

Our Ref: IR 1117236  
Your Ref:

16 December 2012

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**By email**

Dear

**Flat Rock reclassification proposal**

1. You have requested our advice about the Ballina Shire Council's officer recommendation not to reclassify Council owned land at Flat Rock, Ballina from operational to community which was discussed at the Council meeting on 27 October 2011. We regret that we were unable to provide this advice in time for the setting of the agenda for the following council meeting on 24 November 2011.

**Background**

2. You have provided us with a copy of a council report entitled Flat Rock Tent Park – Land Classification. The issue raised in that report is whether parts of the area described as Lot 59 DP 827785 should be retained as operational land “to ensure that the Flat Rock Tent Park can operate effectively as a Council business”.
3. We have viewed the aerial photograph referred to in the Council report, which shows a well vegetated area, with the area set apart for the tent park being lightly vegetated and containing several buildings and roads. Council notes that there is a small area of the lot on the western side of the coast road; and another small area adjacent to a recently constructed roundabout.
4. Council notes that the lot has high ecological and cultural heritage values. The park area comprises 2 out of 34.5 ha, has existed since the 1970s and has approval for 87 unpowered sites, containing an office, residence, kiosk and amenities.
5. Council points out that the land is subject to environmental zoning which limits the uses for which the land can be put but does not outlaw the use of the land for a tent park.
6. The first 5 paragraphs under the heading ‘Local Government Act provisions’ in Council’s report accurately summarises the distinction between operational and community land management and the manner in which any change of reclassification ought to occur.



7. The issues which Council's report raises as reasons to retain the operational classification of lot 59 are as follows:
- a. Council will retain maximum flexibility in terms of future management and use of the property. It is stated that:  

“This obviously does not mean that Council has an unfettered right to do as it pleases with the land, particularly having regard for its acknowledged environmental and cultural values”.
  - b. the Flat Rock Road which provides the linkage between the Coast Road, the Flat Rock Tent Park and the beach/carparking area is a private, not a public road.
  - c. Further, route selection, approval, detailed design and construction of the Coastal Shared Path within Lot 59 are yet to be finalised and should occur before reclassification.
  - d. A change of classification is not likely to have any environmental consequences due to the zoning.
  - e. A change of classification “would have the potential to diminish the land's value and restrict management options in the future. The long-term viability of the Flat Rock Tent Park may also be compromised”.
  - f. The need to put council resources into dedication of Flat Rock road and development of a plan of management

### **Relevance of the purpose of the land**

8. The purpose of the operational/community land distinction was set out in the second reading speech for the *Local Government Act 1993*. The Hon Mr Peacocke stated:

The new legislative scheme provides for community participation in the classification of public land, allowing the community to play a major role in councils' decision-making processes.

The emphasis is on moving away from the current practice of negative management of land through control and regulation by councils, and encouraging positive land management in accordance with objectives spelt out in plans of management. ...

Community land will ordinarily comprise public parks and reserves. Operational land will ordinarily comprise land held as a temporary asset or investment, or land which a council uses to carry out its functions, for example, the town hall or a works depot.

9. It is clear that the intention of the Act is not simply to provide unlimited flexibility for use of land by Council; if that were so, then the distinction between operational and community land would not have been introduced. It is likewise clear that the majority of lot 59 does not comprise land held as a temporary asset or investment, or that on which it carries out its functions.



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10. Accordingly, the prima facie position should be that lot 59 is classified as community land. In fact, it is somewhat surprising that this did not occur upon the introduction of the Local Government Act.

**Environmental management**

11. In our opinion, the approach of Council to this issue is misconceived. The environmental zoning of the land is not a matter that should divert the Council from reclassifying the land to community land. Rather, that zoning, in light of the values outlined by Council, lends weight to the fact that it should be managed as community land.
12. There were a number of court cases following on from the introduction of the concept of community land that touched on the relationship between the EPA Act and the public land provisions of the Local Government Act.
13. There is some limited interaction between the validity of a use and the classification or categorisation of public land. The Court of Appeal has observed that a the grant of a lease or licence for a particular use may be invalid if that use is “manifestly inconsistent” with the categorisation of land: see *Friends of Pryor Park Inc v Ryde City Council* (1996) 91 LGERA 302. This constraint potentially allows a further level of control above and beyond the LEP restrictions to be imposed on particularly sensitive, community land (that is, if the zoning and categorisation are inconsistent).
14. It is also the case that any use of public land, however classified or categorised, needs to comply with the zoning provisions of an LEP. That is, the classification of public land as community land and categorisation within that classification does not permit the land to be used otherwise than in accordance with the LEP.
15. As a response to the outcome of cases like *Friends of Pryor Park* and *Seaton & Ors v Mosman MC & Anor* [1998] NSWSC 75, amendments were made to the provisions dealing with community land, introducing the concept of core objectives and clarifying that in many cases inconsistency with core objectives would result in invalidity for any lease, licence or other estate purporting to be given (s.46(2)). In one sense, this was a clear recognition by the government that zoning provisions are not sufficient to provide for the appropriate management of public land.
16. Given that Council officers have recognised the high ecological and cultural significance of the site, this may be a situation where Council should exercise its discretion to make a pre-categorisation decision to declare part or all of the site as either land containing significant natural features or an area of cultural significance. There are specific requirements relating to the use and management of such areas. For example, they cannot be dealt with by way of a generic plan of management, but must have their own individual plans; and they are automatically categorised as natural area or areas of cultural significance, as relevant, with the relevant core objectives forming part of the plan of management.
17. It is suggested by the Department that the appropriate approach is for Council to resolve to declare land in this manner after preparation of a draft plan of management and community consultation. The practice note on public land management also provides guidance about



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carrying out consultation with Aboriginal people before making a decision whether to declare that land is an area of cultural significance.<sup>1</sup>

### *Categorisation and restricting future options*

18. As discussed above, Council has recognised that the land has high ecological and cultural significance. If the land were reclassified as community land, this analysis would need to be reflected in the categorisation of the land. Clearly, it would be appropriate to categorise the main part of lot 59 as 'natural area', with a subcategory such as bushland, and other parts as areas of cultural significance.
19. As long as the areas do not overlap, it is, however, open for Council to categorise different parts of lot 59 in different ways to accommodate the different aspects and uses of the land.<sup>2</sup> Accordingly, the area used for the tent park may be more appropriately categorised as general community use.
20. To an extent, it is true that reclassification of Flat Rock as community land would restrict management options in the future. This is partly because the categorisation of land is supposed to reflect the land use and/or the physical characteristics of the land. Its intention is to focus Council on the essential nature of the land and how that may best be managed.
21. In our view, it is inappropriate for Council to effectively avoid its responsibilities towards land that is clearly of a 'community' nature *because* those responsibilities will involve closer and more consistent management of the land. The management of community land requires the development of a Plan of Management which can then be used for closer and more effective management of the land and its important features. In contrast, there is no obligation to prepare a Plan of Management or carry out any management operations on operational land.
22. On one view, an approach which avoids the community land responsibilities in order to maintain 'flexibility' may be considered inconsistent with the council charter responsibilities:
  - to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development; and
  - to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible

### **Constraints on the land**

23. It is true to say that the main effect of classification of land is the effect on its alienation and use. Until a Plan of Management is completed, the Act requires that there be no change in the use of the land (s.44). However, this would not itself prevent the continuing use of the tent park.
24. In addition, the land can only be used in accordance with the Plan of Management, which itself must provide for any proposed leases, licences or other estates over the land, and ensure that such uses and management of the land is consistent with its core objectives.

<sup>1</sup> Public Land Management, Revised Practice Note 2000, Department of Local Government, section 4.8.

<sup>2</sup> See Public Land Management, Revised Practice Note 2000, Department of Local Government, p.11



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25. In this regard, the categorisation of the land as a natural area, bushland might affect any future desire by Council to expand the tent park into the bushland area, as this may be inconsistent with its core objectives. However, this means that Council would need to be transparent and accountable about any plans to do this at the time it is preparing a Plan of Management, and would have to re-categorise the land and prepare a new Plan of Management with its attendant community consultation process if there were any future change to those plans. Being accountable and transparent in the way in which it deals with public assets is again consistent with council's charter.
26. The two potential difficulties for Council relate to the roads (private road and coastal path) and continuing use of the tent park on community land.
27. With respect to the tent park, s.47D of the Act provides that the exclusive occupation or exclusive use by any person of community land is prohibited unless it is under a lease, licence or other estate granted under the Act. Such leases and licences can only be granted for a maximum of 21 years before they must be renegotiated. We do not see that this is an insuperable difficulty, and we are not instructed that persons would be likely to object to the continuation of the tent park in its current form.
28. It does not appear to us that a tent park would be inconsistent with the core objectives of land categorized as general community use, being:
- “to promote, encourage and provide for the use of the land, and to provide facilities on the land, to meet the current and future needs of the local community and of the wider public:
- (a) in relation to public recreation and the physical, cultural, social and intellectual welfare or development of individual members of the public, and
  - (b) in relation to purposes for which a lease, licence or other estate may be granted in respect of the land (other than the provision of public utilities and works associated with or ancillary to public utilities).”(s.36I)
29. Thus, we do not see that the viability of the tent park is threatened in any way whatsoever by reclassification of the land, as long as it is appropriately categorised and the Plan of Management effectively covers the need for such a tent park.
30. As to the roads, with respect to the coastal path, we consider that this would fall within the terms of s.47F of the Act. That provision prevents dedication of community land as a public road unless:
- (a) the road is necessary to facilitate enjoyment of the area of community land on which the road is to be constructed or of any facility on that land, and
  - (b) the council has considered means of access other than public road access to facilitate that enjoyment, and
  - (c) there is a plan of management applying only to the land concerned and provision of the public road is expressly authorised in the plan of management.
31. It is clear that the coastal path would fall within this definition, as long as the plan of management authorises the coastal path. However, we recognise the need to clarify the exact route of the pathway before preparing such a Plan of Management. We do not consider that the reclassification would need to await such a decision. However, once reclassification had occurred, Council would have to wait until the pathway route was clear before finalising the Plan



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of Management. This could create some delay in creating the pathway, if the process did not run efficiently.

32. In relation to the private road, it is acknowledged that this may give rise to some complexity in terms of how to manage it. We are not instructed about the exact nature of this road, but if it is a private road because it was left in a subdivision registered before 1920, the most appropriate approach would appear to be by way of formal dedication of the road as a public road under s.16 of the *Roads Act 1993*. It is noted that the owner can object to such a course of action. We would suggest that this action be taken before reclassification of the land.

### **Financial issues**

33. The final set of issues raised by Council relate to land values and lack of budgeted council resources.
34. It is true that reclassification of land will potentially diminish its value. This is because the market value is based on the highest and best use of the land, and this takes into account the statutory restrictions imposed by the classification of land as community land.<sup>3</sup> However, in this case, we consider that such diminution would be limited, given that the zoning of the land for environmental protection limits its use considerably in any event.
35. With respect to the lack of budgeted resources, this is a matter that Council does need to properly consider. However, in our view, the fact that amendments might need to be made to the Council's budget is not an excuse to avoid proper and appropriate management of the land that is entrusted to it as public land.

### **Conclusion**

36. We consider that a number of the bases for the council staff recommendation not to proceed with reclassification of land are misconceived. In particular:
- a. Environmental zoning is not a sufficient constraint on use of the land and proper management of public land with high ecological significance requires classification of that land as community land;
  - b. It is against the purpose of the LG Act and Council's charter for council to avoid its management responsibilities with respect to land that should be community land, on the basis that it wants to "retain flexibility".
  - c. Reclassification of the land would not affect the viability of the tent park and could incorporate the proposed coast path.
37. However, we recognise that there may be some appropriate delay to reclassification while Council deals with the outstanding issue of the private road, most likely by dedication of the road as a public road.

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<sup>3</sup> *Hornsby Shire Council v Roads and Traffic Authority* (1998) 100 LGERA 105; *Roads and Traffic Authority v Hurstville City Council* [2001] NSWCA 11; (2001) 112 LGERA 223



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**13.7 Notice of Motion - Reclassification of Flat Rock Land.DOC**

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38. If you have any questions in relation to this advice, or would like further information, please contact the writer on 6621 1112 or by email to [ian.ratcliff@edo.org.au](mailto:ian.ratcliff@edo.org.au).

Yours sincerely

**Environmental Defender's Office (Northern Rivers) Ltd**



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Senior Solicitor



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