



Office of Environment & Heritage

Our Ref: DOC18/492861

Your Ref: Email dated 13 July 2018

General Manager
Lismore City Council
PO Box 23A
Lismore NSW 2480

Attention: Mr Greg Yopp

Dear Mr Murphy

Re: Planning Proposal – Stage 1 Non-Urban Deferred Matter

Thank you for your email dated 13 July 2018 about the Stage 1 Non-Urban Deferred Matter Planning Proposal seeking comments from the Office of Environment and Heritage (OEH). I appreciate the opportunity to provide early input.

The OEH has statutory responsibilities relating to biodiversity (including threatened species, populations, ecological communities, or their habitats), Aboriginal and historic heritage, National Parks and Wildlife Service estate, flooding and estuary management.

We have reviewed the documents supplied and advise that we consider the approach taken to determine the appropriate zoning for the Deferred Matters lands is inconsistent with the recommendations in the Northern Councils E Zone Review Final Recommendations Report and will not protect land that has high environmental values.

According to recommendation 6 of the Northern Councils E Zone Review Final Recommendations Report, Deferred Matters land previously zoned 7(a) or 7(b) under Lismore LEP 2000 is to be zoned E2 or E3 where councils have verified the attributes of the land against the E zone criteria in Tables 1 and 2 of the report. The primary use test does not apply to such Deferred Matters land.

For Deferred Matters land subject to a zone other than 7(a) or 7(b) under Lismore LEP 2000, council must first ascertain whether the land meets the E zone criteria in Tables 1 and 2 of the Northern Councils E Zone Review Final Recommendations Report. Such Deferred Matters land that meets the E zone criteria should be zoned E2 or E3 unless there is clear documented evidence that the primary use of the land does not warrant an E zone. If such primary use evidence is provided and the council decides not to zone the land E2 or E3, then mapped planning controls should be applied as set out in recommendation 12 of the Northern Councils E Zone Review Final Recommendations Report.

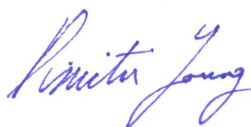
These issues are discussed in detail in **Attachment 1** to this letter.

The OEH recommends that:

1. For Deferred Matters land previously zoned 7a or 7b Environment Protection under the Lismore LEP 2000:
 - a. the land must first be assessed against the E zone criteria in Tables 1 and 2 of the Northern Councils E Zone Review Final Recommendations Report in accordance with recommendation 6 of that report, and
 - b. if the land or part of the land has attributes which have been verified to meet these criteria, then the land or part of the land is to be zoned E2 or E3 depending on which criteria have been met.
2. For Deferred Matters land subject to a zone other than 7(a) or 7(b) under Lismore LEP 2000:
 - a. the land must first be assessed against the E zone criteria in Tables 1 and 2 of the Northern Councils E Zone Review Final Recommendations Report, and
 - b. if the land or part of the land has attributes which have been verified to meet these criteria, then the land or part of the land should be zoned E2 or E3 depending on which criteria have been met, unless there is clear documented evidence that the primary use of the land does not warrant an E zone (e.g. farm management records that accord with a farm management plan, receipts, and/or tax records), and
 - c. if the land or part of the land has attributes which have been verified to meet these criteria and the council decides not to zone the land or part of the land E2 or E3 because relevant evidence of the land's primary use has been provided that indicates it does not warrant an E zone, then mapped planning controls should be applied to the land or part of the land that meets the criteria, as set out in recommendation 12 of the Northern Councils E Zone Review Final Recommendations Report.
3. Once the council has addressed recommendations 1 and 2 above, the OEH should be provided with another opportunity to comment on the planning proposal.

If you have any further questions about this issue, Ms Rachel Lonie, Senior Conservation Planning Officer, Conservation and Regional Delivery, OEH, can be contacted on 6650 7130 or at rachel.lonie@environment.nsw.gov.au.

Yours sincerely

 13 August 2018

DIMITRI YOUNG
Senior Team Leader Planning, North East Branch
Conservation and Regional Delivery

Enclosure: Attachment 1: Detailed OEH Comments – Stage 1 Non-Urban Deferred Matter Planning Proposal

cc: Ms Tamara Prentice, Team Leader Northern Region, Department of Planning and Environment

Attachment 1: Detailed OEH Comments – Stage 1 Non-Urban Deferred Matter Planning Proposal

1. Background

The planning proposal seeks to rezone non-urban Deferred Matter (DM) land under the Lismore Local Environmental Plan (LEP) 2012. It seeks to implement the council resolutions (made on 14 February 2017) not to support the application of E zones on agricultural land and only to apply an E zone where requested by the landholder.

2. Northern Councils E Zone Review

1. Previous Environmental Protection (7) Zones

The *Northern Councils E Zone Review Final Recommendations Report* (DPE 2015) (E Zone Review) states that E2 and E3 zones will only be applied if the primary use of the land is environmental conservation (E2) or environmental management (E3) and the land has attributes which have been verified to meet the criteria for an E2 or E3 zone. The E Zone Review however supports the transfer of some current environmental protection (7) zones to an E2 or E3 zone once councils have verified the attributes of the land against the criteria. If the land does not meet the criteria it will not be transitioned.

E2 zone criteria are:

- SEPP 26 Littoral Rainforests
- SEPP 14 Coastal Wetlands
- Endangered Ecological Communities (EECs)
- Key Threatened Species Habitat
- Over-cleared vegetation communities
- Culturally significant lands

E3 zone criteria are:

- Riparian and estuarine vegetation and wetlands
- Rare, Endangered and Vulnerable Forest Ecosystems
- Native vegetation on coastal foreshores.

Zones in the Lismore LEP 2000 that may be transferred to an E zone, subject to verification, are:

- 7(a) Environment Protection (Natural Vegetation and Wetlands)
- 7(b) Environment Protection (Habitat)

The E Zone Review states this approach is consistent with the Government's support for the application of E zones where there is evidence of significant environmental attributes.

2. Primary use test for other zones

For other zones, the E Zone Review states that the primary use test should be applied. Primary use is described in the E Zone Review as the main use of the land for the last two (2) years. The E Zone Review states this may mean that land which is currently zoned rural will continue to have a rural zone but parts of that land which have attributes that meet the criteria for an E2 or E3 zone may be included in a mapped planning control or there may be more than one zone applied to the land.

The E Zone Review sets out that the procedure for applying an E2 or E3 zone is to assess the land against the E zone criteria and consider the primary use before proposing an E2 or E3 zone. The primary use of land will be identified during the preparation of a planning proposal. If a council believes the primary use of the land does not warrant an E zone, and the land meets the E zone criteria, then a LEP Map and associated clauses can be applied.

3. Council's DM Planning Proposal

3.1 Previous Environmental Protection Zones

Council has not adopted the recommended E Zone Review procedure and provides no assessment against the E2 and E3 criteria except where landholders have requested an E zone.

Rather than first assessing land that has an 7a or 7b Environment Protection zoning against the E zone criteria, council has gone straight to the 'primary use' test. According to Table 5, this means 25% of total lots will change from a rural and environmental (R & E) or environment (E) zone to a rural zone. 7 % of sites are proposed to be zoned in the other direction (i.e. R to E or R to E & R).

The OEH has reviewed vegetation mapping (Lismore LGA 2008) for 7a and 7b zoned lots and identifies that almost all the lots contain vegetation that could qualify under the E2 criteria. Vegetation communities include dry rainforest, coastal valley grassy woodland, wet sclerophyll, and coastal swamp forest and wetland.

OEH Recommendations

1. For Deferred Matters land previously zoned 7a or 7b Environment Protection under the Lismore LEP 2000:
 - a. the land must first be assessed against the E zone criteria in Tables 1 and 2 of the Northern Councils E Zone Review Final Recommendations Report in accordance with recommendation 6 of that report, and
 - b. if the land or part of the land has attributes which have been verified to meet these criteria the land or part of the land is to be zoned E2 or E3 depending on which criteria have been met.

3.1 Other zoned land

For other zoned land the 'primary use test' applies and OEH notes that under the E Zone Review it is not mandatory to apply an E2 or E3 zone even if the land has been verified to meet the E Zone criteria. However, this decision should be supported by evidence and sound and reasoned discussion.

Council's approach to this test was to write to all landholders in November 2017 which provided the council resolution and sought to determine the primary use of the DM land. The consultation letter is not included in the planning proposal report so the OEH cannot comment on how this consultation was framed. A second letter was sent to landholders that did not respond. A response rate of 75.5 % was achieved. A desktop assessment was then used to determine the primary use for the remaining 24.5% of landholders that did not respond. The tables in the planning proposal report document the landholder responses under 'Primary Use' but not which sites were determined via the desktop analysis.

The OEH considers the methods to determine the primary use are inadequate in terms of supporting evidence. Many properties have both DM areas and rural zoned land, but the great majority of the DM areas are intact native vegetation. These have been 'verified' as having a primary use (mostly listed as agriculture – grazing, hobby farm or agriculture – horticulture) for the last two (2) years.

The OEH also undertook a desktop analysis. While parts of the lots are used for rural activities, the claims that entire properties are used for rural activities appear questionable. For example in Site 4, part of Lot 1 DP 1211247 is a vegetated remnant within grazing land that contains subtropical rainforest as mapped in the Lismore Vegetation Mapping 2008. In Sites 8 and 10 (where DM lands are zoned both rural and 7a or 7 b zones) the primary use is listed in most cases as 'agricultural – grazing'. Analysis of the properties such as Lot 3 DP 1177558 using 'NearMap' imagery shows that

areas under horticulture can clearly be distinguished from vegetated land and the vegetated lands are unlikely to have been used for grazing. In Site 19 Lot 138/DP 755720 is mapped as coastal floodplain wetland, and Lot 153 DP 755691 and Lot 1 DP 801877 are mapped as containing coastal swamp forest. These meet the E2 zone criteria for endangered ecological communities.

Based on this analysis by the OEH the 'primary use' of many intact vegetated areas is arguably environmental conservation as described in the E Zone Review. The results of landholder consultation may have been a consequence of how the letter was framed. The OEH considers that council should be requiring documented evidence in the form of land use records that accord with a farm management plan, receipts and/or tax records, to justify the primary use test and not just an assertion from the landholder regarding the primary use test.

Where the DM land meets the E zone criteria, and if agriculture is not established as the primary use of this part of the site, then a split zone approach should be applied to protect areas that have high environmental values. DM land should not be considered 'land in waiting' for future agricultural purposes. It is noted that extensive agriculture will be permitted with consent in the E2 zone and without the need for consent in the E3 zone as recommended in the E Zone Review.

Where the primary use is determined to not be for conservation, but the land has conservation values, council should apply mapped planning controls such as a Biodiversity map and associated development control that identifies matters to be considered in a development application.

OEH Recommendations

2. For Deferred Matters land subject to a zone other than 7(a) or 7(b) under Lismore LEP 2000:
 - a. the land must first be assessed against the E zone criteria in Tables 1 and 2 of the Northern Councils E Zone Review Final Recommendations Report, and
 - b. if the land or part of the land has attributes which have been verified to meet these criteria, then the land or part of the land should be zoned E2 or E3 depending on which criteria have been met, unless there is clear documented evidence that the primary use of the land does not warrant an E zone (e.g. farm management records that accord with a farm management plan, receipts, and/or tax records), and
 - c. if the land or part of the land has attributes which have been verified to meet these criteria and the council decides not to zone the land or part of the land E2 or E3 because relevant evidence of the land's primary use has been provided that indicates it does not warrant an E zone, then mapped planning controls should be applied to the land or part of the land that meets the criteria, as set out in recommendation 12 of the Northern Councils E Zone Review Final Recommendations Report.

