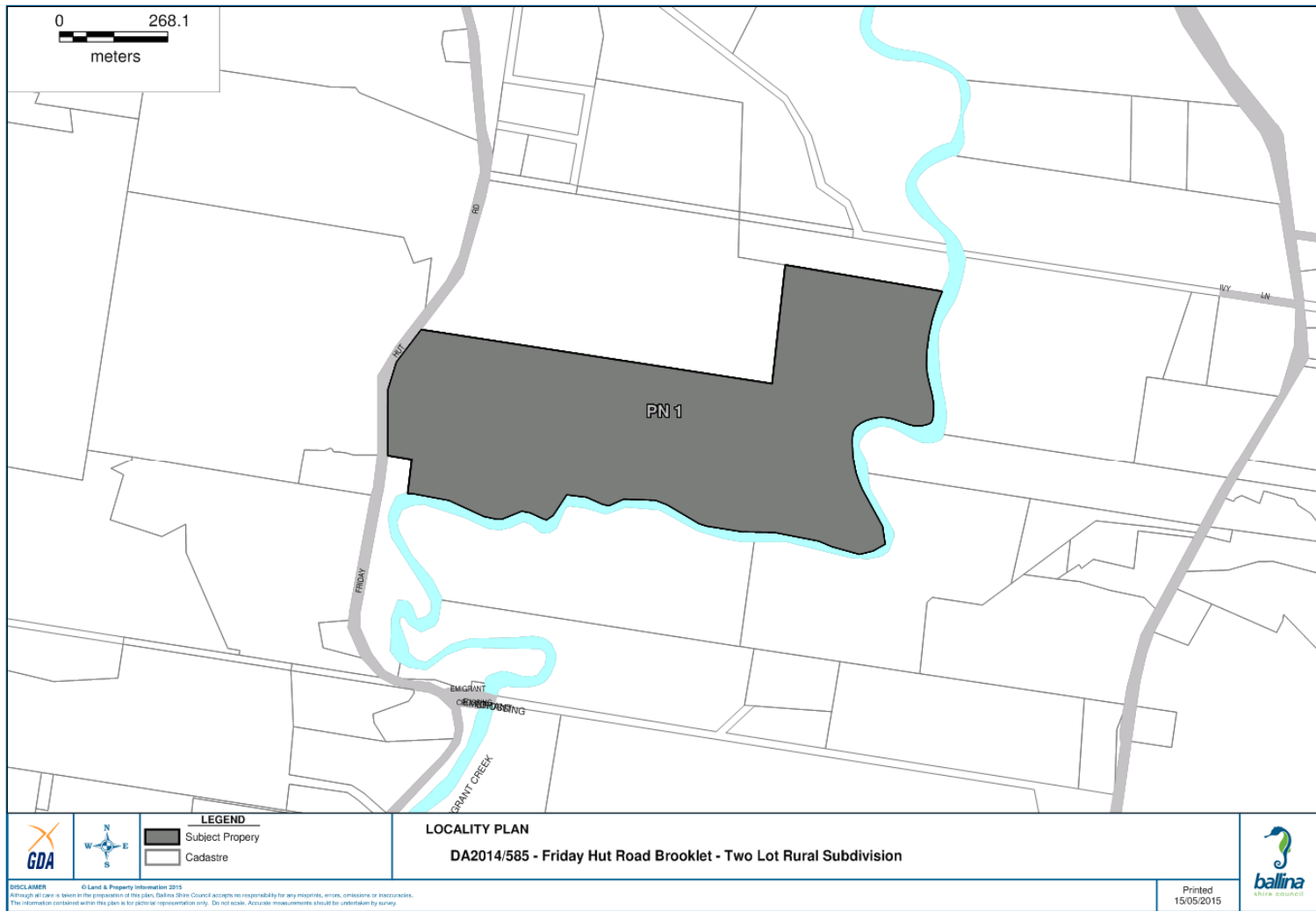
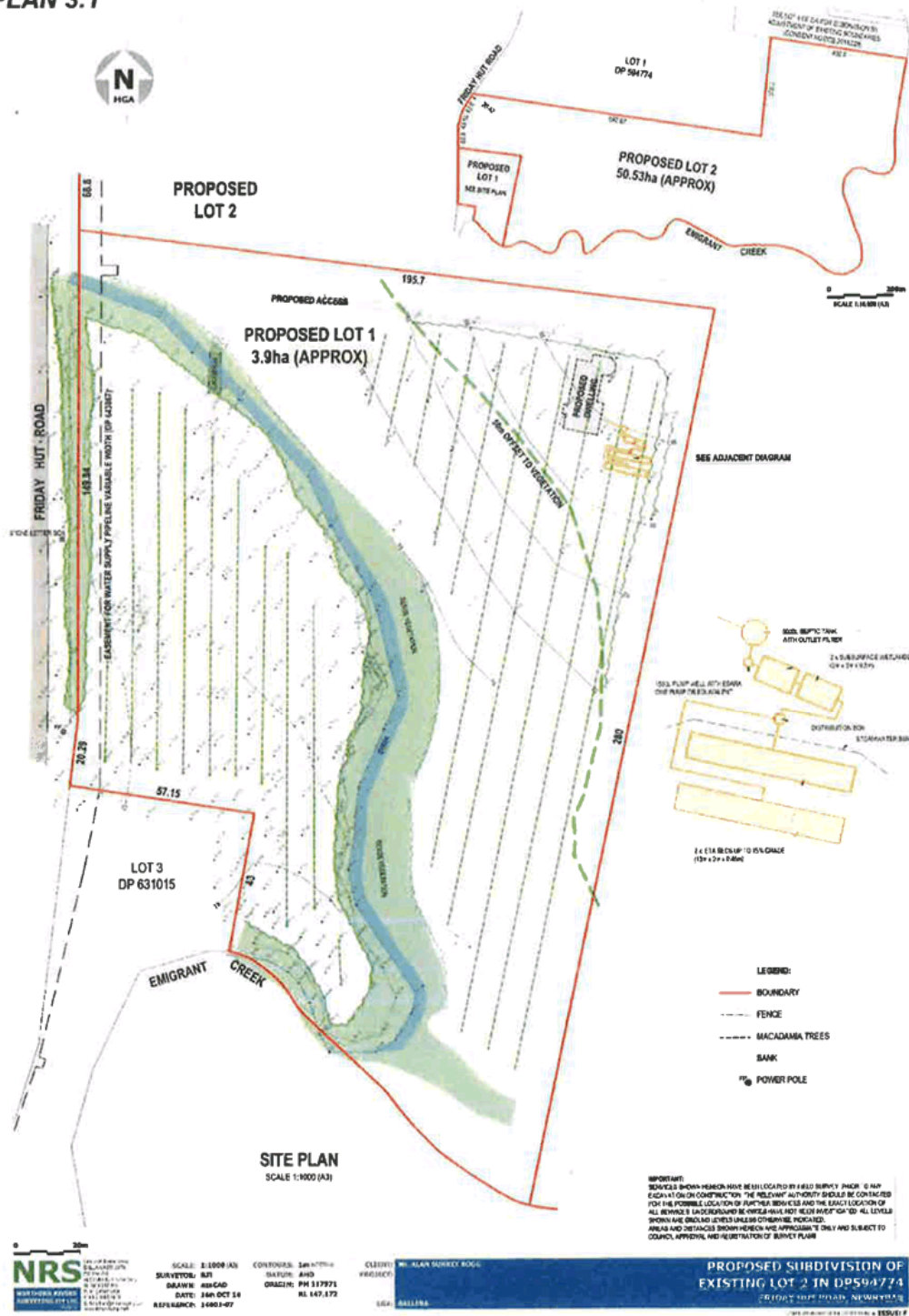


8.4 **DA 2014/585 - Friday Hut Road, Brooklet - Two Lot Subdivision.DOC**



LOT 2 OF DP 594774 – Friday Hut Road, Brooklet

PLAN 3.1



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4.1.3 DEEMED ENVIRONMENTAL PLANNING INSTRUMENTS

A review of the “Deemed” environmental planning instruments has found that there are none that currently apply to the subject land.

4.2 STATE ENVIRONMENTAL PLANNING POLICIES

A review of the relevant state environmental planning policies (SEPP) has been undertaken and a response to those applicable to this proposed development is provided below. It is important to note the references made in the Ballina LEP 2012 in regard to the application of the Ballina LEP 1987 and the SEPPs, in particular that SEPP 1 (Development Standards), SEPP (Rural Lands) 2008 (clause 9) and the North Coast Regional Environmental Plan do not apply to the new LEP 2012.

Notwithstanding that SEPP 1 states:

- *This policy prevails over any inconsistency between it and any other environmental planning instrument, whenever made.*

This proposal is made against the provisions of the Ballina LEP 1987 and the SEPP (Rural Lands); to which the latter, does not provide for the application of SEPP 1, (refer Clause 9 (5)).

The following is an assessment of the proposal against the provisions of the state planning policy SEPP (Rural Lands); a comparative assessment of zoning designations has been undertaken to address the matter of equivalent zones due mainly to the current designation of the subject site under the Ballina LEP 2012 as a “*Deferred Matter*”.

4.2.1 Comparative Assessment Equivalent Zones

Part 1 Clause 3 provides definitions on zoning to which the policy applies. The current zoning of the land subject to this application is 7C Environment Protection (Water Catchment), when considering the application of the SEPP (Rural Lands), a review has been undertaken on the most appropriate designation for the land in terms of equivalent zones.

For this we have looked to the future zoning arrangements listed within the Ballina LEP 2012 in order to align with the strategic intent of Council. The SEPP (Rural Lands) provides several variations on environmental protection zoning, listed below:

- Zone E1 National Parks and Nature Reserves,
- Zone E2 Environmental Conservation,
- Zone E3 Environmental Management,
- Zone E4 Environmental Living.

Council has translated only one environmental protection zone into the 2012 scheme, being, Zone “E1 National Park and Nature Reserves” there is inclusion of a waterway zone however this does not apply to the subject land.



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Figure 4.2 Zoning Map Ballina LEP 2012



The provisions within the 7C Environmental Protection (Water Catchment) Zone are described below with those of the RU1 Zone (see Table 4.1). Whilst the primary objective of the former zone is to preserve water catchment the secondary objectives have considerable alignment with those of the RU1 zone.

Whilst this may support the argument of equivalent zones as determined by the SEPP (Rural Lands) we should also pursue those arguments for similar positions established through judicial decisions. These decisions were based not only on the merits of the zoning objectives, also scrutiny was applied to which uses were permitted with and without consent of Council for each zone to provide a more thorough examination. In terms of the first criteria, i.e. the planning objectives listed provides a comparison of the two zones.

Table 4.1 Zone Objectives Comparison

| 7 C EP (Water Catchment) Zone | RU1 Zone |
|---|---|
| <i>(a) to encourage the productive use of land for agricultural purposes and to permit development which is ancillary to agricultural land uses, except for development which would conflict with the primary objective of the zone</i> | <ul style="list-style-type: none"> • To encourage sustainable primary industry production by maintaining and enhancing the natural resource base. • To encourage diversity in primary industry enterprises and systems appropriate for the area. • To minimise conflict between land uses within this zone and land uses within adjoining zones. |
| <i>(b) to ensure development of the land maintains the rural character of the locality, and</i> | <ul style="list-style-type: none"> • To maintain the rural, cultural and landscape character of the locality. • To enable development that is compatible with the rural and environmental nature of the land. |
| <i>(c) to ensure development of the land does not create unreasonable and uneconomic demands, or both, for the provision or extension of public amenities or services.</i> | <ul style="list-style-type: none"> • To ensure that there is not unreasonable or uneconomic demands for the provision of public infrastructure. |



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In this regard we should better understand Council's intent in applying and retaining the environmental protection designations in the rural areas through referencing reports including the Northern Rivers Farmland Project (NSW, DPI 2005), wherein a recommendation from the final report provided the following:

- *"Environmental protection zones are proposed to be retained where farmland is identified, as recommended in the 2004 Proposals Report".*

The report states further that:

- *"if the environmental protection zone is to be removed because of an absence of environmental values, the land should then be protected in an agricultural zone".*

As the subject site and surrounding region are predominantly given over to large scale horticultural production (macadamia farms) there is little or no environmental values (in terms of the natural landscape). Therefore, the most appropriate agricultural designation would appear to be the RU1 Zone which reflects the existing uses and covers land that surrounds the subject site; providing for the intent desired as part of the Northern Rivers Farmland Project report's final recommendations.

The comparative assessment indicates quite clearly the nexus with the rural and environmental protection zones. Considering the environmental protection zones have not been brought forward in the most current iteration of the planning scheme in Ballina Shire (2012), we can confidently draw the conclusion that the rural, agricultural values are to be retained in the "Deferred Matter" areas and the rural zoning designation is the most appropriate zone to encapsulate these.

4.2.2 SEPP (Rural Lands)

With this in mind we can further review the proposal against the requirements of the state planning policy SEPP (Rural Lands) as being the most appropriate regulatory mechanism. The following tables outline the proposal's impact on the rural planning and subdivision principles.

Table 4.3 SEPP (Rural Lands) Part 2 Clause 7

| Rural Planning Principles | |
|---|---|
| Principle | Response |
| (a) the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas | The intent of the proposal is to secure the approved dwelling within its own parcel and at the same time promote the values of the remaining lot, being the existing horticultural use. The farm is more readily accessible as a going concern to investors who wish to expand their holding as a key component of the rural industry. |
| (b) recognition of the importance of rural lands and agriculture and the changing nature of agriculture and of trends, demands and issues in agriculture in the area, region or State | The proposal satisfies this principle in recognising the demand for land owners in rural areas to have alternate succession plans and/or improved investment, and/or retirement options for managing their agricultural businesses. |



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The following table describes the proposal in terms of the subdivision principles applicable in the rural area, to which the subject land is considered to be located, as described in Clause 8 of the SEPP (Rural Lands).

Table 4.4 SEPP (Rural Lands) Part 3 Clause 8

| Rural Subdivision Principles | |
|---|---|
| Principle | Response |
| (a) the minimisation of rural land fragmentation | The proposal does not pose a contradiction to this principle, the proposed subdivision will allow for any future amalgamation of the rural (horticultural use) parcel, as there will be no dwelling entitlement for this allotment, encouraging the use strictly for agricultural / horticultural purposes. |
| (b) the minimisation of rural land use conflicts, particularly between residential land uses and other rural land uses | There is an approved dwelling house within the proposed Lot 1, and conflicts can be mitigated as established in the land use conflicts risk assessment. In addition, more control in regard to minimising conflicts (e.g. securing buffers, in distance and vegetation) can be provided through development conditions. |
| (c) the consideration of the nature of existing agricultural holdings and the existing and planned future supply of rural residential land when considering lot sizes for rural lands | Whilst this proposal does not look to influence rural residential development patterns, the siting of a residential dwelling within the proposed allotment (Lot 1) is in keeping with the existing rural character as the dwelling will be situated quite a distance from the adjacent road and will not, of itself, encourage rural residential development. |
| (d) the consideration of the natural and physical constraints and opportunities of land | The proposal seeks to remove from the productive parcel an area dissected by a creek with dense vegetation in the alignment (preventing use for commercial purposes). This parcel (proposed lot 1) resides in a largely unproductive area in terms of production per square metre, when compared with the remaining property. |
| (e) ensuring that planning for dwelling opportunities takes account of those constraints | The site has an approved dwelling that has been sited based on Council's advice as to the preferred location. |

This application will rely on provisions within Clause 9 of the SEPP (Rural Lands) to establish the consent parameters with regard to the proposed subdivision. Considerations in regard to equivalent zones, existing uses (including non-conforming uses) and the nature, character and designation of land surrounding the property have been discussed above.

In addressing the broader state planning matters we have determined that the land is appropriately designated for rural purposes in accordance with its current and historical lawful use.



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This clause provides for protective measures to be applied when considering development applications for subdivision of land proposed to be used for the purposes of a dwelling or the erection of a dwelling.

As this proposal is for the purposes of a subdivision of land to which an approval for a dwelling exists (proposed Lot 1), the following criteria taken from Clause 10 are required to be addressed:

- a) *the existing uses and approved uses of land in the vicinity of the development,*
- b) *whether or not the development is likely to have a significant impact on land uses that, in the opinion of the consent authority, are likely to be preferred and the predominant land uses in the vicinity of the development,*
- c) *whether or not the development is likely to be incompatible with a use referred to in paragraph (a) or (b),*
- d) *if the land is not situated within a rural residential zone, whether or not the development is likely to be incompatible with a use on land within an adjoining rural residential zone,*
- e) *any measures proposed by the applicant to avoid or minimise any incompatibility referred to in paragraph (c) or (d).*

With regard to the above criteria we have engaged a specialist consultant to establish the compatibility of the proposal to the surrounding land uses and physical environment. The findings of this report (Land Use Conflict Risk Assessment) have established that the proposal is a suitable development proposal within this rural area and poses no impacts to or conflicts with surrounding land uses. This report is attached at **Appendix A**.

4.3 LOCAL ENVIRONMENTAL PLANS

The Ballina LEP 1987 applies to the subject land. Clause 1.3 (1A) of the Ballina LEP 2012 ("*Land to which Plan applies*") states "*Despite sub-clause (1), this Plan does not apply to the land identified as "Deferred matter" on the Land Application Map*", therefore the provisions of the 1987 Plan and Development Control Plans will apply.

4.3.1 Ballina LEP 1987

The following objective has been taken from Clause 2 of the Ballina LEP 1987 and is applicable to the proposal in terms of the need to recognise the existing character of the subject land and the values placed on residential areas within the rural community. Sub Clause (2) states:

The particular aims of this plan are:

- *(d) to recognise and provide for the variety of agricultural, recreational, residential, natural and other land uses which form the rural environment of the Shire of Ballina*

As discussed, the land proposed for this subdivision application has prior approval for a dwelling, with the expectation that this will be constructed at some time in the near future. This proposal allows for the consolidation of land for agricultural purposes, and does not inhibit the land to be managed from within i.e. the use of the proposed lot 1 as the farm residence, it does provide, as well, scope for the land to be managed externally as part of a larger concern, either under lease or by tenure, thereby retaining the agricultural use and increasing the options for commercial viability.



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6th March 2015

Mr Rod Willis
Group Manager
Development and Environmental Health
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Dear Sir,

Re:- Response to Correspondence DA 2014/585 (Friday Hut Rd, Brooklet)

Thank you for your letter dated 19 February 2015, regarding the development application for subdivision of Lot 2 DP 594774 at Friday Hut Rd, Brooklet. We have addressed the issues in question in regard to the application, your request to the Department of Planning and Environment (the Department) for clarification and final response below. We respectfully request a meeting with Council should this response appear inadequate to the resolution of these matters.

In regard to the issue of the relevancy of the State Environmental Planning Policy (SEPP) No. 1 to the proposal before Council, we concur with the sentiments of the Department in that, SEPP 1 is not considered to be the most appropriate mechanism to address the matters under assessment.

In a recent Land and Environment Court Case, presented by Council in regard to a similar matter (S J Connelly CPP Pty Ltd v Byron Shire Council – NSWLEC 1237), the decision of the presiding judge asserted that *“the SEPP (Rural Lands) allows the excision of a smaller prime agricultural land lot, with a remaining residual lot being allowed, even if it is less than 20 ha. If it contains a dwelling as in the subject application, then a new smaller ‘rural/residential’ lot is created without the need of consideration of a SEPP 1 Objection”*.

We therefore agree with the Department’s opinion that SEPP 1 is not appropriate for the assessment of this proposal (DA 2014/585).

The matter of contention remaining, being the second point requested by Council for clarification from the Department, is in regard to equivalent zones. The request to the Department included the following paragraph:

- *“Additionally, in this application the proponent has maintained that the equivalent zone to 7(c) – Environmental Protection (Water Catchment Zone) in this circumstance is RU1 – Primary Production. Could you also confirm that in the Department’s opinion applications for subdivision under the Rural Lands SEPP located in 7(c) zones are not applicable as the zone is equivalent to an E3 zone which is not a prescribed rural zone required for the application of the SEPP?”*

The site, and a considerable portion of the region’s rural and primary production lands were included within the designation E3 Environmental Management Zone, under the Draft LEP 2011.

Following considerable engagement with rural communities this zone was removed and replaced with the designation Deferred Matter. This designation appears to remove the land from being within the environmental management designation and it would be quite contradictory to reinstate this designation as being the preferred equivalent to the 1987 designation, considering Council's action to remove it.

There are two (2) issues to consider first before we detail our assessment of what constitutes a similar zone. The first is that the SEPP (Rural Lands) has as its first two (2) aims, the following:

- *to facilitate the orderly and economic use and development of rural lands for rural and related purposes,*
- *to identify the Rural Planning Principles and the Rural Subdivision Principles so as to assist in the proper management, development and protection of rural lands for the purpose of promoting the social, economic and environmental welfare of the State,*

The interpretation envisages that this state government policy is directed entirely at rural land areas, and does not involve regulation of areas that would be considered for environmental protection. Regardless, Clause 3 states "*Environmental Protection Zone means any of the following or an equivalent land use zone*". If the pretext in regard to the Department's assessment of equivalent zones, remains, why are environmental protection zones included within the definitions of the SEPP (Rural Lands).

The second point relates to a more basic element of the assessment, in that, Council has asked for clarity (letter sent to the Department dated 6 Jan 2015) in regard to an E3 Environmental Management Zone, to which the Department has confirmed their previous advice (in relation to another matter). However no party has identified that the E3 Environmental Management Zone does not exist, either in the former and still active 1987 LEP or the more recent 2012 LEP. Though there are E3 zones in other planning instruments provided by other Councils in NSW, there are none that appear in the Ballina planning instruments. Therefore the question of which zone is an equivalent zone remains.

We contend therefore, that in the absence of the similar zone to that prescribed for the lot (i.e. E3 Zone) as suggested by Council and confirmed by the Department, the zone must fall back to the current land use and former rural zoning classification (i.e. Interim Development Order No 1 Shire of Tintenbar designation Rural).

Further to this issue, the Department's response to Council provided the following "*In relation to your request to confirm the equivalent zone for the 7(c) Environment Protection (Water Catchment Zone), clause 3(3) of the Rural Lands SEPP provides that it is the opinion of the consent authority which determines equivalence between a Standard Instrument LEP zone and a non-Standard LEP zone. As previously advised, the Department's Equivalent Zones tables for the NSW Housing Code indicate that the 7(c) zone in the Ballina LEP 1987 is equivalent to an E3 Environmental Management zone.*"

It should be noted that the term "*equivalent zone*", occurring within the NSW Housing Code, refers only to "*Exempt and Complying Development*" within the framework of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. This policy is not applicable to the proposal which is also not exempt or complying development.

It appears that this Code has been mentioned by the Department, due to the lack of a more appropriate comparison for equivalent zones, and in particular relating to Ballina Shire, not being elsewhere specifically defined. If we disregard the inappropriate comparison and context and focus on the Code itself, we find, of the several codes developed for Councils (none for Ballina), the majority do not specify that the E3 Environmental Management Zone has an equivalent zone.

There are a few that mention environmental protection, and in regard to the Campbelltown and Sutherland Shires, this also extends to rural (see the list taken from the NSW Housing Code below).

Campbelltown City Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | 1(d) Rural Future Urban, 7(d1) Environmental Protection, (d4) Environmental Protection, 7(d5) Environmental Protection, 7(d6) Environmental Protection |
|-------------------------------|--|

Sutherland Shire Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | 17 – Environmental Protection (Low Impact Rural) |
|-------------------------------|--|

Bankstown City Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

Blacktown City Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

Ku-ring-gai Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

Lithgow City Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

Penrith City Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

Woolhara Shire Council

| | |
|-------------------------------|--|
| E3 - Environmental Management | |
|-------------------------------|--|

The NSW Housing Code does not provide equivalent zone comparisons for Ballina Shire, with two (2) of those it does provide include reference to the rural zone. The Department's reliance on the NSW Housing Code for providing a fit and proper comparative assessment of equivalent zones is not appropriate for the proposal before Council. Nor is it a convincing argument that may provide certainty for decision making or establish support for, or grounds against the proposal, including as Council requests, refusal or withdrawal of the application.

Not only is the comparison not relevant in context (development assessment requirements), there is a specific state policy that directs assessment of this proposal, deeming the provisions of the Exempt and Complying Development SEPP as not being applicable in this case.

It is interesting to note though, the NSW Housing Code provisions for equivalent zones can be interpreted and determined by Councils as well as private certifiers. Should the Department wish to apply these provisions, we may, with the aid of a certifier interpret the equivalency zone issues without Council assistance, which may not be the intended purpose nor most favourable outcome for either Council or the Department.

In addition, the test of equivalency as asserted by the Department and Council, does not have a basis in law, in that, there is no legislative planning instrument currently in force in the Ballina Shire that includes an E3 Environmental Management Zone. Only one (1) E Zone mentioned in the SEPP (Rural Lands) has been adopted by the Ballina Shire Council, which is E1 National Parks and Nature Reserves; there is inclusion of a waterway zone however this does not apply to the subject land.

The land subject to this application does not fall within a national park or nature reserve. There appears no provisions available for the land to be zoned for environmental protection in the 2012 LEP (where it resides as a "Deferred Matter"). The application submitted to Council included a detailed examination of the equivalency test, referring to the case law precedent set and the corresponding basis for the judgement, i.e. assessment of allowable uses within each zone.

It should be stated quite strongly that if the region zoned for environmental protection were to be regulated under proper standards for environmental protection, any use that would impose contamination to land would be strictly prohibited and require detailed environmental impact assessment (EIA) and referral. The existing uses within the zones include for the most part activities that provide these same impacts, though no regulation is established to prohibit or require EIA.

If, as Council asserts, the lands are within water catchments and these catchments have contamination from approved land use activities under the provisions of the environmental protection zoning, what protections are being afforded to communities downstream or connected to the catchment for water supply.

To further support our assessment of equivalent zones, Clause 10 of the SEPP (Rural Lands) outlines the matters to be considered in determining development applications for rural subdivisions or rural dwellings, and in doing so firmly establishes the nexus with rural and environmental zones as the planning criteria is applied across these two land designations, i.e. as follows:

- ***This clause applies to land in a rural zone, a rural residential zone or an environment protection zone.***

The SEPP (Rural Lands) establishes the mechanism and intent for providing flexibility to land owners (in rural areas) to achieve the objectives for development. It is noted that though Council has adopted the provisions of this policy for the 2012 LEP, this flexibility has been removed by the inclusion of Clause 4.6 of the LEP. The principles stated in Clause 7 of the SEPP (rural Lands) still apply, to which Council must consider relevant in the assessment of this and similar development applications, i.e.:

- (d) in planning for rural lands, to balance the social, economic and environmental interests of the community,
- (f) the provision of opportunities for rural lifestyle, settlement and housing that contribute to the social and economic welfare of rural communities,

Such consideration must be given to these matters as Ballina remains a dedicated growth centre for the Northern Rivers region. These principles extend to developing the following strategic action, included within the Shire's Growth Management Strategy, under the heading of "*Shire-wide and other localities* to other rural areas:

- *Investigate the concept of permitting semi-rural allotments on the edges of strategic urban release areas.*
 - *The creation of small rural allotments on the edge of the residential footprint in new release areas may have advantages associated with providing the consolidation of environmental management areas into a small number of landholdings which enjoy dwelling entitlements, thus providing for land management and oversight. However this concept is to be considered further having regard for key issues including access and interface issues, appropriate allotment sizes and configuration and ownership arrangements."*

To conclude, we would appreciate either representation from Council or the Department to review the information contained in this response and provide written advice, where appropriate, to clarify the matters discussed. It is not our intention to obfuscate the issues under assessment further than their current state. We sincerely wish to have a frank and earnest discussion prior to Council deciding the application, should that be in the negative.

Sincerely



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Mr Steve Murray (Regional Director North Coast Region) – Department of Planning and Environment