

8.3 Planning Proposal and VPA - Ballina Heights Commercial Centre

Section Strategic Planning

Objective To seek direction on the finalisation of a planning proposal and associated voluntary planning agreement (VPA) for the relocation of the Ballina Heights Commercial Centre following public exhibition.

Background

Council considered a report at the 24 November 2022 Ordinary meeting which dealt with a planning proposal, and associated voluntary planning agreement (VPA), to relocate the Ballina Heights Commercial Centre and resolved as follows:

1. *That Council endorses the finalisation of the Voluntary Planning Agreement on the basis of Attachment 3 to this report, and subject to final legal advice for the purposes of proceeding to Gateway determination and public exhibition of the planning proposal.*
2. *That subject to Vixsun agreeing to the Voluntary Planning Agreement, the Planning Proposal, provided as Attachment 2 to this report, to amend the Ballina Local Environmental Plan 2012, be referred to the Department of Planning and Environment for Gateway Determination.*
3. *That Council advise the Department of Planning and Environment that Council wishes to exercise its delegation functions with respect to the planning proposal.*
4. *That subject to Council receiving an affirmative Gateway Determination, the planning proposal and voluntary planning agreement be placed on public exhibition in accordance with Council's standard procedures.*
5. *That the Council receive a further report on this matter following the conclusion of the public exhibition.*
6. *That Council advise the Ballina Heights developers that Council requires the Registration of the Voluntary Planning Agreement to occur prior to the finalisation of the planning proposal as per Council's Voluntary Planning Agreements Policy.*

In accordance with the above resolution the VPA was finalised for public exhibition (i.e. to the point where it is ready for execution by Council).

The Planning Proposal was also referred to the Department of Planning and Environment (DPE) for a Gateway determination.

The DPE issued a Gateway determination on 17 March 2023 which allowed the planning proposal to proceed to public exhibition. Following consultation with Government Agencies, as specified in the Gateway determination, the planning proposal and the associated VPA were placed on public exhibition from 21 April 2023 until 22 May 2023.

The exhibited Planning Proposal is provided as Attachment 1 to this report.

This report seeks direction on the finalisation of the planning proposal and the associated VPA.

Key Issues

- Consideration of submissions
- Finalisation of planning proposal and VPA

Discussion

Planning Proposal

The planning proposal seeks to relocate part of the site for the Ballina Heights Commercial Centre from the existing commercial site on Ballina Heights Drive, to a proposed commercial site located on the corner of Power Drive and Ballina Heights Drive. This is in accordance with Council's resolution of 24 March 2022:

That Council prepare a planning proposal to amend the Ballina Local Environmental Plan 2012 to apply the B2 Neighbourhood Commercial zone to part of Lot 66 D 1276775 and apply the R3 Medium Density Residential zone to part of Lot 497 of DP 1261230 as well as associated adjustments to related planning provisions, as outlined in this report.

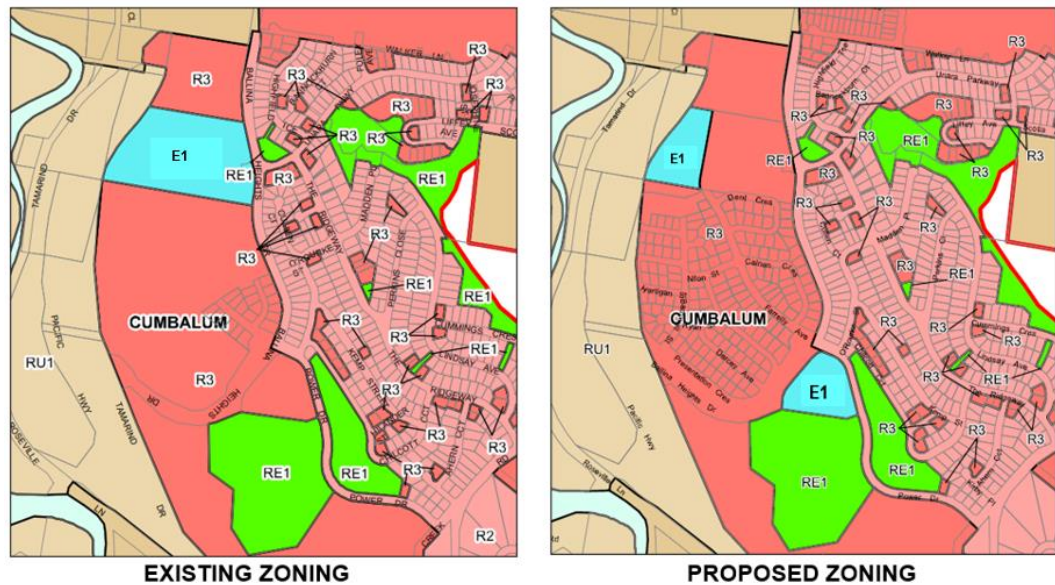
Following the implementation of the State Environmental Planning Policy Amendment (Land Use Zones) (No 2) 2022 on 26 April 2023 the B2 Local Centre zone was changed to an E1 Local Centre zone. This change was reflected in the exhibited planning proposal.

The location of the existing and proposed local centre sites are shown outlined in red on the map below (existing site is the northern most red outlined property and the proposed site is the southernmost red outlined property).



The proposed zoning outcomes associated with the planning proposal are shown in the map below.

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A number of consequential changes to the minimum lot size, building height and floor space ratio standards are also required as a consequence of the proposed zone changes. These matters are detailed in the exhibited Planning Proposal contained in Attachment 1.

Gateway Determination

The Gateway determination which allowed the planning proposal to proceed to public exhibition, and authorised the Council to exercise the functions of the local plan-making authority is subject to the following conditions:

- a) The planning proposal authority has satisfied all the conditions of the Gateway determination
- b) The planning proposal is consistent with applicable directions of the Minister under section 9.1 of the EP&A Act or the Secretary has agreed that any inconsistencies are justified and
- c) There are no outstanding written objections from public authorities.

The Gateway conditions required Council to obtain the agreement of the Secretary to comply with the requirements of the Minister, under section 9.1 of the EP&A Act, regarding a noncompliance with Direction 4.3 Planning for Bushfire Protection. In this respect the NSW Rural Fire Service has raised no concerns or issues to the planning proposal related to bush fire. This being the case the agreement of the Secretary was obtained on 23 May 2023.

Following the Secretary's agreement being received the conditions of the Gateway determination have all been satisfied and Council is now able to proceed to finalise the planning proposal.

Comments from Government Agencies

The Gateway determination required consultation with:

- Transport for NSW
- NSW Rural Fire Service
- The Civil Aviation Authority

There were no issues or objections raised by the above agencies.

Responses received are contained within Attachment 2.

Voluntary Planning Agreement (VPA)

The VPA as previously endorsed by Council at its meeting on 24 November 2022, and now executed by Vixsun Pty Ltd and the Trustees of The Roman Catholic Church for the Diocese of Lismore (TRCCDL), is contained in Attachment 3.

The objective of the VPA is to facilitate the timely development of a commercial centre for the Ballina Heights Estate and to facilitate the provision of affordable rental housing.

The key VPA provisions come into effect upon Ballina LEP 2012 being amended to rezone part of the existing commercial site, located on Part Lot 497 DP 1261230 from B2 Local Centre (now E1 Local Centre) to R3 Medium Density, and the proposed commercial site, located on part of Lot 66 DP1276775 (now part Lot 667 DP 1280013), being rezoned from R3 Medium Density to B2 Local Centre (now E1 Local Centre).

Once the rezoning has been finalised the following will be required to occur:

- No subdivision certificate in respect to the rezoned land on the existing commercial site will be sought until such time as a neighbourhood commercial centre, with a minimum gross floor area of 1000m², has been approved, substantially commenced and an occupation certificate issued.
- TRCCDL agree to either dedicate to Council 1500m² of land for the purpose of affordable rental housing or build a minimum of 5 dwellings for affordable rental housing purposes. Such housing being required to be built within 5 years from the date the LEP amendment is made.
- The VPA to be registered on the land comprising the existing commercial site.

Since the finalisation of the VPA, and its execution by the landowners, the description of the zone has changed from B2 to E1.

Additionally, the site of the proposed commercial centre is now located within part Lot 667 DP 1280013. Previously it was located within part Lot 66 DP1276775.

These changes are minor and were referred to the Solicitor who drafted the VPA. Advice has been received that states that as the VPA has been executed prior to the coming into effect of the zoning change and the change to the Lot/DP, it is not necessary that a new VPA be executed.

Delivery Program Strategy / Operational Plan Activity

Advancing the delivery of the commercial area in the Ballina Heights locality is a specific action for the 2022/23 year under the current Operational Plan and Delivery Program (action PE 1.2b – Support the delivery of commercial and retail shops in the Ballina Heights Estate).

Community Engagement Strategy

The planning proposal and associated VPA were publicly exhibited in accordance with the provisions of the Environmental Planning and Assessment Act. The Gateway determination required a minimum 20-day exhibition period for the planning proposal.

The public exhibition period for a planning agreement is a minimum of 28 days. Consequently, the VPA and planning proposal were exhibited from 21 April 2023 to 22 May 2023 to comply with this requirement. The exhibition process involved documents being displayed on the Ballina Shire Your Say engagement website and in the public notices section of Council's website.

In addition, letters were forwarded to 72 nearby property owners inviting comments.

In response, 20 submissions have been received through the Ballina Shire Your Say engagement website.

An additional submission from the proponents of the planning proposal was also received. This raises some technical concerns relating to the ability to subdivide the site of the existing commercial zone (Lot 497 DP 1261230) from the remainder of the lot.

Public submissions are contained within Attachment 4.

The proponent's submission is contained within Attachment 5.

Consideration of Public submissions

There were 17 public submissions which indicated support and three submissions which did not support the proposal.

A summary of the key issues raised in submissions together with related staff comments are contained in the following table.

Issue Raised in Public Submission	Staff Comments
Current commercial site perfectly located, easily accessible, away from main road and safe to walk for children.	<p>The existing commercial site is well located in terms of encouraging walkability and being more central to a bigger proportion of the population catchment of Ballina Heights and Banyan Hill Estates, there are several factors that make the proposed site more feasible to develop in a commercial and economic sense for the developer.</p> <p>Part of the existing commercial site has a significant slope. Due to this factor, it is more difficult and expensive to develop than the proposed flat site.</p> <p>The existing site also has a land area approximately three times larger than the proposed centre. This far exceeded the area required to support a shopping centre to serve the population of Ballina Heights / Cumbalum.</p>

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Issue Raised in Public Submission	Staff Comments
	<p>It is partly due to the above factors that a developer could not be found to provide shopping facilities on the existing zoned site. It is noted that the existing site is located at the intersection of Ballina Heights Drive and Unara Parkway approximately 500 metres to the north of the proposed site. Whilst the existing site is more central to the Ballina Heights / Cumbalum and Banyan Hills estates neither site raises adverse accessibility or traffic safety concerns.</p> <p>Given the urgent demand for neighbourhood shopping centre facilities for Cumbalum, and the landowners' desires to relocate the commercial precinct based on its commercial viability and development costs, proceeding with the finalisation of the planning proposal at the proposed site is the timeliest way of providing a commercial centre to the locality.</p>
Substantially built requirements for the proposed commercial centre is wishy washy.	<p>This concern relates to provisions of the VPA. The VPA requires that no subdivision certificate be signed for the rezoned residential land (part of the existing E1 Local Centre zoned area) until a neighbourhood commercial centre, with a minimum gross floor areas of 1000m², has been approved, substantially commenced and an occupation certificate issued. These provisions are clear and adequately reflect Council's concerns relating to the building of the proposed centre.</p>
New commercial site significantly smaller will not be big enough to provide for the significant growth longer term.	<p>The proposed site is significantly smaller than the existing site. The adequacy of commercial floor space able to be provided on this site has been examined on Council's behalf by consultants Hill PDA.</p> <p>The consultants concluded that a centre having a shop front space in the range 2 – 3,000m² would be required to service the area's population to 2036. They concluded that a site having an area of 1.7ha would be sufficient for this purpose.</p> <p>They also concluded that the proposed location for the centre is an improvement having regard to its proximity to the on/off ramps to the Pacific Motorway.</p>
Fig trees in the zone change area should be preserved.	<p>These trees are located on the existing zoned commercial site. The significance of the trees will be subject to assessment as part of any subdivision proposal for the subject land.</p>
Resident bought property thinking land opposite would be residential not commercial. Site location means everyone will be driving to it not walking. Concerned about property values.	<p>This concern is noted. It is sometimes the case that land zones are subject to change especially in new urban areas. No evidence has been submitted that property values will be adversely impacted by the proposed commercial centre.</p>

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Consideration of Proponent's Submission

Planners North request council to amend the exhibited planning proposal to enable the subdivision of Lot 497 DP 1261230. The proposed subdivision would excise that part of the site currently zoned E1 Local Centre under the provisions of Ballina LEP 2012, from the remainder of the lot zoned part 2(b) Village Area, part 1(d) Rural (Urban Investigation), and part 7(l) Environmental Protection (Habitat), under the provisions of Ballina LEP 1987.

Following a pre-DA meeting with council staff advice was provided to the proponents that states:

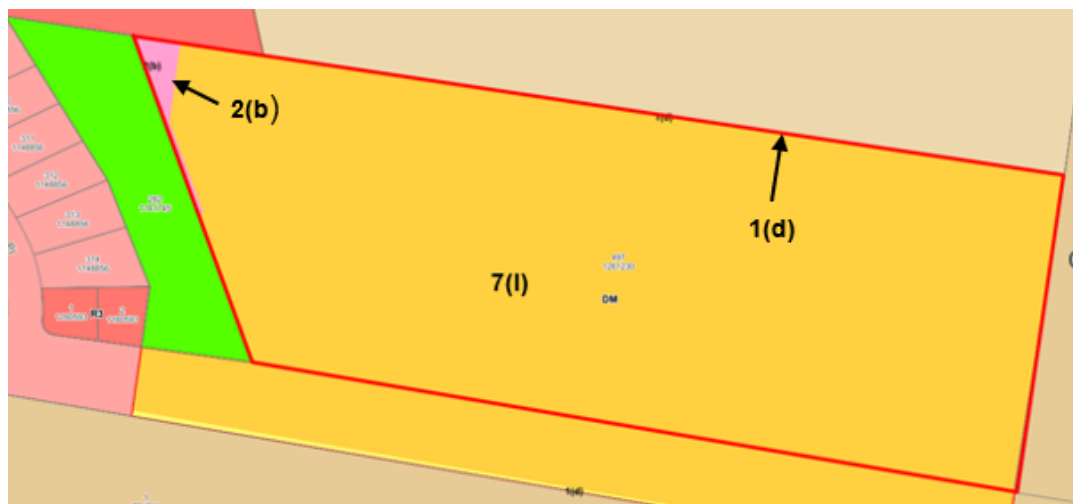
As the site contains zoning under the BLEP 1987, Clauses 11 and 11B of the BLEP 1987 are applicable to the proposed subdivision. It is understood that the applicant intends for the eastern portion of the lot to be excised from the western portion of the lot, but the proposed subdivision of these two portions of the existing lot would not satisfy the provisions of Clauses 11 and 11B.

It is recommended that this matter be further investigated by the proponent, as there is no existing planning mechanism to facilitate excision of this land. The proposal for a residential subdivision on the western portion of the allotment could not proceed without this matter being resolved.

The location, and zoning of the eastern section, of Lot 497 DP 1261230 is shown on the diagrams below.



Location Diagram



Zoning Diagram (eastern section Lot 497)

Lot 497 has a total area of 12.33ha with the western commercial end having an approximate area of 7ha and the eastern end having an area of approximately 5.3ha.

The 1(d) zone affects a sliver of land approximately 100mm wide running parallel to the northern boundary of part Lot 497. The 2(b) zone occupies an area of approximately 512m².

The difficulty for the proponent in terms of subdividing Lot 497 relates to the minimum lot size applicable to subdivisions within the 1(d) and 7(l) zones.

The minimum lot size for subdivision in these zones is 40ha. Ballina LEP 1987 does contain a number of exceptions to the lot size subdivision standard within clauses 11 and 11(b).

It is considered that none of the listed exceptions relate to the circumstances applicable in this case.

Discussion of the issues involved with an officer of the Department of Planning and Environment has resulted in the development of the following strategy to resolve the future proposed subdivision issue:

- Council vary the planning proposal to address the subdivision issue. Section 3.35 of the EP&A Act enables the planning proposal authority (council) to vary a planning proposal as a consequence of its consideration of any submission or report during community consultation or for any other reason.
- A revised planning proposal be forwarded to the Minister with a request that further community consultation not be required.
- Council seek to insert a new clause within Ballina LEP 1987 that addresses the subdivision issues.

A special clause has been drafted as detailed below and is proposed to be inserted in an amended post exhibition planning proposal. The clause will still need to be reviewed by Parliamentary Counsel to ensure it effectively resolves the subdivision concerns discussed above.

33B Subdivision of Land at Cumbalum

- (1) *This clause applies to Lot 497 DP 1261230 as shown by heavy black edging and lettering on the map marked "Ballina Local Environmental Plan 1987 (Amendment No 117)" deposited in the office of the council.*
- (2) *Despite any other provision of this plan, the council may consent to the subdivision of the land to which this clause applies, where all land within Zone No.'s 2(b), 1(d) and 7(l) is contained in one single allotment and the consent authority is satisfied the resulting lot will be created as a result of a subdivision of land for urban purposes involving land in a residential or business or industrial zone, and the resulting lot is suitable for environmental protection or environmental management.*
- (3) *In this clause, residential or business zone means Zone R2, R3, or E1 under Ballina Local Environment Plan 2012.*

Financial / Risk Considerations

The matters set out in this report have legal implications with respect to land uses for which development consent may be sought on the land as set out in the body of this report.

The costs associated with the processing of this planning proposal and associated VPA have been required to be paid by the proponents in accordance with council's fees and charges. On this basis, processing the planning proposal and VPA has been accommodated within existing resources.

The developer may also have options to seek a review of the Council's planning proposal decision through the Department of Planning and Environment.

Options

Option 1 – Council resolve to finalise the planning proposal and associated VPA and as outlined in this report.

Under this option the planning proposal to amend the zoning arrangement over the land would not be finalised until the VPA has been registered on title as per the agreement and Council's policy.

This option is recommended on the basis that the VPA provides the most suitable means to secure the outcomes sought by the proponent and the Council, per the November 2022 resolution, as set out in the body of this report.

Following the finalisation of the VPA by Council's solicitors, the documents were provided to the proponents in January 2023. Subsequently the VPA documents were executed by Vixsun Pty Ltd and the Trustees of The Roman Catholic Church for the Diocese of Lismore. It now remains for Council to resolve that the VPA documents be duly executed under seal and returned to the proponents to be registered.

Under this option, should the proponent's advise Council that they wish to withdraw from the VPA and the planning proposal, at any point prior to the finalisation of the planning proposal, this matter would be reported to the Council for further consideration.

This option will also result in the planning proposal being amended prior to finalisation to reference a proposed new clause within Ballina LEP 1987 that addresses the subdivision issue, and the Minister's consent being sought to this change without further community consultation.

Option 2 – Council could resolve to decline the planning proposal request and take no further action in respect to entering into a VPA.

This option is not recommended on the basis that the outcomes negotiated, with respect to the VPA and planning proposal, provides the most appropriate mechanism for delivering the outcomes sought by the Council and the landowners.

RECOMMENDATIONS

1. That Council authorises the General Manager to proceed to finalise and implement Planning Proposal BSCPP21/002 – Ballina Heights Neighbourhood Commercial Centre, under delegated plan making authority once the executed planning agreement is registered on the title of Lot 497 DP1261230.
2. The finalisation of the planning proposal is to include an amendment so that it incorporates a special clause with the objective of permitting the subdivision of Lot 497 DP1261230 as discussed in this report.
3. The Minister be requested to endorse the revised planning proposal and determine that further community consultation is not required.
4. That Council authorises the use of the Common Seal to execute the Voluntary Planning Agreement associated with Planning Proposal BSCPP 21/002.

Attachment(s)

1. BSCPP 21/002 - Exhibited Planning Proposal
2. BSCPP 21/002 - Agency Responses
3. BSCPP 21/002 - Voluntary Planning Agreement
4. BSCPP 21/002 - Public Submissions
5. BSCPP 21/002 - Proponent Submission - Subdivision Issue

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220623/1 RESOLVED

(Cr Eoin Johnston/Cr Stephen McCarthy)

1. That Council authorises the General Manager to proceed to finalise and implement Planning Proposal BSCPP21/002 – Ballina Heights Neighbourhood Commercial Centre, under delegated plan making authority once the executed planning agreement is registered on the title of Lot 497 DP1261230.
2. The finalisation of the planning proposal is to include an amendment so that it incorporates a special clause with the objective of permitting the subdivision of Lot 497 DP1261230 as discussed in this report.
3. The Minister be requested to endorse the revised planning proposal and determine that further community consultation is not required.
4. That Council authorises the use of the Common Seal to execute the Voluntary Planning Agreement associated with Planning Proposal BSCPP 21/002.
5. That the Ballina Shire Development Control Plan 2012 Chapter 3 – Urban Subdivision be amended to align the Ballina Heights Estate Structure Plan & Landscape Plans with the zoning changes set out

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under BSCPP 21/002.

FOR VOTE - All Councillors voted unanimously.