

Planning Services

Gateway Determination Report

LGA	Byron
RPA	Byron Shire Council
NAME	Rezoning of Lot 22 Stuart Street, Mullumbimby for residential purposes (100 homes, 0 jobs)
NUMBER	PP_2018_BYRON_001_00
LEP TO BE AMENDED	Byron LEP 2014
ADDRESS	Stuart Street, Mullumbimby
DESCRIPTION	Lot 22 DP 1073165
RECEIVED	2 May 2018
FILE NO.	EF17/13913 and IRF18/2318
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:

- rezone part of Lot 22 DP 1073165, Stuart Street, Mullumbimby from RE1 Public Recreation to R1 General Residential;
- change the minimum lot size for that part of the land being zoned R1 from 40 hectares to 200m²;
- reclassify that part of the land being rezoned R1 from community to operational;
- introduce a Key Sites Map to the Byron LEP 2014 and map that part of Lot 22 being rezoned to R1 as a key site; and
- introduce provisions to require diverse and affordable housing on land mapped as a key site on the Key Sites Map.

Site description and Existing planning controls

The site is located to the south of the Mullumbimby urban area. The land is predominantly vacant grazing land. The area of the entire Lot 22 is 29.2 hectares. Part of Lot 22 (approximately 3.5 hectares) is severed from the main parcel by the disused railway corridor. This land east of the railway corridor is not proposed to be rezoned or reclassified. The land was acquired by Council in 2004 for public recreation purposes. Figure 1 shows the entire area of Lot 22. Figure 2 show that part of the land to be rezoned R1 General Residential.



Figure 1 – The entire area of Lot 22 highlighted in yellow with red border

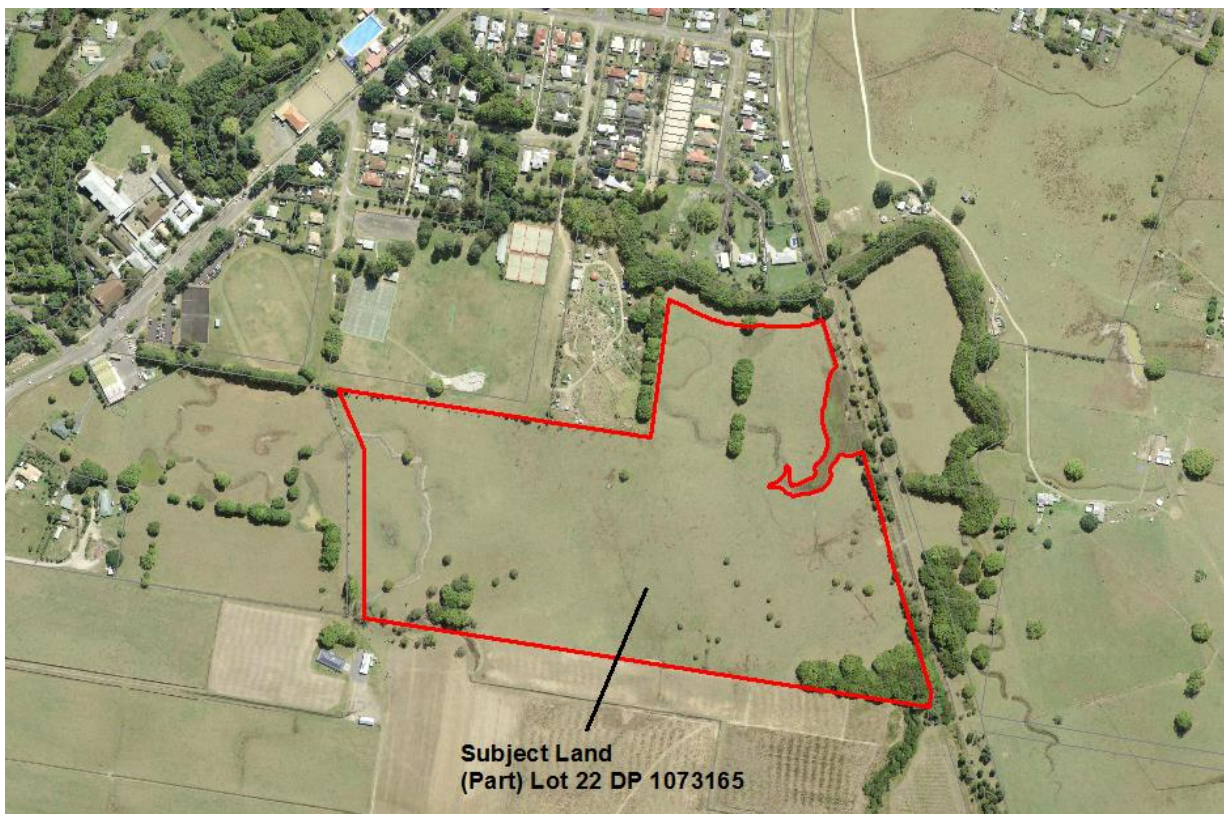


Figure 2 – That part of Lot 22 to be rezoned R1 General Residential outlined in red

In addition to the area of grazing land, Lot 22 contains the Mullumbimby Community Garden in the north west of the site (2.7ha). It is intended that the Community Garden will retain the RE1 Public Recreation zone.

Part of the subject land is also deferred from the Byron LEP 2014 and is currently zoned 7(b) Environmental Protection (Coastal Habitat) under the Byron LEP 1988. This area of

7(b) zoned land constitutes approximately 0.45ha and is a 25 metre wide strip of riparian land along the edge of Saltwater Creek. The current land zones are shown in Figure 3.

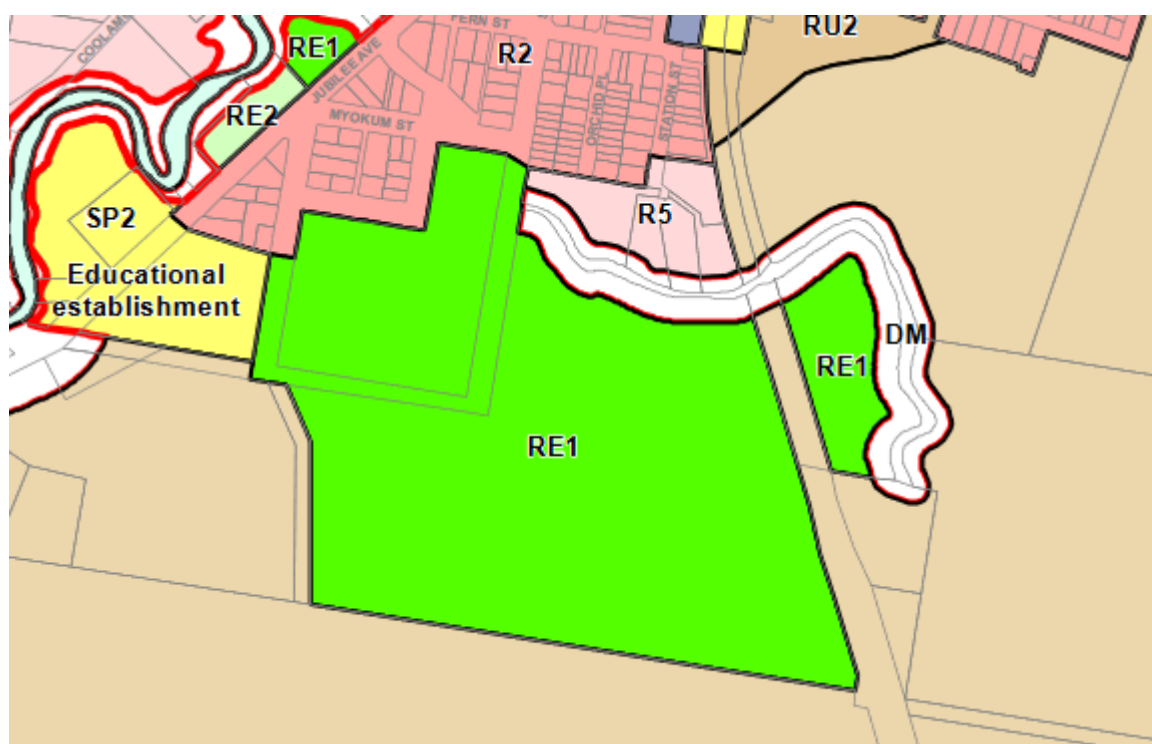


Figure 3 – maps of current zones

Surrounding Area

The site is bounded to the north by the urban area of Mullumbimby, farmland to the east and south and farmland and the Mullumbimby High School to the west. The site is located within the urban growth area for Mullumbimby in the North Coast Regional Plan 2036.

Summary of Recommendation

It is recommended that a Gateway determination for the planning proposal to proceed be issued, subject to a condition that the sections of the planning proposal relating to proposed provisions for affordable housing are removed from the planning proposal. The reasons for this recommendation are as follows:

- The land is located within the urban growth area boundary for Mullumbimby and warrants further investigation for future use for residential purposes; and
- The provisions contained within the planning proposal relating to requiring affordable housing are contrary to the Act.

PROPOSAL

Objectives or Intended Outcomes

The planning proposal includes objectives which adequately describe the intent of the planning proposal. The objectives of the planning proposal are as follows:

1. to rezone part of Lot 22 to R1 General Residential to enable it to be developed for residential purposes;
2. to reclassify that part of lot 22 being rezoned to R1 from community to operational to enable it to be developed and sold for residential purposes;
3. introduce provisions to require diverse and affordable housing on sites mapped on a Key Sites Map in the Byron LEP 2014.

Explanation of Provisions

The planning proposal includes an explanation of the provisions which adequately describe the proposed changes to the Byron LEP 2014 intended to achieve the objectives of the proposal.

The intent of the planning proposal will be achieved by:

1. rezoning approximately 22 hectares of Lot 22 from RE1 Public Recreation to R1 General Residential;
2. introducing an R1 General Residential zone and associated land use table into the Byron LEP 2014;
3. reclassifying that part of Lot 22 proposed to be zoned R1 from community to operational and discharging interests in the land;
4. changing the minimum lot size for that part of the land being zoned R1 from 40 hectares to 200m²;
5. introducing a Key Sites Map into Byron LEP 2014 and mapping that part of Lot 22 proposed to be zoned R1 as a key site;
6. introducing controls to require diverse and affordable housing for land mapped on the Key Sites Map.

Mapping

The planning proposal includes maps which show the current zoning and the proposed zoning and minimum lot size (MLS).

It is recommended that the planning proposal be amended prior to community consultation to include maps which show;

1. the existing and proposed MLS;
2. the area of land proposed to be reclassified via a Part Lots Reclassification Map;
3. the area of land proposed to be mapped as a key site on the Key Sites Map.

Maps which comply with the Standard Technical Requirements for Maps will need to be prepared prior to the planning proposal being finalised.

NEED FOR THE PLANNING PROPOSAL

The planning proposal has arisen out of the Byron Shire Housing Summit that was held in February 2017. In its consideration of the outcomes of the housing summit at its meeting of 22 June 2017, Council identified Lot 22 DP 1073165 as Council owned land that could be considered for affordable housing through the planning proposal process ahead of finalisation of Council's draft Residential Land Strategy.

An amendment to the LEP is the best means of achieving the intent of the planning proposal. The proposed amendments detailed in the planning proposal are Council's preferred means of achieving the objectives of the planning proposal. Other amendments to the LEP such as a local provision relating to the subject land could also achieve the intent of the proposal. It is considered that changes to the mechanism by which the objectives are achieved can be addressed at legal drafting stage of the proposal.

Reclassification

The proposal seeks to reclassify that part of the subject land being rezoned R1 General Residential from 'community' to 'operational' under the *Local Government Act 1993*. The reclassification is necessary to enable Council to develop the land for residential purposes and sell the residential lots. The reclassification also seeks to discharge any interests in the land which may have arisen due to the purchase of the land with section 94 funds. For this

reason, the Governor's approval will be required and Council should not be authorised to be the local plan-making authority to make this plan. This process will also discharge any implied interests in the land as a result of the drafting in Schedule 4 of the Byron LEP 2014, which discharges all interests except those listed in Column 3 of Part 2 of Schedule 4. This is considered to be appropriate.

The reclassification will result in the loss of 22 hectares of land zoned RE1 for public recreation. Council has prepared a Draft Open Space and Recreation Needs Assessment (the 'OSRNA'). The OSRNA has assessed all the developed recreation land in the Byron LGA. Lot 22 was not counted in the supply calculations in the assessment as it is not currently developed for recreation purposes. The OSRNA concludes that in the long term (20 years) Mullumbimby will have a deficit of 0.15ha of parks. The OSRNA therefore concludes that Lot 22 is not required for recreation purposes and Council may investigate development of this land for residential purposes.

Council notes that the 3.5 hectares of Lot 22 located east of the disused railway line and the community gardens on the site will be retained for public recreation purposes and therefore will result in a net surplus of recreation land in the longer term.

Council has also confirmed that the OSRNA has not been adopted for public exhibition at this stage. The Department has already received submissions from members of the community opposing the proposed rezoning which would result in the loss of land currently dedicated for public recreation purposes. It is considered that the Gateway determination should include a condition requiring the OSRNA to be exhibited concurrently with the planning proposal since the proposal relies heavily on the conclusions reached in the OSRNA. The OSRNA should also be finalised and adopted by Council before it requests the Department to draft and finalise the LEP amendment.

Key Sites Map

The proposal seeks to introduce a Key Sites Map to identify the areas of land which will be subject to the diverse and affordable housing provisions. Council has indicated that the map is necessary to clearly delineate the land to which the diverse and affordable housing provisions will apply. It was suggested to Council that a local provision relating solely to the subject area of Lot 22 could achieve the same outcome without the need to introduce a Key Sites Map. However, Council intends to add additional sites to the map in future thereby applying the diverse and affordable housing provisions to other land in the LGA which is shown on the map.

Council's approach is considered to be an acceptable option to achieve the intent of the proposal. However, the preparation of the map should be such that the designation of the land subject to the diverse and affordable housing provisions should be distinct from other lands that are added to the Key Sites Map for purposes not related to the provision of diverse and affordable housing such as the requirement for a DCP to be produced.

Diverse Housing Provisions

The diverse housing provisions seek to ensure that new residential development on affected land comprises at least 25% one bedroom dwellings, at least 50% two bedroom dwellings and no more than 25% of new residential development being three or more bedroom dwellings. The intention is that smaller dwellings will be more affordable for both purchase or rental.

The draft diverse housing provisions in Appendix 1 of the planning proposal indicate that they will only apply to development applications proposing four or more dwellings. This is

not reflected in the plain English explanation of the proposal in the Explanation of Provisions. It is recommended that the Gateway determination contain a condition requiring the planning proposal to be amended prior to public exhibition to make it clear when the proposed diverse housing provisions will apply.

It is considered that simply limiting the number of bedrooms in a dwelling may not result in small floor area, low cost dwellings. It is considered that limits on floor space ratio (FSR) may be a more effective planning control. Council has advised that the absence of an FSR is intended to enable flexibility in the provision of diverse forms of housing and is satisfied that its provisions for parking, landscaping, deep soil areas, building height planes and setbacks will be sufficient to control the site density of proposed dwellings. Council also notes that the 9m building height will limit development to 2 storeys and master planning of the subject land will ensure the objective of maintaining smaller dwelling sizes is achieved.

A 9m height limit is consistent with the height limit for the rest of the Mullumbimby urban area. The rest of the Mullumbimby residential areas have an FSR of 0.5:1.

Council's approach and the proposed diverse housing provisions are considered to be acceptable, and while other mechanisms could be employed to achieve the intent of the provisions, it will ultimately fall to Council, as the consent authority, to determine the development applications for the development of the land and Council is satisfied that it can rely on the provisions in its development control plan to achieve the intended outcome.

Affordable Housing Provisions

The proposed affordable housing provisions require that new residential development on the land to which the provisions apply should comprise 50% affordable rental housing. This required proportion of housing stock being affordable rental housing is significant however is intended to be limited only to the land shown on the Key Sites Map, which in turn is limited to that part of Lot 22. Council has indicated that it has no intention to include privately owned land on the Key Sites Map unless the land owner requests to be included.

The proposed affordable housing provisions cannot be included in the Byron LEP 2014. Section 7.32 of the *Environmental Planning and Assessment Act 1979* provides that conditions requiring the contribution of land or a monetary contribution for affordable housing cannot be required unless the local government area is listed in SEPP No. 70 Affordable Housing (Revised Schemes). Byron Shire LGA is not listed in SEPP 70 and therefore such provisions are contrary to the Act.

The provisions also intend to require the dwellings to be used for affordable rental housing for a period of 30 years. This is a longer time period than required by SEPP (Affordable Rental Housing) 2009.

SEPP (Affordable Rental Housing) 2009 provides that the time period for dwellings to be retained for affordable rental housing purposes is 10 years. The proposal to set this period at 30 years is inconsistent with the SEPP and therefore inappropriate.

Council was advised that its proposal to include provisions to require affordable housing is contrary to the Act and that should Council request a Gateway determination for the planning proposal as submitted, a condition requiring the removal of the affordable housing provisions from the planning proposal may be included in the Gateway determination. Council considered this advice and at its meeting of 19 April 2018 resolved:

Request NSW Department of Planning and Environment proceed to issue a Gateway determination for the planning proposal as submitted by Council and accept that this will include a condition requiring the removal of the affordable housing provisions from the proposal.

Since Council accepts that the proposed affordable housing provisions are contrary to the Act, it is recommended that the Gateway determination contain a condition which requires the affordable housing provisions to be omitted from the proposed LEP amendments. Since Council owns the subject land it can achieve its affordable housing intentions through other means such as legal contracts with housing providers or a planning agreement with a prospective developer.

STRATEGIC ASSESSMENT

State

NSW State Priorities

The proposal is not inconsistent with any of the eighteen State priorities being actioned by the State Government. The proposal will enable the land to be developed to provide additional housing opportunities for the Byron LGA.

Standard Instrument LEP

The Standard Instrument LEP template includes drafting directions for some land uses and mandates that some land uses must be allowed with or without consent in certain zones. The proposed land use table for the R1 General Residential zone in Byron LEP 2014 is consistent with the requirements for the R1 zone in the Standard Instrument LEP template.

The draft R1 Land Use Table proposes to permit a mix of land uses including non-residential land uses which are compatible with the residential land uses and enable a degree of employment generation within the R1 zone. The proposed non-residential land uses which are not normally included in a residential zone are function centres and high technology industries.

The definition of high technology industry excludes “*a building or place used to carry out an industrial activity that presents a hazard or potential hazard to the neighbourhood or that, because of the scale and nature of the processes involved, interferes with the amenity of the neighbourhood.*” Therefore, potential land use conflicts with residential land uses in the area are expected to be able to be managed adequately.

The proposal to permit function centres is considered to be appropriate as it provides the opportunity for a place to enable the community to gather for events. Such a facility is considered to be important in a neighbourhood of small sized lots and small dwellings.

These land uses are therefore considered to be acceptable as they still require development consent at which stage any potential land use conflict could be addressed.

Objectives

The proposal seeks to include three new objectives in the R1 zone these are:

- *To provide a secure supply of affordable housing stock that meets the needs of low to middle income residents.*
- *To enable the provision of non-residential land uses that are compatible with, and do not place demands on services beyond the level reasonably required for residential use.*
- *To encourage adaptable housing that supports ageing in place.*

These proposed objectives are not inconsistent with the current objectives of the zone and will be important considerations when assessing proposals for residential development on a site where Council is intending to achieve diverse housing stock.

Practice Note 11-002

The Department's Practice Note 11-002 provides guidance on the use of standard zones in Standard Instrument LEPs. The proposed R1 zone is an open zone which is consistent with the Practice Note.

The PN contains the following in relation to the R1 zone:

This zone is to provide for a broad variety of residential densities and housing types, including 'dwelling houses,' 'multi-dwelling housing,' 'residential flat buildings,' 'boarding houses' and 'seniors housing'. The zone also includes additional uses that provide facilities or services to residents, including 'neighbourhood shops,' 'community facilities,' 'child care centres' and 'respite day care centres.' If a particular type and consistent density of residential development is desired it is better to use a more tailored residential zone such as R2, R3 or the R4 zone.

The proposal seeks to utilise the R1 zone as it has not previously been used in the Byron LEP 2014. Council intends to use the R1 zone only for the land shown on the Key Sites Map which is subject to the proposed diverse housing provisions

This approach is considered to be acceptable because the current R2 zone in the Byron LEP 2014 does not permit the same range of housing types or employment generating land uses as the proposed R1 zone. Similarly, the current R3 zone permits some tourist and visitor accommodation (being serviced apartments and bed and breakfast accommodation), the presence of which could negatively impact on the intention to provide more affordable housing.

Regional / District

The proposal is not inconsistent with the directions or actions of the North Coast Regional Plan 2036. The land is located within the urban growth area for Mullumbimby as a result of its current urban zoning (RE1 Public Recreation). The planning proposal includes an assessment against the Urban Growth Area Variation Criteria (UGAVC). While an assessment against the UGAVC is not necessary because the land is already contained within the urban growth area, it does demonstrate that the land is suitable for residential development.

The proposal is currently inconsistent with Action 18.2 as it does not include an assessment of Aboriginal cultural heritage on the site. This is however recognised by the proposal and it is recommended that an Aboriginal cultural assessment be a condition of the Gateway determination.

The proposal is consistent with action 23.1 as it intends to deliver greater housing diversity by including provisions which enable the development of dwellings on lots of less than 400m² (a 200m² MLS is proposed for the R1 zoned land).

The proposal is consistent with action 25.1 as it proposes to introduce provisions into the Byron LEP 2014 which will promote a greater variety of housing types on sites that are included on a proposed Key Sites map. The proposed diverse housing provisions are discussed previously in this report.

Local

The Mullumbimby Settlement Strategy 2003 (the MSS) is currently applicable to the site. The subject land was not identified as a future release area in the MSS. The land was purchased by Council in 2004, after the MSS was adopted.

An outcome of the MSS is:

Outcome: No residential development to occur on flood prone land. No fill is to be placed on land subject to the 1 in 100 AEP level unless it can be clearly demonstrated that substantial benefits to the existing flood situation will result. Uses other than residential, such as open space, could be managed on flood prone land.

The land is flood prone though a flood study has been done for the site which concludes that the land can be filled to above the 1% AEP without having a significant adverse impact on the flooding of surrounding properties. This is discussed later in this report in relation to Section 9.1 Direction 4.3.

The MSS will eventually be replaced by the draft Byron Shire Residential Strategy.

Draft Byron Shire Residential Strategy

The draft Byron Shire Residential Strategy (the 'draft Strategy') has not yet been finalised. The proposal precedes the draft Strategy.

The draft Strategy identifies the subject land as a potential greenfield development site that could deliver additional housing for the Mullumbimby town area. The draft Strategy has undertaken a constraints analysis which identified flooding impacts as a high constraint. The flood investigations for the subject land have identified that while most of the land is inundated in a 1% AEP flood event, the velocities of the flood water are low and the land is not a floodway. Filling scenarios have been modelled and it has been concluded that the land could be filled without having a significant adverse impact on the flood affectation of neighbouring properties.

The proposal is therefore not inconsistent with the draft Strategy.

Section 9.1 Ministerial Directions

The following S117 Directions are relevant to the planning proposal 1.3 Mining, Petroleum Production and Extractive Industries, 1.4 Oyster Aquaculture, 2.1 Environment Protection Zones, 2.2 Coastal Protection, 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, 5.10 Implementation of Regional Plans, 6.1 Approval and Referral Requirements, 6.2 Reserving Land for Public Purposes and 6.3 Site Specific Provisions.

The proposal is considered to be inconsistent with directions 2.1, 2.3, 3.1, 4.1, 4.3 and 6.2 as discussed below.

Direction 2.1 Environment Protection Zones is relevant to the planning proposal. The direction provides that a planning proposal shall include provisions that facilitate the protection and conservation of environmentally sensitive areas. The proposal applies to Lot 22 which contains riparian land and a remnant freshwater wetland. The planning proposal also indicates further site investigations for Hairy-joint Grass and the Common Planigale are required.

The Byron LEP 2014 does not contain any environmental protection zones which can be applied to land outside of a national park or nature reserve as a result of the Northern Councils E Zone Review. The proposal intends to retain the existing 7(b) Environment Protection (Coastal Habitat) zone over the riparian land and the RE1 Public Recreation zone over the freshwater wetland. These ecosystems are not intended to be rezoned to R1 General Residential. The retention of the existing zones in the absence a suitable E zone in the Byron LEP 2014 is inconsistent with the direction. However, an E zone cannot be applied to the riparian land or wetland unless it is consistent with the Northern Councils E Zone Review Final Recommendations. Council is intending to address the introduction and application of E zones to deferred land in the LGA in a separate planning proposal to ensure a consistent approach across the LGA. This approach is considered to be appropriate. However, considering that further site investigations for other species are yet to be conducted, it is appropriate to consult with the NSW Office of Environment and Heritage before the inconsistency of the proposal with the direction is resolved.

Direction 2.3 Heritage Conservation is relevant to the planning proposal. The direction provides that a planning proposal must contain provisions which facilitate the conservation of matters of Aboriginal and historical heritage significance. The planning proposal intends to rezone the land for residential purposes however does not include an Aboriginal cultural heritage assessment.

The planning proposal recognises that an Aboriginal Cultural heritage assessment needs to be prepared for the site and it is recommended that a condition of the Gateway determination require such an assessment prior to community consultation. It is considered that until the Aboriginal cultural heritage assessment has been undertaken the inconsistency of the proposal with the direction remains unresolved.

Direction 3.1 Residential Zones is relevant to the proposal. The Direction provides that a planning proposal must reduce the consumption of land on the urban fringe. The proposal seeks to rezone approximately 22ha of land from RE1 Public Recreation to R1 General Residential.

The direction provides that a proposal may be inconsistent with this direction if it is justified by a strategy. The land to be zoned residential is located within the urban growth area for Mullumbimby and therefore considered to be suitably located for future residential development. The proposed diverse housing provisions will also ensure that a broad choice of building types will be provided. It is therefore considered that the inconsistency of the proposal with the direction has been justified in accordance with the terms of the direction.

Direction 4.1 Acid Sulfate Soils is relevant to the planning proposal. The direction provides that a planning proposal shall not contain provisions that enable an intensification of land uses on land subject to acid sulfate soils.

The subject land is mapped as containing class 4 acid sulfate soils and the proposal seeks to rezone the land from RE1 Public Recreation to R1 General Residential to enable the land to be developed for residential purposes.

The direction provides that a study assessing the appropriateness of the proposed change of land use in relation to the acid sulfate soils risk must be prepared. The planning proposal acknowledges that an acid sulfate soils study has not yet been prepared however it is intended that one be undertaken prior to community consultation. It is considered that until this study has been completed the inconsistency of the proposal with the direction is

unresolved. It is recommended that a condition of the Gateway determination require the preparation of an acid sulfate soils study prior to community consultation.

Direction 4.3 Flood Prone Land is relevant to the planning proposal. The direction provides that a planning proposal must not rezone flood prone land from a recreation zone to a residential zone or permit a significant increase in the development of flood prone land.

The proposal seeks to rezone flood prone land from RE1 Public Recreation to R1 General Residential. This will enable the land to be developed for residential purposes. The direction provides that a proposal may be inconsistent with the direction if it is in accordance with a floodplain risk management plan or is of minor significance.

Council has not prepared a floodplain risk management plan. The North Byron Flood Study was adopted by Council in February 2016. Council notes that the next step is to prepare a North Byron Floodplain Risk Management Study and Plan. This plan will determine whether areas of land on the flood plain can or should be filled to enable residential development and which areas of land should not be filled to enable residential development. Council has advised that the timing for the Floodplain Risk Management Study and Plan is nine to twelve months away.

In the absence of a floodplain risk management plan, a report that examines the flood affectation of the land in relation to the proposed residential development of the land has been prepared to accompany the planning proposal. The report is based on the flooding data in the adopted North Byron Flood Study. The report notes that most of the land is inundated in a 1% AEP flood event though the velocities of the flood water are low and the land is not a floodway. The proposal recognises that the land would need to be filled to enable it to be developed for residential purposes. Three fill scenarios have been modelled for the site with option 3, which comprises of three fill pads and drainage reserves in between, demonstrating that the site can be filled to above the 1%AEP without having a significant impact on the flood affectation of neighbouring properties. The report predicts an increase in flood level of less than 20mm for the rural land south of Lot 22 when Lot 22 is filled.

The report notes that a more detailed flooding assessment will be required at development application stage to ensure that the proposed development does not cause adverse flooding impacts on neighbouring properties. The report justifies the need for this additional assessment at development application stage when final details of the fill required for the development is known. The report concludes that the flood affectation of the site does not prevent a feasible development from being achieved on this site.

The subject land is adjacent to the existing Mullumbimby urban area and therefore will not be unreasonably isolated in a flood event. The filling of the land will require additional spending on flood mitigation measures and infrastructure.

One of the issues raised in public submissions already received by the Department relates to the filling of the flood plain. In the absence of a floodplain risk management plan, it is considered that Council should consult with the NSW Office of Environment and Heritage and the State Emergency Service in relation to flooding issues on the site. It is considered that until this consultation has been undertaken, the inconsistency of the proposal with the direction should not be resolved.

The direction also requires that a planning proposal should not permit development to be carried out without consent except for agriculture, roads or exempt development. The

proposal seeks to rezone the land to R1 General Residential. The proposed R1 land use table lists 'environmental protection works', 'home-based child care' and 'home occupations' as development permitted without consent. State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 lists home based child care as exempt development. Therefore while the proposal is inconsistent with the direction, this component of the inconsistency is considered to be of minor significance as the land uses permitted without consent will not result in additional buildings or population on flood prone land (in the case of environmental protection works or home occupations) and in the case of home based child care it has been demonstrated that the land on which homes will be constructed can be filled to above the 1%AEP level and any impact from flooding will be addressed at the development application stage for the dwelling house on the land.

Direction 6.2 Reserving Land for Public Purposes is relevant to the planning proposal. The direction provides that a planning proposal shall not create zones or reservations of land for public purposes without the approval of the relevant public authority and the Secretary.

The proposal seeks to rezone approximately 22ha of land from RE1 Public Recreation to R1 General Residential. The land is currently vacant rural land and was purchased by Council for recreation/sporting purposes. The land is located on the southern edge of the Mullumbimby urban area. That part of Lot 22 which is located east of the railway line and the land which is currently occupied by the Mullumbimby Community Gardens is not intended to be rezoned and will retain the current RE1 zoning. Council has undertaken the Byron Shire draft Open Space and Recreation Needs Assessment (OSRNA) which includes a supply and demand analysis that indicated that the subject land is surplus to Council's recreation or sporting requirements. The OSRNA has not yet been publicly exhibited. The Council's agreement to the rezoning is implicit with the planning proposal which also proposes reclassification of the land from community to operational (interests changed). The Secretary's agreement to the rezoning has not been sought.

The direction provides that a proposal may be inconsistent with the direction if the inconsistency is of minor significance. It is considered that since the OSRNA is still in draft form and has not been publicly exhibited, Council's justification for the loss of land for recreation/sporting purposes has not been tested.

It is considered that the inconsistency of the proposal with the direction cannot be determined to be of minor significance until the OSRNA and the planning proposal have been publicly exhibited and public submissions have been considered. It is recommended that the inconsistency of the proposal with the direction remain unresolved until community consultation has occurred.

The proposal is otherwise consistent with S117 Directions.

State Environmental Planning Policies

Many State environmental planning policies (SEPPs) apply to the land and the proposal is not inconsistent with these policies. The relevant SEPPs are as follows.

SEPP 55 Remediation of Land

SEPP 55 requires a preliminary assessment of the site to determine whether there is the potential for contamination of the land from past land uses. A Preliminary Contaminated Land Assessment has been undertaken. The assessment identifies that there is a small potential for contamination of the land due to the proximity of the site to the disused Casino to Murwillumbah railway line and as a result of past cropping and agricultural activities on

the site. The assessment concludes that further investigation will need to be undertaken at development application stage to determine whether any actual contamination of the soil exists and what remediation measures will be necessary.

The preliminary assessment did not include any soil sampling. It is considered that preliminary soil sampling should be undertaken to inform the rezoning of the site rather than wait until the development application stage, and that this should be a condition of the Gateway determination.

SEPP (Affordable Rental Housing) 2009

The inconsistency of the proposal with this SEPP is discussed previously in this report. The inconsistency of the proposal with this SEPP is resolved with the omission of the proposed affordable housing provisions in the planning proposal.

SITE SPECIFIC ASSESSMENT

Social

The proposal seeks to require diverse and affordable housing only on the subject land and any future land added to the Key Sites Map. The requirements for diverse housing will not apply to all other residential land in the Byron LGA.

Council was asked to address the potential for the provisions to generate enclaves where lower cost housing was provided and the potential social impacts that may result. Council advised that:

Byron Council accepts that it may be appropriate in the future to have clauses in its LEP that encourage diverse and affordable housing throughout the LGA. However, the purpose of this planning proposal is to achieve this outcome on Council land in the first instance. Council considers that Lot 22 is an opportunity to produce a master planned community that is well located and serviced by an existing urban area. It will not be a social housing enclave and the social implications of this site will be no different to other new urban release areas except that ordinary working people will be able to afford to live there. The LEP provisions provide that 50% of the new housing will not need to be affordable housing and will not be social housing. Lot 22 is an opportunity for Council in conjunction with a housing provider to work towards the North Coast Regional Plan Direction to “increase housing diversity and choice”(Direction 23) and “deliver more opportunities for affordable housing”(Direction 25).

Council therefore concludes that the proposal will have strong positive social impacts by improving housing availability and affordability in a new release area that is well located to services and infrastructure and will also contain a mix of conventional housing stock. It is agreed that this aspect of the proposal will have a positive social impact. Byron LGA has a deficit of housing that is affordable and this results in social inequalities. The proposal to address some of these issues is supported.

The proposal also has the potential to have a negative social impact resulting from the loss of public land for public recreation purposes. The Department has already received submissions from residents of Mullumbimby objecting to the loss of recreation land as a result of this planning proposal. This matter will be further addressed through the community consultation phase of the planning proposal. It is however recommended that the consultation for the planning proposal occurs concurrently with the consultation for the OSNRA so as to demonstrate to the community that Council has assessed the open space needs of the LGA before rezoning land currently zoned RE1.

Environmental

An ecological assessment was carried out in July 2017. The ecological assessment found that the majority of Lot 22 is cleared land used for cattle grazing and dominated by exotic pasture species. Tree cover includes dense stands of Camphor Laurel along Saltwater Creek and clumps of Camphor Laurel trees at scattered locations. No threatened flora species were present during targeted surveys in July 2017, however the ecological assessment recommends a summer survey for the threatened species Hairy-joint Grass and Missionary Nutgrass. No Endangered Ecological Communities were currently present. The probability of threatened fauna species being dependent upon the site in its current condition is low. The assessment also recommended that a survey of the site be undertaken to determine if the threatened Common Planigale is present. Three small wetlands with associated stream channels are located near Saltwater and Kings Creek. These wetlands are areas with potential for rehabilitation and recovery of the freshwater wetland and floodplain forest habitats.

The proposal intends to retain the existing 7(b) Environment Protection (Coastal Habitat) zone over the riparian land. This ecosystem is not intended to be rezoned to R1 General Residential and will be considered for an E zone in a separate planning proposal as previously discussed in this report.

Only the eastern wetland is being retained in the RE1 zone. The southern wetland is proposed to be zoned R1 however the site analysis map included with the planning proposal indicates the southern wetland will be located within the proposed 50m wide buffer between the proposed residential development on Lot 22 and the grazing land on the neighbouring property. Council's approach is considered to be appropriate.

The land is not mapped as bushfire prone land. Discussion on flooding impacts is included previously in this report.

The site is mapped as "committed urban use" in the Northern Rivers Farmland Mapping as it is currently zoned for urban purposes being RE1 Public Recreation. The surrounding grazing land is mapped as regionally significant farmland.

Economic

The proposal is expected to have a positive economic impact on the LGA by providing land for additional housing which will have a positive impact for the construction industry and the broader community. Should the proposal achieve the intent of providing low cost housing this will also have a positive economic impact for low income earners in the LGA.

Infrastructure

The planning proposal indicates that there is adequate infrastructure to service the proposed residential development on the land. Reticulated sewer and water and road infrastructure is available to the site and can be augmented to cater for the increased demand. Power and telecommunications are also available. It is expected that the land will have adequate access to services being on the edge of the existing Mullumbimby urban area and only 800m from the centre of the Mullumbimby central business district.

CONSULTATION

Community

The planning proposal indicates that the proposal is not considered to be a low impact proposal and a public exhibition period of 28 days is proposed. Given that a 28 day public

exhibition period is necessary for the reclassification of the land, a 28 day public exhibition period is considered to be appropriate.

Agencies

The proposal indicates that Council intend to consult with the NSW Office of Environment and Heritage on matters relating to vegetation, flooding and Aboriginal cultural heritage. This is considered to be appropriate though Council should also consult with the Local Aboriginal Land Council and the State Emergency Service as well.

TIMEFRAME

The planning proposal includes a project time line which estimates that the plan will be forwarded to the Department for finalisation in October 2018. Given that the Department will still need to assess the proposal after site investigations and consultation has been completed, draft the LEP amendment, and obtain the agreement of the Governor for the reclassification of the land it is recommended that an 18 month time frame is appropriate.

Local Plan Making Authority

Council has requested that it not be authorised to be the local plan-making authority for the making of the LEP. The proposal relates to Council owned land and requires the approval of the Governor to discharge interests in the land when it is reclassified. Therefore, given the nature of the planning proposal, Council should not be authorised to be the local plan-making authority to make this plan.

CONCLUSION

It is recommended that a Gateway determination for the planning proposal to proceed be issued, subject to a condition that the sections of the planning proposal relating to proposed provisions for affordable housing are removed from the planning proposal. The reasons for this recommendation are as follows:

- The land is located within the urban growth area boundary for Mullumbimby and warrants further investigation for future use for residential purposes; and
- The provisions contained within the planning proposal relating to requiring affordable housing are contrary to the Act.

RECOMMENDATION

It is recommended that the delegate of the Secretary:

1. Agree that the inconsistency with Section 9.1 Direction 3.1 Residential Zones, is justified in accordance with the terms of the direction; and
2. Note that the consistency with Section 9.1 Directions 2.1 Environment Protection Zones, 2.3 Heritage Conservation, 4.1 Acid Sulfate Soils, 4.3 Flood Prone Land and 6.2 Reserving Land for Public Purposes are unresolved and will require justification once additional investigations and consultation have been undertaken.

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

1. The planning proposal is to be amended, prior to public exhibition, to remove those sections of the planning proposal where it is proposed to introduce provisions requiring a proportion of developments to be used for the purpose of affordable housing.

2. Prior to public exhibition the planning proposal is to be amended as follows
 - (a) include maps which show;
 - i. the existing and proposed MLS;
 - ii. the area of land proposed to be reclassified via a Part Lots Reclassification Map; and
 - iii. how the mapping will identify that the proposed diverse housing provisions will apply to the land.
 - (b) if a Key Sites Map is proposed, how this map will designate the land subject to the diverse housing provisions as distinct from other lands that may be added to the Key Sites Map for purposes not related to the provision of diverse housing;
 - (c) the Explanation of Provisions for the proposed diverse housing controls is to clarify to the type and scale of development to which the proposed diverse housing provisions will apply; and
 - (d) detail of the public reserve status and the interests in the land and the implications of the reclassification of the land on these interests is to be included in Appendix 3.
3. Prior to public exhibition the following site investigations are to be undertaken and included with the material used for public exhibition:
 - (a) further investigation of the potential for contamination of the land through a soil sampling and assessment program that concentrates on the areas identified as having the greatest potential for contamination in the Preliminary Contaminated Land Assessment report prepared by Greg Alderson and Associates dated August 2017;
 - (b) additional site investigations for the presence of Hairy-joint Grass, Missionary Nutgrass, and the Common Planigale as identified in the Ecological Assessment dated July 2017;
 - (c) an aboriginal cultural heritage assessment for the site; and
 - (d) an acid sulfate soils study.
4. The draft Byron Shire Open Space and Recreation Needs Analysis is to be publicly exhibited concurrently with the planning proposal since the proposal to reclassify and rezone the subject land relies on the conclusions reached by the draft Byron Shire Open Space and Recreation Needs Analysis.
5. The draft Byron Shire Open Space and Recreation Needs Analysis is to be finalised and adopted by Council before it requests the Department to finalise the LEP amendment.
6. The planning proposal should be made available for community consultation for a minimum of 28 days.
7. Consultation is required with the following public authorities:
 - NSW Office of Environment and Heritage;
 - NSW State Emergency Service; and
 - Local Aboriginal Land Council.

This consultation should occur following completion of the additional studies, but prior to the public exhibition of the proposal.

8. The timeframe for completing the LEP is to be 18 months from the date of the Gateway determination.
9. Given the nature of the planning proposal, Council should not be authorised to be the local plan-making authority to make this plan. The proposal relates to Council owned land and requires the approval of the Governor to discharge interests in the land.
10. A public hearing for the reclassification of the land will be required



25/5/18

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