



BELLINGEN SHIRE COUNCIL

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Our Ref: Planning Proposal 13
DB:klb
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Your Ref: PP_2017_BELLI_001_00

20 April 2018

NSW Department of Planning & Environment
Locked Bag 9022
GRAFTON NSW 2460

Dear Sir/Madam

Justification for Request for Review of Gateway Determination – Planning Proposal 13 – Blueberry Regulation

I refer to the abovementioned matter.

Council was advised on 16 March 2018 by Marcus Ray (Deputy Secretary, Planning Services), Delegate of the Minister for Planning, that Councils request for a Gateway determination in respect of Planning Proposal 13 was not supported for the following reason.

- 1. The planning proposal does not adequately demonstrate the need or justification for the proposed provisions or its inconsistencies with s117 Direction 1.5 Rural Lands, State Environmental Planning Policy (Rural Lands) 2008 and the North Coast Regional Plan 2036 as it will not protect the agricultural production value of rural land.**

In arriving at this determination, Mr Wray had regard to a memorandum prepared by Stephen Murray (Executive Director, Regions), the purpose of which was to *"provide an alternative recommendation to the Planning Team Report, which supports Bellingen Councils proposal..."*.

Bellingen Shire Council resolved at its meeting of 28 March 2018 to request a review of this determination. This resolution is reprinted below.

MOVED (Cr Fenton/Cr Wright-Turner)

That Council

- 1 requests that the decision to refuse Planning Proposal 13 is reviewed by the Department of Planning & Environment*
- 2 that Council determine not to appoint a representative for Joint Regional Planning Panel with respect to this matter.*

For: Cr King, Cr Klipin, Cr Harrison, Cr Fenton and Cr Wright-Turner.
Against: Cr Carter and Cr Jenkins.

Council, in requesting a review, is required to include *"a justification for why an alteration of the Gateway Determination is warranted including, where relevant, responses to issues raised by the original Gateway decision maker."*

The issues raised by the original Gateway decision maker are taken, for the purposes of this request, to be those discussed in the Memorandum prepared by Mr Murray and formalised in the official Gateway Determination.

It is Council's contention that the following matters justify an alteration of the gateway determination to allow Council to proceed with the Planning Proposal.

The disparity in opinions emanating from professional officers within the DPE

Prior to discussing specific aspects of the refusal, it is important to note that there are two fundamentally different recommendations emanating from different sections of the Department with respect to this Planning Proposal.

Specifically, the Regional Planning Team who are based in Grafton and who have a strong understanding of regional issues regarding blueberry growing consider that the proposal is worthy of support and complies with relevant legislative requirements. In contrast to this, the Executive Team within Sydney, who have elected to intervene in this matter for reasons not stated, consider that the proposal is fundamentally at odds with relevant legislative requirements.

The Department have pointed to the existence of a strong policy position on this matter in support of their refusal, however it is Council's contention that a well-defined policy position should not be capable of eliciting such fundamentally different recommendations from professional officers within the Department.

Furthermore, it is Council's contention that the professional opinion of regional planning officers with firsthand knowledge of the issues regarding blueberry growing in the region should hold greater stead in the circumstances

The existence of numerous State Government Publications supporting the request

It is submitted that the Gateway Determination neglects to consider the reasonableness of the request with regard to numerous best practice documents issued by the NSW Government.

For example, the Planning Proposal demonstrates that;

- the proposed buffer distances to property boundaries and adjoining dwellings have been selected with reference to the well regarded publication "Living & Working in Rural Areas – A handbook for managing landuse conflict issues on the NSW North Coast (Published by NSW Department of Primary Industries 2007)
- the proposed buffer distances to riparian zones have been selected with reference to the document "Controlled activities on waterfront land – Guidelines for riparian corridors on waterfront land (Published by NSW Department of Primary Industries – Office of Water 2012)
- the proposal to make "horticulture" permissible with consent is in fact explicitly allowed for the by the NSW Standard Instrument Principle Local Environmental Plan, which is considered to be the highest level expression of planning policy in the State.

- The proposed buffer distances to watercourses are a credible policy response to regional climate change projections for increased sheet and rill erosion leading to sedimentation, as documented in the "Integrated Regional Vulnerability Assessment", published by the NSW Office of Environment & Heritage.

The evidence base to support regulation of blueberry growing

The Gateway Determination suggests that there is inadequate evidence to warrant the regulation of the blueberry industry. It is Councils contention that there is compelling evidence to support the Planning Proposal in a recent report prepared by Southern Cross University that looked at water quality impacts downstream of blueberry farms in the Coffs Harbour area.

Some of the findings of this report, titled "*Water Quality on Bucca Bucca Creek and the potential impacts of intensive plant agriculture*", are documented below.

- There was a significant difference in NO_x (nitrate & nitrite) between sites downstream of blueberry farms and control sites.
- 24% of NO_x samples downstream of blueberries were between 50 and 800 fold higher than the ANZECC trigger values
- Increasing riparian buffer zones by planting trees, shrubs and macrophytes is an important management consideration and has been shown to reduce N exports to creeks by every 4% for every m of planting.

It is Councils view that the findings of this report 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.

Whilst making reference to the water quality report, the justification for the Gateway Determination instead elects to adopt a disinterested approach to these findings, observing that impacts including "*increased nitrogen in waterways are commonly associated with many other forms of horticulture, intensive plant agriculture and agriculture*" and "*it is not reasonable to regulate this industry in isolation...without a more detailed evidence base justifying the proposed changes.*" It is of 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.

Objective (b) of the NSW Environmental Planning & Assessment Act 1979 requires decision makers to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations into their decision making processes. A universally accepted principle of ecologically sustainable development is the "precautionary principle" which states that where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

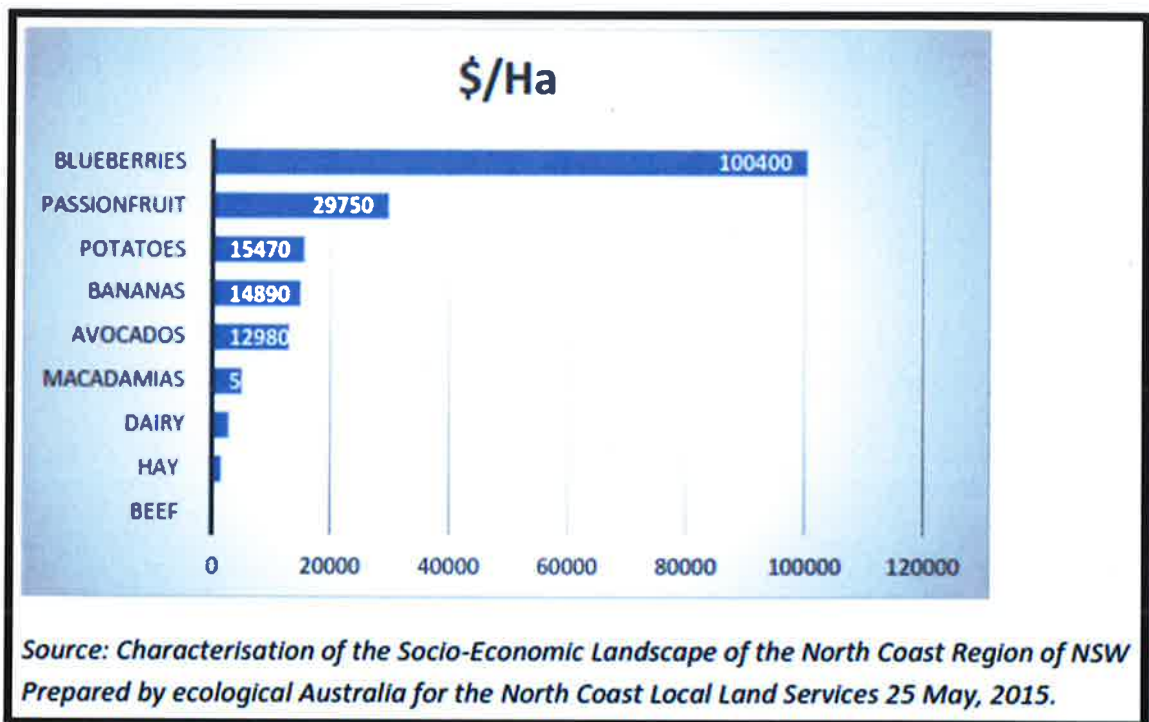
It is submitted that the arguments presented by DPE regarding lack of evidence are contrary to the findings of the Water Quality Report, contrary to the precautionary principle, contrary to the principles of ecologically sustainable development and contrary to the objectives of the Act.

The centrality accorded to economic factors and protecting the agricultural production value of rural land

Council acknowledges that agricultural and economic viability are key matters for consideration in this Planning Proposal. Council made an informed assessment in the Planning Proposal of the contribution that agriculture makes to the economy in Bellingen Shire and deliberately designed it to avoid unintended impacts upon other forms of agriculture by making most horticulture exempt development. Furthermore, Council explicitly acknowledged that the planning proposal may result in a reduced level of interest in establishing blueberry farms in Bellingen Shire, and that the short term economic benefits of establishing those farms in Bellingen Shire may be foregone.

As illustrated in the graph below, the returns per ha for other forms of agriculture on the north coast are significantly less than for blueberry farms. It is Council's contention that this graph;

- Reinforces the need for the Planning Proposal to avoid potential adverse impacts on profitability in other horticultural / agricultural sectors that may arise due to regulation, and
- Serves to illustrate the capacity for minor regulatory changes to be accommodated by the industry without impacting significantly upon profitability.



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, and these are reprinted below.

The objects of this Act are as follows:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

In addition to this, the Rural Planning Principles included in State Environmental Planning Policy (Rural Lands) obligate decision makers *"in planning for rural lands, to balance the social, economic and environmental interests of the community."*

It is submitted that the Gateway Determination selectively focuses on agricultural production values, to the exclusion of other matters that must be taken into consideration such as environmental values. It also takes the view that any diminution of productive value renders the proposal unsupportable, rather than considering whether that diminution of value is reasonable in the circumstances, with reference to economic, environmental and social factors.

It is Councils contention that there are reasonable concerns regarding the environmental impacts of blueberry growing, and that the economic interests of the blueberry industry can continue to be met in Bellingen Shire with the requested buffers in place.

The lack of focus on the specific impacts of the proposal

It is Councils contention that the Gateway Determination neglects to carefully consider the actual terms and impacts of the planning proposal, preferring instead to forecast a range of outcomes that are not actually proposed by Councils request, and that may never actually eventuate.

This stands in contrast to the detailed assessment of the actual likely impacts of the proposal that was undertaken by the Regional Planning Team, who provided the following summary of recommendations.

"It is considered that the planning proposal should proceed, except for the requirement for netting to be black and with clarification around the clearing provision, for the following reasons:

- *the proposal seeks to ensure new blueberry farms comply with DPI guidelines;*
- *the proposal does not change the permissibility of most horticultural land uses in the Bellingen LGA;*
- *the proposal does not prohibit blueberry farming in the Bellingen LGA and permits blueberry farming as exempt development in most instances;*
- *the proposed exempt development standards for blueberry farms relating to distances from property boundaries, neighbouring houses, watercourses and core koala habitat are considered to be well founded and appropriate; and*
- *the colour of the netting and its aesthetic impact is not considered to be an appropriate standard for exempt development."*

For example, Council is not seeking approval to regulate any other form of agriculture, and the actual impact of the proposal on horticulture is considered to be minimal. Notwithstanding this, the determination builds justification for the recommended position by contemplating its future extension to other forms of horticulture, intensive plant agriculture and agriculture.

The determination also suggests that a requirement to retain vegetated buffers should not be supported because landowners may undertake "unnecessary" pre-emptive clearing to preserve a right to farm.

It is Council's contention that the merit of this planning proposal should not be decided with reference to future scenarios that may never eventuate, or because a landowner may undertake unnecessary pre-emptive clearing of koala habitat or riparian vegetation. The specific impacts of the request are minor, as detailed in the Regional Planning Team Report, and should be allowed to proceed as per their recommendation.

A failure to identify specific non-compliances

The justification for the Gateway determination suggests that the Planning Proposal should not be supported because it is contrary to provisions in the North Coast Regional Plan 2036, State Environmental Planning Policy (Rural Lands) (2008) and Section 117 Direction 1.5 Rural Lands.

Council's original Planning Proposal provided specific responses to each of the relevant criteria within these documents, as did the Regional Planning Teams Report on this matter.

It is submitted that the justification report for the Gateway Determination, instead of rigorously addressing the specifics of each of the relevant criteria, instead attempts to rely upon generalised determinations of strategic intent (eg: *"these principles primarily aim to protect the agricultural production value of rural land and facilitate the orderly and economic development of rural lands"*) that overlook other matters of relevance.

The following section details compliance with specific criteria in the relevant documents.

1. Direction 11 of the North Coast Regional Plan 2036

Direction 11 of the Plan is to *"Protect and enhance productive agricultural lands"*. The specific actions to be observed in plan making are documented below.

In general terms, it is considered that these actions are primarily of relevance to Councils undertaking wider scale policy reviews such as Growth Management Strategies. These reviews require a significant investment in time and resources.

It is submitted that these actions should not be used to compel Council to commit to undertaking such reviews given that the planning proposal request has been made in accordance with NSW Government Policy, as expressed through the NSW Standard Instrument Principle Local Environmental Plan. This is considered to be the highest level expression of planning policy in the State and allows Councils to make the determination as to whether horticulture is listed either as permissible with consent, or without consent, in the relevant zones.

11.1 *Enable the growth of the agricultural sector by directing urban and rural residential development away from important farmland and identifying locations to*

support existing and small-lot primary production, such as horticulture in Coffs Harbour.

Comment:

It is submitted that this action is of principle relevance to Planning Proposals that are considering locations for potential new urban and residential development. This is not the intent of the Planning Proposal.

Notwithstanding this, the Planning Proposal identifies locations on individual properties where horticultural activities can occur with reduced likelihood of conflict with adjoining residences. The Planning Proposal is cognisant of the subdivision pattern of rural areas in Bellingen Shire, whereby many small lifestyle allotments exists as a result of historical subdivision permissibility's for concessional allotments, and the landscape is dissected by numerous drainage lines.

Whilst the proposed planning controls would likely not be justified for broad scale agricultural activities on large allotments, it is submitted that the controls are appropriate in the local context and are designed to help new blueberry farms establish and thrive in a manner that reduces the likelihood of conflict occurring with surrounding properties.

11.2 *Deliver a consistent management approach to important farmland across the region by updating the Northern Rivers Farmland Protection Project (2005) and Mid North Coast farmland Mapping Project (2008).*

Comment:

This action is not relevant to this planning proposal.

11.3 *Identify and protect intensive agriculture clusters in local plans to avoid land use conflicts, particularly with residential and rural residential expansion.*

Comment:

It is submitted that this action is of principle relevance to Planning Proposals that are considering residential and rural residential expansion. This is not the intent of the Planning Proposal.

Notwithstanding this, there are no intensive agriculture clusters known to Council that would warrant protection in any case.

11.4 *Encourage niche commercial, tourist and recreation activities that complement and promote a stronger agricultural sector, and build the sectors capacity to adapt to changing circumstances.*

Comment:

This is not the intent of the Planning Proposal.

11.5 *Address sector specific considerations for agricultural industries through local plans.*

Comment:

By definition, the Planning Proposal does not propose any change to existing arrangements for "agricultural industries".

2. Section 117 Direction 1.5 Rural Lands.

The objectives of this direction are to:

- (a) Protect the agricultural production value of rural land,
- (b) Facilitate the orderly and economic development of rural lands for rural and related purposes.

The direction applies when a relevant planning authority prepares a planning proposal that will affect land within an existing or proposed rural or environment protection zone, which is relevant for this matter.

In these circumstances, a planning proposal must be consistent with the Rural Planning principles listed in State Environmental Planning Policy (Rural Lands) 2008.

It is Councils 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 is required by Clause 4 of the Direction.

This is contrary to both the approach adopted by Council in the original Planning Proposal and the approach adopted by the Regional Planning Team in its report on this matter. These assessments are included in the subsequent section of this correspondence, and are included to illustrate that Council has credibly demonstrated compliance with Direction 1.5 and the Rural Planning Principles.

3. State Environmental Planning Policy (Rural Lands) (2008)

The Rural Planning Principles, as addressed by Council in its original Planning Proposal are reprinted below.

- a) the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas,*

Comment:

The planning proposal does not prohibit any form of agriculture. In most instances, no additional consent will be required to undertake agricultural activities in Bellingen Shire. The NSW Governments central planning framework is the Standard Instrument Local Environmental Plan. This allows Councils to choose whether or not they require development consent for horticulture in the zones affected by this proposal.

The approach that Council has elected to pursue protects all types of horticulture from the need to obtain development consent, with the exception of blueberry farms that choose to locate in areas where there is a greater likelihood of impact to either surrounding properties, or the local environment.

It is considered that this approach will allow for the continuation of environmentally sustainable agricultural activities in Bellingen Shire.

(b) recognition of the importance of rural lands and agriculture and the changing nature of agriculture and of trends, demands and issues in agriculture in the area, region or State,

Comment:

The objectives of this planning proposal are to address concerns regarding a recent trend for the establishment of blueberry farms and to address some of the impacts that are being associated with this trend.

A further issue that has arisen in agriculture is an apparent lack of resources to undertake environmental compliance by key NSW Government agencies. The recent release of an "Investigation into water compliance and enforcement 2007-17" by the NSW Ombudsman confirms, for example, the chronic under-resourcing of the compliance and enforcement roles regarding water extraction in NSW.

This has prompted calls from the community for Council to introduce local planning controls, capable of local enforcement by Council Officers, if necessary.

Council recognises the central role that agriculture plays in the local economy, and this is reflected in Objective 2 of the planning proposal, which aims to ensure that any regulatory option is quarantined to blueberry growing only, and does not impact upon other forms of horticulture or agriculture.

(c) recognition of the significance of rural land uses to the State and rural communities, including the social and economic benefits of rural land use and development,

Comment:

The report that was presented to Council regarding this matter documented, and acknowledged, the role that agriculture plays in the local economy. For example, the Agriculture Forestry & Fishing Industry Sector (as a whole) added \$32 million value to the local economy in 2015/16. Of this \$32 million, \$30.5 million was attributable to agriculture alone. Furthermore, the Agriculture Forestry & Fishing Industry Sector (as a whole) currently generates the highest number of Full Time Equivalent jobs in Bellingen Shire, as of 2015/16.

(d) in planning for rural lands, to balance the social, economic and environmental interests of the community,

Comment:

The proposed policy response respects the value of agricultural activity to the local economy and the important role that it plays in the social structure and identity of Bellingen Shire. It is not a broad brush reactive response to agriculture as a whole, but a selective refinement of existing policy.

Should a local government area consider that the economic benefits of a particular model of agriculture do not justify the potential environmental impacts of that activity, then it is reasonable to respond with a policy position that looks to address that disparity. It is submitted that the proposed policy position effectively balances the social, economic and environmental interests of the community.

(e) 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,

Comment:

The planning proposal seeks to divert new blueberry farms away from environmental assets such as riparian zones, and core koala habitat. It does not seek to prohibit farms from establishing in these areas, however will require a more careful consideration of impact if it is proposed to locate within those areas. It is considered that this is a responsible and reasonable response to this planning principle.

(f) the provision of opportunities for rural lifestyle, settlement and housing that contribute to the social and economic welfare of rural communities,

Comment:

The planning proposal does not look to provide new opportunities for rural lifestyle, settlement and housing.

(g) the consideration of impacts on services and infrastructure and appropriate location when providing for rural housing,

Comment:

The planning proposal does not look to provide new opportunities for rural housing.

(h) ensuring consistency with any applicable regional strategy of the Department of Planning or any applicable local strategy endorsed by the Director-General.

Comment:

The planning proposal is considered to be consistent with the North Coast Regional Plan. This has been addressed earlier in this planning proposal.

The assessment made by the Regional Planning Team, that also concluded that the Planning Proposal was consistent with the Rural Planning Principles, is included below.

The planning proposal is consistent with the principles for the following reasons:

- the proposal will continue to protect opportunities for current and future productive horticultural pursuits in rural areas. The proposal does not prohibit horticulture or blueberry farms in the RU1, RU2, RU4 or E4 zones. The proposal will maintain the ability for most horticultural land uses to operate without development consent, including blueberry farms that meet the specified criteria;*
- the proposal recognises the importance of agriculture and its economic benefits in the Bellingen LGA by continuing the ability for most horticultural land uses to be undertaken without development consent;*
- the proposal recognises the changing nature, trend and issues relating to horticulture in the Bellingen LGA by introducing provisions to require development consent for some blueberry farms where land-use conflict may occur;*
- the proposed standards by which blueberry farms can be exempt development are considered to be a balanced approach to addressing the concerns of the community about blueberry farming while enabling farms that comply with the buffer distance criteria to be established as exempt development; and*

- *the proposal considers the protection of native vegetation and water resources by specifying appropriate buffer distances between blueberry farming activities and watercourses and preventing blueberry activities on land mapped as core koala habitat unless the impacts are addressed through a development application.*

In conclusion, it is submitted that the Gateway Determination has not demonstrated that the Planning proposal is contrary to the Rural Lands Planning Principles, in contrast to the detailed analyses provided by Council and the Regional Planning Team which align in their conclusions regarding this matter.

Reliance upon a Code of Conduct in preference to regulatory measures

The justification for the Gateway Determination references the development of a revised Code of Conduct by the Blueberry Industry and asserts that *"the proposed revised code of conduct is supported and will help address any potential issues with the sector across a number of Local Government Areas and is more appropriate than making ad hoc local provisions in a single Council area"*.

Council has reviewed the new Code of Conduct and commends the work undertaken by the Australian Blueberry Growers association to raise awareness of potential matters that may arise during the establishment and operation of a blueberry farm. Despite this, the Code does not compel any grower to abide by its contents, 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 constraint.

As repeatedly emphasised, the "ad hoc" local provisions that the Department refer to are explicitly provided for in the NSW Standard Instrument Local Environmental Plan and Council sees no reason why it should be obstructed from exercising its local discretion in applying them.

A question of calibration

Council acknowledges that it is important for the ongoing vitality of the agricultural sector that the majority of agricultural pursuits are not subject to further regulation by the planning system. Accordingly, the Planning Proposal is deliberately designed to insulate the vast majority of agricultural pursuits from this eventuality.

Notwithstanding this, the NSW Government have indicated their strategic intent for the NSW Planning System to be better calibrated, to ensure that activities with only minor impacts are not unnecessarily burdened by bureaucracy, whilst activities with greater impacts are subject to greater levels of assessment.

In this regard, it is difficult to reconcile that the industrial scale of landscape transformation that can arise due to the establishment of a blueberry farm is not considered to warrant any intervention by the planning system, whilst a wide range of routine and small scale residential development is considered to warrant intervention through the inclusion of any number of restrictions. The image below shows the nature of this landscape transformation on a farm that has recently been established in Bellinger Shire.



Again, 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 Bellingen Shire, and should therefore be permitted to proceed.

Should you have any further enquiries please do not hesitate to contact Councils Senior Strategic Planner, Daniel Bennett, on (02) 6655 7352.

Yours faithfully


Liz Jeremy
GENERAL MANAGER
BELLINGEN SHIRE COUNCIL