

31 March 2020

Alex Caras
Land Use Planning Coordinator
Byron Shire Council

Dear Alex,

RE: Planning Proposal – 31 Alidenes Road, Wilsons Creek

Please find for your reference enclosed letter addressed to the Byron Shire Councillors on 10/12/19 prior to the 12/12/19 Council meeting where the above planning proposal was tabled.

I expressed my concern in the letter to the Councillors regarding the transparency in the process of communication with the proponent, that:

- I was advised my PP would be amended from a R5 Rezoning to Community Title Subdivision less than three weeks before the 12/12/19 Council meeting;
- I was not provided with information on substantial changes amending my PP until one week before the above Council meeting, including:
 - o identification of developable land;
 - o methodology to calculate developable land and dwelling yield;
 - o minimum lot size;
 - o number of expected dwellings.

The amended PP prepared by Council's consultants ("amended PP") were carried out at my expense, as per Council protocol. I paid the full amount as per the agreed budget up front, and when the budget was overrun I was asked to top it up otherwise all work would stop. Throughout this process I was not advised of the above major changes being made to my PP. Essentially I was forced to pay for Council's consultants to dispel my PP and re-write it completely, with recommendations substantially against what was proposed.

I also note that the amount I paid for Council's consultants to produce the amended PP was **triple** the amount I paid Ardill Payne my townplanner to write the original PP (not including any specialist reports such as survey, flood, traffic, land capability, etc). But that's beside the point.

Staff Response

There may be a number of reasons that the amount paid for Ardill Payne to prepare your planning proposal is less than Council's Stage 1 assessment/ review of this document (to date).

As you would recall, Council's initial technical review letter (dated 1 May 2019) and site meeting with both Ardill Payne and yourself (28 March 2019) identified a number of significant issues requiring further attention by Ardill Payne. The main assessment issues in particular included: SEPP 55 (remediation of land); Onsite Sewage Management, flood modelling and climate change; traffic impacts; flora and fauna, minimum lot size (subdivision) and Aboriginal Cultural Heritage. It took more than 6 months to work through these issues with you and/or your Consultant since Council's initial technical review in May 2019. This is not unusual when compared with other planning proposal assessments and given the complexities of this particular site.

As you would also recall, the full scope of Council's Stage 1 assessment was reflected in the initial costs & expenses agreement totaling \$18,660. However this was subsequently adjusted downward to \$15,360 to accommodate your financial concerns about the amount of time Council's consultant had estimated for overall project management, review and finalisation of council report for the above planning proposal. It turns out this reduced amount was fully exhausted by November 2019 and a revised costs & expenses agreement was issued for an additional \$6,860, supported by a detailed breakdown of staff/consultant time spent. The total Stage 1 costs and expenses incurred to date is now \$18,900, very close to Council's original estimate.

Council is not able to comment on the amount you pay your consultant as it is not a party to this agreement.

I would like to address the five topics for follow up discussion tabled in the 12/12/19 Council meeting minutes here.

1. Mapping of Yankee Creek as Key Fish Habitat.

It appears that the amended Planning Proposal for a Community Title Subdivision stems from the management of Yankee Creek due to its mapping as Key Fish Habitat.

The NSW DPI have regarded all waterways as Key Fish Habitats until 2013, when it updated definition of "key fish habitats" to exclude those man-made habitats and mostly dry creeks. Refer p5 of DPI Fisheries P&G: [Policy and guidelines for fish habitat conservation and management \(Update 2013\)](#)

"Generally 'key fish habitats' include those habitats that are crucial to the survival of native fish stocks. The term excludes man-made habitats, such as agricultural drains and off-stream dams and ponds, and those natural waterways which are dry for the majority of the time or have limited habitat value."

Yankee creek is mapped by DPI as Key Fish Habitat purely because it's not a first or second order creek, which under DPI guidelines are the only natural creeks excluded from this definition. Phone discussions with DPI fisheries staff in 2019 indicate the creek is likely to be regarded as **Minimal** key fish habitat.

Yankee creek is dry in the middle and only flows in heavy rain. You visited the site a year ago in March 2019 when you could see that Yankee Creek was heavily degraded.

Each year the creek is further degraded with water drying up, no vegetation management and cattle pooping everywhere including in the creek. Any responsible development would enhance the land, its environmental attributes and the creek habitat including water quality. Left as is, the creek will continue to deteriorate.

As you can see apart from first and second order creeks, all natural waterways are Key Fish Habitats in NSW. That doesn't mean rural residential land along these waterways all have Community Titles. There is plenty of evidence of Torrens Title land adjoining common waterways that are successfully managed by landowners rather than having to resort to a Community Title subdivision. In fact if landowners have their land with frontages to Yankee Creek, they'd be more motivated to check that there is water in the creek and water quality is maintained, rather than leaving the management of the creek to a central committee under community title. If there is a strip of land 30m each side of the creek not belonging to anyone but the "community", it'd be up to the committee members to keep a watch and they'd not have the same incentive as landowners having their lot entitlements fronting the creek.

Planning response

- Torrens Title rural residential development has been shown to be less sustainable as a long term form of rural settlement as no collective management agreement exists between individual landowners. This has often lead to inappropriate and uncoordinated land management, particularly of drainage lines, creeks and wildlife corridors mainly as a result of having a large number of individual landholders with differing attitudes toward care and responsibility for the area. Indeed, I am not aware of examples in Byron Shire where Torrens Title 'rural residential' land incorporating Streams Orders 3 or greater has successfully delivered more coordinated and effective land management outcomes, including implementing opportunities for environmental repair and enhancement.
- There is a clear body of evidence showing that fragmented ownership/ management of a natural resource (watercourse) by multiple private landowners delivers inferior environmental outcomes as compared to management under a single entity. This applies to the rehabilitation and ongoing sustainable management of key fish habitat on your land, the roles and responsibilities of which would be clearly articulated in a Community Neighbourhood Scheme.
- The need for this Planning Proposal to ensure a coordinated management framework for Yankee Creek has been repeatedly conveyed to you and your Consultant during this process.
- Again, 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."*

The amended PP stipulates a "minimum 30m riparian buffer" along Yankee Creek but does not explain where it comes from.

Planning response

- The 30m buffer represents an agreed outcome with you following lengthy discussions about relevant policies/legislation around minimum riparian buffers. At the time Council (in its email dated 9/9/2019) referred you to its *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 - http://www.dpi.nsw.gov.au/_data/assets/pdf_file/0009/468927/Policy-and-guidelines-for-fish-habitat.pdf).
- 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 was Council's position that a minimum 30m buffer for 3rd order streams represents best practice planning in the absence of a site inspection to verify the habitat sensitivity, waterway class and riparian buffers for this section of Yankee Creek. Hence the request at the time for your ecologist to provide this information along with a recommend framework for the future management 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

- If you recall, it was your decision not to proceed with any further ecological assessment of Yankee Creek and hence this information was never provided. Instead you formally agreed (in your email dated 23/09/2019) that "*in the absence of a site inspection to verify the habitat sensitivity and waterway class, any developed area should have a minimum 30m buffer applied (from the 3rd order stream that is mapped on the Biodiversity Values map being Yankee Creek)*".

The Water Management Act 2000 provides that a recommended riparian corridor (RC) width of 30m is applied to third order creeks (such as Yankee Creek), and non-riparian corridor works or development within the outer 50% of a recommended vegetated riparian zone (VRZ) may be undertaken, as long as they offset this activity by connecting an equivalent area to the RC within the development site. An arbitrary 30m minimum riparian buffer is contrary to these guidelines.

Planning response

- This [Water Management Act 2000](#) relates primarily to “controlled activities” and other development near a watercourse. It is really a consideration at the DA stage and is 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.
- Having said this, the 30m buffer that Council has 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.

We’d like Council to consider the PP as a R5 Rezoning proposal as submitted originally, and follow the Water Management Act provisions to manage the riparian buffer.

Planning response

- Council staff have considered zoning the whole site *R5 Large Lot Residential* as per your original planning proposal and this option is not supported, as it is not considered that a future Torrens Title subdivision will deliver a coordinated management framework for Yankee Creek or a protected 30m riparian buffer.

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

Below is a repeat of the concerns raised in my letter to the Councillors.

- Council staff report (P5 L44) states: “any more than 19 dwellings would require a complete redesign of the Alidenes/Wilsons Creek Road intersection via a Voluntary Planning Agreement (which the applicant does not favour)”.

This is not in accordance with our various phone, email and in-person discussions. We have proven to Andrew Pearce, Council Traffic Engineer via detailed intersection survey and traffic design that the intersection does not require major capital works redesign even with additional traffic generated – Andrew has confirmed this in writing. We have communicated to both yourself and Mike Svikis in meetings that if there is any road widening required to Alidenes Rd from Wilsons Creek Rd through to Robinsons Rd due to sufficiently increased traffic from future dwellings, the proponent undertakes to carry out this work as part of the development.

Planning response

Further discussions with Council’s Traffic Engineer (Andrew Pearce) have confirmed that the 12 December council report 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 30 dwellings). I apologise for this oversight and the removal of this wording in a future council report will be drawn to the Councillors' attention.

- The amended PP (P12, P36) states: "Access to Wilsons Creek Road will not be permitted".

As we noted in our calls and meetings that there is existing access by at least two separate occupants from Wilsons Creek Rd. My PP does not propose to increase the existing access to WCR. This has been discussed in meetings with yourself and Andrew Pearce, and it has been agreed that the existing access will be maintained.

Planning response

Further discussions with Council's Traffic Engineer (Andrew Pearce) 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). The Planning Proposal wording (P12, P36) will be amended to reflect this.

- The amended PP (P36, P38) states: "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."

In our various communications and meetings with yourself and Mike Svikis, we have committed to undertake road widening when necessary if there are 20 or more dwellings. It was not a concern at any time of the PP process. Limiting dwelling yield to 15 to address this "concern" was never brought up until the Council staff report and amended PP were released to the proponent one week before the 12/12/19 Council meeting.

Noted. The statement that "*Limiting the dwelling yield to 15 dwellings addresses this concern*" may have been taken out of context here. To avoid confusion, the amended PP (P36, P38) will be reworded to say "***However this is not an issue as the number of dwellings nominated for this site is well below the threshold (20 or more) identified for the upgrading of Alidenes Road***".

In summary we'd like to confirm our meeting and discussion outcomes during 2019 and have the amended PP remove these restrictions.

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.

This topic was covered in the chain of emails starting with Parham's email to me on 9/12/19, with the latest being your email on 11/3/20 which we may need to have a phone discussion to fully understand and respond to. Our differences on this topic have not yet been resolved.

Planning response

- Council's latest email (11/3/2020) was very clear in distinguishing between what is considered to *developable land* –vs- *lot entitlement* and how this relates to the

0.4ha requirement applied to determine your land's "carrying capacity".

As previously conveyed to you: "*developable land* is that area which is unconstrained by riparian + flood affected areas for purposes of accommodating future dwellings and on site waste management systems on your site. **In the absence of more detailed information regarding future lot layouts, dwelling envelopes and onsite sewage treatment systems on the subject site, we have applied a 0.4ha minimum lot size requirement based on** (i) *developable land* and (ii) Council's experience with appropriate lot sizes in other large lot residential subdivisions. In other words, each lot must comprise at least **0.4ha** of *developable land*. By contrast the *lot entitlement* is what results at the subdivision DA stage and at a minimum should include 0.4ha of *developable land*, in addition to any "flood prone" areas along the first/second order creeks and drainage channels". So a future lot will be greater than 0.4ha if it incorporates any 'flood prone areas along the first/second order creeks and drainage channels'.

There's really nothing further to resolve on this matter. Technically, it is what it is and we may have to simply "agree to disagree".

- In relation to the "fill option" and possible minor works being considered, what is required here is for your Consultant to provide information detailing where and how much fill is proposed on the site. Once received, this information can be reviewed and responded to by our flood engineer(s).

4. **The most appropriate Minimum Lot Size capable of treating wastewater generated on the land.**

My consultants have provided models and calculations proving that the 0.3 ha proposed Minimum Lot Size is capable of treating wastewater generated on the land.

Ardill Payne's land capability report identified that the minimum land application area required to treat sewerage for a 5 bedroom dwelling is 113 m² using an AWTS+reed bed in the OSMS design. Based on this they have suggested a MLS of 0.3 ha.

The amended PP changed the MLS to 0.4 ha but did not provide any scientific or technical reason apart from suggesting it is between the 0.5 ha indicated in the RLUS and 0.3 ha in the proponent's report.

There is plenty of evidence of modern OSMS systems located on MLS of 0.3 ha or less, able to treat wastewater to above acceptable standards. For example, all the lots in Federal RU5 village zone have 0.2 ha MLS on individual septic systems.

Planning response

The Federal RU5 Village zone is probably not a good comparison as this area is not affected by key fish habitat, nor is it flood affected or have the same complex drainage pattern associated with your land. An alternative comparison might be the adjoining *R5 Large Lot Residential* zone in Federal, which has a 2.5ha minimum lot size. It is also worth noting that the RLUS suggested that a 0.5 ha minimum lot size would be the "low end" applied to future subdivision, with 1 ha at the "high end".

Notwithstanding this, the following advice from Tim Fitzroy & Associates (Environmental Health Consultant) regarding the OSMS assessment and proposed

0.3ha lot size is provided below:

- At the planning proposal stage, as a precursor to subsequent subdivision and development application for future residential dwellings, Council must adhere to a precautionary approach that considers all site constraints when assessing the capacity of the land to effectively assimilate OSMS. This site comprises multiple constraints as described above which, when considered in total, are the reason why Council in conjunction with NSW Health and other stakeholders have developed guidelines to provide buffers to allow for sustainable development incorporating both public and environmental health criteria.
- As noted in Council's GIS mapping and confirmed during our joint site inspection with the applicant and owner on 28.03.2019, the subject site is impacted by a permanent watercourse (Yankee Creek) together with a series of intermittent watercourses, dry gullies and drainage channels (see attached constraints mapping). The attached constraints mapping includes the Prescriptive Measures identified in section B3.2.2 On-Site Sewage Management (Chapter B3 BSC DCP 2014). Given the number of intersecting gullies and drainage channels plus Yankee Creek the drainage buffers across the subject site are extensive, as confirmed during our site inspection.
- Having regard to the 12th December 2019 Council Report (No 13.24) for the subject Planning Proposal, clearly there is a limited area (outside of the nominated riparian buffer) which is suitable at a planning proposal level for the dispersal of treated effluent. The On site sewage Capability Assessment (prepared by Ardill Payne) has not considered the nominated buffer nor assessed land that is free of the buffer.
- If the applicant wishes to pursue a smaller minimum lot size in the planning proposal, then a **fresh OSMS Capability Assessment is required that acknowledges the 30m buffer to intermittent water course, dams, dry gullies and drainage channels and focuses on soil sampling and assessment within the areas outside of the aforementioned buffers.**
- As originally discussed onsite (on 28.03.2019), given the drainage buffers a decentralised OSMS within a Community Title Development may be a more appropriate development approach for the subject site.

Based on the above advice and Council's experience with lot sizes < 0.4 ha in other large lot residential subdivisions in the Shire, and in the absence of your Consultant providing a fresh OSMS Capability Assessment that acknowledges the 30m buffer to intermittent water course, dams, dry gullies and drainage channels and focuses on soil sampling and assessment within the areas outside of the aforementioned buffers, a 0.3ha minimum lot size would not be supported based on the drainage buffer constraints alone.

5. The amount of land required for infrastructure and utilities.

- Council staff report (P6 L40) states: "An allowance of 10% of developable land for infrastructure and utilities (such as road and power) reduces the developable area to approximately 5.85 ha."

There are no roads proposed in the development other than an existing private road that the neighbouring property has an easement over. All future lots will have shared driveways where applicable and these driveways will form part of the landowners' lot entitlements. The area of the existing private road is approx. 3m x 300m = 900 m², comprising of 0.7% of the site area.

There is existing power supply and distribution lines on the land. As you can see the power station next door already has their power distribution lines criss-crossing my land. Future lot design will take these existing distribution lines into account as long as the safety clearances from electricity assets to dwellings are observed.

My planning consultants believe the 10% allowance is not required for infrastructure and utilities as there is no proposed road, and power supply is existing on the land.

Planning response

The RLUS suggested that in the absence of specific information 20% of a site may be required for infrastructure. Based on Council's experience with other large lot residential subdivisions in the Shire, and in the absence of your Consultant providing more detailed site information showing future lot layouts along with location of private service/access roads, an allowance of 10% of developable land for infrastructure and utilities is considered appropriate.

Conclusion

The amended PP prepared by Council's consultants was not in consultation with the proponent. There are significant inaccuracies contained in the report. The proponent does not agree with its recommendations, except that it supports the strategic direction to provide suitable rural lifestyle living opportunities to meet such demand, and to manage growth and change responsibly. The proponent believes its original PP as submitted was compliant with all policy directions in the RLUS which took many years to formulate and perfect.

The RLUS adopted in 2018 suggests that between my land and the Myocum site, the only two potential sites identified by Council over a 10+ year study as new large lot residential subdivision opportunities: "collectively these sites have the potential to yield between 40-75 additional dwellings, or approximately 3-5 years supply."

It is our common goal to provide suitable rural lifestyle living opportunities to meet such demand in the Byron Shire within the 3-5 year period of supply following the adoption of the RLUS.

Thank you for your consideration of the issues raised in this letter as well as in our numerous emails on the developable land discussion. I hope to be able to reach a mutual understanding with Council in order to achieve our common goal.

Yours faithfully

encl.

Letter of 10/12/19 addressed to the Byron Shire Councillors

Concluding Planning response

The amended planning proposal is a direct result of liaison and consultation with the proponent including numerous phone calls and over 50 emails between March and December 2019. The 12 December 2019 Council report is accurate and consistent with the adopted RLUS. The RLUS estimated a yield of 15 to 30 dwellings for this site and following more detailed constraints analysis, it has worked out at 15 dwellings. The amended planning proposal is consistent with the Policy Direction (RLUS page 13) "Future rural lifestyle living opportunities will serve to repair and enhance the land's natural values in a manner which more than offsets the full impact of the site's population and pressures on the environment."

In conclusion, we have provided a comprehensive response to the issues identified in your letter of 31 March 2020 and in Council Resolution 19-675. Going forward, you and your Consultant have the option of providing:

1. a fresh OSMS Capability Assessment that acknowledges the 30m buffer to intermittent water course, dams, dry gullies and drainage channels and focuses on soil sampling and assessment within the areas outside of the aforementioned buffers; and
2. more detailed site information showing where and how much fill is proposed on the site, future lot layouts, dwelling envelopes and location of future onsite sewage treatment systems on the subject site;

In the absence of this information Council stands by the methodology used to assess the site's developable land and carrying capacity for rezoning purposes, as presented in the 12 December 2019 Council report.

Could you please advise your intentions regarding the additional information requested above.

Feel free to contact me in the meantime should you wish to discuss.

Kind regards,

Alex Caras
Land Use Planning Coordinator