

# Request for Initial Gateway Determination

## Relevant Planning Authority Details

---

Mid-Western Regional Council

Contact Person: Liz Densley

0263 782723 [elizabeth.densley@midwestern.nsw.gov.au](mailto:elizabeth.densley@midwestern.nsw.gov.au)

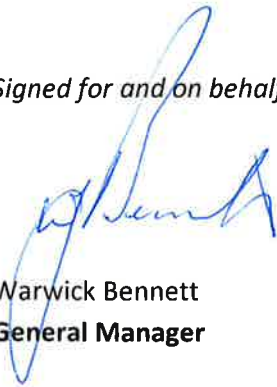
## Planning Proposal Details

---

Complete Planning Proposal attached

**Dwelling Entitlement Lots 28 & 29 DP 755414**

*Signed for and on behalf of the Relevant Planning Authority:*



Warwick Bennett  
General Manager





## Planning Proposal

**Lots 28 & 29 DP 755414 285 Botobolar Road, Botobolar**

Randall Newson

structural engineering  
project management  
residential design  
civil engineering  
registered surveyors  
commercial design  
geotechnical engineering  
town planning  
graphic representations  
environmental drilling  
construction management  
mechanical engineering  
industrial design  
environmental consulting  
nata accredited  
testing laboratory  
electrical engineering  
interior design

t 1300 138 857  
e [generalenquiry@barnson.com.au](mailto:generalenquiry@barnson.com.au)  
w [www.barnson.com.au](http://www.barnson.com.au)

Dubbo . Mudgee . Bathurst . Parkes



Oct-13

(Our Reference: 17645 - P01a.docx)

© Barnson Pty Ltd 2009. Confidential. Subject to the Barnson Terms of Appointment.



## LIST OF CONTENTS

---

1.0	BACKGROUND .....	3
2.0	OVERVIEW OF SITE CHARACTERISTICS.....	4
2.1	Site Location .....	4
2.2	Property Description, Ownership & Zonings.....	4
2.3	Landform and Topography .....	5
2.4	Land-uses .....	5
2.5	Surrounding Development.....	5
2.6	Flora and Fauna.....	7
2.7	Heritage.....	7
2.8	Services .....	7
2.9	Access .....	7
3.0	PROPOSED DEVELOPMENT.....	8
3.1	General.....	8
3.2	Amendment to LEP 2012 .....	8
4.0	STRATEGIC CONTEXT .....	10
4.1	Mid-Western Regional Comprehensive Land Use Strategy .....	10
4.2	Mid-Western Regional Local Environmental Plan 2012.....	11
4.3	State Environmental Planning Policy (Rural Lands) 2008 .....	12
4.4	Section 117 Directions.....	14
4.4.1	Direction 1.2 - Rural Zones .....	14
4.4.2	Direction 1.5 - Rural Lands.....	14
5.0	CONCLUSION.....	15

## APPENDICES

---

Appendix A – Maps

Appendix B – Deferred Commencement Consent and approved plan

Appendix C – AHIMS search

Prepared by:

**BARNSON PTY LTD**

Ben Rourke - BTP, MEnvLaw

**SENIOR TOWN PLANNER**



---

## 1.0 BACKGROUND

---

This Planning Proposal submission is made to Mid-Western Regional Council on behalf of Mr. Randall Newson seeking support in principle for an amendment to the Mid-Western Regional Local Environmental Plan 2012 ("the LEP").

The amendment to the LEP seeks to permit a dwelling on 28ha of rural land in Botobolar identified as Lots 28 & 29 DP 755414 285 Botobolar Road, located approximately 18km north-east of Mudgee. Pursuant to the LEP the land is zoned RU1 - Primary Production with a minimum lot size of 100ha.

A dwelling house with rural access has been constructed on the site under Development Application DA 0292/2003 which was granted by the former Mudgee Council on 8 April 2003 as a *deferred commencement consent*, under the provisions of the Mudgee Local Environmental Plan 1998. At the time LEP 1998 permitted a minimum lot size of 20ha for a dwelling subject to satisfying criteria for intensive agriculture status applying to the land, and on which basis Council granted consent.

The deferred commencement condition required the applicant to *demonstrate the proposed dwelling site complies with the provisions of Council's adopted Floodplain Management Plan*. The applicant has advised that he met with a Council officer on site whereupon it was understood that this issue was resolved. A review of Council's file indicates however that the applicant did not ultimately satisfy the terms of the deferred commencement within 5 years of the consent being granted. As a result the consent has since lapsed leaving the dwelling on the site effectively as an unauthorised structure.

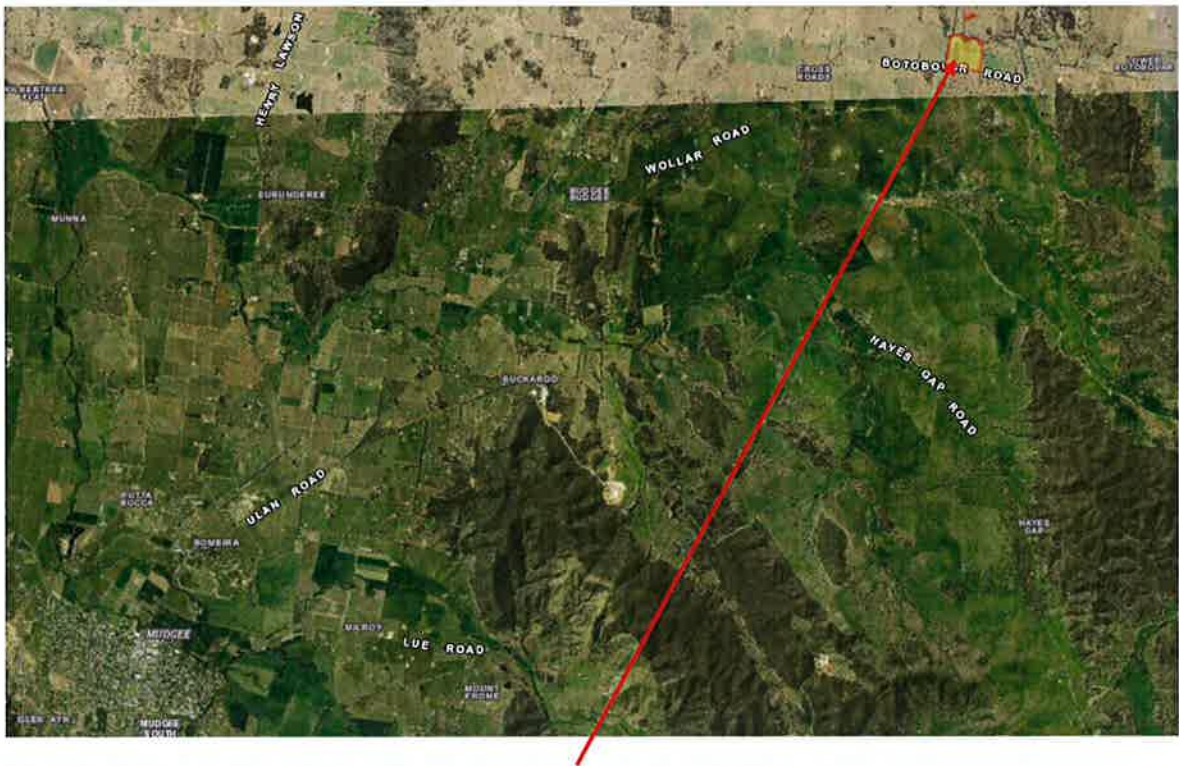
Since the time of the development consent being granted, Council's minimum lot size controls as they relate to the land have changed twice; firstly under the Mid-Western Regional Interim Local Environmental Plan 2008 and secondly under the Mid-Western Regional Local Environmental Plan 2012. Changes to the minimum lot size under the LEP 2008 and carried over in LEP 2012 resulted in this increasing from 20ha to 100ha for the site and its surrounds, thereby effectively preventing a dwelling from being constructed on the site, and on undersized lots / holdings zoned RU1 - Primary Production. As a result the owner has not been able to obtain development consent to approve the use of the dwelling on the site, such that its occupation for residential purposes is unauthorised and the land is not recognised as having a dwelling entitlement.

Based on a preliminary assessment the land is recognised for its potential to support intensive agriculture noting the existing and proposed olive groves, whereby occupation of the existing building as a dwelling would support this use. The land size is also consistent with several other small rural holdings in the locality supporting intensive agriculture and a dwelling thereby ensuring land use conflict is minimised. Accordingly this Planning Proposal report has been prepared seeking grounds for which a dwelling may be approved on the land subject to an amendment to LEP 2012 which would make a dwelling on the land permissible with consent.

## 2.0 OVERVIEW OF SITE CHARACTERISTICS

### 2.1 Site Location

The subject land consists of two (2) lots being Lots 28 & 29 DP 755414 285 Botobolar Road, Botobolar, approximately 18km north-east of the town of Mudgee. The subject land is located on the northern side of Botobolar Road, and bound by Stoney Creek to the north (**Figure 1**).



*Figure 1 - subject land*

### 2.2 Property Description, Ownership & Zonings

The subject land consists of two adjoining lots on the northern side of Botobolar Road as described in **Table 1**. The subject land is currently zoned RU1 - Primary Production pursuant to the Mid-Western Regional Local Environmental Plan 2012 (the LEP). Refer to Map 2A, in **Appendix A**.

**Table 1: Property description, ownership, lot size and zoning**

Lot	DP	Ownership	Lot Size	Existing zoning
28	755414	Randall Newson	14.97ha	RU1 - Primary Production
29	755414	Randall Newson	13.35ha	RU1 - Primary Production
Total Area			28.32ha	



### 2.3 Landform and Topography

The land is relatively flat with a slight fall to the north from Botobolar Road along its southern boundary to Stoney Creek along its northern boundary. The land features three small farm dams: one towards the eastern boundary and two located towards the western boundary.

### 2.4 Land-uses

The subject land is cleared, with Lot 28 having two dams and Lot 29 having one dam. The near complete unoccupied dwelling is located on Lot 28 with a 30KL water tank and small olive grove (trial planting) on its western side, and all weather access from Botobolar Road. Both lots are used for grazing a small number of cattle (less than 20 counted). Refer to **Photo 1** and **Photo 2**.



*Photo 1: View of dwelling and water tank looking south*

### 2.5 Surrounding Development

The surrounding lands reflects its zoning as agricultural land with a mix of rural land uses including livestock grazing and intensive agriculture (including viticulture and olive groves).

Refer to Aerial Map in **Appendix A**.

Noting the range of land uses and lot sizes in the surrounds, the proposal is compatible with the local character and will not result in any land use conflict, nor adversely impact on sustainable agricultural practices in the locality.



**Photo 2:** section of olive grove planted as a trial prior to proposed extensive olive tree planting



**Photo 3:** existing all weather access through site from Botobolar Road entry

## 2.6 Flora and Fauna

The subject land is predominantly cleared having a long established use as low intensity grazing land. Three established eucalypt trees are noted adjacent to the northern boundary of the land, with vegetation apart from these limited to grasses. No fauna was observed onsite, however it is acknowledged that the site may be inhabited on occasion by roaming kangaroos and certain avian species. Based upon this it is unlikely that any flora shall be disturbed as part of any future development relating to the possible rezoning of the site, and no core habitat for local fauna will be threatened.

## 2.7 Heritage

There are no heritage items listed for the subject site in the New South Wales Heritage Register (NSW Heritage Council, 2010) or the Mid-Western Local Environmental Plan 2012.

The National Parks and Wildlife Act 1974 provides for the protection of Aboriginal relics/sites across New South Wales regardless of significance, land tenure and whether or not they are recorded in the NPWS Sites Register. It is an offence to knowingly damage, deface, cause or permit the destruction of an Aboriginal relic or place without the prior written consent of the director general of NPWS.

An archaeologist or Aboriginal consultant has not surveyed the subject lot. However, no Aboriginal heritage items or sites have been recorded at or near the subject site in the New South Wales Heritage Register (NSW Heritage Council, 2010). Refer to **Appendix B** for searches conducted utilising the Aboriginal Heritage Information Management System (AHIMS) for advice to this effect.

## 2.8 Services

The site is serviced with electricity and telephone (land line and mobile) services. Water is provided for domestic purposes to the dwelling with a 30,000L water tank collecting roof water. Three dams are also located on the site available for irrigation. Effluent disposal is to be disposed on site utilising a bioseptic system.

## 2.9 Access

The subject land has frontage to Botobolar Road, which is a sealed collector road along its southern boundary. An all weather farm access road has been constructed over the site with splayed entry at Botobolar Road, providing access to the dwelling at the north end of the site. The access was constructed in accordance with the plan submitted to Council for the dwelling, which was approved as a deferred commencement consent under DA 0292/2003, with the approved plan attached at **Appendix B**. Additional detail can be provided as required by Council.

## 3.0 PROPOSED DEVELOPMENT

---

### 3.1 General

This proposal seeks the Mid-Western Regional Council's support to amend Mid-Western Regional Local Environmental Plan 2012 to permit a dwelling on the subject site. The intention of the proposed amendment is to add an additional sub-clause to permit dwellings on land within the RU1 - Primary Production zone which was previously permitted under the Mudgee LEP 1998 subject to demonstrating capability of intensive agriculture on the land.

An alternative option to the amendment is also offered by way of amending LEP 2012 to identify the property for the purposes of permitting a dwelling in support of intensive agriculture on the property under Schedule 1 - Additional permitted uses. Significantly, both options require the establishment of intensive agriculture on the land in order to permit a dwelling, which is consistent with the objectives of the RU1 - Primary Production zone.

### 3.2 Amendment to LEP 2012

#### ***Option 1 - Insert additional subclause relating to intensive agriculture holdings > 20ha***

Under *Clause 4.2A - Erection of dwelling houses and dual occupancies on land in certain zones* the LEP provides several "savings clauses" providing grounds for which a dwelling may be constructed on an undersized lot in zones including the RU1 - Primary Production zone.

Sub-clause 3(g) has relevance to the proposal whereby the land is:

*(g) a lot on which a dwelling house would have been permissible under an environmental planning instrument prior to the making of Mudgee Local Environmental Plan 1998 and Merriwa Local Environmental Plan 1992, and in the case of land within Zone RU1 Primary Production, has an area of not less than 40 hectares.*

Subclause 3(g) requires a minimum of 40ha however and the Council has advised that the proposed land at 28ha represents an excessive departure to this standard that is not supported. As a result an additional subclause "3(h)" is proposed to consider the circumstances of the proposal as follows:

(3) Development consent must not be granted for the erection of a dwelling house or dual occupancy on land in a zone to which this clause applies, and on which no dwelling house or dual occupancy has been erected, unless the land:

#### ***[ Proposed subclause 3(h) ]***

*(h) for a lot or holding within Zone RU1 Primary Production, on which a dwelling house in conjunction with intensive agriculture on the lot would have been permissible under an environmental planning instrument prior to the making of Mid Western Regional Interim Local Environmental Plan 2008 and has an area of not less than 20 hectares.*

**Note.** *The owner in whose ownership all the land is at the time the application is lodged needs to be the same person as the owner in whose ownership all the land was on the date when Mid Western Regional Interim Local Environmental Plan 2008 was made.*

Proposed subclause 3(h) applies to land zoned RU1 Primary Production of at least 20ha which is, or is proposed to be used for intensive agriculture purposes in order to permit a dwelling on the land. The 'Note' clarifies that it applies to only those landowners who owned such land prior to the gazettal of LEP 2008 whereupon the potential for a dwelling entitlement was removed.

In considering the consequences of these proposed provisions, significantly they existed under the Mudgee LEP 1998, with reference to Clause 20(3)(a)(ii) and Clause 12(6) of that LEP, which enabled the deferred commencement consent to be granted under the now lapsed DA 0292/2003. Noting that proposed subclause 3(h) may create potential dwelling entitlements for numerous rural landowners with holdings of more than 20ha, it does not create a default entitlement to a dwelling being established on such land. As such it requires a merit case from the landowner / applicant demonstrating that the land is capable of supporting intensive agriculture, which would serve to limit the number of landowners able to do so.

Further, by way of requiring a Development Application for a dwelling in such circumstances, subclause (3) requires that *consent must not be granted for the erection of a dwelling house*, unless the land satisfies the proposed terms of sub-clause 3(h). Consequently it is considered that the unintended consequences of proposed sub-clause 3(h) are limited to a satisfactory level, and would not result in an expanse of unplanned rural housing on undersized lots.

**Option 2 - Insert additional land use for site under Schedule 1 - Additional permitted uses**

Schedule 1 of the LEP is provided to enable Council to permit specific uses on specific parcels of land where the zoning and / or minimum lot size controls for the land otherwise prohibit the specified use. Unlike Option 2, no other land which does not benefit from a dwelling entitlement would benefit from such an amendment. Should Council resolve to support this option, it is suggested that the LEP would be amended as follows:

**Schedule 1 Additional permitted uses**

<b>Column 1</b>	<b>Column 2</b>
<b>Land</b>	<b>Permitted use</b>
Lots 28 & 29 DP755414	dwelling-house in association with intensive plant agriculture and consolidation of the two lots

This approach would permit a dwelling to be established over the two lots subject to the land being consolidated and established for intensive plant agriculture (as defined in the LEP Dictionary), noting the applicant's proposal for planting olive groves.

**Comparison of Options 1 and 2**

Option 1 applies to rural holdings greater in area than 20ha where intensive plant agriculture is established or proposed, subject to the holding being held in the same ownership since prior to the making of LEP 2008, when the dwelling entitlement was removed for such land. Option 2 would apply only to the subject land however in this regard may be viewed as exclusively benefiting that land. Consequently **Option 1** is considered more fair and reasonable, whilst having limited unintended consequences given its limited application with ownership requirements, and is therefore the preferred Option.

## 4.0 STRATEGIC CONTEXT

---

The rationale for supporting the proposed amendment to the LEP is addressed through consideration of Council's key planning strategies and instruments, along with relevant State Environmental Planning Policies and Directions of the Minister.

The following is a brief summary of local government planning strategies and instruments which are relevant to future planning of the site:

### 4.1 Mid-Western Regional Comprehensive Land Use Strategy

The Mid-Western Regional Comprehensive Land Use Strategy ("the Strategy") dated October 2009 provides "*a basis for identifying options...to meet long term urban and rural growth needs... and provide direction for targeted growth in specific areas.*"

The Strategy commenced preparation in 2007 by Parsons Brinkerhoff consultants for Council, and was adopted in 2009. Relevant sections of the Strategy are addressed as follows:

**Section 2.1: Rural Land** contains *a set of development principles upon which to build a Strategy for the rural lands.* Of particular relevance to the subject land is the principle:

- *Retain the ability to seek development approval for a dwelling on lots that have been created by Council for that purpose.*

In considering this principle, Council's deferred commencement consent under the now lapsed DA 0292/2003 granted consent to a dwelling subject to subdivision (consolidation) of the land into one lot of 28ha.

In considering the other principles for Rural Land as stated in Section 2.1, the proposal does not result in fragmentation of agricultural land nor give rise to land use conflict, nor is it considered to be inconsistent with any of the principles for rural land. As such the proposal relies upon the establishment of an intensive agricultural enterprise on the land, with an olive grove proposed in this regard to enable a dwelling on the land.

**Section 2.3 Protection of the environment and natural resources** identifies development constraints of relevance to the site. Those of particular relevance to the site are identified including *environmentally sensitive areas, rivers and creek lines, and groundwater / surface water management.* In relation to the existing building proposed for use as a dwelling, this is located approximately 75m from Stoney Creek which forms its northern boundary.

The future planting of an olive grove is identified within a cleared portion of the site between the proposed dwelling and Botobolar Road. The proposed dwelling has a 30KL water tank and the owner will apply for a new bore license for irrigation purposes subject to the Planning Proposal being supported. No physical constraints are identified under the Strategy to the proposed dwelling and olive groves on the land.

**Section 2.6 Infrastructure Services** identifies required services. The site benefits from sealed road access, electricity, telephone (land and mobile) and school bus services. Water is sourced on site and effluent disposal will be on site subject to the recommendations of a geotechnical assessment, which shall be prepared for a future DA for the dwelling.

**Section 4.3.2 Irrigated Agriculture** identifies several principles of relevance to the proposed olive grove on the site, which is an activity that is compatible with other agriculture in the locality. With consolidation of the land this prevents fragmentation of the land, and whilst the minimum lot size has increased to 100ha under LEP 2012, it is noted that the Strategy commenced preparation in 2007, prior to the making of the Interim LEP 2008 whereupon the potential for a dwelling entitlement was ultimately removed.

**Section 4.7 Subdivision and dwelling entitlements** specifically considers the circumstances of the proposal whereby:

*All existing "dwelling entitlements" as recognised in the Mid-Western Interim Local Environmental Plan 2008, Rylstone Local Environmental Plan 1996 and the Merriwa Local Environmental Plan 1992 will be retained. It is also proposed to retain the current provision in the Interim Local Environmental Plan 2008 which makes it clear that lawfully created allotments on which a dwelling house could have been erected will retain that entitlement.*

Noting that the deferred commencement consent DA 0292/2003 granted consent to a dwelling subject to subdivision (consolidation) of the land into one lot of 28ha, this provided a *lawfully created allotment* notwithstanding that the applicant did not carry out the necessary procedure to consolidate the land as approved.

In summary then, a review of the Strategy identifies that the Planning Proposal is not inconsistent with any of the relevant principles of the Strategy that relate to rural development.

## **4.2 Mid-Western Regional Local Environmental Plan 2012**

The general aims of the LEP as set out under Clause 1.2 support the Planning Proposal in that a dwelling on the subject land will support the ongoing agricultural use of the land and proposed olive groves as intensive plant agriculture.

Consideration of the objectives for the RU1 zone as provided below indicate that use of the building on the land as a dwelling in support of agriculture on the land may be carried out in an orderly manner without adversely impacting on the surrounds.

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To encourage diversity in primary industry enterprises and systems appropriate for the area.*
- *To minimise the fragmentation and alienation of resource lands.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To maintain the visual amenity and landscape quality of Mid-Western Regional by preserving the area's open rural landscapes and environmental and cultural heritage values.*
- *To promote the unique rural character of Mid-Western Regional and facilitate a variety of tourist land uses.*

**Comment** - The Planning Proposal supports ongoing agriculture on the land including a proposed olive grove as intensive plant agriculture. The use of the building as a dwelling will support the use of the land whilst not giving rise to any land use conflict with surrounding rural properties and their respective agricultural uses. The proposal also requires the consolidation of the two existing lots thereby preventing any fragmentation of the land in the future, and assisting to preserve the rural landscape by limiting future development opportunities.

LEP Clause 4.2A - Erection of dwelling houses and dual occupancies on land in certain zones sets several 'savings provisions' relating to housing in rural areas including the RU1 Primary Production zone, being the zoning of the subject land and the predominant zoning of its rural surrounds. As explained under Section 3.2 of this report, an amendment to Clause 4.2A is proposed so as to insert an additional savings clause providing grounds for which a dwelling may be constructed on an undersized lot in the RU1 - Primary Production zone.

#### **Clause 6.5 Terrestrial biodiversity**

The LEP Map for Biodiversity Sensitivity identifies two corridors of high biodiversity traversing the northern boundary of the site along Stoney Creek and through the northern portion of the site. An analysis of these against aerial imagery indicate they accord with two corridors of established trees, with the southern corridor more sparse. Given the Planning Proposal does not seek any fundamental change of use that would give rise to any clearing or development, it is considered that the proposed olive groves will not have any effect on the biodiversity significance identified on the site.

### **4.3 State Environmental Planning Policy (Rural Lands) 2008**

The Rural Lands SEPP sets rural planning principles and rural subdivision principles which require consideration under this Planning Proposal, as follows:

#### **Cl. 7 Rural planning principles**

- (a) the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas,*
- (b) recognition of the importance of rural lands and agriculture and the changing nature of agriculture and of trends, demands and issues in agriculture in the area, region or State,*
- (c) recognition of the significance of rural land uses to the State and rural communities, including the social and economic benefits of rural land use and development,*
- (d) in planning for rural lands, to balance the social, economic and environmental interests of the community,*
- (e) the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land,*
- (f) the provision of opportunities for rural lifestyle, settlement and housing that contribute to the social and economic welfare of rural communities,*
- (g) the consideration of impacts on services and infrastructure and appropriate location when providing for rural housing,*
- (h) ensuring consistency with any applicable regional strategy of the Department of Planning or any applicable local strategy endorsed by the Director-General.*



**Comment** - In response to these planning principles, the land will remain zoned RU1 - Primary Production and is considered to satisfy the objectives of the zone. The proposed use of the land for a dwelling is in conjunction with proposed olive groves that will contribute to regional produce while potentially generating employment opportunities in the local community. No clearing of native vegetation is required, while residential occupation of the land will be consistent with the rural settlement pattern of the surrounds without generating excessive demand on community infrastructure and services.

### **CI.8 Rural Subdivision Principles**

- (a) the minimisation of rural land fragmentation,*
- (b) the minimisation of rural land use conflicts, particularly between residential land uses and other rural land uses,*
- (c) the consideration of the nature of existing agricultural holdings and the existing and planned future supply of rural residential land when considering lot sizes for rural lands,*
- (d) the consideration of the natural and physical constraints and opportunities of land,*
- (e) ensuring that planning for dwelling opportunities takes account of those constraints.*

**Comment** - In response to these subdivision principles, the proposal technically involves 'subdivision' however only insofar as requiring consolidation of the two existing lots into a single lot, thereby effectively reversing existing small lot fragmentation. The proposed use as a dwelling in conjunction with intensive plant agriculture on the land, which is predominantly cleared and recognised as providing an opportunity for olive groves.

### **CI.9 Rural subdivision for agricultural purposes**

- (1) The objective of this clause is to provide flexibility in the application of standards for subdivision in rural zones to allow land owners a greater chance to achieve the objectives for development in the relevant zone.*
- (2) Land in a rural zone may, with consent, be subdivided for the purpose of primary production to create a lot of a size that is less than the minimum size otherwise permitted for that land.*
- (3) However, such a lot cannot be created if an existing dwelling would, as the result of the subdivision, be situated on the lot.*
- (4) A dwelling cannot be erected on such a lot.*
- (5) [State Environmental Planning Policy No 1—Development Standards](#) does not apply to a development standard under this clause.*

**Comment** - In response to these subdivision principles, as stated above the proposal is rather a consolidation of the two existing lots into a single lot, rather than a subdivision of the land. As no additional lot is created under the proposal it is submitted that it does represent 'subdivision' as contemplated under this clause, therefore this clause does not apply.

## 4.4 Section 117 Directions

Pursuant to Section 117(2) of the *Environmental Planning and Assessment Act, 1979*, any relevant planning direction issued by the Minister must be followed by Council upon determining to prepare a new Local Environmental Plan (LEP) or an amendment to its LEP as initiated by a Planning Proposal.

The directions that are relevant to the proposal are identified as follows:

- Direction 1.2 - Rural Zones
- Direction 1.5 - Rural Lands

### 4.4.1 Direction 1.2 - Rural Zones

Consideration is given to this direction whereby the proposal seeks an amendment to LEP 2012 to enable a dwelling on rural holdings greater in area than 20ha and used for intensive agricultural purposes. The amendment will apply only to those landowners who owned such land prior to the gazettal of LEP 2008 whereupon the potential for a dwelling entitlement was removed.

As stated, the objective of this direction is to *protect the agricultural production value of rural land*. In the circumstances of this Planning Proposal, the site is currently used for agricultural purposes, and is proposed for intensive plant agriculture in the form of an olive grove. Furthermore the land will be consolidated into one lot which is favourable towards the agricultural production value of the land. Whilst the site and surrounds are not specifically identified for potential rezoning under the Council's Strategy to permit a reduction in the minimum lot size, as discussed in Section 4.1 of this report, the proposal is not considered to be inconsistent with any relevant principles of the Strategy.

### 4.4.2 Direction 1.5 - Rural Lands

Consideration is given to this direction which applies where *a planning proposal affects land within an existing rural zone*, and where the proposal *changes the existing minimum lot size on land within a rural zone*.

The direction requires the proposal to be consistent with the rural planning and subdivision principles listed in *State Environmental Planning Policy (Rural Lands) 2008*. As discussed under Section 4.3 of this report, the proposal is considered to be consistent with the relevant objectives and provisions of the Rural Lands SEPP.

---

## 5.0 CONCLUSION

---

This Planning Proposal has been prepared to seek an amendment to Mid-Western Regional Local Environmental Plan 2012 to enable a dwelling on land zoned RU1 - Primary Production where the holding is at least 20ha and supports intensive agriculture.

Two options are provided as explained in Section 3.2 of this report. Option 1 may apply to several rural landowners, while Option 2 would apply only to the applicant's land. Option 1 which seeks an additional savings clause is recommended, applying to rural holdings greater in area than 20ha where intensive plant agriculture is established or proposed. It is also subject to the holding being held in the same ownership since prior to the making of LEP 2008, when the dwelling entitlement was removed for such land. As a result it has limited unintended consequences given its limited application with ownership requirements. On this basis Option 1 is considered the more fair and reasonable Option and is therefore the preferred Option.

The proposal is generally consistent with the objectives of the zone and the relevant principles of the Mid-Western Regional Comprehensive Land Use Strategy. The proposal is also generally consistent with the Rural Lands SEPP, and relevant S.117 Directions of The Minister.

The site presents few physical constraints to the proposed dwelling and intensive agriculture. It would result in:

- Development that is consistent with the pattern of rural development in the locality;
- Development that would be compatible with adjoining and adjacent landuses;
- Development that shall support an intensive agriculture enterprise;
- Consolidation of the two existing lots thereby preventing (and in fact reversing) existing fragmentation of rural land in the locality.
- Opportunity for owners of land zoned RU1 - Primary Production to apply for a dwelling entitlement where their holding is at least 20ha, supports intensive agriculture and remains in the same ownership since prior to making of Mid-Western Interim LEP 2008, which relinquished dwelling entitlements for such land.

Council is encouraged to support the Planning Proposal and take all necessary steps to amend the Mid-Western Regional Local Environmental Plan 2012, enabling the existing building on the site to be approved as a dwelling subject to establishment of intensive agriculture on the land. Whilst the proposal will affect more than one landowner, the opportunity to obtain a dwelling entitlement under the proposal is limited to landowners that previously benefited from such an entitlement, and is subject to development consent.

We would be happy to meet with Council representatives to discuss this matter further and should Council require any further information please contact the author of this report at our Mudgee office.



## Appendix A



Aerial view of site and surrounds

→ N





## **Appendix B**

Deferred commencement consent and approved plan







# MUDGEE SHIRE COUNCIL

Emma Yule:sp:P1197361 (Newson Elvin)

8 April 2003

Mr R Newson & Ms J Elvin  
295 Pipeclay Lane  
MUDGEE NSW 2850

Dear Mr Newson & Ms Elvin

**DEVELOPMENT APPLICATION 0292/2003 – CONSOLIDATION OF LOTS FOR  
INTENSIVE AGRICULTURAL PURPOSES- LOT 28 & 29 DP 755414, BOTOBOLAR  
ROAD MUDGEE**

I am pleased to advise that your application has been approved by Council.

Attached is Council's formal development consent No. 0292/2003 which is a deferred commencement. It is necessary to comply with the deferred commencement condition prior to commencing use of the site.

It is important that you read the consent and understand the requirements of any conditions imposed. Certain requirements may need to be satisfied prior to proceeding with the development.

The consent is a legal document and should be kept for your future reference as the development proceeds. It should be noted that commencement of the development implies your acceptance of the conditions of consent.

Should you have any query regarding the consent or associated conditions, do not hesitate to contact myself or the appropriate Council officer.

Yours faithfully

**CATHERINE VAN LAEREN  
SENIOR PLANNER / TEAM LEADER**



# MUDGEE SHIRE COUNCIL

## Notice of Determination of a Development Application – Deferred Commencement

Issued under the *Environmental Planning and Assessment Act 1979* Section 80(3)

<b>Our Ref:</b> Emma Yule:sp:P1197361	<b>DA No:</b> DA0292/2003
<b>Applicant:</b> Mr R Newson & Ms J Elvin 295 Pipeclay Lane MUDGEE NSW 2850	<b>Land to be Developed:</b> Lot 28 & 29 DP 755414 Botobolar Road MUDGEE
<b>Proposed Development:</b> Consolidation of lots for intensive agricultural purposes	<b>Building Code of Australia Classification:</b>
<b>Date of Determination:</b> 8 April 2003	
<b>Determination:</b>	<b>CONSENT GRANTED</b> subject to conditions set out below
<b>Consent to operate from:</b> 8 April 2003	<b>Consent to lapse on:</b> 8 April 2008

### Conditions:

#### DEFERRED COMMENCEMENT CONDITION

- A. The applicant shall demonstrate the proposed dwelling site complies with the provisions of Council's adopted Mudgee Floodplain Management Plan.

*Darren Scott's inspection notes!*

#### APPROVED PLANS

1. Development is to be carried out generally in accordance with the approved plans drawn by Preferred Design and Drafting, dwg 1, project no 149.02 and as described in the Marketing Plan prepared by the applicants except as varied by the conditions listed herein. Any minor modification to the approved plans will require the lodgement and consideration by Council of amended plans. Major modifications will require the lodgement of a new development application.
2. A linen plan and nine (9) copies are to be submitted to Council for approval and endorsement by the General Manager.
3. In accordance with the provisions of Section 94(1)(b) of the *Environmental Planning and Assessment Act 1979* and the Mudgee Shire Council Section 94 Contribution Plan, a contribution shall be paid to Council in accordance with this condition for the purpose of:

(a) Transport Improvements	\$716.30
(c) Community Facilities	\$611
(d) Community Services	\$253

(e) Open Space Purchase	\$390
(f) Open Space Improvement	\$390
TOTAL PAYABLE	\$2360.30

4. If the *Subdivision Certificate* is not issued, for any reason whatsoever, within twelve (12) months of the date of determination, then the charges and contributions contained in this consent, may be increased to the current rate at the time of payment.
5. Prior to the issue of a *Subdivision Certificate*:
  - (a) all contributions must be paid to Council and all works required by the consent be completed in accordance with the consent, or
  - (b) an agreement be made between the developer and Council;
    - (i) as to the security to be given to Council that the works will be completed or the contribution paid, and
    - (ii) as to when the work will be completed or the contribution paid.
6. Vehicular entrance to be provided to the lot at the full cost of the developer, as follows:
  - (i) a gate or stock grid set back a minimum distance of ten (10) metres from the boundary of the land with the public road.
  - (ii) a minimum 3.0 metre wide gravel footway crossing, extending from the edge of the public road to the entrance gate or stock grid,
  - (iii) a minimum 150mm thick 3.0 metre wide concrete dish drain or 375mm diameter reinforced concrete pipe culvert with headwalls, aligned with the table drain in the public road,

All works are to be completed prior to the issue of the subdivision certificate, in accordance with Aus-Spec #1, as modified by Mudgee Shire Council.
7. Effective and appropriate sediment and erosion control facilities must be installed during the initial stages of construction and maintained throughout the construction period. These works must be designed and installed in accordance with Department of Land and Water Conservation standards.
8. If any aboriginal artefacts are uncovered or identified during construction earthworks, such work is to cease immediately and the local aboriginal community and National Parks and Wildlife Service are to be notified.
9. Prior to issue of the *Subdivision Certificate*, Council is to be supplied with:
  - (a) A certificate from Country Energy indicating that satisfactory arrangements have been made for the provision of an underground electricity supply and street lighting to the subdivision.
  - (b) A *Pre-Provisioning Confirmation Document* from Telstra indicating that satisfactory arrangements have been made for the provision of telephone services to the subdivision.
10. A *Restriction as to user* shall be created pursuant to Sect. 88 of the Conveyancing Act over the proposed lot that states no dwelling shall be erected on the allotment unless it is ancillary to the use of the land for the purposes of intensive agriculture as

defined by Mudgee LEP 1998. The Sect. 88 instrument shall be created at full cost to the developer and submitted to Council for approval prior to the release of the Subdivision Certificate.

11. A *Restriction as to user* shall be created pursuant to Sect. 88 of the Conveyancing Act over the proposed lot that enforces the building zone as shown on the approved plan. The Sect. 88 instrument shall be created at full cost to the developer and submitted to Council for approval prior to the release of the Subdivision Certificate.

**Other Approvals:** (*List Local Government Act 1993 approvals granted under s78A(5) and general terms of other approvals integrated as part of the consent*).

Not applicable

#### **Advisory Notes**

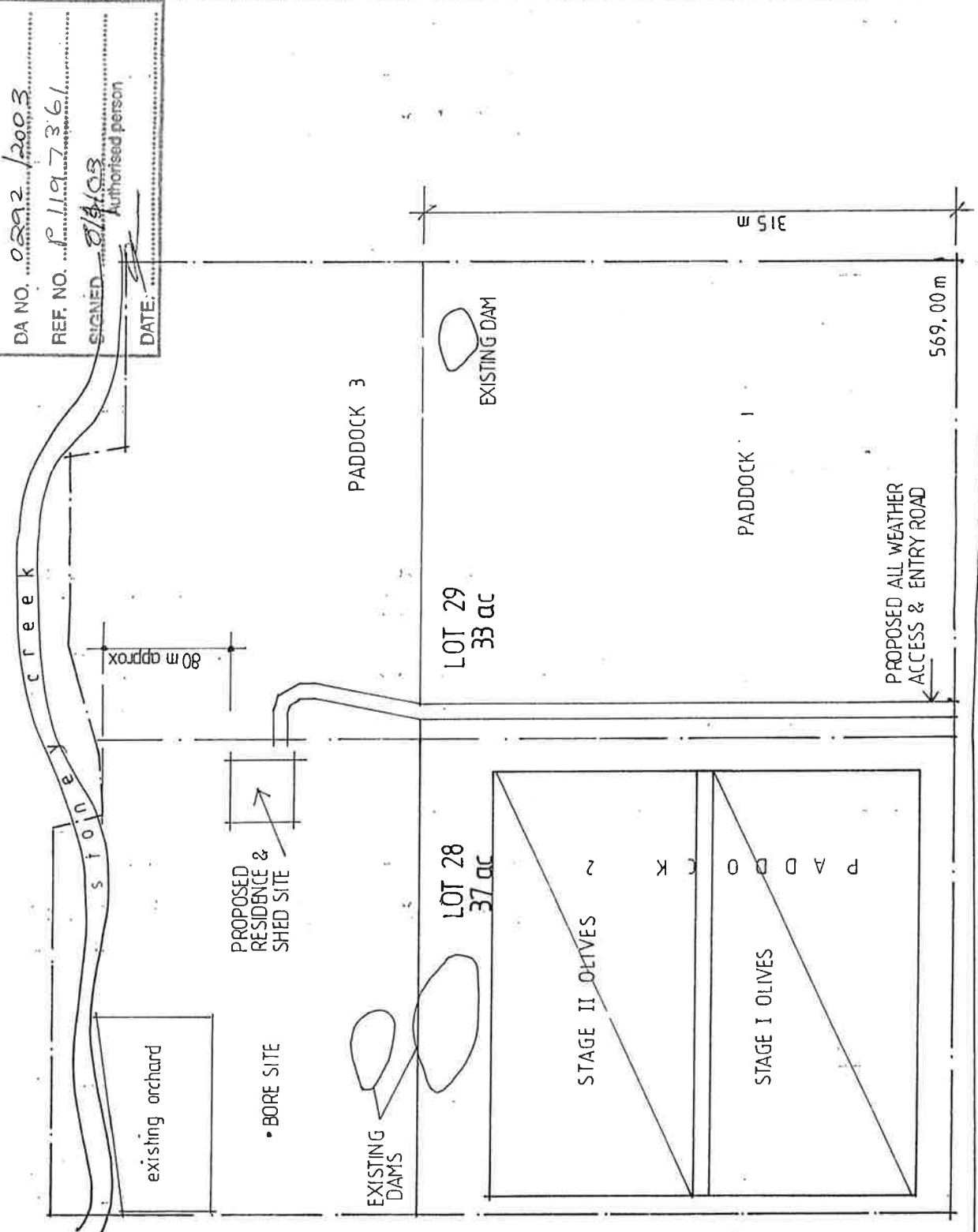
- 1 If dams are to be considered for capture of surface run off (Harvetable Right) in addition to the proposed bore for water supply, DLWC should be contacted before any new dams are constructed. In this respect any new dams are to be installed with reference to the NSW Farm Dams Policy.
- 2 The land upon which the subject building is to be constructed may be affected by restrictive covenants. This approval is issued without enquiry by Council as to whether any restrictive covenant affecting the land would be breached by the construction of the building, the subject of this approval. Persons to whom this approval is issued must rely on their own enquiries as to whether or not the building breaches any such covenant.
- 3 If you are dissatisfied with this decision section 97 of the Environmental Planning and Assessment Act 1979 gives you the right to appeal to the Land and Environment Court within 12 months after the date on which you receive this notice.
- 4 To ascertain the date upon which the consent becomes effective, refer to Section 83 of the Act.
- 5 To ascertain the extent to which the consent is liable to lapse, refer to Section 95 of the Act.

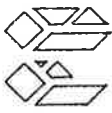
**Signed on behalf of Mudgee Shire Council by:**



**CATHERINE VAN LAEREN  
SENIOR PLANNER/TEAM LEADER**

MUDGEES SHIRE COUNCIL  
 APPROVED PLAN  
 DA NO. 0892 / 2003  
 REF. NO. P 1197361  
 SIGNED: [Signature] 21/10/03  
 AUTHORIZED PERSON  
 DATE: \_\_\_\_\_



A	3-12-02 APPLICATION FOR DEVELOPMENT	
ISSUE	DATE	DESCRIPTION
This drawing is subject to copyright and must not be reproduced or used without written permission of Preferred Design & Drafting		
STRUCTURAL ENGINEER:		
CLIENT: MR R NEWSON & MS J ELVIN 295 PIPECLAY LANE MUDGEE		
PROJECT: PROPOSED OLIVE GROVE INTENSIVE AG. DEVELOPMENT & RESIDENCE		
SITE ADDRESS: LOTS 28 & 29 BOTOBOLAR RD BOTOBOLAR		
SHEET DESCRIPTION: SITE PLAN		
SITE AREA: D.P.		
 PREFERRED DESIGN & DRAFTING 30 LEWIS STREET MUDGEES NSW 2850 PH: 02 6370 5571 MOBILE: 0422 600160 EMAIL: pd@preferred.com.au		
DRAWN	MP	DATE
SCALE	1:250	3-12-02
DRAWING NO.	1	PROJECT NO.
ISSUE		149.02
A		

TO MUDGEE ←  
 Botobolar road  
 SITE PLAN 1:250



## Appendix C

AHIMS search results - *Lots 28 & 29 DP 755415*





# AHIMS Web Services (AWS) Search Result

Your Ref Number : Newson  
Client Service ID : 114256

Ben Rourke  
4 / 108-110 Market St  
MUDGEE New South Wales 2850  
Attention: Ben Rourke  
Email: brourke@barnson.com.au

Date: 15 October 2013

Dear Sir or Madam:

**AHIMS Web Service search for the following area at Lot : 28, DP:DP755414 with a Buffer of 200 meters, conducted by Ben Rourke on 15 October 2013.**

The context area of your search is shown in the map below. Please note that the map does not accurately display the exact boundaries of the search as defined in the paragraph above. The map is to be used for general reference purposes only.



A search of the Office of the Environment and Heritage AHIMS Web Services (Aboriginal Heritage Information Management System) has shown that:

<b>0</b> Aboriginal sites are recorded in or near the above location.
<b>0</b> Aboriginal places have been declared in or near the above location. *



# AHIMS Web Services (AWS) Search Result

Your Ref Number : Newson Lot 29

Client Service ID : 114257

Ben Rourke  
4 / 108-110 Market St  
MUDGEE New South Wales 2850  
Attention: Ben Rourke  
Email: brouke@barnson.com.au

Date: 15 October 2013

Dear Sir or Madam:

**AHIMS Web Service search for the following area at Lot : 29, DP:DP755414 with a Buffer of 200 meters, conducted by Ben Rourke on 15 October 2013.**

The context area of your search is shown in the map below. Please note that the map does not accurately display the exact boundaries of the search as defined in the paragraph above. The map is to be used for general reference purposes only.



A search of the Office of the Environment and Heritage AHIMS Web Services (Aboriginal Heritage Information Management System) has shown that:

<b>0</b> Aboriginal sites are recorded in or near the above location.
<b>0</b> Aboriginal places have been declared in or near the above location. *





# MID-WESTERN REGIONAL COUNCIL

COUNCIL MEETING EXTRACT  
COUNCIL MEETING: 20 NOVEMBER 2013

## 6.2.5 PLANNING PROPOSAL – NEWSON DWELLING ENTITLEMENT GOV400029, A0100056, LAN900041

469/13

**MOTION:** Webb / Walker

**That:**

1. the report by the Manager Strategic Planning on the Planning Proposal – Newson Dwelling Entitlement be received;
2. the Planning Proposal be forwarded the Department of Planning and Infrastructure for determination by the Gateway highlighting the preferred mechanism for achieving the intent of the proposal is an inclusion in Schedule 1; and
3. the cost of this application fee being \$3186 being funded from the Council's financial grants.

**AMENDMENT:** Thompson / Shelley

**That:**

1. the report by the Manager Strategic Planning on the Planning Proposal – Newson Dwelling Entitlement be received;
2. the Planning Proposal be forwarded the Department of Planning and Infrastructure for determination by the Gateway highlighting the preferred mechanism for achieving the intent of the proposal is an inclusion in Schedule 1; and
3. the cost of this application fee being \$3186 being funded as follows: \$1593 by the applicant and \$1593 from the Council's financial grants.

*The amendment was put and lost with Councillors voting as follows.*

<b>Councillors</b>	<b>Ayes</b>	<b>Nayes</b>
Cr Cavalier		✓
Cr Kennedy		✓
Cr Martens	✓	
Cr Shelley		✓
Cr Thompson	✓	
Cr Walker		✓
Cr Weatherley		✓
Cr Webb	✓	
Cr White		✓

*The motion was put and carried with Councillors voting as follows.*

<b>Councillors</b>	<b>Ayes</b>	<b>Nayes</b>
--------------------	-------------	--------------



# MID-WESTERN REGIONAL COUNCIL

COUNCIL MEETING EXTRACT  
COUNCIL MEETING: 20 NOVEMBER 2013

---

Cr Cavalier	✓	
Cr Kennedy	✓	
Cr Martens		✓
Cr Shelley	✓	
Cr Thompson	✓	
Cr Walker	✓	
Cr Weatherley	✓	
Cr Webb	✓	
Cr White	✓	

---

## 1.1.1 Planning Proposal – Newson Dwelling Entitlement

REPORT BY THE MANAGER STRATEGIC PLANNING TO 20 NOVEMBER 2013 COUNCIL MEETING  
Planning Proposal Newson  
GOV400029, A0100056, LAN900041

### RECOMMENDATION

#### That:

1. **the report by the Manager Strategic Planning on the Planning Proposal – Newson Dwelling Entitlement be received;**
2. **the Planning Proposal be forwarded the Department of Planning and Infrastructure for determination by the Gateway highlighting the preferred mechanism for achieving the intent of the proposal is an inclusion in Schedule 1; and**
3. **the Planning Proposal fees be change in accordance with the adopted Fees and Changes at a rate of \$3186.**

---

### Executive summary

Council has received a Planning Proposal from Barnson in respect to the provision of a dwelling entitlement on Lots 28 and 29 DP 755414 Botobolar. In addition, the proponent has requested that Council consider waiving the Planning Proposal fee of \$3186 on the basis that the holding had an entitlement under a previous planning instrument.

### Detailed report

#### Fee

The Planning Proposal fee is adopted in the Fees and Changes and covers part of the costs associated with the administration and processing of the application. There are two fees for Planning Proposals; a more significant fee for the a proposal that is considered inconsistent with the Comprehensive Land Use Strategy (CLUS) which is \$7965 and a lesser fee for all other proposals of \$3186. Initially, the proponent was advised that the proposal is outside the CLUS therefore the higher fee would be applicable. However, Barnson, in preparing the documentation have suggested that as a entitlement existed under the LEP 2008 and the CLUS suggests that it is the intention of Council that no entitlements should be "lost" as a result of the Comprehensive LEP, the proposal is in fact consistent with the CLUS. Further, the preliminary assessment of the proposal revealed that the provisions on which the original DA relied were in fact contained in the draft LEP 2010 (now LEP 2012). On this basis the lesser fee has been applied in this instance.

Regardless of the actual fee changed, there is a considerable amount of time and effort going into the preparation of an amendment to the LEP and the fees are established to account for this.

In this instance the proponent was of the understanding that the fee was the higher of the two and has requested that Council either reduce or waive the fee given the circumstances and nature of the particular proposal. The fee has been reduced as described above. Waving the fee altogether would set a precedent for all of the other proposals coming in to Council and is therefore not supported. However, should Council choose to release the proponent from the burden of the fee an adjustment will need to be made to allocate the equivalent monies from the donations budget as is the practice.

## **Planning Proposal**

### *Background*

The circumstances of the application would be familiar to Council. By way of background, Mr Newson had a development consent issued in 2003 under the provisions of LEP 1998 for a dwelling associated with an intensive agricultural activity on the consolidated lots which have an area of 28ha. The consent was a deferred commencement consent and required the owner to demonstrate compliance with the Floodplain Management Plan. This was not undertaken by the proponent (although as since been satisfied) and the development consent lapsed. The erection of a dwelling on the site was also conditional on the land being used for an intensive agricultural purpose, in this case olives.

On realising that the consent had lapsed, the applicant submitted a new application with a variation to the minimum lot size (100ha) for the erection of a dwelling. The variation was significant given that the lot would only have an area of 28ha and was not supported by planning staff. The application was referred to the Department of Planning and Infrastructure (DOPI) who also refused to accept that variation, however, suggested that consideration would be given to a Planning Proposal to facilitate the entitlement. Further, the DOPI suggested that such a proposal consider the CLUS and the suitability of the entire area for rezoning for lifestyle lots. This would have required that the CLUS be revised to the extent that the methodology and criteria for determining suitability of land for lifestyle development be entirely reviewed.

Initial discussion between Council staff and the consultant engaged by Mr Newson concluded that this approach would be both expensive, unfeasible and potentially undermine the entire strategic direction adopted by Council all for the sake of reinstatement of a single dwelling entitlement. A number of options were suggested including an amendment to the clauses relating to dwellings on agricultural land and the use of Schedule 1.

### *Overview*

The Planning Proposal has been prepared by Barnson Pty Ltd on behalf of the proponent seeking to reinstate the dwelling entitlement on consolidated lots 28 & 29 DP 755414 Botobolar Road Botobolar. The proposal addresses the Comprehensive Land Use Strategy (CLUS) arguing that the proposal is not inconsistent with the intent of the CLUS in terms of the retention of dwelling entitlements, however, the dwelling entitlement existed only in association with the subdivision (in this case consolidation) to create an intensive agricultural lot above the minimum 20ha as specified in LEP 1998.

The following is an extract from the proposal:



## 4.1 Mid-Western Regional Comprehensive Land Use Strategy

The Mid-Western Regional Comprehensive Land Use Strategy ("the Strategy") dated October 2009 provides *"a basis for identifying options...to meet long term urban and rural growth needs... and provide direction for targeted growth in specific areas.*

The Strategy commenced preparation in 2007 by Parsons Brinkerhoff consultants for Council, and was adopted in 2009. Relevant sections of the Strategy are addressed as follows:

**Section 2.1: Rural Land** contains *a set of development principles upon which to build a Strategy for the rural lands.* Of particular relevance to the subject land is the principle:

- *Retain the ability to seek development approval for a dwelling on lots that have been created by Council for that purpose.*

In considering this principle, Council's deferred commencement consent under the now lapsed DA 0292/2003 granted consent to a dwelling subject to subdivision (consolidation) of the land into one lot of 28ha.

In considering the other principles for Rural Land as stated in Section 2.1, the proposal does not result in fragmentation of agricultural land nor give rise to land use conflict, nor is it considered to be inconsistent with any of the principles for rural land. As such the proposal relies upon the establishment of an intensive agricultural enterprise on the land, with an olive grove proposed in this regard to enable a dwelling on the land.

**Section 2.3 Protection of the environment and natural resources** identifies development constraints of relevance to the site. Those of particular relevance to the site are identified including *environmentally sensitive areas, rivers and creek lines, and groundwater / surface water management.* In relation to the existing building proposed for use as a dwelling, this is located approximately 75m from Stoney Creek which forms its northern boundary.

The future planting of an olive grove is identified within a cleared portion of the site between the proposed dwelling and Botobolar Road. The proposed dwelling has a 30KL water tank and the owner will apply for a new bore license for irrigation purposes subject to the Planning Proposal being supported. No physical constraints are identified under the Strategy to the proposed dwelling and olive groves on the land.

**Section 2.6 Infrastructure Services** identifies required services. The site benefits from sealed road access, electricity, telephone (land and mobile) and school bus services. Water is sourced on site and effluent disposal will be on site subject to the recommendations of a geotechnical assessment, which shall be prepared for a future DA for the dwelling.

**Section 4.3.2 Irrigated Agriculture** identifies several principles of relevance to the proposed olive grove on the site, which is an activity that is compatible with other agriculture in the locality. With consolidation of the land this prevents fragmentation of the land, and whilst the minimum lot size has increased to 100ha under LEP 2012, It is noted that the Strategy commenced preparation in 2007, prior to the making of the Interim LEP 2008 whereupon the potential for a dwelling entitlement was ultimately removed.

**Section 4.7 Subdivision and dwelling entitlements** specifically considers the circumstances of the proposal whereby:

*All existing "dwelling entitlements" as recognised in the Mid-Western Interim Local Environmental Plan 2008, Rylstone Local Environmental Plan 1996 and the Merriwa Local Environmental Plan 1992 will be retained. It is also proposed to retain the current provision in the Interim Local Environmental Plan 2008 which makes it clear that lawfully created allotments on which a dwelling house could have been erected will retain that entitlement.*

Noting that the deferred commencement consent DA 0292/2003 granted consent to a dwelling subject to subdivision (consolidation) of the land into one lot of 28ha, this provided a *lawfully created allotment* notwithstanding that the applicant did not carry out the necessary procedure to consolidate the land as approved.

In summary then, a review of the Strategy identifies that the Planning Proposal is not inconsistent with any of the relevant principles of the Strategy that relate to rural development.

The CLUS initially proposed to include a strategic direction relating to the increase in the minimum lot size for the erection of a dwelling in the rural zone from 100ha to 400ha. This being the case it also addressed the need to ensure that existing entitlements were preserved as a result there are provisions in the LEP 2012 clause 4.2A(g) which not only achieve that but reinstate entitlements that were wither not saved or omitted in the Interim LEP 2008 or had previously been removed by a sunset clause in LEP 1998.

The specific matter being considered in consideration of the proposal in this report is that the Council had undertaken a merit assessment of the proposal and issued a development consent that would enable the erection of a dwelling in association with an intensive agricultural activity as was permissible in the LEP 1998.

Under the provisions of LEP 1998 clause 12(6), development for the purposes of subdivision and a dwelling was permissible provided that

- (b) the Council is satisfied that:
- (i) each allotment created by the subdivision has an area of at least 20 hectares and that, based on documentary evidence, each allotment is intended to be used for the purpose of intensive agriculture, and
  - (ii) adequate arrangements exist for the continuous and reliable supply of a sufficient quantity of water to the land, and
  - (iii) the soil, topography, drainage and other physical characteristics of the land are such that intensive agriculture is a suitable use of the land, and

- (iv) the land will not be used for intensive keeping of livestock, and
  - (v) an adequate area is available for the erection of a dwelling-house which will be ancillary to the use of the land and located, as far as is practicable, on land not capable of being used for the purpose of intensive agriculture, and
- (c) the Council has referred the application for consent to subdivide the land to NSW Agriculture and the Department of Land and Water Conservation or a similar expert body with a request for comment, and has taken into account any comments received within 14 days of the Council's request for comment.

These provisions were not saved in the Interim LEP 2008 nor in the LEP 2012. Council did, however, seek to reinstate the clause permitting the subdivision and erection of a dwelling in the RU1 Primary Production zone in association with intensive agriculture and having a minimum lot size of 20ha. The draft LEP 2010 (as it was then, now LEP 2012) submitted to the DOPI under section 62 of the act for a certificate for public exhibition included clause 4.1(3B) which related the subdivision of land in the RU1 Primary Production zone to 20ha for intensive agriculture and a dwelling similar to clause 12(6) above. The DOPI argued that this was inconsistent with the Rural Lands SEPP and as such should be removed (refer Development and Services Committee Report 1 December 2010 Draft LEP s62).

While Council staff are not of the view that the Planning Proposal now being considered addresses this as an holistic issue, under the circumstances it is not considered contrary to the intent of either the CLUS or the initial draft LEP 2010 (LEP 2012), in fact is consistent with Council's draft LEP 2010 submitted to the DOPI for public exhibition.

#### *Precedent*

The Planning Proposal is a matter dealt with under statute and technically precedent has no place nor is it a matter relevant to the determination as to whether the planning proposal should be supported. However, in addressing the proposal the likelihood of the floodgate effect was considered in terms of a number of similar proposals. Unique to this proposal is the fact that the entitlement was created via the provisions of LEP 1998 as outlined above rather than an entitlement that "existed" at some earlier point in time. The minimum lot size (MLS) for an intensive agricultural lot in the Primary Production zone was 20ha. This is consistent with the MLS in the Primary Production Small Lots zone (formerly the Intensive Agricultural zone). This is based on the absolute minimum area on which a commercially viable intensive agricultural activity could be undertaken was deemed to be 20ha. Whether this is in fact the case is again not a point for consideration in this case. In this instance the proponent exceeds this by over 40% with an area of over 28ha.

Further, the proponent had sort and gained development consent for the subdivision (consolidation) and was both unaware that the consent had lapsed and that neither the Interim LEP 2008 nor LEP 2012 saved the provisions. Further, it is fair to assume that the reasonable person in the position the proponent would have demonstrated the same limited understanding of the interrelationship between the CLUS, Interim and 2012 LEPs. This, together with the set of circumstances in which the original development application was approved support the case for the reinstatement of the dwelling entitlement in association with an intensive agricultural use with limited risk of precedent. If there are any cases with similar set of circumstances they will be individually considered, however, this seems remote.

#### *Summary*

Council approved a development application for a subdivision (consolidation) of the two lots which in association with an intensive agricultural land use permitted the erection of a dwelling on the site. The consent lapsed and despite the intention of Council to include the provisions under which it was approved into LEP 2012 the clause was omitted under direction from the DOPI. This is not a case supporting the reinstatement of these provisions verbatim, rather, it is seeking to

acknowledge a valid case in which they had been used in the recent past. It is on this basis that that Planning Proposal submitted by Barnson Pty Ltd is supported.

The preferred mechanism for achieving the desired outcome is an amendment to the LEP 2012 to include the use in Schedule 1 as an additional permissible use. This makes the intention in respect to this site very specific and clear. However, there has been and continues to be some resistance by the DOPI to utilise this mechanism when there is an alternative, such as a zone which would accommodate the intent. The alternative to the use of Schedule 1 would be to rezone the subject land RU4 Primary Production Small Lots and amend the lot size map to indicate a 20ha MLS. The erection of the dwelling would be permissible under these circumstances and still remain conditional on the intended use of the land for intensive agriculture. However, it would be an isolated zone surrounded by RU1 Primary Production. This highly visual representation of the land will be more likely to cause confusion amongst adjoining land owners who are not privy to the circumstances of the case and is therefore not the preferred option although would be a palatable outcome.

### Financial implications

Not Applicable, however, considerable resources have been allocated to this matter in the lead up to the lodgement of the application and through the development application process including representation directly to the Department of Planning in Sydney. Should Council resolve to waive the fees and adjustment of \$3186 will need to be made to the donations budget to account for this application.

### Strategic or policy implications

The Planning Proposal, should it proceed will result in an amendment to the LEP 2012 to enable the proponent to submit a development application for the erection of a dwelling on the subject land in conjunction with an intensive agricultural activity.

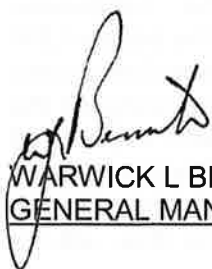
LIZ DENSLEY  
MANAGER STRATEGIC PLANNING

CATHERINE VAN LAEREN  
DIRECTOR DEVELOPMENT & COMMUNITY  
SERVICES

4 November 2013

*Attachments:* 1. Planning Proposal

APPROVED FOR SUBMISSION:



WARWICK L BENNETT  
GENERAL MANAGER