conferring with road engineers and RFS and needed more time. On the 7th July they replied in writing requiring names of who we were conferring with and when we would be in a position to provide documentation for the outstanding conditions by the 16th July, and based on this information they would consider whether they would grant us an extension. An emergency director's meeting was held and a response prepared, outlining what we had done to date to address the outstanding conditions, who we contacted and giving completion timelines for items under our control (e.g. finalising design of building on Red Hill) and flagging that completion dates were not available for issues such as land dedication and road design. We have since learned from Dennis Partners, Road Engineer that Council rang him to verify that we had indeed been in contact with him and checked on the timeframe of surveying. Ralph advised the meeting that he has just received an email from Council to say they had also checked up on Crown Lands were unable to identify our contact with them and requesting a reference number.

Please note the new conditions are available on the member's section of Goolawah's website, please read them if you have not done so already.

WHAT HAVE WE BEEN DOING TO ADDRESS THE REMAINING 6 CONDITIONS

We started out with 23 conditions, we have 17 down and 6 to go. Of the remaining 6 outstanding conditions, it is the Nevertire upgrade that of most concern due to the financial costs, this is one sub-condition of condition 4.

Condition 3 - Outstanding DA application (the existing structure on Justin/Leah's second site).

Justin and Leah were one of the first to submit paperwork to Council and were advised during an early site inspection by Council that this was sufficient. However, in December correspondence to Goolawah from Council raised their second site as needing paperwork and Justin/Leah were advised of this at the time. They have been advised of the recent correspondence from Council and they said they will deal with it. Thanks to everyone for sorting out their paperwork and compliance with Council. Once this last structure is in then paperwork for all existing structures are sorted with Council, and as per discussion and show of hands at July General Meeting people want to keep it that way.

Condition 22 - Bushfire

- We need a building adjacent to the evacuation / fire retreat area of Red Hill. Discussions held previously with RFS indicated they wanted a one-sided building, with a tank providing protection on another side. There is no specific size specified. There was discussion on design at July GM of off-the-shelf shed construction versus pavilion design, Dave Launt is co-ordinating this project, he has got quotes and has been liasing with Red Hill. There seems to be consensus on the proposed location near the playground. We need to finalise design and get a budget proposal ready for October AGM and then we can get paperwork into Council. Again the actual construction can be staged according to budget constraints.
- Mairead completed a plan outlining how we discuss, fund and implement bushfire works for fire trails, asset protection zone, retreat/evaluation areas, water supplies, fire fighting equipment and access roads
- Michael Clancy is looking after fire trail signage and liasing with RFS in this regard. Looking for volunteers to make the signs. Would the craft group be interested in this making this a creative craft project? SWS were provided by RFS for free but were not very exciting. We could some combine function with some artistic flair to make a sign that is attractive yet functional and easily recognisable for fire fighters.
- Michael, Roger and Frankie are looking at ways to reduce the fuel load along the road connecting west side of community and Red Hill, particularly on the North side. Roger has already done some slashing. It would be good if working bees helped out with this task also. Further works (e.g. getting in a heavy duty slasher/mulcher) may be required for some areas and we can investigate those as necessary.

Condition 4 (modified in part in May), Condition 12 / 13 / 14 (Original Conditions that remain unchanged) All Road Related

- Condition 4 outlines requirements in terms of road upgrade, dedication of Illa Langi crown road to Council and deeds of agreement for maintenance. Conditions 12,13, 14 refer to the

road upgrade process itself – e.g. engineering design and sign off, getting agreement from Council on the proposed works (Section 138 application), traffic management, drainage, works as executed plans to show where the road has been built

- The main focus has been on Nevertire upgrade as this is the big ticket item and one of most concern to members
- Since last meeting, Dave Launt and Mairead met with Dennis Partners, Road Engineers for an extended scoping meeting to discuss possible road designs, costs and look at realistic ways forward on this issue
- Free initial legal advice has been received from Rob Doolan and since last meeting a solicitor in the Environmental Defenders Office.

ROAD UPGRADE COST ESTIMATES

Road Engineering Estimate - Josh from Dennis Partners \$6,000 in total

\$4,000 to do ground work and produce a preliminary design. Once design is approved by Council a further \$1,500 - \$2,000 to complete his work

Surveyor Estimate \$2,000 - \$3,000

A survey of Nevertire road is the first step before Dennis Partners can do anything as he needs an accurate map to work from and site characteristics (e.g. blocks/corners) to be pegged. It will also give us important information on whether the road is situated where it should be and if what road reserve widths are available. We are following up with Graham Sawyer (has previously done survey work at Goolawah) and Peter Phyllis who Josh recommended him as being reasonably priced. New member Tony Roberts who has some roadworks and surveying experience has offered to help out. Question: has Council previously done any surveys of Nevertire. A “works-as-executed” plan is required after the road is upgraded to update maps, this is usually done by a surveyor.

Geotech Report Estimate \$2,000

Josh recommended Regional Geo-Technical in Port Macquarie. This can be done later, after design is finalised with Council. Involves doing core samples to determine how thick the fill/surface needs to be to support the road. Depth of fill has a significant cost implication, this should be the only impact of the Geo-tech’s report on road design and cost.

Note previous estimates of cost for professional services were \$30,000, so these estimates come in as a total of \$10,000, which is a lot less than initially expected although still painful as they don’t represent any actual road works. Unfortunately as Nevertire is a Council road and a public asset all these checks and balances are used to ensure road upgrades are done to a good standard. Nevertire Road is not ours to do as we wish with although it has felt like that in the past being a road Council did not maintain.

Road Upgrading Costs

The cost of the road upgrade will come down to the design of the road proposed – e.g. the width of the seal, the length of seal, type of seal, substrate works and depth of materials required, works required to modify corners, drainage works.

The rigid application of a class 3 road design is not feasible nor appropriate to the existing site characteristics and required function of the road.

Road Upgrade requirements and Road Classes are referred to in Council documentation, specifically Kempsey’s Development Control Plan and their Development Design Specification D1, Geometric Road Design which are cited as the relevant document in our conditions. This second document gives a table of different classes of road. Note the heading of the table is “D1.8 Characteristics of Roads in Rural Residential and Rural Subdivisions” – we are not a subdivision. documents are available from Council website, hyperlinks below, just click on them:

[Development Design Specification - Geometric Road Design - \(Urban And Rural\) D1](#)

[Kempsey Council Development Control Plan](#)

(The Development Control Plan is a massive document, if you are overwhelmed just look at Chapter A1 Introduction, B1 Sub-division, B2 Access, B3 Engineering, or do a word search for “rural” and “road”. Note our zoning is “rural” not “rural residential”)

The road class 3 characteristics are listed as follows:

- for a maximum number of 50 potential Tenements - we have 78?? Potential tenements/dwelling, plus dwelling on Nevertire and other lots in the area that may use this road as their access point
- equivalent to 20-200 vehicle movements per day - the road movement survey we did with Roadnet Engineers estimates 94 vpd at full occupancy based on current rates of 1.2 vpd per dwelling and since this report Council acknowledged in writing that we have lower vpd's than a subdivision, but even at these lower vpd's we still fall within that class 3 parameter
- 6 meter sealed carriageway with a 1 meter shoulder and 20 meter road reserve - these widths may not be available, survey to confirm
- to be a desirable drive speed of 80km - site characteristics such as sharp corners, quiet rural residential character of the area, animals grazing on road sides are at odds with this class of road.

Dennis Partners can do a preliminary design that we can submit to Council with the Section 138 approval that is required to be submitted before works can commence. The design would present a sensible and reasonable approach to the road that offers:

- a functional road suited to the site characteristics and the required purposes of the road
- mitigation of the impact of our road use on neighbours
- feasible for our financial means and in line with the objectives of a SEPP 15 development to provide low cost housing

Dennis Partners does not understand the need or benefit of sealing the 1km of road in the flood area beyond the residences. Also there is no benefit in raising the road surface in the flood area, as Maria River Road and Crescent Head roads flood, so it would not allow vehicles to advance on their journeys in flood situations. Council's reception of the design is unknown, but have indicated an engineered road design is their desired next step in the process. Negotiations with Council to date have resulted in them agreeing (verbally) that they are willing to work within the available width.

Road Building Estimates

Different estimates have been provided by different people, we need an agreed design and details confirmed before accurate quotes can be obtained. But for your reference the following figures are what we have to date

- George McKweon, road contractor currently used by Goolawah, estimate of a full Class 3 standard upgrade as costing \$600,000
- Roadnet's report gave an estimate of \$5 per m² for a sealed road, works out at \$550,000 for a 6m width (\$5 per m² X 6m wide X 1830m long), also need to factor in 1m shoulder either side and they said figure could double depending on drainage works required
- Kempsey Council Road Engineer estimated \$500,000
- Tarrik Morssi brother's, a Civil Engineer in Brisbane, estimated \$300,000 - \$350,000 based on a detailed breakdown of required materials per tonne and labour. This estimate was based on materials being supplied through Council suppliers at Council preferential rates and recommended we should pursue this option with Council
- Dennis Partners was unable to give us an estimate of road building costs and recommended speaking to road contractors.

Dennis Partners recommended we negotiate as much of the required road building checks and balances (e.g. tests of base and fill levels) to be included in the road building contract.

Note Nevertire is 1.83km long. From Maria River Road the first 900m is low lying tea-tree growing area and swamp/bush. The road takes a sharp turn and then rises to higher ground. On the higher ground there are lots with structures on them, it is 0.5 km from the first to last property entrance.

MAINTENANCE OF NEVERTIRE INTO THE FUTURE

Planners indicated in their report to Councillors for our DA consent in April 2013 that once Nevertire was upgraded it would be then maintained by Council thereafter. Council's development control

plans and road design guidelines referenced in our conditions also indicate that roads upgraded by subdivision developments and are maintained by Council after upgrade and sign off. However our DA conditions do not explicitly state that Council will maintain Nevertire into the future. Our DA conditions do address our responsibilities for road maintenance on other roads, and the conditions do not require us to be responsible for Nevertire maintenance.

LEGAL ADVICE

The **Environmental Defender's Office** offer free legal advice on planning issues and a solicitor there reviewed our case and provided some advice. She advocated that if we were prepared to do some minimal requirements in relation to the road upgrade (e.g. dust mitigation adjacent to neighbours' dwellings) then we should continue to negotiate with Council. We should outline clearly and in writing that upgrading the whole road was not financially viable at this time and to outline a plan that is financially viable for us. She recommended escalating to formal mediation if required. She did not recommend court action at this point, it was more a last resort. It is important to have a paper trail, to put things in writing to Council and to get things in writing from them. Reasonableness is important legal concept that both sides need to demonstrate. If we can demonstrate a willingness to comply with conditions to the best of our ability and financial means, this will offer us protection if faced with legal action. Council have to be reasonable in their requests of us, including timeframes. We can request further consent condition modifications (Section 96's), e.g. based on new information.

Rob Doolan, Planning Consultant from the North Coast who previously helped in getting our DA over the line, also reviewed our case briefly, looking at Council correspondence and modified conditions. He said Council must be reasonable in their timeframes and our conditions do not mention when Nevertire has to be upgraded by. He was unable to offer any further comment saying it was beyond his area of competence, and referred us to the Environmental Defenders Office and another planner on the North Coast who specialises in legal and strategic advice.

Dennis Partners suggested we go the **Land Environment Court** and request an appeal of the modification of our consent conditions under Section 34, which is called a "conciliation conference". This involves a Commissioner coming to the area in person to meet with parties and do a site visit if necessary, or else holding a remote telephone conference. Commissioners are not judges, they come from a wide range of backgrounds and are not required to have legal training. It costs \$875 in court fees; no further costs are usually awarded against the parties in relation to the proceedings. It is designed to be a quicker, less formal and cheaper option to a full blown court case. You do not need legal representation, although it is advised (Rob Doolan advised we have it). It is likely Councils would have legal representation. Legal representation will have legal expertise in their favour but can lack in-depth knowledge of the issues. If no agreement is reached between the parties, the Commissioner will terminate the conference; and with the parties consent, a hearing can then be held immediately and the commissioner can make a binding decision on the matter. If going down this route, we need to do this within 6 months of a condition modification determination (Section 96), be it the recent May determination or any future modification request we may make.

While these initial free consultations were helpful, they are limited. If we want to get in-depth advice and support with the process we will need to look at other legal advice options

Options Identified for Solicitors that can offer more in-depth legal advice:

- Warick Smith, experienced with multiple occupancies, and a strong advocate for such developments, based in Urunga/Nambucca, reasonable in terms of charges. Known to a number of members and comes recommended.
- Worth Wall, again experienced with multiple occupancies and a strong advocate for such developments, but based in Mullumbimby. A member has used him in the past and recommends him as effective and reasonable in terms of charges. Distance is a factor.
- Linda Dalton, experienced with multiple occupancies, did some solicitor letters for Goolawah in the past which proved costly (\$500 each).

Areas identified for Legal Advice/Input

- Review of road conditions and if they are reasonable. If conditions are not reasonable then what options/actions are open to us. Where do we stand now that Council have made a decision on our modification of conditions application, what are best next steps. Should we proceed with road design as the next step. If so how best to present that design to Council and secure their agreement to this design. What do we do if Council do not accept our road design
- How can push for financial support for the Nevertire upgrade from Council or neighbours; what leverage do we have in relation to our Section 94 road contributions. To date Council have refused to offer support for Nevertire upgrade and are vague in commitments to upgrade Maria River Road
- How do we ensure that Council take on the maintenance of Nevertire road
- How do we respond to Council's continued pressure to comply with road conditions urgently and threats of legal action, despite it been persistently and emphatically emphasised to Council during negotiations that due to our financial circumstances up-grading Nevertire will need to be a long term project
- How do we ensure that Council release building certificates for members who have completed all required conditions for existing structures. Council are currently withholding issuing these building certificates, citing the road conditions as the reason. Also to ensure when the time comes for occupancy certificates, that they are released for members who have built new structures (Note since meeting: Lyn Kingma has said occupancy certificates for new dwellings will be released)
- Advice on deed of agreements for road maintenance into perpetuity
- Advice on implications of dedication of Crown roads to Council

SUMMARY OF COUNCILS ARGUMENTS FOR THE ROAD UPGRADE

- We are a large development and the traffic we generate warrants this upgrade. They cite their road class table (written for sub-divisions) which indicates roads with more than 20 movements per day need to be class 3 local roads
- Need to mitigate the impacts of our traffic on neighbours
- Nevertire is not remote from seal being 3.3km from the seal at Maria River road in the Crescent Head direction and overtime Council will complete a seal corridor by upgrading Maria River Road.

SUMMARY OF OUR ARGUMENTS

- We don't create a lot of traffic, as proven by our traffic movement study. We currently generate 20 vpd a day, thus all-weather standard is sufficient, with further upgrades potentially being warranted in the future in line with occupancy increases
- The up-grade conditions presents an insuperable barrier to our development, a development that is based on SEPP 15 legalisation whose aim is to provide low cost housing. We are not a sub-division who are dividing up and selling on parcels of land for big profit margins that allow them to recover development consent conditions like road upgrades. We have found precedence from the Land Environment Court and various NSW Councils for SEPP 15/multiple occupancies where all weather access roads are acceptable for rural SEPP 15 developments and how Council need to take into account economic factors
- We need to be given time to do any up-grade, again due to the economic profile of our membership and given the other costs of DA compliance that members are dealing with, most significantly payment of up to \$5,500 in Section 94 contributions
- Other roads in the area are all-weather in keeping with the rural character of the area. This upgrade will be a virtual "super-highway island" surrounded by all-weather roads
- There are a number of examples of roads in the shire that have more than 20 VPD a day but are still all-weather standard, including Maria River Road, which council have recorded as having 107 VPD (no date of survey given)

- We have a proven and commendable record in terms of building and maintaining quality roads, both internally and access roads, we are a responsible property operator

RAISING FUNDS FOR ROAD UPGRADES

By my estimation, a total \$4,800 of road levies have been levied on members to date over a 10 year period, from the first Road Levy approved in October 2004 to the latest approved for 2014/ 2015, representing a total a road fund of \$374,000. This works out as an average of \$480 of road levies per year per site over that 10 year period.

We introduced our first road levy in October 2004. It was a levy of \$2,500, to be paid at a rate of \$1,000 a year for 2.5 years to give us a fund of \$200,000 to up-grade our designated access road for DA requirements, which was Illa Langi Road. The upgrade was expected to involve road widening, building up and sealing. So the prospect of up-grading our access road is not new, the difference now being, that Council have decided Nevertire is to be our access road.

While it took time to collect the money, all members did pay their road levies. Our DA stalled for many years and at times seems unreachable, and the need to access to individual lots became pressing as traffic volumes increased and bush tracks deteriorated. Over time the fund collected was spent on internal roads and works on our access roads. We had to collect a further two \$500 levies from 2010 to 2013 to finish our internal road network and keep up with maintenance on access roads whose condition was badly affected by repeated major floods events during that period. There is a figure floating around that we have 12km of roads that we look after (to be confirmed next month, may well be more), made up of internal roads, the crown road connecting the west side of the community to Red Hill and onto our Northgate entrance and both access roads.

If we take the figure of 12km of roads and divide it by the figure of \$374,000 of road levies levied, it works out as \$31,000 invested per km in the last 10 years. Our internal roads all had to be built up from undeveloped bush tracks, and our access roads and connecting crown roads have been upgraded hugely since our arrival. For example the road from the Machinery shed to Goldmine hill did not exist when we arrived and all Red Hill traffic used to go around the Outback and the Bowl and out Forest Way until that more direct route was built. The crown road from Red Hill to Nevertire Road was built up from a bush track. Internal road upgrades by George McKweon in 2012 were quoted at \$74,000 per km the likes of Cookie Close, Three Island Road, Waterview Way and Ironstone Drive. Our average road costs of \$31,000 per km are due to historically lower cost of labour of from member-based road gangs, use of our own machinery and because of lower cost contracted road works and materials in the past.

In 2013 our DA consent was granted. We again started to prepare for access road up-grade costs. A levy of \$800 was approved for 2013/2014 (75% of this has now been collected) and \$500 for 2014/2015 which is to be "ring-fenced" for Nevertire upgrading only and is due to be paid by the end of this financial year.

Historically some people have been slow to pay their road levies. In July 2014 we voted to introduce an interest charge of 10% on outstanding levies to try to break that pattern; people with special circumstances who are experiencing financial hardship can still make representation to the community if required.

In April 2014 we agreed to spend \$40,000 on Illa Langi to do a major all-weather upgrade including building up road height and recovery of road width eroded by vegetation and previous floods. Illa Langi provides an excellent example of the high road maintenance standards we achieve as a development; this should satisfy Council's requirement for all-weather standard.