

**Purpose:** To request that the Independent Planning Commission review the Gateway determination, taking into account information provided by the proponent, and provide advice regarding the merit of the review request.

<b>Dept. Ref. No:</b>	PP_2017_BELLI_001_00	
<b>LGA</b>	Bellingen Shire Council	
<b>LEP to be Amended:</b>	Bellingen Local Environmental Plan 2010 (BLEP 2010)	
<b>Address/ Location:</b>	Applies to all land within the Bellingen Shire zoned RU1, RU2, RU4 and E4	
<b>Proposal:</b>	The proposal seeks 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, and amend schedule 2 of the BLEP 2010 to make horticulture an exempt form of development where the application relates to the establishment of a new blueberry farm and where the application meets certain criteria that are to be introduced under the planning proposal.	
<b>Review request made by:</b>	<input type="checkbox"/>	Council
	<input checked="" type="checkbox"/>	A proponent
<b>Reason for review:</b>	<input checked="" type="checkbox"/>	A determination has been made that the planning proposal should not proceed.
	<input type="checkbox"/>	A determination has been made that the planning proposal should be resubmitted to the Gateway.
	<input type="checkbox"/>	A determination has been made that has imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or Council thinks should be reconsidered.

## Background information

<p><b>Details of the planning proposal</b></p>	<p>The planning proposal seeks to:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• 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 farm; and</li> <li>• amend schedule 2 of the BLEP 2010 to introduce criteria to make blueberry farming exempt development where it meets the following criteria:             <ol style="list-style-type: none"> <li>a) blueberry plants and associated infrastructure (such as poles and netting) are located a minimum of 200m from any dwelling (not including a dwelling on the same property) and a minimum of 50m from any property boundary not held in the same ownership;</li> <li>b) blueberry plants and associated infrastructure (such as poles and netting) are located the following minimum distances away from watercourses based on the Strahler method of stream ordering;</li> </ol> <table border="1" data-bbox="472 831 1477 1182"> <thead> <tr> <th>Stream order</th> <th>Minimum distance either side of watercourse</th> </tr> </thead> <tbody> <tr> <td>1st order</td> <td>10 metres</td> </tr> <tr> <td>2nd order</td> <td>20 metres</td> </tr> <tr> <td>3rd order</td> <td>30 metres</td> </tr> <tr> <td>4th order and greater</td> <td>40 metres</td> </tr> </tbody> </table> <ol style="list-style-type: none"> <li>c) where it is necessary to apply the setback distances specified in subclause b), and those setbacks are vegetated, the setback distances must be retained in their vegetated state, except for the removal of any non-native species;</li> <li>d) blueberry plants and associated infrastructure such as poles and netting are not to be located within any area mapped as 'core koala habitat' in any adopted koala plan of management; and</li> <li>e) any netting proposed for the protection of the crop must be black.</li> </ol> </li> </ul>	Stream order	Minimum distance either side of watercourse	1st order	10 metres	2nd order	20 metres	3rd order	30 metres	4th order and greater	40 metres
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<p><b>Reason for Gateway determination</b></p>	<p>A Gateway determination was not issued because the planning proposal report did not provide:</p> <ul style="list-style-type: none"> <li>• sufficient justification for the need for the planning proposal;</li> <li>• sufficient justification for the planning proposal's inconsistency with the following:             <ul style="list-style-type: none"> <li>○ section 117 (now 9.1) Direction 1.5 Rural Lands;</li> <li>○ State Environmental Planning Policy (Rural Lands) 2008; and</li> <li>○ the North Coast Regional Plan 2036, as it will not protect the agricultural production value of rural land.</li> </ul> </li> </ul>										

## Council views

<b>Date Council advised of request:</b>	Council was advised of the Gateway determination on 16 March 2018. Council as the proponent resolved at its meeting of 28 March 2018 to request a review of the Gateway determination.
<b>Date of Council response:</b>	Council submitted its request to review the Gateway determination on 20 April 2018.
<b>Council response:</b>	Council provided the following issues as reasons for seeking a review: <ul style="list-style-type: none"><li>• the disparity in opinions between professional officers within the Department;</li><li>• the existence of numerous state government publications supporting the request;</li><li>• the evidence base to support the regulation of blueberry growing;</li><li>• the centrality accorded to economic factors and protecting the agricultural value of rural land;</li><li>• the lack of focus on the specific impacts of the proposal;</li><li>• a failure to identify specific non-compliances;</li><li>• the reliance on a code of conduct in preference to regulatory measures; and</li><li>• a question of calibration.</li></ul>

## Proponent justification

### Details of justification:

Council sought a review of the decision not to issue a Gateway determination on 20 April 2018. Council provided the following reasons and justification in support of its review request:

#### 1. The disparity in opinions between professional officers within the Department:

- Council stated that there are two fundamentally different recommendations from different sections of the Department.
- Council contends that the views of the regional planning team who have a strong understanding of the regional issues regarding blueberry growing should hold greater weight than the views of the Sydney-based executive team.
- Although the Department identified that there is a strong policy position on this matter, it is Council's view that a well-defined policy position should not elicit such fundamentally different recommendations from professional officers within the Department.

#### 2. The existence of numerous state government publications supporting the request:

- Council states that the decision neglects to consider the reasonableness of the request regarding numerous best practice documents issued by the NSW Government, including:
  - *Living and Working in Rural Areas – A handbook for managing land use conflict issues on the NSW North Coast* (DPI, 2007) – the basis for the proposed buffer distances to property boundaries and adjoining residences in the planning proposal;
  - *Controlled activities on waterfront land – Guidelines for riparian corridors on waterfront land* (DPI – Office of Water, 2012) – the basis for the proposed buffer distances to riparian zones in planning proposals;
  - Standard Instrument – Principal Local Environmental Plan, which allows horticulture to be identified by Council as a use that is permitted with consent as the expression of planning policy in the state; and
  - *Integrated Regional Vulnerability Assessment* (Office of Environment and Heritage, 2016) – a credible policy response to regional climate change that supports the proposed buffer distances to watercourses.

#### 3. The evidence base to support the regulation of blueberry growing:

- Council states that, contrary to the suggestions in the Gateway determination, there is compelling evidence to support the planning proposal.
- Council cites the following findings from *Water Quality on Bucca Bucca Creek and the potential impacts of intensive plant agriculture*, a report prepared by Southern Cross University that looked at water quality impacts downstream of blueberry farms in the Coffs Harbour area as evidence supporting the planning proposal:
  - there was a significant difference in NO<sub>x</sub> (nitrate and nitrite) between sites downstream of blueberry farms and control sites;
  - 24% of NO<sub>x</sub> samples downstream of blueberries were between 50-fold and 800-fold higher than ANZECC trigger values; and
  - increasing riparian buffer zones by planting trees, shrubs and macrophyte is an important management consideration and has been shown to reduce N exports to creeks by every 4% for every metre of planting.
- Council states that the Gateway determination is contrary to Objective (b) of the *Environmental Planning and Assessment Act 1979*, which requires decision-makers to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations into decision-making processes.
- Council states that the Gateway determination is contrary to the precautionary principle – a universally accepted principle of ecologically

sustainable development.

**4. The centrality accorded to economic factors and protecting the agricultural value of rural land:**

- Council states that it considered the contribution agriculture makes to the economy in Bellingden and designed the planning proposal to avoid unintended impacts on other forms of agriculture by making most horticulture exempt development.
- Council states that the objectives of the *Environmental Planning and Assessment Act 1979*, and the rural planning principles in State Environmental Planning Policy (Rural Lands) 2008, obligate decision-makers to balance the social, economic and environmental interests of the community.
- Council contends that there are reasonable concerns regarding the environmental impacts of blueberry growing and that the economic interests of the blueberry industry can be met with the proposed buffers in place.

**5. The lack of focus on the specific impacts of the proposal:**

- Council contends that the Gateway determination neglects to consider the terms and impacts of the planning proposal. Council argues that the determination contrasts with the detailed assessment of the likely impacts of the proposal undertaken by the regional planning team.
- Council states that it is not intending to regulate other forms of agriculture, which it contends the Gateway determination contemplates.
- Council argues that the merit of the planning proposal should not be decided with reference to future scenarios that may never eventuate.

**6. A failure to identify specific non-compliances:**

- Council states that justification for the planning proposal and an assessment of the proposal's consistency with the planning documents cited in the decision not to issue a Gateway determination was provided in the original planning proposal.
- Council states that, 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.
- Council provides the following comments in relation to the planning proposal's consistency with the relevant planning framework documents:

*North Coast Regional Plan 2036 – Direction 11*

- Action 11.1 – not relevant as the planning proposal does not relate to the consideration of potential locations for new urban development and residential development;
- Action 11.2 – not relevant to the planning proposal;
- Action 11.3 – not relevant as the planning proposal does not relate to residential and rural residential development;
- Action 11.4 – not relevant to the planning proposal; and
- Action 11.5 – the planning proposal does not propose any change to existing arrangements for agricultural industries.

*Section 117 (now 9.1) Direction 1.5 Rural Lands*

- Council argues that the Gateway determination has only documented its consideration of the objectives of this Direction, without viewing them through the lense of the rural planning principles as required by clause 4 of the Direction; and
- Council argues that this is contrary to the approach adopted by Council in the original planning proposal and the regional planning team in its assessment report.

	<p><i>State Environmental Planning Policy (Rural Lands) 2008 – rural planning principles:</i></p> <ul style="list-style-type: none"> <li>○ Principle a) – the planning proposal does not prohibit any form of agriculture. The approach proposed by Council means no additional consent will be required to undertake agricultural activities in the Bellingen Shire;</li> <li>○ Principle b) – the planning proposal is in response to concerns relating to the establishment of blueberry farms and aims to address some of the impacts associated with them. It recognises the economic value of agriculture to the economy and responds to an issue relating to the apparent lack of resources in NSW Government agencies to undertake compliance work;</li> <li>○ Principle c) – Council’s report considered the economic value of agriculture to the local economy;</li> <li>○ Principle d) – the planning proposal respects the value of agriculture to the local economy and is not a reactive response to agriculture as a whole. Council argues that the planning proposal balances the social, economic and environmental interests of the community;</li> <li>○ Principle e) – the proposal does not seek to prohibit farms from being established in areas of environmental assets but requires a more careful consideration of the impact if the proposal seeks to be located in riparian zones and core koala habitat areas;</li> <li>○ Principle f) – the proposal does not provide opportunities for rural lifestyle settlement and housing;</li> <li>○ Principle g) – the proposal does not look to provide new opportunities for rural housing; and</li> <li>○ Principle h) – the planning proposal is consistent with the North Coast Regional Plan 2036.</li> </ul> <p><b>7. The reliance on a code of conduct in preference to regulatory measures:</b></p> <ul style="list-style-type: none"> <li>• The Gateway determination references a revised code of conduct developed by the blueberry growing industry.</li> <li>• Council contends that the code does not compel any grower to abide by its content, provides no mechanisms to censure growers who do not observe it and nominates no standards to observe when considering buffers to adjoining dwellings or areas of environmental constraints.</li> </ul> <p><b>8. A question of calibration</b></p> <ul style="list-style-type: none"> <li>• Council acknowledges that most agricultural pursuits should not be subject to further regulation to ensure the vitality of the agricultural sector.</li> <li>• Council states that the NSW Government has indicated a strategic intent for the planning system is to ensure that activities with only minor impacts are not unnecessarily burdened by bureaucracy.</li> <li>• Council argues that the industrial scale of landscape change that can arise from the establishment of a blueberry farm warrants intervention by the planning system.</li> <li>• Council states that the planning proposal is a reasonable response to the impacts of this type of agriculture and the land constraints in the Bellingen Shire.</li> </ul>
<p><b>Material provided in support of the application/proposal:</b></p>	<p>Council submitted the following in support of its request for a review of the Gateway determination:</p> <ul style="list-style-type: none"> <li>• Gateway determination review application form; and</li> <li>• Justification for Request for Review of Gateway Determination – Planning Proposal 13 – Blueberry Regulation.</li> </ul>

## Assessment summary

### Department's assessment:

The Department's position is that the Gateway determination should remain unchanged. The Department continues to hold the view that the planning proposal should not be supported as it will not protect the agricultural production value of rural land, does not provide sufficient justification for the proposed provisions, and is inconsistent with:

1. s9.1 Direction 1.5 Rural Lands;
2. State Environmental Planning Policy (Rural Lands) 2008; and
3. The North Coast Regional Plan 2036.

While the Northern Region's assessment concluded the proposal should proceed, further consideration and assessment of the planning proposal identified a number of concerns with the planning proposal, including:

4. The planning proposal states that only three blueberry farms operate in the LGA and provides no evidence of issues associated with these farms that would warrant the proposed regulatory response.
5. The use of data from a community survey as the primary justification for the planning proposal is not considered appropriate given the sample size for the survey was 91 responses from an estimated residential population in the Bellingen LGA of more than 12,500. Of the 91 responses, the 60 respondents that supported greater regulation of blueberry farming is not considered to represent the community's views or provide sufficient justification for the blueberry industry to be singled out for regulation.
6. 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.
7. The approach creates a precedent that may have state-wide implications that are contrary to policies relating to managing rural land use.

### Response to Council's justification

#### **1. The disparity in opinions between professional officers within the Department:**

The Deputy Secretary, Planning Services, (as delegate of the Minister for Planning, and the Secretary) considered the recommendations contained in the initial assessment report prepared by the Department's Northern Region, and the additional assessment provided by the Executive Director, Regions, along with the proposal documentation, and determined that the proposal should not proceed.

The Executive Director, Regions oversees all of regional NSW and has extensive knowledge of regional NSW and in particular, the Northern Region, and issues associated with intensive agriculture as he was the Director of the Northern Region for 15 years. In addition, the Deputy Secretary, Planning Services has a strong understanding of regional issues across NSW and is well placed to make these decisions.

#### **2. The existence of numerous state government publications supporting the request:**

In October 2017, the Director General of the Department of Primary Industries (DPI) wrote to Council outlining the agency's concerns with the planning proposal. The planning proposal did not adequately address these concerns.

The Department's decision that the proposal not proceed gave consideration to DPI's concerns, as the lead agency for agricultural land use in NSW.

The publications are guidelines only and are not required government policy. Any guideline needs to be considered in the local context and the broader regional and state context.

**3. The evidence base to support the regulation of blueberry growing:**

The Department does not support the application of additional regulation to the blueberry industry. Many forms of extensive agriculture have similar impacts to those outlined by Council in the submission including land clearing, water extraction, spray drift etc.

The Department does not consider it reasonable to regulate the blueberry industry in isolation from other existing or potential intensive agricultural activities without evidence to justify the proposal and clearly demonstrate the impacts of one use over another.

**4. The centrality accorded to economic factors and protecting the agricultural value of rural land:**

The Department recognises the value of agriculture on the North Coast, and notes that the gross value in the region in 2014-2015 was \$930 million. As noted above, the Department does not support the application of site specific controls to only the blueberry industry in the absence of a holistic and coordinated strategic planning approach to intensive agriculture on a regional or state-wide basis.

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.

**5. The lack of focus on the specific impacts of the proposal:**

As noted above, the Department's position is that the impact of the proposal on the blueberry industry is not justified, is not supported by DPI, and is inconsistent with section 9.1 Direction 1.5 Rural Lands, the North Coast Regional Plan 2036, and State Environmental Planning Policy (Rural Lands) 2008. 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.

**6. A failure to identify specific non-compliances:**

The Department identified the proposals inconsistencies in the attached memorandum from the Executive Director, Regions, to the Deputy Secretary, Planning Services, dated 22 February 2017.

**7. The reliance on a code of conduct in preference to regulatory measures:**

The Department encouraged Council to continue to work with DPI and the industry in the preparation of the now finalised Blueberry Industry Code of Conduct. The Code was prepared by the Australian Blueberry Growers



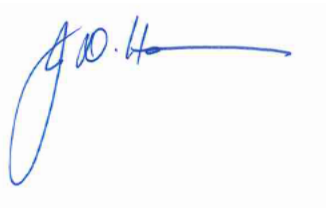
	<p>Association in consultation with DPI, and subsequently released in early 2018. The Department notes the decision not to support the proposal was not based on a reliance of this Code.</p> <p><b>8. A question of calibration</b></p> <p>The Department agrees with Council in that most agricultural pursuits should not be subject to further regulation including the blueberry growing industry. 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.</p>
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**RECOMMENDATION**

**Reason for review: A determination has been made that the planning proposal should proceed subject to conditions.**

<b>Recommendation:</b>	<input type="checkbox"/>	The planning proposal should not proceed past Gateway.
		<input type="checkbox"/> no amendments are suggested to original determination. <input type="checkbox"/> amendments are suggested to the original determination.
	<input type="checkbox"/>	The planning proposal should proceed past Gateway in accordance with the original Determination.

**Any additional comments:**



Prepared by:  
**Jeffrey Horn**  
**Director**  
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