



New South Wales Government
Independent Planning Commission

Gateway Determination Review Request for Secondary Dwellings in Rural Zones, The Hills Shire Council

Gateway Determination Advice Report

Chris Wilson (Chair)
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10 June 2020

1 INTRODUCTION

1. On 18 May 2020, the NSW Independent Planning Commission (**Commission**) received a referral from the NSW Department of Planning, Industry and Environment (**Department**) to give advice pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in relation to a planning proposal and Gateway Determination in respect of rural zones in The Hills LEP 2019 within The Hills Shire Council Local Government Area (**LGA**).
2. On 15 July 2019, The Hills Shire Council (**Council**) lodged the Planning Proposal (**Planning Proposal**) with the Department, seeking to include appropriate criteria for secondary dwellings in rural zones.
3. On 13 February 2020, as delegate of the Minister for Planning and Public Spaces (**Minister**), the Department issued a Gateway Determination that the Planning Proposal did not have strategic merit and should not proceed (the **Gateway Determination**).
4. On 25 March 2020, Council wrote to the Department requesting a review of the Gateway Determination.
5. The matter was referred by the Minister's delegate to the Commission for advice. The letter accompanying the referral requested that the Commission "*review the planning proposal and prepare advice concerning the merits of the review request. The advice should include a clear and concise recommendation to the Minister's delegate confirming whether, in its opinion, the Gateway determination issues on 13 February 2020 should be overturned and given a Gateway to proceed or not.*"
6. Mr Peter Duncan AM, Acting Chair of the Commission, nominated Chris Wilson (Chair) and Soo-Tee Cheong to constitute the Commission providing advice on the review of the Gateway determination.

1.1 The Planning Proposal

7. As stated in the Department's Gateway Determination Report (**Department's Gateway Report**) dated 26 November 2019, the Planning Proposal applies to all rural zoned land under the Hills LEP 2012 which is now the Hills LEP 2019 (**HLEP 2019**) as follows:
 - RU1 Primary Production;
 - RU2 Rural Landscape;
 - RU3 Forestry; and
 - RU6 Transition.
8. The Department's Gateway Report states that the objective of the Planning Proposal is to amend the HLEP 2019 clause 5.4(9) (controls relating to miscellaneous permissible uses – secondary dwellings) to ensure that secondary dwellings within rural areas can be provided in a form that is compatible with the character of the rural locality.

9. Clause 5.4(9) of the HLEP 2019 currently states:

*(9) **Secondary dwellings** If development for the purposes of a secondary dwelling is permitted under this Plan, the total floor area of the dwelling (excluding any area used for parking) must not exceed whichever of the following is the greater—*

(a) 60 square metres,

(b) 20% of the total floor area of the principal dwelling.

10. Council considers that Clause 5.4(9) is currently producing appropriate outcomes in urban areas yet inequitable and inappropriate outcomes in the Shire's rural area as:

- Rural landowners with smaller established homes (up to 300sqm) are effectively limited to a maximum secondary dwelling size of 60m²; and
- Rural landowners with larger dwellings benefit from the ability to achieve secondary dwellings with a size of up to 20% of the principal dwelling which can result in extremely large secondary dwellings equivalent in size to a typical new four bedroom home.

11. Council considers that these outcomes are undesirable given:

- It limits the ability for secondary dwellings to provide an affordable housing outcome;
- it increases the risk of adverse impacts associated with larger secondary dwellings such as visual impacts, vegetation loss, bushfire protection issues and loss of rural character; and
- Large secondary dwellings are more akin to a dual occupancy development noting that detached dual occupancies are not permissible in rural zones.

12. To achieve the stated outcomes of the Planning Proposal, Council has proposed two options for amending clause 5.4(9) of the HLEP 2019:

- Option A (**Option A**) is Council's preferred option which seeks the following changes to the clause:

(9) Secondary dwellings in urban zones

If development for the purposes of a secondary dwelling is permitted in an urban zone under this Plan, the total floor area of the dwelling (excluding any area used for parking) must not exceed whichever of the following is the greater—

(a) 60 square metres,

(b) 20% of the total floor area of the principal dwelling.

(10) Secondary dwellings in rural zones

If development for the purposes of a secondary dwelling is permitted in a rural zone under this Plan, the total floor area of the dwelling must not exceed 110 square metres for habitable rooms plus an optional garage up to 20 square metres (total permitted 130 square metres)

- Option B (**Option B**) is an alternative option which seeks the following changes to the clause:

(9) Secondary dwellings

If development for the purposes of a secondary dwelling is permitted under this Plan, the total floor area of the dwelling (excluding any area used for parking) must not exceed

whichever of the following is the greater—

- (a) 60 square metres,
- (b) 20% of the total floor area of the principal dwelling,
- (c) Notwithstanding (a) and (b), the gross floor area of a secondary dwelling within a rural zone must not exceed 110 square metres, plus an optional garage up to 20 square metres.

1.2 History of the Planning Proposal and Gateway Determination

Table 1 - History of the Planning Proposal and Gateway Determination

| Date | Details |
|------------------|--|
| 24 July 2018 | Council considered a Notice of Motion to write to the Minister for Planning and Public Spaces seeking a meeting to discuss amendments to the Standard Local Environmental Plan (in respect to the Planning Proposal) |
| 30 April 2019 | Council resolved to forward a Planning Proposal to the Department |
| 19 June 2019 | The Hills Shire Local Planning Panel considered the Planning Proposal and recommended that it should proceed to gateway determination |
| 15 July 2019 | Council lodged the Planning Proposal with the Department |
| 26 November 2019 | The Department signed off on its Gateway Determination Report |
| 6 December 2019 | The Hills LEP 2019 came into force, replacing The Hills LEP 2012. The update did not result in any implications for the Planning Proposal apart from the fact that the Planning Proposal now applies to the HLEP 2019. |
| 6 February 2020 | Council met with the Minister for Planning and Public Spaces to discuss provisions for secondary dwellings in rural zones under HLEP 2019. |
| 13 February 2020 | The Department issued its Gateway Determination, in which it determined that the Planning Proposal should not proceed |
| 25 March 2020 | Council lodged a gateway determination review application form |
| 18 May 2020 | The Commission received the request for gateway determination review and Gateway Review Justification Assessment from the Department |

1.3 The Department's Decision

13. The Department's Gateway Report states:

"It is recommended that the delegate of the Minister determine that the planning proposal should not proceed.

Although the proposal has strategic merit as it gives effect to the Central City District Plan, the Hills Future Community Strategic Plan and draft Hills Future 2036 Local Strategic Planning Statement; the proposal does not demonstrate sufficient strategic merit to amend clause 5.4(9) as proposed. The proposed provisions for the percentage of the total floor area of the principal dwelling in rural zones and the maximum size of secondary dwellings under clause 5.4(9)(b) cannot be legally made."

14. The Department's Gateway Report recommended the Planning Proposal should not proceed for the following reasons:

1. *[The Planning Proposal] cannot be legally made as clause 5.4(9) under the Standard Instrument – Principal Local Environmental Plan which is a 'compulsory' clause for local environmental plans;*

2. is inconsistent with Section 9.1 Direction 4.4 Planning for Bushfire Protection; and
3. does not sufficiently test secondary dwelling outcomes and different percentages under clause 5.4(9)(b).

2 THE COMMISSION'S CONSIDERATION

2.1 The Commission's Meetings

15. As part of its review, the Commission met with various persons as set out in Table 2. All meeting notes were made available on the Commission's website.

Table 2 – Commission's Meetings

| Meeting | Date of Meeting | Transcript/Notes Available on |
|------------|-----------------|-------------------------------|
| Department | 27 May 2020 | 3 June 2020 |
| Council | 28 May 2020 | 9 June 2020 |

2.2 Material considered by the Commission

16. In this review, the Commission has carefully considered the following material (**material**):
 - Council's Notice of Motion (**Notice of Motion**) from Council's meeting on 24 July 2018;
 - Council's mayoral letter to the Minister for Planning, dated 20 August 2018;
 - The Minister for Planning's letter to Council, dated 10 October 2018;
 - Council's mayoral letter to the Minister for Planning, dated 30 November 2018;
 - Council's report (**Council Report**) and minutes from Council's meeting on 30 April 2019;
 - The Hills Local Planning Panel Report (**Hills LPP Report**) dated 24 June 2019;
 - Council's Planning Proposal, dated 15 July 2019;
 - Summary of correspondence with Department following submission of Planning Proposal dated between 18 January 2019 – 19 September 2019;
 - the Department's Gateway Determination Report, dated 26 November 2019;
 - the Department's Gateway Determination, dated 13 February 2020;
 - the Department's letter to Council advising of the Gateway Determination, dated 18 February 2020;
 - Council's Gateway Review Application and notification, dated 25 March 2020;
 - Council's Response to Gateway Determination (**Gateway Determination Response**), dated 19 May 2020;
 - the Department's Gateway Review Justification Assessment (**Department's Justification Assessment**) accompanying the Department's referral, dated 18 May 2020; and
the Department's response to the Commission's questions dated 26 May 2020;
 - Additional information provided by the Department dated 29 May 2020;
 - Transcripts of the Commission's meetings with both the Department and Council made available on 3 June 2020 & 9 June 2020 respectively; and
 - Additional information provided by Council dated 4 June 2020;

2.3 Statutory Context

17. Clause 5.4(9) of the NSW *Standard Instrument – Principal Local Environmental Plan (Standard Instrument)* allows local councils to determine their own maximum total percentage of floor area of the principal dwelling for secondary dwellings (subclause (b)). The remainder of the clause is mandatory throughout the State. This is set out below:

Secondary dwellings

If development for the purposes of a secondary dwelling is permitted under this Plan, the total floor area of the dwelling (excluding any area used for parking) must not exceed whichever of the following is the greater—

- (a) 60 square metres,
- (b) [insert number]% of the total floor area of the principal dwelling.
18. Both options proposed by Council in the Planning Proposal involve amending a mandatory clause adopted under the Standard Instrument. As set out in paragraph 12, both Option A and Option B propose to amend the mandatory clause either through the alteration of clause 5.4(9) or through the addition of a new clause, 5.4(10).

Key Issues

2.4 Scenarios and Testing for Secondary Dwelling Outcomes

Council Comments

19. In response to one of the Department's reasons for refusal; that the Planning Proposal does not adequately demonstrate secondary dwelling outcomes and test scenarios of different percentages under clause 5.4.(9)(b), Council's Gateway Determination Response (appendix i) conducted four test scenarios. The results of these test scenarios are found below in Table 3.

Table 3 – Council's Test Scenario Results

| Scenario | Principal Dwelling Size | Max. Secondary Dwelling Size – Compliant with CI 5.4(9)(b) | Bedroom No. | Outcome |
|----------|-------------------------|--|-------------|-------------|
| 1 | 1,200m ² | 240m ² | 4 | Undesirable |
| 2 | 1,043m ² | 208m ² | 3 | Undesirable |
| 3 | 486m ² | 96.59m ² | 2 | Desirable |
| 4 | 350m ² | 69.5m ² | 2 | Desirable |

Source: Council's Gateway Determination Response

20. Council's Gateway Determination Response states the results of these test scenarios highlights that the current 20% limit enables secondary dwellings that are beyond an anticipated scale and density (as shown in scenarios 1 & 2). Conversely, Council's Gateway Determination Response states that scenarios 3 and 4 achieved desirable outcomes with both secondary dwellings being under the proposed 110m² limit.
21. Council's Gateway Determination Response states:
- "Overall, changing the percentage under clause 5.4(9)(b) will not resolve the issue outlined in the planning proposal. The demonstrated test scenarios appropriately respond to reason #3 of the Gateway Determination and justify the need for the planning proposal to proceed."*
22. Council states in its Gateway Determination Response:
- "Should the proposal not progress, future development of secondary dwellings in rural lands would enable the unanticipated addition of residents, with the possible facilitation of a typical 4-bedroom dwelling for larger principal dwellings. Such an unplanned increase in population in the Shire's rural zones would also place pressure on local services and infrastructure."*
23. In response to the Commission's question regarding the extent of the problem, the Council conducted a high-level review of the existing 3,810 dwelling footprints within the rural areas of Council's local government area. Based on this review which included adjustment to account for two storey dwellings, the Council concluded that:
- 1,423 (37%) of the dwelling footprints in the rural area are in excess of 550m² in size and as such, there would be scope for large secondary dwellings (in excess of 110m² Gross Floor Area) on each of these properties under the current controls; and
 - 2,387 (63%) of the dwelling footprints in the rural area are less than 550m² in size and as such, secondary dwellings on these properties would be limited to a size of less than 110m² under the current controls.

Department's Assessment

24. In its assessment of the Planning Proposal, the Department found that the Planning Proposal had strategic merit as it would give effect to the Central City District Plan, the Hills Future Community Strategic Plan and draft Hills Future 2036 Local Strategic Planning, particularly as they relate to housing supply, choice and affordability, liveability objectives and maintaining the character of rural areas in Council's local government area.
25. However, the Department concluded that:
- "Although the proposal has strategic merit as it gives effect to the Central City District Plan, the Hills Future Community Strategic Plan and draft Hills Future 2036 Local Strategic Planning Statement; the proposal does not demonstrate sufficient strategic merit to amend clause 5.4(9) as proposed. The proposed provisions for the percentage of the total floor area of the principal dwelling in rural zones and the maximum size of secondary dwellings under clause 5.4(9)(b) cannot be legally made"*.
26. In particular the Department found that
- "the proposal does not sufficiently test secondary dwelling outcomes and different percentages under clause 5.4(9)(b)."*

Commission's Findings

27. Although the ability to make the Planning Proposal is discussed in detail in paragraphs 45-48, the Commission considers that the Planning Proposal has both strategic and site specific merit. It is consistent with key strategic documents and there are no site specific environmental or social issues that would warrant the Planning Proposal not progressing past Gateway. The Planning Proposal is well considered and is a proactive planning response to both a housing affordability issue and Council's objective of maintaining the character of the local government area's rural lands. The Commission is also satisfied that sufficient evidence has been provided in support of the Planning Proposal noting that Council has adequately characterised the nature and scale of the housing issues that the Planning Proposal seeks to address.
28. The Commission notes the Department's view that "the proposal does not sufficiently test secondary dwelling outcomes and different percentages under clause 5.4(9)(b)". However, the Commission is satisfied that the Council has justified the need for the proposed changes through its scenario testing and additional information provided and outlined in paragraph 24. The Commission is also of the view that to some degree Council's initial lack of scenario testing was dictated by Council's desire to address the two issues at once by providing a gross floor area for secondary dwellings in rural zones (i.e. must not exceed 110m², plus an optional garage up to 20m²).

2.5 Section 9.1 Direction - 4.4 Planning for Bushfire Protection

Council Comments

29. In Attachment B of its Planning Proposal, Council lists *Section 9.1 Ministerial Direction - 4.4 Planning for Bushfire Protection (Direction 4.4)* as being both applicable and relevant to the Planning Proposal. Council finds that the Planning Proposal is consistent with Direction 4.4.
30. Council states in its Planning Proposal that:

"The planning proposal would not impact on the application of the Bushfire Protection Guideline 2006 or the consideration of bushfire protection as part of any Development Application for a secondary dwelling."
31. In response to one of the Department's reasons for refusal; that the Planning Proposal contained unresolved inconsistencies with Direction 4.4, Council states in its Gateway Determination Response dated 19 May 2020:

"This is considered insufficient grounds upon which to refuse the planning proposal as a Gateway Determination could have simply included a condition that the planning proposal be updated to identify how the proposal complies with Planning for Bushfire Protection 2006... and/or updated to justify any inconsistency with the Ministerial Direction. Similar conditions have been placed on Gateway Determinations for other proposals."
32. Council states in its Gateway Determination response that as secondary dwellings are already a permissible use on rural lands in the LGA, additional controls as required under Direction 4.4 are not considered necessary.

Department's Assessment

33. The Department's Gateway Report states that:

"Much of the rural land within The Hills is identified as bushfire prone, containing all categories of risk. The planning proposal would not impact on the application of the Bushfire Protection Guideline 2006 or the consideration of bushfire protection as part of any Development Application for a secondary dwelling. However, the proposal is inconsistent with this Direction as it does not introduce controls that avoid placing inappropriate developments in hazardous areas."

34. The Department concluded that the Planning Proposal is inconsistent with Direction 4.4 as

"it does not introduce controls that avoid placing inappropriate developments in hazardous areas."

35. This assessment was upheld by the Department's Justification Assessment.

Commission's Findings

36. The Commission notes that *Planning for Bushfire Protection 2019* came into effect on 1 March 2020. The Commission has not considered the Planning Proposal against the new guidelines. Notwithstanding, the Commission does not agree with the Department's view that the Planning Proposal is inconsistent with Direction 4.4 and agrees with Council that this is an insufficient ground upon which to refuse the Planning Proposal. The Planning Proposal does not involve a rezoning, change in use, or necessarily an increase in intensity of use (secondary dwellings). The Planning Proposal merely seeks greater control over the size of secondary dwellings in rural zones.
37. Consequently, the Commission questions the need for additional bushfire protection controls and the Department's view that, in the absence of additional controls, the Planning Proposal is inconsistent with Direction 4.4. The Commission agrees with Council that bush fire protection issues could easily be addressed at the development application stage, and to this effect, a condition of Gateway requiring consultation with the Rural Fire Service prior to exhibition would have been sufficient. The Commission does note however, that the Department considers items 1 and 3 of the Gateway Determination to be the determinative aspects of its decision.

2.6 Amendment of the Standard Instrument

Council Comments

38. Council's Planning Proposal states that:

"Consideration was given to the potential to amend the percentage figure within clause 5.4(9)(b), however as the issue is two-fold, amending the maximum percentage within the clause would only resolve one part of the issue whilst concurrently worsening the other. For this reason, the only viable solution to the issues identified by Council is the imposition of a consistent fixed maximum size for all secondary dwellings across rural areas."

39. Council's Gateway Determination Response acknowledges the procedural requirements of amending the Standard Instrument (as set out in paragraph 42), however it goes on to state:

“...it is inconceivable why amendments to Clause 5.9 would be so easily dismissed by the Department when the proposal is within the Minister’s power and simply represents a practical and reasonable response to a local issue which would impact all council areas in NSW with rural land.”

40. Council’s Gateway Determination Response states:

“The Standard Instrument was introduced with the ability for councils to include local provisions to address local circumstances, where justified. It is not clear how imposition of a maximum floor area of 60m² across both urban and rural areas adequately responds to the differing characters in these areas or why Council is unable to tailor these controls to respond to local circumstances which can vary with different land use patterns, lot sizes / densities and community needs.”

Department’s Assessment

41. The Department’s Gateway Report states that:

“Council’s proposed amendments to clause 5.4(9) cannot legally be made as it affects a non-variable part of the compulsory clause of the Standard Instrument – Principal Local Environmental Plan.”

42. The Department’s Gateway Report notes that:

“...the only way in which Council’s proposal could be considered is if there was an amendment to the Standard Instrument (Local Environmental Plans) Order 2006 or the Environmental Planning and Assessment Act 1979; or for a State Environmental Planning Policy to override the effect of clause 5.4(9).”

43. The Department’s Gateway Report states that the Planning Proposal has some strategic merit but not enough to warrant an amendment of the Standard Instrument:

“...gives effect to the Central City District Plan, the Hills Future Community Strategic Plan and draft Hills Local Strategic Planning Statement; the proposal does not demonstrate sufficient strategic merit to amend clause 5.4(9) as proposed.”

44. The Department’s Justification Assessment upholds its assessment, adding that:

“While the proposal may address a relatively small number of applications within The Hills Shire, amendment of the mandatory clause has the potential to affect the provision of secondary dwellings across the state.”

Commission’s Findings

45. Regardless of the Commission’s views on the merits of the Planning Proposal, the ability to make the amendments is fundamental to it progressing in its current form. The Commission notes that the Department is of the view that the Planning Proposal cannot be legally made on the basis that clause 5.4(9) of the Standard Instrument is a ‘mandatory’ clause for local environmental plans.

46. The Commission agrees with the Department’s view that clause 5.4(9) of the Hills LEP cannot (in part) be amended by an EPI (that is, by a planning proposal under Division 3.4 of the EP&A Act). The Commission accepts that the 60m² provision in subclause (a) cannot be amended by the Planning Proposal while the 20% provision at subclause (b) can be amended by the Planning Proposal as it is not stipulated in the mandatory provision of the Standard Instrument.

47. The reasoning supporting this view is that section 3.20(6) of the EP&A Act provides that where a standard instrument has been adopted, only the non-mandatory provisions adopted in an EPI may be amended from time to time by another EPI. This means that the procedure under Division 3.4 of the EP&A Act is not available to amend any mandatory provision of a standard instrument adopted in an EPI such as the HLEP 2019. Notably, Clause 5.4 in the Standard Instrument is marked as mandatory but leaves open the percentage of total floor area to be applied.
48. The Commission recommends that given the strategic merit of the Planning Proposal has been demonstrated and the Department is currently considering providing local government the ability to have greater say on the size of secondary dwellings in rural zones, that the Department should consider affecting the changes by:
- Amending the Standard Instrument to change Clause 5.4(9) from mandatory to non-mandatory. While the Commission accepts that this would enable all LGA's to seek amendments to Clause 5.4(9), any such amendments would still need to demonstrate strategic merit through a Planning Proposal; or
 - Amending a relevant State Environmental Planning Policy (SEPP) to provide local government the ability to have greater say on the size of secondary dwellings in rural zones possibly subject to identified performance criteria.

3 CONCLUSION: THE COMMISSION'S ADVICE

49. The Commission has undertaken a review of the Gateway Determination as requested by the Department. Based on its consideration of the Material, the Commission finds that the Planning Proposal:
- Has demonstrated strategic and site-specific merit. It is consistent with key strategic policies on housing and is unlikely to result in negative social or environmental impacts. It is evidence based and is a well-considered and proactive planning response to both a housing affordability issue and the potential impacts associated with oversized secondary dwellings in the rural areas of the local government area;
 - Is not inconsistent with Direction 4.4 relating to Bushfire Protection. The Planning Proposal does not involve a rezoning, change in use, or necessarily an increase in intensity of use (secondary dwellings). The need for additional controls and the said inconsistency is questionable; and
 - Cannot be legally made in full as Clause 5.4(9)(a) of the Hills LEP is a mandatory clause established in the Standard Instrument.
50. The Commission recommends that the Department seek to affect the amendments sought by the Hills Shire Council either by changing the mandatory nature of Clause 5.4(9)(a) in the Standard Instrument or by affecting the amendments through changes to a relevant State Environmental Planning Policy.



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Member of the Commission



Soo-Tee Cheong
Member of the Commission