

Report of Planning and Economy to the Ordinary Meeting of Council held on Monday 21 August 2017

**PE2 – Request for Council to prepare a Planning Proposal – 11 Westminster Place, Razorback**

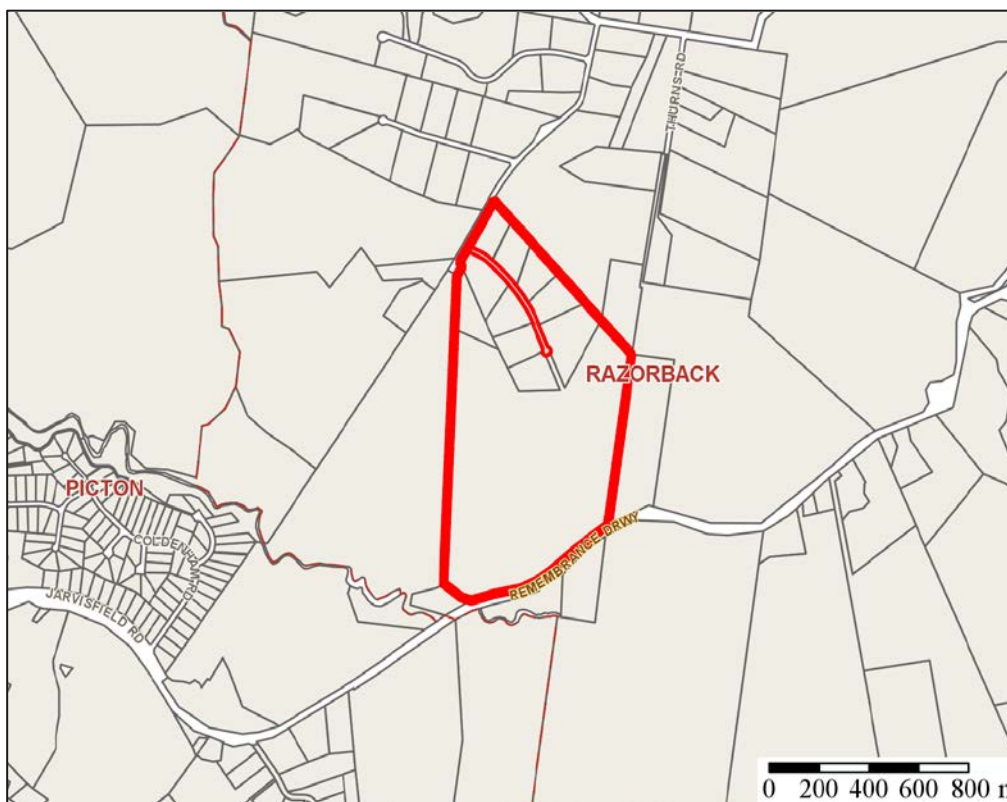
PE2

**Request for Council to prepare a Planning Proposal – 11 Westminster Place, Razorback**

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TRIM 8277

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**LOCATION MAP N**

Stage	Completed
Preliminary notification	Not yet completed
Gateway Determination	Not yet completed
Consultation with Public Agencies	Not yet completed
Specialist Studies	Not yet completed
Public exhibition/community consultation	Not yet completed
Referred to Minister for Publication	Not yet completed

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**EXECUTIVE SUMMARY**

- The purpose of this report is to outline a request for Council to prepare a Planning Proposal for land at No. 11 Westminster Place, Razorback to enable the site to be subdivided into five (5) lots.
- The request follows a development application for a five (5) lot subdivision on the site being refused due to a recent amendment to Wollondilly Local Environmental Plan 2011. The LEP Amendment corrected a series of mapping errors which affected the correct application of a density control to certain Environmental Living zoned lands at Razorback and Menangle.
- This report was considered at the Council meeting on 19 June 2017 where the report was deferred.
- Under legislation, a person who makes a relevant planning application or public submission is required to disclose any reportable political donations. The disclosure requirement extends to any person with a financial interest in the application or any associate of the person making a public submission. No disclosure of political donation has been made in association with this application.
- It is recommended that:
  - Council not proceed with the preparation of a Planning Proposal to enable the further subdivision of Lot 6 DP 1128635, No. 11 Westminster Place, Razorback, as any further subdivision of the lot would contribute to an unreasonable impact on the rural landscape character of the locality and result in an unreasonable density of development on the site and would create an adverse precedent of a way to get around planning rules.
  - A review of E4 zoned land be further considered after the completion of a Rural Land Use Study as part of Council's approach/response to managing the Metropolitan Rural Area.
  - The proponent be advised that if they are not satisfied with this decision then they are able to submit and fund their own planning proposal and if it is not supported by Council seek a pre-gateway rezoning review from the Greater Sydney Commission.

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**REPORT**

**BACKGROUND**

Wollondilly Local Environmental Plan Amendment No. 21 was made on 27 May 2016. This amendment was made to correct a series of LEP mapping errors across E4 zoned land (previously known as 7(c) zoned land under Wollondilly Local Environmental Plan, 1991) in Razorback and Menangle. The mapping errors meant that a density control in Council's LEP did not apply to subdivision applications and that the subdivision of some sites became permissible despite not complying with the E4 zone lot density controls in the then current LEP. The LEP amendment affected a development application that had been lodged but not determined prior to the gazettal of the LEP amendment. The subdivision of the site became prohibited following the gazettal and the development application was refused.

A report on this matter was presented to Council at the June 2017 Ordinary Meeting. At the Proponent's request Council resolved:

*"That the matter be deferred and a site inspection be conducted".*

An inspection of the locality and site took place on 12 July 2017.

**Density Provisions for E4 zoned land**

Wollondilly Local Environmental Plan 2011 (WLEP 2011) contains a clause which intends to control the density of development across certain E4 Environmental Living zoned land within the Shire.

In September 1996, Council completed the Review of Rural Lands Report ("The Rural Lands Report") which led to the introduction of the 7(c) (Environmental Protection (Rural Living) Zone) across certain areas of the Shire and was also the foundation of the density control which is currently applied in WLEP 2011.

The Rural Lands Report was heavily focussed on retaining and protecting rural land for agricultural pursuits but also to retain the rural landscape character of certain areas which may not be suitable for higher intensity agricultural uses but have a rural character that should be retained and are suitable for residential living in a rural environment. The report aimed to achieve a balance between agriculture and other land uses. The objectives of the rural lands study would be achieved by the introduction of three new rural zones into the Wollondilly LEP, 1991:

- 1(a) Agriculture
- 1(b) Agricultural Landscape
- 7(c) Environmental Protection Rural Living.

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The Rural Lands Report states that *"the 7(c) zone is to provide rural living opportunities within a sensitive environment and that subdivision and dwelling houses must cater for the protection of that sensitive environment"*. In order to achieve the intent of the 7(c) (Environmental Protection (Rural Living) Zone) and to ensure that the rural living opportunities were able to be provided it was determined that lots should be developed at a density of 1 lot per 4 hectares.

A 2ha minimum lot size was also introduced to the 7(c) zone *to allow for a range of lot sizes to be created so that they conform to the landscape and landforms of the area and to provide for a variety in the lots created. It should be pointed out that the primary objective of the zone is to encourage the preservation of the landscape character by ensuring that development does not detract from that character. It is considered that any lesser density would not achieve the objective.*

The Rural Lands Report (1996) found that there are four areas suitable for the application of a 7(c) Zone within the Wollondilly Local Government Area being:

- Werombi
- Brownlow Hill
- Menangle
- Razorback and Pheasants Nest.

The LEP Amendments that were made to include the findings of the Rural Lands Report are discussed below:

▪ **Wollondilly Local Environmental Plan 1991**

Amendment No. 11 to Wollondilly Local Environmental Plan 1991 (WLEP 1991) was made on 20 September, 1996 which introduced the 7(c) zone and also inserted Clause 13(b) which provided the following in respect of subdivision in the 7(c) zone:

*"The total number of lots into which the original holding will be subdivided after subdivision will not exceed the number obtained by dividing by 4, the area (in hectares) of the original holding that is within the 7(c) zone only, the dividend being rounded down to the nearest whole number."*

*The term original holding referring to a lot in a current plan (within the meaning of Section 327AA (1) of the Local Government Act, 1919) as at the date of publication in the gazette of Wollondilly Local Environmental Plan 1991 (Amendment No. 11).*

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This clause had the effect that the area of any original holding lot (i.e. a lot that was in existence prior to 20 September, 1996) which was zoned 7(c) (Environmental Protection (Rural Living) Zone) could not be subdivided to a density of greater than 1 lot per 4 hectares.

▪ **Wollondilly Local Environmental Plan 2011**

On 23 February 2011, WLEP 1991 was superseded by WLEP 2011. The NSW Department of Planning's Standard Instrument (Local Environmental Plan) Order 2006 provided that the land use zone E4 Environmental Living would be used in WLEP 2011 as an equivalent zone to the 7(c) (Environmental Protection (Rural Living) Zone).

The density control contained in WLEP 1991 also carried over and were contained in clause 4.1B of WLEP 2011 as follows:

*"4.1B Subdivision of Certain Land in Zone E4 Environmental Living*

- (1) *The objective of this clause is to ensure that certain land within zone E4 Environmental Living is not subdivided to significantly increase the density of development on the land.*
- (2) *The clause applies to land identified as "Original Holdings" on the Original Holdings map.*
- (3) *Despite clause 4.1, development consent must not be granted for the subdivision of land to which this clause applies if the total number of lots comprising the land will exceed 1 lot per 4 hectares as a result of the subdivision.*
- (4) *In this clause, Original Holdings Map means Wollondilly Local Environmental Plan 2011 Original Holdings Map."*

The density control of 1 lot per 4 hectares was retained in WLEP 2011; however, no definition of original holding was included in the LEP as all original holdings lots were to be identified on an original holdings map that would form part of WLEP 2011 (as per sub-clause (2) above). The original holding lot needs to be included (and outlined in red) on the original holdings maps in order for the density controls in clause 4.1B to apply.

When WLEP 2011 was gazetted by NSW Department of Planning in 2011, some E4 zoned land across Razorback and Menangle was not included on the original holdings maps in error and were therefore not subject to the density provisions in Clause 4.1B of WLEP 2011 until Council undertook a Planning Proposal to correct these mapping errors in 2015/2016 (Amendment No. 21 to WLEP 2011).

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▪ **Planning Proposal to correct errors in WLEP Original Holdings  
Maps**

On 20 July 2015 Council resolved to support the preparation of a Planning Proposal to make amendments to the WLEP 2011 Original Holdings Maps to include E4 zoned land that had previously been excluded from the maps in error.

During the Planning Proposal process, formal public consultation on the proposed amendments was carried out for a period of 28 days from 18 November 2015 to 16 December 2015. This included direct written notification to all owners of lots proposed to be added to the original holdings maps (including the owner of 11 Westminster Place).

The Planning Proposal (known as LEP Amendment No. 21) was gazetted on 27 May 2016 and any development application not determined by Council before the gazettal date was required to comply with clause 4.1B of WLEP 2011.

**Subdivision history of the Original Holding and remaining subdivision potential**

The Original Holding Lot for this site was known as Lots 6 and 7 DP 260390 and contained 40.15ha of E4 Zoned land and 40ha of RU2 zoned land (the original holding lot can be seen outlined in red and hatched in attachment 2). The original holding is therefore capable of providing a maximum of 10 E4 zoned lots based on the density controls in the LEP ( $40.15\text{ha}/4 = 10$  (rounded down)) and one RU2 zoned lot. The original holding is therefore capable of a subdivision creating a total of 11 lots (10 E4 zoned lots + 1 RU2 zoned lot = 11 lots).

A development application (D321/00) to subdivide the original holding lot was submitted to Council in 2000 and consent was granted for an eleven (11) lot subdivision on 4 September, 2000. It is noted that the subdivision consent provided for a total of 11 E4 zoned lots which exceeded the maximum permissible yield of 10 E4 zoned lots under the WLEP 1991. The rural zoned lot was not subdivided onto its own title as part of this proposal but rather remained as a lot with 2 land use zones (E4 and RU2).

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The subdivision consent no. D321/00 created Lot 6 DP 1128635 (No. 11) Westminster Place. The site at Lot 6 (No. 11) Westminster Place, Razorback comprises two land use zonings, being E4 Environmental Living and the other RU2 Rural Landscape as can be seen in the map at attachment 1. The minimum lot size and subdivision potential in each zone is summarised below:

- Lot 6 includes approximately 39ha of RU2 zoned land. The minimum lot size for the portion of lot 6 which is zoned RU2 is 35 hectares. The RU2 portion of Lot 6 could therefore still be subdivided onto its own title with consent.
- Lot 6 includes approximately 16.4 hectares of E4 zoned land. The minimum lot size for the E4 zoned portion of lot 6 is 4ha and therefore **if not for the clause 4.1B density controls** may be capable of creating 4 lots.

**Development Application No. 10.2015.775.1 - Five (5) Lot Subdivision**

A further Development Application for Lot 6 DP 1128635 (No. 11) Westminster Place, Razorback was submitted to Council on 16 October, 2015. The application proposed to subdivide the land into five lots. At the time of lodgement of the development application, the subdivision of the site into 5 lots was permissible as LEP amendment No. 21 had not been finalised and therefore any subdivision was not subject to the density controls in WLEP 2011.

The development application was determined after the gazettal of LEP Amendment No. 21 and therefore was required to meet Clause 4.1B in WLEP 2011. The proposed subdivision was unable to comply with this clause and was therefore prohibited and the application was unable to be approved by Council.

The Development Application was refused on 8 December, 2016 for the following reason:

"The development is contrary to clause 4.1B of Wollondilly Local Environmental Plan 2011, particularly sub-clause (3) whereby approval of the development will result in the total number of lots exceeding the statutory lot yield of the original holding."

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**Relevance of Clause 1.8A of Wollondilly Local Environmental Plan 2011**

Clause 1.8A in WLEP 2011 provides that if a development application is lodged prior to, but not determined before the commencement of an LEP, then the development application is to be determined as if the plan had never been made. Clause 1.8A states the following:

***“1.8A Savings provisions relating to development applications***

*If a development application has been made before the commencement of this plan in relation to land to which this plan applies and the application has not been finally determined before that commencement, the application must be determined as if this plan had not commenced.”*

Two recent court decisions have provided clarification over whether Clause 1.8A relates only to development applications lodged before the commencement date of WLEP 2011 (being 23 February, 2011) or whether it has the ability to protect development applications from amendments to LEP's.

In the case *De Angelis vs Wingecarribee Shire Council (2016)*, the NSW Land and Environment Court ruled on 5 February, 2016 that clause 1.8A of the LEP was to be applied so as to protect development applications from amendments to LEP's, and not solely to the LEP commencement date. However, on 1 August, 2016 the NSW Court of Appeal reversed this decision and held that savings provisions '*deal with a precise point in time, namely the point at which a new legal instrument commences*' and did not change over time with subsequent LEP amendments.

The development application for the five (5) lot subdivision at Lot 6 (No. 11) Westminster Place, Razorback therefore could "not be saved" by clause 1.8A in WLEP 2011 as the clause is only to apply to development applications made but not determined before the commencement of WLEP 2011, being on 23 February, 2011.

There was no specific savings clause applied as a result of WLEP Amendment No. 21 to protect development applications lodged with Council before the date of the amendment and therefore the development application for the five (5) lot subdivision at Lot 6 (No. 11) Westminster Place was unable to be approved by Council.



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**Request to prepare a Planning Proposal to enable subdivision of No. 11 Westminster Place, Razorback**

The applicant for the 2015 development application for a five lot subdivision has requested that Council give consideration to a further LEP amendment to enable the subdivision of the site in the manner originally proposed in the development application.

The applicant proposes to include an additional local site specific provision in WLEP 2011 to enable the subdivision of this site into five (5) lots. In effect, this approach would make this particular lot exempt from the operation of clause 4.1B in WLEP 2011 and a five lot subdivision would become permissible with consent.

**Consideration of Proposal**

The applicant has put forward a proposed justification for the additional Local Provision to enable the subdivision of the site into five (5) lots. The applicant's justification and Council's comments are provided below:

Applicant's Justification	Council Officer Comments
<p>The Proposal would provide housing variety</p> <p>The provision of housing variety or choice is an aspiration that is present in the strategic planning for Sydney and Wollondilly at all scales. At the top level, a Plan for Growing Sydney (2014) aims to have the metropolitan area be a city of housing choice. More locally, Policy 8 of Wollondilly GMS is to support the delivery of a mix of housing types to assist housing diversity and affordability so that Wollondilly can better accommodate the housing needs of its different community members and household types. The provision of a small number of rural residential lots is consistent with this aspiration. We understand that council is not presently planning to release rural residential lots on a large scale and that small infill</p>	<p>It is considered that enabling the further subdivision of this original holding for the purposes of housing variety would be contrary to the intent of Clause 4.1B of WLEP 2011.</p> <p>It is considered that the benefit of any increase in housing variety would not be sufficient to overcome the increase in the density of dwellings in the locality as the construction of the dwellings will be at a higher density than on other original holdings within the area.</p> <p>The intent of the development standard is to control subdivision in a manner that preserves the rural landscape character whilst providing a flexible approach to minimal lot size having regard to topographic features and constraints. It is considered that any further subdivision of the E4 zoned portion of lot 6 would be detrimental to that rural landscape</p>

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Applicant's Justification	Council Officer Comments
<p>opportunities are likely to be the primary source of this type of development in the near future.</p>	<p>character and the intent of the area.</p>
<p><b>The Proposal would leverage off existing infrastructure for residential development</b></p> <p>The land is ideally situated to provide rural residential opportunities at this scale. It is located in an existing rural residential precinct which is adequately serviced. The development will also be consistent with the established character of the area as a rural residential area. If this type of residential opportunity were provided using a new release area approach it would likely generate significant infrastructure and servicing needs.</p>	<p>It is agreed that any future lots within the site could be adequately serviced and could utilise existing infrastructure including public roads.</p> <p>It is not agreed that the further subdivision of the site would be consistent with the established character of the area. A proposal to enable 4 additional E4 lots within this site would give an overall total of 15 E4 lots within the original holding which is 50% higher than the planned density of 10 E4 zoned lots for that holding.</p> <p>This would also exceed the established lot density of other original holdings in the locality, which typically provide a mix of smaller lots and also larger lots whilst achieving the desired density of 1 lot per 4 hectares.</p>
<p><b>The proposal would only contribute to around one quarter of one per cent of the district plan target for Wollondilly over the next 5 years.</b></p> <p>The development proposes to deliver around 0.258% of the Shire's five year target for growth under the draft District Plan prepared by the Greater Sydney Commission. We submit that this is a very minor contribution. The proposal will slightly increase the portion of new rural residential lots compared to smaller lot sizes. This small increase will result in improved housing choice without hindering the provision of smaller urban lots around the town centres.</p>	<p>A subdivision of the site would result in a dwelling density that is inconsistent with the desired future character of the locality. The Razorback area is not an area identified for future growth in Council's Growth Management Strategy or any other strategy.</p> <p>It is considered that existing development in Razorback already provides housing variety through a range of lot sizes, as do most of the subdivisions of Original Holding lots that have occurred since the introduction of the 7(c) zone which provide for a range of lot sizes with smaller lot sizes being offset by larger lots.</p>

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Applicant's Justification	Council Officer Comments
	<p>There are other environmental zoned lots in Razorback and Menangle that still have subdivision potential which can provide similar sized lots whilst complying with the relevant density provisions in Clause 4.1B of WLEP 2011 and therefore this argument could not be relied upon to allow a five (5) lot subdivision on this site.</p>
<p><b>The proposal would not result in changed landowner expectations given its context as resulting from a development application that was adversely affected by changing court precedents on the application of the savings provisions in the LEP.</b></p> <p>The proposed rezoning is unlikely to create a precedent in the locality or reasonably change the expectations of other landowners as it is uniquely situated. The circumstances giving rise to this application are a refused development application that could have been approved but for changing understanding of clause 1.8A. To our knowledge there are no other sites in this circumstance. This gives a particular opportunity to provide for a small release of rural residential land without setting a precedent that could result in too many rural lots being created.</p>	<p>At the time that the development application was lodged, the further subdivision of land was only permissible through errors in the original holdings maps. To proceed with another proposal to enable subdivision beyond the permissible density of the original holding would be contrary to the previous Planning Proposal to make the corrections and may give an expectation to other landowners in the locality that further subdivision beyond the desired lot density is achievable though a similar process to amend WLEP2011 for their own land.</p>

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**Draft South West District Plan**

It is considered that a proposal to enable the further subdivision of lot 6 would be contrary to the Draft South West District Plan, sustainability priority 1 as explained below:

Sustainability Priority 1: Improve Protection of Ridgelines and Rural Landscapes

The Rural Lands Report which led to the introduction of the 7(c) (Environmental Protection (Rural Living) Zone) established that the lands that are bound by this landscape should be treated as being within a sensitive environment with a particular landscape character and that the relevant density and minimum lot size controls imposed are necessary for the protection and enhancement of that landscape character. The proposal to enable further subdivision on lot 6 (No. 11) Westminster Place without consideration of the relevant density control is contrary to this sustainability priority which intends to retain scenic landscapes.

**Wollondilly Growth Management Strategy 2011**

The site and broader area of Razorback is not identified as an area for potential future growth beyond that already enabled by compliance with the planning controls contained within WLEP 2011. The Proposal is contrary to the key Policy directions 1, 5, 10 and 19 in the GMS. A more detailed assessment against the key policy directions in the LEP is included at attachment 3.

**Strategic Planning Merit**

It is considered that a proposal to enable the subdivision of the site would be contrary to the desired character of the locality and would also somewhat defeat the purpose of LEP Amendment 21.

Any subdivision of Lot 6 (No. 11) Westminster Place will contribute to the accumulation of dwellings at a higher density than other original holdings in the locality and will be detrimental to the desired rural landscape character of the area which is a key zone objective and one of the intentions of the Rural Lands Report.

Whilst there are other similar sized allotments to those proposed in the locality, these are balanced by other larger lots. The mix of lot sizes, whilst achieving the density controls is a key component in achieving the desired rural landscape character identified in the Rural Lands Report.

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Any change to the development potential of rural land needs to go through an appropriate strategic planning process considering land constraints and capability. Dealing with sites on an individual basis is likely to lead to poor planning outcomes.

It is also noted in the applicant's request that they have included the following advice:

*"at the time LEP amendment No. 21 was made, it is reasonable to conclude that Council and DPE would have assumed, based on the case law available at the time, that Clause 1.8A of the LEP would provide a savings provision that would permit Council to approve any development application lodged but not determined at the time."*

The initial Land and Environment Court Decision which decided that Clause 1.8A in a Council's LEP applied to amendments to LEP's and was not restricted to the initial commencement date of an LEP was made on 5 February, 2016. Prior to this date, although the LEP Amendment No. 21 had not been made, it was significantly progressed (i.e. it had received a Gateway Determination, undergone Public Exhibition) and there was no intent at any stage of the Planning Proposal to include a savings provision to protect Development Applications lodged before the amendment date.

It is therefore reasonable to assume that in the absence of both court judgements that a savings provision would not have been applied to LEP Amendment No. 21, particularly as the purpose of the LEP Amendment was to correct errors which enabled development applications to be submitted without consideration of the density provisions in Clause 4.1B of WLEP 2011.

Council also provided direct written notification to all landowners of land to be added to the original holdings maps and Council did not receive any written submission from any landowners in relation to preparing a savings clause in order to protect any undetermined development applications.

**CONSULTATION**

Initial consultation was carried out with the NSW Department of Planning and they have advised that any Planning Proposal to enable further subdivision of the site would need to demonstrate Strategic Planning merit.

**FINANCIAL IMPLICATIONS**

This report was prepared at the applicants request and was unfunded in Council's adopted budget. No planning proposal fee has been paid due to the background circumstances of the refused development applicant. If the proposal put forward by the applicant is supported, consideration needs to be given to what fees should apply.

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**ATTACHMENTS INCLUDED IN A SEPARATE BOOKLET**

1. Map showing zoning of subject land
2. Map showing Original Holding Lot outlined in red
3. Assessment of the proposal against Wollondilly Growth Management Strategy 2011
4. Letter from the Proponent dated 30 May 2017

**RECOMMENDATION**

1. That Council not proceed with the request to prepare a Draft Planning Proposal to enable the further subdivision of Lot 6 DP 1128635, 11 Westminster Place at Razorback for the following reasons:
  - The proposal would contribute to a density of development which is undesirable in the locality and is inconsistent with surrounding development
  - The proposal would contribute to the generation of an additional four E4 zoned lots which would result in a total of 15 E4 zoned lots in the original holding which would exceed the permissible lot density by 50% which is contrary to the desired character of the area
  - The proposal is not consistent with the Sustainability Priority 1 and in the Draft South West District Plan
  - The proposal is not within an area identified for future growth and would be contrary to key policy directions 1, 5, 10 and 19 within Wollondilly's Growth Management Strategy 2011
  - The proposal would create an adverse precedent for other landowners to pursue an additional permitted use to enable the subdivision on lots bound by Clause 4.1B of WLEP 2011.
2. That a review of E4 zoned land be further considered after the completion of a Rural Land Use Study as part of Council's approach/response to managing the metropolitan rural area.
3. That the proponent be advised that if they are not satisfied with this decision then they are able to submit and fund their own planning proposal and if it is not supported by Council seek a pre-gateway rezoning review from the Greater Sydney Commission.