Ku·ring·gai Planning Panel



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Reference: S06347 / 2010/007459

13 January 2010

Mr Peter Goth
Regional Director
Sydney West Region
Department of Planning
Locked Bag 5020
PARRAMATTA NSW 2150



Dear Mr Goth

Planning Proposal - Inclusion of a Suspension of Covenants, Agreements and Instruments Clause in Ku-ring-gai Town Centres LEP

At its meeting on 2 December 2009, the Ku-ring-gai Planning Panel considered a report on a planning proposal for the inclusion of a suspension of covenants clause in the Draft Ku-ring-gai Local Environmental Plan Town Centres 2009. It resolved:

That the Ku-ring-gai Planing Panel in accordance with Division 4 LEPs of the Environmental Planning and Assessment Act, 1979 (as amended) initiate a draft Local Environmental Plan to insert a new model clause into the draft Plan to allow the suspension of covenants, agreements and instruments, the clause will not apply for certain purposes including clause 4.5(9) and (10) of the Standard Instrument.

The attached planning proposal has been drafted in accordance with Section 55 of the *EP&A Act, 1979* and the Department of Planning's *A guide to Preparing Planning Proposals.*

It is requested that the Planning Proposal be forwarded to the LEP review panel for a gateway determination under section 56 of the EP&A Act.

If you have any further enquiries on this matter, please do not hesitate to contact Craige Wyse, Team leader Urban Planning on 9424 0855.

Yours sincerely

Antony Fabbro

Manager Urban and Heritage Planning

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This document ochicins important information. If you do not understand at please call the Translating and Interorating Service on 131 430. Ask them to phone \$424 0000 on your behalf to contact Ku-ring-gal Council, Business hours: Monday to Friday, \$.30a.n-5pm.

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Ku-ring-gai Planning Panel

Planning Proposal

Inclusion of a Suspension of Covenants, Agreements and Instruments in the Ku-ring-gai Local Environmental Plan (Town Centres) 2009

Background

The Ku-ring-gai Planning Panel adopted the final Draft Ku-ring-gai Local Environmental Plan Town Centres 2009 in May 2009. The draft Plan is now being finalised by the Department of Planning prior to consideration by the Minister for gazettal.

The Ku-ring-gai Planning Panel were provided authorisation from the Director General to exercise the following functions in respect of the draft Ku-ring-gai Town Centres LEP:

- Section 65 (1) certification of the draft LEP and
- Section 69 (1) Director-General's Report.

However, in order to exercise the function(s) under the Delegation the Ku-ring-gai Planning Panel was required to satisfy the relevant terms and conditions including the following (in part):

"3. The draft LEP not containing provisions suspending laws pursuant to Section 28 of the EP & A Act."

In accordance with this condition of delegation, the draft LEP written instrument was prepared and exhibited without provisions that suspend laws pursuant to Section 28 of the EP&A Act.

When adopting the final draft LEP at Section 68 stage, the Planning Panel resolved to request that the Minister amend the draft LEP under section 70 (IA) of the Act to insert the standard instrument model Clause 1.9A pertaining to Suspension of Covenants, Agreements and Instruments into the draft LEP.

This matter has been subsequently raised with the Department who advised that the clause should not be inserted using the Minister's functions under Section 70 (IA) and should be done through an amending LEP (Planning Proposal).

On 2 December 2009, the Ku-ring-gai Planning Panel resolved to initiate a draft Local Environmental Plan to insert a new model clause into the draft Plan to allow the suspension of covenants, agreements and instruments. A copy of the report to the Planning Panel and the subsequent resolution on the matter is included as Attachment A.

It is proposed that the Ku-ring-gai Planning Panel be the relevant planning authority (RPA) for the purpose of this planning proposal.

Planning Proposal

1. A statement of the objectives or intended outcomes of the proposed local environmental plan.

The planning proposal seeks to incorporate a clause into the Ku-ring-gai Local Environmental Plan (Town Centres) 2009 (Town Centres LEP) that would suspend any private covenant, agreement or other similar instrument applying to land covered by the LEP. The suspensions would only be to the extent necessary to enable development consistent with the Plan.

2. An explanation of the provisions that are to be included in the proposed local environmental plan.

It is proposed that the model local clause as presented on the Department of Planning website be used and inserted as clause 1.9A.

It is also recommended that the option to add to the model clause so that it does not apply to Clause 4.5(9) & (10) of the Standard Instrument. The reason for seeking this variation is to ensure the intent of the draft LEP to prevent "double dipping" of FSR is not undermined by the new Clause 1.9A.

The proposed wording of the clause is as follows:

- 1.9A Suspension of covenants, agreements and instruments [local]
 - (1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a development consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.
 - (2) This clause does not apply:
 - (a) to a covenant imposed by the Council or that the Council requires to be imposed, or
 - (b) to any prescribed instrument within the meaning of section 183A of the Crown Lands Act 1989, or
 - (c) to any conservation agreement within the meaning of the National Parks and Wildlife Act 1974, or
 - (d) to any trust agreement within the meaning of the Nature Conservation Trust Act 2001, or
 - (e) to any property vegetation plan within the meaning of the Native Vegetation Act 2003, or
 - (f) to any biobanking agreement within the meaning of Part 7A of the Threatened Species Conservation Act 1995, or
 - (q) to any planning agreement within the meaning of Division 6 of Part 4 of the Act.
 - (h) to covenant imposed under Clause 4.5(9) and (10) of this instrument.
 - (3) This clause does not affect the rights or interests of any public authority under any registered instrument.
 - (4) Under section 28 of the Act, the Governor, before the making of this clause, approved of subclauses (1)–(3).

- 3. Justification for those objectives, outcomes and provisions and the process for their implementation.
 - A. Need for the planning proposal.
 - A1. Is the planning proposal a result of any strategic study or report?

The development of the Ku-ring-gai Town Centres LEP involved a comprehensive integrated planning approach over a 4+ year period and was based on a considerable range of planning studies. These studies included:

- Urban design studies
- Traffic and parking studies
- Retail study
- Employment lands study
- Open space acquisition
- Ecological and Biodiversity studies
- Heritage conservation area and items assessments
- Community facilities strategy
- Economic feasibility assessments

The extent of development envisaged under the draft town centres LEP is supported by the findings of these studies.

However, in accordance with the conditions of delegation issued to the Planning Panel for making the LEP, the draft LEP written instrument was prepared and exhibited without provisions that suspend laws pursuant to Section 28 of the EP&A Act. A potential consequence of this is that there may be in place private covenant or agreements which may prevent the development of land to the full potential envisaged under the LEP. The full extent of covenants, agreements or other similar instruments in place on land covered by the Town Centres LEP is unknown.

The planning proposal will help to facilitate the effective implementation of the Ku-ring-gai Town Centres LEP through removal of potential barriers created by existing private covenant, agreements or other similar instruments.

A2. Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

Yes, the planning proposal is the best ways of achieving the intended outcomes.

When adopting the final draft LEP at Section 68 stage, the Planning Panel resolved to request that the Minister amend the draft LEP under section 70 (IA) of the Act to insert the standard instrument model Clause 1.9A pertaining to Suspension of Covenants, Agreements and Instruments into the draft LEP.

This matter has been subsequently raised with the Department who advised that the clause should not be inserted using the Minister's functions under Section 70 (IA) and should be done through an amending LEP (Planning Proposal).

A3. Is there a net community benefit?

This proposal does not involve a rezoning and therefore the 'Net Community Benefit Test' is not applicable. However, the planning proposal is considered to be a benefit to the community as it will provide more certainty in the implementation of the Ku-ring-gai Town Centres LEP.

- B. Relationship to strategic planning framework.
- B1. Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy?

Yes, the Planning Proposal is consistent with the objectives and actions contained in the Sydney Metropolitan Strategy and the draft North Subregional Strategy.

B2. Is the planning proposal consistent with the local council's Community Strategic Plan, or other local strategic plan?

Yes. The planning proposal is consistent with the Ku-ring-gai Council Community Strategic Plan 2030, which includes the objective of the effective implementation of the Ku-ring-gai Town Centres LEP. The planning proposal will help to facilitate the implementation of the LEP through removal of potential barriers created by existing private covenant, agreement or other similar instruments.

B3. Is the planning proposal consistent with applicable state environmental planning policies?

Yes. This planning proposal is consistent with all applicable State Environmental Planning policies. Refer to Attachment B.

B4. Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?

Yes. The planning proposal is consistent with all applicable s.117 directions. Refer to Attachment B

The relevant directions are:

- 1.1 Business and Industrial Zones
- 2.1 Environment Protection Zones
- 3.1 Residential Zones
- 4.4 Planning for Bushfire Protection
- 6.1 Approval and Referral Requirements
- 6.2 Reserving Land for Public Purposes
- 7.1 Implementation of the Metropolitan Strategy
- C. Environmental, social and economic impact.
- C1. Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

No. The proposed clause will not apply to any covenant, agreement or other similar instruments created under relevant legislation to protect critical habitat or threatened species, populations or ecological communities, or their habitats.

C2. Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

No. The planning proposal will not result in any additional environmental effects to those considered during the process of making the Ku-ring-gai Town Centres LEP.

C3. How has the planning proposal adequately addressed any social and economic effects?

The planning proposal will not result in any additional social and economic effects to those considered during the process of making the Ku-ring-gai Town Centres LEP.

- D. State and Commonwealth interests.
- D1. Is there adequate public infrastructure for the planning proposal?

Yes. The planning proposal will not result in any additional demand for public infrastructure beyond that considered during the process of making the Ku-ring-gai Town centres LEP.

D2. What are the views of State and Commonwealth Public Authorities consulted in accordance with the gateway determination, and have they resulted in any variations to the planning proposal?

No consultation has been carried out with State and Commonwealth public authorities. Consultation will occur with relevant public authorities identified as part of the gateway determination.

It is noted that, in accordance with Section 28 of the EP&A Act, The inclusion of the proposed clause will require the approval of the Governor.

4. Details of the community consultation that is to be undertaken on the planning proposal.

It is proposed that the planning proposal will be exhibited in accordance with the requirements of section 57 of the EP&A Act and/ or any other requirements as determined by the Gateway process under section 56 of the EP&A Act.

This is considered a 'low impact planning proposal' requiring an exhibition period of 14 days. Public notification of the exhibition will include a notice in the local newspaper and a notice on Council's website.

During the exhibition period, the planning proposal, gateway determination and other relevant documentation will be available on Council's website and hard copies will be available at Council's Customer Service Centre and at Council's libraries.

ATTACHMENT A

PLANNING PANEL REPORT AND RESOLUTION

\$06347 24 November 2009

PLANNING PROPOSAL - AMENDMENT TO KU-RING-GAI DRAFT LOCAL ENVIRONMENTAL PLAN TOWN CENTRES 2009

EXECUTIVE SUMMARY

PURPOSE OF REPORT: For the Ku-ring-gai Planning Panel to consider a

planning proposal for the inclusion of a suspension of covenants clause in the Draft Ku-ring-gai Local

Environmental Plan Town Centres 2009.

BACKGROUND: The Ku-ring-gai Planning Panel adopted the final

Draft Ku-ring-gai Local Environmental Plan Town Centres 2009 in May 2009. The draft Plan is now being finalised by the Department of Planning prior to

consideration by the Minister for gazettal.

COMMENTS: Suspension of covenants, agreements and

instruments will enable development to be carried out

in accordance with the draft Ku-ring-gai Local Environmental Plan Town Centres 2009 or with a development consent granted under the Act.

RECOMMENDATION: That the Ku-ring-gai Planning Panel, in accordance

with Division 4 LEPs of the Environmental Planning and Assessment Act 1979 (as amended) initiate a draft Local Environmental Plan to insert the standard instrument model Clause 1.9A pertaining to Suspension of Covenants, Agreements and Instruments into the Draft Ku-ring-gai Local

Environmental Plan Town Centres 2009.

S06347 24 November 2009

PURPOSE OF REPORT

For the Ku-ring-gai Planning Panel to consider a planning proposal for the inclusion of a suspension of covenants clause in the Draft Ku-ring-gai Local Environmental Plan Town Centres 2009.

BACKGROUND

On 12 August 2008 the Department of Planning provided authorisation for the Planning Panel to exercise the following functions in respect of the draft Town Centres LEP subject to the terms and conditions contained within the Authorisation:

- Section 65 (1) certification of the draft LEP and
- Section 69 (1) Director-General's Report.

In order to exercise the function(s) under the Delegation the Ku-ring-gai Planning Panel was required to satisfy the relevant terms and conditions including the following (in part):

The draft LEP not containing provision's suspending laws pursuant to Section 28 of the EP&A Act.

In accordance with this condition of delegation, the draft LEP written instrument was prepared and exhibited without provisions that suspend laws pursuant to Section 28 of the EP&A Act.

However, when adopting the final draft LEP at Section 68 stage, the Planning Panel resolved to request that the Minister amend the draft LEP under section 70 (IA) of the Act to insert the standard instrument model Clause 1.9A pertaining to Suspension of Covenants, Agreements and Instruments into the draft LEP.

This matter has been subsequently raised with the Department who advised that the clause should not be inserted using the Minister's functions under Section 70 (IA) and should be done through an amending LEP (Planning Proposal).

COMMENTS

Suspension of laws is made possible by Section 28 of the Act, which only allows suspension to the extent necessary to enable development consistent with the Plan. For example, a private covenant limiting development on certain lots to a single dwelling would prevent two-storey development of the area even though it was permissible under the local plan.

Model local clauses for Standard Instrument LEPs

The NSW Department of Planning have a series of model local clauses for Standard Instrument Local Environmental Plans.

If a clause for the suspension of covenants is to be included, the model clause below should be used and inserted as clause 1.9A:-

1.9A Suspension of covenants, agreements and instruments [local]

- (1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a development consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.
- (2) This clause does not apply:
 - (a) to a covenant imposed by the Council or that the Council requires to be imposed, or
 - (b) to any prescribed instrument within the meaning of section 183A of the Crown Lands Act 1989, or
 - (c) to any conservation agreement within the meaning of the National Parks and Wildlife Act 1974, or
 - (d) to any trust agreement within the meaning of the Nature Conservation Trust Act 2001, or
 - (e) to any property vegetation plan within the meaning of the Native Vegetation Act 2003, or
 - (f) to any biobanking agreement within the meaning of Part 7A of the Threatened Species Conservation Act 1995, or
 - (g) to any planning agreement within the meaning of Division 6 of Part 4 of the Act.
- (3) This clause does not affect the rights or interests of any public authority under any registered instrument.
- (4) Under section 28 of the Act, the Governor, before the making of this clause, approved of subclauses (1)–(3).

It is also recommended that the Ku-ring-gai Planning Panel utilise the option to add to the model clause so that it does not apply to Clause 4.5(9) & (10) of the Standard Instrument. The reason for seeking this variation is to ensure the intent of the draft LEP to prevent "double dipping" of FSR is not undermined by the new Clause 1.9A.

CONSULTATION

The draft planning proposal will be exhibited in accordance with the new planning gateway proposal that will involve appropriate notification and submissions on the draft Plan from the relevant State Agencies and the general community.

FINANCIAL CONSIDERATIONS

The cost of preparing and processing this project is covered by the Strategy Department - Ku-ring-gai Planning Panel Budget.

CONSULTATION WITH OTHER COUNCIL DEPARTMENTS

Consultation where appropriate has been conducted in the preparation of this report.

S06347 24 November 2009

SUMMARY

The Ku-ring-gai Planning Panel adopted the final draft Ku-ring-gai Local Environmental Plan Town Centres 2009 in May 2009. The draft Plan is now being finalised by the Department of Planning prior to consideration by the Minister for gazettal.

The insertion of a new model clause into the draft Plan to allow the suspension of covenants, agreements and instruments will enable development to be carried out in accordance with the draft Ku-ring-gai Local Environmental Plan Town Centres 2009 or with a development consent granted under the Act.

RECOMMENDATION

- A. That the Ku-ring-gai Planing Panel in accordance with *Division 4 LEPs of the Environmental Planning and Assessment Act, 1979 (as amended)* initiate a draft Local Environmental Plan to insert a new model clause into the draft Plan to allow the suspension of covenants, agreements and instruments, the clause will not apply for certain purposes including clause 4.5(9) and (10) of the Standard Instrument.
- B. That the General Manager be granted delegation to prepare and submit a planning proposal to the Minister for Planning in accordance with Section 55 of the *Environmental Planning and Assessment Act, 1979 (as amended)* to insert a suspension of covenants clause and to include the following:
 - a statement of the objectives or intended outcomes of the proposed instrument:
 - an explanation of the provisions that are to be included in the proposed instrument;
 - iii. the justification for those objectives, outcomes and provisions and the process for their implementation (including whether the proposed instrument will comply with relevant directions under Section 117); and
 - iv. details of the community consultation that is to be undertaken before consideration is given to the making of the proposed instrument.
- C. That the planning proposal exhibition process be in accordance with the NSW Department of Planning's LEP Practice Note (PN09-003) 12 June 2009 and any other requirements from the LEP Panel.
- D. That a report be brought back to the Ku-ring-gai Planning Panel at the conclusion of the exhibition period.

Antony Fabbro

Manager Urban & Heritage Planning

Andrew Watson

Director Strategy & Environment

RESOLUTION OF KU-RING-GAI PLANNING PANEL 02 DECEMBER 2009

Planning Proposal - Amendment to Ku-ring-gai Draft Local Environmental Plan Town Centres 2009

File: S06347

For the Ku-ring-gai Planning Panel to consider a planning proposal for the inclusion of a suspension of covenants clause in the Draft Ku-ring-gai Local Environmental Plan Town Centres 2009.

Resolved:

(Moved: V Berkhout/Chairperson, B Tsakalos)

- A. That the Ku-ring-gai Planing Panel in accordance with *Division 4 LEPs of the Environmental Planning and Assessment Act, 1979 (as amended)* initiate a draft Local Environmental Plan to insert a new model clause into the draft Plan to allow the suspension of covenants, agreements and instruments, the clause will not apply for certain purposes including clause 4.5(9) and (10) of the Standard Instrument.
- B. That the General Manager be granted delegation to prepare and submit a planning proposal to the Minister for Planning in accordance with Section 55 of the *Environmental Planning and Assessment Act, 1979 (as amended)* to insert a suspension of covenants clause and to include the following:
 - i. a statement of the objectives or intended outcomes of the proposed instrument:
 - ii. an explanation of the provisions that are to be included in the proposed instrument:
 - iii. the justification for those objectives, outcomes and provisions and the process for their implementation (including whether the proposed instrument will comply with relevant directions under Section 117); and
 - iv. details of the community consultation that is to be undertaken before consideration is given to the making of the proposed instrument.
- C. That the planning proposal exhibition process be in accordance with the NSW Department of Planning's LEP Practice Note (PN09-003) 12 June 2009 and any other requirements from the LEP Panel.
- D. That a report be brought back to the Ku-ring-gai Planning Panel at the conclusion of the exhibition period.

CARRIED UNANIMOUSLY

ATTACHMENT B

ASSESSMENT OF PLANNING PROPOSAL
CONSISTENCY WITH
SECTION 117 DIRECTION AND
STATE ENVIRONMENTAL PLANNING POLICIES

PART A: DIRECTIONS UNDER S117(2)	Not relevant	Consistent
PART 1 – GENERAL DIRECTIONS		
1. Employment and Resources	-	r
1.1 Business and Industrial Zones		✓
1.2 Rural Zones	✓	
1.3 Mining, Petroleum production and Extractive Industries	✓	
1.4 Oyster Aquaculture	✓	
1.5 Rural Lands	✓	
2. Environment and Heritage	γ	Y
2.1 Environment Protection Zones		✓
2.2 Coastal Protection	✓	
2.3 Heritage Conservation	✓	
2.4 Recreation Vehicle Areas	✓	
3. Housing, Infrastructure and Urban Development		
3.1 Residential Zones		✓
3.2 Caravan Parks and Manufactured Home Estates	✓	
3.3 Home Occupations	✓	
3.4 Integrating Land Use and Transport	✓	
3.5 Development Near Licensed Aerodromes	✓	
4. Hazard and Risk		
4.1 Acid Sulfate Soils	✓	
4.2 Mine Subsidence and Unstable Land	✓	
4.3 Flood Prone Land	√	
4.4 Planning for Bushfire Protection		✓
5. Regional Planning		
5.1 Implementation of Regional Strategies	✓	
5.2 Sydney Drinking Water Catchments	✓	
5.3 Farmland of State and Regional Significance on the NSW Far North Coast	✓	
5.4 Commercial and Retail Development along the Pacific Highway, North Coast	✓	
5.5 Development in the vicinity of Ellalong, Paxton and Millfield (Cessnock LGA)	✓	
5.6 Sydney to Canberra Corridor (Revoked 10 July 2008. See amended Direction 5.1)	✓	
5.7 Central Coast (Revoked 10 July 2008. See amended Direction 5.1)	✓	
5.8 Second Sydney Airport: Badgerys Creek	√	
6. Local Plan Making		
6.1 Approval and Referral Requirements		√
6.2 Reserving Land for Public Purposes		√
6.3 Site Specific Provisions	√	
7. Metropolitan Planning		
7.1 Implementation of the Metropolitan Strategy		✓

PART B:	STATE ENVIRONMENTAL PLANNING POLICIES	Not relevant	Consistent
SEPP1	Development Standards	✓	
SEPP4	Development Without Consent	✓	
SEPP6	Number of Storeys in a Building	✓	
SEPP19	Bushland in Urban Areas		✓
SEPP21	Caravan Parks	✓	
SEPP22	Shops and Commercial Premises	✓	
SEPP30	Intensive Agriculture	✓	
SEPP32	Urban Consolidation (Redevelopment of Urban Land)		✓
SEPP33	Hazardous and Offensive Development	✓	
SEPP44	Koala Habitat Protection	✓	
SEPP53	Metropolitan Residential Development	✓	
SEPP55	Remediation of Land	✓	
SEPP60	Exempt and Complying Development	✓	
SEPP62	Sustainable Aquaculture	✓	
SEPP64	Advertising and Signage	✓	
SEPP65	Design Quality of Residential Flat Development	✓	
SEPP70	Affordable Housing (Revised Schemes)	✓	
SEPP	(Housing for Seniors or People with a Disability) – 2004		✓
SEPP	Building Sustainability Index : Basix 2004	✓	
SEPP	Major Development	✓	
SEPP	Mining, Petroleum Production and Extractive Industries	✓	
SEPP	Temporary Structures 2007	✓	
SEPP	Infrastructure 2007		✓
SEPP	Affordable Rental Housing 2009		✓
SEPP	Exempt and Complying Development Codes 2008		✓

PART C: REGION	AL ENVIRONMENTAL PLANS	Not relevant	Consistent
SYDNEY REP20	Hawkesbury-Nepean River		✓
SYDNEY REP	(Sydney Harbour Catchment) 2005		✓



Ku-ring-gai Planning Panel

Planning Proposal

Inclusion of a Suspension of Covenants, Agreements and Instruments in the Ku-ring-gai Local Environmental Plan (Town Centres) 2009