

Port Stephens LEP 2013 (Amendment No. 1) Gan Gan Road, Anna Bay - formerly known as PS LEP 2000 (Amendment No.22)

Proposal Title : **Port Stephens LEP 2013 (Amendment No. 1) Gan Gan Road, Anna Bay - formerly known as PS LEP 2000 (Amendment No.22)**

Proposal Summary : **Port Stephens LEP 2013 (Amendment No.1) formerly known as Port Stephens LEP 2000 (Amendment No. 22) seeks to amend the Port Stephens LEP 2013 to enable an urban release area, consistent with Council's local strategy, which would yield approximately 50 lots east of Anna Bay village on Tomaree Peninsula.**

PP Number : **PP_2010_PORTS_008_00** Dop File No : **10/09510**

Proposal Details

Date Proposal Lodged with DOP : **04-May-2010** Date Proposal Uploaded to Public Website : **22-Oct-2010**

Proposal Assessment

Is Public Hearing Required by PAC? **No**

Agencies Requested to Consult : **Office of Environment and Heritage**

Gateway Determination

Decision Date : **29-Jun-2010** Gateway Determination : **Passed with Conditions**

Due Date of LEP : **05-Apr-2014**

Implementation

Implementation Start Date : **06-Jul-2010** Exhibition Duration : **30**

Agency consultation consistent with recommendation : **Yes**

If No, comment : **Port Stephens Council was required to undertake agency consultation with Department of Environment Climate Change and Water (now Office of Environment and Heritage) regarding the protection and loss of vegetation especially within the proposed residential zone along Gan Gan Road. Council undertook consultation with DECCW/OEH in accordance with the Gateway. These matters are discussed below.**

Agency Objections : **Yes**

If Yes, comment : **The Office of Environment and Heritage (OEH) has not formally objected to the proposal but has consistently identified a number of concerns with its environmental impact.**

These include the impact of the proposal on Endangered Ecological Communities including koala habitat, the extension of the proposed residential zone into a key wildlife corridor, the zone selected for the environmental land and a lack of its protection in perpetuity, and finally the lack of positive obligations for revegetation.

OEH has provided correspondence in relation to this site in 2008, 2010 and 2013, additional emailed correspondence has been received by the Department in 2014. The 30 hectare subject land is currently zoned rural with a minimum lot size of 20

hectares. Although it has limited development potential there is no recognition of the environmental value of the land nor any additional protection. Council argue that the 19.7 hectares of land zoned E3 Environmental Management enables the retention of a wildlife corridor through the site and protects the EEC and preferred koala habitat consistent with the Port Stephens Comprehensive Koala Plan of Management (CKPoM).

The E3 zone provides better protection and management of the environment than the existing RU2 Rural Landscape zone. However there is no obligation on Council or the landowner to manage this land for environmental purposes in perpetuity, nor any obligation to improve this land through revegetation. Historical attempts to develop this land for rural residential development have not been supported due to their impacts on the environmental value of the land and should continue to be rejected.

Council further justify the E3 zone because it prohibits all agricultural activities (except bee keeping) and provides a limited range of additional development activities within the zone when compared with the E2 Environmental Conservation zone. The PS LEP 2013, E3 zone objectives indicate that these potential developments should not have an adverse impact on the areas with high ecological, cultural, scientific or aesthetic value. Consequently any future development applications will assess the impact on the environmental significance.

The development of land with frontage to Gan Gan Road has been supported since 2005. With an increase of this land, by some 20-30 metres, supported by both Council and the Department in 2010, and considered at the time to be of minor significance. The 3.9 hectares of land to be zoned residential includes 0.4ha of coastal sand apple blackbutt forest. OEH has concerns regarding the loss of this vegetation and the encroachment of this residential land on the wildlife corridor. Council have confirmed that the corridor will retain a width of 100metres as per OEH's recommendation and any clearing will be considered through the development assessment process. The residential zoning is considered consistent with the 'proposed urban area' as identified within the Lower Hunter Regional Strategy, Council's Anna Bay Strategy, and the Gateway Determination.

It is considered that Council has adequately addressed OEH's concerns, given the mechanisms currently available to address these matters.

Documentation consistent
with Gateway :

Yes

If No, comment :

GATEWAY DETERMINATION

On 29 June 2010 the plan was converted from a pending LEP to proceed as a Planning Proposal under the current Part 3 of the EP&A Act 1979.

TIME FRAME

The Minister's delegate approved six extensions of time to complete the planning proposal, extending the last time frame to be completed by 05 April 2014. The time frame extensions were required as there were delays by Council and the proponent in negotiating environmental offsets and resolving issues of drainage. Over the past two years, the agency has facilitated discussions between Council and OEH on this matter.

Council resolved to finalise the Planning Proposal on 13 August 2013. However requested that the proposal not be completed until the preparation of reports relating to SEPP 55 - Remediation of Land and compliance with Part 7A of the EP&A Act 1979 had been prepared and final advice from OEH had been received. The relevant material was provided in January 2014 and additional advice received 15 April 2014.

PARLIAMENTARY COUNSEL OPINION

A request for drafting of the plan was made on 14 January 2014. Subsequently, Council was formally consulted on the draft LEP pursuant to s.59(1) of the EP&A Act on 17 February 2014. Council confirmed on 21 February 2014 that it was satisfied that the draft LEP met the intention of the planning proposal.

A final PC Opinion was issued on 26 March 2014. There has been no change to the draft instrument since the PC Opinion was issued.

PUBLIC PARTICIPATION

The draft LEP was exhibited from 2-31 March 2006 under the authority granted by a section 65 certificate. No submissions were received from the general public. Further, in accordance with the Gateway Determination issued 29 June 2010, adjoining land owners were also notified of Council's resolution to adopt the final version for the draft LEP adopted at its meeting on 29 June 2010. No submissions were received. This notification was consistent with the Gateway Determination.

It is considered that Council has satisfactorily completed agency and public consultation as per the Gateway Determination.

PUBLIC HEARING

The Gateway Determination did not require a public hearing to be held into the matter by any person or body under section 56(2)(e) of the EP&A Act.

CHANGES MADE TO THE PLANNING PROPOSAL AFTER EXHIBITION

The PP has been updated to reflect public participation and exhibition details, however there has been no change to the objectives or intent of the PP post exhibition.

CONSISTENCY WITH STATE POLICIES AND S.117 DIRECTIONS

Consistency with SEPP and s117 Directions

The Department Secretary's delegate agreement is required prior to making the plan, that inconsistencies with s117 Direction 1.2 Rural Zones were justified and of minor significance; and inconsistencies with 1.5 Rural Zone, and 4.1 Acid Sulfate Soils are of minor significance.

Applicable s117 Directions

1.2 Rural Zones

In accordance with cl.4 a PP must not rezone land from a rural zone to a residential zone, and must not contain provisions that will increase the permissible density of land within a rural zone unless justified.

Council has consulted with the Department of Primary Industries (DPI) on the draft LEP. DPI did not object to the draft LEP, however noted its concerns over the proposed rezoning in close proximity to a significant horticultural enterprise on the adjoining lot to the west of the subject land (Lot 21 DP 590387). Consequently DPI requested that a vegetation buffer zone be maintained to mitigate the risk of conflict. Council has indicated these matters can be addressed at the development application stage, however has noted in correspondence dated 14 April 2014 that there is suitable native vegetation to screen the vegetable production; and that the enterprise is current separated from the subject site by three dwellings and approximately 100 metres. Council has concluded that the small scale of the area under production (1.5 acres) and the future strategic plans for the area which identify the land for potential residential development are therefore considered to create minimal land use conflict. In terms of loss of prime

agricultural land, Council notes that the PP will result in a relatively small loss of land within the LGA for agricultural purposes. Additionally, the Lower Hunter Regional Strategy identifies that land as 'proposed urban area'.

Consequently, the Secretary (or delegate) may agree that the provisions of the PP that are inconsistent in accordance with cl.5(b) are considered of minor significance as the land is identified within the Lower Hunter Regional Strategy as a 'proposed urban area', and the PP will result in only a relatively small loss of land within the LGA for agricultural purposes.

1.3 Mining, Petroleum Production and Extractive Industries

The s117 Direction applies when a PP would have the effect of prohibiting or is likely to be incompatible with mining and other minerals, production of petroleum or extractive industries including resources of coal. In preparing the PP consultation with Department of Primary Industries is required to determine consistency with this provision. Consultation was not required as a condition of the Gateway Determination, however Council consulted with Department of Primary Industries who indicated that 'this site is located within Petroleum Exploration licence (PEL 485) held by Macquarie Energy who are currently investigating the potential for coal seam methane gas resources in the title area'.

The Secretary (or delegate) may agree that the provisions of the PP that are inconsistent with cl.4 and cl.5 are considered of minor significance as the land is identified within the Lower Hunter Regional Strategy as a 'proposed urban area'. The land within the PP is located within close proximity to the Anna Bay residential/commercial precinct, and is located within the 2km exclusion zone for purposes of coal seam gas extraction.

1.5 Rural Zones

Under cl.3 the s117 Direction applies where a PP will affect land within an existing rural or environment protection zone or zone boundary; or the PP changes the existing minimum lot size within the rural or environment protection zone. The PP proposes to rezone part of a rural zone to a residential and environmental zone. In accordance with clause 4 and 5 of the s117 Direction, consideration has been given to the Rural Planning Principles, and is consistent with clause 3(b) of the Rural Subdivision Principles listed in SEPP (Rural Lands) 2008.

Consequently, the Secretary (or delegate) may agree that the provisions of the PP that are inconsistent in accordance with cl.6(b) are considered of minor significance as the Lower Hunter Regional Strategy identifies the land as 'proposed urban area' and Council notes in terms of context of agricultural land within the LGA, the PP will result in a relatively small loss of land for agricultural purposes.

2.1 Environment Protection Zones

Under cl.5, a PP that applies to land within an environmental protection zone or land otherwise identified for environmental protection purposes in an LEP must not reduce the environmental protection standards that apply to the land. The PP rezones RU2 Rural Landscape to E3 Environmental Management to protect the remnant stand of swamp Mahogany Paperbark Forest on Lot 902 DP 634550 which forms part of an Endangered Ecological Community under the Threatened Species Conservation Act 1995. The PP is consistent with the s117 Direction as it facilitates the protection and conservation of environmentally sensitive areas.

2.2 Coastal Protection

In accordance with cl.3, this s117 Direction applies as the land is located within the coastal zone. It is considered that this PP is consistent with the provisions of the Direction, as under cl.4 the PP and PS LEP 2013 contain provisions consistent

with the NSW Coastal Policy, the Coastal Design Guidelines, and the relevant provisions of s733 of the Local Government Act.

3.1 Residential Zones

The PP seeks to create additional residential land. In accordance with the objectives and cl. 4 and 5 of the s117 Direction, the PP and PS LEP 2013 includes infrastructure provisions that are consistent with the s117 Direction.

3.4 Integrating Land Use and Transport

The PP will create residential zoned land adjacent to the existing village of Anna Bay. Although the village itself is small and public transport limited it is accessible to larger areas and sufficiently consistent with this direction.

4.1 Acid Sulfate Soils

Under cl.6, a planning authority must not prepare a PP that proposes an intensification of land uses on land identified as having a probability of containing acid sulfate soils (ASS) on the ASS maps unless the planning authority has considered an ASS study assessing appropriateness of the change of land use given the presence of ASS. Land fronting Gan Gan Road is identified as Class 4 ASS, with the remainder of the site identified as Class 3 ASS.

In accordance with cl. 8(b) of this s117 Direction, the DG (or delegate) may agree that the provisions of the PP that are inconsistent with the terms of the s117 Direction are of minor significance. Any future development of the site will be assessed as part of the DA, and being located within Class 4 & 5 ASS is within the lower risk profile. The PS LEP 2013 and PS DCP, and ASS Guidelines have provisions to ensure any future development avoids any significant impacts from ASS.

4.3 Flood Prone Land

Under cl. 3 the s117 Direction applies when the relevant planning authority prepares a PP that creates, removes or alters a zone or provision that affects flood prone land. In accordance with cl.4 a PP must include provisions that give effect to, and are consistent with the NSW Flood Prone Land Policy and principles of the Floodplain Development Manual 2005 (including the Guidelines on Development Controls on Low Risk Areas).

Council has identified that although localised flooding and drainage issues exist in the Anna Bay East area, the land being rezoned for residential purposes is not located within the flood planning area. The PS LEP 2013 and PS DCP have provisions dealing with flood control and can be assessed as part of any future DA process. Consequently, the PP is consistent with the s117 Direction.

4.4 Planning for Bushfire Protection

The subject land is identified as Bushfire Prone Land. In accordance with cl.4 and cl.7 of the s117 Direction, to enable consistency with this direction, the Council must consult with the Commissioner of the NSW Rural Fire Service following receipt of the Gateway Determination. The DG (or delegate) may agree with the PP inconsistency if satisfied that the Council has obtained written advice from the Commissioner of the NSW Rural Fire Service to the effect that notwithstanding the non-compliance, the NSW RFS does not object to the progression of the PP.

As Council amended the PP several times, the NSW Rural Fire Service was consulted on 28 July 2004, 9 May 2005, 1 August 2005, and 19 September 2008. Any future residential developments are likely to be subject to the requirements of section 100B of the Rural Fires Act 1997 and Section 79BA of the EP&A Act 1979. The RFS did not object to the continuance of the PP. The PP is therefore consistent with the s117 Direction.

5.1 Implementation of Regional Strategies

In accordance with cl.4, a PP must be consistent with a regional strategy released by the Minister for Planning. The subject site is identified within the Lower Hunter Regional Strategy (LHRS) as an potential urban area. Land subject of this PP is not located within a regional green corridor, but rezoning land for environmental protection makes a positive contribution toward environmental conservation. The PP is consistent with the s117 Direction.

6.2 Reserving Land for Public Purposes

In accordance with cl.4, the PP does not create, alter or reduce existing zonings or reservations of land for public purposes. The PP is therefore consistent with the s117 Direction.

6.3 Site Specific Provisions

The PP does not create restrictive site specific planning controls. The PP is therefore consistent with the s117 Direction.

CONSISTENCY WITH STATE POLICIES

The following SEPPs are applicable to the PP and have been addressed as part of this PP:

SEPP 44

The Port Stephens Comprehensive Koala Plan of Management (CKPoM) (2001) implements the provisions of SEPP 44. The PP incorporates the full extent of the swamp mahogany-paperbark forest mapped as 'preferred koala habitat' on Lot 902 DP 634550 within the proposed environmental zone. Land considered to be 'supplementary koala habitat' and some cleared land that provides a wildlife corridor link between existing remnant vegetation running east-west and north-south through the subject site has been retained in the proposed environmental zone. The zoning map reflects the findings in the CKPoM, the Anna Bay Strategy and Town Plan. Therefore the PP is consistent with this SEPP.

SEPP 55 - Remediation of Land

In accordance with cl.6, when preparing a draft LEP, Council must consider whether the land is contaminated and be satisfied the land is suitable in its contaminated state (or suitable after remediation) for the purposes on which the land in the zone concerned is permitted to be used. If remediation is required, Council needs to be satisfied that the land will be so re-mediated before the land is used for that purpose.

Council has assessed a Phase 1 Environmental Site Assessment prepared for the purpose of addressing the SEPP, and is satisfied that the land is suitable for the rezoning as proposed. Consequently, the PP is consistent with this SEPP.

SEPP 71 – Coastal Protection

The PP has no significant impacts on the coastal zone, and as the subject lands do not have access to the coastal foreshore, will not adversely impact the existing use of the site, the beach environment, or coastal management strategies.

SEPP (Rural Lands) 2008

In accordance with cl. 2, the policy aims to facilitate the orderly and economic use and development of rural lands for rural and related purposes.

Council has not undertaken an assessment against this SEPP. However in preparing this PP, Council has examined the constraints of the land and has sought to balance the social, economic and environmental interests of the community by protecting natural resources, maintaining biodiversity, and protecting native vegetation. Council has examined the promotion and protection

of opportunities for current and potential productive and sustainable economic activities in this area, considered the impact on rural land fragmentation, land use conflict and planned future supply for residential purposes. Accordingly cl.7 Rural Planning Principles, and cl. 8 Rural Subdivision Principles, have been incorporated in determination of the PP. The PP is therefore consistent with this SEPP.

The planning proposal is consistent with applicable State Environmental Planning Policies (SEPPs).

CONCLUSION

It is recommended that the planning proposal proceed.

Council has complied with the conditions of the Gateway Determination and the provisions of the Environmental Planning and Assessment Act, and the Planning Proposal PP_2010_PORTS_008 is supported. A PC Opinion has been issued and there has been no change to the LEP since the PC Opinion was issued.

LEP Assessment

Date Received from RPA : **09-Jan-2014**

LEP Determination

DatePublishNotification

Date sent to Parliamentary Council to Draft LEP :

Determination Date :

Determination Decision :

Notification Date :