

Peer Review of Planning Propoal

Lot 22 DP 1073165
Stuart Street Mullumbimbi



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This report has been prepared for

NSW Department of Planning, Industry &
Environment

by

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1 Executive Summary

1.1 Overview

Judith Stubbs and Associates (JSA) has been engaged by the NSW Department of Planning, Industry and Environment to undertake a peer review of a Planning Proposal by Byron Shire Council to rezone part of Lot 22 DP 1073165 Stuart Street, Mullumbimby from RE1 Public Recreation to R1 General Residential, and to change the classification of this part of the lot from Community Land to Operational Land. It is also proposal that provisions to encourage diverse housing on this site be inserted into the LEP.

This peer review has been conducted in the context of relevant legislation, strategic plans and policies, and good practice in the planning, development and management of affordable housing. It has been carried out in accordance with the project scope, and further clarification of this scope at the project inception meeting.

1.2 Support for the Planning Proposal

The Planning Proposal on Lot 22 is aligned with strategic directions and priorities of relevant documents including the *North Coast Regional Plan* and *Residential Strategy* with regard to the potential to deliver residential lot and housing diversity within reasonable proximity of the Mullumbimby town centre to meet the needs of an aging population, on land that is not constrained with regard to its agricultural or environmental conservation status, and within an area identified for future urban growth. As discussed below, it has strategic planning merit in this regard.

Further, it has the potential to deliver a substantial component of affordable housing, including for groups identified as being in highest and most urgent need of affordable housing in the LGA in the Residential Strategy and *draft Affordable Housing Contributions Plan*, and as the priority group in the NCRP - very low and low income renters. The fact that the land has been assessed as being feasible with regard to an affordable housing contribution, and at a rate prescribed by Council's *Affordable Housing Contribution Policy* and related *Procedure* of 30%, further supports the proposed rezoning and reclassification of the land, provided it is guaranteed to deliver genuinely affordable housing to priority target groups in an appropriate dwelling typology and tenure mix.

It is also positive that the *Open Space and Recreation Needs Assessment* indicates that the subject land is surplus to open space need in the locality; and that the proposed reimbursement of the (former) section 94 fund from the sale of or value uplift from the land would meet the strategic priority for embellishments, upgrades or repurposing or existing open space and facilities to meet current and future needs. It is also positive that around 11.25 ha of Lot 22 will be retained as RE1 land as well as a strip of 7(B) zoned land along Saltwater Creek; and that the Community Gardens are to be retained, although the expiry of the license agreement with SEED community group indicates that a new, long-term licence may need to be entered into to ensure the continuation of this important activity.

Finally, given the classification of the subject land as Community Land, the funding source and purpose of its original acquisition, and its proposed reclassification to Operational Land, a question arises as to the public benefit that will be provided through its rezoning and reclassification. Council states that there will be significant public benefit from ‘increasing the opportunity for diverse and affordable residential development in response to documented demand, inadequate long-term land supplies and the objectives of the *Byron Residential Strategy*’.¹ Council also notes, in support of this, that the land is serviced, well-located and suited to residential development including a component of affordable housing as a rationale for the Planning Proposal.²

As noted, there is likely to be a public benefit from the use of reimbursed section 94 funds for priority works such as embellishment and upgrades to existing open space. There is the potential for significant public benefit related to the viability of providing a 30% contribution to affordable housing notwithstanding this reimbursement. The realisation and extent of this public benefit will depend upon the extent to which genuinely affordable housing for priority target groups is achieved on the rezoned land in perpetuity.

1.3 Issues to be Clarified and/or Resolved

1.3.1 Overview

The rezoning part of Lot 22 to R1 provides a vital and quite unique opportunity to provide for genuinely affordable housing the context of severe and urgent housing need, particularly for very low and low income renters, who include a high proportion of working households as well as those on Centrelink pension and benefits.

As noted in various documents, Byron Shire is one of the areas most seriously affected by affordable housing need in NSW, and is one of relatively few regional areas in NSW that can feasibly levy an affordable housing contribution under SEPP 70. Additional research conducted in the process of undertaking this review indicates that at least 2,500 very low, low and moderate income households in the LGA are likely to need affordable housing by 2036. Importantly, almost 80% of projected affordable housing need will be amongst very low, low and moderate income **renters**, with three-quarters of this need for **very low and low income renting households**. Given projections that virtually all net growth will be amongst lone person and couple only households, **at least 70% of additional affordable dwellings are likely to be required as smaller households** as studio and 1 bedroom, and possibly 2 bedroom multi dwelling housing and apartments located near town centres.

The affordability analysis reported in the *draft Affordable Housing Contributions Plan*, and augmented for this review, shows that there is no product provided through the market that will provide affordability to any of the affordable housing target groups in the Byron housing market

¹ Planning Proposal for Lot 22 DP 1073165, Mullumbimby, p 49.

² Planning Proposal for Lot 22 DP 1073165, Mullumbimby, p 15.

context. Simply put, a strategy that relies on increasing housing diversity will do nothing to address housing affordability (according to the statutory definition) in this context.

Finally, appropriate detail and certainty regarding the provision of affordable housing in perpetuity on Lot 22 is important given it is the main rationale for the fast-tracking of this rezoning cited by Council in its Planning Proposal, specifically, that ‘the urgent need for diverse and affordable housing is the basis for the subject land preceding the Department’s final endorsement of the shire-wide *Residential Strategy*’.³

It is also important that it is an appropriate location for the provision of appropriate diverse housing, including for smaller one and two bedroom apartments, units and villas to meet the needs of an aging population and decreasing household size. However, as discussed below, there need to be more certainty with regard to the size and dwelling typology for both market delivered and affordable housing in Lot 22 in the context of priority strategic directions and the implications of Council research on housing feasibility.

Although a range of related issues are identified throughout this review, its main focus is on the extent to which the current Planning Proposal and related mechanisms (including a land trust model) provide certainty with regard to delivery of affordable housing in perpetuity that is appropriate to identified need, particularly for very and low income renting households. A secondary and related issue relates to the extent to which the Planning Proposal provides for appropriate housing diversity to meet projected need.

1.3.2 Key Considerations

The following provides a brief summary of the main findings of the review against the key considerations set out by DPIE in its *Statement of Requirements*. The reader is referred to relevant sections for a detailed discussion against each of these considerations.

Relationship between relevant documents and the Land Trust

- Consider the relationships between the Planning Proposal, *draft Affordable Housing Contribution Scheme*, *Residential Strategy* and proposed Land Trust.

Simply stated, there is limited relationship between the Residential Land Strategy and the Planning Proposal, and essentially no relationship between the draft *Affordable Housing Contribution Scheme* and the Planning Proposal, as the Scheme is not referenced or reflected in the Planning Proposal. None of these documents makes mention of a Land Trust (including the Planning Proposal), nor any alternative mechanism to SEPP 70 as a value capture mechanism.

Section 4.2 below provides a detailed review of relevant strategic documents and policies with regard to their relevance to affordable housing in particular and the Planning Proposal in particular, and as a context to discussion on their value as an evidence base below. Notwithstanding a number of definitional issues and gaps in the evidence base, discussed later, there is **reasonable alignment** in the overarching strategic directions of these documents in a broad sense.

³ Planning Proposal for Lot 22 DP 1073165, Mullumbimby, p 20.

In terms of the **alignment of the Planning Proposal** with key strategic directions and policies, it is positive that the Planning Proposal is aligned with these strategic documents in a number of important ways. This includes that it is well-located, has the potential to provide for lot and housing diversity, is assessed as suitable for rezoning against a number of criteria in the Residential Strategy, and has the capacity to deliver an affordable housing contribution.

However, a number of significant gaps and deficiencies are also identified that need to be addressed in further drafts to achieve strategic alignment with these documents. This includes the lack of reference to any data or studies to inform the provision of affordable housing; lack of reference to a relevant rate of contribution (e.g. 30% on Council policy); an apparent reliance upon diversity to achieve affordability, which is unlikely in the local housing market context; no definitions or benchmarks of what is meant by 'affordable housing'; an apparent focus on 'low to middle (sic) income residents' rather than the priority groups of very low and low income renters; and no guarantee that *any* affordable housing will be created on the site, let alone in perpetuity. Reference to an MHE at various points, including the possible use of SEPP 36 as a framework, are also potentially problematic with regard to compliance with the SEPP on a number of provisions, and with regard to Council policy and best practice in the provision of affordable housing for more vulnerable groups.

Greater strategic alignment and clarity is required in the Planning Proposal, or any supporting documentation, notwithstanding that it is for gateway approval, given the importance of this issue.

Strategic evidence base to support delivery of housing on Lot 22

- Identify whether the Affordable Housing Contribution Scheme and *Residential Strategy* are required as a strategic evidence base to inform and support the delivery of housing on Lot 22.

This consideration begs the question regarding whether the evidence base itself provided by these documents is adequate to support the delivery of affordable housing to meet identified need, and to provide an appropriate framework to support this (and any other) Planning Proposal.

Essentially, **Section 4.3** below finds that all documents reviewed lack the robust evidence base required to support the delivery of affordable housing to meet the needs of priority target groups in the LGA. Although the *draft Affordable Housing Contribution Scheme* provides perhaps the most robust evidence base, it also lacks detail in some important areas.

It is positive that the Residential Strategy notes the priority for affordable rental housing for the LGA, and provides strong qualitative evidence with regard to key target groups and other relevant matters. However, it has some serious deficiencies that need to be rectified if it is to provide a robust evidence base for affordable housing. These deficiencies and recommended actions are discussed in detail in Section 4.3.2, and include issues related to the use of non-statutory benchmarks and definitions; inaccuracies in data and analysis; lack of detailed evidence on current and projected need; and other matters that affect the strategic directions proposed.

As such, additional data and analysis is provided at **Section 4.3.4** below to provide some examples of how the identified gaps in the evidence base of all documents could be augmented.

Timing of the Planning Proposal

- Determine whether the Affordable Housing Contribution Scheme and Residential Strategy should be finalised prior to submission of a new planning proposal for a Gateway determination.

Issues related to the timing of the Planning Proposal raise three main considerations. These are related to the quality of the evidence available in Council policy and strategy; the Planning Proposal's alignment with Council policy and strategy; and the risk associated with approval of the Planning Proposal outside of established statutory mechanisms in achieving local and regional strategic directions in the context of relevant considerations.⁴

In summary, our review finds that:

- In relation to the **quality of available evidence**, our review indicates that all documents require an improved evidence base to support this (and any other) Planning Proposal. These deficiencies are identified in detail in the body of this report, and additional evidence is provided as an example of such evidence that may be useful. Given deficiencies in the evidence base identified, it is even more important that the Planning Proposal itself includes a clear rationale for its approach to the creation of affordable housing, and a detailed statement of the nature and quantum of affordable housing that will be created. This Planning Proposal does not adequately reference available evidence, nor provide its own evidence as a basis for the provision of affordable housing on Lot 22. It essentially provides no detail or clarity about what is actually being proposed with regard to affordable housing.
- Secondly, the Planning Proposal is **not aligned with relevant Council policy**, including the *Affordable Housing Contributions Policy* and related *Procedure*, including that there be a concurrent application of a SEPP 70 AHCS clause over land subject to an upzoning. Further, it does not reference or seek to give effect to existing policy with regard to a 30% contribution on Council land. To the extent to which it may rely upon an MHE or 'tiny home development' as alluded to in the Planning Proposal and detailed in the UrbanXChange (2020) Analysis, it is likely to be counter to Council's AHCSPP, as well as Affordable Housing Principles, Criteria and Criteria for Location Fit and Mix. More detail is required in the Planning Proposal or supporting document for this to be adequately assessed, however.
- Thirdly, as discussed in relation to issues related to the Land Trust model below, it appears that there is **too great a risk that genuinely affordable housing per the statutory definition will not be delivered on the site**, and no assurance that it will be delivered in perpetuity. There is no alternative value capture mechanism to a SEPP 70 contribution (or a section 7.4 Planning Agreement) proposed, no detail on the quantum or nature of affordable housing to be provided on site, and no mention of the Land Trust model as a holding entity to secure any affordable housing in perpetuity. It is also of concern that the intended amendment to the Byron LEP is reported to be that 'provisions to encourage diverse

⁴ DPIE, Planning Proposals: A Guide to Preparing Planning Proposals.

housing [rather than affordable housing] on this site be inserted into the LEP';⁵ and that an objective of the new RE1 zone is to provide affordable housing to 'low and moderate income households', rather than the statutory target groups (including 'very low income households').

As noted elsewhere, the Planning Proposal has strategic planning merit with regard to the justification to rezone excess open space for recreational purpose in accordance with relevant assessments;⁶ and the proposed rezoning to residential land is consistent with strategic directions in the *North Coast Residential Plan 2036*, with the subject land identified in the NCRP as an existing urban growth area; and with increasing density around town centres with regard to the proposed R1 zoning, including diversity of lots and indicative dwelling typologies.

However, the Planning Proposal lacks strategic planning merit with regard to two important areas identified in the NCRP, *Byron Residential Strategy* and relevant Council policy. The first is the critical importance of affordable housing for very low, low and moderate income households (which needs to be provided in accordance with the statutory definition). The *Byron Residential Strategy* also reflects Council policy with regard to referencing an affordable housing contribution of 30% of lots or developable area on Council land and that one of the strengths of rezoning Area 7 (the subject lot) is that it has been assessed as being feasible for an affordable housing contribution.

The second relates to the provision of *appropriate* density, with both the NCRP and *Residential Strategy* highlighting the strategic importance of studio, one and two bedroom dwellings in both market-delivered and affordable housing to meet the needs of an aging population and decreasing household size at various points. The NCRP notes the priority for Byron Shire for 'increased housing diversity in the form of additional multi-unit dwellings' including apartments; whilst the *Residential Strategy's* vision includes that town houses, units and apartments will be located in locations with convenient access to shops, services, transport and open space'. The *draft Affordable Housing Contributions Scheme* also notes the strategic priority for 'smaller (studio, 1 and 2 bedroom) dwellings such as residential flat buildings or multi dwelling housing', as noted in the body of this report.

However, the Planning Proposal provides no certainty with regard to appropriate dwelling size and dwelling mix/typology. As noted, Table 5 and Figure 5 of the *Residential Strategy* provides guidance with regard to preferred lot mix and dwelling typologies, but it would be preferable if there were a commitment or at least an indication of priority for one and two bedroom apartments and units in both market and affordable housing to be delivered on the lot.

This concern is increased in light of the only study provided by Council in support of the market and affordable housing found to be feasible on Lot 22, the *Affordable and Social Housing Development Analysis*. As noted in the body of this report, most of the market housing is likely to be provided as large 3 and 4+ bedroom dwellings, that are not generally affordable to any of the target groups. The proposal of tiny homes as social housing has a range of issues

⁵ Planning Proposal, Lot 22, p 4, *Objective and Intended Outcome*

⁶ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*

with regard to lack of certainty about providing affordable housing in perpetuity, the potential ghettoization of disadvantaged people, and that it appears to take up 12.5% of developable area rather than 30%.

In light of these issues related to strategic planning merit, it is likely that the issuing of a favourable Gateway determination for the current Planning Proposal would require significant revision of the Planning Proposal to include mechanisms to deliver affordable housing and appropriate diversity, noting that these need to be embedded in the LEP amendment to be achieved, and cannot rely on the determination of the detail of future development consents to achieve strategic goals.

This approach exposes Council to the risk of committing time and resources to developing a proposal that may still have weaknesses in these areas and so not guarantee achieving the strategic goals of diversity and affordability, and this is a basis for refusing the Planning Proposal.

On balance, it is more prudent to not issue the Gateway determination until Council articulates the proposed mechanisms for achieving the strategic goals of affordability and appropriate diversity.

Relationship to Local Government Legislation

- Identify what local government legislation the Affordable Housing Contribution Scheme must address (including proposed Land Trust), under the Local Government Act 1993 and analyse impacts and appropriateness to the Residential Strategy, Affordable Housing Scheme and Planning Proposal.

In terms of the first part of the question, it is not apparent that any specific local government legislation must be addressed by the *Affordable Housing Contribution Scheme*, including any provisions of the *Local Government Act 1993*. The relevant legislation for the development of an Affordable Housing Contribution Scheme is found in section 7.32 and 7.33 of the *Environmental Planning and Assessment Act 1979 (NSW)*.

With regard to the development of the proposed land trust, the provisions of section 358 of the *Local Government Act 1993* require Council to obtain the consent of the Minister with respect to the formation or participation in the formation of a corporation or other entity. There are no constraints on the corporation or other entity, other than a need to demonstrate, to the satisfaction of the Minister, that the formation is in the public interest. A 'trust' is listed as one under section 358(4) as an 'entity' that requires such consent.

Such consent would have little or no impact on the *Residential Strategy*, Affordable Housing Scheme and Planning Proposal, unless the Minister considered that the finalisation of such documents was necessary to demonstrate the public interest of the proposed land trust.

Essentially, this does not appear to have any relevance to Council's proposal to seek approval for the Planning Proposal in advance of the approval of the *Residential Strategy* or *Affordable Housing Contribution Scheme*.

Dependability of the Land Trust as a Delivery Mechanism

- Examine the process to create a Land Trust and determine whether it is a dependable mechanism to deliver affordable housing on Lot 22 if an *Affordable Housing Contribution Scheme* and *Residential Strategy* have not been finalised.

At this stage, there is too little detail and sometimes conflicting information with regard to the purpose, governance and operation of the land trust to find that it is a dependable mechanism to deliver affordable housing on Lot 22 in perpetuity.

Further, whilst it is proposed as a 'holding entity' in relevant Council documentation, it is not clear that it can act as a value capture mechanism with the same legal force as a SEPP 70 AHCS or a Planning Agreement negotiated under section 7.4 of the Act, nor that the land placed with this entity will be used for affordable housing in perpetuity, or be sold in the future and the funds used for a purpose other than affordable housing. It may be possible to set up a trust in such a way, but more detail and legal certainty is needed in this regard.

Further, it is not clear that this mechanism has been used in NSW or in other jurisdictions to do the work of established statutory mechanisms, nor to operate in the way that appears to be proposed by Council (to own land and lease it to private individuals or not for profit providers), and the examples cited by Council such as City of Port Phillip operate quite differently to what appears to be proposed by Council, as discussed below.

This is of greater concern given the Planning Proposal lacks any detail on the quantum and nature of affordable housing to be provided on Lot 22; appears to be prioritising low and moderate income households rather than very low and low income renters; relies largely upon housing diversity to provide affordability; and references a housing form (MHEs) to provide the affordable housing on site, which is unlikely to be provided in accordance with its own policy from information available. Again more detail should be provided within the Planning Proposal, and for its effect to be properly assessed.

Section 6 below sets out these concerns in detail. It notes that it is *possible* that it could provide for some certainty with regard to holding Council land or other affordable housing assets from Lot 22 in perpetuity, in particular, through a detailed deed of trust entered into as a condition precedent to the Planning Proposal. Arising from this review, our recommendations are:

1. Council to clarify their proposed model.
2. Council seek expert legal advice to confirm or otherwise the understanding of trusts set out in Section 6 below.
3. If a deed of trust with a trustee is proposed, that deed of trust should be entered into prior to approval of the planning proposal. It may be possible to incorporate the planning proposal as a condition precedent in the deed of trust.
4. The deed of trust should have limited opportunity for amendment.
5. The deed of trust should set out the land in question, for example, the identification of lots for affordable housing, and matters relevant to the provision of affordable housing on the site.
6. The deed of trust should be explicit with regard to the purpose the land is to be used for.

Relevant Local Government Case Studies

- Investigate and consider any relevant NSW local government case studies with affordable housing governance models that support and facilitate the delivery of affordable housing on council owned land.

As noted, we are not aware of any NSW Councils that have used a land trust in the manner in which it is described in Council documentation; and examples such as Port Phillip do not operate in the way Council has expressed.

Council's research paper refers to the City of Port Phillip, Inner City Councils and Hobsons Bay in Melbourne, who are in fact using registered housing providers as trustees to manage property owned by Council for the purpose of affordable housing.⁷ This appears to be somewhat different to the model proposed by Council, where it is proposed that the trustee would 'lease land to an individual household or a community housing provider'.⁸ We are not aware of a model similar to that proposed by Council. What is described internationally as a Community Land Trust appears to be more similar to a cooperative housing association in the Australian context, where land owned by the organisation is leased to members of the organisation.

Models with which we are familiar, and which are generally employed by Council (including using its own land in affordable rental housing partnerships, are included in **Attached A: Affordable Housing Case Studies**.

Two broad models relevant to the current proposal are set out in more detail in **Section 7** below. The first is where Council has gained land through a **value capture mechanism**; the second, where Council **dedicates or sells its own land** (generally at a discounted market value or equity share arrangement) to a community housing provider. To the extent to which Council is the recipient of a 'windfall profit' through the rezoning of its own land (and thus subject to an affordable housing contribution) or simply selling and/or developing its own land (and thus acting as a developer expecting a rate of return), each may be seen as relevant.

Proposed Actions or Alternative Options

- Develop advice on proposed actions or alternative options to ensure that an affordable housing component is delivered on Lot 22.

There are a number of options to ensure an affordable housing component is delivered on the Lot 22. These options include:

1. To enter into an appropriate Deed of Trust over the part of Lot 22 proposed for rezoning, taking into account recommendations set out above in relation to identification of lots for affordable housing at an appropriate rate of contribution, with an appropriate dwelling and tenure mix for very low and low income renters. The Deed of Trust would be a condition precedent on the approval of the Planning Proposal.

⁷ Urban Xchange Echelon Planning (November 2019) Alternative Housing Models - Research Paper for Byron Shire Council, page 76.

⁸ Council letter dated 16 April 2021

2. Finalise and implement an Affordable Housing Contribution Scheme which covers Lot 22, at an appropriate rate of contribution according to reassessment of feasibility, and with a strengthened evidence base regarding dwellings typology and priority target groups, and in accordance with Council's AHCPP.
3. Enter into a Planning Agreement under section 7.4 of the Act over the whole of Lot 22 to provide for the dedication of land or dwellings created on the land to be used free of cost for a public purpose (affordable housing) at an appropriate contributions rate, and in accordance with Council's AHCPP.
4. Sell Lot 22 on the private market subject to a competitive (EOI) process, with EOI requirements including dedication of an agreed quantum and type of dwellings, salt and peppering of these dwellings throughout the site, and indistinguishable from other dwellings on the site with regard to external finishing, and secured through a Planning Agreement, and/or supported by a site specific DCP. This may also require Council to do more robust whole of site feasibility analysis to have a preliminary understanding of what contribution would be appropriate, although this could be left to the market/ EOI process.
5. Building on Point 3 and 4 above, consideration could also be given to a market approach to delivery of dwellings through rezoning to R1 without the highly prescriptive lot mix in the Residential Strategy on Lot 22. Preliminary analysis by JSA indicates, as well as discussion in relation to Council's analysis at various points below, indicates that the proposed lot mix may not be the best way of providing dwelling diversity and affordability.

It is beyond the scope of this review to conduct whole of site modelling that would be required to examine this issue properly, including to account for the new flood study and cross-subsidisation between dwelling mixes and tenures, etc. However, a very preliminary analysis indicates that affordable housing dwelling yield may be higher and/or provided more in accordance with good practice through taking such a market approach in tandem with a site specific DCP, Planning Agreement, or other set of requirements. This is detailed in **Section 8** below as a very preliminary worked example.

2 Scope of Works

2.1 Background

Judith Stubbs and Associates (JSA) has been engaged by the NSW Department of Planning, Industry and Environment to undertake a peer review of a Planning Proposal by Byron Shire Council to rezone part of Lot 22 DP 1073165 Stuart Street, Mullumbimby from RE1 Public Recreation to R1 General Residential, and to change the classification of this part of the lot from Community Land to Operational Land. It is also proposal that provisions to encourage diverse housing on this site be inserted into the LEP.

In summary, the Planning Proposal seeks to rezone on 17.5 ha of the 29.2 ha lot from RE1 Public Recreation to R1 General Residential, with the stated purpose of ‘increasing the opportunity for diverse and affordable residential development in response to documented demand, inadequate long-term land supplies and the objectives of the *Byron Residential Strategy*’.⁹ The Planning Proposal will leave the Mullumbimby Community Gardens and adjoining environmental areas (a remnant wetland) (7.75 ha), and a piece of land on the eastern side of a railway line in an RE1 zone (3.5 ha) as RE1 zoned land. A strip of land adjacent to Saltwater Creek (0.45 ha) zoned 7(B) Coastal Habitat will remain as a Deferred Matter and is subject to Byron LEP 1988.

It is also intended that the part of the lot to be rezoned will be reclassified from Community land to Operational land in this Planning Proposal. Council notes that the reclassification of the land from Community to Operational land will allow it to be ‘leased and/or sold as part of its future development as an affordable residential area’, and that being able to lease or sell the land will also increase its value.¹⁰ The expected uplift from the rezoning of the land is also expected to raise sufficient funds to refund the s94 program under which the land was originally purchased for an extension to Mullumbimby Recreation Park (which did not occur) to provide instead for embellishments to other recreational and sporting areas.¹¹

It is proposed by Council that a Gateway determination for the Planning Proposal be issued in advance of the approval of its SEPP 70 *Affordable Housing Contributions Scheme* (AHCS), currently in draft form, and that the land be removed from the forthcoming scheme, which would otherwise provide a legal mechanism for a contribution for the purpose of the affordable housing at a specified rate in perpetuity. At this stage, Council has decided to adopt a land trust model for the dedication of land and/or dwellings for the purpose of affordable housing rather than the mechanism provided by SEPP 70, and/or other potential mechanisms to ensure that land/dwellings are used in perpetuity for this purpose, such as placing a covenant against the title

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¹⁰ Planning Proposal for Lot 22 DP 1073165, Mullumbimby, Appendix 4, p 1-2.

¹¹ Planning Proposal for Lot 22 DP 1073165, Mullumbimby, Appendix 4.

of the land, gifting the land to a community housing provider under an appropriate legal agreement, etc.

It is also noted that other key documents that inform the Planning Proposal as well as dwelling typologies under the *draft Affordable Housing Contributions Scheme*, including the *Byron Residential Strategy*, are also in the process of finalisation.

2.2 Scope of Works

The scope of works set out in DPIE's *Statement of Requirements* received 5 May 2021 is as follows:

- Review the Planning Proposal, draft Affordable Housing Contribution Scheme, *Residential Strategy*, North Coast Regional Plan 2036, State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes), other associated documents, and correspondence between Council and the Department;
- Consider the relationships between the Planning Proposal, *draft Affordable Housing Contribution Scheme*, *Residential Strategy* and proposed Land Trust;
- Identify whether the Affordable Housing Contribution Scheme and *Residential Strategy* are required as a strategic evidence base to inform and support the delivery of housing on Lot 22;
- Determine whether the *Affordable Housing Contribution Scheme* and *Residential Strategy* should be finalised prior to submission of a new planning proposal for a Gateway determination;
- Identify what local government legislation the *Affordable Housing Contribution Scheme* must address (including proposed Land Trust), under the Local Government Act 1993 and analyse impacts and appropriateness to the *Residential Strategy*, Affordable Housing Scheme and Planning Proposal;
- Examine the process to create a Land Trust and determine whether it is a dependable mechanism to deliver affordable housing on Lot 22 if an Affordable Housing Contribution Scheme and *Residential Strategy* have not been finalised;
- Investigate and consider any relevant NSW local government case studies with affordable housing governance models that support and facilitate the delivery of affordable housing on council owned land; and
- Develop advice on proposed actions or alternative options to ensure that an affordable housing component is delivered on Lot 22.

Further clarification was provided with regard to related aspects of the peer review at the Inception Meeting of 28 May 2021. Matters raised by DPIE are in line with issues arising from the above scope of works, and include the following:

- Whether the proposed land trust model provides sufficient certainty to ensure that 30% of land/dwellings are provided as affordable rental housing in perpetuity in the absence of an approved AHCS, including:

- Details of the governance arrangements and other operational issues;
 - Whether the model provides certainty with regard to securing the affordable housing contribution in perpetuity, and whether such a model has been used successfully elsewhere;
 - Whether other models would be more suitable to minimise the risk that the contribution may not be retained in perpetuity, for example, through the sale of the land and/or dwellings created by an incoming Council in the future;
 - The relationship of other relevant Council policies and plans, e.g. the Affordable Housing Contributions Policy, and the Affordable Housing Contributions Policy and Procedure.
- The extent to which the proposed lot mix/dwelling typology is in line with current and projected need for affordable rental housing in the Shire with regard to size, type, diversity and income group/rental cost;
 - The suitability of the site for residential development that includes a component of affordable housing, and including the viability and relevant rate of affordable housing contribution in line with relevant strategic documents;
 - Whether there is sufficient justification for the reclassification of the subject land from Community to Operational land in terms of need for and provision of open space and benefits of the proposal.

This report responds to the scope of works, and further clarification of issues arising from the inception meeting within areas of JSA's expertise.

3 Overview of Planning Proposal

3.1 Background to the Proposal

Participants at a well-attended Housing Summit convened by Council in February 2017 supported a proposal to identify and rezone land that can be used to achieve affordable and diverse housing ahead of the Residential Land Strategy.

Subsequently, Council resolved (among other things) to progress discussions and feasibility analysis for the development of affordable housing on selected sites; request EOIs from landowners on sites with a potential for affordable housing development for the consideration of Council as part of an early implementation program to supplement Council's Residential Lands Strategy; and identified Lot 22 DP 1073165 as Council land that should be considered for affordable housing purposes through a planning proposal and subsequent development.¹²

In preparing the Planning Proposal, Council has been informed by a number of assessment reports on the site, including the draft *Byron Shire Recreation Needs Assessment* that reviewed the need for this land to be used as a recreation area.

3.2 Summary of Planning Proposal

The Planning Proposal relates to 17.5 ha of a 29.2 ha lot located at Stuart Street, Mullumbimby, which is approximately 29.2 ha in total area, irregular in shape and severed by a railway line). Portions of the lot not included are the site of Mullumbimby Community Garden, an area east of the Railway line, a Deferred Matter along Saltwater Creek zoned 7(B) Coastal Habitat, and unmade road connections to Mullumbimby.

It is understood that Lot 22 is one of four sites collectively known as the Saltwater Creek Precinct, with these sites are identified in the *Residential Strategy* as investigation areas for future residential development, which have been subject to an early implementation initiative that aims to incorporate affordable housing outcomes as a component of any future development. Under Byron LEP 2014, the subject land has a building height limit of 9 metres, but is not subject to any Floor Space Ratio or Minimum Lot Size.

Council reports that the land has been subject to a flooding assessment, two ecological assessments, two contaminated land reports, an ASS analysis, a geotechnical report, a Land Use Conflict Risk Assessment (LUCRA), and an Aboriginal cultural heritage assessment, and that all of these reports support the application of a residential zone over part of the area through a planning proposal. In relation to flooding, Council states that, in conjunction with drainage works, the areas affected by flooding can be filled without significant impacts on surrounding land.

¹² Council meeting, 22 June 2017.

Council also notes that the *Byron Shire Open Space and Recreation Needs Assessment* has indicated that the subject land is not required for future recreation or sporting use.

In support of the benefits of the proposed rezoning for residential (including affordable housing) purposes, Council notes that it is 'an area that can be serviced with urban infrastructure, has good road and pedestrian access options and will allow affordable, innovative and diverse housing to take place that contributes to the local economy without causing concern regarding social services'.

In a strategic sense, it also notes that the proposed zoning changes are consistent with the North Coast Regional Plan (NCRP), with the land identified in the Plan as an existing urban growth area, and is consistent with relevant State Environmental Planning Policies.

However, the Planning Proposal provides relatively little detail regarding the quantum and nature of affordable housing that will be created on the site, the nature of and mechanism for ensuring the dedication of land or dwellings for affordable housing in perpetuity, nor the target groups that will principally benefit any affordable housing arising from the Planning Proposal. It does not reference either the *draft Affordable Housing Contribution Scheme*, studies to inform planning for affordable housing on the site, nor the land trust model that is understood to be proposed as an alternative mechanism to SEPP 70.

4 Review of Planning Proposal in Relation to Strategic Documents & Policies

4.1 Overview

A further set of issues arising from the scope of work relate to the relationship between the Planning Proposal and relevant strategic plans and documents, specifically the need to:

- Review the Planning Proposal, draft Affordable Housing Contribution Scheme, Residential Strategy, North Coast Regional Plan 2036, SEPP 70 – Affordable Housing (Revised Schemes) other associated documents, and correspondence between Council and the Department;
- Consider the relationships between the Planning Proposal, *draft Affordable Housing Contribution Scheme*, *Residential Strategy* and proposed Land Trust;
- Identify whether the *draft Affordable Housing Contribution Scheme* and *Residential Strategy* are required as a strategic evidence base to inform and support the delivery of housing on Lot 22;
- Determine whether the *draft Affordable Housing Contribution Scheme* and *Residential Strategy* should be finalised prior to submission of a new planning proposal for a Gateway determination.

This is first looked at below with regard to the strategic alignment with relevant documents, as well as the proposed land trust model. The need for the draft Affordable Housing Contribution Scheme and *Residential Strategy* as a strategic evidence base to inform and support the delivery of housing on Lot 22, and the extent to which these and other related documents do in fact provide such an evidence base is then examined. Finally, the timing of the Planning Proposal with regard to these documents is then looked at in the context of this review of the documents and their evidence base.

4.2 Alignment with Strategic Priorities

4.2.1 Overview

The first issue involves a review of the relationship between relevant plans, strategies, policies and schemes, and the extent to which there is alignment between the strategic directions and requirements in relevant documents and the Planning Proposal.

The key documents considered in this section are:

- The North Coast Regional Plan;
- The Byron Residential Strategy;
- The draft Affordable Housing Contribution Scheme;
- The Byron Affordable Housing Policy;

- The Byron Affordable Housing Policy and Procedure; and
- The proposed land trust model (reviewed in more detail above).

A brief review of relevant documents is first provided to the extent that they are relevant to the Planning Proposal on the subject land. This is followed by a discussion on the relationship between these documents, the extent to which there is strategic alignment, and the extent to which they provide sufficient evidence base to inform the Planning Proposal.

4.2.2 North Coast Regional Plan

The North Coast Regional Plan (NCRP) provides a strategic framework to guide future urban development in the region in the context of current and emerging social, economic and environmental needs and issues.

Relevant to the subject Planning Proposal, the NCRP has a strong focus on housing diversity and affordability (defined as rental or mortgage payments being no more than 30% of the gross household income of **very low and low income households**). This is in the context of an aging population, progressively smaller household size, the relatively low rate of social housing, and growing affordable housing need, which is amongst the highest in NSW.

Goal 4: Great Housing Choice and Lifestyle Options notes the importance of ‘Housing that meets the needs of residents on a range of incomes...in addressing the need for affordable and social housing to help reduce social disadvantage and provide shelter.’¹³

Direction 23: Increase Housing Diversity and Choice, states that ‘Providing housing diversity and choice will improve affordability, help meet the needs of an aging population and support the reduction of household size’. Relevantly, Action 23.1 is to ‘Encourage diversity by delivering **40% of new housing in the form of dual occupancies, apartments, townhouses, villas or dwellings on lots of less than 400 square metres by 2036**’.¹⁴

Direction 25: Deliver more opportunities for affordable housing, acknowledges that the region has ‘a high proportion of low income earners, and that housing in many areas is less affordable than the State average’.¹⁵ The Direction includes reference to a range of planning tools including bonus development provisions, where a percentage of affordable housing is included in a proposal; incentives for secondary dwellings; planning incentives or agreements to encourage private investment in affordable housing; promotion of MHEs in various urban contexts; and planning proposals that identify responsive lot size and planning controls.

Actions include delivering more opportunities for affordable housing through integration of policies and planning controls to increase housing diversity and incentivise private investment; and preparing guidelines for **local housing strategies that provide guidance on planning for local affordable housing needs**. It is noted that ‘Affordable Housing’ under the NCRP is defined more narrowly in terms of target groups than the Act, and is ‘Housing for **very low and**

¹³ NSW Department of Planning and Environment (2017) *North Coast Regional Plan 2036*, p 52.

¹⁴ NSW Department of Planning and Environment (2017) *North Coast Regional Plan 2036*, p 56

¹⁵ NSW Department of Planning and Environment (2017) *North Coast Regional Plan 2036*, p 57

low income households where rent or mortgage payments are below 30 per cent of gross household income or the household is eligible to occupy rental accommodation under the National Rental Affordability Scheme'.¹⁶

Specific to Byron LGA, priorities for future residential development of housing includes to **'Investigate opportunities for increased housing diversity in the form of additional multi-unit dwellings'**.¹⁷ It is understood that 'multi-unit dwellings' has a different meaning than 'Multi dwelling housing' in the Standard Instrument LEP, and is intended to include dwelling types such as Residential flat buildings, apartments, etc, in the interest of increasing housing diversity to meet identified need.¹⁸

4.2.3 Byron Residential Strategy:

Byron Residential Strategy's vision for the future includes that,

Residents will be able to find housing that meets their current and future needs in terms of type, tenure, size and cost. More diverse housing forms such as **town houses, units and apartments** will be located in locations with convenient access to shops, services, transport and open space, where it is easy to walk or cycle.¹⁹

The *Residential Strategy* reports that an additional 3,150 dwellings will be required by 2036, although this varies at a few points in line with varying assumptions. In accordance with its vision, most additional development to 2036 will be in 'well-located areas'.

Local Planning Action 1: Adopt a target of 85% of new dwellings to be provided in towns and villages by 2036 to make good use of land and infrastructure, with the balance in our rural areas, is informed by a set of sound urban residential 'suitable-for-use principles', which include that the land has access to essential services; travel efficiency with regard to connectivity by walking, cycling and public transport; is part of a community with opportunities for physical and social integration; and that the proposal is culturally respectful of Aboriginal communities.

This Direction is responsive to the much older than average age structure (a median age of 44 years) of the LGA, the projected aging of the population, and ongoing reduction in household size. Implications for housing need and supply in the LGA include **'unmet demand for affordable, small, low-maintenance dwellings located close to or within easy access to services in established locations'**; and the need to 'address the predominance of large, detached housing not suitable for "ageing in place"'. It also notes that **rental accommodation and some seniors' living options are not affordable or even available**.²⁰ As such, planning for an older population **'must consider more homes that support "ageing in place" and housing**

¹⁶ NSW Department of Planning and Environment (2017) *North Coast Regional Plan 2036*, p 52

¹⁷ NSW Department of Planning and Environment (2017) *North Coast Regional Plan 2036*, p 62

¹⁸ Email correspondence, DPIE 28 June 2021.

¹⁹ Byron Shire Council (2020) *Residential Strategy*, p 8.

²⁰ Byron Shire Council (2020) *Residential Strategy*, p 20.

choice such as smaller one and two bedroom dwellings for seniors who don't want to live in retirement housing complexes and want to stay in their community.'.²¹

Like the NCRP, the *Residential Strategy* highlights the very high rate of housing stress in the Shire, and that very low, low and moderate income households are some of the most vulnerable in the community due to high housing costs relative to income. Adverse impacts on the local economy due to lack of affordable housing and displacement of key workers in growing industry sectors is also as a key issue for economic development.²²

However, it should be noted that there are a number of inaccuracies in relation to housing stress, benchmarks and method of calculation of target groups, etc in the Strategy. There is also a lack of detailed analysis of existing affordable housing need and a lack of detailed projections to inform strategic planning with regard to projected affordable housing need, relevant dwelling typologies and the extent to which the market can provide for different sub-groups as a basis for identifying the most effective and efficient mechanisms for future affordable housing delivery. This is discussed in more detail later.

The *Residential Strategy* also notes the lack of success of previous strategies, particularly waiving fees for secondary dwellings in order to create affordable rental housing, and that such dwellings largely entered short term rental accommodation (STRA), and have had no discernible effect on reducing the median rent for one bedroom dwellings in the LGA.

Local Planning Actions (LPAs) most relevant to the subject Planning Proposal include:

- LPA 2 Examining current infrastructure capacity, charges and engineering standards to determine...c) updates needed to support the mix of housing and lot typologies shown in Strategy Section 3 – Policy 2: Table 5;
- LPA 4 Considering landowner-initiated planning proposals for Mullumbimby Saltwater Creek Precinct (including Area 7 (Lot 22)) for potential new release residential land...including applying SEPP 70 affordable housing contribution provisions.
- LPA 9 Support the delivery of a high-level concept structure plan for the Mullumbimby Saltwater Creek Precinct (Areas 5 – 9 as identified on Map 1) for inclusion in DCP 2014, setting out a framework for...d) the scale, pattern and broad location of new housing, including providing affordable housing.²³

Relevantly, *Policy 2: Improved housing choice, diversity and equity* notes that 'Housing needs to be accessible for households on very low, low and moderate incomes, including key workers, and that 'Improving these residents' ability to access the housing they need is one of the main challenges of this strategy'.²⁴ Noting the complexity of government relationships and policy and legislative

²¹ Byron Shire Council (2020) *Residential Strategy*, p 20.

²² Byron Shire Council (2020) *Residential Strategy*, p 20-21.

²³ Byron Shire Council (2020) *Residential Strategy*, pgs 37-39.

²⁴ Byron Shire Council (2020) *Residential Strategy*, Table 3, p40.

arrangements, the Strategy 'primarily focusses on land use planning enablers and barriers to housing supply, types and models'.²⁵

Lot 22 is identified as '**Area 7**' in the *Residential Strategy*. Proposed zoning is R1, and developable area is assessed as 7.725 ha.²⁶ Strengths of subject land as an Investigation Area are reported to include that it is already contained within the NCRP urban growth area; adjacent an existing residential area; in good proximity to employment areas and on an existing public transport route; and has been assessed as a viable affordable housing contribution area.

Controls proposed for Area 7 include the following:

- **Housing mix and density target** that caters for a range of residential types including dwelling houses, dual occupancies and multi dwelling housing reflecting local housing needs and at a density generally between 30 and 37 dwellings per hectare (after allowance for roads and parks etc)
- **Preferred lot size typology, mix and layout** to be generally consistent with Strategy Section 3 – Policy 2: Table 5 (Column 2A) and Diagram 2.
- **Affordable provision** will aim to achieve an affordable housing contribution rate of 30% of the additional lots or developable area whichever is the greater that is to be used for residential uses in accordance with Strategy *Appendix D Affordable housing and social housing criteria*.²⁷

Direction 2.1 also refers to 'new residential forms and models that can be built on private land or government owned land', with those listed as suitable for Area 7 being:

- Micro-home/lot - Single house on a freehold lot less than 200m².
- Intentional community - An integrated housing project on a single lot with shared community facilities collectively funded by residents who often have shared values.²⁸

The Strategy notes that Council is investigating emerging funding and tenure models to complement these new residential forms, including:

- community land trusts
- shared equity and dual mortgage ownership
- not-for-profit company providing long term social and affordable housing
- housing co-operatives.

Also relevant to the subject Planning Proposal is *Direction 2.2: Facilitate and promote growth in the proportion of rental and to buy housing aimed at the lower end of the market, including those with very low incomes*, which notes that 'the ability for new release and infill sites to deliver affordable housing is central to maintaining our Shire's community diversity and identity', and that

²⁵ Byron Shire Council (2020) *Residential Strategy*, Table 3, p41, and Fig 4 p 42.

²⁶ Byron Shire Council (2020) *Residential Strategy*, pgs 95-97.

²⁷ Byron Shire Council (2020) *Residential Strategy*, pgs 95-97.

²⁸ Byron Shire Council (2020) *Residential Strategy*, pgs 42-44; *Table 4 Byron Shire Bespoke Residential Forms*.

future development is unlikely to deliver affordable housing without some sort of planning intervention.

The related Action Framework includes key actions, including:

- A Byron Shire 'Lot Typology and Mix' (Section 3 – Policy 2: Table 5 and Diagram 2) as an alternative to applying standard minimum lot size in a new R1 zone to support the overall dwelling diversity target for the zone; and
- The concurrent application of a SEPP70 Affordable Housing Contribution Scheme to all requests for upzoning;

The Strategy states that the 'Byron Shire *Affordable Housing Contribution Policy* (AHCP) and associated *Affordable Housing Contribution Procedures to accompany Policy* (AHCPP) set out a framework for contributions', and reports that a planning proposal to apply the scheme over 'investigation area precincts' is currently under way, and that 'The scheme would make it clear that when the land is rezoned a contribution would be sought for that area of land that is ultimately upzoned', with upzoning and any proposed scheme amendments (such as proposed variations to the rate) 'combined for gateway/exhibition etc. so the zone /scheme amendments occur simultaneously'.

Local Planning Actions (in addition to those outlined above) include:

- LPA 16. Using the template criteria for affordable housing and social housing (Strategy Appendix D) to review local planning controls to support the location and design for affordable housing and social housing.
- LPA 17. Investigate applying a SEPP 70 AHCS over new release areas within the urban growth investigation areas (including Area 7) consistent with SEPP 70— Affordable Housing (Revised Schemes), and guided by *Guideline for Developing an Affordable Housing Contribution Scheme*, the Strategy's *Appendix D – affordable housing principles*, and the *Byron Shire Affordable Housing Contribution Policy and Procedures*.
- LPA 18. Consider affordable housing as a first option when investigating the best use of lands owned by Council.

Other matters of relevance to the Planning Proposal include the following:

- **Appendix C: Investigation Area Profile** reports that a staging program has been applied to Mullumbimby investigation areas, including based on priority for investigation areas 'most likely to deliver the highest proportion of affordable housing'.
- **Appendix D: Residential Models** supports Policy 2 of the *Residential Strategy*, and seeks to improve housing choice, diversity and equity, and includes criteria to guide the location and design of a range of development, including affordable and social housing. It includes:
- '**Affordable Housing Criteria**' notes that a clear understanding of what is affordable housing is needed including in relation to opportunities for land owners to submit affordable housing proposals for Council consideration as part of an early implementation program;

- **Eleven ‘Affordable Housing Principles’** including that affordable housing is to be provided for a mix of very low, low and moderate income households; that appropriate income and cost benchmarks are applied to affordable rental; and that affordable housing is provided in perpetuity and is constructed to a standard consistent with other dwellings in the locality.
- **Affordable housing criteria for location, fit and mix**, which includes that it be dispersed throughout a neighbourhood; accessible to services and facilities; ‘salt and peppered’ throughout a large development, and with a maximum of 5 affordable housing lots in a row; with a mix of 1, 2 and 3 bedroom dwellings; and allowing for ‘hybrid buildings to encourage the combining of different housing types and sizes.
- Table D.2: Target Recipient Household Criteria sets out the type of households referred to in the above criteria to ‘help understand what are very low, low and moderate income households.
- **Appendix F: Key Housing Terminologies and Definitions** provides a definition of ‘Affordable Housing’ that is reported to be in accordance with the Act (SEPP 70), although there are some inaccuracies with the definition used, as discussed later. The Appendix also provides a definition of ‘Affordable Rental Housing’, although as discussed later, this is conflated with ‘Community Housing’, which is generally regarded as a subset of affordable rental housing.

4.2.4 Draft Affordable Housing Contributions Scheme

Overview

A *draft Affordable Housing Contribution Scheme* (AHCS) has been prepared for Byron Council, and has been submitted to DPIE for its consideration. It provides a legal mechanism for the levying of mandatory developer contributions in specified precincts and/or lots under section 7.32 of the *Environmental Planning and Assessment Act 1979 (NSW)*, with contributions made in cash or in kind (land or dwellings) under section 7.33 of the Act.

In accordance with section 1.3(d) and Division 7.2 of the *Environmental Planning and Assessment Act 1979 (NSW)* (‘the Act’), and the *Byron Shire Affordable Housing Contribution Policy*, the objectives of the draft AHCS are to:

- To facilitate the provision of affordable housing options within the Byron Shire Council area to meet the needs of very low, low and moderate income households so as to promote diversity, equity, liveability and sustainability; and
- To set out how, where and at what rate development contributions will be collected by Byron Shire Council to provide fairness, certainty and transparency for the local community, developers and other stakeholders.

The draft Byron AHCS principally applies to the land identified in its Appendix B in Byron Bay, Bangalow and Mullumbimby, including part of Lot 22 (25 ha) identified as being ‘West of railway line and South of Saltwater Creek’.

Viability of Contributions

Viability for the imposition of an affordable housing contribution on an indicative lot in Mullumbimby was been assessed using the method set out in the SEPP 70 *Affordable Housing Viability Tool*, and found that residential subdivision would be viable with an affordable housing contribution equivalent to 62% of lots.

A contribution rate of 20% has been adopted as reasonable for land in and around Mullumbimby, including for Lot 22, based on the assessment of viability. As noted later, it does not reference the 30% contribution proposed for Council land.

Need for Affordable Housing

A detailed evidence base regarding the **need** for affordable housing to justify the imposition of an affordable housing contribution under section 7.32 of the Act is contained in **Section 1.4 Overview of Affordable Housing Need** and **Appendix A** of the AHCS.

In summary, it finds that the extent and nature of affordable housing need in the LGA, particularly among very low, low and moderate income renters,²⁹ provides a clear justification for the introduction of a mandatory affordable housing contribution in the LGA, and that the adoption of an AHCS likely provides one of the only opportunities to provide for housing needs of these groups.

It notes that Byron Shire Council has undertaken extensive affordable housing research and needs assessment over some years, including this more recent analysis, which has

...consistently found that there is substantial and growing unmet affordable housing need in its community that will not be met without strong planning intervention, in particular, affordable housing contributions, and the direct creation of affordable housing through government funding of social housing.

Further, it finds that rental affordability is at 'crisis point for many local people', leaving an increasing number of local people no option but to live in severe housing stress, situations of primary, secondary or tertiary homelessness (around 7 times the average rate on some indicators of homelessness), or to relocate to other areas where they do not have historical connections or social support.

The major undersupply of social housing (2% compared with 5% for rest of NSW) is also a contributing factor. Further, despite the much older that average age structure and projected aging of the population, the AHCS finds that Byron LGA has only one-quarter the Rest of NSW rate of self-contained accommodation in retirement villages (0.5% of occupied private dwellings compared with 2.0% for Rest of NSW).

Importantly, rental data for 2020³⁰ shows that the cost of rental for all housing products in the LGA is around double that for Rest of NSW; and that '**no housing product in the LGA was affordable to very low- or low-income renting households**', with a 1 bedroom unit affordable to only the

²⁹ See for example Tables 4.3 and 4.4 in the AHCS.

³⁰ Department of Communities and Justice, Rent and Sales Report, June Quarter 2020.

upper 60% of moderate income renting households. Relevant statutory income benchmarks, and related rental and purchase cost ranges, are set out at Table 4.5 of the AHCS.

As such, it finds that **increasing diversity of housing in and of itself is unlikely to provide affordability to any very low or low income households**, or to many moderate income households, particularly moderate income households with children. Likewise, the AHCS notes that, 'It is clear that the **private market in Byron Shire is unable to supply affordable rental accommodation** to the vast majority of very low-, low- and moderate-income households who need it'.³¹

Based on DPIE's (2019) population projections, it reports that an additional 3,393 dwellings will be required between 2016 and 2041, with around 90% of the demand for additional dwellings from increases in Couple Only and Lone Person households due to the ongoing aging of the population, suggesting that many of these could be **smaller (studio, 1 and 2 bedroom) dwellings such as residential flat buildings or multi dwelling housing**.³²

The AHCS concludes that,

This indicates stronger intervention through the planning system in the form of **mechanisms to capture an equitable share of land value uplift**, as well as the direct creation of affordable housing on public land through development partnerships, will be required to achieve affordability for the vast majority of relevant target groups, in particular all very low- and low-income households, and moderate-income family households including key worker households.

Although a significant problem for affordability, high land values and significant land value uplift provide **a real opportunity in the Shire to engage the planning system in the creation of affordable housing contributions** that are not available in many other regional areas of NSW.³³

4.2.5 Byron Affordable Housing Contribution Policy 2020

The *Byron Shire Affordable Housing Contribution Policy* (AHCP) provides a framework to advocate for, facilitate, provide and manage affordable housing contributions in Byron Shire. It notes that, although the policy is not legally binding, it is intended that the Council and all persons dealing with Council in relation to affordable housing contributions will follow this policy to the fullest extent possible.³⁴

Objectives include increased transparency and certainty in relation to contributions for affordable housing, consistency with Council's strategic directions, and to give local communities 'greater clarity about affordable rental housing planned for their local area'.³⁵ It defines 'Affordable Housing' in accordance with *State Environmental Planning Policy No 70 — Affordable Housing*

³¹ Draft Affordable Housing Contributions Scheme, p 9.

³² Draft Affordable Housing Contributions Scheme, p 47.

³³ Draft Affordable Housing Contributions Scheme, p 10.

³⁴ *Byron Shire Affordable Housing Contribution Policy*, p 1.

³⁵ *Byron Shire Affordable Housing Contribution Policy*, p 1.

(*Revised Schemes*) [and so is different to the definition provided in the *Residential Strategy* in this regard].

The Policy notes that the *Byron Residential Strategy* includes a priority for affordable housing affordability, and that analysis informing the Strategy identified the gap between supply and demand for affordable **rental housing**, the limited opportunities for the market to meet the significant underlying demand for affordable housing in Byron Shire and housing, justifying the collection of affordable housing contributions if economically viable.³⁶

In support of relevant objectives of the Act, it notes that Council has or is in the process of activating mechanisms related to additional local provisions in the LEP (Clause 6.7); Voluntary Planning Agreements with negotiated terms for affordable housing contributions as part of the Early Implementation affordable housing projects; and a SEPP 70 Affordable Housing Contribution Scheme for lands that undergo an upzoning.

This policy sets how Council intends to operate the contribution framework in Byron Shire, including Council (among other things):

- commits to seeking affordable housing contributions within the legal framework provided by the Act;
- favours affordable housing contributions that improve the supply of smaller dwellings (1- 2 bedroom) such as self-contained units in retirement villages, residential flat buildings and multi-dwelling housing suited to smaller households;
- supports the *Residential Strategy* in identifying affordable housing contribution scheme investigation areas where need and viability are established;
- seeks the concurrent application of a SEPP 70 AHCS clause over land subject to an upzoning;
- supports use of LEP Maps to help illustrate what is the preferred affordable housing contribution form for certain land; and
- supports a target of about 140 rental units for very low to moderate income households via the AHCS in the urban areas over the next 15 to 20 years (although the provenance of this number is not known).

The Policy also notes its alignment with other strategic documents, including *Byron Shire Draft Local Strategic Planning Statement - A Liveable Shire*, Local Priority 3: Support housing diversity and affordability with housing growth in the right locations.

4.2.6 Affordable Housing Contribution Procedure

Council's *Affordable Housing Contribution Procedures to accompany Policy* (AHCPP) supports the *Affordable Housing Contribution Policy 2020*. It offers a framework to advocate for, facilitate, provide and manage affordable housing contributions in Byron Shire obtained under a SEPP 70 AHCS or a Planning Agreement under the Act.

³⁶ *Byron Shire Affordable Housing Contribution Policy*, p1

The AHCPP notes that Statement of Intent 14 of the Policy guides the *Residential Strategy* to set a minimum affordable housing contribution rate for areas based on Council's understanding of development feasibility. Relevant to the Planning Proposal, it states that Council is seeking a contribution of 30% of the additional lots or developable area (whichever the greater) of residential land on Mullumbimby greenfield housing contribution areas that is owned by Council. It also notes that the rate is set at a higher level for Council land as it is assumed Council will not be seeking the same return on investment margin as a property developer (20% proposed contribution on private land).

Table 1: Investigation Areas Affordable Housing Yields reports that Mullumbimby Lot 22 has a potential **rental affordable housing yield 30 of dwellings**, with the activating referencing document cited being the *Byron Residential Strategy*, although as discussed later, the provenance of this figure is not clear and may not accord with a 30% contribution rate.

Importantly, the procedure set out in *Diagram 1: Contribution Setting* in relation to AHCS Investigation Areas and/or Early Implementation Lands indicates the importance of pre-lodgement determination of relevant contribution rates including acceptance of the minimum contribution rate in the *Residential Strategy* and/or independently assess of viability; and that **Council will activate the Planning Proposal to apply the AHCS clause [in the LEP] prior to application for a Gateway determination** [emphasis added].

Section 5: Terms guiding an Affordable Housing Contribution Scheme (AHCS), notes that the contribution may be in the form of a percentage of dedicated floor space, land, a monetary contribution or combination of these.

The AHCSPP makes no mention of a Land Trust as an **alternative mechanism** to the application of the AHCS clause [in the LEP] prior to application for a Gateway determination. As such, the Planning Proposal lodged ahead of the amendment of the LEP to insert an AHCS clause does not appear to be in line with Council's existing Policy.

4.2.7 Land Trust Model

None of the strategic documents discussed above refer to a land trust model as a mechanism for operationalising an affordable housing contribution, nor provide any detail with regard to how a contribution can be achieved outside of the legal framework provided by SEPP 70.

Likewise, the Planning Proposal does not make reference to or provide any detail on the proposed land trust model, not does it provide any reference to SEPP 70 as the mechanism to capture an affordable housing contribution in perpetuity, consistent with the *Residential Strategy* and Council Policies and Procedures outlined above.

Issues related to the land trust model are discussed in more detail in Section 5 below.

4.2.8 Comment on Relationship and Alignment

An initial question is to: *Consider the relationships between the Planning Proposal, draft Affordable Housing Contribution Scheme, Residential Strategy and proposed Land Trust.*

This is first looked at with regard to the relationship and alignment between these key strategic documents. The alignment of the Planning Proposal with relevant documents and strategic directions, and the extent to which such strategic directions are reflected in the current Planning Proposal are then examined below.

Relationship Between and Alignment of Strategic Documents

A common driver of future housing need identified in plans, strategies and policies reviewed above is the older age profile and significant projected aging of the population, the mismatch between existing housing stock and current and projected housing demand in terms of diversity and location, and the need to locate most new dwellings close to shops and services within major urban centres.

Accordingly, each highlights the importance of and/or prioritises smaller (studio, 1 and 2 bedroom) dwellings provided as 'self-contained units in retirement villages, residential flat buildings and multi-dwelling housing suited to smaller households' (in the case of the AHCPP); multi-unit dwellings including RFBs for Byron LGA (in the NCRP); or 'more diverse housing such as town houses, units and apartments (in the Vision for the *Residential Strategy*) [although there appear to be limitations to the consideration of RFBs in Figure 5 in R1 zones, including limiting these with regard to a requirement that they mix living and work space, which could result in an unintended cost impost on the apartment, and should perhaps be reconsidered if an objective of the zone is affordability).

Importantly, the strategic documents reviewed highlight the critical need for affordable housing, particularly affordable rental housing, for very low, low and moderate income households, and consider the development of affordable housing for relevant target groups as a key strategic priority, regionally and locally. The NCRP, and DPIE Guideline for Developing an AHCS, each explicitly cite 'very low and low income households' as key target groups for affordable housing, which is in line with the most serious affordable housing need identified in the *draft Affordable Housing Contribution Scheme* (AHCS). The *draft Affordable Housing Contribution Scheme* notes that affordable housing contributions levied under SEPP 70 provide the most important mechanism for creating affordable rental housing in perpetuity in Byron Shire, and quite a unique opportunity for a regional area due to the amount of land value uplift associated with rezoning.

A range of mechanisms and strategies are outlined in the NCRP, and referenced in the *Residential Strategy*. These are supported by Council's AHCP and AHCPP, which provide a strategic (if non-legal) framework for both voluntary and mandatory contributions, with these clearly supporting the priority use of Council land for affordable housing and a 30% affordable housing contribution under an AHCS developed in accordance with SEPP 70. This mechanism is operationalised by the *draft Affordable Housing Contribution Scheme*.

Although there is an apparent reliance upon 'diversity' as a means to achieve 'affordability' to some extent in each of these documents, nonetheless, they all refer explicitly to an affordable housing contribution scheme under SEPP 70, with the *Residential Strategy* aligned with Council's AHCP and AHCPP in this regard, and including in its controls/ targets for Area 7 (Lot 22) an affordable housing contribution of 30% of lots or developable area, whichever is the greater (*Appendix C: Investigation Area Profile*).

Notwithstanding a number of definitional issues and gaps in the evidence base, discussed later, there is reasonable alignment in the overarching strategic directions of these documents in a broad sense.

Alignment of Planning Proposal with Key Strategic Directions

It is positive that the **Planning Proposal** is aligned with these strategic documents in a number of important ways. Firstly, Lot 22 is well-located with regard to shops, services and recreational facilities, is identified as having a range of strengths in the *Residential Strategy* that make it suitable as a priority site for rezoning, and identified as priority site with regard to its ability to deliver an affordable housing contribution.

Secondly, the Planning Proposal is aligned with strategic directions with regard to increasing diversity of lot sizes and dwelling mix, in particular, reflecting the proposed lot diversity mix and indicative dwellings typology in Appendix 2 of the Planning Proposal in accordance with Table 5 of the *Residential Strategy*.

It is also positive that proposal to reclassify land from Community to Operational is supported by other studies, including the *Byron Shire Open Space and Recreation Needs Assessment 2017-36* (see **Section 6** below).

However, the Planning Proposal provides **weak support for and certainty regarding the provision of a 30% affordable housing contribution**, the quantum and nature of affordable housing that is likely to be created, and the provision of this affordable housing in perpetuity. There is also an apparent misalignment between the target groups that will benefit from any affordable housing created and key strategic documents outlined above. Moreover, the Planning Proposal appears to rely upon an assumption that providing for lot and dwelling ‘diversity’ will result in ‘affordable housing’, which is not the case in a housing market like Byron Shire.

This potentially results in the loss of a unique opportunity for the creation of affordable housing for those in most need of such housing/key priority groups, **very low and low income renters**. This is particularly the case if a Gateway determination for the Planning Proposal is issued ahead of the draft AHCS, and Lot 22 is removed from the AHCS as proposed, without sufficient detail in the Planning Proposal as to the quantum and nature of affordable housing that will be created, and the support of an alternative legal mechanism.

Appropriate detail and certainty regarding the provision of affordable housing in perpetuity is important given the main rationale for the fast-tracking of this rezoning in the Planning Proposal, specifically, that **‘the urgent need for diverse and affordable housing is the basis for the subject land preceding the Department’s final endorsement of the shire-wide *Residential Strategy*’** [emphasis added].³⁷

In support of these observations, I note the following:

- Although the Planning Proposal references various environmental, recreational and land use studies in support of the rezoning and reclassification,³⁸ it does not cite any affordable

³⁷ Planning Proposal, Lot 22, p 20.

³⁸ Planning Proposal, Lot 22, pgs 9-10

housing study or analysis to support appropriate development of affordable housing on the land. It does not reference the *draft Affordable Housing Contribution Scheme*, or its evidence base and provisions, and there is no mention in the Planning Proposal of an affordable contribution rate (i.e., the 30% rate on Council land per the AHCPP). Likewise, there is no proposed LEP clause related to affordable housing on the site, nor in the objective of the Planning Proposal, and an apparent reliance on market diversity to provide for affordability.³⁹

- Although it does reference Council's AHCP with regard to affordable housing as a 'first option' on Council land,⁴⁰ there is no detail as to how this will be achieved, and no commitment to implementing the directions of this Policy or related AHCPP on the land. There is only one reference to an affordable housing 'contribution' (at p12), and this is in relation to advantages in flexibility with regard to lot sizes, etc 'particularly if land is subject to an affordable housing contribution [emphasis added].
- References throughout the Planning Proposal to 'affordable housing' are generally vague and unspecific, with no reference to appropriate benchmarks or target groups definitions, and some statements that indicate the Planning Proposal may be at odds with priority need and strategic directions outlined above. For example, although it cites the *Residential Strategy* Appendix D, the Planning Proposal states that 'Council is **investigating** available options to secure affordable housing on Lot 22 that best suit the site and Council's objectives' [emphasis added]⁴¹ but makes no mention of the draft AHCS or the evidence base available in other documents. [Issues relating to the evidence base provided by Appendix D of the *Residential Strategy* and other documents are also discussed below].
- Further, an additional objective added by Council to the proposed R1 zone is 'To provide a secure supply of affordable housing stock that meets the needs of **low to middle (sic) income** residents [emphasis]. Whilst the omission of 'very low income' households may be an oversight, this is an important omission, and clarification is needed from Council as to whether this is the intent of this zone objective.
- In a related way, in reporting its consistency with s9.1 Directions in relation to a proposed residential zone, the Planning Proposal states that, 'The ability to enforce good urban design is more likely with Council as the owner. Development of areas of near level, flood-free residential land capable of affordable housing (**in the context of Byron LGA house prices**) is the desired outcome' [emphasis added].⁴² In the absence of relevant benchmarks, this could result in housing being 'lower cost' or cheaper than average for Byron Shore by virtue of smaller lots, or diversity, etc, but not being 'affordable' according to the statutory definition for very low and low income households.

³⁹ Planning Proposal, Lot 22, p 24

⁴⁰ Planning Proposal, Lot 22, p 15.

⁴¹ Planning Proposal, Lot 22, p 17.

⁴² Planning Proposal, Lot 22, p 31.

- There appears to be a reliance on ‘diversity’ to provide ‘affordability’, and at times a conflation of these terms. For example, the Planning Proposal states that lot size and housing diversity provisions ‘are essential in terms of increasing the housing yield from this land and ensuring that smaller (more affordable and diverse) dwellings result from this development’. It is also important to note that the intended amendment to the LEP is reported to be that ‘provisions to encourage diverse housing [rather than affordable housing] on this site be inserted into the LEP’.⁴³ However, as noted below, and in the *draft Affordable Housing Contribution Scheme*, diversity in terms of smaller lots and housing products *per se* will not provide affordability in the context of the Byron Shire housing market. Whether providing a three bedroom house for a very low income renting family or a one bedroom flat for a very low income renting couple, the housing product will generally require deep subsidies to be ‘affordable’ per the statutory definition, which is the reason that SEPP 70 provisions are so important.
- Finally, the Planning Proposal states that its objectives are complementary to the North Coast Regional Plan 2036, Direction 23: *Increase housing diversity and choice* (Action 23.1), which requires Councils to ‘encourage housing diversity by delivering 40 per cent of new housing in the form of dual occupancies, apartments, townhouses, villas or dwellings on lots less than 400 square metres, by 2036’. In general terms, this may be achieved for the wider community through operationalising Table 5 and Figure 5 of the *Residential Strategy*. However, it is not certain that this important strategic direction (or strategic directions in other documents cited above) will be achieved in relation to any ‘affordable housing’ that is created on the subject land, nor whether affordable housing will be maximised and provided efficiently.

Reference to an MHE at various points in the Planning Proposal is a case in point. For example, in reporting against consistency with s9.1 Directions, the Planning Proposal notes that the Planning Proposal ‘seeks to permit development for the purposes of a manufactured homes estate (MHE) on this land as an affordable housing initiative and the R1 zone is preferred for that reason’,⁴⁴ and assesses the site as being suitable for an MHE in accordance with the provisions of SEPP 36 and as an appropriate location for such a use. There is again no detail on the target groups, tenure arrangements, urban efficiency or relative affordability of a proposed MHE, nor how affordable housing in perpetuity will be assured. It is also noted that the minimum size of sites for MHEs developed under SEPP 36 and related regulation is 130 m²,⁴⁵ which is far larger than sites sizes understood to be proposed or under consideration (see also **Section 4.3.5** below for discussion).

It is also noted that there is no reference to an MHE in *Appendix C: Investigation Area Profile of the Residential Strategy*, nor in Figure 5, although such dwellings may be included under reference to ‘Fully detached home on micro-lots’, although this is proposed

⁴³ Planning Proposal, Lot 22, p 4, *Objective and Intended Outcome*

⁴⁴ Planning Proposal, Lot 22, p 31.

⁴⁵ *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*, Division 3: Manufactured Home Estates

in a related study,⁴⁶ discussed later. Again, these issues need to be further articulated in relation to the Planning Proposal insofar as it relates to the provision of genuinely affordable housing in perpetuity.

A further issue is that the Planning Proposal does not appear to be in accordance with Council's AHCP and AHCPP, noting that these documents have an explicit reliance on SEPP 70 and the related *Affordable Housing Contribution Scheme* (when adopted) as the mechanism to ensure that affordable housing contributions are made in accordance with the Act; as well as specifying an appropriate rate for Council land), quantum and tenure (30 affordable rental dwellings), and in perpetuity. This also relates to the procedure in the AHCPP regarding Investigation Areas and/or Early Implementation that 'indicates the importance of pre-lodgement determination of relevant contribution rates and/or independence assess of viability; and that Council will activate the Planning Proposal to apply the AHCS clause [in the LEP] prior to application for a Gateway determination',⁴⁷ as noted above.

Finally, it is noted that the Planning Proposal, like the strategic documents discussed above, **makes no reference to a land trust model as a mechanism for operationalising an affordable housing contribution**, nor provides any detail with regard to how a contribution can be achieved outside of the legal framework provided by SEPP 70, or section 7.4 of the Act with regard to negotiated Planning Agreements.

4.3 Evidence Base for the Planning Proposal

4.3.1 Overview

A second question is related to the evidence base for the Planning Proposal, specifically *whether the draft Affordable Housing Contribution Scheme and Residential Strategy are required as a strategic evidence base to inform and support the delivery of housing on Lot 22*.

It is clear from the above review of the Planning Proposal in the context of strategic documents outlined above that the Planning Proposal in its current form does not reflect the available evidence base, nor generally reference this evidence. Given the quite unique opportunity to create genuinely affordable housing on this Council-owned land, it is important that the Planning Proposal provide sufficient detail to ensure that any resources dedicated to affordable housing are demonstrated to meet priority needs, make efficient use of land and resources, and are secured in perpetuity.

Given the lack of alternative evidence or detail on affordable housing provided in the Planning Proposal, and that the ability to meet the urgent need for affordable housing is cited as the rationale for its early approval, it is important that these strategic documents provide an evidence base for this or an amended Planning Proposal, or other such proposals that may come to Council.

⁴⁶ UrbanxChange (November 2020) *Affordable and Social Housing Development Analysis Lot 22*

⁴⁷ Byron Shire Council, *Affordable Housing Contribution Policy and Procedure, Diagram 1: Contribution Setting* in relation to AHCS Investigation Areas and/or Early Implementation Lands

As such, it is first important to review the nature and quality of the evidence base provided by these and other relevant documents. This review is provided below.

4.3.2 Residential Strategy

Positive Aspects

The *Residential Strategy* is positive in that it recognises and highlights the critical importance of housing affordability in the LGA, in particular, the importance of affordable rental housing. It notes the high relative rate of housing stress in the Shire, and that, as the demand for affordable housing far exceeds supply, ‘very low and low income households living in rental housing are some of the most vulnerable people in the community’ as priority issues to be addressed in planning for future development.⁴⁸

As outlined above, the Strategy also highlights the personal, community and economic development costs of the lack of affordable housing for relevant target groups in Byron Shire in the context of the low paid and insecure nature of much of the employment in the Shire, and ongoing demographic change, including the aging of the population and decreasing household size. Strategic directions including that 85% of new dwellings be located in towns and villages; that more homes that support “ageing in place” and housing choice such as smaller one and two bedroom dwellings for seniors;⁴⁹ and the priority for more diverse housing forms such as town houses, units and apartments with convenient access to shops, services, transport and open space,⁵⁰ are responsive to changing need and appropriate in this regard.

It is also positive that the Strategy acknowledges and explores in a qualitative sense the housing issues of number of key demographic groups in the LGA, including Aboriginal people, young people and workers, people who are homeless or at risk of homelessness, middle aged people and families and older people.⁵¹

The *Residential Strategy* also recognises the priority for affordable housing ‘at the lower end of the market, including those with very low incomes Under Direction 2.2, and the central importance of new release and infill sites in delivering this housing.

Relevantly, the Strategy acknowledges that there is likely to be the need for strong planning intervention as future market development is unlikely to deliver affordable housing, and that affordable housing contributions through SEPP 70 are likely to be required amongst a suite of interventions.⁵² Relevantly, it states that, when processing a rezoning request for an upzoning, Council is committed to concurrently seeking an amendment of Byron LEP 2014 that applies a SEPP 70 Affordable Housing Contribution Scheme clause to the same land’, and reflects Council Policy in this regard.⁵³

⁴⁸ Byron Shire Council (2020) *Residential Strategy*, p 119.

⁴⁹ Byron Shire Council (2020) *Residential Strategy*, p 20.

⁵⁰ Byron Shire Council (2020) *Residential Strategy*, p 8.

⁵¹ Byron Shire Council (2020) *Residential Strategy*, pgs 17-20.

⁵² Byron Shire Council (2020) *Residential Strategy*, p 37.

⁵³ Byron Shire Council (2020) *Residential Strategy*, p 48.

Areas that Could be Strengthened

Overview

Acknowledgment of the critical importance of affordable housing, and broad priorities with regard to target groups and delivery mechanisms, provide strategic support for strong Council action and intervention on affordable housing, particular on land that provides the greatest opportunities including the subject site.

However, the *Residential Strategy* provides a relatively weak evidence base to inform and support the delivery of affordable housing on Lot 22, including identifying the quantum and nature of affordable housing required to meet current and projected affordable housing need, detail on the extent to which dwelling mix and typology are able to address affordable housing need (which is often quite different to the target groups in the wider community). and with regard to a number of technical matters with regard to definition, benchmarks and thus overall assessment of priority need.

These matters would be relatively straightforward to address, and important given the framework provided by the Strategy for Investigation Areas and land proposed as Early Implementation sites including the Planning Proposal for Lot 22. As such, the following provides a relatively detailed critique of relevant aspects of the *Residential Strategy*, followed by some additional data and analysis in **Section 4.2.4** below.

Issues related to Definitions, Benchmarks and Target Groups

There are a number of inaccurate statements in relation to housing stress, the method of and benchmarks used for calculation, and the priority groups for affordable housing.⁵⁴ This makes the analysis potentially unreliable and difficult to use as a basis for planning to meet local affordable housing need. This importance is highlighted in the DPIE (2019) *Guideline for the Development of Affordable Housing Contributions Scheme*, which notes the importance of local Housing Strategies in providing a comprehensive evidence base to develop an AHCS and the areas they will be applied, as well as considering current and changing supply and demand for affordable housing for very low and low income households as part of a broader consideration of housing supply.⁵⁵

For example, the *Residential Strategy* states that 'To avoid housing stress, a median annual household income of \$102,267 is required. Byron Shire's median annual household income is \$63,336 - two-thirds of that'.⁵⁶ It is difficult to interpret this statement, the provenance of these figures is unknown, and it is likely inaccurate in any case. Under the statutory definition, a 'moderate income household' is one that earns between 80-120% of the gross household income

⁵⁴ See for example, Byron *Residential Strategy*, pgs 20-22 and Table D2, Appendix D.

⁵⁵ DPIE (2019) *Guideline for the Development of Affordable Housing Contributions Scheme*, p 21

⁵⁶ The benchmark for the 'Mullumbimby catchment' also appears to be incorrect and lower than the values reported in a range of possible geographies in the 2016 Census (Mullumbimby SA2, Mullumbimby UCL and Mullumbimby State Suburb), with household median incomes for these areas \$993, \$983 and \$998 respectively. The provenance of the figure for 'Mullumbimby catchment' is unclear.

for Rest of NSW. The median household income at the time of ABS (2016) Census was \$1,168 for Rest of NSW (\$60,736 p.a.), so that a 'moderate income household' was one that earned between \$943 and \$1,401 at that time (\$49,036 to \$72,852 p.a.). It could be that the statement is intended to mean anyone earning more than \$72,852 (rather than \$102,267 as cited) is on a higher income, and therefore cannot be in housing stress, but, in any case and as noted, the base figure is incorrect.

The statement that the median income of Byron Shire is only two-thirds of the median income (\$63,336 compared with \$102,267 p.a.) is also noted; however, both the statement and both of the figures are incorrect. As noted, the median household income for Rest of NSW was \$1,168 per week in 2016 (\$60,736 p.a.). For Byron Shire it was in fact quite similar (\$1,149 per week, or \$59,748 p.a.).⁵⁷ As well as the statutory requirement to use the correct benchmark, the similarity in the median household income for Byron LGA and Rest of NSW does not provide a compelling reason to consider varying this benchmark.

These and other issues carry over to *Appendix D, Table D2: Target Recipient Household Criteria* under 'Affordable Housing Criteria', which is used as a basis to determine relevant target groups. A significant problem with this table (and thus the criteria) is that it uses a median income of \$965 per week for the 'Mullumbimby catchment' (although again this figure appears to be incorrect⁵⁸) rather than the statutory requirement of Rest of NSW (\$1,168 per week). This has the effect of reducing the number of households on very low, low and moderate incomes that will be eligible for affordable housing in Byron Shire, and means that less people will be included in each category and have their housing needs properly understood.

For example, in Table D2, a 'very low income household' is said to earn \$482.50 per week (50% of \$965). However, using the statutory benchmark, a very low income household would earn up to \$584 per week. In the Table D2 analysis, a 'low income household' would earn up to \$772 whereas the figure should be up to \$934 per week based on the statutory definition, and thus include more households in each of these income groups for the purpose of calculating affordable housing need. These are reasonable differences at the lowest end of the income scale, and can represent quite a large group of people who are most vulnerable in the housing market, and moving a reasonably large cohort from 'very low' to 'low income', and from 'low income' to 'moderate income' in terms of assessment of affordable housing need. This is discussed in more detail later.

Issues related to definitions, and thus an understanding of housing needs, are also reflected in *Appendix F: Key Housing Terminologies and Definitions*, where a definition that is different to both the statutory definition and that used in Table D2 is provided. For example, Appendix F defines 'Affordable housing' as those households whose gross income 'falls within the following ranges of percentages of the median household income for the **Byron Shire Statistical Division or relevant sub statistical area** according to the Australian Bureau of Statistics' [emphasis added], rather than Rest of NSW as required by the Act. The conflation of 'Affordable Rental Housing' with 'Community Housing' is also problematic, noting that affordable rental housing can also be provided through the private market (being dependent on relative cost to income ratio rather than

⁵⁷ ABS (2016) Census

⁵⁸ The various geographies that include Mullumbimby are all higher than the figure cited (\$965), with \$998 for Mullumbimby State Suburb, \$993 for Mullumbimby SA2 ['Mullumbimby catchment?'], and \$983 for Mullumbimby UCL (ABS 2016 Census).

provider on the affordable housing ‘continuum’⁵⁹), as well as in market products such as ‘new generation’ boarding housing under SEPPARH, which may also be provided by the private market, and may or may not be managed by a CHP.

Issues Related to Lack of Detailed Evidence of Current and Projected Need

Another significant problem with regard to assessing need for affordable housing in the *Residential Strategy* is the fact that there is no breakdown of the income groups, tenure groups or household types that are in housing stress and/or or paying 30% or more of their gross household income on their housing costs, and no projection of affordable housing need to 2036 to guide strategic directions with regard to priority groups or required housing typology. There is also no detailed analysis of the what types of housing products (rental or purchase) are affordable to which target groups, although again there are broad statements about gaps in supply. Again, this is needed to provide an evidence base for the formulation of the subject Planning Proposal and the strategic framework for Investigation Areas and Early Implementation lands, including other planning proposals that may be received by Council.

There is thus no proper consideration of the quantum and nature of current and future gaps in supply of affordable housing with regard to income, tenure and household group and typology (although there are some broad statements with regard to such gaps). There is also no proper analysis of the extent to which the market can provide affordable rental and for whom, and thus no evidence base to inform for strategic planning, for example, with regard to which target groups needs could be met through the market with more limited intervention, and which groups would need stronger planning intervention (for example, through mandatory contributions) to have their needs met.

These limitations to a proper analysis of affordable housing need are further complicated by the apparent lack of detailed population and housing projections in the *Residential Strategy*, for example, in relation to the projected growth in household types and age cohorts, which again makes projection of the extent and nature of housing (including affordable) housing need problematic. Council cites the limitations of population projections as a rationale for its focus on short- to medium-term (5 year) planning in the Strategy,⁶⁰ but it does make longer-term for affordable housing planning more problematic.

The lack of detailed population projection and detailed analysis of the quantum and nature of affordable housing need leads to other issues with regard to the potential prioritisation of some groups, and statements about such groups. This includes the inclusion of ‘moderate income households’ as some of most vulnerable households⁶¹ rather than a clear priority on those most seriously affected by affordable housing need (very low and low income households, which

⁵⁹ See for example <https://www.greater.sydney/metropolis-of-three-cities/liveability/housing-city/housing-more-diverse-and-affordable>

⁶⁰ Byron Shire Council (2020) *Residential Strategy*, p 65

⁶¹ Byron Shire Council (2020) *Residential Strategy*, p 21

includes both employed people and those on pensions and benefits); and a prioritisation of groups including ‘workers’ and ‘low and moderate income households’ in a generic sense.⁶²

Whilst the focus on increasing such diversity is likely important for considerations of general housing supply, particularly given the projected aging of the population and that 90% of projected increase in population to 2036 is likely to be from lone person and couple households, it does not provide the robust evidence base required for consideration of affordable housing priorities required as part of a Housing or *Residential Strategy*, and likely results in some of the issues regarding strategic planning for Investigation Areas including Lot 22. Moreover, providing for lot diversity is not sufficient to provide housing affordability, as discussed later.

A number of Housing or Residential Strategies with which the author is familiar provide a robust evidence base for planning for future affordable housing need, and may be worth reviewing [see for example Inner West Council Housing Strategy, adopted by Council on 3 March 2020].⁶³

4.3.3 Draft Affordable Housing Contribution Scheme

The gap in evidence for planning for future affordable housing need in Byron Shire is met to some extent by the *draft Affordable Housing Contributions Scheme* prepared in accordance with DPIE’s *Guideline for Developing and Affordable Housing Contribution Scheme*, and with reference to DPIE (2019) Population and Housing Projections to 2026. It also provides a more detailed breakdown of income and tenure groups in housing stress, and a somewhat more robust assessment of housing affordability for key groups.

The *draft Affordable Housing Contributions Scheme* provides a reasonable evidence base for the urgent need for the creation of affordable rental housing for or very low and low income renters in the Shire, the viability of a much higher than average affordable housing contribution rate for sites like Lot 22, and an assessment that one of the only mechanisms likely to be effective in addressing the quantum and nature of need in the LGA is that provided through SEPP 70.

However, the *draft Affordable Housing Contributions Scheme* is deficient in several regards. First, it does not provide a detailed tenure and income breakdown by household type, dwelling typology, nor projections or targets for future affordable housing need/provision. It also does not provide a detailed assessment of what is available and for whom in the Byron housing market context. It also makes no reference to the 30% contribution rate on Council land in line with Council policy. It is noted, however, that the *draft Scheme* was prepared in accordance with the DPIE Guideline, which

⁶² Byron Shire Council (2020) *Residential Strategy*, pgs 9-10

⁶³ https://ehq-production-australia.s3.ap-southeast-2.amazonaws.com/620bec083322f4ea901596a8792b4f7ffca14e52/original/1587615787/Housing_Strategy_Adopted_-_updated_21_April_2020.pdf_521308fc3962a9b7acc3ad506286b49d?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIBJCUKKD4ZO4WUUA%2F20210704%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20210704T011613Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=63d73b8a2e10fe110ea67eb94e28c6294269be89245dd6b3839c4aae8fca09b0

does not explicitly require this level of analysis, although in the absence of such analysis in the *Residential Strategy*, it would be prudent to provide it in the final *Scheme*.

Finally, like all other documents reviewed, it does not provide any detail on the implementation mechanism that is proposed to be used if Lot 22 is removed from the AHCS, and that is understood to be proposed as the holding entity for resources created using SEPP 70 in relation to other land subject to affordable housing contributions – the land trust model. The proposed land trust model is reviewed in Section 5 below.

Given the lack of this detailed analysis in the *Residential Strategy* and in the *draft Affordable Housing Contributions Scheme*, a preliminary analysis of target groups and affordability is provided in **Section 4.3.4** below.

4.3.4 Additional Analysis to Supplement Evidence Base

Analysis of Current and Projected Affordable Housing Need

This section provides additional analysis to supplement the affordable housing need analysis in the *draft Affordable Housing Contributions Scheme*, and as a further evidence-based for the Planning Proposal.

The following table provides a breakdown of current and projected affordable housing need by income group and broad household/dwelling typology. This is based on the statutory definition of ‘affordable housing’ for very low, low and moderate income households,⁶⁴ and assumes that those paying 30% or more of their gross household income are in housing stress, and in need of affordable housing. This is likely to be an underestimate of need as only rent and mortgage costs are considered rather than all housing costs, although rent and mortgage make up by far the largest component of housing costs.

A total of at least 2,520 households in affordable housing need by 2036 (current and projected, with a factor for at least maintaining the supply of social housing). This is made up of 1,920 very low, low and moderate income household currently in housing stress and/or paying 30% or more of their gross household income on rent or mortgage repayments, and an additional 600 households in need of affordable (including social) housing by 2036.

In terms of income, tenure and household target groups for the purpose of strategic planning, the following is noted:

- Almost 80% of projected affordable housing need will be amongst very low, low and moderate income **renters**, with three-quarters of this need for housing that is affordable to **very low and low income renting households**;
- **Smaller very low income renting households** (lone person and couple only) are projected to make up around one-quarter of those in affordable housing need by 2036;

⁶⁴ Assumes the Rest of NSW median income at the time of the ABS 2016 Census, and that a very low income household is one paying up to 50% of their gross household income on rent or mortgage; a low income household is one paying up to 50-80% of their gross household income on rent or mortgage; and a low income household is one paying up to 80-120% of their gross household income on rent or mortgage.

- The number of very low income private renters currently in housing stress in private rental (630 households) far exceeds the current supply of social housing occupied by eligible renters (190 households), noting that many of the former would be working and ineligible for social housing (see also case study of target groups below);
- In terms of broad dwelling typology, the overall breakdown would need to be round 60% smaller (studio and 1 bedroom dwellings, and possibly 2 bedroom dwellings) and 40% smaller and larger family dwellings (2, 3 and 4+ bedrooms). However, it is also noted that virtually all net growth in the Shire is projected to come from lone person and couple households,⁶⁵ so that it would be prudent to provide **at least 70% of additional affordable dwellings as smaller (studio and 1 bedroom, and possibly 2 bedroom) dwellings** and 30% as smaller and larger family dwellings.

This is breakdown by income group, tenure and broad dwellings typology is shown below.

Table 4.1: Need for Affordable Housing in Byron LGA to 2036 (1)

		Renting Households			Purchasing Households		
		Suitable for Lone Persons or Couples without Children	Suitable for Families with Children	TOTAL	Suitable for Lone Persons or Couples without Children	Suitable for Families with Children	TOTAL
Total Currently Required (2016)	Affordable to Very Low Income H/hs	441	189	630	103	6	109
	Affordable to Low Income H/hs	192	262	454	104	45	149
	Affordable to Moderate Income H/hs	125	274	399	87	92	179
Additional Required	Affordable to Very Low Income H/hs	123	53	176	29	2	30

⁶⁵ Draft Byron AHCS derived from DPE (2019) Population and Housing Projections

		Renting Households			Purchasing Households		
		Suitable for Lone Persons or Couples without Children	Suitable for Families with Children	TOTAL	Suitable for Lone Persons or Couples without Children	Suitable for Families with Children	TOTAL
2016-2036 (1)	Affordable to Low Income H/hs	54	73	127	29	13	42
	Affordable to Moderate Income H/s	35	76	111	24	26	50
Social Rental Housing (2)	Affordable to Very Low Income H/hs	39	26	65	N/A	N/A	N/A
Total Required in 2036 (3)	Affordable to Very Low Income H/hs	603 (24%)	268 (11%)	871 (35%)	132 (5%)	8 (1%)	139 (6%)
	Affordable to Low Income H/hs	246 (10%)	335 (13%)	581 (23%)	133 (5%)	58 (2%)	191 (7%)
	Affordable to Moderate Income H/hs	160 (6%)	350 (14%)	510 (20%)	111 (4%)	118 (5%)	229 (9%)

Source: JSA calculations, using data from ABS Census of Population and Housing 2016 and DPIE (2019) Population and Housing Projections

Table notes:

- (1) Adopts delivery target in the NCRP for Byron Shire, and as reflected in the Byron *Residential Strategy*, of 3,150 additional dwellings by 2036, and assumes the current rate of housing stress of 17% of all households will continue ($3,150 \times 17\% = 535$ dwelling). These 536 dwellings have then been apportioned by income and broad household/dwelling type for 2016 (first part of the table above). It is also noted that this is the lower range projected in the *Byron Residential Strategy*. The effect of applying Council's upper range

- (3,550 dwellings would increase the need for affordable housing by around 70 dwellings needed from 2016-36 (a total of 700 additional affordable dwellings from 2016-36).
- (2) Existing residents in social housing (2016 Census) are assumed to be affordably housed due to rental policies of providers. However, a factor to provide for an increase in social housing at the same rate of provision in the LGA is included for 2016 (2% of dwellings or an additional 65 social housing dwellings from 2016 to 2036).
 - (3) Total of current and projected housing need (as defined by current and projected housing stress), with a factor for additional social housing needed.

Housing Affordability by Housing Product and Target Group

This section provides further additional analysis to supplement the affordability analysis in the draft Affordable Housing Contributions Scheme, and as a further evidence-based for the Planning Proposal. The first table shows statutory incomes and benchmarks for affordable rental and purchase prices, indexed to March 2021 dollars. The median household income of \$1,168 (ABS Census 2016) has been adjusted to \$1,251 with reference to CPI.⁶⁶

The tables that follow provide an analysis of affordability of current market rents for selected housing products in Byron Shore compared with Rest of NSW from the DCJ *Rent and Sales Report* for the most recent quarter for which data is available (March 2021). This analysis shows that there is no product provided through the market and/or increased housing diversity that will provide affordability to any of the affordable housing target groups in the Byron housing market context, and also shows the seriousness of the situation compared with other regional areas.

⁶⁶ CPI 117.2 Sept 2016 109.4 Adjusted income

Table 4.2: Relevant Affordable Housing Income and Cost Benchmarks – Rest of NSW

	Very low-income household	Low-income household	Moderate-income household
Income Benchmark	<50% of Gross Median H/H Income for Rest of NSW	50-80% of Gross Median H/H Income for Rest of NSW	80%-120% of Gross Median H/H Income for Rest of NSW
Income Range (2)	<\$626 per week	\$627-\$1,001 per week	\$1,002-\$1,502 per week
Affordable Rental Benchmarks (3)	<\$188 per week	\$189-\$300 per week	\$301-\$451 per week
Affordable Purchase Benchmarks (4)	<\$238,000	\$238,001-\$376,000	\$376,001-\$565,000

Source: JSA 2020, based on data from ABS (2016) Census and ABS (2020) Consumer Price Index, ANZ online home loan repayment calculator, www.anz.com.au/personal/home-loans/calculators-tools/calculate-repayments/

(1) All values reported are in December Quarter 2020 dollars

(2) Total weekly household income

(3) Calculated as 30% of total household income

(4) Calculated using ANZ Loan Repayment Calculator, using 21 April 2021 interest rate (3.19%) and assuming a 20% deposit for a 30 year ANZ Standard Variable Home Loan and 30% of total household income as repayments.

Table 4.3: Rent Tables, Houses, March Quarter 2021

		2 BR House		3 BR House		4BR+ House	
		Q1	Median	Q1	Median	Q1	Median
Byron Shire	Weekly Rent	\$500	\$595	\$650	\$795	\$900	\$1,100
	Affordability (NSW ex-Greater Sydney)	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only
NSW ex-Greater Metropolitan Region	Weekly Rent	\$265	\$325	\$325	\$380	\$410	\$490
	Affordability (NSW ex-Greater Sydney)	Affordable to 32% of low income band	Affordable to 84% of moderate income band	Affordable to 84% of moderate income band	Affordable to 47% of moderate income band	Affordable to 27% of moderate income band	Affordable to higher incomes only

Source: NSW Department of Family and Community Services (2021) Rent Report No 135, Mar Qtr 2021; ABS (2016); ABS (2021) Consumer Price Index Australia, Dec 2020

Table 4.4: Rent Tables, Flats & Units, March Quarter 2021

		1 BR Flat/Unit		2 BR Flat/Unit		3BR Flat/Unit	
		Q1	Median	Q1	Median	Q1	Median
Byron Shire	Weekly Rent	\$405	\$470	\$470	\$580	Insufficient data	Insufficient data
	Affordability (NSW ex-Greater Sydney)	Affordable to 31% of moderate income band	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only	Affordable to higher incomes only
NSW ex-Greater Metropolitan Region	Weekly Rent	\$195	\$240	\$250	\$300	\$330	\$390
	Affordability (NSW ex-Greater Sydney)	Affordable to 95% of low income band	Affordable to 54% of low income band	Affordable to 45% of low income band	Affordable to 100% of moderate income band	Affordable to 87% of moderate income band	Affordable to 47% of moderate income band

Source: NSW Department of Family and Community Services (2021) Rent Report No 135, Mar Qtr 2021; ABS (2016); ABS (2021) Consumer Price Index Australia, Dec 2020

Examples of Target Groups

Very low, low and moderate income households as defined by the *Environmental Planning and Assessment Act 1979 (NSW)* make up at least 60% of the population of the LGA. As such, a majority of current and future residents potentially benefit from strategies to increase the supply of affordable housing, in particular,

In the Byron Shire context, they are made up largely of working households including working households on very low and low incomes, as well as those on pensions and benefits, such as the Aged or Disability Pension, Parenting Payment and JobSeeker Allowance.

Some examples of **very low income key worker households** include a lone person working part-time as an entry-level aged care worker, earning around \$600 for a 30 hour week; or as a casual cleaner earning around \$600 for a 25 hour week in a couple with children relationship where the partners is studying and caring for children. These households would need to pay less than \$180 rent per week for their housing. These households could not afford to rent anything in the LGA, even a 1 bedroom flat, and would pay more than they earn for a 3 bedroom house.

Examples of **low income key workers** include a full time process worker, store person or enrolled nurse living alone and earning \$765 to \$900 per week living in a lone person household; or a couple with two young children, with one person caring for the children and the other working full-time as an experienced nursing assistant, and earning around \$850 per week. These households would need to pay between \$230 and \$270 rent per week for their housing to be affordable. They would be unable to afford even a one bedroom apartment in Byron LGA, and would only be able to rent a median priced one bedroom unit, and would pay virtually all of their household income to rent a 3 bedroom house.

Moderate income key worker households include a lone person working full-time as an ambulance officer, entry level teacher or registered nurse earning around \$960 to \$1,330 per week; or a couple with one person working part-time as a cleaner and the other as a process worker, earning around \$1,400 per week. These households would need to pay between \$300 and \$420 rent per week for their housing to be affordable. They could only afford to rent a 1st Quartile 1 bedroom apartment, were the latter to be available.

Some examples of **very low income households dependent on Centrelink payments** are a single aged pensioner with no superannuation on an income of \$476 per week including relevant supplements, who could afford to pay \$193 in rent including Commonwealth Rental Assistance;⁶⁷ and a single person on JobSeeker Allowance, who would have an income of \$310 per week, and could afford to pay \$143 in rent including Commonwealth Rental Assistance. These households could not afford to rent anything in the LGA, and would pay at least double their income for even a one bedroom flat.

⁶⁷ Around \$50 per week for eligible households.

4.3.5 Affordable Housing Policy and Accompanying Procedure

Issues Related to Quantum and Nature of Affordable Housing on Lot 22

The Byron AHCP and AHCPP do not provide an evidence base *per se* for the Planning Proposal, but do provide an important framework within which the Planning Proposal needs to be developed and implemented.

Important aspects of these documents relevant to the Planning Proposal include definitions and benchmarks for affordable housing per the statutory definition; establishing procedures for Investigation Areas and/or Early Implementation Lands that include activation of the AHCS clause prior to application for a Gateway determination; and adoption of a 30% affordable housing contribution under SEPP 70 for Council owned land in Mullumbimby in the form of dedicated floor space, land, a monetary contribution or combination of these. As noted above, the Planning Proposal appears to show insufficient recognition of this Policy and related Procedure in a number of respects.

The second issue relates to the quantum of affordable housing that can be created on Lot 22. *Table 1: Investigation Areas Affordable Housing Yields* reports that Lot 22 has a potential **rental affordable housing yield of 30 dwellings**, with the activating referencing document cited being the *Byron Residential Strategy*. However, the provenance of this figure is not clear as there is no mention of the quantum of affordable housing expected to be created on Lot 22 in the *Residential Strategy* or related Appendices, and no information with regard to how this figure has been calculated.

The only document we have been provided with that analyses potential yield on Lot 22 is the *Affordable and Social Housing Development Analysis Lot 22* (UrbanxChange, November 2020). Our preliminary analysis, and that contained within the UrbanxChange document, indicate that 30 affordable rental dwellings is likely be too low a figure for Lot 22 if a 30% contribution rate, and the proposed lot mix, dwelling typologies and density, is assumed per Table 5 and Figure 5 of the *Residential Strategy*. However, there are also a range of issues with the *Affordable and Social Housing Development Analysis* apparent from our review of this document.

It is not clear what the status of this document is as it is not referenced in any of the strategic or policy documents outlined above, nor in the Planning Proposal, and its proposed master plan (among other things) is at odds with the lot diversity mix set out in the *Residential Strategy*. However, a more detailed review of this document has been undertaken in the event that its analysis is used as the basis for future planning for affordable housing on Lot 22. Additional preliminary analysis has also been undertaken as an example of an alternative approach to providing affordable housing on Lot 22 in Section 7.

Review of *Affordable & Social Housing Development Analysis* and Related Issues

The *Affordable and Social Housing Development Analysis Lot 22* (UrbanxChange 2020) undertakes a range of modelling to investigate the feasibility of a number of delivery options for various forms of affordable and social housing on Lot 22, and provides a masterplan approach to providing affordable and social housing on the subject land.

It separately analyses a number of potential delivery options, as set out below.

Small Lot, Micro Lot and SOHO Modelling

Models 1, 2, and 3⁶⁸ consider market delivery of 'Affordable by Design' dwellings on Small Lots of 450 m², Micro-lots of 125 m², and SOHO on lots of 200 m². Purchase costs are assumed as \$750,000 (Small lot housing), \$500-600,000 (townhouses on Micro lots) and \$760,000 (SOHO) respectively. The modelling shows development covering around 87.5% of the developable area in three stages,⁶⁹ and indicates that these scenarios are likely to just 'break even' when all costs are considered.

The modelling on this market approach to delivery finds that housing is 'affordable' to what the Analysis terms 'low and moderate income' households (per Table 5, p15); and that the income required is \$115,000 p.a. for Small lot housing; \$90,000 p.a. for Micro lot housing; and \$130,000 p.a. for SOHO.

However, the income ranges that are deemed to be 'low and moderate income' household in the Analysis are not in line with statutory definition of affordable housing. Table 5 starts with an income of \$962 per week, which is in fact in the middle of the 'moderate' income range, and ends with an income of \$2,500, which is actually in the high income range, with the upper end of the moderate income range being \$1,400 in 2016 or \$1,500 in today's dollars. Further, as shown in Table 5.1 above, to be affordable to a low income household as defined in the Act, the purchase price would need to be \$376,000 or less. None of the above products are affordable to this group. To be affordable to a moderate income household, the purchase price would need to be \$565,000 or less, meaning that townhouses may, at best, be just affordable to the upper end of the moderate income range, but none of the other products would be affordable.

A further problem with the use of these dwelling types is that their indicative sizes indicates that they would be at least 3 bedroom dwellings, and possible 4+ bedroom dwellings, which does not meet the critical need for smaller (studio, 1 and 2 bedroom dwellings) across much of the site.

Build to Rent Modelling

Models 4 and 5⁷⁰ model a 'build to rent' approach to the provision of affordable rental housing as discount market rent (75% of local market rent). The first model assumes 40 x 140m² townhouses (3-4 bedroom) at \$550 per week rent; and the second assumes 121 x 140m² townhouses at \$517 per week rent, each on 125 m² Micro-lots. The modelling shows that development is feasible at these rents.

Even though this model is said to be 'affordable housing' by virtue of being provided at discount market rent, these rents are in fact only affordable to higher income earners and to no moderate income households per the statutory definition and benchmarks set out in Table 5.1 above (a maximum rent of \$450 per week in today's dollars for moderate income households). They are well out of reach of very low and low income renters, who are the key priority groups in Byron Shire (\$188 and \$300 per week respectively).

⁶⁸ Attachments 1,2 and 3

⁶⁹ Calculated from Figure 3, Table 4 and relevant Appendices.

⁷⁰ Attachments 4 and 5

Again, it is noted that these town houses would be at least 3 bedrooms, and would not contribute to housing diversity. Being on two levels, they would also not be suitable as adaptable housing for an aging population.

Social ('Transitional') Housing Modelled as Tiny Homes on 50 Sq Mtr Lots

Models 6, 7 and 8⁷¹ model social housing as 140 Tiny Homes (referred to as 'Transitional Housing' in the concept masterplan mix at Table 4) to be located on Micro-lots of 50 m². This was modelled using three different assumptions - for all very low income renters, for a mixture of very low and low income renters, and for all low income renters. Average rents were respectively \$185/week, \$255/week (possibly a range of \$185 to \$320/week) and \$217/week [although it seems that the rents for Models 7 and 8 may be reversed as it would be expected that the modelling for all low income households would be higher than for the mixed model average].

As such, rents are said to be affordable at the lowest end to a person on Centrelink payments and at the upper end to a low income household, although Table 5.1 above indicates that this would only be affordable to perhaps the upper 50% of the low income range, and only to moderate income household if the upper end of the rent range is assumed in the 'mixed' model (\$320). It is also noted that the rent of \$185 per week would be affordable to an aged pensioner if they are eligible for Commonwealth Rent Assistance (CRA) of around \$50 per week. However, this rent would not be affordable to a person on JobSeeker allowance, even with \$50 CRA, who could only afford a weekly rent of \$143.

The analysis indicates that this development would be feasible under all scenarios modelled, noting also that the analysis takes a cash flow approach rather than a whole of life approach.⁷² The mixed development is modelled as most favourable, although as noted it is likely that the rent for 'all low income renters' was used in the 'average rent' for this model.

The masterplan (at Figure 3) indicates that these 'Tiny Homes' for social or transitional housing would be provided in three clusters with a total area of 7,000 m² (0.7 ha or around 12.5% of the total area developed for housing under the masterplan).⁷³ However, 30% of developable area would be 2.32 ha based on the developable area assumed in the *Residential Strategy* and Planning Proposal;⁷⁴ or around 1.7 ha based on the developable area in the masterplan area in the UrbanXChange Analysis.⁷⁵

It is also noted that housing for 'very low' income households is conflated with 'social' or 'transitional' housing. As noted above, many people on very low incomes in Byron Shire are unlikely to be eligible for social housing as they are employed, and would not be eligible for

⁷¹ Attachments 6, 7 and 8

⁷² Basically, this means that the modelling is less optimistic than if it were modelled under a whole of life discount cash flow analysis, which would likely show higher returns due to the effects of reduced interest rates and payments over time.

⁷³ 5.6 ha / 0.7 ha * 100 = 12.5 ha.

⁷⁴ 7.725 ha x 0.3 = 2.32 ha

⁷⁵ 5.6 ha x 0.3 = 1.7 ha

‘transitional housing’ as they are not exiting homelessness, noting that the latter term is not generally not used in this way, and has a specific meaning in NSW State Government policy.⁷⁶

Social (‘Transitional’) Housing Modelled as Apartments

The final set of options considered (**Models 9, 10 and 11**)⁷⁷ are 50 x Social or Transitional Housing Apartments, with apartments sizes of 55 m² and 75m² (likely 1 and 2 bedrooms). These are modelled under three scenarios – for an average of \$190 per week for Centrelink recipients only; for an income mix of Centrelink recipients and low income renters for \$267 per week (likely rent range of \$190 to \$344); and for \$308 for low income renters only [Again, it is queried if rents have been reversed in the case of Model 10 and 11. Issues related to terminology and conflation of very low income working households with Centrelink recipients eligible for social or transitional housing, and the gap for JobSeeker recipients noted above also relevant].

Although it is positive that they assume 1 and 2 bedroom rental dwellings, which makes a contribution to strategic objectives related to increasing housing diversity in apartments, the modelling for each of these options was found to be not economically viable.

Issues Arising

A range of issues arise from the review of the *Affordable and Social Housing Development Analysis* above.

First, as noted, Table 5 in the report at *Section 3.2 What is Affordable* uses entirely the wrong income ranges/benchmarks for what it reports to be ‘low- to moderate-income earners’, with the lowest value in the table equating to **only the upper 10% of the lower income household range**, and most of the incomes listed actually being high household incomes. Although it cites 30% as the relevant proportion of income that should be spent on rent or mortgage repayments, it does not say 30% of what income.⁷⁸ This possibly leads to the first five scenarios modelled (Small and Micro lots and SOHO and Build to Rent) being affordable to none of the relevant target groups for affordable housing.

Although the remaining six scenarios modelled are likely affordable to some very low and low income households, the ‘social’ or ‘transitional’ apartments are found to be not economically feasible. It is not apparent that these have been factored into the masterplan.

This leaves the ‘social’ or ‘transitional’ Tiny Houses on 50m² lots as the only viable option on the site for very low and low income renters, although as noted, they are not affordable to a Centrelink recipient on JobSeeker Allowance. Although their affordability is positive, there are a number of issues in a policy and a strategic sense that need to be considered. It is also important to look at this model in more detail as this is the only support that could be found in documents examined for the

⁷⁶ ‘Transitional housing in NSW is housing that is ‘short-term housing for people exiting crisis accommodation’ and ‘managed by specialist homelessness services (SHS)’. Such accommodation is generally for people existing homelessness or at risk of homelessness (e.g., exiting domestic violence situations), and is provided for two weeks and up to twenty-four months. See for example <https://www.facs.nsw.gov.au/download?file=333455>

⁷⁷ Attachments 9, 10 and 11.

⁷⁸ Executive Summary, p 7.

reference to MHEs as a preferred form of affordable housing in the Planning Proposal, as discussed above.

- First, these are reported to take up 12.5% of developable land rather than the 30% that applies under the AHCPP and referenced in the *Residential Strategy*.
- Secondly, as noted, these 150 homes are shown as being provided in **three distinct clusters** in the masterplan, with possibly 70 homes in the largest cluster. The size of the lots is very small (50m²). The homes are assumed as being \$90,000 each in modelling (presumably, including installation) so that the home would likely be around 30-40 m²,⁷⁹ which would provide for limited distance between homes each side and to the rear. This raises a number of issues in a policy, liveability and sustainability sense.
- In terms of Council policy, the clustering of these homes for very low income renters (potentially largely on Centrelink benefits), their size and the nature of construction makes them highly distinguishable from other dwelling forms within the Lot 22 masterplan area, and is regarded as poor practice in the provision of social and affordable housing, which now seeks to avoid 'ghettos' of poor or more vulnerable households, such as occurred in the highly stigmatised broadacre public housing estates of the past. Multi-tenure development is now the preferred model in public policy and based on the evidence.⁸⁰
- Council's 'Affordable Housing Principles' and 'Affordable housing criteria for location, fit and mix' at Appendix D of the *Residential Strategy* would be regarded as good practice in this regard, and needs to inform the planning for any housing provided on Lot 22 for very low and low income renters. As noted above, this includes that 'affordable housing is provided in perpetuity and is constructed to standard consistent with other dwellings in the locality'; that it be 'dispersed throughout a neighbourhood'; 'salt and peppered' throughout a large development, and with a 'maximum of 5 affordable housing lots in a row'; with a mix of 1, 2 and 3 bedroom dwellings; and allowing for 'hybrid buildings to encourage the combining of different housing types and sizes.'
- A further issue relates to the lightweight construction of the 'tiny' (manufactured) homes, which provide poor insulation, being very hot in summer and cold in winter, and requiring an air conditioner to be liveable in many climates; have significant problems in terms of noise and privacy; and limited space for landscaping that can buffer these effects, or provide for deep soil planting of trees for natural cooling. These are some of the reasons that SEPP 36 and related regulation requires 130 m² minimum site area for manufactured homes⁸¹ (as a form of permanent residential accommodation) as distinct for the earlier SEPP 21 and

⁷⁹ Typical size of studio and one bedroom manufactured homes.

⁸⁰ See for example Judith Stubbs & Associates (2019) Multi-Tenure Development: Best Practice Approaches to Design, Development and Management at <https://communityhousing.org.au/publications/multi-tenure-developments-best-practice-approaches-to-design-development-and-management/>

⁸¹ *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*, Part 2: Manufactured Home Estates

related regulation⁸² which provides 80 m² for permanent sites on caravan parks, and which were not originally envisaged to provide such permanent accommodation.⁸³

- Other requirements with regard to minimum size of land to be used for an MHE, levels of servicing, etc are also important consideration if the Planning Proposal intends to use the provisions of SEPP 36 and related regulation, as stated in the Planning Proposal.
- It is possible that this could be provided as an option for owner-renters, for example, as a form of shared equity where Council owns the land and the resident owns the home). However, research indicates that this is not an affordable option for very low and low income households without significant capital or savings due to the lack of conventional finance available for such purchase in the absence of an interest in the land, and the high rate of depreciation on such manufactured homes.⁸⁴ This would likely exclude many if not most very low and low income renters in the LGA. Other issues noted above regarding the size of lots and high level of clustering of vulnerable people in distinguishable dwellings also remain.

A number of other issues are canvassed in a broad sense under the various scenarios reviewed, including:

- That the masterplan at Figure 4 does not reflect the lot/potential dwelling mix in Table 5 and Figure 5 of the *Residential Strategy* (referenced in the Planning Proposal), and the relationship between these documents is unclear. Moreover, most of the market dwelling modelled are larger (3 and possible 4+ bedroom dwellings), which is not the priority for future dwellings in the Shire based on population projections and need;
- The amount of developable land dedicated to potentially affordable housing (12.5%) appears to be too low with regard to Council policy, and less than would be achieved under the *draft Affordable Housing Contribution Scheme*. This is important as most of the housing developed on site is unlikely to be affordable to very low, low or moderate income households, and nothing provided, even as 'diverse' housing through the market, will be affordable;
- The modelling in the *Affordable and Social Housing Development Analysis* is undertaken on each type of scenario separately, and does not consider the feasibility of different types of development across the site as a whole, for example, with a mix of these types of options. The modelling generally does not maximise uplift or profit. This means that potential opportunities for cross-subsidisation from high income housing to very low income housing and/or from higher income purchase to very low and low income rental are not considered, and that opportunities identified in the *draft Affordable Housing Contribution Scheme* may

⁸² *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*, Part 3: Caravan Parks

⁸³ Empirical study of caravan parks and MHEs in NSW in Stubbs, J. 2003. *Battle for the Right to the City: Opportunities for an Emancipatory Social Practice in a Polarising Urban Landscape* (Unpublished PhD Thesis, RMIT, School of Social Science and Town Planning).

⁸⁴ Economic modelling of affordability of caravan parks and MHEs in Stubbs, J. 2003. *Battle for the Right to the City: Opportunities for an Emancipatory Social Practice in a Polarising Urban Landscape* (Unpublished PhD Thesis, RMIT, School of Social Science and Town Planning).

be missed. This is the type of economic modelling with which we are familiar where such whole of site planning for affordable housing is being tested, and is discussed further below.

Example of possible alternative approaches are provided at **Section 7** below.

4.4 Feasibility of Affordable Housing Contribution

4.4.1 Preliminary Assessment of Feasibility

As important consideration arising from the above discussion on the ability of Lot 22 to deliver genuinely affordable housing is whether a 30% contribution can be achieved per Council's policy on developable land under the Planning Proposal, as well as reimbursing the section 94 fund for the loss of recreation land through rezoning and reclassification (see also **Section 6** below).

Lot 22 has an area of 29.18 ha.⁸⁵ The area proposed for rezoning is 17.5 ha.⁸⁶ We understand the developable area of Lot 22 is 7.725 ha,⁸⁷ with the balance of the lot retained as RE1 land and open space. This developable area is different to that in the masterplan area in the *Affordable and Social Housing Development Analysis*, but is used due to the status and date of preparation of the *Residential Strategy*.

The purchase of Lot 22 was settled on 7 October 2004 for the sum of \$896,500, with the purchase of the land carried out using section 94 funds. In addition to the purchase cost, there would have been other costs, such as sales tax (estimated at \$36,000)⁸⁸ and transactions costs.

In 2021 dollars, the expenditure from section 94 funds is estimated at \$1,364,000.⁸⁹ As 60%⁹⁰ of the land will be lost to recreational purposes through rezoning, the section 94 fund should be reimbursed by \$820,000.⁹¹

The table below shows that Council will make a substantial profit after allowing for the affordable housing contribution and for reimbursement of section 94 funds.

Gross income is estimated from data in the Affordable Contribution Scheme, scaling for the developable area and deducting the affordable housing contribution of 30%. Similarly, development costs are scaled from estimates in the *draft Affordable Housing Contribution Scheme*.

⁸⁵ EAC RedSquare Data Base.

⁸⁶ Planning Proposal for Lot 22 DP 1073165, Mullumbimby p 4.

⁸⁷ Byron Shire *Residential Strategy* p 95.

⁸⁸ <https://www.apps09.revenue.nsw.gov.au/erevenue/calculators/landsalesimple.php>

⁸⁹ $(\$896,500 + \$36,000 + \$896,500 * 1\%) * 117.2 \text{ (CPI Dec 2020)} / 80.9 \text{ (CPI Sep 2004)} = \$1,363,902.$

⁹⁰ $17.5 \text{ ha} / 29.18 \text{ ha} = 0.59997$

⁹¹ $\$1,364,000 * 0.6 = \$818,400.$

Table 4.5: Feasibility of Development and Affordable Housing Contribution

	Cost
Gross income (assuming no income from 30% of lots)	$\$46\text{--}\$58 \text{ million} * 0.7 * 7.725\text{ha}/10\text{ha} = \$24.9\text{--}\$31.4 \text{ million}$
Development Cost	$(\$11.8 \text{ million} * 7.725\text{ha}/10\text{ha} = \$9.1 \text{ million})$
Reimburse s94 fund	(\$0.8 million)
Profit to Council	\$15.0-\$21.5 million

Source: using data from draft Affordable Housing Contribution Scheme Section 5.2

4.4.2 Discussion

Deducting development costs and reimbursement of the section 94 fund from gross income gives profit to Council, demonstrating the **economic viability of the proposal, including a 30% affordable housing contribution rate** on a preliminary analysis. This would be around \$7.47 contribution of land at market value (or equivalent cash or dwelling contribution) as a deduction from the \$15-21.5 million estimated profit.

However, it is also understood that a revised flood study has been undertaken by Council in 2020,⁹² and that this may be reflected in the masterplan shown in the *Affordable and Social Housing Development Analysis Lot 22*. This most recent flood study now shows a high proportion of Lot 22 as being flood prone. It is not known whether this was considered in the *Residential Strategy*, but was not considered in the draft Affordable Housing Contribution Scheme, where modelling relied upon the previous (and at that time current) flood study.

As such, there may be some additional costs associated with development of this lot which *may* affect the calculation of land value uplift. This may need to be further considered in modelling for this site in determining an appropriate contribution rate.

4.5 Timing of the Planning Proposal

4.5.1 Overview

A further question relates to *whether the Affordable Housing Contribution Scheme and Residential Strategy should be finalised prior to submission of a new Planning Proposal for a Gateway determination*.

Issues related to the timing of the Planning Proposal raise three main considerations. These are related to the quality of the evidence available; the Planning Proposal's alignment with Council policy; and the risk associated with approval of the Planning Proposal outside of established statutory mechanisms.

⁹² WMA Water (September 2020) *North Byron Flood Plane Risk Management Plan*.

Our review on each of these considerations indicates that a Gateway determination for the Planning Proposal should not be issued prior to the issues identified being clarified or resolved.

These considerations are addressed in order below.

4.5.2 Evidence Base for the Planning Proposal

The first consideration is whether the quality of the evidence provided by these and other documents is adequate to support the Planning Proposal, and whether the Planning Proposal relies upon and/or reflects the evidence in these or other relevant analysis or studies?

As noted above, issues related to the timing of the Planning Proposal beg the question as to the quality of the existing evidence base provided by these and other documents reviewed. Our review indicates that **all documents require an improved evidence base** to support this (and any other) planning proposal, particularly if a planning proposal is to be approved outside of the accepted strategic planning and/or statutory framework. Although there is some reasonable guidance provided by these documents, issues identified above need to be addressed in order for these documents to provide sufficient guidance in both the preparation and the assessment of and planning proposal, or any other proposal that comes to Council purporting to create 'affordable housing'.

In the absence of a more robust and detailed evidence base, it is even more important that the Planning Proposal itself include a clear rationale for its approach to the creation of affordable housing, and a detailed statement of the nature and quantum of affordable housing that will be created to meet priority affordable housing need. This is not provided by the current Planning Proposal. Further, to the extent that documents reviewed do provide evidence of affordable housing need, this is not reflected in the Planning Proposal, and there is no citation of the evidence that does exist, as discussed in detail earlier.

4.5.3 Alignment with Council policy

The second consideration relates to the Planning Proposal's alignment with Council policy.

The approval of the Planning Proposal ahead of the SEPP 70 AHCS and in its current form is **not in line with Council's *Affordable Housing Contributions Policy* and related *Procedure***. As noted, although the policy is not legally binding, Council intends that all persons dealing with Council in relation to affordable housing contributions will follow this policy to the fullest extent possible.⁹³ The Policy commits (among other things) to:

- priorities identified in the *Residential Strategy* for affordable rental housing in the context of the inability of the market to provide affordable housing;
- seeking affordable housing contributions within the legal framework provided by the Act;
- favouring affordable housing contributions that improve the supply of smaller dwellings (1-2 bedroom) such as self-contained units in retirement villages, residential flat buildings and multi-dwelling housing suited to smaller households;

⁹³

- seeking the concurrent application of a SEPP 70 AHCS clause over land subject to an upzoning.

With regard to the contents of the Planning Proposal, it **does not reference or seek to give effect to existing policy** with regard to a 30% contribution on Council land, but is silent on this and other important matters. To the extent to which it may rely upon research such as that included in the UrbanXChange (2020) Analysis (for example, in relying upon an MHE to provide all of the affordable housing for very low and low income households on Lot 22), the Planning Proposal is likely to be counter to Council's AHCSPP, as well as Affordable Housing Principles, Criteria and Criteria for Location Fit and Mix. The reliance on market diversity to provide 'affordable housing' to other target groups is unlikely to be genuinely affordable.

These issues are discussed in detail above, and would need to be clarified and/or resolved prior to consideration of approval of the Planning Proposal, given the seriousness of issues for very low and low income renters in particular, and the quite unique opportunity provided by an affordable housing contribution on Council land.

4.5.4 Risk of Approval Outside Established Statutory Mechanisms

The final consideration is related to the risk associated with approval of the Planning Proposal outside of established statutory mechanisms for benefit capture, principally mandatory contributions under SEPP 70 and negotiated Planning Agreements under section 7.4 of the Act.

It is clear from the analysis in Section 5 below that, at this stage, a clause that amended the LEP in relation to the land and that enacted the appropriate rate determined in the *Affordable Housing Contribution Scheme* under SEPP 70 would provide far greater certainty with respect to the provision of affordable housing on Lot 22, and the quantum of affordable housing that would be expected, than the current proposal, which lacks any such detail or assurances. The need to amend the final *Affordable Housing Contribution Scheme* to reflect the 30% (or amended) contribution rate and more detailed housing need/dwelling typology is also noted.

It is further noted that the Planning Proposal lacks any mention of an alternative mechanism to SEPP 70 or a Planning Agreement as a method of securing affordable housing in perpetuity, including a land trust model.

As discussed in Section 5 below, it is *possible* that a land trust model *could* be developed to provide a mechanism to capture benefit and provide more certainty (for example, through **specifying the actual lots** and/or units or monetary contribution required through a Trust Deed), but at this stage, the model appears to be poorly articulated and understood in the Council documentation reviewed (see recommendations in Section 6 below).

In any case, a land trust may be preferred as a **'holding' entity rather than a value capture mechanism**,⁹⁴ as appears to be the case in other examples reviewed, and it is not clear why Council would use a land trust model for value capture rather than other methods of securing affordable

⁹⁴ As noted in Council's letter dated 16 April 2021, and cited in Section 6.2 below.

housing in perpetuity, such as a Planning Agreement, covenants against title and other mechanisms, outlined below.

It is recommended that legal advice be sought with regard to the operations of the Land Trust prior to finalising decisions on the model as this is matter that requires specialised legal assessment.

5 Relationship to Local Government Legislation

A further question is to *identify what local government legislation the Affordable Housing Contribution Scheme must address (including proposed Land Trust), under the Local Government Act 1993; and analyse impacts and appropriateness to the Residential Strategy, Affordable Housing Contribution Scheme and Planning Proposal*

In terms of the first part of the question, it is not apparent that any local government legislation must be addressed by the Affordable Housing Contribution Scheme, including any provisions of the *Local Government Act 1993*. The relevant legislation for the development of an Affordable Housing Contribution Scheme is found in section 7.32 and 7.33 of the *Environmental Planning and Assessment Act 1979 (NSW)*.

With regard to the development of the proposed land trust, the provisions of section 358 of the *Local Government Act 1993* require Council to obtain the consent of the Minister with respect to the formation or participation in the formation of a corporation or other entity. There are no constraints on the corporation or other entity, other than a need to demonstrate, to the satisfaction of the Minister, that the formation is in the public interest. A 'trust' is listed under section 358(4) as an 'entity' that requires such consent. It is also noted that Section 8A(1)(f) may also be relevant, that is, that Councils 'should manage land and other assets so that current and future local community needs can be met in affordable way'.

The consent required to form a trust would have little or no impact on the *Residential Strategy, Affordable Housing Contributions Scheme* and Planning Proposal, unless the Minister considered that the finalisation of such documents was necessary to demonstrate the public interest of the proposed land trust.

Essentially, this does not appear to have any relevance to Council's proposal to seek the issuing of a Gateway determination for the Planning Proposal in advance of the approval of the final Residential Strategy or *Affordable Housing Contribution Scheme*.

6 Issues Related to the Land Trust Model

6.1 Overview

Further questions are to:

- *Examine the process to create a Land Trust and determine whether it is a dependable mechanism to deliver affordable housing on Lot 22 if an Affordable Housing Contribution Scheme and Residential Strategy have not been finalised.*

These issues were further clarified at the meeting of 28 May 2021, particularly with regard to whether the model provides certainty with regard to securing the affordable housing contribution in perpetuity.

These issues are looked at below.

6.2 Governance Arrangements and other operational issues

The governance arrangements are set out in Council correspondence,⁹⁵ and are reported to be:

4.2 Land Trusts and Governance

A Land Trust is a form of shared ownership that can be applied to different property circumstances.

For a residential development, the land component would be owned by a not-for-profit legal entity (i.e. Council) with the actual buildings/homes owned (or leased long-term) by an individual household or a community housing provider/s.

*It is expected that over the next 12 – 18 months, Council land for affordable housing will be coming on line, including the Lot 22 site. Council needs a simple **means to hold this land in perpetuity** and to enable its use/development for ‘affordable’ housing [emphasis added].. To this end, Land trusts are proven to be inherently flexible and successful in providing housing for the target residents.*

⁹⁵ Council letter dated 16 April 2021

Administration

A Land Trust is an incorporated company with a constitution. It comprises:

- majority shareholder – Byron Shire Council
- managed by Chief Executive Officer or like
- oversight by a board.

*The principal purpose of such a trust is to **acquire land to provide charitable housing in perpetuity for people in need of charitable housing who live or work in the Shire.***

Stewardship and Ground Lease

- The land is held in the ownership of the land trust

Long term leases (i.e. 50 yrs) are provided to organisations - they lever funds, build housing and manage tenancies and rents. Organisations may include:

- Registered community housing providers
- Not-for-profit organisation

• Land held by the trust reverts back to Council when the trust ceases.

We are not lawyers and so professional legal advice should be sought to confirm the following.

Our understanding is that a trust is an obligation imposed on a person or other entity to hold property for the benefit of beneficiaries. The trust is governed by the trust deed. A trust deed is a legal document that sets out the rules for operating the trust. It includes such things as the fund's objectives, who can be a member and how the land should be used. The trust deed forms the trust's governing rules.⁹⁶

There appears to be some confusion in the understanding of "Land Trust".

It appears that what Council is describing as a Land Trust is not a trust, but rather a shared equity scheme where an entity holds the land in ownership and leases it to others with long term leases at pepper corn rents.⁹⁷ It is possible for the lessee to sell or to sublease the lease to others, although there may be a contractual relationship with the owner limiting to whom it can be sold and for how much. At the expiry of the lease the ownership entity resumes control of the land and anything that is permanently fixed to the land.

However, Council's research paper also recognises elsewhere that a trust is an obligation imposed on a trustee.⁹⁸

We have assumed that Council's proposal is to create an incorporated company that will become the trustee for certain land owned by Council. The trustee will manage the land in accordance with

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⁹⁷ Urban Xchange Echelon Planning (November 2019) Alternative Housing Models - Research Paper for Byron Shire Council, page 33 and Council letter dated 16 April 2021.

⁹⁸ Urban Xchange Echelon Planning (November 2019) Alternative Housing Models - Research Paper for Byron Shire Council, page 80.

the trust deed. The land will be managed for the charitable purpose of the provision of affordable housing in the Shire of Byron for eligible (low to moderate income) residents.⁹⁹ The intention is that this be done via a shared equity scheme.

6.3 Certainty in securing the affordable housing contribution in perpetuity

6.3.1 Issues related to the Land Trust

Our understanding is that, if the trust deed is appropriately worded, the trustee will only be able to manage the land in accordance with the trust deed. Consequently, if the deed said the land was to be used for the purpose of affordable housing, appropriately defined, then the trustee would have to manage the land so that it was used for the purposes of affordable housing. An appropriately worded deed would appear to provide certainty.

On preliminary review, important considerations with regard to certainty could include:

- Ability to amend the trust deed, noting that it is our understanding that if the trust deed does not have a power of amendment, then it cannot be amended;
- The land that is to be the subject of the trust deed would need to be defined **prior to the trust being established**, so that, until the trust deed is drawn up and appropriately ratified, there is no certainty with regard to the dedication of the land, at all or in perpetuity. To provide certainty, such a trust arrangement would need to be a **condition precedent** on the implementation of the Planning Proposal (that is, the Planning Proposal could only go ahead once an appropriate trust deed is in place). It may be that the entirety of the land would be entrusted, with the deed specifying, for example, that the land will be developed and subdivided, 70% of the lots sold off with funds from the sale going to Council, and 30% of lots to be used for the construction and provision of affordable housing in perpetuity; and
- The wording of the trust is important, and would need to be explicit with respect to usage. Use of a term such as “affordable housing” is vague, and it would be better if the deed said something like “50% of the land would be used to develop housing which would in turn be rented to households with a household income in the bottom 40% of household incomes for Rest NSW [very low and low income households], as determined from time to time by the Australian Bureau of Statistics”.

6.3.2 Issues related to the Shared Equity Model

With regard to a shared equity model, it can be difficult to ensure that the housing remains as affordable housing in perpetuity where the shared equity partner is a **private person** who builds or locates a house on the land. This is because the personal or household circumstance may change

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so that the household is no longer a low or moderate income household. We also note that the research report does not include very low income households in the purpose, and this is typically where the highest demand for affordable housing is found, as discussed above.

In certain circumstances, the lessee can also on-sell the lease and make a profit which further defeats the provision of affordable housing in perpetuity, although this could be controlled by the lease terms.

Where the shared equity partner is a **community housing provider**, they would let the property in accordance with their rent setting policy, noting that an approved policy forms part of the provider's registration compliance. The community housing provider could vary their rent setting policy, e.g. to have different classes of property, and rent the properties out for higher rents; however, this is controlled to some extent as maintenance of charitable status does not allow them to operate as a 'for profit' and limits rents to less than 80% of market rent, and their eligibility and rent setting policy under their registration. This could also be set out in the terms of the lease.

Further certainty could be obtained if the **holding entity in turn entered into a deed of trust with the housing provider** to ensure that the property is used to meet the purpose desired by Council; however, if this was the case, it would be more straightforward if the holding entity was a community housing provider, either existing or set up for this purpose.

6.4 Use of the model elsewhere

Council's research paper refers to the City of Port Phillip, Inner City Councils and Hobsons Bay in Melbourne who are using registered housing providers as trustees to manage property owned by Council for the purpose of Affordable Housing.¹⁰⁰ This appears to be somewhat different to the model proposed by Council, where it is proposed that the trustee would lease land to private household or a community housing provider, although this varies throughout the letter.¹⁰¹

We are not aware of a model similar to that proposed by Council. What is described internationally as a Community Land Trust appears to be more similar to a cooperative housing association in the Australian context, where land owned by the organisation is leased to members of the organisation.

6.5 Risk in retaining the contribution in perpetuity

As set out above, risks in the land trust model relate to amendment powers under the deed, the definition of the particular land in question and the wording of the deed. If these matters are appropriately addressed, then, for example, the risk of later sale of the land and use of the funds for general Council revenues can be mitigated.

¹⁰⁰ Urban Xchange Echelon Planning (November 2019) Alternative Housing Models - Research Paper for Byron Shire Council, page 76.

¹⁰¹ Council letter dated 16 April 2021

Risks in the shared equity model include change in circumstances of the owner and on-selling of the property, with a risk of the property no longer providing affordable accommodation, either by virtue of the cost or through recipients no longer being in the target group.

Alternative models could include giving the land to a Community Housing Provider (outright or for an agreed rate of return), or an Affordable Housing Contribution Scheme over the land.

The land could be given to a community housing provider with some certainty that it will continue to be used for the purpose of affordable housing, as the constitution and registration regime will provide some certainty as, for registration, mandatory arrangements must be in place to ensure in the event of wind-up and/or deregistration, surplus assets remaining after the payment of liabilities continue to be available for social housing such as by passing them to another registered housing provider with similar objectives. Our understanding is that if the land was given to a community housing provider, they could sell the land, but would be bound to use the proceeds of the sale for the provision of social and/or affordable housing. Further certainty could be achieved if the sale or deeding of the land to a community housing provider was appropriately covenanted, so that it must continue to be used for affordable housing, again noting that this would need to be clearly defined. It is noted that a range of Councils are using in partnership arrangement with their local community housing provider.

With regard to an Affordable Housing Contribution Scheme, it is our understanding that certainty in perpetuity is provided by *Environmental Planning and Assessment Act 1979*, relevant regulations, Ministerial direction and case law, and is an established mechanism that a range of Councils are using. We note that this basis of certainty could be changed at any time by Act of Parliament or by Ministerial fiat, so there is no guarantee that an Affordable Housing Contribution Scheme will retain the contribution in perpetuity; however any such decision appears unlikely and would be outside Council's decision making.

6.6 Relationship to other policies

Other council policies and plans of relevance are understood to be:

- Draft Affordable Housing Contribution Scheme;
- Policy Affordable Housing Contribution; and
- Procedure Affordable Housing Contribution.

Lot 22 is currently identified in the Draft Affordable Housing Contribution Scheme and a contribution rate of 20% is shown for land in and around Mullumbimby. It is our understanding that, if the land trust model does not go ahead, the Draft Affordable Housing Contribution Scheme will be amended to include an additional precinct containing Lot 22 with a contribution rate of 30%. If the land trust model goes ahead, Lot 22 will be removed from the Draft Affordable Housing Contribution Scheme.

The proposed land trust will operate alongside the draft Affordable Housing Contribution Scheme however the two will be independent. We understand that it is Council's preference that contributions under the scheme will be managed by the same incorporated company as will manage

Lot 22. It is our understanding that any contributions transferred by Council will require a separate deed for each occasion of land transfer.

The Affordable Housing Contribution Policy and Procedure relate to Planning Agreements and to the Affordable Housing Contribution Scheme. The proposed land trust will operate alongside the Policy and Procedure.

The Affordable Housing Contribution Procedure identifies the following target affordable housing contribution rate:¹⁰²

Mullumbimby Council land greenfield housing contribution areas: 30% of the additional lots or developable area whichever the greater that is to be used for residential uses.

6.7 Recommendations

Our recommendations are:

7. Council to clarify their proposed model.
8. Council seek expert legal advice to confirm or otherwise the understanding of trusts set out in the current report.
9. If a deed of trust with a trustee is proposed, that deed of trust should be entered into prior to approval of the planning proposal. It may be possible to incorporate the planning proposal as a condition precedent in the deed of trust.
10. The deed of trust should have limited opportunity for amendment.
11. The deed of trust should set out the land in question.
12. The deed of trust should be explicit with regard to the purpose the land is to be used for.

¹⁰² Byron Shire Council (2020) Procedure Affordable Housing Contribution page 1.

7 Affordable Housing Case Studies

Another question to be considered is:

- *Investigate and consider any relevant NSW local government case studies with affordable housing governance models that support and facilitate the delivery of affordable housing on council owned land; and*

As noted, we are not aware of any NSW Councils that have used a land trust in the manner in which it is described in Council documentation; and examples such as Port Phillip do not operate in the way Council has expressed.

Council's research paper refers to the City of Port Phillip, Inner City Councils and Hobsons Bay in Melbourne, who are in fact using registered housing providers as trustees to manage property owned by Council for the purpose of affordable housing.¹⁰³ This appears to be somewhat different to the model proposed by Council, where it is proposed that the trustee would 'lease land to an individual household or a community housing provider'.¹⁰⁴ We are not aware of a model similar to that proposed by Council. What is described internationally as a Community Land Trust appears to be more similar to a cooperative housing association in the Australian context, where land owned by the organisation is leased to members of the organisation.

Models with which we are familiar, and which are generally employed by Council (including using its own land in affordable rental housing partnerships, are included in **Attached A: Affordable Housing Case Studies**.

Two broad models are relevant – the first, where Council has gained land through a **value capture mechanism**; the second, where Council **dedicates or sells its own land** (generally at a discounted market value or equity share arrangement) to a community housing provider. To the extent to which Council is the recipient of a 'windfall profit' through the rezoning of its own land (and thus subject to an affordable housing contribution) or simply selling and/or developing its own land (and thus acting as a developer expecting a rate of return), each may be seen as relevant, and are looked at in turn below.

- The local government authority captures a **share of land value uplift** created through a rezoning or upzoning via a statutory mechanism (SEPP 70 AHCS or Planning Agreement under section 7.4 of the Act) and either:
 - Holds the land, units or cash contribution in a separate affordable housing trust fund/program with administrative and annual reporting requirements for the purpose of affordable housing in perpetuity. Council may act as sole developer and owner of the affordable rental housing created, and hold exclusive title to the land or affordable rental units created; or

¹⁰³ Urban Xchange Echelon Planning (November 2019) Alternative Housing Models - Research Paper for Byron Shire Council, page 76.

¹⁰⁴ Council letter dated 16 April 2021

- Uses the **land in an affordable housing partnership** with a community housing provider. The land may have a covenant against title as additional protection, or the registration (including 'wind up') requirements of the CHP may be viewed as sufficient guarantee of the land being used in perpetuity. Provision may also be put in place regarding the sale of this land or dwellings, provided the funds are used wholly for the purpose of affordable rental housing (e.g. reconfiguration of dwellings to meet changing demand). The CHP then leverages the land to maximise affordable rental housing, including through CRA maximisation, NHFIC, their own funds and/or borrowing capacity. The CHP is selected either on a preferred partner basis, where there is a long-term relationship with the Council; or on a case by case basis, generally through an EOI process, where the CHP is selected on the basis of their expertise, ability to maximise affordable rental housing on the site.

Councils may use the registered housing providers as trustees to manage property owned by Council for the purpose of affordable housing (for example, City of Port Phillip, Inner City Councils and Hobsons Bay in Melbourne examples above); may have joint ownership of affordable housing created under the partnership (proportional to their capital share/investment, as tenants in common, etc); or may hold separate title to a proportion of units created, depending on their capital share/investment.

We are not aware of any long-term lease arrangements that have been entered into by Council on land obtained through a value capture mechanism although NSW Land and Housing Corporation has provided for long-term leases with CHPs in the case of some stock transfers.

- Council **uses its own land** (not gained through a value capture mechanism) for affordable housing in perpetuity. Again, this can be done acting alone, or in partnership with a CHP, as shown in examples in Attachment A.
 - Where Council is acting alone to re/develop the land (City of Perth and North Sydney Council examples), the dwellings created are administered under its affordable housing program in accordance with a council policy, and transparent administrative and reporting requirements. CHPs are generally contracted to manage the dwellings, on a fee for service or other arrangement. Covenant can be placed against title to secure the housing in perpetuity. Otherwise, however, there is the risk that Council may decide to divest or sell these units at some time in the future, for example, where it faces financial difficulties; or
 - Council may give the land to a registered CHP at no or low cost; may enter into some form of shared title/ownership of land and dwellings created; or make the land available for a negotiated return on capital (e.g. agreed percentage, or in the form of title to, or the proceeds from, the sale of some of the affordable dwellings created to the value of the land, etc). Similar to the partnership arrangement discussed above, the CHP may be selected on the basis of preferred partner status or competitive tendering process; leveraging of resources would be expected to maximise affordable rental housing created; and there would be some protective mechanism to ensure the housing remains affordable in perpetuity.

Typically, modelling undertaken by JSA in relation to Council-owned land that has been made available for purpose of an affordable housing partnership is based on a multi-tenure approach to development where, for example, one-third of dwellings may be sold to fund the development; one-third are provided as affordable rental to low (and sometimes moderate) income renters at discount market rent; and one-third are rented to very low income households at no more than 30% of gross household income, some of which would be working and some on Centrelink payments. These tenure proportions vary depending on the amount of land, the market price of sale, and the relative density, etc, with quite often a lower amount of sale required in a high value area, and a higher proportion that can be cross-subsidised for very low and low income renters. Adding more efficient urban forms, such as New Generation Boarding Houses into the mix will often increase both the viability and the relative affordability of the project.

Depending on how the Council's land for affordable housing on Lot 22 is regarded (as an affordable housing 'contribution' due to the value uplift created through the planning process, or as land which Council is developing on a commercial basis), different models would apply, particularly with regard to whether the land is dedicated free of cost to a CHP partnership, or whether a rate of return on the land would be expected.

8 Alternative Options to Ensure Affordable Housing

The final issue from the scope of works is to:

- *Develop advice on proposed actions or alternative options to ensure that an affordable housing component is delivered on Lot 22.*

There are a number of options to ensure an affordable housing component is delivered on the Lot 22. These options include:

1. To enter into an appropriate Deed of Trust over the part of Lot 22 proposed for rezoning, taking into account recommendations set out above in relation to identification of lots for affordable housing at an appropriate rate of contribution, with an appropriate dwelling and tenure mix for very low and low income renters. The Deed of Trust would be a condition precedent on the approval of the Planning Proposal.
2. Finalise and implement an Affordable Housing Contribution Scheme which covers Lot 22, at an appropriate rate of contribution according to reassessment of feasibility, and with a strengthened evidence base regarding dwellings typology and priority target groups, and in accordance with Council's AHCPP.
3. Enter into a Planning Agreement under section 7.4 of the Act over the whole of Lot 22 to provide for the dedication of land or dwellings created on the land to be used free of cost for a public purpose (affordable housing) at an appropriate contributions rate, and in accordance with Council's AHCPP.
4. Sell Lot 22 on the private market subject to a competitive (EOI) process, with EOI requirements including dedication of an agreed quantum and type of dwellings, salt and peppering of these dwellings throughout the site, and indistinguishable from other dwellings on the site with regard to external finishing, and secured through a Planning Agreement, and/or supported by a site specific DCP. This may also require Council to do more robust whole of site feasibility analysis to have a preliminary understanding of what contribution would be appropriate, although this could be left to the market/ EOI process.
5. Building on Point 3 and 4 above, consideration could also be given to a market approach to delivery of dwellings through rezoning to R1 without the highly prescriptive lot mix in the Residential Strategy on Lot 22. Preliminary analysis by JSA indicates, as well as discussion in relation to Council's analysis at various points below, indicates that the proposed lot mix may not be the best way of providing dwelling diversity and affordability.

Preliminary Example

It is beyond the scope of this review to conduct whole of site modelling that would be required to examine this issue properly, including to account for the new flood study and cross-subsidisation between dwelling mixes and tenures, etc. However, a very preliminary analysis indicates that affordable housing dwelling yield may be higher and/or provided more in accordance with good practice through taking such a market approach in tandem with a site specific DCP, Planning Agreement or other set of requirements.

For example, accepting the 5.6 ha of developable land in the UrbanXChange (2020) Analysis (rather than the 7,725 ha in the Residential Strategy and Planning Proposal), then 30% of this would be 16,800 m² in land contribution. Assuming a 30% footprint would equate to 5,050 m². The construction of two storey apartments buildings (rather than townhouses) with a mix of studio and 1 bedroom (av of 50m²) and 2 bedroom apartments (70m²) would yield 168 apartments. If villas were assumed, this would yield 84 studio, 1 and 2 bedroom dwellings. Assuming that one-third were required to be sold to fund the sale, and that the remaining were provided as affordable (discount market) and social (tied to income) rental to very low and low income renters, this would potentially provide 112 apartments or 56 villas as affordable and social rental.

Ground floor apartments and villas could be adaptable, and would be scattered throughout the site in small clusters and/or salt and peppered in larger developments, and indistinguishable from other private market dwellings in accordance with Council policy and best practice in the provision of affordable housing.

This example is very basic and needs to be modelled in detail with varying assumptions and inputs, however, it provides a very preliminary worked example of a different type of approach with which JSA is familiar.

9 Justification for Reclassification of Land

9.1 Key Issues

A further question that was raised by DPIE in the project inception meeting relates to whether there is sufficient justification for the reclassification of the subject land from Community to Operational land. There are two parts to this question.

- First, is there sufficient recreational and open space land to meet current and projected demand?
- Secondly, can the legal requirements regarding its original purchase from s94 contributions be satisfied under the proposed arrangements and/or benefits of the proposed rezoning?

These are addressed below.

9.2 Background

Lot 22 was originally purchased by Council in 2004 from money collected under section 94 (now section 7.11) of the *Environmental Planning and Assessment Act 1979*. The purpose of the acquisition was to have land available for expansion of the adjoining Mullumbimby Recreation Ground Sportsfields.

Council states that the subject land is not a ‘public reserve’ under the *Local Government Act 1993*, noting that the Act defines a ‘park’ as ‘an area of open space used for recreation, not being bushland’. Although the land was purchased to be used for public recreation, Council reports that it has never been used for this purpose. Rather, it is fully fenced and has been used for the agistment of cattle by neighbouring land owners, and is not accessed regularly by the public.¹⁰⁵ It is also noted that Lot 22 is characterised as ‘Other open space - undeveloped’ in the *Byron Shire Open Space and Recreation Needs Assessment 2017-36*,¹⁰⁶ and its area is not included in the assessments of adequacy of facilities against relevant planning standards, discussed below.

Council also notes that other parts of the subject lot will remain as RE1 and/or in community use. Specifically, the Planning Proposal will leave the Mullumbimby Community Gardens and adjoining environmental areas (a remnant wetland) (7.75 ha) as well as the land on the eastern side of a railway line (3.5 ha) as RE1 zoned land (a total of 11.25 ha remaining as RE1).

The portion of the lot used for Mullumbimby Community Gardens has been licensed since 1 September 2014 under a five year agreement to Mullum SEED. It is reported that they will continue to operate the Community Garden on the land (presumably under a new agreement), and will remain Community Land.

¹⁰⁵ Planning Proposal, Appendix 4, p 2.

¹⁰⁶ Ross Planning (2018)

A 25-metre wide strip of land adjacent to Saltwater Creek (0.45 ha) will remain as a Deferred Matter and is subject to Byron LEP 1988.

9.3 Need for Public Open Space or Recreation Land

9.3.1 Review of Need and Related Matters

The first consideration is the relative need for and provision of open space in the locality.

*Byron Shire Open Space and Recreation Needs Assessment 2017-36*¹⁰⁷ provides a comprehensive technical assessment of the relative supply and demand for Parks and Open Space and other recreational needs, and also reports on results of extensive community consultation with user groups and a wide cross-section of the community.

The Needs Assessment notes that it is important to develop a range of open spaces that meet the needs of the community, including with respect to minimum standards for the provision of land for open space (2.87 ha/1,000 population), access to open space (within 400 metres walk from residential development), and an appropriate level of embellishment.

The overarching finding of the demand and gap analysis is that ‘there is currently an oversupply of parks and sports parks and aquatic facilities for the population of the Shire and the towns and hinterland’. The analysis of future demand, based on population growth projects, also indicates that ‘there will be an oversupply of aquatic facilities in the Shire and oversupply of parks and sports parks in all areas except Mullumbimby where there will be a very small deficit (0.15ha) predicted in 20 years’.¹⁰⁸

The Needs Assessment concludes that, ‘overall, Mullumbimby and adjoining communities are well supplied with open space for passive recreation.’ According to the demand and gap analysis of the current open space network, Mullumbimby and the Northern Hinterland planning area has a requirement of 5.0 ha for Parks and 5.0 ha for Sporting Parks based on relevant standards. This results in a surplus of 1.92 ha and 3.97 ha respectively for these uses over the next 1-10 years (a total surplus of 5.89 ha for the locality).¹⁰⁹

There is also projected to be surplus over the following 11-20 years of 1.12 ha for Parks and 3.17 ha for Sporting Parks in Mullumbimby. After 20+ years, there is projected to be a slight deficit in Parks of -0.15 ha, but a continued surplus for Sporting Parks of 1.90 ha for Mullumbimby and Northern Hinterland.¹¹⁰

Priorities identified for Mullumbimby at various points in the report include:

- Make active use of the rail corridor including connections between Ocean Shores, Mullumbimby, Byron Bay, Bangalow and Lismore given the importance of walking and cycling activities identified by the community during consultations;

¹⁰⁷ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*

¹⁰⁸ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*, p 16.

¹⁰⁹ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*, p 17.

¹¹⁰ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*, p 50.

- The importance of expanding the number of community gardens for both health benefits and social inclusion as the population ages, noting that the only two in the Shire are currently in Mullumbimby and Ocean Shores, with the former regarded as a ‘valuable community asset’ in the context of an aging population;¹¹¹
- The need for a new skate park in Byron Bay and improved facilities at Mullumbimby to improve youth activities and participation;
- The need to upgrade the aging or inadequate infrastructure of a range of parks and open space areas in Mullumbimby including the provision of disabled access and parking to the swimming pool (the only 50m pool in the Shire); and embellishments to and master planning of Heritage Park, as the main recreation park in the planning area, to bring it up to a village/town standard; and other simple upgrades to the play and picnic facilities at Apex Park and Swimming Pool Park.

Relevant to future plans for the Mullumbimby Recreation Ground Sportsfields, the Needs Assessment recommends that the facility be subject to a master plan to provide for relevant upgrades and potential reconfiguration of uses. It notes that the oval/field at the Sportsfield is not being formally used by a sporting code, so that consideration of alternatives (for example, maintaining the field/oval as an informal sports oval and developing the facility as a youth precinct), is warranted.

However, the Sportsfield is the regional hub for tennis and netball, although the car park is in poor condition, and too small to accommodate peak demand, whilst the public toilets and netball amenities building are ageing. Recommendations for upgrade include extension and upgrade of the netball car park, new amenities, canteen and storage facility to cater for the needs of netball and future users, the addition of two tennis courts, walking track with exercise equipment, and a BMX track.

9.3.2 Discussion

The proposal to sell part of the land proposed for rezoning to R1 and/or capture some of the uplift from its rezoning to reimburse Council’s funds collected for the purpose of recreation and open space under the former section 94 is **justified on the basis of the *Open Space and Recreation Needs Assessment***.

There will be a surplus of Parks and Sport Parks for the next 20 years, and a continued surplus of land for Sport Parks projected for more than 20 years. The oval/field at the Sportsfield is reported to be underutilised, and the original purpose for which the section 94 funds were collected (the extension of the Mullumbimby Recreation Ground Sportsfields) is no longer required.

Rather, the Assessment finds that priority needs are related to upgrade and embellishment of existing facilities that are in higher demand, and/or replacement or repurposing of aging or redundant facilities and amenities associated with existing designated parks and recreational facilities. The need to fund these embellishments, upgrades or repurposing would likely be a more

¹¹¹ Ross Planning (2018) *Byron Shire Open Space and Recreation Needs Assessment 2017-36*, p 47.

beneficial use of section 94 funds, and the ability to redirect these funds would to meet currently identified and changing need in the future.

9.4 Section 94 Considerations

A second question is whether any potential legal issues arise in relation the original purchase of the land for the expansion of Mullumbimby Recreation Ground Sportsfields from (former) section 94 contributions, in particular, the current proposal to sell some of the land and/or use the proceeds of uplift to fund upgrades and embellishments of existing open space and recreation facilities to meet current and projected need.

I have requested a copy of the relevant section 94 Contributions Plan (CP), noting that the Planning Proposal reports that Lot 22 was purchased in 2004. However, Council has at this stage provided JSA with a Plan dated 2005,¹¹² although a map dated 2001 has been provided.

As noted above, the purchase of Lot 22 was settled on 7 October 2004 for the sum of \$896,500. In 2021 dollars, this would be \$1,364,000.¹¹³ As 60%¹¹⁴ of the land will be lost to recreational purposes through rezoning and reclassification, the section 94 fund should be reimbursed by \$820,000.¹¹⁵ The analysis in Section 4.5 above indicates that this is likely to be feasible, with a 30% contribution to affordable housing still feasible including this reimbursement.

With regard to Open Space and Leisure Facilities, Council conducted an assessment of the existing level of open space and leisure facilities in the Shire and in each catchment and urban area based on an assessment of the demands created by the incoming population in relation to:

- Local open space (playgrounds, informal open space); and
- District/structured open space (sports grounds, basketball courts, tennis courts, environment open space such as major bushland, etc).

The philosophy adopted in the CP is to maintain the existing standard of open space and leisure facilities in the Shire, with an emphasis more on improvement and embellishment where local open space is well provided to increase carrying capacity, and provision of new open space where the need exists. It also notes that Council does not wish to acquire additional land beyond that identified in previous CP's (the 2001-2006 Plan), and that 'this will lead in some cases to a larger allocation of funds for embellishment rather than acquisition'.¹¹⁶ This may indicate a change in philosophy based on changing assessment of need or demand from earlier plans.

It is noted that the *Open Space Facilities Strategy: Works Program* in the 2005 CP relation to Mullumbimby is relatively non-specific with regard to the nature of works, facilities upgrades and acquisitions to which contributions will be applied, and only sets out (under '1993 Works Brought

¹¹² Byron Shire Council, Section 94 Development Contributions Plan 2005 (incorp. Amendment No. 1)

¹¹³ $(\$896,500 + \$36,000 + \$896,500 * 1\%) * 117.2 \text{ (CPI Dec 2020)} / 80.9 \text{ (CPI Sep 2004)} = \$1,363,902.$

¹¹⁴ $17.5 \text{ ha} / 29.18 \text{ ha} = 0.59997$

¹¹⁵ $\$1,364,000 * 0.6 = \$818,400.$

¹¹⁶ Byron Shire Council, Section 94 Development Contributions Plan 2005 (incorp. Amendment No. 1), p 34.

Forward') that \$1.433 million will be spent on Structured Open Space for 'Acquisition/Embellishments'. It is also noted that the subject lot is not shown as land to which the 2001-2006 CP applies for either embellishment or acquisition. JSA has been informed by Council that the request to purchase Lot 22 came from the owner, which Council subsequently did with developer contributions. However, this lot was not in the CP, and the actual acquisition area was in Tallowood.¹¹⁷

Moreover, there would appear to be nothing to constrain Council from selling part the proposed land to be rezoned within Lot 22 and/or from realising part of the land uplift to reimburse the section 94 fund in order to meet changing needs, provided the full amount of the contribution is used for embellishment of existing facilities, as proposed and in line with recommendations in Council's *Open Space and Recreation Needs Assessment*. The refund amount would need to be indexed to today's dollars and pro rata with regard to the proportion of Lot 22 to be rezoned (17.5 ha or 60% of the total area of Lot 22).

9.5 Public Benefit

Finally, given the classification of the subject land as Community Land, the funding source and purpose of its original acquisition, and its proposed reclassification to Operational Land, a question arises as to the public benefit that will be provided through the rezoning and reclassification.

It is also noted that a total of 11.25 ha remaining as RE1 land will be retained in the proposal, as well as 7(B) zoned land along Saltwater Creek. The location of the portion of land to be retained likely provides for opportunities for passive recreation adjacent to the Saltwater Creek. It is also positive that it is proposed that the Community Gardens are to be retained, although the expiry of the license agreement with SEED community group indicates that a new, long-term licence may need to be entered into to ensure the continuation of this important activity.

Council states that there will be significant benefit from 'increasing the opportunity for diverse and affordable residential development in response to documented demand, inadequate long-term land supplies and the objectives of the *Byron Residential Strategy*'.¹¹⁸ It also noted, in support of this, that the land is serviced, well-located and suited to residential development including a component of affordable housing.¹¹⁹

As noted, there is a public benefit from the use of reimbursed section 94 funds for priority works such as embellishment and upgrades to existing open space. There is the potential for significant public benefit related to the viability of providing a 30% contribution to affordable housing notwithstanding this reimbursement. The realisation and extent of this public benefit

¹¹⁷ Email correspondence, Byron Shire Council, 17 June 2021.

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will depend upon the extent to which genuinely affordable housing for priority target groups is achieved on rezoned land.