
GENERAL MANAGER

ITEM	SF2460	170518	LEP & DCP AMENDMENTS - HORTICULTURE, CLAUSE 4.2A & TREE PRESERVATION
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AUTHOR/ENQUIRIES: Daniel Walsh, Manager Development and Environment

Summary:

This report seeks Council approval to proceed with a planning proposal to amend clause 4.2A of the Nambucca Local Environmental Plan 2010 (LEP) to ensure that the existing restrictions to the erection of dwellings within the rural and environmental protection zones apply to all development applications for dwellings within those zones.

This report also seeks amendments to the Nambucca Development Control Plan 2010 (DCP) including controls which regulate the establishment of horticulture development on land zoned R5 Large Lot Residential and the removal of vegetation within the Pearl Estate, Valla.

This report was last considered by Council at its meeting on 26 April 2018 when the matter was deferred. Additional discussion has been added to the body of the report to address the proposal raised by Cr Finlayson at that meeting.

NOTE: This matter requires a “Planning Decision” meaning a decision made in the exercise of a function of the council under the Environmental Planning and Assessment Act 1979 including a decision relating to a development application, an environmental planning instrument, a development control plan or a development contribution plan. Under Section 375A of the Local Government Act 1993 it requires the General Manager to record the names of each Councillor supporting and opposing the decision.

RECOMMENDATION:

- 1 Council staff forward the planning proposal contained within attachment 1 to the Minister for gateway determination in accordance with section 3.34 of the Environmental Planning and Assessment Act 1979.**
- 2 If the Minister determines that the matter should proceed, Council staff undertake community consultation in accordance with the gateway determination.**
- 3 Following community consultation, Council staff report the planning proposal back to Council for consideration of any submissions received and a final decision as to whether Council will proceed to make the planning proposal.**
- 4 Council endorse the draft amendments to the Nambucca Development Control Plan 2010 (DCP) contained within attachment 2 and exhibit the draft DCP for 28 days pursuant to Part 3 of the Environmental Planning & Assessment Regulation 2000.**
- 5 The draft DCP be reported back to Council following the completion of the exhibition period for consideration of any submissions received and a final decision as to whether Council will proceed to amend the DCP.**

OPTIONS:

- 1 Approve some or all of the recommended amendments to the LEP and DCP.**
- 2 Modify the recommended amendments to the LEP and DCP.**
- 3 Refuse some or all of the recommended amendments to the LEP and DCP.**

DISCUSSION:

Additional discussion to address the proposal raised by Cr Finlayson

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At Councils meeting on 26 April 2018 the following resolution was made:

“That Council defer the matter to a workshop to enable consideration to be provided to the proposal put forward by Cr Finlayson.”

The proposal put forward by Cr Finlayson is outlined in italics below with planning staff comment provided after each point:

Council's planning staff be requested to prepare further draft amendments to the LEP which will reflect the following provisions:

- 1. Horticulture in areas zoned RU1 and RU2 will be subject to a development application but no application will be required if landowner complies with following requirement, namely:
 - a) no horticulture (including erection of netting) to take place within a radius of 100 metres of existing house on adjoining land*
 - b) the 100 metres is to be measured from that house, not the boundary**

Comment: This can be done by amending the current planning proposal to make horticulture permissible with consent within the RU1 and RU2 zones within the LEP land use table and adding the specific requirements to schedule 2 of the LEP. This would mean that horticulture would be exempt from requiring development consent in the RU1 and RU2 zones only if it complied with the above requirements.

Such an amendment is supported by staff, however was not included within the current planning proposal due to item 3 of Councils resolution (527/17) made on 26 October 2017 and outlined within the original report below.

Aside from increasing the size of the buffer from the adjoining dwelling, one suggested amendment would be to require the buffer to be from a dwelling on an adjoining lot not associated with the horticultural activity. This would ensure that farmers operating on a holding with multiple lots would not be required to lodge a development application if the horticultural activity encroached within the buffer to a dwelling on one of their own allotments.

- 2) Horticulture in areas zoned R5 will be subject to a development application and any approval shall include inter alia the following provisions;*

a) where the property adjoins other land zoned RU1 or RU2 but where there is no existing house, no buffer will be required. No horticulture will be carried out within a radius of 100 metres of any existing house, the 100 metres being measured from the house, not the boundary

Comment: This control could be incorporated into Part F of the Nambucca Development Control Plan 2010 (DCP) and enforced as part of any development consent. However, it is recommended that the originally recommended buffers in the draft Part F contained within **attachment 2** be maintained (200m without a landscape buffer or 80m with a 40m wide landscape buffer incorporated within it.

b) where the property adjoins other land zoned R5 which is vacant no horticulture will take place (including erection of netting) within 20 meters of the boundary and that 20 metres shall contain a 10 metre vegetative buffer.

Comment: Refer to comment below.

c) No building envelope shall be permitted to be located within 40 metres of a boundary on the other side of which horticultural activities have been permitted.

Comment: Refer to comment below.

d) when the property adjoins land zoned R5 on which houses are located, no horticulture will be permitted within a radius of 50 metres of that house (such radius measured from the house) and there shall be a vegetative buffer provided along the boundary of the said radius within the land where horticulture is to take place.

Comment: The above three controls could be incorporated into Part F of the DCP and enforced as part of any development consent. However, it is recommended that the buffer not be inconsistent with those

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required within the rural zones; especially not to a lower standard. It is recommended that the originally recommended buffer in the draft Part F contained within **attachment 2** be maintained (80m from an adjoining boundary with a 40m wide landscape buffer incorporated within it). The R5 zone is a residential zone. Any reliance on adjoining land as a buffer in these instances should not be permitted as it could impact the adjoining land owners ability to develop their residential land in the future to its full potential. Any reliance on adjoining land should be left as a merit decision as part of the development assessment process. This is because it is at this stage that it can be validated that the reliance on part of the adjoining land as a buffer will not impact its development potential.

As a minimum, the buffers referred to in the above three controls should be consistent, as the first two controls result in a 60m buffer and the last control requires a 50m buffer.

3. The applicant will ensure that any operations on the property requiring the use of chemicals shall be under the supervision of a person who is the holder of a Farm Safety Management Certificate and an Agricultural Chemical Users Certificate.

Comment: This control could be incorporated into Part F of the DCP and is supported.

4. No bird netting shall be erected anywhere in the shire of a colour other than black.

Comment: This control could be incorporated into Part F of the DCP as well as the exempt provisions within schedule 2 of the LEP if consent were to be required within the RU1 and RU2 zones. However, it is not recommended that black netting be required to be used in all areas of the shire. This is because some farmers prefer to use white netting and there are areas of the shire where white netting could be used which would not be visually obtrusive to the surrounding area due to separation, screening and topography. It is recommended that black netting be required as part of any horticultural development within the R5 zone and as part of any exempt provisions with schedule 2.

5. s149 Certificates issued by Council will be amended accordingly so that potential purchasers of property are put on notice of these requirements

Comment: The applicable zone land use table is incorporated within any s149 certificate (now called s10.7 certificates). The land use table identifies whether or not development consent is required for horticulture.

Comment from General Manager

Notwithstanding the growth of the blueberry industry and the good intentions to reduce potential land use conflicts, consideration should also be given to the unintended consequences of regulatory regimes. I remain wary about a suggested buffer requirement for horticulture in RU1 and RU2 zones for the reason that horticulture covers a myriad of crops and farming practices and the strategic purpose of the zones is to facilitate agriculture. By way of example a farmer might decide to plant a small crop (0.5 hectares) of water melons. The farmer might rotate his crop from year to year and want to include good quality land which is close to their boundary. But the land close to the boundary might fall within the specified buffer generating the requirement for a development application. If Council wishes to have regulatory provisions in relation to the RU1 and RU2 zones it needs to accept such unintended consequences.

My concerns don't pertain to the proposals for the R5 zone as its strategic purpose is the provision of large lot residential subdivision.

Original Report

At the meeting on 26 October 2017, Council made the following resolution (527/17):

1 Pursuant to the section 55 of the Environmental Planning and Assessment Act 1979, Council staff prepare a planning proposal to support an amendment to the Nambucca Local Environmental Plan 2010 (NLEP 2010) which:

- Removes 'horticulture' from 'permitted without consent' in the land use table for the R5 Large Lot Residential, and relocates it to 'permitted with consent'.*

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- 2 *That a report come back to council on a revision of the DCP to incorporate appropriate standards for Horticulture in the R5 zone.*

- 3 *That as requested by the NSW Department of Primary Industries (DPI) Council not amend the NLEP in relation to Horticulture in the RU1 and RU2 zones in light of the Blueberry Code of Conduct currently being developed by the Blueberry Interagency Working Group and the Australian Blueberry Growers Association (AGBA) with the support of DPI to address rural land use conflict; and the recently announced proposal by the NSW Department of Planning and Environment to implement "a package of reforms to update and improve the planning framework for primary production and rural development" which includes a new SEPP, changes to Ministerial Planning Directions under section 117 of the Environmental Planning and Assessment (EP&A) Act 1979 and a revision of definitions and clauses in the Standard Instrument LEP.*

- 4 *That Council staff forward the planning proposal to the Minister for gateway determination in accordance with section 56 of the Environmental Planning and Assessment Act 1979.*

- 5 *That if the Minister determines that the matter should proceed, Council staff undertake community consultation in accordance with section 57 of the Environmental Planning and Assessment Act 1979 and any requirements specified by the Minister.*

- 6 *Following community consultation, Council staff report the planning proposal back to Council for consideration of any submissions received and a final decision as to whether Council will proceed to make the planning proposal to support an amendment to NLEP 2010.*

The purpose of this report is to:

- Include an additional amendment to the Nambucca Local Environmental Plan 2010 (LEP) in the above mentioned planning proposal prior to sending the planning proposal to the Minister for gateway determination as per item 4 of the above resolution. The additional amendment is to clause 4.2A of the LEP which relates to the permissibility of dwellings within rural and environmental protection zones and is not related to the horticulture amendment. The reasons for the amendment are outlined later in this report and within the planning proposal contained within **attachment 1**.

- Enable Council to consider an amendment to Part F of the Nambucca Development Control Plan 2010 (DCP) as required by item 2 of the above resolution. The recommended DCP amendments have been included within **attachment 2**.

- Enable Council to consider an amendment to Part A of the DCP to address clearing activities within the Pearl estate Valla which are contrary to the intentions of the development consent for the subdivision. The recommended DCP amendments have been included within **attachment 2**.

Planning Proposal – LEP Amendment

Prior to sending the planning proposal to the Minister for the amendment to the land use table of the R5 Large Lot Residential Zone as referred to in the above resolution, it is considered appropriate to include an amendment to clause 4.2A of the LEP in the same planning proposal. The reason for this is that combining the planning proposal will save staff time and enable the change to occur as quickly as possible given the implications of not making the amendment.

Clause 4.2A restricts the erection of dwellings within the rural and environmental protection zones to lots which meet the criteria specified within the clause. The intent of restricting dwellings in these zones to particular lots is to minimise unplanned rural residential development which create impacts such as drain on infrastructure and increased potential for land use conflict and fragmentation. The existing wording of the clause results in it only being applicable to a lot which is vacant and has had no dwelling erected on it in the past. This results in the clause not being applicable to a lot which contains an existing dwelling which has been constructed without development consent and to lots which have had dwellings erected on

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them but have been demolished or decommissioned as part of a development consent on an adjoining lot in the same ownership.

It is recommended that the wording of clause 4.2A of the LEP be amended so that it applies to all development applications seeking approval to erect or use a dwelling within the rural and environmental protection zones. This will ensure the controls within the clause are applicable to development applications seeking continued use of an unlawful dwelling. It is also recommended that the wording be amended to ensure it is permissible to erect a dwelling which is replacing a previous dwelling that has been destroyed by events such as a natural disaster or house fire.

The recommended wording for the amendment to clause 4.2A is contained in the planning proposal within **attachment 1**.

DCP Amendment – Part F

Development controls applicable to development applications seeking approval for horticulture within the R5 Large Lot Residential zone have been included within an amendment to Part F of the DCP contained within **attachment 2**. The amendments to the existing DCP are shown as track changes for clarity.

A summary/justification for the proposed amendments to Part F is as follows:

- Housekeeping amendments on pages 1 and 2 which clarify what development applications are required to be accompanied with details of existing land uses on surrounding lots, that the 300m building setback to unsealed roads only applies to dwellings, setbacks to boundaries, and that the land use buffer controls apply to all development applications. This will ensure a development application for horticulture will be required to specify proximity to surrounding dwellings and will be required to comply with the buffer controls within Part 4.
- An amendment to the buffer distance between horticulture development and dwellings by increasing it from 150m to 200m. Increasing the distance to 200m is in line with chapter 6 of the *'Living and Working in Rural Areas'* handbook. The handbook has been prepared by the NSW Department of Primary Industries and is a practical guide aimed at reducing and avoiding rural land use conflict on the NSW North Coast.

Please note that due to the mandatory requirements for the implementation of a landscaped buffer for horticulture developments in the R5 Large Lot Residential zone in the proposed additional clause F1.3.6 (addressed below) and that development consent is not required for horticulture within the rural zones, the 200m separation distance will effectively only be applicable for dwellings within the rural zones.

- Clarification on the requirements for vegetation buffers to ensure they meet their objective.
- An additional clause F1.3.6 has been added which requires a 40m wide landscape buffer to be incorporated within an 80m separation buffer from adjoining residential zoned lots and from dwellings within an adjoining rural or environmental protection zone. The reasoning behind this control is to protect the future development of adjoining residential zoned land and existing dwellings within the rural and environmental protection zones which have been approved with no rural buffer requirements due to the adjoining land (on which the horticultural use is proposed) being zoned residential.

This clause also requires plans of the landscape buffers to be submitted to Council for approval, any netting to be black to minimise visual amenity impacts, and the provision of a water management plan. The requirement for a water management plan has been included as a result of the findings of a recent study prepared by Southern Cross University titled 'Water Quality on Bucca Bucca Creek and the potential impacts of intensive plant agriculture', dated 3 January 2018.

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Please note that requirements regarding impacts on flora and fauna are taken into account under section 1.7 of the Environmental Planning and Assessment Act 1979 and are reinforced within Part A of the DCP.

DCP Amendment – Part A

Council received a two submissions to the exhibition of the most recent amendments to the DCP (reported to this meeting separately) relating to vegetation clearing within the Pearl Estate, Valla. The submissions request that Council include vegetation within the Pearl Estate within the DCP so that a permit is required for the removal of vegetation under Part 3 of the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (the SEPP). They also request Council erect signage outlining the significance of vegetation within the estate and for Council to undertake tree surveys to form a data base of existing vegetation. The submissions have been included within **attachment 3**. It was not considered appropriate to consider the requested amendments to the DCP under the previously exhibited document due to insufficient public consultation on the matters raised in the submissions. It is considered that any such amendment could be incorporated with the amendment to Part F as outlined above and exhibited at the same time.

The development consent for the Pearl Estate was approved by the Department of Planning and Environment and included conditions which required vegetation within certain areas of the estate to be retained. The conditions were based off specialist Flora and Fauna reports which included a plan of the areas of vegetation to be retained. This plan has been included within **attachment 4**. The conditions required those areas of vegetation to be retained to be protected during subdivision works and for a restriction on use of land under section 88B of the Conveyancing Act 1919 to be created prior to the issue of the subdivision certificate which restricted the removal of the vegetation in perpetuity. However, the required restriction on the use of land was not created, the subdivision certificate was approved by Council, and the lots have been registered. Furthermore, the terminology of the development consent does not enable the vegetation intended to be protected (except for the koala corridor) to be regulated post issuing the subdivision certificate.

Due to the Pearl Estate being located within the R5 Large Lot Residential zone, the only approval required for the removal of vegetation within the estate would be from the Native Vegetation Panel under Part 4 of the SEPP. However, this approval is only required if more than 5000m² of vegetation is to be removed. Please note that the Native Vegetation Panel has not yet been established. Council has been advised that NSW Local Land Services will accept and process these applications until the panel is established.

Having regard to the above and the submissions received, it is considered appropriate to protect those areas of vegetation identified in the development consent as vegetation to be retained. To do this, it is recommended that Council amend Part A of the DCP by adding clause A5.14 which restricts the clearing of vegetation from the areas identified in the plan within **attachment 4** as vegetation to be retained.

Please note that the above approach will only require a permit under the SEPP for the removal of native vegetation within the areas specified on the plan. It will not apply to all vegetation within the estate. Furthermore, under clause 8(3) of the SEPP, a permit would not be required to remove vegetation within the areas identified to be retained if council is satisfied that the vegetation is a risk to human life or property.

The recommended amendment to Part A of the DCP has been included within **attachment 2**. The additional clause A5.14 has been shown as a track change for clarity.

The request for the erection of signage and tree surveys is not supported as it is not something Council has the resources to do for other areas of the shire with equally or more significant habitat due to the substantial costs which would be imposed.

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CONSULTATION:

Senior Town Planner
Coordinator Strategic Planning & Natural Resources

SUSTAINABILITY ASSESSMENT:**Environment**

It is not considered that the recommended amendments will have any adverse environmental impacts.

Social

It is not considered that the recommended amendments will have any adverse social impacts.

Economic

It is not considered that the recommended amendments will have any adverse economic impacts.

Risk

Not implementing the recommendations would weaken Councils ability to defend an appeal against a refusal of a development application for the continued use of an unlawful dwelling as clause 4.2A of the LEP could not be relied on; inconsistent approaches could be implemented into development consents to minimise the land use conflicts associated with horticulture; and vegetation identified to be retained as part of a development consent could be removed without any ability for regulation.

FINANCIAL IMPLICATIONS:**Direct and indirect impact on current and future budgets**

Nil

Source of fund and any variance to working funds

N/A

Service level changes and resourcing/staff implications

Nil

ATTACHMENTS:

- 1 8338/2018 - Attachment 1 - Planning Proposal
- 2 8431/2018 - Attachment 2 - Draft DCP Amendments
- 3 8336/2018 - Attachment 3 - Submissions
- 4 8335/2018 - Attachment 4 - Vegetation Plan