

ITEM	6b.21.051	PLANNING PROPOSAL REZ2020/0006 – LOT 231, HAMPTON ROAD, WATERVIEW HEIGHTS – ADDENDUM REPORT
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Meeting	Environment, Planning & Community Committee	20 July 2021
Directorate	Environment, Planning & Community	
Reviewed by	Director - Environment & Planning (Adam Cameron)	
Attachment	To be tabled	

SUMMARY

<i>Proponent</i>	O'Donohue Hanna & Associates Pty Ltd
<i>Date Received</i>	28 October 2020 – registered as REZ2020/0006
<i>Owner</i>	J McCabe, M McCabe, H McCabe, B McCabe & A McCabe
<i>Subject land</i>	Lot 231 DP 880455, Hampton Road, Waterview Heights
<i>Current Zoning CVLEP 2011</i>	RU2 Rural Landscape (RU2)
<i>Proposal</i>	To rezone part of the land from RU2 to R5 Large Lot Residential (R5) to permit the subdivision of the land into 1 additional lot having an area of approximately 9,800m ²

This report considers additional information in support of the above planning proposal deferred from the 22 June 2021 Council meeting. This report should be read in conjunction with the previous report to Council

It is recommended that Council not support the planning proposal (PP).

OFFICER RECOMMENDATION

That Council not support planning proposal REZ2020/0006 to amend the Clarence Valley Local Environmental Plan 2011 that seeks to rezone part Lot 231 DP 880455, Hampton Road, Waterview Heights from RU2 to R5 to facilitate the large lot residential subdivision of the land into 1 additional lot having an area of approximately 9,800m² and a residue lot of approximately 39.2 ha for the following reasons:

1. The proposal lacks adequate strategic justification in the context of the North Coast Regional Plan 2036 (NCRP) and relevant Minister's section 9.1 Planning Directions as further noted in 2 and 3, below;
2. The proposal is inconsistent with Actions 1.1, 18.2 and 24.1 of the NCRP;
3. The proposal is inconsistent with the following Minister's section 9.1 Planning Directions –
 - (a) Direction 1.2 Rural Zones
 - (b) Direction 1.5 Rural Lands
 - (c) Direction 5.10 Implementation of Regional Plans;
4. The proposal as lodged has the potential to create a "higher development potential" than it intends to create; and
5. The proposal seeks to enable, through amendment of the minimum lot size map, the potential to subdivide a rural dual occupancy which is not supported by any Council policy or strategy, or any State or regional strategy. Any support of such a proposal will establish a precedent for an undesirable approach to the subdivision of rural land.

COMMITTEE RECOMMENDATION

Novak/Clancy

That the Officer Recommendation be adopted.

Voting recorded as follows:

For: Novak, Clancy, Simmons

Against: Baker, Williamson

Having declared an interest in this item Cr Ellem left the Council meeting at 6.03pm and returned at 6.17pm.

COUNCIL RESOLUTION – 6b.21.051**Baker/Toms**

That Council support planning proposal REZ2020/0006 to amend the Clarence Valley Local Environmental Plan 2011 that seeks to rezone part Lot 231 DP 880455, Hampton Road, Waterview Heights from RU2 to R5 at minimum 4,000sqm to facilitate the large lot residential subdivision of the land into 1 additional lot having an area of approximately 9,800m² and a residue lot of approximately 39.2 ha.

Voting recorded as follows:

For: Simmons, Kingsley, Baker, Williamson, Lysaught, Toms

Against: Clancy, Novak

CARRIED**LINKAGE TO OUR COMMUNITY PLAN**

Theme 5 Leadership

Objective 5.1 We will have a strong, accountable and representative Government

Strategy 5.1.4 Ensure transparent and accountable decision making for our community

BACKGROUND

Council on 22 June 2021 considered a report (6b.21.036) and Committee recommendation on a PP which aims to rezone part Lot 231 DP 880455, Hampton Road, Waterview Heights from RU2 to R5 to facilitate a subdivision to create 1 additional lot (zoned R5) having an area of approximately 9,800m² and a residue lot of approximately 39.2 ha (retaining the RU2 zone).

Council resolved to defer Item 6b.21.036 until the July 2021 Council meeting to allow receipt of additional information. A copy of the minuted report is at Attachment 1.

The Applicant submitted additional information on 25 June 2021. A copy of the additional information letter is provided at Attachment 2. The additional information is reviewed in 'Key Issues' below.

A copy of the submitted PP considered by Council on 22 June 2021 is at Attachment 3.

KEY ISSUES**Mechanism for achieving desired outcome**

The Applicant's submission (refer to Attachment 2) states that:

- the Council planning officer's report to the Committee (dated 15 June 2021) does not recommend support for rezoning of the subject land. This is despite a previous indication that should application of a 4000sqm minimum lot size for the rezoned portion of the site be found to be unacceptable due to a possible higher development potential, that a larger minimum lot size control (i.e. 9000sqm) that limits any potential for further subdivision would likely be supported and recommended.
- a 4000sqm minimum lot size was sought as this is considered to be a logical and reasonable progression of the neighbouring development standard/control in this local context. It is consistent with the pattern of local development and associated lot size controls, and effectively provides for an orderly minor extension of the adjoining R5 area, which also exhibits a range of lots in excess of 8000sqm, yet all have a 4000sqm minimum lot size control applied. We submitted in the Planning Proposal, and reiterate, that the theoretical development potential was just that, theoretical, subject to further assessment and not a foregone conclusion.
- Council officers have expressed some concern regarding the site's development potential if the area (9800sqm) proposed to be rezoned to R5 Large Lot Residential was capable of further subdivision into two lots that each could also hypothetically support dual occupancies, rather than a single additional lot. Again, this potential remains very restrained and would be subject to future merit/development assessment. Nevertheless, in the opinion of the Council officer, application of a 4000sqm minimum lot size to the rezoned area may supposedly allow for an "undesirable" higher development potential than primarily intended and therefore has not been supported.

- the officer's report indicates that there are three options available for Council to consider in determining the proposal. This includes an alternative in what has been referred to as "Option 2", that would conditionally support the proposal on the basis of amending the minimum lot size to 9,000sqm for the part of the land that is proposed to be rezoned to R5 (consistent with Council's letter dated 5 November 2020).
- it is dismayed that the officer now appears to suggest that even this very reasonable, permissible, and restrained alternative option may not be supported.
- requests Council to reconsider the proposal, including a minimum lot size of 4000sqm, as justified in the Planning Proposal and given this is the most efficient use of land resources that would fall under the R5 zone, whilst also maintaining consistency with the adjoining R5 zone development standards/controls.
- if Council maintains concerns regarding the potential development yield, we consider the alternative application of a minimum lot size of 9000sqm, previously suggested by Council (Option 2 in the officer's report) to be entirely reasonable, justified, and supportable under the current planning framework. We understand that our client would be accepting of this conservative alternative if adequate support is not achieved for the original.

Officer Comment

The Applicant was invited to submit a revised PP seeking to achieve its objective by:

- rezoning part of the existing lot (proposed Lot 1, 9800m²) to R5; and
- applying a lot size of 9000m² to the part of the land that is proposed to be rezoned to R5.

This invitation was given prior to Council staff consulting DPI Agriculture and prior to making a full assessment of the PP against all the relevant policies, plans and direction. As a consequence of the PP not being revised the subsequent assessment and Council report considered the PP as lodged.

Refer also to comment under 'Applicants reasons for supporting planning proposal or Option 2' below.

Applicants reasons for supporting planning proposal or Option 2

The additional information submitted by the Applicant (refer to details at Attachment 2) has provided a range of reasons for Council to support either their preferred proposal option (R5 zone and Lot Size map amendment to 4000m²) or alternative option, being Option 2 as mentioned in the report to 22 June 2021 Council meeting, being R5 zone and Lot Size map amendment to 9800m².

The submission makes the following points:

1. Both options, with either a 4000m² or 9800m² minimum lot size, are compatible with the adjoining development pattern, planning controls and are minor/inconsequential in terms of their development potential;
2. Both options would not undermine the overall direction or intent of the relevant regional and local strategic plans; and not result in any major inconsistency with the strategic or statutory planning framework, nor would it result in adverse or unintended/undesirable land use planning consequences;
3. The proposal is considered consistent with the assessment criteria that have been established in the Department of Planning and Environment's (DPE) *Guide to Preparing Planning Proposals 2018* to assist proponents to justify a PP where a regional plan does not include Sustainability Criteria that provides a framework to consider PPs that are not consistent with the strategy but may nonetheless have merit. Given the consistency with the assessment criteria it is considered that both minimum lot size options are supportable in this specific context and justified by the applicable assessment Criteria to overcome any minor inconsistency with the formal strategic planning framework. The Applicant is of the opinion that the Council officer's report does not fully acknowledge or consider this and the fact that a minor inconsistency does not preclude the proposal from consideration, nor should it be the sole, or default, grounds for refusal.
4. The Council officer's report also suggests that the "minor significance" argument applied to this proposal, if accepted, creates an undesirable precedent for future proposals. We submit that the minor significance argument is entirely appropriate for use in this context and clearly forms part of the supportable reasons under the Section 9.1 Directions where a Planning Proposal may have a level of inconsistency with a Direction. The Applicant submits that the proposal is largely consistent with the applicable Section 9.1 Directions. Where some inconsistency has been identified, this is minor and the inconsistency has been justified and is permissible as a valid consideration/ground under the s.9.1 Directions. The s.9.1 Directions themselves outline that a PP may be inconsistent with the terms of a Direction if certain matters can be satisfied, which includes if justified by a strategy, has consideration for

the Direction objectives and site-specific merit, or if it is of minor significance. Notably, the Council officer's report does not disagree that the proposal is of minor significance, but rather suggests this should not be supported due to it potentially setting an undesirable precedent. We note that the consideration of "precedent" does not form part of the consistency test required under the relevant s.9.1 Directions, and in our opinion, it should not be used as a primary determining factor. In light of this, if the minor significance grounds/argument cannot be used in this case which has demonstrable site-specific and contextual merit, and is of a very restrained scale, it begs the question then when/where could the minor significance grounds/argument be applied, if at all, if such a rigid interpretation is adopted? We therefore respectfully request that these matters be reviewed.

5. Furthermore, all PPs and development applications must be assessed on individual merit, and it is a commonly accepted planning principle that precedent, or the potential of creating a precedent, is not an applicable test for determining proposals. Therefore, we are of the view that adoption of the proposal, especially the 9800m² minimum lot size option, would not result in an undesirable precedent given it has particular characteristics pertaining to its site-specific merit/context and on the basis of its minor significance it can and does satisfy the relevant considerations. Notwithstanding this, we also do not believe that comparatively site-specific merit in such a context would be commonly found in the broader Local Government Area anyway. The minor significance and individual merits of the proposal are in fact also acknowledged by the Department of Primary Industries (DPI) Agriculture in their comments to Council and satisfy the tests and Assessment Criteria in the DPE Guide to Preparing Planning Proposals 2018.
6. The existing development of the land already in part is akin to a large lot residential lifestyle, directly adjoining a R5 zoning. It demonstrably and effectively coexists with surrounding R5 and RU2 land uses. Adoption of either minimum lot size option would not alter or impact this effective coexistence.
7. The proposal is compatible with adjoining land uses and sits neatly at the interface with existing R5 land and the southern part of the Waterview Heights large lot residential area. Supporting the proposal in either form does not amount to an isolated or fragmented rezoning, and would not notably affect the interface between the R5 and RU2 land in terms of preserving agricultural values/potential (it is also noted that the site is not identified as important farmland), character, amenity, and minimising the potential for land use conflict. Furthermore, there are well over 100 existing and approved large lot residential lots in the southern part of the Waterview Heights R5 area (south of Gwydir Highway), and capacity for further subdivisions. Given this and the existing extensive presence of R5 zoned land/large lot residential lots interfacing with the RU2 zone in this area, the addition of one or at worst two more lots, immediately adjoining existing R5 land is inconsequential and negates the potential to cause/increase land use conflict (a fact acknowledged in DPI Agriculture's comments to Council).
8. Overall, the PP can be supported as it is generally consistent with many of the applicable directions and actions of the strategic planning framework and the identified inconsistencies have been justified by virtue of its minor significance and site-specific merit which are in themselves a relevant test/grounds. The overall intent of the relevant strategic and statutory planning framework would not be undermined or hindered. On this basis, we are of the opinion that the proposed rezoning, and at minimum Option 2 via the application of an amended 9000sqm minimum lot size, is supported by sound planning rationale, and the minor significance argument/grounds used in this context is entirely reasonable, valid and can/should be legitimately used to support the proposal on its merits. We therefore seek support for the proposal as is, or subject to a condition to increase the minimum lot size to 9000sqm as per Option 2.

Officer Comment

The original planning proposal and the Applicants additional information submission relies heavily on this matter being a minor rezoning or matter and being of minor significance when it comes to trying to justify the inconsistencies with key s.9.1 planning directions and actions in the NCRP.

As noted in report to Councils 22 June meeting the planning proposal is considered to be inconsistent with:

1. NCRP Action 1.1 – "*Focus future urban development to mapped urban growth areas*";
2. NCRP Action 18.2 – "*Ensure Aboriginal objects and places are protected, managed and respected in accordance with legislative requirements and the wishes of local Aboriginal communities*";
3. NCRP Action 24.1 – "*Facilitate the delivery of well-planned rural residential housing areas by:*
 - *identifying new rural residential areas in a local growth management strategy or rural residential land release strategy endorsed by the Department of Planning and Environment; and*
 - *ensure that such proposals are consistent with the Settlement Planning Guidelines: Mid and Far North Coast Regional Strategies (2007) or land release criteria (once finalised)*";

4. s.9.1 Planning Direction - Rural Zones the objective of which is *“to protect the agricultural production value of rural land”*;
5. s.9.1 Planning Direction - Rural Lands, the objectives of which are *“to:*
 - (a) *protect the agricultural production value of rural land,*
 - (b) *facilitate the orderly and economic use and development of rural lands for rural and related purposes,*
 - (c) *assist in the proper management, development and protection of rural lands to promote the social, economic and environmental welfare of the State,*
 - (d) *minimise the potential for land fragmentation and land use conflict in rural areas, particularly between residential and other rural land uses,*
 - (e) *encourage sustainable land use practices and ensure the ongoing viability of agriculture on rural land*
 - (f) *support the delivery of the actions outlined in the New South Wales Right to Farm Policy”*; and
6. s.9.1 Planning Direction - Implementation of Regional Plans the objective of which is *“to give legal effect to the vision, land use strategy, goals, directions and actions contained in Regional Plans”*.

The inconsistencies with the above State and regional strategic considerations are multiple and even if all were regarded as minor inconsistencies it is considered that any proposal that is inconsistent with 6 key State and regional strategic considerations cannot be regarded a minor or insignificant and on this basis alone, should not be supported. There are no guidelines issued by the DPIE for local Council's to assess and determine just what can be considered as “minor significance”.

The ‘minor significance’ argument put forward in both the original PP and the Applicant's additional information submission is not supported given that the proposal seeks to enable the subdivision of an existing dual occupancy.

If approved as proposed will allow the opportunity for a second dwelling on each of the two lots that will result under the 9800m² option, or potentially more dwellings if 4000m² lot size option was supported.

The subdivision of rural dual occupancy is currently prohibited (except where the lot size can be met for both resultant lots). The subdivision of rural dual occupancy is not a component of any Council policy or strategy, nor of any State or regional strategy.

Although the land adjoins an area that is already zoned R5 it is unlikely that any future local growth management strategy or rural residential strategy is likely to look at areas that are core koala habitat such as this land for future rural residential development opportunities and extension to the R5 zone.

Options

The options available to Council include:

Option 1 - Not support the planning proposal, as per the Officer Recommendation, on the following grounds:

1. The proposal lacks adequate strategic justification in the context of the North Coast Regional Plan 2036 (NCRP) and relevant Minister's section 9.1 Planning Directions as further noted in 2 and 3, below;
2. The proposal is inconsistent with Actions 1.1, 18.2 and 24.1 of the NCRP;
3. The proposal is inconsistent with the following Minister's section 9.1 Planning Directions:
 - (a) Direction 1.2 Rural Zones (from pages 19/20 of the proposal)
 - (b) Direction 1.5 Rural Lands (from page 21 of the proposal)
 - (c) Direction 5.10 Implementation of Regional Plans;
4. The proposal as lodged has the potential to create a “higher development potential” than it states; and
5. The proposal seeks to enable, through amendment of the minimum lot size map, the potential to subdivide a rural dual occupancy which is not supported by any Council policy or strategy, or any State or regional strategy. Any support of such a proposal will establish a precedent for an undesirable approach to the subdivision of rural land.

Option 1 is the preferred option for Council to support.

Option 2 - Support the planning proposal on the basis that it be amended to achieve the planning proposal objective by:

- (a) Rezoning part of the existing lot (proposed Lot 1, 9,800 m²) to R5; and
- (b) applying a lot size of 9,000 m² to the part of the land that is proposed to be rezoned to R5.

Option 3 - Support the planning proposal on the basis that it is not amended in any way.

Should Option 2 or 3 be selected as the preferred option, it should be noted that Council's adopted Community Participation Plan 2019 (page 13) states that where Council has supported a planning proposal against a staff recommendation it will provide reasons for such decision.

COUNCIL IMPLICATIONS

Budget/Financial

The Applicant has paid the initial rezoning application fee which is expected to cover the reasonable costs associated with administering this phase of the PP. Additional fees, in accordance with Council's adopted Fees and Charges, will apply if the proposal progresses beyond the Gateway.

Asset Management

N/A

Policy or Regulation

Environmental Planning and Assessment Act 1979 - including relevant State Environmental Planning Policies and Minister's Section 9.1 Directions
State Environmental Planning Policy (Koala Habitat Protection) 2020
North Coast Regional Plan
CVC Community Participation Plan 2019

Consultation

Preliminary consultation has been undertaken with Department of Primary Industries - Agriculture (DPI Agriculture). This has been discussed further in 'Key Issues' under the Strategic context and merit heading of the June 2021 report, being Item 6b.21.036 (refer to Attachment 1).
Council's Natural Resource Management Officer (Biodiversity) has also provided advice as outlined in 'Key Issues' under the Biodiversity and koala habitat protection heading of the June report (refer to Attachment 1).

Legal and Risk Management

There are no legal appeal rights for third parties who may oppose the proposal. The Applicant may request a review of the Gateway determination if they are dissatisfied with the determination.

Climate Change

This proposal does not raise any foreseeable climate change implications.

Prepared by	Terry Dwyer, Strategic Planning Coordinator
To be tabled	Attachment 1 - Council report, and resolution of, to 22 June 2021 Council meeting Attachment 2 - Applicants additional information submission Attachment 3 - Planning proposal Lot 231, DP 880455, Hampton Road, Waterview Heights