

## 11.5 Planning Proposal to amend clause 1.9A(2) of Wingecarribee Local Environmental Plan 2010 to include the western portion of Retford Park Bowral residential estate.

Report Author: Senior Strategic Land Use Planner  
Authoriser: Interim Deputy General Manager

**THIS ITEM WAS CONSIDERED AT THE INTERIM ADVISORY PLANNING ASSESSMENT PANEL MEETING OF 7 JULY 2021.**

### PURPOSE

The purpose of this report is to consider comments from the Department of Planning, Industry and Environment with regard to a Planning Proposal to amend clause 1.9A(2) of Wingecarribee Local Environmental Plan 2010 to include the western portion of the Retford Park residential estate.

Applicant / Proponent	Wingecarribee Shire Council
Owners	N/A
Consultants	N/A
Notification	N/A
Number Advised	N/A
Number of Submissions	N/A
Current Zoning / MLS	N/A
Proposed LEP Amendment/s	Nil
Political Donations	N/A
Recommendation	<i>THAT</i> <ol style="list-style-type: none"><li><i>Council continue to seek a formal Gateway Determination for the Planning Proposal</i></li><li><i>Council provide the Mosman Local Environmental Plan 2012 as an example of a similar amendment to clause 1.9A(2)</i></li><li><i>Should a Gateway Determination recommend the Planning Proposal not proceed, Council investigate and pursue alternative options to enforce the site specific design guidelines over the subject area.</i></li></ol>

### RECOMMENDATION

#### **THAT**

- Council continue to seek a formal Gateway Determination for the Planning Proposal***
- Council provide the Mosman Local Environmental Plan 2012 as an example of a similar amendment to clause 1.9A(2)***

- 6. *Should a Gateway determination recommend the Planning Proposal not proceed, Council investigate and pursue alternative options to enforce the site specific design guidelines over the subject area.***

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#### **LOCAL PLANNING PANEL'S ADVICE**

This item was considered at the Local Planning Panel meeting of 7 July 2021. Prior to the meeting, Local Planning Panel members were given a briefing by Council staff. The initial recommendation of Council staff was that the Planning Proposal be withdrawn as the Department of Planning, Industry and Environment staff had advised Council staff that the Planning Proposal was unlikely to be supported for a positive Gateway Determination.

The Panel informed Council staff that a similar inclusion into clause 1.9A of the Mosman Local Environmental Plan 2012 had been achieved and that staff should ask the Department to further review the Planning Proposal and pursue a Gateway Determination. The Panel also suggested that staff continue to explore alternative options. Staff supported both these suggestions.

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 understands there is precedence for amendments to clause 1.9A in at least one other Local Environmental Plan.

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#### **REPORT**

At its Ordinary Meeting of 9 September 2020 Council considered a petition (Petition 5/2020) objecting to an application (DA20/0720) for a dual occupancy development and subdivision at 40 Sir James Fairfax Circuit, Bowral, located within the western portion of the Retford Park residential estate (the subject land). The location of the subject land is indicated in **Figure 1** below.

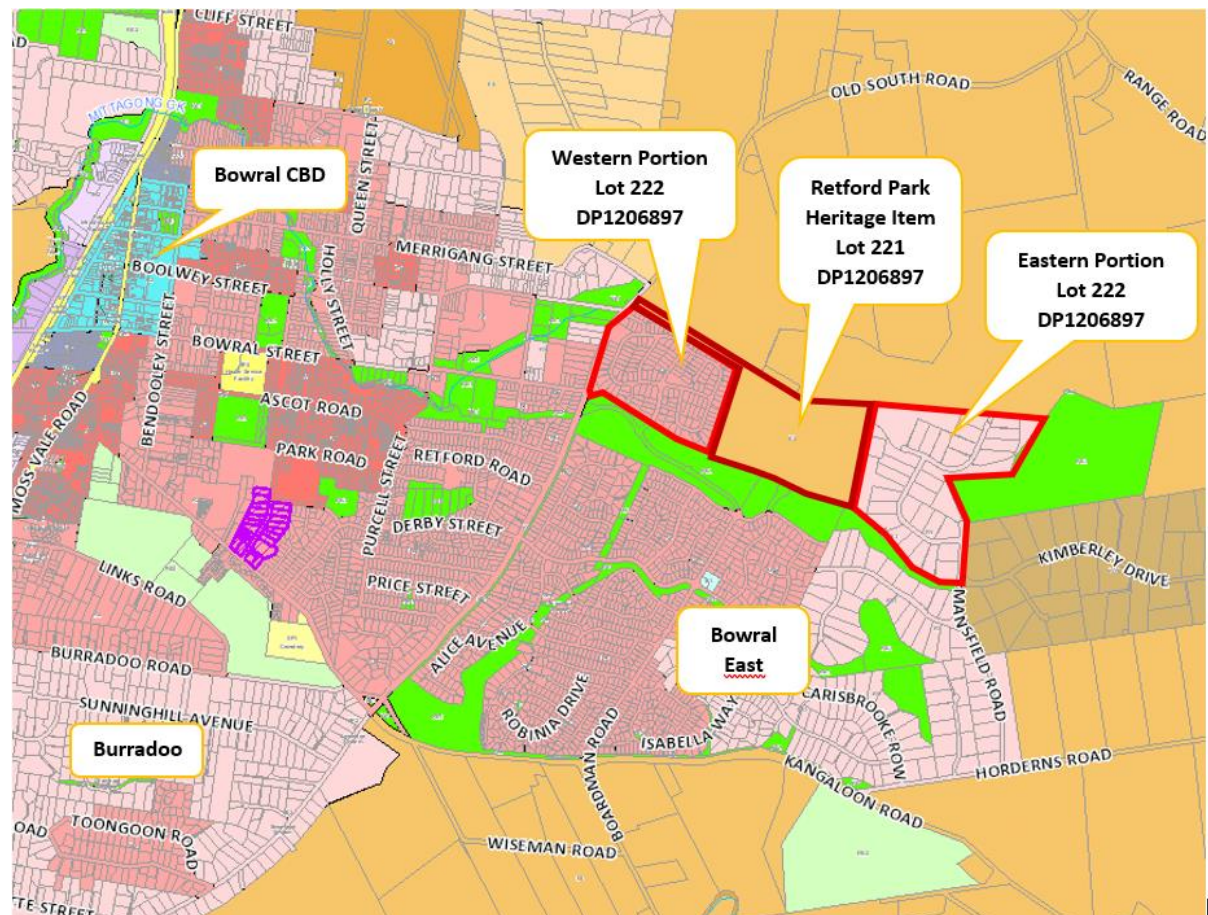


Figure 1 Location of Subject Land

Accompanying the petition was correspondence from Hicksons Lawyers on behalf of the Executors of the Estate of the Late James O. Fairfax AC seeking to amend Clause 1.9A(2) of Wingecarribee Local Environmental Plan (WLEP) 2010 to include the subject land.

Clause 1.9A of WLEP 2010 addresses the suspension of covenants, agreements and instruments and states:

- (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.*

Subclause (2) lists those covenants, agreements and instruments to which subclause (1) does not apply.

The intent of this request was to enable the legal enforcement of the Purchaser's Agreement and Future Purchaser's Agreement (the Agreements) into which every purchaser of a lot within the Retford Park residential estate had entered with the Executors of the Estate of the Late James O. Fairfax AC (the Executors) at the time of purchase.

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 Purchaser's Agreement requires the purchaser to abide by the Design Guidelines and to ensure that any

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person they sell to also enters into a Further Purchaser's Deed of Agreement with the Executors.

The Petition and accompanying request from Hicksons Lawyers were in response to DA20/0720 which sought approval for a dual occupancy development and subsequent subdivision within the Retford Park west residential area. Although the Design Guidelines do allow the opportunity for a dual occupancy development, they expressly prohibit further subdivision of such a development. The Executors had obtained legal advice that the Agreements could not be enforced as their operation is suspended by clause 9.1A of WLEP 2010.

In response, Council resolved at its Ordinary Meeting of 9 September 2020 (MN367/20) as follows:

1. ***THAT Petition 5/2020 relating to Retford Park Estate be received and noted by Council.***
2. ***THAT a report come to Council to prepare a Planning Proposal to amend clause 1.9A(2) of Wingecarribee LEP 2010 by adding the following:***
  - (h) ***to any agreement or other relevant instrument applying to any parcel of land within Retford Park Estate, being the 26.63ha of land comprising the western portion of Lot 222 DP1206897.***

In response to Resolution MN367/20, a report was considered by Council at its Ordinary Meeting of 14 October 2020 and Council resolved as follows:

***THAT a Planning Proposal be urgently prepared and submitted to the Department of Planning, Industry and Environment for a Gateway Determination under section 3.33 of the Environmental Planning and Assessment Act 1979, to amend clause 1.9A(2) of the Wingecarribee Local Environmental Plan 2010 by adding the following:***

***(h) to any agreement or other relevant instrument applying to any parcel of land within Retford Park Estate, being the 26.63ha of land comprising the western portion of the estate bounded by Old South Road Bowral, David Woods Playing Fields and Lot 221 DP1206897 known as Retford Park.***

The Planning Proposal was submitted to the NSW Department of Planning, Industry and Environment (the Department) on 22 October 2020.

Council subsequently received a response from the Department on 9 November 2020, advising that it (the Department) "*is uncertain the Proposal would obtain support from the Parliamentary Counsel's Office or the Governor*". The Department further noted that "*it is preferable to not use the LEP to enforce what is essentially a private matter between a developer and purchaser.*"

In considering the Department's comments it is recommended that Council request the Minister for Planning and Public Spaces to determine, under Section 3.35 of the *Environmental Planning & Assessment Act 1979*, that the Planning Proposal to amend clause 1.9A(2) of Wingecarribee Local Environmental Plan 2010 to include the western portion of the Retford Park residential estate not proceed.

Council remains mindful of the concerns of residents within the Retford Park residential estate, but it would appear that it is perhaps more appropriate now for the proponents to investigate alternative options for enforcing their Purchasers' Agreements.



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## **COMMUNICATION AND CONSULTATION**

### **Community Engagement**

Should the Planning Proposal not proceed, no community engagement would occur. The proponents would, however, be informed of Council's decision.

### **Internal Communication and Consultation**

No further consultation would occur should the Planning Proposal not proceed.

### **External Communication and Consultation**

No further consultation would occur should the Planning Proposal not proceed.

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## **SUSTAINABILITY ASSESSMENT**

- **Environment**

There are no environmental issues in relation to this report.

- **Social**

There are no social issues in relation to this report.

- **Broader Economic Implications**

There are no broader economic implications in relation to this report.

- **Culture**

There are no cultural issues in relation to this report.

- **Governance**

There are no governance issues in relation to this report.

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## **COUNCIL BUDGET IMPLICATIONS**

There are no budget implications in relation to this report.

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## **RELATED COUNCIL POLICY**

There are no related Council policies in relation to this report.

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## **CONCLUSION**

Following the receipt of comments from the Department of Planning, Industry and Environment that the Planning Proposal is unlikely to be supported, it would appear more appropriate for the proponents to investigate alternative options for enforcing their Purchasers' Agreements rather than pursue the Planning Proposal. Therefore it is

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recommended that Council request the Minister for Planning and Public Spaces to determine, under Section 3.35 of the *Environmental Planning & Assessment Act 1979*, that the Planning Proposal to amend clause 1.9A(2) of Wingecarribee Local Environmental Plan 2010 to include the western portion of the Retford Park residential estate not proceed.

### ATTACHMENTS

There are no attachments to this report.