

Matthew Wood

Ballina Local Environmental Plan 2012 (14/38055)

17 June 2014

Director, Planning Coordination and Support
Department of Planning & Environment
GPO Box 39
SYDNEY NSW 2001.

Dear Sir/Madam

Re: Department of Planning and Environment – Review of Environmental Zones in the Far North Coast – DRAFT Ballina Shire Council Submission

I refer to the public exhibition of the interim report prepared by Parsons Brinkerhoff (PB) and the associated materials prepared by the Department of Planning and Environment in relation to the review of 'E' zones on the Far North Coast.

Council has undertaken a review of the documentation exhibited and unfortunately, extensive factual errors, omissions and mis-descriptions have been identified. Ironically, the reporting criticises councils for a supposed lack of evidence base in completing the LEPs but fails to fully document the process and logic underpinning the Ballina LEP.

The evidence base underpinning the statements, conclusions and recommendations drawn on by PB is limited and incomplete and as such, it is difficult to trust in the process or indeed the Department's consideration of the 'E' zone matter. The PB report redefines the goalposts for application of environmental protection provisions in LEPs without properly recognising the current statutory environment in NSW.

Council is disappointed in the way in which the 'E' zone review has come about and been conducted. This is due to the lack of detailed consideration of Council's draft instrument at the outset, combined with a lack of transparency (most recently evident in the unavailability of submission and site assessment information), the substantial time delay in delivery of the project, the short exhibition period, limited consideration of the applicable statutory framework, complete lack of regard for the shire's planning history and the factual errors and omissions evident in the interim reporting.

It is also difficult to understand why five Standard Instrument LEPs on the North Coast have been singled out for this process when the Department has now completed over 130 other Standard Instrument LEPs, including many since the removal of the 'E' zones from the Ballina LEP. Council notes that plans made both before and after the Ballina LEP recognise a variety of environmental attributes through various zones, zone objectives and special provisions. In this context, the findings of the interim report seem to undermine the Standard Instrument LEP process.

It is also worthwhile pointing out that the interim report and the Department's response suggest outcomes that have the potential to impact upon plan making in the entire State based on relatively small numbers of submissions (and not including consideration of stakeholders outside the five LGAs examined) and 'rapid' site assessments. This seems at odds with the premises promoted in the reporting around evidence based planning and stakeholder engagement.

The following provides more specific commentary on a variety of key issues identified by Council and an outline of Council's viewpoint with respect to the recommendations made by Parsons Brinkerhoff. The Department's interim response is also addressed.

Factual Errors, Omissions, Misrepresentations and Unfounded Inferences

In reviewing the report, Council has identified a number of factual errors, omissions of important information and misrepresentation of material. This is of concern because many of these elements underpin the conclusions reached. As such, Council is of the view that the body of evidence compiled within the report is presently incomplete and misleading and this undermines the integrity of the conclusions reached and moreover, leads to conclusions and statements that do not provide a full picture of the circumstances. Examples of the errors, omissions and misrepresentations identified include:

- At its very outset, the document indicates that there are four environmental zones that can potentially be applied to private property. This includes listing of the E1 National Parks and Nature Reserves Zone. This is an error as the E1 zone can only be applied to land reserved under the *National Parks and Wildlife Act*. This error suggests from the outset that there is a limited understanding of the terms of the Standard Instrument. It is also important because the lack of environmental protection zone options is a root cause of many of the difficulties councils have had in translating their previous LEPs into the Standard Instrument.
- The executive summary indicates that PB has recognised previous application of environmental protection zones in the shire and provision has been made for the retention or updating of these zones. This statement is misleading as it does not match with the consultant's recommendations or the Department's response in that environmental values, aside from those centred on ecological values (such as buffers, scenic areas and coastline), are not catered for in any way by zoning under the outcomes recommended by the report.

Further, the document goes on to state that E zones should only be applied to areas containing tangible environmental attributes and where there is evidence of these attributes. Again, the recommendations of the report do not support the address of environmental values such as scenic areas, water catchments, buffers and coastline by way of zoning.

- PB infers that because Council does not have a biodiversity strategy, then the E zones are not based on robust data sources and analysis. This is incorrect as the absence of a particular type of strategy or study does not invalidate other data sources.

For clarity, the E zones proposed in relation to ecological attributes under the Council endorsed Ballina LEP were based on a documented methodology and a variety of evidence sources. Council's Environmental Scientist prepared a vegetation mapping dataset which was the subject of ground truthing and assessment, as well as comparison with other data sources. Development of the vegetation mapping layer by Council's Environmental Scientist included the following:

- Use of validated State government vegetation mapping (GIS) produced by NPWS as the initial basis for developing the mapping layer. For consistency vegetation classifications were also based on the communities identified in Byron Shire Council's "Flora and Fauna Study 1999".
- Use of Council's in house threatened species database records.
- Digitisation of vegetation communities using Map Info GIS system.
- Ground truthing of digitised polygons by use of a GPS derived palm pilot. The information recorded the date and the person who undertook the survey.
- Recording of threatened flora and fauna species encountered during on ground surveys.
- Integration of field work information into Council's vegetation mapping layer.

More specifically, Council drew on sources such as the Targeted Vegetation Survey of Floodplains and Lower Slopes on the Far North Coast (DECC 2008), ecological assessment undertaken by the Roads and Maritime Service in association with the Woodburn to Ballina Pacific Highway Upgrade, OEH flora and fauna wildlife atlas records, OEH regional corridors and habitat mapping, the Far North Coast Regional Conservation Plan (DECCW 2010) and numerous ecological assessments relied upon by applicants in relation to rezonings and development applications.

In terms of predicting threatened species habitat PB tends to indicate that it is necessary to undertake detailed surveys to ensure that threatened species utilise a subject vegetation community. Such an approach is considered financially impractical and ecologically unnecessary given the seasonal usage of habitats and cryptic nature of numerous species. Council is of the opinion that once a vegetation community is identified and mapped these attributes can be used to predict threatened species usage of that vegetation community. This is standard industry practice that has more recently been included into State Government policy such as Biobanking.

An important principle of Council's mapping program was that where there was no data available, no historic environmental protection zoning, or there was substantial uncertainty about ecological attributes, environmental protection zones were not to be applied. Practically, this has meant that vegetation communities outside existing environmental protection zoned areas that were not subject to ground truth surveys have been assumed as non significant and did not meet Council's criteria for inclusion into E Zones unless Council had access to suitable ecological information available from another source.

Significantly, at no stage during plan preparation did the Department challenge the adequacy or authenticity of the material used to derive the draft plan.

It appears that PB did not check or verify the information sources drawn on by Council as part of its review. The above mentioned inference made by PB that Council did not have a reasonable evidence base for its decision making is factually incorrect.

Furthermore Council was granted a waiver by the Department from completing an environmental study in relation to the Standard Instrument LEP process in recognition of the extensive strategic planning framework that Council already had in place at the time the LEP program commenced. Notwithstanding this, Council still undertook the analysis of key issues through a discussion paper series that included examination of the natural assets in the shire. This discussion paper series was publicly exhibited and was a foundation for the preparation of the LEP.

The other disappointing thing about section 2.1.1 of the report is that the reliance on a biodiversity strategy as a key document by PB does not give any recognition to other environmental values beyond those that are ecological. This is a fundamental and very important omission because the definition of environment is far more wide reaching than ecology alone and indeed this is evident in the applicable statutory instruments, the Department's own practice notes and the objectives of the E2 and E3 zones in the Standard Instrument.

It is misleading and arguably deceptive to suggest that Council did not have a clear, transparent and evidence based approach to the application of the proposed environmental protection zones.

- The PB report states that there is no definition of agriculture in the Ballina LEP 1987. This is incorrect and again demonstrates a lack of understanding of the Ballina LEP, making it difficult to see how PB's conclusions have had proper regard for the history of the planning framework in Ballina Shire.

Under Clause 6 of the Ballina LEP 1987, the LEP adopts the Environmental Planning and Assessment Act Model Provisions (with specified exceptions). The model provisions include a definition of agriculture which references the former Local Government Act.

- The results discussion on page 31 relating to agricultural land use lumps prohibition and the need for development consent together, implying that the need for development consent is akin to a prohibition. As these are quite different outcomes and the plans referred to vary in the way that the prohibitions or consent requirements are applied, the two concepts should be separated. For Ballina Shire, there should also be an acknowledgement that in many cases the need for development consent actually represents no change to the provisions applying under the Ballina LEP 1987.
- The table at 2.1 lacks explanation in that it implies that permitted agricultural land uses in previous agricultural zones are subject to a new regime of regulation without reason. The table should be clarified to indicate that councils have applied new E zones based on their established criteria and indeed it may be appropriate for land use outcomes to change on this basis.
- The case study referred to on page 33 suggests that extensive agriculture would become prohibited under the Ballina LEP in the E2 zone. This is drawn on to give an example of concerns associated with existing use rights. This is a poor example, because the proposed E2 zone in the Ballina LEP permits extensive agriculture with consent and therefore such uses are not subject to existing use provisions. This implies an outcome in the Ballina LEP that is not true and is therefore misleading.
- There is a statement that says E zones are proposed over land currently being used for agricultural purposes which have the effect of either prohibiting or making agricultural uses subject to development consent. This statement does not recognise the historic permissibility of agriculture in Ballina Shire and it does not have any objective quantification of the extent of land proposed for the E zones where agriculture becomes prohibited that is confirmed as being used for agricultural production. That is, there is no specific evidence presented in the case of Ballina Shire to justify this statement.
- The PB report makes a statement that there is an imbalance evident between agricultural and environmental characteristics where the E3 zone has been applied to scenic areas, urban buffer areas and drinking water catchments without consideration of agricultural suitability or on ground biodiversity values.

Even a cursory review of Council's LEP rationale documentation will demonstrate that agricultural activity has been given very careful consideration by the Council in preparing its LEP. The LEP recognises that agriculture is an activity that occurs in the areas proposed for E3 zoning and the land use table for the zone endorsed by Council clearly reflects this through broad permissibility of agricultural uses without development consent. In this regard, the statement by PB is a clear misrepresentation.

Secondly, PB identify in this section that the E3 zone may be applied in circumstances other than where there are ecological values present whilst then implying that the absence of biodiversity values in the E3 zones proposed by Ballina Shire Council makes the zones imbalanced. This does not properly recognise the framework for the zones under the Standard Instrument and the applicable statutory framework.

- The statement made by PB that additional criteria have led to a wider application of E zones is incorrect. The wider application of E zones comes about because there are areas in the shire that share the same characteristics as areas already subject to environmental zones that are not zoned for environmental protection.

That is, to fairly apply the criteria for existing E zoned areas, it is necessary to look beyond the boundaries of the existing zones. This is an example of an evidence based approach using defined criteria (which PB advocates for) as opposed to an approach that centres on property boundaries, property values or other political factors. It is unreasonable to think that nothing would be different or have changed since the implementation of the 1987 LEP. Obvious examples of change to be considered are the extent of listed endangered ecological communities and the proportionate representation of remaining vegetation communities in the shire.

Further, the PB report does not reflect that the application of the criteria used by Council also led to reduction in areas of existing environmental protection zones for some properties.

- The PB report implies that simply considering a number of land uses in a land use table determines whether a zone is open or closed. It infers that open E zones might diminish the value of the E zone. It is suggested that the suitability of the uses should be gauged on the particular use rather than the number of uses. For example, in the case of the Ballina LEP, of the twelve uses permitted in the proposed E2 zone, five relate directly to dwellings (and Council did not wish to extinguish dwelling entitlements on E zoned land), three relate to uses that could be for environmental education or research purposes, one is mandated by State policy, extensive agriculture matches PB's report recommendations and roads and signage logically follow the other land uses as well as being considered reasonable in their own right.

Once again, the lack of depth in interrogation of the details of the Ballina LEP leaves the PB report open to misinterpretation and does not provide a full or robust consideration of the underpinnings of the Ballina LEP. This leaves the evidence base for the recommendations substantially lacking.

- The PB report indicates that in identifying scenic amenity values, Ballina Shire Council did not undertake any studies to determine areas of scenic amenity value. PB does not recognise that Council utilised digital elevation data and visibility of areas from public viewing points through a GIS based thematic mapping model and fails to recognise that the majority of the area identified for E3 zoning for scenic amenity purposes is already zoned 7(d) or 7(d1) Environmental Protection under the Ballina LEP 1987. Further, Council ground truthed these areas to validate the GIS based data.

The omission of key detail again implies a lack of process and logic which is simply not the case in relation to the application of zones for scenic amenity purposes. For the record, Council communicated its methodology in relation to scenic amenity evaluation to PB on 12 March 2013.

- There appear to be several inconsistencies (or instances of a lack of explanation) in the information provided in the Community and Stakeholder Consultation Report with respect to the number of site visits undertaken by PB and in the summary of engagement activities and feedback received. Examples include the following:
 - There seems to be a discrepancy between the 23 site inspections nominated on page 44 in Appendix A and the 19 nominated on page 14 in Appendix B.
 - Table 6.1 identifies that 499 people attended community drop-in session whilst Table 6.2 states 427 people attended the meetings.
 - Table 6.2 states that 88 people attended the drop in session conducted in the Ballina LGA whilst Section 7.1.9.1 says 59 people were in attendance.
 - Figure 7.11 is considered inaccurate in that it purports to show awareness of E zones amongst participants but its seems to relate to a question on the preceding page relating more to whether there was landholder agreement with the zone. Awareness and agreement are very different things and so the chart misrepresents the results and no detailed explanation is evident.
 - Page 33 of Section 7.1.9.1 identifies that eight participants agreed that E Zones were correct on their property. This number contrasts with page 36 which references six people agreed.

Unfortunately, Council has no way of validating this data as the Department has advised that it will not release the submissions or information identifying the locations of the sites inspected. Given the above, it is difficult to clearly discern the results of the engagement process and the specific details accurately.

The issues raised above demonstrate that there is far more to consider before arriving at the conclusions that have been reached. The errors and omissions do not give proper recognition to the process undertaken by Ballina Shire Council and unduly undermine the work completed openly and transparently by this Council. Essentially, the incomplete nature of the discussion in the report is misleading to readers.

Methodology and Assessment Results

Council notes that in the Review Methodology at Appendix A to the interim E zone report that PB identifies that no detailed ecological surveys or planning assessments were undertaken on any property. Further, that no attempt was made to conduct a comprehensive ecological survey.

Council understands the limitations of such a study and recognises the difficulties PB would have encountered in compiling the report. However, given that the outcomes of the PB report have the potential to fundamentally change the way E zones are applied on the North Coast, and perhaps the State, and substantially alter existing zoning patterns, it seems counterintuitive that such an outcome would be based on a process that acknowledges a lack of evidence base when the Government continues to say that evidence based planning is the proper way to make decisions.

Council is also concerned that the sampling process may be subject to bias. With respect to the field assessment methodology, the document states that the selection of sites for field assessment was on the basis of half via random selection and half via selection from those who made representations to the project. It is suggested that by not completing a full random selection the results of the field work are biased because they disproportionately represent properties the subject of an objection relative to the total number of properties subject to proposed E zones in the shire.

The sample size is also very small, in that the inspections represent 1.3% of all properties in the shire subject to proposed E zones. The number of properties where PB identifies accuracy or precision issues is even smaller (and is debatable in any case). Again, Council recognises the limitations of the study but is of the view that this limited evidence base is not sufficient reason to make substantial changes to the E zone framework when over 130 Standard Instrument LEPs are now complete and in the case of the North Coast LEPs, the plans have been through extensive plan preparation, community engagement and Council review processes.

In terms of the inspections and the conclusions reached by PB around mapping suitability and accuracy, one point of serious concern for Council is that the Department has not made available the submissions or a list of the sites examined. Council therefore has no opportunity to examine the 'evidence' used to draw PB's conclusions. This is unacceptable and is counter to the concept of evidence based planning (in that the evidence should be available for review). Indeed, it would likely be unacceptable to the Department if Council had not made public its rationale and documentation that supported the application of the E zones in the shire. This double standard significantly undermines the Department's rhetoric of partnerships with local government and culture change.

More specifically, Council is also concerned with some of the details associated with the conclusions PB draw from its site assessments. This is discussed further below:

E2 Zone

It is noted that the study recognised that 100% of E2 zoned sites inspected by PB contained high conservation value biodiversity assets. The report qualifies this though by indicating that 38% of these areas are dominated by camphor laurel. The report provides little information about the assessments undertaken by PB, including the criteria used (for examples, what constitutes camphor dominated forest for the purpose of PBs reporting, were threatened species that were encountered recorded and identified).

It is important to note that the presence of camphor laurel does not remove the conservation values otherwise present in an area. It is also important to give the issue a more robust context in that much of the area where camphor is found correlates with the last remnants of the Big Scrub (Lowland Rainforest in the NSW North Coast and Sydney Basin Bioregions Endangered Ecological Community) in Ballina Shire. It is estimated that only 0.07% of the Big Scrub remains (see Scientific Committee determination). Therefore, there is a strong argument that all remnants of the Big Scrub, even where subject to intrusion from weed species, are important and of conservation value.

With respect to camphor laurel, aside from the known fauna usage of camphor laurel dominated vegetation Council has identified a number of threatened species of flora listed at both a State and Federal level are also known to occur in camphor laurel dominated vegetation communities. These species include Arrow-head Vine (*Tinospora tinosporoides*), Rough-shelled Bush Nut (*Macadamia tetraphylla*), White Lace Flower (*Archidendron hendersonii*) and Green-leaved Rose Walnut (*Endiandra muelleri* subsp. *Bracteata*). Such knowledge and the detection of threatened species during ground truthing informed Council's zone application in relation to areas that include camphor laurel vegetation.

The ecological value of camphor laurel is recognised by PB on page 26 of its report but this is not clearly borne out in the statements made on page 4. Unfortunately, section 2.1.1.1 of the report is misleading.

It is also unclear as to what constitutes a mapping error in terms of accuracy and precision. Specifically, it is not clear as to whether accuracy and precision relates to how a zone boundary has been drawn or where PB disagrees with the reason the zone has been applied.

In the case of the examples given relating to the caravan park and the sand quarry, the report fails to recognise key information. Specifically, the caravan park is located in the coastal corridor and has been zoned for environmental protection purposes since 1987. An analysis of the proposed zone arrangement and LEP provisions (additional permitted uses schedule) shows that the caravan park land use is enabled.

The site of the sand mine is comprised of a majority of high conservation value vegetation, the sand mine is a temporary use until the sand extraction is exhausted, the zoning has been based on both Council's assessment and ecological assessment prepared on behalf of the proponent in support of the mine's approval, the mine area is required to be rehabilitated by condition of development consent and the E zone does not apply to the entire land holding. Furthermore, the mine is also afforded protection to expand its operation under the Mining SEPP.

Council considered both of the above mentioned sites very carefully before deciding on the proposed zone application, a fact clearly not understood by PB, with no clarification sought from Council.

The point from the above examples is that it is not possible to make sweeping statements about zone suitability without a proper and complete understanding of site history, circumstances and actual land use outcomes provided for by the LEP. The examples used are extreme and are subject to very specific circumstances and this is not adequately explained.

Finally, the example of an E2 'mapping error' given by PB in Appendix D relates to a property that Council identified to PB in March 2013 as a site where Council had recognised the E2 zone had been applied incorrectly. Council committed over 12 months ago to correct this situation. Council raises no issue with adjusting E zone boundaries where they apply to ecological attributes where available information warrants a change. However, Council strongly objects to the narrowing of the circumstances under which an E zone can be applied to other environmental attributes.

E3 Zone

The PB discussion about the E3 zone unfortunately simply misses the whole point of the zone's application in Ballina Shire. PB has reframed the use of the zone by its own criteria to make judgements rather than considering the way in which Council applied the zone. Specifically, the interim report refers to presence of biodiversity assets which were not a factor in deciding the E3 zones application in Ballina Shire. It is therefore inappropriate to consider the accuracy of the zone against a criteria set that it was never based on.

To label the application of the zone as being subject to 100% mapping errors is a misinterpretation of the purpose of the zone and is misleading to the reader. There has been no assessment as to whether the zones have been applied accurately in terms of the purpose for which they were applied. The report basically expresses a difference of opinion rather than a justifiable position as to whether the mapping is accurate.

Council's application of environmental protection zones over areas of scenic amenity, urban buffer and drinking water catchment values was a deliberate and considered decision based on criteria.

It is the case that rural land used for farming can have environmental characteristics worthy of recognition and that both can co-exist within the planning framework as has been the case in this shire since 1987. The presence of farming does not negate scenic, water quality, buffer or coastal values.

The Department will be aware that Council has consistently argued for a broader set of environmental protection zones to properly recognise the non ecological environmental attributes that are special and prominent in Ballina Shire and are highly valued by this community. Unfortunately, the Department has done nothing to address this concern that is shared by many councils across the State.

Statutory Framework and Responsibilities

The section of the interim PB report that looks at the statutory framework is highly selective in the instruments that it addresses. It appears that only instruments that give weight to the conclusions of the interim report are addressed.

The argument given in relation to s117 Direction - Farmland of State and Regional Significance is difficult to follow as the direction is aimed at protecting agricultural land from sterilisation and urban encroachment. It does not mention environment matters. Further, the analysis by PB does not recognise that zoning an area environmental protection does not necessarily detract from agricultural production potential. The s.117 direction does not exclude application of environmental protection zones to State or regionally significant farmland.

In any case, to reinforce Council's recognition of agricultural land use in the shire, it is worthwhile noting that of the identified State significant farmland in the shire, only 0.7% was proposed for application of an E2 zone and only 3.1% of the shire's regionally significant farmland was identified for an E2 zone. In considering the application of E zones in relation to farmland, it is also important to recognise the wide permissibility of agricultural land uses with and without consent in the Council's proposed E3 zone (many activities not being impacted in any way by the LEP because of their permissibility without development consent).

With reference to s.117 Direction 3.2, the PB interim report states that the Ballina LEP should facilitate retention of the existing caravan park. An examination of the LEP shows that 'caravan park' is permitted expressly on the subject land by way of an additional permitted use provision in Schedule 1. In this way, the requirements of the s117 direction are met in that the caravan park is expressly acknowledged and the environmental values (noting the existing 7(f) zone under the 1987 LEP) of the land are recognised. The elected Council thought carefully about this situation on several occasions before endorsing the application of the E2 zone to the land.

The most disturbing thing about Section 2.2.2 of the interim report is that it has no regard for, and does not attempt to balance, the full suite of statutory requirements associated with application of environmental protection zones relative to the concerns raised. Furthermore, the key statutory instruments are described as 'background documents, supporting information and studies' later in the report. The significance of these statutory instruments is not properly drawn out and moreover, is diminished by PB in the way they are described and omitted.

To be complete and credible, the interim report should identify and discuss the requirements of s.117 directions 2.1 (Environmental Protection Zones) and 5.1 (Implementation of Regional Strategies).

More specifically, Direction 2.1 instructs councils to include provisions in LEPs that facilitate the protection and conservation of environmentally sensitive areas. The history in Ballina Shire demonstrates that this includes scenic, coastal, water catchment and urban buffer areas, as well as those areas of ecological sensitivity.

Direction 5.1 instructs councils to prepare LEPs consistent with the relevant regional strategy. By way of examples, the Far North Coast Regional Strategy includes the following requirements:

- LEPs will protect and zone land with State or regional environmental, agricultural, vegetation, habitat, waterway, wetland or coastline values.
- LEPs will identify and zone land of landscape value (including scenic and cultural landscapes) to protect those values.
- LEPs will include provisions to encourage habitat and corridor establishment in future zoning of Environmental Assets and Rural Land area.
- LEPs will align with the Regional Strategy's settlement network to contain the spread of urban development, efficiently utilise existing services and infrastructure and protect areas of high conservation value.
- LEPs will maintain interurban breaks between existing and new settlements.
- LEPs will recognise and protect the regional water supply system through appropriate planning provisions.

Under the North Coast Regional Environmental Plan which was applicable to the preparation of Council's Standard Instrument LEP, the following clauses provided statutory direction to councils:

14 Plan preparation—wetlands or fishery habitats

(1) A draft local environmental plan for land containing rivers, streams, wetland or fishery habitats should:

- (a) include wetlands, fishery habitats and sufficient land to separate adjoining land uses from the wetlands and fishery habitats in an environment protection zone, and*
- (b) include provisions to require the council's consent for development such as agricultural uses, the clearance of vegetation, the filling or draining of land and the construction of levees in the environment protection zone referred to in paragraph (a), and*
- (c) be prepared only after consideration of any environmental audit or water quality study prepared by the Department of Water Resources or the Environment Protection Authority and relating to the land.*

29 Plan preparation—natural areas and water catchments

A draft local environmental plan should:

- (a) retain existing provisions allowing the making of tree preservation orders,*
- (b) not alter or remove existing environmental protection, scenic protection or escarpment preservation zonings or controls within them, without undertaking a detailed analysis to determine whether there will be adverse environmental effects resulting from such action,*
- (c) include significant areas of natural vegetation including rainforest and littoral rainforest, riparian vegetation, wetlands, wildlife habitat, scenic areas and potential wildlife corridors in environmental protection zones,*
- (d) contain provisions which require that development in domestic water catchment areas or on land overlying important groundwater resources does not adversely affect water quality, and*

(e) require consent for the clearing of natural vegetation in environmental protection, scenic protection or escarpment preservation zones.

32A Plan preparation—coastal lands

(1) This clause applies to land within the region to which the NSW Coastal Policy 1997 applies.

(2) A draft local environmental plan which applies to any such land should:

(a) include provisions that give effect to and are consistent with the NSW Coastal Policy 1997, and.....

The Coastal Policy, as referenced above, also includes reference to coastal areas, scenic areas and habitat areas in relation to the establishment of planning provisions under LEPs.

As is evident in the above provisions, environmental attributes as considered in the context of the Standard Instrument program and LEP making generally are far wider than ecological matters alone. Discussion in this regard is basically non-existent in the PB report.

The above provides a clear basis (and moreover a requirement) for consideration of a wide range of environmental attributes through zoning. This is critical because the above mentioned instruments are the current legal mechanisms upon which the Ballina LEP is based. To neglect these would be improper. Council took the requirements of these provisions very seriously and significantly, at no stage in the plan preparation process did the Department identify any aspect of non-compliance with the above mentioned provisions.

The absence of the consideration of these statutory elements suggests a poor understanding of the system within which the LEPs were prepared and does not properly recognise the requirements and responsibilities of the councils. It is also of great concern that the Department of Planning and Environment would allow a report to progress to exhibition in the absence of this fundamental information.

On a final note in relation to this matter, the PB report provides a detailed overview of the practice notes issued by the Department relating to environmental protection zones. Whilst it is acknowledged that these documents inform the plan making process, it must be recognised that they are not statutory instruments and, as such, have a lesser weight in the decision making framework than the items referenced above. This point is not made in the PB interim report.

The report redefines the goal posts and examines the application of the E zones against criteria different from those that still prevail under the statutory planning system in NSW. This reflects poorly on the Department.

Community Engagement

Council does not accept the statement that the consultation methods it employed during the LEP process did not result in effective engagement across all sectors of the community. There is a clear difference between community satisfaction and methods of engagement (that is community satisfaction does not directly correlate with the extent or appropriateness of methods employed). Unfortunately, it is difficult for Council to consider the submissions in relation to the interim report in any detail as the Department has advised it will not make them available.

The submissions analysis indicates relatively small numbers of landholders who showed dissatisfaction with Council's engagement process. The 73 submissions cited (if assumed that each did not raise more than one issue) as raising consultation process related concerns equates to 4.1% of all landholdings identified for E zones.

Council applied extensive resourcing to the community engagement associated with its LEP and the process utilised is closely aligned with what the government has identified for

engagement in its planning reform package. The Department is fully aware of the comprehensive community engagement undertaken by Council when preparing its LEP. At no stage did the Department raise any concern or suggest a deficiency in what Council had implemented.

Specifically, in terms of community engagement, Council undertook the following to feed into the plan preparation process:

- Briefing sessions with interest groups.
- Maintenance of a register of interested parties.
- Management of an amendment request register.
- Preparation and exhibition of a series of discussion papers at the outset of the project.
- Convening of a community policy forum (a deliberative democracy based program) to examine key issues including how environmental and agricultural considerations should be balanced.
- Maintenance of a project website.

The above tasks sought to examine broader community interests and viewpoints to establish principles for the LEP program up front, as envisaged under the planning reforms. The LEP program was also underpinned by a Department funded Sustainability Framework for Ballina Shire that was prepared in collaboration with the community in advance of the Standard Instrument LEP process.

Council also employed a variety of engagement measures during public exhibition of its draft LEP on two occasions. Importantly, this included notices via Council's community connect newsletter which is sent to all properties in Ballina Shire.

Council's confidence in its engagement methods is reinforced by the fact that it is very similar to that employed by PB and the Department in delivery of the E zone project, which is just as significant in terms of influencing land use zoning outcomes. In the attached letter, Minister Hazzard made it clear to Council by letter in March 2013 that advertising, face to face discussions, FAQs, media involvement and website material (in the absence of direct landholder contact) is an appropriate means of engaging with the community about land use zoning matters. We agree entirely with the Minister's advice and as such, find it difficult to accept the inferences in the PB report about the adequacy of Council's program.

The other point that is not clearly made is that community engagement is subject to resource availability and as such, it is not always possible (and particularly affordable) for local government to undertake ideal community engagement initiatives. Notwithstanding, Council emphasises that it applied substantial resources to its LEP engagement program as a matter of high priority and is of the firm opinion that the methods used were both effective and comprehensive.

Council finds it extraordinary that it is being criticised for delivering a process that is in line with the planning reforms, as advocated by the Government.

Recommendations

The following provides Council's response to each of the recommendations made by PB with reference to the recommendation numbers.

➤ Recommendation 1.

Council generally supports the criteria identified for application of the E2 zone on an ecological basis subject to clarification as to what constitutes validated data. However, Council strongly supports the expansion of the criteria to include Core Koala Habitat, public bushland reserves and bushland in urban areas, bushland and other habitat set aside by negotiations (e.g. via planning proposals or voluntary planning agreements) and areas under long term conservation covenants.

Koala habitat is a key consideration for Council because this type of ecological landscape is under direct threat from ongoing land clearing, including private native forestry practice. The presence of environmental protection zones is critical in the process of regulating private native forestry, particularly given the apparent lack of detailed site assessment and reliance on information from other sources in the private native forestry approval process.

Further, if the criteria for the application of the E2 zone is adopted along the lines recommended by PB, Council supports flexibility in relation to the permissibility or prohibition of extensive agriculture in the zone as the vegetation is being promoted by the criteria as 'best of the best'. As an outcome of a planning proposal to apply to E2 zone, such high quality vegetation may not be considered suitable for agricultural activity beyond what may already be lawfully occurring.

Council is also of the view that coastal foreshore areas (not identified as National Parks or Nature Reserves) should be included in the E2 zone to recognise the significant value of such area to the public. Alternatively, a specific zone should be made available. This is because distinction in permissibility of land uses is critical to ensuring that coastal land characteristics are maintained in the broader public interest. It is not acceptable to zone these areas for urban or agricultural purposes in the case of Ballina Shire and the open space zones do not provide a suitable framework given current land tenure.

Aside from the overall ability to recognise the full suite of environmental attributes appropriately, this issue is perhaps the most significant to Council as the relatively undeveloped coastline is consistently identified by our community as a key attribute of the Ballina Shire. The Department must not allow this to be eroded.

The Department will also recall the State Member for Ballina, Mr Page, who was instrumental in calling for the E zone review, strongly advocated for 'tight' or restricted land uses in the shire's coastal corridor in recognition of the important environmental (not necessarily ecological) values held by members of this community.

➤ Recommendation 2.

Council agrees with this recommendation but is of the view that the 7(f) Environmental Protection (Coastal Lands) zone should also be transferred directly into the E2 zone in recognition of the values of this area and the historical application of environmental protection zoning to this land since 1987. As outlined above, erosion of the planning provisions applicable to the coastline is not acceptable to Council.

➤ Recommendation 3.

No applicable to Ballina Shire.

➤ Recommendation 4.

Not applicable to Ballina Shire.

➤ Recommendations 5.

Not applicable to Ballina Shire.

➤ Recommendation 6.

The application of zoning to land that does not meet set criteria for an environmental protection zone having regard for the characteristics of the land is reasonable. The more fundamental issue though is what attributes qualify for inclusion in an environmental protection zone. It is also not always clear cut as to what a primary function of land is and too narrow an interpretation of this could lead to pressure for urban type land use zones in rural areas. This may lead to land use conflict and undermining of the principles associated with maintenance of farming and food production opportunities.

➤ Recommendation 7.

Subject to the expansion of the E2 zones criteria, Council does not raise objection to the ecological criteria identified for the E3 zone.

However, Council strongly objects to the narrow nature of the zone. The zone should be available for use in relation to a variety of environmental attributes including scenic, urban buffer and drinking water catchment attributes. The ability to distinguish these areas by way of land uses and zone objectives is a much more appropriate mechanism for recognising these values than an overlay or reliance on the development assessment process more generally.

It is also important to recognise that the removal of the existing environmental protection zone applying around Alstonville and Wollongbar will expose these villages to pressure for expansion which has been successfully managed through the 7(i) Environmental Protection (Urban Buffer) zone since 1987. The loss of this zone also exposes this area to State planning policies that apply to land that is not subject to environmental protection zones. A current example in this regard is the potential for seniors housing to occur on rural land adjacent to Alstonville or Wollongbar in the absence of an environmental protection zone.

The potential for seniors housing to occur on land where environmental protection zones would be removed if the approach recommended by PB and the Department is enacted also extends beyond the Alstonville Plateau to sensitive coastal locations such as Skennars Head and Lennox Head. The approach suggested by PB and the Department erodes the existing planning framework and makes sensitive areas more vulnerable to development that is not currently enabled. Council reinforces its view that environmental protection zones should be available to apply to different environmental attributes to provide the ability to distinguish land uses, reinforce intent through objectives and clearly show areas of environmental value in the local environmental plan.

➤ Recommendation 8.

Not applicable to Ballina Shire.

➤ Recommendation 9.

Not applicable to Ballina Shire.

➤ Recommendation 10.

Council strongly objects and maintains its view that drinking water catchment areas are appropriately recognised by way of land use zoning as well as applicable special provisions, given their importance to the broader community.

Council does, however, support the availability of overlays and associated provisions as an alternate tool to recognise catchment values within in LEPs.

➤ Recommendation 11.

Council strongly objects and maintains its view that scenic areas should be recognised by way of land use zoning consistent with the historical application of such zones in Ballina Shire, noting that agriculture remains a use that is generally allowable and encouraged (Council had endorsed a specific zone objective for the E3 zone to recognise and encourage agricultural activity within the zone)

Areas of scenic amenity value have been zoned for environmental protection purposes in Ballina Shire since 1987 and the removal of this approach is a retrograde step that does not properly acknowledge the history of the shire or the overall values of these areas.

Notwithstanding the above, Council supports the availability of an overlay and associated special provision as an alternate tool to recognise areas of scenic amenity within LEPs.

➤ Recommendation 12.

See comments under recommendation 6.

➤ Recommendation 13.

Council strongly objects to the modification of the zone objectives for the E3 zone as it reduces the scope for the application of the zone. Council also raises concern with the impact of this action on the other Standard Instrument LEPs that are made or underway as many rely on the current zone objectives (and some added objectives) associated with values other than ecological attributes. A change in this regard could have a significant cascading effect causing extensive modification and uncertainty in relation to the SILEP program which is all but complete.

It does not seem logical to adjust the Standard Instrument in this way because a relatively small number of landholders have concerns about a scenic amenity zoning – a zoning that has been in place in Ballina Shire since 1987 without any documented adverse outcomes for primary production. Without clear evidence to the contrary, the suggestion that the application of the E3 zone as proposed in Ballina Shire diminishes agricultural production potential is a fallacy.

➤ Recommendation 14.

Not applicable in Ballina Shire.

➤ Recommendation 15.

Unless land has an alternate attribute for consideration, land identified as State and regionally significant farmland has typically been zoned for rural purposes in the Ballina LEP. Council intends to maintain this approach should it proceed to finalise the Ballina LEP 2012.

➤ Recommendation 16.

This recommendation does not address the purpose of Council's environmental protection zoning of coastal lands. In Ballina Shire the zone is primarily about the public value attributable to the coastline as opposed to risk. In considering this we draw attention to the views of local member Mr Don Page as outlined in relation to Recommendation 1.

Council strongly objects to any measures that remove the coastline (as currently zoned 7(f) under the Ballina LEP 1987) from an environmental protection zoning.

➤ Recommendation 17.

Not applicable to Ballina Shire.

➤ Recommendation 18.

Council is uncertain as to how this recommendation would be actioned as the intent behind the Ballina LEP in terms of ecological attributes has been to zone areas that meet specified criteria for environmental protection purposes. The utility of this recommendation will only be evident once the criterion for the E zones is settled.

Notwithstanding the above, Council would like to see the use of such a provision maintained as an option.

Additional Considerations

Council has not considered these additional items in any depth. However, two matters of note are as follows:

- With respect to existing use rights, it is considered to be the State's responsibility to explain this concept to the community if there is to be information material produced. The EP&A Act is the State's legislation and there is a significant risk of variable and inconsistent interpretations if information is not coordinated through a central agency. Indeed, the complexity of existing use rights and the legal interpretations is most likely why the State and local government have produced limited documentation on this matter.
- There is already a natural resource management group under NOROC that has been functioning in the North Coast region for a considerable period of time. The secretariat for the group is presently managed through Richmond River County Council.

Department's Viewpoint

The following provides Council's response to the views expressed in the Department's interim response to PB's report where the Department expresses a different position from that recommended by PB.

With respect to the introduction, Council notes that the E zone review came about because of concerns that environmental protection zones were being applied to rural and agricultural land without evidence and concern that such zones would limit existing agriculture and rural activities.

In the case of Ballina Shire, the E zones proposed have been applied based on an extensive rationale and transparent process. Furthermore, the zones as proposed provide extensive permissibility for agricultural activity. This was clearly known to the Department through ongoing discussion during preparation of the draft plan. As such, Council maintains that the E zone review in the case of Ballina Shire was not warranted and has been undertaken at unnecessary substantial cost to the public and delay to Council's completion of its Standard Instrument LEP. The exercise has been contrary to the public interest.

Council does not agree with the Department's limited support for the use of environmental overlays. Council supports use of zoning to recognise various environmental values. Where zoning is not able to be used however, it is reasonable for key environmental attributes to be identified by another clear means. By not including matters such as scenic amenity within LEPs, the address of these issues is diminished particularly given the status of development control plans in NSW. The approach advocated by the Department is also counter to the extensive history of recognising environmental values in Ballina Shire by way of its LEP.

Department of Planning and Environment Inconsistencies

When reflecting on the E zone review process and the interim reporting, it is clear that there are many inconsistencies in the Department's approach. These inconsistencies add to the difficulty in understanding the Department's logic in relation to the E zone review and the Standard Instrument process overall.

Local Planning Panel

During 2011 and 2012, the Local Planning Panel undertook a review of the Standard Instrument through a consultative process across the State. This work was done on behalf of the Minister for Planning and the Department. Council supported this process and appreciated the opportunity to discuss the Standard Instrument program in the context of this review.

Notably, the Panel made a number of recommendations for improvement to the Standard Instrument. Relevant to the E zone review process, Council notes that the Panel's recommendations to the Minister and Department included the following:

- Development of a new environmental zone for inclusion in the SILEP that caters for land impacted by natural hazards,
- Inclusion of an additional zone for each suite of zones including the environmental protection zone suite, and
- Greater flexibility for councils to include zone objectives to reflect local conditions.

The Panel also noted that issues associated with concerns over environmental protection zone application raised during its consultation process were considered to be matters for councils.

The PB report does not address the Panel process or its recommendations in relation to the E zone review. The concept of further restricting the purpose and application of E zones is at odds with the Panel's recommendations. It is unfortunate that a State wide consultative process like that of the Panel has been overlooked and that ultimately recommendations have been put forward without considering the work that has gone before.

E Zone Application in Other Completed SILEPs

Council has undertaken a review of a number of completed Standard Instrument LEPs across the State in relation to the application of E zones. What is clear is that E zones have appropriately been used to recognise a variety of environmental values including water catchment areas, scenic areas and coastal areas as well as areas with ecological values.

Specifically for example, the Wollongong, Wingecarribee, Warringah, Clarence Valley, Hawksbury and Shoalhaven LEPs recognise areas of scenic amenity by use of E2 or E3 zones. Some of these LEPs also incorporate additional zone objectives that expressly address scenic amenity. Significantly, the Kempsey and Shoalhaven LEPs were completed after that of Ballina Shire Council.

The same can be said for a number of the above mentioned LEPs and others with respect to zoning of drinking water catchment areas as either E2 or E3 and including specific zone objectives to recognise the identified catchment values.

With respect to areas of coastline, completed LEPs the length of the NSW coast properly recognise coastal land in E2 and E3 zones. Such areas include Clarence Valley, Coffs Harbour, Bellingen, Nambucca, Kempsey, Port Macquarie, Greater Taree and Great Lakes.

The historic context of the Standard Instrument program and the way in which zones have been applied is important to understanding the way in which the E zones have been utilised. It also has significant implications in relation to what is practical and reasonable where changes to the E zones are proposed. This history does not receive adequate attention in the Department's E zone review process. The history also illustrates a stark set of double standards.

Biodiversity Provisions and Overlays

The inconsistency of the Department is demonstrated again in relation to its position on the use of overlays for biodiversity. The Department's interim response states that it does not support the use of overlays to manage terrestrial biodiversity areas. However, a number of Standard Instrument LEPs incorporate a specific terrestrial biodiversity provision (based on a Departmental model) that relates to an overlay map.

Most strikingly, there are examples where this provision has been included very recently in LEPs including Coffs Harbour (September 2013), Hornsby (September 2013) and Shoalhaven (April 2014). It is also noted that other LEPs such as that of Kempsey Shire Council (February 2014) include other biodiversity related provisions.

It is simply incomprehensible as to why the Department's position as expressed in response to the E zone review is so different to its actions throughout the Standard Instrument program and indeed within the last 12 months. The Department's approach lacks credibility and undermines long standing relationships with local government.

Scenic Amenity Overlays

One final inconsistency is that demonstrated by the inclusion of a "Protection of scenic character and landscape values" provision inclusive of a Scenic Land Protection Map overlay within the Kempsey LEP made in February this year, well after the Department received the PB interim E zone report. Needless to point out, this provision, whilst considered entirely appropriate by Ballina Shire Council, is completely at odds with the Department's stated position in response to the E zone review.

Costs

Council and the Ballina Shire community have expended substantial resources in delivering the State Government's Standard LEP Instrument program. Council has done this based on a fully transparent and open process, with comprehensive reporting and rationale to support its LEP renewal program. Council has also taken great care to engage the shire community and consider the applicable and current statutory planning framework. Council has done this in an environment where State government planning policy has continually shifted and the goal posts have shifted in delivery of the Standard Instrument program.

The E zone review places a requirement for a further process on Council to achieve a single LEP for the shire as desired by the State Government. The State Government has created a further financial liability for Council and a resource intensive process to complete the Standard Instrument program in Ballina Shire.

Council is of the view that it is no longer reasonable or fair to expect the Ballina Shire community to pay for this process that has initiated by the State Government and as such, Council requests that the State Government now fully fund the required work to complete the Standard Instrument LEP for Ballina Shire.

Summary

The recommendations of the interim documents that seek to reduce the scope of environmental protection zoning and associated planning provisions would constitute a significant retrograde step for the Ballina Shire community and are not supported by this Council.

Council is seeking to be able to apply environmental protection zones across the shire that reflect the full range of identified environmental attributes consistent with the historic application of such zones and the community and environmental values attributable to such areas. The use of zones is essential to Council because:

- zoning provides for the differentiation of land uses in terms of permissibility,
- zoning supports the identified environmental attributes through identification in zone objectives,
- zoning clearly recognises the identified attributes in the principal local planning instrument, and
- zoning is significant in terms of the way that State Government planning policies are applied (i.e. environmental protection zoned areas are often treated specifically in such policies to differentiate permissibility of land uses between areas).

Inability to recognise environmental attributes (inclusive of ecological, scenic amenity, coastal, urban buffer and drinking water catchment attributes) by way of zoning weakens the planning framework for addressing these matters and moreover, weakens the existing structure and function of the planning framework presently applying in Ballina Shire under the Ballina LEP 1987.

Beyond the reasons why Council views the availability of environmental protection zones for a variety of environmental attributes as being crucial to good planning outcomes in the shire, there is no clear justification given for the removal of environmental protection zones over non ecological attributes in Ballina Shire. There is no underpinning study or evidence base that shows why the zones that have historically been applied in areas for scenic amenity, coastal, water catchment or urban buffer reasons have been ineffective and should be removed.

9.1 Department of Planning and Environment - E Zone Review.DOC

There is also no specific evidence presented in the Parsons Brinkerhoff reporting that shows how agricultural activity is adversely impacted by the planning provisions within existing and proposed environmental protection zoned areas in Ballina Shire. There is simply no proper justification provided for a weakening of the current planning framework (and the framework endorsed by Council under the Standard Instrument LEP) or the non inclusion of areas in the shire identified by Council as having environmental attributes worthy of recognition.

In the event that there is not support for a broader application of E zones outside those areas already subject to such zones, Council supports the concept of a like for like basis. This means though that there is a need to accommodate non ecological values in LEPs via environmental (or perhaps newly tailored) zones.

Council also recommends that before the Department completes the review process that it engages all other local government areas in NSW to seek feedback given that the review has the potential to impact all other LEPs in the State. The potential impacts of the E zone review make other councils stakeholders in the process. Engagement with other local government areas would be in the interests of open and transparent process and liaison with key stakeholders, and would go some way to alleviating the perception of bias against this Council.

Ultimately, Council would like to conclude its Standard Instrument LEP process by following the zoning procedures established by this Council consistent with the current statutory planning framework and in consultation with the Ballina Shire community. However, we see that this is unfortunately unlikely given the nature of this project and that Council has raised many of the concerns identified before with apparently limited consideration by the Department and its consultants.

In addition to the outcomes sought in terms of applying environmental protection zones, Council is also of the view that it is fair and appropriate for the errors, omissions and unfounded inferences contained in the reporting to be corrected to properly reflect what has actually occurred through the preparation of the LEP for Ballina Shire and the E zone review.

This submission is made as much for the benefit of the public record as it is in the expectation that the 'E' zone review process will conclude with an accurate representation of Council's LEP preparation and sensible planning outcomes that recognise the work done by this Council and the historic planning circumstances in Ballina Shire.

If you have any enquiries in regard to the matters raised in this submission please contact me on telephone 6686 1284.

Yours faithfully

Matthew Wood
**Manager Strategic Planning
Strategic and Community Facilities Group**

cc: Steve Murray – General Manager Northern Region, Department of Planning and Environment
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Local Government NSW