



IRF22/354

Gateway determination report – PP-2022-315

Subdivision and Dwelling Permissibility Amendments
to Ballina LEP 1987

February 22



Published by NSW Department of Planning and Environment

dpie.nsw.gov.au

Title: Gateway determination report – PP-2022-315

Subtitle: Subdivision and Dwelling Permissibility Amendments to Ballina LEP 1987

© State of New South Wales through Department of Planning and Environment 2022. You may copy, distribute, display, download and otherwise freely deal with this publication for any purpose, provided that you attribute the Department of Planning and Environment as the owner. However, you must obtain permission if you wish to charge others for access to the publication (other than at cost); include the publication in advertising or a product for sale; modify the publication; or republish the publication on a website. You may freely link to the publication on a departmental website.

Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (February 22) and may not be accurate, current or complete. The State of New South Wales (including the NSW Department of Planning and Environment), the author and the publisher take no responsibility, and will accept no liability, for the accuracy, currency, reliability or correctness of any information included in the document (including material provided by third parties). Readers should make their own inquiries and rely on their own advice when making decisions related to material contained in this publication.

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 and objectives of planning proposal	1
1.2	Explanation of provisions	2
1.3	Site description and surrounding area.....	2
1.4	Mapping.....	4
2	Need for the planning proposal	4six
3	Strategic assessment	6
3.1	Regional Plan	6
3.2	District Plan [If relevant]	Error! Bookmark not defined.
3.3	Local.....	7
3.4	Local planning panel (LPP) recommendation.....	Error! Bookmark not defined.
3.5	Section 9.1 Ministerial Directions	7
3.6	State environmental planning policies (SEPPs)	9
4	Site-specific assessment	9
4.1	Environmental.....	9
4.2	Social and economic.....	9
4.3	Infrastructure	9
5	Consultation	9
5.1	Community	9
5.2	Agencies.....	10
6	Timeframe	10
7	Local plan-making authority	10
8	Assessment Summary	10
9	Recommendation	10

Table 1 Reports and plans supporting the proposal

Relevant reports and plans
BSCPP 21 006 Planning Proposal (Gateway)
BSCPP 21 006 – Letter to DPE requesting Gateway determination
Attachment 4 – Evaluation Criteria for Authorising Council to make the LEP

1 Planning proposal

1.1 Overview

Table 2 Planning proposal details

LGA	Ballina Shire Local Government Area
PPA	Ballina Shire Council
NAME	Subdivision and Dwelling Permissibility Amendments to Ballina LEP 1987
NUMBER	PP-2022-315
LEP TO BE AMENDED	Ballina Local Environmental Plan 1987
ADDRESS	Whole of LGA and Lot 1 McLeans Ridge Road Wollongbar
DESCRIPTION	Lot 1 DP 238911
RECEIVED	28/01/2022
FILE NO.	IRF22/354
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 planning proposal contains objectives and intended outcomes that adequately explain the intent of the proposal.

The objectives of the planning proposal are to:

- include additional subdivision provisions that provide flexibility in relation to certain minor boundary adjustment subdivisions, or subdivisions involving land containing more than one zone (in keeping with existing controls contained in Ballina LEP 2012);
- Amend clause 12 to include additional subclauses to clarify criteria relating to the permissibility of replacement dwelling houses in rural and environmental zones (in keeping with existing controls contained in Ballina LEP 2012);
- Reinstate an historic dwelling entitlement for a property at McLeans Ridge (Lot 1 DP 238911).

The objectives of this planning proposal are clear and adequate.

1.3 Explanation of provisions

The planning proposal contains an explanation of provisions that adequately explains how the objectives of the proposal will be achieved.

It should be noted that Council's explanation of provisions includes examples of the proposed clauses. Given the proposed amendments to subclauses contained in clauses 11A, 11B and 12 are taken directly from Ballina LEP 2012, it is unlikely that major changes will result to these clauses at the time of legal drafting. As such it is appropriate in this circumstance for these proposed clauses to remain for the purposes of exhibition.

In contrast, it is noted that proposed clause 34B relating to Development of land at McLeans Ridges Road, Wollongbar states that a dwelling house may, with the consent of Council, be erected on Lot 1 DP 238911.

As stated above, a dwelling-house is already permissible on part of Lot 1 DP 238911 zoned 9(a) Roads (Main Roads Proposed). A subsequent discussion with Council during the assessment of the proposal indicated that the intention of the inclusion of the entire lot in proposed clause 34B was to ensure it was clear that the entire Lot, regardless of zone, retained a dwelling entitlement, pursuant to the subdivision approved in 1969. This is considered appropriate.

Notwithstanding, to allow flexibility at the legal drafting stage, it is considered appropriate that the planning proposal be amended to outline that proposed clauses may be subject to change at the time of legal drafting.

1.4 Site description and surrounding area

Proposed amendments to the Ballina LEP 1987 relating to clauses 11A, 11B and subclause 12(5) and (6) apply to the whole LGA.

Proposed clause 34B Development of Land at McLeans Ridges Road, Wollongbar relates specifically to Lot 1 DP 238911.

Lot 1 DP 238911 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. It is recommended that consultation be undertaken with this agency as part of this proposal.

The site is zoned part 7(c) Environmental Protection (Water Catchment) and part 9(a) Roads (Main Roads Proposed) (**Figure 2**) under Ballina LEP 1987.

The site is identified as bushfire prone land (**Figure 3**) and as such will require consultation with RFS. This is discussed in greater detail below. Additionally, the site is identified as State Significant Farmland (**Figure 4**) and Biophysical Strategic Agricultural Land (**Figure 5**) under the North Coast Regional Plan 2036. The planning proposal is silent on the discussion of these features of the site.

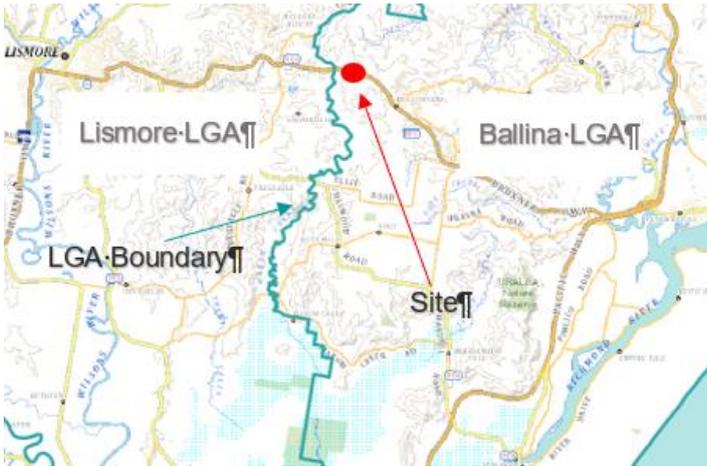


Figure 1 Site Context (source: NSW Spatial Viewer)



Figure 2 Lot 1 DP 238911 Land Zoning



Figure 3 Bushfire Prone Land Mapping



Figure 4 State Significant Farmland



Figure 5 Biophysical Strategic Agricultural Land

1.5 Mapping

There are no changes proposed to existing maps resulting from this proposal.

2 Need for the planning proposal

The planning proposal is not the result of an assured local strategic planning statement, or Department approved local housing strategy, employment strategy or strategic study or report.

The amendments are sought to the Ballina LEP 1987 on the basis that Ballina LEP 1987 continues to apply to deferred matter areas under the Ballina LEP 2012. Ballina Shire Council are continuing to integrate some deferred matters into the Ballina LEP 2012, with planning proposal/s currently being prepared.

Notwithstanding, this is being undertaken as a staged process and the proposed changes to the Ballina LEP 1987 instrument will assist during the interim phase.

Therefore, the planning proposal seeks to amend the Ballina LEP 1987 per the changes below.

Boundary Adjustment and Split Zone Subdivision

The proposal outlines an intention to include additional provisions in the Ballina LEP 1987, which would facilitate greater flexibility to approve adjustments between two lots that are already below the minimum lot size standard, or subdivision involving land characterised by more than one zone where residual lots are below the minimum lot size.

A large majority of lots within the Ballina Shire Council subject to an environmental protection zone under Ballina LEP 1987 are below the minimum size specified in clause 11 of the Plan. In other cases, there are areas where an environmental protection zone applies to part of the land, with another zone applying to the remainder.

Council outline that a number of applications for subdivision proposals in both cases have been received and both are beneficial in regard to creating more logical property boundaries or providing opportunities to enhance environmental protections and reduce opportunities for land use conflict.

Notwithstanding, Ballina LEP 1987 does not permit the creation of residual lots for environmental purposes, where the lot area is not at least 90 per cent of the minimum standard, and this has become a major issue since the Department revoked the former SEPP 1 – Development Standards that could facilitate these types of proposals.

Provisions providing more flexibility in these cases, allowing for an assessment of the proposal on the merits of the application, have been introduced as part of the Standard Instrument LEP controls and Ballina LEP 2012 provides zoning flexibility in these circumstances.

The intent of the proposal is to introduce provisions applicable to the Ballina LEP 2012 into Ballina LEP 1987, to allow for broader consideration in these cases and achieve consistency between the two instruments.

Proposed clauses, 11A Exceptions to minimum subdivision lot size for lot boundary adjustments and 11B Exceptions to minimum lot sizes for split zones, align with clause 4.2B and 4.2C of the Ballina LEP 2012.

Replacement Dwellings in Rural and Environmental Protection Zones

Under the Ballina LEP 1987, clause 12 applies to a number of zones within the deferred areas within which the Plan continues to apply and outlines the requirements for the permissibility of dwelling houses within relevant rural and environmental protection zones.

Broadly, the clause allows for a dwelling house to be erected on land to which clause 12 applies, that is vacant land that meets the minimum lot area, or where a 'dwelling entitlement' exists on the land.

Historically, Council have approved replacement dwellings on the basis that any existing dwelling would be removed or otherwise decommissioned (e.g. converted in manner that renders the dwelling uninhabitable and demonstrated as part of a development application package or required per the conditions of consent issued for the replacement dwelling).

Notwithstanding, a recent judgement in the Land and Environment Court (*White v Ballina Shire Council* [2021] NSWLEC 1468) has brought into question the ability to approve replacement dwellings under clause 12. As such, it is appropriate to include additional subclauses to clarify the permissibility of approving a replacement dwelling on land, in the event the existing dwelling is decommissioned or demolished.

The clauses proposed to be included are in keeping with clauses 4.2A(4)(b) and (c) and 4.2(5) of the Ballina LEP 2012 and achieve consistency between the two instruments.

Reinstated Dwelling Entitlement

Lot 1 DP 238911, McLeans Road Wollongbar was created in 1969 as part of a 10-lot subdivision. The approval was issued under the Shire of Tintenbar Interim Development Order No. 1.

Lot 1 remains vacant, despite dwellings being constructed on all other lots created as a result of the original subdivision.

The land is zoned part 7(c) Environmental Protection (Water Catchment) and part 9(a) Roads (Main Roads Proposed) and under the current provisions of clause 12 of the Ballina LEP 1987, Council cannot consent to a dwelling house within part of the lot zoned 7(c), as the lot is undersized, is not an existing holding and the subdivision was approved prior to the commencement of Ballina LEP 1987.

'Dwelling-houses' are permissible in the 9(a) zone, however Council have indicated that approval of a dwelling in that part of the site could prejudice future planning for upgrades of the Bruxner Highway.

Clause 12 of the Ballina LEP 1987 contained a provision prior to 2009, which permitted Council to approve dwelling-houses on rural and environmental protection land where a lot was lawfully created prior to the commencement of Ballina LEP 1987. However, this was amended as a result of Council resolution on 26 June 2008 which aimed to clarify circumstances in which a lot zoned rural and environmental under the Plan enjoyed a dwelling entitlement, due to difficulty in interpreting the clause as highlighted by court cases at the time.

Additionally, Council resolved to include a schedule of lots under the new Shire-wide comprehensive LEP, which eventually became the Ballina LEP 2012, to maintain dwelling entitlements on these lots. However, Lot 1 DP 238911 was not included on this schedule as the land is a deferred matter under Ballina LEP 2012.

It is therefore proposed to include a new provision in Ballina LEP 1987 to permit with consent in the 7(c) Environmental Protection (Water Catchment) a dwelling-house on Lot 1 DP 238911 to reinstate the dwelling entitlement under this Plan.

The planning proposal is the best means of achieving the objectives or intended outcomes. The planning proposal will provide more flexibility when applying the provisions of the Ballina LEP 1987 to deferred matters under the Ballina LEP 2012 and will bring more consistency between the two instruments, whilst further work is undertaken to amend the Ballina LEP 2012 to address the outstanding deferred matters.

3 Strategic assessment

3.1 Regional Plan

The proposal is considered broadly consistent with the North Coast Regional Plan 2036 and relates specifically to incorporating existing controls from the Ballina LEP 2012 into Ballina LEP 1987 to achieve more flexibility and consistency between the two instruments when dealing with proposals containing split zoned land or requiring minor boundary adjustments, replacement dwellings on deferred matter lands and recognising a historic dwelling entitlement.

Notwithstanding, it is noted that the planning proposal addresses the Far North Coast Regional Strategy, which has been superseded by the North Coast Regional Plan 2036. A condition has been included requiring amendment of the planning proposal to reference the current strategic planning document relevant to the proposal.

3.2 Local

Council have identified that the proposal is consistent with the Ballina Local Strategic Planning Statement 2020 Healthy Environment Theme.

The proposal will provide for consistency between the two instruments applying to lands within the Ballina LGA and facilitate appropriate development outcomes and orderly application of provisions as an interim measure. The proposal is considered broadly consistent with the LSPS.

3.3 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

Directions	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
1.5 Rural Lands	No - Justifiable Inconsistent	<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 Council's adopted policy and past practices.</p>

2.1 Environmental Protection Zones	No - Justifiable Inconsistent	<p>This planning proposal is inconsistent with this direction as, being LGA 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>
2.3 Heritage Conservation	No - Justifiable Inconsistent	<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>
4.1 Acid Sulfate Soils	No - Justifiable Inconsistent	<p>The planning proposal is inconsistent with this direction as, being LGA wide, it potentially applies to land having a probability of containing acid sulfate soils and is unable to satisfy all requirements of the direction. 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>
4.4 Planning for Bushfire Protection	Unresolved	<p>The planning proposal is potentially inconsistent with this direction as, being LGA wide, the proposal impacts bushfire prone land. Further, Lot 1 DP 238911 is also identified as bush fire prone. 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. Until this consultation has occurred the inconsistency with the direction is unresolved.</p>

3.4 State environmental planning policies (SEPPs)

The planning proposal is consistent with all relevant SEPPs. A number of SEPPs will be relevant to future subdivision or development proposals as a result of the proposed amendments and will be required to be addressed at future stages.

4 Site-specific assessment

4.1 Environmental

The potential environmental impacts associated with the proposal are broadly considered to have a positive impact, given the controls allow for flexibility when considering split zoned sites and boundary adjustments and will permit minor subdivisions of land to enable better land management between environmentally zoned land and other zones. Additionally, the proposed controls for inclusion in the Ballina LEP 1987 have been formally established under the Ballina LEP 2012 and allow for consistency between the two instruments.

The replacement of dwelling houses on a site, following the demolition or decommissioning of an existing dwelling house, is in keeping with the existing controls contained in the Ballina LEP 2012, which recognises this particular circumstance. Further, it is considered that any environmental impacts specific to the construction of a new dwelling can be managed at the time of the application for development.

4.2 Social and economic

The potential social and economic impacts associated with the proposal are broadly considered to have a positive impact, given the controls, as previously mentioned, allow for flexibility when considering split zoned sites and boundary adjustments and will permit minor subdivisions of land to enable better land management. Additionally, the proposed controls for inclusion in the Ballina LEP 1987 have been formally established under the Ballina LEP 2012 and allow for consistency between the two instruments.

It is considered that the impact of the proposed dwelling entitlement on Lot 1 in regard to land use conflict and fragmentation is minor and can be appropriately considered and managed at the development application stage.

4.3 Infrastructure

Access to Lot 1 is currently provided from McLeans Ridges Road. The road is a sealed, local road, which gains access from Bruxner Highway. It is not envisaged that the proposal will result in an increase in traffic that will materially affect the operation of the Bruxner Highway. Notwithstanding, consultation with Transport for NSW is recommended as part of this proposal.

The proposal is unlikely to generate the need for additional services. The lot is not serviced and is likely to require onsite sewage management. This can be adequately be considered by Council at the development application stage.

5 Consultation

5.1 Community

Council outlines that community consultation will be undertaken in accordance with the Gateway determination.

It is considered appropriate that public exhibition be undertaken for a period of 14 days. This recommendation forms part of the recommended conditions of the Gateway determination.

5.2 Agencies

The proposal does not specifically raise which agencies will be consulted.

It is recommended the following agencies be consulted on the planning proposal and given 30 days to comment, in accordance with the Local Environmental Plan Making Guideline:

- Transport for NSW
- NSW Rural Fire Service

6 Timeframe

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

Council's proposed time frame is considered appropriate and in line with the Department's commitment to reduce processing times. It is recommended that if the gateway is supported it also includes conditions requiring council to exhibit and report on the proposal by specified milestone dates.

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

7 Local plan-making authority

Council has advised that it would like to exercise its functions as a Local Plan-Making authority.

As the proposal primarily seeks to only provide greater flexibility in planning controls to align with Ballina LEP 2012 and to deal with some minor local matters, this is considered appropriate.

8 Assessment summary

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

- The amendments will allow for existing clauses in the Ballina LEP 2012 to be applied consistently across the LGA, regardless of the instrument that applies to the land,
- The amendments are broadly consistent with the North Coast Regional Plan 2036,
- The amendments are broadly supported by the Ballina Local Strategic Planning Statement 2020.

As discussed in the previous sections 4 and 5, the proposal should be updated to:

- Identify that final clauses will be subject to Parliamentary Counsel as part of the legal drafting process,
- Reference the North Coast Regional Plan 2036 as the current strategic planning document applying to the LGA.

9 Recommendation

It is recommended the delegate of the Secretary:

- Agree that any inconsistencies with section 9.1 Directions 1.5 Rural Lands, 2.1 Environmental Protection Zones, 2.3 Heritage Conservation, 4.1 Acid Sulfate Soils, 4.3 Flooding are minor or justified; and

- Note that the consistency with section 9.1 Direction 4.4 Planning for Bushfire Protection is unresolved and will require 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 updated to:
 - Identify that final clauses will be subject to Parliamentary Counsel as part of the legal drafting process,
 - Reference the North Coast Regional Plan 2036 as the current strategic planning document applying to the LGA.
2. Consultation is required with the following public authorities:
 - Transport for NSW
 - NSW Rural Fire Service
3. The planning proposal should be made available for community consultation for a minimum of 14 days.
4. The planning proposal must be exhibited within two months from the date of the Gateway determination.
5. The planning proposal must be reported to council for a final recommendation four months from the date of the Gateway determination.
6. The timeframe for completing the LEP is to be six months from the date of the Gateway determination.
7. Given the nature of the proposal, Council should be authorised to be the local plan-making authority.



11/2/2022

_____ (Signature)

_____ (Date)

Craig Diss

Manager, Northern Region



11/2/2022

_____ (Signature)

_____ (Date)

Jeremy Gray

Director, Northern Region

Assessment officer

Ella Wilkinson

Senior Planner, Northern Region

9995 5665