

Northern Councils E Zone Review Final Recommendations Report

A new approach to North Coast environmental zones

EDO NSW Briefing Note - December 2015

This briefing note outlines the NSW Government's changes to the way that councils can set land aside for environmental conservation and management in the Far North Coast of NSW as set out in the [Northern Councils E Zone Review Final Recommendations Report \(Final Recommendations\)](#).

EDO NSW's comments are based on our extensive experience as an independent, not-for-profit community legal centre specialising in public interest environmental law. EDO NSW will continue to engage in the future implementation of these reforms.

1. **Background**
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1. Background

The NSW Minister for Planning has announced key changes to the way that councils can set land aside for environmental conservation and management on the Far North Coast of NSW. This announcement is the latest development in a three-year review of the way that environmental zones (**E zones**), which include E2 (environmental conservation), E3 (environmental management) and E4 (environmental living), as well as environmental overlays in Local Environmental Plans (**LEPs**), are applied by councils on the Far North Coast.

As part of the review, the Government released an interim report in May 2014 that was publicly exhibited – see our [submission](#).

E zones provide fundamental protection for thousands of hectares of forests, wetlands and wildlife habitats on Far North Coast, the most biologically diverse region in NSW.¹ They do this by setting core objectives for the purpose of the land and restricting certain land uses in the E zone. The importance of E zones has been acknowledged in the Courts.²

The Final Recommendations water down the ability of Ballina, Byron, Kyogle, Lismore and Tweed Shire Councils to zone land for environmental conservation (**E2**) and

¹ Office of Environment & Heritage: <http://www.environment.nsw.gov.au/biodiversity/regconsplans.htm>

² See for example, *Ryan v The Minister for Planning* [2015] NSWLEC 88 at 150.

environmental management (E3) under their LEPs. These changes are significant for the Far North Coast environment, but they carry broader State-wide implications and reveal a different approach to strategic planning and zoning based on the current primary use of land.

2. The new process for E2 and E3 zoning

- 1) *Primary use of the land must be environmental conservation (E2) or environmental management (E3)*

Far North Coast councils are first required to consider the 'primary use' of the land before weighing the ecological evidence needed to verify that an area is suitable for environmental zoning. An E2 or E3 zone can only be applied to land with a primary use of environmental conservation or environmental management for the preceding 2 years. The 'primary use' of the land is the first consideration when making zoning decisions and is to be determined by the council.

- 2) *The land must meet the E zone criteria and this must be verified*

The presence of significant environmental values is to be assessed in accordance with specific criteria detailed in the [Northern Councils E Zone Review Final Recommendations Report](#). Land can only qualify for an E zone if it is home to the specified E2 or E3 zone criteria, such as listed littoral rainforests, listed coastal wetlands, listed endangered ecological communities, vegetation that has been over-cleared, or is a place of cultural significance to the local Aboriginal community.

These attributes must be verified to meet the E zone criteria through tests such as flora and fauna reports, biodiversity field inspections and ground surveys, or Aboriginal heritage field inspections and cultural heritage reports.

- 3) *The proposal to apply an E zone is included in a planning proposal through the Gateway process*

Before a new LEP or an amendment to an existing LEP can be made, the council must prepare a planning proposal which explains the intended effect of the new LEP and the justification for it, including any relevant maps showing the intended rezoning, and the details of how the authority proposes to carry out community consultation. This planning proposal is then given to the Minister for Planning who decides whether the council can proceed with preparing the new or amended LEP. This is known as the Gateway process.

If the Minister determines that community consultation is required, a proposal to apply an E zone to land will be placed on public exhibition and anyone will be able to make a submission to the proposal as part of the gateway process.

3. Summary of the Final Recommendations & our comments

- The five councils to which the Final Recommendations apply will now only be able to apply an E zone to land that is deemed to be of very high conservation value, such as certain recognised littoral rainforest, certain coastal wetlands, key

threatened species habitat, and rare, endangered and vulnerable forest ecosystems. It is likely that some currently E zoned land will not satisfy the criteria and therefore lose E zone status.

EDO NSW is concerned that the application of these restrictive and narrow criteria will in effect undermine the objectives of the E zones and restrict application of E zones unduly. The recommended criteria fail to ensure adequate protection for certain high conservation values such as any types of rainforest which are not listed under SEPP 26 (Littoral Rainforest); coastal wetlands which are not listed under SEPP14 (Coastal Wetlands); or important wildlife corridors.

- First and foremost, the 'primary use' of the land needs to have been either environmental conservation (E2) or environmental management (E3) for the preceding two years before it can be zoned E2 or E3. This approach appears to significantly restrict the ability for councils to strategically plan and set aside land that ought to have an environmental zone applied.
- Where land has been verified to meet the criteria for an E2 or E3 zone but the primary use of land is not consistent with that of an E zone, it will not be set aside as an E zone but included in a mapped planning control, such as a vegetation map. Environmental overlays such as vegetation maps are much weaker tools, are not legal instruments, and do not offer environmental protection. An environmental overlay triggers extra considerations that a council must take into account before approving development where the overlay applies. However, an overlay cannot prohibit land uses like an E zone does and it cannot be applied to development that the LEP allows to be carried out without consent in the zone.
- Scenic values can no longer be used as an attribute for the application of an E2 or E3 zone or mapped planning controls. This means the current Far North Coast scenic/escarpment zones are likely to lose their E zoning, unless the land meets the E2 or E3 zone criteria and its primary use reflects an E zone.
- Biodiversity field inspections, ground surveys, supporting current flora and fauna reports or current aerial photography are required to verify whether the land meets the specified criteria to be zoned as E2 or E3. This is likely to impose a significant practical, time-consuming and financial burden on councils that may not have current vegetation mapping for their local government area (**LGA**). Taken literally, councils will be required to buy or commission the very latest aerial photography and engage staff or consultants to carry out the required field inspections before an amended LEP can be proposed. Without a clear understanding of the data currently available to councils, there is a significant risk that the LEP development process will be delayed by the need to validate E zones.
- Even if land is verified as having met the criteria for an E zone as well as having a primary use consistent with an E zone, it is not mandatory for the council to apply an E2 or E3 zone to it. If the council believes the intended primary use of the land does not warrant an E zone, then other mapped planning controls can be applied.

EDO NSW is most concerned that this effectively provides no guarantee of protection through an E zone if the council believes an E zone should not be applied, and defeats the fundamental purpose of E zones. It is entirely unclear how flexible this exception is and how it will be applied.

- In most cases, privately-owned land will not have an E2 or E3 zone applied to it unless the landowner agrees or requests it. The effect of the Final Recommendations is that one of the only ways to create a new E zone will be where a private landowner requests it.
- 'Extensive agriculture' is to be listed as permissible with consent in the E2 zone and permissible without consent in the E3 zone in the five Far North Coast LEPs. Extensive agriculture includes the production of crops or fodder for commercial purposes, the grazing of livestock for commercial purposes, bee keeping, and pasture-based dairy farming. The mandatory objectives of the E2 zone in the Standard Instrument Local Environmental Plan (**Standard Instrument LEP**) are:
 - To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values; and
 - To prevent development that could destroy, damage or otherwise have an adverse effect on those values.

In relation to the E3 zones, the objectives are:

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values; and
- To provide for a limited range of development that does not have an adverse effect on those values.

The mandatory objectives of these E zones have not changed. Permitting extensive agriculture as defined above will not meet these objectives. The mandatory zone objectives included under the Standard Instrument LEP must be complied with by all local councils in NSW and necessarily included in all LEPs. As such, the Final Recommendations do not reflect the Department of Planning and Environment policy reflected in the mandatory zone objectives in zone E2 and E3 as contained in the Standard Instrument LEP and the [Local Environmental Plan Practice Note PN 09-002 – Environment Protection Zones \(LEP Practice Note\)](#).

- The changes focus on how E zones are to be applied and the intention is to create a clear and consistent way of applying E zones on the Far North Coast. However, a number of important questions as to the application of E zones arise following the Final Recommendations which appear to allow greater flexibility and inconsistency than previously.

EDO NSW is of the view that the approach of the Final Recommendations is out of step with the Standard Instrument LEP and the dominant position adopted by most coastal councils in NSW.³ EDO NSW is deeply concerned that these changes are a

³ For example, coastal or hinterland Councils with LEPs in which extensive agriculture is not permissible within the E2 Zone include: Coffs Harbour LEP 2011, Kempsey LEP 2013, Kiama LEP 2011, Kur-ring-gai LEP 2012, Nambucca LEP 2010, Bellingen LEP 2010, Bega Valley LEP 2013, Port Stephens LEP

considerable erosion of the fundamental objective of E2 and E3 zones, being to protect, manage and restore areas with high or special ecological, scientific, cultural or aesthetic values. This is of particular concern given that the reforms apply to one of the most biologically diverse regions in NSW. These reforms are also worrying in the context of the NSW Government's biodiversity legislation review which from all indications to date is likely to result in further weakened protections for native flora and fauna.

4. Wider implications & Next steps

The Far North Coast E zone recommendations will initially apply to land in the Ballina, Byron, Kyogle, Lismore and Tweed LGAs. However, the Department of Planning and Environment has announced that is consulting with other councils about how the Final Recommendations can work across NSW and it is possible that they will be rolled out State-wide.

Meanwhile, if other NSW councils are reviewing the application of E zones under their LEPs, the principles contained in the Final Recommendations can be used. It therefore appears that other NSW councils are free to voluntarily adopt the Final Recommendations. We note that this goes against the principal purpose of the Standard Instrument LEP being to standardise LEPs across the State.

According to the Final Recommendations, the Department is considering a revision of the Standard Instrument LEP to remove 'aesthetic values' from the zone objectives of the E2 and E3 zones and as an attribute for the application of an E2 or E3 zone. The removal of aesthetic values for these E zones would have significant implications for numerous spectacular environmental sites in NSW.

The possibility of an amendment to NSW planning legislation⁴ to remove or extend the 12 month time limit which extinguishes existing use rights for the land use 'extensive agriculture' is also being investigated.

The Final Recommendations reflect a move away from the key purpose of E zones and do not reflect the mandatory E2 and E3 zone objectives enshrined in the Standard Instrument LEP and the LEP Practice Note – Environmental Protection Zones. The Final Recommendations have the effect of reducing consistency between councils' LEPs.

A Ministerial direction to implement the changes is expected to be issued to the five councils in the coming weeks. EDO NSW will publish the release of the Ministerial direction in our [eBulletin](#) and continue to monitor and analyse implementation of the Final Recommendations.

For more information, see our [blog](#) and [article](#) or read more about the background to these recommendations in our [court case](#) challenging amendments to Lismore LEP.

2013, Port Macquarie – Hastings LEP 2011, Great Lakes LEP 2014, Greater Taree LEP 2010, Wyong LEP 2013, Wollondilly LEP 2011, Wingecarribee 2010, Gosford LEP 2014, Eurobodalla LEP 2012, Hawkesbury LEP 2012, Shoalhaven LEP 2014, and Shellharbour LEP 2013.

⁴ *Environmental Planning and Assessment Act 1979* or *Environmental Planning and Assessment Regulation 2000*.