

5 December 2024

The General Manager
Tweed Shire Council
PO Box 816
Murwillumbah NSW 2484

By email: LMcGavin@tweed.nsw.gov.au

Attention: Lindsay McGavin

Dear Lindsay

Advice about DA24/0352

Our ref: SVN/TWE002-00066

1. Your instructions

- 1.1 Tweed Shire Council (**Council**) requires advice about following matters relating to a proposed caravan park on land zoned RU1 Primary Production and RU2 Rural Landscape under the *Tweed Local Environmental Plan 2014 (TLEP 2014)*:
- (a) Whether the proposed effluent disposal area is properly characterised as development for the purposes of a “caravan park” (and therefore prohibited in the RU1 zone) or is otherwise properly characterised as “extensive agriculture” (and therefore permitted without consent in the RU1 zone); and
 - (b) Whether clause 7.10 of the TLEP 2014 operates to prevent consent from being granted to the proposed development.

2. Summary of advice

- 2.1 The proposed effluent dispersal system is properly characterised as development for the purposes of a caravan park (or, in the alternative, development for the purposes of a sewage treatment plant or water recycling facility) and is prohibited on the RU1 zoned land under the TLEP 2014.
- 2.2 Based on the information we have been provided, the Applicant has not provided sufficient information to satisfy the Northern Regions Planning Panel (as the relevant consent authority) that the supply of water is available or that adequate arrangements will be made to make the supply of water available to the proposed development when required. It follows that the Panel must refuse the DA.

3. Background

- 3.1 Development Application No. DA24/0352 (**DA**) was lodged with Council on 30 July 2024. The DA seeks development consent for a “caravan park” comprising 267 long-term sites and 12 short-term site (including demolition of existing structures and the associated construction of a clubhouse, outbuildings and roads) on Lot 250 DP755701 at 1183 Cudgera Creek Road, Cudgera Creek (**Land**).

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3.2 The Statement of Environmental Effects prepared by Planit Consulting dated July 2024 (**SEE**) describes the proposed development as follows:

Specific land uses sought within the Development Application (DA) include Road and Caravan Park.

The road land use involves upgrades and extensions to Cudgera Creek Road and Johansons Road, specifically:

- Inclusion of Auxiliary Left Turns (AULs) and Channelised Right Turns (CHRs) treatments on Cudgera Creek Road to improve access to Johansons Road and the site.
- Widening, realignment and sealing of Johansons Road along its length from its intersection with Cudgera Creek Road. Road. A road width of 8m (pavement), plus 1.5m shoulder and verge each side is proposed, being a higher standard than required for a 'Class B' type as per Council's Rural Road Cross Section Standard Drawings.
- Reconstruction of the bridge crossing Cudgera Creek for a length of 30m.
- Construction of bridge or culvert structures to maintain site drainage.
- Fill to increase the finished level of Johansons Road to be above the modelled 1% annual exceedance probability (AEP) flood levels of the subject site.
- Provision of a cul de sac head to delineate the interface between public and private road infrastructure.

The caravan park land use involves:

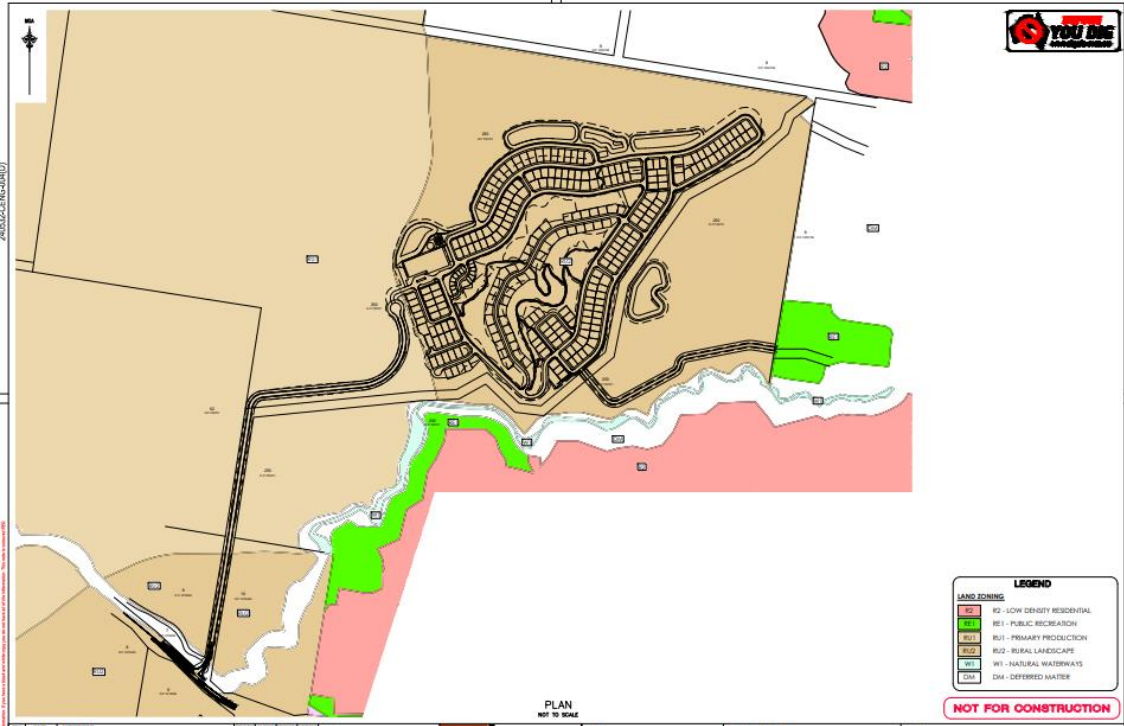
- Demolition of 2x existing dwelling houses, an existing farm building and other rural infrastructure within the footprint of the caravan park, such as fencing
- 267x long-term sites, of which all are reserved for use by self-contained moveable dwellings.
- 12x short term sites
- Clubhouse, with outdoor resort pool, inground pool and spa, bowling rink and pickle ball court
- Amenities building
- Potting and gardening building
- Grounds maintenance / hobby shed
- Ancillary components such as earthworks, tree removal, access roads, carparking for 84x vehicles, installation of essential services including private wastewater infrastructure, stormwater treatment, water supply, landscaping and the like.

For clarity, development consent is not sought for the installation of moveable dwellings or the like on sites within the caravan park. The installation of any structures on sites post consent will be pursued separately.

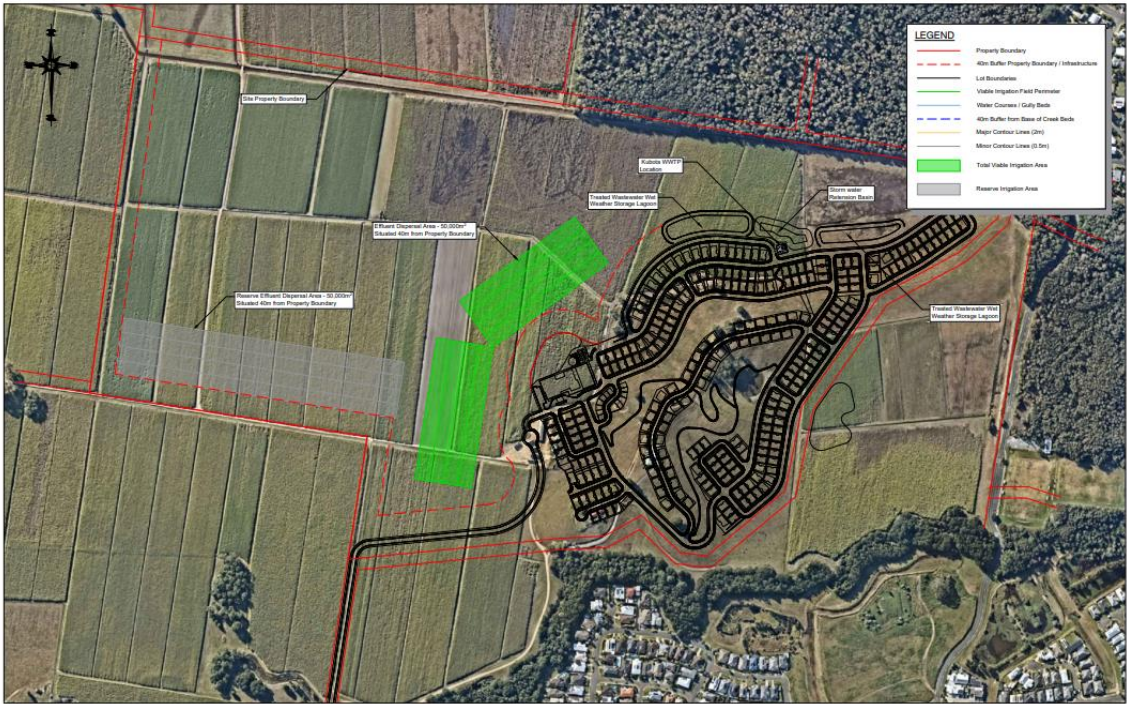
3.3 The Northern Regions Planning Panel (**Panel**) is the consent authority for the DA.

3.4 The Land is largely zoned part RU1 and part RU2 under the TLEP 2014 and also includes deferred matter zoned Rural 1(a) and part Rural 1(b) under the Tweed Local Environmental Plan 2000 (**TLEP 2000**). The proposed "caravan park" is located within the part of the Land

zoned RU2 as shown in the extract below from the Land Zoning Plan (Drawing No. 004 Revision D):



3.5 The development is proposed to connect to Council’s reticulated water supply but not to Council’s reticulated sewage system. The effluent disposal areas are located within the part of the Land zoned RU1 as shown in green on the extract below from the Site Plan – Overall Indicative Layout (Drawing No. CCCP-WWTP-H-0005 Revision A):



3.6 The DA was accompanied by legal advice from Matthew Harker of Counsel that concludes:

That purpose is for development that falls squarely within the definition of a caravan park. The development is therefore for a nominate permissible purpose within the RUZ zone.

- 3.7 On 27 August 2024, Council received an email from Planit Consulting that provides as follows about the proposed effluent disposal system:

The discussion in the SEE is brief as development consent is not being sought to irrigate the treated water, rather, will be utilised by extensive agriculture operations (which occur without consent).

4. Is the proposed effluent disposal area properly characterised as “extensive agriculture” (and therefore permitted without consent in the RU1 zone)?

Description of the proposed development

- 4.1 As outlined above, the development does not propose to connect to Council’s reticulated sewage system but instead proposes on-site sewage disposal as described in the SEE below:

All sewage generated by the Proposal is to be treated and managed within the subject site by a sitespecific Wastewater Treatment System (WWTS), comprising:

- A 110kL: Kubota wastewater treatment plant (WWTP)
- ~1.5 megalitres of effluent storage lagoons for wet weather storage.

The effluent dispersal system proposed integrates with the ongoing extensive agriculture pursuits of the land, specifically, impact sprinklers irrigating pasture and fodder crops.

All wastewater infrastructure within the subject site is proposed to be privately owned and operated by the established licensed entity and managed by True Water Australia. Reticulated water supply is to be provided to each site and building within the Proposal.

- 4.2 The Effluent Management Plan lodged with the DA includes the following description of the proposed wastewater treatment system:

Wastewater Treatment Plant

The Wastewater Treatment Plant (WWTP) will be sited achieving suitable buffers and offsets to sensitive receptors. The WWTP will consist of an Equalisation/Balance Tank and a Kubota Wastewater Treatment Plant with a nominal treatment capacity of 100,000L/day. The 100kL Kubota WWTP is designed to treat peak flows of up to 1.25 times the nominal daily capacity (125kL) in emergency or unforeseen events. The Kubota WWTP is scalable and can be expanded if required. The Kubota WWTP will provide advanced secondary treatment and the quality of effluent will meet Class A.

Wet Weather Storage

Effluent Storage Lagoons will provide approximately 1 megalitre of treated effluent storage.

Effluent Dispersal

A large portion of the 119-hectare site is suitable for effluent irrigation and achieves suitable buffers and offsets to sensitive receptors. To provide a conservatively sized effluent dispersal area, only a small portion of the suitable land is required, and a 10-hectare area has been nominated on the southwest of the site.

Conservative industry guidelines recommend a Design Irrigation Rate (DIR) of 2mm/day for effluent irrigation on moderately to heavily structured clay soils regardless of climate throughout Australia. The climate is temperate, the site has few constraints, and the DIR could be increased in line with environmental factors and vegetation demand. However, to simplify regulatory assessment and address any questions regarding viability of effluent dispersal or design suitability, the conservative approach of general guidelines will be employed. Therefore, the peak DIR will be 1mm/day, and the average annual DIR will be 0.7mm/day.

The WWTS does not recycle water and is not a recycled water scheme or an effluent reuse scheme. Effluent dispersal has no secondary use, the purpose is solely treated effluent dispersal.

- 4.3 The WWTP and effluent storage lagoons are located within the part of the Land zoned RU2 and the effluent dispersal areas are located within the part of the Land zoned RU1 as shown on the Site Plan at paragraph 3.5 above.
- 4.4 The proposed effluent dispersal system includes irrigation pumps that pump the treated wastewater from the effluent storage lagoons to a sprinkler system that disperses the effluent in the effluent dispersal areas (as shown in the Wastewater Treatment Plant concept drawings prepared by TrueWater Australia lodged with the DA).

Principles of characterisation

- 4.5 The task of characterisation is a jurisdictional precondition which must be undertaken to determine if the development is permissible with development consent under an environmental planning instrument for the purposes of section 4.2(1) of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.¹
- 4.6 The general principles concerning characterisation are set out in *Chamwell v Strathfield Council* (2007) 151 LGERA 400 as follows:

In planning law, use must be for a purpose ... The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued ... In determining whether land is used for a particular purpose, an enquiry into how that purpose can be achieved is necessary ... The use of land involves no more than the “physical acts by which the land is made to serve some purpose”. ...

The fact that the nature of the uses of different components or parts of the development may vary is not necessarily of importance ... the nature of the use needs to be distinguished from the purpose of the use. Uses of different natures can still be seen to serve the same purpose ...

...

The characterisation of the purpose of the use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes...

- 4.7 When characterising development to determine permissibility under an environmental planning instrument, the character, extent, and other features of the proposed development must be compared against the various categories specified in the Land Use Table for the zone in question.² This involves a factual enquiry to determine whether the proposed development falls within one or more of the defined categories.³ This requires:
- (a) a general assessment of the categories of development specified in the Land Use Table and dismissal of any wholly irrelevant categories; and
 - (b) a detailed examination of the potentially relevant categories to determine whether the development meets or falls within one or more of them.
- 4.8 If the proposed development falls only within one of the categories, then that is the purpose of the development. If that category of development is nominately permissible with development consent, then it is unnecessary to determine whether the development falls within another

¹ *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* (2004) 136 LGERA 288; [2004] NSWCA 422.

² *Penrith City Council v Waste Management Authority* (1990) 71 LGRA 376

³ *Residents Against Improper Development Incorporated & Anor v Chase Property Investments Pty Ltd* [2006] NSWCA 323

category of development. This approach was outlined by Bignold J in *Friends of Pryor Park Incorporated v Ryde Council* [1995] NSWLEC 160 (***Friends of Pryor Park***):

The respondent's competing argument is that, where as in the present case, the proposed development falls within the permissible purpose of community facilities, development consent may be legally granted to the proposed development of that purpose and the fact that the development also falls within another purpose, namely childcare centre, is legally irrelevant to the validity of the development consent granted for the permissible purpose.

...

In my judgement the Respondent's argument is correct and is clearly to be preferred to the Applicant's competing argument.

- 4.9 In *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 (***Pet Carriers***), Preston CJ at [31] explained that the process of characterisation is to be answered by reference to the particular terms of the relevant environmental planning instrument:

32 In this situation, the question of characterisation is to be answered by reference to the particular terms of the environmental planning instrument and the land use table for the zone in which the development is to be carried out. The inquiry is whether the development can be characterised as being for a purpose that the instrument identifies as being permissible with consent and not for a purpose that the instrument identifies as being permissible without consent or as being prohibited. The focus of this inquiry is whether the development is within a nominate or innominate purpose, the terms of which are specified in the instrument. It is not to determine, at large, the category of purpose into which the development should be seen as falling and to formulate a description of that category. The latter task may be required when determining whether a development is an existing use under the EPA Act: see *C B Investments Pty Ltd v Colo Shire Council* at 280. But it is not the task to be undertaken when determining whether development is for a purpose that may be carried out with consent.

- 4.10 Development can involve a purpose of development which is a category of development (a genus) that has one or more sub-categories of development (a species) or development which is prohibited but ancillary to the permitted use. Preston CJ in *Pet Carriers* (at [55] and [68]) explained the principles that have been developed dealing with these categories of development:

55 The decisions fall roughly into two categories. First, there are decisions which involve a purpose which is a genus and one or more species of purposes falling within that genus. If the genus is a nominate prohibited purpose, development for that purpose will be prohibited even if it could also come within one or more species of purposes that are innominate permissible purposes. Conversely, if the genus is a nominate permissible purpose, development for that purpose will be permissible even if it could also come within one or more species of purposes that are innominate prohibited purposes. Decisions in this first category include *Egan v Hawkesbury City Council* (1993) 79 LGERA 321; *Hawkesbury City Council v Sammut* [2002] NSWCA 18; (2002) 119 LGERA 171; *Abret v Wingecarribee Shire Council*

[2011] NSWCA 107; (2011) 180 LGERA 343; and *Friends of Pryor Park Inc v Ryde City Council*.

...

68 The second category of decisions relied on by the Council involve development that could be seen to be for two or more different purposes, one being permissible and the others being prohibited. The inquiry is whether the prohibited purposes are subsumed in the permissible purpose so that it is legitimate to disregard the prohibited purposes and treat the permissible purpose as that for which the land is being used, or whether they are independent of each other so that the land is being used for both prohibited and permissible purposes. Decisions in this category include *Foodbarn Pty Ltd v Solicitor-General*; *C B Investments Pty Ltd v Colo Shire Council*; *Lizzio v Ryde Municipal Council*; *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404; *Berowra RSL Community and Bowling Club Ltd v Hornsby Shire Council* [2001] NSWLEC 243; (2001) 114 LGERA 345; and *Bardsley-Smith v Penrith City Council*.

4.11 Uses that are ancillary are also categorised as forming part of the dominant purpose of development rather than being for a separate and independent purposes. For development to be ancillary to another development, it must not merely coexist with, but must serve the purposes of, the other development.⁴ Whether a use is ancillary or a separate and independent use is a question of fact and degree.⁵ A use will be separate and independent if, by reason of its nature and extent, it is capable of being an independent use. This involves consideration of whether:

- (a) the uses are severable;
- (b) the uses are inextricably linked;
- (c) the continuation of one use necessarily requires the other; and
- (d) the two uses ordinarily occur together, rather than merely sometimes being associated as a matter of convenience.⁶

4.12 In *Joint Venture Pty Ltd v Mid-Coast Council* [2021] NSWLEC 1138 (**Joint Venture**), Commissioner Dickson considered a proposed manufactured home estate across the RE1 Public Recreation and the R1 General Residential zones under the *Greater Taree Local Environmental Plan 2010*. The development proposed manufactured homes only within the R1 zone and the roads, outdoor bowling green and men's shed were located in the RE1 zone. The Commissioner approached the task of characterisation based on each of the individual components of the proposed manufactured home estate. This resulted in the Commissioner accepting the Applicant's submission (put forward by Tim Robertson SC) that the roads were permissible as "roads" (consistent with the decisions of the Court in *Argyropoulos v Canterbury Municipal Council* (1988) 66 LGERA and *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020 NSWLEC 41]) and the outdoor bowling green and men's shed were permissible as recreation facility (outdoor) while the proposed dwellings were innominately permissible as a manufactured home estate. The Commissioner was not satisfied however that the proposed

⁴ *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410.

⁵ *Lizzio v Ryde Municipal Council* (1983) 155 CLR 211

⁶ *Scott's Provisions Stores Pty Ltd v Sydney City Council* (1958) 3 LGRA 191.

five water quality basins were properly characterised as an environmental facility (but did find they were development for the purposes of a stormwater management system and permissible with consent pursuant to clause 111A of *State Environmental Planning Policy (Infrastructure) 2007*. The Court adopted this approach of characterising the separate components of the manufactured home estate based on the principle in *Friends of Pryor Park* that it was only necessary the proposed uses were for a permissible purpose of development irrespective that the uses were also capable of falling within another prohibited purpose of development.

TLEP 2014

- 4.13 The Land is zoned part RU1 Primary Production and RU2 Rural Landscape.
- 4.14 The Land Use Table for both zones identifies the development permitted without consent (Item 2), the development permitted with consent (Item 3) and development that is prohibited (Item 4). Both the RU1 and RU2 zones are closed zones which means that, unless the development is expressly identified as being permissible without or with consent under Items 2 and 3, it is prohibited under Item 4.
- 4.15 The Land Use Table for the RU1 zone relevantly provides (our emphasis added):

2 Permitted without consent

Environmental protection works; **Extensive agriculture**; Home occupations; Intensive plant agriculture

3 Permitted with consent

Agricultural produce industries; Agritourism; Animal boarding or training establishments; Aquaculture; Bed and breakfast accommodation; Boat launching ramps; Boat sheds; Cellar door premises; Dual occupancies (attached); Dwelling houses; Environmental facilities; Extractive industries; Farm buildings; Farm stay accommodation; Flood mitigation works; Forestry; Group homes; Helipads; Home-based child care; Home businesses; Home industries; Industrial retail outlets; Intensive livestock agriculture; Jetties; Open cut mining; Plant nurseries; Roads; Roadside stalls; Rural workers' dwellings; Turf farming; Water recreation structures; Water storage facilities

4 Prohibited

Any development not specified in item 2 or 3

Consideration

- 4.16 It appears from the information we have been provided that the Applicant contends that:
- (a) development consent is not being sought to irrigate the treated water such that the permissibility of the proposed effluent dispersal system is irrelevant to the determination of the DA;
 - (b) even if the proposed effluent dispersal / irrigation system formed part of the DA, it is for the purposes of the existing extensive agriculture operations on the RU1 zoned land.
- 4.17 As identified in paragraph 4.15 above:
- (a) "extensive agriculture" is nominated as being permitted without consent on land in the RU1 zone;
 - (b) Caravan parks are innominately prohibited in the RU1 zone;

- (c) Sewage treatment plants (being a type of sewerage system) are innominately prohibited in the RU1 zone; and
- (d) Water recycling facilities (being a type of sewerage system) are innominately prohibited in the RU1 zone.

4.18 “Extensive agriculture” is defined in Dictionary of the TLEP 2014 as follows:

extensive agriculture means any of the following—

- (a) **the production of crops or fodder (including irrigated pasture and fodder crops) for commercial purposes,**
- (b) the grazing of livestock (other than pigs and poultry) for commercial purposes on living grasses and other plants on the land as their primary source of dietary requirements, and any supplementary or emergency feeding, or temporary agistment or housing for weaning, dipping, tagging or similar husbandry purposes, of the livestock,
- (c) bee keeping,
- (d) a dairy (pasture-based) where the animals generally feed by grazing on living grasses and other plants on the land as their primary source of dietary requirements, and any supplementary or emergency feeding, or temporary agistment or housing for weaning, dipping, tagging or similar husbandry purposes, of the animals.

4.19 The Dictionary of the TLEP 2014 also includes the following definitions for “sewage treatment plants” and “water recycling facility”:

sewage treatment plant means a building or place used for the treatment and disposal of sewage, whether or not the facility supplies recycled water for use as an alternative water supply.

water recycling facility means a building or place used for the treatment of sewage effluent, stormwater or waste water for use as an alternative supply to mains water, groundwater or river water (including, in particular, sewer mining works), whether the facility stands alone or is associated with other development, and includes associated—

- (a) retention structures, and
- (b) treatment works, and
- (c) irrigation schemes.

4.20 In accordance with the reasoning in *Joint Venture* (consistent with decisions of the Court in *Pet Carriers* and *Friends of Pryor Park*), if the effluent dispersal system is characterised as development for the purposes of “extensive agriculture” it would be permitted without consent in the RU1 zone under TLEP 2014. If that were correct, it is irrelevant that that uses might also be capable of falling within another prohibited purpose of development (such as development for the purposes of a caravan park).

4.21 It is apparent from the Effluent Management Plan and the Wastewater Treatment Plant concept drawings that the effluent dispersal system is an essential component of the Wastewater Treatment System as a whole that is necessary for the treatment and disposal of sewage generated by the proposed caravan park.

4.22 While the SEE provides (at Section 3.4.4) that “*the effluent dispersal system proposed integrates with the ongoing extensive agriculture pursuits of the land*”, it also submits (when addressing whether the proposed development is designated development) that the proposed

sewerage system serves the dominant purpose of the caravan park and is ancillary to the caravan park (refer to Section 1.4 of the SEE).⁷

- 4.23 Consistent with the principles in *Chamwell* that “[t]he characterisation of the purpose of the use of land should be done at a level of generality”, it is our view that the purpose of the Wastewater Treatment System (including the effluent dispersal system) is for the management / treatment and disposal of sewage generated by the caravan park (that is, it is required for the purposes of the caravan park and not for the purpose of irrigating any existing or proposed crops or fodder on the RU1 zone). On this basis, the proposed Wastewater Treatment System (including the effluent dispersal system) is properly characterised as development for the purposes of a caravan park.
- 4.24 Even if we adopt the *Joint Venture* approach of characterising the Wastewater Treatment System as an individual and separate component of the caravan park, it would be properly characterised as a sewage treatment plant (or a water recycling facility on the basis that the effluent is being used as an alternative supply to mains water to irrigate the RU1 zoned land).
- 4.25 It follows that the proposed effluent dispersal system is prohibited on the RU1 zoned land under the TLEP 2014.

5. Does clause 7.10 of the TLEP 2014 prevent consent from being granted to the proposed development?

Description of the proposed development

- 5.1 The DA proposes that the proposed development will connect to Council's reticulated water supply. The SEE relevantly provides:

3.4.2 Water

Connection to Council's reticulated water supply network is proposed from a DN150 water main provided alongside Tom Merchant Drive, alongside the subject site. The water demand of the Proposal has been calculated, generating a demand for 224.6ET. The referred calculations can be found within the Water Assessment provided.

Connection to the existing reticulated water supply is proposed to leverage capacity from network reservoir at Koala Beach. Should Council's modelling indicate that additional capacity is required, additional storage at the Koala Beach reservoir site can be investigated with Council. All water infrastructure within the subject site is proposed to be privately owned and maintained. Reticulated water supply is to be provided to each site and building within the Proposal.

- 5.2 The DA has been referred to Council's Water and Wastewater Unit who have recommended refusal for the following reasons:

The subject site is located outside of the TSC Development Servicing Plans for Water Supply (DSP areas). Therefore, no water supply demand from this site has been allowed for in TSC's Pottsville water networks or network planning.

The application proposes a connection to Council's water network.

The relevant water network has no capacity for additional development outside of the TSC Pottsville water supply DSP area. If this development were to proceed with a connection to

⁷ We have not considered, for the purposes of this advice, whether the proposed Wastewater Treatment System is designated development (or would be considered ancillary development pursuant to clause 49 of Schedule 3 of the *Environmental Planning and Assessment Regulation 2021*).

Council water supply scheme, it will compromise TSC's servicing standards for existing and future zoned development within the current DSP area.

The TSC Water and Wastewater Business and Assets Unit therefore recommend that the application be refused due to the above reasoning – unable to connect to Council's water supply system.

Clause 7.10 TLEP 2014

5.3 Clause 7.10 of the TLEP provides:

7.10 Essential services

Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required—

- (a) the supply of water,
- (b) the supply of electricity,
- (c) the disposal and management of sewage,
- (d) stormwater drainage or on-site conservation,
- (e) suitable vehicular access.

5.4 The Land and Environment Court has considered similar provisions in other environmental planning instruments. The following relevant principles have been established by those cases:

- (a) The clause requires the consent authority (that is, the Council) to satisfy itself of the adequacy of the provision of services prior to granting development consent. That is, the requisite satisfaction is a precondition to the grant of consent and cannot be the subject of a deferred commencement condition.⁸
- (b) It is not sufficient for the necessary satisfaction to be based on an assumption that in a private development, the owners will arrange for the provision of the relevant services within a reasonable time and at a proper level.⁹
- (c) The arrangements must be made with the relevant authority or body. For example, arrangements for the provision of electricity must be made with the electricity supplier.¹⁰ The Court does not have the power under section 39(2) of the *Land and Environment Court Act 1979* to make arrangements on behalf of the Council (i.e. the Court cannot stand in the shoes of the Council – as the water supply authority – to agree to make the adequate arrangements).¹¹

⁸ *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429 (**Hornsby v Malcolm**); applied in *Alan Logan & Associates Architects v Byron Shire Council* (1997) 98 LGERA 7; *Shree Swaminarayan Temple v Baulkham Hills Shire Council* [2011] NSWLEC 1218 (**Shree Temple**). See also the decision in *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC41 (**Ballina v Palm Lake Works**), which considered a similar provision in then *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004*, requiring the consent authority to be satisfied that housing "will be" connected to reticulated water and have adequate facilities for sewage disposal. The Chief Judge in that case held that the Commissioner had failed to form the requisite opinion as a precondition to the grant of a development consent and that the state of satisfaction could not be formed by the imposition of a deferred commencement condition.

⁹ *Hornsby v Malcolm*

¹⁰ *Shree Temple*

¹¹ *Codlea Pty Ltd v Byron Shire Council* [1999] NSWCA 399.

- (d) Adequate (where not defined in the LEP) takes its everyday meaning, which means that minds might differ as to whether the arrangements, if expressed in broad terms rather than in every detail, are adequate.¹²
- (e) 'Arrangements' indicates something less formal than a contract, but it implies that there have been discussions between the relevant parties resulting in a consensual decision.¹³

5.5 In *Awesome Corowa Pty Ltd v Federation Council* [2021] NSWLEC 1633 (**Awesome Corowa**) the Court held that it could not form the requisite level of satisfaction under clause 7.9 of the *Corowa Local Environmental Plan 2012* (standing in the place of the Council consent authority) that adequate arrangements for the provision of water, sewer and roads had been made, and so it could not grant consent to the development application. The applicant offered to enter into a VPA with Council that delivered works in kind, including construction of water and sewer reticulation infrastructure in a staged manner but there were concerns about, amongst other things, that the Council's water main infrastructure within the vicinity of the development would not be capable of supplying the required flows to the land. Acting Commissioner Morris held at [180] that he was not satisfied that adequate arrangements had been made to make the essential services available or to make them available when required:

I cannot be satisfied that the site can be serviced by water and that it will be possible to dispose and manage sewage. Whilst there are both water and sewage services within the township of Corowa, those services are not of the necessary capacity that would make them available when required for the various stages of the subdivision.

- 5.6 Based on the decision in *Awesome Corowa* and the other authorities referred to in paragraph 5.4, it is reasonable for a consent authority to consider the following when determining whether adequate arrangements have been made for the provision of essential services:
- (a) the level of certainty about what service upgrades are needed;
 - (b) how and when the services will be provided;
 - (c) the likely environmental impacts that will be caused;
 - (d) what assessment and approval framework applies; and
 - (e) whether the relevant regulatory authority has considered or approved the proposal.
- 5.7 The information provided to Council accompanying the DA (including the development contract) must also be sufficient to allow Council to perform its evaluative function under section 4.15 of the EPA Act. This includes assessing the likely environmental, social and economic impacts of the development (including the impacts of the proposed servicing strategy and any offsite impacts)¹⁴ and the suitability of the site for the development. As noted in *Awesome Corowa*, it is not appropriate to leave the environmental assessment of those works to a later time, particularly when the works are a fundamental component of the development.

¹² *Visionary Investment Group Pty Ltd v Wollongong City Council* [2019] NSWLEC 1234 (**Visionary Investment**) at [230]

¹³ *Visionary Investment* at [230] citing *Codlea Pty Ltd v Byron Shire Council* [1999] NSWCA 399

¹⁴ *Ballina v Palm Lake Works*

Conclusion

5.8 Based on the information we have been provided, the Applicant has not provided sufficient information to satisfy the Panel (as the relevant consent authority) that the supply of water is available or that adequate arrangements will be made to make the supply of water available to the proposed development when required. It follows that the Panel must refuse the DA.

6. Next steps

6.1 A copy of this advice can be provided to the Panel.

Yours faithfully



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