

Report on Public Hearing

Planning Proposal to Reclassify
Community Land as Operational Land

25-27 Barwon Avenue &
17-21 Chisholm Street
SOUTH TURRAMURRA

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ABBREVIATIONS USED IN THIS REPORT

<i>County Road</i>	<i>Planned Connection of F3 Freeway to M2 Motorway</i>
<i>DPI</i>	<i>Department of Planning & Infrastructure</i>
<i>EP&A Act</i>	<i>Environmental Planning and Assessment Act 1979</i>
<i>KLEP 216</i>	<i>Ku-ring-gai Local Environmental Plan No.216</i>
<i>LGA 1993</i>	<i>Local Government Act 1993</i>
<i>Proposal</i>	<i>Current Planning Proposal</i>

1.0 Introduction

This is a report on the public hearing held on 2 December 2011 in relation to a planning proposal, (the *Proposal*), by Ku-ring-gai Council to reclassify the following six (6) parcels of land in South Turramurra from “community land” to “operational land” under the terms of the *Local Government Act 1993* (LGA 1993):

- Site 1 - 17 Chisholm Street
- Site 2 & 3 - 21 Chisholm Street
- Site 4 - 25 Barwon Avenue
- Site 5 - 25A Barwon Avenue
- Site 6 - 27 Barwon Avenue

The *Proposal* also seeks to discharge a declaration of trust relating to Sites 2 and 3 which originated from the transfer of the land from the Cumberland County Council to Ku-ring-gai Council, which essentially required the land not to be used for any other purpose other than a public park, public reserve or public recreation area until such time as it was required for the construction of a *County Road*, i.e. a planned connection of the F3 Freeway to the M2 Motorway.

Sites 1 to 6 formerly comprised part of the land required for the *County Road*, a proposal that was abandoned by the NSW State Government in 1996.

Sites 1, 2, 4, 5 and 6 have always been zoned Residential ‘C’ under the *Ku-ring-gai Planning Scheme*, while Site 3 was rezoned Residential ‘C’ by virtue of *Ku-ring-gai Local Environmental Plan No.201*, which was made on 13 January 2006 following the abandonment of the *County Road*.

The reclassification is proposed by Council to provide it with the mechanism to assist in the planning and delivery of new facilities and services for the community.

The reclassification will allow Council to progress options for the sale, land swaps or long term lease of the land to facilitate, together with a substantial adjoining State Government landholding, low density residential development on it in a manner consistent with the character of the locality with a subdivision design that includes sustainable urban design and an economically viable lot yield.

LGA 1993 requires public land to be classified as either “community land” or “operational land” and makes specific provision for its reclassification from “community land” to “operational land” to enable Councils to rationalise the use of their land resources to best meet the needs of their community.

The NSW *Department of Planning & Infrastructure (DPI)* issued a Gateway Determination, under Section 56(2) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, on 16 March 2010 that the *Proposal* should proceed subject to a number of conditions relating to procedural matters.

I conducted a public hearing, in accordance with Section 29(1) of *LGA 1993*, on 6 December 2010 in respect to a planning proposal to reclassify Sites 1 to 6 from “community land” to “operational land”.

Following the hearing, in a report dated 16 December 2010, I recommended that all of the sites be reclassified as “operational land”.

Council on 1 February 2011 resolved to forward the planning proposal to the *DPI* and to request that a local environmental plan, *Ku-ring-gai Local Environmental Plan No.216 (KLEP 216)*, be made to effect the reclassification of Sites 1 to 6 as “operational land”.

In a letter dated 29 August 2011, the *DPI*:

- advised Council that the planning proposal had not foreseen the complete discharge of interests under Section 30 of the *LGA 1993* applying to a part of the land to be reclassified; and
- recommended that Council re-exhibit the planning proposal to ensure that the exhibition material was clear regarding its intention to discharge the interests applying to the land, together with draft *KLEP 216*.

These interests affecting the land involve:

- a declaration of trust relating to Sites 2 and 3, which is proposed to be discharged in the current *Proposal*; and
- a caveat which affected only Site 2, which protected the land from inappropriate use prior to its ultimate use for the *County Road*.

The latter caveat was removed earlier this year by the NSW *Land & Property Management Authority* at Council's request in accordance with the original planning proposal.

This public hearing into the *Proposal* has been conducted in accordance with Section 29(1) of *LGA 1993*.

The *Proposal* was publicly exhibited between 14 October and 10 November 2011 and nine (9) written submissions were received concerning the *Proposal*.

The holding of this hearing was notified in the *North Shore Times* on 11 November 2011, with the period for written submissions closing on 1 December 2011.

I have been commissioned to conduct the hearing independently of Council and to make recommendations to Council as to the course of action to be taken concerning the *Proposal*.

2.0 Background Information

The concept of the classification of Council-owned land was introduced with the making of the *LGA 1993* on 1 July 1993.

There was no precedent for public land classification or how land should be classified in NSW prior to 1993.

Section 25 of the *LGA 1993* requires all land owned by Council to be classified as either "*community land*" or "*operational land*".

The purpose of classifying land is to clearly identify land which should be kept for community use.

"*Community land*" represents land which needs to be kept for community use because of its use or special features, while "*operational land*" is not required for such purposes and may be sold by Council.

All of the sites are classified as "*community land*" under the terms of the *LGA 1993*.

Section 27 of the *LGA 1993* provides for the reclassification of public land by the preparation of a local environmental plan.

Section 29(1) of *LGA 1993* requires Council to arrange a public hearing in respect to any planning proposal to reclassify "*community land*" to "*operational land*".

The current *Proposal* has involved an extensive community consultation program undertaken by Council, including consultations involved with the original planning proposal in 2010.

The *DPI* issued a Gateway Determination, under Section 56(2) of the *EP&A Act* on 16 March 2010, that the *Proposal* should proceed subject to a number of conditions relating to procedural matters.

The *Proposal* was publicly exhibited between 14 October and 10 November 2011.

The public notice of the exhibition the *Proposal* was published in the *North Shore Times* on 14 October 2011 and surrounding owners were individually notified of the exhibition on 12 October 2011.

Details of the exhibition were also available on Council's website.

Nine (9) written submissions were received concerning the *Proposal*.

Section 47G(2) of the *LGA 1993* provides that the person presiding at the public hearing must not be:

- a Councillor or an employee of the Council holding the public hearing; or
- a person who has been a Councillor or an employee of that Council at any time during the 5 years before the date of appointment.

In accordance with this provision, I have been commissioned by Council to conduct the public hearing.

The purpose of the hearing is to provide an opportunity for people to make submissions concerning the *Proposal* and/or to elaborate on any written submission that was made to Council following its public exhibition.

It is my role to assess the submissions and matters raised at the public hearing and, independently of Council, to make recommendations as to the course of action to be followed.

The holding of the public hearing was notified in the *North Shore Times* on 11 November 2011 with the period for written submissions closing on 1 December 2011.

Submissions were accepted up to the commencement of the hearing and the opportunity was given to anyone to address the hearing, whether or not a written submission had been made.

In addition, surrounding owners were individually notified of the hearing on 9 November 2011.

Council is required, under Section 47G(3) of the *LGA 1993* to make a copy of this report available for public inspection no later than four (4) days after its receipt.

Should the land be reclassified, Council has indicated that it intends to prepare and publicly exhibit:

- a site-specific draft development control plan to guide the future development of the land; and
- a development/subdivision application.

I have reviewed the Council's records and I am satisfied that the appropriate steps have been taken to give notice of:

- the *Proposal*; and
- the public hearing.

I have:

- reviewed all of the relevant the background information;
- reviewed all of the written submissions that were received as a result of the exhibition of the *Proposal*; and
- inspected the sites and the area more generally.

3.0 Public Hearing Details

The venue of the public hearing was advertised in the *North Shore Times* on 11 November 2011 as being the Council Chambers, Level 3, 818 Pacific Highway, Gordon.

The hearing was conducted on Friday, 2 December 2011.

The hearing opened at 4.00pm.

The hearing opened with an explanatory overview and Council's submission on the *Proposal* by Council's Manager Urban & Heritage Planning, Antony Fabbro.

- Dierk Mohr, President of the Kissing Point Progress Association, 21 Barwon Avenue, South Turramurra; and
- Yvonne Langshaw, 26 Chisholm Street, South Turramurra.

The hearing closed at 6.00pm.

4.0 Land Proposed for Reclassification

4.1 Site 1: 17 Chisholm Street

Parcel Address: 17 Chisholm Street, South Turramurra
Parcel Description: Lot 3, DP 746618
Area of Land: 0.255 hectares
Date of Acquisition: May 1990
Method of Acquisition: Private treaty
Purpose of Acquisition: Open space purposes
Interests/Trusts: Nil

Classification Details:

Current Classification: Community Land
Proposed Classification: Operational Land

Zoning Details:

Ku-ring-gai Planning Scheme: Residential 'C'
Proposed Change under this Plan: No change proposed

Improvements on Parcel: Part of open paddock area

4.2 Sites 2 & 3: 21 Chisholm Street

Parcel Address: 21 Chisholm Street, South Turramurra
Parcel Description: Lots 1 and 2, DP 840228
Area of Land: 0.335 hectares
Date of Acquisition: 1960
Method of Acquisition: Land transferred to Council by the Cumberland County Council
Purpose of Acquisition: Held for the purposes of the *County Road* and open space
Interests/Trusts: Subject to Declaration of Trust, which is to be discharged. See Section 5.3.2 of this report

Classification Details:

Current Classification: Community Land
Proposed Classification: Operational Land

Zoning Details:

Ku-ring-gai Planning Scheme: Residential 'C', largely as a result of *Ku-ring-gai Local Environmental Plan No.201* made on 13 January 2006
Proposed Change under this Plan: No change proposed

Improvements on Parcel: Nil. Bushland area

4.3 Site 4: 25 Barwon Avenue

Parcel Address: 25 Barwon Avenue, South Turrumurra
Parcel Description: Lot 74, DP 216500
Area of Land: 0.5 hectares
Date of Acquisition: 1964
Method of Acquisition: Private treaty
Purpose of Acquisition: Open space purposes
Interests/Trusts: Nil

Classification Details:

Current Classification: Community Land
Proposed Classification: Operational Land

Zoning Details:

Ku-ring-gai Planning Scheme: Residential 'C'
Proposed Change under this Plan: No change proposed

Improvements on Parcel: Nil. Bushland area

4.4 Site 5: 25A Barwon Avenue

Parcel Address: 25A Barwon Avenue, South Turrumurra
Parcel Description: Lot 1, DP 847214
Area of Land: 1,572.23m²
Date of Acquisition: 1994
Method of Acquisition: Land transferred to Council by the State Government
Purpose of Acquisition: Open space purposes
Interests/Trusts: Nil

Classification Details:

Current Classification: Community Land
Proposed Classification: Operational Land

Zoning Details:

Ku-ring-gai Planning Scheme: Residential 'C'
Proposed Change under this Plan: No change proposed

Improvements on Parcel: Nil. Bushland area

4.5 Site 6: 27 Barwon Avenue

Parcel Address: 27 Barwon Avenue, South Turramurra
Parcel Description: Lot 1, DP 746618
Area of Land: 0.36 hectares
Date of Acquisition: 1990
Method of Acquisition: Private Treaty
Purpose of Acquisition: Open space purposes
Interests/Trusts: Nil

Classification Details:

Current Classification: Community Land
Proposed Classification: Operational Land

Zoning Details:

Ku-ring-gai Planning Scheme: Residential 'C'
Proposed Change under this Plan: No change proposed

Improvements on Parcel: Nil. Bushland area

5.0 Submissions to Public Hearing

5.1 Written Submissions

Written submissions concerning the *Proposal* were received from the following residents of the area:

- Chulani Yasaratne, 10 Warner Avenue, South Turramurra, which included a petition containing twenty-seven (27) signatures of residents of Warner Avenue, Lyon Avenue, Chisholm Street and Barwon Avenue;
- Davinia Jones & Massud Zhouand, 7 Lyon Avenue, South Turramurra;
- Dierk Mohr, President of the Kissing Point Progress Association, 21 Barwon Avenue, South Turramurra;
- Grahame Abbott, 53 Barwon Avenue, South Turramurra;
- Mr. J.B. Burgmann, 12 Tamboon Avenue, Turramurra; and
- Margaret Burgmann, 12 Tamboon Avenue, Turramurra.

The submissions raised the following matters:

- Sites 2 and 3 should remain as open space as stipulated by the condition of transfer of those Sites to Council and Council's plan to rezone and reclassify these Sites is not an adequate reason for extinguishing the declaration of trust applying to them;
- all of the recommendations of the Flora and Fauna Survey & Constraints Assessment, prepared by Ambrose Ecological Services Pty Ltd, should be implemented;
- Sites 2 and 3 should be retained for community use and their use as a community garden/fruit tree grove should be considered;
- there is a "secret garden" on Sites 2 and 3 that has provided enjoyment to local residents over the years;
- frustration was expressed over the inordinate delay and Council's inability to get all the facts together in a timely fashion concerning the *Proposal*;
- no indication of any detriment to the local community was given for the proposed discharge of the declaration of trust relating to Sites 2 and 3;
- the community benefits flowing from the *Proposal* had not been identified;
- there was a need to maintain an access path, with appropriate width and lighting, through the land to connect Barwon Avenue and Chisholm Street;
- there is a need to bring forward plans to construct footpaths in Barwon Avenue and Chisholm, Auluba and Vernon Streets for safety and comfort reasons for existing and future residents of the area;
- kerb and guttering should be constructed on both sides of Barwon Avenue and Chisholm Street up to Canoon Road;
- an appropriate stormwater management plan should be prepared to mitigate problems associated with flooding;
- consideration should be given to the construction of footpaths to allow access to the shops and bus stop in Kissing Point Road; and
- Chisholm Street should be increased in width between Barwon Avenue and Auluba Street.

I have also reviewed and taken into consideration the written and oral submissions that were made to the public hearing held on 6 December 2010.

In addition, submissions were received from the following public authorities:

- Ku-ring-gai Council;
- Office of Environment & Heritage;
- Sydney Water Corporation; and
- NSW Rural Fire Service.

The Office of Environment & Heritage has indicated that the advice it provided in relation to the original planning proposal in 2010 remains relevant to the *Proposal*.

Sydney Water Corporation has indicated it has no objections to the *Proposal* and will assess the impact of future development when an application is made to develop the land.

The NSW Rural Fire Service has indicated that any future development on the land will be required to comply with Section 100B of the *Rural Fires Act 1997*, Section 79BA of the *EP&A Act* and the requirements of *Planning for Bush Fire Protection 2006*.

5.2 Oral Submissions

Oral submissions were made to the hearing by;

- Dierk Mohr, President of the Kissing Point Progress Association, 21 Barwon Avenue, South Turramurra; and
- Yvonne Langshaw, 26 Chisholm Street, South Turramurra.

Mr. Mohr indicated support for the *Proposal* subject to the retention of a pathway linking Chisholm Street and Barwon Avenue as had been recommended in the report on the previous public hearing in 2010.

Mrs. Langshaw indicated that greater pressure was being put onto existing open space and bushland resources and the flora and fauna habitats they support.

She indicated that the land should be retained in community ownership to enable the bushland on it to be preserved.

5.3 Consideration of Submissions

5.3.1 Reclassification of the Land

It would be reasonable to summarise the submissions as:

- raising no objections to the proposed reclassification of the land as proposed, with the exception of the reclassification and discharging of the declaration of trust relating to Sites 2 and 3; and
- raising a number of concerns regarding the specific details of any future development that may take place on the land.

The latter issues can largely be addressed in the development control plan and the specific development application that are to be prepared and publicly exhibited by Council for the land's redevelopment.

The vital public interest concerns relating to reclassification of the land from "*community land*" to "*operational land*" which will need to be addressed in the development control plan and the development are:

- the provision of a satisfactorily designed public accessway between Barwon Avenue and Chisholm Street;
- the provision of a satisfactorily designed riparian corridor through the land and the implementation of stormwater measures to prevent downstream flooding; and
- the recommendations of the Flora and Fauna Survey & Constraints Assessment prepared by Ambrose Ecological Services Pty Ltd.

The current hearing has not raised any new issues concerning the need to retain the "*community land*" classification of the Sites to those raised at the public hearing held on 6 December 2010, other than that Sites 2 and 3 should remain as open space as stipulated by the condition of transfer of those Sites to Council and Council's plan to rezone and reclassify these Sites is not an adequate reason for extinguishing the declaration of trust applying to them.

The declaration of trust relating to Sites 2 and 3, which originated from the transfer of the land from the Cumberland County Council to Council and required the land not to be used for any purpose other than a public park, public reserve or public recreation area until such time as it was required for the construction of a *County Road*, is not of itself a reason to dictate that the land should be retained as "*community land*".

Issues relating to the declaration of trust and the discharge of that trust are to be addressed in the following section of this report.

The need for land to be retained as "*community land*" should be related directly to the need for it to be kept in community ownership for community use or because of its special features.

In this regard, no new issues were raised at the hearing concerning the need for Sites 2 and 3 to be retained for community use.

Consequently, I have no reason to change the conclusions that I reached following the 2010 public hearing that:

- it is appropriate for all of the sites to be reclassified as “*operational land*”; and
- the other matters raised in the submissions relate largely to decisions Council may be required to make irrespective of the classification and use of these sites.

5.3.2 Discharge of Declaration of Trust

The land comprising Sites 2 and 3 originally comprised part a single allotment of land, i.e. Lot 8, Section 1, DP 5941, which was acquired by the Cumberland County Council essentially for the construction of the *County Road*.

The land was transferred to Council under a declaration of trust, dated 20 April 1960.

It was subsequently subdivided by Council into two (2) allotments, i.e. Lots 1 and 2, DP 840228, by virtue of a plan of subdivision registered by the Registrar-General on 16 June 1994.

Lot 2, which comprises Site 2, has an area of 2,677m² and a frontage of 40.1m to Chisholm Street, represents the land that was required for the *County Road*.

Lot 1, which comprises Site 3, has an area of 751.1m² and has no road frontage, represents the residue of the land transferred to Council under the declaration of trust.

The declaration of trust requires Council:

- to hold the land comprised in Site 2 and to make it available, without cost, to the Commissioner for Main Roads or any other body that may be the constructing authority for the *County Road*, when required to do so;
- not to use this land for any purpose other than as a public park, public reserve or public recreation area pending its requirement for the *County Road*; and
- to hold the residue of the land, i.e. Site 3, for the purposes of a public park, public reserve or public recreation area and not permit its use for any other purpose.

Consequently, the trust was not predicated on the ongoing use of Site 2 for public reserve purposes.

The shape, dimensions and location of Site 3 is not conducive to its reasonable use for public recreational purposes.

Section 30(1) of the LGA 1993 specifically provides that:

“A local environmental plan that reclassifies community land as operational land may make provision to the effect that, on commencement of the plan, the land, if it is a public reserve, ceases to be a public reserve, and that the land is by operation of the plan discharged from any trusts, estates, interests, dedications, conditions, restrictions and covenants affecting the land or any part of the land, except for:

- (a) any reservations that except land out of a Crown grant relating to the land, and*
- (b) reservations of minerals (within the meaning of the Crown Lands Act 1989).”*

This provision is consistent with the principle of enabling Councils to rationalise the use of their land resources to best meet the needs of their communities and is consistent with contemporary local government practice.

I do not believe that a declaration of trust imposed over fifty (50) years ago, under the circumstances it was made, should preclude Council from reviewing whether or not that land needs to be kept for community purposes or precluding the Council from using it in an orderly manner in accordance with the contemporary needs of its community.

In view of my conclusion that Sites 2 and 3 are not required to be retained as “community land”, it is appropriate to discharge the trust relating to these allotments.

7.0 Recommendation

The reclassification of Sites 1 to 6 from “*community land*” to “*operational land*” under the terms of the *Local Government Act 1993* is appropriate.

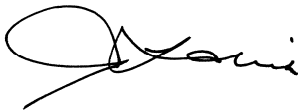
The discharging of the declaration of trust applying to Sites 2 and 3, as proposed in Part 2 of Schedule 10 to be incorporated into the *Ku-ring-gai Planning Scheme Ordinance* by *Ku-ring-gai Local Environmental Plan No.216*, is appropriate.

The issues that will need to be addressed in detail in the development control plan and the specific development application to be prepared following the reclassification include:

- the provision of a satisfactorily designed public accessway between Barwon Avenue and Chisholm Street;
- the provision of a satisfactorily designed riparian corridor through the land and the implementation of stormwater measures to prevent downstream flooding;
- the recommendations of the Flora and Fauna Survey & Constraints Assessment prepared by Ambrose Ecological Services Pty Ltd.

A copy of this report should be made available for public inspection as required by Section 47G of the *Local Government Act 1993*.

People who made submissions concerning the proposed reclassifications should be advised accordingly.



Andy Ludvik
Ludvik & Associates Pty Ltd

Date: 5 December 2011