

8.2. Finalisation of planning proposal to permit dwellings on deemed concessional lots

The planning proposal to amend the *Bega Valley Local Environmental Plan 2013* to permit dwellings on deemed concessional lots has been publicly exhibited. This report seeks Council's resolution to progress the planning proposal.

Director Community Environment and Planning

Officer's Recommendation

That Council:

1. Support the amendment to *Bega Valley Local Environmental Plan 2013* (Amendment 39) (Attachment 1) to incorporate provisions to permit consideration of dwellings on deemed concessional lots as exhibited and request that the Minister for Planning and Public Spaces make the plan.
2. Advise those who made a submission during exhibition of the planning proposal of Council's resolution on this matter.

Executive Summary

Public exhibition of the planning proposal to amend *Bega Valley Local Environmental Plan 2013* (BVLEP 2013) to permit consideration of dwellings on deemed concessional lots took place between 7 May 2021 and 6 June 2021. Three public and three agency submissions were received during the exhibition period. After reviewing the submissions, no changes to the exhibited planning proposal are recommended.

The purpose of this report is to advise Council of the feedback received during exhibition of the planning proposal and seek a resolution to progress the matter to finalisation. As the NSW Department of Primary Industries Agriculture Division (DPI Agriculture), NSW Department of Planning, Industry and Environment Biodiversity and Conservation Division (BCD) and the NSW Rural Fire Service (RFS) have formally objected to the planning proposal, Council does not have delegation to finalise the matter. The amendment to BVLEP 2013 must be finalised by the Minister for Planning and Public Spaces.

Background

State Environmental Planning Policy (Rural Lands) 2008 (Rural SEPP) amended *Bega Valley Shire Local Environmental Plan 2002* (BVLEP 2002) 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 NSW Department of Planning, Industry and Environment (DPIE) has confirmed that 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. At its meeting of 16 December 2020, Council considered a report on options to reinstate provisions to enable consideration of dwellings on deemed concessional lots and resolved to:

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.*

Options

Council can proceed to request that the matter is finalised by the Minister for Planning and Public Spaces. Although the outcome of the planning proposal is at the discretion of the Minister because of the three unresolved NSW Government agency objections, this option is recommended because it may achieve the intention of the planning proposal to re-instate dwelling entitlements lost following the implementation of the Rural SEPP.

Alternatively, Council could choose to formally withdraw the planning proposal and BVLEP 2013 would remain in its current form.

Community and Stakeholder Engagement

Engagement undertaken

Consultation was conducted in accordance with the requirements of the Gateway Determination and Council's adopted *Community Engagement Strategy*. Public exhibition was undertaken for 30 days from 7 May 2021 and 6 June 2021. Exhibition of the planning proposal was notified on the 'Have Your Say' page of Council's website, a public notice was placed in each of the three local papers and the development professionals group was notified by email.

In accordance with the Gateway Determination, consultation with DPI Agriculture, the RFS and the BCD was also undertaken.

Summary of submissions

Three public and three agency submissions were received during the exhibition. The key issues raised in the submissions are outlined below including discussion from Council staff.

1) NSW Department of Primary Industries - Agriculture

Issue summary: DPI Agriculture objected to reinstating dwelling entitlements on deemed concessional lots due to the inconsistencies with state, regional and local planning strategies including the *Right to Farm Policy 2015* and Directions 8 and 28 of the *South East and Tablelands Regional Plan 2036* that aim to protect important agricultural land and provide rural residential development in a strategic manner.

Staff response: Council staff presented a detailed response to the issues raised in DPI Agriculture's submission outlining that, although inconsistent with policy, the dwelling entitlements were inadvertently removed and therefore should be able to be restored in this instance; any net increase in land use conflict would be negligible, enabling dwellings on these lots land may support agricultural production through the provision of accommodation for rural workers; and if Council were to adopt DPIE's model clause for dwellings in rural and environmental protection zones this would have a far greater impact on commercial farming operations. However, the agency did not remove the formal objection.

Recommendation: It is recommended that Council proceed with the planning proposal and requests that the matter be finalised by the Minister for Planning and Public Spaces.

2) NSW Rural Fire Service

Issue summary: The RFS stated that the proposal should not progress in its current form because it is not satisfied that the proposal is consistent with the Section 9.1 Directions of the *Environmental Planning and Assessment Act 1979* regarding bushfire hazards. In order to support the progression of the planning proposal the RFS required either:

- a bushfire hazard assessment of any land expected to gain a dwelling entitlement as a result of the amended LEP clauses to demonstrate all effected lots can comply with *Planning for Bush Fire Protection 2019*, or
- that proposed clause 6.12 (2)(k) be amended to read, the dwelling house will not be located on land mapped as bushfire prone.

Staff response: Council staff presented a detailed response to the issues raised in the RFS submission, which included outlining that neither of these options were achievable because the exact land affected by the planning proposal was unknown and that amending proposed clause 6.12 (2)(k) as suggested would exclude all lots from consideration because virtually all rural land in the Bega Valley Shire is mapped as bushfire prone. However, the RFS did not support the progression of the planning proposal.

Recommendation: It is recommended that Council proceeds with the planning proposal and requests that the matter be finalised by the Minister for Planning and Public Spaces.

3) DPIE Biodiversity and Conservation Division

Issue summary: BCD responded that further information is required to demonstrate that Ministerial Directions regarding environment protection zones, coastal management, flood prone land and the implementation of regional plans were met. The response stated that Council should demonstrate that the proposed dwelling entitlements will not lead to any increase in environmental harm through existing and proposed provisions including assessment against other provisions in BVLEP 2013, the *Bega Valley Shire Development Control Plan 2013*, *Biodiversity Conservation Act 2016*, *Coastal Management Act 2016*, and State Environmental Planning Policies (SEPP) such as *SEPP (Vegetation in Non-Rural Areas) 2017* and *SEPP (Coastal Management) 2018*.

Staff response: Council staff presented a detailed response to the issues raised in the agency submission including outlining that detailed assessment required by the agency was not achievable because the exact land affected by the planning proposal was unknown; however, the agency did not support the progression of the planning proposal.

Recommendation: It is recommended that Council proceeds with the planning proposal and requests that the matter be finalised by the Minister for Planning and Public Spaces.

4) 2-10 hectare standard for deemed concessional lots

Issue summary: Lot 191 DP 750238 and Lot 14 DP 750223 qualified as deemed portions under the provisions of BVLEP 2002; however, the proposed amendment introduces an additional standard that caps the size of deemed concessional lots to 10 hectares or less. The submissions stated that the rationale of this standard is appreciated but should not be applied to deemed concessional lots that are currently owned by people who do not own another lot containing a dwelling within the relevant existing holding.

Staff response: It is the intention of the planning proposal to strengthen the 2-10 hectare standard for deemed concessional lots; however, the standard is not new. Under the provisions of BVLEP 2002 deemed concessional lots were required to be “*substantially the same*” as concessional lots, which were all between 2 hectares and 10 hectares. The notes of BVLEP 2002 also clarified that “*With respect to lot area, generally the [deemed concessional lot] is to be commensurate with the 2-10ha requirement ... although there may be mitigating*”

circumstances that permit a lot of larger area, provided that all other assessment criteria under the plan are satisfied.”

Removing or amending the 2-10 hectare standard for certain land on the basis of ownership is not supported as it would have the effect of enabling some vacant Crown portions to be considered as deemed concessional lots that would not have qualified under the provisions of BVLEP 2002.

Recommendation: No change to planning proposal.

5) Allocation of deemed concessional lot dwelling entitlements within holdings

Issue summary: The planning proposal will give back dwelling entitlements to some landowners who already achieved a dwelling under the previous provisions and reinstates the worst aspects of the old concessional lot provisions that the Minister saw need to remove through the Rural SEPP. Example cited of an existing holding with five lots that may qualify as vacant deemed concessional lots with four separate owners but where only two dwelling entitlements exist. Submission that the owner of Lot 22 DP 1103458 has a higher right to at least one of the remaining entitlements as they are one of several owners that do not have a dwelling within the holding.

Staff response: Giving preferential treatment to one landowner over another on the basis that they made a submission to Council on a matter is inequitable and is not based on sound planning principles. The planning proposal seeks to re-instate the provisions for deemed concessional lots essentially as they existed prior to the implementation of the Rural SEPP in 2008 and, if the planning proposal is finalised, the approval of dwellings under the provisions will be subject to the full development assessment process, which will include demonstrating that there is capacity in the existing holding for an additional dwelling at the time of lodgement.

Recommendation: No change to planning proposal.

6) Use of Schedule 1 to create dwelling entitlements for certain lots

Issue summary: Request for a new provision in BVLEP 2013 Schedule 1 ‘Additional Permitted Uses’ to include development for the purposes of dwelling houses as the means to open dwelling entitlements on Lot 138 DP 750227, Lot 14 DP 750223 and Lot 22 DP 1103458.

Staff response: Clause 2.5 of the Standard Instrument Order allows Council to permit additional uses for particular land in Schedule 1 of BVLEP 2013. These uses are permitted in addition to those identified in the LEP Land Use Table for the nominated sites only. Lot 191 DP 750238, Lot 14 DP 750223 and Lot 22 DP 1103458 are predominantly zoned either RU1 Primary Production or E3 Environmental Management. As both zones currently permit dwelling houses with consent in the land use tables, the use of Schedule 1 would not create a dwelling entitlement for these properties, as the provisions of BVLEP 2013 Clause 4.2A which currently prevent dwellings on concessional lots would still apply.

Recommendation: No change to planning proposal.

Financial and Resource Considerations

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

Item	\$ Excl GST
Expenditure Detail	
Advertising	\$1,500
Total Expenditure	\$1,500
Source of Funds	
General Fund	\$1,500
Total income available	\$1,500
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 specifically 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 planning assessment criteria for deemed concessional lots. Site-specific environmental impacts would be considered as part of any development application.

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 planning 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. Exhibited Deemed Concessional Lot Planning Proposal