

8.4 Dual Occupancy Permissibility - Environmental Protection Zones

8.4 Dual Occupancy Permissibility - Environmental Protection Zones

Section Strategic Planning

Objective To review the permissibility of dual occupancies on land zoned for environmental protection purposes.

Background

Council's Delivery and Operational Plan contains an action to be undertaken by Strategic Planning in 2025/26, to:

Investigate the permissibility of dual occupancies on land zoned for an environmental purpose (LP1.3f)

Population growth for Ballina Shire over the next 20 years is anticipated to require an additional 275 dwellings per annum.

Consistent with Council's strategic planning, the majority of this is planned to come from residential zoned greenfield sites, increased density in existing urban areas and strategic urban growth areas.

Rural dual occupancies provide another (limited) housing option that can also give rural landowners flexibility to provide housing for family members or generate a rental income to supplement farming or other income. At present attached and detached dual occupancies are enabled on land zoned RU1 Primary Production and RU2 Rural Landscape, with attached dual occupancies only permissible in a range of other circumstances in rural areas.

Council is currently managing compliance issues in several situations where landowners have constructed a second dwelling to make a *detached* dual occupancy without consent in some of the areas that are 'Deferred' from the Ballina Local Environmental Plan 2012 (BLEP 2012).

In areas where the 1987 LEP zones apply, only attached dual occupancies are permissible and there is currently no approval pathway available to assess the suitability of the unapproved dwellings and to have them made 'legal'.

For the purposes of this report, '*land zoned for an environmental purpose*' has been defined as any Deferred Matter area with an underlying 'environmental' zone under BLEP 1987, which are:

- Zone No 7 (a) Environmental Protection (Wetlands) Zone
- Zone No 7 (c) Environmental Protection (Water Catchment) Zone
- Zone No 7 (d) Environmental Protection (Scenic/Escarpment) Zone
- Zone No 7 (d1) Environmental Protection (Newrybar Scenic/Escarpment) Zone
- Zone No 7 (f) Environmental Protection (Coastal Lands) Zone
- Zone No 7 (i) Environmental Protection (Urban Buffer) Zone
- Zone No 7 (l) Environmental Protection (Habitat) Zone,

as well as areas zoned C2 Environmental Conservation and C3 Environmental Management in the BLEP 2012.

This report considers the role of rural dual occupancy in the context of Council's strategic housing policy intent, the merit of permitting detached dual occupancies in each of the nominated zones and possible pathways for amending the LEP to make detached dual occupancies permitted, with consent.

Key Issues

- Strategic housing policy intent
- The suitability of environmentally zoned land for additional housing
- Planning pathways available for consideration of detached dual occupancies in certain areas

Discussion

Existing permissibility and controls

There are more than 43,000 hectares of land zoned for rural or environmental purposes across Ballina Shire, which is 87% of the total land mass. Approximately 12,000 hectares is 'deferred' from BLEP 2012.

Since December 2017, attached and detached dual occupancies have been permitted with consent on land zoned RU1 Primary Production and RU2 Rural Landscape under the BLEP 2012.

However, detached dual occupancies are not permitted in any Deferred Matter areas, or on land zoned C2 Environmental Conservation, or C3 Environmental Management.

Prior to December 2017, only attached dual occupancies were permitted in the RU1 and RU2 zones.

Clause 4.2A(4A) of BLEP 2012 requires that rural dual occupancies can only be approved where it is demonstrated that:

- (a) the development will not impair the use of the land or adjoining land for agriculture or rural industries, and*
- (b) each dwelling will use the same vehicular point of access to and from a public road, and*
- (c) the land is physically suitable for the development, and*
- (d) the land will accommodate the on-site disposal and management of sewage for each dwelling.*

Clause 14 of BLEP 1987 allows *attached* dual occupancies in all the '7' environmental zones.

There are no other considerations in the LEP, however, Chapter 7 of the Ballina Development Control Plan (DCP) provides criteria to be complied with.

These include: the second dwelling must be within 10 metres of the first and can be attached by means of a covered walkway and the second dwelling must have the same road access and must be located to minimise conflict with adjoining land uses.

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BLEP 1987 also allows rural workers' dwellings in all the '7' environmental zones where the lot is >20ha and supports the need of existing agriculture (Clause 12).

Dwelling houses are permitted in all the '7' zones, other than 7(a) *Wetlands*, where they are prohibited.

Unapproved dual occupancies

There are situations where landowners have constructed a second dwelling to make a detached dual occupancy without consent in Deferred Matter areas.

Currently there is no approval pathway available to have these dwellings made 'legal'.

A search of compliance records indicates there have been 10 matters reported, where unauthorised dual occupancies have been identified within three of the '7' zones in the BLEP 1987:

- 6 properties in Zone 7(c) in the Brooklet / Newrybar area
- 2 properties in Zone 7(d1) in the Newrybar area
- 1 property in Zone 7(c) in the Wollongbar area, and
- 1 property in Zone 7(i) in the Alstonville area.

It is likely there are more unapproved detached dual occupancies, unknown to Council, within zones that do not currently have an approval pathway.

Council could continue to pursue compliance action, in which case the landowner could be required to demolish, or to make the second dwelling uninhabitable (through the disconnection of plumbing etc).

Alternatively, LEP amendments can be made to facilitate a merit-based assessment of suitability taking into consideration site constraints, the structural adequacy and safety of the dwelling and adequacy of wastewater treatment etc.

LEP amendments that facilitate a planning approval pathway need to be considered in the context of Council's strategic housing policy expressed in Council's Housing Strategy, Growth Management Strategy (GMS) and Local Strategic Planning Statement (LSPS).

These situations are particularly difficult to address given they involve personal circumstances, housing considerations and property enhancements.

From a planning perspective, the best way to look at this equitably, is to consider the issue from a policy perspective, rather than on a case-by-case basis.

This report examines the policy basis for changes to dual occupancy provisions in environmental zones.

Understanding the role of rural dual occupancies in addressing housing supply in Ballina Shire

Since the BLEP 2012 was amended in December 2017 to permit detached dual occupancies in rural zones, approximately 51 consents have been issued. A significant proportion of these were for a 'change of use' of an existing structure, rather than construction of a new dwelling.

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This represents an average of just over seven approvals per annum, over a seven-year period.

Prior to the LEP amendment, an estimated eight attached dual occupancies had been approved in five years.

This is a significant change and indicates that any expansion in permissibility of detached dual occupancy will lead to more dwellings in rural areas.

Key balancing considerations here are that each dwelling has potential to result in land use conflict, particularly in relation to agricultural production, relative to potential for additional housing, albeit a modest volume through a means that is not central to Council's overall housing strategy for the shire.

There is sufficient residential zoned land to support an additional 2,800-5,500 dwellings in Ballina Shire over the next 20+ years.

Council's GMS and LSPS also identify future residential growth areas.

Council's Housing Strategy 2024 focuses on increasing density, diversity and affordability within urban centres. Rural housing plays a small role in meeting housing demand in the shire.

Assessment process for dual occupancy permissibility in environmental zones

The geographic location of the deferred matter lands, with an underlying 'environmental' zone under BLEP 1987, zone objectives, permitted and prohibited uses and the potential impacts of allowing detached dual occupancies within the zoned land were assessed.

A summary of this assessment is as follows for the applicable zones.

In respect to the '7' zones, three are based on the protection of vegetation characteristics (wetlands, coastal lands and habitat) and four are based upon their scenic values or water catchment areas.

Zone 7(a) Wetlands

The 7(a) zone is applicable to coastal areas north of Lennox Head, as well as wetland areas of Skennars Head, Kinvara, Meerscham Vale, and various other small pockets of land around waterways.

Dwellings are prohibited in the zone, and the objectives of the zone are about the protection of significant wetlands and prohibiting development that could damage a wetland ecosystem.

Change to existing controls is not recommended as it would be contrary to the zone objectives.

Zone 7(c) Water Catchment

The 7(c) zone is applicable to areas on the western boundary of Ballina Shire around McLeans Ridges / Wollongbar / Rous, two small areas at Dalwood / Lynwood and to an area in the north of the shire around Newrybar / Brooklet.

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The primary zone objective is to prevent development which would affect urban water supply, with secondary objectives to encourage agriculture, and ensure development maintains rural character and does not create unreasonable demand for public amenities / services.

Allowing detached dual occupancies, as permitted with consent, on this land would allow for a greater spread of dwellings across the landscape, with some potential impact on the scenic rural character.

Further protection of scenic values could be achieved by adding an additional subclause to the current requirements under CI4.2A(4A), similar to clauses in the Lismore, Byron Shire and Richmond Valley LEPs that require:

the development will not have an adverse impact on the scenic amenity or character of the rural environment.

An extension to the current DCP Ridgelines and Scenic Areas Map and associated planning controls would provide additional guidance.

The landscape in these areas is largely cleared agricultural land, predominantly used for grazing and macadamia production and is identified as 'important farmland' within the North Coast Regional Plan.

Council has sufficient guidelines and controls to manage any additional on-site wastewater treatment systems.

However, any change is highly likely to lead to an increase in dual occupancy applications, noting that 7 of the 10 (known) unapproved detached dual occupancy are within the 7(c) zone.

Should Council wish to make detached dual occupancies permissible, with consent, in the 7 (c) zoned areas, there are two possible planning pathways:

1. Amend BLEP 1987

This would involve inserting a new clause to allow detached dual occupancies as permissible with consent in Zone 7(c).

The clause would replicate the requirements of Clause 4.2A(4A) that currently applies to rural areas in BLEP 2012, with an additional subclause to protect scenic rural character.

This option represents a relatively minor change to current planning controls but would need to be supported by the Department of Planning, Housing and Infrastructure (DPHI), which is addressed later in this report.

2. Amend BLEP 2012.

This would involve the transition of areas zoned 7(c) to a rural zoning in BLEP 2012, with a simultaneous amendment to the Drinking Water Catchment overlay map.

The most likely rural zone would be RU1 Primary Production (RU1 zone) as it is consistent with adjoining land and reflects the 'Important Farmland' classification of the land.

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At present development in Zone 7(c) is subject to Clause 24A in BLEP 1987 which guides assessment of development impact on water quality within the catchment.

These considerations are similar to Clause 7.4 of BLEP 2012, which is triggered by the associated overlay map and provides a series of requirements that must be considered when assessing development within a drinking water catchment.

A map showing all 7(c) zoned land in BLEP 1987 and the current areas captured by the drinking water clause in BLEP 2012 is shown as Figure 1.

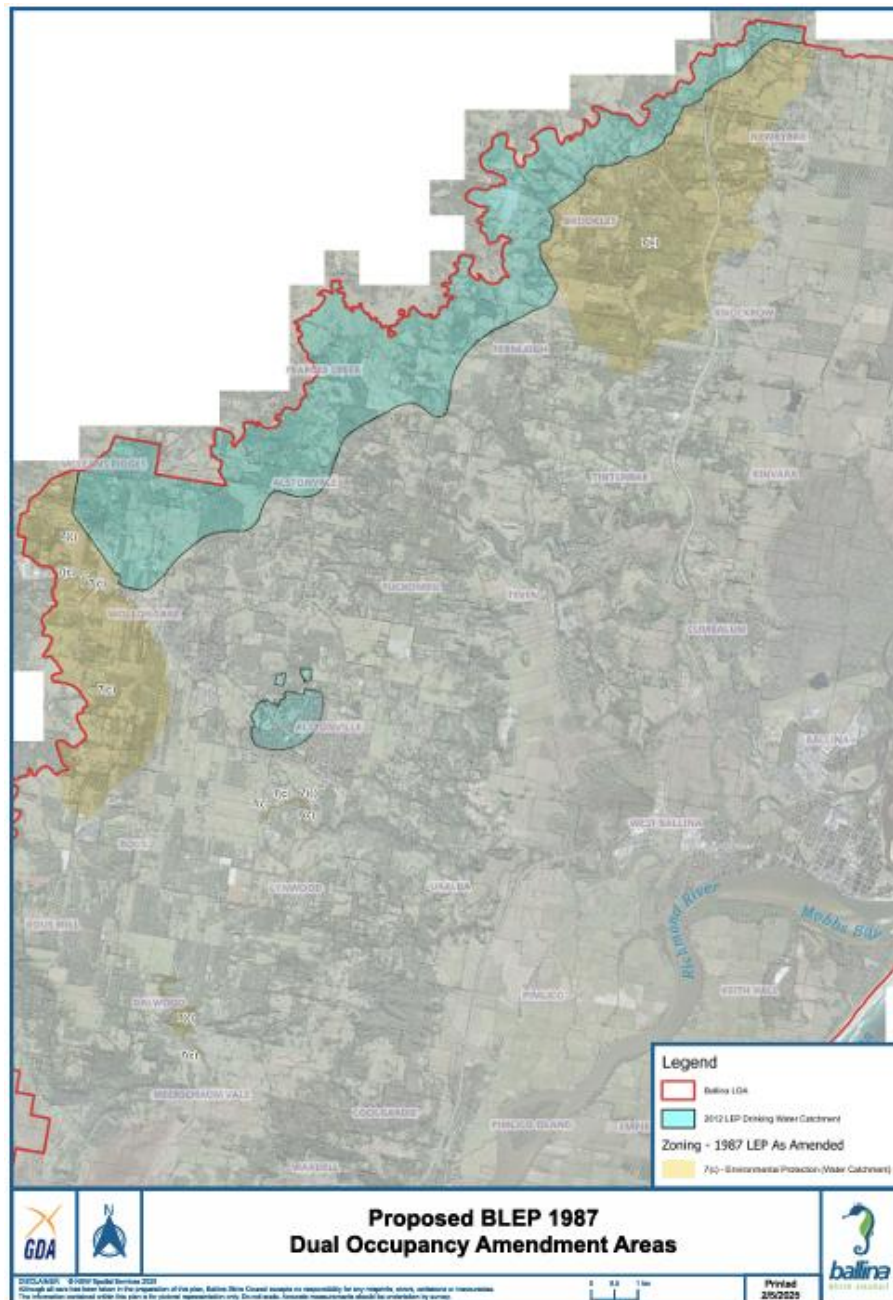


Figure 1: Areas currently zoned 7(c) in BLEP '87 (yellow) and areas mapped as drinking water catchment in BLEP 2012 (blue/green).

One of the implications of transitioning land from BLEP 1987 to a rural zone in BLEP 2012 is that a range of additional land uses would also become permissible with development consent. Zone 7(c) currently has a very limited range of permissible uses, specifically:

Bed and breakfast establishments; childcare centres; dwelling-houses; forestry; helipads; home industries; public utility undertakings; retail plant nurseries; roads; telecommunications facilities; utility installations.

Zone RU1 permits a much broader range of uses with consent including *agritourism, animal boarding or training establishments, extractive industries, markets, and recreation facilities (outdoor)* as some examples of additional uses that would be enabled if the 7(c) zoned land was transitioned to RU1.

Enabling additional uses and changing LEP controls applying to this area would be subject to consultation with Rous Water.

Given that this policy review is focused on dual occupancies, the preferred approach to enabling detached dual occupancy is to amend the 1987 LEP.

This is a more targeted approach and does not require broad scale analysis of planning policy and other consequences of change, or consideration of the State Government's environmental protection zone criteria.

Zone 7(d) Environmental Protection (Scenic/Escarpment)

The 7(d) zone is applicable to various small areas throughout the shire.

The primary zone objectives are about protecting scenic value, minimising soil erosion and preventing development in geographically hazardous areas.

Secondary objectives are to be consistent with zone objectives for land zoned 1(b) Rural (Secondary Agriculture) which encourages agriculture and ancillary uses including dwellings and tourism orientated development.

The 7(d) zone includes land at Skennars Head and Lennox Head, that acts as a separation between residential areas and The Coast Road.

These scenic areas are sensitive to change, and impacts associated with new structures. These areas are also highly valued by the community, as part of the open space, scenic and environmental characteristics of the shire. There appears to be very few existing dwellings within 7(d) zoned land.

No change is recommended for the 7(d) zone.

Zone 7(d1) Environmental Protection (Newrybar Scenic/Escarpment)

The 7(d1) zone is applicable to a visually prominent narrow area running north – south in the Newrybar / Knockrow area as shown in Figure 2.

The primary zone objectives focus on protecting areas of scenic value, ensuring development maintains rural character, encouraging productive use of the land and development ancillary to agriculture, including dwellings and rural workers' dwellings and ensuring development is of a scale that does not impact adversely on amenity.

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Secondary objectives are about minimising soil erosion and ensuring development does not create unreasonable demand for public amenities / services.

The DCP Ridgelines and Scenic Areas Map applies to development on land zoned 7(d1).

The zone was specifically introduced to recognize scenic values associated with this area, founded in extensive community engagement.

Permitting detached dual occupancies, with consent, is highly likely to lead to an increase in applications for housing in this area.

Due to the location and associated land values, this could see development applications for substantial sized dwellings that would likely impact on scenic amenity and rural character.

While this could partly be addressed through an additional LEP subclause and existing DCP controls, no change is recommended at this time for the 7(d1) zone.

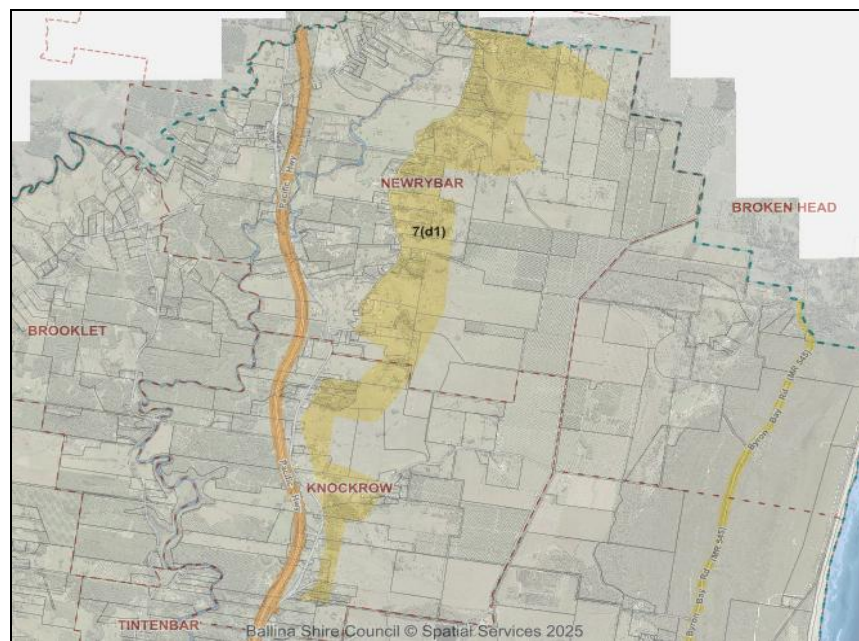


Figure 2: Areas zoned 7(d1) in BLEP '87.

Zone 7(f) Environmental Protection (Coastal Lands)

The 7(f) zone is applicable exclusively to various coastal areas from Lennox Head to East Wardell.

The land is predominantly in public ownership.

The primary objectives are the protection of environmentally sensitive coastal lands and to prevent development that would impact on coastal processes.

Change to existing controls is not recommended as it would be contrary to the zone objectives and the coastal characteristics that are highly valued.

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Zone 7(i) Environmental Protection (Urban Buffer)

The 7(i) zone applies exclusively to land located around Alstonville and Wollongbar that is part of the inter-urban space between the two villages.

Land is located on both sides of the Bruxner Hwy and east of Alstonville near Tuckombil Quarry. It covers 105 properties (around 632 hectares), including numerous large (20+ ha) macadamia farms and the Elvery Lane sports area (tennis / soccer / rugby / netball) fields.

The primary objective of the zone is to create a green space separation between Alstonville and Wollongbar and to enable development that is consistent with zone 1(a1) which is to ensure land is utilised for agriculture and ancillary uses.

Both the Wollongbar and Alstonville Place Plans identify the need to maintain an inter-urban buffer between the villages to maintain the rural character of the area and to prevent urban style development in this area.

The area is shown in Figure 3.

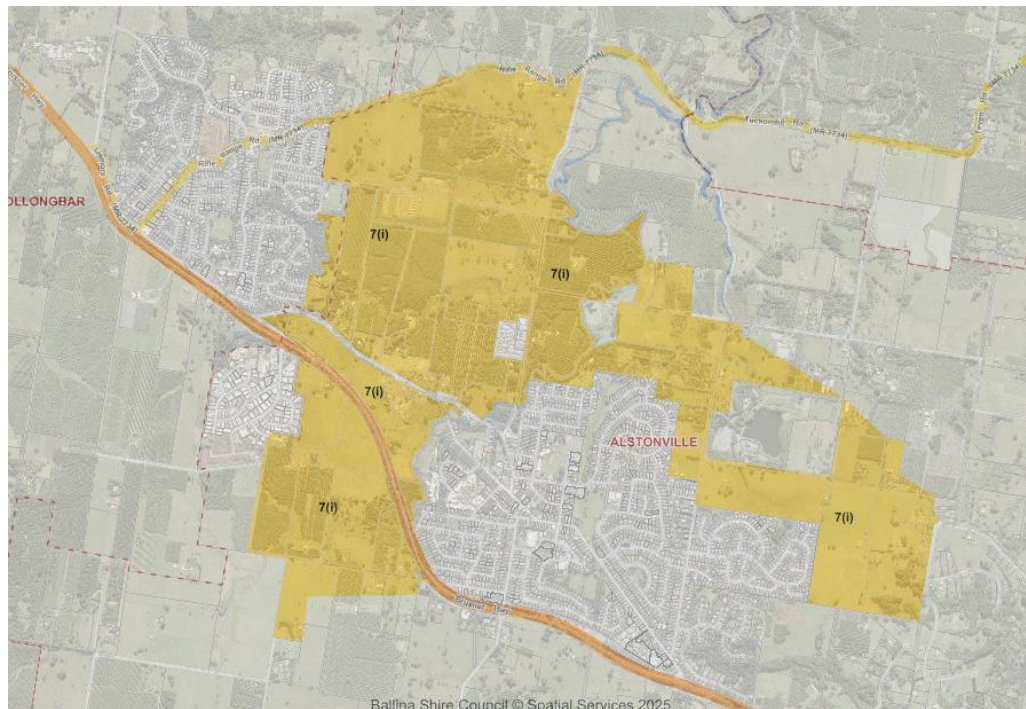


Figure 3: Area zoned 7(i) in BLEP '87

Allowing detached dual occupancies, as permitted with consent, would likely lead to an increase the number of dwellings in the urban buffer, with potential impacts on rural character and farming enterprises.

As discussed in relation to Zone 7(c), impacts on visual amenity could be addressed through an additional LEP subclause and associated DCP controls.

However, the potential increase in dwellings would result in incremental and unplanned expansion of development into an area valued by the community as an 'urban buffer'.

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Rather than make ad hoc changes, it is preferable to consider the future use of these buffer areas more strategically in conjunction with ongoing planning for the future of Wollongbar and Alstonville and in consultation with these communities.

At present, enabling detached dual occupancy in this zone would be contrary to current place-based planning policy for the plateau villages, which is founded in extensive community engagement.

No change is recommended for the 7(i) zone.

Zone 7(l) Environmental Protection (Habitat)

The 7(l) zone applies to various small areas across the shire identified for their habitat value, including a large area east of Wardell that is predominantly owned by Jali LALC.

The primary objective is the protection of significant habitat, and the secondary objective is to be consistent with objectives for land zoned 1(b) Rural (Secondary Agriculture), which encourages agriculture and ancillary uses including dwellings and tourism orientated development.

These objectives and the current permissible land uses appear to be in conflict (e.g. protection of significant habitat is generally not consistent with development for agriculture, additional dwellings and/or tourism operations).

No change to existing controls is recommended due to the presence of significant habitat.

Zone C2 Environmental Conservation (BLEP2012)

Land zoned C2 is in small clusters across the shire.

Dwelling houses are permitted with consent. Dual occupancies are prohibited.

The zone objectives are to protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values and to prevent development that could destroy, damage or otherwise have an adverse effect on those values.

Changing existing controls is not recommended as it would be contrary to the zone objectives.

Zone C3 Environmental Management (BLEP2012)

Land zoned C3 is currently limited to two properties in the Coolgardie / Meerscham Vale area and one in Wollongbar.

Dwelling houses are permitted with consent. Dual occupancies are prohibited.

The zone objectives are to protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values and to provide for a limited range of development that does not have an adverse effect on those values.

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Changing existing controls is not recommended as it would be contrary to the zone objectives.

Summary of LEP zone recommendations

Of the nine existing environmental zones, it is recommended that an LEP amendment is considered only to the 1987 LEP Zone 7(c).

This is within a context where there are existing controls in place to protect the drinking water catchment from the impacts of development, including additional on-site wastewater treatment systems, and it will support some additional (limited) housing opportunities.

Any amendment to enable additional development in this area would be subject to consultation with Rous County Council.

Considerations for amending BLEP 1987

Preliminary advice from DPHI is that amendments to non 'Standard Instrument' LEP's such as BLEP 1987 are generally discouraged.

However, it can be done where it is sufficiently justified.

It is considered that sufficient justification can be provided to DPHI to amend the 1987 LEP including that:

- the land has characteristics that are compatible with enabling detached dual occupancy and environmental considerations can be suitably managed through LEP and DCP provisions
- the amendments will allow for an (albeit limited) increase in housing supply, which is consistent with DPHI's broader objectives to support increased housing
- the change would allow Council to better regulate on-site sewage management and compliance matters where illegal housing is occurring
- the area is largely cleared of vegetation and in that regard the proposed amendment will have minimal environmental impact
- on the basis the policy issue around permissibility is settled by Council, the amendment is relatively minor from a technical perspective.

If the DPHI only supports an amendment to a similar zone in LEP 2012, likely RU1 and/or RU2, this would be reported back to Council.

Advice was also sought from the DCCEEW's conservation division, now called Conservation Programs, Heritage and Regulation (CPHR).

They advised a "cautious approach" be taken to allowing detached dual occupancy in 7 zones and indicated it would only support a planning proposal where it can be demonstrated future detached dual occupancies are "*unlikely to have impact on biodiversity values and are in flood free locations*".

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CPHR's advice is that Council should undertake an assessment to determine all properties that contain High Environmental Value (HEV) vegetation and to exclude them from any planning proposal.

This would be a significant undertaking and potentially costly if ground truthing investigations were required.

Further, this is not justified as the '7 (c) zone' proposed to be amended, is an 'environmental protection' zone for water catchment reasons, rather than the conservation or protection of habitat or HEV vegetation.

Delivery Program Strategy / Operational Plan Activity

The Delivery and Operational Plan contains the following action:

Investigate the permissibility of dual occupancies on land zoned for an environmental purpose (LP1.3f)

Community Engagement Strategy

Community consultation has not been undertaken at this preliminary stage.

Should Council resolve to proceed with any amendments to planning controls via a planning proposal, community engagement provisions that are in line with the Community Engagement Strategy and any statutory provisions will be applied, including public exhibition.

Financial / Risk Considerations

The recommendations provided within this report are not considered to pose any financial risk to Council and do not require additional funding sources.

Options

Option 1

Council endorses the preparation of a planning proposal to amend BLEP 1987 to provide an application pathway for detached dual occupancies within Zone 7(c) Water Catchment.

The amendment would include a clause that replicates the controls required for detached dual occupancies in BLEP 2012 Cl. 4.2A(4A) and add an additional requirement as follows:

- (a) the development will not impair the use of the land or adjoining land for agriculture or rural industries, and*
- (b) each dwelling will use the same vehicular point of access to and from a public road, and*
- (c) the land is physically suitable for the development, and*
- (d) the land will accommodate the on-site disposal and management of sewage for each dwelling.*
- (e) the development will not have an adverse impact on the scenic amenity or character of the rural environment.*

This option is recommended for the reasons outlined in this report.

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This option would ultimately result in compliance action being taken on the two properties in the 7(d1) zone in Newrybar and the one property in the 7(i) zone in Alstonville to demolish or decommission the dwellings to render them uninhabitable.

Owners of currently unauthorised dwellings in 7(c) zoned areas would be afforded an opportunity to regularise their dwellings to make them lawful.

It is not good practice to amend planning instruments to provide for correction of unlawful land use outcomes unless there is a sound policy basis in the public interest.

In this instance, there is alignment with broader strategic objectives around housing that can be in the public interest.

Option 2

Council endorses the preparation of a planning proposal to amend BLEP 1987 to allow an approval pathway for detached dual occupancies within Zones 7(c) Water Catchment, Zone 7(d1) Newrybar Scenic/Escarpment and Zone 7(i) Urban Buffer.

This could be extended to other environmental zones.

The approach would include a clause that replicates the controls required for detached dual occupancies in BLEP 2012 Cl. 4.2A(4A) and add an additional requirement relevant to protection of scenic amenity and rural character as set out in Option 1.

This option would extend the permissibility for rural detached dual occupancies to more areas.

The protection of scenic values could be considered via a new subclause and an update to the DCP scenic ridgeline overlay map and associated provisions. However, over time these values could be eroded.

Option 2 is not recommended as it would likely result in direct conflict with zone objectives, and the characteristics and values of the land, ultimately undermining Council's current zoning framework.

Option 3.

Council endorses preparation of a planning proposal to transition land zoned 7(c) Water Catchment to an appropriate rural zoning in BLEP 2012.

This option would have a similar impact as Option 1, in that properties within Zone 7(c) would have detached dual occupancies as a permitted use.

However, it would also facilitate a range of additional potential uses, as discussed in this report.

Almost all the land in Zone 7(c) is identified as 'Important Farmland', which would indicate a RU1 Primary Production zoning could be the most appropriate LEP 2012 zone and consistent with adjoining land.

Provisions for the protection of water quality would be facilitated by an extension of the Drinking Water Catchment overlay map which triggers a range of requirements under Clause 7.4 of BLEP 2012.

This option is not recommended as transition of only one of the Deferred Matter areas to BLEP 2012. This approach also requires much broader consideration of implications and consequences and address of a wider range of planning matters. If this approach is preferred, it is recommended that Council receive a further report.

Option 4

Take no further action.

This option is not recommended as there are areas where rural detached dual occupancies may be appropriate subject to meeting LEP and DCP controls.

RECOMMENDATIONS

1. That Council prepare a planning proposal to amend the Ballina Local Environmental Plan 1987 to allow an application pathway for detached dual occupancies within Zone 7(c) Environmental Protection (Water Catchment), including insertion of the following clause:
 - (a) *the development will not impair the use of the land or adjoining land for agriculture or rural industries, and*
 - (b) *each dwelling will use the same vehicular point of access to and from a public road, and*
 - (c) *the land is physically suitable for the development, and*
 - (d) *the land will accommodate the on-site disposal and management of sewage for each dwelling.*
 - (e) *the development will not have an adverse impact on the scenic amenity or character of the rural environment.*
2. The planning proposal is to be submitted to the Department of Planning, Housing and Infrastructure for a Gateway Determination.
3. Upon an affirmative Gateway Determination, the procedural steps associated with progression of the planning proposal be undertaken, including consultation with Rous County Council and the relevant State Government Agencies, along with public exhibition.
4. That the Department of Planning, Housing and Infrastructure be advised that Council wishes to exercise its delegated plan making functions for this LEP amendment.

Attachment(s)

Nil