



2 October 2018

Advice for Gateway Determination Review Amendment to the *Bellingen Local Environment Plan 2010* (PP_2017_BELLI_001_00)

1. INTRODUCTION

1. On 20 August 2018, the Independent Planning Commission (the **Commission**) received a request from the Department of Planning and Environment (the **Department**), dated 15 August 2018, relating to Bellingen Shire Council's (**Council**) proposal to amend the planning controls of the *Bellingen Local Environment Plan 2010* (**BLEP 2010**) applying to all land within the Bellingen Shire zoned RU1, RU2, RU4 and E4 (the **planning proposal**).
2. The Commission has been requested by the delegate of the Minister of Planning, in accordance with section 3.34(5) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), to review the decision of the Gateway determination that the planning proposal not proceed, and prepare advice on the merits of the planning proposal.
3. Professor Mary O'Kane, Chair of the Commission, nominated Dr Peter Williams (Chair), Professor Snow Barlow, and Professor Chris Fell to constitute the Commission to review the planning proposal.

1.1 Council's request for Gateway determination review

4. On 8 March 2018 the delegate of the Minister of Planning issued a Gateway determination that the planning proposal should not proceed because the planning proposal was:
 - inconsistent with New South Wales planning policies, including *section 117 (now 9.1) Direction 1.5 Rural Lands, State Environmental Planning Policy (Rural Lands) 2008*, and the *North Coast Regional Plan 2036* (collectively **NSW Planning Policies**); and
 - insufficient justification was provided by Council for the proposed changes.
5. As set out in the review request from the Department, dated 15 August 2018, the Commission has been, "*requested to review the decision to not issue a Gateway determination and prepare advice concerning the merits of the request*".

1.2 Summary of Planning Proposal and Gateway Determination

6. On 30 November 2017, Council submitted to the Department for Gateway determination a planning proposal to amend the BLEP 2010. The proposed amendments, as described in the Department's *Gateway Review Justification Assessment* were to amend the BLEP 2010 to:
 - amend the land-use tables in the BLEP 2010 to make horticulture a permissible land use requiring development consent in the RU1 Primary Production zone, RU2 Rural Landscape zone, RU4 Primary Production Small Lots zone and E4 Environmental Living zone;
 - amend schedule 2 of the BLEP 2010 to make horticulture an exempt form of development in all instances, except where the development application relates to the establishment of a new blueberry cultivation operations; and
 - amend schedule 2 of the BLEP 2010 to introduce criteria to make blueberry cultivation operations exempt development where it meets defined criteria, including a setback from riparian areas and adjacent properties, avoidance of 'core koala habitat' and utilising black protective netting.

2. THE DEPARTMENT'S GATEWAY REVIEW JUSTIFICATION ASSESSMENT

7. On 20 April 2018, Council sought a review of the decision of the Gateway determination that the planning proposal not proceed and submitted to the Department a Gateway Determination Review Application dated 20 April 2018.
8. The Department prepared the *Gateway Review Justification Assessment* and submitted the assessment to the Commission for review.

3. THE COMMISSION'S MEETINGS

9. In carrying out the review, the Commission met with the Department and held a teleconference with Council on 10 September 2018. Transcripts of both the meeting and the teleconference have been made available on the Commission's website since 15 September 2018.

3.1 Meeting with the Department

10. In the meeting held on 10 September 2018 with the Department, the following matters were raised in relation to the planning proposal and Gateway determination:
 - the impacts of fertilizer and spray drift pollution on water quality and adjacent land-uses;
 - the lack of justification to link blueberry cultivation operations to identified water quality issues and the lack of specificity regarding the proposed management measures; and
 - the suitability of using an amendment to the BLEP 2010 to regulate a single type of horticulture.

3.2 Meeting with Bellingen Shire Council

11. In the teleconference with Council, the following matters were raised in relation to the planning proposal and Gateway determination:
 - the potential impacts to water quality, including the supporting water quality studies;
 - the potential for expansion of the blueberry industry and current activity in the Bellingen Shire;
 - compliance activity in relation to sedimentation, soil erosion and water quality impacts from two of the three current blueberry cultivation operations in the Bellingen Shire; and
 - options for the regulation, enforcement including recent compliance actions undertaken against two blueberry cultivation operations.

4. ADDITIONAL INFORMATION

12. On 7 September 2018, Council provided the Commission with two further water quality studies:
 - *Final Report - Coffs Harbour City Council Environmental Levy Program - Investigating water quality in Coffs coastal estuaries and the relationship to adjacent land use Part 1: Sediments*, dated 14 July 2018; and
 - *Final Report - Coffs Harbour City Council Environmental Levy Program - Investigating water quality in Coffs coastal estuaries and the relationship to adjacent land use Part 2: Water quality*, dated 14 July 2018.
13. These documents have been made available on the Commission's website since 14 September 2018.
14. On 7 September 2018, the water quality studies were provided to the Department for comment by 13 September 2018.
15. The Department informed the Commission on 14 September 2018 that the:
"issue of water quality is an important consideration, however as noted in the Department's assessment of the planning proposal and in its presentation to the IPC, there are many issues that the Department considers are not adequately addressed in the Council's submitted material provided in support of the planning proposal."

The Department's submission has been made available on the Commission's website since 26 September 2018.

16. On 17 September 2018 and 19 September 2018, Council provided the Commission with the following additional information in relation to its planning proposal:
- Two photomontages of blueberry cultivation;
 - A copy of Elliot and Clark (1993) Estimates of Erosion on Potato Lands on the Krasnozems at Dorrigo, N.S.W, using the Caesium-137 Techniques. *Australian Journal of Soil Research*. Vol 31, pp 209-23; and
 - A copy of *Cultivation Management on the Dorrigo Plateau - Code of Proactive and Guidelines* (January 2005) prepared by the Northern Rivers Catchment Management Authority.
17. These documents have been made available on the Commission's website since 27 September 2018 and a copy provided to the Department.

5. THE COMMISSION'S CONSIDERATION

18. In reviewing the planning proposal, the Commission has carefully considered the following material (the **Material**):
- the planning proposal;
 - the Department's Gateway determination, dated 8 March 2018, including all attachments;
 - the Department's Bellingen Gateway determination PP_2017_BELLI_001_00 memorandum, dated 8 March 2018 (the **Gateway report**);
 - the *Bellingen Shire Council Gateway Review Application*, dated 20 April 2018, including all attachments (the **Review Application**);
 - The *Gateway Review Justification Report*, including all attachments (the **Justification Report**);
 - *Final Report - Coffs Harbour City Council Environmental Levy Program - Investigating water quality in Coffs coastal estuaries and the relationship to adjacent land use Part 1: Sediments*, dated 14 July 2018 (**Coffs Harbour Final Report Part 1**);
 - *Final Report - Coffs Harbour City Council Environmental Levy Program - Investigating water quality in Coffs coastal estuaries and the relationship to adjacent land use Part 2: Water quality*, dated 14 July 2018 (**Coffs Harbour Final Report Part 2**);
 - Departments' comments on *Final Report - Coffs Harbour City Council Environmental Levy Program Part 1 and Part 2*, dated 13 September 2018;
 - *State Environmental Planning Policy (Rural Lands) 2008*;
 - the *North Coast Regional Plan 2036*;
 - *Section 117 (now section 9.1) Direction 1.5 Rural Lands*;
 - information discussed with the Commission at its meeting with the Department on 10 September 2018 and provided in the transcript published on the Commission's website;
 - information discussed with the Commission at its meeting with Bellingen Shire Council on 10 September 2018 and provided in the transcript published on the Commission's website;
 - The Department's submission regarding *Final Report - Coffs Harbour City Council Environmental Levy Program Part 1 and Part 2*, dated 14 September 2018;
 - Councils email to the Commission dated 17 September 2018 and 19 September 2018, including:
 - Two photomontages of blueberry cultivation;
 - Elliot and Clark (1993) Estimates of Erosion on Potato Lands on the Krasnozems at Dorrigo, N.S.W, using the Caesium-137 Techniques. *Australian Journal of Soil Research*. Vol 31, pp 209-23; and
 - *Cultivation Management on the Dorrigo Plateau - Code of Proactive and Guidelines* (January 2005) prepared by the Northern Rivers Catchment Management Authority.
 - *Planning Circular 16-004 – Independent reviews of the plan making decisions* (the **Planning Circular**); and
 - *Local Environment Plans: A guide to preparing local environment plans 2016* (the **Guide to LEPs**).

19. In undertaking a review of the planning proposal, the Commission has considered the merits of the planning proposal outlined in the Planning Circular and Guide to LEPs.

5.1 Consideration of the Environmental Planning Policies

20. The Commission has reviewed the planning proposal considering the NSW Planning Policies identified by the Department, as set out in paragraph 4.
21. *Section 117 (now section 9.1) Direction 1.5 Rural Lands* applies to all planning proposals to which *State Environmental Planning Policy (Rural Lands) 2008* applies, including all local government areas with the exception of certain local government areas. The direction applies to Bellingen local government area as it is not listed as an exempt local government area. The direction applies when “a relevant planning proposal will affect land within an existing or proposed rural or environmental protection zone”. A planning proposal “must be consistent with the Rural Planning principles listed in *State Environment Planning Policy (Rural Lands) 2008*”.
22. The Rural Planning principles are set out in clause 7 of the *State Environment Planning Policy (Rural Lands) 2008*. This includes “ensuring consistency with any applicable regional strategy of the Department of Planning or any applicable local strategy endorsed by the Director-General”.
23. The *North Coast Regional Plan 2036* is the applicable regional strategy.

Council’s consideration

24. With regard to the planning proposal’s consistency with NSW Planning Policies, Council stated in its Justification Report:
- “instead of rigorously addressing the specifics of each of the relevant criteria and provisions of the *North Coast Regional Plan 2036*, *State Environmental Planning Policy (Rural Lands) 2008* and section 117 (now 9.1) *Direction 1.5 Rural Lands*, the determination attempts to rely on generalised determination of strategic intent that overlook other relevant matters.”
 - With regard to *Direction 11* of the *North Coast Regional Plan 2036*, “In general it is considered that these actions are primarily of relevance to Council’s undertaking wider scale policy reviews such as *Growth Management Strategies*.”; and
 - With regard to section 117 *Direction 1.5 Rural Lands*,
“a planning proposal must be consistent with the Rural Planning principles listed in *State Environment Planning Policy (Rural Lands) 2008*.
It is Councils (sic) contention that the Gateway Determination has only documented its consideration of the objectives of the direction, without viewing them through the “lense” of the Rural Planning Principles, as required by Clause 4 of the Direction.”

Department’s consideration

25. With regard to the planning proposal’s consistency with NSW Planning Policies, the Department stated in its Gateway Report that:
- “*Direction 11* of the *North Coast Regional Plan 2036* recognises the importance of agriculture (including horticulture) to the region and requires councils through their ongoing strategy work to:
 - *Direct urban and rural development away from important farmland and identifying locations to support small lot agriculture (such as horticulture);*
 - *Identify and protect intensive agriculture clusters in local plans to avoid land use conflict; and*
 - *Address site specific consideration for agricultural industries through local plans.*”;

- “*State Environmental Planning Policy (Rural Lands) 2008 and section 117 Direction 1.5 also identify rural planning principles to be used by councils when planning for rural lands. These principles primarily aim to protect the agricultural value of rural land and facilitate the orderly and economic development of rural lands.*” and
- “*Rather than adopting a holistic and co-ordinated strategic planning approach for intensive agriculture to avoid land use conflict and to support and grow the sector (as advocated by SEPP (Rural Lands) 2008 and section 117 direction 1.5 Rural Lands and the North Coast Regional Plan), Council has elected in the current proposal to only apply site specific controls to the blueberry industry.*”

Commission’s consideration

26. In considering the *North Coast Regional Plan 2036*, the Commission notes that:

“the NSW Government has acknowledged the importance of the environment and the opportunities of the Pacific Highway, South East Queensland and the region’s cities and centres and set the following regionally focused goals:

- *The most stunning environment in NSW*
- *A thriving, interconnected economy...*”

27. The Commission notes the *North Coast Regional Plan 2036* does not prioritise one regionally focused goal over another in the plan.

28. The Commission notes that the actions associated with Goal 1, Direction 2: Enhance biodiversity, coastal and aquatic habitats, and water catchments of the *North Coast Regional Plan 2036* are particularly relevant. These actions set out the need to:

- *“2.1 Focus development to areas of least biodiversity sensitivity in the region and implement the ‘avoid, minimise, offset’ hierarchy to biodiversity, including areas of high environmental value.*
- *2.2 Ensure local plans manage marine environments, water catchment areas and groundwater sources to avoid potential development impacts.”*

29. The Commission finds that in relation to *State Environmental Planning Policy (Rural Lands) 2008*, the planning proposal was unlikely to adversely impact or significantly limit the agricultural productivity of an agriculturally productive landscape.

30. The Commission notes that Part 2 – Rural Planning Principles establish the need for:

- *“planning for rural lands, to balance the social, economic and environmental interests of the community” and*
- *“the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land”*

31. The Commission considers that the planning proposal is not inconsistent with actions under *Goal 2: A thriving, interconnected economy*. The planning proposal would be unlikely to diminish agricultural production but will leave horticulture an exempt form of development (and thus unregulated) under the BLEP 2010, except for the establishment of new blueberry farms.

32. As set out in paragraphs 26 - 31, the Commission finds that planning proposal is not inconsistent with the NSW Planning Policies. The Commission considers that appropriate regulation of horticulture can be consistent with the NSW Planning Policies, as long as it is appropriate, demonstrates merit, and is suitably justified.

5.2 Justification and merit of planning proposal

Council’s consideration

33. As set out in the Review Application, with regard to the justification and merit of the planning

proposal, Council's conclusions included:

- that the findings of the *Water Quality on Bucca Bucca Creek and the potential impacts of intensive agriculture*, attached to the Review Application:

“Further validate the environmentally responsible intent of the Planning Proposal. Of particular relevance is the recommendation to increase riparian buffer zones, which accords with the approach advocated by Council to observe buffer zones to riparian features and retain them in their vegetated state if currently vegetated.It is a concern to Council that impacts of this nature seem to have been dismissed as the price of undertaking agriculture, and that affected communities should passively accept such impacts in the interest of not impacting upon the profitability of growers.”

Council provided additional information through the *Final Report - Coffs Harbour City Council Environmental Levy Program Part 1 and Part 2*, which they stated during the teleconference of 10 September 2018 further established the connection between blueberry cultivation operations and a decline in water quality.

- that the potential economic impacts had been considered, stating:

“In the circumstances, Council has carefully weighed up the economic impact of the decision against the environmental and social impacts of allowing blueberry farms to establish without adequate safeguards in place, and has concluded that, for Bellingen Shire the best solution is to proceed with the minimal level of regulation advocated in the Planning Proposal.

The objectives of the NSW Environmental Planning & Assessment Act 1979 obligate decision makers to consider this full range of matters. Objectives (a) and (b) of the Act are particularly relevant in the circumstances”

- that the calibration of the planning proposal was suitable, stating:

“whilst this type of activity may be of relatively minor concern in areas with limited ecological value, large lot sizes, relatively few drainage lines and lack of immediate neighbours, these characteristics are not typical of land within Bellingen Shire.

In this regard, it is submitted the Planning proposal is a reasonable response to the impacts of this type of agriculture, and the land constraints that exist in the Bellingen Shire and should therefore be permitted to proceed.”

Department's consideration

34. The Department concluded in its Gateway report that *“it is not considered reasonable to regulate this industry in isolation compared to other existing or potential agricultural activities without a more detailed evidence base justifying the proposed change.”*

35. As set out in the *Gateway Review Justification Report*, with regard to the justification and merit of the planning proposal, the Department stated:

- *“Council's planning proposal does not provide any additional assessment of the potential economic impacts of the proposal or an assessment of the potential impacts the proposal may have on the local community in terms of impacts on employment or the local economy. The planning proposal does not include any evidence to indicate whether council has considered other mitigation measures to address the issue prior to proceeding with the planning proposal. The proposal does not include evidence to indicate that the views of the affected landowners have been considered as part of a balanced consideration of the merits of the proposal.”;*
- *“The justification provided by Council relies on information and studies not directly related to or completed to inform the preparation of the proposal. The planning proposal is also not supported by any specific data or monitoring reports that establish a clear link between blueberry farming and the environmental impacts the planning proposal is intending to address.”;*

- “The range of impacts cited in Council’s report are commonly associated with other forms of horticulture. Spray drift, visual impacts, land clearing and impacts on waterways are not solely associated with blueberry farming”; and
- “The Department notes that Council’s position is based on mitigating environmental impact arising from the scale of landscape change necessary for the establishment of a blueberry farm but does not acknowledge that other forms of intensive agriculture can have the same impacts. Council’s view that the impacts of blueberry farming activities including the establishment of new farms can be managed through the introduction of buffer zones and boundary setback requirements is not supported.”

Commission’s consideration

36. The Commission notes, as set out in the *Gateway Review Justification Report* and paragraph 35, that the potential environmental impacts associated with agricultural runoff are not unique to blueberry cultivation operations and “*that other forms of intensive agriculture can have the same [or similar] impacts*”.
37. The Commission notes, as stated in the teleconference with Council on 10 September 2018 and set out in the paragraph 11, compliance actions were undertaken against two blueberry cultivation operations in the Bellingen Shire.
38. The Commission notes, as presented in the Justification Report, that the planning proposal would amend the BLEP 2010 and alter horticultural activities to “*an exempt form of development in all instances, except where the development ... relates to the establishment of a new blueberry farm*”.
39. The Commission accepts Council’s view, provided during the teleconference on 10 September 2018, that there is the merit in managing the environmental impacts associated with intensive horticulture.
40. The Commission accepts Council’s view, provided during the teleconference on 10 September 2018, that significant expansion of blueberry cultivation operations, if unregulated, could result in adverse impacts to the environment, including through sediment fertiliser run off and spray drift impacts to water quality and neighbouring properties.
41. The Commission accepts the Department’s view, as set out in the paragraph 35, that Council’s justification for the planning proposal does not “*acknowledge that other forms of intensive agriculture can have the same impacts*” or provide adequate consideration of the use of alternative methods for managing these impacts and consideration of the impacts that the planning proposal may have on affected landholders.
42. The Commission accepts the Department’s view in its Gateway report, as set out in the paragraph 34, that:
“*it is not considered reasonable to regulate this industry in isolation compared to other existing or potential agricultural activities without a more detailed evidence base justifying the proposed change.*”
43. The Commission agrees with the Department’s conclusions in the Justification Report, as set out in the paragraph 35, that the justification for the planning proposal, and specifically the linkages between blueberry cultivation operations and potential impacts to water quality, have not been clearly established because “*[t]he range of impacts cited in Council’s report are commonly associated with other forms of horticulture. Spray drift, visual impacts, land clearing and impacts on waterways are not solely associated with blueberry farming*”.
44. The Commission considers that the planning proposal may have the unintended result of changing the classification of most horticultural practices and potentially exacerbating the environmental impacts of these because it would amend the BLEP 2010 to make horticulture an exempt form of development in all instances, except where the development relates to the

establishment of a new blueberry farm.

45. Accordingly, as set out in paragraphs 41 - 44, the Commission does not consider that the planning proposal has adequately demonstrated the merit of regulating the establishment of new blueberry cultivation in isolation or that blueberry cultivation operations warrant unique consideration under the BLEP 2010.
46. The Commission considers, on balance, that the merit of removing the ability to manage the environmental impacts associated with all horticultural production, does not compensate for the limits in the merit and justification for isolating one type of horticultural production in this instance blueberry cultivation, for regulation.

6. REVIEW OF THE DEPARTMENT'S GATEWAY DETERMINATION AND RECOMMENDATIONS

47. The Commission has reviewed and considered the Material.
48. The Commission finds that the planning proposal is not inconsistent with section 117 (now section 9.1) Direction 1.5 Rural Lands, *State Environmental Planning Policy (Rural Lands) 2008*, or the *North Coast Regional Plan 2036* for the reasons set out in paragraph 32.
49. The Commission finds that there is merit in managing the environmental impacts associated with horticulture raised by Council, as set out in paragraph 39.
50. However, as set out in paragraphs 43 - 46, the Commission does not consider that the planning proposal provides adequate justification or merit in amending the BLEP 2010 to regulate one form of horticultural production, when that horticultural production is unlikely to be the sole contributor to the environmental impacts raised by Council.
51. The Commission recommends to the Minister's delegate that the decision of the Gateway determination be confirmed, and the planning proposal should not proceed.



Dr Peter Williams (Chair)
Member of the Commission



Professor Snow Barlow
Member of the Commission



Professor Christopher Fell
Member of the Commission