

Item: CP - Proposed Amendment to Clause 4.1E Exceptions to Minimum Subdivision Lot Size for Grose Wold of Hawkesbury Local Environment Plan 2012 - (95498, 124414)

REPORT:

Executive Summary

This purpose of this report is to recommend to Council that Clause 4.1E Exceptions to minimum subdivision lot size for Grose Wold of the Hawkesbury Local Environmental Plan 2012 (LEP 2012) be amended.

The purpose of the proposed amendment is to remove the ambiguities within the clause and ensure the long term protection of threatened species, populations and ecological communities and land in an environmental constraint area within the Grose Wold area.

Background

Council has recently been involved in two Land and Environment Court (LEC) cases dealing with the wording of Clause 4.1E Exceptions to minimum subdivision lot size for Grose Wold and its relationship to Clause 4.1 Minimum subdivision lot size of Hawkesbury Local Environmental Plan 2012.

Clause 4.1 establishes the general minimum lot size provisions for a 'conventional' subdivision of land within the Hawkesbury local government area.

Clause 4.1E contains additional provisions relating to the subdivision of certain land within Grose Wold. In simple terms these provisions are based on the concept of 'lot averaging' whereby proposed lots may be less than the conventional minimum lot size provided certain ecologically significant vegetation is protected and the overall number of proposed lots is not greater than that which would be achieved by conventional subdivision. Clause 4.1E is based on the former Clause 41AA of Hawkesbury Local Environmental Plan 1989 (LEP 1989) which was in operation from 2 June 2000 until the commencement of LEP 2012.

The current Clauses 4.1 and 4.1E are attached to this report.

In both LEC cases Council lost due to ambiguity in the wording of Clause 4.1E and its relationship with Clause 4.1. The cases revolved around quite detailed legal argument and specific circumstances for each site hence it is difficult to explain in simple terms the arguments presented. However, in summary in the first case, MB Investments Pty Ltd v Hawkesbury City Council, the LEC found that the qualitative provisions of Clause 4.1E over rode the quantitative provisions of Clause 4.1. Whereas in the second case, Ogg v Hawkesbury City Council, the LEC found that the quantitative provisions of Clause 4.1 over rode the quantitative provisions of Clause 4.1E.

The net effect of these findings is that land will be subdivided in a manner and produce a greater number of lots than was envisaged by the former Clause 41AA of LEP 1989.

A review of the preparation of LEP 2012 has found that the ambiguity in Clause 4.1E has arisen as a consequence of the former Clause 41AA of LEP 1989 being translated and re-drafted by DP&E's legal branch and/or NSW Parliamentary Counsel in the finalisation of LEP 2012.

In addition to these cases, two further appeals were lodged with the LEC on 11 November 2015 against Council's refusal to grant consent for subdivision of certain land to which Clause 4.1E applies. These refusals were issued in June 2015 and the applications were refused on similar reasons to Council's defence of the Ogg matter.

The need for an amendment to Clause 4.1E was previously mentioned in a report to Council on 31 March 2015 dealing with a suite of general amendments to LEP 2012. The resultant planning proposal

for these amendments was forwarded to the DP&E for a gateway determination on 31 July 2015. At the time of preparing this report Council had not received a gateway determination for this planning proposal and given the urgency of the proposed amendment to Clause 4.1E it is recommended that this particular matter be dealt with separately to the general amendments planning proposal.

Proposed Amendment to LEP 2012

In light of the above mentioned judgements and possible future appeals a proposed amendment to Clause 4.1E has been prepared by Council staff and Council's solicitors. The proposed amendment is attached to this report. The final wording of the amendment will be a matter for the DP&E legal branch and the NSW Parliamentary Counsel (PC).

The proposed amendment seeks to remove the ambiguities within the clause and ensure the long term protection of threatened species, populations and ecological communities and land in an environmental constraint area. Also 'Grose Vale' has been added to the clause heading and sub-clause (1) because part of the land in 'Area B' and edged heavy yellow on the Lot Size Map is in Grose Vale. 'Cumberland Plain Woodland' in the current clause has been replaced with "threatened species, populations and ecological communities" as Cumberland Plain Woodland is only one type of significant vegetation potentially existing in the subject area and the wording of the current clause excludes consideration of other threatened species, populations or ecological communities.

The Environmental Planning and Assessment Act 1979 (EP&A Act) outlines two methods to amend a local environmental plan. One method is by way of the planning proposal process which would normally require the preparation of a planning proposal, referral to the DP&E for a gateway determination, consultation with public authorities and the community, and the finalisation of the amendment by way of further referral to the DP&E and the NSW PC. The other method is by way of an expedited amendment (under Section 73A of the EP&A Act) whereby many of the above mentioned steps need not be undertaken. Expedited amendments are only available for correcting an obvious error; addressing matters that are of a consequential, transitional, machinery or other minor nature; or where by the Minister grants an exemption to the above mentioned steps because the amendment will not have any significant adverse impact on the environment or adjoining land.

Council staff have requested advice from DP&E regarding the potential to utilise Section 73A of the EP&A Act to achieve the proposed amendment as it is considered that the current clause that was amended by others, does not reflect Council's original intention, i.e., translation of the previous LEP 1989 clause. At the time of preparing this report a reply had not been received.

Conformance to the Hawkesbury Community Strategic Plan

The proposal is consistent with the Caring for Our Environment strategy;

- Manage growth with ecologically sustainable principles

Financial Implications

No financial implications, apart from use of staff resources are applicable to this report.

Planning Decision

As this matter is covered by the definition of a "planning decision" under Section 375A of the Local Government Act 1993, details of those Councillors supporting or opposing a decision on the matter must be recorded in a register. For this purpose a division must be called when a motion in relation to the matter is put to the meeting. This will enable the names of those Councillors voting for or against the motion to be recorded in the minutes of the meeting and subsequently included in the required register.

RECOMMENDATION:

That:

1. In association with advice from the Department of Planning and Environment, Council staff either:
 - a) Forward a planning proposal to amend Clause 4.1E of Hawkesbury Local Environmental Plan 2012 as intended by this report to the Department of Planning and Environment for a gateway determination, or
 - b) Request the Minister for Planning to amend Clause 4.1E of Hawkesbury Local Environmental Plan 2012 as intended by this report under Section 73A of the Environmental Planning and Assessment Act 1979.
2. The Department of Planning and Environment be advised that, in the case of the proposed amendment being dealt with as a planning proposal, Council requests a Written Authorisation to Exercise Delegation to make the Plan

ATTACHMENTS:

- AT - 1** Current Clause 4.1 and Clause 4.1E of Hawkesbury Local Environmental Plan 2012
- AT - 2** Proposed Amendment to Clause 4.1E of Hawkesbury Local Environmental Plan 2012

AT - 1 Current Clause 4.1 and Clause 4.1E of Hawkesbury Local Environmental Plan 2012

4.1 Minimum subdivision lot size

- (1) The objectives of this clause are as follows:
 - (a) to ensure that the pattern of lots created by subdivision and the location of any buildings on those lots will minimise the impact on any threatened species, populations or endangered ecological community or regionally significant wetland, waterways and groundwater as well as any agricultural activity in the vicinity,
 - (b) to ensure that each lot created in a subdivision contains a suitable area for the erection of a dwelling house, an appropriate asset protection zone relating to bush fire hazard and a location for on-site effluent disposal if sewerage is not available,
 - (c) to ensure a ratio between the depth of the lot and the frontage of the lot that is satisfactory having regard to the purpose for which the lot is to be used.
- (2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.
- (3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.
- (3A) If a lot in a following zone is a battle-axe lot or other lot with an access handle, the area of the access handle is not to be included in calculating the lot size:
 - (a) Zone R1 General Residential,
 - (b) Zone R2 Low Density Residential,
 - (c) Zone R3 Medium Density Residential.
- (4) This clause does not apply in relation to the subdivision of individual lots in a strata plan or community title scheme.

4.1E Exceptions to minimum subdivision lot size for Grose Wold

- (1) The objective of this clause is to provide an alternative method to clause 4.1 for the subdivision of land to which this clause applies in a way that ensures the protection of the Cumberland Plain Woodland.
- (2) This clause applies to land in the area known as "Grose Wold", being the land identified as "Area B" and edged heavy yellow on the Lot Size Map.
- (3) Development consent may be granted for the subdivision of land to which this clauses applies only if:
 - (a) the consent authority is satisfied that the pattern of lots to be created by the subdivision and the location of any buildings on those lots will minimise the impact on any Cumberland Plain Woodland, any land in an environmental constraint area and waterways and groundwater, and
 - (b) the consent authority has considered a geotechnical assessment demonstrating the land is adequate for the on-site disposal of effluent in accordance with best practice, and
 - (c) the Cumberland Plain Woodland and any land in an environmental constraint area is retained in one lot as much as possible, and

- (d) the consent authority is satisfied there will be no significant adverse impacts on Cumberland Plain Woodland or land in any environmental constraint area located downstream or surrounding the development.
- (4) Despite clauses 4.1, 4.1AA, 4.1A and 4.1C, if land to which this clause applies contains an environmental constraint area, development consent must not be granted for the subdivision of that lot unless:
 - (a) the number of lots to be created for a dwelling house by the subdivision will not exceed the area of the original lot for the land to be subdivided, in hectares, divided by 4, and
 - (b) any lot created for a dwelling house will contain at least one hectare of land that is not in an environmental constraint area.
- (5) When considering a development application to which this clause relates, the consent authority must have regard to the effect the development is likely to have on the following:
 - (a) the water quality and water quantity in the Grose River and its tributaries,
 - (b) the scenic quality of the area,
 - (c) existing riparian vegetation, the rehabilitation of local native riparian vegetation located along the Grose River and along drainage lines and creeks.
- (6) In this clause:

Cumberland Plain Woodland means the critically endangered ecological community with that name referred to in Part 2 of Schedule 1A to the Threatened Species Conservation Act 1995.

environmental constraint area means land identified as “Environmental Constraint Area” on the Environmental Constraints Area Map.

original lot for land being subdivided means a lot that existed immediately before 2 June 2000 that included the land.

AT - 2 Proposed Amendment to Clause 4.1E of Hawkesbury Local Environmental Plan 2012

4.1E Variations of lot size without increasing lot yield at certain land at Grose Wold and Grose Vale

- (1) The objective of this clause is to ensure the protection of threatened species, populations and ecological communities and land in an environmental constraint area within certain land at Grose Wold and Grose Vale.
- (2) This clause applies to land identified as "Area B" and edged heavy yellow on the Lot Size Map.
- (3) Despite clauses 4.1, 4.1AA, and 4.1A where land contains an environmental constraint area development consent must not be granted for the subdivision of the land unless:
 - (a) the number of lots to be created for a dwelling house by the subdivision plus the number of lots created for a dwelling house by any prior subdivision since 2 June 2000 of whole or part of the original lot will not in total exceed the area of the original lot for the land to be subdivided, in hectares, divided by 4, and
 - (b) any lot created for a dwelling house will contain at least one (1) hectare of land that is not in an environmental constraint area.
- (4) Where land does not contains an environmental constraint area development consent must not be granted for the subdivision of the land unless
 - (a) the minimum lot size provisions of 4.1, 4.1AA and 4.1A are complied with; and,
 - (b) the number of lots to be created for a dwelling house by the subdivision plus the number of lots created for a dwelling house by any prior subdivision since 2 June 2000 of whole or part of the original lot will not in total exceed the area of the original lot for the land to be subdivided, in hectares, divided by 4.
- (5) When considering a development application to which this clause relates, the consent authority must be satisfied that:
 - (a) the pattern of lots created by the proposed subdivision and the location of any proposed buildings on those lots will minimise the impact on any threatened species, populations or ecological communities, waterways and groundwater , and any land within an environmental constraint area, and
 - (b) a geotechnical assessment has been undertaken demonstrating the land is adequate for the on-site disposal of effluent in accordance with best practice, and
 - (c) any land containing threatened species, populations or ecological communities and any land within an environmental constraint area is retained in one lot as much as possible, and
 - (d) there will be no significant adverse impacts on any threatened species, populations or ecological communities or land within any environmental constraint area located downstream or surrounding the proposed development.
- (6) When considering a development application to which this clause relates, the consent authority must have regard to the effect the development is likely to have on the following:
 - (a) the water quality and water quantity in the Grose River and its tributaries,
 - (b) the scenic quality of the area,

- (c) existing riparian vegetation, the rehabilitation of local native riparian vegetation located along the Grose River and along drainage lines and creeks.

(7) In this clause:

threatened species, populations and ecological communities means species, populations and ecological communities specified in Schedules 1, 1A and 2 of Threatened Species Conservation Act 1995

environmental constraint area means land identified as “Environmental Constraint Area” on the *Environmental Constraints Area Map*.

original lot for land being subdivided means a lot that existed immediately before 2 June 2000 that included the land.

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