

IRF21/3129

Gateway determination report – PP-2021-4816

Retford Park West Estate, Bowral

August 21

Published by NSW Department of Planning, Industry and Environment

[dpie.nsw.gov.au](http://www.dpie.nsw.gov.au/)

Title: Gateway determination report – PP-2021-4816

Subtitle: Retford Park West Estate, Bowral

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Table Reports and plans supporting the proposal

| Relevant reports and plans |
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| Planning Proposal Version 2 – July 2021 |
| Council Report – 14 July 2021 |
| Council Resolution – 14 July 2021 |
| Retford Park Estate Design Guidelines – November 2015 |
| Delegation Request Form |

# Planning proposal

## Overview

Table Planning proposal details

| LGA | Wingecarribee  |
| --- | --- |
| **PPA** | **Wingecarribee Shire Council** |
| **NAME** | **Retford Park Estate West (0 homes, 0 jobs)** |
| **NUMBER** | **PP-2021-4816** |
| **LEP TO BE AMENDED** | **Wingecarribee Local Environmental Plan 2010** |
| **ADDRESS** | **Retford Park Estate West, Bowral** |
| **DESCRIPTION** | **Retford Park Estate West, Bowral** |
| **RECEIVED** | **4/08/2021** |
| **FILE NO.** | **IRF21/3129** |
| **POLITICAL DONATIONS** | **There are no donations or gifts to disclose and a political donation disclosure is not required**  |
| **LOBBYIST CODE OF CONDUCT** | **There have been no meetings or communications with registered lobbyists with respect to this proposal** |

## Objectives of planning proposal

The planning proposal contains objectives and intended outcomes that adequately explain the intent of the proposal.

The objective of the planning proposal is to enable the legal enforcement of Purchaser’s Agreements (and associated Design Guidelines) into which every purchaser of a lot within Retford Park Estate West enters with the Executors of the Estate.

The intent of the Agreements was to establish and maintain a consistent standard of development within the Estate through a set of Design Guidelines. The Agreements require every purchaser to abide by the Design Guidelines.

The Design Guidelines were completed in 2015 so that incoming purchasers of housing lots would be fully aware of the expectations of development before they committed to binding contracts for the purchase of lots.

The Design Guidelines set out numerous standards for development, addressing a range of matters such as building heights, boundary setbacks, roof materials, facades, colour palettes, the interrelation of public and private areas, and secondary buildings, as well as a procedure for designing and gaining approval for a proposed development within the Estate.

The Design Guidelines seek to conserve the unique character and heritage of the Retford Park Estate for current and future generations.

The objectives of this planning proposal are clear and adequate.

## Explanation of provisions

To achieve the objectives of the planning proposal, Council is seeking to amend clause 1.9A of the Wingecarribee LEP 2010 so that it does not apply to any agreement or other relevant instrument applying to any parcel of land associated with the Retford Park West Estate.

In simple terms, clause 1.9A allows Council’s to consent to development carried out in accordance with the LEP or granted under the EP&A Act without the requirement/liability to ensure compliance with certain covenants or agreements on land (e.g. a private covenant on land title limiting development).

Council is seeking to amend Clause 1.9A of the Wingecarribee LEP as follows (shown in bold):

*1.9A   Suspension of covenants, agreements, and instruments*

*(1)  For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a 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—*

1. *to a covenant imposed by the Council or that the Council requires to be*

*imposed, or*

1. *to any relevant instrument within the meaning of section 13.4 of the*[*Crown Land Management Act 2016*](https://legislation.nsw.gov.au/view/html/inforce/current/act-2016-058)*, or*
2. *to any conservation agreement within the meaning of the*[*National Parks and Wildlife Act 1974*](https://legislation.nsw.gov.au/view/html/inforce/current/act-1974-080)*, or*
3. *to any Trust agreement within the meaning of the*[*Nature Conservation Trust Act 2001*](https://legislation.nsw.gov.au/view/html/repealed/current/act-2001-010)*, or*
4. *to any property vegetation plan within the meaning of the*[*Native Vegetation Act 2003*](https://legislation.nsw.gov.au/view/html/repealed/current/act-2003-103)*, or*
5. *to any biobanking agreement within the meaning of Part 7A of the*[*Threatened Species Conservation Act 1995*](https://legislation.nsw.gov.au/view/html/repealed/current/act-1995-101)*, or*
6. *to any planning agreement within the meaning of Subdivision 2 of Division 7.1 of the Act****, or***
7. ***to any agreement or other relevant instrument applying to any parcel of land within Retford Park Estate, being 26.63ha of land comprising the western portion of the estate bounded by Old South Road, Bowral, David Woods Playing Fields and Lot 221 DP 1206897, known as Retford Park.***

*(3)  This clause does not affect the rights or interests of any public authority under any*

*registered instrument.*

*(4)  Under section 3.16 of the Act, the Governor, before the making of this clause, approved*

*of subclauses (1) – (3).*

By excluding Retford Park Estate West land from the operation of clause 1.9A, Council is seeking to enable legal enforcement of Purchaser’s Agreements and Future Purchaser’s Agreements (and associated Design Guidelines) into which every purchaser of a lot within Retford Park Estate West enters.

The planning proposal also acknowledges the Department’s suggestion that preparation of a site-specific Development Control Plan (DCP) incorporating the Design Guidelines and accompanying local clause might also achieve the intended effect (depending on how the Purchaser’s Agreement’s interact with the Design Guidelines).

The Design Guidelines would be incorporated into the Retford Park Precinct within the Bowral Township DCP and the clause would require amendment to the Local Clauses Map/s to identify the site.

The alternative option of using a draft local clause is included in the planning proposal as follows:

*7.12 Development of land at Retford Park West*

*(1) This clause applies to Lot, as shown edged heavy black and marked “Retford Park West” on the Local Clauses Map.*

*(2) Despite any other provision of this Plan, consent may not be granted for land to which this clause applies unless the development is deemed by Council to meet the relevant standards contained within the Retford Park West Precinct of the Bowral Township Development Control Plan.*

Councils preferred approach is to amend clause 1.9A (as above), however both options form a part of the planning proposal to be exhibited. The option ultimately used to achieve the intended effects will be determined in consultation with Council, the Department and Parliamentary Counsel’s Office during finalisation.

It is also noted that amendment to clause 1.9A requires Governor’s approval and the alternative option may need to be utilised in the event the preferred approach is not supported by the Governor or otherwise.

The planning proposal contains an explanation of provisions that adequately explains how the objectives of the proposal will be achieved.

## Site description and surrounding area

The planning proposal applies to land described as Retford Park West and is located on the north-east edge of the Bowral township in the Wingecarribee local government area (**Figure 1**).



Figure Site Location (source: Planning Proposal)

The site is approximately 26.63ha in size. The Retford Park house, grounds and outbuildings, an Item of Local Heritage listed in Schedule 5 of Wingecarribee LEP, adjoins the site to the east with Retford Park East located further beyond (**Figure 2**).

The Retford Park house was built in 1887 for Samuel Horden (1849-1909), a merchant and stockbreeder. The property was purchased in 1964 by James O. Fairfax AC and was gifted to the National Trust of Australia (NSW) in 2016. The house, gardens and outbuildings have local (European) heritage significance.

Retford Park West (the subject site), Retford Park House heritage item and Retford Park East all previously formed a part of DP 1206897 (Lots 221 and 222 – refer to **Figure 1**). However, in 2015, the eastern portion of the broader site was subdivided into 31 lots (forming Retford Park East residential area) and the western portion was subdivided into 157 lots (forming Retford Park West residential area or the land that is the subject of this planning proposal).



Figure 2 Subject site (source: Planning Proposal)

## Mapping

The planning proposal may require amendment to the Local Clauses Map/s if the option of a local clause it utilised to achieve its intended effects.

The planning proposal does not include draft LEP Maps and therefore, a Gateway condition is recommended requiring the planning proposal to be updated to include the draft maps, prior to public exhibition.

## Background

At its Meeting of 9 September 2020, Council considered a petition objecting to an application for a dual occupancy development within the Retford Park West residential estate.

The Executors of the estate advised Council that this proposal was contrary to the Purchaser’s Agreement which had been entered into by the owner of the land on which the DA was proposed.

Accompanying the petition was legal opinion provided on behalf of the Executors of the Estate of the Late James O. Fairfax AC noting that the Executors were unable to enforce the Agreements because their operation was suspended under clause 1.9A of Wingecarribee LEP 2010. It was requested Council amend clause 1.9A(2) of the LEP so that it didn’t apply to the Retford Park West (the subject site).

A draft planning proposal to amend clause 1.9A was subsequently submitted to the Department on 22 October 2020.

The Department raised concern with the proposal that it was not preferable to use the LEP to enforce what is essentially a private matter between a developer and purchaser. In addition, the Department considered there may be better options to achieve the intended effects of the planning proposal (e.g. preparation of a site-specific DCP incorporating the Design Guidelines and accompanying local clause). The Department asked Council to update the planning proposal to consider alternative options to achieve the intended effects.

Based on this advice, Council staff made a recommendation to withdraw the planning proposal to its Independent Planning Advisory Panel (noting Council is currently under administration) on 7 July 2021.

The Panel noted that it recognises the unique nature of the Retford Park precinct and understands the desire of the residents to seek a mechanism to enforce the detailed design guidelines which were part of the vision of the late Sir James O Fairfax AC.

The Panel informed Council staff that there is precedent for proposed amendment to clause 1.9A in at least one other Local Environmental Plan, namely Mosman LEP 2012, and recommended that Council seek a further review of the planning proposal by the Department.

# Need for the planning proposal

Council states the planning proposal is needed to enable the legal enforcement of Purchaser’s Agreements and Future Purchaser’s Agreements (and associated Design Guidelines) into which every purchaser of a lot within Retford Park Estate West enters with the Executors of the Estate.

This would ensure the unique character and heritage of the Retford Park precinct is preserved.

Council has advised amendment to 1.9A is preferred because:

* legal opinion provided to Council on behalf of residents at Retford Park Estate west advises there is no other way of enforcing the Agreements without amending clause 9.1A to include the subject land;
* Council has formally resolved to amend clause 1.9A on two separate occasions;
* Council does not believe that the alternative (local) clause would have the same legal strength; and
* the alternative local clause would require a formal resolution of Council to amend the Bowral Township DCP, as well as public exhibition. The Department notes this process is likely to take a considerable amount of time to complete.

It is noted Council’s Independent Planning Advisory Panel also acknowledged the unique nature of the Retford Park precinct and advised there is precedent for proposed amendment to clause 1.9A in at least one other Local Environmental Plan, namely Mosman LEP 2012.

Council’s preferred option appears to present the quickest and most efficient way to achieve the intended outcomes consistent with the Department’s *A Guide to Preparing Planning Proposals*. There also appears to be a precedent set for such proposals in at least one other LEP.

The final mechanism ultimately used to achieve the intended effects of the planning proposal will be determined in consultation with Council, the Department and Parliamentary Counsel’s Office (PCO) during finalisation.

It is also noted amendment to clause 1.9A requires Governor’s approval and the alternative option (i.e. drafting of a local clause to achieve the same intended effects) may need to be utilised in the event the preferred approach is not supported by PCO, the Governor or otherwise.

# Strategic assessment

## Regional Plan

The following table provides an assessment of the planning proposal against relevant aspects of the South East and Tablelands Regional Plan.

Table 3 Regional Plan assessment

| Regional Plan Objectives | Justification |
| --- | --- |
| Direction 23 – Protect the regions heritage  | The planning proposal is consistent with this Direction and associated actions by seeking to enforce the Design Guidelines to conserve the unique character and heritage of the Retford Park precinct. |

## Local

The proposal states that it is consistent with the following local plans and strategies. It is also consistent with the strategic direction and objectives, as stated in the table below:

Table 4 Local strategic planning assessment

| Local Strategies | Justification |
| --- | --- |
| Local Strategic Planning Statement | Council considers the planning proposal to be consistent with key planning priorities in the LSPS (4.1 and 4.3) by facilitating supporting well-planning development of the Retford Park residential release area that respects the Retford Park heritage property/item and surrounds. |
| Wingecarribee 2031 Community Strategic Plan  | The planning proposal is consistent with key goals and strategies in the CSP by seeking to establish and maintain a quality residential development, while enabling the heritage recognition and protection of the adjoining Retford Park heritage item (3.2.2 and 3.2.3). |

## Section 9.1 Ministerial Directions

The planning proposal is not inconsistent with applicable section 9.1 Directions. Given the nature of the planning proposal, few section 9.1 Directions apply or are relevant.

Direction 2.3 - Heritage Conservation

The Planning Proposal seeks to support and reinforce Design Guidelines to protect and enhance the unique character of the Retford Park precinct and the adjacent heritage listed Retford Park property. The proposal is therefore consistent with this Direction.

Direction 4.4 – Planning for Bushfire Protection

The site is mapped as bushfire prone land.

The Direction requires consultation with the NSW Rural Fire Service.

As consultation has not yet occurred with the NSW Rural Fire Service on this proposal, it is currently inconsistent with the terms of the Direction.

A condition is recommended requiring Council to consult with the NSW RFS prior to public exhibition. Consistency with this Direction remains unresolved until this occurs.

Direction – 5.2 – Sydney Drinking Water Catchment

The site is in the Sydney Drinking Water Catchment and the Direction requires consultation with WaterNSW when preparing a planning proposal.

Consultation has not yet occurred with WaterNSW on this proposal and it is inconsistent with the terms of the Direction.

However, given the nature of the planning proposal, water issues are likely to be nil/negligible and the Secretary’s delegate may be satisfied any inconsistency is of minor significance.

Consultation is recommended with WaterNSW during public exhibition

## State environmental planning policies (SEPPs)

The planning proposal is not inconsistent with applicable SEPPs.

# Site-specific assessment

## Environmental

The proposal would not result in any adverse environmental impacts. Conversely, reinforcement of the Design Guidelines would assist in protecting the environmental heritage value of Retford Park.

## Social and economic

Protection of the heritage value of the Retford Park precinct is expected to result in positive social and economic impacts to the community.

# Consultation

## Community

Council proposes a community consultation period of 28 days.

The exhibition period proposed is considered appropriate, and forms part of the conditions of the Gateway determination.

## Agencies

It is recommended the following agencies be consulted on the planning proposal and given at least 21 days to comment:

* Water NSW; and
* NSW Rural Fire Service.

# Timeframe

Council proposes a 7 month time frame to complete the LEP.

The Department recommends a time frame of 12 months to ensure enough time in case unforeseen issues arise.

# Local plan-making authority

Council has advised that it would like to exercise its functions as a local plan-making authority.

However, as the planning proposal is likely to require Governor’s approval to finalise (i.e. to amend clause 1.9A of the LEP), the Department is unable to issue local plan-making authority to Council for this proposal.

# Assessment summary

The planning proposal is supported to proceed with conditions as it is consistent with local and regional strategic planning objectives to protect character/heritage. It is noted that other LEP’s contain similar provisions.

# Recommendation

It is recommended the delegate of the Secretary:

* agree that the planning proposal is consistent with relevant section 9.1 Directions (except those outlined below);
* agree that any inconsistencies with section 9.1 Direction 5.2 - Sydney Drinking Water Catchment is minor or justified; and
* note that the consistency with section 9.1 Direction 4.4 – Planning for Bushfire Protection is unresolved and will require justification.

It is recommended the delegate of the Minister determine that the planning proposal should proceed subject to the following conditions:

1. Prior to public exhibition, the planning proposal shall be updated to include Draft Local Clauses Map/s in the event the option of a local clause is utilised to achieve the intended effects.
2. Consultation is required with the following public authorities:
* WaterNSW; and
* NSW Rural Fire Service.
1. The planning proposal should be made available for community consultation for a minimum of 28 days.
2. The timeframe for completing the LEP is to be 12 months from the date of the Gateway determination.
3. Given the nature of the proposal, which is likely to require approval of the Governor, Council should not be authorised to be the local plan-making authority.

13/08/21

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16/08/2021

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Attachment A – Planning Proposal

Attachment B – Gateway determination

Attachment C – Letter to Council