



17 December 2019

**Advice for Gateway Determination Review  
112 & 134 School Lane, Southgate (PP\_2019\_CLARE\_001\_00)**

## 1. INTRODUCTION

1. On 28 October 2019, the Independent Planning Commission of NSW (the **Commission**) received a referral to review a Gateway determination pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* in relation to a planning proposal for 112 and 134 School Lane, Southgate (the **Site**).
2. In August 2018, A Fletcher & Associates Pty Ltd (the **Applicant**) lodged a planning proposal with Clarence Valley Council (**Council**) seeking to reduce the minimum lot size applying to the Site from 40ha to 6ha within the RU1 Primary Production zone to permit the subdivision of land and the erection of two additional dwellings (the **planning proposal**).
3. Council officers reviewed the planning proposal and reported it to the Council Meeting of 11 December 2018 with an officer recommendation to not support the planning proposal due to a lack of strategic justification. However, the elected Council resolved to support the planning proposal as proposed and refer it to the then Department of Planning and Environment's (the **Department**) gateway panel for determination. The Commission understands that the elected Council supported the planning proposal on the basis that it would be "*entirely conditional upon registration of a covenant on the Southgate Ferry Road properties in favour of Council to the effect that dwelling construction is prohibited on the subject properties*". This proposition is known as the '**associated offer**', which is described in further detail at paragraph 14.
4. On 4 June 2019, as delegate for the Minister for Planning, the Department issued a Gateway determination for the planning proposal not to proceed (the **Gateway determination**) because the proposal is "*considered to lack strategic merit*", is "*inconsistent with the relevant Environmental Planning Instruments*" (**EPIs**) and "*may set an undesirable precedent for similar development in the area.*"
5. On 22 July 2019, A Fletcher & Associates Pty Ltd (the **Applicant**) requested a review of the Gateway determination (**Gateway determination review request**) and challenged the basis of the Gateway determination.
6. The matter was referred to the Commission for advice from the Minister's delegate. The letter accompanying the referral requests the Commission to:  
  
*"review the decision and prepare advice concerning the merits of the request. The advice should include a clear and concise recommendation confirming whether, in the Commission's opinion, the Department's decision should stand."*
7. Professor Mary O'Kane, Chair of the Commission, nominated Chris Wilson (Chair) and Stephen O'Connor to comprise the Commission's Panel to undertake the review and provide advice.

## 1.1 Site Description

8. The Site covers a total area of 25.5ha and comprises four adjoining, cleared rural lots that together make up 112 and 134 School Lane, Southgate (**Figure 1**). The legal descriptions of the allotments are as follows:

No. 112 School Lane:

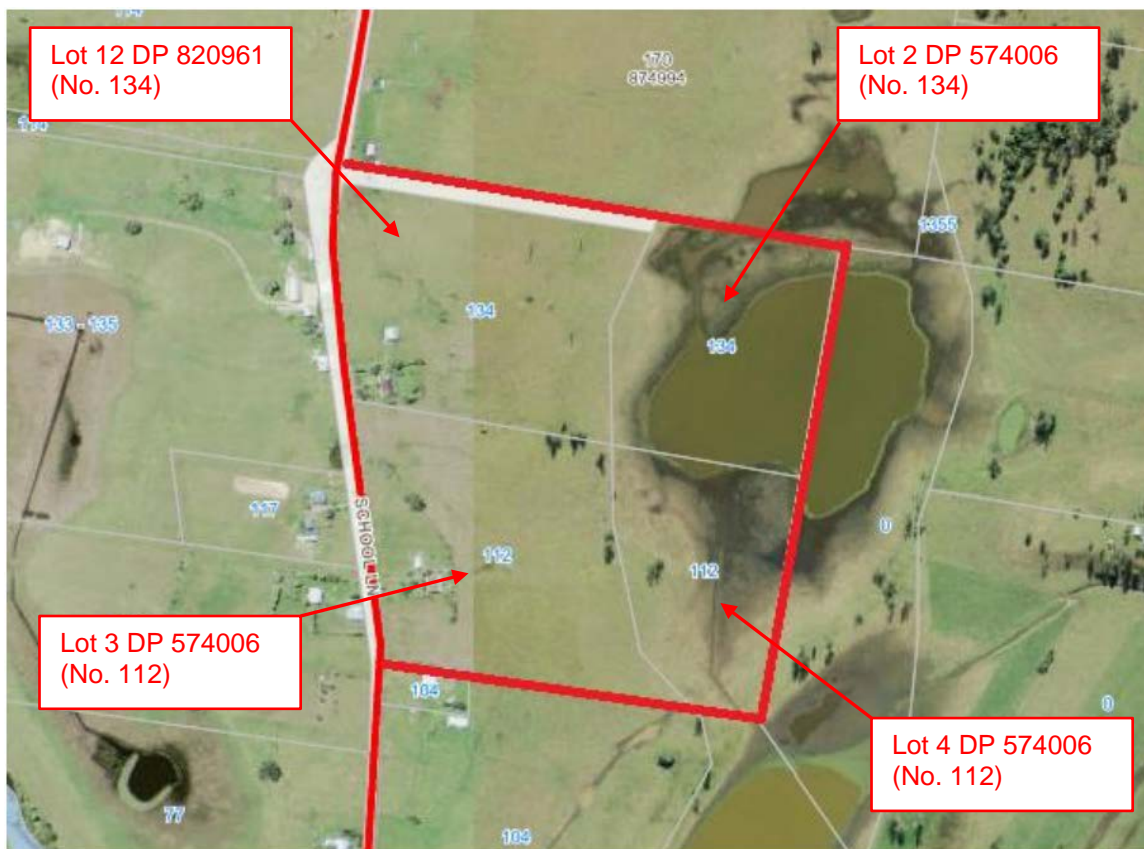
- Lot 3 DP 574006 (8.11ha)
- Lot 4 DP 574006 (4.47ha)

No. 134 School Lane:

- Lot 2 DP 574006 (5.6ha)
- Lot 12 DP 820691 (7.31ha)

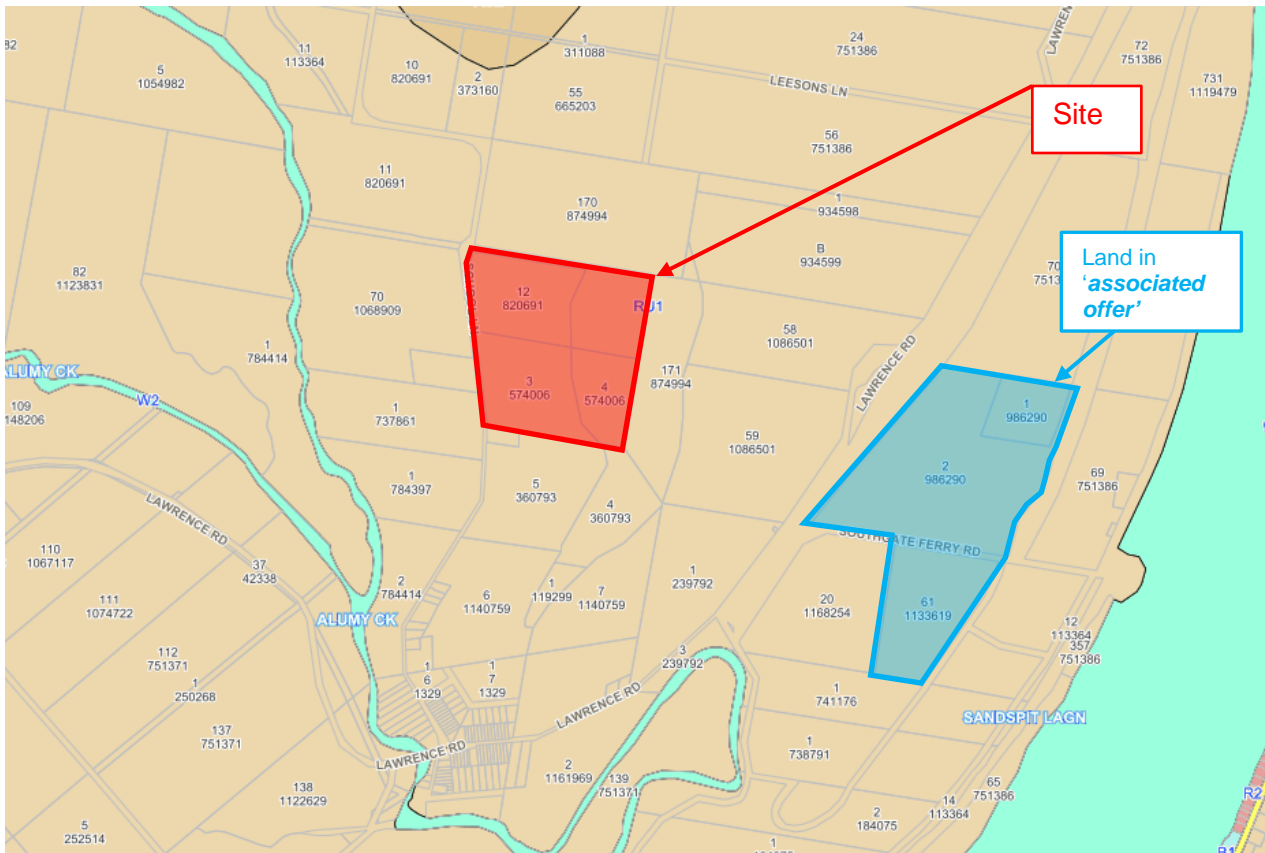
9. Lot 12 DP 820691 (No. 134) and Lot 3 DP 574006 (No. 112) front School Lane, and include flood free portions adjacent to the road. These 2 allotments contain a dwelling each, accessed via School Lane.

10. Lot 2 DP 574006 (No. 134) and Lot 4 DP 574006 (No. 112) are flood affected, vacant of development and are used for cattle grazing. A significant portion of the lower parts of these lots contains a wetland known as Southgate Lagoon. Southgate Lagoon is included in the high environmental value map in the North Coast Regional Plan 2036 (**see Figure 4 in section 3.2.3**).



**Figure 1 – Subject Site** (source: Applicant's Planning Proposal)

11. Under the Clarence Valley Local Environmental Plan 2011 (**CVLEP**), the Site is zoned RU1 Primary Production (**Figure 2**), with a minimum lot size requirement of 40ha under Clause 4.1 of the CVLEP.

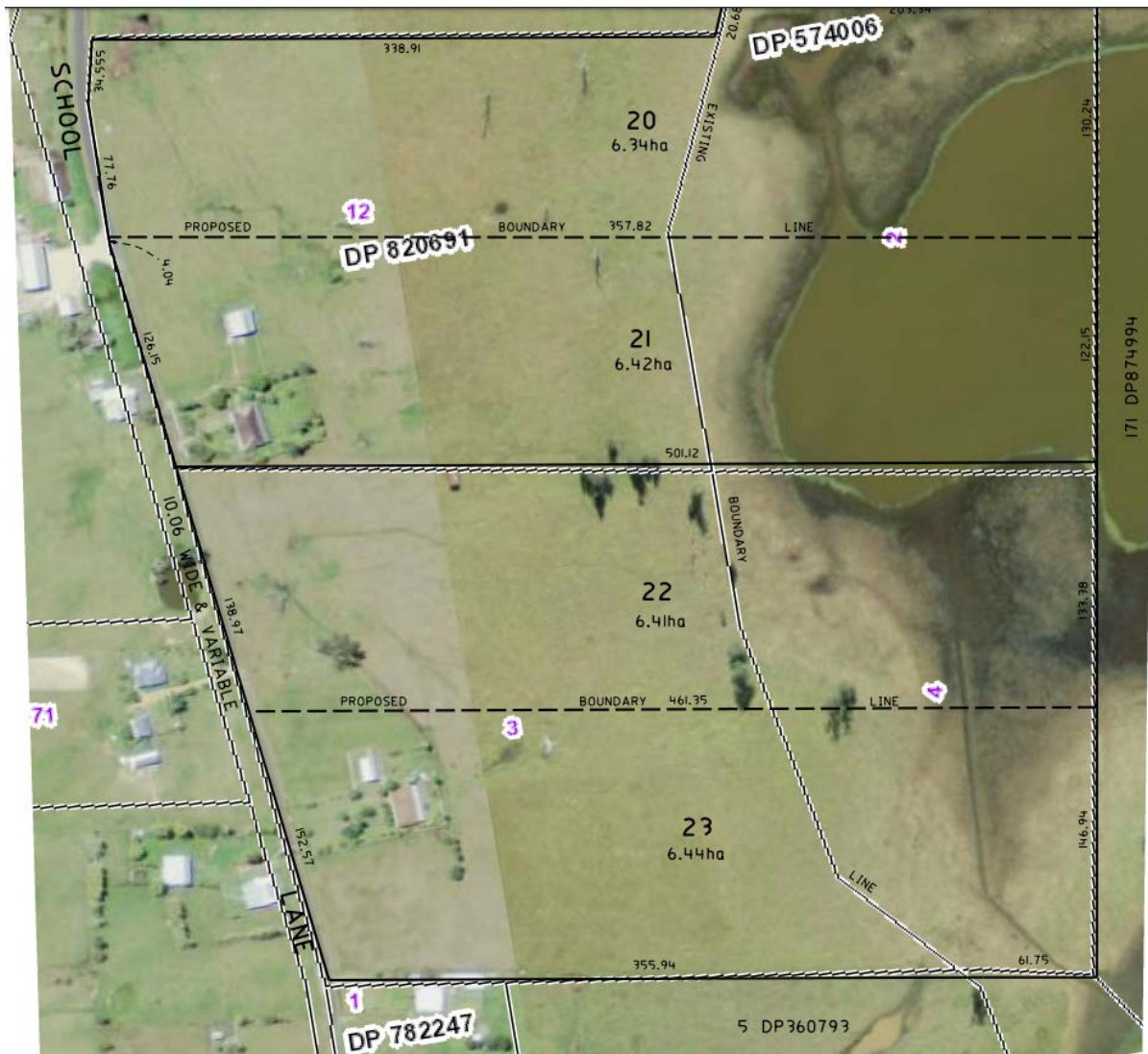


**Figure 2 – Clarence Valley LEP 2011 Zoning Map showing Site is zoned RU1 Primary Production (source: CVLEP)**

## 1.2 Planning Proposal

12. The planning proposal seeks to reduce the minimum lot size of the Site from 40ha to 6ha to permit the subdivision of land and the erection of two additional dwellings adjacent to School Lane. The planning proposal would allow a boundary adjustment to occur and to create two additional dwelling entitlements adjacent to School Lane.
13. The proposed boundary adjustment plan provided in the planning proposal shows 4 east-west allotments at the Site, ranging in size from 6.34ha to 6.44ha (**Figure 3**). This boundary adjustment is currently not permitted under CVLEP Clause 4.1B(3)(c) because it would increase the number of dwellings entitlements at the Site.
14. The planning proposal also refers to an '**associated offer**' to extinguish two dwelling eligibilities provided for under the CVLEP on flood-prone, cane-cropping land by way of restrictive covenant. The land is located on Southgate Ferry Road and is identified as Lots 1 and 2 DP 986290 and Lot 61 DP 1133619 (see Figure 2). This land is located approximately 500m to the east of the Site and is held in the same ownership as the Site in School Lane.

However, while the ‘associated offer’ is considered by the Applicant to be “critical” to the planning proposal, this offer does not form part of the submitted planning proposal.



**Figure 3 – Proposed boundary adjustment plan**  
(source: Applicant’s planning proposal)

### 1.3 History of Planning Proposal and Gateway Determination

15. Table 1 provides a history of the planning proposal:

**Table 1 – History of the Planning Proposal**

August 2018	The Applicant submitted a planning proposal to Clarence Valley Council
11 December 2018	Council considered the planning proposal at the Ordinary Council Meeting of 11 December 2018. The Council Officer recommended that Council resolve not to support the planning proposal.  However, by way of unanimous vote, the Council resolved to support the planning proposal and submit it to the Department for a Gateway determination.

17 December 2018	The planning proposal was submitted to the Department for a Gateway determination.
4 June 2019	The Department determined that the proposed amendment to the Clarence Valley Local Environmental Plan 2011 should not proceed.
22 July 2019	The Applicant sought a review of the decision not to issue a Gateway Determination
31 July 2019	Clarence Valley Council was advised of the Gateway determination review request
27 August 2019	Council responded to the Gateway determination review request and reiterated Council's resolved position that the planning proposal be conditionally supported
28 October 2019	The Commission receives a request to review the Gateway determination decision

16. The Applicant is permitted 42 days to request a review of a Gateway determination if the decision is that the planning proposal should not proceed or there are conditions the Applicant does not agree with. In this case, and as demonstrated in Table 1, the Applicant requested the Gateway determination review within the required timeframe.

#### 1.4 The Department's decision for the planning proposal not to proceed past Gateway

17. The Department's decision for the planning proposal not to proceed past Gateway was made because the planning proposal was considered to:
- Lack strategic merit;
  - Be inconsistent with the relevant state, regional and local planning policies; and
  - Potentially set an undesirable precedent for similar development in the area and other rural areas in the local government area.

## 2. THE COMMISSION'S MEETINGS AND SITE INSPECTION

18. As part of its considerations, the Commission held a teleconference with various parties, as detailed in the following pages. A decision was made by the Chair not to conduct a site inspection given the nature of the review and the ability to make an informed decision based on meetings with stakeholders and the material provided.

### 2.1 Meeting with the Department

19. On 20 November 2019, the Commission met with the Department via teleconference to discuss the planning proposal and the Gateway determination. Issues discussed at the meeting are recorded in a transcript which was made available on the Commission's website on 3 December 2019.
20. A summary of key matters discussed is as follows:
- 'Associated offer' to extinguish the dwelling entitlements on the land on Southgate Ferry Road;
  - Loss of flood free land;
  - Servicing and land use conflict issues between rural residential and agricultural uses;
  - The Department's views that the lots subject to the 'associated offer' as still viable as cane farming even without dwelling entitlements; and
  - The planning proposal is inconsistent with the provisions in the CVLEP relating to the subdivision of agricultural land.

## 2.2 Meeting with Clarence Valley Council

21. On 20 November 2019, the Commission met with Council officers via teleconference to discuss the planning proposal and the Gateway determination review. Issues discussed at the meeting are recorded in a transcript which was made available on the Commission's website on 3 December 2019.
22. A summary of key matters discussed is as follows:
  - The Council Officer recommendation for the planning proposal to not proceed;
  - Whether the proposal would result in a rural residential settlement;
  - Lack of strategic merit, inconsistency with policies;
  - Inconsistency with the character of the locality;
  - The local government area (**LGA**) provides enough land zoned for residential uses (approximately 7,000 lots) to meet anticipated demand in the Clarence Valley for many years to come;
  - The associated offer to create a restrictive covenant preventing dwellings from being constructed on the land in Southgate Ferry Road is inconsistent with CVLEP – Council advised a covenant can't effectively prohibit a use permitted by an environmental planning instrument (**EPI**); and
  - The flood risk to the Site and associated offer – Council provided further information on the flood risk and velocity post-meeting on 21 November 2019 – this information was made available on the Commission's website.

## 2.3 Meeting with the Applicant

23. On 20 November 2019, the Commission met with the Applicant via teleconference to discuss the planning proposal and the Gateway determination review. Issues discussed at the meeting are recorded in a transcript which was made available on the Commission's website on 3 December 2019.
24. A summary of key matters discussed is as follows:
  - Description and justification of the '*associated offer*';
  - Confirmation that the '*associated offer*' does not form part of this planning proposal;
  - Counter argument to the Council officer's view that the planning proposal will result in a '*settlement*';
  - Dwellings located on the existing sugar cane farm (the land of the '*associated offer*') would compromise the viability of that agricultural use;
  - Whether the planning proposal will set an undesirable precedent; and
  - Whether the land in proximity to the Site is already fragmented, so a precedent for small lots has already been set.

## 3. THE COMMISSION'S CONSIDERATION

### 3.1 Material considered by the Commission

25. In reviewing the Gateway determination and Gateway determination review request the Commission has carefully considered the following material (the **material**):
  - the Applicant's planning proposal, dated August 2018, and attachments;
  - the Council Report – recommendation and resolution, dated 11 December 2018;
  - the Department's Gateway Determination Report PP\_2019\_CLARE\_001\_00, dated 14 May 2019;

- the Department's Gateway determination and reasons, dated 4 June 2019;
- the Applicant's Gateway determination review request and accompanying submission, dated 22 July 2019;
- letter from Council in response to the Gateway determination review request, dated 27 August 2019;
- the Department's referral letter to the Commission, dated 22 October 2019;
- the Department's Gateway Review Justification Assessment Report (**Justification Assessment**);
- *Planning Circular PS 18-012 – Independent reviews of the plan making* (the **Planning Circular**), dated 14 December 2018;
- *Local Environment Plans: A guide to preparing local environment plans* (a **Guide to LEPs**), dated December 2018;
- strategic planning documents identified in **section 3.2**;
- information presented and discussed with the Commission at its separate meetings with the Department, Council and Applicant on 20 November 2019, set out on the Commission's website in the publicly available transcripts; and
- additional information received from the Council on 21 November 2019 (refer to paragraph 22).

### 3.2 Strategic Context

26. In reviewing the Gateway determination, the Commission has identified and considered the key strategic planning documents as follows:

#### 3.2.1 State Environmental Planning Policy (Primary Production and Rural Development) 2019 [SEPP(PPRL)]

##### *Applicant's comments*

27. The planning proposal is consistent with the relevant aims of SEPP(PPRL) as follows:

a) *to facilitate the orderly economic use and development of lands for primary production*

In its submission accompanying the Gateway determination review request, the Applicant states the 'associated offer' "*will protect the continued orderly economic use of the cane farm for primary production*" and is therefore consistent with the aims of SEPP (PPRL).

The Applicant is also of the view the "*planning proposal will have a minor impact on the low-intensity grazing of land within School Lane*".

b) *to reduce land use conflict and sterilisation of rural land by balancing primary production, residential development and the protection of native vegetation, biodiversity and water resources*

The Applicant states the additional 2 dwellings on School Lane will not conflict with existing uses in the locality. Future uses that may potentially conflict with the new dwellings will have to address any conflicts in a future development application.

The Applicant also states the construction of the dwellings on the cane properties as is currently permitted under the CVLEP would potentially impact the cane farming use of that land.

e) *to encourage sustainable agriculture, including sustainable aquaculture*

In responding to this aim, the Applicant refers to the associated offer, and states in the planning proposal the extinguishment of the dwelling entitlement on the Southgate Ferry Road lots will reduce the likely fragmentation of agricultural land, and retaining these lots within the existing cane farm will strengthen the sustainability of the cane farm operation.

#### *Council's comments*

28. The relevant SEPP is *“aimed at maintaining land for agriculture and Council officers are not convinced the proposal achieves this”*.

#### *Department's comments*

29. SEPP (PPRL) applies to the Site through the application of cl.5.16 of CVLEP, which adopts the provisions of Schedule 4, Part 2 of SEPP(PPRL) to establish matters for consideration applicable to the subdivision of land in certain zones, including the RU1 Primary Production zone.
30. The Department considers the planning proposal to be *“inconsistent with the rural subdivision principles, as listed in Schedule 4 of SEPP(PPRL) (and clause 5.16 of CVLEP), in particular:*
- the proposal is likely to have a significant impact on the predominant land uses in the vicinity (primary production);*
  - the proposal is likely to be incompatible with the surrounding land uses;*
  - the planning proposal does not include measures that would minimise land use conflicts; and*
  - the planning proposal would further fragment rural land and reduce the site's grazing and flood-free refuge potential’.*

#### *Commission's consideration*

31. The Commission acknowledges the aims of SEPP (PPRL) and agrees with the Department's assessment outlined at paragraph 30 that the planning proposal is inconsistent with the provisions listed in Schedule 4.
32. The Commission has considered the Applicant's comments in relation to SEPP (PPRL). As outlined in paragraph 27, it is apparent the Applicant's primary justification for the planning proposal is the merit of the associated offer. This is not a valid argument given the associated offer is not part of the planning proposal and has therefore not been assessed by the Department or the Commission. Furthermore, there is no guarantee that such a covenant could be sustained and ultimately assure the protection of productive agricultural land (cane farm).
33. In terms of the ability for the planning proposal to achieve the principles of SEPP (PPRL), the Commission is of the view that the planning proposal has the potential to adversely impact the existing uses in the vicinity. Furthermore, the proposed subdivision pattern has the potential to further sterilise and fragment the less constrained agricultural land at the Site and potentially impact the predominant and future uses in the locality by setting an undesirable precedent. Therefore, the Commission is of the view that the planning proposal is not consistent with SEPP (PPRL).



### 3.2.2 Ministerial Section 9.1 Directions

34. The Commission has reviewed the planning proposal against the following relevant Section 9.1 Directions:
- Direction 1.2 Rural Zones
  - Direction 1.5 Rural Lands
  - Direction 4.1 Acid Sulfate Soils
  - Direction 5.10 Implementation of Regional Plans

#### *Applicant's comments*

35. In the Applicant's Gateway determination review request and accompanying submission, dated 22 July 2019, the Applicant states that the Council and Department's findings that the planning proposal is inconsistent with the Section 9.1 Ministerial Directions "*appears to be based on a belief that it establishes a rural residential cluster, i.e. a de facto rezoning to R5. As highlighted elsewhere (in the Applicant's submission), this is not the case*".

#### *Council's comments*

36. The Council officer notes the Applicant's justification in the planning proposal that the land currently being used for cane farming would not continue to be used for cane farming if the dwellings were to be constructed on the land, and therefore extinguishing those entitlements and allowing the additional dwellings on School Lane is a satisfactory trade off. However, the Council officer contends that without consolidating the land there is no guarantee that the parcels will not be sold off individually and will still potentially fragment the cane farming land in the future.

#### *Department's comments*

37. The Department's Gateway Determination assessment states the planning proposal is inconsistent with the following Section 9.1 Ministerial Directions:
- Direction 1.5 Rural Lands - because it does not minimise the potential for land fragmentation and land use conflict in rural areas.
  - Direction 4.1 Acid Sulfate Soils – because the planning proposal will intensify land uses on land identified as containing classes 3 and 5 acid sulfate soils without having undertaken an acid sulfate soils study to assess the appropriateness of the land-use change. However, the Department notes this issue is minor given the CVLEP contains suitable provisions to consider and address development on land affected by acid sulfate soils at the development application stage.
  - Direction 5.10 Implementation of Regional Plans - because the planning proposal is inconsistent with Action 24.1 of the North Coast Regional Plan 2036 (see paragraph 43), and therefore it is inconsistent with Direction 5.10. The Department does not consider this inconsistency to be justified.

#### *Commission's consideration*

38. The Commission agrees with the Department's assessment at paragraph 37 that the planning

proposal is inconsistent with the Ministerial Directions in relation to the fragmentation and potential land use conflicts in rural areas for the reasons provided by the Department, and because the planning proposal is inconsistent with the North Coast Regional Plan 2036 for the reasons highlighted in paragraphs 41 to 47.

### 3.2.3 North Coast Regional Plan 2036

#### Applicant's comments

39. The Applicant contends the planning proposal is “*not inconsistent with the regional plan as it does not create a rural-residential settlement*”.
40. In the Submission accompanying the Gateway determination review request, the Applicant argues “*the resultant subdivision (from the planning proposal) is in effect a reorganisation of four small lots, will reflect the existing development pattern in School Lane without creating a rural-residential settlement*” and is consistent with other dwellings located along School Lane on lots of 6.67ha, 10.56ha, 8.39ha, 4200m<sup>2</sup>, 10.31ha and 1.92ha.

#### Council's comments

41. The Council Report formed the view that there is no support or context for the planning proposal in the North Coast Regional Plan 2036.

#### Department's comments

42. The Department advised the Site partially contains land with potentially high environmental value (wetland), as mapped under the regional plan (see **Figure 4**).



**Figure 4 – Potentially high environmental value land on the Site**  
(source: Department's Gateway Determination Report)

43. The Department is of the view that the planning proposal is inconsistent with Direction 24: Deliver well-planned rural residential housing areas. Action 24.1 requires the delivery of well-planned rural residential housing areas by identifying new areas in a rural residential land release strategy endorsed by the Department. In the Department's view, this planning proposal *"will create a cluster of dwellings on small 6ha rural allotments surrounded by agricultural land and land with potentially high environmental value. This is out of character with the nature of surrounding land uses and contrary to the existing and desired future regional and local strategic planning direction for the area"*.
44. The Department considers that the Site is part of a broader farm holding and provides a potential refuge for surrounding grazing operations as it is partly above the flood level.
45. The Department considers the planning proposal also introduces a potential land-use conflict which could adversely restrict agricultural land practices and production on the adjoining lands. Furthermore, the proposed subdivision pattern and additional dwellings have the potential to further sterilise and fragment the less constrained agricultural land at the Site. The additional dwellings are likely to lead to increased servicing pressures in the locality, due to increased service use and differing expectations as to servicing standards in rural areas.

#### *Commission's consideration*

46. As indicated by the Department in paragraph 42, the Site is mapped as 'potentially high environmental value' in the North Coast Regional Plan 2036. This Plan sets planning principles for guiding growth on the NSW north coast. One of those principles relates to directing growth to identified urban growth areas, and protecting environmental assets, such as those mapped as having potentially high environmental value. The Commission is of the view that the Site is not appropriate under the provisions of the North Coast Regional Plan 2036 to support additional residential uses, when the site is agricultural land and appropriate land has been identified under the North Coast Regional Plan 2036 for residential uses.
47. The Commission agrees with the Department's conclusions identified in paragraph 43, that the planning proposal has the potential to adversely impact the agricultural setting of the Site and is inconsistent with the provisions of the North Coast Regional Plan 2036 for the reasons set out by the Department.

### **3.2.4 Clarence Valley Local Environmental Plan 2011**

#### *Applicant's comments*

48. The Applicant states the planning proposal is consistent with the objectives of the RU1 zone as:
  - the planning proposal and associated offer will prevent the fragmentation of the existing cane farm and the potential loss of approximately 46ha of productive agricultural land. This impact on sustainable agricultural production is significantly greater than that potentially resulting from the minor fragmentation of low-intensity grazing land in School Lane;
  - the addition of two dwellings into the existing development pattern in School Lane is unlikely to increase land use conflict;
  - the planning proposal does not create a dispersed rural settlement pattern. In the context of the existing development pattern in School Lane, two additional dwellings are not significant;
  - Grafton provides public services and facilities for Southgate, and the level of demand is

unchanged whether the two dwellings are on cane land in Southgate Ferry Road or in School Lane; and

- The planning proposal removes two dwelling entitlements from flood-affected land and relocates them to land with no environmental hazards.

#### *Council's comments*

49. The proposed reduced minimum lot size in the RU1 zone is not supported by the Council officer, who notes while the Applicant has observed smaller lots nearby the Site, these smaller lots are the result of historical decisions and prior planning regimes (for example concessional allotments). The current planning controls and rural lands strategy provide for a minimum lot size of 40ha, which is aimed at preventing further fragmentation of farmland.
50. The Council states with regard to the associated offer, a covenant cannot effectively override the provisions of CVLEP. The dwellings on the Southgate Ferry Road land are permissible under clause 4.2B of CVLEP (the '**sunset clause**'). It is not possible to apply a covenant that prohibits this. It is also possible to remove such restrictions in the future, and while the 3 lots that comprise the associated offer are currently in the same ownership, they are separate parcels that could be sold individually.
51. Council states that the "*planning proposal would create an undesirable precedent in the locality*".

#### *Department's comments*

52. The Department determined the planning proposal to be inconsistent with the objectives of the RU1 Primary Production zone because it does not prevent dispersed rural settlement or minimise the fragmentation and alienation of resource lands.
53. The Department also concludes the planning proposal would potentially create an undesirable precedent for similar planning proposals in the locality and across the LGA in other rural-zoned areas to create small lots. This is considered by the Department to be potentially detrimental to protecting agricultural uses in the RU1 zone.

#### *Commission's consideration*

54. The Commission has considered the material above, and notes CVLEP was specifically provided with a sunset clause (Clause 4.2B(4)) extinguishing the dwelling entitlement on lots less than 40ha within the RU1 Primary Production zone from 2021. The Commission understands Clause 4.2B(4) was implemented to prevent the proliferation of dwelling houses on agricultural land that may impact the primary agricultural use of the land.
55. The sunset clause was included in CVLEP in recognition that the appropriate lot size within the RU1 zone is 40ha to provide for a dwelling alongside the primary production use of the land. Given any lot less than 40ha without an existing dwelling will lose the dwelling entitlement in 2021, allowing a reduction in the lot size of the Site under this planning proposal would be inconsistent with the intention provided for under CVLEP.
56. The Commission agrees with the Department's assessment summarised at paragraph 52 that the planning proposal does not achieve the objectives of the RU1 zone.

### 3.2.5 Clarence Valley Settlement Strategy

#### *Applicant's comments*

57. The Applicant states in its Gateway determination review request and accompanying submission, dated 22 July 2019 this *"strategy focuses on, and operates at, a higher level than the relocation of two dwelling entitlements in the same location."* The Applicant opposes the Department's view that the planning proposal comprises a settlement that creates a cluster of rural residential developments.
58. The planning proposal creates a four-lot arrangement, which is *"in keeping with the development pattern in the immediate vicinity, all of which occurred with the approval of the former Copmanhurst Shire Council and in accordance with the provisions of its LEP"*.
59. It is the Applicant's contention that *"the proposal is not inconsistent with the strategy as the strategy is not relevant to the development that will occur as a result of the proposal."*

#### *Council's comments*

60. In the Council report, the Council officer formed the view that there is no support or context for a proposal of this nature in the Clarence Valley Settlement Strategy.
61. At the teleconference on 20 November 2019 described at paragraph 22, Council officers acknowledged that the Clarence Valley Settlement Strategy was prepared some time ago, but noted it is still a relevant policy. It provides for settlement areas and patterns that are located outside the floodplains. Council officers note Southgate is flood prone and is therefore *"not an ideal area to encourage...settlement"*. Council officers also advised that despite the age of the Clarence Valley Settlement Strategy, Council has recently reviewed the strategy and determined it is still a relevant and useful strategy.
62. Council officers advised at the meeting with the Commission on 20 November 2019 the Clarence Valley Settlement Strategy identifies enough land zoned for residential or rural residential to meet demand for many years, and therefore the current planning proposal is not justified in terms of delivering housing in the LGA.

#### *Department's comments*

63. The Department stated in its Gateway determination report the Clarence Valley Settlement Strategy is Council's adopted urban and rural land release strategy. The strategy does not identify or plan for the release of rural residential style development in Southgate. The planning proposal is not consistent with locally implemented planning principles as it would result in the fragmentation of rural land and additional development outside agreed growth areas for rural residential development.

#### *Commission's consideration*

64. The Commission accepts the Council's advice at paragraph 61 that the Clarence Valley Settlement Strategy provides for sufficient land to satisfy demand for residential and rural residential purposes in the LGA.
65. The Commission agrees with both the Council officer's and Department's conclusions summarised in paragraphs 61 and 63. The Commission accepts the Council officer's views

that the Clarence Valley Settlement Strategy is still a relevant policy to guide residential development in the locality, and already makes sufficient provision for additional residential and rural residential developments in appropriate locations. This is one of the reasons the Commission does not support additional dwelling entitlements on rural land at the Site. Therefore, the Commission considers the planning proposal to be inconsistent with the Clarence Valley Settlement Strategy.

### 3.3 Key Matters for Consideration

66. In undertaking the review of the Gateway determination, the Commission has considered each reason for the Department's decision and provides an assessment below.

#### 3.3.1 The Planning Proposal lacks strategic merit, and is inconsistent with the relevant State, Regional and Local planning policies

##### *Applicant's Consideration*

67. In its submission that accompanied the Gateway determination review request, the Applicant agrees *"the proposal by itself has no strategic merit but when considered in conjunction with the associated offer it achieves the strategic outcome of minimising the risk to life and property from flooding which is an objective of state and Council policy documents"*.
68. The Applicant also states *"the associated offer also protects productive agricultural land (the cane farm on the Southgate Ferry Road properties) from potentially significant fragmentation and loss of production compared to the potentially minor loss of low-intensity agricultural activity in School Lane. The protection of agricultural land is a strategic goal of a variety of strategic policies, including the North coast Regional Plan 2036, Ministerial Directions and SEPP (PPRL)."*
69. With regard to potential land use conflicts under the relevant planning policies, the Applicant also contends *"there are no existing uses in the locality which would conflict with 2 additional dwellings and any future uses which may have the potential for conflict would require the submission of a development application which would be assessed on a number of grounds including potential conflict."*

##### *Council's Consideration*

70. As described at paragraph 61, the Council stated the planning proposal is not necessary from a strategic perspective to accommodate additional rural residential development.
71. The Council report dated 11 December 2018 recommends the planning proposal not be supported because the planning proposal does not minimise the fragmentation of agricultural land and is therefore not strategically supported by Ministerial Directions or Council strategies.
72. While it is noted the Council resolved at the meeting on 11 December 2018 to support the planning proposal to proceed for a Gateway determination, this resolution was dependent on the registration of a covenant on the Southgate Ferry Road properties (the associated offer) to the effect that dwelling construction is prohibited on those properties. However, the mechanism for such a covenant did not form part of the planning proposal, and Council Officers questioned the ability for such a covenant to effectively override the dwelling entitlement provided under CVLEP.

73. In addition, at the meeting held on 20 November 2019, the Council officers discussed with the Commission the potential for additional dwellings to impair present or future agricultural pursuits on adjoining land, which is inconsistent with the provisions of SEPP (PPRL), the relevant Section 9.1 Ministerial Directions and the objectives of the RU1 Primary Production zone.

#### *Department's Consideration*

74. In its Gateway Determination Report, the Department contends there is *"no identified strategic merit or need for the planning proposal. The intent of the proposal is to transfer dwelling eligibilities from flood-affected land to flood-free grazing land within the same ownership. This premise assumes the erection of dwellings on the flood-affected land would occur. Until a development application is assessed, it can't be determined whether the land would be suitable for development or if a dwelling house would be approved."* It is also noted this associated offer is not a formal part of this planning proposal.
75. The Department's assessment also states the *"mere presence of development constraints affecting a site is considered to be an inappropriate strategic premise for moving development 'potential' to other land."*
76. The Department's Gateway determination report identifies that the *"imposition of unplanned rural residential development amid lands predominantly used for agricultural production...introduces potential land-use conflict which could adversely restrict agricultural land practices and production on the adjoining lands."*
77. As detailed in paragraphs 30, 37, 43, 45, 52, 53 and 63, the Department considers the planning proposal to be inconsistent with the relevant state, regional and local planning provisions and desired outcomes.

#### *Commission's Consideration*

78. The Commission has considered the material above and concurs with the Council officers comments outlined in paragraphs 70 to 73 and the Department's consideration summarised in paragraphs 74 to 77, and has formed the view that the planning proposal is not necessary from a strategic perspective.
79. The Commission has not found the planning proposal to have strategic merit because it is not necessary to meet rural residential demand in the locality, is not consistent with the relevant state, regional and local planning and is not required to address any significant changes in the locality.
80. The Applicant's arguments supporting the strategic merit of the planning proposal are reliant on the associated offer, which is not a formal component of this planning proposal. Even if it was included in the planning proposal, there is no guarantee that a covenant on title could be sustained as described in the associated offer, and therefore productive agricultural cane land may not be protected.
81. The Commission also contends that future compliant uses in the RU1 zone should not be adversely impacted by the proposed use, which is inconsistent with the desired future character of the RU1 zone as identified in CVLEP. In the Commissions view, the lot realignment and additional dwellings have the potential to further sterilise and fragment the less constrained agricultural land at the Site and potentially increase the risk of conflict with

the future agricultural uses in the locality and may set an undesirable precedent for other similar land in the LGA

### **3.3.2 The Planning Proposal will set an undesirable precedent for similar development in the area and other rural areas in the LGA**

#### *Applicant's Consideration*

82. The Applicant argues the Site is located in the vicinity of a number of sub-sized agricultural allotments, and therefore a precedent already exists for the planning proposal.

#### *Council's Consideration*

83. In the Council Officer's report dated 11 December 2018, an apparently similar planning proposal is described that was adopted by Council in April 2011, which also "*involved the relocation of dwelling entitlements from flood prone agricultural land.*" However, the Council report notes there were significant differences between that planning proposal and the current planning proposal because the land in question was located adjacent to R5 Large Lot Residential zoned land and involved a rezoning to R5 for the relocated dwelling entitlements. That planning proposal also included an amendment to the Minimum Lot Size Map to 200ha so the residual farmland would be retained and could not be further subdivided in the future.
84. The Council officer's report notes the current planning proposal and associated offer is not on contiguous land and is not consistent with the previous 2011 planning proposal adopted by Council.
85. The Council Officer's report states the planning proposal will set a precedent for "*additional dwelling trades on flood prone land for non-contiguous rural lifestyle lots in primary production areas.*"
86. The Council Officer's report also raises concerns that if the planning proposal was to be supported and set a precedent for similar development in the locality, it would give rise to increased fragmentation of rural land and would result in additional development outside the agreed growth areas for rural residential development.

#### *Department's Consideration*

87. In its Gateway Determination report, the Department advises the proposal "*would potentially create an undesirable precedent for similar proposals in the locality and across the LGA in other rural-zoned areas...(and)...it may set a precedent for the further reduction of land sizes on similar nearby land and lead to increased fragmentation of rural land.*"

#### *Commission's Consideration*

88. The current planning proposal is different to the planning proposal described and adopted by Council (paragraph 83 and 84) because the land subject to the associated offer is not contiguous to the Site, and given the existing 3 lots subject to the associated offer are already less than 40ha, the possibility remains that these lots can be sold off separately in the future, with a potential dwelling entitlement until 2021.
89. As described in paragraphs 54, 55 and 56, the Commission is of the view that the intent of CVLEP is clear in the future desired character of RU1 zoned land, and despite the presence



of RU1 zoned lots less than 40ha in the locality, the Commission agrees with the Council Officer's and Department's views that some of the smaller lots that don't currently include a dwelling house may be consolidated in future to accommodate larger agricultural pursuits, aligning with the RU1 zone objectives.

90. Furthermore, the Commission is of the view the planning proposal has the potential to further sterilise and fragment agricultural land at the Site. Currently the agricultural capability of the existing eastern allotments (Lots 2 and 4 DP 574006) are constrained by both flooding and identified environmental values. The western lots (Lot 3 DP 573006 and Lot 12 DP 820961) on the other hand are less constrained and more suitable for agriculture. The new subdivision pattern which runs east to west (**Figure 3**) along with the additional dwellings will intensify non agricultural uses on this less constrained agricultural land.

#### **4. THE COMMISSION'S ADVICE**

91. The Commission has undertaken a review of the Gateway determination, as requested by the Department, and provides the following advice on whether the planning proposal should proceed past Gateway.
92. Based on its consideration of the material, the Commission agrees with the Department's gateway decision that the planning proposal does not demonstrate strategic merit and therefore should stand as:
- it is inconsistent with State Environmental Planning Policy (Primary Production and Rural Lands) 2019; the North Coast Regional Plan 2036; the Clarence Valley Local Environmental Plan 2011 and the Clarence Valley Settlement Strategy; and
  - it is inconsistent with the relevant Section 9.1 Ministerial Directions.
93. The Commission also considers that the **planning proposal**:
- may potentially create a land use conflict;
  - may potentially sterilise and fragment primary production land; and
  - may create an undesirable precedent.
94. For the reasons outlined in paragraphs 92 and 93, the Commission agrees with the Minister's delegate's decision, and recommends that the planning proposal not proceed past Gateway.



**Chris Wilson (Chair)**  
Member of the Commission



**Stephen O'Connor**  
Member of the Commission