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Gateway determination report – PP-2022-2615

Blue Mountains LEP 2015 Amendment 16 – Response
to Low Rise Housing Diversity Code

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Acknowledgment of Country

The Department of Planning and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

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Table 1 Reports and plans supporting the proposal

Relevant reports and plans
Attachment A – Planning Proposal
Attachment D – Gateway alteration letter to Council May 2022

Attachment F – Correspondence from DPIE 07.07.2020

Attachment J – LPP_Agenda_13 December 2021

1 Planning proposal

1.1 Overview

Table 2 Planning proposal details

LGA	Blue Mountains
PPA	Blue Mountains City Council
NAME	Blue Mountains LEP 2015 Amendment 16 – Response to Low Rise Housing Diversity Code
NUMBER	PP-2022-2615
LEP TO BE AMENDED	Blue Mountains Local Environmental Plan 2015
ADDRESS	LGA-wide
DESCRIPTION	N/A
RECEIVED	21/07/2022
FILE NO.	IRF22/2556
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

1.2 Objectives of planning proposal

The planning proposal (**Attachment A**) contains objectives and intended outcomes which Council are seeking to implement in response to the Low Rise Housing Diversity Code.

The objectives of the planning proposal are to:

- Amend Minimum Lot Size for Dual Occupancies
- Remove Clause 4.1B (3) from Blue Mountains LEP 2015
- Introduce a Minimum Lot Size for Multi Dwelling Housing
- Amend Clause 3B.59 of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

The objectives of this planning proposal are clear and adequate.

1.3 Explanation of provisions

The primary intention of this planning proposal is to ensure outcomes resulting from the Low Rise Housing Diversity Code align with intended outcomes of the Blue Mountains Local Environmental Plan 2015. The planning proposal seeks to amend the Blue Mountains LEP 2015 by amending

dual occupancy minimum lot size (MLS), introducing an MLS for multi-dwelling housing, removing Clause 4.1B(3) and amending the Low Rise Housing Diversity Code (Low Rise Code)

Amendments to Minimum Lot Size (MLS):

Table 3 Current and proposed controls

Minimum lot size	Current	Proposed
Dual Occupancies (attached) – in R1, R2, R3 zones	900m ²	1,000m ²
Dual Occupancies (detached) – in R1, R2, R3 zones	1,100m ²	1,000m ²
Multi dwelling housing and Manor Houses – in R1, R3, and B2 zones	Nil	1,300m ²

Removal of Clause 4.1B(3) from Blue Mountains LEP 2015:

The planning proposal is also seeking to delete the following provision:

(3) Despite subclause (2), development consent may be granted to development on a lot with an area of at least 720 square metres in a zone specified in the table for the purpose of a dual occupancy (attached) if the development will include one dwelling with a gross floor area not exceeding 100 square metres.

Amend the Low Rise Housing Diversity Code (Low Rise Code) in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 in relation to stormwater management:

The planning proposal seeks to add the following requirements to Clause 3B.59 Drainage of the Codes SEPP

A complying development certificate cannot be issued for development under this Code unless it has been demonstrated by a suitably qualified engineer, that the requirements of Blue Mountains LEP 2015 clause 6.9, and associated DCP controls have been met.

The planning proposal contains an explanation of provisions that adequately explains how the objectives of the proposal will be achieved.

1.4 Site description and surrounding area

The planning proposal applies to land identified on the Land Application Map under the Blue Mountains LEP 2015 (Figure 1 below).

The planning proposal does not apply to several areas in the Blue Mountains LGA which are currently deferred from the Blue Mountains LEP 2015 and are subject to Blue Mountains LEP 2005 and Blue Mountains LEP 1991.

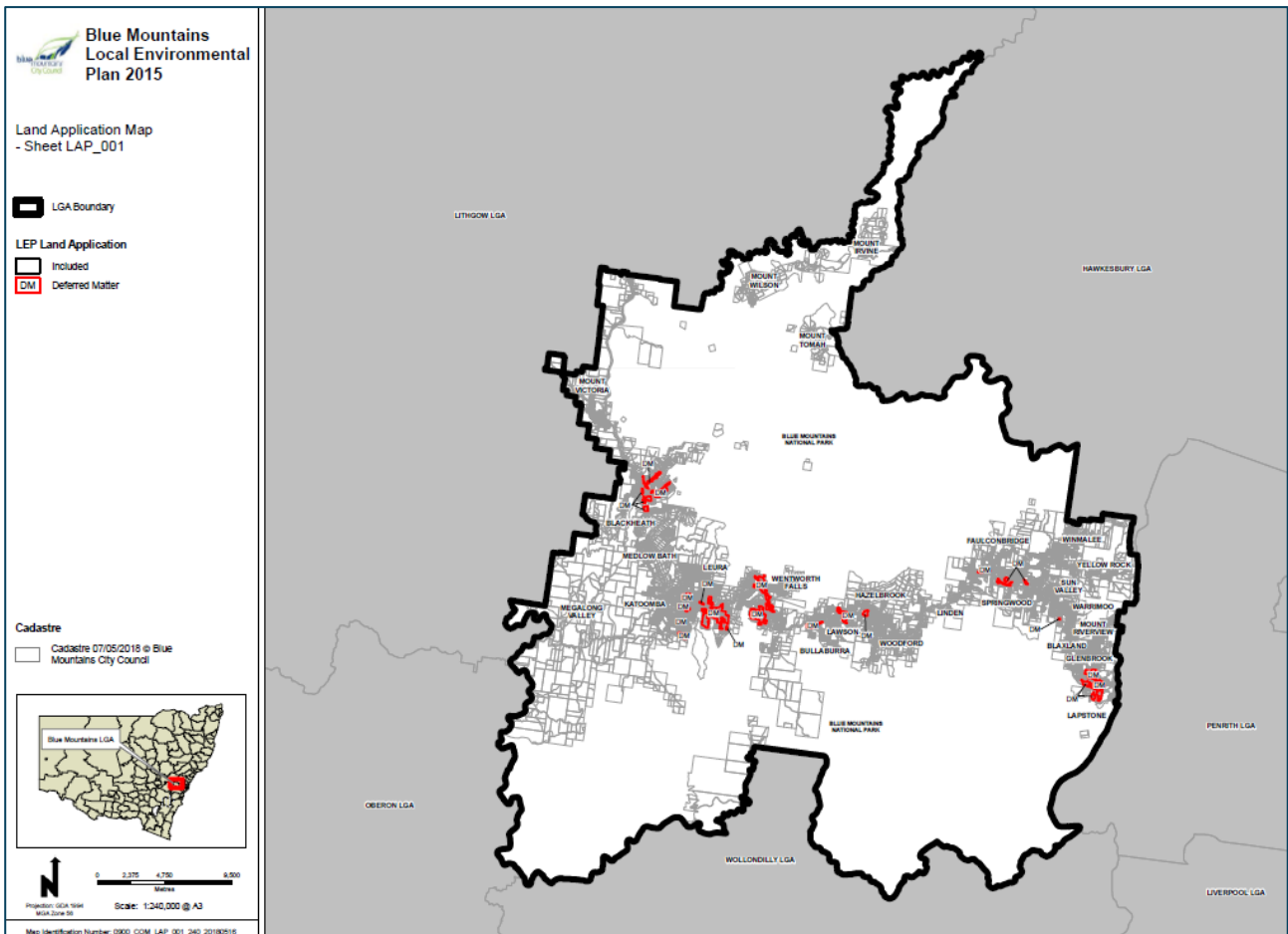


Figure 1 Blue Mountains Land Application Map (source: NSW Legislation website)

1.5 Mapping

The planning proposal does not include any mapping amendments.

1.6 Background

This planning proposal is the 3rd iteration Blue Mountains City Council (Council) has submitted for Gateway in response to the Low Rise Code. An overview of the history is below in Table 4.

Table 4: Planning proposal history

Planning proposal	Details
Blue Mountain LEP 2015 – Amendment 13 – Amendment to Clause 1.9 of LEP: PP-2021-3711	<p>Returned to Council for resubmission on 20 July 2021 to permit further discussion between Council and the Department as to how to best balance local and state priorities through a potential revised Planning Proposal.</p> <p>The resubmission was preceded by a letter from Marcus Ray to Council (15 June 2021) advising:</p> <p><i>In response an amendment to the Code is being progressed to limit the size of dual occupancy development in the R2 zone in the Blue Mountains. The amendment will vary the Code so that the floor space ratio control for dual occupancies in R2 zones will mirror the controls in the Blue Mountains Local Environmental Plan 2015 from 2 October 2021. This amendment is temporary for two years while a review of the Code is undertaken.</i></p>

Blue Mountains LEP 2015
– Amendment 13A –
Amendment to Clause 1.9
of LEP: PP-2021-4866

Council submitted an unaltered planning proposal for Gateway, advising that the Department's June letter does not address Council's fundamental planning issues with the Code.

A Gateway determination was issued on 28 October 2021.

Following further work between the Department and Council, a Gateway alteration was issued October 2021 to permit exhibition to commence 6 months (originally 3 months) from the date of the Gateway determination.

The Gateway Alteration Letter to Council May 2022 advised council that the Department supports:

Floor Space Ratio (FSR)

This part of the proposal seeks to make permanent the current variation to dual occupancies in the R2 zone, and extend the variation to manor houses and multi dwelling housing (terraces) in the R1 and R3 zones.

Site coverage and permeable area

This part of the proposal seeks to achieve a minimum pervious area of 40% of the lot for dual occupancies, manor houses and terraces.

Regarding the proposed amendments in relation to minimum lot size, the Department will support relevant amendments to the controls in the Blue Mountains LEP 2015 to address minimum lot sizes. This is because the Codes SEPP applies the controls contained in the LEP.

The letter further advised:

Dual Occupancy:

The Codes SEPP applies clause 4.1B of the LEP, therefore the Department would welcome proposed amendments to ensure development outcomes arising from these controls are appropriate.

Manor Houses and Terraces (referenced as Residential Flat Buildings in the LEP)

As there are currently no minimum lot size controls for these development types in the LEP, the Department would welcome proposed amendments to insert minimum lot size controls.

In relation to the proposed stormwater management amendment, the letter noted:

the Department would support an amendment to LEP which could provide that clause 6.9 (of the LEP) applies to development carried out under Part 3B of the Codes SEPP.

However, upon further consideration, subsequent correspondence to Council on 17 June 2022 advised that any amendment would need to clarify Council's role and assist Council in assessing applications under the Local Government Act and not inadvertently make it the responsibility of certifiers to certify the matters contained in clause 6.9 (which aren't complying development standards). The Department will work further with the Codes team to clarify how best to do this – potentially as part of the amendment to

Planning proposal	Details
	the Code (to address the status of the note in 3B.59 of the Code, to replicate existing clause 3A.32) rather than an amendment to the LEP.
Blue Mountains LEP 2015 Amendment 16 – Response to Low Rise Housing Diversity Code: PP-2022-2615	<p>In this current PP, Council have largely followed the advice of the Department following consideration of Am 13A. However, the proposed amendments to the stormwater provisions of the Code are not supported.</p> <p>While it is acknowledged that there is no statutory link between clause 6.9 of Council's LEP and sections 68 and 89 of the <i>Local Government Act</i> (LG Act), the Department's position remains as previously advised by the Deputy Secretary Mr Marcus Ray in July 2020. This is because the Department considers the powers under the LG Act (such as sections 68 and 89) sufficiently broad to contemplate the objectives of clause 6.9 of the LEP. Council can consider a very wide range of matters when assessing an application under the LG Act as set out under section 89, which may include of the kinds of things contained within in clause 6.9 of the LEP.</p> <p>Further to the LG Act, Council's Local Approvals Policy also provides additional criteria for Council's consideration.</p>

2 Need for the planning proposal

The planning proposal is an appropriate mechanism to pursue the intended amendments, as the proposal is the result of longstanding work between Council and the Department to balance local and state priorities. See **Table 4** above.

This planning proposal (as amended by the Gateway determination) is a result of an assured Local Strategic Planning Statement, approved Local Housing Strategy, and demonstrates consistency with the District Plan.

3 Strategic assessment

3.1 District Plan

The site is within the Western District and the Greater Sydney Commission released the Western City District Plan on 18 March 2018. The plan contains planning priorities and actions to guide the growth of the district while improving its social, economic and environmental assets.

The planning proposal is consistent with the priorities for infrastructure and collaboration, liveability, productivity, and sustainability in the plan as outlined below.

The Department is satisfied the planning proposal gives effect to the District Plan in accordance with section 3.8 of the *Environmental Planning and Assessment Act 1979*. The following table includes an assessment of the planning proposal against relevant directions and actions.

Table 5 District Plan assessment

District Plan Priorities	Council's Justification
W12 Protecting and improving the health and enjoyment of the District's waterways	<p>The intent of the planning proposal is consistent with Planning Priority W12 as it seeks to maintain the strong local environmental and stormwater management controls that are currently applied to all medium density development under the Blue Mountains LEP 2015.</p> <p>The Department's position in relation to stormwater management is outlined in Table 4 above.</p>
W14 Protecting and enhancing bushland and biodiversity	The planning proposal is consistent with Planning Priority W14 as it seeks to ensure strong local planning provisions be applied to all medium density development within the LGA, to protect and enhance the significant environmental values of the surrounding World Heritage Area and the character values of the Blue Mountains' built environment.
W6 Creating and renewing great places and local centres, and respecting the District's heritage	The planning proposal is consistent with Planning Priority W6 as it seeks to protect both local character of the LGA.

3.2 Local

The proposal states that it is consistent with the following local plans and endorsed strategies. It also claims consistency with strategic direction and objectives, as stated in the table below:

Table 6 Local strategic planning assessment

Local Strategies	Justification
Blue Mountains Local Strategic Planning Statement	<p>The <u>intent</u> of the planning proposal is consistent with Councils LSPS as it seeks to deliver LSPS Actions, as follows:</p> <ul style="list-style-type: none"> • Action 1.3 – Council will seek an exemption from the Low Rise Medium Density Housing Code in State Environmental Planning Policy (Exempt and Complying Codes) 2008, to ensure local stormwater management controls are maintained and continue to protect the receiving environment of the Blue Mountains World Heritage Area; and • Action 5.7 – Council will seek an exemption from the Low Rise Medium Density Housing Code in State Environmental Planning Policy (Exempt and Complying Codes) 2008, to ensure local controls are maintained to protect the character of the Blue Mountains. <p>The planning proposal is essentially the culmination of Council's commitment to deliver these two actions.</p>

Blue Mountains Local Housing Strategy (LHS) 2020	The planning proposal is considered consistent with Council's LHS. In particular, the strategy indicates that the 5-year housing target can be met or exceeded under current local planning controls.
Blue Mountains Local Character Study 2020	The planning proposal is generally consistent with the aims of the Blue Mountains Local Character Study 2020. The Local Character Study highlights the importance of character to the Blue Mountains, the typologies of the towns and villages and the threats to local character, including development that is compatible with unique local context.

3.3 Local planning panel (LPP) recommendation

Amendment went to the Local Planning Panel on the 13th December 2022 (**Attachment J**) as an addendum to Amendments 13 and 13A.

The Panel unanimously advised that Council continue to press the Department of Planning to grant an exemption from the Low Rise Code. Failing this, the LPP is of the view that Council considers the alternative put by the Department in the Gateway determination, ensuring that the strictest possible controls for local variations are incorporated into the Low Rise Code to ensure preservation of the Blue Mountains World Heritage Area into the long term future.

The Department notes that this proposal (apart from the stormwater management component) is the result of negotiations and an agreed approach, which is essentially:

- where the Low Rise Code contains control, the Department supports a local variation (Am 13A)
- where the Low Rise Code defers to controls contained in Councils LEP, then the Department supports appropriate amendments to the controls in Councils LEP (this Planning Proposal – Am 16).

3.4 Section 9.1 Ministerial Directions

The planning proposal's consistency with relevant section 9.1 Directions is discussed below. It is noted that the planning proposal refers to the Direction 9.1 numbering prior to the version released 1 March 2022.

Table 7 - 9.1 Ministerial Direction assessment

The Planning Proposal is considered consistent with the Ministerial Directions.

Directions	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
N/A		

3.5 State environmental planning policies (SEPPs)

The planning proposal is consistent with all relevant SEPPs as discussed in the table below.

Table 8 Assessment of planning proposal against relevant SEPPs

SEPPs	Requirement	Consistent/ Not Applicable	Reasons for Consistency or Inconsistency
SEPP 55: Remediation of Land	Promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment.	Not Applicable	The planning proposal does not seek to propose any changes to zoning or land use permissibility.
State Environmental Planning Policy (Exempt and Complying Development Codes) 2008	This Policy aims to provide streamlined assessment processes for development that complies with specified development standards	Consistent	The planning purpose is seeking to amend controls that would apply to complying development. It is noted that Council's original intention was to seek a wholesale exemption from the SEPP, however the Department seeks to ensure that complying development remains a pathway for development in the Blue Mountains, and this amendment along with Am 13A, will achieve local and state objectives.

4 Site-specific assessment

4.1 Environmental

The following table provides an assessment of the potential environmental impacts associated with the proposal.

Table 9 Environmental impact assessment

Environmental Impact	Assessment
Disturbances to critical habitat, threatened species, populations or ecological communities or their habitats	<p>The proposal endeavours to further protect the unique environment of the Blue Mountains including critical habitats, threatened species, populations, ecological communities and their habitats.</p> <p>The planning proposal seeks to ensure that there are controls in the LEP which the Low Rise Code relies upon. This will provide appropriate provisions and enable complying development to remain a development pathway in the Blue Mountains LGA.</p>

4.2 Social and economic

The following table provides an assessment of the potential social and economic impacts associated with the proposal.

Table 10 Social and economic impact assessment

Social and Economic Impact	Assessment
Preservation of local character and environmental values	<p>The planning proposal is considered appropriate to respond to the unique local character and environmental values of the area while providing for complying development.</p> <p>The Department notes that Council's LHS (adopted on 31 March 2020), identified that Council can meet (or may exceed) its 5-year housing targets under existing LEP controls, and is located in the Metropolitan Rural Area which is to cater for local growth.</p> <p>It is therefore expected that there would be negligible economic or housing delivery impacts as a result of this planning proposal, especially considering the current very low take up of complying development in the LGA.</p>

4.3 Infrastructure

This planning proposal seeks to make an amendment to restrict specific development types to larger, more suitable lots. Therefore, this planning proposal is not likely to increase the demand for public infrastructure.

5 Consultation

5.1 Community

Council proposes a community consultation period of 28 days.

The exhibition period proposed is considered appropriate, and forms a condition of the Gateway determination.

5.2 Agencies

Council has nominated the Rural Fire Services (RFS) as the only public agency to be consulted about the planning proposal.

The Department does not consider that this is required; though Council may opt to consult RFS should it choose.

6 Timeframe

Council proposes a 7 month time frame to complete the LEP.

The Department recommends a time frame of 9 months following the date of the Gateway determination is reasonable given the extensive collaboration between Council and the Department which has resulted in this proposal.

A condition to the above effect is recommended in the Gateway determination.

7 Local plan-making authority

Council does not request delegation to be the Local Plan-Making authority.

As the planning proposal relates to the application of the Codes SEPP, the Department recommends that Council not be authorised to be the local plan-making authority for this proposal.

8 Assessment summary

Minimum Lot Size:

As per Departments letter to Council on 11 May 2022 (**Attachment D**), the Department advised it would consider proposed amendments to the Blue Mountains LEP where the Low Rise Code relies on controls contained within a council's LEP.

Council therefore is seeking a number of MLS amendments:

- No longer differentiate between attached and detached dual occupancies,
- Amend the MLS for the R1, R2, R3 zones to 1,000m²,
- introduce an MLS for multi dwelling housing in the R1, R3 and B2 zones of 1,300m², and
- introduce an MLS for Manor Houses in the R1, R3 and B2 zones of 1,300m².

Change to Dual Occupancies (attached/detached)

Section 3B.21(b) of the Codes SEPP refers to the below MLS controls for dual occupancy.

Subdivision 2 Built form development standards

3B.21 Lot requirements

The lot must meet the following requirements—

(b) in the case of a dual occupancy—the area of the lot must not be less than whichever is the greater of the following—

(i) 400m²,

(ii) the minimum lot area specified for dual occupancies in the environmental planning instrument that applies to the land concerned,

Council notes that Section 3B.21(b) doesn't differentiate between dual occupancy 'attached' and 'detached', however, the Blue Mountains LEP 2015 does differ between minimum lot size requirements for attached and detached dual occupancies. Council considers that the lower of the two LEP MLS figures could be utilised under the Code, without the need to have regard to a dual occupancy being attached or detached; resulting in detached dual occupancies being erected on lots of 900m².

To mitigate this, Council proposes to have a single minimum lot size control of 1,000m² for dual occupancy in the Blue Mountains LEP 2015, making no differentiation between attached or detached.

The Department does not object to these proposed changes.

It is noted that the planning proposal contains a suggested drafting of 4.1B, noting that the proposed written amendments will be subject to legal drafting and the provisions may be altered to meet legal drafting requirements.

Introduction of MLS for multi dwelling housing, including manor houses

Section 3B.21(a) of the Codes SEPP refers to the below MLS controls for manor houses.

Subdivision 2 Built form development standards

3B.21 Lot requirements

The lot must meet the following requirements—

(a) in the case of a manor house—the area of the lot must not be less than whichever is greater of the following—

(i) 600m²,

(ii) the minimum lot area specified for manor houses in the environmental planning instrument that applies to the land concerned,

The Blue Mountains LEP 2015 currently does not have a multi-dwelling housing MLS, which will result in Codes 3B.21(a)(i) being applied. Council considers that this MLS of 600m² will result in overdevelopment and unnecessary intensification of residential areas and ultimately this will detract from local character and have multiple negative cumulative effects. To mitigate this, Council proposes to introduce a 1,300m² MLS for Multi dwelling housing and manor houses.

The Department does not object to these proposed changes.

Removal of Clause 4.1B(3) from Blue Mountains LEP 2015:

The planning proposal seeks to delete Clause 4.1(B)(3) of the Blue Mountains LEP 2015 (see below) as Council understands that the Codes SEPP creates an avenue for applicants to default to the smallest MLS of 720m², without observing the 100m gross floor area provision.

4.1(B)(3) Despite subclause (2), development consent may be granted to development on a lot with an area of at least 720 square metres in a zone specified in the table for the purpose of a dual occupancy (attached) if the development will include one dwelling with a gross floor area not exceeding 100 square metres.

Having considered Council's comments on this matter, the Department's position and understanding is that although clause 4.1B(3) of the LEP contains an exception to the minimum lot size requirements, the minimum lot size requirements for the purposes of clause 3B.8 under the Codes SEPP will be 720 sqm only if:

- the condition of Clause 4.1B(3) in the LEP is satisfied, and
- provided the development complies with the other requirements under the Codes SEPP.

If Clause 4.1B(3) is not satisfied, then the current minimum lot sizes contained in 4.1B(2), being 900 sqm for attached dual occupancies and 1100 sqm for detached dual occupancies, will apply for the purposes of clause 3B.8 of the Codes SEPP.

Notwithstanding this different interpretation, should Council wish to proceed with deleting 4.1(B)(3), that is a matter for Council and the Department does not object, but it is not considered necessary as outlined above.

Stormwater Management:

The planning proposal seeks to amend Codes SEPP drainage section 3B.59 to require that a CDC cannot be issued unless it has been demonstrated 'by a suitably qualified engineer that the requirements of the Blue Mountains LEP clause 6.9' and associated DCP controls have been met.

This amendment is not supported as discussed in **Table 4** and the Gateway determination has been conditioned accordingly. The Department will continue to investigate a general amendment to the Codes SEPP to address the status of the note in 3B.59 of the Code.

9 Recommendation

It is recommended the delegate of the Minister determine that the planning proposal should proceed subject to the following conditions:

1. The planning proposal is to be updated to:
 - Remove the stormwater management provisions
2. The planning proposal should be made available for community consultation for a minimum of 28 days.
3. The planning proposal must be exhibited three (3) months from the date of the Gateway determination.
4. The planning proposal must be reported to council for a final recommendation six (6) months from the date of the Gateway determination.
5. The timeframe for completing the LEP is to be nine (9) months from the date of the Gateway determination.
6. Given the nature of the proposal, Council should not be authorised to be the local plan-making authority.



12 Aug 2022

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