

Planning Proposal 21/006

**» BLEP 1987
Amendments**

January 2022 (V3 Exhibition) 22/10274

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1. Introduction

1.1 Summary of Planning Proposal

This planning proposal applies to land within the Ballina Shire that is subject to Ballina Local Environmental Plan 1987.

The purpose of the proposal is to amend BLEP 1987 to address issues that continue to arise around use and development on land zoned rural or environmental protection.

The proposed amendments include:

1. Inclusion of additional subdivision provisions that provide flexibility in relation to certain minor boundary adjustment subdivisions, or subdivision involving land containing more than one zone;
2. Additions to clause 12 to clarify criteria relating to the permissibility of dwelling houses in rural and environmental zones; and
3. Reinstatement of an historic dwelling entitlement for a property at McLeans Ridges.

1.2 Background

LEP Renewal Program 2006 – 2013

Ballina Shire Council prepared a comprehensive local environmental plan (LEP) under the State Government's Standard Instrument LEP (SILEP) program between 2006 and 2013.

Council resolved to endorse a new draft LEP for the shire in December 2011 and subsequently sought finalisation and implementation of the draft plan through the then NSW Department of Planning and Environment.

In September 2012, prior to Council's draft plan being finalised by the Department (it had received endorsement by the Department's regional office in Grafton), the then Minister for Planning, the Hon. Brad Hazzard made a decision to initiate a review of environmental protection zones in five local government areas on the Far North Coast, including Ballina Shire.

As a result, Council's comprehensive LEP was only partly made, with areas identified as having environmental values excluded from the plan.

These 'deferred matter' areas remain subject to the provisions of the Ballina LEP 1987 (being the instrument the new plan was to replace).

Northern Councils E Zone Review 2012 – Present

In October 2015, the Department published its final recommendations report for the Northern Councils E Zone Review (NCEZR). The review recommendations do not align with Council's endorsed draft LEP from 2011 or with almost 30 years of environmental protection zoning history and identified environmental attributes and values in the Ballina Shire local government area.

For Ballina Shire, the NSW Government's review recommendations result in the loss of opportunity to apply environmental protection zones to areas on the basis of scenic and amenity value, coastal value, water catchment characteristics and urban buffer characteristics.

This is a substantial shift for Ballina Shire and one that represents a significant change in long standing Council planning policy.

Environmental protection zones have been part of Ballina Shire since 1987 and the majority of the areas so zoned in 1987 remain zoned environmental protection under that plan at present.

Previously adopted staged integration programs

Notwithstanding the above, an initial staged approach to integrate deferred matter areas was adopted by the Council at its April 2016 Ordinary meeting, in line with the requirements of the Department's final recommendations report.

At its Ordinary meeting held in April 2017, however, the Council resolved to retain existing deferred areas that are subject of an environmental protection zone under the BLEP 1987 and to integrate all other deferred areas into the BLEP 2012 in accordance with the criteria established under the NCEZR.

Current approach to the integration of certain deferred matters

In April 2021, Council engaged ecological consultants to identify and verify proposed E2 and E3 zones under the BLEP 2012, in line with the criteria outlined by the DPIE in the NCEZR report. In accordance with the April 2017 Council resolution, that work relates to existing deferred areas that are not subject to an environmental protection zone under the BLEP 1987.

A planning proposal was subsequently prepared to integrate some deferred matters into the BLEP 2012. At the Ordinary meeting of 28 October 2021, Council resolved to seek a Gateway Determination in relation to that planning proposal.

Remaining deferred matters

Assuming that the planning proposal referred to above proceeds, existing deferred areas that are subject of an environmental protection zone under the BLEP 1987 will remain.

A review as to the future zoning of those areas will be undertaken, but is likely to take some time.

In the meantime, Council continues to deal with a number of issues around minor subdivision proposals and applications for new dwellings.

Boundary Adjustment and Split Zone Subdivision

Under the current LEP provisions, there are significant limitations on the ability to approve adjustments between two lots that are already below the minimum lot size standard or subdivisions involving more than one zone, where residual lots are below the minimum size.

This is a significant issue in that the majority of lots within the shire subject to an environmental protection zone under BLEP 1987 are below the minimum subdivision lot size specified in Clause 11 of that Plan. There are also numerous areas where the environmental protection zone applies to only a part of the land, with a residential or other urban zone applying to the remainder.

Council often receives applications for subdivision proposals in these cases based on the merits of particular situations.

There can be a number of reasons why a boundary adjustment subdivision can be beneficial. For example, it may assist in achievement of larger agricultural production units, enable creation of more logical property boundaries, or provide opportunities for enhanced environmental protection or diminution of land use conflict.

The issue of split zones is particularly relevant to subdivisions associated with new urban areas as the BLEP 1987 does not enable the creation of residual lots or lots for environmental purposes where the lot area is not at least 90% of the minimum standard.

This means that routine practices such as excising the balance of a farm after a stage of an urban subdivision, inclusion of environmental protection zoned land in urban lots or separation of areas of environmental values in urban subdivision areas typically cannot be undertaken unless the lots are at least 36ha in area.

Provisions providing flexibility in these cases have been introduced into BLEP 2012, but they do not currently apply to areas that retain a zoning under BLEP 1987.

The intent of this planning proposal is to introduce the zoning flexibility provisions applicable to BLEP 2012 into BLEP 1987 and provide for consistency between the two instruments.

Dwelling Permissibility

Clause 12 of LEP 1987 establishes provisions for the permissibility of dwelling houses on land within a rural or environmental protection zone.

In summary, a dwelling house can be approved on vacant land that meets a minimum lot area, or where a 'dwelling entitlement' otherwise exists (e.g. existing holding, lot within an approved subdivision, etc.).

Where the land is not vacant, Council has historically approved replacement dwellings on the basis that any existing dwelling would be removed or otherwise decommissioned (i.e. converted to uninhabited shed or the like).

A recent judgement in the Land and Environment Court (*White v Ballina Shire Council* [2021] NSWLEC 1468) revealed a lack of clarity with the provisions of clause 12 regarding such proposed replacement dwellings.

It is appropriate, therefore, to add additional subclauses that clarify Council's intention in relation to land subject to clause 12. The changes provide for the following:

1. Where a valid development consent exists for a dwelling which has not yet been constructed, the consent must be surrendered before Council can approve another dwelling house; and
2. Where an existing lawfully erected dwelling house exists, development consent can only be granted for a new dwelling house on the basis that the existing dwelling is removed from the property or otherwise rendered uninhabitable.

Reinstated Dwelling Entitlement

Lot 1 DP 238911 is located at McLeans Ridges Road Wollongbar. The lot was created in 1969 as part of a 10 lot subdivision approved under the Shire of Tintenbar Interim Development Order No. 1. Lot 1 is vacant, while dwellings have been constructed on all the other lots in the original subdivision.

Lot 1 is located approximately 17 kilometres north west of the Ballina CBD, located on the western fringe of the Ballina LGA, and approximately 16km from Lismore (**Figure 1**). The site

is an irregular shaped lot, with frontage to two existing roads, the Bruxner Highway, which links Lismore to Ballina, and McLeans Ridges Road. The Bruxner Highway is a classified road and is managed by Transport for NSW.

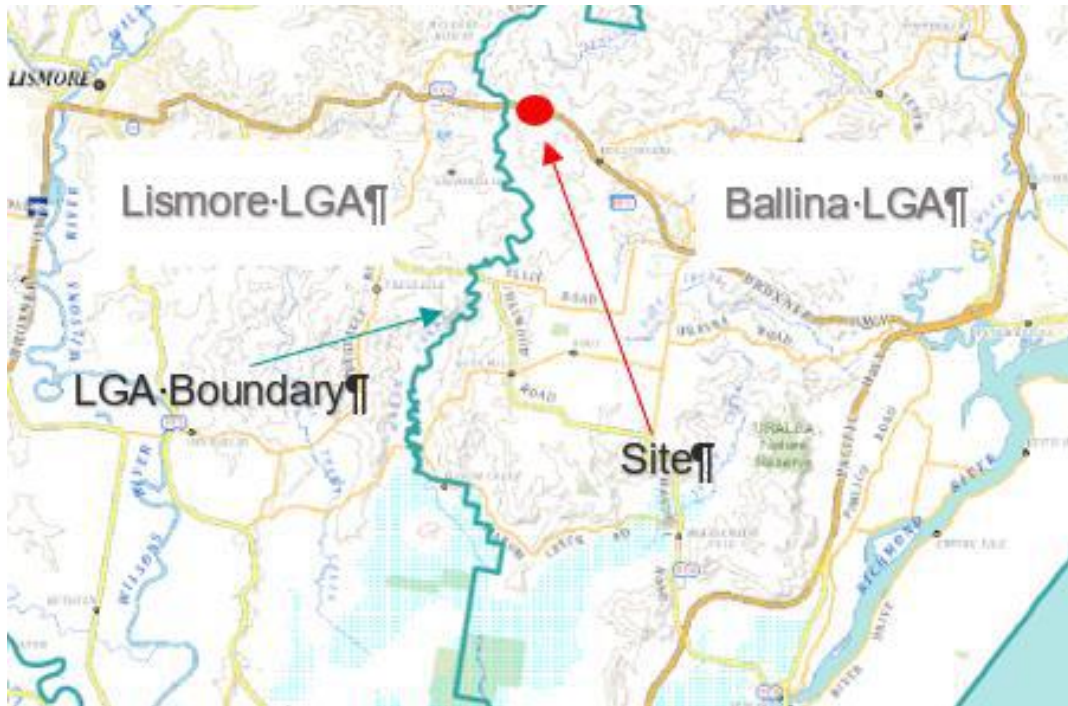


Figure 1 Site Context (source: NSW Spatial Viewer)

The land is zoned part 7(c) Environmental Protection (Water Catchment) and part 9(a) Roads (Main Roads Proposed) under BLEP 1987 (Figure 2). It is identified as bushfire prone land (Figure 3) and State Significant Farmland under the North Coast Regional Plan 2036 (Figure 4).

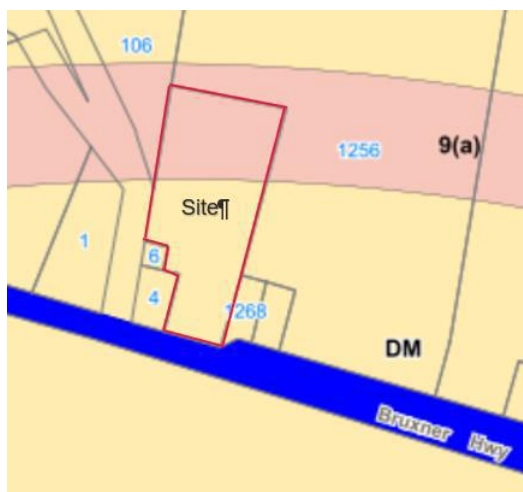


Figure 2 Zoning

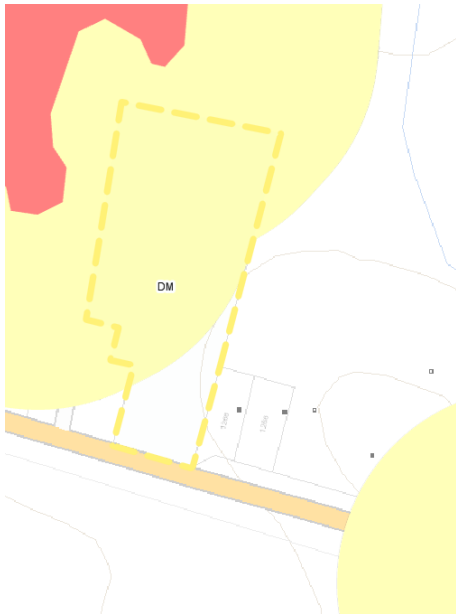


Figure 3 Bushfire Prone Land Mapping



Figure 4 State Significant Farmland

Under the current provisions of Clause 12 of BLEP 1987, Council is not able to consent to a dwelling house on the 7(c) part of the land, as the lot does not meet the minimum lot size requirement, is not an existing holding and the subdivision creating the lot was approved prior to the commencement of BLEP 1987.

Dwellings are permissible in the 9(a) zone, but approval of a dwelling in that part of the site could prejudice future planning for upgrades to the Bruxner Highway.

Prior to 2009, clause 12 of the LEP contained a provision allowing Council to approve a dwelling-house on rural and environmental protection land where a lot was lawfully created before BLEP 1987 commenced.

That clause would have applied to the lot at McLeans Ridges Road. However, on 26 June 2008, Council resolved to amend the provisions of Clause 12 of BLEP 1987 to clarify the circumstances in which properties within rural and environmental protection zones have dwelling entitlements, as a result of court cases at the time highlighting the difficulties in the interpretation of the clause.

In removing the provision, Council resolved to include a schedule of lots within the new Shire-wide comprehensive LEP (which became BLEP 2012) to maintain previously acknowledged dwelling entitlements.

Lot 1 DP 238911 would be eligible for inclusion in that schedule but it cannot be included within the 2012 LEP because the land is a deferred matter resulting from the State Government's decision regarding environmental protection zones.

Given this history, it is appropriate that the previously acknowledged dwelling entitlement for Lot 1 DP 238911 should be reinstated. It is proposed, therefore, to include a new provision in the LEP amendment to permit, with development consent, a dwelling house on Lot 1 DP 238911.

1.3 Council Resolutions

Council considered a report on this matter at the ordinary Meeting of 27 January 2022 (see Appendix 1), and resolved (Minute No. 270122/5):

1. *That Council endorses, for Gateway determination, the amendments to Ballina Local Environmental Plan 1987 outlined in the planning proposal contained in Attachment 1 (BSCPP 21/006).*
2. *That Council submits the planning proposal contained in Attachment 1 to the NSW Department of Planning, Industry and Environment for review and Gateway determination.*
3. *That upon an affirmative Gateway determination being received from the Department of Planning, Industry and Environment the procedural steps associated with progression of the planning proposal, including public exhibition, be undertaken.*
4. *That the Department of Planning, Industry and Environment be advised that Council wishes to exercise its delegated plan making functions for this LEP amendment.*
5. *That Council receive a further report on the proposal following the completion of the public exhibition of the planning proposal.*

1.4 Gateway Determination

A Gateway determination was issued by the Department of Planning Industry & Environment on 11 February 2022, authorising the public exhibition of the draft planning proposal.

The Gateway also authorises Council as the planning proposal authority and specifies that the LEP amendment should be completed before 11 August 2022.

A copy of the gateway determination is in Appendix 2.

2. Objectives & Intended Outcomes

To amend Ballina LEP 1987 to:

1. include additional subdivision provisions that provide flexibility in relation to certain minor boundary adjustment subdivisions, or subdivision involving land containing more than one zone;

2. Add to clause 12 to clarify criteria relating to the permissibility of dwelling houses in rural and environmental zones; and
3. Reinstate an historic dwelling entitlement for a property at McLeans Ridges.

3. Explanation of the Proposal

3.1 Land to Which the Planning Proposal Applies

This planning proposal applies to all land within the Ballina Shire that is subject to Byron Local Environmental Plan 1987.

3.2 The Proposal – Explanation of Provisions

To achieve the intended outcomes, this planning proposal will make the following amendments to BLEP 1987. The proposed clause outlined below may be subject to change at the time of legal drafting.

Proposed new clauses:

11A Exceptions to minimum subdivision lot size for lot boundary adjustments

- (1) *The objective of this clause is to permit boundary adjustments in rural and environmental protection zones that will provide improved agricultural or environmental outcomes without creating additional opportunities for the erection of dwellings.*
- (2) *Development consent may be granted for the subdivision of land within Zone No 1 (a1), 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f), 7 (i) or 7 (l) to create lots less than the minimum size specified in clause 11(2) and (3) if the consent authority is satisfied that-*
 - (a) *the subdivision will not result in the creation of an additional lot or the opportunity for additional dwelling entitlements, or both, on any land, and*
 - (b) *the subdivision will not adversely impact on the long-term agricultural production potential or environmental characteristics of the lots and the surrounding locality.*

11B Exceptions to minimum subdivision lot sizes for split zones

- (1) *The objectives of this clause are as follows-*
 - (a) *to permit the creation of lots that support urban development in planned urban growth areas,*
 - (b) *to provide for the subdivision of lots that are within more than one zone but cannot be subdivided under clause 11,*
 - (c) *to ensure that the subdivision occurs in a manner that promotes suitable land uses and development.*
- (2) *This clause applies to each lot (an **original lot**) that contains-*
 - (a) *land in a residential, business or industrial zone within this Plan or another Environmental Planning Instrument, and*

- (b) *land within Zone No 1 (a1), 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f), 7 (i) or 7 (l).*
- (3) *Despite clause 11, development consent may be granted to subdivide an original lot to create other lots (the **resulting lots**) if-*
 - (a) *one of the resulting lots will contain all of the land within Zone No 1 (a1), 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f), 7 (i) or 7 (l) that was in the original lot, and*
 - (b) *each of the other resulting lots will contain land that has an area that is not less than the minimum lot size specified in relation to that land.*
- (4) *Development consent may only be granted if the consent authority is satisfied that the lots to be created under subclause (3)(a)-*
 - (a) *will be created as a result of a subdivision of land for urban purposes involving land in a residential, commercial or industrial zone, and*
 - (b) *the lot is suitable for environmental protection, environmental management or agriculture.*
- (5) *If the area of land that would comprise the resulting lot created under subclause (3)(a) is of a size that is sufficient to allow the creation of more than one lot each of a size that is not less than the minimum size specified in clause 11 in relation to that land, then not more than that the number of lots may be created under subclause (3)(a).*

34B Development of land at McLeans Ridges Road, Wollongbar

- (1) *Notwithstanding the other provisions of this plan, a dwelling house may, with the consent of Council, be erected on Lot 1 DP 238911, McLeans Ridges Road, Wollongbar.*

Proposed addition to existing Clause 12 [additions shown below in blue font]:

12 Dwelling-houses within Zone No 1 (a1), 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f), 7 (i) or 7 (l)

- (1) *This clause applies to land within Zone No 1 (a1), 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f), 7 (i) or 7 (l).*
- (2) *For the purpose of this clause, a reference to a dwelling-house includes a reference to a dwelling-house operated as a bed and breakfast establishment.*
- (3) *The Council shall not consent to the erection of a dwelling-house on land to which this clause applies except in accordance with this clause.*
- (4) *A dwelling-house may, with the consent of the council, be erected on vacant land to which this clause applies only where that land—*
 - (a) *has an area of not less than—*
 - (i) *in the case of land within Zone No 1 (a1) or 7 (i) – 20 hectares,*
 - (ii) *in the case of land within Zone No 1 (a2), 1 (b), 1 (d), 1 (e), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f) or 7 (l) – 40 hectares,*
 - (b) *is an existing holding,*
 - (c) *is an allotment created by subdivision to which development consent has been granted in accordance with clause 11,*

- (d) *is an allotment created by a subdivision to which development consent has been granted in accordance with clause 13 as in force when consent for the subdivision was granted but before the gazettal of Ballina Local Environmental Plan 1987 (Amendment No 36), or*
 - (e) *is an allotment created by a subdivision to which development consent, or approval, was granted by the Council in accordance with the provisions of Interim Development Order No 1—Municipality of Ballina or Interim Development Order No 1—Shire of Tintenbar before the appointed day, not being development consent, or approval, that was granted subject to a condition that a dwelling could not be erected on the allotment.*
- (5) *Development consent must not be granted under subclause (4) unless—*
 - (a) *if a development application has been made for development for the purposes of a dwelling house on the land – the application has been refused or it was withdrawn before it was determined, and*
 - (b) *if development consent has been granted in relation to such an application – the consent has been surrendered or it has lapsed.*
- (6) *Development consent may be granted under subclause (4) for the erection of a dwelling house on land to which this clause applies if there is a lawfully erected dwelling house on the land and the dwelling house to be erected is intended only to replace the existing dwelling house.*
- (7) *The council may consent to the erection of a dwelling-house on vacant land to which this clause applies that would have complied with subclause (4) but for the fact that part of the land has been acquired by a public authority for a public purpose.*
- (8) *A rural workers' dwelling may, with the consent of the council, be erected on an allotment of land, being an allotment having an area of not less than—*
 - (a) *in the case of land within Zone No 1 (a1) or 7 (i)—10 hectares for the first rural workers' dwelling and 30 hectares for each subsequent rural workers' dwelling, and*
 - (b) *in the case of land within Zone No 1 (a2), 1 (b), 1 (d), 7 (a), 7 (c), 7 (d), 7 (d1), 7 (f) or 7 (l)—20 hectares for the first rural workers' dwelling and 60 hectares for each subsequent rural workers' dwelling,**if the council is satisfied that—*
 - (c) *the erection of each such additional dwelling will not impair the suitability of the land for agriculture,*
 - (d) *the needs of existing agriculture genuinely require that rural workers reside on the land, and*
 - (e) *any other rural workers' dwellings on the holding are being used by persons substantially engaged in agricultural employment on that land.*

4. Justification

4.1 Section A – Need for the Planning Proposal

Q1 Is the planning proposal a result of an endorsed local strategic planning statement, strategic study or report?

No

Q2 Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

Yes. A planning proposal is the appropriate mechanism through which to permit the proposed changes to Ballina LEP 1987.

4.2 Section B – Relationship to Strategic Planning Framework

Q3 Will the planning proposal give effect to the objectives and actions of the applicable regional, or district plan or strategy (including any exhibited draft plans or strategies)?

The North Coast Regional Plan 2036 is the current strategic planning document applying to the Ballina Shire.

The proposal is broadly consistent with the Regional Plan, which provides the regional framework for the consideration of policy development and the overall vision of the future. The proposal supports agricultural, environmental and urban growth outcomes and actions identified in the strategy.

Q4 Will the planning proposal give effect to a council's endorsed local strategic planning statement, or another endorsed local strategy or strategic plan?

Ballina Shire Council Community Strategic Plan 2017-2027

The proposal is considered to be consistent with the Healthy Environment theme contained within Council's Community Strategic Plan 2017 – 2027. Specifically it is considered to be consistent with outcome HE3.2:

Minimise negative impacts on the natural environment.

Ballina Local Strategic Planning Statement 2020

The proposal is consistent with a key theme within the LSPS of healthy environment.

Q5 Is the planning proposal consistent with applicable State Environmental Planning Policies?

The proposal is considered to be consistent with applicable State Environmental Planning Policies (SEPPs).

Q6 Is the planning proposal consistent with applicable Ministerial Directions (s.9.1 directions)?

Yes. A number of section 9.1 directions are relevant to the planning proposal. A section 9.1 checklist is provided at Appendix 3.

4.3 Section C – Environmental, Social and Economic Impact

Q7 Is there any likelihood that critical habitat or threatened species, population or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

The planning proposal is likely to result in positive impacts on flora and fauna as environmental protection zones will be able to be excised and protected from urban land release areas in planned urban growth areas. Additionally, practical boundary adjustments that provide for improved agricultural or environmental outcomes without creating additional opportunities for the establishment of dwelling houses will be able to be approved by Council.

Q8 Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

No direct adverse environmental impacts are likely to arise as a result of the planning proposal.

Q9 Has the planning proposal adequately addressed any social and economic effects?

The planning proposal will enable the creation of lots that promote environmental protection and management outcomes while supporting the provision of urban development outcomes in planned urban growth areas. It will also enable boundary adjustments.

Overall, the planning proposal is considered likely to achieve positive social and economic effects, particularly through improved flexibility and clarity for subdivision in identified circumstances.

4.4 Section D – State and Commonwealth Interests

Q10 Is there adequate public infrastructure for the planning proposal?

The planning proposal does not create any additional demand on public infrastructure.

Q11 What are the views of state and Commonwealth public authorities consulted in accordance with the Gateway determination?

Relevant agencies will be consulted in accordance with the Gateway determination.

5. Mapping

Mapping is not required for this planning proposal.

6. Community Consultation

This planning proposal will be publically exhibited in accordance with the Gateway determination and the terms of the *Environmental Planning and Assessment Act 1979*.

7. Timeline

The proposed timeline for completion of the planning proposal is as follows:

Plan Making Step	Estimated Completion (Before)
Gateway Determination	February 2022
Completion of Technical Information	Completed
Government Agency Consultation	March 2022
Public Exhibition Period	March 2022
Public Hearing	N/A
Submissions Assessment	May 2022
Local Plan Making Authority (LPMA) Assessment of Planning Proposal and Exhibition Outcomes	May 2022
LPMA Decision to Make the LEP Amendment (if delegated)	N/A
Submission of Endorsed LEP to DPI&E for Finalisation	June 2022

8. Appendices

Appendix 1 – Council Reports

Appendix 2 – Gateway Determination

Appendix 3 – Response to s9.1 Directions

Appendix 1 – Council Reports

9.2 **LEP Amendment - Ballina Local Environmental Plan 1987**

Section	Strategic Planning
Objective	To invite Council to initiate an amendment to BLEP 1987 to introduce provisions that increase flexibility for certain minor subdivisions, clarify dwelling house approval criteria in rural and environmental zones, and acknowledge a historic dwelling entitlement for a property at McLeans Ridges, and seek direction on the submission of the planning proposal for Gateway Determination.

Background

The Ballina Local Environmental Plan 2012 (BLEP 2012) currently includes areas known as deferred matters (DM) due to the State Government's decision in 2012 to not allow the Ballina LEP 2012 (and other LEPs for surrounding LGAs) to include environmental protection zones.

These areas remain subject to the provisions of the BLEP 1987.

At the 28 October 2021 Ordinary meeting, Council endorsed, for Gateway determination, the integration of some of these DM areas into the Ballina Local Environmental Plan 2012.

In accordance with previous resolutions of Council, this only relates to deferred areas where the land is not subject to an environmental protection zone under BLEP 1987.

The process to integrate those deferred matters will take some time, and, when complete, DM areas will remain, where an environmental protection zone applies under BLEP1987.

It is appropriate, therefore, that Council continue to review and update relevant provisions of BLEP 1987, where required.

This report describes the following recommended amendments to the 1987 LEP:

1. Inclusion of additional subdivision provisions that provide flexibility in relation to certain minor boundary adjustment subdivisions, or subdivision involving land containing more than one zone;
2. Additions to clause 12 to clarify criteria relating to the permissibility of dwelling houses in rural and environmental zones; and
3. Reinstatement of a historic dwelling entitlement for a property at McLeans Ridges.

Key Issues

- Boundary adjustment subdivisions and split-zone subdivisions not permitted with lots below minimum lot size
- Clarity relating to approval for replacement dwelling in rural and environmental zones
- Acknowledgement of an historic dwelling entitlement

Discussion

Subdivision

Under the current LEP 1987 provisions, there are significant limitations on the ability to approve adjustments between two lots that are already below the minimum lot size standard, or subdivisions involving more than one zone, where residual lots are below the minimum size.

This can restrict subdivision outcomes that may otherwise have positive agricultural, environmental and/or urban growth outcomes.

The majority of lots subject to an environmental protection zone under BLEP 1987 are below the minimum subdivision lot size specified in Clause 11 of that Plan. There are also numerous areas where the environmental protection zone applies to only a part of the land, with a residential or other urban zone applying to the remainder.

Council often receives applications for subdivision proposals in these cases, based on the merits of particular situations.

There can be a number of reasons why a boundary adjustment subdivision can be beneficial. For example, it may assist in achievement of larger agricultural production units, enable creation of more logical property boundaries, or provide opportunities for enhanced environmental protection, or reduction of land use conflicts.

The issue of split zones is particularly relevant to subdivisions associated with new urban areas as currently LEP 1987 does not enable the creation of residual lots or lots for environmental purposes where the lot area is not at least 90% of the minimum standard.

This means that routine practices, such as excising the balance of a property after a stage of an urban subdivision, inclusion of environmental protection zoned land in urban lots, or separation of areas of environmental values in urban subdivision areas, typically cannot be undertaken unless the lots are at least 36ha in area.

Within Ballina LEP 2012, clauses 4.2B and 4.2C were introduced in 2014 to provide flexibility in dealing with these issues.

At that time, similar provisions were not required for BLEP 1987 as the provisions of *State Environmental Planning Policy No. 1 – Development Standards* (SEPP No. 1) were applicable to development under that Plan and provided the flexibility required.

The Department of Planning, Industry & Environment (DPIE) subsequently revoked SEPP No. 1 and replaced it with Clause 39, inserted into LEP 1987, to provide some flexibility in relation to development standards.

However, in relation to the subdivision of land within a rural or environmental protection zone, clause 39 does not allow the creation of any lots where the lot area is not at least 90% of the minimum standard.

This means that routine practices such as excising the balance of a property after a stage of an urban subdivision, inclusion of environmental protection zoned land in urban lots or separation of areas of environmental values in urban subdivision areas, typically cannot be undertaken unless the lots are at least 36ha in area.

Council continues to receive applications for boundary adjustment subdivisions or to rationalise lots with split zones. Where the land is zoned under BLEP 1987, those applications cannot currently be considered, regardless of the individual merit.

The planning proposal in Attachment 1 outlines two provisions proposed to address subdivision related issues arising in relation to the current LEP.

These proposed provisions are consistent with the approach applied within the adopted 2012 LEP (i.e. introducing these provisions provides for a consistent approach to the identified subdivision situations shire wide).

The planning proposal contains background information and further detail with respect to the proposed provisions, which is summarised below.

Table 1: Summary of Proposed Subdivision Provisions

Provision Summary	Reason and Key Elements
<p>Enable <u>boundary adjustment subdivision</u> on rural & environmental land where lot sizes do not meet minimum lot size standards.</p> <p><i>Example: A circumstance where a farmer wishes to adjust a boundary to acquire adjoining land for agricultural expansion.</i></p>	<p>LEP 1987 significantly limits the potential boundary adjustment subdivision in rural areas. Given boundary adjustment subdivision is a common form of subdivision in rural areas and has the potential to provide for improved agricultural and/or environmental outcomes, more flexibility and merit-based assessment is proposed.</p> <p>The provision would deliver more opportunity for boundary adjustment subdivision to be considered by Council subject to a proposal not resulting in:</p> <ul style="list-style-type: none"> creation of additional lots or opportunities for dwellings; or adverse impact on agricultural or environmental attributes of the land or surrounds.

Provision Summary	Reason and Key Elements
<p>Enable creation of <u>residual rural/ environmental zoned lots</u> associated with urban development where lot sizes do not meet minimum lot size standards</p> <p><i>Example: A circumstance where the balance of a farm is subdivided from an area rezoned for residential development.</i></p>	<p>LEP 1987 currently limits the creation of residual rural or environmental zoned lots arising from urban subdivision to being greater than 90% of the minimum lot standard.</p> <p>Not all lots created for this purpose exceed the standard and as such, the current framework may limit the progress of planned urban development.</p> <p>The provision provides for the creation of rural and environmental zoned lots less than the minimum lot size standard where such lots are an outcome of planned urban growth and the lots are suitable for an environmental or agricultural purpose.</p> <p>This approach enables land identified as unsuitable or not yet planned for urban development to be excised from planned urban release/ development areas.</p>

The proposed provisions are designed to:

- reflect the existing planning framework under the Ballina LEP 2012
- remove current ambiguity in subdivision provisions under LEP 1987
- provide flexibility for merit-based consideration of subdivision proposals under that LEP;
- enable Council to maintain the integrity of its minimum lot standards in rural areas (not subject to the defined circumstances), including limiting the potential for fragmentation of agricultural land.

Dwelling Permissibility

Clause 12 of LEP 1987 establishes provisions for the permissibility of dwelling houses on land within a rural or environmental protection zone.

In summary, a dwelling house can be approved on vacant land that meets a minimum lot area, or where a 'dwelling entitlement' otherwise exists (e.g. lot within an approved subdivision, etc.).

Where the land is not vacant, Council has historically approved replacement dwellings on the basis that any existing dwelling would be removed or otherwise decommissioned (i.e. converted to a non-habitable building).

Examples of this type of circumstance include replacement of damaged dwellings (e.g. fire damage) or cases where a land owner wishes to construct a new house in a different location on a rural land parcel.

A recent judgement in the Land and Environment Court (*White v Ballina Shire Council* [2021] NSWLEC 1468) revealed a lack of clarity with the provisions of clause 12 regarding such proposed replacement dwellings.

It is recommended, therefore, that additional sub-clauses are included in the 1987 LEP to clarify Council's intention in relation to land subject to clause 12. The proposed provisions are summarised as follows:

- Where a valid development consent exists for a dwelling which has not yet been constructed, the consent must be surrendered before Council can approve another dwelling house; and
- Where an existing lawfully erected dwelling house exists, development consent can only be granted where the new dwelling house will replace the existing one.

Reinstated Dwelling Entitlement

Lot 1 DP 238911 is located at McLeans Ridges Road Wollongbar. The lot was created in 1969 as part of a 10 lot subdivision approved under the Shire of Tintenbar Interim Development Order No. 1. Lot 1 is vacant, while dwellings have been constructed on all the other lots in the original subdivision.

The land is zoned part 7(c) Environmental Protection (Water Catchment) and part 9(a) Roads (Main Roads Proposed) under BLEP 1987.

Under the current provisions of Clause 12 of BLEP 1987, Council is not able to consent to a dwelling house on the 7(c) part of the land.

Dwellings are permissible in the 9(a) zone, but approval of a dwelling in that part of the site could prejudice future planning for upgrades to the Bruxner Highway.

Prior to 2009, clause 12 of the LEP contained a provision allowing Council to approve a dwelling-house on rural and environmental protection land where the lot was lawfully created before BLEP 1987 commenced.

That clause would have applied to the lot at McLeans Ridges Road. It was, however, deleted from the LEP in 2009 following a Land and Environment Court case that set an undesirable precedent.

In removing that provision, Council resolved to include a schedule of lots within the new Shire-wide comprehensive LEP (which became BLEP 2012) to maintain previously acknowledged dwelling entitlements (based on specific criteria).

The dwelling entitlement was acknowledged in a Council issued planning certificate issued for Lot 1 DP 238911 in March 2000.

Lot 1 DP 238911 would be eligible for inclusion in that schedule but it cannot be included within the 2012 LEP because the land is a deferred matter resulting from the State Government's intervention regarding environmental protection zones.

Given this history, it is appropriate that the previously acknowledged dwelling entitlement for Lot 1 DP 238911 should be reinstated.

It is proposed, therefore, to include a new provision in the LEP amendment to permit, with development consent, a dwelling house on Lot 1 DP 238911.

Delivery Program Strategy / Operational Plan Activity

The management of LEP amendment requests and the associated assessment and processing of such requests is referenced in action HE3.1j of the Delivery Program and Operational Plan 2020 – 2024.

Community Consultation Policy

No community or agency consultation has occurred to date with respect to this matter.

The proposed amendments to the LEP will be subject to the usual community and agency consultation requirements associated with planning proposals, subject to the terms of a Gateway determination issued by DPIE.

A minimum public consultation period of 28 days is proposed.

Financial / Risk Considerations

The preparation of a planning proposal can be accommodated within existing resources.

It is considered appropriate that delegation of plan making functions be sought from DPIE with respect to this matter to enable Council to complete the implementation of the changes should Council ultimately endorse the amendments post public exhibition.

The legal effect of the LEP amendment would be to:

- enable the lodgment of development applications for boundary adjustment and/ or split zone subdivisions, where the land is subject to BLEP 1987
- clarify provisions relating to the permissibility of dwellings on land subject to a rural or environmental protection zone where an existing dwelling is located on that land and
- enable the lodgment of a development application for a dwelling within land zoned 7(c) Environmental Protection (Water Catchment) on land known as Lot 1 DP 238911, located at McLeans Ridges Road Wollongbar.

Options

Option 1 – Proceed with the planning proposal.

The planning proposal seeks to amend BLEP 1987 to enable certain development on land within a rural or environmental protection zones, consistent with the provisions of the 2012 LEP. The provisions provide for flexibility and clarification.

This approach involves the submission of the planning proposal contained in Attachment 1 to DPIE for Gateway determination. If supported by DPIE, the proposal will be subject to a public exhibition period prior to further consideration by Council.

Under this approach it is also proposed that Council would seek to exercise delegated plan making functions.

This is the recommended approach.

Option 2 – Defer or amend the planning proposal.

This approach is not recommended given that:

- the maintenance of the current LEP framework limits the consideration of subdivision proposals that deliver positive agricultural, environmental and urban growth related outcomes
- there is a need for clarification of Council's intentions regarding approval of replacement dwellings on rural or environmentally zoned land and
- a land owner has a circumstance which meets established criteria for reinstatement of a dwelling entitlement.

However, if Council requires further information a briefing could be provided. In this regard it is suggested that a briefing could be held following public exhibition to enable Council to consider any public submissions received in relation to the proposed amendments.

Deferral or amendment to the planning proposal is not recommended.

Option 3 – Cease further action in relation to the planning proposal.

For the same reasons outlined in relation to option 2, this approach is not recommended.

RECOMMENDATIONS

1. That Council endorses, for Gateway determination, the amendments to Ballina Local Environmental Plan 1987 outlined in the planning proposal contained in Attachment 1 (BSCPP 21/006).
2. That Council submits the planning proposal contained in Attachment 1 to the NSW Department of Planning, Industry and Environment for review and Gateway determination.
3. That upon an affirmative Gateway determination being received from the Department of Planning, Industry and Environment the procedural steps associated with progression of the planning proposal, including public exhibition, be undertaken.
4. That the Department of Planning, Industry and Environment be advised that Council wishes to exercise its delegated plan making functions for this LEP amendment.
5. That Council receive a further report on the proposal following the completion of the public exhibition of the planning proposal.

Attachment(s)

1. BSCPP 21/006 Planning Proposal (Concept) 

9.2 LEP Amendment - Ballina Local Environmental Plan 1987

270122/5 RESOLVED

(Cr Phillip Meehan/Cr Stephen McCarthy)

1. That Council endorses, for Gateway determination, the amendments to Ballina Local Environmental Plan 1987 outlined in the planning proposal contained in Attachment 1 (BSCPP 21/006).
2. That Council submits the planning proposal contained in Attachment 1 to the NSW Department of Planning, Industry and Environment for review and Gateway determination.
3. That upon an affirmative Gateway determination being received from the Department of Planning, Industry and Environment the procedural steps associated with progression of the planning proposal, including public exhibition, be undertaken.
4. That the Department of Planning, Industry and Environment be advised that Council wishes to exercise its delegated plan making functions for this LEP amendment.
5. That Council receive a further report on the proposal following the completion of the public exhibition of the planning proposal.

FOR VOTE - All Councillors voted unanimously.

Appendix 2 – Gateway Determination



Department of Planning and Environment

Gateway Determination

Planning proposal (Department Ref: PP-2022-315): Subdivision and dwelling permissibility amendments to the Ballina LEP 1987

I, the Director, Northern Region at the Department of Planning and Environment, as delegate of the Minister for Planning and Homes, have determined under section 3.34(2) of the *Environmental Planning and Assessment Act 1979* (the Act) that an amendment to the Ballina Local Environmental Plan 1987 to include additional subdivision and dwelling permissibility amendments to the Ballina LEP 1987 should proceed subject to the following conditions:

1. Prior to agency consultation and public exhibition, the proposal is to be updated to:
 - (a) outline that proposed clauses may be subject to change at the time of legal drafting; and
 - (b) reference the North Coast Regional Plan 2036 as the current strategic planning document applying to the Local Government Area.
2. Public exhibition is required under section 3.34(2)(c) and clause 4 of Schedule 1 to the Act as follows:
 - (a) the planning proposal is categorised as standard as described in the *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021) and must be made publicly available for a minimum of 14 days; and
 - (b) the planning proposal authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021).

Exhibition must commence within two months following the date of the gateway determination.

3. Consultation is required with the following public authorities and government agencies under section 3.34(2)(d) of the Act and/or to comply with the requirements of applicable directions of the Minister under section 9 of the EP&A Act:
 - Transport for NSW
 - NSW Rural Fire Service

Each public authority is to be provided with a copy of the planning proposal and any relevant supporting material via the NSW Planning Portal and given at least 30 days to comment on the proposal.

4. A public hearing is not required to be held into the matter by any person or body under section 3.34(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
5. The Council as planning proposal authority is authorised to exercise the functions of the local plan-making authority under section 3.36(2) of the EP&A Act subject to the following:
 - (a) the planning proposal authority has satisfied all the conditions of the gateway determination;
 - (b) the planning proposal is consistent with applicable directions of the Minister under section 9.1 of the EP&A Act or the Secretary has agreed that any inconsistencies are justified; and
 - (c) there are no outstanding written objections from public authorities.
6. The LEP should be completed on or before 11 August 2022.

Dated 11 day of February 2022.



Jeremy Gray
Director, Northern Region
Local and Regional Planning
Department of Planning and Environment

Delegate of the Minister for Planning and
Homes

Appendix 3 – Section 9.1 Directions Checklist (28/01/2022)

Section 9.1 Directions Checklist	
Planning Proposal – Lindendale Road, Wollongbar	
Direction No.	Compliance of Planning Proposal
1. Employment and Resources	
1.1 Business and Industrial Zones	Does not apply to planning proposal.
1.2 Rural Zones	Does not apply to planning proposal.
1.3 Mining, Petroleum Production and Extractive Industries	Does not apply to planning proposal.
1.4 Oyster Aquaculture	Does not apply to planning proposal.
1.5 Rural Lands	<p>N – Justifiably Inconsistent.</p> <p>The proposal is inconsistent with this direction as it contains provisions that will affect land within existing rural and environmental protection zones.</p> <p>The inconsistency is considered minor in relation to proposed clauses 11A, 11B and 12 as, despite being LGA wide, the amendments are unlikely to adversely impact existing and future rural land uses. The proposed amendments will allow for additional flexibility when considering subdivisions relating to boundary adjustments and split zoned sites, providing opportunities for environmental protections and reduction of land use conflict. The proposed amendments will generally not reduce the amount of land available for agriculture, however providing controls that will facilitate better management between land uses.</p> <p>It is noted that the addition of the proposed dwelling entitlement for Lot 1 is located on land identified as important farmland in the North Coast Regional Plan 2036. This is considered to be of minor significance due to the small size of the land (approx. 1.2ha), the surrounding rural lifestyle types land uses and as the proposal is only seeking to reinstate a former entitlement consistent with</p>
2. Environment and Heritage	
2.1 Environmental Protection Zones	<p>No – Justifiably Inconsistent.</p> <p>This planning proposal is inconsistent with this direction as, being Shire wide, it affects land mapped as containing Potential High Environmental Values and Biophysical Strategic Agricultural Land under the North Coast Regional Plan 2036 and Biodiversity Values shown on the Biodiversity Values Map.</p> <p>The inconsistency with the direction is considered to be of minor significance as the proposed provisions do not seek to reduce the existing environmental protection standards that apply to any land.</p>
2.2 Coastal Management	Does not apply to planning proposal.

Section 9.1 Directions Checklist Planning Proposal – Lindendale Road, Wollongbar	
Direction No.	Compliance of Planning Proposal
2.3 Heritage Conservation	<p>No – Justifiably Inconsistent.</p> <p>The proposal is inconsistent with this direction as it requires that the proposal contain provisions that facilitate the conservation of European and Aboriginal Cultural heritage. As the controls are proposed LGA wide, it is considered that land subject to heritage protections may be affected by future proposals.</p> <p>Notwithstanding, the inconsistency is considered minor as there are existing controls in place that would afford appropriate protections to sites with significant European and Aboriginal Cultural heritage values that would need to be considered at the time of future proposals.</p>
2.4 Recreation Vehicle Areas	<p>Consistent.</p> <p>The planning proposal does not involve the development of land for the purpose of a recreation vehicle area.</p>
2.5 Application of E2 and E3 Zones and Environmental Overlays in Far North Coast LEPs	Does not apply to planning proposal.
2.6 Remediation of Contaminated Land	<p>Consistent.</p> <p>The potential for land contamination would be routinely investigated as part of any subdivision or dwelling house proposal.</p>
3. Housing, Infrastructure and Urban Development	
3.1 Residential Zones	Does not apply to planning proposal.
3.2 Caravan Parks and Manufactured Home Estates	Does not apply to planning proposal.
3.3 Home Occupations	Revoked
3.4 Integrated Land Use and Transport	Does not apply to planning proposal.
3.5 Development Near Regulated Airports and Defence Airfields	Does not apply to planning proposal.
3.6 Shooting Ranges	Does not apply to planning proposal.
3.7 Reduction in non-hosted short term rental accommodation period	Does not apply to planning proposal.
4. Hazard and Risk	
4.1 Acid Sulfate Soils	<p>No – Justifiably Inconsistent.</p> <p>The planning proposal is inconsistent with this direction as, being Shire wide, it potentially applies to land having a probability of containing acid sulfate soils and is unable to satisfy all requirements of the direction.</p> <p>The inconsistency is considered to be of minor significance as the proposal is unlikely to result in an intensity of uses on land having the probability of acid sulfate soils being present in relation to proposed clauses 11A, 11B and 12. Lot 1 DP 238911 is not identified as land containing acid sulfate soils.</p>

Section 9.1 Directions Checklist Planning Proposal – Lindendale Road, Wollongbar	
Direction No.	Compliance of Planning Proposal
4.2 Mine Subsidence and Unstable Land	Does not apply to planning proposal.
4.3 Flooding	Consistent.
4.4 Planning for Bushfire Protection	<p>Unresolved.</p> <p>The planning proposal is potentially inconsistent with this direction as, being Shire wide, the proposal impacts bushfire prone land. Further, Lot 1 DP 238911 is also identified as bush fire prone.</p> <p>The direction provides that Council must consult with the Commissioner of the NSW Rural Fire Service (RFS) following the issue of a Gateway determination and prior to community consultation.</p> <p>Until this consultation has occurred the inconsistency with the direction is unresolved.</p>
5. Regional Planning	
5.1 Implementation of Regional Strategies	Revoked
5.2 Sydney Drinking Water Catchments	Does not apply to Ballina Shire.
5.3 Farmland of State and Regional Significance on the NSW Far North Coast	<p>Consistent</p> <p>The proposal is consistent with the objectives of the direction as it will not put significant agricultural land at risk while providing greater flexibility and certainty in relation to the subdivision of rural land.</p> <p>The proposal will not prejudice the current status of significant agricultural land as Council is not seeking widespread opportunities for the variation of lot sizes in rural areas to limit the potential for fragmentation of agricultural land.</p> <p>The planning proposal does not involve the rezoning of any rural land.</p>
5.4 Commercial and Retail Development along the Pacific Highway, North Coast	Does not apply to planning proposal.
5.5 Development in the vicinity of Ellalong Paxton and Millfield (Cessnock LGA).	Revoked.
5.6 Sydney to Canberra Corridor	Revoked.
5.7 Central Coast	Revoked.
5.8 Second Sydney Airport: Badgerys Creek	Revoked.
5.9 North West Rail Link Corridor Strategy	Does not apply to Ballina Shire.
5.10 Implementation of Regional Plans	<p>Consistent.</p> <p>No inconsistencies with the North Coast Regional Plan 2036 have been identified.</p>
5.11 Development of Aboriginal Land Council land	Does not apply to this planning proposal.
6. Local Plan Making	

Section 9.1 Directions Checklist Planning Proposal – Lindendale Road, Wollongbar	
Direction No.	Compliance of Planning Proposal
6.1 Approval and Referral Requirements	Consistent. The planning proposal does not introduce any new concurrence or consultation provisions or any additional designated development types.
6.2 Reserving Land for Public Purposes	Consistent. The planning proposal does not create, alter or reduce existing zonings or reservations of land reserved for public purposes.
6.3 Site Specific Provisions	Consistent No site specific provisions are proposed.
7. Metropolitan Planning	
7.1 to 7.13	These Directions do not apply to Ballina Shire.