

8.11 Report on Investigation into Permissibility of Land uses at Myoora and Mona Vale Roads, Terrey Hills

EXECUTIVE SUMMARY

Purpose

To report to Council the findings of an investigation into the permitted/prohibited land use status of land uses at Myoora and Mona Vale Road.

Summary

In the making of WLEP 2011 (in accordance with the Standard Instrument template) some lawfully established land uses have become prohibited.

This report considers the planning implications for affected land uses within the Myoora and Mona Vale Road precinct.

The report recommends that Existing Use Right provisions under the Environmental Planning and Assessment Act provide sufficient planning provisions for the 17 land uses that have become prohibited within the zone.

Financial Impact

Nil.

Policy Impact

Nil.

RECOMMENDATION OF DEPUTY GENERAL MANAGER ENVIRONMENT

That Council take no further action with respect to Item A of Mayoral Minute 15/2010.

REPORT

Background

At its meeting of 24 August 2010 Council resolved that staff were to prepare a report on the Myoora and Mona Vale Roads - RU4 Rural Small Holdings precinct (Item A) for Council's consideration following the making of the Warringah LEP 2009.

The discussion of the item ('Item A') from this report (Mayoral Minute 15/2010) is relevant and provides context to the analysis as follows:

Attachment 1: Item A – Myoora and Mona Vale Roads - RU4 Rural Small Holdings

Matter discussed:

Part 5C in Submissions Discussion booklet. Permitted / prohibited status of lawfully approved and established Category Three Land Uses in the current A4 Myoora Road Locality under the draft Warringah LEP 2009.

Summary of discussion:

It is possible to permit additional uses on the individual lots on which the uses are currently located by amending WLEP 2009, Schedule 1 Additional Permitted Uses, and the Additional Permitted Uses map.

Such a change would mean that the uses become permissible on those lots but that if expansion, for example, onto an adjoining lot is required, then a planning proposal would need to be submitted.

Land owners in Belrose North (Part 5B in Submissions Discussion booklet) have also made similar submissions. To achieve consistency the area for investigation may need to extend beyond the Myoora Road area.

Investigation is required around the question of whether the NSW Department of Planning (DOP) is open to accepting a significant number of additions to Schedule 1 or whether it will deem that the 'Existing Uses' provisions of the Environmental Planning and Assessment Act (EP & A Act), are appropriate to address this matter.

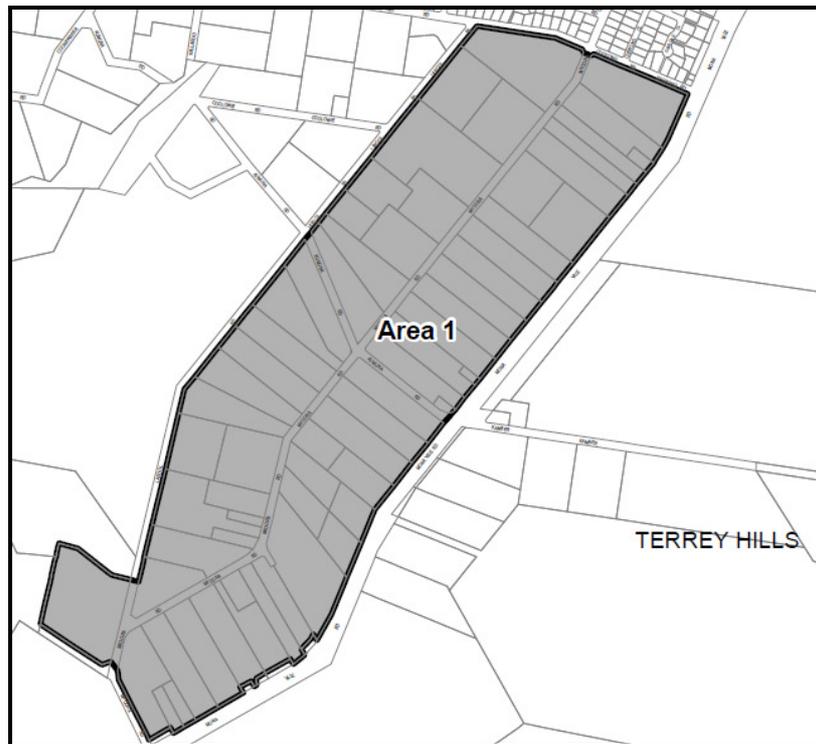
Outcome of discussion:

Council staff are instructed to further investigate these areas and report back to Council.

Key to this exercise was to investigate whether further additional uses needed to be added to Schedule 1 of WLEP 2011. Such a change would mean that existing approved uses could expand and intensify their development, subject to Council consent. Alternatively, Council Officers were also to investigate whether existing use right provisions provide adequate planning provisions for affected uses. The matter has been investigated and the results contained herein.

Precinct and land use context

The area is referred to as the Myoora Road / Mona Vale Road precinct. It is a large area of land (108 hectares) fronting the western side of Mona Vale Road at Terry Hills.



The general character of the area is semi urban / semi rural. Whilst Garigal National Park is opposite the precinct (on the eastern side of Mona Vale Road), and land further to the west towards Duffys Forest is more rural in character, the precinct has been cleared of its natural bushland and contains a variety of urban land uses.

The land topography within the precinct is relatively level with some parts gently sloping away from Mona Vale Road to Myoora Road. The allotment sizes range from 446m² to 121,540m² and average around 15,700m² providing sufficient areas to accommodate a range of land uses.

Given these qualities, the precinct has evolved to contain a range of different uses most of which can be broadly described as low intensity in nature. Some examples of the more prominent businesses within the precinct include: Australian Native Landscapes; Forest Coach Lines; Miramare Gardens function centre; Terrey Hills Caravan Park; Forest Way Fresh; St Anthony in the Fields Church.

Characteristics of the issue

The Myoora Road precinct contains a wide range of lawfully established uses, each varying in scale and intensity. For example the Hills Flower Market, Terrey Hills Tavern and Forest Coach Lines. Other land uses include The Spastic Centre of NSW; Checkers Resort and Conference Centre; Terrey Hills Tavern; The German International School; Golf Paradise.

Warringah LEP 2011 zones the precinct RU4 Rural Small Holdings. However the precinct is distinguished from the remainder of the RU4 zone by the provision of additional permitted land uses pursuant to Schedule 1 of the LEP. Under Schedule 1 the precinct is known as Area 18. The additional permitted uses within Area 18 include:

- educational establishments,
- garden centres,
- hospitals,
- hotel or motel accommodation,
- places of public worship,

- recreation areas,
- recreation facilities (indoor),
- recreation facilities (outdoor),
- registered clubs and
- restaurants or cafes

Whilst Schedule 1 has gone a considerable way to capture the unique land use character of the precinct there remain a number of land uses that are not permitted by WLEP 2011. The matter that Council has sought an investigation of is in effect:

- What are the planning implications for these land uses?
- What options are available to accommodate this situation?

Key to this exercise is to investigate whether further additional uses should be added to Schedule 1 of the LEP or alternatively, whether the prevailing, existing use right provisions are adequate in providing planning provisions for the affected uses.

An investigation of these matters has been undertaken. This has involved a desk top analysis, land use survey, review of development consents, site visit and analysis of applicable planning legislation and strategic documents. Advice has also been sought from the Department of Planning and Infrastructure.

Key findings from the investigation are outlined in the following analysis:

- Of the 69 individual properties within the precinct 74% (or 51) properties currently contain a use that is permissible under the WLEP 2011.
- 25% (17) are prohibited under WLEP 2011.
- 1% (1) are currently operating without consent (an illegal use, for which an Order has been served to the owners by Council Officers).
- In addition a development application lodged prior to the introduction of WLEP 2011 for a Category 3 use is currently under assessment by Council Officers.

25% or 17 properties within the precinct contain a land use that is prohibited under WLEP 2011. It is this 25% that is the subject of analysis in the remainder of this report. Businesses include:

- Forest Way Fresh,
- The Glazed Garden,
- Forest Coach Lines,
- Imperial Gardens Nursery,
- The Spastic Centre of NSW,
- Terrey Hills Caravan Park,
- Warringah Crane and Transport,
- Miramare Gardens Function Centre,
- Hills Flower Market, and
- Private Operators



Potential means of addressing the issue

In considering the options for achieving appropriate planning provisions for the 17 land uses that have become prohibited, there are four key considerations. These include:

1. Existing Use Rights – What is permitted under existing use rights provisions and how are existing use rights protected?
2. Comparison between WLEP 2000 and WLEP 2011 – How do these documents differ in their approach to land uses?
3. Additional Permitted uses within a Zone – Schedule 1 of WLEP 2011 – What are the advantages and disadvantages of additional uses under Schedule 1?

The existing use rights provisions under the Act are assessed as satisfactory in accommodating land uses within the precinct and the appropriate means to deal with the issue; the basis for this is discussed below.

1 Existing Use Rights

Lawfully established uses within the precinct are protected by existing use right provisions established under the Environmental Planning and Assessment Act 1979 and the Environmental Planning and Assessment Regulation 2000.

These provisions provide certainty for landholders currently operating lawfully established land uses that have become prohibited in the precinct and ensures the attainment of appropriate outcomes by Council. The Regulation permits, subject to development consent:

- The enlargement, expansion and intensification of an existing use
- Alteration or extension of the existing use
- Rebuilding of the use
- Change of use to a permissible use
- Change of use to a prohibited use subject to certain requirements under the Regulation. Most notably the Regulation does not permit the significant intensification of the use or an expansion of floor space beyond 10% of that existing.

Existing use rights enable lawfully established land uses to continue operating in perpetuity and permit development rights for the change or increased development of the use subject to Council consent (as discussed above). Existing use rights allow Council to have a consistent land use pattern in accordance with the established vision for the area and provides for the timely transition of land to the new preferred planning outcomes established under WLEP 2011. It is noted that land owners, not Council, are responsible for establishing existing use rights for individual uses. This report makes no comment on whether or not existing use rights are applicable to the sites listed.

The benefit of existing use rights lies in the fact that it provides a site by site approach in comparison to other options such as Schedule 1. In this manner, inconsistent uses are contained to appropriate sites and individual uses considered to be unsuitable are not permitted throughout the entire precinct as would occur under Schedule 1. For example if a whole of precinct approach was taken under Schedule 1 this would mean that certain uses including Bulky Goods Premises and Function Centres would become permissible throughout the precinct, inconsistent with Council's current vision for the area. As such existing use provisions provide certainty for the land holder and for Council in achieving appropriate outcomes in the precinct.

It is considered that existing use rights provide appropriate planning controls for the future development of the precinct until a strategic direction is established and relevant supporting studies are undertaken.

2 Comparison between WLEP 2000 and WLEP 2011

WLEP 2011 was prepared in accordance with the Standard Instrument LEP Template under the instruction of the State Government. The Standard LEP is a traditional zoned based planning scheme as opposed to the locality and performance based model of WLEP 2000. Under WLEP 2011 land uses are either permitted or prohibited with a significant increase in prohibited land uses. If a proposed land use is prohibited, a Planning Proposal to amend WLEP 2011 is required.

2.1 Category 3 of WLEP 2000

WLEP 2000 contained provisions known as Category 3 land uses, which in turn gave rise to what became known as Category 3 developments. Category 3 was similar to achieving a 'spot rezoning' and required a thorough performance test to determine the suitability of the proposal within the locality. The assessment of a proposed Category 3 development also required an Independent Public Hearing to be undertaken to further determine the suitability of the proposal.

Clause 16 of WLEP 2000 provided development controls for existing Category 3 uses and only permitted:

- Minor alterations and additions
- The rebuilding of the use
- The minor expansion or intensification of the use

The assessment of Category 3 developments was based on rule of thumb approach, generally permitting a maximum 10% increase in scale or intensity of an existing use.

It is noted that a number of land uses within the precinct have been approved as Category 3 development and are now prohibited. These approved uses will have existing use rights subject to the demonstration of such by the landowner.

3 Additional Permitted uses within a Zone – Schedule 1 of WLEP 2011

Schedule 1 provides for certain land uses, beyond that permitted by the applicable zoning table, to become permissible with consent in a designated area. Schedule 1 already applies to the precinct and allows a variety of additional uses.

The ability to add additional uses to Schedule 1 is partly at the discretion of the Department of Planning and Infrastructure (the Department). The Department originally advised (via a Practice Note) that Councils were to limit their use of Schedule 1 in adopting new LEPs in the Standard Instrument format. Officers in the Department have reconfirmed this position in discussions as part of the investigation of these matters.

Further, existing uses provisions under the Act are appropriate for accommodating lawfully established land uses. This position has been further clarified by the Department in relation to this issue through the following advice:

- The number of uses in Schedule 1 should be kept to a minimum and only be used where absolutely necessary.
- Existing use rights provisions are appropriate for lawfully established land uses.

Existing use rights provisions provide sufficient opportunity for the future expansion of existing legal uses within the precinct and additional uses are not required in Schedule 1 to protect these uses. Further this advice can be interpreted to suggest that a Planning Proposal to amend Schedule 1 of WLEP 2011 to include additional uses would not be viewed favourably by the Department. There are also a number of legitimate planning reasons why further additions to Schedule 1 are not deemed appropriate for the precinct:

- The application of Schedule 1 is a precinct based approach. If all lawfully established uses were listed under Schedule 1 this would mean that they would become permitted

within the entire precinct including Bulky Goods Premises, Pubs and Functions Centres. This is inconsistent with Council strategies and vision for the area.

- The Department has advised that the number of uses in Schedule 1 should be kept to a minimum and only be used where absolutely necessary. A Planning Proposal to amend Schedule 1 of WLEP 2011 to include additional uses would not be viewed favourably by the Department.
- Current planning provisions are appropriate. Existing use rights provide development rights for individual uses and the attainment of appropriate outcomes by Council.

Comparison between Schedule 1, Existing Use Rights and Category 3 Assessment

Given the changes that have occurred and uncertainty surrounding the permissibility of lawfully established uses within the precinct concerns have been raised by property owners regarding the application of the former WLEP 2000 and the current WLEP 2011. As such a comparison between Schedule 1, Category 3, and existing use rights has been undertaken.

Type of Development	Rebuilding of use	Change of use to another prohibited use	Change of use to a complying use	Alterations and additions	Expansion or intensification
Schedule 1	YES	NO	YES	YES	YES
Clause 16 Category 3 (WLEP 2000)	YES	YES ^a	YES	YES*	YES*
Existing Use Rights	YES	YES [^]	YES	YES	YES

^aSubject to a Category 3 assessment as discussed in Section 2 above.

[^]Change of use from light industrial use to another light industrial use or commercial use to another commercial use and limited to 10% expansion in floor space.

*Rule of thumb limited to 10% expansion.

As demonstrated in the table above, existing use rights provisions are equivalent and in certain circumstances less restrictive than development under the former Category 3 provisions of WLEP 2000.

On this basis WLEP 2011 and existing use rights provisions are considered appropriate planning controls for the precinct. Current controls provide certainty for land owners and facilitate the attainment of appropriate outcomes in the precinct in accordance with Councils vision for the area.

Future potential

There is some expectation that the precinct will continue to be identified by land holders for 'higher and better' uses. This is supported by the SHOROC Regional Employment Strategy 2008 which identified the site as an opportunity for future investigation due to its access to Mona Vale Road, its location adjoining Austlink Business Park and market activity in the area.

A range of resources and studies would be needed to investigate any future development potential and this is a relatively large undertaking. Part of these investigations would relate to what enhanced infrastructure provision is needed to support any higher development, the costs and the funding sources identified.

As identified in the Strategic Community Plan Council is undertaking an employment study, which will involve a supply and demand analysis, and which will ultimately lead to the preparation of an employment strategy. This work is needed to provide a strategic planning framework against which to consider the future land use potential of a number of areas within Warringah Local Government Area.

Notwithstanding the above, the potential also exists for landholders to make an application to rezone land within the precinct and permit a use that is currently not permitted under WLEP 2011.

Conclusion

A number of options are available to landowners within the precinct and a large range of land uses are permissible in the area, above that of other zones. Furthermore, as discussed throughout this report, existing planning controls under WLEP 2011 and existing use rights provisions provide certainty in development rights for landowners and appropriate outcomes for Council until further planning is undertaken.

As such it is recommended that Council resolve not to change the planning settings applicable to the land at this time. The additional permitted uses list in Schedule 1 of the LEP as well as existing use rights provisions under the Act are considered satisfactory for the present time.

Existing use rights provisions provide sufficient opportunity for the future expansion of existing legal uses within the precinct and additional uses are not required in Schedule 1 to protect these uses.

Group Manager Strategic Planning

