



BYRON PRESERVATION  
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Director Environment and Building Policy  
NSW Department of Planning and Environment  
GPO Box 39  
Sydney NSW 2001

Dear Director,

**Submission on Draft Coastal Management State Environmental Planning Policy  
("Draft SEPP")**

- 1 We object to the draft SEPP, mapping and Ministerial Direction on the grounds set out below, including:
  - (1) unlawful and contrary to law – the new proposed provisions are so excessive they are beyond power;
  - (2) mapping – errors and omissions in mapping;
  - (3) economic factors not taken into account;
  - (4) social factors not taken into account;
  - (5) wider environmental impacts not taken into account or able to be taken into account;
  - (6) no differentiation in type and degree of coastal risk;
  - (7) impact on the iconic township of Byron Bay would be adverse in social and economic and environmental terms;
  - (8) these reforms do not permit a wider range of coastal solutions to be considered at each particular site;

- (9) these reforms are too heavily in favour of permitting retreat and loss of property without compensation and without regard to the economic or social consequences;
- (10) these reforms do not provide access to a sophisticated and flexible range of responses to the problems social communities are facing or may face in the future. The reforms restrict possible responses to sand nourishment or sand dunes. As such, they are too narrow and restrictive as a reform to assist our valuable coastal communities.

### **Unlawful/Contrary to Law**

- 2 In our submission, the Draft SEPP would be unlawful and invalid if made.
- 3 The power to make SEPPs for the purposes of environmental planning arises from s 37 of the *Environmental Planning and Assessment Act 1979* (NSW) ("**EP&A Act**"). As delegated legislation, the Draft SEPP would be invalid for a number of reasons:
  - (a) It would not be authorised by the empowering statute by reason of unreasonableness and lack of proportionality;
  - (b) It would be inconsistent with the objectives in the *Coastal Management Act 2016* (NSW);
  - (c) It would be inconsistent with the *Coastal Management Act 2016* (NSW).
- 4 In addition, we are of the view that the draft Local Planning Direction proposed to be made under s 117(2) of the *EP&A Act* would be unlawful as it is manifestly unreasonable and lacking in proportionality.
- 5 The legal principles supporting these submissions are outlined briefly below.
- 6 Legal unreasonableness and lack of proportionality are recognised grounds upon which subordinate legislation would be held not to be authorised by the empowering statute.
- 7 A SEPP which is "manifestly unjust" or involving "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men" would be invalid: *Attorney-General for South Australia v Adelaide City Corporation* (2013) 249 CLR 1 at 34, 37; *Clements v Bull* (1953) 88 CLR 572 at 577.
- 8 Parliament could not possibly have authorised a SEPP with such significant potential deprivation of property rights and narrowing or restrictions in coastal protection beyond those contemplated by the Parliament.
- 9 Section 37 of the *EP&A Act* is a purposive power, and therefore the means used to attain its purpose in the Draft SEPP must not be unreasonably disproportionate to its object of environmental planning: *South Australia v Tanner* (1989) 166 CLR 161, 165, 178. The imposition of the burdens and limitations in the Draft SEPP would be grossly disproportionate to the purpose of environmental planning and protection for coastal communities.

- 10 As subordinate legislation, the Draft SEPP would also be invalid as inconsistent with other statutes.

### **Invalidity of Local Planning Direction**

- 11 The proposed Draft Local Planning Direction – Coastal Management provides in section 4 that a planning proposal “must not rezone land which would enable increased development or more intensive land-use on land ... within a coastal vulnerability area”. Section 1 provides that the direction applies to land that “has been identified as land affected by a current or future coastal hazard in a study or assessment undertaken ... by or on behalf of the relevant public authority, or ... by or on behalf of a public authority and provided to the relevant planning authority”.
- 12 The result is that, whenever a public authority provides *any report* to a planning authority, if the report identifies land as affected by a coastal hazard - even a coastal hazard in the future - any change to the use of the land to increase intensity is automatically prohibited. That is so regardless of the degree and nature of the risk identified, the reliability of the report, the fact of any other conflict reports, or the nature of the proposed rezoning and how it may affect the nature of the coastline or coastal hazards. The effect is to preclude a planning authority from making a rational assessment of a planning proposal by reference to the true merits and detriments of the proposal.
- 13 Such a direction would be capricious and unreasonable, as well as lacking in proportionality, and the legislature could not have intended to authorise the Minister to make such a direction by section 117 of the *EP&A Act*.
- 14 We submit that the Draft SEPP and Local Planning Direction would be unlawful and void if made. Those instruments therefore should be revised.
- 15 The proposed delegated legislation and direction would have significant adverse impacts on most of the township of Byron Bay including its small businesses and tourism facilities. There has been no consultation with this community. Our community would have a strong interest in challenging the legal validity of these instruments if they were to be promulgated in their current form.

### **Economic and Social Factors Not considered**

- 16 At the public consultation meeting held at Erina, the representatives of the Office of Environment and Heritage indicated that in the preparation of these reforms there had been no consideration of the economic and social implications of these reforms on coastal communities.
- 17 The Productivity Commission has previously noted the importance to Australia’s economic well-being and prosperity of coastal communities. In the context of concerns about sea-level rise, one of the aims of a sound modern coastal management policy would be to provide the means to Australian coastal communities to provide adequate protection to ensure the economic well-being of these communities and their social well-being.
- 18 A reform that has had no regard at all to these issue is obviously grossly inadequate and should be sent back for further consideration.

- 19 We are practically concerned about the impact of these reforms being imposed on Byron Bay town as shown in the mapping. The immediate application of these reforms will have a strong adverse impact on the business and tourism businesses in Byron Bay town which will be directly affected. This will affect many families in this community who depend on these businesses as a source of employment or revenue. It is reckless to consider imposing these reforms on this iconic community in Australia without any regard to the social or economic or wider environmental effects (see below).

### **No Regard to Nature/Degree of Coastal Risk**

- 20 The New South Wales coastline has had a long history of coastal protection and management. There are well-known so-called coastal “hot spots” to which insufficient attention and action has been paid by a succession of governments.
- 21 The proposed reforms do nothing at all to recognise these existing issues or to facilitate solutions being provided. There are existing coastal issues on this coast for which solutions need to be found urgently.
- 22 Furthermore, there is no differentiation between the degree of erosion threat i.e. in whether it is immediate or predicted in the future, slight or large, extreme or manageable. All coastal risks are lumped together indiscriminately and treated in the same way. A more sophisticated refined approach is needed which allows for responses to be tailored to the particular situation rather than the “one size fits all” approach in the current draft SEPP.

### **Other Environmental Factors need to be considered**

- 23 In many beach side communities, the front line of properties and their protection provide protection not only for those houses but for the dunes on which they sit, the communities behind them and other natural wetlands.
- 24 Our community at Belongil is a good example of this. The houses at Belongil Beach are built on a dune which is estimated to be 5,000 to 6,000 years old. This dune provides protection not only for the surrounding built community and infrastructure – but also for the natural fresh-water wetlands and the flora and fauna in this habitat. Failure of the existing protection and the inundation of this natural wetlands by salt water would be an environmental disaster.
- 25 Yet the draft reforms make no allowance at all and do not facilitate protection being put in place in the wider interests of the community and the environment. There should be a wider focus on the environment than just the beach and beach nourishment. Our coastal systems also include lakes, estuaries, creeks and dunes. The whole of the eco-system needs to be assessed – not just the beach.
- 26 The proposed reforms are too narrow and restrictive. They do not contain a realistic, holistic approach to dealing with the many environmental issues up and down the New South Wales coastline. The reforms could lead to greater environmental damage than they seek avoid.

### **Mapping Errors**

- 27 We submit that there evidently has not been sufficient time to produce accurate mapping. We understand that some of this mapping has been conducted by OEH and remote locations using only Google. In other instances, out of date or inaccurate mapping has been provided

by local councils. It is obviously crucial that sufficient time be taken to prepare accurate mapping.

- 28 There are many errors and omissions in the mapping on display. For example, in relation to the Central Coast coastal waters, there are reported to be many omissions.
- 29 In relation to Byron, the mapping for coastal hazard area includes a large section of the township of Byron Bay itself which will subject this iconic township, including many small businesses, to the provisions of the SEPP. This is likely to stifle development in this small community and impose inappropriate mandatory requirements on an important small business community which could ill afford such burdens and requirements. The provisions are totally inappropriate for this township.
- 30 The immediate application of the Local Planning Direction would also result in an automatic “freeze” on development by way of rezoning on Byron Bay township. On the admission of OEH, no one has considered the economic impact of this direction on this small community. In particular, it seems obvious that such an impact should not be automatic and mandatory.

### **Too Narrow Approach to Coastal Protection Solutions**

- 31 The Coastal Engineering Profession has developed a variety of modern environmentally sound solutions to deal with the variety of coastal erosion problems which may present.
- 32 These so called “modern” legislative reforms are in fact the opposite of that. The proposed reforms preclude the use of modern sophisticated options in favour only of sand dunes or sand nourishment.
- 33 There can be no justification for a blanket rejection of every other option that may be a potential application as a solution at a particular site.
- 34 The narrowing of options and the exclusion of many modern coastal protection mechanisms as a blanket exclusion cannot be justified in the modern era. This is particularly so when so much of Australia’s existing built communities are on the coastline. Thus the economic prosperity and social well-being of Australia’s communities depend on being able to have effective coastal protection in the future. Limiting these communities to sand dunes and sand protection is an out of date response which turns its back on the wide array of modern sophisticated coast mechanism. For this reason alone these reforms should be rejected.
- 35 These reforms are too heavily weighted in favour of allowing councils to impose “planned retreat” on property owners without compensation and without property owners being able to access modern coastal protection techniques. This is not a proper or sustainable way for any Australian government to approach the threat of sea level rise for the existing built communities of NSW.

### **Insufficient Consultation**

- 36 Public involvement and consultation is obviously a very important aspect of any planning reform.

- 37 We are concerned that most residents and business owners in coastal communities have no notice of the proposed reforms. The purported consultation period has been in December and January – December being the busiest month of the year and January is the month when most people are away.

## **Conclusion**

- 38 The proposed reforms should not yet proceed. The *Coastal Management Act* should not be brought in until these reforms have been considered more carefully and with proper consultation with affected communities.
- 39 In addition, we have many concerns about the inaccuracies and misleading nature of the mapping. In many cases there have been material omissions. These omissions will have misled residents to think they are not affected by the proposed reforms. The whole of the mapping for the New South Wales coastline is an extensive job which should be undertaken with care.
- 40 None of these reforms should be progressed at this time until this work has been done and accurate mapping made available.
- 41 In addition, assessment should be made of the economic, social and environmental factors and the need to provide coastal communities with a variety of means to protect their communities. Only when this work has been done, will it be possible to assess the true impact of these reforms on coastal communities and the people of New South Wales.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Siddle', with a stylized flourish at the end.

20 January 2017

**Michael Siddle**  
**President**

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