

Planning and Assessment

Gateway determination report

Clarence Valley Gateway determination: PP_2020_CLARE_004_00

Purpose: To recommend the Director, as delegate of the Minister, determine that planning proposal PP_2020_CLARE_004_00 should proceed.

Analysis: The planning proposal seeks to reclassify five lots from Community to Operational at Westringia Place and Witonga Drive, Yamba. The planning proposal is considered to have merit and should proceed subject to conditions.

Approval required: 18 November 2020

Reason for deadline: The Gateway determination is to be issued by the above date, being 20 days since receiving the planning proposal.

1. INTRODUCTION

LGA	Clarence Valley
PPA	Clarence Valley Council
NAME	Reclassification of 5 lots from Community to Operational at Westringia Place and Witonga Drive, Yamba (0 homes, 0 jobs)
NUMBER	PP_2020_CLARE_004_00
LEP TO BE AMENDED	Clarence Valley Local Environmental Plan 2011 (CVLEP)
ADDRESS	Westringia Place and Witonga Drive, Yamba
DESCRIPTION	Lot 223 DP260230, Lot 286 DP262200 and Lot 10 DP866724, Lot 12 DP881975, Lot 57 DP1013843
RECEIVED	16/8/2020
FILE NO.	IRF20/4637
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required.
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal.

1.1 Description of planning proposal

The planning proposal seeks to reclassify five Council owned land parcels from 'Community' to 'Operational' under the *Local Government Act 1993* (LG Act). The classification to Operational land will allow Council to facilitate the approval and lawful licensing of existing and future private waterway structures located in the drainage reserve lots associated with the adjoining residential subdivisions. Many of these existing structures were previously approved in good faith in the (false) belief that the lots were classified as operational.

1.2 Site description

The subject lots are in Yamba and are:

- drainage reserve lots associated with canal/waterway residential subdivisions (Figures 1 & 2);
- part of the Clarence River estuary area and allow private residential waterway structures access to the canal/waterways; and
- are situated approximately 10km east of the Pacific Highway, north of Yamba Road.



Figure 1 – Westringia Place & Witonga Drive, Yamba
Source – Nearmap



Figure 2 – Westringia Place & Witonga Drive, Yamba
Source – Submitted PP

1.3 Existing planning controls

No planning controls are proposed to be amended by this planning proposal.

The current land zoning (Figure 3) is:

- Lot 223 DP 260230 and Lot 286 DP 262200, Westringia Place, are zoned W2 Recreational Waterway;
- Lot 12 DP 881975 and Lot 54 DP 1013843 Witonga Drive are zoned R2 Low Density Residential; and
- Lot 10 DP 866724 Witonga Drive is zoned Part W2 Recreational Waterway and Part R2 Low Density Residential.

There is no minimum lot size effecting any of the subject lots. All lots are within the Flood Planning Area (Figure 4) and are shown on the Acid Sulfate Soils Map (Figure 5).



Figure 3 – Land Zoning for subject lots

Source – Submitted PP

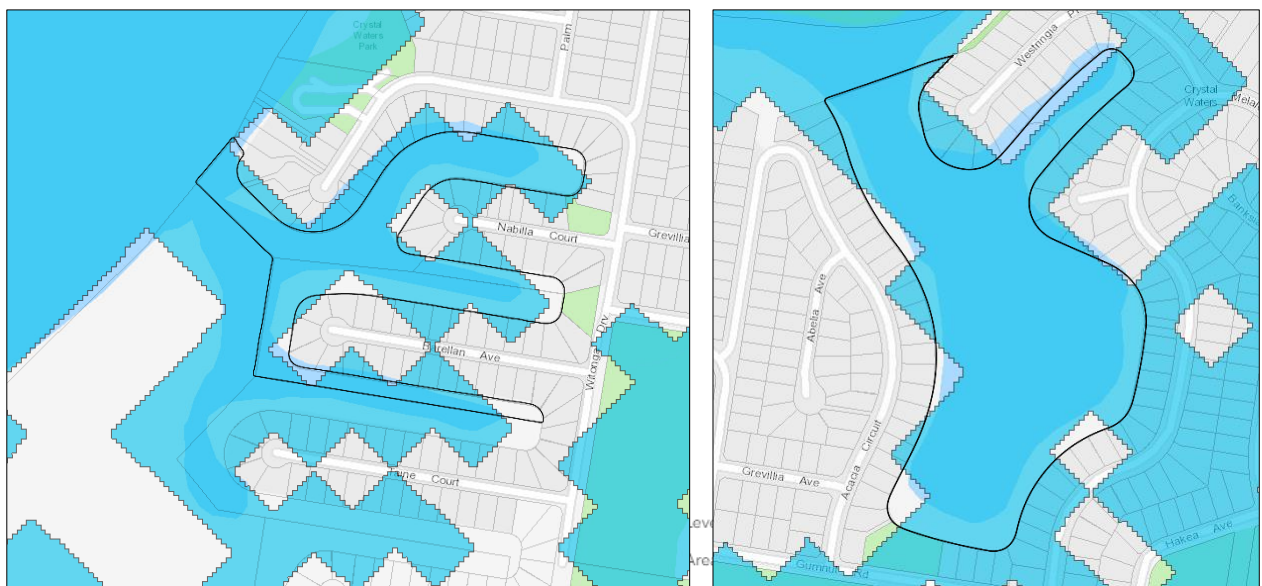


Figure 4 – Flood Planning for subject lots

Source – ePlanning Spatial Viewer



Figure 5 – Acid Sulfate Soils for subject lots

Source – ePlanning Spatial Viewer

1.4 Surrounding area

The surrounding area is primarily residential lots and river estuary. The canal/waterways enable residents to access the recreational waterways and have some private mooring facilities. The surrounding areas also have identified Coastal Wetlands and within the Coastal Use Area on the SEPP (Coastal Management) 2018 maps.

1.5 Summary of recommendation

It is recommended that the planning proposal be supported, with conditions, as it will correct the previous land classification errors and provide the appropriate operational classification to the subject lots.

2. PROPOSAL

2.1 Objectives or intended outcomes

The proposal clearly outlines the objectives and intended outcomes to reclassify the land from 'Community' to 'Operational'.

2.2 Explanation of provisions

The explanation of provisions is clearly stated in the proposal. The proposal clearly outlines that Schedule 4 Part 1 Land classified, or reclassified, as operational land – no interests changed will be amended to achieve the objectives and intended outcomes.

2.3 Mapping

The proposal does not propose any changes to CVLEP 2011 maps as there are no changes to any part lots. The proposal provides maps that adequately identify the subject lots and are adequate for exhibition purposes.

3. NEED FOR THE PLANNING PROPOSAL

The proposal is not the result of any specific strategy or study.

The proposal is needed to rectify land reclassification errors identified through Council's asset and land rationalisation process. Legal advice in May 2016 confirmed that anomalies in the procedures and processes of the former councils that now constitute Clarence Valley Council have created uncertainty as to current classification. Council considered to remove any legal uncertainty that all land parcels identified in the above process should be reclassified. Council has previously completed two proposals (Amendments 31 and 40) to facilitate the reclassifications of certain lots from Community to Operational land.

While Section 49(3) of the Local Government Act 1993 indicates that drainage reserves are operational land¹, Council has received legal advice dated 26 February 2019 (**Attachment D**), that *“there does not appear to be any statutory provision or other authority to support that assertion. Section 49(3) of the LG Act does not deal with the classification of the land and in fact suggests that the Council holds the land “for drainage purposes”.*

The legal advice further states that:

- Land vested in the Council as drainage reserve prior to the commencement of the LG Act on 1 July 1993 was automatically classified as "community land" by clause 6(2)(b) of Schedule 7 of the LG Act and can only be reclassified as "operational land" by a local environmental plan;
- Land vested in the Council as drainage reserve after the commencement of the LG Act on 1 July 1993 was automatically classified as "community land" under section 31(2A) of the LG Act unless the Council gave public notice under section 34 of the LG Act of a proposed resolution to classify the land as "operational land" (allowing a 28 day period for submissions) and then subsequently passed a resolution to classify the land as "operational land" either before it was vested in the Council or within three months after it was vested in the Council; and
- If the council wishes to classify land that is to be vested in the Council as drainage reserve on the registration of a plan of subdivision as "operational land", it would need to give public notice under section 34 of the LG Act of the proposed resolution to classify the land as "operational land" (allowing a 28 day period for submissions) and then subsequently pass a resolution to classify the land as operational land either before it is vested in the Council or within three months after it is vested in the Council.

Due to this legal advice, the proposal is considered the only means for achieving the reclassification of the public land from community to operational to enable Council to manage and conduct lawful licencing and approval of existing and future private waterway structures.

4. STRATEGIC ASSESSMENT

4.1 State

The proposal does not contain any matter of state significance and is not inconsistent with the Premier's Priorities.

4.2 Regional / District

There are no directions or actions that specifically relate to the proposal and therefore is not inconsistent with the North Coast Regional Plan 2036 (NCRP).

4.3 Local

The proposal is not inconsistent with Council's community strategic plan, in particular Objective 2.1 to have communities that are well serviced with appropriate infrastructure and Objective 5.1 to have a strong, accountable and representative Government.

The proposal is not inconsistent with Council's Local Strategic Planning Statement, Delivery Program & 2020/21 Operational Plan or Open Spaces Strategic Plan 2012.

4.4 Section 9.1 Ministerial Directions

The proposal is consistent with the relevant section 9.1 Directions except for the following:

Direction 2.2 Coastal Management

The proposal is inconsistent with this Direction as it is within the coastal zone and does not include provisions that give effect to and are consistent with the *Coastal Management Act 2016* and other documents specified by the Direction. The inconsistency is considered to be of minor significance as the subject sites are not being rezoned or having any other development controls being amended, are not facilitating any significant intensification of development and are canal/waterways/drainage reserves of existing residential subdivisions.

Direction 3.1 Residential Zones

The proposal is inconsistent with this Direction as it is affecting land within the existing R2 Low Density Residential zone and does not include provisions that encourage the provision of housing. The inconsistency is considered to be of minor significance as the land is existing canal/waterways/drainage reserves of existing residential subdivisions and will at no time in the future provide for additional housing supply.

Direction 4.1 Acid Sulfate Soils

The proposal is inconsistent with this Direction as it is affecting land having a probability of containing acid sulfate soils as shown on the Acid Sulfate Soils Planning Maps and is not supported by an acid sulfate soils study. The inconsistency is considered to be of minor significance as the subject sites are not being rezoned or having any other development controls being amended, are not facilitating any significant intensification of development, are already existing canal/waterways/drainage reserves of existing residential subdivisions and as Clarence Valley LEP 2011 already contains appropriate acid sulfate soil provisions for development applications.

4.5 State environmental planning policies (SEPPs)

The proposal is considered to be consistent with all applicable state environmental planning policies.

5. SITE-SPECIFIC ASSESSMENT

5.1 Social

The reclassification of the subject lots to operational land will have negligible social consequences. The subject sites are canal/waterways/drainage reserves to existing residential subdivisions and are not being rezoned or having any change in planning controls.

5.2 Environmental

The subject lots have no critical habitat or threatened species, populations or ecological communities present. The subject lots are subject to flooding, but no adverse impact is anticipated from the land reclassification as they are not being rezoned or having any change in planning controls. While the change to operational land will allow Council to approve and license structures within the drainage reserves, this is consistent with the already existing nature of the reserves and the activities that these structures can create and can be appropriately managed by Council through the licensing and approval processes.

5.3 Economic

The reclassification of any Council owned land has the potential to provide Council with an economic benefit by enabling surplus operational land to be leased or sold. The current proposal has highlighted that the operational classification will allow the lawful licencing and approval of existing and future private waterway structures located in the drainage reserve lots and this will contribute to Council revenue. Council has advised that the nominal annual fee for licence agreements of \$70, as contained in Council's adopted 2020/21 Fees and Charges, is set aside for maintenance of the relevant drainage reserve lots and drainage assets in the area. Prior to public exhibition the planning proposal is to be amended by updating Appendix 3, Items 14, 15 and 16 of both Westringia Place and Witonga Drive property statements to advise of these licence fees on waterway structures and how Council will financially utilise the fees. This is considered satisfactory.

5.4 Public Open Space

Council has confirmed that the subject lots have all been registered as drainage reserves and are canal/waterways with privately owned waterway structures located within the subject lots. The subject lots are not considered to be public reserves.

As discussed above, Council's legal advice is to reclassify the subject lots to allow for the lawful licencing and approval of existing and future private waterway structures. Council has advised their aim of reclassification is to allow for a lawful and proper licensing regime. There are no specific plans of management covering any of the subject lots. Council also advises that the income received from the annual licence fee of waterway structures is set aside for

maintenance of the relevant drainage reserve lots (canals/waterways) and other drainage assets in the area.

There is no proposal to change or alter the current waterway/canal system or limit in any way the public access and use, rather the legal formalising of licencing the waterway structures within, allowing the public continued safe access and use of the waterway/canals for recreational uses. This is considered satisfactory.

6. CONSULTATION

6.1 Community

Council proposes to exhibit the proposal for a minimum of 28 days which is in line with the Department's Practice Note 16-001 Classification and reclassification of public land through a local environmental plan. A copy of the Practice Note is included in Appendix 2 of the proposal.

A public hearing will also be required to be held in accordance with section 29(1) of the *LG Act* and section 57 of the *Environmental Planning and Assessment Act*. After the exhibition has ended, at least 21 days public notice is to be given before the hearing. This allows the person chairing the hearing sufficient time to consider written submissions and all issues raised.

The proposed consultation process is considered adequate.

6.2 Agencies

No Government agency consultation is required for this planning proposal.

7. TIME FRAME

Council proposes a seven month timeframe for completion of the LEP amendment, however due to a community consultation process of 28 days and a 21 day public notice period for the public hearing a nine month timeframe is recommended.

8. LOCAL PLAN-MAKING AUTHORITY

Council has not requested the use of plan making delegations and resolved in the 15 November 2016 minutes relating to the subject lots, not to use their delegations. It is recommended that delegations not be granted in order to promote transparency in the plan making process as the reclassification has the potential to generate income for Council by the licencing of waterway structures and any perceived potential to sell operational land.

9. CONCLUSION

It is recommended that the planning proposal be supported, with conditions, as it will correct the previous land classification errors and provide the appropriate operational classification to the subject lots.

Proceeding with the planning proposal will allow community consultation and enable Council to effect operational transparency and good governance and offer lawful licencing and approval of existing and future private waterway structures. The proposal does not propose to rezone or change any development standards, will not extinguish any public reserve status or change/extinguish any other interests in relation to any of the subject lots and as such the Governor's approval under s30 of the *LG Act 1993* is not required.

10. RECOMMENDATION

It is recommended that the Director, as delegate of the Secretary:



1. **agree** that any inconsistency with section 9.1 Directions 2.2 Coastal Management, 3.1 Residential Zones and 4.1 Acid Sulfate Soils is justified in accordance with the terms of the Directions.

It is recommended that the Director, as delegate of the Minister:

1. **note** the planning proposal (**Attachment A**);
2. **determine** that the planning proposal should proceed subject to the following conditions:

1. The planning proposal should be made available for community consultation for a minimum of 28 days.
 2. Consultation is not required with any public authorities.
 3. The time frame for completing the LEP is to be nine months from the date of the Gateway determination.
 4. Given the nature of the planning proposal, Council should not be authorised to be the local plan-making authority to make this plan.
 5. Council must arrange a public hearing in respect of the planning proposal to reclassify community land as operational land in accordance with the requirements of the *Local Government Act 1993*.
 6. Prior to public exhibition the planning proposal is to be amended by updating Appendix 3, Items 14, 15 and 16 of both Westringia Place and Witonga Drive property statements to advise of licence fees on waterway structures and how Council will financially utilise the fees.
3. **sign** the Gateway determination (**Attachment B**) noting that Clarence Valley Council is **not** the local plan-making authority and the letter to Council (**Attachment C**).

Director Approval

 <p>Craig Diss Manager, Local and Regional Planning, Northern Region</p> <p>Date: 5/11/20</p>	 <p>Jeremy Gray Director, Northern Region Local and Regional Planning</p> <p>Date: 13/11/2020</p>
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Attachments

Attachment	Title
A	Planning proposal
B	Gateway determination
C	Letter to Council
D	Council's legal advice 26 February 2019