

Greater Sydney, Place and Infrastructure

IRF18/4396

Plan finalisation report

Local government area: The Hills

PP Number: PP_2016_THILL_012_00

1. NAME OF DRAFT LEP

The Hills Local Environmental Plan 2012 proposed amendment for 90 Weavers Road, Maroota (the draft LEP).

2. SITE DESCRIPTION

The draft LEP applies to land at 90 Weavers Road, Maroota (Lot 239 DP 752025) in the Hills Local Government Area and is shown in Figure 1 (below). The site is 10.12 hectares. The site contains a single storey dwelling and part of the site is vegetated with Shale Sandstone Transition Forest which is a critically endangered ecological community under the *Biodiversity Conservation Act 2016*. The site slopes away from Weavers Road (with a gradient over 20%) down to a gully at the centre of the site.

A significant portion of the site is identified as bush fire prone land and the site access directly adjoins land as classified bush fire prone which has the potential to restrict access and egress during a bush fire event.

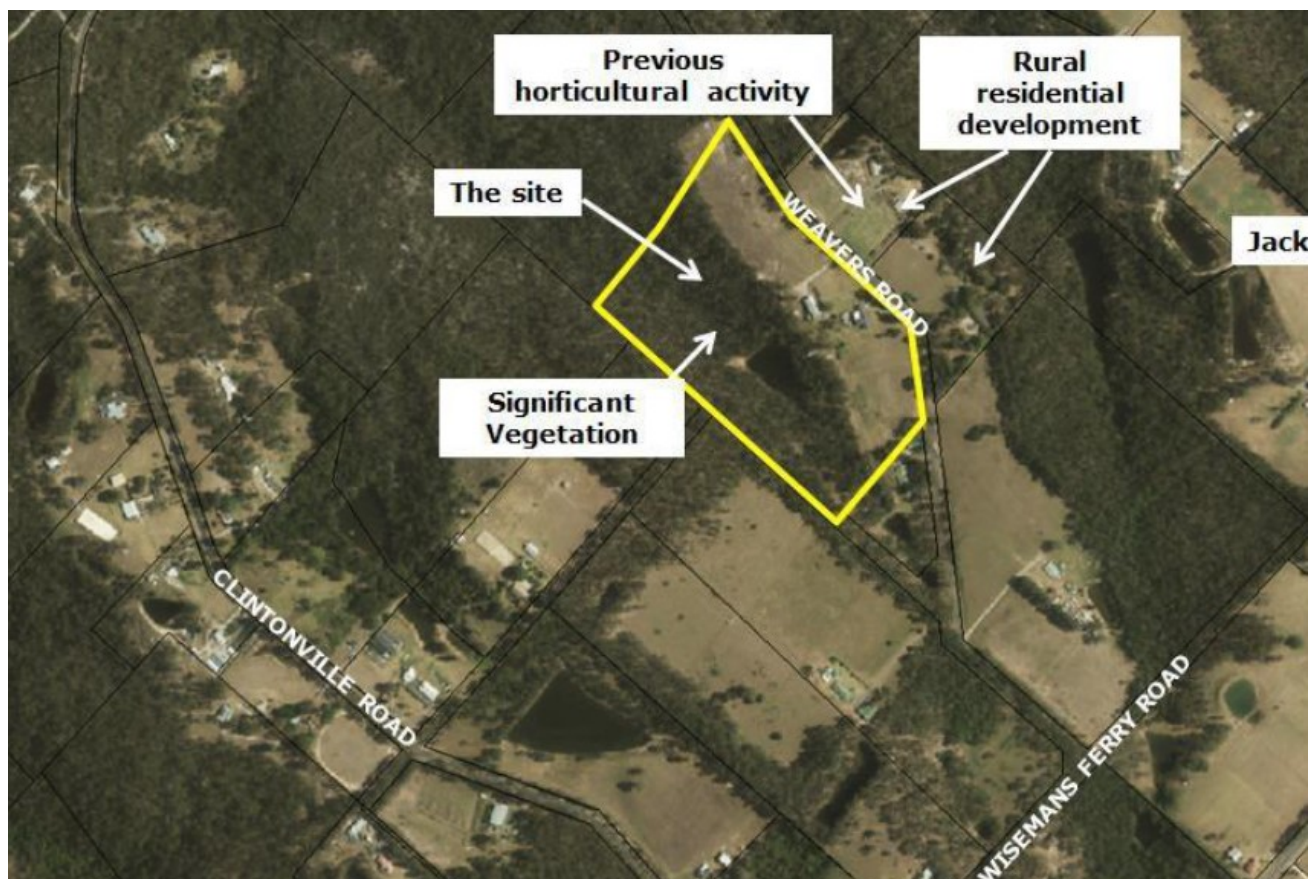


Figure 1: Subject site and surrounds (site outlined in yellow).

3. PURPOSE OF PLAN

The draft LEP seeks to rezone land at 90 Weavers Road, Maroota from RU1 Primary Production to RU2 Rural Landscape and to amend the Terrestrial Biodiversity Map to identify part of the site as affected by biodiversity. The plan aims to facilitate rural cluster subdivision through making community title subdivision permissible on the site under the existing provisions of Clause 4.1AA of The Hills LEP 2012, resulting in approximately five dwellings. The proposed development lots range from 6082m² to 1 hectare.

4. STATE ELECTORATE AND LOCAL MEMBER

The site falls within the Hawkesbury State electorate. The Ms Robyn Anne Preston, MP is the State Member for Hawkesbury.

The site falls within the Berowra Federal electorate. Julian Leeser MP is the Federal Member for Berowra.

To the planning team's knowledge, neither MP has made any written representations regarding the proposal.

NSW Government Lobbyist Code of Conduct: There have been no meetings or communications with registered lobbyists with respect to this proposal

NSW Government reportable political donation: There are no donations or gifts to disclose and a political donation disclosure is not required

5. GATEWAY DETERMINATION AND ALTERATIONS

The Gateway determination issued on 1 August 2016 (**Attachment D**) determined that the proposal should proceed subject to conditions, including a requirement for consultation with NSW RFS prior to public exhibition.

The Gateway determination was altered on 28 April 2017 (**Attachment EA**) to extend the timeline for the plan to be made and on 31 October 2019 (**Attachment EB**) to revoke the Written Authorisation to Exercise Delegations issued on 1 August 2016 to Council, so that the Department can proceed to finalise the plan as the plan making authority.

The Gateway determination (as since altered) conditions are discussed below.

Condition 1 required Council to provide a copy of the planning proposal package to the Commissioner of the NSW Rural Fire Service and allow at least 21 days to comment on the proposal prior to public exhibition. Council was required to take into consideration any comments received from RFS and to amend the planning proposal as required prior to exhibition.

- Council has consulted with NSW RFS as required by the Gateway determination. However, RFS has outstanding objections to the proposal as discussed further under the 'advice from public authorities' heading of this report. The issues raised by the NSW Rural Fire Service has not been resolved and no changes were made to the planning proposal as a result of the NSW Rural Fire Service advice.

Condition 2 required community consultation for a minimum of 28 days which was carried out from 14 September to 13 October 2017.

Condition 3 required consultation with public authorities which was completed in September 2017. Responses received are detailed further in this report.

Condition 4 provided that no public hearing was necessary, and Council has not held nor been required to hold one.

Condition 5 required the timeframe for completing the LEP to be 9 months from the week following the date of the Gateway determination. An Alteration of Gateway determination was issued to extend the timeframe to a total of 18 months (**Attachment EA**).

Condition 6 revokes the Written Authorisation to Exercise Delegations issued on 1 August 2016 to The Hills Shire Council. This condition was included through an Alteration of Gateway determination on 31 October 2019 to enable the Department to finalise the proposal (**Attachment EB**).

6. PUBLIC CONSULTATION

In accordance with the Gateway determination, community consultation was undertaken by Council from 14 September to 13 October 2017.

During the public consultation period, no public submissions were received.

7. ADVICE FROM PUBLIC AUTHORITIES

Council was required to consult with the following agencies and utility providers in accordance with the Gateway determination:

- NSW Rural Fire Service;
- Office of Environment and Heritage;
- Department of Primary Industries – Agriculture;
- Department of Trade and Investment;
- Sydney Water; and
- Endeavour Energy.

Council has consulted these stakeholders and received correspondence from all the above except Department of Trade and Investment and Sydney Water (**Attachment CI**).

Council also received comment from the following additional agencies:

- Heritage Council of NSW; and
- NSW Department of Industry – Geological Survey of New South Wales.

The key issues raised by the agencies and Council's response to these issues are as follows:

NSW Rural Fire Service

In accordance with the gateway determination and the provisions of section 9.1 Direction 4.4 – Planning for Bush Fire Protection, the NSW Rural Fire Service was consulted on the planning proposal.

The purpose of the rezoning is to facilitate the permissibility of rural cluster subdivision under Clause 4.1AA of The Hills Local Environmental Plan 2012. As rezoning the site from RU1 to RU2 has the potential to increase residential density, it triggers a requirement to consider section 9.1 Direction 4.4 Planning for Bush Fire Protection.

NSW RFS provided an initial response to Council on 2 September 2016 and further comments were also provided by RFS in response to additional information prepared by the proponent and as a result of ongoing discussion (**Attachment CI – letters dated 2 September 2016; 1 February 2017; 9 May 2017 and 3 August 2018**).

In each of these letters, the NSW RFS maintained the planning proposal was not able to satisfy the provisions of the section 9.1 Direction and specifically, the provisions of Planning for Bush Fire Protection 2006, as follows:

- The site is located a distance greater than 200m from a public road. Planning for Bush Fire Protection 2006 notes travel distances of 200m or more are difficult to traverse with

dense smoke and reduced vision as well as the increased chance of being isolated by the advancing fire;

- The site access directly adjoins land classified as bush fire prone which has the potential to restrict access and egress during a bush fire event. Planning for Bush Fire Protection 2006 notes that trees close to the access track could become obstacles in a hazy environment. Furthermore, those trees have the potential to fall and block emergency access and egress;
- The plans show that at least two of the lots in the indicative plan would have two or more direct exposures to bush fire hazard. Planning for Bush Fire Protection 2006 notes that a subdivision should be designed to minimise exposure to the bush fire hazard; and
- The site has not been provided with an adequate secondary egress which could be used to egress the site in an emergency should the primary egress be blocked. Planning for Bush Fire Protection 2006 requires secondary access/egress for lots that are located greater than 200m from a public road.

The Department has liaised with the proponent, Council and RFS on potential solutions. On 9 April 2018 the Department wrote to the proponent (**Attachment F**) requesting a revised concept plan that responded to what Council raised as an unexplored option to provide a secondary egress, for the purposes of liaising further with RFS. Council suggested the development may be able to connect the site to Cliftonville Road via an unformed Crown road.

A revised concept plan for subdivision and additional information (**Attachment G**) was provided by the proponent to the Department on 19 July 2018 and was referred to NSW RFS for comment on 1 August 2018. RFS provided comment to the Department regarding the revised concept plan on 3 August 2018 (**Attachment H**) and stated that their previous concerns remained and raised additional concerns regarding the potential fragmentation of vegetation that would be caused by the suggested secondary egress.

The NSW RFS Chief Commissioner wrote to the Department (received 23 July 2018 – **Attachment H**) raising significant concern in relation to the growing number of isolated rural cluster subdivisions being proposed in the Sydney area, with many being planned in remote and significantly bush fire affected areas in The Hills Shire.

The Department met with RFS and The Hills Shire Council on 24 August 2018 to discuss rural cluster subdivisions in The Hills in bush fire prone areas. Following the meeting, NSW RFS provided a formal response and formal position on multi lot subdivisions in bush fire prone areas to the Department on 30 August 2018 (**Attachment H**).

NSW RFS has issued a fact sheet entitled Multi Lot Residential Subdivision in Bush Fire Prone Areas (Fact Sheet 1/17) (Version 1 – August 2018) (**Attachment K**). The fact sheet was issued in response to the growing concerns of NSW RFS in relation to rural cluster subdivision and their ability to comply with the relevant standards. The fact sheet notes in many instances access issues will prevent NSW RFS from supporting a proposal.

In summary, NSW RFS does not support the proposal as it is inconsistent with Planning for Bush Fire Protection 2006. The aim of planning for Bush Fire Protection 2006 is to provide for the protection of human life (including residents and firefighters) and minimise impacts on property from the threat of bush fire.

As a result of the consultation with NSW RFS, the concerns raised by the RFS in relation to the planning proposal cannot be resolved.

Council response

Council's response to matters raised by NSW RFS is as per Council's post-exhibition report (14 November 2017 – **Attachment CK**).

Council notes under the Section 9.1 Ministerial Direction 4.4 Planning for Bush Fire Protection (which applies to the site), a planning proposal may only be inconsistent with this Direction if written advice is received from the Commissioner of the NSW Rural Fire Service that the planning proposal is supported.

Council stated the issues raised by NSW RFS often arise in the assessment of individual rural cluster subdivision applications and can usually be resolved on similarly constrained sites as part of the detailed development application and subdivision design process.

The proponent submitted further advice by their consultant Building Code & Bush Fire Hazard Solutions (November 2016) to address the issues raised by RFS. The consultant undertook a site-specific risk assessment and concluded the site's risk rating was 'medium', rather than extreme as indicated by RFS. They have outlined bush fire protection measures to address how future development could respond to bush fire risk including future dwellings to be constructed to a higher Bush Fire Attack Level, emergency management measures and provision of a perimeter fire trail at the rear of future lots on site.

Council identifies that should the planning proposal proceed; further work would be required at the development application stage to provide a suitable design layout that achieves compliance with the Planning for Bush Fire Protection 2006 guidelines and/or proposes suitable alternative solutions. The RFS would again be consulted as part of the development application process and further assess any alternative solutions proposed by the proponent to address technical non-compliance with the guidelines.

Council states that it may be possible to address the access/egress issue for the site in the event of a bush fire by providing a fire trail/connection to the south, connecting the site to Cliftonville Road via the unformed Crown road. Council states this approach is similar to that taken for other rural cluster development proposals to resolve issues related to access and isolation in the event of a bush fire.

Further, Council officers attended a meeting with representatives of RFS in March 2017 to discuss alternative solutions (as outlined above) which may resolve RFS' concerns in addition to those raised within the proponent's additional information.

Despite these representations, RFS has maintained its objection and has advised that given the non-compliance with the Guidelines, it is not able to support the proposal based on the information provided.

Department response

The Department has liaised with the proponent, Council and RFS on potential solutions. On 9 April 2018 the Department wrote to the proponent (**Attachment F**) requesting a revised concept plan that responded to what Council raised as an unexplored option to address the access/egress issue for the site in the event of a bush fire to connect the site to Cliftonville Road via an unformed Crown road; for the purposes of liaising further with RFS. A revised concept plan for subdivision (see Figure 2 next page and **Attachment G**) was provided to the Department on 19 July 2018 and was referred to RFS for comment on 1 August 2018.

RFS provided comment to the Department regarding the revised concept plan on 3 August 2018 (**Attachment H**) and stated that its previous concerns remained. Further, RFS stated the revised concept plan's secondary access road is through the main vegetation hazard and this does not satisfy the requirement of section 4.1.3(2) of PBP 2006 "to provide safe access to/from the public road system for firefighters providing property protection during a bush fire and for occupants faced with evacuation."

RFS states the proposal's use of a fire trail for the purpose of a secondary access road for public use is inappropriate and should not be relied upon to meet the objective of providing a safe secondary access. The use of an unformed Crown reserve for the purpose of a secondary access would involve on-going maintenance and may fragment the biodiversity values of the site. As this land is outside the Community Association Lot for the proposed subdivision, Council would need to provide for on-going maintenance costs, however no details of management have been provided or supported.

Concerns have also been raised by RFS that the implementation of the proposed secondary access road for the subdivision could be relied upon by future proposed subdivisions in the area as a means of their own secondary access and will have an unacceptable cumulative impact that would increase the amount of people potentially exposed to a greater bush fire threat.

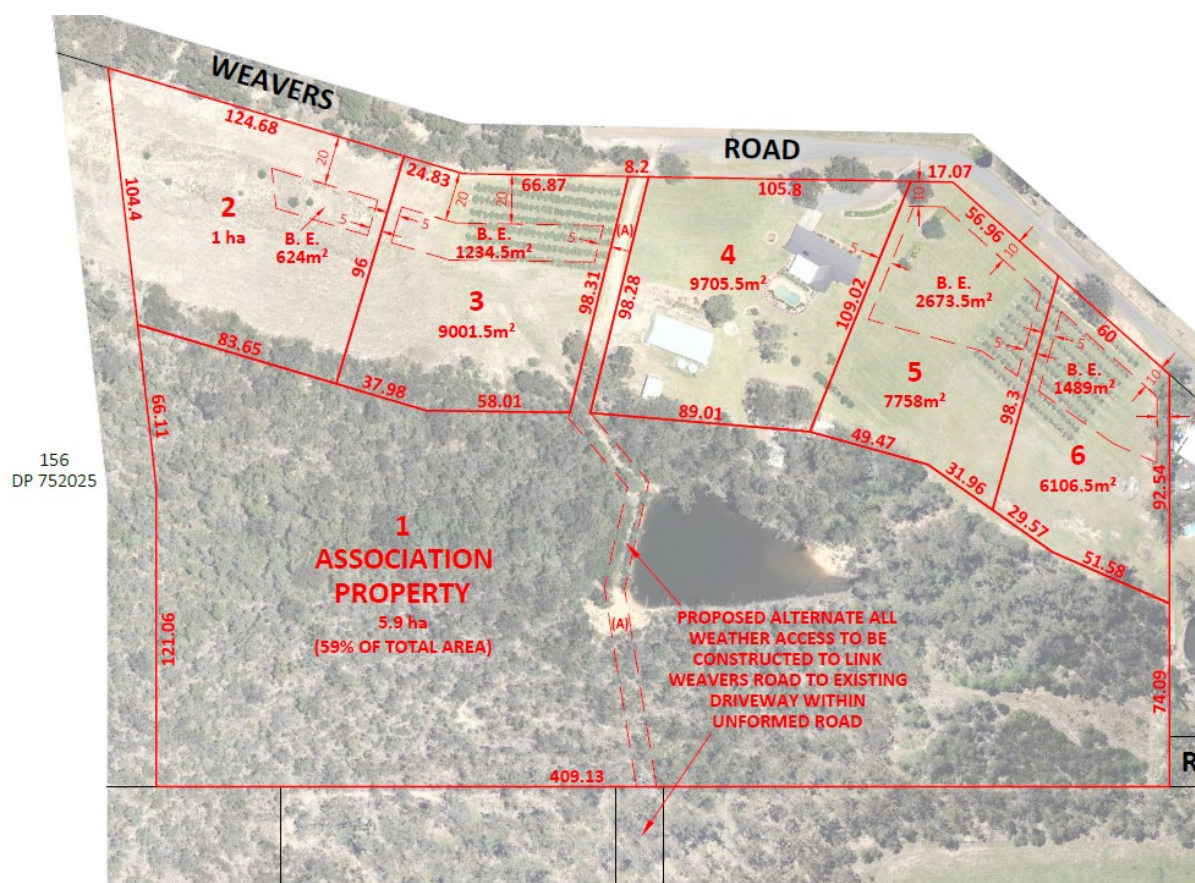


Figure 2: Updated concept plan of subdivision (19 July 2018)

The Department met with RFS and The Hills Shire Council on 24 August 2018 to discuss a consistent approach to rural cluster subdivisions in The Hills in bush fire prone areas.

Following the meeting, RFS provided a formal response and formal position on multi lot subdivisions in bush fire prone areas to the Department on 30 August 2018 (**Attachment H**), summarised as follows.

Given the constraints posed by existing road access infrastructure and vegetation in providing safe access for emergency management and evacuation have not been addressed to a satisfactory level at the land rezoning stage, particularly in areas located at considerable distance from public through roads, the NSW RFS maintains its concerns now raised on numerous occasions.

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The NSW RFS is of the view that the Council has not addressed the suitability of the access provisions at the strategic level to more appropriately reflect the bush fire risk that exists.

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It is preferable that the NSW RFS work closely with The Hills Shire council and the Department of Planning and Environment in identifying areas that are suitable for increase in densities. Specifically, in identifying areas within the current zoning where safe access for emergency management and evacuation cannot meet the access provisions with Planning for Bush Fire Protection 2006 prior to lodgement of any development application and at the strategic level prior to lodgement of planning proposals for rezoning.

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Multi Lot residential Subdivisions Fact Sheet

The NSW RFS has seen an increase in developments involving the subdivision of large rural blocks into smaller rural-residential allotments which include an association lot. In some cases, these subdivisions cannot meet all the acceptable solutions in PBP.

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In many situations, access issues will prevent compliance with the Performance Criteria of PBP and these types of subdivisions will not be approved by the NSW RFS.

The Department considers that the proponent has been unable to demonstrate how RFS requirements can be met for the dwelling density proposed and that there is no viable outcome to satisfy the requirements of Planning for Bush Fire Protection 2006.

Planning for Bush Fire Projection 2006 aims to protect life, property and the environment from bushfire hazards. In this context, it is not considered that increased density is an appropriate outcome on this site and therefore, there is no merit in rezoning the site from RU1 to RU2.

Office of Environment and Heritage

OEH provided comments to Council on 13 October 2016. In summary, OEH considers that the survey and assessment carried out as part of the Flora and Fauna Assessment (FFA) (18 July 2015) submitted with the planning proposal is inadequate. However, it is also acknowledged that this may not be critical given most of the native vegetation on site is proposed to be retained within the proposed biodiversity mapping layer. OEH raised concern that there may be some impacts on site from the creation of an asset protection zone (APZ) within the retained vegetation and there will also likely be indirect impacts from the potential increase in residential density.

OEH reviewed the FFA prepared with the planning proposal and provide the following comments:

- The FFA refers to Shale/Sandstone Transition Forest (SSTF) as an endangered ecological community, but SSTF is listed under the Threatened Species Conservation Act 1995 as a critically endangered ecological community.
- It does not appear that systematic flora or vegetation surveys were done nor that any survey guidelines were followed (e.g. OEH's Threatened Biodiversity Survey and Assessment Guidelines 2004 or Guide to Surveying Threatened Plants 2016).
- It is noted that no fauna surveys were undertaken, however there are records of threatened fauna species in the locality (detailed in OEH's submission at **Attachment CI**). It is also noted that Council's report states that there is a high likelihood of threatened species and/or their habitats occurring on the site.
- The FFA states that the site contains potential koala habitat.

- Further, the FFA states that the proposal will not have a significant impact on any fauna species but does not identify which species. It is not adequate to undertake an assessment for all fauna species as a group and an assessment of significance need to be addressed for each species.
- OEH notes that the FFA assumes Lot 1 (5.91 ha) is to be managed by Council and concluded that there will not be a significant impact on any threatened species or EECS based on this outcome being achieved. However, it is noted that this outcome has not been supported by Council.

Further, OEH understands that the proposal identifies vegetation to be retained on the Terrestrial Biodiversity Map and vegetation management is to be undertaken by a community association. OEH is not satisfied that this will provide adequate security for the remnant vegetation on site, particularly given its Critically Endangered Ecological Community status. OEH recommended that Council considers a split zoning for the site which zones land with biodiversity values E2 Environmental Conservation and ensuring a vegetation management plan is in place.

Council response

As per Council's post exhibition report (14 November 2017 – **Attachment CK**), Council in summary states:

- the assessment submitted by the applicant identifies two critically endangered ecological communities under Part 4 of the Biodiversity Conservation Act 2016 on site. In response to this, the proposed rural cluster lots have been sited on land predominately absent of native vegetation;
- the current LEP and DCP contain provisions relating to rural cluster subdivision which requires Council to be satisfied that appropriate management measures will be in place to protect the landscape, biodiversity and rural setting of the land. Council states existing development controls provide an appropriate framework for assessment of environmental impacts and the suitability of the subdivision at development application stage;
- OEH's concern regarding the environmental implications of bush fire asset protection zones is noted. However, Council states that their concerns can be reviewed at the development application stage; and
- the suggestion by OEH to rezone the site to E2 Environmental Conservation is not supported by Council. Council states the planning framework established under LEP 2012 for rural cluster subdivision provides certainty as to the conservation and management of the high-biodiversity land.

Department response

The proposal provides an additional layer of protection of a significant area of vegetation (5.9 hectares of Shale Sandstone Transition Forest) through the LEP mapping of the biodiversity corridor. OEH's concern regarding the environmental implications of bush fire asset protection zones is noted.

The Department recognises the value of the existing vegetation on the site. It is also recognised that this vegetation is currently protected under the existing provisions of the Biodiversity Conservation Act 2016 and the Environmental Protection and Biodiversity Conservation Act 1999.

Department of Primary Industries - Agriculture

DPI Agriculture provided comments to Council on 29 September 2016 and raised several concerns:

- justification is lacking on the need for extra small lots for dwellings in the RU2 zone and does not adequately assess the potential risk to biodiversity values if similar proposals

become prevalent in the locality. The current planned and serviced growth areas for The Hills Shire would seem appropriate for encouraging development for housing;

- agriculture investment in the location requires certainty for future land use. Residential development undermines that certainty and limits intensive agricultural development options on land near residential dwellings;
- increasing settlement near primary production zones risks increasing land use conflict. Although the removal of approximately 4 hectares from agricultural production is deemed minor relative to available agricultural land within the Hills Shire, the potential for similar planning proposals would incrementally reduce the available agricultural resources;
- the planning proposal does not support the intent of the RU1 or RU2 objectives for sustaining primary industry production; and
- alternatives for managing the threatened biodiversity are not discussed and the current use of the proposed association property for water catchment for agricultural production has been overlooked.

Council response

As per Council's post exhibition report (14 November 2017 – **Attachment CK**), Council in summary states:

- the site is not suited to agricultural use due to poor quality soils, topography and the presence of existing vegetation. The location of the site on the periphery of the identified primary production area and the ability to conserve vegetation as part of a community lot warrants a change of the zone to RU2 Landscape;
- it is considered that the potential for land use conflict can be appropriately managed through existing DCP controls; and
- the potential for other sites to seek similar outcomes is limited, as these too would require detailed justification that the land is no longer suitable for production activities and that the environmental benefits of the proposal would outweigh the loss of land identified for agricultural production.

Department response

The Department agrees that there is limited agricultural production value for the subject site given significant site constraints including the site's ridge line and the presence of a large area of critically endangered ecological community (Shale Sandstone Transition Forest) on site. However, additional housing/rural subdivision of the subject site is not considered appropriate as discussed elsewhere in this report due to risk of bush fire, nor is the potential for a precedent to be established for the fragmentation of land zoned RU1 in the Hills Shire.

Department of Trade and Investment

No response was received from the Department of Trade and Investment.

Sydney Water

No response was received from Sydney Water.

Endeavour Energy

Endeavour Energy provided comments to Council on 30 September 2016 and raised no objections to the planning proposal. However, Endeavour Energy does make recommendations for any future development of the land and power supply, including confirming network capacity/connection, network access, vegetation management, demolition, and public safety.

Heritage Council of NSW

Heritage Council of NSW provided comment to Council on 15 September 2016 and raised no concerns regarding the proposal.

NSW Department of Industry – Geological Survey of New South Wales

NSW Department of Industry – Geological Survey of NSW provided comment to Council on 16 September 2016 and raised no concerns regarding the proposal.

8. POST EXHIBITION CHANGES

Council did not resolve to undertake any post-exhibition changes to the planning proposal.

9. ASSESSMENT

It is recommended that the draft LEP does not proceed to finalisation as it cannot meet with requirements of RFS Planning for Bush Fire Protection 2006 and is inconsistent with Section 9.1 Direction 4.4 Planning for Bush Fire Protection.

Section 9.1 Directions

Council formed the view when preparing the planning proposal, the relevant Directions included 1.2 Rural Zones, 2.1 Environment Protection Zone and 4.4 Planning for Bush Fire Protection. Any inconsistency with Direction 1.2 and 2.1 was considered minor during the consideration of the Gateway determination.

Direction 4.4 Planning for Bush Fire Protection seeks to protect life, property and the environment from bush fire hazards. In accordance with the Direction, Council was required to carry out consultation with the RFS post gateway and to consider any comments made by RFS.

This Direction is relevant as the planning proposal will result in the potential for an increase in residential density (through enabling the provisions of Clause 4.1AA which does not apply in the RU1 zone) within an area identified as bush fire prone (Category 1 Highest Risk and Vegetation Buffer).

Council undertook consultation with RFS and has been unable to demonstrate to RFS that the proposal is able to satisfy the provisions of Planning for Bush Fire Protection 2006. In accordance with the terms of the Direction, a planning proposal must have regard to Planning for Bush Fire Protection 2006. As stated above, RFS considers that the planning proposal is unable to demonstrate that it can comply with Planning for Bush Fire Protection 2006, and therefore is inconsistent with the Direction.

The Direction states a planning proposal may be inconsistent with the terms of the Direction only if the relevant authority has received written advice from the Commissioner of the NSW Rural Fire Service advising NSW RFS does not object to the progression of the planning proposal.

As Council and the Department have been unable to obtain this advice from the Commissioner of the NSW Rural Fire Service, the inconsistency with the Direction cannot be justified and the planning proposal cannot proceed.

State Environmental Planning Policies

The LEP amendment is consistent with relevant SEPPs.

State, regional and district plans

A planning proposal is required to give effect to the District Plan. The Central City District Plan requires consideration of natural hazards in Planning Priority C20 – Adapting to the impacts of urban and natural hazards and climate change. The planning priority identifies that climate change is likely to result in a longer bush fire season with more bush fires and longer lasting heatwaves and identifies that the RFS requires new developments to comply with Planning for Bush Fire Protection 2006.

As the planning proposal has been unable to demonstrate how the natural bush fire hazard can be mitigated through compliance with Planning for Bush Fire Protection 2006, it is the planning proposal will not give effect to the District Plan.

10. MAPPING

As the planning proposal is not supported, no mapping amendments are required.

11. CONSULTATION WITH COUNCIL

Council was updated on discussions the Department had with the proponent and RFS and attended a meeting with the Department and RFS on 17 August 2018. Council staff are aware that RFS matters are unable to be resolved.

12. PARLIAMENTARY COUNSEL OPINION

Parliamentary Counsel Opinion has not been requested as the draft LEP is not supported to proceed to finalisation.

13. RECOMMENDATION

It is recommended that the draft LEP does not proceed to finalisation as the draft LEP:

- cannot satisfy the requirements of Planning for Bush Fire Protection 2006;
- cannot demonstrate consistency with Section 9.1 Direction 4.4 Planning for Bush Fire Protection; and
- does not give effect to Planning Priority 20 of the Central City District Plan.