

Planning Services

IRF18/5493

Gateway determination report

LGA	Byron
PPA	Byron Shire Council
NAME	Amendment to clause 32(5) of Byron LEP 1988
NUMBER	PP_2018_BYRON_007_00
LEP TO BE AMENDED	Byron Local Environment Plan 1988
ADDRESS	Various
DESCRIPTION	The proposal applies to all land in the Urban Coastal Land 7(f2) zone in the Byron local government area
RECEIVED	28 September 2018 and additional information received 25 October 2018
FILE NO.	IRF18/5493
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

INTRODUCTION

Description of planning proposal

The planning proposal seeks to amend clause 32(5) of the Byron Local Environment Plan (LEP) 1988 to restrict subdivision under the *Strata Schemes Development Act 2015* that results in vacant allotments in the 7(f2) Urban Coastal Land zone.

Site description

The proposal applies to all land zoned 7(f2) Urban Coastal Land under the Byron LEP 1988. This zoning encompasses urban areas along sections of South Golden Beach, New Brighton, Belongil, Byron Bay and Suffolk Park (Figures 1 and 2, pages 3–4).

Much of the land in the Urban Coastal Land zone has been mapped as having physical constraints, including coastal erosion, acid sulfate soils, flood risk and bushfire risk.

Existing planning controls

With the development of the Standard Instrument Byron LEP 2014, certain lands, including lands in the Urban Coastal Land 7(f2) zone, were designated as 'deferred matters'. These deferred areas are under review, and until assessment and rezoning takes place under the Byron LEP 2014, the lands remain subject to the provisions of the Byron LEP 1988.

The provisions of clause 32(5) permit strata subdivision in the 7(f2) zone and do not specify whether this subdivision can result in vacant lots. These provisions are:

- (5) *The Council must not consent to the subdivision of land within Zone No 7 (f2) other than:*

- (a) a subdivision under the *Strata Schemes (Freehold Development) Act 1973*, or
- (b) a subdivision to excise an allotment that is, or that the Council is satisfied is intended to be, used for a public purpose, or
- (c) a subdivision that, in the opinion of the Council, is only a boundary adjustment where no additional lots are created.

Summary of recommendation

It is recommended that the planning proposal proceed subject to conditions for the following reasons:

- additional protection will be given to land in environmentally sensitive areas of the Urban Coastal Land 7(f2) zone; and
- the provisions act as an effective temporary measure to prevent strata subdivision to create vacant residential land until the deferred areas are reviewed and transferred to the Byron LEP 2014.

PROPOSAL

Objectives or intended outcomes

The objective of the planning proposal is to strengthen provisions to limit intensification of development on lands likely to be affected by coastal processes in the 7(f2) Urban Coastal Land zone.

Explanation of provisions

The proposed provisions are to amend clause 32(5) of the Byron LEP 1988. The amendment will:

- update the legislative reference in the clause from *Strata Schemes (Freehold Development) Act 1973* (since repealed) to the *Strata Schemes Development Act 2015*; and
- clarify that Council will only consent to the subdivision of 7(f2) land under this strata legislation in relation to an existing lawfully erected building (or buildings) where the subdivision will not create a vacant lot suitable for further development.

Mapping

The planning proposal does not involve any changes to mapping in the Byron LEP 1988.

NEED FOR THE PLANNING PROPOSAL

The Byron LGA includes various lands which are deferred under the Byron LEP 2014. These lands retain the zoning applicable to them under the Byron LEP 1988. The lands associated with this planning proposal are those in the 7(f2) Urban Coastal Land zone, which are subject to the Byron LEP 1988.

Provisions in the Byron LEP 1988 address constraints in this zone, including coastal erosion, acid sulfate soils, flooding and bushfire. Individual residential lots in the 7(f2) zone may be subject to some or all of these mapped constraints.

These constraints combined with a strong demand for development along the coast, mean Council needs robust planning provisions to ensure development is appropriate on the subject lands.

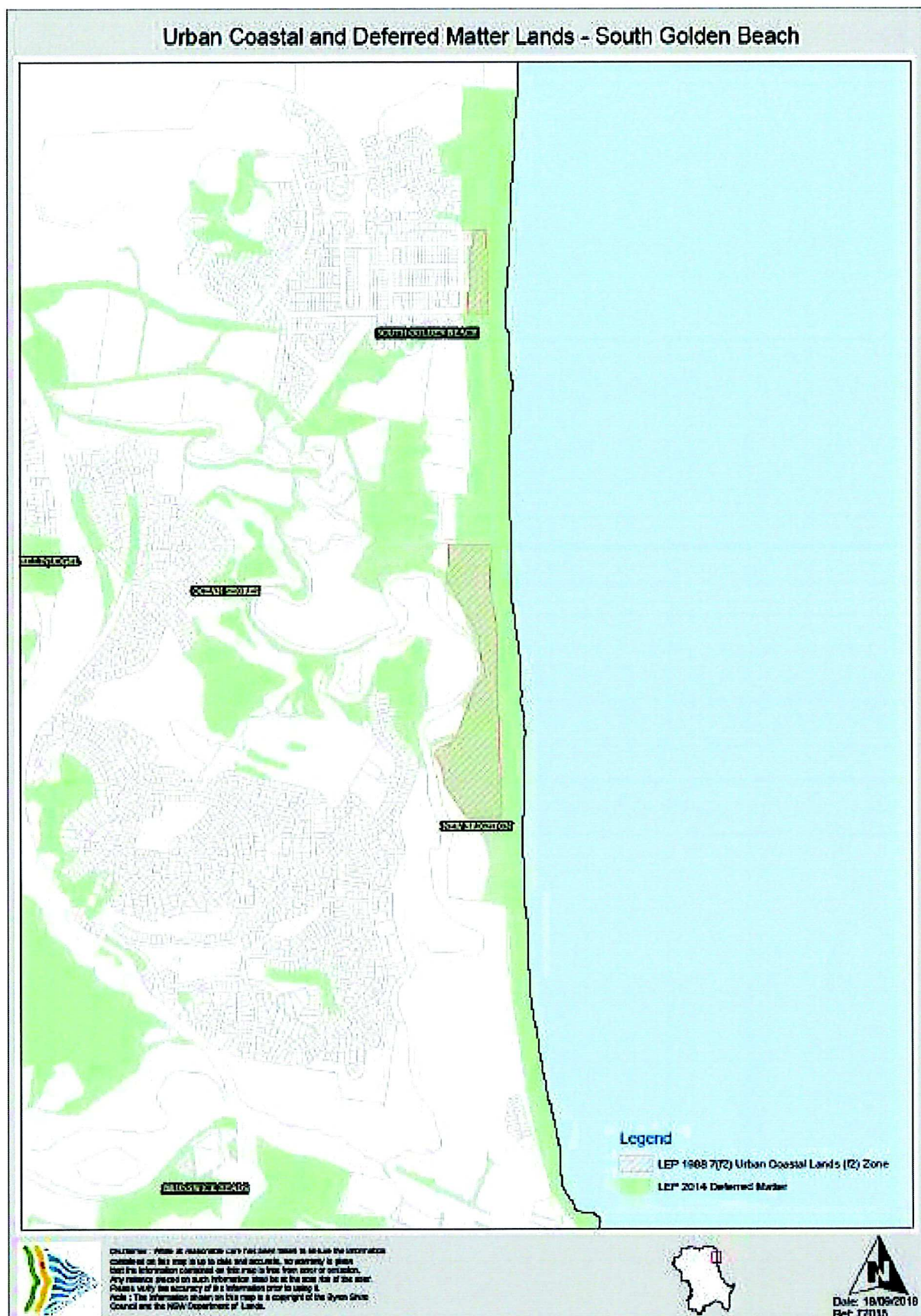


Figure 1: Subject lands in the north of the Shire (source: Byron Shire Council).

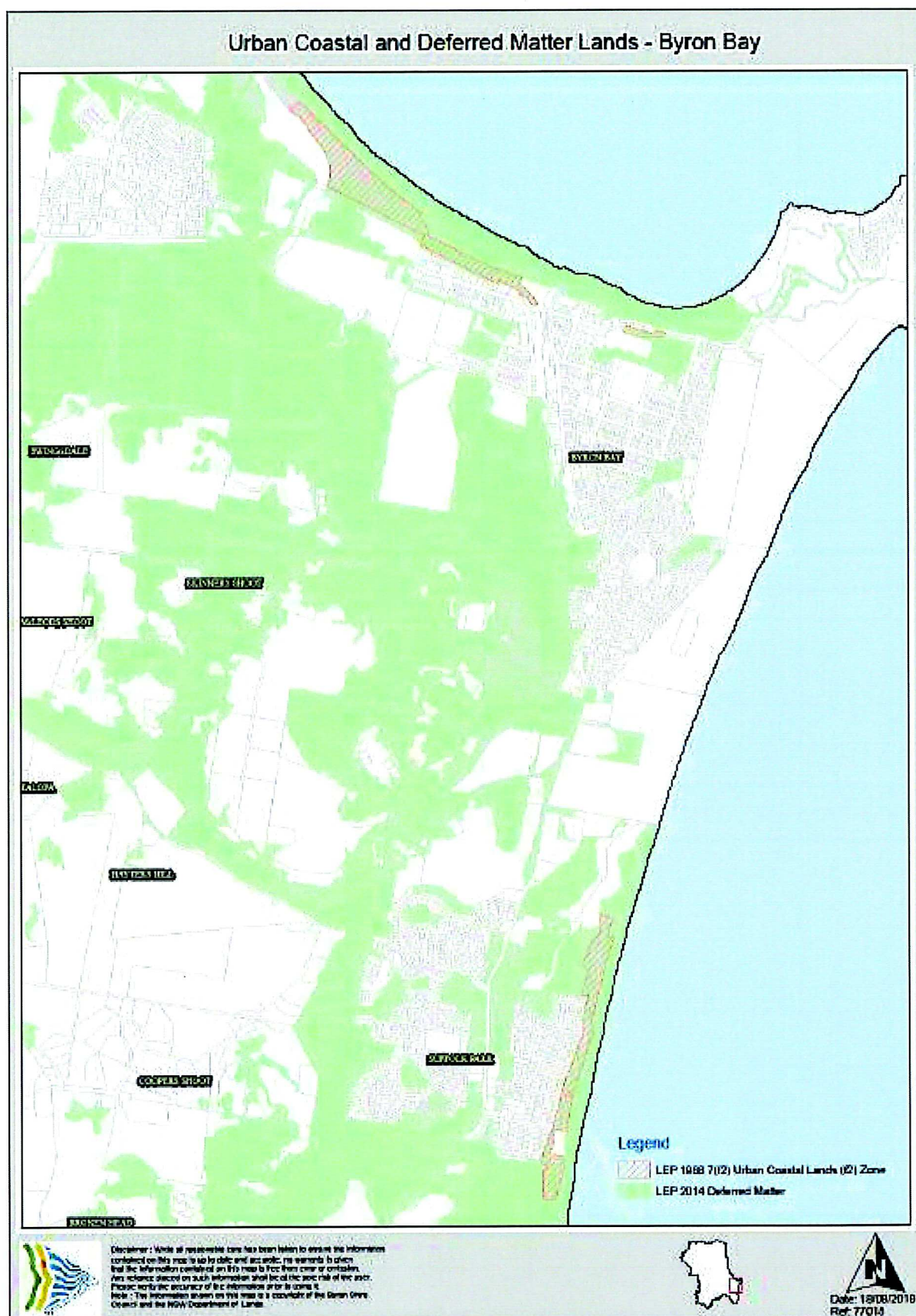


Figure 2: Subject lands in the south of the Shire (source: Byron Shire Council).

Council recently received a development application that highlighted an ambiguity in the wording of clause 32 of the Byron LEP 1988. The applicant sought to strata subdivide Urban Coastal Land to create an additional vacant allotment. The development application was for land partly within *Coastal Erosion Precinct 1 – Beach Escarpment to the Immediate Impact Line* and partly within *Precinct 2 – Between the Immediate Impact line and the 50-year Erosion Line*. The proposed new dwelling was sited in Precinct 2 in line with the existing dwelling, which would be rotated 90° (Figure 3).

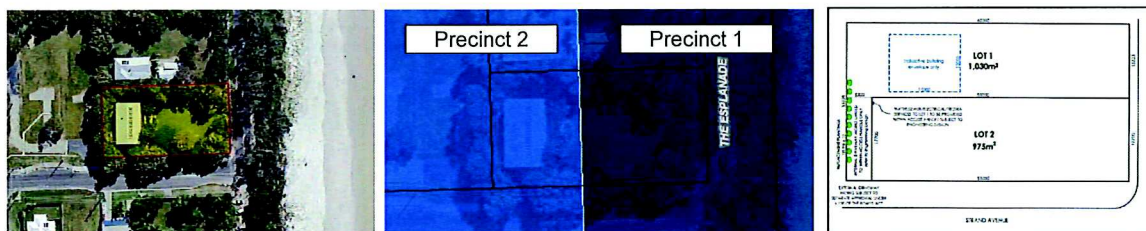


Figure 3: The property at New Brighton (left, outlined in red), coastal erosion precincts showing the existing dwelling in Precinct 2 – between the immediate impact line and the 50-year erosion line (middle) – and the strata subdivision plan for creating the vacant lot on the site (right).

Council refused the development application on the following grounds:

- the subject land was not considered suitable given the nature and extent of coastal hazard;
- it was not in the public interest to intensify development in a location subject to significant coastal hazard and flood hazard;
- there were inconsistencies with SEPP 71 Coastal Protection (since repealed) and the Byron LEP 1988;
- the proposed development would impact on flooding in the vicinity; and
- stormwater management issues.

The proponent appealed the decision in the Land and Environment Court. A section 34 conciliation hearing was held, and the assessor favoured the applicant's view that the wording of clause 32(5) allows the creation of vacant lots by way of strata title.

The wording of clause 32(5) specifies that:

- (5) *Council shall not consent to the subdivision of land within Zone No. 7(f2), other than for the following:*
- (a) *a subdivision under the Strata Schemes (Freehold Development) Act 1973, or*
 - (b) *a subdivision to excise an allotment that is, or that the Council is satisfied is intended to be, used for a public purpose, or*
 - (c) *a subdivision that, in the opinion of the Council, is only a boundary adjustment where no additional lots are created.*

Council contends that the intent of this clause is to restrict subdivision of land so additional lots are not created on land that may be affected by coastal processes. In this context, clause 32(5)(a) appears to relate to strata subdivision of existing lawfully

approved buildings, rather than to allow the creation of additional vacant lots. It is considered incongruent to prohibit the subdivision of land under one form of title and permit it under another form of title.

The wording of clause 32(5)(a) does not clearly state the suggested intent, and the recent court appeal in favour of the applicant has affirmed this. Council resolved to amend this wording to clarify that subdivision under the strata legislation will only be approved where it does not result in the creation of any additional vacant lots suitable for development.

It is likely that, without amendments to the current planning instruments, similar development applications will be received by Council that it may be unable to refuse. Of additional concern is there is a lack of development standards limiting the minimum lot size in the 7(f2) zone. Council states there are a substantial number of properties across the Shire zoned 7(f2) that could be subject to development applications seeking to use the *Strata Schemes Development Act 2015* to create vacant lots. Future development applications for more intense land subdivision may occur if no additional controls are applied to these lands.

Council have considered alternative options however due to the need for a quick amendment this option is considered the best course of action.

STRATEGIC ASSESSMENT

State

Standard Instrument (Local Environmental Plans) Order 2006

The planning proposal is inconsistent with the Standard Instrument (LEP) Order 2006, which provides that all councils progress to a Standard Instrument LEP. The Byron LEP 1988 contains zoning and provisions that are not standard. The planning proposal to amend provisions for the 7(f2) zone in the Byron LEP 1988 is therefore inconsistent with the Order.

Council could rezone these lands in accordance with the Standard Instrument Byron LEP 2014. The current 7(f2) lands would then be allocated a Standard Instrument zone and lands identified in Council's current coastal hazard maps would be included as a 'Coastal Vulnerability Land' overlay under the SEPP (Coastal Management) 2018. These amendments could be combined with minimum lot size controls and changes to local provisions to limit strata subdivision that creates vacant lots on these sites.

As discussed previously, addressing the issue through the Standard Instrument LEP would be more complex and take significantly longer for Council to complete. Council is progressing its transfer of deferred lands into the Standard Instrument Byron LEP 2014 and when this is accomplished, this inconsistency will be resolved.

Regional

North Coast Regional Plan 2036

The planning proposal is considered consistent with the regional plan, particularly in relation to *Direction 3 Manage natural hazards and climate change*, which contains *Action 3.1 Reduce the risk from natural hazards, including the projected effects of climate change, by identifying, avoiding and managing vulnerable areas and hazards*.

Local

The planning proposal is considered consistent with the local planning framework as it aligns with objectives of the Community Strategic Plan 2028 to protect and enhance the natural environment and manage growth and change responsibly.

Section 9.1 Ministerial Directions

The following section 9.1 Directions are relevant to the planning proposal:

2.1 Environment Protection Zones; 2.2 Coastal Management; 2.3 Heritage Conservation; 2.4 Recreation Vehicle Areas; 3.1 Residential Zones; 3.2 Caravan Parks and Manufactured Home Estates; 3.3 Home Occupations; 3.4 Integrating Land Use and Transport; 4.1 Acid Sulfate Soils; 4.3 Flood Prone Land; 4.4 Planning for Bushfire Protection; 5.10 Implementation of Regional Plans; and 6.1 Approval and Referral Requirements.

Of these, the proposal is considered to be inconsistent with Direction 4.4.

Direction 2.1 Environment Protection Zones

This Direction is relevant to the planning proposal. It provides that a planning proposal must include provisions that facilitate the protection and conservation of environmentally sensitive areas, and not reduce environmental protection standards that apply to the land. The proposal aims to preclude the subdivision of land under the *Strata Schemes Development Act 2015*. This would lessen the impact of development on environmentally sensitive areas in the Urban Coastal Land zone. For this reason, the proposal is considered consistent with the Direction.

Direction 2.2 Coastal Management

This Direction is relevant to the planning proposal. It provides that a planning proposal must contain provisions which give effect to NSW coastal policies and do not enable increased development or more intensive development on land subject to coastal hazards. This proposal expands on existing provisions by amending clause 32 to strengthen measures to prevent further strata subdivision of land in the 7(f2) zone and therefore mitigate risks from coastal hazards.

Direction 3.1 Residential Zones

This Direction is relevant to the planning proposal as it affects land where residential development is permitted. It provides that a planning proposal must contain provisions to encourage a variety and choice of housing types, make efficient use of infrastructure and services and minimise impacts of residential development on the environment.

The proposal seeks to prevent subdivision which will create vacant lots in the 7(f2) Urban Coastal Land zone. The proposal does not reduce the potential of the land to be developed for residential development.

The proposal is consistent with the objective to minimise the impact of residential development on the environment, as it limits development on lands subject to coastal erosion hazards. However, not all land in the 7(f2) zone is mapped as having coastal erosion hazards. Owners of 7(f2)-zoned land that is suitable for development would not be able to strata subdivide vacant land under the proposed controls.

As the planning proposal does not prevent the diversity of permissible residential uses, it is consistent with this Direction.

Direction 4.1 Acid Sulfate Soils

This Direction is relevant to the planning proposal as the proposal impacts on lands identified with various acid sulfate soils risk classes. The Direction requires a relevant planning authority to provide provisions consistent with the Acid Sulfate Soil Planning Guidelines when proposing to regulate works in acid sulfate soils or intensifying land uses on sites subject to acid sulfate soils. As the proposal plans to limit intensification of development on some lands which are subject to acid sulfate soils, the proposal is considered consistent with this Direction.

Direction 4.3 Flood Prone Land

This Direction is relevant to the planning proposal. It applies when creating, removing or altering a zone or a provision that affects flood-prone land. The planning proposal amends provisions for the 7(f2) zone, which limits development on some flood-prone lands. For this reason, the proposal is considered consistent with this Direction.

Direction 4.4 Planning for Bushfire Protection

This Direction is relevant to the proposal as some land to which the proposal applies is mapped as being bushfire prone. The Direction provides that Council must consult with the NSW Rural Fire Service (RFS). Consultation is required after a Gateway determination is issued and until this consultation has occurred, the inconsistency of the proposal with this Direction remains unresolved.

The proposal is otherwise consistent with relevant section 9.1 Directions.

State environmental planning policies (SEPPs)

SEPP (Coastal Management) 2018

The aim of this SEPP is to promote an integrated and coordinated approach to land-use planning in the coastal zone. The planning proposal is considered consistent with this SEPP as it manages development in the coastal zone, protects the environmental assets of the coast, and strengthens the land-use planning framework to guide decision-making in the coastal zones.

SEPP (Exempt and Complying Development Codes) 2008

The Codes SEPP allows strata subdivision of buildings as complying development where a consent for the building has been issued within five years. The requirements of the Codes SEPP provide that a consent be issued for the building ensuring the impacts of the building have been assessed before the strata subdivision occurs. The proposal is therefore consistent with the Codes SEPP.

SITE-SPECIFIC ASSESSMENT

Social and economic

The planning proposal is expected to have broader positive social and economic impacts for people on land subject to coastal erosion hazard in the 7(f2) zone. The restriction of land subdivision in this area will prevent further intensification of development and possibly limit the amount of people residing in the area. This would potentially result in the reduction of personal and financial risks associated with exposure to environmentally hazardous events.

Some owners of 7(f2)-zoned land that is suitable for development and is not mapped as being subject to coastal hazards could be negatively impacted by the proposed additional controls.

Environmental

The proposed additional controls on land subject to coastal erosion hazards are likely to reduce potential impacts on coastal processes and the broader environment.

CONSULTATION

Community

Council has nominated a 28-day public exhibition period. Given the nature of the proposal and that the Urban Coastal Land zone covers a significant area of the LGA, this is considered a suitable time frame. It is recommended Council also write specifically to the effected landowners.

Agencies

Council proposes to consult with the Office of Environment and Heritage during the public exhibition period. This is considered appropriate.

It is also recommended that Council consult with RFS following the Gateway determination to satisfy the requirements of section 9.1 Direction 4.4 Planning for Bushfire Protection.

TIME FRAME

The planning proposal includes a project timeline, which estimates completion of the planning proposal within four months of the Gateway determination. Given the need for Council to consult with state agencies and the community, a nine-month time frame is recommended.

LOCAL PLAN-MAKING AUTHORITY

Council requests delegated authority to make the LEP amendment. As the proposal deals with matters of local significance, it is recommended that Council be authorised to exercise plan-making delegation for this matter.

CONCLUSION

It is recommended that the planning proposal proceed subject to conditions for the following reasons:

- additional protection will be given to land in environmentally sensitive areas of the Urban Coastal Land 7(f2) zone; and
- the provisions act as an effective temporary measure until the deferred areas are reviewed and transferred to the Byron LEP 2014.

RECOMMENDATION

It is recommended that the delegate of the Secretary note that the consistency with section 9.1 Direction 4.4 Planning for Bushfire Protection is unresolved.

It is recommended that the delegate of the Minister for Planning determine that the planning proposal should proceed subject to the following conditions:

1. Council write to all property owners in the 7(f2) zone that will be affected by the planning proposal.
2. The planning proposal should be made available for community consultation for a minimum of 28 days.
3. Consultation is required with the following public authorities:

- Office of Environment and Heritage; and
 - NSW Rural Fire Service.
4. The time frame for completing the LEP is to be nine months from the date of the Gateway determination.
 5. Given the nature of the planning proposal, Council should be authorised as the local plan-making authority.



Tamara Prentice
Team Leader, Northern



12-12-2018
Jeremy Gray
Director Regions, Northern
Planning Services

Contact Officer: Tamara Prentice
Team Leader, Northern
Phone: 6641 6610