

Ordinary Meeting

Meeting Date: Monday, 10 October, 2022
Location: Council Chambers, City Administrative Building, Bridge Road, Nowra
Time: 5.30pm

Membership (Quorum - 7)
All Councillors

Addendum Agenda

Mayoral Minute

Mayoral Minute

MM22.26 Mayoral Minute - Land Use Planning Changes for Agritourism 1

Reports

City Development

CL22.540 52 Parker Crescent, Berry - Public Interest Representations for the
Revocation of a Complying Development Certificate (CDC 518/22). 3

MM22.26 Mayoral Minute - Land Use Planning Changes for Agritourism

HPERM Ref: D22/425568

Recommendation

That:

1. Council urgently and strongly confirm to the NSW Department of Planning and Environment, that Shoalhaven City Council:
 - a. 'Opts out' of the new provisions for agribusiness/tourism until such time as we conduct our own review of where the provisions/clauses could possibly be appropriate;
 - b. Reaffirms Parts 1 to 3 of its resolution of 28 March 2022 (MIN22.200);
 - c. Objects to the land use terms 'Agritourism', 'Farm experience premises' and 'Farm gate premises' being made permissible with consent anywhere in our LEPs at this stage;
2. Once confirmed, Council write to those who have previously engaged with Council on this issue to reassure them of Council's position;
3. Given the community concern that this matter is generating, Council receive a short report as soon as practical on the agritourism related land use planning changes being considered/pursued by the NSW Government.

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Details

Following a period of additional Council consultation by the NSW Government in early 2022, Council considered the new land uses ('Agritourism', 'Farm experience premises' and 'Farm gate premises') and whether to 'opt in' to the optional clauses relating to 'Farm stay accommodation' and 'Farm gate premises'. Council ultimately resolved on 28 March 2022 (MIN22.200) to:

1. *Not Opt-in to the proposed new 'Farm stay accommodation' and 'Farm gate premises' optional clauses for inclusion in the Shoalhaven Local Environmental Plan (LEP) 2014.*
2. *Nominate the new 'Agritourism', 'Farm experience premises' and 'Farm gate premises' land use terms to be prohibited across all zones in the Shoalhaven LEP 2014, including in the RU1 Primary Production and RU2 Rural Landscape zones.*
3. *Not nominate additional zones where 'farm stay accommodation', 'cellar door premises' and 'roadside stalls' would be permitted with consent at this point (i.e. retain status quo).*
4. *Advise the NSW Department of Planning & Environment (DPE) of Council's resolution by 31 March 2022 and request further meaningful consultation and dialogue with DPE on the current proposal and broader agritourism reforms, where relevant.*
5. *Receive future reports, if required, to:*
 - a. *Enable further comment on the detail (or adjustment) of the proposed agritourism planning reforms.*

- b. Consider how a Shoalhaven appropriate version of the optional clauses, emerging land uses ('Agritourism', 'Farm experience premises' and 'Farm gate premises') and other clauses, as required, could work for Shoalhaven.
6. Advise CCBs, Industry Representatives and those who made a deputation, of this resolution.

The NSW Department of Planning & Environment was advised of Council's position in writing on 31 March 2022.

Since this time, the scope of the reforms has changed slightly, with the key scope in the new Agritourism and Farm Stay Accommodation Code in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) outlined below:

- Exempt development pathways are available for 'Farm experience premises', 'Farm gate premises' and 'Farm stay accommodation' (essentially change of use) in rural zones, or zones that 'Agritourism', 'Extensive agriculture', 'Intensive livestock agriculture' and 'Intensive plant agriculture' is permissible with consent.
- Exempt development pathway for 'Roadside stalls' in rural zones.
- Complying development pathways for 'Farm experience premises', 'Farm gate premises' and 'Farm stay accommodation' in rural zones.

The changes to the Codes SEPP, Standard Instrument LEP and Regulations will commence on **1 December 2022**.

It appears that the new land use 'Agritourism' (including the terms 'Farm experience premises' and 'Farm gate premises') may now be permitted where 'agriculture' is permitted with consent. For Shoalhaven, this is the RU1, RU2 and RE1 (tbc) zones. The land use may also be made permissible in the RU4 zone. Council had resolved to make these land uses prohibited in all zones in Shoalhaven's LEPs. Staff are liaising with the NSW Government on this matter, seeking clarification to better understand the implications of the Agritourism Reforms for Shoalhaven. It is understood that any changes to Shoalhaven's LEPs will be made in **February 2023**. Council needs to provide final nominations for zone changes by **23 December 2022**.

You can find information on the notified NSW Government's Agritourism changes at:

<https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Planning-amendments-for-agriculture>

CL22.540 52 Parker Crescent, Berry - Public Interest Representations for the Revocation of a Complying Development Certificate (CDC 518/22).

HPERM Ref: D22/416454

Approver: James Ruprai, Director - City Development

Attachments: 1. CONFIDENTIAL LEGAL ADVICE - 52 Parker Crescent Berry (Confidential - under separate cover)

Reason for Report

The purpose of this report is to inform Council of the historical consent issued by the NSW Land and Environment Court and the associated status of complying development certificate CDC 518/22 (the CDC) regarding 52 Parker Crescent, Berry (issued by private certifying authority).

Council has received representations from our community regarding the CDC challenging its validity and requesting that Council revoke the CDC pursuant to s 4.57 of the *Environmental Planning and Assessment Act 1993* (the EPA Act).

Legal advice on this matter has been obtained to inform Council and is included under a separate confidential attachment.

Recommendation

That Council:

1. Note the historical information related to consent issued by the NSW Land and Environment Court.
2. Note that the Complying Development Certificate (CDC 518/22) has been issued lawfully.
3. Take no further action on this matter.

Options

1. Council resolve as per the recommendation.

Implications: Council take no further action in this matter.

2. Council advises an alternative course of action.

Implications: Staff to action alternative resolution as appropriate.

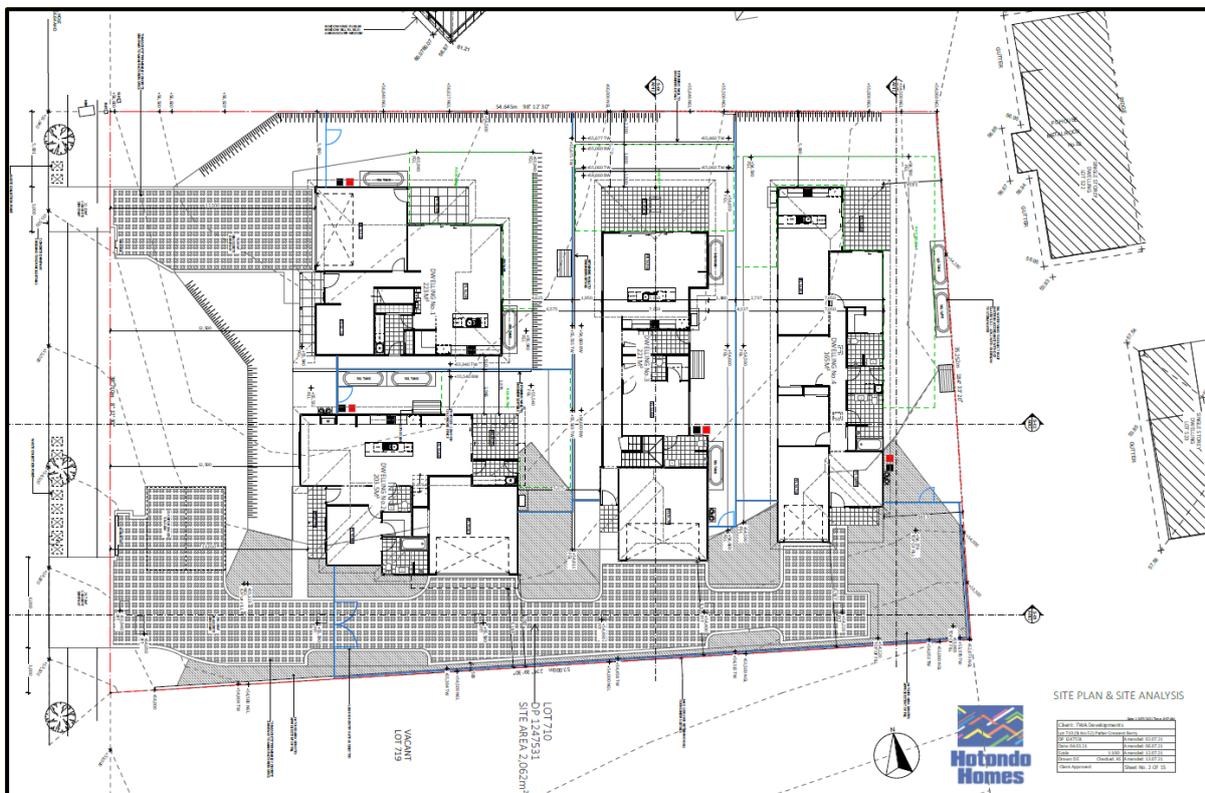
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Background

A development application (DA19/1857) for a proposed five (5) dwelling construction and associated strata titled subdivision on the subject site was assessed by Council and refused on 1 September 2020. The proposal was for land zoned R1 (General Residential) at that point in time.

The decision of Council was appealed in the NSW Land and Environment Court (LEC), and on 29 July 2021 the LEC issued a consent for the multi-dwelling proposal without subdivision. It is important to note that the consent required a subsequent application to be lodged for the land subdivision via appropriate legislative and approval pathways.

An overview of the LEC issued approved development appears in figure 1 (below):



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FIGURE 1:- Development plans for consent issued for multiple residential premises at 52 Parker Crescent, Berry.

Concurrent to the 2021 legal proceedings, Council had resolved to rezone the land in question from R1 (General Residential) to R5 (Large Lot Residential), however had not finalised the Planning Proposal at the time of the refusal being issued, or subsequent legal appeal.

The court decision acknowledged Council’s intent to rezone the property and granted consent based on the proposal not being inconsistent with the objectives of the proposed R5 zone, therefore being no reasons justifying a refusal.

Council has recently received correspondence from the community questioning the validity of the CDC and raising concerns that the strata subdivision is in breach of the *Shoalhaven Local Environmental Plan 2014* (SLEP 2014). Furthermore, correspondence from the community has requested Council revoke the CDC utilising its powers under s 4.57 of the EPA Act.

Pursuant to s 4.57 of the EPA Act Council's power to revoke a consent (including a CDC) is limited to circumstances where it reasonably considers that a development should not be carried out or completed '*having regard to the provisions of a proposed local environmental plan*'.

Section 4.57(7) of the EPA Act provides for compensation to be recovered by the aggrieved party from Council in circumstances where Council is responsible for the revocation (i.e., if Council revokes the consent, Council is liable to pay compensation to the aggrieved parties).

Section 4.57(1), (2) and (7) of the Act appear as follows, confirming that it may apply to CDCs, as well as compensatory provisioning:

4.57 Revocation or modification of development consent

(cf previous s 96A)

- (1) If at any time it appears to—
- (a) the Planning Secretary, having regard to the provisions of any proposed State environmental planning policy, or
 - (b) a council (being the consent authority in relation to the development application referred to in this subsection), having regard to the provisions of any proposed local environmental plan,

that any development for which consent under this Division is in force in relation to a development application should not be carried out or completed or should not be carried out or completed except with modifications, the Planning Secretary or council may, by instrument in writing, revoke or modify that consent.

- (2) This section applies to complying development for which a complying development certificate has been issued in the same way as it applies to development for which development consent has been granted and so applies to enable a council to revoke or modify a complying development certificate whether the certificate was issued by the council or by a registered certifier.

.....

- (7) If a development consent is revoked or modified under this section, a person aggrieved by the revocation or modification is entitled to recover from—
- (a) the Government of New South Wales—if the Planning Secretary is responsible for the issue of the instrument of revocation or modification, or
 - (b) the council—if the council is responsible for the issue of that instrument,

compensation for expenditure incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the notice under subsection (3) which expenditure is rendered abortive by the revocation or modification of that consent.

The CDC has been issued under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP) - a state-wide environmental planning instrument which includes standard requirements and conditions. A CDC for subdivision may be issued under this instrument where there are no inconsistencies with relevant legislation or planning instruments (including the SLEP 2014).

The SLEP 2014 contains minimum lot requirements for subdivision of land in applicable zones under clause 4.1. The exception to the minimum lot requirements occurs for strata plan or strata plan of subdivision (SLEP clause 4.1(4)(a)). Accordingly, the minimum lot requirements imposed by the SLEP 2014 do not apply to strata plan of subdivision and are

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not applicable in this instance (does not explicitly prevent the issuing of a CDC for that purpose).

Clause 4.1(4)(a) of the SLEP 2014 appears as follows:

4.1 Minimum subdivision lot size

- (4) This clause does not apply in relation to the subdivision of any land—
- (a) by the registration of a strata plan or strata plan of subdivision under the *Strata Schemes Development Act 2015*

Legal advice obtained on this matter appears at **Confidential Attachment 1** to this report. This remains confidential as it contains *advice concerning litigation, or advice that would otherwise be privileged, or privileged from production in legal proceedings on the ground of legal professional privilege*. In accordance with Section 10A(2)(g) of the *Local Government Act 1993*, any discussion, debate or questions on the specifics of this legal advice should be undertaken in closed (confidential) session.

Based on the advice received by Council the CDC is considered valid.

Accordingly, it is recommended that Council not revoke the CDC as it has been issued legally and appropriately. There is also no relevant proposed local environmental plan to consider that could affect the strata subdivision. To attempt to revoke the CDC would not only expose Council to the payment of compensation, but also to procedural matters for an unlawful revocation utilising a section of legislation out of context with the current scenario (strata subdivision). It is therefore recommended that Council not pursue revocation of the CDC, and furthermore, given the legality of the CDC and associated strata subdivision, not pursue proceedings in the NSW Land and Environment Court.

Policy Implications

Decisions on this matter may impact the ongoing provision of statutory planning instruments and environmental planning instruments, including the SLEP 2014.

Financial Implications

If Council were to proceed with revoking the CDC Council would be exposed to additional legal costs and liability to pay compensation to the aggrieved party, likely the developer and/or landowner. The quantum of compensation would be determined by agreement between the parties or via Class 3 proceedings in the LEC.

In the event Council sought to commence Class 4 (Judicial Review) proceedings in the LEC for a declaration that that the CDC is invalid, Council would be exposed to additional legal costs as well as being potentially liable to pay the other parties' legal costs.

Risk Implications

As a result of the background and legal review, noting that both the Court issued consent and the CDC are considered legal and valid, pursuing revocation of the CDC (through application of Council's legislative powers or via judicial proceedings) presents a significant legal and financial risk to Council.