

### CM13.1. Regulatory Options for Restricted Premises in Albury and Lavington CBDs

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<b>CONFIDENTIAL</b>	No		
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#### Purpose of Report

This investigation report outlines the options available to introduce planning requirements and controls related to the development of Restricted Premises in the Albury LGA.

#### Background

Following Council's resolution to refuse consent to a Restricted Premises – Adult Entertainment Venue at 542 Olive Street, Albury – on the basis of adverse impact upon the amenity of the surrounding area and social considerations (including community safety) – a further resolution was carried at the next Council Meeting dated 12 August 2024, as follows:

*That a report be provided to a future Council meeting outlining the options available to introduce planning requirements and controls related to the development of Restricted Premises in the Albury LGA, especially the Albury and Lavington CBDs.*

A CEO note was also provided on the topic to assist Council with its considerations. It clarified relevant matters as follows:

#### Definition

**Restricted premises** means premises that, due to their nature, restrict access to patrons or customers over 18 years of age, and includes sex shops and similar premises, but does not include a pub, hotel or motel accommodation, home occupation (sex services) or sex services premises.

#### Permissibility

Albury and Lavington CBDs predominately consist of land zoned either E2 Commercial Centre or MU1 Mixed Use. The permissibility of Restricted Premises in both the E2 Commercial Centre Zone and the MU1 Mixed Use Zone is mandated to be included as 'Permitted with Consent'. Therefore, Council cannot list Restricted Premises as a prohibited use in either of these two zones.

### Further Investigations

... Council can investigate options to grant greater discretion in relation to the assessment and determination of any application for a Restricted Premises, particularly in the Albury or Lavington CBD. For example, options may include specific controls and planning requirements in either Albury Local Environmental Plan 2010 or Albury Development Control Plan 2010 which could provide further constraints when considerations before Council relate to a Restricted Premises, noting the impact on community members who frequent the Albury and Lavington CBDs.

The outcomes of further investigations are outlined and discussed in following sections of this report.

### **Strategic Alignment**

The following *Towards Albury 2050* strategic actions under the theme of 'A Growing Sustainable Economy', are relevant to this report:

- 1.1 *Albury is a liveable city supporting sustainable population growth through the provision of high quality infrastructure, industry-leading services and high levels of amenity.*
  - 1.1.1 *Responsibly provide residential and commercial development options for our growing city, whilst prioritising sustainability.*

### **Issues**

In New South Wales (NSW), Local Environmental Plans (LEPs) and Development Control Plans (DCPs) regulate and provide guidance on land use management, location, design and operations via development standards and controls.

An informal audit undertaken to date has revealed that most councils do not have specific development provisions in their LEPs or specific development controls relating to Restricted Premises in their DCPs. These Councils rely on general planning provisions (eg. relating to amenity) and the Development Assessment (DA) and determination process. However, an initial review identified some NSW Councils (approximately 15) do have specific planning provisions (eg. LEP or DCP controls) relating to Restricted Premises.

These Councils are primarily in metropolitan LGAs and generally seek to ensure that Restricted Premises (and sex services premises) minimise land use conflicts and adverse impacts on amenity and safety, and are not visually prominent from public places or other locations, especially areas regularly frequented by children.

The following sections of this report outline and discuss potential options available for further planning provisions relating to Restricted Premises.

### **Option 1 – LEP provisions (introduced by Council initiated Planning Proposal and LEP Amendment)**

LEPs can play a significant role in regulating land uses such as Restricted Premises through land use permissibility controls and development standards.

Council could opt to undertake and prepare a Council-initiated Planning Proposal that seeks to amend the Albury LEP 2010 to introduce either one or a combination of development provisions related to Restricted Premises.

The process of Planning Proposals and LEP Amendments is set out by the NSW LEP Plan Making Guidelines (August 2023) and is a lengthy process. Typical steps include:

- Prepare scoping proposal and submit to the Department.
- Refer scoping proposal to authorities and government agencies for comment (if required).
- Pre-lodgement meeting with the Department.
- Department completes initial assessment and issues written advice, including planning proposal requirements.
- Prepare planning proposal including technical studies.
- Prepare report to Council for formal consideration.
- Submit planning proposal to the Department for Gateway determination.
- Public exhibition in accordance with Gateway determination.
- Review of submissions, consideration of issues raised and whether the proposal should be amended.
- Review and amend the planning proposal (if required).
- Recommendation is prepared for decision by Council.
- Making of the LEP/Planning proposal referred to the Department to finalise the LEP.
- Prepare drafting instructions for the Parliamentary Counsel's Office (PCO) to draft the LEP.
- Make the LEP and request the Department arrange notification.

Whilst a Council-initiated Planning Proposal does not incur fees, there would be costs incurred in Council resources required in further investigating, preparing, exhibiting, reporting and implementing any Planning Policy amendments. Other City Planning projects may be delayed if resources are required to be dedicated to this specific Council-initiated Planning Proposal. There is currently a large number of strategic plans and strategies being prepared or commencing in the next 12-24 months (eg. Thurgoona Wirlinga Precinct Structure Plan review, Infrastructure Contributions Plan review, Local Strategic Planning Statement review and Land Use Strategy, Heritage Study, Housing Strategy Implementation) that would be impacted by a Council-initiated Planning Proposal.

Some options to amend the Albury LEP 2010 to review zoning or introduce development standards related to Restricted Premises include:

- 1A Land Use Zoning: defines where Restricted Premises can operate. This can limit their establishment to certain areas, reducing potential conflicts with residential zones or other sensitive land uses (already in place).

In an Albury LGA context, Albury and Lavington CBDs predominately consist of land zoned either E2 Commercial Centre or MU1 Mixed Use. The permissibility of Restricted Premises in both the E2 Commercial Centre Zone and the MU1 Mixed Use Zone is mandated (by the NSW Government) to be included as 'Permitted with Consent'. Therefore, Council cannot list Restricted Premises as a prohibited use in either of these two zones.

In addition to the above, Restricted Premises are also 'Permitted with Consent' in the E1 Local Centre Zone and the E4 General Industrial Zone under the Albury LEP 2010. These zones are not mandated by the NSW Government so could be reviewed. E1 Local Centre Zones generally apply to smaller retail centres such as East Albury, Thurgoona and West Albury. E4 General Industrial Zones apply to most Industrial areas, eg. South Albury, East Albury, surrounding the Airport, and Lavington (Dallinger Road/Catherine Crescent) but not NEXUS Industrial Precinct.

An initial review of other similar sized regional Councils (including Bathurst, Orange, Wagga Wagga, Tweed and Dubbo) indicates the current Albury LEP 2010 has similar land use permissions for Restricted Premises. The differences are that Orange and Bathurst prohibit Restricted Premises in the E1 Local Centre Zone, while Dubbo and Tweed prohibit Restricted Premises in the E4 General Industrial Zone.

1B Amenity and safety considerations: that specify that the consent authority must also take into account:

- the impact of the proposed development on character and amenity of the area;
- the impact of the proposed development on places of high pedestrian activity;
- the impact of the proposed development on land frequented by children for care, recreational or cultural purposes; and
- whether the appearance of the restricted premises is sufficiently discreet.

An initial audit indicates that some Councils (mostly metropolitan) have amenity provisions within their LEPs, these include:

- Blacktown City,
- Penrith City,
- Parramatta City,
- Marrickville (now part of Inner West Council), and
- Dubbo Regional Council.

Example clauses from Blacktown, Penrith, Parramatta, Marrickville (now part of Inner West Council) and Dubbo LEPs are provided in Attachment 1 for Council's information and reference.

Initial investigations of other similar sized regional Councils (including Bathurst, Orange, Wagga Wagga, Tweed and Dubbo) have indicated that, with the exception of Dubbo (listed above), no other Councils have any LEP provisions that are specific to Restricted Premises.

1C Location Restrictions: seek further consideration for Restricted Premises with respect to location inclusive of minimum distance restrictions from sensitive uses, such as schools, places of worship, and parks.

Amongst those Councils identified via initial audit as having LEP provisions relating to Restricted Premises, common provisions used, including locational criteria, stipulate that:

- Restricted Premises must not be located on land that adjoins or is directly adjacent (as specified) to sensitive receptors, listed as follows:
  - residential zones and/or development,
  - land that is used for the purposes of a centre-based child care facility,
  - a community facility,
  - an educational establishment,
  - a place of public worship,
  - a recreation area,
  - a railway station entrance,
  - a bus stop,
  - a taxi rank,
  - a similar public utility undertaking, or
  - land used already for the purposes of a Restricted Premises (to prevent clustering).
- a distance buffer (minimum separation) from those land uses (sensitive receptors) listed above.

Example clauses from Blacktown, Parramatta and Marrickville (now part of Inner West Council) LEPs that stipulate locational criteria (buffers) are provided in Attachment 1 for Council's information and reference.

Any proposed LEP Amendment (via Planning Proposal) will require NSW Department Planning, Housing and Infrastructure (DPHI) endorsement through the Gateway Determination process. During this Gateway process DPHI would undertake a review to determine the strategic and site-specific merits of a proposal and then determine whether the Planning Proposal should proceed.

Any LEP Amendment and associated development standards will need to demonstrate reasonableness and gain DPHI support to proceed. Locational criteria (that seek buffers to sensitive receptors) could be considered. However, an excessive buffer from sensitive receptors would be unlikely to receive DPHI support, if such buffers effectively prohibit Restricted Premises.

### **Option 2 – DCP controls (introduced by Council initiated DCP Amendment)**

DCPs are documents that support the implementation of LEP intent (via prescribed and numeric controls), and in so doing, can help manage land use and development.

Similar to the above, Council could choose to undertake and prepare a Council-initiated amendment to the Albury DCP 2010 to introduce either one or a combination of development controls.

Some options to amend the Albury DCP 2010 to introduce development controls related to Restricted Premises include:

- 2A Location Restrictions: similar to option 1C above, a location or buffer restriction could be introduced as DCP provision around sensitive uses, helping to avoid clustering and mitigate potential impacts on the community.

- 2B Development controls: DCP provision to help control elements such as the hours of operation, signage and external appearances of Restricted Premises to minimise impacts. Whilst such controls will regulate design and minimise impacts, they do not impact permissibility.

Of those Councils identified via initial audit as having DCP controls relating to Restricted Premises, the common planning provisions include design criteria related to access, operations, lighting and signage, street appearance and public safety (eg. lighting and security measures).

Dubbo Regional Council's development controls include a requirement that stipulates that certain listed development types (including Restricted Premises greater than 100m<sup>2</sup> gross floor area) will require a Social Impact Assessment (SIA). The purpose of this DCP control is to ensure that listed development (including Restricted Premises) is subject to a process of investigating the possible effects of the development proposal (via SIA) and to:

- *Assist in establishing the full facts about the development and to support decision making about the appropriateness of a development proposal,*
- *Minimise adverse impacts and maximise beneficial impacts of the development,*
- *Assess the potential impacts of the development on future generations,*
- *Inform the community and facilitate participation by the community in the planning and development assessment process,*
- *Facilitate the consideration of alternative development proposals; and*
- *Enhance existing data to inform the planning and development assessment process.*

- 2C Monitoring and Compliance: establish frameworks within the DCP for monitoring compliance with regulations and addressing violations, to help ensure that venues operate within the established guidelines.

Whilst NSW Government (DPHI) endorsement is not required for any DCP Amendment, the same considerations relating to the reasonableness of proposed development controls would apply as a matter of process and to limit any potential challenges via the Land and Environment Court.

It is also noted that in many cases, aspects related to 2B and 2C above could be considered under other general amenity and safety planning provisions in the DCP or form part of conditions of approval.

Investigation of other similar sized regional Councils (including Bathurst, Orange, Wagga Wagga, Tweed and Dubbo) indicates generally limited specific DCP provisions relating to Restricted Premises, with the exception of Wagga Wagga that has focused development controls relating to both Sex Service Premises and Restricted Premises.

Extract examples of development controls for Wagga Wagga, Waverley, Penrith and Sydney Councils are provided for information and reference (refer Attachment 2).

Whilst further detailed investigation will be required prior to drafting DCP controls relating to Restricted Premises, the following provisions are likely to be considered as part of any Council-initiated DCP Amendment process:

- Buffer requirements from sensitive receptors and design provisions that seek to ensure discrete access and presentation to public spaces (for example similar to Wagga Wagga provisions – refer Attachment 2).
- Social Impact Assessment (SIA) requirement for Restricted Premises to ensure appropriate consideration is given to social impacts as part of the application and assessment process (for example refer Dubbo Council provision in 2B above).

Amending a DCP is a more straight forward process than an LEP and does not require endorsement by the NSW Department of Planning, Housing and Infrastructure. Typical steps include:

- Drafting of the proposed amendment;
- Council resolution to exhibit;
- Public exhibition in accordance with our Community Participation Plan;
- Consideration of submissions; and finally
- Council resolution to adopt.

### **Option 3 (Hybrid) – LEP/DCP development standards (provisions)/controls (Council initiated)**

Similar to the above, Council could opt for a combination of Option 1 and 2 above. This would include undertaking and preparing a Council-initiated amendment to both the Albury LEP 2010 and Albury DCP 2010 that would operate in tandem with high level considerations addressed via the LEP and more detailed prescribed or numeric development controls considered via the DCP.

### **Option 4 (no change) – Development Application assessment process**

Another option is to remain with the existing planning provisions and noting the current processes in the Development Application (DA) assessment and determination in regulating Restricted Premises.

Examples of the planning mechanisms currently used to regulate these venues include:

- Community Consultation (via DA notification processes): community consultation processes undertaken when applications for Restricted Premises are made, allowing local residents to voice their concerns and inform decisions.
- Assessment considerations (via Section 4.15 of the *Environmental Planning & Assessment Act 1979 (EP&AA)*): outlines matters to be considered when determining a development application, including the compatibility of the development with the existing environment, public interest, and any relevant planning instruments.
- Conditions of Approval (via DA assessment/determination process): impose specific conditions on the design and/or operation of Restricted Premises, such as entry location, operating hours or security measures, to address community safety and amenity.

- Compliance and Enforcement (via Part 6 of the EP&AA): provides a framework for monitoring and enforcing compliance with regulations, allowing Councils to take action against non-compliant venues.

The DA assessment and determination processes provide Council with discretion in relation to the assessment and determination of any application for a Restricted Premises.

These discretionary powers allow Council to balance the interests of the community, the rights of business owners, and regulatory requirements when considering development applications.

As such Council may consider this option is adequate noting the limited frequency by which such development applications are received, the current planning provisions, and the existing powers available to Council in the DA assessment and determination process (including the consideration of public interest).

### **Risk**

- **Business Risk** – Whilst business risk is considered low, it is noted that any resource dedicated to this specific project will come at the expense of existing projects which is likely to result in delays to the existing works program for Council projects.
- **Corporate Risk** – The corporate risk is considered moderate in recognition of the significant public interest in a recent Development Application for a Restricted Premises in Olive Street. Any proposed amendments to existing planning policy that seek to regulate Restricted Premises will require further community engagement to inform decisions and manage corporate risk.
- **WHS and Public Risk** – There were no risks identified.
- **Environmental Risk** – There were no risks identified.
- **Delivery Program Risk** – Yes, see Business Risk (above) for impact on other projects.

### **Engagement**

Should Council opt to undertake further investigations in relation to Options 1, 2 or 3, any future engagement actions will be undertaken in accordance with a Stakeholder Engagement Plan, relevant planning legislation and guidelines, the AlburyCity Community Participation Plan and any conditions of a future Gateway Determination if LEP provisions are proposed.

### **Options**

As outlined earlier in this report the following options are provided in relation to potential planning requirements and controls specific to Restricted Premises in the Albury LGA:

1. Amend the Local Environment Plan 2010 (LEP) provisions (introduced by Council initiated Planning Proposal and LEP Amendment) - **Not Recommended.**

*That Council undertake and prepare a Council-initiated Planning Proposal that seeks to amend the Albury LEP 2010 to introduce either one or a combination of development provisions (eg. Options 1A, 1B and 1C as detailed in this report) relating to planning provisions for Restricted Premises in the Albury LGA.*

2. Amend Development Control Plan (DCP) controls (introduced by Council initiated DCP Amendment) – **Recommended.**

*That Council undertake and prepare a Council-initiated amendment to the Albury DCP 2010 to introduce either one or a combination of development controls (eg. Options 2A, 2B and 2C as detailed in this report) relating to planning provisions for Restricted Premises in the Albury LGA.*

3. (Hybrid) – Amend LEP/DCP development standards (provisions)/controls (Council initiated) – **Not Recommended.**

*That Council undertake and prepare a Council-initiated amendment to both the Albury LEP 2010 (eg. Options 1A, 1B and 1C as detailed in this report) and the Albury DCP 2010 (eg. Options 2A, 2B and 2C as detailed in this report) that would operate in tandem with high level considerations addressed via the LEP and more detailed prescribed or numeric development controls considered via the DCP relating to planning provisions for Restricted Premises in the Albury LGA.*

4. (No change) – Continue to rely on the Development Application assessment process – **Not Recommended.**

*That Council continues to rely on the existing planning provisions and current processes in the Development Application (DA) assessment and determination in relation to Restricted Premises.*

Should Council determine to progress with Option 1, 2 or 3, further investigations, additional comparative audit of other Councils and provision testing would be required prior to the preparation, public exhibition and consideration of feedback of any proposed additional planning provisions relating to Restricted Premises.

Based on the discussion earlier in this report, it is recommended that Council proceed with Option 2. While LEP (Option 1) are high-order planning provisions, the LEP amendment process can be protracted, resource intensive and requires concurrence from the NSW Government (DPHI). As such a DCP Amendment (Option 2) is considered the preferred option for providing local planning provision.

## **Conclusion**

This investigatory report provides an overview of the options available to introduce specific planning requirements related to Restricted Premises in the Albury LGA, beyond existing general planning provisions (eg. amenity and safety) and normal Development Application assessment and determination processes.

### **Recommendation**

That Council:

- a. receive and note this report, and
- b. undertake and prepare a Council-initiated amendment to the Albury Development Control Plan 2010 to introduce either one or a combination of development controls relating to planning provisions for Restricted Premises in the Albury LGA.

### **Attachments**

1. Example clauses from Blacktown, Penrith, Parramatta, Marrickville (now part of Inner West Council) and Dubbo planning instruments (LEPs) that relate to Restricted Premises (DOC24/274709).
2. Example DCP controls from Wagga Wagga - Waverley - Penrith - Sydney Councils that relate to Restricted Premises (DOC24/283835).