



Mr P Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Our ref: PP_2013_BALLI_008_00 (13/14468)
Your ref: 13/50416

Dear Mr Hickey

Planning proposal to amend Ballina Local Environmental Plan 2012

I am writing in response to Council's letter dated 27 August 2013 requesting a Gateway determination under section 56 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") in respect of the planning proposal to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land.

As delegate of the Minister for Planning and Infrastructure, I have now determined the planning proposal should proceed subject to the conditions in the attached Gateway determination.


Council is reminded of its obligations for undertaking a public hearing in relation to the proposed reclassification of land in accordance with the department's practice note *PN09-003, Classification and reclassification of public land through a local environmental plan*.

The amending Local Environmental Plan (LEP) is to be finalised within 9 months of the week following the date of the Gateway determination. Council should aim to commence the exhibition of the planning proposal as soon as possible. Council's request for the department to draft and finalise the LEP should be made 6 weeks prior to the projected publication date.

The State Government is committed to reducing the time taken to complete LEPs by tailoring the steps in the process to the complexity of the proposal, and by providing clear and publicly available justification for each plan at an early stage. In order to meet these commitments, the Minister may take action under section 54(2)(d) of the EP&A Act if the time frames outlined in this determination are not met.

Should you have any queries in regard to this matter, please contact Jon Stone of the regional office of the department on 02 67101 9688.

Yours sincerely

 6 September 2013
Stephen Murray
Regional Director
Northern Region
Planning Operations and Regional Delivery

Northern Region 49 Victoria St Grafton NSW 2460 Locked Bag 9022 Grafton NSW 2460
Telephone: (02) 6641 6600 Facsimile (02) 6641 6601 Website planning.nsw.gov.au



Gateway Determination

Planning proposal (Department Ref: PP_2013_BALLI_008_00): to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land.

I, the Regional Director, Northern Region at the Department of Planning and Infrastructure as delegate of the Minister for Planning and Infrastructure, have determined under section 56(2) of the EP&A Act that an amendment to the Ballina Local Environmental Plan (LEP) 2012 to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land should proceed subject to the following conditions:

1. Community consultation is required under sections 56(2)(c) and 57 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") as follows:
 - (a) the planning proposal must be made publicly available for a minimum of **28 days**;
 - (b) the relevant planning authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in section 5.5.2 of *A Guide to Preparing LEPs (Department of Planning & Infrastructure 2013)*; and
 - (c) the public exhibition must include details of the trusts to be discharged in relation to the reclassification of the land.
2. No consultation is required with public authorities under section 56(2)(d) of the EP&A Act.
3. A public hearing is not required to be held into the matter by any person or body under section 56(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
4. The timeframe for completing the LEP is to be **9 months** from the week following the date of the Gateway determination.

Dated *6th* day of *September* 2013.


Stephen Murray
Regional Director
Northern Region
Planning Operations and Regional Delivery
Department of Planning and Infrastructure

Delegate of the Minister for Planning and
Infrastructure

BSCPP 13/008 – Reclassification of Council Owned Waterways

Submissions Summary

At its Ordinary Meeting held on 26 August 2013, the Council resolved to proceed with a proposal to reclassify the land comprising the Ballina Quays and Banyanda waterways from community land to operational land. The reason for the proposal is to enable private waterway structures, such as pontoons, boat ramps and jetties, to remain in the waterways and be consistent with the requirements of the Local Government Act 1993 (LGA).

The planning proposal for the reclassification of the waterways was placed on public exhibition from 9 October to 11 November 2013 in accordance with statutory requirements. Following the public exhibition period, a public hearing was held on 11 December 2013. The hearing was independently facilitated by Mike Svikis of Mike Svikis Planning.

During the public exhibition period, 77 submissions were received all objecting to the proposal. Nine of the submissions received object to the proposal but do not provide any reasons or justification for objection. One of the submissions includes a petition containing the names of six landowners.

The issues raised in the submissions have been assessed and are discussed further below. Two recurrent themes are consistently raised in the submissions, these being the possibility of Council charging fees for the placement of the structures and concerns relating to the routine maintenance of the waterways. While these issues are not directly related to the reclassification proposal, it is evident that there is concern in the community that the proposal may relate to those issues.

The need for the change of classification is also a key theme within the feedback received.

Impacts on land value

Several of the submissions raise concerns that if the land containing the waterways is reclassified it will affect land values. This may be linked to concerns relating to the impacts of possible future charges for the structures and/or the perception of changes to the management and maintenance of the canals.

As detailed in previous reporting, the reclassification proposal is considered necessary to appropriately address Council's legal obligations in managing the waterways. It is also considered necessary in enabling existing and future structures to be placed in the waterways in a manner consistent with the provisions of the *Local Government Act 1993*. As such, it is therefore considered that the reclassification will have a negligible, if any, effect on land values and will potentially maintain or improve values through conforming with the *Local Government Act 1993* in relation to the placement of private waterway structures within the public land.

Proposal is revenue raising – residents already pay higher rates – double dipping

While the reclassification proposal will not result in additional charges or fees being levied on adjoining residents, there is concern raised in the majority of submissions received that the Council will use this opportunity to commence such charging. This option was briefly addressed in the previous reporting on the matter, suggesting that the Council could consider such an option in the future if it chooses.

It is important to note that regardless of the classification of the land, the Council could opt to apply fees and charges for the structures. It is further noted that an audit of past approval

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documents issued by Council for the placement of the structures reveals that a standard notification was typically issued in association with approvals advising of the possible levying of annual fees for the structures.

Many of the submissions also raise that the owners of land adjoining the waterway ('wet' lots) pay higher rates than those that don't ('dry' lots). Based on this, it is argued that the possibility of additional fees and charges is unfair as these landowners are already paying additional rates. A comparison of two random lots in Dolphin Drive reveals the following:

	Unimproved capital value	Annual rates
Wet lot	\$408,000	\$2420.00
Dry lot	\$220,000	\$2119.32

While this level of difference is acknowledged, it is not considered pertinent to the reclassification proposal as it is not seeking the application of new or additional fees and charges. It is also important to acknowledge that the higher rates applicable to 'wet lots' is due to the landowner enjoying a higher land value. There are no special rates applied to properties fronting Council owned waterways.

The concerns in some submissions relating to possible fees and charges also raise criticism of potential 'double dipping'. This argument is linked to the additional rates paid by landowners as well as other fees and charges levied by the Council in relation to obtaining approval for the structures. The submitters in this case feel that charging additional fees would be unfair in addition to those already charged and levied.

While the concerns raised by submitters in relation to fees and charges may be valid, they are not considered relevant to the reclassification proposal. There is no direct proposal to charge any additional fees on the owners of waterway structures as a result of the reclassification proposal. It has been indicated in previous reporting that the Council may choose to consider the application of fees and charges for the structures in the future. If this occurs it would be subject to a separate assessment and consultation process.

Reclassification will remove obligations for maintenance - obligation shifted to landowners

Similar to the issues raised in relation to additional charges, there is nothing in the proposal to reclassify the land from community land to operational land that seeks to remove or reduce the Council's previous commitments to the maintenance and management of the waterways as publicly accessible community assets. It should be noted that the change in classification is essentially a legal mechanism to enable the ongoing and future use of the waterways for private structures. There is nothing proposed or likely to result from the reclassification that will change or have the effect of changing the Council's obligations towards the physical maintenance of the canals and waterways as public assets. Council's annual budget provides an allocation of funding towards canal maintenance.

Waterway structures have always been given Council permission

In auditing the existing structures within the waterways, it has been found that generally all structures have been given Council approval. Since changes to land use planning regulations in 1999, all new structures have been required to have development consent (DA approval) which has been generally granted. The proposed reclassification will not result in any changes to the current approval requirements for the structures under planning legislation.

The key issue is that these approvals remain inconsistent with the provisions of the *Local Government Act* 1993 which, following amendments in 1998, place restrictions on the

exclusive use of public land limiting it to certain specified uses in accordance with a lease, licence or other estate. The exclusive private use of public land for waterway structures in the case of Ballina Quays canals and Banyanda Lake is inconsistent with these provisions.

Reclassification allows opportunity to charge fees for licencing, maintenance etc.

As previously stated, the Council currently has the ability to impose additional fees for licencing the structures or the maintenance of the canals under existing statutory provisions. The reclassification of the land does not affect this or change the ability to levy such charges.

Reclassification is not for the good of the community

To enable the ongoing and future use of the waterways and to enable those landowners who benefit from waterfront access to place private structures within the waterway it is necessary to reclassify the land. The reclassification has been determined, based on staff assessment, legal advice and liaison with the Office of Local Government, to be necessary to allow the structures to be consistent with the provisions of the *Local Government Act 1993*. As such, the proposed reclassification has been considered necessary to enable the ongoing and future use of the waterways as is currently expected by the community.

The reclassification also assists with the address of potential risk management issues associated with the identified inconsistency with the *Local Government Act 1993* in the interests of the wider Ballina Shire community.

Failure to see any justification - no benefit to proposal - every change means rise in cost of living

A number of submissions object to the proposal based on the concepts above and raise the principle of "if it 'aint broke, why fix it". As stated above, the reason for the reclassification is to enable the ongoing and future use of the waterways by adjoining landowners for private structures. The situation is that Council's research, along with legal advice it has obtained, indicates there is presently an issue in terms of conformity with the *Local Government Act 1993*. The proposed solution, being a change to the classification, is relatively simple and does not alter existing or future maintenance regimes for the waterways. It is considered necessary to reclassify the land to enable the placement of the structures and to ensure their consistency with the provisions of the *Local Government Act 1993*. Based on this position, without the reclassification, Council may not be able to authorise future new and/or replacement structures. Consideration may also need to be given to removal of existing structures.

Reclassification will affect resale, land value, amenity and is not in interests of landholders

Some submissions have raised concerns that the reclassification will affect the value of properties, make it difficult to sell them and will impact on the amenity of the area. In considering this, it is important to note that the canal is publicly owned land and the reclassification is simply a legal classification applied to Council owned land.

It is not the intention of the proposal to reclassify the land to make any changes to the current situation in relation to how the waterways are managed, used by the public and accessed by adjoining owners. As previously stated, Council can and may choose to in the future, seek to apply a reasonable fee charging regime for the placement of the structures. This would be the subject of a separate proposal that would need to be considered and assessed on its own merits.

There are no components of the reclassification proposal that are intended to have any effects on land or amenity values. The reclassification is to enable the ongoing and future use of the waterways for private structures that is consistent with the provisions of the *Local Government Act 1993*. Indeed it could be argued that not correcting the inconsistency with the *Local Government Act 1993* will have a greater impact in terms of limitations on private structures on the publicly owned land.

Can only support proposal if erosion prevention is undertaken

It is due to the physical nature of the canals, based on their engineering design, that they require frequent maintenance to maintain a navigable waterway and beach profile. Council has systems and procedures in place to ensure the canals are maintained on a regular basis. The reclassification does not and will not affect the maintenance regime for the canals.

Reclassification will restrict access by general public – will restrict residential use

The proposed reclassification of Council owned waterways is intended to enable the ongoing and future placement of private structures within the waterway that is consistent with the provisions of the *Local Government Act 1993*. The proposal will not result in any changes to the current arrangements for both public and private access to the waterways. Following any reclassification, the waterways will continue to be managed and maintained as publicly accessible open space.

Creates opportunity to contract maintenance and management

The reclassification proposal does not relate to maintenance and does not seek to change Council's existing or future maintenance commitments. The classification of the land does not affect or require changes to maintenance requirements and does not affect any contracting arrangements for maintenance works should they be considered. It is Council's intent to retain and manage the waterways as public open space.

Plan of management provides for structures, issues can be addressed in PoM

While the Ballina Quays waterways are addressed in the Council's generic plan of management for community land, the use of the land, while it remains classified as community land, remains inconsistent with the provisions of the *Local Government Act 1993* based on the advice available to Council. The Act contains provisions that specify a plan of management does not apply where the use and occupation of the land is inconsistent with the requirements of the Act.

Structures not unlawful, have been installed with approval

It is acknowledged that the majority of the existing structures have been given Council approval, including new installations in recent years having development consent under planning legislation. While the structures may have approval and consent, their presence within the waterway and on Council owned community land remains inconsistent with the provisions of the *Local Government Act 1993*.

Reclassification is first step in move to charge licence fees as per Crown waterways

As previously stated, the reason for the proposed reclassification is to ensure existing and future waterway structures can be located on Council owned land consistent with the provisions of the *Local Government Act 1993*.

Council may choose to exercise the option of charging administrative fees and charges in relation to the placement of structures within the waterways in the future regardless of the

classification. This would be the subject of a separate proposal that would be considered on its merit with appropriate consultation. It is possible the system of management and charging for private waterway structures by the Crown in waterways under its administration would be considered for guidance in the development of such a proposal.

Landowners were assured when buying land there would never be charges

A review of the history of the development of the waterways does not reveal any official position of the Council in relation to whether or not fees and charges would be levied on adjoining owners with structures in the waterways. Council's previous approval documents for various individual structures typically include an advisory notation indicating that Council may implement annual charges for the structures should it determine.

Older residents cannot afford to pay extra charges

The proposal to reclassify the land does not include any provision for the levying of extra charges. Any future charges for the placement of waterway structures on/over Council owned land would be subject to a separate proposal and considered on merit.

Canals are not artificial waterways and form part of Richmond River

In a legal and land tenure sense, the subject waterways (Ballina Quays and Banyanda Lake) are artificial waterways that were constructed as part of residential developments. The waterways themselves are integrated with the wider Richmond River estuary. The land parcels containing the bed of the waterways is owned as freehold land by Ballina Shire Council. This is different to natural waterways where the waterway bed comes under the jurisdiction of the Crown.

Why has this come up now when the law has been in place for 20 years?

It is acknowledged that the provisions of the Local Government Act 1993 have been in place for 20 years. It is also acknowledged that a number of amendments have been made to this legislation in that time. Council has recently undertaken a review of its management provisions for public land in the Shire. The issue with the occupation of the waterways by private structures is a result of this review. It is important to note that Council has an obligation to ensure the occupation and use of land under its ownership and control is undertaken lawfully and in consistency with statutory provisions. Lack of consistency and compliance in the past should not be a reason for not taking corrective action.

Placement of pontoons/structures is not exclusive use and does not restrict access

The private structures within the waterway and on/over Council owned land comprise an exclusive use to the benefit of a private party. It is the general intention of adjoining landowners when placing such structures that they are retained for their own private use and not available to the general public. The identified need for the reclassification is to enable these private structures to remain on public land in a way that is consistent with the provisions of the *Local Government Act 1993*. In essence, the requirements for the reclassification are a result of those areas of the waterway occupied by the private structures.

Liability – there have been no complaints or incidents, if they have DA approval, Council is not responsible, liability is responsibility of owners

Council has a duty of care to address its legal liabilities and obligations in managing the use of public land. These obligations include ensuring use and occupation of public land is consistent with statutory requirements. While the private structures are partially the responsibility of the relevant owner, they are also partially the responsibility of the Council

where they are located on/over Council owned land. The absence of incidents, complaints or claim should not be a reason for not addressing the identified risk management issues.

Section 31(3) of Local Government Act 1993 prohibits reclassification

Section 31 only applies to land acquired by a council after 1 July 1993. It provides for a council to allocate a classification to land based on its intended purpose and applies to land acquisitions following the commencement of the current Act. In the case of the land containing the subject waterways, Council owned the land prior to the commencement of the Act provisions on 1 July 1993.

There is no similar proposal for other waterways (Endeavour, Prospect etc.)

As previously reported, the Council owns a number of artificial waterways. Like the Ballina Quays and Banyanda Lake, some of these are classified as community land. There are no proposals to reclassify these parcels because they are not directly adjoined by private waterfront properties and do not contain private waterway structures. Endeavour Lake adjacent to the Southern Cross industrial area is owned by Council and is already classified as operational land.

Further legal advice (third party) should be obtained prior to proceeding

Council has acted on the legal advice obtained from its insurer's solicitor in commencing the process to reclassify the land as operational land. Further to this, it is also based on similar actions in other jurisdictions as well as with concurrence from the Department of Premier & Cabinet, Division of Local Government (now the Office of Local Government). Notwithstanding the above, it is recommended in the public hearing report facilitated by Mike Svikis that a third party legal advice be obtained. The option of obtaining further legal advice is canvassed in the report to the Council associated with this submissions summary.

Occupation can be granted by lease, licence or other estate (being, for eg, da consent)

It is correct that under the *Local Government Act 1993* exclusive occupation of community land may be granted by a lease, licence or other estate. This occupation, however, must be consistent with the requirements in section 46 of the *Local Government Act 1993* which contains restrictions on the issue of leases, licences or other estates granted for the exclusive use of community land. Private uses for waterway structures on community land do not comply with the provisions of section 46 of the *Local Government Act 1993*.

Advice received is from solicitors from insurers and is biased towards insurers view

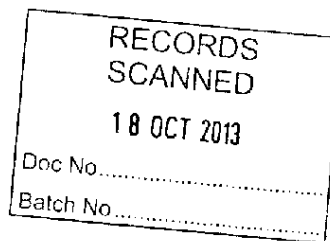
It may be observed that the legal advice from Council's solicitor is biased. It should be noted that the legal advice is only one component of a suite of technical views on the matter including the technical assessment of Council staff, action taken in other jurisdictions in relation to similar matters and correspondence received from the Department of Premier and Cabinet, Division of Local Government (now the Office of Local Government) concurring with Council's course of action. Notwithstanding the above, it is recommended in the public hearing report facilitated by Mike Svikis that a third party legal advice be obtained. As outlined above, the option of obtaining further legal advice is canvassed in the report to the Council associated with this submissions summary.



Department of Primary Industries

Our Ref: TRIM13/3534, OUT13/31144

The General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478



17 October 2013

Attention: Mr Lachlan Sims

Dear Mr Sims

Re: Planning Proposal BSCPP 13/008
Reclassification of Council Owned Waterways, Ballina LGA

Thank you for your letter of 10 October 2013 requesting a response from Fisheries NSW, a division within the Department of Primary Industries on Council's proposal to amend the Ballina Local Environmental Plan 2012 to reclassify the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) as operational land.

Fisheries NSW is responsible for ensuring that fish stocks are conserved and that there is "no net loss" of key fish habitats upon which they depend. To achieve this, the Aquatic Habitat Protection Unit assesses activities under Part 5 of the Environmental Planning and Assessment Act 1979 in accordance with the objectives of the Fisheries Management Act 1994, the aquatic habitat protection and threatened species conservation provisions in Parts 7 and 7A of the Act, and the associated and the Policy and Guidelines for Fish Habitat Conservation and Management (2013 Update). In addition Fisheries NSW is responsible for ensuring the sustainable management of commercial, quality recreational fishing and viable aquaculture within NSW.

Fisheries NSW have no objection to the proposed amendment. Canal estate waters are not considered as key fish habitat within the Policy and Guidelines for Fish Habitat Conservation and Management (2013 Update) and referral to Fisheries NSW of proposals in these waters is no longer required. It is also noted that the proposed amendment will not impact on access for recreational fishers.

If you have any further enquiries please contact me on (02) 6626 1397.

Yours sincerely

Patrick Dwyer
Fisheries Conservation Manager (North)

Division of Primary Industries, Fisheries NSW
1243 Bruxner HWY WOLLONGBAR NSW 2477
Tel: 02 6626 1397 Fax: 02 6626 1377 ABN 72 189 919 072 www.dpi.nsw.gov.au



Transport
Roads & Maritime
Services

8 November 2013

General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Attention: Lachlan Sims



Dear Sir/Madam,

RE: Planning Proposal BSCPP 13/008 – Reclassification of Council Owned Waterways

Thank you for your letter dated 10 October 2013 in which you sought Roads and Maritime Service's (RMS) comments on the abovementioned proposal. RMS have reviewed the proposal and raises no objection to the proposed reclassification of the two waterways.

Notwithstanding the above, RMS in its role as a maritime safety regulator encourages Council to advise them of any future development applications in the waterways within Ballina LGA. Enquiries should be directed to:

Sonia McKay
Principal Manager North
Boating Operations Branch
Roads and Maritime Services
PO Box 653 Newcastle NSW 2300

If you require any further information, please do not hesitate to contact the undersigned on 9563 8853 or scott.schimanski@rms.nsw.gov.au.

Yours sincerely,

Scott Schimanski
A/ Senior Planner
Planning, Environment, & Spatial Information Branch

Roads & Maritime Services


City Office | Level 11, 207 Kent Street, Sydney NSW 2000 | **P:** 02 9563 8511 | **F:** 02 9364 2321
Rozelle Office | James Craig Road, Rozelle NSW 2039 | **P:** 02 9563 8511 | **F:** 02 9563 8530
Postal Address | Locked Bag 5100, Camperdown NSW 1450 | **Web** | www.maritime.nsw.gov.au



Report on a Public Hearing into the Proposed Reclassification of Council Land being the Ballina Quays Canals, Banyanda Lake and Land at Old Bagotville Road, Wardell

**Lot 63 DP 263861 and Lot 132 DP 775228, Ballina Quays Canals (BSCPP13/008);
Lot 50 DP 259593, Banyanda Lake, Ballina (BSCPP13/008);
Lot 5 DP 843369, Old Bagotville Road, Wardell (BSCPP13/007)**

Prepared for Ballina Shire Council
by MikeSvikisPlanning
18 December 2013



Mike Svikis
Principal Planner

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Introduction

Mike Svikis (Principal Planner at MikeSvikisPlanning), was engaged by Ballina Shire Council as an independent chair for a public hearing into the proposed reclassification of certain land and water bodies in Ballina and near Wardell.

The public hearing was held on 11 December 2013 at the Richmond Room in Ballina. Verbal submissions were made on both the land at Wardell and the water bodies at Ballina. This report summarises the submissions and provides a response to them and recommendations to Council.

Council will consider this report in making its deliberations on the subject land.

In preparing this report I have also reviewed the information that Council placed on public exhibition and the written submissions to the exhibition. With Council officers, I inspected the land at Wardell and the water bodies at Ballina on 21 November 2013. The photographs in this report were taken at that time.

Objectives of the Public Hearing

The objectives of this public hearing are to:

- Satisfy legislative requirements relating to public land reclassification
- Provide an opportunity for any person to make a verbal submission
- Enable those submissions to be considered by an independent chairperson who can then prepare a report and make recommendations on those issues to Council.

'Public land' is any land (including a public reserve) vested in, or under the control of, Council (with some exceptions such as roads). 'Community land' is public land that is generally open to the public, eg parks, reserves or sports grounds. 'Operational land' is public land that may be used for other purposes, eg a works depot or held as a temporary asset. All public land is either Community or Operational (NSW DoP Practice Note PN 09-003).

Changing land from one classification to another can be undertaken through a planning proposal under the Environmental Planning and Assessment Act 1979. When it is changed the classification status of the land is recorded in a schedule in the Local Environmental Plan. When Community land is proposed to be reclassified as Operational land a public hearing must be held at some time after the close of the exhibition period of the planning proposal.

The Independent Chairperson

The public hearing must be chaired by an independent person. The Local Government Act 1993 states in relation to this:

47G Public hearings

- (1) *In this section, **public hearing** means any public hearing required to be arranged under this Part.*
- (2) *The person presiding at a public hearing must not be:*
 - (a) *a councillor or employee of the council holding the public hearing, or*

Proposed Reclassification of Council Owned Land

- (b) *a person who has been a councillor or employee of that council at any time during the 5 years before the date of his or her appointment.*
- (3) *Not later than 4 days after it has received a report from the person presiding at the public hearing as to the result of the hearing, the council must make a copy of the report available for inspection by the public at a location within the area of the council.*

This public hearing was chaired by Mike Svikis who is not a Councillor or an employee of Ballina Shire Council now or at any time in the past.

Background

The planning proposal for Ballina Quays Canals and Banyanda Lake was commenced by Ballina Shire Council at its Ordinary meeting of 22 August 2013. It proposed that the land on which these waterways are located should change from Community to Operational under the Local Government Act 1993 (LG Act). No change of zoning was proposed.

The planning proposal for Lot 5 DP 843369 at Old Bagotville Road, Wardell was commenced by Ballina Shire Council at its Ordinary meeting of 20 December 2012. It proposed that this land change from Community to Operational under the LG Act. No change of zoning was proposed.

Lot 63 DP 263861 and Lot 132 DP 775228, Ballina Quays Canals, Ballina and Lot 50 DP 259593, Banyanda Lake, Ballina

The land containing Banyanda Lake (Lot 50 DP 259593) has an area of 1.97 hectares and the land containing the Ballina Quays Canals (Lot 63 DP 263861 and Lot 132 DP 775228) has a combined area of 9.37 hectares.

All three parcels are in the ownership of Ballina Shire Council and are classified as Community land. The purpose of this planning proposal is to enable the reclassification of the land to Operational land in accordance with the requirements of the LG Act.

All the subject lots are located fully within the W2 Recreational Waterway zone under the provisions of the Ballina Local Environmental Plan 2012 (BLEP 2012). No amendments to the current zoning arrangements under the BLEP 2012 form part of this planning proposal.

This planning proposal seeks to reclassify the entire area of Lot 63 DP 263861 and Lot 132 DP 775228 (Ballina Quays Canals) and Lot 50 DP 259593 (Banyanda Lake) from Community land to Operational land under the provisions of the LG Act. This involves the amendment of Schedule 4 of the BLEP 2012 to incorporate reference to the reclassification of Lot 63 DP 263861, Lot 132 DP 775228 and Lot 50 DP 259593.

Council advised that a review of the management provisions applying to public Community land, and specifically the subject lots detailed above, revealed that the placement of private structures on Community land is inconsistent with the statutory management provisions of the LG Act. This has also highlighted potential public liability for Council in relation to the placement of such private structures on land for which it has management responsibility in accordance with the LG Act.

Council considers that section 47D of the LG Act requires that the private, exclusive use of community land may only be by way of a lease, licence or other estate. A lease, licence or other estate for the use of Community land is limited to purposes that meet the current and future needs of the community and wider public such as public recreation and those that promote the physical, cultural, social and intellectual welfare or development of persons. As such, the current private structures placed in the subject waterways cannot be issued with a lease, licence or other estate because they are inconsistent with the requirements of the LG Act.

Council's solution for rectifying the above matter and enabling the private waterway structures to be made consistent with the LG Act is to reclassify the subject land from Community land to Operational land. This will allow Council, in the first instance, to make the structures consistent with the LG Act through removing the application of the specific management requirements of the Act. Subsequently, it will allow Council to further consider its options with regard to managing and regulating the placement of the structures through leasing and/or licensing.

The NSW Department of Planning and Infrastructure issued a Gateway Determination on 6 September 2013. The draft planning proposal was publicly exhibited and approximately 75 submissions were received.

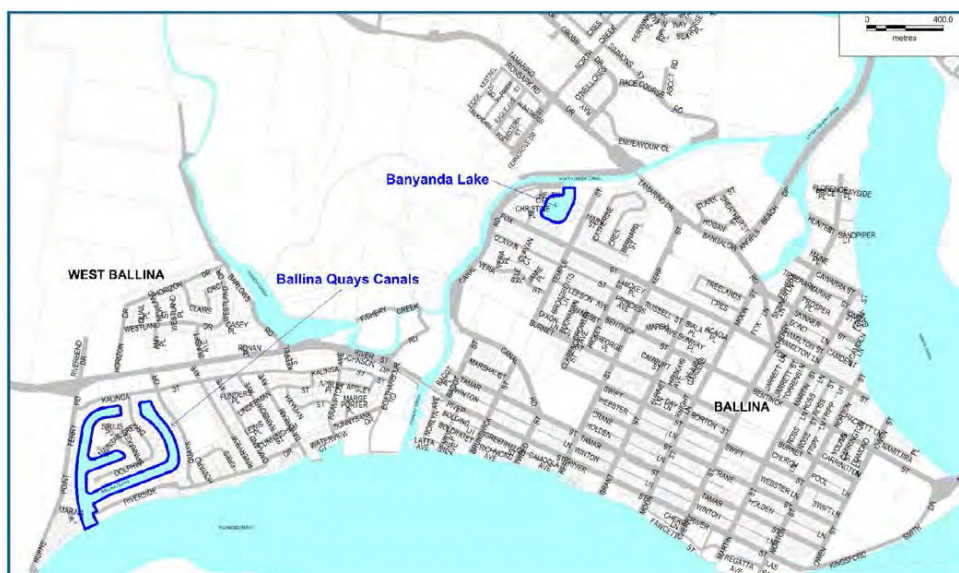


Figure 1: Ballina Quays and Lake Banyanda in Ballina

Lot 5 DP 843369, Old Bagotville Road, Wardell

Lot 5 DP 843369 has an area of 50.53 hectares and is in the ownership of Ballina Shire Council. The land is classified as Community land for the purposes of the Local Government Act 1993 (LG Act). The purpose of this planning proposal is to enable the reclassification of the land to Operational land in accordance with the requirements of the LG Act.

Part of Lot 5 DP 843369 is zoned RU2 Rural Landscape under the provisions of the Ballina Local Environmental Plan 2012 (BLEP 2012) with the remainder of the site being "deferred matter". This land is identified as deferred matter under the BLEP 2012 due to the proposed application of the E2 Environmental Protection Zone to the land under this plan. The Ballina Local Environmental Plan 1987 (BLEP 1987) applies to the area identified as "deferred matter". This area is zoned part 1(b) – Rural (Secondary Agricultural Land) and part 7(l) – Environmental Protection (Habitat) under the provisions of the BLEP 1987. No amendments to the current zoning arrangements under either the BLEP 2012 or BLEP 1987 are proposed as part of this planning proposal.

This planning proposal seeks to reclassify the entire area of Lot 5 DP 843369 from Community land to Operational land under the provisions of the LG Act. This will involve the amendment of Schedule 4 of the BLEP 2012 and Schedule 7 of the BLEP 1987 to incorporate reference to the reclassification of Lot 5 DP 843369.

Lot 5 DP 843369 was acquired by Council in 1996 for its potential as an extractive resource and future landfill site. Due to the land being acquired after auction by negotiation, Council was unable to comply with the legislative requirements applicable at the time in relation to the classification of the land as Operational land. As such, the land has been classified as Community land in accordance with the provisions of the LG Act.

Proposed Reclassification of Council Owned Land

Council considers that the physical and geographic constraints of Lot 5 DP 843369 mean it has limited use for future Community land uses. As such, to enable Council to consider its options with regard to the sale, lease and/or use of the land, it is considered that the Operational land classification is more appropriate for the land. Commercial uses of the land could include quarrying operations. In addition to the above, the preferred route of the Pacific Highway Upgrade (Woodburn-Ballina Section) traverses Lot 5 DP 843369. The reclassification of the land to Operational land will support liaison with Roads and Maritime Services with regard to the acquisition of the land required for the highway upgrade.

The NSW Department of Planning and Infrastructure issued a Gateway Determination on 6 September 2013. The draft planning proposal was publicly exhibited, and three public submissions and four government submissions were received.



Figure 2: Lot 5 DP 843369, Old Bagotville Road, Wardell

Public Hearing

The Public Hearing was held on 11 December in the Richmond Room at Ballina. It commenced at 6.00 pm with submissions on the land at Old Bagotville Road, Wardell, and this matter was dealt with until 6:55 pm. At 7.00 pm the hearing re-commenced with submissions on the waterways at Ballina, and this was completed at 8:15 pm.

Lot 63 DP 263861 and Lot 132 DP 775228, Ballina Quays Canals, Ballina

Fifty-two persons in attendance, four Council staff, Mike Svikiš is the presiding officer.

Introduction by Steve Barnier, including a welcome to country. He provided details of the planning proposal and advised that maintenance of the canals was not part of the proposal being considered. Steve also clarified that maintenance would not be affected by the reclassification and that Council had made no decision in relation to possible charges referenced in Council's [August 2013] report.

Mike Svikiš advised how he would manage the hearing with those registered being given first opportunity before opening the floor to others in attendance. Mike outlined his approach to the hearing, advising that he would be primarily listening to the issues raised and then reporting on those issues to Council. The night was not a general question and answer session, and he asked speakers not to repeat the issues or matters raised by others as he was well aware that some of the issues were of concern to many in attendance.

David Kirsh commenced at 7.15 pm. He has read the reports and information on the proposal. His main question – cannot see why it is illegal to have pontoons on public land. He cannot see why these cannot be placed on Community land. The law changed 10 years ago and new structures have been added since then with Council approval with the Local Government Act in place. He does not know which part of the LG Act makes the pontoons illegal. The only way he can see the reason for the reclassification is to allow the Council to start charging a levy on land owners for the structures. He can see from research that the land was gifted to the Council and must be classified as Community land and that it cannot be reclassified. Operational land is only land not open to the public like a works depot. He is concerned that if the land is reclassified it will be closed off to the public. Will the public still be able to use the land if reclassified?

Nick Reimer commenced at 7.20 pm. He feels hampered by the instructions given as to what he can and cannot say at this hearing. He has lived on the quays for about 10 years and bought his land/house after making enquiries in relation to establishing a pontoon, boat ramp and retaining wall on the land, all of which have been done with lawful approval by the Council and constructed by a master builder. He would not have purchased the property if he could not have done these things. In relation to estuaries [Crown waterways], he found the quays appealing as they do not have the same licence charges as the estuaries [Crown waterways]. He was advised at the time of purchase that there would be no charges on the structures. In relation to maintenance he raised matters relating to previous Council commitments to maintain the waterways and keep public access. In 2008 there was a proposal for a special rate policy that was unsuccessful. Based on early documentation in development files, the justification for the quays' maintenance by the Council is based on the higher rates paid on the quays' properties, which were considered sufficient to defray the maintenance costs. The reclassification lays the groundwork for Council to start charging land owners and this will affect land values. It is difficult to sell these properties and the possible charges will make it worse. Are all these structures now illegal? He raised section 47D of the LG Act and is of the view that no land owner has exclusive use of the waterway. The adjoining land owners share the waterway with members of the public, and the land is a public reserve with access to the public provided by adjoining parks. He raised section 30(1) of the LG Act where reclassified land ceases to be a public reserve. There are unfortunate consequences of the reclassification. The Council has been party to the erection of the illegal structures. Many of the structures are unused or not maintained and some may seek the removal of the old structures. He strongly objects to the reclassification.

Dan McOmish commenced at 7.30 pm. He is a semi-retired solicitor and has worked both for and against councils in legal matters for 30 years. He believes the reasons for the reclassification are the management of the private structures, the regulation of the private structures, compliance with the LG Act and the legality of the structures. In his written submission he has stated that he believes the structures can be legally approved under the LG Act. The concept of exclusive use is incorrect and that approval has never been granted by Council for exclusive use, thus the concept has no application. The issue can be fixed by a management plan as required under the Act; it can also be fixed by regulation, and the local member [Don Page] could achieve this by a stroke of a pen. He is concerned with the philosophical issues of the reclassification of Community land. Desires to keep Council out of publicly used land; this land should not be used as a fund raising mechanism for the Council. The land is for public use, not just for those land owners adjoining the canal. The land is also a drainage reserve. The provisions in the LG Act regulate activities on public land and this is not addressed in the Council's submission. In the LG Act there are a number of provisions relating to what a Council can and cannot do, and also in relation to public safety. The Council is enabled under the LG Act to issue orders and notices for defective structures. The Council can raise charges for structures over public land. There are sections of the LG Act that indicate you can place private structures on public land. He asked whether Council will disclose to the public its legal advice in relation to this matter? Has this advice been obtained independently by an expert in LG law? The reclassification of Community land leads to consequences, such as tampering with sporting fields, alienation and commercialisation of public open space. When the quays were approved they had a condition applied that required the dedication (Condition No 3) of roads, waterways and parklands to Council. The reclassification needs to do more than stated in the Council report. He referenced section 32 of the LG Act in relation to dedication of land under section 94 of the Environmental Planning and Assessment Act. In section 30 it provides that the Council can only reclassify this land if it is found to be unsuitable for its intended purpose. Council has various mechanisms under the LG Act to raise fees, charges and special rates. As a safeguard to the community, any annual charge must be based on the reason for that charge and its benefit to the user. Once the decision to reclassify is made the public can appeal, make submissions to the minister and the Land and Environment Court.

Richard Crandon commenced at 7.45 pm. He is a retired engineer and resident of Burns Point Ferry Road, and has a pontoon. He questions the legalities of the claim by the Council that the pontoons are illegal. He has good knowledge of the LG Act. He referred to new provisions commencing in 1993, allowing the change to open space classification and land dedication. The Act requires land to be classified and Community land must have a plan of management. He asked whether there was a plan of management for the land. He was advised by Council staff that there was, and it was available there for perusal after the public hearing or on Council's web site. He was advised that special provisions applied but only to Ballina Quays and only for pontoons. Where land is Operational land, Council has full control. He believes there should be a proper plan of management for the waterways to regulate and detail works on the land, such as maintenance. The plan of management is essential in achieving this. If these matters are not addressed in the plan of management then Council has been negligent. Does the reclassification remove Council's requirements? Is this an easy way out for the Council in the absence of a plan of management specific to the canals? There are maintenance issues and liabilities with the canals, and he sees the reclassification as a way for Council to sell the land and remove its maintenance obligations and discharge its responsibilities. He wants to see Council's legal advice.

At this point, there being no further registered speakers, Mike asked if there were any more interested in speaking. Specifically, he asked if any present were representative of the land owners adjoining Lake Banyanda. Of the group, there were only two, and they chose not to speak to the hearing.

Pam Maxwell addressed the hearing at 7.55 pm. She has been resident of Ballina Quays for 22 years and has seen many documents and many issues over this time, particularly regarding maintenance. She referred to legal advice in 1993 obtained by the Council in relation to maintenance. She advised this was referenced in her submission, which she chose to formally table at the hearing. Her interpretation of the advice is that the land is classified as Community land and could stay that way. The advice indicates that the Council is responsible for maintenance.

Proposed Reclassification of Council Owned Land

Ken Thurston addressed the hearing at 7.57 pm. He has been a resident of Ballina Quays for 13 years and is very concerned in relation to proposed maintenance charges. He is reassured by the advice that the maintenance program will not be interrupted by the reclassification proposal. He has read the [August 2008] report to the Council and notes reference to charges in other council areas. He questions the legality if the reclassification goes through. What might happen to stop people from using the canal? Can the Council restrict access to the canal through the application of the Operational classification if there are liability issues identified?

Joe Fisher addressed the hearing at 8.00 pm. He is a resident of Ballina Quays and is a boat owner. There were a lot of boat owners present. He likes being able to use his pontoon and the convenience it provides as a boating enthusiast. He is of the view that the Council does not like boat owners – the Ballina bar is treacherous, the quays are too shallow, the Ballina marina was allowed to be taken away. He feels wronged as a boat owner. He feels that they are not valued enough given they pay higher rates.

Some general and procedural questions were asked by unidentified attendees including: Can the legal advice obtained by the Council be made available to the public? Steve Barnier advised that this would be up to the Councillors and the writer of the advice. In response to a question asked about the legality of the whole process, it was advised that it would be the Councillors making the final decision in this matter.

Noel Warr addressed the hearing at 8.05 pm. He advised that he had approached some Councillors and that they knew nothing of what he was talking about. He believes that the Councillors do not have the knowledge to know what they are doing and that they are not qualified to make this decision. There is a lot of work and reading behind this matter. Will the Councillors take note of this? This is far and above a matter for decision at a Council meeting.

Deanna Savage addressed the hearing at 8.10 pm. She has parents who built on Ballina Quays. She asked if there would be a workshop for the Councillors. Steve advised in response that this would be a matter for the General Manager to decide, but that it was probably likely. If a workshop is scheduled, it is up to the Councillors to participate – they are not obliged to.

Discussion and Recommendation

A number of submissions questioned Council's legal advice and the premise that the current situation of privately owned structures on Community land is unlawful. It was also suggested that under the current Community land designation, Council could issue leases to the owners of the structures if it chose to. This would allow the waterways to stay as Community land and therefore remain as an area open to the public (boats, swimmers, fisherpersons, etc) as well as a drainage reserve. It would give adjacent land owners comfort that Council is not going to divulge itself of responsibilities (particularly maintenance) in relation to the waterways because they would remain Community land.

Other submissions clearly object to leases or licenses in any form as they see them inevitably linked to charges and fees that will probably be recurrent. They also see the concept of changing these waterways to Operational as linked to the cost of maintenance of the waterways. Any extra charge for waterway maintenance is strongly opposed.

Some who presented to the hearing believe the history of development approvals can be viewed as evidence that the existing structures are not illegal and nothing needs to change. Previous legal advice from 1993 appears to differ from the legal advice more recently obtained, but not yet released to the public.

Some submissions expressed concern that Council has not been fully briefed to make a decision on this important matter. The comment is that it should be taken to Councillors as a workshop item so that it can be fully discussed. The legal advice, which is the reason that Council is doing this, should be made available to the public in the interests of transparency.

As the independent chairperson at the hearing, I was aware of the strong views and feelings on this issue on the night. The number of submissions and high attendance at the public hearing demonstrate genuine concern

among residents about what Council is trying to achieve. I also believe there is a lot of misunderstanding and confusion about what is being proposed and what will flow from any change, if it occurs.

In my opinion the recent decision by Council to tender for maintenance dredging in the waterways (albeit allegedly overdue from the five year cycle expected by residents) is a clear statement that the proposed change of the waterways from Community to Operational is not about Council not wanting to undertake maintenance. In my opinion it is also not about charging for maintenance as this could be done by Council regardless of the land being Community or Operational land under the Local Government Act 1993.

In my opinion changing the land to Operational will not facilitate Council collecting fees as a lucrative source of revenue. There are about 145 structures at Ballina Quays and less than 10 at Lake Banyanda. (There are less than 10 on the Endeavour Close waterway as well.) This is a relatively small base from which to collect licence fees, and the cost of collecting those fees would be considerable. There has been no decision taken by Council on the issue of fees and charges should the waterways become Operational land. If the waterways become Operational and structures are licensed, it is inevitable that fees will be considered at some stage. Council, however, has the choice to set these fees at a level it considers appropriate, and that debate is yet to occur. The potential for licence fees is not a reason in itself to avoid reclassifying the waterways.

Council has issued many approvals under the Environmental Planning and Assessment Act 1979 for structures to be erected on and in the waterways at Ballina Quays and Lake Banyanda on Council land. Council knew that the waterways were Community land when these approvals were issued. In the case of Ballina Quays these structures are mentioned in the Principal Generic Plan of Management for Community Land. If Council's current legal advice is correct and these approvals should not have been issued then Council should take action to "regularise" or "make good" its past actions so as to not leave residents exposed to the assumption that their lawfully issued consents are regarded in any way as an unlawful occupation of public land. Since Council is now fully aware of this matter, it should not issue any more consents until it has been sorted out.

The crux of the matter is the accuracy of the legal advice that Council has obtained. This indicates that to make good its past consents and put itself in a position where owners can lodge applications for new or replacement structures, Council should reclassify the waterways to Operational and then issue a licence or lease for the exclusive use of a part of that waterway to those that want to have jetties, pontoons or boat ramps located on or over Council (public) land. The lease or licence creates the relationship between the applicant and the public land (the waterway), and the development approval documents the size and nature of the structure, who has responsibility for its maintenance, etc. In my opinion this advice is partly at odds with legal advice received in 1993 and tabled at a Council meeting (at that time) that indicated the waterway should be classified as Community land (paragraph 17 of the advice). This advice was issued in 1993 so it may be superseded by amendments to the legislation. However, it is currently the only legal advice available to the residents. In fairness to the concerned residents, and to ensure Council is taking the correct action, I am of the view that Council should seek a Barrister's opinion on this matter before it makes its decision as to whether the waterways in question should be changed from Community to Operational in order that leases or licences can be issued for structures approved in the past and can be issued for structures if approved in the future. Council should ensure that the Barrister has relevant experience in the Local Government Act 1993. This advice should be made available to the public so that residents and others can see why Council is taking this action.

My recommendation on Lot 63 DP 263861 and Lot 132 DP 775228, Ballina Quays Canals is:

- 1 Council should confirm (or otherwise) its current legal advice on the key issue of the legality of permitting privately owned structures such as pontoons and boat ramps to be located on Community land (being public land owned by Council). This should be done through a Barrister's opinion and that opinion should be made available to the public so that all Ballina Shire residents can fully understand Council's position.**
- 2 If the Barrister's opinion confirms its current legal advice, then Council should continue to reclassify Lot 63 DP 263861 and Lot 132 DP 775228 as Operational land under the Local Government Act 1993.**

Council should, after this has been finalised, consider its leasing or licensing arrangements for all privately owned structures over Lot 63 DP 263861 and Lot 132 DP 775228.

- 3 If the Barrister's opinion does not confirm its current legal advice and Council can allow privately owned structures such as pontoons and boat ramps to be located on Community land without being in contravention of the Local Government Act 1993, then it should consider updating its Plan of Management to more comprehensively address this matter in relation to structure maintenance and responsibility and public liability. Council should also consider its leasing or licensing arrangements for privately owned structures over Lot 63 DP 263861 and Lot 132 DP 775228 pursuant to the Local Government Act 1993.

Lot 50 DP 259593, Banyanda Lake, Ballina

The group was asked if there was anyone present who was a resident of the Banyanda Lake Estate. Two people indicated they were. They chose not to present to the public hearing.

Discussion and Recommendation

Banyanda Lake is in the same situation as the Ballina Quays Canals, except it is not mentioned in the Principal Generic Plan of Management for Community Land and it has fewer pontoons and boat ramps.

My recommendation on this land is therefore the same as for Ballina Quays Canals. That is:

- 1 Council should confirm (or otherwise) its current legal advice on the key issue of the legality of permitting privately owned structures such as pontoons and boat ramps to be located on Community land (being public land owned by Council). This should be done through a Barrister's opinion and that opinion should be made available to the public so that it can fully understand Council's position.
- 2 If the Barrister's opinion confirms its current legal advice, then Council should continue to reclassify Lot 50 DP 259593 as Operational land under the Local Government Act 1993. Council should, after this has been finalised, consider its leasing or licensing arrangements for privately owned structures over Lot 50 DP 259593.
- 3 If the Barrister's opinion does not confirm its current legal advice and Council can legally allow privately owned structures such as pontoons and boat ramps to be located on Community land without being in contravention of the Local Government Act 1993, then it should consider updating its Plan of Management to include reference to Banyanda Lake as well as to more comprehensively address this matter in relation to structure maintenance and responsibility and public liability. Council should also consider its leasing or licensing arrangements for privately owned structures over Lot 50 DP 259593 pursuant to the Local Government Act 1993.

Lot 5 DP 843369, Old Bagotville Road, Wardell

Three persons in attendance, four Council staff, Mike Svikis is the presiding officer.

Introduction by Steve Barnier, including a welcome to country. He outlined the requirements for a public hearing under the Local Government Act 1993. Steve advised that this matter would most likely go to Council in February 2014, and Council would then consider how this matter should proceed.

He indicated that participants would be advised by letter when the Independent Chairperson's report became available so that they could download it from the web.

Proposed Reclassification of Council Owned Land

Mike Svikis advised how he would manage the hearing with those registered being given first opportunity before opening the floor to others in attendance. Mike outlined his approach to the hearing, advising that he would be primarily listening to the issues raised and then reporting on those issues to Council. He would ask questions if required to clarify any issues. He indicated that up to one hour had been allocated, so there was plenty of time for all there to present their views.

Cullimurra Woia (Acting CEO Jali LALC) commenced at 6.10 pm. Ms Woia tabled information related to the National Reserve System (NRS) and advised that the NRS was a network of protected areas which included the Ngunya Jargoan Indigenous Protected Area (NJIPA). She advised that the NJIPA adjoined Lot 5 (Appendix A).

Ms Woia advised that the whole Shire should be proud of the NJIPA and the NRS. She indicated that so far this year five school groups, each containing 50 or more people, had visited the NJIPA. These groups had received information about the cultural history and ecology of the area. Nothing like the NJIPA exists elsewhere in Ballina Shire. She advised that the reclassification would take away an important buffer area between the cane farms and quarries and the NJIPA. This, in turn, would diminish the value of the Indigenous Protected Area (IPA).

The IPA attracts significant grant funds for employment and training. In her opinion, the IPA people could partner with Council to preserve the land.

She indicated that the IPA was an important wildlife corridor for the Long-nosed Potoroo and this corridor included Lot 5. It is important for the whole Shire that this valuable ecosystem be protected. Lot 5 has permanent water that the IPA does not have nearby. It is very important.

She indicated that her (and Jali LALC's) preference was for the whole of Lot 5 to be left as Community land so that it would be preserved for the benefit of the whole Shire. Development of the land would impact on the IPA.

Mike Svikis asked Ms Woia if Jali would want to take over ownership of the land if the opportunity arose? She answered that they would, but management and protection of the land is more important than owning it. She indicated that the concern is that the land will be taken away and developed. She believes that little things can impact a great deal. If reclassification resulted in development, this would have a great impact on wildlife. She advised that Jali could do weed and pest control on the land if it remained Community land. Also consider that Lot 5 will serve as a buffer to the IPA from the proposed Pacific Highway alignment.

David Milledge commenced at 6.30 pm. He advised that he has been a wildlife ecologist for 45 years. Currently works part-time for the Nature Conservation Council and as a consultant.

He tabled a paper on the distribution of Long-nosed Potoroo habitat on the far north coast of New South Wales, which he has co-written for publishing in the Australian Zoologist (Appendix B).

He indicated that he has two primary interests related to Lot 5. Firstly, it is integral to maintenance of biodiversity within the NJIPA. He considered that the IPA land is more significant than a National Park because it has national significance, not just state. He considers that Lot 5 intrudes into the IPA and is essentially part of it.

The second interest relates to the Long-nosed Potoroo, which is listed as vulnerable under national and state legislation. He advised that the IPA probably contains the last viable population of the Long-nosed Potoroo on the North Coast of New South Wales.

In his role with the National Conservation Council he conducts monitoring surveys over five different IPAs. In respect to Lot 5 he has not conducted any formal biodiversity surveys, but he has conducted them all around it. He has recorded various endangered species in the NJIPA as per his written submission.

He considers that Lot 5 has very high biodiversity value in its context with the NJIPA. It has a high movement corridor value. He had issues with Council's assessment report as it made no reference to its biodiversity value. The report should have also referenced its location in terms of proximity to the IPA.

Proposed Reclassification of Council Owned Land

He has specific issues regarding how Council staff had interpreted part 3 of the DoPI practice note on planning proposals. He claims that staff had misconstrued this technical issue regarding whether or not the reclassification would have any environmental impact.

Mike Svikis asked whether David Milledge believed there was any direct impact on Lot 5 from proposed reclassification as such? Mr Milledge answered yes, because reclassifying all of Lot 5 implies it is all suitable for some sort of development and that Council can do what it wants with it. Maybe RMS will put a depot on it for their road project.

Mr Milledge considers that there may not be any direct impact from the reclassification but that this is the thin edge of the wedge. Council should have undertaken a threatened species assessment under Part 5A.

He considers that Council would be in a stronger position if the land remained Community. Council could then negotiate with the RMS to use the land as compensatory habitat.

He advised that the land also had connectivity values to land on the other side of Bagotville Road.

In summary, Mr Milledge strongly advocated that the land stay Community. If this occurred then Council could more strongly advocate the land's biodiversity values and obtain a stronger financial return.

Mike Svikis asked David Milledge whether he would like the land managed by the same people that manage the IPA? Mr Milledge answered yes – the land is integral to the IPA as it is part of the paper bark wetlands. Approximately four-fifths of Lot 5 should be managed as part of the IPA.

Mike Svikis asked Mr Milledge that if it was true that under the LG Act land could only be transferred to a Crown authority if it stayed Community, did he see this as a problem if it could not be transferred to IPA? Not if managed appropriately by Council.

Mike Svikis asked Mr Milledge if he was aware that the land was designated E2 in the draft LEP before that part of the land became a deferred matter? Yes, he was aware of that.

Mike Svikis asked Mr Milledge if he thought that the draft zoning, if implemented, would provide protection for the land? Mr Milledge did not think so due to the ISEPP provisions.

Ms Woia stated to the hearing that her aim was not to gain the land for the IPA but to ensure that the land remains Community for the benefit of the community. She indicated that if it stayed Community then Jali could do weed and feral pest control without cost to Council.

Marcus Ferguson commenced at 6.45 pm. He indicated that he was the Cultural Sites Officer with Jali LALC and Co-ordinator for the IPA. He advised that he has dealt with the Pacific Highway proposal since 2002. He has a number of issues with the highway location due to impacts on permanent water sources and the IPA. He advised that on the Jali land the water dries up, but not on the Council land (Lot 5). Jali wants to look after Lot 5 and the biodiversity of this area. The highway will destroy scar trees and stone arrangements. He cannot be sure if there are or are not any Aboriginal cultural heritage sites on Lot 5. There are none registered that he is aware of, but others are nearby.

Discussion and Recommendation

Council has stated its intention in changing the classification of Lot 5 is that it is no longer regarded as suitable for the use for which it was purchased, ie a quarry or landfill site (or both). Council is also aware that part of Lot 5 may be required by RMS for the Pacific Highway bypass and they would consider it to be an advantage to have the lot Operational rather than Community. Since Council made its decision to commence the process of reclassification, RMS has issued a property acquisition sketch (dated 28/10/13), which shows an area at the western edge of Lot 5 that is marked for possible acquisition to be used for the highway (Appendix C). This sketch was available for discussion at the public hearing.

I agree that the biodiversity values of a large part of Lot 5 have not been emphasised in the supporting material to the planning proposal, and the existence of the IPA on land immediately surrounding it is also not mentioned. I do not consider that the planning proposal should have been the subject of a Threatened Species assessment or referred to the Commonwealth Government under the EPBC Act 1999. If the land goes to Operational, Council may well choose to dispose of all or part of it, including some of it to RMS. However, it is the subsequent actions by RMS or other owners that would be subject to detailed environmental assessment, not the act of changing the land classification under the Local Government Act 1993. Facilitating the sale of a piece of land to RMS could result in the balance of Lot 5 ending up with the Jali LALC and incorporated into the IPA, if Council was to choose to do this. The choice to transfer land to a non-government organisation such as Jali LALC is only available to Council if the land is Operational.

However, no formal discussion with Jali LALC has occurred and its clear position on this matter is that it opposes the reclassification to Operational under the LG Act. It supports Council retaining the land and working with Jali LALC to manage it as Community land.

Land classified as Community can still be transferred to a Crown authority whether it is Community or Operational. Although the RMS has only expressed an interest in part of Lot 5 for the highway realignment, it may be interested in the balance as an environmental offset area.

In relation to the future use of Lot 5 if it were to become Operational land, this would be largely influenced by the zones that apply to it under Council's LEP. In this case Ballina LEP 2012 zones Lot 5 partly RU2 Rural Landscape and partly "deferred matter". The "deferred matter" was going to be zoned entirely E2 Environment Protection, but this zone was deferred by the Minister throughout Ballina LEP 2012, leaving Ballina LEP 1987 as the substantive LEP over these deferred areas. Under Ballina LEP 1987 the deferred area on Lot 5 is zoned part 1(b) Rural (Secondary Agricultural Land) and part 7(l) Environmental Protection (Habitat). The two LEPs are shown in Figures 3a and 3b.

From this it is clear that the environmentally significant land on Lot 5 is not currently adequately protected by Councils LEPs. The area covered by 7(l) under LEP 1987 is considerably smaller than the area proposed as E2. In changing the classification of Lot 5 from Community to Operational, the subsequent sale of the land could lead a purchaser to believe that land zoned Rural under LEP 1987 could be cleared (for say, agriculture) without consideration of its environmental values. Parts of this land have high biodiversity value and are likely the habitat of Threatened Species such as the Long-nosed Potoroo.

The other concern with Lot 5 is the lack of information on its Aboriginal cultural heritage significance. AHIMS does not record any sites occurring on Lot 5, however Marcus Ferguson is aware of several in the general locality, so there is a possibility that they occur on Lot 5 as well. Had the E2 zone been applied by LEP 2012 as Council intended, it is likely that any sites would be covered by that zone. Partly because it is extensive and partly because the area in RU2 at the western edge of Lot 5 is heavily disturbed by past clearing and quarrying activity.

My recommendation on Lot 5 DP 843369, Old Bagotville Road, Wardell is:

- 1 Council should retain as Community land all that part of Lot 5 that is currently designated as "deferred matter" under LEP 2012. The balance of Lot 5 that is zoned RU2 under LEP 2012 should be reclassified as Operational land. When the environment protection zones have been finalised in LEP 2012 and Lot 5 is zoned according to its environmental characteristics; and when Council has considered whether it wants to manage Lot 5 in the long-term or pass it on to a land management group (such as the managers of the adjacent IPA), then the matter of its classification can be revisited as a way of facilitating its transfer (either all of it or part of it) to an appropriate land manager, if this is Council's preferred position.**
- 2 If Council considers splitting Lot 5 into two classifications is not practical then all of Lot 5 should be retained as Community land until such time as the environment protection zones have been finalised in LEP 2012 and Lot 5 is zoned according to its environmental characteristics. This should ensure that the ecological values and Aboriginal cultural heritage values (potentially) of Lot 5 are not**

compromised by a future owner. When Council has considered whether it wants to manage Lot 5 in the long-term or pass it on to a land management group (such as the managers of the adjacent IPA), then the matter of its classification can be revisited as a way of facilitating its transfer (either all of it or part of it) to an appropriate land manager, if this is Council's preferred position.

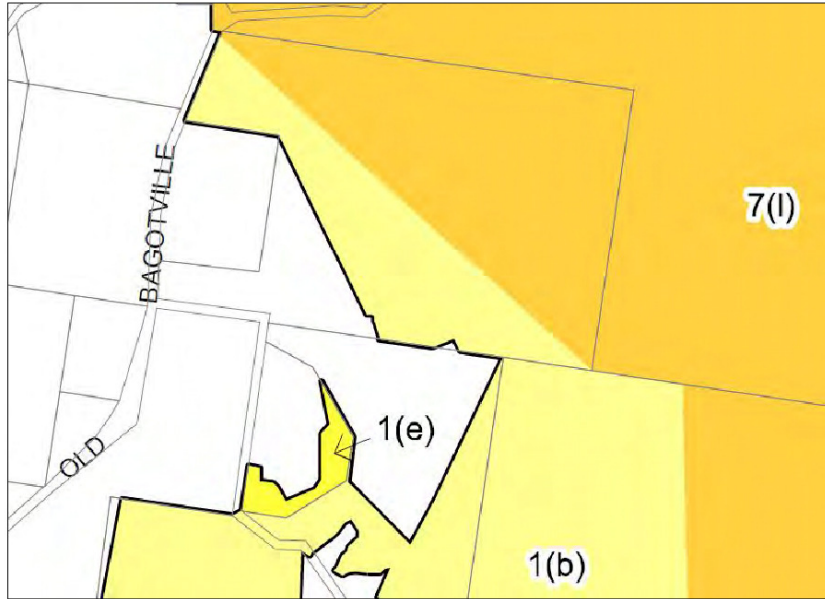


Figure 3a: Lot 5 as zoned under LEP 1987

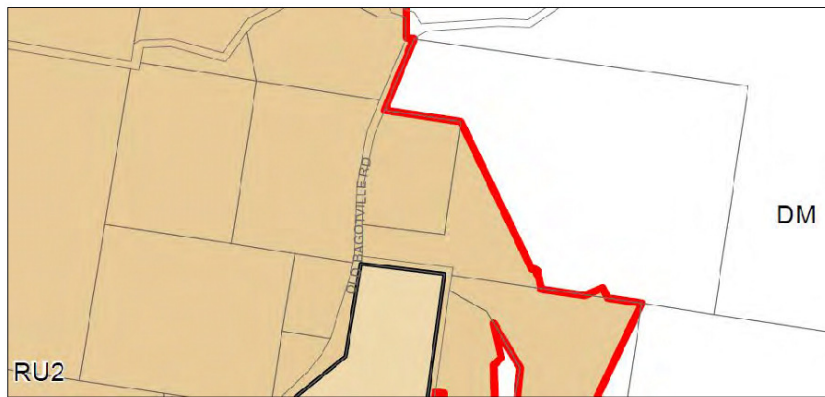


Figure 3b: Lot 5 as zoned under LEP 2012

Appendices

Appendix A: Jali Indigenous Protected Area Information

Appendix B: Ecological Paper (unpublished) on Long-nosed Potoroo by Andren et al

Appendix C: Property Acquisition Sketch by RMS for proposed Highway Alignment

Menu



Australian Government
Department of the Environment

National Reserve System



Three Mile Waterhole, Henbury Station NT

The National Reserve System is Australia's network of protected areas, conserving examples of our natural landscapes and native plants and animals for future generations. Based on a scientific framework, it is the nation's natural safety net against our biggest environmental challenges.

The reserve system includes more than 10,000 protected areas covering 16.52 per cent of the country - over 12.7 million hectares. It is made up of Commonwealth, state and territory reserves, Indigenous lands and protected areas run by non-profit conservation organisations, through to ecosystems protected by farmers on their private working properties.

About the National Reserve System



The National Reserve System is underpinned by a scientific framework.

[About the NRS](#) | [Science, maps and data](#)

Funding and getting involved



The National Reserve System is one of the world's great conservation partnerships. Under Caring for our Country, the Australian Government committed \$180 million to build the National Reserve System over the five years to 2013.

[Funding](#) | [Getting involved](#) | [Our partners](#)

3.2 The goals of the Indigenous Protection / recognition of the Caring for our Country Initiative are to:

- Support Indigenous landowners to ensure waterways can provide \$750 of flow for as part of Australia's National Reserve System,
- Support Indigenous interests to develop, coordinate and manage waterways with appropriate agencies, including government agencies,
- Support the integration of Indigenous knowledge and values in relation with waterways and waterway management activities.





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Map 1 - Aerial photograph showing the location of the waterway...



5. WHAT'S IMPORTANT TO US – OUR ASPIRATIONS

Management plan consultations identified four community aspirations for the use of the land.

1. Be a place which is healthy and protected.

The most commonly recurring theme during consultation. Bundjalung people consulted share a common desire to restore the area of Jali Lands declared as an IPA to health and maintain its integrity. The word 'health' is used in the Indigenous sense to include natural and cultural values. There are many well formed ideas (particularly from the Green Team) about what NRM work is required to achieve this goal. Much work has already been accomplished.

2. Be a place for education.

A strong theme was identified in which the IPA area should be a basis for education. That is, the education of children in the ecology of the land and the cultural landscape; and the education of adults who are working on the Jali Lands, or who might come as visitors.

3. Be a place for work and employment.

The Green Team are already working on the IPA area in various capacities, either through their training providers (eg. TAFE) or stakeholders (e.g. Wetland Care). There is a strong desire that this work should continue. There are also emerging ideas for cultural tourism, camping and nature trails/boardwalks.

4. Be a place to visit and enjoy.

The Jali Lands were used frequently in the past as a camping and meeting places and people would like to see it appreciated again in this regard. Some strategies have been put forward to achieve this such as open days and camping infrastructure. The process of IPA consultations has been successful in catalysing people to visit the lands again.



The distribution of Long-nosed Potoroo *Potorous tridactylus tridactylus* habitat on the far north coast of New South Wales

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ABSTRACT

The Long-nosed Potoroo *Potorous tridactylus tridactylus* has declined substantially on the far north coast of New South Wales. In this study, the known and potential habitat of the Long-nosed Potoroo on the coastal sandplain in the region is mapped in detail for the first time. A total of 3,613 ha of potential habitat is distributed in 10 areas from 24 ha to 1,423 ha in size. Heathy Scribbly Gum *Eucalyptus signata* woodland was considered to be particularly significant habitat in the region. While there is evidence that eight of the areas mapped once supported potoroos, their presence has only been confirmed in four of them since 2000. Targeted survey at known sites where the Long-nosed Potoroo has not been recently confirmed is urgently required, as well as a thorough reassessment of its conservation status in the region. Ecological research into threats and food preferences, and implementation of targeted conservation management actions is also needed.

Key words: Long-nosed Potoroo, endangered marsupials, mammal conservation, threatened species

Introduction

Potoroids (Marsupialia: Potoroidae) have fared poorly in Australia over the last two centuries. Of the 10 modern species, two are presumed to be extinct and all others have suffered declines, most of them severe (Claridge *et al.* 2007). The Long-nosed Potoroo *Potorous tridactylus* has declined on the Australian mainland (Claridge *et al.* 2007; Johnston 2008; Martin and Temple-Smith 2010; Frankham *et al.* 2012) and there has been a number of local population extinctions (Claridge *et al.* 2007; Martin and Temple-Smith 2010). It is listed as a Threatened species under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and also under State legislation in New South Wales (NSW), Queensland, Victoria and South Australia. One population at Cobaki Lake on the NSW far north coast is listed as an Endangered Population and declines are considered to be occurring elsewhere in the State (Lunney 1989; Mason 1997).

Frankham *et al.* (2012) recommend that the mainland population of the Long-nosed Potoroo be managed as three separate subspecies, including *Potorous tridactylus tridactylus*, the subspecies assigned to its occurrence in southeast Queensland and northeast NSW. The eastern escarpment of the Great Dividing Range in northeast NSW is the stronghold for this subspecies, with a series of relatively regularly spaced populations from the Barrington Tops region to the Border Ranges (Schlager 1981; NPWS 1994). In contrast, along the coastal margin the distribution is extremely fragmented (Schlager 1981),

with populations separated by wide gaps. Notwithstanding the limited number of targeted surveys that have been conducted in the coastal margins, between the Richmond and Hunter Rivers there are only four locations where potoroos have been reliably observed: Limeburners Creek, Old Bar, Forster and Port Stephens. In Queensland, mainland coastal populations once occurred on the Gold Coast and Sunshine Coast (Amos 1982), and the species is apparently extant on Fraser Island (Martin and Temple-Smith 2010).

The far north coast of NSW (defined here as the coastal plain north of the Richmond River) may once have been a coastal stronghold for the species. A string of localities where the Long-nosed Potoroo was known to occur span the region, from Wardell on the Richmond River to Cobaki Lake near the Queensland border. Early records from far north coast populations came from a road-kill near Lennox Head in 1971, a juvenile animal killed by a domestic cat at Wardell in 1980 and a pouch young found dead at the same Wardell locality in 1981 (Schlager 1981).

During a terrestrial vertebrate survey of coastal Byron Shire in 1985, three Long-nosed Potoroos (adult male and adult female with young at heel) were trapped at one site (Fig. 1a) in what is now Tyagarah Nature Reserve (Milledge *et al.* 1986; Milledge 1991). The species was also recorded in surveys of the vertebrate fauna of the Cudgen Lake (Fig. 1b) and Brunswick Heads areas in 1988 and 1992 (Milledge 1988; Milledge and McKinley 1992). The ongoing presence of the Cudgen

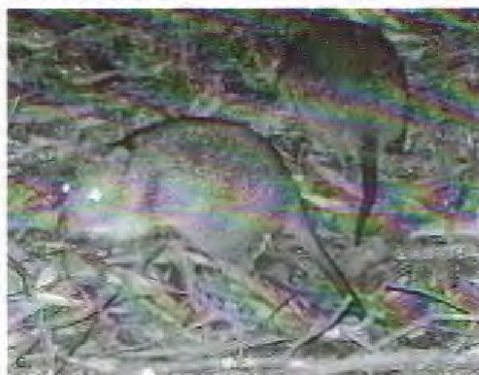
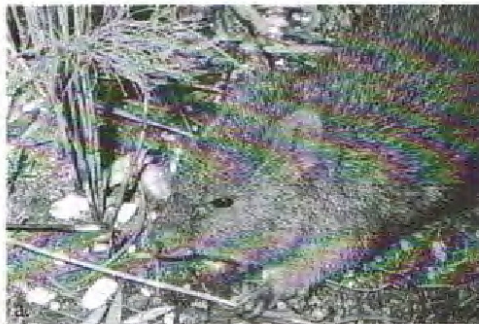




Figure 2. Photo Courtesy of the Ballina Shire Council Hydrology & Environmental Services Section. It is a good practice to regularly collect samples along the Ballina Shire Waterways.

Identification of habitat suitability for the aquatic environment is an important part of the assessment process and management of waterways. It is important to identify suitable habitat for the aquatic environment, as well as to identify areas that are not suitable for the aquatic environment. This is done by using a range of tools and techniques, including field observations, aerial photography, and GIS. The Ballina Shire Council Hydrology & Environmental Services Section has developed a range of tools and techniques to help identify suitable habitat for the aquatic environment. These tools and techniques are used to assess the suitability of different areas for the aquatic environment. This is done by using a range of tools and techniques, including field observations, aerial photography, and GIS.

Waterway management guidelines for the Ballina Shire Council Waterways are based on the principles of sustainable waterway management. This means that waterways should be managed in a way that ensures their long-term health and productivity. This is done by using a range of tools and techniques, including field observations, aerial photography, and GIS. The Ballina Shire Council Hydrology & Environmental Services Section has developed a range of tools and techniques to help identify suitable habitat for the aquatic environment. These tools and techniques are used to assess the suitability of different areas for the aquatic environment. This is done by using a range of tools and techniques, including field observations, aerial photography, and GIS.

Methodology

Study area

The study area is the Ballina Shire Council Waterways, which are located in the Ballina Shire Council area. The study area is defined by the Ballina Shire Council Waterways, which are located in the Ballina Shire Council area.

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Ballina Shire Council

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Figure 4: Aerial view of the Lagoon at the Ballina Shire Council



Figure 4: Aerial view of the Lagoon at the Ballina Shire Council. The image shows a dense forest of tall, thin trees, likely a lagoon area.

The study area of the lagoon was divided into three sections: the northern section, the middle section and the southern section. The northern section was the largest and contained the most trees. The middle section was the smallest and contained the fewest trees. The southern section was the largest and contained the most trees.

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Results

The study area was divided into three sections: the northern section, the middle section and the southern section. The northern section was the largest and contained the most trees. The middle section was the smallest and contained the fewest trees. The southern section was the largest and contained the most trees.

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Discussion

The study area was divided into three sections: the northern section, the middle section and the southern section. The northern section was the largest and contained the most trees. The middle section was the smallest and contained the fewest trees. The southern section was the largest and contained the most trees.

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Figure 1: Study area showing the location of the waterways within the Ballina Shire Council waterways estate and the location of the study area within the waterways estate.

Long-nosed Potoroo habitat on the far north coast of NSW

Table 2. The area, tenure, status and historical summary of the 10 areas mapped as potential Long-nosed Potoroo habitat on the far north coast.

Location	Hectares of total potential habitat (% of total)	Hectares of high quality (Class 1) habitat (% of high quality)	Tenure*	Status and history of observations
Arakwal	45 (1%)	0	100% Arakwal National Park	Unlikely to be extant. Small amount of suitable habitat; never recorded.
Billinudgel	87 (2%)	0	86% Billinudgel Nature Reserve 14% Freehold	Possibly extant. Only a small amount of suitable habitat; 1987 unconfirmed record (A. Benwell, G. Opat pers. comm.); 1994 road-kill record at South Golden Beach (B. Law pers. comm.); not recorded in small-scale camera-trap survey 2012 (M. Andren unpubl. data 2012).
Cobaki Lake	206 (6%)	106 (11%)	93% Crown Land 7% Freehold	Extant. Recorded 1992 (Warren 1992); 1993 trapping (Mason 1993); 2003 trapping and radio-tracking (Bali et al. 2003); possible diggings 2005 (P. Parker pers. comm.).
Cudgen Lake	135 (4%)	49 (5%)	83% Freehold 17% Cudgen Nature Reserve	Possibly extant. 1988 trapping (Milledge 1988); 2004 observation (Callaghan et al. 2004); not recorded in surveys since (e.g. Goldingay et al. 2006).
Hastings Point	46 (1%)	0	50% Freehold 46% Cudgen Nature Reserve 4% Freehold	Unlikely to be extant. Some suitable habitat; never recorded.
Lennox Head	499 (14%)	0	41% Freehold (JLALC) 35% Crown Land 24% Freehold	Possibly extant given large amount of habitat, but none known to be of high quality. 1971 road-kill (Schlager 1981); not recorded in small scale camera-trap survey 2012 (M. Andren unpubl. data 2012).
Skinners Shoot	24 (1%)	0	100% Freehold	Unlikely to be extant. Very small amount of habitat; 1995 possible diggings (Milledge et al. 1995).
Ti-Tree Lake	64 (2%)	35 (4%)	47% Crown Land 40% Freehold 13% Ti-Tree Lake Aboriginal Area	Possibly extant but only small amount of suitable habitat. 1993 possible record from hair analysis (Parker 1993).
Tyagarah / Brunswick Heads	1,098 (30%)	434 (45%)	54% Tyagarah Nature Reserve 33% Freehold 8% Crown Land 5% Brunswick Heads Nature Reserve	Tyagarah: Extant? 1985 trapping (Milledge et al. 1986); 1992 trapping (Mason 1997); 2004 trapping (Parker 2005); not recorded in recent surveys 2009 (Goldingay & Lindsay 2009, D. Scotts unpubl. data), 2011 (N. Graham pers. comm.) or 2012 (Lake 2012). Brunswick Heads: Probably extant. 1992 trapping (Milledge & McKinley 1992); 2000 trapping (Milledge 2000); 2004 trapping record (B. Taylor); not recorded in recent surveys 2009 (D. Scotts unpubl. data) or 2011 (N. Graham pers. comm. 2012).
Wardell	1,423 (39%)	345 (36%)	61% Freehold (JLALC) 35% Freehold 5% Crown Land	Extant. 1980 and 1981 specimens (Schlager 1981); Graham and Morrison (2009); 12 localities found in 2009-12 camera-trap survey (M. Andren unpubl. data).
TOTAL	3,613	969	32% Freehold 30% Freehold (JLALC) 23% NPWS Reserves 15% Crown Land	

* Although the tenure of most of the 368 cadastral polygons involved in this study was known, some were not. These figures are therefore not exact, but they are likely to be close to the true value. For each location, tenure was divided into: Freehold Land; Freehold Land owned by the Jali Local Aboriginal Land Council (JLALC); NSW National Parks and Wildlife Service (NPWS) reserves; Crown Land.



Long-nosed Potoroo habitat on the far north coast of NSW



a. Ngunya Jargoan



b

Figure 8. (a) The draft logo based on the Long-nosed Potoroo that has been adopted for the Ngunya Jargoan Indigenous Protected Area at Wardell. (b) Long-nosed Potoroo survey team employed by the Jali Local Aboriginal Land Council.

significant Wardell habitat. This area is also subject to impacts from coastal development, including increased fragmentation due to the upgrade of the Pacific Highway. However, the Long-nosed Potoroo is an icon of this area (Fig. 8a), where habitat is protected by an Indigenous Protected Area agreement (Ngunya Jargoan Indigenous Protected Area) finalised in 2013. The Land Council is employing the local community to continue potoroo surveys (Fig. 8b) in order to accurately establish the extent of the population on their land. With an informed approach to private land conservation, they are aiming to develop and implement a conservation management plan for the species.

The Long-nosed Potoroo is subject to numerous threats on the far north coast. Habitat loss, fragmentation and degradation from coastal development remains a fundamental threat to the species. Additional associated threats such as increased predation pressure when habitat is opened up and inappropriately applied fire removing vegetation cover too frequently or over large areas are also very likely to impact Long-nosed Potoroo populations. The complex and interrelated roles of these threats are recognised as key considerations for the conservation management of the species in the region.

Despite the small populations and prevailing threats, we believe that with concerted action in some key remaining areas, conservation of the Long-nosed Potoroo on the far north coast remains a realistic goal. Therefore, we urgently recommend (i) surveying all locations of historical records where potoroos have not been recently recorded (such as Billinudgel, Brunswick Heads, Cudgen Lake and parts of Tyarah Nature Reserve) and (ii) undertaking a conservation assessment of the species in the region to re-assess its status. Research into the decline of the species (such as the role of predation and changed fire regimes), the genetic relationships of the populations on the far north coast (such as the possible divergent northern mainland lineage suggested by Frankham *et al.* (2012)) and local food resources are also needed, together with increased funding for the targeted conservation management of key populations.

Acknowledgments

The Ecosystems and Threatened Species Unit of the NSW Office of Environment and Heritage (OEH) at Coffs Harbour is thanked for providing the opportunity for Mick Andren and Jill Smith to participate in this study. The views expressed are those of the authors and not necessarily those of the OEH. Mick Andren is also grateful for the opportunity extended by the Jali Local

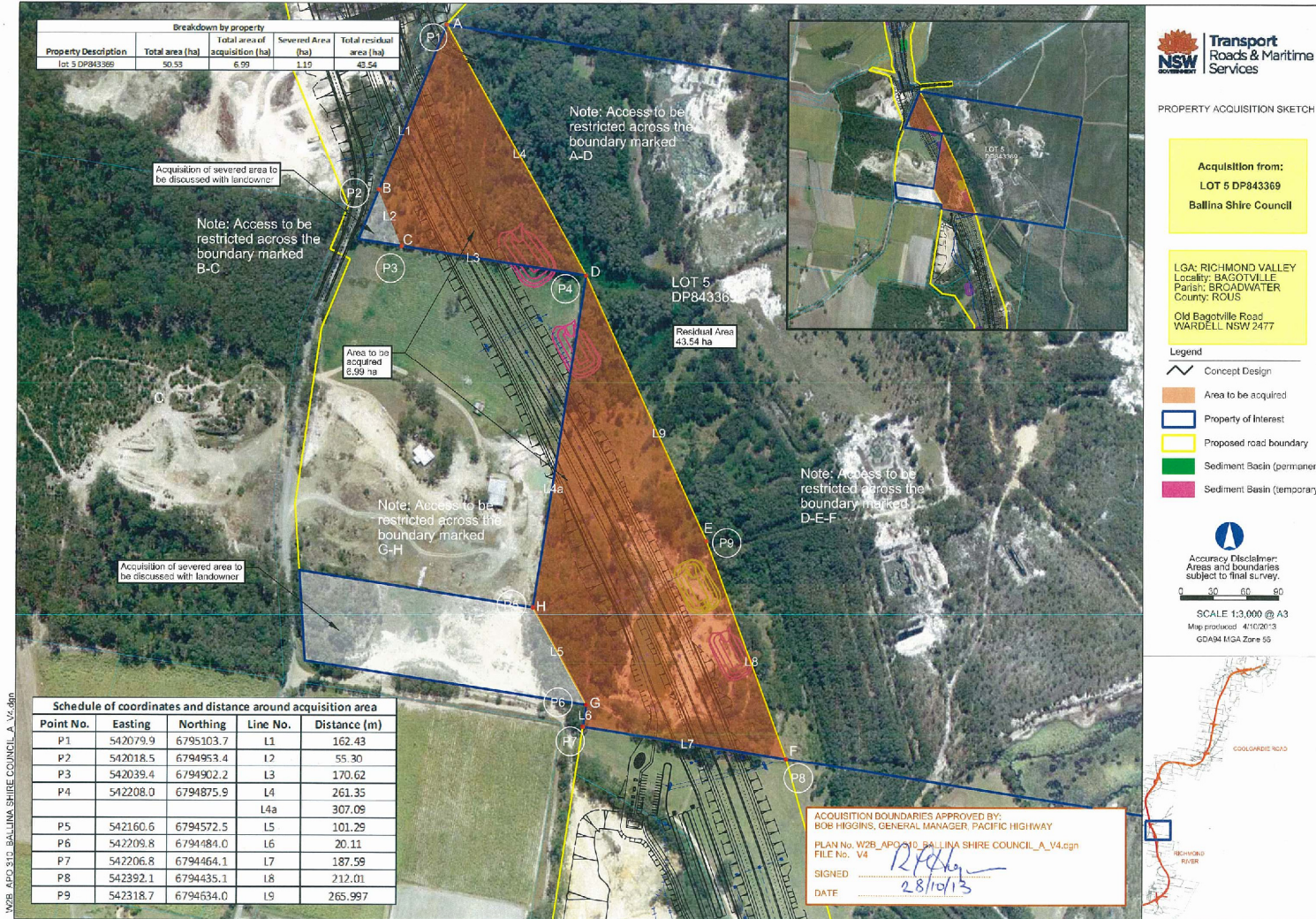
Aboriginal Land Council to survey potoroos on their Wardell property. Marcus Ferguson and the rest of the Wardell field crew are particularly thanked. We also thank Ben Lewis and Mark Graham for their assistance in the mapping of habitat at Cobaki Lake and Wardell, Peter Parker for information relating to his records and Ernst Kemmerer for his comments on the draft manuscript.

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9.6 **Planning Proposal - Reclassification of Council Owned Waterways.DOC**

APPENDIX C



PROPERTY ACQUISITION SKETCH

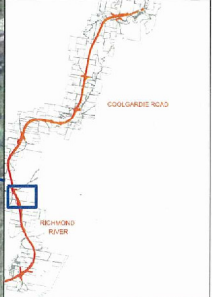
Acquisition from:
LOT 5 DP843369
Ballina Shire Council

LGA: RICHMOND VALLEY
Locality: BAGOTVILLE
Parish: BROADWATER
County: ROUS
Old Bagotville Road
WARDELL NSW 2477

- Legend
- Concept Design
 - Area to be acquired
 - Property of Interest
 - Proposed road boundary
 - Sediment Basin (permanent)
 - Sediment Basin (temporary)

Accuracy Disclaimer:
Areas and boundaries
subject to final survey.

SCALE 1:3,000 @ A3
Map produced 4/10/2013
GDA94 MGA Zone 55



Strengthening local government

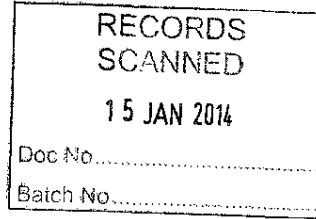


Premier & Cabinet
Division of Local Government

5 O'Keefe Avenue NOWRA NSW 2541
Locked Bag 3015 NOWRA NSW 2541

Our Reference: A362126
Your Reference: B3CPP 131008
Contact: Susan Hartley
Phone: 02 4428 4214

Mr Paul Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478



Dear Mr Hickey

Thank you for your letter of 13 December 2013 about Ballina Shire Council's decision to proceed with a planning proposal for the reclassification of community land consisting of waterways known as the Ballina Quays Canals (Lot 63 DP 263861 & Lot 132 DP 775228).

I understand you are seeking the Division of Local Government, Department of Premier and Cabinet's advice on Council's interpretation of the *Local Government Act 1993* (the Act) particularly about the provisions of sections 46 and 47D of the Act as they relate to the occupation of community land by private structures.

At the outset I must advise you that it is not the role of the Division to provide legal advice to councils or to interpret legislation on their behalf. However, the Division has reviewed Council's letter and the planning proposal to reclassify the Ballina Quays Canals from community land to operational, which I understand received a Gateway Determination from the Department of Planning and Infrastructure.

I note that Council has determined the reclassification of the Ballina Quays Canals is necessary to allow the structures to remain in place, to address issues of maintenance and public liability and to enable Council to enter into agreements with the owners of the structures.

Given the restrictions that exist in the Act for granting estates over community land, I consider that Council's actions in seeking to reclassify the land to address the existing occupation of the land by private structures are consistent with its public land management obligations. I also consider this remedy represents a practical solution to the current situation.

I trust the above information is of assistance.

Yours sincerely

Ross Woodward
Chief Executive, Local Government
A Division of the Department of Premier and Cabinet

T 02 4428 4100 F 02 4428 4199 TTY 02 4428 4209
E dlg@dlg.nsw.gov.au W www.dlg.nsw.gov.au ABN 99 567 863 195





Planning Proposal BSCPP 13/008

March 2014

Reclassification of Land

Council Owned Waterways

Ballina Quays Canals (Lot 63 DP 263861 & Lot 132 DP 775228)

Banyanda Lake (Lot 50 DP 259593)

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14/16331 Final

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INTRODUCTION

Summary of Planning Proposal

This planning proposal relates to land identified as Lot 50 DP 259593 (Banyanda Lake) and Lot 63 DP 263861 & Lot 132 DP 775228 (the Ballina Quays Canals) which comprise Council owned waterways currently classified as community land for the purposes of the *Local Government Act* 1993 (LG Act). The subject parcels are shown on the locality map below (Figure 1).

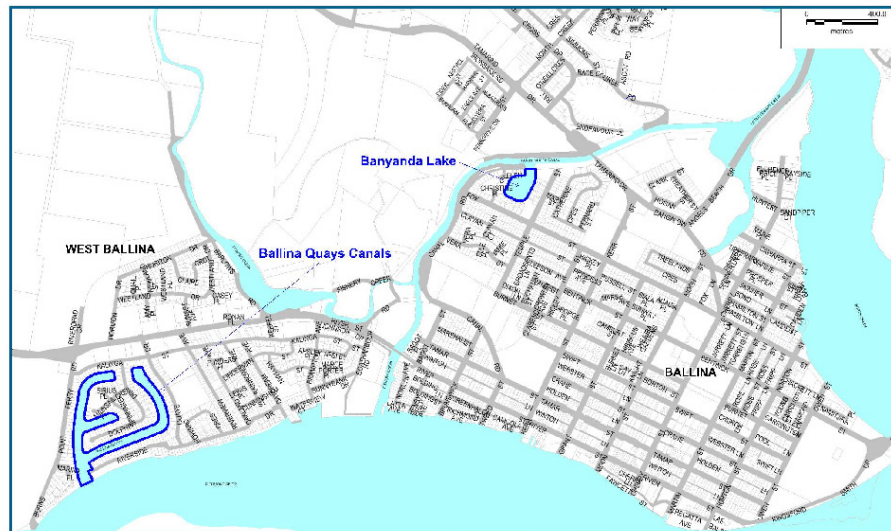


Figure 1 – Site Location

The land containing Banyanda Lake (Lot 50 DP 259593) has an area of 1.97 hectares and the land containing the Ballina Quays Canals (Lot 63 DP 263861 & Lot 132 DP 775228) has a combined area of 9.37 hectares. All three parcels are in the ownership of Ballina Shire Council and are classified as community land. The purpose of this planning proposal is to enable the reclassification of the land to operational land in accordance with the requirements of the LG Act.

All the subject lots are located fully within the W2 Recreational Waterway zone under the provisions of the *Ballina Local Environmental Plan 2012* (BLEP 2012). No amendments to the current zoning arrangements under the BLEP 2012 form part of this planning proposal.

This planning proposal seeks to reclassify the entire area of Lot 63 DP 263861 & Lot 132 DP 775228 (Ballina Quays Canals) and Lot 50 DP 259593 (Banyanda Lake) from community land to operational land under the provisions of the LG Act. This involves the amendment of Schedule 4 of the BLEP 2012 to incorporate reference to the reclassification of Lot 63 DP 26386, Lot 132 DP 775228 and Lot 50 DP 259593.

Planning Context

Lot 50 DP 259593 (Banyanda Lake) comprises part of the Banyanda residential estate and was dedicated to Council as a public following the registration of the plan of subdivision in 1979. Lot 50 includes the bed of the lake as well as the shoreline and the majority of the intertidal area of the waterway.

Lot 63 DP 263861 and Lot 132 DP 775228 (the Ballina Quays Canals) comprise different stages of the Ballina Quays estate and were dedicated to Council as public reserves following the registration of the plans of subdivision in 1983 and 1988 respectively. While Lots 63 and 132 include the bed of the waterway, the property boundaries of the canals extend into the intertidal zone of the canals and in some areas the canal shoreline is located outside the canal boundaries.

The subject lots detailed above were in Council's ownership at the time of commencement of the LG Act. Due to their dedication as public reserves, they became classified as community land by default following the commencement of the LG Act provisions.

The lots form artificial waterways which were constructed as part of the Ballina Quays and Banyanda residential estate developments. Directly adjoining the waterways are 214 residential allotments of which an estimated 145 have private structures, such as boat ramps and pontoons, placed in the waterway on Council owned community land. Council has, in the past, authorised the placement of these private waterway structures through the issue of development consent under the *Environmental Planning and Assessment Act 1979* and the application of development standards for works and structures in the waterways.

A recent review of the management provisions applying to public community land and specifically the subject lots detailed above has revealed that the placement of these private structures is inconsistent with the statutory management provisions of section 35 of the LG Act. This has also highlighted potential public liability for Council in relation to the placement of such private structures on land for which it has management responsibility in accordance with the LG Act.

Section 35 of the LG Act requires that the private, exclusive use of community land may only be by way of a lease or licence. A lease or licence for the use of community land is limited to purposes that meet the current and future needs of the community and wider public such as public recreation and those that promote the physical, cultural, social and intellectual welfare or development of persons. As such, the current private structures placed in the subject waterways cannot be leased or licensed because they are inconsistent with the requirements of the LG Act.

The identified solution to rectifying the above matter and enabling the private waterway structures to be made lawful is to reclassify the subject land from community land to operational land. This will allow Council, in the first instance, to make the structures lawful through removing the application of the specific management requirements of section 35 of the LG Act. Subsequently, it will allow Council to further consider its options with regard to managing and regulating the placement of the structures through leasing and/or licensing.

The reclassification of Lot 50 DP 259593 (Banyanda Lake), Lot 63 DP 263861 and Lot 132 DP 775228 (the Ballina Quays Canals) was considered by the Council at its Ordinary Meeting held on 22 August 2013 where it was recommended that Council prepare a planning proposal for the reclassification of the land in accordance with the requirements of the LG Act. A copy of the report submitted to the Council at its Ordinary Meeting on 22 August 2013 and its subsequent resolution are contained in Appendix A.

Given that the land is Council owned and Council's associated commercial interest in the site, this planning proposal has been prepared having regard for the Department of Planning and Infrastructure's Practice Note PN 09-003 - Classification and reclassification of public land through a local environmental plan and Best Practice Guideline: LEPs and Council Land. Information addressing the requirements of the practice note and guideline and the rationale for the reclassification is contained in Tables 1-3 below.

Table 1 – Site Assessment – Lot 50

Site	Lot 50 DP 259593, Banyanda Lake, Ballina
Land Register ID	L20024_01
Current Classification	Community Land
Proposed Classification	Operational Land
Reason for classification/ reclassification	To enable Council to regularise (make lawful) the placement of private structures within the waterway in accordance with the requirements of the LG Act.
Reason for the Draft LEP	To insert reference to Lot 50 DP 259593 in Schedule 4 of the BLEP 2012 to enable the reclassification of the subject land from community land to operational land.
Ownership of the land	Ballina Shire Council
Nature of Council's Interest	Council received the land by dedication as a public reserve as part of the Banyanda residential estate in 1979. Being a public reserve, the land was classified as community land upon commencement of the LG Act in 1993. Council now manages the land as a public waterway and seeks to provide adjoining landowners with a lawful means to place private structures, such as boat ramps and pontoons, within the waterway.
Other parties with interests	Adjoining landowners with private structures in the waterway.
Change of interests resulting from classification/ reclassification	Not applicable – there are no other parties with an interest in this land.
Special agreements applicable to the land	No special agreements apply to the land other than the land being dedicated and registered as a public reserve.
Financial issues	The reclassification of the land will enable Council to appropriately manage and regulate the use of the waterway, including with respect to the placement of private structures within it.
Asset issues	The subject land comprises an artificial waterway for which Council has a management and maintenance responsibility.

Table 2 – Site Assessment – Lot 63

Site	Lot 63 DP 263861, Ballina Quays Canal, West Ballina
Land Register ID	L21003_02
Current Classification	Community Land
Proposed Classification	Operational Land
Reason for classification/ reclassification	To enable Council to regularise (make lawful) the placement of private structures within the waterway in accordance with the requirements of the LG Act.
Reason for the Draft LEP	To insert reference to Lot 63 DP 263861 in Schedule 4 of the BLEP 2012 to enable the reclassification of the subject land from community land to operational land.
Ownership of the land	Ballina Shire Council
Nature of Council's Interest	Council received the land by dedication as a public reserve as part of the Ballina Quays residential estate in 1983. Being a public reserve, the land was classified as community land upon commencement of the LG Act in 1993. Council now manages the land as a public waterway and seeks to provide adjoining landowners with a lawful means to place private structures, such as boat ramps and pontoons, within the waterway.
Other parties with interests	Adjoining landowners with private structures in the waterway.
Change of interests resulting from classification/ reclassification	Not applicable – there are no other parties with an interest in this land.
Special agreements applicable to the land	No special agreements apply to the land other than the land being dedicated and registered as a public reserve.
Financial issues	The reclassification of the land will enable Council to appropriately manage and regulate the use of the waterway, including with respect to the placement of private structures within it.
Asset issues	The subject land comprises an artificial waterway for which Council has a management and maintenance responsibility.

Table 3 – Site Assessment – Lot 132

Site	Lot 132 DP 775228, Ballina Quays Canal, West Ballina
Land Register ID	L21003_01
Current Classification	Community Land
Proposed Classification	Operational Land
Reason for classification/ reclassification	To enable Council to regularise (make lawful) the placement of private structures within the waterway in accordance with the requirements of the LG Act.
Reason for the Draft LEP	To insert reference to Lot 132 DP 775228 in Schedule 4 of the BLEP 2012 to enable the reclassification of the subject land from community land to operational land.
Ownership of the land	Ballina Shire Council
Nature of Council's Interest	Council received the land by dedication as a public reserve as part of the Ballina Quays residential estate in 1988. Being a public reserve, the land was classified as community land upon commencement of the LG Act in 1993. Council now manages the land as a public waterway and seeks to provide adjoining landowners with a lawful means to place private structures, such as boat ramps and pontoons, within the waterway.
Other parties with interests	Adjoining landowners with private structures in the waterway.
Change of interests resulting from classification/ reclassification	Not applicable – there are no other parties with an interest in this land.
Special agreements applicable to the land	No special agreements apply to the land other than the land being dedicated and registered as a public reserve.
Financial issues	The reclassification of the land will enable Council to appropriately manage and regulate the use of the waterway, including with respect to the placement of private structures within it.
Asset issues	The subject land comprises an artificial waterway for which Council has a management and maintenance responsibility.

PART 1 – OBJECTIVES OR INTENDED OUTCOMES

The objectives and intended outcome of this planning proposal is:

- to reclassify Lot 50 DP 259593, Lot 63 DP 263861 and Lot 132 DP 775228 (Council owned waterways) to operational land to enable Council to regularise (make lawful) the existing private waterway structures on the land.

PART 2 – EXPLANATION OF THE PROPOSAL

This planning proposal will result in the amendment of Schedule 4 of the BLEP 2012 to incorporate reference to the reclassification of Lot 50 DP 259593, Lot 63 DP 263861 and Lot 132 DP 775228 from community land to operational land for the purposes of the *Local Government Act 1993*.

PART 3 – JUSTIFICATION

Section A - Need for the Planning Proposal

1. Is the planning proposal a result of any strategic study or report?

The planning proposal is the result of an internal review of the management provisions applying to Council's landholdings and land classified as community land.

2. Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

The planning proposal to reclassify Lot 50 DP 259593, Lot 63 DP 263861 and Lot 132 DP 775228 as operational is the best means for achieving a desired outcome to facilitate the lawful placement of private structures within Council owned waterways. Further rationale for the reclassification is contained in Tables 1-3.

Section B - Relationship to the Strategic Planning Framework

3. Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?

The proposal to reclassify the subject land is consistent with the objectives and actions in the applicable regional and sub-regional strategies.

4. Is the planning proposal consistent with the local council's Community Strategic Plan, or other local strategic plans?

The proposed reclassification will enable the future and ongoing lawful placement and use of the private water based structures in subject waterways. This is consistent with Council's historic actions to allow such structures in the waterways, including the provisions of Council's Principal Generic Plan of Management for Community Land (PoM). This matter is not directly addressed in Council's Community Strategic Plan or other local plans aside from the PoM.

5. Is the planning proposal consistent with applicable state environmental planning policies?

The proposal is generally consistent with applicable State Environmental Planning Policies (SEPPs).

6. Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?

The proposal is consistent with the relevant Section 117 Directions as detailed in the Section 117 Direction Checklist contained in Appendix B.

Section C - Environmental, Social and Economic Impact

7. Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats will be adversely affected as a result of the proposal?

The proposed reclassification will not result in direct impacts on critical habitat or threatened species, populations or ecological communities or their habitats.

8. Are there any other likely environmental effects as a result of the planning proposals and how are they proposed to be managed?

No other likely environmental effects are expected.

9. How has the planning proposal adequately addressed any social and economic effects?

The proposed reclassification is not expected to result in any adverse social or economic effects. The reclassification will allow Council to lawfully regulate and manage the placement of private structures on public land while maintaining the waterways for general use by the community.

Section D - State and Commonwealth interests.

10. Is there adequate public infrastructure for the planning proposal?

The planning proposal will not create any need for public infrastructure.

11. **What are the views of State and Commonwealth public authorities consulted in accordance with the gateway determination?**

No engagement with State or Commonwealth public authorities has been undertaken as part of this planning proposal to date.

PART 4 – MAPPING

The planning proposal relates to the reclassification of Lot 5 DP 843369 from community land to operational land as detailed in the aerial maps below. The proposal will not result in amendments to any of the maps associated with the BLEP 2012.





PART 5 – COMMUNITY CONSULTATION

The planning proposal was placed on public exhibition for a minimum of 28 days in accordance with the Gateway determination. The exhibition period was from 9 October 2013 to 11 November 2013. A total of 77 submissions were received which were addressed by the Council at its Ordinary Meeting held on 27 March 2014. In addition to the above, and in accordance with the requirements of the *Local Government Act* 1993, a public hearing was held in relation to the reclassification proposal on 11 December 2013. The report submitted by the independent presiding officer appointed to conduct the hearing was also considered by the Council at its Ordinary Meeting held on 27 March 2014.

PART 6 – TIMELINE

The proposed timeline for completion of the planning proposal is as follows:

Plan Making Step	Estimated Completion (Before)
Gateway Determination	September 2013
Government Agency Consultation	October 2013
Public Exhibition Period	October – November 2013
Public Hearing	December 2013
Submissions Assessment	December 2013 – February 2014
RPA Assessment of Planning Proposal and Exhibition Outcomes	March 2014
Submission of Endorsed LEP to DP&I for Finalisation	April 2014
RPA Decision to Make the LEP Amendment (if delegated)	N/A – proposal not subject to delegation
Forwarding of LEP Amendment to DP&I for Notification (if delegated)	N/A – proposal not subject to delegation

Note: Council is not seeking delegation of plan making functions in relation to this proposal due to Council's commercial interest in the subject property.

APPENDICES

Appendix A – Council Reports and Resolutions

9.2 Land Reclassification - Council Owned Waterways

9.2 Land Reclassification - Council Owned Waterways

Delivery Program Strategic Planning

Objective To advise in relation to private structures within Council owned waterways and to seek direction with respect to the ongoing management of these structures.

Background

There are a number of artificial waterways which are owned and managed as public land by Council in accordance with the provisions of the *Local Government Act 1993* (LG Act). The land tenure of these waterways differs from natural waterways (such as rivers and creeks) which are managed and controlled as Crown land. These waterways exist as a result of past land developments and include:

- Ballina Quays Canals (Lot 63 DP 263861 & Lot 132 DP 775228)
- Lakes at Northlakes Estate (Lot 114 DP 852971 & Lot 171 DP 1041678)
- Banyanda Lake (Lot 50 DP 259593)
- Endeavour Lake (Southern Cross Industrial Estate) (Lot 72 DP 778628)
- Prospect Lake (Lot 105 DP 871675)
- Chickiba Lake (Lot 207 DP 851318).

There are a number of private allotments which directly adjoin these waterways giving them access to the waterway and a connection to the wider Richmond River estuary system. The waterways with directly adjoining allotments are the Ballina Quays canals, Banyanda Lake and Endeavour Lake as identified in the locality plan in Attachment One.

Although the waterways identified are Council owned (public) land, some of the allotments adjoining the waterways benefit from the placement of private structures within the waterway such as jetties, gangways, pontoons, boat ramps, slipways and the like. In the past, Council has regulated the placement of these structures through the issue of development consents in conjunction with application of physical design parameters to ensure the integrity of the waterway profile.

A recent review of Council's practices and procedures for the management of Council owned land has identified several issues relating to the ongoing use and management of private waterway structures on Council owned public land. The purpose of this report is to bring these matters to Council's attention and to seek direction as to Council's preferred course of action in addressing the issues.

Key Issues

- Management of private structures on public land
- Appropriate regulation of private structures in Council
- Compliance with requirements of the *Local Government Act 1993*.

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9.2 Land Reclassification - Council Owned Waterways

Information

There are a number of Council owned waterways within which private structures have been placed. Many of the private allotments with direct access to these waterways benefit from private structures located within the waterway on Council owned land. In most cases, the waterway structures have been installed with approval and endorsement from Council through the issue of development consent. An estimate of the number of waterfront properties with associated private waterway structures is detailed in Table One.

Table One – Waterfront Lots with Waterway Structures ¹		
Location	Waterfront Lots	Lots With Waterway Structure ²
Ballina Quays	182	138 (75%)
Banyanda Lake	32	7 (21%)
Endeavour Lake	26	8 (30%)
TOTAL	240	153 (63%)

1. Council owned waterway only – excludes natural, Crown land waterways.
2. Based on observation of 2012 aerial photography

The Local Government (LG) Act contains specific requirements for the exclusive (private) occupation of Council owned public land. A recent review of the management provisions for the private occupation of public land has identified that Council's current and past practices regarding the placement of private waterway structures on Council owned land does not fully comply with the requirements of the LG Act. This non-compliance has also raised possible liability issues for Council.

Local Government Act 1993

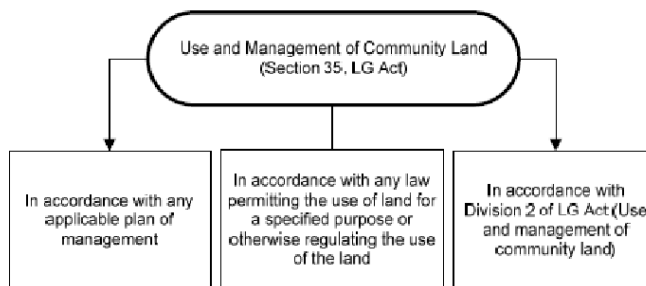
The Council owned land comprising the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) has been classified as 'community land' since the commencement of the LG Act in 1993. The land comprising Endeavour Lake (Lot 72 DP 778628) has been classified as 'operational land' in accordance with the LG Act and Council's resolution of 24 February 1994. Land classified as community land is subject to specific management provisions as detailed in the LG Act while land classified as operational land is not.

Section 35 of the LG Act governs the use and management of community land. Section 35 has three components which specify the management provisions for community land as shown in Figure 1.

Any use of, or management provisions associated with, community land must comply with the requirements of all three components of section 35.

9.2 Land Reclassification - Council Owned Waterways

Figure One – Use and Management of Community Land, *Local Government Act 1993*



The plan of management applicable to the subject land is Council's *Principal Generic Plan of Management for Community Land (PoM)* adopted in April 1995. The PoM contains special provisions that recognise and authorise the establishment and use of 'private pontoons' but only in the Ballina Quays waterways. There are no specific management provisions for waterway structures in the Banyanda Lake. In the case of Endeavour Lake, because this land is classified as operational land the PoM provisions do not apply.

Other laws permitting or regulating the use of the subject land include the *Environmental Planning and Assessment Act 1979*, the *Ballina Local Environmental Plan 2012* and the *Fisheries Management Act 1994*. The installation and erection of structures within the subject waterways can be carried out with permission or consent granted in accordance with the provisions of the above legislative instruments, subject to consistency with the requirements of the LG Act.

The provisions of Division 2 of the LG Act contain the specific statutory requirements for the use and management of community land. In relation to the exclusive use of community land involving the placement of private waterway structures, section 47D permits this only in accordance with a lease or licence. To date, no leases or licences have been issued by Council in relation to the occupation of community land by private waterway structures.

Section 46 of the LG Act provides further specifications in relation to the issue of a lease or licence in respect of community land. Although it provides that a lease or licence may be "in accordance with an express authorisation in the plan of management" it also requires that it must be for a purpose prescribed in the LG Act. These purposes typically relate to the provision of services and facilities and the carrying out of activities to meet the current and future needs of the local community and the wider public such as public recreation and the physical, cultural, social and intellectual welfare or development of persons.

In accordance with the above information, section 46 of the LG Act does not make provision for the issuing of a lease or licence for the placement of private waterway structures on community land. Further to this, the LG Act provides, in section 46(6), that "a plan of management is void to the extent that it purports to authorise the grant of a lease, licence or other estate in contravention of this section."

9.2 Land Reclassification - Council Owned Waterways

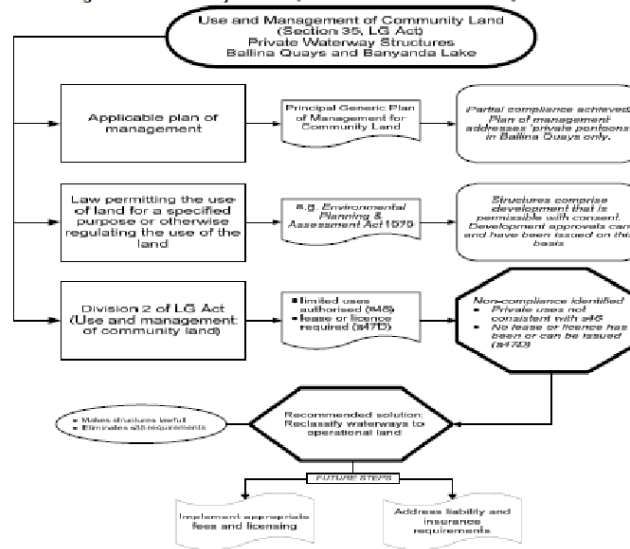
This means that although Council's adopted PoM provides for the occupation of land in the Ballina Quays canals for private waterway structures, the PoM provisions are void where they are in contravention of the LG Act requirements for the usage, leasing and licensing of community land.

Based on the above it can be interpreted that the exclusive use of community land for private waterway structures is inconsistent with the management provisions for community land in the LG Act. In addition, the LG Act provides that a lease or license cannot be granted for the subject waterway structures under the current circumstances and thus the occupation of the land is not in compliance with the requirements of the LG Act.

Legal opinion in relation to the above was obtained from the solicitor of Council's insurer (DLA Piper) in April 2013. This advice concurs with the interpretation above and recommends that to regularise (make lawful) these waterway structures, the land comprising the Ballina Quays and Banyanda Lake should be reclassified from community land to operational land. The reclassification of the subject land to operational will allow Council to make the subject structures lawful (through conformity with the LG Act) and will also enable it to address the potential liability issues relating to the placement of private structures on public land.

The LG Act provisions relating to the placement of private structures on community land and that form the basis of the recommendations in this report are summarised in Figure Two below.

Figure Two – Summary of LG Act Provisions and Recommendations



9.2 Land Reclassification - Council Owned Waterways

Public Liability

One of the other issues that arises as a result of the investigation into this matter is that of Council's responsibility and potential liability for claims in relation to unregulated and/or unlicensed structures on Council land. This issue was also referred to Council's DLA Piper for further advice.

In response, DLA Piper has advised that the current structures, where located on community land, are unlawful, and therefore are presently a potential liability for Council. In addition to the advice to reclassify the land as detailed above, it is also advised that following the reclassification, appropriate leasing or licensing arrangements between Council and the owners of the structures should be made to address Council's potential liability in this regard. It is proposed that this step would be undertaken separate from the reclassification as it is likely to be controversial and require significant community engagement.

Recommended Actions

A number of actions are recommended in order to address and resolve the issues identified above, with the key outcome being to ensure existing and future structures are lawful and to manage Council's liability risk. These are expected to result in a formalised and regulated response to the establishment and ongoing use of waterway structures on Council owned land that ensures public safety and addresses the potential liability of both Council and the owners of the structures. In sequence, the recommended actions are detailed below.

1. *The land comprising the Ballina Quays and Banyanda Lake is reclassified from community land to operational land in accordance with the provisions of the LG Act.*

The reclassification of public land requires an amendment to the *Ballina Local Environmental Plan 2012 (LEP)*. To enable this, it is recommended that the attached planning proposal be submitted to the Department of Planning and Infrastructure for Gateway determination in accordance with the requirements of the *Environmental Planning and Assessment Act 1979*.

Part of the reclassification process will require a public hearing as specified in the LG Act. This is in addition to the standard public consultation associated with an LEP amendment. Clear and sufficient information will need to be provided to the public to ensure they are adequately informed of the situation and the reasons for the relevant actions in relation to the reclassification and expected subsequent related actions. The reclassification of the subject land to 'operational land' is an essential step in enabling Council to regularise (make lawful) existing and future private structures within the subject waterways.

2. *Council prepare and adopt a policy to regulate and manage private waterway structures on land comprising Council owned waterways.*

It is recommended that Council develop a policy to enable it to manage and appropriately regulate the use of public land for private waterway structures. The policy could be supported by guidelines relating to the use

9.2 Land Reclassification - Council Owned Waterways

and application of such structures in Council waterways and incorporate the existing formal and informal requirements and procedures relating to these structures. The development of a policy and supporting guidelines would be undertaken separately from the reclassification in item one. The drafting of a policy and its subsequent implementation represents the greatest resource commitment by Council in relation to this matter. In developing the policy, consideration will need to be given to how it will be applied and implemented in relation to existing, long-standing, unregulated structures in the subject waterways.

Once a policy standard is drafted and adopted, further work will then be required in relation to authorising and regulating existing structures and formulating relevant leasing or licensing arrangements. This is likely to involve extensive legal work as well as physical verification of the location of existing structures, whether or not they are approved structures, whether or not they comply with the conditions of approval and whether or not the existing structures are of a suitable public safety or construction standard. The parameters, expectations and requirements for the owners of existing structures to comply with the above will need to be considered and incorporated into the policy.

Should Council resolve to support the preparation of a draft policy to regulate and manage private waterway structures on land comprising Council owned waterways, it is recommended that this matter be further reported to Council separately.

3. *Council considers the application of a fee structure for the administration of the leasing or licensing of private waterway structures on land comprising Council owned waterways in association with Action 2.*

In relation to Item two, Council will have the option to apply application and licensing fees as it considers appropriate for the ongoing management and use of the waterway structures. An assessment has been undertaken of other local government areas with similar private waterways as well as Crown Lands who manage natural waterways comprising Crown land. The findings of this assessment are detailed in Table Two. As with Item two, this matter would be reported to Council for its consideration separate to the proposed reclassification of the land.

Authority	Application Fee	Recurring Fees
Crown	\$438.40	Annual market based rent calculated via formula including base fee, area of occupation and generic land values
Tweed Shire Council	\$133.90	\$210 annual licence fee
Clarence Valley Council	N/A	\$55 annual lease fee
Port Macquarie Hastings Council	N/A	\$87 annual licence fee
Gosford City Council	Solicitors fees to establish licence agreement	\$753.70 annual licence fee

9.2 Land Reclassification - Council Owned Waterways

Sustainability Considerations

- **Environment**
The management and regulation of the placement of private structures within Council owned waterways as detailed in this report is not expected to result in significant environmental impacts. The placement of such structures currently requires development consent under the provisions of the *Environmental Planning and Assessment Act 1979*. This will not change as a result of the recommendations of this report.
- **Social**
As detailed in this report, there are a number of private structures occupying Council owned public land in a manner inconsistent with the provisions of the LG Act. It is considered optimal that this arrangement is formalised in a manner consistent with the terms of the LG Act, including examination of the issues associated with use of the public land and potential liability risk to Council.
- **Economic**
The recommendations in this report are not expected to result in any significant economic impacts on the broader community.

Legal / Resource / Financial Implications

The current regime of placing private structures within Council owned waterways has been identified as inconsistent with the provisions of the LG Act. As such, Council has a responsibility to take action to make any existing structures lawful as well as to facilitate the lawful placement of such structures in the future.

Part of this report contains the recommendation that Council reclassify two of the identified waterways in the first instance to enable the lawful regulation of the waterway structures. This action will require the commitment of Council resources in the processing of a planning proposal with the Department of Planning and Infrastructure as well as the undertaking of a public hearing in accordance with the LG Act. It is estimated that the reclassification of the subject land can be expected to take 6-8 months.

Further, should Council resolve to prepare of a draft policy to regulate the placement of private structures on public land, a further commitment of resources will be required. This will involve the preparation of the draft policy and its subsequent reporting, public exhibition and final consideration by Council. Depending on the contents and outcomes of the draft policy, a substantial commitment of Council resources may be required, particularly in relation to the regulation of existing waterway structures.

As detailed in this report, Council also has the option to consider the levying of fees and charges in relation to the placement of private structures within Council owned waterways. The consideration of these fees and charges could be undertaken in conjunction with the consideration of the draft policy. The levying of fees and charges for such structures would allow Council to recover some of its administrative costs in relation to regulating the structures as well as possibly some of its maintenance costs in relation to the upkeep of the artificial waterways.

9.2 Land Reclassification - Council Owned Waterways

As recommended in this report, this would be reported to Council for its consideration separate to the proposed reclassification of the land.

Consultation

No consultation has been undertaken to date in relation to this matter. As specified in this report, should Council resolve to reclassify the subject land, a public notification, public exhibition and public hearing processes will be required.

In relation to the preparation of a draft policy for the placement of private structures in Council owned waterways, this matter will be further addressed in a separate report to Council should it resolve to proceed with the preparation of a draft policy.

Options

1. Note the contents of this report and resolve to take no further action

The subject waterways and many of the structures detailed in this report have been in place for over 25 years with minimal to no regulation. There is the option to continue in this regard and take no action. Under this approach, the existing structures will remain inconsistent with LG Act requirements.

With respect to the address of the potentially significant risks to Council as landowner in relation to a personal injury or lawful use claim in relation to the structures, the alternative to the reclassification of land is Council compliance action to have the existing structures removed from its land.

Having regard for the above, this option is not recommended.

2. Reclassify the subject land from community land to operational land

Of the three Council owned waterways discussed in this report, two are classified as community land under the LG Act. The LG Act provisions effectively prohibit the placement of the identified private structures on community land resulting in the current structures being inconsistent with the terms of the LG Act.

To address this, it is recommended that the identified community land containing waterways with private structures be reclassified. This will involve the reclassification of the land containing the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) from community land to operational land and allow Council to regularise (make lawful) any private structures on that land. This will involve the submission of the planning proposal in Attachment Two (or as amended by Council) to the Department of Planning and Infrastructure for Gateway determination.

Council may resolve to exercise this option on its own without committing to the preparation of a draft policy. While this will be a step towards achieving an appropriate level of management and regulation of private structures on public land, it does not adequately address Council's

9.2 Land Reclassification - Council Owned Waterways

potential liability in relation to privately owned structures on Council owned land.

It is recommended that this option be considered in conjunction with the implementation of a Council policy for private structures in Council owned waterways as detailed in Option Four.

3. Prepare a draft policy to manage and regulate the placement of private waterway structures on Council owned land

Council has the option to resolve to prepare a draft policy to manage and regulate the placement of private waterway structures on Council owned land (public land). Council can only legitimately lease or license its land for private exclusive use in the subject circumstances if the land is classified as operational land under the LG Act.

Currently, only one of Council's waterways with existing private structures is classified as operational land (Endeavour Lake). Therefore, to enable the appropriate application of the recommended policy to all Council owned waterways, this option must be considered in conjunction with Option Two.

4. Reclassify the land and prepare a draft policy with the aim of managing and regulating the placement of private waterway structures on Council owned land

This option is an amalgam of Options Two and Three. Should Council resolve to support this option, it would result initially in the submission of the planning proposal in Attachment Two to enable the reclassification of the subject land from community land to operational land. This initial component would be further reported to Council for final consideration following the conclusion of the public exhibition and public hearing process.

The second component of this recommendation is that Council commit to the preparation of a draft policy for the regulation and management of private structures in Council owned waterways. This would involve the preparation of a draft policy that would be submitted to Council for consideration as a separate matter. It would also be open to Council to consider its options in relation to the charging of leasing/licensing fees in conjunction with such a policy.

It is also recommended that Council, in conjunction with its consideration of a draft policy for the regulation and management of private structures in Council owned waterways, also consider its options in relation to the levying of fees and charges for such structures. Should Council subsequently resolve to support the adoption of such a policy, it would take effect following the reclassification of the subject land detailed above.

Proceeding with this option will provide a process to address legal and public liability issues surrounding private structures on public land and enable existing structures to be made lawful in terms of the LG Act. This option does, however, result in a substantial resourcing commitment as detailed in this report.

9.2 Land Reclassification - Council Owned Waterways

This option is the recommended approach.

5. Reclassify the land and hold a briefing to consider options for the regulation and management of the placement of private waterway structures on Council owned land

Given the complexity and diversity of issues raised in this report, Councillors may wish to hold a briefing to further consider these issues before committing to further action. It is recommended that if it is resolved to proceed with a briefing, that Council not delay commencing the process to reclassify the land. As detailed in this report, the reclassification of the land is an essential step in making the existing structures compliant with the requirements of the LG Act. Further, Council will have further opportunities to consider the reclassification, post its initiation, prior to the completion of the process.

The reclassification of the land does not commit Council to the issue of any leases, licences or any other forms of regulation of the existing structures. Should Council resolve to proceed with this option, it will authorise the commencement of the reclassification process while deferring a decision with regard to the management and regulation of the waterway structures until after a workshop can be held.

RECOMMENDATIONS

1. That Council endorses the commencement of the process for the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) from community land to operational land based on the planning proposal contained in Attachment Two.
2. That Council submit the planning proposal for the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) to the Department of Planning and Infrastructure for review and Gateway determination.
3. That upon an affirmative Gateway determination being received from the Department of Planning & Infrastructure, the procedural steps associated with progression of the planning proposal, including public exhibition and the holding of a public hearing, be undertaken.
4. That a further report be presented to Council in relation to the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) following mandatory community consultation.
5. That Council prepare a draft policy in relation to the management of private structures within Council owned waterways and that this matter be reported to Council for its consideration.
6. That in conjunction with its consideration of a draft policy for the management of private structures within Council owned waterways, that Council also consider options regarding the levying of fees and charges for the leasing/licensing of private structures in Council owned waterways.

9.2 Land Reclassification - Council Owned Waterways

Attachment(s)

1. Locality Maps - Council Owned Waterways
2. Planning Proposal - Reclassification of Land, Council Owned Waterways

Ballina Shire Council

For Action Item - Land Reclassification - Council Owned Waterways

TO: Steve Barnier - Group Manager

COPY TO:

DATE: 26 August 2013

MEETING: Council Meeting of 22/08/2013

Action is required for item 9.2 as per the Council Resolution outlined below.

220813/13 RESOLVED

(Cr Keith Williams/Cr Paul Worth)

1. That Council endorses the commencement of the process for the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) from community land to operational land based on the planning proposal contained in Attachment Two.
2. That Council submit the planning proposal for the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) to the Department of Planning and Infrastructure for review and Gateway determination.
3. That upon an affirmative Gateway determination being received from the Department of Planning & Infrastructure, the procedural steps associated with progression of the planning proposal, including public exhibition and the holding of a public hearing, be undertaken.
4. That a further report be presented to Council in relation to the reclassification of the Ballina Quays canals (Lot 63 DP 263861 & Lot 132 DP 775228) and Banyanda Lake (Lot 50 DP 259593) following mandatory community consultation.
5. That Council prepare a draft policy in relation to the management of private structures within Council owned waterways and that this matter be reported to Council for its consideration.
6. That in conjunction with its consideration of a draft policy for the management of private structures within Council owned waterways, that Council also consider options regarding the levying of fees and charges for the leasing/licensing of private structures in Council owned waterways.

FOR VOTE - All Councillors voted unanimously.

Appendix B – Section 117 Direction Checklist

Section 117 Direction Checklist	
Planning Proposal Lot 50 DP 259593, Banyanda Lake, Ballina Lot 63 DP 263861 & Lot 132 DP 775228 (the Ballina Quays Canals)	
Direction No.	Compliance of Planning Proposal
1. Employment and Resources	
1.1 Business and Industrial Zones	Does not apply to planning proposal.
1.2 Rural Zones	Does not apply to planning proposal.
1.3 Mining, Petroleum Production and Extractive Industries	Does not apply to planning proposal.
1.4 Oyster Aquaculture	Does not apply to planning proposal.
1.5 Rural Land	Does not apply to planning proposal.
2. Environment and Heritage	
2.1 Environmental Protection Zones	Does not apply to planning proposal.
2.2 Coastal Protection	Consistent. The planning proposal is for the reclassification of land and will not result in inconsistencies with the identified coastal policies, guidelines or management provisions.
2.3 Heritage Conservation	Consistent. The planning proposal is for the reclassification of land and will not directly impact any known items, areas, objects or places of environmental heritage significance and indigenous heritage significance.
2.4 Recreation Vehicle Areas	Does not apply to planning proposal.
3. Housing, Infrastructure and Urban Development	
3.1 Residential Zones	Does not apply to planning proposal.
3.2 Caravan Parks and Manufactured Home Estates	Does not apply to planning proposal.
3.3 Home Occupations	Does not apply to planning proposal.
3.4 Integrated Land Use and Transport	Does not apply to planning proposal.
3.5 Development Near Licensed Aerodromes	Does not apply to planning proposal.
3.6 Shooting Ranges	Does not apply to planning proposal.
4. Hazard and Risk	
4.1 Acid Sulphate Soils	Consistent. Although the subject waterways contain potential acid sulfate soils, the planning proposal relates to the reclassification of land only. The planning proposal will not amend the applicable regulatory requirements of the BLEP 2012 that address development on land having the potential for acid sulfate soils.
4.2 Mine Subsidence and Unstable Land	Does not apply to planning proposal.
4.3 Flood Prone Land	Consistent. The planning proposal relates to the reclassification of land that is primarily below mean high water mark and permanently inundated. The proposal will not result in changes to any existing zoning or land use permissibility provisions.
4.4 Planning for Bushfire Protection	Does not apply to planning proposal.
5. Regional Planning	
5.1 Implementation of Regional Strategies	The Far North Coast Regional Strategy applies to Ballina Shire. The planning proposal is consistent with the Far North Coast Regional Strategy.
5.2 Sydney Drinking Water Catchments	Does not apply to Ballina Shire.

9.6 Planning Proposal - Reclassification of Council Owned Waterways.DOC

5.3 Farmland of State and Regional Significance on the NSW Far North Coast	Does not apply to planning proposal.
5.4 Commercial and Retail Development	Does not apply to planning proposal.
5.5 Development in the vicinity of Ellalong Paxton and Millfield (Cessnock LGA).	Repealed
5.6 Sydney to Canberra Corridor (Revoked 10 July 2008. See amended Direction 5.1	Repealed
5.7 Central Coast (Revoked 10 July 2008. See amended Direction 5.1)	Repealed
5.8 Second Sydney Airport: Badgerys Creek	Does not apply to Ballina Shire
6. Local Plan Making	
6.1 Approval and Referral Requirements	Consistent. The planning proposal does not introduce any new concurrence or consultation provisions or any additional designated development types.
6.2 Reserving Land for Public Purposes	Consistent.
6.3 Site Specific Provisions	Does not apply to planning proposal.
7. Metropolitan Planning	
7.1 Implementation of the Metropolitan Strategy	Does not apply to Ballina Shire.

Appendix C – Gateway Determination



Mr P Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Our ref: PP_2013_BALLI_008_00 (13/14468)
Your ref: 13/50416

Dear Mr Hickey

Planning proposal to amend Ballina Local Environmental Plan 2012

I am writing in response to Council's letter dated 27 August 2013 requesting a Gateway determination under section 56 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") in respect of the planning proposal to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land.

As delegate of the Minister for Planning and Infrastructure, I have now determined the planning proposal should proceed subject to the conditions in the attached Gateway determination.


Council is reminded of its obligations for undertaking a public hearing in relation to the proposed reclassification of land in accordance with the department's practice note *PN09-003, Classification and reclassification of public land through a local environmental plan*.

The amending Local Environmental Plan (LEP) is to be finalised within 9 months of the week following the date of the Gateway determination. Council should aim to commence the exhibition of the planning proposal as soon as possible. Council's request for the department to draft and finalise the LEP should be made 6 weeks prior to the projected publication date.

The State Government is committed to reducing the time taken to complete LEPs by tailoring the steps in the process to the complexity of the proposal, and by providing clear and publicly available justification for each plan at an early stage. In order to meet these commitments, the Minister may take action under section 54(2)(d) of the EP&A Act if the time frames outlined in this determination are not met.

Should you have any queries in regard to this matter, please contact Jon Stone of the regional office of the department on 02 67101 9688.

Yours sincerely


Stephen Murray
Regional Director
Northern Region
Planning Operations and Regional Delivery

Northern Region 49 Victoria St Grafton NSW 2460 Locked Bag 9022 Grafton NSW 2460
Telephone: (02) 6641 6800 Facsimile (02) 6641 6801 Website planning.nsw.gov.au



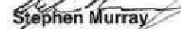
Gateway Determination

Planning proposal (Department Ref: PP_2013_BALLI_008_00): to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land.

I, the Regional Director, Northern Region at the Department of Planning and Infrastructure as delegate of the Minister for Planning and Infrastructure, have determined under section 56(2) of the EP&A Act that an amendment to the Ballina Local Environmental Plan (LEP) 2012 to reclassify Lot 63, DP 263861 and Lot 132, DP 775228, Ballina Quays Canals in West Ballina and Lot 50, DP 259593, Banyanda Lake, in Ballina from community to operational land should proceed subject to the following conditions:

1. Community consultation is required under sections 56(2)(c) and 57 of the Environmental Planning and Assessment Act 1979 ("EP&A Act") as follows:
 - (a) the planning proposal must be made publicly available for a minimum of **28 days**;
 - (b) the relevant planning authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in section 5.5.2 of *A Guide to Preparing LEPs (Department of Planning & Infrastructure 2013)*; and
 - (c) the public exhibition must include details of the trusts to be discharged in relation to the reclassification of the land.
2. No consultation is required with public authorities under section 56(2)(d) of the EP&A Act.
3. A public hearing is not required to be held into the matter by any person or body under section 56(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
4. The timeframe for completing the LEP is to be **9 months** from the week following the date of the Gateway determination.

Dated *6th* day of *September* 2013.


Stephen Murray
Regional Director
Northern Region
Planning Operations and Regional Delivery
Department of Planning and Infrastructure

Delegate of the Minister for Planning and
Infrastructure