**General Manager**

**ITEM 9.4 SF1541 250321** **Amendment to the Nambucca Local Environmental Plan 2010**

**AUTHOR/ENQUIRIES:** Daniel Walsh, Manager Development and Environment

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| **Summary:**This report provides additional information to Council in accordance with a resolution at the meeting on 11 March 2021 regarding recommended amendments to the Nambucca Local Environmental Plan 2010.**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.** |

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| **Recommendation:**1. **Council forward a planning proposal to the Minister for gateway determination in accordance with section 3.34 of the Environmental Planning and Assessment Act 1979 which includes the following amendments:**
2. **Include ‘Residential Accommodation’ as a land use that is permissible with development consent in the RU1, RU2, R5, E2, E3, E4 zones so that manufactured homes are permitted to be installed within these zones with development consent.**
3. **Alter the wording of Clause 4.2A(3) so that it applies to lots on which a manufactured home is proposed to be installed and to lots on which dwellings have been constructed/installed without development consent.**
4. **Include ‘Vehicle Sales or Hire Premises’ as a land use that is permissible with development consent within the B7 Business Park Zone.**
5. **If the Minister determines that the matter should proceed, Council staff undertake community consultation in accordance with the gateway determination.**
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.**
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**OPTIONS:**

* Proceed with the planning proposal with or without amendments.
* Not proceed with the planning proposal.

**DISCUSSION:**

The below report was presented to Council at the previous meeting on 11 Mach 2021. After consideration of the report Council made the following resolution:

*That the Amendment to the Nambucca Local Environmental Plan 2010 report be deferred to seek further clarification on the current and proposed legal status of manufactured homes on rural land.*

The following comments are made to clarify the above:

* Currently a single manufactured home on a vacant lot is prohibited within the RU1, RU2, R5, E2, E3, E4 zones under the NLEP 2010. This is because ‘residential accommodation’ is prohibited within these zones and a manufactured home does not fall under any other land use within the NLEP 2010.
* Two manufactured homes are permissible with development consent on a vacant lot in the above mentioned zones as they are classified as a ‘dual occupancy’ under the NLEP 2010.
* A single ‘dwelling house’ (building constructed on site) is permissible with development consent on a vacant lot in the above mentioned zones.
* A manufactured home cannot be classified as a ‘dwelling house’ as a dwelling house is defined as a building, and the Environmental Planning and Assessment Act 1979 definition of a building excludes manufactured homes.
* The proposed amendment in recommendation 1 (i) of this report will result in a single manufactured home being able to be installed within the above mentioned zones with development consent in the same way a single dwelling house can be built on the same site.
* The proposed amendment in recommendation 1 (ii) of this report will result in any proposal to install a manufactured home in the above mentioned zones being required to comply with the dwelling entitlement provisions of the NLEP 2010 in the same way a single dwelling house being built on the same land would have to comply with.

**Report from 11 March 2021 Council Meeting**

It has come to the attention of staff that there are discrepancies in the Nambucca Local Environmental Plan 2010 (LEP) which need urgent attention. These are outlined as follows:

Permissibility of manufactured homes

Manufactured homes are a popular form of dwelling construction, especially in rural areas. Manufactured homes are built off site and transported to the site in one or more major sections and installed on footings.

A manufactured home is defined in the Local Government Act 1993 as:

*“a self-contained dwelling (that is, a dwelling that includes at least one kitchen, bathroom, bedroom and living area and that also includes toilet and laundry facilities), being a dwelling—*

*(a)  that comprises one or more major sections, and*

*(b)  that is not a motor vehicle, trailer or other registrable vehicle within the meaning of the*[*Road Transport Act 2013*](https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-018)*,*

*and includes any associated structures that form part of the dwelling.”*

The definition of a building in the Environmental Planning and Assessment Act 1979 excludes a manufactured home or associated structure as defined above.

The result of this is that prior to the installation of a manufactured home on land, approval is required under section 68 of the Local Government Act 1993 for the physical installation of the dwelling on the land and development consent is required under the Environmental Planning and Assessment Act 1979 for the use of the land.

Historically, most if not all Councils in the state have issued development consents for manufactured homes for the use of the land as a ‘dwelling’. As part of that development consent, approval is also given under section 68 of the Local Government Act 1993 for the installation of the manufactured home (provisions in the act allow both approvals to be issued in one development consent).

The issue that has emerged is that a ‘dwelling’ is not a land use under the LEP. Land uses are listed under group terms in the LEP. The group term ‘residential accommodation’ is defined in the LEP as follows:

*“residential accommodation means a building or place used predominantly as a place of residence, and includes any of the following:*

*(a)  attached dwellings,*

*(b)  boarding houses,*

*(c)  dual occupancies,*

*(d)  dwelling houses,*

*(e)  group homes,*

*(f)  hostels,*

*(g)  multi dwelling housing,*

*(h)  residential flat buildings,*

*(i)  rural workers’ dwellings,*

*(j)  secondary dwellings,*

*(k)  semi-detached dwellings,*

*(l)  seniors housing,*

*(m)  shop top housing,*

*but does not include tourist and visitor accommodation or caravan parks”*

The land uses relevant to ‘residential accommodation’ are listed from a-m above. A ‘dwelling house’ is a dwelling that is constructed on the lot. A ‘dwelling house’ is defined as a building under the LEP. A single manufactured home on a vacant lot does not fall within the ‘dwelling house’ definition or any of these other land uses because it is not a building under the Act and it is only one dwelling. However, a single manufactured home on a vacant lot which is to be used as a person(s) place of residence still falls within the group term ‘residential accommodation’.

This position was supported by the Land and Environment Court in ***Central Coast Council v Bhandari [2020]*. As part of this case, the Council sought** a declaration that a land owner was in breach of the Environmental Planning & Assessment Act 1979 for using his land for ‘residential accommodation’ by living in a caravan (falls within the definition of manufactured home) on land in a zone in which ‘residential accommodation’ was prohibited under the Gosford Local Environmental Plan 2014.

The result of this is that unless ‘residential accommodation’ is permissible within the zone the development site is in, the installation of one manufactured home on a vacant lot is prohibited under the LEP. However, two manufactured homes on the same lot would be permissible as dual occupancies are a permissible land use. It is considered that this oversight is the result of the requirement to obtain an approval under two separate Acts for one building, the variety of definitions which apply across both Acts, and the implementation of the standard LEP which was rolled out across NSW from 2006 (new standard definitions/land uses were established).

For Council to rectify this issue it is recommended that Council amend the land use tables of the LEP to permit ‘residential accommodation’ to be undertaken with development consent in those zones where dwelling houses are currently permissible. Put simply, this would mean that if you can construct a dwelling on the land you will be able to choose to install a manufactured home on the land instead.

Currently manufactured homes are permissible within most residential zones as ‘residential accommodation’ is permissible with consent in those zones. However, ‘residential accommodation’ is prohibited in the following zones where ‘dwelling house’ are permissible:

* RU1 Primary Production
* RU2 Rural Landscape
* R5 Large Lot Residential
* E2 Environmental Conservation
* E3 Environmental Management
* E4 Environmental Living

The intent of including ‘residential accommodation’ in the above zones as permissible with consent is to permit the installation of manufactured dwellings. To ensure other land uses listed in a-m above do not also become permissible where they are not already, the amendment to the land use tables will list those land uses as prohibited.

In summary, the above amendment will resolve the current issue of it being permissible to construct a dwelling in the above zones or install two manufactured homes on the one site to form a ‘dual occupancy’ or ‘secondary dwelling’; but not being permissible to install one manufacture home on a vacant lot.

Lots which dwelling entitlement provisions do not apply to within the rural and environment protection zones

Clause 4.2A of the LEP reads as follows:

***4.2A   Erection of dwelling houses and dual occupancies on land in certain rural and environmental protection zones***

*(1)  The objectives of this clause are as follows—*

*(a)  to minimise unplanned rural residential development,*

*(b)  to enable the replacement of lawfully erected dwelling houses and dual occupancies in rural and environmental protection zones.*

*(2)  This clause applies to land in the following zones—*

*(a)  Zone RU1 Primary Production,*

*(b)  Zone RU2 Rural Landscape,*

*(c)  Zone E2 Environmental Conservation,*

*(d)  Zone E3 Environmental Management.*

*(3)  Development consent must not be granted for the erection of a dwelling house or a dual occupancy on a lot in a zone to which this clause applies, and on which no dwelling house or dual occupancy has been erected, unless the lot is—*

*(a)  a lot that is at least the minimum lot size specified for that lot by the* [*Lot Size Map*](https://legislation.nsw.gov.au/view/html/inforce/current/epi-2010-0401/maps)*, or*

*(b)  a lot created before this Plan commenced and on which the erection of a dwelling house or dual occupancy was permissible immediately before that commencement, or*

*(c)  a lot resulting from a subdivision for which development consent (or equivalent) was granted before this Plan commenced and on which the erection of a dwelling house or a dual occupancy would have been permissible if the plan of subdivision had been registered before that commencement, or*

*(d)  an existing holding.*

The above clause is the development standard which determines if a lot has a dwelling entitlement. Without this clause a dwelling would be permissible on all lots within the rural and environmental protection zones regardless of its size.

Subclause 4.2A(2) outlines that the clause applies to the rural and environment protection zones.

Subclause 4.2A(3) only identifies a ‘dwelling house’ or ‘dual occupancy’ as being applicable to the operation of the clause. If Council were to amend the land use table to permit ‘residential accommodation’ to facilitate manufactured homes in these zones as outlined above; it is recommended that subclause 4.2A(3) be amended to have ‘residential accommodation’ as being applicable to the operation of the clause. This would ensure that a manufactured home couldn’t be installed on a site which doesn’t have a dwelling entitlement.

It is also recommended to amend subclause 4.2A(3) to refer to a lot on which no lawful dwelling has been erected. This is because the section underlined in the clause above refers to a lot “on which no dwelling house or dual occupancy has been erected”. The issue with this is that if someone were to build a dwelling on a lot without approval, this clause would not apply to that lot as it is a lot on which a dwelling house has been erected. This means that if someone owns a lot which does not have a dwelling entitlement, they could build a dwelling without approval and as part of any application to seek to continue to use the dwelling, this clause would not apply.

To rectify the above issues with clause 4.2A(3) it is recommended that it be amended with wording to the following effect:

*Development consent must not be granted for residential accommodation on a lot in a zone to which this clause applies, and on which no lawful residential accommodation has been established, unless the lot is—*

*(a)  a lot that is at least the minimum lot size specified for that lot by the* [*Lot Size Map*](https://legislation.nsw.gov.au/view/html/inforce/current/epi-2010-0401/maps)*, or*

*(b)  a lot created before this Plan commenced and on which the erection of a dwelling house or dual occupancy was permissible immediately before that commencement, or*

*(c)  a lot resulting from a subdivision for which development consent (or equivalent) was granted before this Plan commenced and on which the erection of a dwelling house or a dual occupancy would have been permissible if the plan of subdivision had been registered before that commencement, or*

*(d)  an existing holding.*

Permissibility of ‘Vehicle Sales or Hire Premises’ in the B7 Business Park zone

Recently Council received a development application for the use of the former Kennwal Ford site on Giinagay Way, Nambucca Heads for a mixed use development which was to incorporate the sale of vehicles from the land. The site is within the B7 Business Park zone. As part of the assessment of this application it became apparent that ‘vehicle sales or hire premises’ are prohibited within the B7 Business Park zone. Development consent was not able to be granted to the use of the site as a vehicle sales or hire premises due to this and that the site no longer benefits from existing use rights (Kennwal Ford had development consent) as the former use had ceased for over 12 months.

Given land uses such as depots, garden centres, hardware and building supplies, and industrial retail outlets are permissible within the B7 Business Park zone, it is not considered that vehicle sales or hire premises would be contrary to the character of this zone. As such, it is recommended to add ‘vehicle sales or hire premises’ to the land use table of the B7 Business Park zone so that they are permissible with development consent.

Please note that the current use of the former Kennwal Ford site is assessed to be a wrecking yard and residential accommodation, with both uses being prohibited in the zone. The proposed amendment will not make these uses permissible. Compliance action is underway in relation to the current use of the land.

**CONSULTATION:**

Nil

**SUSTAINABILITY ASSESSMENT:**

**Environment**

The proposed amendments will not result in any negative impacts on the environment.

**Social**

The proposed amendments will give greater flexibility to people when choosing construction methods for dwellings.

**Economic**

Prohibiting manufactured homes has the potential to significantly impact those companies which construct manufactured dwellings and increase costs of establishing dwellings on remote sites where manufactured homes are the most viable option.

**Risk**

It is not considered there is any risk with adopting the recommendations. However, there is risk of being unsuccessful in any court proceedings regarding unlawful dwellings if clause 4.2A is not amended.

**FINANCIAL IMPLICATIONS:**

**Direct and indirect impact on current and future budgets**

Nil

**Working funds – justification for urgency and cumulative impact**

Nil

**Service level changes and resourcing/staff implications**

Minor level of staff time to make the amendments. No additional resources needed.

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**Attachments:**

There are no attachments for this report.