

“Heritage Estates” Rezoning Investigations Small Lot Rural Subdivision at Worrowing Heights

Updated July 2009

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Background

This “paper subdivision” is made up of approximately 1,200 lots in Deposited Plans 8590, 8591, 8770, 8771 and 8772 within the locality of Worrowing Heights. Refer to Figure 1 - Location of the 'Heritage Estates'.

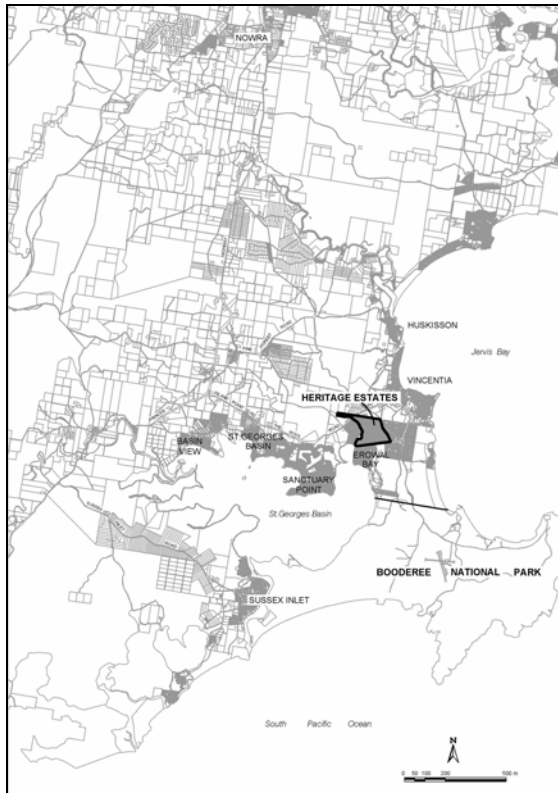


Figure 1 - Location of the 'Heritage Estates'

Henry F. Halloran originally subdivided the land in 1915 as part of his vision for St. Vincent and Pacific Cities. The Deposited Plans that make up the Heritage Estates were registered in 1915/1916. The subdivision and registration complied with the relevant legislation of the day.

The subdivision was never actually implemented and remained unzoned until 1964 when the City's first landuse zoning scheme, the Interim Development Order No. 1 came into affect. Under IDO No. 1, the land was given a "Rural" zoning, which essentially prohibited dwellings on the individual lots. When the IDO was superseded by the Shoalhaven Local Environmental Plan (LEP) in 1985, rural zonings were retained and the land is currently zoned Rural 1(d) and Rural 1(b). These zones also do not enable the individual lots within the subdivision to be built on.

The subdivision was largely retained in large ownerships until the late 1980's and early 1990's when the individual lots were marketed for sale. As a result the 1,200 lots are now held in approximately 1,100 ownerships.



Figure 2 - Aerial photograph and cadastre

Rezoning Investigations: 1992 - 1999

Requests from landowners to rezone the land led to a decision in December 1992 by Council to investigate rezoning to enable dwellings to be erected on the individual lots. As part of this process, an environmental study and other detailed investigations were prepared in the mid 90's.

Disagreement among stakeholders and the community about the appropriateness of developing the land led to formation of a taskforce in 1998 and when the taskforce was unable to reach agreement, the State Government convened a Commission of Inquiry (CoI) in 1999 to resolve the matter.

NSW Commission of Inquiry, 1999

The CoI held under Commissioner Kevin Cleland, Deputy Chairman was finalised in August 1999 and made 12 recommendations. These recommendations are detailed on the [attached diagram](#). (PDF file 1.42Mb requires Adobe Acrobat Reader)

Further information on the CoI and its outcomes are available at:

<http://www.coi.nsw.gov.au/inquiry/component/view.php?CompId=97>

Jervis Bay Settlement Strategy, 2003

The CoI recommendations included the need to consider the matter in the overall Settlement Strategy for the Jervis Bay Region. The Jervis Bay Settlement Strategy (JBSS) was completed by Council and endorsed by the State Government during 2003.

The JBSS indicates that the area will be investigated for future rezoning to enable residential development in accordance with the CoI recommendations.

The JBSS can be viewed on Council's Internet site at:

<http://www.shoalhaven.nsw.gov.au/council/pubdocs/JBSettlementStrategy.pdf> (PDF file 6.1Mb requires Adobe Acrobat Reader)

Scoping Study, 2004

Following the release of the Jervis Bay Settlement Strategy in 2003, a "[Scoping Study](#)" (PDF file 787Kb requires Adobe Acrobat Reader. Does not include certain figures and annexure's.) was prepared for the project that outlines the range of tasks and costs associated with progressing the rezoning investigations. The findings of this Study were considered by Council during February 2004 and it was resolved that

- a. *Council proceed with Stage 1 (rezoning investigations) only for the Heritage Estates and if successful leave the development application and construction stages to be negotiated by the Landowners.*
- b. *The cost of the Stage 1 rezoning investigations of the Heritage Estates be ultimately recouped by way of a special rate to be applied to rateable properties in the rezoned area.*

Following on from this resolution Council included funding of \$350,000 in its 2004/2005 Management Plan to advance the rezoning investigations. This funding has been used to employ a dedicated project officer to oversee the detailed investigations (eg. flora/fauna, bushfire, stormwater etc) associated with the proposed rezoning and fund the required detailed investigations that were outlined in the "Scoping Study".

Rezoning Investigations in 2005 - 2009

A number of strategic planning assessments were completed from 2005 - 2007. These included:

- Threatened Biodiversity
- Bushfire Assessment
- Water Quality Monitoring
- Hydrogeology & Soils
- Cultural Heritage (Aboriginal and European)

Outcomes from the Threatened Biodiversity Assessment culminated in the proposal being refused under Federal environmental law in 2009. The findings of the threatened biodiversity report are summarised below. A summary of the findings of the other assessments can be found in the [Heritage Estates Public Environment Report](#).

Threatened Biodiversity Assessment results

This Assessment was completed by Bushfire & Environmental Services (BES). A number of protected plants, animals and ecological communities were identified on the subject land:

Threatened Species Conservation Act (NSW)

- 3 threatened flora species: Biconvex Paperbark, Bauer's Midge Orchid & the Leafless Tongue Orchid
- 1 Endangered Ecological Community: Swamp sclerophyll forest
- 17 threatened fauna species: Black Bittern, East Coast Freetail Bat, Eastern Bentwing Bat, Eastern Bristlebird, Eastern False Pipistrelle, Eastern Pygmy-possum, Gang-gang Cockatoo, Glossy Black Cockatoo, Greater Broad-nosed Bat, Grey-headed Flying-fox, Ground Parrot, Southern Myotis, Powerful Owl, Masked Owl, Square-tailed Kite, White-footed Dunnart, & Yellow-bellied Glider

Environment Protection and Biodiversity Conservation Act (Commonwealth)

- 2 flora species: Biconvex Paperbark, & the Leafless Tongue Orchid
- 2 fauna species: Eastern Bristlebird & Grey-headed Flying-fox.
- 5 migratory species: Black-faced Monarch, Latham's Snipe, White-bellied Sea-eagle, White-throated Needletail, & Rufous Fantail

Other

4 ROTAP (Rare or Threatened Australian Plants) flora species + 19 other significant species. ROTAP species are those listed by the CSIRO. Some ROTAP species are already protected under the *TSC Act* and *EPBC Act*. ROTAP species that do not yet have statutory protection under the legislation are matters for consideration in the assessment of development applications.

The Giant Burrowing Frog (protected under the *TSC Act* and the *EPBC Act*) was not recorded but the survey results were inconclusive due to poor survey conditions at the time. The occurrence of suitable habitat and proximity to known records on nearby land led BES to conclude that the species could occur on the subject land. Similarly, although the Eastern Underground Orchid was not detected, it is known to occur nearby and the subject land contains potentially suitable habitat.

More detailed information on the findings, including habitat maps of some of these species, can be found in the [Heritage Estates Public Environment Report](#).

What was done with the biodiversity findings?

All flora and fauna consultants working in NSW are licensed by the NSW Department of Environment and Climate Change (DECC) in order to carry out their work. As a condition of the license agreement all threatened flora and fauna records collected must be provided to DECC.

Following receipt of the draft report, a briefing of Council took place on 20th September 2006. At that meeting, Councillors were provided with a number of options to progress the rezoning investigations and it was decided, given the significance of the issues at hand, that a meeting would be requested with the then Minister for Planning, the Hon Mr Frank Sartor, MP and the then Minister for the Environment, the Hon Mr Bob Debus, MP and their respective heads of department. This meeting took place on 23rd November 2006, with the then Mayor, Cllr Greg Watson, the General Manager, Mr Russ Pigg and Director Strategic Planning, Mr Ernie Royston representing Council.

It was decided to establish a Working party to consider options for the future development of the land. The Working Party included representatives from Council and DECC. The first meeting of the Working Party took place on 15th December 2006. The Working Party was convened to consider options and

opportunities having regard to the findings of the biodiversity assessment, bushfire, social and economic issues.

The second meeting of the Working Party was held in Canberra on 24th January 2007. The purpose of the meeting was to meet with the then Department of the Environment and Water Resources (DEW) to discuss matters relevant to the study area, that are protected under the *Environment Protection & Biodiversity Conservation Act, 1999 (EPBC Act)*.

Referral made under the EPBC Act

Correspondence from DEW dated 22 March 2007 advised:

- It would be in the best interests of all parties to make a referral under the *EPBC Act*, as soon as possible.
- No additional flora or fauna surveys would be needed to complete a formal referral.
- It was likely that the project would be deemed to be a "controlled action" under the *EPBC Act*.

The EPBC referral documentation comprising the referral form, the Biodiversity Survey and Assessment prepared by Bushfire & Environmental Services Pty Ltd (BES) and other attachments were submitted to the EPBC Referrals Section of DEW in May. In the referral form, Council advised that the biodiversity assessment had not at that stage been released to the public and was regarded as sensitive information, and therefore requested that the document be treated accordingly.

Council received correspondence dated 11 May 2007 acknowledging receipt of the referral and advising of a public consultation period extending for 10 working days. The referral form completed by Council was placed on the [EPBC referral website](#).

[Click here](#) to view a flow diagram of the EPBC assessment process.

Outcome of the EPBC Referral

On 22 June 2007, the delegate for the Minister for the Environment and Water Resources determined that the proposal is a "**controlled action**". That is, that the proposal is likely to have a significant impact on matters protected under Part 3 of the EPBC Act: listed threatened species and ecological communities (sections 18 and 18A); and Commonwealth land (sections 26 and 27A). This meant that if the proposed rezoning and development was to proceed, Council (as the proponent) would require the approval of the Commonwealth Minister for Environment and Water Resources under the EPBC Act.

The Minister's delegate also determined that the proposal was to be assessed via a **Public Environment Report (PER)**.

Heritage Estates Public Environment Report

As part of the approval process under the EPBC Act, Council was required to prepare a draft Public Environment Report (PER), addressing matters detailed by

Department of the Environment Water Heritage & the Arts (DEWHA). The draft PER was publicly exhibited from June to September 2008 as required by DEWHA.

The [Heritage Estates Public Environment Report](#), incorporating comments received during the public consultation on the draft PER, was finalised and published in accordance with the requirements of the EPBC Act in January 2009.

Proposal Refused Under EPBC Act

On 13 March 2009, the Federal Minister for the Environment Peter Garrett MP, refused the proposed rezoning and associated public works to facilitate residential development at the "Heritage Estates", Worroving Heights under the EPBC Act, due to its impact on listed threatened species and Commonwealth land (Booderee National Park).

The Federal Environment Minister notified Council on 23 February 2009, that he proposed to refuse the proposal and gave Council 10 business days to comment. Council wrote to the Minister on 3 March 2009, urging stronger consideration of social and economic issues. The letter from the Minister accompanying his final decision on 13 March stated:

"I have given careful consideration to the comments you have provided, as well as to recent public comments that were received by the Council and my department from members of the public. I have also spoken with the Shoalhaven City Council Mayor, Paul Green, regarding Council's views on the matter.

Although I appreciate the social and economic concerns that have been raised, nothing has been brought to my attention that I did not previously consider in making my proposed decision."

People seeking further information on the decision are encouraged to review the [Recommendation Report](#) prepared by DEWHA prior to the Minister's decision.

What Has Happened Since the Minister's Decision

As a result of the decision under the *EPBC Act*, on 24 March 2009, Council resolved to:

- *acknowledge the refusal of the Heritage Estates rezoning proposal under the EPBC Act by the Federal Minister for the Environment on 13 March 2009.*
- *urgently seek discussions with the Commonwealth Director of National Parks and the NSW Department of Environment and Climate Change (DECC) to discuss the option of Government acquisition of the Heritage Estates.*

Council wrote to the Federal Environment Minister on 25 March 2009, to acknowledge the decision and urging the Minister to proactively assist in acquiring the land for addition to the National Park system (see below for more information on resolving land tenure). Council also notified the NSW Department of Planning that the draft LEP (rezoning) process that was initiated by Council's resolution on 22 December 1992, has been terminated.

Resolving Land tenure

Since refusal of the proposal under the EPBC Act on 13 March 2009, Council has pursued the possibility of joint acquisition with NSW and Federal Government representatives. The outcomes of these discussions were reported to Council on 7 July 2009.

On 14 July Council resolved to:

- a) *Advise landowners of the outcome of representations and meet with landowner representatives to discuss possible options;*
- b) *Again make further strenuous representations to relevant State and Federal Ministers pointing out that the property owners in the Heritage Estates, Worrowing Heights, are being treated unfairly and being denied natural justice by not having the provision of compensation.*

As such, Council staff will now take the necessary steps to action this resolution and further representations will be made to the relevant NSW and Federal Ministers in accordance with the resolution.

Rates & special rates

Council is required to issue rate notices under the *Local Government Act, 1993* to all land owners of rateable land. The category of these properties for rating purposes is "residential non-urban".

In 2006/07 Council began levying the Heritage Estates Special Rate on those properties located in the investigation areas. The purpose of this was to recoup Council's costs for conducting the rezoning investigations.

As a result of Council's resolution to terminate the rezoning investigations, Council resolved to reduce the rates on the properties by:

- discontinuing the special rate (only applied to properties in the investigation areas) - note that the special rate was to have been levied for a period of 10 years; and
- reduce the 'residential non-urban' rate to approximately \$50 p.a. (2008/09 'residential non-urban rates were \$383 p.a.).

The above changes came into effect from 1 July 2009.

Transfer of Land in Lieu of Unpaid Rates

Council has a policy titled "[Small Lot Rural Subdivisions – Transfer of Land in Lieu of Unpaid Rates](#)" that was adopted by Council on 27th February 2007. Under this Policy, Council may accept the transfer of land within the Heritage Estates, in lieu of unpaid rates, if requested to do so by the owner.

In such circumstances, Council will meet all legal costs associated with the transfer of the land. Where property owners are subject to debt recovery action, land owners will have 30 days to agree to a repayment schedule or transfer of the land to Council.

Alternatively, under S.713 of the Local Government Act, 1993 Council may move to sell the land by public auction where rates and charges have been unpaid for more than five years. In the case of vacant land, Council may sell the land within

12 months but only if the amount of outstanding rates exceeds the value of the land.

The Policy will be reviewed in the near future.

What Can Be Done With the land?

Advice on 'land maintenance' issued by Council in 2006

At a meeting of landowners on 6th March 2006, Council staff were asked to provide information as to when landowners could resume these activities. Due to the complexity of existing and new controls applying to the clearing of vegetation in NSW, an undertaking was given that a response would be provided on Council's Internet site.

In summary, the advice that was subsequently prepared stated that:

There is no legal ability for land in the Heritage Estates to be cleared, slashed or mowed without development consent. As development consent has always been required, the question of existing or continuing use rights does not arise. Removal of vegetation within Heritage Estates would most likely require development consent from the Southern Rivers Catchment Management Authority as well as Council.

In the circumstances, land owners are advised to refrain from carrying out further clearing, slashing or mowing activities on their land without first having discussed the need for formal approval to undertake such work with Council's Development & Environmental Services Group.

The resumption of clearing, slashing, mowing and maintenance activities resulting in the removal of vegetation has the potential to undermine the rezoning investigations and delay completion of the project.

The advice can be viewed in full at:

<http://shoalhaven.nsw.gov.au/council/pubdocs/communityissues/Heritage/Clearing%20Internet.pdf>

In addition to the above, the Heritage Estates land contains habitat protected under NSW and Federal environmental legislation as outlined below.

Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

The Heritage Estates land is known to contain a number of environmental assets known as matters of national environmental significance, which are protected by the national environmental legislation the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

Matters of national environmental significance include listed threatened species and ecological communities, among others. Under the EPBC Act a person must not take an action that has a significant impact on a matter of national environmental significance. An action includes activities such as vegetation clearing or earth moving. Substantial penalties apply to a person who undertakes an action that has a significant impact on a matter of national environmental significance.

Threatened Species Conservation Act 1995 (TSC Act)

Severe penalties can also be imposed for clearing vegetation protected under the NSW Threatened Species Conservation Act. For example, the NSW Land and Environment Court recently imposed a \$180,000 fine on an individual for clearing woodland listed as an Endangered Ecological Community. The penalty was the highest imposed for such an offence and is further evidence of the continuing trend of the Court to impose significant fines for breaches of environmental legislation.

Summary

Council's advice to landowners is that no further clearing, slashing, mowing or "maintenance" of land should be undertaken without the appropriate approvals. This advice is considered to be in the best long term interests of landowners, particularly as the land contains habitat that is protected under NSW and Federal legislation.

The above information is not legal advice. It represents Council's current understanding of the planning controls and legislation applying to the Estate based on detailed research carried out by Council staff.

Any landowner intending to carry out any work involving the clearing of vegetation without development consent should obtain their own independent legal advice.

Policy prohibiting camping or erection of temporary structures

Council has had a policy of prohibiting camping or the erection of temporary structures on the land prior to the sale of the land.

Contact Details & Further Information

For further information please contact Eric Hollinger, Senior Project Planner on 02 4429 3320 or planning@shoalhaven.nsw.gov.au