

8.2. Planning proposal to permit dwellings on deemed concessional lots

This report recommends that *Bega Valley Shire Local Environmental Plan 2013* is amended to incorporate provisions to permit consideration of dwellings on deemed concessional lots.

Director Community Environment and Planning

Officer's Recommendation

That Council:

1. Authorise Council officers to submit the planning proposal (Attachment 1) and supporting information to the Department of Planning, Industry and Environment requesting a Gateway Determination under Section 3.34 of the *Environmental Planning and Assessment Act 1979*.
2. Consider a further report from staff in relation to feedback received during public and agency exhibition undertaken as part of the Gateway process.

Executive Summary

State Environmental Planning Policy (Rural Lands) 2008 (Rural SEPP) amended *Bega Valley Shire Local Environmental Plan 2002* (BVLEP 2002) in 2008 by removing the clauses that enabled the subdivision of land to create concessional lots and approval of a dwelling on a deemed concessional lot.

As a result of the changes to BVLEP 2002, there was an unintended consequence that resulted in Council being able to consider the erection of a dwelling on most lots within rural areas. The intention of the Rural SEPP was to stop concessional lot subdivision but not to remove existing or create additional dwelling entitlements.

Bega Valley Local Environmental Plan 2013 (BVLEP 2013) does not currently provide for consideration of dwellings on deemed concessional lots that existed before the Rural SEPP, nor provisions that permit dwellings on the majority of rural lots that existed after the Rural SEPP. This report considers how Council might seek to reinstate the previous provisions to enable consideration of dwellings on deemed concessional lots. [Background](#)

At the meeting of 9 October 2019, Council considered a report on the outcomes of the exhibition of the draft *Rural Living Strategic Directions Report* (which subsequently became the adopted *Rural Residential Strategy* in February 2020). The report of 9 October 2019 considered issues raised in submissions to the draft including submissions that dwelling opportunities on certain rural properties had been lost following the gazettal of BVLEP 2013. The staff response in the report stated that this issue was beyond the scope of the project, and that Council staff would prepare a separate report on this matter for consideration at a future Council meeting.

Following further submissions on the matter to the exhibition of the revised draft *Rural Residential Strategy*, Council resolved on 5 February 2020: "That Council staff prepare a report by the end of this calendar year, to allow Council to consider the issue of deemed concessional lots". This report has been prepared in response to that resolution.

Existing holdings

An existing holding is all the adjoining/adjacent land in a rural area that was owned by a person/s on 7 January 1966. Each existing holding could have a dwelling, and in addition, prior to the implementation of the Rural SEPP in 2008, Council could consider subdivision for the purposes of dwellings within existing holdings and/or the approval of dwellings under the

provisions of BVLEP 2002. These provisions were commonly known as concessional lot subdivisions and deemed concessional lots.

Concessional lot subdivisions

Concessional lot subdivision provisions existed in Bega Valley Shire's LEPs from 1987 until the Rural SEPP in 2008. These provisions permitted the creation of lots between 2ha and 10ha for dwellings in rural areas. Concessional lot subdivisions were created from intact existing holdings or the largest part of an existing holding. The maximum number of concessional lots that could be created from an existing holding was determined by a formula based on the area of the existing holding.

Deemed concessional lots

Under *Bega Valley Local Environmental Plan 1987* (BVLEP 1987) and BVLEP 2002, Council could grant consent to the erection of a dwelling house on an existing lot (including a Crown portion) within rural zones. Such lots were "deemed" to be created under the concessional lot subdivision provisions for existing holdings and were included in the yield calculations for the maximum number of concessional lots that could be created for the purposes of a dwelling from an existing holding.

Importantly, the provisions stated that the effect of approving a lot as a deemed concessional lot must be substantially the same as if the land was subdivided as a concessional lot. The notes accompanying BVLEP 2002 explain this in the following way: *"This provides for crown portions to have a dwelling entitlement where a lot of similar size and impact could otherwise be created under [the concessional lot provisions]. With respect to lot area, generally the crown portion is to be commensurate with the 2-10ha requirement under [the concessional lot provisions] although there may be mitigating circumstances that permit a lot of larger area, provided that all other assessment criteria under the plan are satisfied."*

Under BVLEP 2002, the assessment criteria that had to be met for a deemed concessional lot to be eligible for consideration of a dwelling included that the land or development:

- *has a suitable dwelling house site, and*
- *will not, because of its use, affect the economic viability of existing farmland, and*
- *is not located near operational aspects of a farm, and*
- *is located outside areas designated as Class 1 or 2 in the New South Wales Department of Agriculture's "Agricultural Land Classification Atlas, Far South Coast Region New South Wales" dated August 1986, and*
- *will not be part of an inholding within a national park within the meaning of the National Parks and Wildlife Act 1974, and*
- *will not have a dwelling located on it within 100m of the boundary of a national park or nature reserve within the meaning of the National Parks and Wildlife Act 1974, and*
- *will have legal and practical access to an existing Council-maintained public road, and*
- *will not create a need for any additional access onto a State highway or an arterial road, and*
- *will have a dwelling site located outside any areas of bushfire hazard identified by the Council, and*
- *will be serviced by existing electricity reticulation or short extensions from the existing reticulation network, or will utilise alternative stand-alone electric power systems, and*
- *has soils suitable for on-site sewage management disposal, and*
- *does not contain or adjoin perennial streams and does not have access by easement for drawing water from perennial streams, and*

- *will not adversely affect important features of cultural or natural heritage or disrupt regional ecological systems or processes*

State Environmental Planning Policy (Rural Lands) 2008

Concessional lot provisions were removed from BVLEP 2002 by the application of the Rural SEPP on 9 May 2008. This was one of the primary objectives of the Rural SEPP in line with the outcomes of the Central West Rural Lands Inquiry in 2007. Other purposes of the Rural SEPP included: facilitating the orderly and economic use and development of rural lands for rural and related purposes; assisting in the proper management, development and protection of rural lands; and minimising land use conflict.

The implementation of the Rural SEPP removed clauses from all NSW councils' LEPs relating to concessional lot subdivision, including provision for deemed concessional lots.

These changes inadvertently enabled dwellings to be erected on almost all existing lots in rural areas because there was no longer a requirement for them to qualify as a deemed concessional lot. These provisions remained in place from 9 May 2008 until the commencement of BVLEP 2013 on 2 August 2013.

Options

1) Do nothing

In the 12 years since the implementation of the Rural SEPP in 2008 Council has been made aware of five cases where landowners may have lost dwelling entitlements due to the removal of deemed concessional lot provisions. The imminent removal of concessional lot provisions was very widely known in the Bega Valley Shire (and rural NSW) at the time, and Council received many development applications for concessional lot subdivisions in the period immediately prior to the implementation of the Rural SEPP. Planning instruments (such as LEPs and NSW Government legislation) are continually being amended, which impacts on the development potential of individual sites at various points in time. The implementation of the Rural SEPP is just one example of such an amendment.

2) Prepare a planning proposal to reinstate the deemed concessional provisions as they existed in BVLEP 2002 on 8 May 2008 (the day before gazettal of the Rural SEPP)

This is the recommended option. It is noted that while DPIE has not endorsed this option, it has also not ruled it out. To mitigate DPIE's concerns regarding the scale of unplanned rural development that may result from this proposed amendment, as well as achieve Council's and the NSW Government's objectives with regard to rural land use planning, it is proposed to include clarification that deemed concessional lots must be between 2ha and 10ha in size.

Both the adopted *Bega Valley Shire Rural Residential Strategy 2020* and *South East Tablelands Regional Plan 2036* set out criteria for future rural residential development. These criteria are aimed at: ensuring that farmers have the right to farm by minimising land use conflict from non-agricultural land uses; maximising use of existing physical, social and community infrastructure; and avoiding areas affected by natural hazards or high environmental or cultural values. These criteria ensure that future rural residential development supports our towns and villages, is consolidated near existing developments and infrastructure and does not impact on the Shire's natural advantage.

Reinstating the deemed concessional lot provisions without clarifying the intention of BVLEP 2002 to primarily permit deemed concessional lots on parcels of land between 2ha and 10ha could enable the development of many hundreds of lots on or near viable agricultural landholdings or in remote, sensitive locations. This would undermine the purpose of Council's *Rural Residential Strategy*, expose residents and emergency services personnel to increased risk and add to road and other infrastructure capital and maintenance burden for Council.

Council officers are of the opinion that reinstating deemed concessional lot provisions only on lots that are substantially the same size as a concessional lot will reinstate the dwelling entitlements that were inadvertently lost through the implementation of the Rural SEPP without creating an undue burden on Council's infrastructure or services or significantly undermining the intention of Council's or the NSW Government's strategic planning in rural areas. Mitigation of potential risks from natural hazards or to the environment can be managed through the application of relevant current planning legislation in the development assessment process. This includes the *Planning for Bushfire Protection Guidelines 2019* and the *Biodiversity Conservation Act 2016*.

It is noted that Council will still retain some flexibility in the application of the criteria for a deemed concessional lot through the application of BVLEP 2013 Clause 4.6, which permits variations to standards contained in the BVLEP 2013.

3) Adopt the new DPIE model clause for erection of dwelling houses on land in certain rural and environmental protection zones.

Since the adoption of BVLEP 2013, DPIE has amended the model clause for considering dwellings in rural areas from: "**a lot created under an environmental planning instrument before the plan commenced on which the erection of a dwelling house was permissible immediately before that commencement,**" to: "**a lot created before the plan commenced on which the erection of a dwelling house was permissible immediately before that commencement.**"

It is noted that immediately before the commencement of BVLEP 2013, BVLEP 2002 permitted the approval of dwellings on the majority of rural lots within the Shire, including Crown portions and parish lots. As discussed elsewhere in this report, this situation was not a decision made by Council, but an unintended consequence of the implementation of the Rural SEPP.

It is acknowledged that the unintended outcome of the Rural SEPP was contrary to the objectives of both the Rural SEPP itself as well as BVLEP 2002, which both aimed to minimise land use conflict and fragmentation of rural lands. The new model clause is not suitable for the Bega Valley Shire because it would reinstate dwelling entitlements that were inadvertently created by the Rural SEPP, leading to poor planning outcomes.

Under this option, more rural residential lots could be created and occupied close to or within large commercial farms. This could have a range of impacts including further fragmentation of rural land, increased land use conflicts and increased demand for infrastructure and services in remote areas. It would also undermine Council's and the NSW Government's strategic planning for the provision of rural residential development to provide opportunities for rural lifestyle in appropriate locations in rural areas as discussed in option 2 above.

4) Amend the Rural Residential Strategy to permit owners to lodge site specific planning proposals

A fourth option could be to amend the *Rural Residential Strategy* to support lodgement of planning proposals that amend the minimum lot size map for parcels where it has been demonstrated that they would have met the deemed concessional lot provisions of BVLEP 2002 immediately prior to the introduction of the Rural SEPP. Amending the *Rural Residential Strategy* would require endorsement by DPIE. The preparation of site specific planning proposals is not recommended because it would place considerable cost on owners of land in addition to normal development application costs, and the outcome would be less certain because the planning proposal process includes referrals to NSW Government agencies who require detailed reports and may object to planning proposals proceeding.

Community and Stakeholder Engagement

Engagement undertaken

No community consultation has yet been undertaken by Council for this planning proposal.

Council officers have consulted with DPIE regarding options to reinstate deemed concessional lot provisions. During this consultation, DPIE clarified that the intent of the Rural SEPP was to remove the clauses that enabled councils to approve concessional lots, but not to remove existing dwelling entitlements nor create additional dwelling entitlements. DPIE has advised Council that the reintroduction of planning provisions in BVLEP 2013 to reinstate dwelling entitlements that existed immediately prior to the Rural SEPP would not be inconsistent with the intent of the Rural SEPP. However, DPIE has raised several issues relating to this possible course of action.

During the consultation, DPIE requested information to better understand the scale of the issue and planning implications of reinstating deemed concessional lot dwelling entitlements. There are currently 1,663 existing holdings on old titles across the Shire, of which approximately 132 are consistent with the deemed concessional lot definition of being between 2ha and 10ha in size. It is not clear whether there is still capacity for dwellings within all these relevant existing holdings.

This number increases to 1,134 if lots between 2ha and 16ha are eligible for consideration as deemed concessional lots due to “mitigating circumstances”. An exact figure or identification of affected parcels of land cannot readily be determined because of the flexibility of the deemed concessional lot provisions and the amount of research required to assess each holding to determine if it would qualify as a deemed concessional lot.

DPIE noted that, since the Rural SEPP came into effect 12 years ago, there have been several changes to legislation and policy that would affect development consent for a rural dwelling, such as new bushfire, biodiversity and access provisions. DPIE raised concerns that reinstating dwelling entitlements may create false expectations about the development potential of a lot, if development consent cannot be granted due to these constraints or if dwellings were approved on lots and subsequently created significant planning issues. Council officers acknowledge that it may be the case that some of the lots will be significantly constrained and note that many Crown portions are located either within existing farm holdings or in remote, marginal country. Development consent may not be granted on these lots were planning matters cannot be adequately addressed.

Engagement planned

Community engagement for the planning proposal will be carried out in accordance with Council's *Community Engagement Strategy* and *Community Engagement and Communications Toolkit*. The project is assessed to be Level 2 - Consult on the IAP2 spectrum.

The Gateway Determination will confirm community consultation requirements. It is likely that the planning proposal will be exhibited as a ‘low’ impact proposal for a period of not less than 14 days in accordance with Section 5.5.2 of *A Guide to Preparing Local Environmental Plans*.

Council will follow community and agency consultation requirements as per the Gateway Determination and *Bega Valley Shire Community Engagement Strategy*. It is planned to advertise the planning proposal on Council's website and in local newspapers.

Following community and agency consultation, a further report will be prepared for Council outlining feedback on the planning proposal and any recommended changes in response to submissions prior to resolving whether to proceed with amending BVLEP 2013.

Financial and Resource Considerations

The preparation of the planning proposal and its public exhibition will be undertaken as part of Council's regular work program and within the adopted 2020-21 budget.

Item	\$ Excl GST
Expenditure Detail	
Advertising	\$500
Total Expenditure	\$500
Source of Funds	
General Fund	\$500
Total income available	\$500
Total Project Capital Cost	Nil
Total Available Construction Funding	N/A
Project Funding Shortfall	Nil

Legal /Policy

The planning proposal has been prepared in accordance with Section 3.33 of the *Environmental Planning and Assessment Act 1979* and the NSW Department of Planning, Industry and Environment's *A Guide to Preparing Planning Proposals* (December 2018).

Impacts on Strategic/Operational/Asset Management Plan/Risk

Strategic Alignment

The planning proposal does not align with any Council strategies but instead seeks to reinstate dwelling entitlements for deemed concessional lots that were inadvertently lost with the application of the Rural SEPP in 2008.

Environment and Climate Change

The planning proposal has regard to environmental considerations and sustainability principles. The extent of any environmental impacts is expected to be limited due to the relatively small number of lots affected and the application of the assessment criteria for deemed concessional lots. Site-specific environmental impacts would be considered as part of any development application, should the Minister for Planning and Public Spaces endorse the planning proposal.

Economic

The planning proposal may increase property values of affected land; however, the extent of this impact is expected to be limited to approximately 132 rural lots.

Risk

The planning proposal may increase risk to life from placing dwellings in remote areas as well as increase the risk of land use conflict with existing agricultural operations. However, the extent of any additional risks is expected to be limited due to the relatively small number of lots affected and the application of the assessment criteria for deemed concessional lots at the development application stage.

Social / Cultural

The planning proposal may cause social impacts from placing dwellings in remote areas as well as impact cultural values. However, the planning proposal may also have positive social benefits in reinstating dwelling opportunities for certain rural landholders. The extent of any social or cultural impacts is expected to be limited due to the relatively small number of lots affected and the application of the assessment criteria for deemed concessional lots.

Attachments

1. Deemed concessional lots planning proposal