

GATEWAY REVIEW – Justification Assessment and Recommendation Report

LGA:	BALLINA
Amended LEP:	BALLINA LOCAL ENVIRONMENTAL PLAN 1987
Address:	Deferred areas under Ballina LEP 2012 (areas proposed to be zoned to a standard instrument Environment Zone)
Proposal:	Introduce provisions relating to private native forestry
Review request made by:	Ballina Council
Reason for review:	☒ A determination has been made that the planning proposal should not proceed
	☐ A determination has been made that the planning proposal should be resubmitted to the Gateway
	☐ A determination has been made that has imposed requirements (other than consultation) or makes variations to the proposal that the proponent or council thinks should be reconsidered.

SUMMARY OF THE PROPOSAL

The Planning Proposal seeks to amend the *Ballina Local Environmental Plan 1987* (LEP) by:

1. Adding definitions for 'forestry' and 'private native forestry' into the LEP;
2. Requiring development consent for private native forestry in the 1(b) Rural (Secondary Agricultural Land), 1(d) Rural (Urban Investigation), 1(e) Environmental Protection (Water Catchment), 7(f) Environmental Protection (Coastal Lands) and 7(l) Environmental Protection (Habitat) Zones; and
3. Adding a clause to the LEP that specifies matters to be considered when determining a development application for private native forestry.

REASON FOR THE GATEWAY DETERMINATION

The Gateway determination was to not proceed with the planning proposal.

The reasons for not proceeding with the planning proposal included that it was not appropriate to include additional consent requirements in the areas deferred from the Ballina LEP 2012 until the Department's E Zone Review was finalised, and that it is premature to introduce new controls and a dual consent regime for private native forestry in the deferred areas given the proposed changes outlined the NSW Biodiversity Legislation Review.

DETAILS OF PROPONENT JUSTIFICATION FOR REVIEW

Council is the proponent of this planning proposal.

Council has three reasons for requesting a review:

1. The Deputy Secretary, Planning Services (when exercising the Minister's delegation) gave insufficient weight to the findings, conclusions and recommendations of the Northern Planning Team Report and the Local Environmental Plan Review Panel recommendations.

2. The briefing report of the Executive Director, Regions is considered to be flawed in its interpretation of how the planning proposal relates to, and impacts upon, the Government's E Zone Review and the review of biodiversity legislation.
3. The Deputy Secretary, Planning Services, would not have reasonably concluded that the introduction of new consent requirements and dual consent for private native forestry pre-empted the E Zone Review and the Government's review of biodiversity legislation had he not relied upon the inadequate information contained in the briefing report of the Executive Director, Regions.

SUMMARY OF PROPOSAL AND GATEWAY DETERMINATION

1. Objective and intended outcomes:

The objective of Council's planning proposal is to require development consent for *Private native forestry* in certain rural and environmental protection zones under the Ballina LEP 1987.

The outcomes are:

- Insert separate definitions within the Ballina LEP 1987 for *Forestry* and *Private native forestry* and require development consent to be obtained for *Private native forestry* in the Rural 1(b), 1(d) and 1(e) zones (this would ensure consistency with the Ballina LEP 2012). *Forestry* is proposed to remain 'Permitted without consent' in these zones. Full details of the proposed changes to the Ballina LEP 1987 are provided in Table 1.
- Insert a reference to *Forestry* within clause 6(a) of the Ballina LEP 1987 to ensure that the definition of *Forestry* as contained within the *Environmental Planning and Assessment Model Provisions 1980*, no longer applies.
- Amend Ballina LEP 1987 to permit *Private native forestry* with development consent in the 7(c) Environmental Protection (Water Catchment) Zone, 7(f) Environmental Protection (Coastal Lands) Zone and 7(l) Environmental Protection (Habitat) Zone. This maintains the status quo as *Forestry* is currently permitted with development consent in these zones.
- Insert a new clause within Ballina LEP 1987 which specifies matters to be considered when determining development applications for private native forestry.

2. Explanation of provisions:

The planning proposal will amend Ballina LEP 1987 in the following ways:

- Amend clause 5 *Interpretation* by inserting the following definitions (Note. The definition of *Forestry* is to be amended as indicated by the underlined text and the new definition of *Private native forestry* definition is consistent with the *Native Vegetation Regulation 2013*):

Forestry includes aboriculture, silviculture, forest protection, the cutting, dressing and preparation, other than in a sawmill, of wood and other forest products and the establishment of roads required for the removal of wood and forest products and for forest protection. *It does not include private native forestry.*

Private native forestry means the management of native vegetation on privately owned land or Crown land that is not Crown-timber land within the meaning of the *Forestry Act 2012* for the purpose of obtaining, on a sustainable basis, timber products (including sawlogs, veneer logs, poles, girders, piles and pulp logs).

- Amend clause 6(a) as indicated underlined below:

6 Adoption of Model Provisions

The *Environmental Planning and Assessment Model Provisions 1980* are adopted except for:

- (a) The definitions of **commercial premises**, **forestry**, **map**, **residential flat building** and **tourist facilities** in clause 4(1).
- Amend clause 9 *Zone Objectives and Development Control Table* as follows:

Insert *Private native forestry* as a use permitted with development consent in Column 3 of the following zones – 1(b) Rural (Secondary Agricultural Land), 1(d) Rural (Urban Investigation), 1(e) Environmental Protection (Water Catchment), 7(c) Environmental Protection (Water Catchment) Zone, 7(f) Environmental Protection (Coastal Lands) Zone, and 7(l) Environmental Protection (Habitat) Zone.

- Insert a new clause 39 *Private Native Forestry* to protect the biodiversity value of land and its natural environmental and scenic amenity. The clause will provide assessment criteria for impacts relating to visual impact, erosion and sedimentation control, roads and traffic, and koala habitat.

3. Gateway determination:

The Northern Regional Team recommended that the planning proposal proceed.

The matter was considered by the Local Environmental Plan Review Panel. The Panel supported the Regional Office's recommendation that the matter proceed subject to agency consultation. It also informally consulted with the Environment Protection Authority (EPA) and the Department of Primary Industries – Forestry. The EPA advised that it had only issued 7 Property Vegetation Plans for private native forestry in the Ballina local government area since 2007.

On 24 March 2015, a Gateway determination was issued by the Deputy Secretary Planning Services to Ballina Council in relation to PP_2015_BALLI_001_00 that determined that the planning proposal should not proceed. The reason for refusing the proposal was that "the introduction of new consent requirements and dual consent for private native forestry should not pre-empt the final outcomes of the Northern Councils review of environmental zones and the Government's review of biodiversity legislation".

The Deputy Secretary was provided with a briefing note that outlined the concerns relating to the proposal and the E Zone Review as well as the independent review of the NSW biodiversity legislation (Tag D).

The brief included the following advice:

- Until the E Zone Review is finalised, it is not appropriate to include additional consent requirements in the deferred areas for a land use linked to existing rural pursuits.
- The independent review of the biodiversity legislation, including the *Native Vegetation Act 2003*, has recently been exhibited for public comment. Key recommendations include simplifying the approvals process, including removing the need for dual consent and changing the assessment regime for private native forestry.
- Given the proposed changes outlined in the biodiversity legislation review, it is premature to introduce new controls and dual consent for private native forestry in the deferred areas under the 1987 LEP.

Council's application for a Gateway Review has addressed the concerns raised in that briefing note and argues further for the planning proposal as follows:

- The deferred areas exist as a consequence of the Government's E Zone Review that commenced in September 2012 (prior to the finalisation of Ballina Council's Standard Instrument principal Local Environmental Plan). The decision to defer the areas was made by the then Minister for Planning when the Ballina LEP was finalised. The review was intended to be completed by March 2013. An assessment report and draft response from the Department was exhibited over May and June in 2014. There is no timetable for the finalisation of the Review.
- The planning proposal is intended to be a "stop gap" or interim measure pending the finalisation of the E Zone Review and a Standard Instrument zoning regime being applied to the deferred areas. Council does not consider the planning proposal to be contrary to the E Zone Review and refutes that it pre-empts the E Zone Review outcomes.
- The planning proposal does not introduce additional complexity to those undertaking rural uses on rural land. Given that the current Ballina LEP 2012 already requires development

consent for forestry (including private native forestry) on rural land (and therefore there is an existing dual consent regime), the planning proposal introduces consistency with the Ballina LEP 2012 by requiring development consent for private native forestry on rural land.

- Due to a parcel of land having multiple zones applying to the one parcel of land, it is feasible that it could be subject to both the Ballina LEP 1987 and the Ballina LEP 2012. Council is concerned that some landowners would be subject to the inequality of different provisions and the need for development consent for private native forestry only for part of the proposed area. Council argues that its proposed changes would resolve this inconsistency.
- Recommendation 7 of the *Review of biodiversity legislation in NSW*, relating to private native forestry, considered that it would be more appropriate for the Government to regulate timber harvesting on private land through a separate process to the review of biodiversity legislation. Council does not consider the planning proposal would pre-empt the specific recommendations of the biodiversity legislation review.
- Council refutes the claim that the biodiversity legislation review expressed concerns about dual consents applying to private native forestry.
- Council remains concerned that the specific issues of amenity (such as noise and visual impact), erosion and sedimentation control, site access, traffic and potential ecological impacts (specifically impacts on koalas and koala habitat) are not adequately considered in the assessment of Property Vegetation Plans (PVP) for private native forestry required under the *Native Vegetation Act*.

GATEWAY REVIEW ASSESSMENT

4. Private native forestry approval process

All proposals for private native forestry require a PVP from the Environment Protection Authority (EPA). After receiving basic proposal and property details, the EPA provides an information pack that includes a sketch map (showing various landscape features, such as old growth and rainforest areas) and a draft PNF PVP agreement. Once the landholder has indicated the proposed PNF area on the sketch map, it is returned to the EPA who finalises the PVP (including Forest Operations Plan) that are then forwarded to the landholder. The landholder is responsible for compliance with the Private Native Forestry Code of Practice (see Section 11 of this report for more information about the Code).

It is also possible (but not required) for a local environmental plan (LEP) to require consent for forestry (or even specifically private native forestry) as an additional approval to the need to obtain a PVP, in other words, a dual consent. There is no specification for one approval to be required before the other. There is potential for a PVP to be issued by the EPA for a PNF proposal, but the local Council refuse a development application for the same proposal. There are no stated protocols or requirements for how this situation is resolved.

5. Inconsistency between the Ballina LEP 2012 and Ballina LEP 1987:

Ballina Council has sought a Gateway Review over its concerns that there is an inconsistency between the Standard Instrument Ballina LEP 2012 and the Ballina LEP 1987 that applies to the deferred areas (these deferred areas are subject to the Department's E Zone Review).

Ballina LEP 2012

Under the Ballina LEP 2012, *Forestry* (including *Private native forestry*) requires development consent in both the RU1 Primary Production and the RU2 Rural Landscape Zones. Council is of the view that this definition of *Forestry* includes *Private Native Forestry*. Therefore, dual consent is currently required for *Private native forestry* on land zoned RU1 and RU2 under the Ballina LEP 2012.

It is important to note that while *Forestry* requires consent in the rural zones of the Ballina LEP 2012, the *Plantation and Reafforestation Act 1999* overrides other legislation and enables plantation forestry to be undertaken without the need for development consent. Therefore, Council

is essentially only requiring development consent for private native forestry (which is not separately defined in the Standard Instrument) in the rural zones of the Ballina LEP 2012.

Ballina LEP 1987

Under the Ballina LEP 1987, *Forestry* is defined by the Model Provisions 1980 and it could be argued that *Private Native Forestry* (PNF) would fall within this definition. This creates an inconsistency between the Ballina LEP 2012 and the Ballina LEP 1987 because *Forestry* does not require development consent in the 1(b), 1(d) and 1(e) zones under the Ballina LEP 1987. Table 1 shows the proposed changes to the land use table in the Ballina LEP 1987.

Table 1. Proposed land use table changes to Ballina LEP 1987

BALLINA LEP 1987 ZONES	Forestry (incl. PNF) under LEP 1987 (Deferred areas)	Proposed <i>Private native forestry</i> changes to LEP 1987	Proposed <i>Forestry</i> changes to LEP 1987
Zone No 1 (a1) Rural (Plateau Lands Agriculture) Zone	Consent required	No change	No change
Zone No 1 (a2) Rural (Coastal Lands Agriculture) Zone	Consent required	No change	No change
Zone No 1(b) Rural (Secondary Agricultural Land) Zone	Permitted without consent	Require consent	No change
Zone No 1(d) Rural (Urban Investigation) Zone	Permitted without consent	Require consent	No change
Zone No 1(e) Rural (Extractive and Mineral Resources) Zone	Permitted without consent	Require consent	No change
Zone No 7(a) Environmental Protection (Wetlands) Zone	Prohibited	No change	No change
Zone No 7(c) Environmental Protection (Water Catchment) Zone	Consent required	Permit PNF with consent	No change
Zone No 7(d) Environmental Protection (Scenic/Escarpment) Zone	Consent required	No change	No change
Zone No 7(d1) Environmental Protection (Newrybar Scenic/ Escarpment) Zone	Prohibited	No change	No change
Zone No 7(f) Environmental Protection (Coastal Lands) Zone	Consent required	Permit PNF with consent	No change
Zone No 7(i) Environmental Protection (Urban Buffer) Zone	Prohibited	No change	No change
Zone No 7(l) Environmental Protection (Habitat) Zone	Consent required	Permit PNF with consent	No change

6. Definitions relating to *Forestry* and *PNF*:

Under the Ballina LEP 2012, Council has not distinguished between the two definitions of *Forestry* and *Private native forestry*. Council is of the view that the definition of *Forestry* via the Standard Instrument includes PNF. Under the Ballina LEP 2012 Council has required consent for *Forestry* in the RU1 Primary Production and RU2 Rural Landscape Zones. This is despite Section 9(1) of the *Plantations and Reafforestation Act 1999* requiring any plantation to be authorised under that Act. (Note. A natural forest is not considered a plantation for the purposes of that Act and therefore *Private native forestry* is not required to be authorised under that Act).

In effect, while the Ballina LEP 2012 indicates that development consent is required for *Forestry*, any plantation forestry authorised under the *Plantations and Reafforestation Act 1999* (P&R Act) is not subject to development consent under the *Environmental Planning and Assessment Act 1979*.

(see Section 47 of the P&R Act). Therefore, the use of the definition of *Forestry* in the rural zones in the Ballina LEP 2012 has the effect of only applying to *Private native forestry*.

Council's planning proposal aims to distinguish between *Forestry* and *Private native forestry* and provide for different permissibility regimes.

7. E Zone Review:

In September 2012, the Minister for Planning announced that the Government would not endorse the use of E2 and E3 environmental zones and environmental overlays on rural land in council local environmental plans on the Far North Coast. Instead, these areas would be excised from the plans (deferred) while the Department reviewed the use of these controls in consultation with other government agencies and stakeholders.

The Department commissioned Parsons Brinckerhoff to undertake an independent review into the way environmental zones and overlays were being applied to land on the Far North Coast (the local government areas of Ballina, Byron, Kyogle, Lismore and Tweed). The findings of Parsons Brinckerhoff are contained in the *Northern Councils E Zone Review Interim Report* (the 'Interim Report'). The Interim Report was publicly exhibited in May and June 2014.

In summary, the E Zones Review made certain recommendations about the suitability of applying E zones in the 5 Council areas, as well as identifying potential criteria to be used to validate a decision to propose an E zone (based on vegetation or environmental sensitivity).

While the E Zone Review commenced over 2 years ago, it is still not finalised. This is one of Council's justifications for acting ahead of the Standard Instrument LEP commencing in all areas of the Shire.

Even if the E Zone Review were finalised soon, to implement its outcomes and rezone the deferred lands is likely to take at least 12 - 24 months as new planning proposals will be needed.

8. Biodiversity Legislation Review:

In 2014, the Minister for the Environment commissioned a Panel of experts to undertake a review of the *Native Vegetation Act 2003*, *Threatened Species Conservation Act 1995* and *Nature Conservation Trust Act 2001*, and parts of the *National Parks and Wildlife Act 1974*. The aims of the review were to recommend a simpler, streamlined and more effective legislation which improves the conservation of biodiversity and supports sustainable development thereby reducing the compliance and administrative burdens.

The Review was released in December 2014 and its recommendations have been adopted by the State Government. It is understood that the Office of Environment and Heritage is current working on an Exposure Bill that may go to Parliament towards the end of 2015.

The briefing note to the Deputy Secretary recommending that the planning proposal not proceed summarises key recommendations of the Biodiversity Legislation Review including "simplifying the approvals process, including removing the need for dual consent and changing the assessment regime for private native forestry". The briefing note also concludes that "it is premature to introduce new controls and dual consent for [PNF] in the deferred areas under the 1987 LEP".

The Biodiversity Legislation Review deals with "Timber harvesting on private land" in section 3.2 of the report where it does not mention or address the issue of dual consents. It also does not attempt to address the issues of concern raised by Ballina Council about the assessment of matters that are considered outside the scope of PNF PVPs (e.g. visual impact, erosion and sediment control, roads and traffic as well as potential impacts on the koala habitat). However, it is also acknowledged that one of the overarching perspectives of the Review is the reduction in the complexity of rural land use approvals, particularly the elimination of dual consents where possible.

While Section 3.2 of the Report does address "Timber harvesting on private land", it recommends (No. 7) that the regulatory arrangements for timber harvesting on private land be reviewed as part of a separate process. Therefore, the Biodiversity Legislation Review and the Government's associated legislative response are unlikely to specifically address the issue of private native forestry in the short term.

9. Data For PNF PVPs issued for Ballina LGA:

The Environment Protection Authority (EPA) has provided details of the PNF Property Vegetation Plans (PVPs) that have been issued in Ballina. Since 2007, there have been 7 PNF PVPs issued (approximately 1 per year).

10. PNF Code of Practice for Northern NSW:

Ballina Council's submissions have argued that there are a number of issues not adequately addressed as part of the PVP approval process. These include management of amenity issues (eg. noise and visual impact), erosion and sedimentation control, site access, traffic, and potential ecological impacts (specifically on koala habitat).

The PVP is a self regulating approval that requires the landholder to comply with the relevant Code of Practice. The Code of Practice outlines a number of specifications that must be met in relation to forestry activities, construction and maintenance of forest infrastructure, and conditions relating to impacts on listed threatened species.

The PNF Code of Practice for Northern NSW provides protection conditions for koalas and their habitats. It is not clear how Council would propose to condition PNF development in relation to koala habitat differently to the conditions provided for in the Code.

The Code also provides conditions for forestry operations in riparian areas. There are also conditions relating to the construction and maintenance of forestry infrastructure (such as roads). Council has not indicated how it would condition these activities differently specifically in relation to erosion and sedimentation control.

The Code does not address the other issues raised by Council, such as noise, visual impact, and traffic.

CONCLUSION

Sufficient information has been provided by Council to enable a thorough review of the Gateway determination.

There is currently an inequality and inconsistency between the Ballina LEP 2012 and the Ballina LEP 1987 with regard to the permissibility of *Forestry* and specifically *Private native forestry* in rural and environment protection zones.

While the PNF Code of Practice for Northern NSW provides a regulatory framework to address some of the concerns raised by Council (specifically in relation to the protection of koala habitat and erosion and sedimentation control), it is not clear how the Council considers the requirements of the Code in relation to its own proposed development consent conditions.

The Code of Practice does not address other issues of concern raised by Council relating to noise, visual impact and traffic.

The timing for the completion and implementation of the Department's E Zone Review is unclear. Council's view is that the planning proposal serves as an interim measure for the management of PNF approvals until the deferred lands are appropriately zoned under the Standard Instrument.

The planning proposal does not pre-empt the implementation of the NSW Biodiversity Legislation Review as the Review found that timber harvesting on private land should be addressed through a separate review. The timing of such a separate review is unclear.

It is important to note that Ballina local government area is not subject to numerous private native forestry proposals. To date, there has only been on average, 1 new operation approved per year. This is considerably less than other LGAs on the North Coast of NSW.

Given the complexity of this issue and the differing opinions between the parties, it is considered justified that this matter be independently assessed by the Northern Joint Regional Planning Panel.

RECOMMENDATION

It is **recommended** that the Deputy Secretary form the opinion that the request should proceed to review by the Joint Regional Planning Panel (JRPP).



24 June 2015

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8/7/15

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10/07/15

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