

LEGAL ADVICE – Federal village master plan

4 November 2022

This legal advice is confidential

Issue

The elected Council seeks advice on the proposed Federal village masterplan (masterplan) in the context of the facts below.

Advice

Summary

- The proposed Federal village master plan isn't "enforceable" as a standalone document.
- The master plan, depending on the stage it is at, is a relevant matter Council considers when evaluating a development application.

The reasons below explain the summary position.

Reasons

Facts

On 25 August, Council resolved as follows regarding the masterplan:

FOR ACTION

Report No 13.17 - Draft Federal Village Masterplan

TO: Hawton, Isabelle - Place Liaison Officer

COPY TO:

DATE: 26 August 2022

MEETING: Council Meeting of 25 August 2022

RESOLUTION NUMBER: 22-429

Action is required for this item as per the Council Resolution outlined below.

Resolved:

1. That Council endorses the Draft Federal Village Masterplan for public exhibition as outlined in the report.
2. That Council receives a further submissions report at the close of the extended exhibition period.
3. That Council through its legal counsel will clarify the legal status and enforceability of the Masterplan as a planning instrument by the end of the exhibition period'

(Swivel/Balson).

This advice goes to resolution point three.

Law

Master Planning is a process that aims to create a long-term plan or vision for a neighbourhood and/or a community. A Master Plan is a comprehensive plan that focuses mostly on the built environment. It is not a statutory document and as such doesn't have any legal status. A Master Plan *inter alia*, can be the basis for changes in planning controls like LEPs and DCPs. These changes in zoning and planning controls occur separate to, and after the adoption of a master plan. Examples of this include the Byron Bay Town Centre Planning Control review and the Bangalow DCP review.

The masterplan isn't a planning instrument under the EP&A Act.

An "environmental planning instrument" is defined under the EP&A Act this way (section 1.6):

environmental planning instrument means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force.

If relevant parts of the masterplan were included in the *Byron Local Environmental Plan 2014* (BLEP 2014), this would give **those parts of the masterplan** a clear "legal status and enforceability" under the planning law.

This is because EP&A Act section 4.15(1) provides several matters for consideration by a consent authority in determining a development application, where those matters are relevant.

The Land and Environment Court has conferred some "legal status" on policies like the masterplan. The Court has held that consideration of relevant planning policies like a masterplan is a component of the public interest under section 4.15(1). For instance:

"Matters relevant to the public interest touching a particular [development] application are not confined to those appearing in published environmental planning instruments, draft or final. Obviously such instruments carry great and at times determinative weight, but they are not the only source of information concerning the public interest in planning matters...A consent authority may range widely in the search for material as to the public interest": *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* [2003] NSWCA 289 at [81].

And:

"The public interest is expressly acknowledged as a relevant consideration in [section 4.15(1)(e)] of the Act...It must extend to any well-founded detailed plan adopted by a council for the site of a proposed development either alone or forming part of a greater area, even if it is not formally adopted as a development control plan": *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 at [90].

How much weight Council in its role as a development consent authority will give the masterplan when evaluating relevant development will depend on the application.

The Court has provided guidance about how a consent authority can weight a planning policy like a masterplan so as not to be accused of irrationally considering matters relevant to the evaluation of a development application:

The matters which are relevant when determining the weight to be given to a planning policy adopted by a council are as follows:

1. the extent, if any, of research and public consultation undertaken when creating the policy;
2. the time during which the policy has been in force and the extent of any review of its effectiveness;
3. the extent to which the policy has been departed from in prior decisions;

4. the compatibility of the policy with the objectives and provisions of relevant environmental planning instruments and development control plans;
5. the compatibility of the policy with other policies adopted by a council or by any other relevant government agency; and
6. whether the policy contains any significant flaws when assessed against conventional planning outcomes accepted as appropriate for the site or area affected by it: *Stockland* at [92].

Similar principles regarding the weight to give a masterplan were provided in *Aldi Foods Pty Limited v Holroyd City Council* [2004] NSWLEC 253 at [43].

How these principles are applied will depend both on what stage the masterplan is at (e.g., the masterplan is currently on public exhibition and its inclusion in Council's planning controls is likely some way off), as well as the proposed development Council is asked to evaluate.

