

BYRON SHIRE COUNCIL

ORDINARY (PLANNING) MEETING MINUTES

17 September 2020

- Report No. 13.5 PLANNING - Streets as Shared Spaces Grant - Mullumbimby Talking Street
- Report No. 13.8 PLANNING - 10.2020.323.1 Use of two (2) existing structures as Class 10a buildings for the purposes of one (1) farm storage shed including alterations and additions, and one (1) outbuilding including removal of an unapproved bathroom structure.
- Report No. 13.9 PLANNING - DA 10.2020.230.1 Use of existing Nursery Structure ancillary to Community Facility (Mullumbimby Community Garden) at 156 Stuart Street Mullumbimby
- Report No. 13.10 Footpath dining and COVID-19 impacts

The remaining Recommendations and Committee Recommendation were adopted as a whole, being moved by Cr Richardson and seconded by Cr Hunter. Each recommendation is recorded with a separate resolution number commencing at Resolution No. 20-466 and concluding with Resolution No. 20-468.

STAFF REPORTS - SUSTAINABLE ENVIRONMENT AND ECONOMY

- Report No. 13.2 PLANNING - 26.2019.1.1 - Planning Proposal for an amendment to Byron LEP 2014 to permit Community Title subdivision and dwellings at Lot 38 DP 1059938, Alidenes Road, Wilsons Creek**
- File No:** I2020/1081

20-466 Resolved that Council:

1. Proceed with a planning proposal based on inserting a 'Schedule 1 Additional Permitted Uses' listing in LEP 2014 that would permit a community title subdivision of up to 15 neighbourhood lots/dwellings, with the common 'residue' lot to include the Yankee Creek waterway and suitable riparian buffers;
2. Amend wording of Council's Planning Proposal (pages 12 & 36 in Attachment 2 – E2019/85691) to clarify that "*Council does not support any new lots or dwellings having access from Wilson's Creek Road due to safety issues with the access point*";
3. Remove the following sentence from 'Section D' and 'Summary' section of Council's planning proposal (pages 36, 38 in Attachment 2 – E2019/85691): "*Limiting the dwelling yield to 15 dwellings addresses this concern*".
4. Amend and forward the planning proposal to the NSW Department of Planning, Industry and Environment for a Gateway determination.
5. Pending a positive Gateway determination undertake public exhibition of the planning proposal in accordance with the determination requirements.
6. Consider a submissions report post-exhibition that includes any recommended changes to the planning proposal for final adoption. (Richardson/Hunter)

The motion was put to the vote and declared carried.

Crs Coorey, Martin, Lyon, Ndiaye, Richardson, Cameron, Spooner and Hunter voted in favour of the motion.

No Councillors voted against the motion.

Report No. 13.2 **PLANNING - 26.2019.1.1 - Planning Proposal for an amendment to Byron LEP 2014 to permit Community Title subdivision and dwellings at Lot 38 DP 1059938, Alidenes Road, Wilsons Creek**

Directorate: Sustainable Environment and Economy

Report Author: Alex Caras, Land Use Planning Coordinator

File No: I2020/1081

Summary:

Council at its 12 December 2019 meeting considered a [report](#) to amend Byron LEP 2014 to permit Community Title Subdivision and dwellings at Lot 38 DP 1059938 Alidenes Road (12.27 ha), Wilsons Creek. The report was deferred so that staff could further liaise with the proponent to discuss differing views regarding management of key fish habitat, traffic impacts, flooding and minimum lot size for the subject land.

Staff have since held ongoing discussions with the proponent to see if there may be common ground on any of the above issues, however the parties have been unable to reach agreement on the most fundamental of these. The purpose of this report is to provide a summary of the key issues and outcomes relating to further discussions held with the proponent since January 2020. The report requests that councillors decide between the following two (2) options in moving forward with this planning proposal:

- Proceed with an amended planning proposal based on inserting a 'Schedule 1 Additional Permitted Uses' listing in LEP 2014 that would permit a community title subdivision of up to 15 neighbourhood lots/dwellings, with the common 'residue' lot to include the Yankee Creek waterway and suitable riparian buffers. **(Recommended)**
- Proceed with a planning proposal based on the proponent's request to apply a combined *E3 Environmental Management* and *R5 Large Lot Residential* zoning over the subject land, with the E3 zone encompassing the 'residue' lot comprising the Yankee Creek waterway and riparian zone (excluding "flood free" land) and applying a Minimum Lot Size of 0.3 ha to the remaining R5 zone.

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 a planning proposal based on inserting a 'Schedule 1 Additional Permitted Uses' listing in LEP 2014 that would permit a community title subdivision of up to 15 neighbourhood lots/dwellings, with the common 'residue' lot to include the Yankee Creek waterway and suitable riparian buffers;**
2. **Amend wording of Council's Planning Proposal (pages 12 & 36 in Attachment 2 – E2019/85691) to clarify that "Council does not support any new lots or dwellings having access from Wilson's Creek Road due to safety issues with the access point";**

3. **Remove the following sentence from 'Section D' and 'Summary' section of Council's planning proposal (pages 36, 38 in Attachment 2 – E2019/85691): “*Limiting the dwelling yield to 15 dwellings addresses this concern*”.**
4. **Amend and forward the planning proposal to the NSW Department of Planning, Industry and Environment for a Gateway determination.**
5. **Pending a positive Gateway determination undertake public exhibition of the planning proposal in accordance with the determination requirements.**
6. **Consider a submissions report post-exhibition that includes any recommended changes to the planning proposal for final adoption.**

Attachments:

- 5 1 Staff response to issues raised in letter provided to Councillors by the landowner, dated 10/12/19, E2020/67994 
- 2 Planning Proposal 31 Alidenes Rd, Wilsons Creek (Council's amended version, as attached to 12 December 2019 Council report), E2019/85691 

REPORT

Background

- 5 Council at its 12 December Planning Meeting considered a [report](#) to amend Byron LEP 2014 to permit Community Title Subdivision and dwellings at Lot 38 DP 1059938 Alidenes Road (12.27 ha), Wilsons Creek. The matter was deferred (**Res 19-675**) so staff could:

10 "... *liaise with the proponent to discuss differing views and provide advice on the following matters at the next available Planning Meeting:*

1. *Mapping of Yankee Creek as Key Fish Habitat.*
2. *Traffic impacts and appropriate intersection designs, including access from Wilsons Creek Road (without increasing from current access users) and upgrading Alidenes Road.*
- 15 3. *Flood, including filling of some flood prone land and clarity on the area affected by the 1% '2100yr' climate change flood event and 30m riparian buffer to Yankee Creek and therefore, clarifying the amount of the site that is developable.*
4. *The most appropriate Minimum Lot Size capable of treating wastewater generated on the land."*

20 The above resolution was also in response to a letter provided to Councillors by the landowner dated 10/12/19. A copy of this letter together with the staff response to issues raised is contained in Attachment 1.

25 Planning Proposal (from proponent)

The [original planning proposal](#) lodged by the proponent in February 2019 and considered at the 12 December 2019 Council meeting, requested that all of the subject land be included in an *R5 Large Lot Residential* zone with a Minimum Lot Size of 0.3 ha and a prospective lot yield of 30.

30 Recently the proponent has proposed a variation to the planning proposal that includes a combined *E3 Environmental Management* and *R5 Large Lot Residential* zoning for the subject land, with the E3 zone encompassing the 'residue' lot comprising the Yankee Creek waterway and suitable riparian buffers, while retaining a Minimum Lot Size of 0.3 ha for R5 Large Lot Residential zone. The applicant has not indicated a MLS for the E3 zone or the predicted lot yield from a combined R5/E3 zoning. Although a revised planning proposal for this scenario has not been submitted, Council estimates this would equate to a potential lot yield of 21. Under this scenario responsibility for the future management of Yankee Creek is uncertain.

40 Planning Proposal (revised by Council)

An amended planning proposal was prepared by staff and considered at the 12 December 2019 Council meeting (Attachment 2) to permit:

- 45 ▪ A subdivision using a neighbourhood community title scheme enabling up to 15 neighbourhood lots. Each lot can be privately owned. It will also include one lot comprising the residue of the land that will be in shared ownership and will contain the main Yankee Creek waterway (including a riparian buffer) that runs through the land.
- Each privately owned lot will be limited to only one dwelling.

50 Subject Land

55 The subject land is described as Lot 38 DP 1059938, Alidenes Road, Wilsons Creek. It is an area of 12.27 hectares with approximately 550 metres frontage to Alidenes Road and approximately 170 metres frontage to Wilsons Creek Road. The site is burdened by a 10-metre wide Right of Carriageway that provides access to Lot 1 DP 701525 (southwest of subject land) from Alidenes

Road. It is also burdened by two 10-metre wide easements for pipelines that stem from the old Mullumbimby power station and run along the Wilsons Creek Road boundary. The land previously contained two dwellings and one of these was recently demolished, with a replacement dwelling approved this year.

5



Figure 1 - Subject site showing old Mullumbimby power station at southern boundary

Summary of Key Issues and Outcomes from further discussions with proponent

- 10 Since the 12 December Council report, staff and specialist consultants have held numerous discussions with the proponent to see if there may be common ground on the issues identified in Resolution **19-675**. Unfortunately the parties remain unable to reach agreement on the most fundamental of these issues as discussed below:

15 (i) Mapping of Yankee Creek as Key Fish Habitat and required buffers

Proponent requests:

- that staff regard Yankee Creek as only “minimal” key fish habitat due to its ephemeral nature and its current degraded state;
- that staff remove 30m buffer to Yankee Creek as it does not represent the actual (technical) riparian zone, the extent of which should be defined by the flood mapping;
- 20 ▪ An arbitrary 30m minimum riparian buffer is contrary to the *Water Management Act 2000*

Planning staff response:

- 25 A 30m minimum riparian buffer has been applied to Yankee Creek having regard to Council's *Design Guidelines for On-Site Sewage Management for Single Households* (5.1.6 Buffer Distances) and DPI's *Policy and guidelines for riparian and freshwater aquatic vegetation* (section 3.2.4.2).

- 30 Although recommended buffer distances in these documents are not absolute, given their consistency with the Office of Water document titled “[Guidelines for riparian corridors on waterfront land](#)” (see Table 1 below), it remains staff's position that a minimum 30m buffer for 3rd order streams represents best practice planning in the absence of a site inspection by a suitably qualified ecologist to verify the habitat sensitivity, waterway class and riparian buffers for this section of Yankee Creek.

Table 1. Recommended riparian corridor (RC) widths

Watercourse type	VRZ width (each side of watercourse)	Total RC width
1 st order	10 metres	20 m + channel width
2 nd order	20 metres	40 m + channel width
3 rd order	30 metres	60 m + channel width
4 th order and greater (includes estuaries, wetlands and any parts of rivers influenced by tidal waters)	40 metres	80 m + channel width

The *Water Management Act 2000* relates primarily to “controlled activities” and other development near a watercourse. The provisions are really a consideration at the DA stage and not relevant to determining suitable riparian buffers at the planning proposal stage, particularly where a coordinated management framework for Yankee Creek needs to be in place.

Notwithstanding this, the 30m buffer that staff have applied to Yankee Creek is consistent with the recommended riparian corridor (RC) widths by the NSW Office of Water (see Table 1 above) and the water management principles set out in the *Water Management Act 2000*. The need to keep this buffer free of development is also consistent with NSW DPI’s [Policy and guidelines for fish habitat conservation and management](#) (2013 update) – section 3.2.4.2.

It is also noted that the SEPP Biodiversity Values map shows a riparian corridor around Yankee Creek that is at least 30 metres wide. The *Biodiversity Conservation Regulations 2017* refer to such land as:

CI 7.3 (3) (e) ”land that is identified by the Environment Agency Head as protected riparian land,

Whilst the above legislation does allow for certain non-riparian land uses to occur within the outer 50% of protect riparian land, staff are of the view that a 30 metre minimum buffer should form part of the riparian zone to be managed on the subject site into the future.

(ii) ‘Community Title’ vs ‘Torrens Title’ Subdivision AND Preferred Zoning

Proponent requests:

- a zoning that enables Torrens Title subdivision, as putting watercourses in the collective ownership of a “community” with no individual private ownership will not work;
- application of a split R5 / E3 zone on subject land with an *E3 Environmental Management* zone encompassing the ‘residue’ lot comprising the Yankee Creek waterway and suitable riparian buffers, while retaining a Minimum Lot Size of 0.3 ha in the *R5 Large Lot Residential* zone;
- ability to prepare a Vegetation Management Plan (VMP) “post gateway which could be applied by a restriction on title and require rehabilitation of Yankee Creek to an agreed level prior to this issue of a subdivision certificate for any future DA”.

Planning staff response:

Staff consider that a future Torrens Title subdivision will not deliver a coordinated management framework for Yankee Creek and associated riparian buffer. As stated in the 12 December Council report: *"Given the complex drainage of the subject land and the biodiversity value of Yankee Creek (as key fish habitat), this outcome is best achieved by a Community Title development and a Schedule 1 listing in LEP 2014, rather than application of the R5 zone with an arbitrary minimum lot size. A Community Title development also has the advantages of shared internal access roads and waterway crossings, the potential for collective onsite wastewater management systems and disposal areas, suitable buffers to Yankee Creek and greater flexibility for 'private' lot sizes."*

In addition, the application of a split R5 / E3 zoning on this land has the following shortcomings to achieving the above aim:

- an R5 Large Lot Residential zone allows for secondary dwellings and other land uses that cannot be controlled (ie. prohibited) by Schedule 1 in BLEP 2014; only the latter can ensure that each privately owned lot will be limited to only one dwelling.
- Council cannot legally require community title development over any part of land in a future R5 Large Lot Residential zone;
- an E3 Environmental Management zone also permits uses such as dwelling houses and dual occupancies which is at odds with the nature of Yankee Creek and its riparian zone objectives. Council has not typically placed small waterways such as Yankee Creek in a separate zone;
- LEP 2014 clause '4.1D Exceptions to minimum subdivision lot sizes for certain split zones' currently does not apply to E2 or E3 zones and would need to be amended to include these. Even if clause 4.1D was amended to capture the E3 zone and assuming a 40ha Minimum Lot Size were applied (or anything > 10ha), the end result is that one of the R5 lots would have to contain ALL of the E3 zoned watercourse/riparian area. This is not an acceptable outcome for the subject land;
- A hybrid R5 zone (both Torrens and Community Title arrangement) is likely to create a confusing rural residential estate that could be 'messy' to recommend in a planning proposal, let alone justify to Council and the Department of Planning, Industry and Environment.

Regarding the proponent's suggestion that a Vegetation Management Plan (VMP) can be created prior to, or as part of, a future subdivision DA for this site — it is noted that such a plan has a finite life (generally 5 years) beyond which the long term and ongoing management of Yankee Creek would remain uncertain.

On the other hand, a VMP that forms part of a Community Neighbourhood Scheme can better deliver a consistent and coordinated management framework over the long term. Furthermore, under a community title scheme Council only has to deal with 1 entity (neighbourhood association) for any non-compliance issues arising from future activities and management of the common lot. A community title scheme also has the advantages of shared internal roads and waterway access, the potential for collective onsite wastewater management systems and disposal areas, suitable buffers to Yankee Creek and greater flexibility for 'private' lot sizes.

(iii) Flood, including filling of some flood prone land and clarity on the area affected by the 1% '2100yr' climate change flood event and 30m riparian buffer to Yankee Creek and therefore, clarifying the amount of the site that is developable.

Proponent requests: (from email of 23/06/2020)

- Staff accept the proponent's modelling showing 8.4ha of subject land as being flood free and hence developable. This is based on very minor works involving either shallow swales or earth bunds up to 0.5m in depth or height to remove surface sheet flow in the western corner of the site, thereby removing this section of flood prone area in the flood mapping;

- Staff remove 30m buffer to Yankee Creek as: (a) does not represent the actual riparian zone, (b) is contrary to the Water Management Act 2000 guidelines and (c) the parameters in the proponent's flood modelling are sufficient to support reasonable buffers to Yankee Creek).

Planning staff response:

- 5 Staff are not opposed to minor flood mitigation works in the far western part of the site, which could potentially reduce the total area of flood-affected land by up to 0.18ha. Overall this is considered inconsequential.

10 The main area of disagreement, however, seems to be around the *purpose* vs the *technical definition* of a riparian zone for the subject land. Staff acknowledge that a riparian zone includes the immediate vicinity of the stream, which consists of the bed, banks and adjacent land, and may include the floodplain (or part of it). But for reasons outlined in the above response to issue (i) and given that improving the water quality and riparian habitat/biodiversity values of Yankee Creek are key issues for this site, a 30 metre minimum buffer is warranted (even if on flood-free land) and should form part of the riparian zone to be managed into the future.

15

(iv) The most appropriate Minimum Lot Size capable of treating wastewater generated on the land."

Proponent requests:

- 20 Minimum Lot Size of 0.3 ha (3,000m²) be applied based on the On-site Sewage Management Systems (OSMS) assessment provided with the applicant's planning proposal;

Planning staff response:

25 Based on the advice and further modelling undertaken by Council's specialist OSMS consultant (ie. as part of Council's review), the proponent has been consistently advised that: *"in order to accurately assess the site's OSMS capability — given the obvious constraints with respect to watercourses, gullies and intermittent streams — a proposed lot layout, with dwelling and effluent envelopes and nominated buffers to Yankee Creek and drainage channels would need to be supplied based on a site specific soil assessment of the proposed lots. In the absence of this information, a minimum lot size of 3,000m² cannot be supported for this planning proposal."*

30 This proponent was also advised that the OSMS modelling must consider the capability of the site to assimilate treated effluent on a 'catchment basis'; **therefore the smaller the lot (or cumulative lots across the site), the larger the land application area required to disperse treated effluent.** The OSMS assessment provided with the applicant's planning proposal does not satisfy this requirement.

35 **Issues where some agreement was reached (partly or fully)**

(v) Traffic impacts and appropriate intersection designs, including access from Wilsons Creek Road (without increasing from current access users) and upgrading Alidenes Road

Proponent requests:

- 40 Minimum Lot Size of 0.3 ha (3,000m²) be applied based on the On-site Sewage Management Systems (OSMS) assessment provided with the applicant's planning proposal;
- 45 That staff acknowledge that the following statements made in the 12 December 2019 Council report are incorrect
- (p163) regarding the need to *"limit the traffic generation to less than 19 dwellings, as any more than 19 dwellings would require a complete redesign of the Alidenes/ Wilsons Creek Road intersection via a Voluntary Planning Agreement"* is incorrect;
- (p165) *"... staff do not support any access from Wilsons Creek Road due to safety issues with the access point"*;
- Remove the following wording in 'Section D' and 'Summary' sections of Council's planning proposal (pages 36, 38) highlighted in **yellow** below:

*“Council considers that the applicant must upgrade Alidenes Road from Wilsons Creek Road through to Robinsons Road if they propose 20 or more dwellings. **Limiting the dwelling yield to 15 dwellings addresses this concern**”.*

5 Planning staff response:

(p163) – This relates to ‘Section D’ and ‘Summary’ of Council’s planning proposal (pages 36 & 38 of Attachment 2). Further discussions with Council’s Traffic Engineer have confirmed that the statement that *“any more than 19 dwellings would require a complete redesign of the Alidenes/ Wilsons Creek Road intersection via a Voluntary Planning Agreement”* was incorrect. Although there would be a traffic loading threshold at which an intersection redesign would be required, the SIDRA modelling (undertaken by Ardill Payne) found that this intersection was working satisfactory in 2018 (base case) and would be in 10 years time if fully developed (based on an assumed 30 dwellings).

No change is required to Council’s planning proposal (Attachment 2) as this statement only relates to the 12 December 2019 [report](#).

(p165) – This relates to pages 12 & 36 of Council’s planning proposal (Attachment 2). Further discussions with Council’s Traffic Engineer have confirmed that this statement only applies to new lots/dwellings created on the subject land (ie. access for these must be via Alidenes Road). Council’s Planning Proposal will be amended to clarify this and this forms part of the report recommendations.

(‘Section D’ and ‘Summary’ of Council’s planning proposal) – staff are in agreement with the proponent’s request to remove the wording **highlighted** above and this forms part of the report recommendations.

vi) Percentage (%) of developable land required for infrastructure and utilities (such as roads and power)

Proponent requests:

- For purposes of determining future dwelling yield, that the 10% figure cited in the December 2019 Council report (p6) should be reduced to reflect that internal ‘community title’ road requirements (min 5.5 m width) are less than public road dedication in R5 Zone (min 14m width)

Planning staff response:

Based on discussions with the proponent and advice from Council’s traffic engineer relating internal ‘private’ road requirements, it was determined that a 5% allowance for infrastructure is more appropriate if future subdivision occurred under ‘community title’. Whilst applying this lower % increases the potential developable land area to approximately 6.2 ha (previously 5.85ha), the calculated dwelling yield is still only 15 dwellings under the methodology applied in the 12 December 2020 council report (ie. 6.2ha / 0.4 MLS = 15.4 dwellings, rounded down to the nearest dwelling multiple).

vii) Access to any future development from Alidenes Road

Proponent requests:

- Ability to create more than 2 access points off Alidenes Road to minimise impacts on waterways from road/bridge crossings on subject land.

Planning staff response:

Advice from Council’s traffic engineer is as follows:

- Having more than 2 access point to minimise impacts on waterways from road/bridge crossings may be accepted under certain circumstances, where adequately justified; and
- Such a scenario (as part of any future DA) would need to be supported with a traffic impact study in accordance with Chapter B4 of the DCP to identify the type of access required for the catchment and internal road requirements but not limited to.

CONCLUSION AND OPTIONS GOING FORWARD

Following Council's deferral of this matter in December 2019 staff have been in ongoing discussions with the proponent to see if there may be common ground on the issues identified in Resolution 19-675. Whilst there has been some progress on a few issues, unfortunately the parties remain unable to reach agreement on the most fundamental issues relating to this planning proposal. Staff have endeavoured to apply a holistic and precautionary approach to the planning process. Given the exhaustive communication between Council and the Applicant to date on this planning proposal, the most practical way forward is for councillors to choose between the following two (2) options for this planning proposal:

- Proceed with a planning proposal based on inserting a 'Schedule 1 Additional Permitted Uses' listing in LEP 2014 that would permit a community title subdivision of up to 15 neighbourhood lots/dwellings, with the common 'residue' lot to include the Yankee Creek waterway and suitable riparian buffers. **(Recommended);**

OR

- Proceed with a planning proposal based on the proponent's request to apply a combined *E3 Environmental Management* and *R5 Large Lot Residential* zoning over the subject land, with the E3 zone encompassing the 'residue' lot comprising the Yankee Creek waterway and riparian zone (excluding "flood free" land) and applying a Minimum Lot Size of 0.3 ha to the remaining R5 zone.

STRATEGIC CONSIDERATIONS

Community Strategic Plan and Operational Plan

CSP Objective	CSP Strategy	DP Action	OP Activity
<i>Objective 4: We manage growth and change responsibly</i>	4.1 Support the visions and aspirations of local communities through place-based planning and management	4.1.3 Manage development through a transparent and efficient assessment process	4.1.3.10 Prepare and assess Planning Proposals and Development Control Plans, and amend Local Environmental Plan maps

Financial Implications

If Council chooses to proceed with the planning proposal, it will be at the proponent's expense as a landowner 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.

If Council chooses not to proceed then the matter does not incur any additional costs.

Statutory and Policy Compliance Implications

S. 9.1 Directions and SEPPs

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

- has not yet been referred to RFS for bushfire consideration
- introduces site specific provisions
- restricts the potential development of resources on the site

5

These justifiable inconsistencies are all discussed in more detail in the planning proposal in Attachment 2.

10

The planning proposal is consistent with the relevant SEPPs including SEPP 55 (Remediation of Land). These are also discussed in more detail in the planning proposal (Attachment 2).