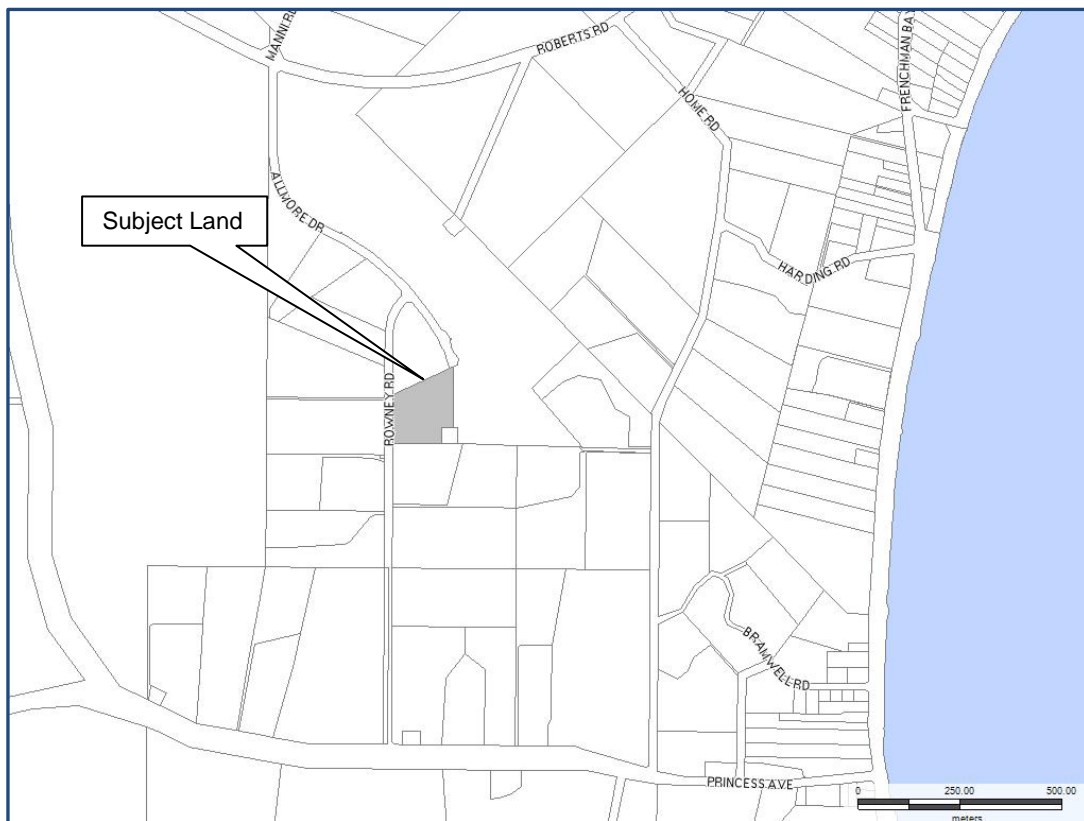


2.3: FINAL APPROVAL OF AMENDMENT – LOT 202 ROWNEY ROAD, ROBINSON

Land Description	: Lot 202 Rowney Road, Robinson
Proponent	: Ayton Baesjou Planning
Owner	: Mr T Ackley
Business Entity Name	: N/A
Attachment(s)	: Attachment 1 - Initial modified Subdivision Guide Plan : Attachment 2 - Final modified Subdivision Guide Plan : Attachment 3 - Schedule of Submissions
Councillor Workstation	: Amendment Document – AMD302 : Copies of Submissions
Responsible Officer(s)	: E/Director Planning and Development Services (G Bride)

Maps and Diagrams:



IN BRIEF

- Consider the submissions received from the public consultation period and determine whether to grant final approval to the proposed Scheme Amendment to modify the Subdivision Guide Plan (SGP) for Special Rural zone Area No. 10.

9.20PM Councillor Paver registered his objection that he had not had an opportunity to read out his Amended Alternate Motion as the Mayor ruled that it had been presented late to the meeting.

The Mayor subsequently asked for Council support to have Councillor Paver read his Amended Alternate Motion.

**TIED 6-6
MAYOR EXERCISED CASTING VOTE
LOST 6-7
BY SHOW OF HANDS**

ITEM 2.3: AMENDED ALTERNATE MOTION BY COUNCILLOR PAVER

- 1) In accordance with Section 75 of the Planning and Development Act 2005 and Pursuant to Regulation 17(2) of the Town Planning Regulations 1967, Council **DOES NOT WISH TO PROCEED WITH** Amendment No. 302 to Town Planning Scheme No. 3 for the following reasons:
 - Reducing the development exclusion area to facilitate development in the locality proposed removes the protection currently guaranteed to the ridgeline and the vegetation thereon and thereby threatens the amenity of Lot 304 (51) Rowney Road and the visual amenity of the lots in the surrounding area.
 - The amendment if adopted would set an undesirable precedent and encourage further applications to remove or modify development exclusion areas in the existing subdivision guide plan.
 - Purchasers of Lots in this subdivision have placed reliance on the planning controls contained in the existing subdivision guide plan the amendment whereof would serve to defeat their legitimate expectations and undermine their confidence in the public planning process.
- 2) Council advises the Western Australian Planning Commission of the above resolution, requesting the Hon. Minister for Planning refuse the amendment proposal.

ITEM 2.3: RESOLUTION (Amended Alternate Motion by Councillor Paver)

MOVED: COUNCILLOR PAVER

SECONDED: COUNCILLOR J BOSTOCK

THAT the Amended Alternate Motion by Councillor Paver be ADOPTED.

LOST 4-8

Record of Vote

For the Motion: Councillors Paver, J Bostock, D Bostock and Leavesley

Councillor Reason:

The adjacent neighbour, Mr Tilbury, purchased his property on the understanding that a future dwelling was unable to be constructed in the area identified in the amendment proposal.

Officer Report (G Bride)

There are no specific implications related to the alternate motion. Should the motion be supported by Council the Minister for Planning, on the advice of the Western Australian Planning Commission, will ultimately decide whether to refuse the amendment. There is no appeal right if the Minister decides that the amendment is not supported and the existing subdivision guide plan associated with this Special Rural Area (Area No. 10) will remain in place.

ITEM 2.3 AMENDMENT BY COUNCILLOR PAVER

THAT Council:

1. In accordance with Section 75 of the Planning and Development Act 2005 and Pursuant to Regulation 17(2) of the Town Planning Regulations 1967 **ADOPTS WITH MODIFICATIONS** Amendment 302 to Town Planning Scheme No. 3 by:
 - i) Modify the Subdivision Guide Plan for Special Rural Zone No. 10 by amending the Development Exclusion Area on Lot 202 Rowney Road so that the Ridgeline Protection Area more accurately reflects the alignment of the ridgeline.
2. **ADOPT** the recommendations contained in the Schedule of Submissions, except that in relation to Submission 5 (from Mr R Tilbury) the following recommendation is applied:
 - i) A modified Subdivision Guide Plan (SGP) shall incorporate a notation referring to the supplementary guide plan.
 - ii) The modified supplementary guide plan (Attachment 2 in Council Report) submitted by the proponent, which depicts a reduced development area, shall be adopted along with the modified Subdivision Guide Plan to further inform the development of Lot 202 Rowney Road, Robinson.
 - iii) A new clause 7.5 being inserted into the special provisions for Special Rural Area No. 10 stating: "Additional tree planting shall be required as a condition of development approval along the southern boundary of Lot 202 Rowney Road, as per the supplementary guide plan."
 - iv) A new clause 7.6 being inserted into the special provisions for Special Rural Area No. 10 stating: "The protection of existing trees shall be required as a condition of development approval on Lot 202 Rowney Road, as per the supplementary guide plan."
 - v) A new clause 7.7 being inserted into the special provisions for Special Rural Area No. 10 stating: "Notwithstanding Clause 7.1, the existing trees on Lot 202 Rowney Road that are identified as 'Vegetation to be Retained' on the supplementary guide plan shall remain."

ITEM 2.3: RESOLUTION (Amendment by Councillor Paver)

MOVED: COUNCILLOR PAVER

SECONDED: COUNCILLOR J BOSTOCK

THAT the Responsible Officer Recommendation be AMENDED to read as above.

LOST 4-8

Record of Vote

For the Motion: Councillors Paver, J Bostock, D Bostock and Leavesley.

9.45PM Councillor J Bostock made a Point of Order and requested that her comments be minuted. Councillor Bostock said that she believed that to continue with this motion was a breach of the Local Government Act. This motion was voted on in February and there was a decision made on this particular motion. Councillor Bostock said that to move exactly the same motion is in breach of the Local Government Act and requires a rescission motion.

ITEM 2.3: RESPONSIBLE OFFICER RECOMMENDATION

THAT Council:

1. In accordance with Section 75 of the Planning and Development Act 2005 and Pursuant to Regulation 17(2) of the Town Planning Regulations 1967 **ADOPTS WITH MODIFICATIONS** Amendment 302 to Town Planning Scheme No. 3 by:
 - i) **Modify the Subdivision Guide Plan for Special Rural Zone No. 10 by amending the Development Exclusion Area on Lot 202 Rowney Road so that the Ridgeline Protection Area more accurately reflects the alignment of the ridgeline.**
2. **ADOPT the recommendations contained in the Schedule of Submissions.**

ITEM 2.3: RESOLUTION (Responsible Officer Recommendation)

**MOVED: COUNCILLOR DUFTY
SECONDED: COUNCILLOR SUTTON**

THAT the Responsible Officer Recommendation be ADOPTED.

CARRIED 8-4

Record of Vote

Against the Motion: Councillors Paver, J Bostock, D Bostock and Leavesley

Staff Reason (G Bride):

In order to reinforce the development controls on the modified Subdivision Guide Plan and supplementary plan the addition new clauses 7.5, 7.6 and 7.7 will provide a greater level of certainty to adjacent landowners and the future purchaser of the lot.

BACKGROUND

1. Amendment 302 proposes to amend Town Planning Scheme (TPS) No. 3 by modifying the Subdivision Guide Plan (SGP) for Special Rural zone Area No. 10 by amending the Development Exclusion Area on Lot 202 Rowney Road, Robinson so that the Ridgeline Protection Area more accurately reflects the alignment of the ridgeline.
2. The development of Lot 202 Rowney Road, which lies within Special Rural zone area no. 10, should be in accordance with the Subdivision Guide Plan and the Special Provisions set out in TPS No. 3, *Schedule 1 – Special Rural Zones*.

3. The SGP identifies Development Exclusion Areas (both a bore buffer around a water abstraction point and a ridgeline protection area) on Lot 202 (Lot 25 on the SGP). Water Corporation easements and a band of trees running parallel to the western boundary and sweeping across the centre of the lot to the north of the Development Exclusion Areas are further constraints on the site. The requirement for 15m boundary setbacks, as set out in the Special Provisions for Special Rural Zone No. 10, compounds the situation and leaves a relatively narrow strip of cleared land to the northern extent of the lot as the only developable area.
4. The landowner claims he is unable to sell the lot due to the identified constraints, as potential purchasers have limited options for locating a dwelling. The landowner therefore lodged a Development Application to establish a building envelope within the Development Exclusion Area; though very little supporting information or justification was provided at this time. Due to there being sufficient unconstrained space on the lot for development to take place and the Special Provisions expressly preventing the construction of buildings, tanks or structures within the Development Exclusion Area, staff had no option but to refuse the application under delegation.
5. The refusal was appealed to the State Administrative Tribunal for review, which resulted in a more detailed Development Application being considered by Council at its meeting dated 20 April 2010. At this meeting it was resolved:

THAT Council:

- i) ADVISES the State Administrative Tribunal that whilst it is supportive of the relocation of the building envelope it UPHOLDS the original decision to REFUSE Planning Scheme Consent for 'Single House (determination of building envelope)' at Lot 202 Rowney Road, Robinson as there is no discretion under Council's Town Planning Scheme No. 3 to allow development within a 'development exclusion area' as specified under Clause 5.1 of Special Rural Area No. 10.*
 - ii) ADVISES the applicant that it would welcome a scheme amendment application to modify the Subdivision Guide Plan to accommodate the desired building envelope location.*
6. The proposed Scheme Amendment was submitted following Council's resolution and provides justification for modifying the SGP as described. The Amendment was then initiated at Council's Ordinary Meeting on 17 August 2010.
 7. Following the public advertising period, the Amendment was returned to Council's Ordinary Meeting on 15 February 2011 with a recommendation that it be finally approved, subject to modification. However, a representation opposing the Amendment had been made during the public advertising period by Mr R Tilbury of 51 Rowney Road, which lies to the south of the subject lot. Mr Tilbury also spoke to the Council Agenda item during the public forum at the Ordinary Council Meeting on 15 February 2011, reiterating his concern over the

amendment proposal. The motion to approve Amendment No. 302 was lost 3-8 at the Council meeting in February 2011.

8. However, as no alternate motion had been brought forward, it was considered that Council may not have completed the decision making process required under regulation 17(2) of the *Town Planning Regulations 1967* (as amended). Legal advice was sought on the matter and it was confirmed that Regulation 17(2) requires that the Council pass a resolution either:
 - (a) *that the Scheme Amendment be adopted with or without modification; or*
 - (b) *that it does not wish to proceed with the Scheme Amendment.*
9. This advice confirmed that given the wording of the resolution, Council had not passed a resolution under Regulation 17(2) that could be forwarded to the Western Australian Planning Commission. The legal advice states that as the motion calls for adoption of the Amendment, subject to modification, it follows that there are alternatives other than a decision not to proceed, as the majority may (in theory) have been prepared to adopt the Amendment without the modification, or with other modifications. While it appears that the feeling of the majority may well have been that the Amendment should be refused, the law will not make that assumption, as it is not possible to assume what individual councillors' opinions were. A Court would instead look objectively at the possibilities open on the face of the resolution, in the context of all relevant facts.
10. In addition, Regulation 18 requires, among other things, that the City forward to the Western Australian Planning Commission:
 - a) *a copy of the resolution passed under regulation 17(2); and*
 - b) *if that resolution was a resolution under regulation 17(2)(b), a summary of the reasons why the responsible authority does not wish to proceed with the Scheme Amendment.*
11. Therefore, if Council wishes to resolve under regulation 17(2)(b) that it does not wish to proceed with the Amendment, it is required to provide a summary of the reasons for that decision.
12. The Amendment is therefore being brought back to Council for a resolution in accordance with regulation 17(2). It should be noted that the issues raised by Mr. Tilbury have been predominantly addressed since Council considered the Amendment at its Ordinary Meeting on 15 February 2011 and these are discussed in more detail below.
13. Successful completion of this Amendment will allow the subject lot to be developed in a more desirable fashion, while continuing to protect the ridgeline and remaining consistent with the objectives of the zone, particularly as it would "*minimise the visual impact of new development and allow for low intensity rural pursuits*".

DISCUSSION

14. The lot covers an area of 2.1ha and lies to the east of Rowney Road, approximately 4.5km south-west of the Albany central area. A ridgeline extends through the lot, rising from the south-western corner to a point approximately half way along the eastern boundary. Much of the land has been cleared, although a stand of parkland cleared peppermint trees extends along the western boundary of the lot and sweeps across to the east, roughly following the ridgeline.
15. The surrounding land is also zoned 'Special Rural' and is subject to the same planning controls as the subject lot.
16. As described above, much of the site is constrained by Development Exclusion Areas, specifically the Water Corporation bore buffer, which radiates across the site from a point just beyond the south-eastern corner, and the ridgeline protection area, which extends along the western edge of the bore buffer in an elongated teardrop shape, approximately 15m across at its widest point.
17. However, the ridgeline protection area does not accurately reflect the actual landform on-site. In fact, the ridgeline protection area extends over the 12m contour line, while the highest point on the ridge is at 18m.
18. Although a building envelope could be accommodated on the flatter, cleared land at the northern extent of the site, the need for a 15m boundary setback and a low fuel buffer zone to mitigate bushfire risk would result in it being pushed further south and higher on the slope at the base of the ridge. This location has an open aspect to the north, especially towards Lot 201 and could therefore be considered both visually intrusive and detrimental to the amenity of Lot 201 as a consequence. However, any development in this location would have the benefits of being set low in the landscape, thereby avoiding sky lining, and being backgrounded by the ridgeline and trees.
19. The proposed development area is located where prospective buyers have indicated a desire to build. Although further elevated, this location is not atop the ridge, but rather four to five metres below the ridge, which rises to the east. It would also be set amongst the parkland cleared peppermint trees that grow in a band across the middle of the lot. This would partially screen any new house, thereby reducing its visual impact on the landscape, although there is a concern that any new development in this location may require additional clearing, making it more visually intrusive from both northern and southern aspects.
20. It has also been highlighted in the amending document that one of the objectives of the 'Special Rural' zone is to "...allow for low intensity rural pursuits", which the flatter land at the northern end of the site would be suitable for. When viewed in this context, it would make practical sense to allow development of a dwelling in the proposed location, so as not to prejudice the use of the flatter land for rural pursuits.

21. Additionally, construction of a new house in this location would not significantly increase bushfire risk, as the trees have already been parkland cleared and are surrounded by pasture. This situation could be improved further by selective clearing immediately around buildings and pruning of the remaining trees to ensure that their canopies are separated.
22. Mr. R Tilbury, of 51 Rowney Road, lodged a written objection to the proposal during the public advertising period on this basis. Specifically, he considered that the proposed new development area would result in any future buildings being far more visually intrusive across the wider area than they would on the existing development area, and that any new dwelling in this location would overlook the outdoor living area and garden ground, which are positioned to the north of his house. Further to this, he has stated that he considers that any new dwelling would be closer to his house than one would expect in a semi-rural area and that the existing approved SGP gives a high degree of certainty as to the future development of the area, which had been instrumental in his decision to locate and orientate his house as he has.
23. Following discussions with the proponent, a modified supplementary SGP was provided (Attachment 1), which adjusted the proposed new development area, reducing the likelihood of it impacting on the existing vegetation and amenity of 51 Rowney Road. The requirement for a development application for any development on the lot would also ensure that the clearing of vegetation is strictly controlled. In addition, any approval can be conditioned to include revegetation, if deemed necessary, in order to ensure that any development is adequately screened from 51 Rowney Road.
24. However, as is outlined in paragraph 7 above, when the Amendment was reported to Council's Ordinary Meeting on 15 February 2011 for final approval, Mr Tilbury spoke during the public forum, reiterating his concern over the proposed development. The motion to approve the Amendment, subject to modification, was then lost at the Council vote on the strength of his objection.
25. Unfortunately, as no alternate motion had been brought forward, it was considered that Council had not completed the decision making process, as is outlined in paragraphs 8 and 9 above, hence the need for Council to reconsider the item.
26. In the intervening period, discussions between the proponent and Mr. Tilbury have taken place and the proponent has further modified the supplementary SGP (Attachment 2) to address Mr. Tilbury's concerns. A site meeting with the proponent, Mr. Tilbury, neighbouring landowners, staff and Councillors Dufty, Holden and Sutton was held on 12 May 2011 to discuss the implications of this modified plan. It was generally agreed that the plan adequately mitigated Mr. Tilbury's concerns and was also mindful of potential effects on other adjoining landowners. The modified plan has been forwarded to Mr. Tilbury for his formal written comment, however at the time of writing this report no response has been received (such a response is anticipated prior to the Council meeting and will be forwarded to Councillors when available).

27. In view of the above staff consider that the proposal is acceptable, subject to the replacement of the original supplementary SGP with the modified supplementary SGP (Attachment 2).

GOVERNMENT CONSULTATION

28. The Amendment documents were initially referred to the Environmental Protection Authority (EPA) as required by the *Planning and Development Act 2005* for environmental assessment. The EPA has advised that the Amendment has been assessed and does not require further formal assessment. However, additional advice and recommendations were provided, as outlined in the attached Schedule of Submissions.
29. The Amendment was also referred to WA Gas Networks (WestNet Energy), Telstra, Water Corporation, Western Power, Department of Water, Department of Environment and Conservation, and Fire and Emergency Services Authority (FESA) for assessment and comment. Responses were received from Water Corporation, Department of Water and Department of Environment and Conservation and are summarised in the attached Schedule of Submissions.

PUBLIC CONSULTATION / ENGAGEMENT

30. The Amendment was advertised in accordance with the requirements of the *Town Planning Regulations 1967* from 2010 to 2010 by placement of sign on-site, direct referral to affected and adjoining/nearby landowners, relevant State Government agencies and advertisement in the local newspaper.
31. A total of five written submissions were received as attached. The submissions received are summarised and discussed with a recommendation for each submission in the attached Schedule of Submissions.

STATUTORY IMPLICATIONS

32. All scheme amendments undergo a statutory process in accordance with the *Planning and Development Act 2005* and *Town Planning Regulations 1967*. Council's decision on the final approval of the amendment requires endorsement by the WAPC and the approval of the Minister for Planning.

STRATEGIC IMPLICATIONS

33. The land is designated within the Albany Local Planning Strategy as Rural Residential. The modification to the development exclusion area on Lot 202 would not impact on the Albany Local Planning Strategy (ALPS).

POLICY IMPLICATIONS

34. There are no policy implications relating to this item.

RISK IDENTIFICATION AND MITIGATION

35. There are no identifiable risks associated with this proposal as Council's decision will be forwarded to the Western Australian Planning Commission, with the Minister for Planning ultimately deciding whether to finally approve the amendment.

FINANCIAL IMPLICATIONS

36. The appropriate planning fee has been paid by the proponent and the processing of the amendment proposal has been undertaken by staff within existing budget lines.

LEGAL IMPLICATIONS

37. As discussed earlier in the report the motion to finally approve Amendment No. 302 was lost 3-8 at Council's Ordinary Meeting on 15 February 2011. However, as there was no alternate motion, Council did not complete the decision making process under regulation 17(2) of the *Town Planning Regulations 1967* (as amended), which requires that Council pass a resolution either:

- (a) that the Scheme Amendment be adopted with or without modification; or*
- (b) that it does not wish to proceed with the Scheme Amendment.*

38. In addition, regulation 18 requires, among other things, that the City forward to the Western Australian Planning Commission (WAPC):

- a) a copy of the resolution passed under regulation 17(2); and*
- b) if that resolution was a resolution under regulation 17(2)(b), a summary of the reasons why the responsible authority does not wish to proceed with the Scheme Amendment.*

39. Council must therefore pass a clear resolution in accordance with regulation 17(2) and if it resolves not to proceed with the Scheme Amendment under regulation 17(2)(b), it is required to provide a summary of the reasons for that decision, in accordance with Regulation 18.

ALTERNATE OPTIONS

40. Council has the following options in relation to this item, which are:

- To seek final approval to the scheme amendment without modification;
- To seek final approval to the scheme amendment with modifications; or
- To not seek final approval to the scheme amendment.

41. Council's decision on the scheme amendment is in effect a recommendation to the WA Planning Commission and Minister for Planning. The Minister for Planning is empowered under the *Planning and Development Act 2005* to make the final decision on the scheme amendment.

SUMMARY CONCLUSION

42. The proposal seeks to modify the SGP for Special Rural Zone No. 10 by amending the Development Exclusion Area on Lot 202 Rowney Road, Robinson so that the Ridgeline Protection Area more accurately reflects the alignment of the ridgeline. It is considered that the proposal would achieve this goal while remaining consistent with the objectives of the zone, particularly as it would *“minimise the visual impact of new development and allow for low intensity rural pursuits”*.
43. Although an objection to the proposal was raised by an adjoining property owner, it is considered that a minor modification to the proposal, in conjunction with the various planning controls that will be applied at the development stage, will ensure that their concerns are suitably mitigated.
44. Staff would therefore recommend that the Scheme Amendment be finally adopted, subject to modifications.

Consulted References	Town Planning Scheme No. 3
File Number (Name of Ward)	AMD 302 (Vancouver Ward)
Previous Reference	OCM 10/04/10 – Item 13.1.2 (Development Application) OCM 17/08/10 – Item 1.5 (Initiation) OCM 15/02/11 – Item (Final Approval)