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PGF001311

Ref T5-116
IS:IS

8 March 2012

DEPARTMENT OF PLANNING
LOCKED BAG 9022
GRAFTON NSW 2460

Received
12 MAR 2012
11\17920
North Coast

Attn: Claire Purvis

Dear Madam,

SUBJECT: PLANNING PROPOSAL T5-116
PROPERTY: Lot 10 DP754396 – GILBERT CORY STREET, SOUTH WEST ROCKS

I refer to the Gateway Determination (your reference: PP_2011_KEMPS_005_00 (11/17920)) issued by the Department of Planning & Infrastructure (DoPI) on 3 November 2011, which refused to allow the planning proposal to proceed for the above property. The planning proposal sought to rezone land from 1(d) (Rural (Investigation) "D" Zone) to 2(a) (Residential "A" Zone), 7(a) (Wetlands Protection Zone) and to 7(b) (Environmental Protection (Habitat) Zone).

Council, at its meeting held on 21 February 2012, resolved to request the DoPI to review the Gateway Determination for the proposed rezoning at the above location. This resolution was based on a report responding to the reasons for refusal provided in the Gateway Determination. The majority of the content of that report to Council is reproduced as follows.

Gateway Determination
By letter of 3 November 2011, the DoPI advised that the Planning Proposal should not proceed for the following reasons:

1 *The planning proposal does not adequately demonstrate that there is sufficient unconstrained land available for the proposal to proceed at this stage.*

2 *The planning proposal is inconsistent with a number of S117 Directions including 1.2 Rural Zones, 1.5 Rural Lands, 2.1 Environmental Protection and 4.4 Planning for Bushfire Protection. Insufficient justification has been provided for urban purposes.*

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3 *The planning proposal is unjustifiably inconsistent with the North Coast Regional Environmental Plan in that the land is not consistent with Council's local growth management strategy.*

4 *The planning proposal has not provided sufficient evidence that offsetting is feasible, because the extent of knowledge about the Endangered Ecological Communities and threatened species on the site is unclear, finding an adequate like-for-like offset area is problematic, and fragmentation of the site is undesirable. Council is to resolve the level of biodiversity value investigations and feasibility of offsetting arrangements with the Office of Environment and Heritage if it wishes to progress the matter.*

Justification for Inconsistencies with S117 Directions

1.2 Rural Zones

Clause 4(a) of this direction states that Council must not rezone land from a rural zone to a residential zone. Clause 5 of this direction allows consideration of planning proposals that are inconsistent with this direction.

Clause 5 of Direction 1.2 places the onus on Council to demonstrate that the inconsistency is justified and states that the Director-General of the DoPI must be satisfied that the inconsistency is justified. The position previously endorsed by Council, is that the inconsistency is justified under the parameters of Clause 5(c) of this direction as the land is identified under the Mid North Coast Regional Strategy as being within an agreed growth area, subject to studies being completed to assess the constraints. It is envisaged that the constraints assessment would be further refined as the proposal progresses through the various stages of rezoning process.

It is also noted that the objective of this direction is to protect agricultural land which is not relevant in this instance.

1.5 Rural Lands

The objectives of this Direction are to:
(a) Protect the agricultural production value of rural land; and
(b) Facilitate the orderly and economic development of rural lands for rural and related purposes.

This direction applies insofar that it involves rezoning land in a rural zone to residential and environmental protection zones and requires that the Planning Proposal be consistent with the Rural Planning Principles and the Rural Subdivision Principles contained in *SEPP (Rural Lands) 2008.*

It is considered that the Planning Proposal is consistent with Rural Planning Principles as:

- The principals do not require the retention of land in the rural zone, but promote the protection of potentially productive agricultural land. Given the environmental constraints affecting the site such as the wetland, the land is not considered to have any significant productive potential.

- The principles specifically require avoidance of land constrained by water resources, native vegetation and recognised biodiversity warranting protection.

- The Planning Proposal seeks to rezone the most constrained parts of the site into environmental protection zones, rather than rural zones.

It is considered that the Planning Proposal is consistent with the Rural Subdivision Principles as the Planning Proposal:

- Will not result in rural land use conflicts between residential uses and other rural land uses;

- Takes into consideration the planned supply of residential land.

- Is based on an assessment of the natural and physical constraints and opportunities of the subject land.

2.1 Environmental Protection Zones

The objective of this direction is to protect and conserve environmentally sensitive areas.

It is considered that the Planning Proposal achieves consistency with this direction by proposing to place the wetland in Zone 7(a)(Wetlands Protection Zone) and identified Endangered Ecological Communities in Zone No. 7(b) (Environmental Protection Habitat Zone).

The DoPI have not provided any information to support their position that the planning proposal is not consistent with this direction.

It is considered that the proposal is consistent with this direction as it includes provisions by way of environmental protection zoning for land within the site which does not currently apply under the 1(d) Rural zone.

4.4 Planning for Bushfire Protection

This Direction applies to land mapped as bushfire prone land. The Planning Proposal is supported by a bushfire hazard assessment which indicates

that RFS requirements can be satisfied by a 20m wide Asset Protection Zone around all proposed residential development areas, taking into account the predominant 0-5 degree slope across the site and the nature of the vegetation. In addition, the proposed rezoning will improve vehicle accessibility to the subject land and neighbouring bushfire affected properties.

The APZs referred to in the Bushfire Assessment report may be incorporated into the Draft LEP.

This Direction requires Council to consult with the Rural Fire Service following the Gateway Determination and is not considered to be a valid ground on which to base refusal.

Inconsistency with Local Growth Management Strategy (LGMS)

Reason No. 3 of the DoPI reasons for refusal states that the planning proposal is inconsistent with the LGMS.

The *Mid North Coast Regional Strategy* (Growth Areas Map 6) identifies the western portion of the site as a new urban release area, albeit subject to further investigations regarding the environmental constraints of the land. On this basis, Council prepared and endorsed its *LGMS* with SWRU1A 6 Spencerville to New Entrance to be subject to the identification and protection of land with high biodiversity values.

In October 2009, Council wrote to the DoPI and advised that landowners within the Spencerville New Entrance area (which is SWRUIA6), no longer wished to pursue a Landscape Ecology Scale Assessment being prepared as part of the Spencerville/New Entrance Masterplan process, as the process had become frustrated and stalled. The master planning process stalled due to the difficulties in identifying biodiversity offsets outside of the statutory planning process required to provide certainty. In order to achieve certainty, the DoPI were asked whether individual rezoning applications would be considered on the site. The Department responded in October 2009, by stating:

> *"....we would consider individual rezoning proposals as the land is included in the Mid North Coast Regional Strategy. Because the land is indicated in the MNCRS as constrained individual studies would be required to address the constraints. In this regard the use of other land fees offsets may be appropriate (subject to DECCW agreement). There would have to be a formal decision to abandon the study before we would agree to landowners proceeding on an individual basis".*

In subsequent Planning Reform Fund reports Council advised the Department in December 2010, that it wished to abandon the

Spencerville/New Entrance Masterplan and that landowners were pursuing individual assessments. In addition, the Department had received a Part 3A Subdivision application for 220 residential lots, which covered land within the original Landscape Ecology Study Area, thereby significantly reducing the validity of the Masterplan.

Without any consultation with Council, the subject land was excluded by the DoPI when it approved the *Kempsey Local Growth Management Strategy (LGMS)*. In July 2011 the DoPI advised that the LGMS may be amended to include the site, upon Council writing to the DoPI requesting this amendment. This advice was provided prior to the submission of the planning proposal and the Department was aware that landowner's were in the process of preparing rezoning applications.

Subsequent to receiving Council's reports, the Department issued an Acquittal Certification for the Spencerville/New Entrance Masterplan, formally recognising cessation of the Masterplan.

Council's resolution of 20 September 2011 to forward the planning proposal to the DoPI for a Gateway Determination included a resolution for Council to request the DoPI to change the growth areas of the LGMS to re-include growth area SWRUIA6. As advised by DoPI, it was intended that this would be undertaken concurrently with the rezoning process.

A letter from the Department dated 2 December 2011, acknowledged and responded to Council's intention to request an amendment to the LGMS to accommodate the Planning Proposal. The pertinent part of the response is reproduced as follows:

> *The Gateway did not support the planning proposal over the site, mainly because Council had not demonstrated that unconstrained land was available and the Office of Environment and Heritage (OEH) has indicated that offsetting would not be feasible. The letter suggested that Council, if it wished to progress the matter, could contact the regional office to arrange a meeting between OEH and Council.... In the meantime, we will take no further action on your request to amend the LGMS.*

As can be seen in the above response, the amendment to the LGMS hinges on a resolution between the applicant and the OEH in relation to providing biodiversity offsets, or using other means to compensate for and demonstrate that parts of the site are unconstrained for development.
The determination of the issue of biodiversity offsets is best dealt with concurrently with the rezoning process for the following reasons:

1 The LGMS is not intended to definitively determine the potential of an area to support residential development. The purpose of the LGMS is to identify broad landuse constraints, including the ability to service

an area with required infrastructure, in order for releases to be staged in a rational manner. It is recognised that both the Mid North Coast Regional Strategy and LGMS identify the land as being constrained by high biodiversity values, however, as previously agreed by DOPI, it is considered that the most practical means of determining whether offsets can be achieved (albeit problematic) should be through the rezoning process.

2 In order to maximise openness and transparency, it is preferable that subsequent negotiations with OEH relating to potential offsets be carried out within the statutory framework of the rezoning process. In the event these offsets cannot be found, the area would not be re-included in the LGMS and the rezoning would not proceed.

3 The extent of any residential zone will be determined by a range of considerations including bushfire, stormwater treatment, drainage, aboriginal heritage etc. and will not be known until the rezoning process has concluded. The extent of any residential zone will determine any required biodiversity offsets.

4 In the event suitable offsets can be found, the rezoning process may include consideration of a clause in the LEP requiring suitable arrangements to be entered into in the form of a Planning Agreement prior to consideration of any DA. There is no statutory mechanism to tie inclusion of the land in the LGMS to any Planning Agreement requiring biodiversity offsets.

In the basis of the above considerations, Council wishes to formally request that the Gateway Determination be reviewed to allow consultation between the Office of Environment & Heritage and Council to be undertaken in the context of the planning proposal.

If you wish to discuss this matter or require any information please contact the undersigned on 6566 3200 or by email at ilija.susnja@kempsey.nsw.gov.au

Yours faithfully

Ilija Susnja
Area Planner
SUSTAINABLE ENVIRONMENT