

Joint Regional Planning Panel – Pre-Gateway Review

The Southern Joint Regional Planning Panel (JRPP) has considered the request for a review of the proposed instrument as detailed below.

Declarations of Interest:

Greg Watson and Ernie Royston declared an interest in the matter and did not participate in the consideration of this matter.

The Pre-Gateway Review:

Date of Review:	26 and 27 September 2016
Dept. Ref. No:	PGR_2016_SHOAL_001_00
LGA:	Shoalhaven
LEP to be Amended:	Shoalhaven LEP 2014
Address / Location:	510 Beach Road, Berry
Proposed Instrument:	
Panel Chair:	Alison McCabe
Panel Members:	Renata Brooks and Mark Grayson

Reason for review:	☐	The council has notified the proponent that the request to prepare a planning proposal has not been supported
	☒	The council has failed to indicate its support 90 days after the proponent submitted a request to prepare a planning proposal

In considering the request, the JRPP has reviewed all relevant information provided by the proponent as well as the views and position of the Department of Planning and Environment and the relevant local government authority. Based on this review the JRPP recommends the following:

JRPP RECOMMENDATION:	☒	The proposed instrument should be submitted for a Gateway determination, subject to the matters raised in the recommendation of the Panel
	☐	The proposed instrument should not be submitted for a Gateway determination
Composition of Recommendation:	☒ Unanimous ☐ Not unanimous	Comments:

JRPP Advice and Justification for Recommendation:

1.0 Overview

The Panel considered this matter over two (2) days, Monday 26th and Tuesday 27th September 2016. The Panel has reviewed the Planning Proposal documents and accompanying reports, the Council report and the Department's report. The Panel inspected the site and surrounding area, which included walking the site and driving through adjoining rural residential subdivisions. The Panel had the benefit of presentations from:

- Graham Towers and Lisa Kennedy of the Department of Planning and Environment;

- Michael Brown, Stephen House, Robyn Johnson, Mark Passfield, Richard Hall, Robyn Bates and Troy Bates – the proponents team and representatives of the owner; and
- Tim Fletcher, Gordon Clarke and Danielle Ratcliffe of Shoalhaven Council.

The following additional information was requested by the Panel and provided by Council:

- Council report to the Development Committee of the 18th January 2016 regarding the Planning Proposal and resolution of this meeting;
- Minerals Resource Audit Shoalhaven City Council July 2014 prepared by Mineral Resources Branch Land Use Assessment;
- Background information regarding how the rezoning of adjoining lands to rural residential and transfers of lands to National Parks occurred– Amendment No. 166 to Shoalhaven LEP 1985;
- Identification of concessional lots in existence when LEP 166 was proceeding;
- Detailed contour information of the subject site and adjoining site; and
- All LEP maps for site and adjoining site and Kiama LEP 2012 maps for adjoining lands;
- General information regarding Cleary Brothers sand mining approval in the locality.

The Panel notes that both the Council and the Department of Planning and Environment are supportive of some change to the zoning of the site to provide rural residential development and transfer of a portion of the site to National Parks and Wildlife Services, just not at the density proposed by the proponent and with rural residential uses occurring in a more restricted area – i.e. development limited to north of the ridgeline (Council and the Departments position is that there should be no dwellings located on the southern side of the ridge).

The Panel's comments are directed to the material submitted for the Pre-Gateway Determination ("the current Proposal"). Council's submission had raised issues with the application, in that there were differences between the documents submitted and considered by Council, and those that were the subject of the Pre-Gateway Determination. The Panel noted that the Layout Plan Version B is the same, and that the document was re-dated. While it had minor changes in content, they were not of substance. The Layout Plan supporting the Planning Proposal and arising from the reports prepared was essentially the same – other than the further suggestions made by the Proponent as a result of questioning by the Panel.

2.0 Proposed Planning Framework

Zoning Changes

The subject site is zoned RU1 Primary Production and E2 Environmental Conservation. The E2 Environmental Conservation zone applies to a portion of the land that falls within Coomonderry Swamp, being a SEPP 14 wetland and a wetland of considerable environmental significance.

The Planning Proposal seeks to zone approximately two-thirds of the land as R5 Large Lot Residential with the remainder to be zoned E1 National Park and Nature Reserve.

As part of the presentation to the Panel, the Proponent sought to vary what was to be considered. The Proponent acknowledged that a VPA was the appropriate mechanism to provide for the transfer of lands to the National Parks and Wildlife Services. The Proponent also offered a similar zoning as development west of the site, where the southern slopes of the lots are zoned E2 Environmental Management. The Proponent suggested two-thirds of Lots 3-36 be zoned E2 Environmental Management as well as Lot 15 where Jims Forrest is located.

Background to Council Position

Council's position is that the current proposal should be modified to align more with the approach taken to the rezoning of the sites to the east and west. It is noted that in the consideration of the change in zoning to these sites, the subject land was deemed suitable for small rural lot subdivision

on the basis of the transfer of ownership of a portion of Coomonderry Swamp to the National Parks and Wildlife Services and the protection of the environmentally sensitive portion of the site.

The owner of the lands at this point in time advised Council that they did not wish to proceed and lands either side were rezoned. These actions have left a rural site isolated between two (2) areas of rural residential use.

This has some potential for continuing land use conflict (noting that the Panel was advised that no conflict has been reported under the current zoning) and is one reason Council is conditionally supportive of a change to the zoning to allow a similar form and density of rural residential use, that also facilitates the transfer of a state significant wetland into public ownership.

3.0 Strategic Merit Assessment

Policy Considerations

The proposal essentially seeks to:

- Remove an area of agriculturally viable land from agricultural production;
- Propose a greater protection over a biodiversity corridor, comprising Coomonderry Swamp, by dedicating it to the National Parks and Wildlife Service; and
- Propose an increase in rural residential land.

In considering the strategic merit of the proposal, a key question is whether the achievement of strategic biodiversity objectives and the increase in rural residential land outweighs the strategic impact of the loss of agriculturally viable land.

The Illawarra Shoalhaven Regional Plan (ISRP) sets strategic directions for:

- Protecting regionally important agricultural lands as an asset to food and fibre production; and
- Protecting the region's biodiversity corridors in local planning controls.

The SLEP 2014 has a biodiversity layer identifying the Coomonderry Swamp and Jim's forest, but does not have a layer identifying priority agricultural land or preferred locations for rural residential development- other than through the relevant zones and permitted uses. Council representatives indicated, there was no explicit strategic consideration of either rural residential development priorities or the location of priority agricultural land in the context of finalising the SLEP 2014.

The Plan of Management for the Seven Mile Beach National Park includes objectives for the protection of that part of Coomonderry Swamp outside the national park, but does not include an objective to add it to the national park estate. The proponent has provided a letter indicating that NPWS would accept the land, subject to Ministerial approval.

The proposal to dedicate the southern portion (Coomonderry Swamp) to the NPWS is consistent with the Illawarra Shoalhaven Regional Plan strategy to protect biodiversity corridors through planning instruments. This would represent an incremental improvement from the current E2 Environmental Conservation zoning.

It is understood that there is no demonstrated imperative to increase rural residential land in existing strategic documents, nor is there a shortage of land with appropriate zoning for residential development. However, it is understood that there is demand from buyers and sellers for rural residential land.

Land Use Context

The Council had previously considered the subject land in the context of amendments to the SLEP 1985 (Amendment No 166) which rezoned the adjacent lots to allow for rural residential development.

At that time, the reported Council view was that the value of protecting the Coomonderry Swamp outweighed the loss of prime agricultural and cropping land. The subject land was originally included in considerations, but the owner withdrew from discussions prior to finalisation of the amendment, which was gazetted in 2000.

As a result of Amendment No 166, the rural residential development to the east and west of the subject land has potentially constrained future agricultural opportunities on the subject land by increasing the risk of land use conflict, and has exacerbated fragmentation of the land from other rural lands.

The subject land has a set of characteristics which appear to be unique within the area east of Berry and north of the Shoalhaven River. These include:

- The land is bounded to the east and west by the two areas rezoned by Amendment No 166 to rural residential development.
- The land includes part of Coomonderry Swamp in its southern portion and the rest of the swamp is to the south (zoned E2).
- The land to the north is zoned RU1 Primary Production and comprises substantial areas identified as Biophysical Strategic Agricultural Land (BSAL) in the Strategic Agricultural Land Map – sheet STA_042 of the Mining SEPP.
- The subject land predominantly comprises soil types suitable for high quality grazing (formerly identified as prime agricultural and cropping land), but only small amounts of land identified in the Mining SEPP as BSAL. However, the agricultural assessment report provided by the proponent references a previous 1994 study of the entire site indicating that the soils have characteristics consistent with the definition of BSAL.

The Panel was not presented with evidence of any more recent assessment of land capability of the subject land from an agricultural perspective.

There are about 15 other lots to the south west with split lot RU1/E2 zoning which include portions of Coomonderry Swamp (similar to the subject land) – none of these lots has rural residential land on both sides. As a consequence of an informal consultation, Council received 1 submission in support, 10 opposed, and 14 opposed to the proposal in its current form.

The immediate lands to the east and west are zoned in a similar way to that proposed. The subject site has a history of Council consideration for rural residential lots. A consideration that is linked (p.8)* to a specific public benefit of achieving a transfer of environmentally valuable lands to public ownership and their ongoing protection. The site presents as essentially an infill of rural lands located between two (2) rural residential subdivisions

Agricultural land

Generally the alienation of agricultural land is not consistent with the Illawarra Shoalhaven Regional Plan. Furthermore the proposal is inconsistent with S117 directions 1.2 and 1.5 (Rural Zones and Rural Lands) unless it is justified by a strategy or meets the test of being of “minor significance”. It is the Panels understanding that there is no strategy relevant to rural zones or rural lands justifying the proposal. However the proposal could be considered to be of minor significance if:

- The area impacted by the proposal is small in the context of the region; **and**
- The proposal will not establish a precedent for other rural lands.

Is the proposal of minor significance?

The proposal removes 62ha of rural land (that portion of the lot which is not Coomonderry Swamp) representing 3% of the total area of land used for agriculture in the LGA (reported in the agricultural assessment report submitted by the proponent as 1960 Ha) This is not insignificant. There is a risk that rezoning the subject land will establish an expectation or precedent that other land zoned RU1 Primary Production could or should be rezoned as R5 Large Lot Residential. This risk is exacerbated by the absence of strategic identification of regionally important agricultural lands and the absence of a strategy to identify preferred locations for rural residential subdivisions. However this risk is partly mitigated by the unique features of the proposal as outlined above.

Conclusion

At best, the proposal provides a modest biodiversity outcome by strengthening the protection for the 12.85ha which is part of Coomonderry Swamp, adding to the 169ha (of the total 670ha) which is currently zoned E1 National Parks and Nature Reserves (an 8% increase).

The impact on achieving the ISRP outcome of protecting regionally significant agricultural lands as an asset to food and fibre production and the significance of the departure from S117 1.2 and 1.5 is lessened by potential constraints already created on the subject land by Amendment No 166 to the SLEP 1985 allowing rural residential development to the east and west.

The regional strategies give equal weight to environmentally sensitive lands and strategically important agricultural land. This land is still reasonable agricultural land and of a size that could support primary production. However its location between existing rural residential subdivisions does give rise to the potential for land use conflicts.

It is the Panel's view that, only because there has been a history of consideration, and the fact that it is an infill, that there is strategic merit in changing the zoning to complement adjoining land uses and achieve the transfer of a portion of Coomonderry Swamp to public ownership.

On balance while the Panel is of the view that there are justifiable reasons to maintain the agricultural use of the site, the earlier land use decisions of adjoining lands distinguishes this site from the other sites exhibiting similar characteristics, which means strategically it is appropriate to revisit the planning framework.

4.0 Site Specific Merits

Land Use and Zoning

While the Panel is of the view that the zoning could change, it is of the view that the density and yields currently proposed are not acceptable in the event of rezoning. Any change needs to reflect the same principles as the adjoining lands. These principles include a combination of factors – land capability and rural character. This means that a zoning framework should provide for development restricted to behind and to the northern side of the ridge – generally lands between Beach Road and RL30/32 being the area proposed as R5 Large Lots Residential.

The extent of the current proposed lot yield and sizes is not supported. The density is not consistent with the rural character of the variety of large lot sizes in the adjoining R5 zoned land to the east and west. The density of lots needs to reflect environmental constraints and the rural character.

Specifically, Jim Forrest should be in one lot with a dwelling entitlement that accommodates all its APZ within the one lot.

The key elements should include:

- Lands around Jim Forrest and south of the ridge being zoned E2 Environmental Protection to ensure limited and restricted use;
- Delineation of the area as proposed Lot 47 to be transferred to National Parks and Wildlife Services and zoned appropriately as E1 or E2;
- Controls need to be drafted to promote a variety of lot sizes greater than a minimum of 1 hectare. This appropriately reflects the rural character and there are provisions already in existence in the SLEP 2014 at clause 4.2B being the type of controls applied to the R5 zoning; and
- Controls to maintain all vegetation on site and that there is limited change to land levels.

VPA

It is the Panel's view that the appropriate mechanism to facilitate transfers of land to National Parks and Wildlife Services is through a VPA and this should accompany the Planning Proposal. In the absence of a clear mechanism the Proposal has limited public benefit and cannot be distinguished from any other rural subdivision proposal, which would rely on a Strategic Framework to proceed.

Further Studies

The Panel agrees that there are further studies to be carried out and that these need to be undertaken prior to the exhibition on the Planning Proposal.

5.0 Conclusion

The Panel acknowledges that the subject site has value as agricultural land and that Council has not undertaken a strategic exercise of identifying lands suitable for rural residential landscape and subdivision. At the same time the land use decisions of Council have resulted in this site being bordered to the east and west by established rural residential land uses that would pose some constraint to continuing agricultural uses. Furthermore, there is public benefit in ensuring an environmentally significant wetland is held in public ownership. The land use context and opportunity to transfer lands to public ownership are the distinguishing features of this proposal, given that there are other split zoned sites that may see the transfers of E2 Environmental Conservation zoned lands to NPWS as a means of achieving a change to zoning.

It is the Panels view that Council needs to address this strategically to avoid future ad hoc decisions. In respect to the site specific matters, it is the Panels view that this proposal should only proceed if the previously identified changes are made.

An appropriate mechanism such as a VPA also needs to run with the Planning Proposal as it should not proceed unless there is certainty around mechanism for transfers of land to public ownership.

6.0 Recommendation

1. The Panel considers that the Planning Proposal has strategic merit and recommends that the Planning Proposal proceed to a gateway determination.
2. The Panel is of the view that the following amendments should be made:
 - Lands around Jim Forrest and south of the ridge being zoned E2 Environmental Protection to ensure limited and restricted use;
 - Delineation of the area as proposed Lot 47 to be transferred to National Parks and Wildlife Services and zoned appropriately as E1 or E2;
 - Controls being drafted to promote a variety of lot sizes greater than a minimum of 1 hectare, to appropriately reflect the rural character; and
 - Controls to maintain all vegetation on site and that there is limited change to land levels.

3. The Panel recommends that there should be certainty around the transfer of lands to public ownership and that the mechanism for these should accompany the Planning Proposal.
4. There should not be any further consideration of rezoning proposals for rural residential subdivision until Council has developed a rural residential strategy (it is understood that there is a current resolution to develop a new position on rural residential land) and has identified regionally important agricultural lands.

	
Endorsed on 22/11/2016 by	Alison McCabe (Chair)
	
Renata Brooks	Mark Grayson