

Planning and Environment

Report No. PE45/2020

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SUBJECT: *18 2020 5 - PLANNING PROPOSAL TO GRANT A DWELLING ENTITLEMENT FOR LOT 686 DP 619758, KNOWN AS 58 TAYLORS ROAD BLACK HILL*

RESPONSIBLE OFFICER: *Acting Strategic Planning Manager - Iain Rush*

SUMMARY

Application Number	18/2020/5
Proposal	Amend the LEP to grant a dwelling entitlement to Lot 686 DP 619758, known as 58 Taylors Road, Black Hill
Property Description	Lot 686 DP 619758
Property Address	58 Taylors Road, Black Hill
Zone (Current)	RU2 Rural Landscape
Zone (Proposed)	RU2 Rural Landscape
Owner	B Beavan and J Tyler
Proponent	Perception Planning

Council has received a planning proposal to amend the *Cessnock Local Environmental Plan 2011* (the LEP) to grant a dwelling entitlement on land at Lot 686 DP 619758, known as 58 Taylors Road, Black Hill.

An assessment of the proposal has been undertaken against the regional, district and local strategic planning framework. It has been determined that the proposal is inconsistent with this framework and has no merit to proceed. Therefore, it is recommended that Council not support the request to prepare a planning proposal and, pursuant to clause 10A of the *Environmental Planning and Assessment Regulation 2000*, notify the applicant as soon as practicable in writing that the proposal is not supported.

The proposal has also flagged that mapping of dwelling entitlements in the LEP provides a mechanism to apply for dwelling entitlements that it was never intended to provide. Therefore, it is recommended that Council further investigate clause 4.2(A)(3)(e) of the LEP and associated mapping as part of the comprehensive LEP review, potentially providing this administrative function in the Cessnock Development Control Plan (DCP).

RECOMMENDATION

1. That Council not support this request to prepare a planning proposal; and
2. That Council, pursuant to Clause 10A of the *Environmental Planning and Assessment Regulation 2000* notify the applicant as soon as practicable in writing that Council does not support the proposal.

3. That Council investigate clause 4.2(A)(3)(e) of the Cessnock Local Environmental Plan 2011 and associated mapping as part of the comprehensive LEP review.

BACKGROUND

Clause 4.2(A) of the LEP prohibits the erection of a dwelling on land in a zone unless the land meets certain criteria, including that the lot is at least the minimum lot size specified for that land by the Lot Size Map.

Council received a request on 23 October 2020 to amend the LEP to include land at Lot 686 DP 619758, known as 58 Taylors Road, Black Hill, on the dwelling entitlement map; thereby allowing council to consider a development application for a dwelling on that land.

REPORT/PROPOSAL

The LEP, like most NSW Planning Instruments, includes provisions that limit the permissibility of dwellings on undersized, rural-zoned land. Dwellings on lots below the minimum lot size are permissible with consent only where a dwelling entitlement exists. A dwelling entitlement exists only where the proponent can establish that the land satisfies one or more of the following conditions:

1. Where a dwelling has been legally constructed on the land.
2. The land was a lot created before the LEP commenced (i.e. 2011) and on which the erection of a dwelling house was permissible immediately before that commencement, or
3. The land was a lot resulting from a subdivision for which development consent (or equivalent) was granted before the LEP commenced and on which the erection of a dwelling house would have been permissible if the plan of subdivision had been registered before that commencement, or
4. The land is an existing holding, or
5. The land is identified as having a dwelling entitlement on the Dwelling Entitlement Map,
or
6. It is a lot created under clause 4.1 (i.e. it satisfies the minimum lot size requirement).

The proponent for the current application cannot satisfy any of these criteria and therefore Council is unable to grant development consent for a dwelling under that clause. The proponent has requested that Council amend the LEP dwelling entitlement map to identify the site as having a dwelling entitlement and therefore enable Council to consider a development application for a dwelling on the site under item 5 above.

Having a dwelling entitlement map in an LEP is uncommon. The reason why the mapping was originally included in the LEP was for administrative purposes to record where dwelling entitlements had been identified through Council's 'Dwelling Entitlement Check' process. It was not anticipated to be a mechanism for Council to approve dwelling entitlements outside the criteria (1-4, 6) listed above.

As part of the Local Strategic Planning Statement (LSPS), Council had proposed to introduce a *sunset clause* to the LEP to allow those landholders with a valid entitlement to prove that they had the entitlement and commence construction of the dwelling. After the *sunset period* expired, no further opportunities would be provided for dwellings on lots below the minimum

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lot size. There was significant community concern expressed during the exhibition period of the LSPS and Council opted to remove the initiative from the LSPS and indicated that it would consider the issue further at a later time and as its own project. Any consideration of dwelling entitlements should be undertaken in a holistic, strategic manner; not on a site-by-site or ad hoc basis as is proposed in this application. Most importantly, there is considerable risk that this will set a significant precedent for others to apply for dwellings on undersized lots using this mechanism.

In addition to the above, any change to the CLEP needs to be consistent with the strategic framework that includes the Hunter Regional Plan 2036 (HRP 2036), the Greater Newcastle Metropolitan Plan 2036 (GNMP 2036) and the LSPS. The following discusses the proposal with reference to these three strategies.

Hunter Regional Plan 2036

The proposal is inconsistent with the following directions of the HRP 2036.

Direction 10 – Protect and enhance agricultural productivity

The use of rural land for primarily a residential purpose undermines the capability of the land to sustain rural uses. It also introduces the potential of existing or future land-use conflicts. The proponent has argued that the proposal is consistent with this direction on that basis that:

“This would be achieved by ensuring the land is not sterilised of agricultural capability and productivity. As detailed within this report, given the small Lot size, undulating topography in sections, soil profile and vegetated areas of the site, the land is not suitable for large scale agricultural use. The planning proposal will not result in incompatible development on the site that would otherwise pose negative impacts on the agricultural sector.”

The justification does not acknowledge existing and potential rural uses on the adjoining sites. The reference to ‘large scale agricultural use’ does not recognise that rural uses do not have to be large to be viable or the importance of the collective of small scale rural uses that contribute to the overall viability of certain agricultural and supporting rural industries in the region.

Direction 11 – Manage the ongoing use of natural resources

The site adjoins the Black Hill extractive mining operation. The HRP states “Mining activities have specific operational needs that can compete with other sensitive uses”. The operation of the mine has attracted ongoing complaints from adjoining neighbours. The proposal is inconsistent with this direction in that it would introduce an additional sensitive receiver into an area that is experiencing land-use conflicts.

Direction 13 – Plan for greater land use compatibility

The HRP states in relation to resource areas: “There is also potential for conflict if new housing encroaches into rural and resource areas, leading to increased management costs. Conflict could also affect the potential to sustain or grow rural and resource industries.” Given the proximity of the site to the existing extractive industry and the conflict that is occurring, it is inconsistent with the direction to allow another sensitive receiver into the area.

Greater Newcastle Metropolitan Plan 2036

The proposal is inconsistent with the following outcomes and strategies identified in the GNMP 2036:

Strategy 13: Protect rural amenity outside urban areas

Rural areas in Greater Newcastle have a wide range of environmental, social and economic values. These rural areas need to be carefully planned for the future to provide a secure long-term future for productive and sustainable agriculture.

According to the HRP 2036 beef cattle contributes \$5.5M to the local economy. A significant proportion of this comes from the many small-scale beef cattle operations across Cessnock. The argument presented under direction 10 that the site is not suitable for a 'large scale agricultural use' does not acknowledge the significant contribution that the small scale agricultural uses collectively make to the local economy.

Local Strategic Planning Statement 2036

The proposal is inconsistent with the following planning priorities of the Cessnock LSPS:

Planning Priority 6: Rural residential, large lot residential development and environmental living are considered in limited and appropriate locations.

In relation to rural residential development, this priority seeks to avoid existing and potential land-use conflict. As discussed above, the proposal would introduce an additional sensitive receiver into an area that is affected by an existing extractive industry and may undermine the potential of existing and future rural uses on adjoining sites.

Planning Priority 8: Our rural land is protected from incompatible development.

As above.

Planning Priority 22: Our rural landscape is retained and enhanced.

The rural landscape and amenity makes a significant contribution to the character of Cessnock. Arguably, dwellings on rural properties undermine the integrity of these qualities and therefore, should be minimised. The existing dwelling entitlement provisions in the LEP limit the number of dwellings that are permitted to those that have an existing dwelling entitlement. A decision to permit a dwelling via this mechanism in the LEP risks setting a significant precedent that could result in significantly more dwellings on undersized rural lots. A strategic, holistic review of the dwelling entitlement provisions across the entire city would result in a more robust, considered outcome.

OPTIONS

Council has the following options:

1. That Council does not support the request to prepare a planning proposal. *This is the recommended option.*

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2. That Council resolve to support the planning proposal and request a Gateway determination from the Department of Planning, Industry and Environment. This option is not recommended, as the proposal is inconsistent with the state and local policy framework and has no merit to proceed.

CONSULTATION

Acting Director Planning and Environment (Strategic Planning Manager)

Acting Strategic Planning Manager (Senior Strategic Planner)

STRATEGIC LINKS

a. Delivery Program

The recommendation supports Council's commitment to Objective 3.1: Protecting & enhancing the natural environment & the rural character of the area.

b. Other Plans

The following strategic plans are relevant to the proposal and are discussed elsewhere in this report.

- Hunter Regional Plan 2036
- Greater Newcastle Metropolitan Plan 2036
- Cessnock Local Strategic Planning Statement 2036

IMPLICATIONS

a. Policy and Procedural Implications

The proposal is inconsistent with the intent of clause 4.2(A)(3)(e) of the Cessnock Local Environmental Plan 2011. If the decision is made to support this proposal it would provide a significant precedent for other applications for dwelling entitlements on under-sized rural lots using this mechanism.

The recommendation of this report is consistent with Council's adopted LSPS.

b. Financial Implications

Nil

c. Legislative Implications

The proposal is inconsistent with the intent of clause 4.2(A)(3)(e) of the LEP. If the decision is made to support this proposal it would provide a significant precedent for other applications seeking dwelling entitlements on under-sized rural lots using this mechanism.

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d. Risk Implications

If the decision is made to support this proposal it would provide a precedence for other applications for dwelling entitlements on under-sized rural lots using this mechanism.

e. Environmental Implications

There is existing evidence of land-use conflict between rural residential lots in the vicinity of the Black Hill extractive industry. Supporting the proposal would result in an additional sensitive receiver in the immediate area of the operations.

f. Other Implications

Nil

CONCLUSION

An assessment of the proposal has been undertaken against the state, regional, district and local strategic planning framework. It has been determined that the proposal is inconsistent with this framework and has no merit to proceed. Any consideration of dwelling entitlements should be undertaken in a holistic, strategic manner; not on a site-by-site or ad hoc basis. Therefore, it is recommended that Council does not support this request to prepare a planning proposal and undertake additional measures to prevent the use of this mechanism in the future.

ENCLOSURES

- 1 [↓](#) Application for dwelling entitlement at 58 Taylors Road, Black Hill - Proponent Report - Provided Under Separate Cover