Review of the Northern Councils E Zone Review Interim Report (the "report") by Parsons Brinckerhoff ("PB")
Submitted on behalf the Ballina Landholders Association.

5 June 2014

A. General Comments

We believe that:

1. There are valuable insights in the report, in particular the critique of Councils' arbitrary, "blanket", inaccurate and unsupported work resulting in zoning productive rural land into E-zones. This was compounded by Councils willfully ignoring State S117 directives, Department guidelines and landholder submissions. However there are many issues that are not addressed or addressed in such a way in the report that the damage to our properties, businesses and livelihoods will continue, until such issues are properly addressed.

2. The pro-environmental bias of PB and/or their brief is evident throughout the report, and thus has prejudiced the outcome. For instance environmental values and concerns are accepted as facts; whereas throughout the report any other concern (i.e. for economic or other reasoning) is noted as only being a 'potential' or 'perceived' or 'out of scope', and not worthy of investigation. The bias is particularly apparent when comparing the language of Minister Hazzard's media release, which announced the PB study, to that of the brief issued to PB by the Department. We and others have previously documented this – for example see our email to the Hon Brad Hazzard dated 3 April 2014.

3. A vast majority of the issues arise from the lack in planning law of an overarching, clear set of principles protecting historical & current land uses and the associated landholder rights into the future. Planning and zoning in particular should reflect such uses, not the intentions of Local or State governments to change them without the landholder's permission. The entire scheme of diminishing the amenity, utility and potential of private land by environmentally based exclusion of uses goes against the grain of a liberal free enterprise society as the rights of the landholders are subjugated to intangible benefits to unaffected individuals, all without compensation.

B. Specific criticisms & requests to address resulting issues

1. There is frequent use of terms such as "high conservation value", "area of habitat" and "endangered ecological community" in the report without clear plain English definitions. These terms need to be described unambiguously and the methodology by which they are applied explicitly defined. Once the terms are defined the onus of proving that such land has these attributes should be on the council and if the landowner concerned disagrees his or her costs of such dispute should be funded by or reimbursed by the council.
2. While the PB report clearly states a principle in 2.2.3.2 p 37: "Where the primary focus of the land is not the conservation and/or management of environmental values a different Zone should be applied", this principle does not appear to be applied in the specific criteria for E2 and E3 (3 p75 -78) zones. This leaves the zoning process and criteria susceptible to manipulation and misinterpretation by councils.
    a) The report is silent on who is the arbiter of what the primary focus of the land is. It should be the land owner, based on:
        i. historical and actual use of the land
        ii. permissible uses of the land at the time of purchase
    b) "Validated data sets" must be defined with use of ground 'truthing' and should not be based on aerial photography (see 3c below).
    c) Many of the criteria listed appear incomprehensible to landowners as well as (probably) to many lawyers and planners, with references to non-statutory documents.
3. Councils are apparently still free to spend unlimited funds and resources (including ratepayers' and other public purpose funds) on environmental studies to manipulate land into their preferred their E zones:-
    a) Ballina & Lismore Councils are already starting vegetation mapping and a wide biodiversity study for the purpose of meeting the criticism of this report (2.1.1 p 3)
    b) We understand that (for example) Byron Council is in the process of spending much of its Environmental Levy http://www.byron.nsw.gov.au/your-environmental-levy-at-work and applying for State funding for such work.
    c) We understand from Planning Director Neil McGaffin that there was nothing to stop councils having

"a go ANY TIME IN THE FUTURE" at zoning ANY land into E2 or E3 as long as they did their detailed work - that is on the ground, comprehensive, scientifically accurate & verifiable studies. The land owners should in all fairness be given equal funds to rebut these investigations.

d) However the Grafton office of the Department has confirmed that councils can rely solely on satellite and aerial photography to determine E zones. This is contradictory to Director McGaffin's view and is poor science; see attached & previously supplied paper by an expert in mapping vegetation Mr. Robert Crossley. Such use of photography as a determinant of zoning decisions should be prohibited.

e) The Department should confirm the methodology as per 3c above and make its application mandatory, not just a guideline, as councils have shown by their behaviour & stated intentions to ignore Department practice notes and guidelines. Such aberrant behaviour was not addressed in the report.

f) Councils should have their timeframes and expenses on these activities highly constrained, scrutinized and publicised and should be under the strict supervision of the Department head office, with all studies validated by independent experts, and affected landholders directly involved in the process from the start.

g) All documents resulting from these past and future activities should be disclosed to the landowners and public – Ballina Council has refused to do so in the past, and in particular has refused to provide copies of or access to field notes and records and reports said to have been prepared by its environmental scientist whose view that a particular area of land should be re-classified to an E zone has been held sacrosanct.

4. While the South Ballina sand mine & caravan park are named in the report as "anomalies" (2.1.1.1` p 5) or "can be excluded along with grazing & orchards" (2.1.1.6 p 25) no actual appropriate zones are proposed for mines & parks.
5. The following zoning criteria and zones should be mandatory:
    a) All land used or currently permitted to be used for "agriculture, aquaculture, forestry, mining and extractive industries" (Department of Planning Practice Note PN 11-002) should be zoned RU1.
    b) All land used for private caravan parks and camping grounds should be zoned RE2, with tourist uses explicitly included without consent, and residential uses with consent.
    c) Coastal, Riparian and Scenic Amenity lands should not be included in E zones per se, and should only be so zoned by meeting mandatory, defined rigorous criteria and processes. Any such categorisations should not affect the zones in 5a and 5b.
    d) Aesthetic values (being inherently subjective) should be specifically excluded from zoning considerations.
    e) The use of "Areas of habitat" of koalas and other species should be specifically excluded from zoning considerations.
    f) The declaration of lands according to the above criteria should be made expeditiously as the keeping of land Mapped Deferred Matter is causing uncertainty and having a negative impact on land values and potential investments.
6. The report doesn't take into account land that can be lawfully logged or cleared, including by private forestry agreements. Such uses are highly compatible with agriculture and should be included in the RU1 Zone. If such land is E zoned, compensation for the removal of access to this resource should be payable.
7. Councils should not be permitted to use past "7" zonings as a validation for E Zoning for private land. These past zonings were almost universally imposed without any consultation with individual landowners and were not based on appropriate studies. Those landowners who questioned the 7 (and later E zones) were routinely informed by Council staff that that had nothing to be concerned about as they had "existing use rights" – see 14 below for our comments on these highly limited rights.
8. The use of the term 'extensive agriculture' is misleading as it in fact means *highly limited agriculture* (table 2.1 p 29). The current Ballina LEP permits agriculture to be undertaken without consent in rural secondary agricultural land (1B) yet when rezoned as E2 no agriculture is permitted without consent. By way of example agriculture under the Ballina LEP includes forestry however forestry is prohibited under the proposed classification of "extensive agriculture". One can undertake a limited form of agriculture that is described as 'extensive agriculture with consent' and horticulture, which was formerly permitted without consent is now

prohibited. Extensive Agriculture should be re-named Limited Agriculture and should only be used in very specific, defined circumstances where such limitations are supported by proper scientific studies.

9. Spilt zoning of single lots is supported in the report (2.3.1 p 47) – so councils could apparently continue to carve off parts of private lots into an E zone as long as they are not small or isolated. Despite Minister Hazzard's express commitment to us to not allow this, Director McGaffin expressed his support for split zoning.
    a) Split zoning has strong consequences of impracticality in that a proper survey would need to be carried out to demarcate the inter-zone boundaries within the lot. Questions arise such as:
        i. At whose expense would the survey be done?
        ii. How would such boundaries and limitations be enforced?
        iii. Would inter zone fencing be required and at whose cost?
        iv. What criteria are used to determine for"small" and "isolated" or the converse?
    c) The use of split zoning would introduce a distortion of the whole legal basis of our land ownership system – the unambiguous Torrens title. We are opposed to it.
10. Economic implications are briefly mentioned in the report (2.2.1 p 32) as something to be considered only if E zoning increases, and with no clear criteria proposed.
    a) Economic and social factors and impacts should each have equal weight to environmental impacts or factors in any proposed E zoning.
    b) Associated economic and social impact studies should be required at councils' expense and by independent experts.
    c) Such studies should include criteria such as:
        i. value & protection of future potentially productive agricultural land.
        ii. value & protection of tourism, including State and regional tourism policies and plans
        iii. impact on local employment, taking into account high levels of regional unemployment
        iv. social amenity to local communities of farming & tourism
    d) The report confirms that the purpose of the E 2 zones is "to protect manage and restore areas of high ecological, scientific, cultural or aesthetic values" (2.2.3.1 p 35). However the report is silent on who is to pay to implement such goals. We do not agree with the implied burden is to be borne by the landholder. If Councils wish to achieve these purposes they should purchase the lands at fair market value first or pay compensation.
11. Valuations and compensation
    a) Effect on valuations (2.2.5 p40) - this is stated in the report as "outside the scope" and described as"perceived impacts".
    b) On p41 2.2.5.1 under 'Desirable outcomes' the report advocates the E zones should restrict the number of types of land uses within the zone – but (cunningly) not so that a land owner who is stripped of numerous valuable rights can receive fair compensation for the extinguishment of their rights. This implies support for official duplicity, and is particularly misleading as our understanding is that as currently no compensation can be made for the results of planning decisions. In any event it would be expensive for the landholder to attempt such a claim.
    c) The report then recommends that to minimise the potential for compensation as a result of implementing an E zone, such zones should be applied on an exclusive "like for like" basis. Ballina Council (and we believe others) chose to apply E Zones without regard to previously permitted uses with and without consent, despite repeated requests to cease & desist in this practice. The term "like for like" should be defined to include all permitted uses with and without consent.
    d) We can confirm that PB was supplied in writing with at least one very significant independent devaluation example in South Ballina. Other landholders expressed the view that they have not asked for valuations as their lenders would possibly withdraw support if the land value was diminished, as they regarded it very likely.
    e) Ballina Council confirmed in writing that the proposed E zones were more restrictive than any of the previous zones, including the 7 zones.
    f) There is no doubt that any valuer presented with significantly more restrictive zoning than current

would diminish the value of the land, based on the land's lessened utility.

g) The report shows its anti-landholder bias by using the term "perceived" and equivalencing the devaluation of land to those who chose to "purchase and live land "containing an E Zone". The latter is presumably hypothetical as E Zones have not been declared.

h) This major factor of land valuations needs to be included in all:-

i. economic impact statements, as valuations are the fundamental input to any financing required.

a. the effect on State land tax and stamp duties should be included

ii. social impact statements, as valuations strongly affect family relationships and the well being of multiple generations.

i) Devaluations caused by council re-zoning should be automatically subject to the Just Terms Compensation Act, with Councils having to provide such compensation.

12. According to the Department, Ministerial S117 Directives, which should take priority over LEP's, may still be overridden by LEP's (2.2.2 p 34).
    a) The report confirms that Councils ignored statutory instruments including section 117 directions and state environment planning policies in preparing their LEPS.
    b) This willful practice by Councils should not be allowed and more strictly policed.
13. Biodiversity conservation overlays are promoted in the report (2.2.3.2 p 37) without rules for their application. Such rules need to be explicit and mandatory if any overlays are to be used. We agree with the Department that overlays are just an added layer of unwarranted complexity.
14. Existing use rights are discussed in the report (2.2.4 p 38) but no actual solution proposed.
    a) An existing use is a statutory use that can be removed at any time, with the onus of proving such use is on the landowner to prove. Such use is expensive to maintain legally and in practical effect illusory(see below**).
    b) The report acknowledges that its opinions in respect of existing use rights are devoid of legal opinion (2.2.1 p33).
    c) The report then makes an unsubstantiated comment that "it is reasonable to ensure a mechanism exists in legislation that requires applicants to obtain (or reobtain) the relevant approvals when a land use is abandoned" (2.2.4 paragraph 2, p40). The question of who would deem the land is abandoned or not is not answered. The report then states that it is reasonable for the State to act outside the law. This approach is confusing and implies imposing further unreasonable and unwarranted hardship on rural landowners. The issue should be put to rest by returning all such rights and determinations to the landowner.
    d) There is no discussion of the right to intensify or change to another permitted use – these uses need to be expressly permitted.
    e) Existing use rights should not lapse by the landholder choosing not to exercise them.
15. The report proposes that Councils can continue to hide their intent on S149 certificates (2.2.5 P 41).
    a) This should not be allowed, all proposed and/or draft zoning changes should be included in S149 certificates, which are required by law to be attached to a contract for the sale of land and which are relied upon by a purchaser of land.
    b) Councils must be held liable for the accuracy of information in Section 149 Certificate, otherwise why have it? Surely a prospective purchaser of a parcel of land is entitled to know what limitations council plans or intends to impose on that parcel.
16. There is no process described in the report as to how proposed E zoning should be communicated to each and every affected landholder and how it can be readily challenged. We propose:
    a) Proposed zoning and its detailed permitted and prohibited uses to be communicated in writing to each and every affected landholder with a minimum of 6 months notice. Such notice should include the environmental, economic and social studies pertaining to the particular land in question.
    b) If the landholder does not agree to the zoning, council is to fund independent experts chosen by the landholder to produce a challenging report(s).
    c) If council and the landholder cannot agree, the landholder shall have the right to appeal to the L&E Court at no cost to the landowner.

17. The issue of Ballina Council (and most likely others) using highly restrictive DCP's to achieve the same or greater results by other means as E zoning (including on lands "adjacent to E zones" and as a purpose of enlargement of the zones) has not been addressed in the report.
    a) The current Ballina DCP is based on the assumption that E2 and E3 Zones have been fully approved with all of their restrictions.
    b) DCP's do not need ministerial approval and must not go outside of an LEP but once in place can only effectively be challenged in L&E Court.
    c) DCP's should be subject to the same formal (Department & Minister) approval process as LEP's.
    d) Draft DCP's must be exhibited for a period of no less than 90 days.
18. The report confabulates incentives (2.2.3.2, p38) for voluntary conservation measures with supposed benefits of and/or incentives for E zoning. Such involuntary E zoning has no incentive for the landholder, quite the opposite with onerous duties, restrictions and most probable devaluation. Council should not receive bio-banking or similar credits for E Zoning land without the landholders express written agreements.

*** "….existing use rights are a transitional derogation designed, for a time only, to cushion the impact of new general planning laws upon private owners with established use of the land which has continued without abandonment". Justice Kirby, Court of Appeal, North Sydney MC V Boyts Radio & Electrical 1989.*