

## Planning and Assessment

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### Plan finalisation report

**Local government area:** Eurobodalla Shire

#### 1. NAME OF DRAFT LEP

Eurobodalla Local Environmental Plan (LEP) 2012 (Amendment No 11). This plan will repeal the Eurobodalla Rural LEP 1987.

#### 2. SITE DESCRIPTION

The draft LEP applies to extensive areas of rural and environmentally significant land, including land previously deferred from the LEP and a range of other urban and commercial lands across the Eurobodalla Shire LGA.

#### 3. BACKGROUND TO PLANNING PROPOSAL

When preparing its Standard Instrument LEP, Eurobodalla Shire Council identified significant areas of environmental land in the LGA. It proposed to zone these lands E3 Environmental Management in draft LEPs that Council exhibited in 2009 and 2011. These areas were deferred from the Eurobodalla LEP 2012 and remain zoned under the Eurobodalla Rural LEP 1987.

When making the 2012 LEP, the then Minister for Planning directed Council to prepare a strategy to inform the application of appropriate land use zones and other controls to these deferred and other rural lands.

Council prepared a rural lands strategy to inform the subject planning proposal. The strategy sought to provide further subdivision and development opportunities on rural and environmentally constrained land. The proposed approach to considering environmental impacts and bushfire protection measures in the strategy was to rely on the assessment of individual development applications rather than applying a strategic approach, which would give greater certainty to landowners.

#### 4. PURPOSE OF PLAN

The draft LEP seeks to:

- implement recommendations of Council's Rural Lands Strategy (2016), including changes to zones and minimum lot sizes;
- remove the terrestrial biodiversity map and associated Clause 6.6 Biodiversity from the LEP;
- introduce Standard Instrument zones and mapping to areas currently deferred from the 2012 LEP – the RU1 Primary Production zone will be applied to most of these areas;
- create 'open' land use tables for all rural, business and industrial zones where nominated uses are prohibited and all other uses are permissible;
- allow 'grazing of livestock' as exempt development in the E2 Environmental Conservation zone by including this activity in schedule 2 of the LEP;

- extend the application of Clause 4.1E Lot averaging subdivision to apply to the RU4 Primary Production Small Lots zone;
- amend zoning, minimum lot size and height of building maps for certain land outside rural areas;
- amend Schedule 5 Environmental heritage to include heritage items on deferred lands;
- amend Schedule 1 Additional permitted uses to introduce new items and update some existing items;
- introduce an Airspace Operations clause;
- remove the dwelling entitlements map and reference in clause 4.2A; and
- reclassify two parcels of land at Batemans Bay and Malua Bay from community to operational land. Council has requested that this element of the proposal be deferred and progressed as a separate amendment as the reclassifications may delay finalisation of this plan due to the need to seek the Governor's approval.

Council indicates that the draft LEP will facilitate up to 122 new lots and up to 247 new dwellings.

## 5. STATE ELECTORATE AND LOCAL MEMBER

The LGA falls within the Bega state electorate. The Hon Andrew Constance MP is the State Member for Bega. Minister Constance supports the rural land strategy that informs the planning proposal.

The LGA falls within the federal electorates of Eden Monaro and Gilmore. The Hon Dr Mike Kelly AM MP is the Federal Member for Eden Monaro and Mrs Fiona Phillips MP is the Federal Member for Gilmore. To the regional planning team's knowledge, neither federal MP has made written representations regarding the proposal.

**NSW Government Lobbyist Code of Conduct:** There have been no meetings or communications with registered lobbyists with respect to this proposal

**NSW Government reportable political donation:** There are no donations or gifts to disclose and a political donation disclosure is not required.

## 6. GATEWAY DETERMINATION

The Gateway determination issued on 31 October 2017 (**Attachment B**) determined that the proposal should proceed subject to conditions.

The planning proposal was due to be finalised on 30 April 2019.

## 7. PUBLIC EXHIBITION

In accordance with the Gateway determination, the proposal was publicly exhibited by Council from 9 May to 22 June 2018.

Council received 550 community submissions during the exhibition period.

## **7.1 Submission summary**

Council provided a submissions report, which included a summary of community submissions received on the proposal. A summary of the issues raised is provided below:

### Objections/concerns

Approximately 82% of community submissions objected to, or expressed concerns with, certain aspects of the proposal. Issues raised include:

- potential biodiversity impacts from the application of the primary production zone to environmentally significant lands;
- reduced minimum lot sizes for rural lands;
- the removal of the terrestrial biodiversity map and clause;
- Council not addressing advice/objections from NSW Government agencies;
- the impacts of additional permissible land uses in rural zones;
- the potential environmental impacts from permitting 'grazing of livestock' as exempt development in the E2 zone;
- the potential negative impacts of development and land clearing on waterways and their catchments and on aquaculture;
- the potential impacts on tourism/recreation industries through adverse environmental impacts;
- the Council process used to develop the rural lands strategy and planning proposal, including concerns regarding the adequacy of community consultation;
- increased development in bushfire-prone areas; and
- impacts on climate change.

Council's general response to the objections and concerns raised in the community submissions is that the planning proposal is informed by the rural lands strategy and any potential environmental impacts or bushfire risks will be managed under relevant legislation and/or will be resolved at the development application stage.

### Support

Approximately 6% of community submissions supported the proposal. Reasons identified in support of the proposal included the reduction in minimum lot sizes for rural areas, the application of rural zones, increased rural development opportunities and noting the proposal implements Council's rural lands strategy.

### Changes sought

Approximately 12% of community submissions were from landowners requesting further subdivision and development potential for their properties.

Council noted these requests but did not amend the planning proposal in response.

## **8. ADVICE FROM PUBLIC AUTHORITIES**

Council was required to consult the former agencies of NSW Office of Environment and Heritage, NSW Department of Primary Industries – Agriculture, NSW Department of Primary Industries – Fisheries, NSW Rural Fire Service, NSW Local Land Services, Local Aboriginal Land Council and NSW Roads and Maritime Services in accordance with the Gateway determination.

Council wrote to all the above agencies/groups and the Department of Planning, Industry and Environment – Division of Resources and Geoscience.

Council advised that no responses were received from local Aboriginal land councils.

A summary of the objections/concerns raised in agency submissions, Council's response to issues raised and the Department's assessment is provided below.

## **8.1 NSW Rural Fire Service (RFS)**

### RFS submission

RFS objected to several aspects of the proposal and noted that it has previously expressed concerns to Council in written and verbal communications. Specifically, the RFS submission:

- requested a strategic bushfire study for areas subject to bushfire risk;
- noted the proposal is inconsistent with section 9.1 Direction 4.4 Planning for Bushfire Protection as it fails to achieve the primary objective to protect life, property and the environment;
- objected to the application of rural zones on land mapped as high hazard;
- objected to the reduction in minimum lot sizes on land mapped as high hazard;
- did not support the creation of asset protection zones on land identified as high conservation value (HCV). This is consistent with the *Rural Fires Act 1997*, section 9.1 Direction 4.4 and the *Planning for Bush Fire Protection*;
- noted that Council should apply appropriate minimum lot sizes and zonings to HCV lands; and
- objected to changes to land use tables for lands affected by bushfire hazard that introduce a range of new permissible land uses.

### Council response

Council did not amend the proposal in response to RFS's original objections/concerns. Council advised that:

- the assessment of bushfire risk and the mitigation measures required to facilitate development are matters for consideration at the development assessment stage;
- the number of potential new lots/dwellings is not unreasonable;
- there are areas that may not be able to meet the *Planning for Bush Fire Protection* standards. However, landowners should have the opportunity to address these matters at the development application stage; and
- a significant number of sites contain suitable cleared areas and/or can provide an appropriate amount of clearing for new dwellings.

### RFS revised submission

Following Council's request to make the plan, the Department consulted with RFS to resolve its objections. RFS subsequently removed several objections to the proposal.

RFS maintains its objection to the proposed minimum lot sizes for seven sites/areas where it considers potential new dwelling entitlements would be facilitated in areas where the level of bushfire hazard and risk is unacceptable.

RFS maintains its support for the inclusion of terrestrial biodiversity mapping and the associated clause in the LEP.

## Assessment

RFS has identified that a strategic bushfire study is required for the planning proposal to assess the risks to residents and firefighters where additional development is proposed on bushfire-prone land. A strategic bushfire assessment would inform the application of appropriate zones, lot sizes and land uses in areas of high bushfire risk, provide greater certainty for landowners on potential development opportunities on their land, support outcomes that protect human life and property and protect the environmental attributes that characterise high bushfire danger areas.

This strategic approach would ensure bushfire risks are appropriately assessed up-front and incorporated into the planning proposal and is preferable to attempting to identify and resolve issues such as access on a site-by-site basis at the development application stage.

Introducing controls in the LEP that permit subdivision or development on land that is bushfire prone without a strategic bushfire assessment may result in greater risk to residents and firefighters and is likely to raise landowner expectations on development potential. This may place pressure on Council and RFS to approve development in isolated areas with high bushfire risk.

Additionally, many areas of high bushfire risk correlate with land mapped as high environmental value in the *South East and Tablelands Regional Plan*. These areas are heavily vegetated and may contain known important and/or endangered flora and fauna, including federally listed endangered ecological communities (EECs).

It is not considered appropriate to increase potential subdivision and development on land where suitable access and dwelling sites cannot be identified without significant environmental impacts.

To address the outstanding RFS objection, the Department has amended the draft LEP to apply minimum lot sizes to the seven areas identified by RFS to ensure no further subdivision. Further details of these changes are discussed in section 9 of this report.

## **8.2 Office of Environment and Heritage (OEH) – now Environment, Energy and Science in Department of Planning, Industry and Environment**

### OEH submission

OEH objected to several aspects of the proposal and noted that previous comments on the draft proposal have not been addressed by Council. Specifically, the OEH submission:

- objected to the removal of the terrestrial biodiversity map and associated clause 6.6. The maps identify native vegetation, EECs and biodiversity corridors. The use of the maps is particularly important given that environmental zones are not being used extensively on private lands;
- noted that the inclusion of biodiversity mapping in a code referenced in a development control plan (DCP) as proposed by Council is not adequate as it is a non-statutory document;
- objected to the proposed minimum lot sizes and zones for some areas with high environmental significance. OEH has restricted its objections to those areas considered to have significant environmental values and/or areas where environmental impacts would be unacceptable;
- objected to the inclusion of 'extensive agriculture' in the E4 Environmental Living zone as it permits activities that are inconsistent with the zone objectives, such as cropping and pasture improvement;

- objected to permitting 'grazing of livestock' as exempt development in the E2 Environmental Conservation zone due to potential degradation of biodiversity values;
- noted that the high fire risk of many of the areas has implications for biodiversity with the need for clearing of areas of native vegetation to provide for asset protection; and
- noted that increasing development opportunities in bushland areas in many cases will trigger the biodiversity offsets scheme under the *Biodiversity Conservation Act 2016*, resulting in additional costs to landowners due to the required mandatory biodiversity and offsetting.

#### Council response

Council did not substantially amend the proposal in response to objections/concerns raised by OEH. Council advised that:

- the removal of the terrestrial biodiversity map from the LEP and replacing it with a map in a development code referenced in a DCP will achieve the same outcome and will allow mapping to be updated more easily and made available to landowners and developers. NSW Government legislation and policies, including the *Biodiversity Conservation Act 2016*, will continue to be the primary assessment framework for development applications requiring the clearing of vegetation;
- section 3.3 of the LEP does not allow exempt development on environmentally sensitive areas, including wetlands, etc. Therefore, the proposal will only permit grazing of livestock on a small number of E2-zoned areas on private property where grazing is already being undertaken;
- the best approach to protection for these areas is improved farm management practices; and
- not every lot identified by OEH will benefit from additional development or will require extensive clearing. Where clearing would be required, assessment of the impacts would be in accordance with the *Biodiversity Conservation Act 2016*.

#### OEH revised submission

OEH revised its objection as a result of further discussions with Council and the Department, reducing the scope of its objection.

OEH maintains its objection to:

- the removal of the terrestrial biodiversity mapping and associated clause;
- permitting grazing of livestock as exempt development in the E2 Environmental Conservation zone;
- permitting extensive agriculture with consent in the E4 Environmental Living zone; and
- the proposed minimum lot sizes for 15 sites/areas that would facilitate potential new dwellings and/or subdivision where the potential impact of clearing of important/endangered native vegetation and impacts on flora and fauna is considered unacceptable.

#### Assessment

##### *Terrestrial biodiversity map and clause 6.6*

The Department's preference is for the terrestrial biodiversity map and associated clause 6.6 to remain in the LEP. It is also appropriate that the map be extended to apply, where relevant, to land currently deferred from the LEP. The purpose of the map and clause is to identify land with significant environmental values and to require the consideration of



environmental impacts prior to determination of a development application. The clause and overlay do not affect the permissibility of development.

Council's preference is to address the objection raised by OEH by preparing a DCP to include mapping of terrestrial biodiversity and assessment criteria similar to the LEP clause.

Council's approach may not fully satisfy OEH's concerns. However, it is a satisfactory approach used by many councils. The potential impacts identified by OEH can be further mitigated subject to:

- including mapping of terrestrial biodiversity in the DCP;
- including the objectives in the repealed LEP Clause 6.6 Biodiversity in the DCP; and
- adopting and implementing a DCP so that adequate protections are in place for environmentally sensitive lands.

The *Environmental Planning and Assessment Act 1979* sets the framework for DCPs and identifies that the purpose of the draft DCP prepared by Council is to provide guidance on development matters and give effect to the aims of an environmental planning instrument (such as an LEP), facilitate development permissible under the instrument and achieve the objectives of the land zones under the instrument. Councils are able to amend DCPs without the agreement of state agencies or the Department.

Council has suggested the DCP controls will achieve the same environmental protection outcomes as the existing LEP provisions and will have the added benefit of allowing for faster updating to reflect new mapping as it becomes available.

A DCP would work with a suite of state biodiversity conservation regulations to provide similar protections of environmentally sensitive areas to the LEP provisions and enable Council to adequately consider these matters during development assessment without the need for reference to the LEP provision. This includes the *Biodiversity Conservation Act 2016* and the *Local Land Services Act 2013*, which have a balanced approach to land management and biodiversity conservation in NSW and support sustainable development and productive farming that responds to environmental risk.

Other councils across NSW effectively manage biodiversity through DCPs in conjunction with state regulations. DCPs that are prepared in consultation with the local community, supported by background studies and are consistently applied are regularly upheld by the NSW Land and Environment Court.

Council has prepared, exhibited and adopted a draft DCP that identifies matters to be considered for proposed development on land mapped as 'native vegetation'. This DCP includes:

- mapping of terrestrial biodiversity, and
- objectives contained in Clause 6.6 Biodiversity.

Provided this DCP is consistently applied by Council, then it will assist to mitigate OEH's concerns.

The Minister can direct a council to make, amend or revoke a DCP under section 3.46 of the *Environmental Planning and Assessment Act 1979*, should the DCP and mapping not afford similar protections to the LEP clause.

#### *Grazing in the E2 Environmental Conservation zone*

Allowing 'grazing of livestock' as exempt development in the E2 Environmental Conservation zone is not the Department's preferred option. While grazing of livestock is

exempt development in the R5 Large Lot Residential and E4 Environmental Living zones in the LEP, the E2 zone applies to land with significant environmental characteristics.

The Department considers the proposal should be revised to permit extensive agriculture with consent in the E2 Environmental Conservation zone. This would provide an opportunity for new agricultural activities (including grazing of livestock) that may be consistent with the E2 zone objectives to be considered by Council through a development application process. This approach would be consistent with government policy outlined in the Northern Councils E Zone Review Final Recommendations Report.

The impacts from Council's preferred option of allowing grazing in the E2 zone will be localised as exempt development cannot legally occur on E2 zoned land that is also mapped as environmentally sensitive. This includes coastal wetlands and other areas listed in Clause 3.3 Environmentally sensitive areas excluded of the LEP.

#### *Permitting extensive agriculture with consent in the E4 Environmental Living zone*

The Department notes that grazing of livestock is permitted as exempt development in the E4 Environmental Living zone and this land often supports agricultural activities. It is considered that extensive agriculture activities should be able to continue on this land without the need to obtain development approval. Additionally, the Department notes that a range of other LEPs across the state permit extensive agriculture without consent in the E4 Environmental Living zone.

#### *Increased subdivision and dwelling potential on environmentally significant land*

The planning proposal creates additional dwelling and subdivision potential in areas with significant biodiversity/conservation value. Development in these areas has the potential to significantly impact on state and federally listed protected species and habitats.

The Department's preference is that areas identified by OEH that are heavily vegetated, contain known threatened flora and fauna species and have little or no historical or potential agricultural use should be protected through either an environmental zoning and/or minimum lot sizes that prevent further subdivision/dwellings.

Council proposes to use LEP subdivision clauses and a DCP mapping terrestrial biodiversity as the appropriate mechanisms to help it make decisions about the merits of subdivision and dwelling potential on environmentally significant land. This is not an uncommon approach in other councils, and the benefit of this approach is that the terrestrial biodiversity mapping can be updated based on more accurate and site-specific vegetation survey and assessment.

Section 10 of this report address OEH's concerns and inconsistencies with section 9.1 Directions.

### **8.3 Local Land Services (LLS)**

LLS expressed concerns with several aspects of the proposal, including:

- the blanket application of the RU1 zone to land across a range of land capabilities;
- additional permissible land uses may not be compatible with primary production or rural industry expansion. This has the effect of diluting the ability of the zoning to align land use with land type and limits the ability to make strategic land use decisions in relation to protecting productive agricultural land;
- permitting grazing of livestock as exempt development in the E2 zone;
- the proposed fragmentation of productive agricultural land (classes 1–4) by reducing minimum lot sizes. LLS encourages Council to align land use and regulatory maps to



protect high-quality agricultural land and zone other areas considering these regulatory maps; and

- the removal of the terrestrial biodiversity map and associated clause 6.6 from the LEP.

#### Council response

Council did not amend the proposal in response to issues raised by LLS. Council advises that:

- most of the land proposed to be zoned RU1 or RU4 is zoned Rural 1a (Environmental Constraints and Agriculture) or 1(a1) (Environmental Constraints, Water Catchment Protection and Agricultural) under the Eurobodalla Rural LEP 1987. The existing zonings cover a range of land capabilities, and land use decisions will be assessed via the development assessment process and guided by Council's DCP;
- 'grazing of livestock' as exempt development in the E2 zone will only occur in areas that are not considered environmentally sensitive under section 3.3 of the LEP;
- it disagrees that the proposal facilitates fragmentation of high-quality agricultural land and advises that the range of lot sizes being applied across the LGA minimise future subdivision, provide for a modest number of additional lots and dwellings and minimise potential biosecurity risks; and
- the terrestrial biodiversity map and clause 6.6 in the LEP do not protect vegetation and simply identify the location of vegetation and issues to consider in assessment. Council's map referenced in a DCP will achieve the same outcome.

#### Assessment

It is considered that a blanket RU1 zoning applied to land that is not suitable for primary production has the potential to increase land use conflict, negatively impact on important environmental attributes and provide unrealistic development expectations for landowners. However, this can be mitigated with a DCP that identifies the environmentally sensitive areas and the objectives for protecting and conserving biodiversity that must be achieved with new development.

#### **8.4 DPI – Agriculture**

The submission from DPI – Agriculture:

- asks Council to further consider the proposed application of RU1 and RU4 zones to land that is highly vegetated as the zones are not suitable for rural production without extensive clearing and, in some instances, due to steep slopes;
- does not support the reduction of minimum lot sizes in some areas where it could lead to the fragmentation of land with good agricultural quality and that is highly suited to broad acre production; and
- recommends Council reconsiders permitting land uses in the rural zones that are incompatible with rural land use.

#### Council response

Council did not amend the proposal in response to the issues raised by DPI – Agriculture. Council advises that:

- the deferred lands were largely zoned Rural 1a (Environmental Constraints and Agriculture) or 1(a1) (Environmental Constraints, Water Catchment Protection and Agricultural). The RU1 Primary Production and RU4 Primary Production Small Lots

zones reflect existing land uses and offer the potential for the expansion of land uses in suitable locations, subject to development consent and clearing approvals; and

- concerns regarding additional permitted land uses and ancillary uses not compatible with the rural zone objectives will be addressed through a DCP to guide future assessment.

### Assessment

Some areas proposed to be zoned for primary production have no historical or potential agricultural use. These areas were previously proposed to be zoned E3 Environmental Management under two exhibited drafts of the Eurobodalla LEP 2012, before being deferred. The application of the E3 zone to these lands is an alternative that Council could consider and apply. Council's proposal to use the RU1 zone is consistent with section 9.1 Directions and practice notes for the use of rural zones by maintaining an agricultural zone and supporting this zoning with a Council-prepared rural land strategy.

### **8.5 DPI – Fisheries**

The submission from DPI – Fisheries:

- objects to the grazing of livestock as exempt development in the E2 Environmental Conservation zone;
- does not support lot averaging in the RU4 zone where it will result in increased run-off to oyster-growing estuaries and impact on oyster-growing environments and subsequent harvesting status of oyster farms in the affected areas;
- objects to the amendment of clause 4.2A to remove the requirement for certain rural dwellings to have access to/from a sealed road;
- does not support the rezoning of deferred lands to RU1, RU4 or E4 where they are located adjacent to waterways with good-condition native riparian habitat;
- does not support the subdivision of land not connected to reticulated sewage systems where the subject land is within 10km of an oyster lease or where a stream enters an estuary containing an oyster lease;
- does not support the removal of the terrestrial biodiversity map and associated clause 6.6; and
- recommends including Batemans Marine Park zoning map as a layer in the LEP.

### Council response

Council did not amend the proposal in response to issues raised by DPI – Fisheries.

Council advises that:

- section 3.3 of the LEP does not allow exempt development on environmentally sensitive areas, including wetlands, etc. Therefore, the proposal will only permit grazing of livestock on a small number of E2-zoned areas on private property where grazing is already being undertaken;
- impacts from any increase in the potential lot or development yield will be assessed as part of any development assessment process;
- DPI – Fisheries has misinterpreted clause 4.2A in relation to the 'sealed roads' component;
- the existing terrestrial biodiversity map and associated clause 6.6 do not directly protect vegetation; rather, they identify the location of vegetated land and provide matters for consideration when assessing development. Council is to include a map (regularly updated) in a code and referenced in a DCP that will achieve the same outcome; and

- marine park layers are not appropriate in the LEP.

### Assessment

The advice from DPI – Fisheries regarding the potential impacts on the marine environment and marine life including the oyster industry, which depends on clean aquatic environments, is noted.

DPI's concerns relate to additional development in catchments and ensuring that activities do not negatively impact on water quality downstream. The proposed zoning, lot size and permissible land uses facilitate additional development opportunities on the land and have the potential to impact on water quality in the catchment if land uses are not managed appropriately, and it is therefore important that Council implement a DCP to identify the terrestrial biodiversity lands.

### **8.6 OEH – Heritage**

No objections or concerns were raised.

### **8.7 DPIE – Resources and Geoscience**

DPIE – Resources and Geoscience recommended the inclusion of permissible land uses that reflect uses permitted under State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

### Council response

Council removed 'open cut mining' as a prohibited land use in the RU4 and IN1 zones.

### Assessment

While duplication of land uses permissible under the Mining SEPP is not required in the LEP, Council has amended the proposal to be more consistent with the Mining SEPP.

## **9. POST-EXHIBITION CHANGES BY COUNCIL**

Council made minor changes to the planning proposal in response to submissions made during the exhibition period. These include:

- adding a note to Schedule 2 Exempt development advising that clause 3.3 prohibits the carrying out of exempt or complying development on environmentally sensitive areas;
- removing 'open cut mining' as a prohibited land use in the RU4 and IN1 zones. This is to address concerns raised by DPIE – Division of Resources and Geoscience that the LEP is inconsistent with the Mining SEPP, which permits this use with consent wherever 'agriculture' or 'industry' are permissible; and
- updating zoning maps to reflect recent boundary changes for several National Parks and Nature Reserves (zoned E1) and land transferred to state forest (zoned RU3).

The post-exhibition changes are considered minor as they do not change the intent or outcomes of the planning proposal. It is considered that these changes do not warrant further community or agency consultation.

The proposal also seeks to reclassify two parcels of land at Batemans Bay and Malua Bay. This component of the draft plan requires approval from the Governor to remove the public reserve status of the lands. Council has requested this component be removed from the draft plan to avoid delays in finalising the broader changes in the plan. It is recommended that the reclassification of the two parcels be deferred from the draft LEP and progressed as a separate LEP amendment.

## **10. ASSESSMENT**

The planning proposal submitted by Council incorporates a range of amendments from minor/housekeeping matters to significant changes that increase the development potential for rural lands and on environmentally sensitive areas.

Changes to the LEP that are supported and are consistent with section 9.1 Directions include:

- expanding the range of permissible land uses in business and industrial zones;
- various site-specific rezonings outside rural areas;
- changes to residential lot sizes and building heights; and
- various site-specific additional permitted uses.

Parts of the submitted planning proposal are considered to be not fully consistent with some section 9.1 Directions unless additional changes are made or other requirements met. This includes:

- deleting the terrestrial biodiversity maps and the associated clause 6.6 from the LEP;
- applying the RU1 Rural Primary Production zone to areas of high environmental values; and
- expanding the range of permissible land uses in all rural and environmental protection zones.

### **10.1 Section 9.1 Directions**

Council has identified inconsistencies with the following Directions:

- 1.1 Business and Industrial Zones;
- 1.2 Rural Zones; and
- 2.1 Environment Protection Zones.

Council considers that any inconsistencies with these Directions are justified and/or of minor significance.

In addition to the inconsistencies identified by Council, the proposal is also considered to be not fully consistent with the following Directions:

- 1.4 Oyster Aquaculture;
- 1.5 Rural Lands;
- 4.3 Flood Prone Land;
- 4.4 Planning for Bushfire Protection; and
- 5.10 Implementation of Regional Plans.

#### **1.1 Business and Industrial Zones**

This Direction aims to protect employment land and identifies that a planning proposal must retain business and industrial zones and must not reduce the potential floor space for employment uses.

The proposal is broadly consistent with the objectives and terms of this Direction. The creation of 'open' land use tables in business and industrial zones, where specific uses are prohibited and all innominate uses are permitted, will allow additional uses to be considered and potentially create additional employment opportunities.

Item 19 of the planning proposal proposes to rezone a small area of land at South Durras from B1 Neighbourhood Centre to R2 Low Density Residential. This inconsistency is considered to be of minor significance due to the small area of affected land and the fact that neighbourhood shops are permitted in the R2 zone.

The Secretary's delegate may be satisfied that any inconsistency with this Direction is of minor significance.

## 1.2 Rural Zones

Council noted that this Direction applies. However, the Department's assessment is that the Direction does not apply as no rural-zoned land is proposed for rezoning under clause 4(a) of the Direction and the density concerns in clause 4(b) do not apply to the Eurobodalla local government area.

## 1.4 Oyster Aquaculture

The proposal provides for an intensification of development in catchments that could impact on oyster aquaculture. DPI – Fisheries has raised concerns with potential impacts. Council has advised that any increased development in these areas would be minor and that this issue will be considered in any subsequent development application assessment.

It is considered that any inconsistency with this Direction is of minor significance due to the relatively small number of dwellings proposed across a large area and because the impacts on water quality are likely to be able to be managed through the development assessment process.

The Secretary's delegate may be satisfied that any inconsistency with this Direction is of minor significance.

## 1.5 Rural Lands

This Direction aims to protect agricultural land by facilitating its orderly and economic use for rural purposes and minimising the potential for fragmentation and land use conflict in rural areas.

This Direction identifies that a planning proposal must be consistent with the relevant regional plan, protect environmental values, and minimise fragmentation and risk of land use conflict in rural areas.

The proposal is assessed to be not fully consistent with clause 4 of this Direction as it is not consistent with Action 8.2 of the *South East and Tablelands Regional Plan* to protect identified important agricultural land from land use conflict and fragmentation. The proposal is applying an RU1 Primary Production zone to significant areas of high environmental value and constrained land not suitable for agriculture (e.g. heavily vegetated land with steep slopes). The plan provides for further subdivision by reducing the minimum lot size. This will facilitate some new dwellings and other potentially incompatible land uses in areas adjacent to working farms, increasing the potential for some land use conflict.

This inconsistency is justified by the *Eurobodalla Shire Council Rural Lands Strategy*, which was prepared giving consideration to the objectives of this Direction and identified the land subject to the RU1 zoning change. The strategy has been adopted by Council but has not been formally approved by the Planning Secretary. Inconsistencies with the objectives of this Direction will be further minimised by the small total increase in potential new dwellings in rural areas (approximately 250 in total), which is a 2% increase for rural areas and of minor significance.

The Secretary's delegate may be satisfied that any inconsistency with this Direction is justified by a local strategy and is of minor significance.

## 2.1 Environment Protection Zones

The objective of this Direction is to protect and conserve environmentally sensitive areas.

The proposal as submitted by Council is assessed to be not fully consistent with this Direction as it removes terrestrial biodiversity mapping and its associated clause 6.6 from the LEP and applies a rural zone to most of the deferred land and reducing the environmental protection standards that apply to the environmentally sensitive land.

The Department has met with Council and OEH to understand the proposed changes to the protection and conservation of environmentally sensitive areas in the draft LEP.

OEH strongly supports the terrestrial biodiversity mapping, noting that the detail and accuracy of the endangered ecological community mapping is of high quality and that the important wildlife and bio-corridor maps identify regional connections. OEH asks that the mapping be included in the LEP as E zones are not extensively used in the Eurobodalla LEP 2012, and that the community be made fully aware of the environmental attributes of the land early in the planning stages.

OEH also notes that increasing development opportunities in bushland areas may trigger the biodiversity offset scheme under the *Biodiversity Conservation Act 2016* and result in additional costs to landowners due to mandatory biodiversity assessment and offsetting. In discussion with OEH, a refinement of these concerns was narrowed to 15 areas where minimum lot sizes should be changed to reflect that they are not suitable for development.

The proposal also permits grazing of livestock as exempt development in the E2 Environmental Conservation zone, which OEH states is likely to lead to the degradation of biodiversity values in areas currently benefitting from the application of the E2 zone.

### ***DPIE's preferred option***

The Department has carefully considered OEH's advice and reviewed the policy guidance in relation to the application of environmental zones and provisions in LEPs, including the recommendations of the Northern Councils E Zone Review.

On balance, the Department prefers that the terrestrial biodiversity mapping and clause should be retained in the Eurobodalla LEP as this maintains the mechanism for protecting environmentally sensitive areas and requires that the consent authority must consider any adverse impact from the development on environmentally sensitive areas. This approach would be consistent with the final recommendations of the Northern Councils E Zone Review which has been adopted by government.

Amending the minimum lot size for the 15 sites would facilitate the protection of specific environmentally sensitive areas by limiting further development of these sites, and this would be fully consistent with this Direction.

The Department has consistently permitted extensive agriculture as permissible with consent in E2 Environmental Conservation zones following the Northern Councils E Zone Review, so a change to the draft LEP to require consent for extensive agriculture (including grazing of livestock) would be the preferred option. Existing use rights would continue to apply to existing extensive agriculture farming. This change would be fully consistent with this Direction.

### ***Council's preferred option***

Council is proposing to remove biodiversity mapping and provisions from the LEP and include similar mapping and criteria in a DCP. Council has suggested that the DCP controls will achieve the same environmental protection outcomes as the existing LEP provisions



and will have the added benefit of allowing for faster updating to reflect new mapping as it becomes available.

Council also indicated that other environmental legislation and regulation effectively provide similar protections of environmentally sensitive areas to the LEP provisions and enable Council to adequately consider these matters during development assessment without the need for reference to the LEP provision. This includes the *Biodiversity Conservation Act 2016* and the *Local Land Services Act 2013*, which have a balanced approach to land management and biodiversity conservation in NSW and support sustainable development and productive farming that responds to environmental risk.

Other councils across NSW effectively manage biodiversity through DCPs in conjunction with the suite of biodiversity conservation regulations. DCPs that are prepared in consultation with the local community, supported by background studies and are consistently applied are regularly upheld by the NSW Land and Environment Court.

In addition, the final recommendations of the Northern Councils E Zone Review do not apply to Eurobodalla LGA.

Council has prepared, exhibited and adopted a draft DCP that identifies matters to be considered for proposed development on land mapped as 'native vegetation'. This DCP includes mapping of terrestrial biodiversity and the objectives contained in Clause 6.6 Biodiversity. Provided this DCP is consistently applied by Council, consistency with this Direction could be achieved in relation to all environmentally sensitive land.

The Minister can direct a council to make, amend or revoke a DCP under section 3.46 of the *Environmental Planning and Assessment Act 1979*, should the DCP and mapping not afford similar protections to the LEP clause and mapping preferred by this Direction.

Making grazing of livestock exempt development in the E2 Environmental Conservation zone would be inconsistent with this Direction and the recommendations of the Northern Councils E Zone Review. However, the impacts on environmentally sensitive areas are likely to be localised as exempt development cannot legally occur on E2 zoned land also mapped as environmentally sensitive land. This includes coastal wetlands and other areas listed in the mandatory excluded land clause 3.3 in the LEP.

The Secretary's delegate can be satisfied that either the Department's preferred option or Council's proposed option with additional matters for the DCP is consistent with this Direction.

### 2.3 Heritage Conservation

The proposal is considered to be consistent with this Direction as it protects identified heritage items through their inclusion in schedule 5 of the LEP.

### 4.3 Flood Prone Land

The proposal may permit development on land that is subject to flooding. However, proposed lot sizes mean there are likely to be opportunities to avoid developing on flood-prone areas. Potential flooding impacts can be assessed through the development application process.

It is considered that any inconsistency with this Direction is of minor significance as any potential impacts will be addressed through the development application process.

### 4.4 Planning for Bushfire Protection

This Direction aims to protect life, property and the environment from bushfire hazards by discouraging incompatible land uses in bushfire-prone areas.

RFS has objected to components of the proposal. As discussed in section 8 of this report, key concerns include permitting additional dwellings and other uses in areas subject to high bushfire risk and where access is limited for firefighting. RFS does not consider that the proposal is consistent with the objectives of this Direction and maintains its objection to aspects of the proposal.

A proposal may be inconsistent with this Direction, but only if the RFS Commissioner has advised in writing that they do not object to the proposal. Therefore, the proposal is considered to be inconsistent with this Direction.

As discussed in section 8 of this report, the Department has amended lot sizes to the seven sites/areas to which RFS objects to prevent any further subdivision/development. Changes to proposed minimum lot sizes in these areas remove the potential for further subdivision and resolve RFS's objection. This results in the proposal not being inconsistent with this Direction.

#### 5.10 Implementation of Regional Plans

The objective of this Direction is to give legal effect to the *South East and Tablelands Regional Plan*.

The proposal is assessed as being not fully consistent with this Direction as it is not consistent with several directions and actions in the regional plan. These include:

- Direction 8 – Protect important agricultural land, as some new dwellings would be permitted in areas adjacent to working farms;
- Direction 14 – Protect important environmental assets, as validated high environmental value lands would not be mapped in the LEP;
- Direction 15 – Enhance biodiversity connections, as bio-corridors would not be mapped in the LEP; and
- Direction 28 – Manage rural lifestyles, as some new dwellings would be permitted in some remote, isolated, and environmentally significant areas.

Council does not consider the proposal as being inconsistent with the regional plan but rather that it is consistent with the plan, especially in relation to growing the area's agricultural productivity.

Similar to the assessment for Direction 2.1, the Department's preferred option is for the protections to be included in the LEP for the mapping of terrestrial biodiversity and for changes to the minimum lot size in specific areas to limit additional development. These changes to the submitted proposal would make the draft LEP fully consistent with this Direction and give effect to the regional plan.

Likewise, Council's preferred option to protect and conserve environmentally sensitive areas mapped in a DCP could be consistent with this Direction if the DCP is consistently applied by Council and includes mapping of terrestrial biodiversity and the objectives listed in clause 6.6 Biodiversity.

#### **10.2 State environmental planning policies (SEPPs)**

The planning proposal is considered to be not fully consistent with SEPP (Primary Production and Rural Development) 2019.

This SEPP replaced the Rural Lands SEPP 2008, which applied when the planning proposal was prepared and exhibited. The objectives of both SEPPs are similar and relate to the orderly economic use and development of rural land, protecting agricultural land and the need to reduce/avoid land use conflict.

The proposal is considered to be not fully consistent with the aims of the SEPP as it increases the potential for fragmentation by reducing minimum lot sizes for rural-zoned land and increases the risk of land use conflict by permitting additional dwellings and other uses such as function centres, restaurants and cafes, and health services facilities in rural zones.

This inconsistency is justified by the *Eurobodalla Shire Council Rural Lands Strategy*. The strategy has been adopted by Council but has not been formally approved by the Planning Secretary. Inconsistencies with the SEPP are minimised by the small total increase in potential new dwellings in rural areas (approximately 250 in total), which is a 2% increase for rural areas and of minor significance.

The proposal is considered to be generally consistent with other relevant SEPPs.

### **10.3 South East and Tablelands Regional Plan**

Aspects of the proposal are considered to be not fully consistent with parts of the regional plan, including:

#### **Direction 7 – Grow the South Coast’s aquaculture industry**

##### ***Action 7.2 – Minimise the impacts of development on aquatic habitats in aquacultural estuaries***

DPI – Fisheries has raised several concerns regarding the potential impacts of increased development within the catchments on oyster-growing areas. The proposal allows for a range of additional uses on environmentally sensitive areas, as well as permitting grazing of livestock as exempt development on E2-zoned lands. This may increase sedimentation and the risk of other pollutants within catchments surrounding the Eurobodalla’s oyster-growing estuaries and subsequently affect the industry, which relies on a clean aquatic environment.

The proposal does not minimise the impacts of development on aquatic habitats in aquacultural estuaries and is potentially not fully consistent with Action 7.2 of the regional plan. However, any impacts are likely to be of minor significance due to the relatively small number of dwellings proposed across a large area and because the impacts on water quality are likely to be able to be managed through the development assessment process.

#### **Direction 8 – Protect important agricultural land**

##### ***Action 8.2 – Protect identified important agricultural land from land use conflict and fragmentation and manage the interface between important agricultural land and other land uses through local environmental plans***

The proposal seeks to apply the RU1 Primary Production zone to significant areas of high environmental value and constrained land not suitable for agriculture (e.g. heavily vegetated land with steep slopes). The plan provides for further subdivision/dwellings by reducing applicable minimum lot sizes. This will facilitate new dwellings and other potentially incompatible land uses in areas adjacent to working farms, increasing the potential for land use conflict.

The proposal is considered to be not fully consistent with Action 8.2 of the regional plan but is supported by Council’s rural lands strategy.

#### **Direction 14 – Protect important environmental assets**

##### ***Action 14.2 – Protect the validated high environmental value lands in local environmental plans***

The proposal seeks to zone lands that are mapped as high environmental value in the regional plan as RU1 Primary Production rather than applying an environmental zoning. The proposal also seeks to remove the terrestrial biodiversity overlay mapping from the LEP and instead place this mapping in Council’s DCP.

The protection of validated high environmental value lands in the LEP is reduced by not applying environmental zones and by removing environmental overlays from the LEP.

The proposal is considered to be not fully consistent with Action 14.2 of the regional plan, and it is the Department's preferred option that the terrestrial mapping be retained in the LEP. Council's preferred approach of including the mapping in a DCP could be supported if the DCP includes equivalent objectives to Clause 6.6 Biodiversity and that the mapping includes endangered ecological communities and important wildlife and bio-corridors.

*Action 14.4 – Improve the quality of access to information relating to land with identified high environmental values*

The proposal reduces access to information on land with high environmental value by reducing terrestrial biodiversity mapping from the LEP. However, Council has advised that this information will be available in an accompanying DCP.

Direction 15 – Enhance biodiversity connections

*Action 15.1 – Protect and enhance the function and resilience of biodiversity corridors in local strategies*

The proposal is not a local strategy. However, it does apply rural zones to environmentally significant areas, including biodiversity corridors. The proposal also removes terrestrial biodiversity mapping from the LEP, which reduces the protection of important biodiversity corridors currently identified in the LEP and in the high environmental value mapping in the regional plan.

While not specifically inconsistent with the terms of Action 15.1, the proposal does not support the protection and enhancement of biodiversity corridors, unless the DCP includes the corridor mapping and objectives to equivalent to clause 6.6 biodiversity.

Direction 28 – Manage rural lifestyles

*Action 28.1 – Enable new residential development only where it has been identified in a local housing strategy prepared by council and approved by the Department of Planning, Industry and Environment*

*Action 28.2 – Locate new rural residential areas:*

- *close to existing urban settlements to maximise the efficient use of existing infrastructure and services, including roads, water, sewer and waste services, and social and community infrastructure;*
- *to avoid and minimise the potential for land use conflicts with productive, zoned agricultural land and natural resources; and*
- *to avoid areas of high environmental, cultural and heritage significance, important agricultural land and areas affected by natural hazards.*

*Action 28.3 – Manage land use conflict that can result from cumulative impacts of successive development decisions*

The proposal seeks to permit rural-residential development in some areas and facilitate residential development in some remote, isolated, and environmentally significant areas. This provides for some potential land use conflicts with agricultural land uses, as well as with some significant environmentally sensitive areas. The cumulative impacts of new development in environmentally sensitive areas and/or productive rural land need to be managed.

The proposal is considered to be not fully consistent with Actions 28.1, 28.2 and 28.3 of the regional plan but is supported by Council's rural land strategy.

## **11. DPIE AMENDMENTS TO DRAFT LEP**

Following assessment and further consultation with RFS, the draft LEP has been amended to address RFS's objection relating to the seven identified areas by applying a minimum lot size that prevents further subdivision.

## **12. FURTHER RECOMMENDED AMENDMENTS TO DRAFT LEP**

As noted in section 8 of this report, the draft LEP (**Attachment LEP**) has been amended to address the outstanding RFS objection by applying a minimum lot size that prevents further subdivision to the seven identified areas.

The Department's preference is that further amendments are required to address the remaining outstanding objections from OEH and RFS and inconsistencies with section 9.1 Directions and the *South East and Tablelands Regional Plan*.

The following changes are recommended:

- retain the terrestrial biodiversity map and clause 6.6 and apply this mapping to land being brought into the LEP;
- amend lot size maps for the 15 areas identified by OEH as unsuitable for additional development to prevent further subdivision; and
- remove provisions that will permit grazing of livestock as exempt development in the E2 Environmental Conservation zone and permit extensive agriculture with consent in the E2 Environmental Conservation zone.

Council has not agreed to these proposed changes.

An alternative and satisfactory approach to address the outstanding objections and inconsistencies with the section 9.1 Directions is that Council adopts a DCP that includes mapping of terrestrial biodiversity and objectives to:

- protect native fauna and flora;
- protect the ecological processes necessary for their continued existence;
- encourage the recovering of native fauna and flora and their habitats; and
- maximise connectivity, and minimise fragmentation, of their habitat.

Council has prepared, exhibited and adopted a DCP. The Minister can direct a council to make, amend or revoke a DCP under section 3.46 of the Act should the DCP and mapping not afford similar protections to the LEP clause and mapping.

## **13. MAPPING**

The draft LEP involves 128 new/amended LEP maps. These include: land zoning; lot size; height of building; acid sulfate soils; public infrastructure buffer; environmental heritage; and wetlands, riparian lands and watercourses maps covering large areas of the LGA. The changes include the application of Standard Instrument provisions to areas deferred from the Eurobodalla LEP 2012 and to other provisions applying to land already covered by the LEP.

Council submitted the draft maps as part of the proposal package on 18 December 2018. The Department's ePlanning Team completed a review of the technical aspects of the maps and on 13 February 2019 asked Council to make a significant number of amendments.



Council submitted revised maps on 19 March. The Department's ePlanning team reviewed and identified several outstanding matters and sent comments back to Council for action on 22 March.

After several further revisions by Council and subsequent reviews by ePlanning, final maps were received from Council on 14 May.

The minimum lot size maps have been amended to address the RFS objection relating to the seven identified areas by applying a minimum lot size that prevents further subdivision.

The ePlanning team amended the maps to reflect the revised minimum lot sizes for areas identified by RFS as unsuitable for additional development. Maps were finalised on 1 August 2019. Council has not reviewed the final maps as amended.

#### **14. CONSULTATION WITH COUNCIL**

Council was consulted on the terms of the draft instrument under clause 3.36(1) of the *Environmental Planning and Assessment Act 1979*. Council confirmed on 17 July that it was happy with the draft LEP (**Attachment C**).

#### **15. PARLIAMENTARY COUNSEL OPINION**

On 31 July, Parliamentary Counsel provided the final Opinion that the draft LEP could legally be made. This Opinion is provided at **Attachment PC**.

#### **16. CONCLUSION**

The Department considers that the plan could be made subject to the following changes to mitigate impacts on environmentally sensitive areas, namely:

- retain the terrestrial biodiversity map and clause 6.6 and apply this mapping to land being brought into the LEP;
- amend lot size maps for the 15 areas identified by OEH as unsuitable for additional development to prevent further subdivision; and
- remove provisions that will permit grazing of livestock as exempt development in the E2 Environmental Conservation zone and permit extensive agriculture with consent in the E2 Environmental Conservation zone.

These changes would resolve outstanding agency objections and address inconsistencies with section 9.1 Directions and the *South East and Tablelands Regional Plan*.

Alternatively, the plan could be made without these changes, subject to Council implementing a DCP that includes mapping of terrestrial biodiversity and objectives equivalent to Clause 6.6 Biodiversity. The Minister can direct Council to make, amend or revoke a DCP should the DCP and mapping not afford similar protections to the LEP clause and mapping.



## **17. RECOMMENDATION**

It is recommended that the Minister's delegate as the local plan-making authority agree to make the Eurobodalla Local Environmental Plan 2012 (Amendment 11) by either the Department's preferred option or Council's preferred option, including the requirements for a DCP.

A handwritten signature in black ink, appearing to read 'Monica Gibson', with a stylized, cursive script.

24 September 2019

**Monica Gibson**

**Acting Executive Director, Local and Regional Planning  
Planning and Assessment**

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