



DIRECTOR SUSTAINABLE DEVELOPMENT SERVICES REPORT

3rd February 2009

DSDS5 PROPOSED AMENDMENT TO KEMPSEY LOCAL ENVIRONMENTAL PLAN - REZONING OF LAND AT 37 BELLE O'CONNOR STREET SOUTH WEST ROCKS
FILE: T5-111 PK {Folio No. *}

SUMMARY:

Reporting that Council has received an application to rezone land to enable the erection of dwellings on land that has a development approval issued by the Department of Planning for a residential subdivision (DA-07-320 for 108 lots)

SECTION 375A OF LOCAL GOVERNMENT ACT REQUIRES THAT A DIVISION BE CALLED IN RESPECT TO THIS REPORT

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Applicant: King and Campbell Pty Ltd
 Subject Property: Lot 124 DP1097510, 37 Belle O'Connor Street South West Rocks
 Zone: Current: 1(d) (Rural (Investigation) "D" Zone), 1(c) (Rural (Small Holdings) "C" Zone), 6(a) (Open Space "A" Zone). (See attachment)
 Proposed: 2(a) (Residential "A" Zone). (See attachment)

BACKGROUND:

Initially the rezoning was part of the Draft Shire Wide Local Environmental Plan (LEP) amendment (Number 67) being undertaken in 2006. Following the introduction of the requirement to prepare the new Standard Local Environmental Plan, the Department of Planning suggested that this project be stopped and incorporated in the Standard Local Environmental Plan.

The landowner was informed and has requested that Council proceed with a spot rezoning so as not to delay the subdivision. Given the relatively minor nature of the rezoning, it is considered that Council can accommodate the amendment in its work program.

The Subject Land

The subject site, Lot 124 DP109750, is situated south-east of the township of South West Rocks and is accessed from Belle O'Connor Street via Gregory Street.

The site is situated adjacent to the South West Rocks Golf Course (to the northwest of the site), an existing residential subdivision to the west and rural and rural residential land to the south, east and north-east.

The majority of the site has historically been cleared for agricultural purposes. An area of remnant vegetation is located on the upper slopes of the ridgeline in the sites south-western corner.

The site is moderate to gently sloped, ranging between 1 degree and 8 degrees. A relatively small part of the site is located on the south-western side of a ridge line which extends from Arakoon Road to the south-east of the site. The highest elevation of the ridgeline is 50m AHD. That part of the site which exists on the south-western side of the ridgeline falls at a relatively steep grade down to Gregory Street at an approximate slope of 12 degrees. This portion of the site is proposed to remain as Environmental Protection 7(d).

The Department of Planning has approved Development Application T6-07-320 for a 108 lot subdivision over the subject land. [\(Appendix O – Page G265\)](#) however, given the current zonings, dwellings cannot be approved.

In respect to the background of the 6(a) Open Space zoned strips, in an attempt to minimise truck movements through South West Rocks, the land was identified as a potential tanker route from Arakoon Road to the now decommissioned oil storage facilities. The 6(a) zone was created to prevent access to the route and for landscaping. [\(Appendix P – Page G266\)](#)

Justification for the Rezoning Application

The applicant is requesting that the parts of the subject land be rezoned from 1(d) Rural Investigation, 1(c) Rural Small Holdings and 6(a) Public Open Space to 2(a) (Residential “A” Zone). [\(Appendix Q – Page G267\)](#). The applicant has provided the following grounds to justify the proposed amendment:

- a) *“The current zoning layout is considered an anomaly with no apparent justification for its existence. It is believed that the original intention of the 6(a) Open Space zoning and the 1(C) zoning was to accommodate road infrastructure to provide a road connection between Arakoon Road and the Sewerage treatment works to the north of the subject site. To the land owners knowledge no works have ever commenced;*
- b) *The rezoning of the identified 6(a) Open Space and 1(c) Rural (Small Holdings) C land to Residential 2(a1) shall ensure consistency with the approvals granted by the Department of Planning under Master Plan 38-92004 and Major Project 05_0018;*
- c) *The rezoning of the identified 6(a) Open Space is not considered to detrimentally impact the South West Rocks or wider Kempsey localities availability of 6(a) Open Space as the land is not of a size or shape, or within a locality suitable for public usage;*
- d) *The rezoning of the subject land to 2(a1) Residential shall ensure the orderly release of land within the Kempsey Shire;*

- e) *The rezoning of the subject land to 2(a1) Residential shall ensure the provision of greater housing choice for current and future South West Rocks residents without posing a significant environmental or social impact within the locality;*
- f) *Environmental Impact Assessments including the following have been completed in relation to the subject site and identified land area;*
- *Bushfire Impact Assessment (Australian Bushfire Protection Planners Pty Ltd, 2008 and ERM, 2006)*
 - *Ecological Impact Assessment (Darkheart Eco-Consultancy, 2007 and Umwelt, 2004)*
 - *Aboriginal Heritage Assessment;*
 - *Traffic Impact Assessment (TTM)*
 - *Water Management (King & Campbell Pty Ltd)*
 - *Stormwater Management (King & Campbell Pty Ltd)*
 - *Acid Sulphate Soils (King & Campbell Pty Ltd); and*
 - *Geotechnical requirements (Chandler Geotechnical)*
- g) *The land to the north and west of the subject site is identified as 'Medium Term' residential land release area under the provisions of the Kempsey 'Residential Land Release Strategy 1997.*

LEGISLATIVE CONSIDERATIONS

Kempsey Local Environmental Plan (KLEP) 1987

The proposed amendment seeks to rezone the area zoned 1(d) (Rural (Investigation) "D" Zone), 1(c) (Rural (Small Holdings) "C" Zone), 6(a) (Open Space "A" Zone), 2(a) (Residential "A" Zone) and 7(d) (Scenic Protection Zone) (See attachment), to 2(a) (Residential). The objectives of the 2(a) zone are as follows:

1. *Objectives of zone*

The objective is to provide areas for low density residential development.

2. *Without development consent*

Dwelling-houses

3. *Only with development consent*

Any purpose other than a purpose included in Item 2 or 4.

4. *Prohibited*

Aerodromes; agriculture; airline terminals; animal boarding and breeding establishments; aquaculture; bulk stores; bus depots; bus stations; camping grounds; caravan parks; car repair stations; clubs; commercial premises; equestrian centres; extractive industries; forestry; generating works; helipads; heliports; holiday cabins; hospitals; hotels; industries; institutions; intensive animal husbandry; junk yards; light industries; liquid fuel depots; marinas;

marine service centres; medical centres; mineral sand mines; mines; miscellaneous forestry; motels; motor showrooms; offensive or hazardous industries; places of assembly; plant nurseries; public buildings; recreation areas; recreation establishments; recreation facilities; rural workers dwellings; sawmills; service stations; shops; stock and sale yards; taverns; timber yards; tourist facilities; transport terminals; veterinary establishments; warehouses.

Environmental Planning and Assessment Act (EP& A Act) 1979

Should the rezoning application be considered to have merit, Council will need to resolve under Section 54 of the Environmental Planning and Assessment Act 1979, to prepare a draft Local Environmental Plan to rezone the subject land.

As the amendment is considered to be relatively minor, Council should utilise Section 73A of the Environmental Planning and Assessment Act 1979 – Minor amendments of environmental planning instruments. Should the Department of Planning (DoP) not agree with this approach, the rezoning can proceed under the standard process.

Should the DoP require the standard process to be followed, section 57 of the Environmental Planning and Assessment Act 1979 requires Council to prepare an environmental study for the land to which the draft LEP is to apply.

Having regard to the Department of Planning's approval of a residential development on the land, and the associated assessment undertaken for that proposed use, it is considered that an environmental study should not be required and the DoP should be requested to waive this requirement.

North Coast Regional Environmental Plan (REP) 1988

Clause 7 – Plan Preparation - Prime crop or Pasture land

The subject land is not classified as prime agricultural land, and is not indicated on the Draft Mid North Coast Farmland Mapping project maps as being significant farmland.

Clause 16 – Plan Preparation - Geological Resources

This clause aims to prevent sterilisation of known resources by inappropriate development near potential extraction sites.

The presence of potentially important resources has not been addressed in the rezoning request. Should Council resolve to proceed with the draft LEP (and the Department of Planning requires Council to undertake the amendment under the standard process) consultation with the Department of Primary Industries would be undertaken.

Clause 29 – Plan Preparation – Natural areas and water catchments

A draft local environmental plan should:

- (a) retain existing provisions allowing the making of tree preservation orders;*

- (b) *not alter or remove existing environmental protection, scenic protection or escarpment preservation zonings or controls within them, without undertaking a detailed analysis to determine whether there will be adverse environmental effects resulting from such action;*
- (c) *include significant areas of natural vegetation including rainforest and littoral rainforest, riparian vegetation, wetlands, wildlife habitat, scenic areas and potential wildlife corridors in environmental protection zones;*
- (d) *contain provisions which require that development in domestic water catchment areas or on land overlying important groundwater resources does not adversely affect water quality; and*
- (e) *require consent for the clearing of natural vegetation in environmental protection, scenic protection or escarpment preservation zones."*

The development application and its associated impacts have already been assessed and consent issued by the Department of Planning. The proposed rezoning is not inconsistent with the development consent or the provisions of this clause.

Clause 36 – Development in the vicinity of heritage items

No listed heritage items exist on the site or on surrounding properties. It is therefore considered that the rezoning will not impact on any heritage items.

Clause 45 – Plan Preparation – Hazards

As a part of the Department of Planning's development consent, consideration was given to the threat of bushfire. The Rural Fire Service issued an Authority under the Rural Fires Act. It is therefore considered that bushfire is a manageable hazard.

Clause 53 – Plan Preparation – primary arterial roads

The subject land obtains access from Belle O'Connor Street, via Gregory Street. Impacts on the road network was considered and addressed by the Department of Planning in their assessment of the subdivision development application. It is therefore considered that the rezoning will not impact on primary arterial roads.

Clause 58 – Plan Preparation – Servicing urban areas

Adequate arrangements are in place to service the proposed residential areas to the existing water, sewer and power networks.

Clause 69 – Plan Preparation – Environmental Features and Hazards

The development application for the residential subdivision has been approved by the Department of Planning on the subject land. The development approval had regard to environmental features and hazards on the site. The draft LEP is not inconsistent with the provisions of this clause.

State Environmental Planning Policies (SEPP's)

SEPP 44 – Koala Habitat Protection

This policy applies to land in the Kempsey local government area and as the site has an area greater than 1ha; further investigation was required to determine if the land qualified as potential koala habitat.

In this regard, an Ecological Impact Assessment was undertaken by Darkheart Eco-Consultants as part of the Development Application submitted to the Department of Planning. The report noted that *'...no Koala population has an association with the site'* and the site does not contain *'suitable koala habitat'*.

The report also noted that *'...the site and study area contains Scribbly Gums and Tallowwoods which are listed in SEPP No.44 as primary preferred forage species. These occur in sufficient abundance to qualify the site as potential Koala habitat. This survey and previous survey of most of the remainder of the property however, failed to detect Koalas'*.

Although it is recognised that the subject site lies in close proximity to an area of potential Koala habitat, the connection to this potential habitat has been effectively isolated by recent residential development and therefore the current potential for Koala's to occur within the subject site is at best, very low.

SEPP 55 – Remediation of Contaminated Land

The relevant provisions of SEPP 55 were considered at the time the residential subdivision was assessed and approved. Further investigation is not required, as the use of the land has already been approved by the development consent.

SEPP 71 – Coastal Protection

The land is located within the Coastal Zone as defined by the Coastal Protection Act 1979. There are a number of matters for consideration in Clause 8 of SEPP 71 that apply to the site. Of the relevant considerations in Clause 8 the following comments are made. The rezoning will not result in any adverse impacts on wildlife corridors or coastal processes as noted in Clauses 8(i) and (j). With respect to clause 8(o) requiring the encouragement of compact towns and cities the residential development approved on the site is within the boundaries of the existing urban footprint.

The implications of the proposed development have been considered and conditioned by the Department of Planning.

Section 117 - Environmental Planning and Assessment Act 1979 – Ministerial Directions

Direction	Consistency	Comments
1.2 Rural Zones	Yes	The subject rezoning request relates to both 1(d) (Rural (Investigation) "D" Zone) land and 1(c) (Rural (Small Holdings) "C" Zone). The existing portion of 1(d) (Rural (Investigation) "D" Zone) land is located between the two strips of 6(a)

		((Open Space) "A" Zone) land. The portion of land zoned 1(c) (Rural (Small Holdings) "C" Zone) is located to the east of the land zoned 6(a) ((Open Space) "A" Zone). Given that these areas form part of the Stage 1B approval granted by the Department of Planning for the purposes of residential development, and are not identified as prime agricultural land or regionally significant farmland, it is not considered that these areas are viable for agricultural purposes.
1.3 Mining, Petroleum Production and Extractive Industry – Rural Zones	Yes	The subject land is not located within an area of known mineral resources. If required, the draft LEP will be referred to the relevant Government Agencies for comment.
1.5 Rural Lands	Yes –	The draft Mid North Coast Farmland Mapping Project identifies the subject site as 'committed urban use'. See Figure 3 under Section 4.5.1 of this report. Under the provisions of the Environmental Planning and Assessment Act 1979 the Department of planning has issued development consent for a residential subdivision over land zoned rural. The loss of this rural zoned land is not considered to have a significant impact on the agricultural productivity of the Kempsey Local Government Area.
2.1- Environmental Protection Zones	Yes	The subject site includes an area zoned 7(d) Scenic Protection. This area is located in the sites south-western corner relating to the vegetated ridge. It is not proposed to rezone this area.
2.2- Coastal Protection	Yes	This Direction aims to implement the principles of the NSW Coastal Policy. The subject site does not directly adjoin the coastal foreshore and shall therefore not detrimentally affect public access or coastal processes.
2.3 - Conservation and Management of Environmental and Indigenous Heritage	Yes	As a part of the development application archaeological assessments have been completed over the subject site and no Aboriginal or European items or places of heritage significance were identified.

3.1 – Residential Zones	Yes	The approval of the site for the purposes of residential development shall ensure that the choice of building types and locations available within the local housing market is provided in a suitable manner. The sites location, in close proximity to the golf course and Rocks Shopping Fair also ensures that the development is suitably located.
3.4 – Integrated land Use and Transport	Yes	The Department of Planning's approved Master Plan includes a circular link road to ensure that bus services can adequately manoeuvre around the subdivision. The subject site is located in close proximity to the South West Rocks golf club, the Rocks Shopping Fair and the South West Rocks town centre. Direct pedestrian access is provided via Belle O'Connor Street to Gregory Street and the Rocks Shopping Fair.
4.1 Acid Sulfate Soils	Yes	Council's mapping information indicates that the subject site includes 'Low Risk' Acid Sulfate Soils. Geotechnical investigations were undertaken by Chandler Geotechnical in September 2003 as a part of the Major Project application. It is estimated that approximately 8ha of the subject site is identified within a 'low risk' acid sulfate soils area. This area is located in low lying land situated in the north of the subject site outside of the Stage 1C residential locality and forms part of the proposed drainage area. Overall, no constraints to rezoning the land to residential are posed by soil conditions or Acid Sulphate Soils.
4.4 Planning for Bushfire Protection	Yes	Bushfire Impact Assessments have been completed in relation to the subject site and associated approval. The development of the site for the purposes of residential development is not hindered as a result of bush fire impacts.
6.1 Approval and referral requirements	Yes	The proposed development does not contain provisions requiring concurrence or referral to the Minister.
6.2 Reserving	Yes	The existing 6(a) Open space land

land for public purposes		proposed to be rezoned is not considered appropriate for this use given its location, shape, dimensions, and ownership. The potential for its retention as open space is further compromised by the department of planning's residential subdivision approval.
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The Draft Mid North Coast Strategy

The Department of Planning is currently preparing the Draft Mid North Coast Strategy. The subject land has been included in the Draft Agreed Growth Area Maps which includes future urban and employment lands expansion areas. The subject land has been identified as being residential land expansion areas. The zoning of the land as residential is consistent with this draft strategy.

Threatened Species Conservation Act 1995

Ecological impact assessments have been assessed by the department of planning in relation to the Master Plan and Major Project approvals. It is noted that no threatened species, Ecological Endangered Communities or populations were found on the site.

NSW Rural Fires Act 1997

It is not envisaged that the rezoning of the identified land area would create any detrimental impacts in relation to bushfire protection as the residential development of the identified land area has previously been granted.

Relationship with Standard LEP

The proposed 2(a) Zone is equivalent to the R1 - General Residential Zone in the Draft Standard Local Environmental Plan.

Provisions of Section 73A(b) of the Environmental Planning and Assessment (EP & A) Act 1979

Section 73A of the EP & A Act states;

" 73A Minor amendments of environmental planning instruments

An amending environmental planning instrument may be made under this Part without the provisions of this Part relating to the conditions precedent to the making of the instrument if the instrument, if made, would amend or repeal a provision of a principal instrument in order to do any one or more of the following:

- (a) correct an obvious error in the principal instrument consisting of a misdescription, the inconsistent numbering of provisions, a wrong cross-reference, a spelling error, a grammatical mistake, the insertion of obvious missing words, the removal of obviously unnecessary words or a formatting error,*
- (b) address matters in the principal instrument that are of a consequential, transitional, machinery or other minor nature."*

It is considered that there may be scope for the Department of Planning to consider the application of section 73A (b) to this LEP amendment. The proposed amendment is considered to be transitional and minor in nature. The justification for its use is as follows;

1. The Department of Planning (DOP) have already approved the proposed residential landuse, via their development approval of a residential subdivision over the land which is currently zoned 6(a), 1(d) and 1(c) respectively.
2. The DOP have already approved the inclusion of the proposed rezoning in the shirewide LEP Amendment No 67. If not for matters unrelated to this rezoning, that caused delay in the finalisation of that shirewide LEP amendment, the rezoning would have likely been gazetted last year. The DOP raised many issues in relation to Amendment No 67, none of which related to the rezoning of this land.
3. The DOP urged Council not to proceed with shirewide LEP amendment No 67, and instead focus on the Standard LEP. Council accepted the DOP's advice.
4. It is likely that the reason the DOP approved the development application over the 6(a) land is that it was thought that the land was going to be imminently rezoned. As noted above, this was not possible, due to the DOP's advice.
5. The Development Consent, and the associated approved residential use of the land, is unable to operate to its fullest extent (eg. grant approvals for dwellings), while the land is zoned to prohibit residential use.
6. On the basis that the land is identified in the Draft Mid North Coast Strategy as being an urban expansion area, the land will be rezoned to a residential zone in the Standard LEP. However the completion of that LEP is not likely until late in 2009. In this regard the proposed amendment and rezoning is considered to be transitional and minor, given that the DOP has already approved the landuse, and effectively the rezoning.

Should the Department of Planning accept the use of the provisions of this section, the LEP Amendment could be submitted directly to the Department seeking gazettal, and would not be required to be publicly exhibited thus saving time. Given the minor nature of the amendment, it is considered worthwhile pursuing this course of action in the first instance.

If the DOP does not agree to apply the provisions of section 73A(b), then the proposed LEP amendment will need to follow the standard procedures for LEP Amendments under the Environmental Planning and Assessment Act 1979.

RECOMMENDATION IMPLICATIONS:

- ***Environmental***

The proposed rezoning will not pose any environmental impacts, which have not already been assessed and addressed by the Department of Planning's conditions of consent for the approved residential subdivision.

- *Social*

The land is currently vacant and is not required as open space. The rezoning will facilitate the provision of additional dwellings and increase the availability of housing stock in South West Rocks.

- *Economic (Financial)*

The availability of additional residential lots has the potential to create a positive economic outcome.

- *Policy or Statutory*

Nil

RECOMMENDATION:

- A. That Council resolve in the first instance to forward the application to the Department of Planning under the provisions of Section 73A of the Environmental Planning and Assessment Act 1979.
- B. Should the Department direct that the provisions of section 73A do not apply:
 - 1. That in accordance with Section 54 of the Environmental Planning and Assessment Act 1979, Council prepare a draft Local Environmental Plan to rezone Lot 124 DP 1097510, 37 Belle O'Connor Street, South West Rocks, from 1(d) (Rural (Investigation) "D" Zone), 1(c) (Rural (Small Holdings) "C" Zone) and 6(a) (Open Space "A" Zone), to 2(a) (Residential "A" Zone)).
 - 2. That the Department of Planning and the Local Environmental Plan Review Panel be notified of Council's decision.
 - 3. That the Department of Planning be requested to waive the requirement for a Local Environmental Study.

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R B Pitt
DIRECTOR SUSTAINABLE DEVELOPMENT SERVICES