

Report No. 13.8 **PLANNING - Planning Proposal 26.2019.11.1 - Lot 6 DP 8385 Yagers Lane, Skinners Shoot - Request for Dwelling Entitlement**
Directorate: Sustainable Environment and Economy
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File No: I2020/778

Summary:

Council has received a planning proposal to amend Byron LEP 2014. The planning proposal seeks a dwelling entitlement for the land so that development consent can be sought for the use of an existing unauthorised dwelling house on the land. The matter is the subject of current enforcement action in accordance with Council's Enforcement Policy, the outcome of which will be determined as a consequence of Council's resolution on this report.

The land has an area of approximately 4.1 hectares and is zoned RU2 pursuant to LEP 2014. The planning proposal is consistent with the *Byron Rural Land Use Strategy 2017* and the *North Coast Regional Plan 2036*.

The following report provides the Council with options on to how to proceed with the planning proposal and the relevant information that has been provided to Council to make an informed decision in this regard.

NOTE TO COUNCILLORS:



In accordance with the provisions of S375A of the Local Government Act 1993, a Division is to be called whenever a motion for a planning decision is put to the meeting, for the purpose of recording voting on planning matters. Pursuant to clause 2(a) under the heading Matters to be Included in Minutes of Council Meetings of Council's adopted Code of Meeting Practice (as amended) a Division will be deemed to have been called by the mover and seconder of all motions relating to this report.

RECOMMENDATION:

That Council:

1. **Proceed with option 1 to request the NSW Department of Planning, Industry and Environment to issue a Gateway determination for the planning proposal as contained in Attachment 1 (E2020/40745).**
2. **Agree that staff can proceed to obtain further studies from the applicant (if required by the Gateway determination), then undertake public exhibition of the planning proposal and government agency consultation based on the Gateway determination.**
3. **Request staff to prepare an Unauthorised Residential Accommodation Policy as a matter of priority to identify planning pathways and consequences for Unauthorised Residential Accommodation seeking regularisation, and that this be reported to the next available Planning meeting for consideration of public exhibition.**

Attachments:

- 1 26.2019.11.1 - Planning Proposal to obtain Dwelling Entitlement Lot 6 DP 8385 - Joe Davidson - Lot 6 Yagers Lane Skinners Shoot, E2020/40745 
- 2 Special Disclosure and Pecuniary Interest Form, E2012/2815 

REPORTBackground

5 Council records indicate that ownership of the land was transferred to the current landowners on 21 May 2014.

10 A Planning Certificate was issued by Council to the previous landowner dated 5 February 2014 in accordance with Section 149(5) of the Environmental Planning and Assessment Act 1979. This certificate specified that a dwelling house is not permitted to be erected on the land with the development consent of Council pursuant to Byron Local Environmental Plan 1988.

15 Historically, Lot 6, together with Lots 4, 7 & 8 of DP 8385 formed an “existing holding” on the relevant day as defined within Clause 15 of LEP 1988. Pursuant to clause 15 of Byron LEP 1988 an existing holding is entitled to one ‘dwelling entitlement’ over the entire aggregation of lots in the holding.

20 The ownership of the four lots comprising the existing holding changed on 11 October 2013. Clause 4B of the *Environmental Planning & Assessment Act 1979* defines ‘subdivision of land’ which includes reference to a division of land affected by ‘conveyance, transfer or partition’. Consequently as of 11 October 2013 the land no longer satisfies the requirements for an “existing holding” under the terms of Clause 15(2)(b) of LEP 1988. Accordingly Lot 6 does not hold a dwelling entitlement as reflected in the Section 149(5) certificate issued 5 February 2014.

25 On 21 July 2014 Council wrote to the legal representatives of the previous landowner in response to a request for clarification on information contained within the Planning Certificate dated 5 February 2014 regarding the “dwelling entitlement” status of the land. This correspondence reaffirmed Council’s position that a dwelling was not permitted to be erected on the land. Council further advised that, should the landowner wish to pursue a dwelling entitlement on the subject lot, 30 a planning proposal to amend the LEP could be submitted.

35 On 30 May 2016 Joe Davidson Town Planning, on behalf of the current landowners, made application to Council for development related advice. The application requested clarification on whether a dwelling house could be erected on the land, under two hypothetical scenarios, in the absence of a “dwelling entitlement” in accordance with Clause 15 of Byron Local Environmental Plan 1988.

40 Council issued a response to the request for development related advice dated 31 August 2016. This response advised that consent could not be granted in either of the proposed scenarios as the land does not have a “dwelling entitlement” and does not comply with Clause 15 of LEP 1988.

45 On 28 July 2016 Council received a complaint regarding the alleged construction of a dwelling house on the land without consent. On the same day the site was inspected by a Council compliance officer who determined that construction of what appeared to be a dwelling house had commenced without consent.

50 A Show Cause letter was issued on 2 August 2016 providing the opportunity for the landowners to demonstrate why formal enforcement action should not be taken for unauthorised development in relation to the construction of an alleged dwelling.

55 On 16 August 2016 the landowners responded by advising that the building under construction was a farm building not a dwelling house and advised that as a farm building is permitted as exempt development in accordance with State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 that were not in breach of the local environmental plan.

Council accepted the response from the landowners in good faith and on 3 February 2017 determined that no further action would be taken at that time.

5 On 14 June 2018, Council again received a complaint regarding an alleged unauthorised dwelling house on the land. The site was inspected by a Council compliance officer on 7 July 2018 who confirmed that the building was being used as a dwelling house.

10 Compliance staff subsequently issued a Notice of Proposed Order No. 3 – Demolish Works on 18 July 2018 to require the dwelling to be demolished.

15 On 3 September 2018 Council received representations from the landowners to advise why an Order No. 3 should not be issued. Representations advised that the building was originally constructed as a farm building for storage and rural workers facilities (toilets showers and lunchroom) for people that would be working on the property for agricultural pursuits. The landowners further advised that due to a change in accommodation circumstances their family was forced to use the farm building on the property for accommodation.

20 Within the representations the landowners also advised that, in order to rectify outstanding matters, they will seek approval to operate the existing On-site Sewerage Management System, seek development consent for use of the building as a dwelling house and apply for a Building Information Certificate to demonstrate structural adequacy and safety of the building. It was advised that Joe Davidson Town Planning would be preparing a development application that would be lodged in 60 day time frame.

25 Over a time period of approximately six months the landowners and Joe Davidson intermittently updated Council compliance staff on progress with regard to submission of an application for approval to operate the existing On-site Sewerage Management System, a Development Application, an application for a Building Information Certificate, and with discussions with Council's Strategic Planning staff regarding obtaining a dwelling entitlement for the land.

30 Given that over nine months had passed since the issue of a Notice of Proposed Order No. 3 – Demolish Works on 18 July 2018, and that a Development Application had not been submitted, Council compliance staff issued an Order No. 3 – Demolish Works on 1 May 2019 requiring the dwelling to be demolished.

35 The landowners' legal representative wrote to Council on 23 May 2019 arguing that the Order No. 3 dated 1 May was invalid and should be withdrawn. It was argued that procedural fairness had not been granted as Council had not sufficiently considered that the giving of the Order would make the landowners homeless and that it is not appropriate for Council to issue an order requiring the building to be demolished as the original configuration of the structure is permitted as an exempt development Farm Building. Council subsequently withdrew the Order.

40 A revised Notice of Proposed Order No. 1 – Stop Use of the existing dwelling was issued on 27 August 2019 and the subject planning proposal has been submitted to address this Notice.

Subject Land

The land is described as Lot 6 DP 8385 with an area of approximately 4.1 hectares and has a regular shape. The street address is informally known as 31 Yagers Lane, Skinners Shoot. The land contains an existing unapproved dwelling house.



Figure 1: Subject land showing existing dwelling

The Planning Proposal

5 The planning proposal (Attachment 1) seeks to obtain a dwelling entitlement for the land that will allow for a Development Application to be lodged with Council seeking retrospective consent for the use of the existing building as a dwelling house on the land.

Specifically, the planning proposal seeks to add the land to Schedule 1 – Additional permitted uses of LEP 2014 to permit a dwelling house with consent on Lot 6 DP 8385.

10 ***Key issues***

1) *Byron Shire Rural Land Use Strategy*

15 Action No. 22 of the *Byron Shire Rural Land Use Strategy 2017* (BSRLS) recommends investigation into a strategic framework for resolving dwelling entitlement issues. This action provides the strategic basis for the subject planning proposal to be assessed and determined by Council.

2) *North Coast Regional Plan*

20 The Plan identifies 25 strategic directions within 4 broader goals. The following directions are identified as being relevant to the subject planning proposal:

- Direction 1: Deliver environmentally sustainable growth
- Direction 3: Manage natural hazards and climate change
- Direction 14: Provide great places to live and work
- Direction 22: Deliver greater housing supply
- 25 • Direction 23: Increase housing diversity and choice
- Direction 24: Deliver well planned rural residential housing areas

The proposal does not offend these directions.

3) *LEP 2014*

30 The land is zoned RU2 Rural Landscape in accordance with LEP 2014.

4) *Section 9.1 Directions*

The planning proposal is inconsistent with some Section 9.1 Directions because it:

- Increases the permissible density of land within a rural zone by seeking a dwelling entitlement for a lot which currently does not have a dwelling entitlement.

- 5
- has not yet been referred to RFS for bushfire consideration
 - introduces site specific provisions

These inconsistencies are discussed in more detail in the planning proposal.

5) *SEPP 55 and Land Contamination*

- 10 A search of Council records and geographical information mapping did not identify any constraints of concern such as acid sulfate soils, cattle dip sites or past land uses associated with land contamination.

- 15 A Preliminary Contaminated Land Assessment prepared by Greg Alderson & Associates dated November 2019 and submitted with this planning proposal provides that soil sampling results were below the Health Investigation Levels (HIL) in accordance with the National Environment Protection (Assessment of Site Contamination) Measure. Reporting was conducted in accordance NSW EPA (2000) Guidelines for Consultants Reporting on Contaminated Sites.

- 20 The site is considered to be suitable for residential land use. However, based on limitations identified in the submitted contaminated land assessment, any future development application for residential land use should include the provision of an Unexpected Findings Protocol (Contaminated Land).

6) *Bush fire*

- 25 The site is partially subject to bush fire prone land mapping. However the location of the existing dwelling is not subject to bush fire prone land mapping and therefore is not required to meet Planning for Bushfire Protection 2019 requirements.

7) *Flooding*

- 30 Flood modelling information available to Council indicates that the majority of the site (including the site of the existing dwelling) is not inundated during the Probable Maximum Flood (PMF).

- 35 Access to the site during a flood is compromised as Yagers Lane and Skinners Shoot Road are inundated during flood events, however there is no need to evacuate during a flood given the site has land above the PMF.

8) *Onsite sewage management*

- 40 An on-site Wastewater Management Report prepared by Greg Alderson & Associates dated November 2019 and submitted with this planning proposal demonstrates that wastewater generated by a future dwelling can be adequately managed via an On-site Sewage Management Facility comprising a Septic Tank. The site is considered to be suitable for treatment and disposal of wastewater.

9) *Land Use Conflict*

- 45 The subject site is located approximately 200 metres from a former piggery to the south on Lot 8 DP 8385, and 500 metres to an electricity power station contained on Lot 1 DP 1184803, to the southeast. Other surrounding land uses comprise large rural residential allotments and grazing

lands. It is considered that granting of a dwelling entitlement on Lot 6 DP 8385 will not create any significant land use conflict between the identified adjoining land uses.

10) Aboriginal Heritage

- 5 A search of the Aboriginal Heritage Information Management System dated 4 November 2019 was undertaken by the applicant and submitted with this planning proposal. The search did not identify any aboriginal sites or places within proximity of the subject site.

11) Farmland Protection

- 10 The site is not identified as containing regionally or state significant farmland.

12) Developer Contributions / Planning Agreement

The planning proposal seeks to amend LEP 2014 so that a dwelling is permitted with consent on the subject site.

- 15 If a dwelling is permitted on the site, this will create additional demands on rural roads, community facilities, open spaces etc. Such demands are captured by the Byron Shire Developer Contributions Plan 2012 which requires a monetary contribution in accordance with the Plan and Section 7.11 of the *Environmental Planning and Assessment Act 1979*.

- 20 Ordinarily contributions would be paid at the time of subdivision for creating a lot with a dwelling entitlement equivalent to one Standard Dwelling Unit (SDU) (3 bedroom dwelling or greater). However, for the purposes of this planning proposal, there is no clear mechanism within the Contributions Plan for applying developer contributions.

- 25 The submitted planning proposal included a letter of offer to enter into a planning agreement with Council. The offer proposes payment of a monetary contribution equivalent to one SDU.

- 30 Council staff have no justification to require additional contributions over and above the demand normally generated for a rural dwelling under the terms of the Contributions Plan 2012.

However, Council may resolve to apply different terms in the agreement if deemed reasonable and appropriate in the circumstances.

- 35 A formal agreement will need to be drafted to be exhibited concurrently with the planning proposal.

Options to Move Forward

- 40 Staff reported a proposed preliminary framework for an 'Unauthorised Residential Accommodation Policy to the Strategic Planning Workshop on 3 October 2019. The proposal outlined planning pathways for three different scenarios involving unauthorised residential accommodation:

- Pathway 1 – Land has a dwelling entitlement and contains unauthorised residential accommodation – development consent may be sought.
- 45 • Pathway 2 – Land does not have a dwelling entitlement and contains unauthorised residential accommodation – meets the strategic merit test for LEP amendment - Planning Proposal may be submitted before development consent may be sought.
- Pathway 3 – Land may or may not have a dwelling entitlement and contains unauthorised residential accommodation – does not meet the strategic merit test for LEP amendment
- 50 and does not comply with LEP and DCP provisions – Enforcement action as per

Enforcement Policy 2016 to follow i.e. Orders to demolish/restore to previously approved use as appropriate.

Recommendation 1 of this report corresponds to Pathway 2.

- 5 The as proposed Unauthorised Residential Accommodation Policy has not progressed since the SPW on 3 October 2019 and therefore there is no specific Council policy framework guiding the assessment of the subject planning proposal. This planning proposal is the first of its type and, subject to the determination, there may be many other planning proposals that follow that will not all be equal in their circumstances.

- 10 This planning proposal has demonstrated that it meets the strategic merit test. The land is not mapped as regional or state significant farmland, the land has been historically cleared of vegetation and the existing dwelling does not present any significant environmental impact. While parts of the land are mapped as bushfire prone and flood prone the location of the existing dwelling is not bushfire prone or flood prone. The site has legal and practical vehicular access via direct frontage to Yagers Lane and the existing dwelling does not unreasonably increase the demand for services. The site does not contain any recorded Aboriginal sites or declared Aboriginal places.

- 15 The above demonstrates that the existing dwelling is located on an unconstrained site while many sites that Council's Community Enforcement Team investigate for unauthorised residential accommodation, particularly in the hinterland areas, are severely constrained in terms of bushfire, access, ecological matters, onsite sewage management etc. and can be without legal and practical access.

- 20 It is critical that Council have a formal policy position to guide any future planning proposals regarding these matters.

Conclusion

- 25 This planning proposal was anticipated as a response to compliance action that has been carried out in relation to the existing unauthorised dwelling house on the site.

There are two options for Council:

- 30 1. Proceed with the planning proposal and request the DPIE to proceed to issue a Gateway determination for the planning proposal as attached to this report;
- 35 2. Not proceed with the planning proposal and provide reasons to the applicant; and progress enforcement action in accordance with the Council's Enforcement Policy.

STRATEGIC CONSIDERATIONS

Community Strategic Plan and Operational Plan

CSP Objective	L2	CSP Strategy	L3	DP Action	L4	OP Activity
Community Objective 4: We manage growth and change responsibly	4.2	Support housing diversity in appropriate locations across the Shire	4.2.1	Establish planning mechanisms to support housing that meets the needs of our community		
Community Objective 2: We cultivate and celebrate our diverse cultures, lifestyle and sense of community	2.4	Enhance community safety and amenity while respecting our shared values	2.4.3	Enhance public safety, health and liveability through the use of council's regulatory controls and services	2.4. 3.1	Monitor, investigate and resolve complaints in relation to community safety, land use and the environment

5 *Legal/Statutory/Policy Considerations*

The relevant legal/statutory/policy considerations have been noted above.

Financial Considerations

- 10 If Council chooses to proceed with the planning proposal, it will be at the proponent's expense as a land owner initiated planning proposal. Full cost recovery of the remaining stages will be required by Council. If the applicant chooses not to pay then the planning proposal will not proceed.
- 15 If Council chooses not to proceed then the matter does not incur any additional costs.

Consultation and Engagement

- 20 If Council chooses to proceed with the planning proposal, it will be forwarded to the NSW Department of Planning & Environment for a Gateway determination. A positive determination will identify any government agency or other consultation requirements.