

DE21.91 Proposed Instrument Housekeeping Planning Proposal - Shoalhaven Local Environmental Plan 2014

HPERM Ref: D21/341854

Department: Strategic Planning

Approver: Gordon Clark, Acting Director - City Futures

Reason for Report

Obtain the necessary resolution to progress the proposed LEP Instrument Housekeeping Planning Proposal which seeks to make three low-impact but timely amendments to Shoalhaven Local Environmental Plan 2014 (the LEP).

Recommendation (Item to be determined under delegated authority)

That Council:

1. Prepare the Instrument Housekeeping Planning Proposal based on the scope outlined in this report and submit to the NSW Department of Planning, Industry and Environment for an initial Gateway determination.
2. If the Gateway Determination requires formal public exhibition, proceed to public exhibition in accordance with the terms of the determination and legislative requirements and if any submissions are received, these are to be considered in a further report to enable finalisation of the Planning Proposal and subsequent Amendment to the LEP. If no submissions are received (or if exhibition is not required), proceed to finalise the Planning Proposal as exhibited to enable the subsequent Amendment to the LEP to occur, without any further reports.
3. Advise Development Industry Representatives and Community Consultative Bodies of the exhibition arrangements and when the Plan is finalised.

Options

1. As recommended.

Implications: This is the preferred option. The Planning Proposal is considered to have a minor impact as it enables permissible medium density development to benefit from clearly defined subdivision opportunities in the B4 Mixed Use zone, a value currently enjoyed by medium density in residential zones. Subdivision opportunities for dual occupancy development in the R3 Medium Density Development zone will also be clarified in line with Council's longstanding intent. The Planning Proposal also proposes a Natural Disaster Clause that is tailored to Shoalhaven to assist in the rebuilding of dwellings destroyed during a natural disaster event, which is considered beneficial following the 2019-2020 Bushfire and flood events, and likely future natural disaster events.

2. Adopt an alternative recommendation.

Implications: This will depend on the extent and scope of any changes.

3. Not proceed with the PP.

Implications: This option is not favoured as subdivision opportunities for certain medium density development in the B4 and R3 zones will remain ambiguous. Further, a Shoalhaven specific Natural Disaster Clause will not be available to the community for rebuilding after natural disaster events.

Background

The Instrument Housekeeping Planning Proposal proposes the following changes/adjustments to the LEP:

- Require a minimum parent lot size and extend greater subdivision opportunities for medium density development in the B4 zone by including multi dwelling housing and residential flat buildings in Clause 4.1A of the LEP.
- Clarify subdivision opportunities for dual occupancy development in the R3 Medium Density Residential zone, to which Clause 4.1B of the LEP applies.
- Introduce a 'Natural Disaster Clause' that is more specific to the needs of Shoalhaven, to enable the rebuilding of dwellings following a natural disaster.

These matters are discussed in more detail below.

Parent Lot Size and Subdivision of Medium Density Development in the B4 Zone

The existing LEP Clause 4.1A (Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing etc), was introduced in August 2020 to set a minimum lot size for a parent lot prior to the erection of a dual occupancy, manor house, multi dwelling housing, multi dwelling housing (terraces) or residential flat building in certain residential zones. The clause sought to prescribe a minimum parent lot size to provide more certainty for developers and the community, and also lift the restriction on Torrens subdivision via clause 4.1 following lawful medium density development.

The new clause has assisted and provided more assurance and flexibility in the consideration and delivery of medium density residential products throughout Shoalhaven.

The original Planning Proposal (2020) only considered medium density development in residential zones, however medium density land uses are also permissible with consent in certain non-residential zones, specifically multi dwelling housing and residential flat buildings in the B4 Mixed Use zone. To ensure an equitable and consistent approach for all medium density land uses across the city, it would be beneficial to amend Clause 4.1A to apply to certain development in the B4 Mixed Use zone. The current clause 4.1A is provided below, with the proposed additions highlighted in red to facilitate this proposal (subject to drafting by the NSW Parliamentary Counsels Office). Whilst a minimum parent lot size of 900m² would be required, this is considered consistent with the minimum parent lot size across the city for this form of development. More importantly, the clause enables the efficient subdivision of the resulting dwellings which is a market expectation, and not unrealistic. Essentially, "if it looks like Torrens title it should be"¹.

After a year of operation, there is merit in slightly adjusting subclause 4 to avoid any doubt surrounding the permissibility of resulting land uses post subdivision (also shown in red below, subject to drafting by the NSW Parliamentary Counsels Office).

4.1A Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing, multi dwelling housing (terraces) and residential flat buildings

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

(a) to achieve planned residential density in certain zones,

¹ Explanation of Intended Effects, Proposed Medium Density Housing Code, NSW Government.

- (b) to ensure that the area and dimensions of a lot are able to accommodate development that is consistent with the objectives and development controls for dual occupancies, manor houses, multi dwelling housing, multi dwelling housing (terraces) and residential flat buildings,
 - (c) to minimise any likely adverse impact of development on the amenity of neighbouring properties.
- (2) Development consent must not be granted to development on a lot in a zone shown in Column 2 of the Table to this subclause for a purpose shown in Column 1 of the Table opposite that zone, unless the area of the lot is equal to or greater than the area specified for that purpose and shown in Column 3 of the Table.

Column 1	Column 2	Column 3
Dual occupancy (attached)	RU5 Village, R1 General Residential and R2 Low Density Residential	500 square metres
Dual occupancy (detached)	RU5 Village, R1 General Residential and R2 Low Density Residential	700 square metres
Manor houses	RU5 Village, R1 General Residential and R3 Medium Density Residential	900 square metres
Multi dwelling housing	B4 Mixed Use , RU5 Village, R1 General Residential and R3 Medium Density Residential	900 square metres
Multi dwelling housing (terraces)	B4 Mixed Use , RU5 Village, R1 General Residential and R3 Medium Density Residential	900 square metres
Residential flat buildings	B4 Mixed Use , RU5 Village, R1 General Residential and R3 Medium Density Residential	900 square metres

- (3) If a lot is a battle-axe lot or other lot with an access handle, the area of the access handle is not to be included in calculating the lot size.
- (4) Despite **the Land Use Table** or any other provision of this Plan, a dual occupancy, manor house, multi dwelling housing or multi dwelling housing (terraces) for which development consent has been granted in accordance with this clause may, with development consent, be subdivided into lots of any size to enable **each dwelling to be situated on its own lot of land with a separate title** ~~the resulting individual dwellings on those lots to have separate titles.~~
- (5) In this clause—
manor house and **multi dwelling housing (terraces)** have the same meaning as in clause 1.5 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

Subdivision of Dual Occupancy Development in the R3 Zones

The current clause 4.1A discussed above does not include a minimum lot size for a dual occupancy (attached or detached) in the R3 Medium Density Residential zone to avoid conflict with current clause 4.1B. The purpose of clause 4.1B is to retain larger sites for higher density development (e.g., multi dwelling housing and residential flat buildings) and as such, existing clause 4.1B prescribes a maximum lot size for a dual occupancy development

in the R3 zone of 800m². Further, this can only occur if it can be demonstrated to Council's satisfaction that amalgamation of land to create a lot greater than 800m² to facilitate a higher density development cannot occur.

Despite the above, if a dual occupancy is approved via clause 4.1B on a lot less than 800m², there is a reasonable market expectation that the development could be subdivided. As such, it is appropriate to clearly specify subdivision opportunities in clause 4.1B (similar to clause 4.1A), as shown below in red (subject to drafting by the NSW Parliamentary Counsels Office).

4.1B Dual occupancy development in Zone R3

- (1) The objective of this clause is to encourage greater dwelling densities on land in Zone R3 Medium Density Residential.
- (2) Development consent must not be granted to development for the purpose of a dual occupancy on a lot in Zone R3 Medium Density Residential unless—
 - (a) the area of the lot is less than 800 square metres, and
 - (b) the consent authority is satisfied that amalgamation of the lot with other land in that zone is not feasible.
- (3) Despite the Land Use Table or other provision of this Plan, a dual occupancy for which development consent has been granted in accordance with this clause may, with development consent, be subdivided into lots of any size to enable each dwelling to be situated on its own lot of land with a separate title.

Natural Disaster Clause

In response to the 2019-2020 bushfire and flood events, the NSW Department of Planning, Industry and Environment (DPIE) prepared an optional general 'model' Natural Disaster clause for inclusion in the NSW Standard Instrument LEP to attempt to alleviate regulatory challenges faced by homeowners seeking to rebuild lawfully erected homes following natural disaster events. Council has provisions in its existing LEP that already provide for the replacement of dwellings that are lost.

The clause in the Standard Instrument LEP is outlined below:

5.9 Dwelling house or secondary dwelling affected by natural disaster [optional]

- (1) The objective of this clause is to enable the repair or replacement of lawfully erected dwelling houses and secondary dwellings that have been damaged or destroyed by a natural disaster.
- (2) This clause applies to land in the following zones—
 - (a) *[set out the zones to which the clause is to apply]*
- (3) Despite the other provisions of this Plan, development consent may be granted to development on land to which this clause applies to enable a dwelling house or secondary dwelling that has been damaged or destroyed by a natural disaster to be repaired or replaced if—
 - (a) the dwelling house or secondary dwelling was lawfully erected, and
 - (b) the development application seeking the development consent is made to the consent authority no later than 5 years after the day on which the natural disaster caused the damage or destruction.

Through the consultation process relating to the new clause, NSW councils had the opportunity to 'opt in' to the set Clause being included in their LEPs. On 18 January 2021, Council resolved (MIN21.4) to:

1. *Not opt-in to the new Standard Instrument Local Environmental Plan Natural Disaster clause and advise the NSW Department of Planning, Industry and Environment accordingly (by 15 February 2021) based on the content of this report.*
2. *Consider including a different version of the clause, that better meets Shoalhaven's needs, via the standard Planning Proposal process at the appropriate point in time and receive a future report.*

Essentially, the clause only enabled the replacement of a dwelling house or secondary dwelling, not the replacement of any dwelling which is an important criterion for Shoalhaven.

This proposal seeks to enact part two of the January 2021 resolution, to pursue an alternate version of the clause. The clause could be constructed as follows (subject to drafting by the NSW Parliamentary Counsels Office), noting that it would be appropriate for the clause to apply to the entire City, not just specific zones:

[Insert Clause Number] Dwellings affected by natural disaster

- (1) The objective of this clause is to enable the repair or replacement of lawfully erected dwellings that have been damaged or destroyed by a natural disaster.
- (2) Despite the other provisions of this Plan, development consent may be granted to enable a dwelling that has been damaged or destroyed by a natural disaster to be repaired or replaced if—
 - (a) the dwelling was lawfully erected, and
 - (b) the development application seeking the development consent is made to the consent authority no later than 5 years after the day on which the natural disaster caused the damage or destruction.

It is noted that a merit assessment is still required, including consideration of contemporary bushfire legislation/guidelines or requirements of other legislation, however the rebuild or repair cannot be refused on the basis of any development standards in the LEP.

The proposed clause seeks to 'cut the red tape' for rebuilding any dwelling after a natural disaster and should be pursued, especially acknowledging that Shoalhaven was significantly affected by the 2019-2020 Bushfire event and 2020 flood events.

Conclusion

The proposed changes to the LEP have merit for a number of reasons, including facilitating the reasonable subdivision of medium density development in certain zones and assisting in the efficient rebuilding of dwellings affected by natural disasters. As such, it is recommended that the proposal proceeds to the NSW Department of Planning, Industry and Environment for an initial Gateway determination.

Community Engagement

The PP will be exhibited for comment in accordance with Council's Community Participation Plan, and in accordance with relevant legislative requirements.

The Gateway determination will specify the minimum exhibition period and any government agencies who should be consulted (if any).

Policy and Risk Implications

Proposed Changes to the B4 and R3 Zones

The proposal seeks to reinforce subdivision opportunities for medium density development in the B4 and R3 zones. The subdivision of certain medium density development in these

zones is considered an acceptable outcome. Council's longstanding intent and should be facilitated through clear provisions.

Natural Disaster Clause

Although most existing dwellings that are lost in a natural disaster circumstance would benefit from 'existing use' rights depending on their legal status, the clause will provide additional clarity (and comfort for landowners) that a dwelling can be rebuilt or repaired if the original lawful dwelling was destroyed or damaged in a natural disaster event.

The rebuild or repair cannot be refused on the basis of any development standards in the LEP, however a merit assessment is still required, including consideration of contemporary bushfire legislation/guidelines, for example.

Financial Implications

There are no immediate financial implications for Council. This PP is being resourced within the Strategic Planning budget.

Subject: Instrument Housekeeping Planning Proposal - Shoalhaven Local Environmental Plan 2014 - Preparation - Gateway Determination - Public exhibition - Adoption
HPERM Reference 33363E
Related Report D21/341854
Item Number DE21.91

RESOLVED (Clr Watson / Clr Proudfoot)

MIN21.620

That Council:

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2. If the Gateway Determination requires formal public exhibition, proceed to public exhibition in accordance with the terms of the determination and legislative requirements and if any submissions are received, these are to be considered in a further report to enable finalisation of the Planning Proposal and subsequent Amendment to the LEP. If no submissions are received (or if exhibition is not required), proceed to finalise the Planning Proposal as exhibited to enable the subsequent Amendment to the LEP to occur, without any further reports.
3. Advise Development Industry Representatives and Community Consultative Bodies of the exhibition arrangements and when the Plan is finalised.

FOR: Clr Pakes, Clr Findley, Clr Gash, Clr Wells, Clr White, Clr Gartner, Clr Digiglio, Clr Alldrick, Clr Levett, Clr Watson, Clr Kitchener, Clr Proudfoot and Stephen Dunshea

Against: Nil

CARRIED