



IRF22/3805

Gateway determination report – PP-2022-3871

Introduce the C2 Environmental Conservation & C3 Environmental Management zones into the Ballina LEP 2012 & amend associated clauses & rezone Lot 1 DP 124173 for conservation purposes & amend associated development standards.

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Acknowledgment of Country

The Department of Planning and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

Contents

1	Planning proposal	1
1.1	Overview	1
1.2	Objectives of planning proposal	1
1.3	Explanation of provisions	2
1.3.1	Site Rezoning	2
1.3.2	Incorporation of the C2 and C3 Zones	3
1.3.3	Consequential Amendments as a result of zone introduction	3
1.4	Site description and surrounding area	5
1.5	Mapping	6
1.6	Background	10
2	Need for the planning proposal	13
3	Strategic assessment	13
3.1	Regional Plan	13
3.2	Northern Councils E Zone Review Final Recommendations	15
3.2.1	Primary Use Test	15
3.3	Local	17
3.4	Section 9.1 Ministerial Directions	19
3.5	State environmental planning policies (SEPPs)	21
4	Site-specific assessment	21
4.1	Environmental	21
4.2	Social and economic	23
4.3	Infrastructure	24
5	Consultation	24
5.1	Community	24
5.2	Agencies	24
6	Timeframe	25
7	Local plan-making authority	25
8	Assessment summary	25
9	Recommendation	25

Table 1 Reports and plans supporting the proposal

Relevant reports and plans
Ballina Shire Council Planning Proposal 22/007 – Conservation Zone Burns Point Ferry Road, West Ballina (22/75943)
Ballina Shire Council Planning Proposal 22/007 – Appendices Burns Point Ferry Road West, Ballina (22/76024)
Northern Councils E Zone Review – Final Recommendations Report
LEP Practice Note Environment Protection Zones (PN09-002)
Development Application Assessment Form Ballina Shire Council – DA 2019/233

A reference to an Environment Protection zone E1, E2, E3 or E4 within this document should be taken to be a reference to a Conservation zone C1, C2, C3 or C4. For further information please see Standard Instrument (Local Environmental Plans) Amendment (Land Use Zones) Order 2021.

1 Planning proposal

1.1 Overview

Table 2 Planning proposal details

LGA	Ballina Local Government Area
PPA	Ballina Shire Council
NAME	Introduce the C2 Environmental Conservation and C3 Environmental Management Zone into Ballina LEP 2012 and amend associated clauses and rezone Lot 1 DP 124173 for conservation purposes and amend associated development standards.
NUMBER	PP-2022-3871
LEP TO BE AMENDED	Ballina LEP 2012
ADDRESS	550-578 River Street, West Ballina
DESCRIPTION	Lot 1 DP 124173
RECEIVED	9/11/2022
FILE NO.	IRF22/3805
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

1.2 Objectives of planning proposal

The proposal aims to apply a C2 Environmental Conservation zone to land known as Burns Point Ferry Road, or 550-578 River Street, West Ballina (Lot 1 DP 124173), and amend associated development provisions to identify the biodiversity value of the site.

Additionally, the proposal will introduce two new land use zones to the Ballina LEP 2012, the C2 Environmental Conservation zone and C3 Environmental Management zone. The introduction of these zones requires amendment to several associated or consequential clauses within the Ballina LEP 2012.

The introduction of both the C2 and C3 zone as part of this planning proposal is to allow Council flexibility throughout the exhibition process and negotiation with the landowner to apply the appropriate zone, within the context of the E Zone Policy.

It should be noted that, prior to 1 December 2021, conservation zones were formally known as environmental zones. The E Zone Review Final Recommendations Policy was finalised prior to this change and therefore, the reference to an environment protection zone in the E Zone Policy should

be taken to be a reference to a conservation zone. This name change does not alter the recommendations of the E Zone Policy.

The planning proposal prepared by Council adequately outlines the objectives of the planning proposal.

Whilst Council has outlined in its planning proposal how it has addressed the requirements of the E Zone Policy, it is considered further consultation with the landowner and relevant state government agencies is required in order to demonstrate how the proposed zone complies with the policy. This is discussed in greater detail in section 3 if this report.

Additionally, as the site is referred to interchangeably in Council documentation as either 'Burns Point Ferry Road', '550-578 River Street, West Ballina' or 'Lot 1 DP 124173' it is considered that these descriptions should be captured in the objective, to avoid confusion between the multiple references used in relation to the location of the planning proposal.

Burns Point Ferry Road, 550-578 River Street, West Ballina or Lot 1 DP 124173 will hereby be referred to as the 'subject site' throughout the remainder of this report.

1.3 Explanation of provisions

1.3.1 Site Rezoning

The planning proposal seeks to amend the Ballina LEP 2012, relating to the subject site, per the changes below:

Table 3 Current and proposed controls for the subject site

Control	Current	Proposed
Zone	Part R2 Low Density Residential, Part RU2 Rural Landscape	C2 Environmental Conservation
Minimum lot size	Part 450m ² (R2 zoned portion) and part 40ha (RU2 zoned portion)	40ha

Council also proposes to delete clause 7.12 of the Ballina LEP 2012, Home businesses at Burns Point Ferry Road, West Ballina, which is a clause that relates specifically to the subject site. This clause applies to land that is:

- Zoned R2 Low Density Residential, and
- Identified with a letter H on the floor space ratio map.

The clause allows a dwelling used for the purposes of carrying out a home business on land to which this land applies to exceed the floor space ratio of 0.5:1 in certain circumstances. Council outline that the proposed amendments as part of this proposal will render this control ineffectual.

Council intends to amend the floor space ratio control currently applied to the subject site as a result of the planning proposal, however this is not clearly outlined as part of the proposal submitted by Council. Currently the site has an FSR control of 0.7:1 applied to southern section of R2 zoned land. There is no FSR restriction currently applied to the northern section of R2 zoned land and RU2 zoned land.

Table 4 Additional current and proposed controls for the subject site

Control	Current	Proposed
Floor space ratio	Part 0.7:1 (southern section of R2 zoned land), part no FSR restriction (northern section of R2 zoned land and RU2 zoned land)	No FSR restriction

Council proposes to maintain the 8.5m building height restriction on the site. This control is applied to other RU1 Primary Production and RU2 Rural Landscape in the immediate locality of Ballina town centre, including to the existing RU2 zone to the south of the site. Council also intends to maintain the Building Height Allowance map, which is associated with clause 4.3A of the Ballina LEP 2012.

It is recommended that explanation of provisions for the site be amended to identify the full suite of changes to the land as a result of the proposed rezoning of the subject site.

1.3.2 Incorporation of the C2 and C3 Zones

Additionally, the proposal will result in wider changes to the Ballina LEP 2012, including the introduction of two new land use zones. These are the C2 Environmental Conservation and C3 Environmental Management zones.

The proposed land use tables are also proposed to be included as part of PP-2022-456, which is an existing planning proposal which seeks to apply conservation zones to deferred matter land across the wider LGA. The zones have been included in this proposal just in case it is finalised prior to PP-2022-456.

It is considered that these land use tables have been included in accordance with the requirements as outlined under the Standard Instrument LEP (SILEP) and relevant practice notes except in relation to the inclusion of Intensive plant agriculture as permitted with consent in the C3 zone. Council advises that it has been included on the basis that this addresses local provisions/issues, specific to the LGA. PN09-002 outlines that, unless they are existing uses in the zone, the intensive plant agriculture is generally considered to be unsuitable for the C3 zone. The inclusion of intensive plant agriculture should be reviewed by the Biodiversity and Conservation Division (BCD) as part of the agency consultation stage, given the objectives of the C3 zone and the requirements of the practice note.

1.3.3 Consequential Amendments as a result of zone introduction

Table 5 Consequential Amendments to Ballina LEP 2012

Clause	Required Amendment	Department's Comment
2.1	Add C2 Environmental Conservation and C3 Environmental Management to include the new zones in the LEP	This is within the intent of the proposal.
4.1AA	Add C2 Environmental Conservation and C3 Environmental Management to include the new zones in this clause to control the size of lots under community title schemes through the Minimum lot size map.	This is in keeping with existing arrangements under the Ballina LEP 2012 and is within the intent of the proposal.

Clause	Required Amendment	Department's Comment
4.1B	Add C2 Environmental Conservation and C3 Environmental Management to include the new zones in this clause to control the size of lots under strata plan schemes through the Minimum Lot Size map.	This is in keeping with existing arrangements under the Ballina LEP 2012 and is within the intent of the proposal.
4.1C	Add C3 Environmental Management to include the new zone in this clause to provide further requirements for the consent authority to consider, prior to issuing development consent for the erection of a rural worker's dwelling.	<p>As 'rural workers dwelling' is not a use sought to be permitted in the C3 zone land use table, it is queried why the inclusion of the C3 zone in this clause is sought.</p> <p>It is further noted that the C3 land use table proposed as part of PP-2022-456 also does not seek the inclusion of rural workers dwelling as a use permitted in the zone.</p> <p>A condition has been included on the Gateway to remove this reference from the planning proposal prior to exhibition.</p>
4.2A	Add C2 Environmental Conservation and C3 Environmental Management to include the new zones in this clause to manage unplanned development of dwelling houses and dual occupancies and manage land use conflict between residential dwellings and surrounding rural uses.	This is in keeping with existing arrangements under the Ballina LEP 2012 and is within the intent of the proposal.
4.2C	Add C2 Environmental Conservation and C3 Environmental Management to include the new zones in this clause to permit the subdivision of split zone properties, where the lot comprises a combination of RU1 Primary Production, RU2 Rural Landscape, C2 Environmental Conservation or C3 Environmental Management zones, where one or more of the resulting lots will contain all of the land in the above-mentioned zones from the original lot and no other land. Each of the resulting lots are to contain land that has an area not less than the minimum size shown on the Lot Size Map for that land.	This is in keeping with existing arrangements under the Ballina LEP 2012 and is within the intent of the proposal.
7.9	Add C3 Environmental Management to include the new zone in this clause to provide the consent authority further considerations prior to approving tourist development on land in this zone.	As the proposed C3 land use table outlines the intention to include tourist and visitor accommodation uses, this is considered appropriate to be incorporated as part of this proposal and meets the overall intent of the proposal.

It is noted that further amendments to clauses that meet the overall objective of the proposal may be required as a result of agency or community consultation, or at the time of legal drafting as identified by Parliamentary Counsel. Therefore, the above is included to identify and assess the consequential changes proposed by Council as a result of this proposal and is not intended to be an exhaustive list at this stage of the proposal.

1.4 Site description and surrounding area

The subject site is located approximately 3km west of the Ballina central business district, on the urban fringe of the strategic centre of Ballina (**Figure 1**). The site, which is approximately 56.36ha, is an irregular shaped lot, bounded by River Street to the north, Burns Point Ferry Road to the east, Emigrant Creek to the west and Richmond River to the south (**Figure 2**).

The site is surrounded by low density residential uses, characterised mainly by free standing dwellings. The Ballina Waterfront Village and Tourist Park adjoins the site on the north west corner, fronting River Street. Detached dwellings are also located in this location, fronting Emigrant Creek Lane. A canal estate development adjoins the site on the western boundary, fronting Burns Point Ferry Road.

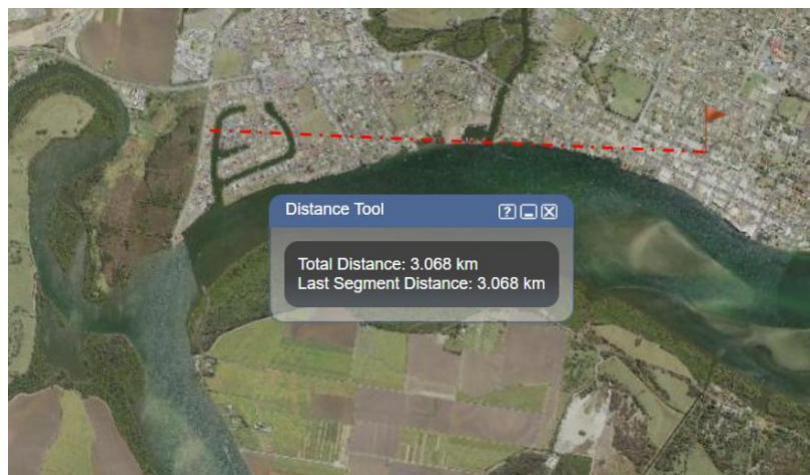


Figure 1 Subject site (source: Six Maps)



Figure 1 Site context (source: Six Maps)

The site is largely characterised by vegetation and remains undeveloped, with the exception of building works for two fill pads, described by Council in its report as “trial fill pads”. The landowner obtained consent for the construction of the pads under development consent 2019/233 (**Figure 3**). The pads were constructed within the R2 Low Density Residential zoned land in 2020. However, Council advises that these pads were constructed without the required Roads Act approvals for access to the site and were not constructed in the approved locations. Council have not however sought further action on these matters to date as the compliance authority for these matters. Furthermore, the consent issued for the “trial fill pads” specified that the consent did not authorise any future use of the subject land, nor any future use of the trial fill embankment on the subject land and the site of the fill material is not authorised to be used as a building pad or for any other purpose other than a trial fill embankment.



Figure 3 DA2019/233 Stamped Approval for approved location of Trial Fill Pads (source: Councils Submitted Documentation)

1.5 Mapping

The planning proposal includes mapping showing the proposed changes to the Land Zoning (**Figure 4 and 5**) and Minimum Lot Size (**Figure 6 and 7**) maps. These are considered suitable for community consultation. However, it is noted that the proposed minimum lot size map shown in the planning proposal is currently inverted and this should be rectified prior to exhibition. A condition has been included on the Gateway determination.

Notwithstanding, the planning proposal outlines the floor space ratio and building height allowance map will be prepared post-Gateway.

Council have advised that the inclusion of the Building Height Allowance map in Part 4 of the planning proposal is an error, as no change is proposed to this control. A condition has been included to remove this reference, prior to exhibition.

Council have also advised it is the intention to amend the FSR control on the site. As such, a condition has been included requiring the inclusion of the current (**Figure 8**) and proposed FSR maps as part of the proposal.

Finally, it is noted that Council will be required to prepare LEP maps that meet technical standards as part of the finalisation package, following exhibition.

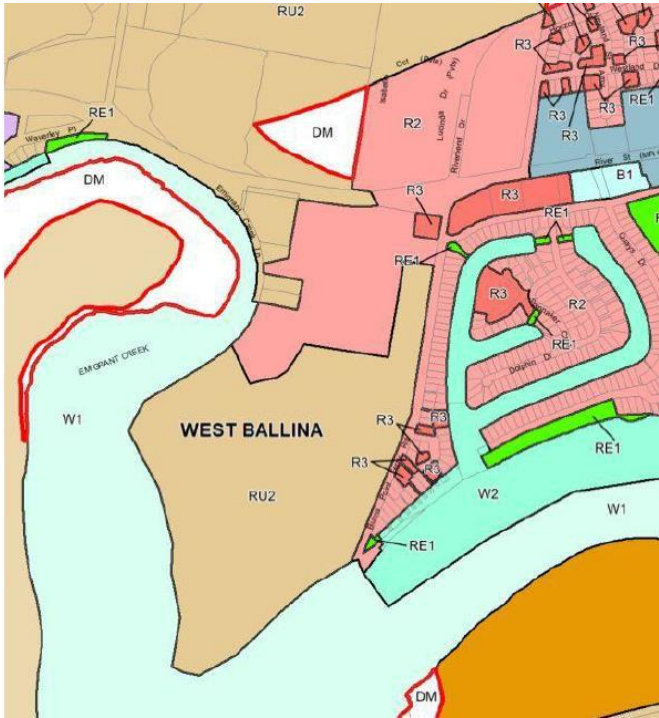


Figure 4 Current zoning map – Current Map Sheet LZN_006A (Source: Council's Planning Proposal)

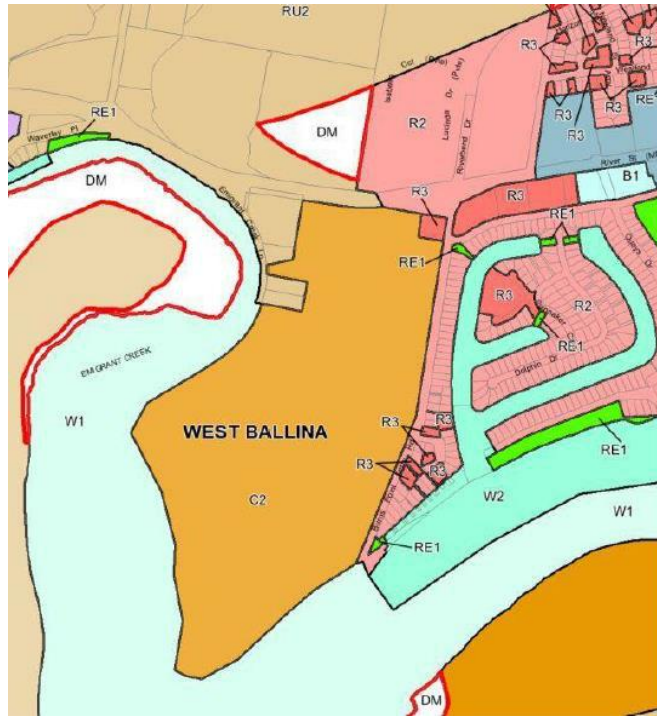


Figure 5 Proposed zoning map – (Source: Council's Planning Proposal)



Figure 6 Current minimum lot size map – Current Map Sheet LSZ_006A (Source: Council's Planning Proposal)

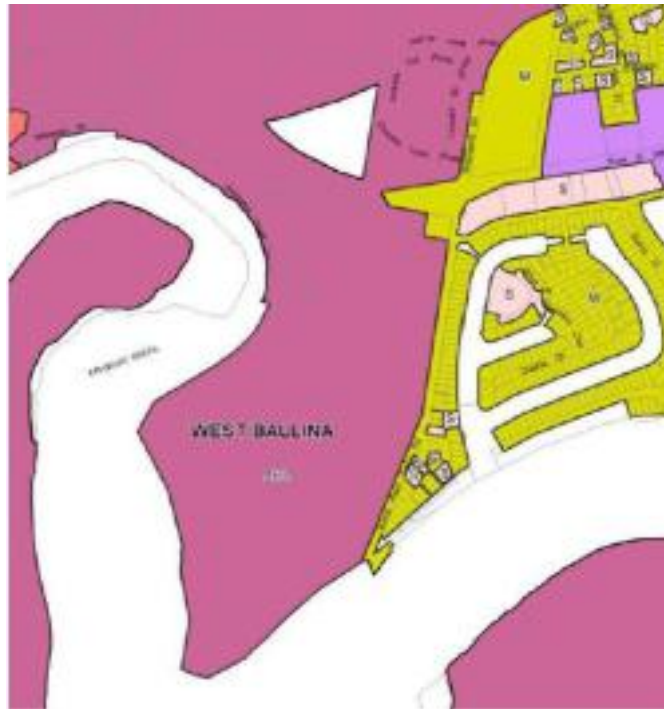


Figure 7 Proposed minimum lot size map (Source: Council's Planning Proposal)



Figure 8 Current floor space ratio map (Source: Ballina LEP 2012)

1.6 Background

The land was rezoned from 1(d) Rural (Urban Investigation) to the current controls (approximately 16ha part R2 Low Density Residential, and the residue part RU2 Rural Landscape) under Ballina LEP 2012 Amendment No. 40 on 25 June 2019. The southern portion of the site (zoned RU2 Rural Landscape) is subject of a BioBanking agreement.

Following the rezoning, two development applications were lodged, DA 2019/233 and DA 2020/192.

DA 2019/233 sought consent for two fill pads, described by Council in its report as “trial fill pads”. The pads are previously discussed in section 1.4 and the location demonstrated in **Figure 3**.

According to Council’s planning proposal, construction works for the pads was commenced without the required Roads Act 1993 approvals (section 138) for access to the site. Council further indicate the pads were placed in alternate locations to those approved under DA 2019/233 consent.

Council has not sought remediation or applied a penalty for these breaches of the development consent.

DA 2020/192 sought consent for a 230-lot manufactured home estate within the R2 zoned portion of the land. The consent further sought fill, civil and landscaping works. **Figure 9** demonstrates vegetation mapping from approved DA (DA2019/233) for the trial fill pads.

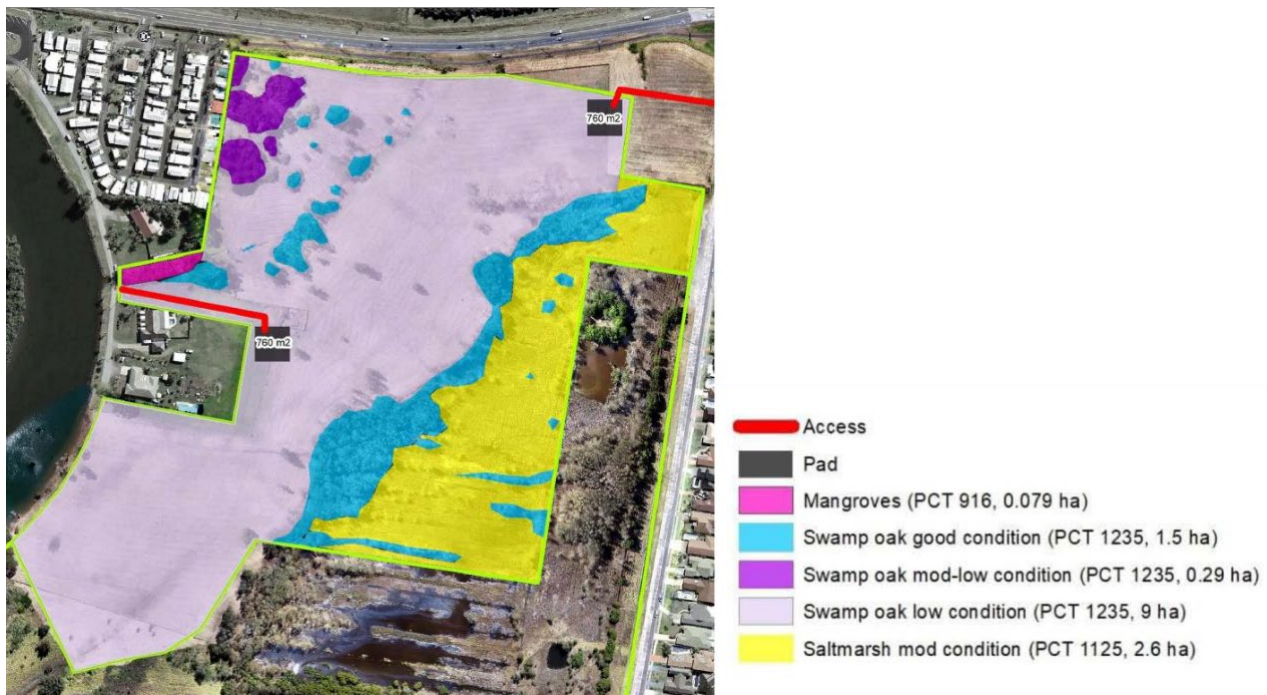


Figure 9 Vegetation mapping from approved DA (DA2019/233) for trial fill pads (Source: Appendix 2 Council’s Planning Proposal)

This application was lodged in June 2020 and a ‘deemed refusal’ appeal was lodged in the Land & Environment Court (L&EC) in September 2020. In November 2021, the development application was refused by the Chief Judge of the L&EC. This determination was based on a number of matters, including:

- Permissibility of the development,
- Precondition to grant of consent under clause 9(1) of the Manufactured Home Estates State Environmental Planning Policies (SEPP),
- Precondition to grant of consent under clause 11(1) of the Coastal Management SEPP,

- Precondition to grant of consent under s 7.16 of the *Biodiversity Conservation Act 2016*.

The judgement outlined that the proposed development was to be carried out partly on land that is excluded land under cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP, being land within the Coastal Wetlands and Littoral Rainforests Area identified under the Coastal Management SEPP (**Figure 10**), on which development for the purposes of a manufactured home estate is not permissible.

It should be noted that 45 former SEPPs have now been consolidated into 11 SEPPs. Under the new SEPP framework, the former Coastal Management SEPP referred to above has now been consolidated into the Resilience and Hazards SEPP. Notwithstanding, the SEPP consolidation program did not seek to amend the operation of any of the SEPPs. As such, the controls remain the same, despite the amended reference. Further, by virtue of section 68 of the *Interpretation Act 1987 No 15* references to former SEPPs (including the Coastal Management SEPP) should be taken to mean a reference to the Coastal Wetland and Littoral Rainforest Area provisions in the Resilience and Hazards SEPP. As such, the Coastal Wetland Area demonstrated in **Figure 10** remains relevant.

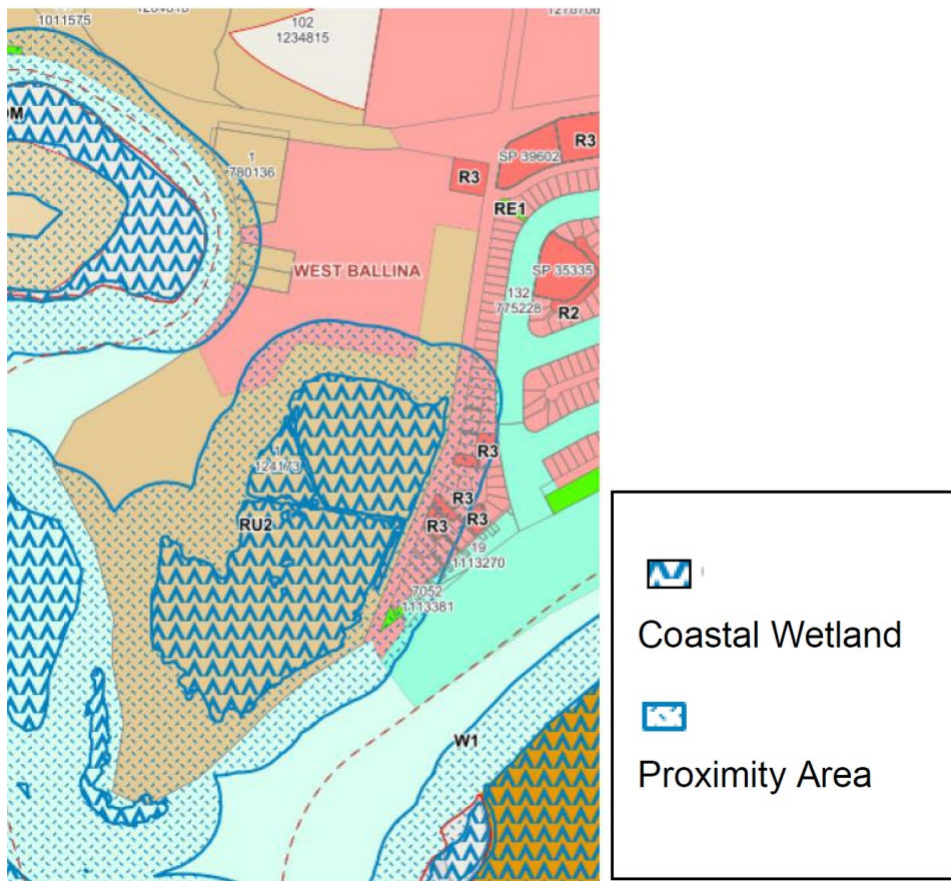


Figure 10 SEPP (Resilience & Hazards) Coastal Wetlands Mapping (Source: Council's Planning Proposal)

Additionally, the L&EC determined that it was not satisfied:

- under clause 9 (1) of the Coastal Management SEPP, that the proposed development on the excluded land would not have an adverse effect on land having special ecological qualities, which the land within the Coastal Wetlands and Littoral Rainforests Area retains;
- under clause 11(1) of the Coastal Management SEPP that the proposed development would not significantly impact on the biophysical, hydrological or ecological integrity of the

adjacent coastal wetland or the quantity or quality of surface and ground water flows to and from the adjacent coastal wetland;

- under s 7.16(2) of the *Biodiversity Conservation Act 2016*, that the proposed development is likely to have serious and irreversible impacts on the biodiversity values present on the site (including directly as a result of development within the R2 Low Density Residential zone and indirectly, to Endangered Ecological Communities (EECs) in the RU2 Rural Landscape zone).

As part of the proceedings, a joint Ecology Report was prepared. This evidence found there was conjecture between joint experts regarding the condition and the type of Plant Community Types. However, the report determined that the whole of the R2 zoned part of the land (the location of the proposed development) contains EECs. **Figure 11** demonstrates one of the joint ecology experts PCT Plots and the suggested PCTs, over BDAR vegetation mapping.

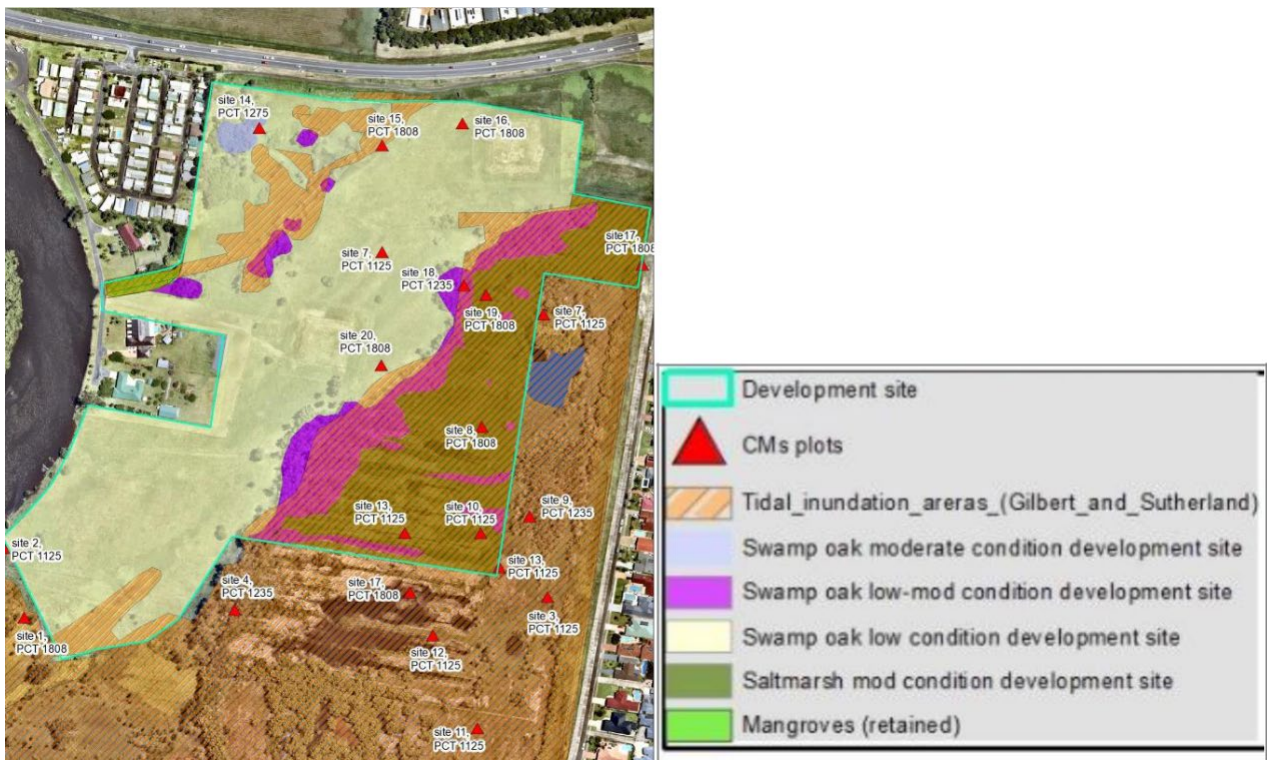


Figure 11 Gilbert and Sutherland tidal intrusion mapping with CM's PCT plots and his suggested PCTs over BDAR vegetation mapping (Source: Appendix 2 of Council's Planning Proposal)

It is understood that since the L&EC judgment, the landowner has prepared additional studies and information to support lodgement of an amended proposal, which reduces the number of lots in the manufactured home estate from the proposed 230 lots (under DA 2020/192), to 148 lots. It is understood that application has not yet however been lodged with Ballina Shire Council.

It is standard Department practice to require the incorporation of a savings clause as part of the Gateway determination for any undetermined development applications. As the development application has not formally been lodged at this stage, this condition has not been included on the Gateway determination. Council has been advised however that, should a development application for the land be lodged prior to the planning proposal being finalised, it is anticipated that a savings provision will be included as part of the finalisation process. Council noted and accepted this outcome. Inclusion of a savings clause at that time would not warrant re-exhibition as it would be consistent with section 30(1)(b) of the Interpretation Act 1987 No 15, which states that the amendment or repeal of an Act or statutory rule does not affect the previous operation of the Act or statutory rule or anything duty suffered, done or commenced under the Act or statutory rule. It is

understood this has the effect that any development application lodged up until the date of the making of the Ballina LEP amendment could still be subject to the provisions of the Ballina LEP as in force at the date of lodgement.

2 Need for the planning proposal

The planning proposal is not the result of a local strategic planning statement, Department approved local housing strategy, employment strategy or strategic study or report. Council indicate that the planning proposal is the result of the L&EC refusal of a development application on the subject land. Council believe that the findings of the court indicate that the site is not suitable for urban use due to the high biodiversity values of the site.

The planning proposal is considered to be the best means of achieving the objectives or intended outcomes.

3 Strategic assessment

3.1 Regional Plan

The proposal is broadly consistent with the North Coast Regional Plan 2036. The proposal has addressed its consistency with the exhibited draft North Coast Regional Plan 2041.

It should be noted that the North Coast Regional Plan 2036 (**Figure 12**) and draft North Coast Regional Plan 2041 (**Figure 13**) both identify the site as being:

- Located within the Urban Growth Area;
- Identified as Investigation Area – Urban Land; and
- Located within the Coastal Strip.

However, as noted by both plans, not all land identified within the urban growth areas can be developed for urban use and these areas will be subject to further investigation to determine the suitability of a proposal on the land.





Figure 12 Urban Growth Area Map for Ballina (Source: North Coast Regional Plan 2036)

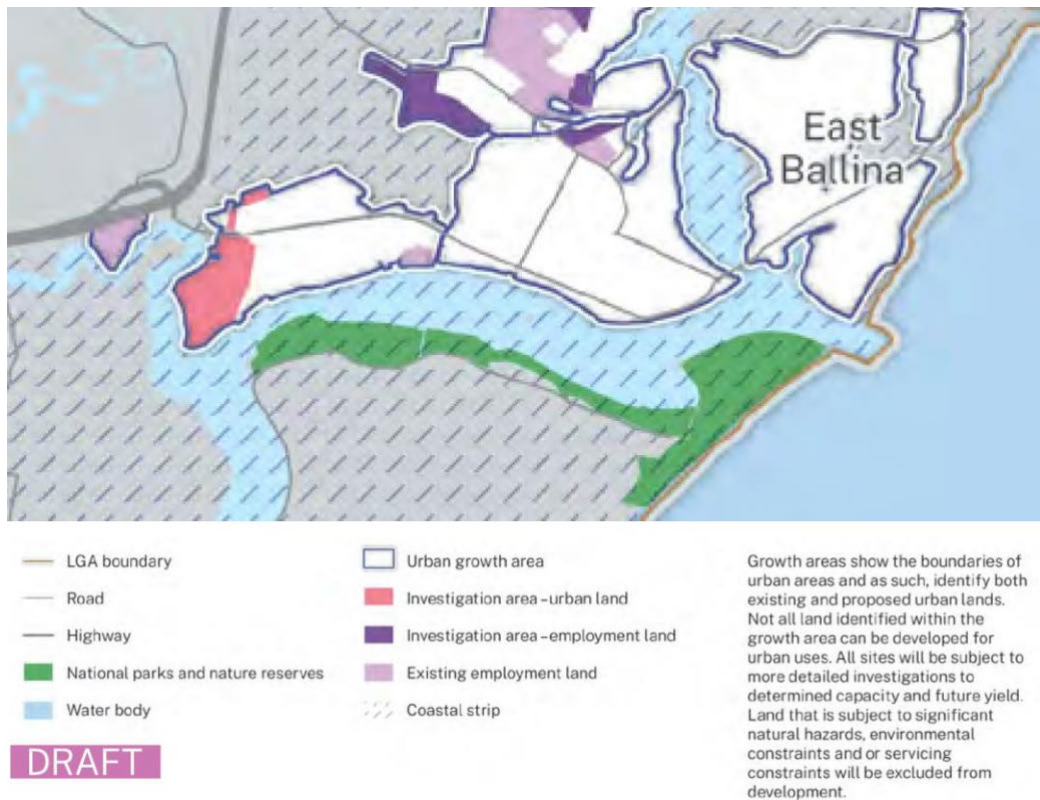


Figure 13 Urban Growth Area Map for Ballina (Source: Draft North Coast Regional Plan 2041)

It is noted that the site is partly mapped potential HEV (**Figure 14**) under the regional plan. As previously mentioned, and demonstrated in **Figure 9 and 11**, the site is identified as having EECs present within the R2 Low Density Residential and RU2 Rural Landscape zone. The site is also partly mapped as Coastal Wetland Area under the Resilience and Hazards SEPP (**Figure 10**). Rezoning the land for conservation purposes is therefore considered to be considered consistent with the regional plan, and in particular Direction 2 Enhance biodiversity, coastal and aquatic habitats, and water catchments.

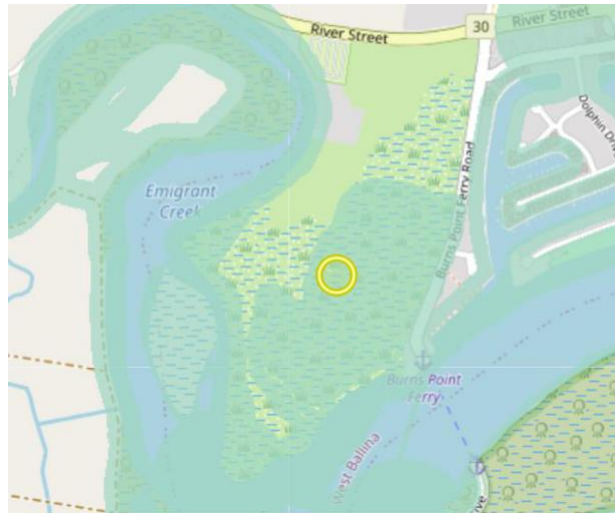


Figure 14 HEV Mapping (Source: North Coast Regional Plan 2036)

3.2 Northern Councils E Zone Review

Final Recommendations

The proposal indicates proposed zones will be implemented in accordance with the Northern Councils E Zone Final Recommendations (E Zone Policy). **Attachment A** of this Report outlines a checklist for consistency with the E Zone Policy and this should be read in conjunction with the information contained below:

3.2.1 Primary Use Test

The E Zone Policy outlines that an C2 Environmental Conservation or C3 Environmental Management zone will only be applied, if the primary use of the land is considered to be environmental conservation or environmental management and the land contains attributes which meet one or more of the criteria for an C2 or C3 zone (outlined in Tables 1 and 2 of the E Zone Policy).

The primary use of the land is the main use for which the land has been used for the last two years and may vary across a particular property depending on the characteristics of the land. This may mean more than one zone is applied to the land.

The primary use is to be identified during the preparation of a planning proposal.

As the site is subject to two separate zones, each with different requirements and considerations in relation to the primary use criteria, the following discussion below is split between the two areas to account for these differences:

RU2 Rural Landscape Zone

The RU2 portion of the site is considered to meet the criteria for a C2 zone as it is partly mapped Coastal Wetlands under SEPP (Resilience and Hazards) (**Figure 10**) and is accepted to contain vegetation communities listed as EECs (see discussion under section 1.6). Further, Council indicate that the land has been identified as providing habitat for a number of key threatened species and contains areas of freshwater wetlands and saline wetlands, which are native vegetation in over-cleared Mitchell landscapes. This portion of the site is also understood to be under a BioBanking agreement.

It is therefore accepted that primary use of the portion of the site under the BioBanking agreement and zoned RU2 Rural Landscape is considered to be environmental conservation.

R2 Low Density Residential Zone

In regard to the R2 Low Density zone, it is noted that there is agreement that the northern part of the site zoned R2 is comprised of EECs (**Figure 9 and 11**). The Chief Judge in the L&EC ruling found that this section of the site is potentially comprised of the following EECs:

- Coastal Saltmarsh EEC to the east and south,
- Freshwater Wetlands EEC grading to the west,
- Swamp Oak Floodplain Forest EEC, depending on the different microhabitats across the site,
- Swamp Oak Floodplain Forest EEC ending in the north-western corner.

The presences of EECs on the site are considered to meet the Table 1 criteria.

Council also indicate that the current R2 zone meets the criteria for an C2 zone on the basis that the site contains areas of freshwater wetlands and saline wetlands, both of which are native vegetation in over-cleared Mitchell landscapes. Finally, Council indicate that the site provides habitat for five threatened species:

- Southern Myotis,
- Black-necked Stork,
- Collared kingfisher,
- Mangrove honeyeater,
- Curlew Sandpiper.

To verify these attributes, Council has relied on the biodiversity field inspections and ground surveys conducted by an appropriately qualified person, as well as the preparation of the Joint Ecological Report, prepared as part of the L&EC proceedings undertaken in 2020. The E Zone Policy specifies that supporting flora and fauna reports will only be acceptable where the fieldwork is not more than five years old. The Joint Report was released as part of the L&EC court orders on 3 November 2021 and indicates that the fieldwork conducted to inform the report was undertaken in February 2021. This is therefore consistent with the requirements of the E Zone Policy.

In regard to the primary use test, Council acknowledges the approval of two trial fill pads within this portion of the land. However, Council notes that the current trial pads have been built illegally in the wrong location and argues these cannot be used to secure primary use.

It is agreed that the illegally constructed fill pads cannot be considered to secure the primary use of land. It is considered however that the yet constructed works approved under DA 2019/233 (which is still a valid consent and can be acted upon) do not constitute the environmental conservation or environmental management of the land as required by the E Zone Policy. As such, it is considered land within the area of the approved fill pads should not be included as part of this proposal at this time. A condition has been included on the Gateway determination requiring Council amend the proposed mapping to maintain the existing controls on the area identified as the trial fill pads pursuant to DA 2019/233 unless landowner agreement to the rezoning of the trial pad areas to E2 Environmental Conservation can be obtained.

Notwithstanding the above, should Council be able to provide further information in the future that demonstrates that the primary use of the subject site is environmental conservation, this issue can be reconsidered.

In regard to the wider R2 zone, Council outline that the landowner slashes within this area. Council concede that no planning approval is required for slashing in the R2 zone. However, Council indicates that the acknowledged presence of EECs within this portion of the site mean that

approval for slashing may be required from the relevant State agency and cannot be considered a determining factor for the purposes of securing primary use.

For this reason, it is considered that consultation is required with the NSW Biodiversity and Conservation Division to further investigate the legality of the slashing on site and to help clarify the current primary use. If it can be proven that approval is not required for the current slashing activities, again these activities do not constitute the environmental conservation or environmental management of the land as required by the E Zone Policy, and if the landowner objects to the proposed Conservation zone, it is likely this land would need to be deferred from the proposal. Council has acknowledged this outcome in discussions with the Department's regional team.

3.3 Local

The proposal states that it is consistent with the following local plans and endorsed strategies. It is also consistent with the strategic direction and objectives, as stated in the table below:

Table 6 Local strategic planning assessment

Local Strategies	Justification
Local Strategic Planning Statement 2020 - 2040	<p>The proposal is broadly consistent with the LSPS healthy environment theme specifically planning priority 14, to focus development to areas of least biodiversity sensitivity and least exposure to natural hazards such as flooding and bush fire.</p> <p>The LSPS identifies the land as “vacant residential land” (Figure 15), consistent with the current zoning of the land. The LSPS identifies Strategic Urban Growth Areas (SUGA), which are identified areas that may be able to accommodate additional potential residential allotments. The LSPS states that there is approximately 118 hectares of undeveloped SUGA land. If all this land is found to be suitable for urban purposes, these SUGA areas have the potential to yield between 890-1228 lots. It should be noted that the subject site is not identified as a SUGA area, however the supply of residential land in the LGA is a wider consideration of this proposal.</p> <p>The LSPS outlines it elaborates on strategies identified in the Ballina Growth Management Study, prepared in 2013 and discussed in further detail below. The LSPS states that in regard to SUGA land, much of this is affected by constraints (flood, bushfire, biodiversity value).</p> <p>As such the LSPS has reduced the potential lot yield per hectare of this land. The Ballina Growth Management Strategy identified a target of 15 lots per hectare. The LSPS estimates yields between 7.5 and 10.4 lots per hectare, however for some land in SUGA, these yields can be between 0 and 4 lots per hectare. The LSPS outlines that there is approximately 20 years of residential land supply in the LGA.</p>
Ballina Growth Management 2013	The Ballina Growth Management Strategy (BGMS) is a local strategy, prepared in 2012 and endorsed by the Department in 2013.

The proposal is not inconsistent with the BGMS, however the following matters are noted:

- The site is located in the West Ballina locality and is identified as having a portion to the north of the site, adjoining the existing caravan park to the north west and River Street to the north, as strategic urban growth area (**Figure 16**).
- As previously stated, the LSPS which has been prepared more recently, has expanded on strategies identified in the BGMS.
- The BGMS identifies that there is potential for physical constraints to expansion on land in West Ballina, including agricultural lands, soft soils and flooding. It is further acknowledged that the area lacks social infrastructure, with residents relying on the town centre for this infrastructure.
- The BGMS identifies that the wider area contains Aboriginal and non-Aboriginal cultural heritage values and/or sites.

It is noted that the trial fill pads, and the location to be retained as R2 Low Density Residential, are largely located within an area that correlates to the SUGA identified in the BGMS.



Figure 15 Location of Vacant Residential Land and Strategic Urban Growth Areas, Ballina (Source: Ballina LSPS)

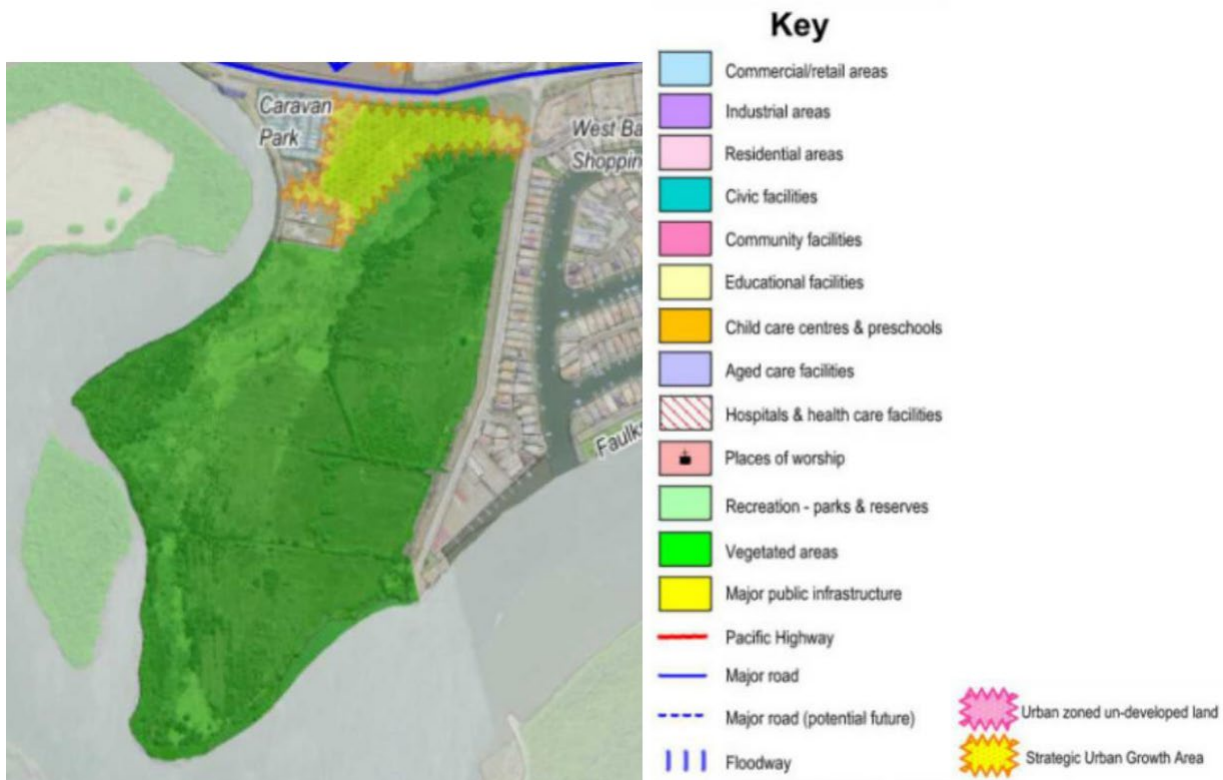


Figure 16 Location of Former Strategic Urban Growth Area (Source: Ballina LGMS 2013)

3.4 Section 9.1 Ministerial Directions

The planning proposal's consistency with relevant section 9.1 Directions is discussed below:

Table 7 9.1 Ministerial Direction assessment

Direction	Consistent/Not Applicable	Reasons for Consistency or Inconsistency
3.4 Application of C2 and C3 Zones and Environmental Overlays in Far North Coast LEPs	Unresolved	<p>In consideration of the introduction of the C2 and C3 zone into the Ballina LEP 2012, this is considered to be appropriate and not inconsistent with the E Zone Policy.</p> <p>In consideration of the application of the C2 zone to the subject site, as discussed above and in Attachment A, a number of matters such as consultation with the landowner, NSW RFS, BCD and DPI to verify the primary use and site attributes of the land is still outstanding. Until this process is completed, this matter cannot be resolved. Therefore, the consistency of the proposal with this direction cannot be determined.</p>

4.1 Flooding	No – Minor Inconsistency	<p>This direction applies as it creates, removes or alters a zone or a provision that affects flood prone land.</p> <p>The site adjoins Emigrant Creek to the north west and south west and Richmond River to the south east.</p> <p>The Richmond River catchment is identified as a high risk catchment according to 2022 NSW Flood Inquiry Report. The Wilsons River catchment, another identified high risk catchment, forms part of the larger Richmond River catchment. This catchment drains to the sea at Ballina, approximately 6km downstream from the subject site.</p> <p>The proposal is inconsistent with the direction as it does not include provisions that give effect to the specified NSW flood policies, manuals and guidelines.</p> <p>This inconsistency is considered to be of minor significance as the proposal reduces the development potential of the site and as Ballina LEP 2012 already contains appropriate flood planning controls.</p> <p>Notwithstanding, it is considered appropriate that BCD and NSW SES be consulted on the proposal.</p>
6.1 Residential Zones	No – Minor Inconsistency	<p>The proposal is inconsistent with this direction as the planning proposal will reduce the consumption of land for housing and associated development on the urban fringe.</p> <p>The inconsistency is considered to be minor as Council have confirmed that the site is unable to be developed, due to biodiversity constraints on the site. Further, Councils LSPS indicates that there is approximately a 20-year land supply identified as part of SUGAs, which is surplus to the potential lots that could be provided on this site. It is considered therefore that the potential loss of yield on this site can be supported elsewhere in the LGA.</p>
6.2 Caravan Parks and Manufactured Home Estates	Yes	<p>Caravan parks will remain permissible within the R2 Low Density Zone, R3 Medium Density, RU2 Rural Landscape, RE1 Public Recreation, RE2 Private Recreation. Manufactured homes are therefore permissible in these zones, where the proposal meets broader requirements of the Housing SEPP.</p>

		It is therefore considered that this proposal is not inconsistent with this direction.
9.2 Rural Lands	No – Minor Inconsistency	<p>The proposal is inconsistent with this direction as it will affect land within an existing or proposed rural or conservation zone (including the alteration of any existing rural or conservation zone boundary).</p> <p>The inconsistency is considered to be minor as the proposal intends to rezone this land to C2 Environmental Conservation to reflect the environmental constraints of the land and which make agriculture on the land unfeasible and better reflects the existing BioBanking agreement that is in place.</p>

It is noted that there is a minor error in Appendix 4 of Council's planning proposal. The table references Ministerial Direction No. 5.3 as Flooding. This Direction is Development Near Regulated Airports and Defence Airfields. It is not considered that the proposal is inconsistent with this direction, however for clarity, it is recommended that the planning proposal be updated to reference the correct direction.

3.5 State environmental planning policies (SEPPs)

The planning proposal is considered to be broadly consistent with all relevant SEPPs. There are considered to be a number of SEPPs that may be relevant to future development on site. These may include, but are not limited to:

- SEPP (Housing) 2021,
- SEPP (Resilience and Hazards) 2021,
- SEPP (Exempt and Complying Development) 2008,
- SEPP (Biodiversity and Conservation) 2021,
- SEPP (Planning Systems) 2021,
- SEPP (Building Sustainability Index: BASIX) 2004.

In regard to the SEPP (Exempt and Complying Development) 2008, it should be noted that development on land that is critical habitat is not complying development for the purposes of any environmental planning instrument under 1.17A of the SEPP. This may be a relevant consideration for any remaining R2 zoned land at a future development stage.

4 Site-specific assessment

4.1 Environmental

The following table provides an assessment of the potential environmental impacts associated with the proposal.

Table 9 Environmental impact assessment

Environmental Impact	Assessment
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Biodiversity	<p>The proposal seeks to include the C2 Environmental Conservation and C3 Environmental Management zones into the Ballina LEP 2012. Council proposes to include some uses in these land use tables which are either not included in the Standard Instrument LEP or identified in the LEP Practice Note PN09-002, which is relevant to the introduction of environment zones. BCD should be consulted on the suitability of these land use tables.</p> <p>Additionally, the proposal, as amended by the Department's recommendations, will alter the land use zone for the subject site to part C2 Environmental Conservation, part R2 Low Density Residential. Given the presence of HEV land, EECs, threatened species habitat, mapped coastal wetlands and native vegetation in over-cleared, BCD should also be consulted.</p> <p>Additionally, as an existing BioBanking agreement remains in place for part of the site, it is considered the agency responsible for managing this agreement, the Biodiversity Conservation Trust, should be consulted on the proposal.</p> <p>Finally, as the site adjoins Emigrant Creek and Richmond River, both of which are identified as Key Fish Habitat on the Fisheries NSW Spatial Data Portal, DPI Fisheries should be consulted on the proposal.</p>
Flooding	<p>The site is affected by flooding. The proposal will result in a reduction in the number of dwellings permissible on the site, which is considered to reduce the overall risk to life and property on this site.</p> <p>Notwithstanding, there is still potential for three potential dwellings on the site. As such, it is considered that NSW SES and BCD Flooding should be consulted on the proposal.</p>
Rural Land	<p>The proposal will rezone land currently zoned RU2 Rural Landscape to C2 Environmental Conservation. The impact of this is considered to very minor as extensive agriculture has been included as a use permitted with consent in the C2 zone. Further, the land is not classified as important farmland.</p> <p>Moreover, the land subject of the RU2 zone is under a BioBanking agreement, so any current operation of the land for the purposes of agriculture are considered highly unlikely.</p> <p>Notwithstanding, it is considered appropriate that Council consult with DPI Agriculture as part of its agency consultation process.</p>
Aboriginal Cultural Heritage	<p>In its planning proposal, Council do not identify whether the site contains any Aboriginal objects or Aboriginal places or landscapes. Notwithstanding, the BGMS does identify that the wider West Ballina area contains Aboriginal cultural heritage values.</p> <p>Whilst it is considered that the C2 Environmental Conservation zone will afford additional protections to any significant objects, places or landscapes within the site boundary, it is considered appropriate that Heritage NSW and Jali LALC are consulted by Council as part of its agency consultation process.</p>
Bushfire	<p>The site is not identified as bushfire prone land, however the proposal may result in a potential bushfire hazard as the proposed changes may result in large tracts of vegetated land in proximity of existing and future residential dwellings. As such, it is considered NSW RFS should be consulted on the proposal, to provide comment and any requirements for future development on the site.</p>

4.2 Social and economic

The following table provides an assessment of the potential social and economic impacts associated with the proposal.

Table 10 Social and economic impact assessment

Social and Economic Impact	Assessment
Acquisition of Land	<p>In applying a C2 zone, the Department's LEP Practice Note for Environmental Protection Zones outlines that Councils should be aware that uses should not be drawn too restrictively as they may, depending on circumstances, invoke the Land Acquisition (Just Terms Compensation) Act 1991 and the need for the Minister to designate a relevant acquiring authority.</p> <p>Generally, an acquisition authority for E2 land would not be identified unless the land is expressly set aside for a public purpose under section 26(1)(c) of the <i>Environmental Planning and Assessment Act 1979</i>, e.g. as public open space or a public reserve. This land is not to be expressly set aside for a public purpose according to this planning proposal.</p> <p>However, depending on circumstances, if the permitted uses are considered to be drawn too restrictively, a relevant acquiring authority may need to be designated.</p> <p>Whilst it is noted that the application of the C2 zone and the increase of the minimum lot size to 40ha to a majority of the site will reduce the overall lot yield, there is still development potential in the form of dwelling houses for land zoned C2. Additionally, dwelling houses will continue to be permissible on the proposed R2 zoned land.</p> <p>In this regard, it is not considered that uses have been drawn too restrictively for the Department to consider at this stage to appoint a relevant acquiring authority.</p> <p>Notwithstanding, this may need to be revisited throughout the course of this planning proposal, depending upon the outcome of exhibition and any resulting amendments to the proposal.</p>

Housing Supply

Whilst the proposal will result in a reduction in the lot yield of this particular parcel, it is noted that Council has identified that there is a 20 year supply of existing zoned residential land, with additional residential investigation land with the SUGAs.

Additionally, the subject site will still provide for some dwelling yield, albeit at a more restricted and controlled number than allowed by the current controls.

It is considered that whilst this may have an immediate impact on the amount of housing that can be provided on the site, the loss of this residentially zoned land will not materially affect Ballina Shire Councils wider housing delivery targets over the next 20 years.

4.3 Infrastructure

The proposal is not expected to create a need for additional public infrastructure.

It should be noted that the proposed R2 zoned land portions do not have frontage to River Street, due to the location of the approved trial fill pads under DA 2019/233. Access to these trial fill pads is shown as being approved from Burns Point Ferry Road and Emigrant Creek Lane, subject to section 138 Approvals. It is noted that this access is only provided for construction of the trial fill pads and the approval under DA 2019/233 does not given consent for the use of the fill pads beyond trialling construction techniques to support residential development, which would need to be sought under separate consent.

Based on this, it is considered that further consent would be required in order for any land subject of this proposal to be constructed upon. It is further noted that Council intends to include roads as a use permitted with consent in the C2 Environmental Conservation zone.

Based on this, it is considered that alternate access may be able to be provided to the R2 zoned land, and this could be a matter resolved at a future stage of development, either through subdivision or creation of an easement under section 88B of the *Conveyancing Act 1919*.

5 Consultation

5.1 Community

Council does not identify a community consultation period, and only outlines that the proposal will be exhibited in accordance with the Gateway determination.

Given Council is currently preparing to exhibit a similar proposal (PP-2021-456), which proposes to introduce a C2 and C3 zone into the Ballina LEP 2012 and rezone a number of properties across the LGA, it is considered appropriate that Council align the period of consultation for both proposals, to ensure consistency.

As such it is considered appropriate that public exhibition be undertaken for a period of 28 days. This recommendation forms part of the recommended conditions of the Gateway determination.

5.2 Agencies

It is recommended the following agencies be consulted on the planning proposal and given 30 days to comment:

- Department of Primary Industries – Agriculture,
- Department of Primary Industries – Fisheries,
- NSW Rural Fire Service,

- Heritage NSW,
- Jali Local Aboriginal Land Council,
- Biodiversity Conservation Division,
- NSW State Emergency Service,
- Biodiversity Conservation Trust.

6 Timeframe

Council proposes a four month time frame to complete the LEP.

The Department recommends a time frame of six months to ensure it is completed in line with its commitment to reduce processing times and ensure appropriate consultation can be undertaken with the landowner, the community and relevant government agencies.

A condition to the above effect is recommended in the Gateway determination.

7 Local plan-making authority

Council has not requested delegation to be the Local Plan Making Authority.

Consistent with the former Secretary's letter to Ballina Council of 1 March 2016, which specified plan making delegations, an authorisation to act as the Local Plan-Making authority is not to be issued where a planning proposal seeks to apply an E Zone to land. This is to ensure a consistent approach to the finalisation of rezoning decisions consistent with the E Zone Review Final Recommendations Report. It is recommended that Council is not authorised to act as the Local Plan-Making authority.

8 Assessment summary

The planning proposal is supported to proceed with conditions for the following reasons:

- The proposal is broadly consistent with the North Coast Regional Plan 2036,
- The proposal is broadly consistent with the draft North Coast Regional Plan 2041,
- The proposal is broadly consistent with Council's Local Strategic Planning Statement and the Ballina Local Growth Management Strategy,
- The proposal will implement the Final Recommendations of the Northern Councils E Zone Review.

9 Recommendation

It is recommended the delegate of the Secretary:

- Agree that any inconsistencies with section 9.1 Directions 4.1 Flooding, 6.1 Residential Zones, 9.2 Rural Lands are minor or justified, and
- Note that the consistency with section 9.1 Direction 3.4 Application of C2 and C3 Zones and Environmental Overlays in Far North Coast LEPs is unresolved and will require further justification.

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

1. The planning proposal is to be amended prior to consultation to:
 - utilise one consistent property description
 - include all the proposed changes within the explanation of provisions

- retain the existing R2 Low Density Residential zone and minimum lot size for the area approved for trial fill pads under DA 2019/233, as the primary use of the land is not for environmental management or conservation, unless land owner agreement for the proposed change can be obtained
 - remove the proposed change to clause 4.1C, as rural workers dwelling is not a use sought to be permitted in the C3 Zone land use table.
 - correctly orientate the proposed minimum lot size map
 - remove the reference to the Building Height Allowance map in Part 4 Mapping
 - include current and proposed FSR maps
 - correctly reference section 9.1 Ministerial Direction 5.3 from 'Flooding' to 'Development Near Regulated Airports and Defence Airfields'.
2. Consultation is required with the following public authorities:
 - Department of Primary Industries – Agriculture,
 - Department of Primary Industries – Fisheries,
 - NSW Rural Fire Service,
 - Heritage NSW,
 - Jali Local Aboriginal Land Council,
 - Biodiversity Conservation Division,
 - NSW State Emergency Service,
 - Biodiversity Conservation Trust.
 3. The planning proposal should be made available for community consultation for a minimum of 28 days.
 4. The timeframe for completing the LEP is to be six months from the date of the Gateway determination.
 5. Given the nature of the proposal, Council should not be authorised to be the local plan-making authority.



29/11/22

 (Signature)

 (Date)

Craig Diss

Manager, Local and Regional Planning, Northern Region



9/12/2022

 (Signature)

 (Date)

Jeremy Gray

Director, Northern Region



15/12/22 (Date)

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