



Planning Proposal 19/005

» Rural Industry Definition Change Ballina LEP1987

December 2019 (V1. Gateway) 19/93868

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shire council



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1. Introduction

1.1 Summary of Planning Proposal

This planning proposal applies to that part of Ballina Shire to which Ballina LEP 1987 applies.

This planning proposal seeks to substitute the definition of *rural industry* applicable to Ballina LEP 1987 with the definition of *rural industry* contained within the Standard Instrument – Principal Local Environmental Plan.

1.2 Background

Development Application 2018/597 (the DA) was lodged in September 2018. It sought consent for the establishment and operation of a *water supply system*. The application included the drawing of water from two existing bores, the construction of a shed and associated works, and the transport of water to a remote site for bottling.

Community consultation associated with the DA resulted in excess of 1000 submissions objecting to the proposed development.

The level of community objection to the DA resulted in Councillors debating a Notice of Motion at the Ordinary Council meeting on 22 November 2018.

The Notice of Motion expressed concern relating to the impact of potential ground water extraction on the aquifers located on the Alstonville Plateau and other underground water resources within the shire. Council resolved as follows in respect to the Notice of Motion:

1. *That Council receives a report on options to amend the LEP to prohibit water extraction for the purposes other than for agricultural or domestic uses.*
2. *That Council write to the relevant State Government Departments and the Minister for Primary Industries, Lands and Water, Mr Niall Blair and other relevant Ministers calling for a halt to any new water licences for non-agricultural purposes such as bottled water within the Ballina Shire. As part of this correspondence clarification is requested on whether existing licences can be transferred to third parties for non-agricultural uses.*
3. *That Council engage with Rous Water with regards to water supply security for the Ballina Shire and neighbouring Councils.*

This planning proposal resulted from Council's consideration of a report at its Ordinary Meeting on the 28 November 2019, which dealt with item 1 of the above resolution. A copy of that report is contained within Appendix 3.

The characterisation of the development proposed by the DA concluded that what was proposed was a *light industry*. This is a use prohibited within the RU1 and RU2 zones under the provisions of Ballina LEP 2012. The applicant however, contended that the proposed

use should be characterised as a *water supply system*, which is a use, permitted with development consent in both the RU1 and RU2 zone.

The DA was subsequently withdrawn in October 2019. The reasons for its withdrawal were not specified by the applicant.

The report which considered the statutory framework related to water extraction for non-agricultural or domestic use within the shire's rural area (refer Appendix 3) concluded that such use may also be characterised as a *rural industry* using the definition applicable under the provisions of Ballina LEP 1987. If characterised as a *rural industry* then such development would be permissible with consent within the Ballina LEP 1987 zones referenced in the table below:

| Zone | Rural Industry Permitted with Development Consent |
|--|---|
| 1(a1) Rural (Plateau Lands Agriculture) | ✓ |
| 1(a2) Rural (Coastal Lands Agriculture) | ✓ |
| 1(b) Rural (Secondary Agricultural Land) | ✓ |
| 1(d) Rural (Urban Investigation) | ✓ |
| 1(e) Rural (Extractive and Mineral) | ✓ |
| 2 (b) Village Area Zone | ✓ |
| 7 (d) Environmental Protection (Scenic/Escarpment) | ✓ |
| 7 (d1) Environmental Protection (Newrybar Scenic/Escarpment) | ✓ |
| 7 (i) Environmental Protection (Urban Buffer) | ✓ |
| 9 (a) Roads (Main Roads Proposed) | ✓ |
| 9 (b) Roads (Local Roads Proposed) | ✓ |

The definition of *rural industry* applicable to Ballina LEP 1987 is contained within the [Environmental Planning and Assessment Model Provisions 1980](#). That definition provides as follows:

rural industry means *handling, treating, processing or packing of primary products and includes the servicing in a workshop of plant or equipment used for rural purposes in the locality.*

The above definition of *rural industry* is also applicable to Tweed LEP 2000. This definition has been utilised by both Ballina Shire and Tweed Shire Councils to characterise, and subsequently approve, of a number of water extraction and bottling facilities prior to the coming into force of new Standard Instrument LEPs (Ballina LEP 2012 and Tweed LEP 2014).

The definition of *rural industry* contained within the Standard Instrument – Principal Local Environmental Plan and Ballina LEP 2012 is as follows:

rural industry means the handling, treating, production, processing, storage or packing of animal or plant agricultural products for commercial purposes, and includes any of the following—

- (a) agricultural produce industries,*
- (b) livestock processing industries,*
- (c) composting facilities and works (including the production of mushroom substrate),*
- (d) sawmill or log processing works,*
- (e) stock and sale yards,*
- (f) the regular servicing or repairing of plant or equipment used for the purposes of a rural enterprise.*

The major difference between the two definitions is that the earlier (1980 Model Provisions) definition is more broad in nature as it references primary products which are not defined. The later definition (Standard Instrument) limits products to animal or plant agricultural products. In so doing resources such as water, which at one time was considered to be a primary product, is no longer encompassed by the Standard Instrument definition of *rural industry*.

1.3 Council Resolutions

A copy of the report to the Council is contained in Appendix 3.

Council considered the matter at its Ordinary meeting held on 28 November 2019. The Council resolved as follows:

1. *That Council prepare a planning proposal which seeks to substitute the definition of rural industry contained within Ballina LEP 1987 with the Standard Instrument definition of rural industry.*
2. *That the planning proposal once prepared be forwarded to the Department of Planning Industry and Environment for a Gateway determination.*
3. *That the Department of Planning Industry and Environment be advised that Council seeks to exercise the functions of the local plan-making authority under section 3.36(2) of the Environmental Planning and Assessment Act 1979 for this LEP amendment.*
4. *That upon an affirmative Gateway determination being received from the Department of Planning and Environment, the procedural steps associated with progression of the planning proposal be undertaken, including public exhibition.*
5. *That Council receive a further report on the matter following the completion of the public exhibition of the planning proposal and after the release of the final report of the NSW Chief Scientist and Engineer into the Impacts of the Bottled Water Industry on Groundwater Resources in the Northern Rivers Region of NSW.*

1.4 Gateway Determination

(To be completed after Gateway determination)

2. Objectives & Intended Outcomes

To amend Ballina LEP 1987 to:

- exclude from its provisions a reference to the definition of *rural industry* as contained within the Environmental Planning and Assessment Model Provisions, and
- insert within Ballina LEP 1987 the definition of *rural industry* as contained within the Standard Instrument – Principal Local Environmental Plan.

3. Explanation of the Proposal

3.1 Land to Which the Planning Proposal Applies

This planning proposal will apply to those parts of Ballina Shire to which Ballina LEP 1987 still applies.

3.2 The Proposal – Explanation of Provisions

This planning proposal seeks to substitute the definition of *rural industry* as referenced in Ballina LEP 1987 with the definition of *rural industry* as contained in the Standard Instrument – Principal Local Environmental Plan.

This is being done to remove the potential for water harvesting for non-agricultural or domestic purposes from being characterised as a rural industry by application of the 1980 Model Provisions definition.

One way in which the proposed outcome may be achieved is by:

- Inserting a reference to *rural industry* within clause 6(a) of Ballina LEP 1987, and
- Inserting the Standard Instrument - Principal Local Environmental Plan definition of *rural industry* within clause 5 Interpretation of Ballina LEP 1987.

4. Justification

4.1 Section A – Need for the Planning Proposal

Q1 Is the planning proposal a result of an endorsed local strategic planning statement, strategic study or report?

No.

This planning proposal arose as a consequence of the examination of the statutory basis upon which water extraction and bottling facilities have historically been

approved within the Ballina and Tweed local government areas (LGAs). The report which considers this issue is contained within Appendix 3.

A planning proposal is considered to be required to remove the anomaly that is created by having two separate definitions of *rural industry* apply within Ballina Shire. In some cases, where rural properties are affected by dual zonings (Ballina LEP 1987 and 2012), both definitions are applicable. This then results in significantly different permissibility outcomes which may give rise to confusion.

Q2 Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

Yes. A local council sponsored planning proposal is the best way of addressing this issue given the applicable circumstances.

Ideally, the anomaly and confusion created by having two different *rural industry* definitions apply, within LEPs applicable to the same LGA, should be addressed at the State level through an appropriate legislative amendment. As this has not occurred this planning proposal is the best means available at the local council level to achieve the consistency sought to be applied to the definition of *rural industry*.

It is uncertain as to whether the final report of the NSW Chief Scientist and Engineer, into the Impacts of the Bottled Water Industry on Groundwater Resources in the Northern Rivers Region of NSW, will address the permissibility issue. Council has however, resolved to receive a further report on the planning proposal following public exhibition, and once the NSW Chief Scientist and Engineer's final report has been released. This further report will then examine any recommendations made by the NSW Chief Scientist and Engineer and how these affect this planning proposal.

4.2 Section B – Relationship to Strategic Planning Framework

Q3 Will the planning proposal give effect to the objectives and actions of the applicable regional, or district plan or strategy (including any exhibited draft plans or strategies)?

North Coast Regional Plan 2016

Ballina Shire is subject to the North Coast Regional Plan 2036 (NCRP) and is identified as being located within the Far North Coast subregion of the plan.

This planning proposal is consistent with NCRP Direction 11 and Action 11.5. as detailed below:

Direction 11 – Protect and enhance productive agricultural lands.

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

Comment: The establishment of agricultural industries will be facilitated by ensuring a consistent definition of *rural industry* is contained within applicable LEPs.

Productive agricultural lands will be enhanced by ensuring that ground water resources are retained for agricultural production as opposed to being harvested for transport to distant bottling plants.

Q4 Will the planning proposal give effect to a council's endorsed local strategic planning statement, or another endorsed local strategy or strategic plan?

Ballina Shire Council Community Strategic Plan 2017-2027

The proposal is considered to be consistent with the Healthy Environment theme contained within Council's Community Strategic Plan 2017 – 2027.

Specifically it is consistent with Healthy Environment outcome:

HE2 We use our resources wisely

Q5 Is the planning proposal consistent with applicable State Environmental Planning Policies?

The proposal is considered to be generally consistent with applicable State Environmental Planning Policies (SEPPs).

Q6 Is the planning proposal consistent with applicable Ministerial Directions (s.9.1 directions)?

No.

A number of section 9.1 directions are relevant to the planning proposal. A section 9.1 checklist is provided at Appendix 2. Inconsistencies are noted and are considered to be justified due to the minor significance of this planning proposal.

4.3 Section C – Environmental, Social and Economic Impact

Q7 Is there any likelihood that critical habitat or threatened species, population or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

No.

Q8 Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

No.

Q9 Has the planning proposal adequately addressed any social and economic effects?

This planning proposal seeks to provide consistency to the definition of *rural industry* as contained within environmental planning instruments applicable to Ballina Shire. In this respect, it is considered that any social and economic effects, which may arise from this planning proposal, are likely to be positive in nature.

4.4 Section D – State and Commonwealth Interests

Q10 Is there adequate public infrastructure for the planning proposal?

Issues related to the public infrastructure are not relevant for this planning proposal.

Q11 What are the views of state and Commonwealth public authorities consulted in accordance with the Gateway determination?

At this stage no consultation with public authorities is proposed.

5. Mapping

No mapping is proposed to support this planning proposal.

6. Community Consultation

This planning proposal is proposed to be publically exhibited for the period specified in the Gateway determination, and in accordance with the terms of the *Environmental Planning and Assessment Act 1979*.

7. Timeline

The proposed timeline for completion of the planning proposal is as follows:

| Plan Making Step | Estimated Completion (Before) |
|--|-------------------------------|
| Gateway Determination | January 2020 |
| Completion of Technical Information | NA |
| Government Agency Consultation if required. | NA |
| Public Exhibition Period | February 2020 |
| Public Hearing | N/A |
| Submissions Assessment | March 2020 |
| Local Plan Making Authority (LPMA) Assessment of Planning Proposal and Exhibition Outcomes | March 2020 |
| LPMA Decision to Make the LEP Amendment (if delegated) | April 2020 |
| Submission of Endorsed LEP to DPI&E for Finalisation | April 2020 |

Council is proposing to exercise plan finalisation functions under delegation as the Local Plan Making Authority.

8. Appendices

Appendix 1 – Maps

There are no maps applicable to this planning proposal

Appendix 2 – Section 9.1 Direction Checklist

| Section 9.1 Direction Checklist | |
|---|---|
| Planning Proposal – Rural Industry Definition Change Ballina LEP 1987 | |
| Direction No. | Compliance of Planning Proposal |
| 1. Employment and Resources | |
| 1.1 Business and Industrial Zones | Consistent. |
| 1.2 Rural Zones | Consistent |
| 1.3 Mining, Petroleum Production and Extractive Industries | Does not apply to planning proposal. |
| 1.4 Oyster Aquaculture | Does not apply to planning proposal. |
| 1.5 Rural Land | Consistent |
| 2. Environment and Heritage | |
| 2.1 Environmental Protection Zones | Consistent. |
| 2.2 Coastal Management | Justifiably inconsistent. Some land located within the coastal zone is impacted by this planning proposal. This planning proposal does not seek to introduce provisions within BLEP1987 that give effect to the matters specified in clause (4) of this Direction. This inconsistency is considered to be justified due to the minor significance of this planning proposal. |
| 2.3 Heritage Conservation | Consistent. Ballina LEP 1987 contains appropriate provisions which facilitate the conservation of items of environmental heritage (refer to clauses 18 to 20). |
| 2.4 Recreation Vehicle Areas | Consistent. |
| 2.5 Application of E2 and E3 Zones and Environmental Overlays in Far North Coast LEPs | Does not apply to planning proposal. |
| 3. Housing, Infrastructure and Urban Development | |
| 3.1 Residential Zones | Consistent. |
| 3.2 Caravan Parks and Manufactured Home Estates | Consistent. |
| 3.3 Home Occupations | Consistent, Ballina LEP 1987 contains provisions which address this Direction. |
| 3.4 Integrated Land Use and Transport | Not applicable |
| 3.5 Development Near Licensed Aerodromes | Not applicable. |
| 3.6 Shooting Ranges | Not applicable. |
| 3.7 Reduction in non-hosted short term rental accommodation period | Not applicable. |
| 4. Hazard and Risk | |
| 4.1 Acid Sulfate Soils | Consistent – BLEP1987 already contains provisions relating to Acid Sulfate Soils |

| Section 9.1 Direction Checklist | |
|---|---|
| Planning Proposal – Rural Industry Definition Change Ballina LEP 1987 | |
| Direction No. | Compliance of Planning Proposal |
| 4.2 Mine Subsidence and Unstable Land | <p>Consistent.</p> <p>This planning proposal does not apply to land within a mine subsidence district.</p> <p>This planning proposal does not propose to permit development of unstable land.</p> |
| 4.3 Flood Prone Land | <p>Justifiably Inconsistent</p> <p>Some land affected by this planning proposal may be classified as flood prone land. This planning proposal does not seek to introduce provisions into BLEP1987 as referenced in clause (4) of this Direction.</p> <p>Given the nature of this planning proposal the inconsistency is considered to be of minor significance.</p> |
| 4.4 Planning for Bushfire Protection | <p>Justifiably Inconsistent</p> <p>This planning proposal may affect bushfire prone land. At this stage, no consultation has occurred with the NSW Rural Fire Service.</p> <p>Given the nature of this planning proposal Direction 4.4 is not considered to be of direct relevance.</p> |
| 5. Regional Planning | |
| 5.1 Implementation of Regional Strategies | Does not apply to Ballina Shire. |
| 5.2 Sydney Drinking Water Catchments | Does not apply to Ballina Shire. |
| 5.3 Farmland of State and Regional Significance on the NSW Far North Coast | Consistent |
| 5.4 Commercial and Retail Development along the Pacific Highway, North Coast | <p>Justifiably inconsistent</p> <p>This direction may apply to some land affected by this planning proposal. This planning proposal does not seek to introduce provisions into BLEP1987 as referenced in clause (4) of this Direction.</p> <p>Given the nature of this planning proposal, the inconsistency is considered to be of minor significance.</p> |
| 5.5 Development in the vicinity of Ellalong Paxton and Millfield (Cessnock LGA). | Revoked. |
| 5.6 Sydney to Canberra Corridor (Revoked 10 July 2008. See amended Direction 5.1) | Revoked. |
| 5.7 Central Coast (Revoked 10 July 2008. See amended Direction 5.1) | Revoked. |
| 5.8 Second Sydney Airport: Badgerys Creek | Does not apply to Ballina Shire. |
| 5.9 North West Rail Link Corridor Strategy | Does not apply to Ballina Shire. |
| 5.10 Implementation of Regional Plans | <p>Consistent.</p> <p>No inconsistencies with the North Coast Regional Plan 2036 have been identified.</p> |
| 5.11 Development of Aboriginal Land Council land | Does not apply to this planning proposal. |

| Section 9.1 Direction Checklist | |
|---|--|
| Planning Proposal – Rural Industry Definition Change Ballina LEP 1987 | |
| Direction No. | Compliance of Planning Proposal |
| 6. Local Plan Making | |
| 6.1 Approval and Referral Requirements | Consistent. The planning proposal does not introduce any new concurrence or consultation provisions or any additional designated development types. |
| 6.2 Reserving Land for Public Purposes | Consistent. The planning proposal does not create, alter or reduce existing zonings or reservations of land reserved for public purposes. |
| 6.3 Site Specific Provisions | Consistent. |
| 7. Metropolitan Planning | |
| 7.1 to 7.10 | These Directions do not apply to Ballina Shire. |

Appendix 3 – Council Reports

8.4 Local Environmental Plan Framework - Water Extraction

8.4 Local Environmental Plan Framework - Water Extraction

Delivery Program Strategic Planning

Objective To provide Council with information relating to the permissibility of water extraction within rural zones for non agricultural or domestic use purposes and seek direction on this matter in relation to the LEP framework in the Shire.

Background

Development application DA 2018/597 was lodged on 26 September 2018. The application proposed the establishment and operation of a *water supply system*. The proposal included the drawing of water from two existing bores, the construction of a shed and associated works, and the transport of water to a remote site for bottling.

The DA2018/597 related to a site known as Lot 15 DP 1067330, Ellis Road, Rous (Lot 15).

Lot 15 is zoned partly RU1 Primary Production (RU1) under the provisions of Ballina LEP 2012 (LEP 2012) and partly 7(c) Environmental Protection (Water Catchment) under the provisions of Ballina LEP 1987 (LEP 1987). The works and activities proposed by the DA were confined to that part of Lot 15 zoned RU1.

In considering issues arising in relation to the extraction of water for bottled water production and other non agricultural or domestic uses Council at the Ordinary meeting held 22 November 2018 resolved as follows:

- 1. That Council receives a report on options to amend the LEP to prohibit water extraction for the purposes other than for agricultural or domestic uses.*
- 2. That Council write to the relevant State Government Departments and the Minister for Primary Industries, Lands and Water, Mr Niall Blair and other relevant Ministers calling for a halt to any new water licences for non-agricultural purposes such as bottled water within the Ballina Shire. As part of this correspondence clarification is requested on whether existing licences can be transferred to third parties for non-agricultural uses.*
- 3. That Council engage with Rous Water with regards to water supply security for the Ballina Shire and neighbouring Councils.*

Items 2 and 3 have previously been actioned.

This report relates to Item 1 of the above resolution and presents options to prohibit water extraction other than for agricultural or domestic uses.

The report has been prepared at this time as DA 2018/597 was formally withdrawn on 21 October 2019.

8.4 Local Environmental Plan Framework - Water Extraction

The applicant did not provide written reasons for the withdrawal of the application (an applicant is not required to give reasons for withdrawal of an application under the *Environmental Planning and Assessment Act*).

This report examines the permissibility of water extraction in Ballina Shire's rural areas for purposes unrelated to uses otherwise permitted on the land.

Key Issues

- Characterisation of water extraction as a land use
- Consideration of legal advice
- Planning proposal preparation

Information

A key factor in the consideration of the provisions of the LEP relative to water extraction is the definition of particular land uses. Attachment 1 contains the definitions applicable to the terms in italics within this section of the report.

Ballina LEP 2012

Council has obtained legal advice which indicates, based on the details of the application submitted, that the use as proposed under DA 2018/597 would reasonably be characterised as a *light industry* rather than a *water supply system*, and is therefore a prohibited use in the RU1 zone.

Water supply systems are permitted with consent within the RU1 and RU2 zones under the provisions of LEP 2012 whereas *light industry* is a prohibited use.

The applicant also obtained legal advice. The applicant's advice expresses the view that the development should be characterised as a *water supply system* and not a *light industry*.

The applicant's legal advice was referred to Council's solicitors and barrister for further advice. Following review of the applicant's information, the legal advice obtained by Council maintains the original position being that the use proposed under DA 2018/597 is a prohibited use within the RU1 zone.

The advice obtained by Council from its legal representatives is considered sound. It also confirms the conclusions reached by senior planning staff prior to seeking the advice.

Ultimately, the Land and Environment Court may have been required to determine this issue had the application not been withdrawn.

In summary, based on the legal advice obtained by Council, water extraction for uses not otherwise permitted within the RU1 or RU2 zone, such as what was proposed by DA 2018/597, are prohibited.

This being the case an amendment to LEP 2012 is not required to prohibit such use.

8.4 Local Environmental Plan Framework - Water Extraction

It is noted that the letter received from the Hon. Scot MacDonald MLC, Parliamentary Secretary for Planning, the Central Coast and the Hunter, (Attachment 2) states that:

"there are currently no planning policies specifically covering water extraction and bottling in NSW and that such developments are generally prohibited in rural areas."

The subject letter was one of a number of responses received following the actioning of Item 2 of Council's November 2018 resolutions.

The permissibility comments made by the Parliamentary Secretary also add some weight to the view that water extraction for bottling is not a use intended to be permitted in rural areas.

In considering the above, it is important to not though that permissibility is determined based on the manner in which a use is characterised.

The characterisation process in turn is required to consider the particular details of any proposed application and relevant case law. This means that every proposal is required to be individually assessed and characterised.

Tweed LEP 2000 and 2014 and planning proposal to prohibit water bottling facilities in the RU2 zone.

A Gateway determination was issued in May 2019, by the Department of Planning and Environment, to amend Tweed LEP 2014 so as prohibit water bottling facilities in the RU2 zone.

The Tweed RU2 zone is similar to the Ballina RU2 zone in various respects including that both zones permit with consent a *water supply system*, and prohibit *light industry*.

Tweed Shire Council had previously approved a number of water bottling and extraction plants within its rural zones under the provisions of Tweed LEP 2000. Such uses appear to have been characterised at the time as a *rural industry*. This *rural industry* definition changed when Tweed LEP 2014 came into force in June 2014. From that time it was considered to no longer permit the water bottling and extraction plants previously approved.

To facilitate the expansion of a water bottling and extraction plant in 2015 Tweed Shire Council prepared a planning proposal to permit *water bottling facility* within the RU2 zone.

Tweed Shire Council initially sought to limit the application of the planning proposal to those sites that already had approved water bottling and extraction plants rather than permit them throughout the RU2 zone. The Department of Planning and Environment, however, required that the planning proposal proceed as a general zone amendment as opposed to an additional permitted use on a few sites.

The consequence of the above was that a number of new DAs were submitted to Tweed Council for *water bottling facilities*. Community opposition to the proposed new facilities led to the Council resolving (November 2018) to prepare a new planning proposal.

8.4 Local Environmental Plan Framework - Water Extraction

This new planning proposal now seeks to amend Tweed LEP 2014 (removal of clause 7.15 *Water bottling facilities in the RU2 zone*) and will, once the LEP amendment is made, restore the previous position being the prohibition of water bottling facilities in the RU2 zone.

The Tweed case is of interest because neither Tweed Council, nor the Department of Planning, Industry and Environment, have sought to insert additional provisions within the Tweed LEP 2014 which seek to reinforce the prohibition of *water bottling and extraction facilities* within the RU2 zone.

Tweed LEP 2014 and Ballina LEP 2012 share Standard Instrument definitions for *water supply system* and *light industry*, with the former being permitted with consent, and the latter being prohibited, in the respective RU2 zones (*light industry* is also prohibited in the Ballina LEP 2012 RU1 zone). It therefore reinforces the view that water extraction for commercial purposes such as bottling is a use that is prohibited within the RU2 zone in both LEPs.

Ballina LEP 1987 (LEP1987)

A portion of Ballina Shire is still subject to the provisions of LEP 1987, being those areas subject to deferred matters resulting from the proposed application of environmental protection zones under the Standard Instrument LEP.

The definition of *rural industry* and *light industry* contained within LEP 1987 are the same as contained within Tweed LEP 2000.

The matrix below shows relevant LEP 1987 zones which permit with consent *rural industry* and or *light industry*.

Table 1 - Ballina LEP 1987 Permissibility Matrix (Permitted ✓ Prohibited x)

| Zone | Rural Industry | Industry / Light Industry |
|--|----------------|---------------------------|
| 1(a1) Rural (Plateau Lands Agriculture) | ✓ | x |
| 1(a2) Rural (Coastal Lands Agriculture) | ✓ | x |
| 1(b) Rural (Secondary Agricultural Land) | ✓ | ✓ |
| 1(d) Rural (Urban Investigation) | ✓ | x |
| 1(e) Rural (Extractive and Mineral) | ✓ | ✓ |
| 2 (b) Village Area Zone | ✓ | ✓ |
| 7 (d) Environmental Protection (Scenic/Escarpment) | ✓ | x |
| 7 (d1) Environmental Protection (Newrybar Scenic/Escarpment) | ✓ | x |
| 7 (i) Environmental Protection (Urban Buffer) | ✓ | x |
| 9 (a) Roads (Main Roads Proposed) | ✓ | ✓ |
| 9 (b) Roads (Local Roads Proposed) | ✓ | ✓ |

The approach used by Tweed Council to characterise water bottling and extraction facilities, under the provisions of Tweed LEP 2000, as a *rural industry* requires water to be classified as a primary product.

8.4 Local Environmental Plan Framework - Water Extraction

It is not clear as to whether water in 2019 would still be regarded as a primary product. It is however, arguable that water could be regarded as a primary product within the context of the applicable definition for *rural industry*.

Primary products, in a contemporary context, consist of plant and animal derived products not resources such as water. This is reinforced by the new Standard Instrument definition of *primary industry* contained in LEP 2012. However, the previously applicable definition could be interpreted far more broadly to include resources such as water.

Ballina Shire Council has historically applied a similar approach to Tweed Council in relation to water bottling and rural industry. In 1993 Ballina Shire Council also consented to a *rural industry* on a property in Fernleigh being for the processing and bottling of spring water. The land the subject of this consent is now zoned RU1 Primary Production under the provisions of LEP2012.

Water bottling and extraction facilities may also, in certain circumstances, be characterised as *light industry* or *industry* under the provisions of LEP 1987. Were this to occur then such use would also be permitted with development consent within the zones indicated above.

The location of the LEP 1987 zones that permit rural industry, and or industry / light industry on the Plateau, as indicated in Table 1 are shown on the maps contained in Attachment 3.

Attachment 4 only shows the 1(b) Rural (Secondary Agricultural Land) on the Plateau and adjoining areas.

In summary, by applying definitions as outlined above, it remains possible to establish a water bottling facility or otherwise extract water for bottling under the current provisions of the Ballina LEP 1987.

Amending Ballina LEP 1987

LEP 1987 may be amended to address the permissibility of water bottling facilities (and water extraction for other non agricultural or domestic uses) through the planning proposal process. This is discussed further in the options section of this report.

Whilst an amendment to address definitions and permissibility in this instance is not likely to be technically difficult, the difficulty Council may face relates to the reasons behind the deferred matters and the ongoing operation of the Ballina LEP 1987. That is, the Department of Planning, Industry and Environment may take a position that seeks to encourage Council to address other Standard Instrument LEP related matters that are not related to the water extraction matter at hand.

To address this potential difficulty, it is recommended that any amendment of LEP 1987 should be kept as simple as possible. Ideally, it should avoid introducing new specific provisions and minimise the locations in the LEP where changes are proposed.

8.4 Local Environmental Plan Framework - Water Extraction

LEP 1987 zones that permit *industries* or *light industries* consist of the 1(e) Rural (Extractive and Mineral) zone the 1(b) (Secondary Agricultural Land) zone.

The extractive mineral industry zone affects four Plateau sites. Of these two are owned by Council, one is owned by the RMS and the other is privately owned (land located off Stokers Lane at Teven). These sites are not considered at high risk of being further developed for ground water harvesting purposes.

The land within the 1(b) (Secondary Agricultural Land) zone, as indicated on the map forming part of Attachment 4, affects numerous sites. There is therefore a risk that some of this land may be proposed to be utilised for ground water harvesting purposes in the future.

Some 1(b) (Secondary Agricultural Land) zoned land was deferred from LEP 2012 due to its higher ecological value. Transitioning of this land to into LEP 2012 is in progress in accordance with Council's previous April 2017 resolution covering deferred areas. This is also the case for the land zoned 1(e) Rural (Extractive and Mineral).

Although timing for this transition is not yet confirmed (this is dependent on mapping that is in preparation), it is recommended that no further action be taken at this time in terms of addressing the *industry / light industry* permissibility issue as this will be resolved once the land is transitioned into LEP 2012. This is because of the greater degree of complexity involved in addressing this issue and a lower relative risk associated with this avenue being pursued to enable water extraction for non agricultural or domestic purposes.

The sites that permit *rural industry* under the provisions of LEP1987 are far more extensive and include the 1(b) and 1(e) zoned sites. For this reason an approach which seeks to replace the definition of *rural industry* contained within LEP1987, with the current Standard Instrument definition of *rural industry*, through a planning proposal is recommended.

Such an approach maintains the integrity of zones and minimises legal drafting complexities. This approach has also been discussed with Department of Planning, Industry and Environment (DPIE) planning staff who have indicated that it appears to be a supportable, and a relatively uncomplicated option.

The above approach does risk the DPIE exerting pressure to broaden the planning proposal to incorporate other matters related to the transitioning of E zones under LEP 1987 to LEP 2012. If this were to occur then this matter can be reported back to Council for the consideration of appropriate responses.

Overall, the recommended approach in relation to the LEP 1987 is to pursue the most technically simple amendment to exclude water bottling facilities from being permissible in the majority of the deferred matter areas. This approach though does not entirely eliminate the potential for this use to occur in rural areas.

8.4 Local Environmental Plan Framework - Water Extraction

Report of the NSW Chief Scientist and Engineer (NSWCSE) – Independent Review of the Impacts of the Bottled Water Industry on Groundwater Resources in the Northern Rivers region of NSW

The initial report of the NSWCSE was published in February 2019.

This report was focused on information gathering and analysis as well as documenting stakeholder views.

Stakeholders are awaiting the release of the final report. Council's November 2018 submission to the NSWCSE raised, amongst other matters, the issue of a lack of a clear planning framework, including State based guidelines, to regulate the extraction of ground water for the bottled water industry.

It is hoped that the final report of the NSWCSE will address this issue and provide some clear recommendations related to appropriate State and local planning controls for regulation of this industry.

The timing for the release of the final report is not known to Council.

Sustainability Considerations

- **Environment**

The preparation of a planning proposal, which removes substantially the potential for water extraction not associated with uses otherwise permitted within Ballina's rural hinterland, is considered to give rise to significant environmental benefits. It better maintains regional water security by providing a source of drinking and agricultural water for use especially in times of drought.

The proposed restriction on industrial type uses from being established within the rural parts of the Shire also assists to maintain the environmental and scenic amenity of these areas by reducing heavy vehicle traffic and presence of industrial style buildings.

- **Social**

It is clear from the number and nature of submissions received against DA2018/597 that a large number of Plateau community residents do not support water extraction not associated with uses otherwise permitted within Ballina's rural hinterland.

Preparation of a planning proposal, which seeks to reduce the likelihood of similar water extraction development being again proposed, is considered to have net social benefits. It will likely assist to reinforce the sense of community which exists amongst the Plateau's rural community.

- **Economic**

There are considered to be no substantive adverse economic consequences from adopting a strategy designed to prohibit the extraction of water for uses not otherwise permitted within rural zones or other zones.

8.4 Local Environmental Plan Framework - Water Extraction

Legal / Resource / Financial Implications

There are no specific legal or financial implications associated with the preparation of a planning proposal, which seeks to substitute the *rural industry* definition contained within LEP1987 with the Standard Instrument definition of *rural industry*.

Progression of this matter can be accommodated within the existing resources of the Planning and Environmental Health Division.

Consultation

Should the matter proceed, an affirmative Gateway determination will specify government agencies consultation requirements and the minimum community consultation period. It is considered that a minimum consultation period of 14 days is appropriate given that the planning proposal will seek to better align LEP 1987 with LEP 2012.

At this stage no specific public agency consultation is proposed.

Options

The following options are presented for Council's consideration.

1. Council may resolve to prepare a planning proposal which seeks to substitute the definition of *rural industry* contained within Ballina LEP 1987 with the Standard Instrument definition of *rural industry* for submission to the Department of Planning, Industry and Environment for Gateway determination.

The finalisation of such a planning proposal would then ideally await the release of the final report of the NSWCE so as to ensure that there is no conflict between both documents.

This is the preferred and recommended option.

2. Council may resolve to prepare a planning proposal which addresses the *rural industry* as well as *industry / light industry* issues identified within this report related to LEP 1987, as well as seeking to reinforce the position that certain types of water extraction are prohibited within the RU1 and RU2 zones.

This option is not supported as it is considered to add significant complexity to the planning proposal and may not result in a positive Gateway determination being received. Such a planning proposal may also have unintended consequences for zones contained within LEP 1987 and LEP 2012.

It may also affect uses already legitimately established as was the case when Tweed Shire Council introduced its 2014 LEP. Substantial research would be required to clarify how existing established uses are likely to be impacted. Such a process will add significantly to the cost and time involved in preparing a planning proposal.

8.4 Local Environmental Plan Framework - Water Extraction

3. Council may defer consideration of this report pending the release of the report of the NSWCE and then further consider its options with respect to the preparation of a planning proposal or the taking of other action.

This is also a sound option, which would enable Council to further consider the scope of any planning proposal that it may resolve to prepare. This option also reduces the potential for any significant amendment of a planning proposal to incorporate matters that may be recommended by the NSWCE for implementation at the local government level.

This action has not been recommended as the alignment of the definition of *rural industry* contained in LEP 1987 and LEP 2012 is logical and is a relatively simple amendment to complete (assuming it is supported by the Department of Planning, Industry and Environment).

Option 1 addresses this issue by commencing the planning proposal process and then delaying finalisation until such time that the final report of the NSWCE has been considered.

4. Council may resolve to note the contents of this report and take no further action.

This action has not been recommended on the basis that it does not result in any additional limitation on water extraction activities in the deferred matter areas that are subject to the Ballina LEP 1987. The reasons why the change is recommended are outlined in this report.

If however, the position of Council is not to change the existing situation, this approach is the appropriate course of action.

5. Council may also defer this report to a briefing if there are any issues identified that require explanation beyond that contained within this report.

This approach is not recommended at this stage. However, a briefing could be held post exhibition of proposed changes to the LEP to enable considering of key issues arising before Council makes a decision on the implementation of the changes.

RECOMMENDATIONS

1. That Council prepare a planning proposal which seeks to substitute the definition of rural industry contained within Ballina LEP 1987 with the Standard Instrument definition of rural industry.
2. That the planning proposal once prepared be forwarded to the Department of Planning Industry and Environment for a Gateway determination.
3. That the Department of Planning Industry and Environment be advised that Council seeks to exercise the functions of the local plan-making authority under section 3.36(2) of the *Environmental Planning and Assessment Act 1979* for this LEP amendment.

8.4 Local Environmental Plan Framework - Water Extraction

4. That upon an affirmative Gateway determination being received from the Department of Planning and Environment, the procedural steps associated with progression of the planning proposal be undertaken, including public exhibition.
5. That Council receive a further report on the matter following the completion of the public exhibition of the planning proposal and after the release of the final report of the NSW Chief Scientist and Engineer into the Impacts of the Bottled Water Industry on Groundwater Resources in the Northern Rivers Region of NSW.

8.4 Local Environmental Plan Framework - Water Extraction

281119/1 **RESOLVED**

(Cr Eoin Johnston/Cr Sharon Cadwallader)

1. That Council prepare a planning proposal which seeks to substitute the definition of rural industry contained within Ballina LEP 1987 with the Standard Instrument definition of rural industry.
2. That the planning proposal once prepared be forwarded to the Department of Planning Industry and Environment for a Gateway determination.
3. That the Department of Planning Industry and Environment be advised that Council seeks to exercise the functions of the local plan-making authority under section 3.36(2) of the *Environmental Planning and Assessment Act* 1979 for this LEP amendment.
4. That upon an affirmative Gateway determination being received from the Department of Planning and Environment, the procedural steps associated with progression of the planning proposal be undertaken, including public exhibition.
5. That Council receive a further report on the matter following the completion of the public exhibition of the planning proposal and after the release of the final report of the NSW Chief Scientist and Engineer into the Impacts of the Bottled Water Industry on Groundwater Resources in the Northern Rivers Region of NSW.

FOR VOTE - All Councillors voted unanimously.

Attachment(s)

1. Relevant LEP Definitions
2. Letter from Hon Scot MacDonald MLC
3. Location of Ballina LEP 1987 zones referenced in Table 1
4. Location of 1(b) Rural (Secondary Agricultural) zone - Alstonville Plateau

Appendix 4 – Gateway Determination