
MANAGER DEVELOPMENT AND ENVIRONMENT REPORT

ITEM 11.2 SF2381 110424 HORTICULTURE WITHIN THE NAMBUCCA VALLEY

AUTHOR/ENQUIRIES: Daniel Walsh, Manager Development and Environment**Summary:**

This report addresses previous resolutions of Council relating to the permissibility of horticulture within the rural zones of the Nambucca Valley and the land use conflicts which can occur between horticulture, surrounding sensitive receivers and the environment.

NOTE: This matter requires a “Planning Decision” meaning a decision made in the exercise of a function of the council under the Environmental Planning and Assessment Act 1979 including a decision relating to a development application, an environmental planning instrument, a development control plan or a development contribution plan. Under Section 375A of the Local Government Act 1993 it requires the General Manager to record the names of each Councillor supporting and opposing the decision.

RECOMMENDATION:**THAT:**

1. Council forward a planning proposal to the Minister for Planning for gateway determination in accordance with section 3.34 of the *Environmental Planning and Assessment Act 1979*, which includes the following amendments to the Nambucca Local Environmental Plan 2010:
 - a) The relocation of ‘horticulture’ from ‘permitted without consent’ in the land use table for the RU1 Primary Production and RU2 Rural Landscape zones to ‘permitted with consent’.
 - b) The inclusion of the RU1 Primary Production and RU2 Rural Landscape zones in Schedule 2 so that the specified forms of ‘horticulture’ become exempt development in the same manner that they currently are in the R5 Large Lot Residential zone and add the prohibition of structures to support the exempt horticultural activity.
2. If the Minister determines that the matter should proceed, Council staff undertake community consultation in accordance with the gateway determination.
3. Following community consultation, Council staff report the planning proposal back to Council for consideration of any submissions received and a final decision as to whether Council will proceed to make the amended plan.

OPTIONS:

- 1 Do nothing. This will result in horticulture remaining permissible without development consent in the rural zones.
- 2 Proposed recommendation.
- 3 Remove the exempt provisions relating to horticulture in Schedule 2 of the Nambucca Local Environmental Plan 2010 (LEP).

BACKGROUND:

On the meeting held on 16 November 2023 Council made the following resolution:

THAT Council:

- 1 *Actively seek to minimise land use conflict between different types of farming through the use of buffer zones, planning changes, and better definitions of 'productive farmland' etc.*

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- 2 *Receive a report on the proposal to submit a planning proposal to the Planning Minister which seeks to amend the Nambucca LEP 2010 to make intensive plant agriculture permissible with development consent in the RU1 and RU2 zones.*
- 3 *Write to the Minister for Water and the Environment requesting assurances that greater resources be allocated to State agencies responsible for monitoring legislative compliance within the Nambucca Valley horticulture industry associate with water testing, water harvesting, clearing of native Vegetation and Pollution.*
- 4 *Seek legal advice to clarify if development application is required prior to the erection of Netting and Greenhouses associated with horticulture (blueberries) in Rural Zones; and if a development application is not required, seek legal advice as to which changes are needed to make it so, using the experience of the Coffs Harbour Council.*
- 5 *Receive a report on a Rural Land Use Strategy.*

Council then made the following resolution at the meeting on 18 January 2024:

That Council report back on the need for regular community meetings on land use conflicts and the intensive plant agriculture.

Since the above resolutions were made Council staff have obtained the required legal advice, written to and received responses from the relevant Ministers and have worked with the NSW Environment Protection Authority (EPA) to gain a greater insight into the level of water pollution generated by blueberry/vegetable farms within the Nambucca Valley.

There has also been a high level of public interest in this matter which have given the berry industry concerns regarding misconceptions about their industry. **Attachment 1** of this report contains a submission from Oz Group which seeks to address community concerns regarding the growth, sustainability and impact of berry farms in the Nambucca Valley.

DISCUSSION:

The above resolutions made by Council are addressed below as follows:

Actively seek to minimise land use conflict between different types of farming through the use of buffer zones, planning changes, and better definitions of 'productive farmland' etc.

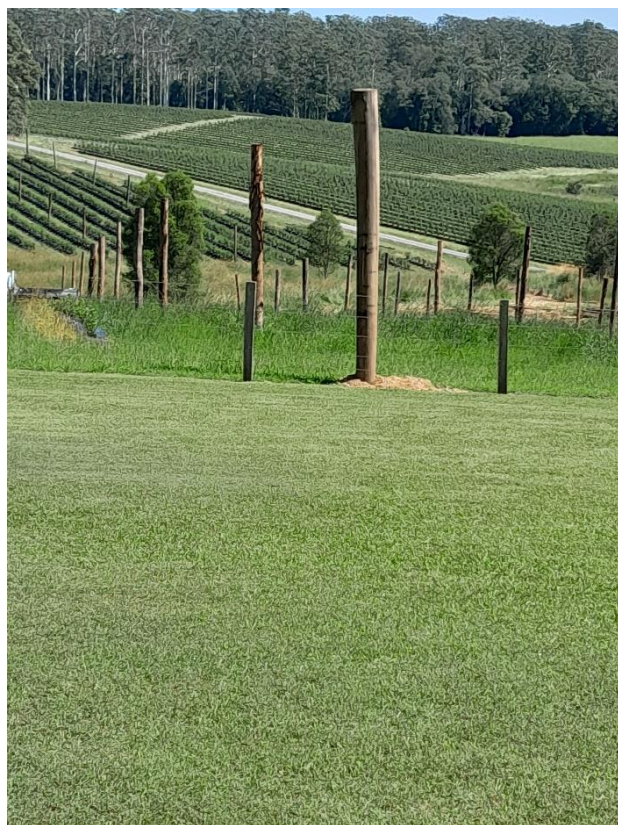
Staff Comment – The only ability for buffer zones to be enforced is if there is a statutory requirement for a buffer to be implemented. Currently, there is not any legislation which requires buffers to be implemented between horticulture and surrounding land uses within the RU1 Primary Production and RU2 Rural Landscape zones (rural zones) in the Nambucca Valley.

The only ability for Council to implement statutory requirements for buffers to be provided is through an amendment to the LEP which makes development consent a requirement for horticulture in the rural zones. While some may think the requirement to lodge a development application and obtain consent is too onerous for farmers, there is no other way for Council to enforce land use buffers. Given horticulture is an identified land use within the land use tables of the LEP, it is considered that its regulation through the development application/consent process is the most appropriate method of enforcement. Council cannot alter definitions within the LEP to separate different types of horticulture or specify areas within the rural zones where horticulture can and cannot be undertaken.

Since this matter was last considered by Council it has become evident that a blueberry farm in Eungai Creek has planted blueberry plants approximately 10m from the boundary of two adjoining residential properties. This can be seen in the aerial photo below.

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The farmer has then proceeded to erect posts to support netting less than 1m from the dividing boundary. The reason for this would be to enable machinery within the netted area to move between the rows of blueberry plants. This removes the ability for any form of landscape buffer to be planted as part of the blueberry farm to assist mitigate potential land use conflict, with the adjoining dwellings living areas 15m from the netting. Photos of the netting posts proximity to the boundary can be seen in the below photos.



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This lack of any form of buffer comes at a time where the concerns relating to social and economic impacts of land use conflict associated with horticulture has been made very clear to the blueberry industry by Council and parts of the community. Since this matter was last considered by Council, staff have consulted the EPA on their experience with land use conflict arising from horticulture who have advised that complaints about spray drift have been received from people within the Nambucca Valley and other local government areas and that the implementation of some form of buffer would assist in mitigating these impacts.

In 2017 Council considered whether the LEP should be amended to require development consent for horticulture within the rural zones. One of the reasons Council opted not to require development consent was due to the creation of a draft industry code of conduct prepared by the Australian Blueberry Growers Association. The draft code of conduct presented to Council was intended to promote best practice operations and included the following with regards to buffers:

“Site development and design – Design and development of the site should consider appropriate buffer distances and proximity to existing buildings/residences, roads, and other neighbouring land uses. When designing an appropriate set-back, the grower should consider the topography, the distance, and the type of vegetation used in a vegetated buffer. Growers should also consider the purpose of the set-back or buffer to assess its effectiveness. The site should be laid out to reduce the potential for spray drift, minimise soil erosion and nutrient run-off (including slope, drainage and vegetation buffers), and enable effective access for maintenance and harvest (including access roads, turning circles and drainage). Growers should also consider safe machinery operations when designing their orchard layouts. A well designed orchard will ensure a more profitable and easier to run farm as well as reduce the potential for land use conflict.”

The current Code of Practice adopted by the Association includes a provision to the above effect. The lack of buffer illustrated in the above photos is contrary to the above provisions of the draft code previously presented to Council and the current code of practice adopted by the Association. When asked if anything could be done to increase the setback to provide a buffer to the adjoining dwelling which is 15m from the boundary/netting, representatives from both Oz Group and Berries Australia advised that there was no ability for them to require the farmer to implement a buffer despite the provisions of the code of practice.

The position presented to Council in 2017 by the industry was not to require development consent for horticulture because it is already over regulated and they should be given time to implement their code of conduct. While it is acknowledged that there is existing legislation in place which can be used to regulate the potential impacts of horticulture; there is no legislation to enforce appropriate buffers to mitigate the potential social and economic impacts on surrounding properties which is considered best practice by the industry themselves.

The intent of the LEP is to specify what land uses are permissible without consent, with consent and which ones are prohibited. The purpose of this is to ensure land uses are appropriately located and operated so that they do not have any significant impacts on the natural, social or economic environments of the site they are located on or the surrounding area. For a land use to be permitted without development consent, Council should be satisfied that the land use will not result in any of these impacts or can be regulated under other legislation if they are not carried out appropriately.

It is agreed with the industry that not providing adequate land use conflict buffers is not best practice horticultural farming as it can result in significant impacts on the natural, social and economic environments of surrounding land. Given there is no other regulation to enforce appropriate buffers, it is not considered appropriate for horticulture to be permitted without consent in the rural zones. With appropriate buffers in place it is considered that horticulture can be appropriately carried out in the rural zones. As such, it is considered that the LEP should be amended to make horticulture permissible with consent in the rural zones.

Receive a report on the proposal to submit a planning proposal to the Planning Minister which seeks to amend the Nambucca LEP 2010 to make intensive plant agriculture permissible with development consent in the RU1 and RU2 zones.

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Staff Comment – As outlined above, it is considered that the LEP should be amended by relocating 'horticulture' from 'permitted without consent' in the land use tables for the RU1 Primary Production and RU2 Rural Landscape zones to 'permitted with consent'. Given the group term 'intensive plant agriculture' is already only permitted with 'development consent' and includes 'horticulture'; the amendment would be done by deleting horticulture from the 'permitted without consent' section of the land use tables.

Not only will the recommended LEP amendment assist with the implementation of land use conflict buffers, it can also assist with preventing environmental harm resulting from inappropriate farm establishment. Currently, regulation of environmental impacts such as water pollution is reactive to inappropriate farm establishment and operation, with considerable resources allocated by the State Government to provide education to farmers and undertake regulatory action. The requirement for development consent for horticulture would provide the opportunity for regulation to become proactive by ensuring farms are set out and established in accordance with best practices promoted by the industry themselves and state agencies such as NSW Local Land Services and the NSW Department of Primary Industries.

While some may view this as overburdening farmers, it is considered that if a farm is designed in accordance with best practice then there should be no reason consent is not granted, while resulting in a decrease in environmental impacts and drain on the resources of regulatory agencies trying to get environmental pollution rectified.

After consultation with the EPA it is evident that they have been very active with inspections of blueberry/vegetable farms within the Nambucca Valley, focusing on the use of chemicals and monitoring their impacts on water quality.

The table below is a summary of the pesticide sampling data recorded from water sampling taken from nine Nambucca Valley catchment locations on 4 March 2024. The sampling found some low-level pesticide detections at three of the nine sites.

Sample Site	Pesticide concentration	Australian water quality guideline limit	Comment
Eungai Creek	Nil Detections		
Snakey Creek	Atrazine: 0.01 ug/L Metolachlor: 0.09 ug/L	13ug/L guideline 0.46ug/L guideline	Low level detections below guidelines for aquatic ecosystem protection. Both are widely used agricultural herbicides. EPA inspecting catchment properties in week commencing 25 March 2024.
Taylors Arm	Nil Detections		
South Creek, Bowraville	Nil Detections		
Nambucca River, Bowraville	Nil Detections		
Blackbutt Creek, near Wilson Rd bridge	Imidacloprid: 0.07 ug/L	No guideline limit	Low-level detection of common horticultural insecticide. EPA currently undertaking investigations at upstream horticultural operation.
Newee Creek	Nil Detections		
Deep Creek	Nil Detections		
Oyster Creek	Imidacloprid: 0.01 ug/L	No guideline limit	Low-level detection of common horticultural insecticide. EPA currently undertaking investigations at upstream horticultural operation.

96 different pesticides were tested at each site, including common agricultural herbicides, fungicides and insecticides. Of these, only 3 pesticides were detected which were at low levels and below national water quality guideline limits. Whilst there has only been one set of data collected, this is positive news for the broader Nambucca River catchment.

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Sites where pesticides have been detected are currently the subject of ongoing EPA investigations and regulatory action. What has been observed to date is that horticultural operations can be undertaken in a manner which does not impact water quality. This was evident in the testing of blueberry farm catchment dams which returned no recordings of chemicals.

However, there will inevitably be farms established which do not follow best practice that will impact on water quality and require regulation from the EPA. It is considered that demonstrating that a farm will be established meeting best practice guidelines before the farm is established will be a more proactive approach to protecting the environment rather than react once an issue has evolved.

It is for this reason and for the inability to enforce land use conflict buffers as outlined above that it is recommended that the LEP be amended to require development consent for horticulture.

It is noted that in 2017 Council resolved to require development consent for horticulture within the R5 Large Lot Residential zone as it was previously permitted without consent. When considering the proposal at that time Council had concerns that the development consent requirement would be too onerous for less impactful horticultural operations such as potatoes, pumpkins, etc. which were planted in a paddock and removed during harvest. To address this concern Council included the following exemption in schedule 2 of the LEP:

Horticulture in Zone R5

- (1) Must be on land in Zone R5 Large Lot Residential.*
- (2) Must involve a crop with a productive duration of less than 12 months.*
- (3) Must remove entire plant during harvest.*

The above means that although development consent is identified as being required for horticulture within the land use table for the R5 zone, development consent is not required if the horticultural operation meets the above exempt provisions.

The retention of this exemption and expansion to include the rural zones is not opposed. However, an additional provision which restricts the use of farm buildings or structures to directly support the exempt horticulture operation should be included. The reasons for this is that wastewater from greenhouses has been found to be problematic to deal with and the major contributor to water pollution from horticultural operations. The inclusion of this provision would ensure that all horticulture operations which are located within buildings are the subject of development applications.

Alternatively, Council could seek to remove the horticulture exemption from Schedule 2.

Write to the Minister for Water and the Environment requesting assurances that greater resources be allocated to State agencies responsible for monitoring legislative compliance within the Nambucca Valley horticulture industry associated with water testing, water harvesting, clearing of native Vegetation and Pollution.

Staff Comment – Staff have written to the relevant Ministers with the responses received included within **attachments 2 and 3.**

Seek legal advice to clarify if development application is required prior to the erection of Netting and Greenhouses associated with horticulture (blueberries) in Rural Zones; and if a development application is not required, seek legal advice as to which changes are needed to make it so, using the experience of the Coffs Harbour Council.

Staff Comment – Legal advice has been obtained and has been included within **attachment 4.** In addition to the above resolution, legal advice was also sought to confirm that the establishment of a fruit or vegetable farm (including blueberries) is classified as horticulture under the LEP and that development consent is currently not required. This was requested as some members of the community are of the belief that development consent is already required for blueberry farms in rural zones under the LEP.

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The legal advice confirms that the growing of fruit and vegetables commercially is classified as horticulture under the LEP and that development consent is not currently required.

It also advises that development consent is not required for the erection of netting or tunnels over plants as they are considered ancillary to the horticultural use. However, it is advised that development consent is required for the erection of greenhouses as these structures are not considered to be ancillary structures.

It should be noted that the attached legal advice is not a ruling of the court. As it suggests, whether or not the netting, tunnels or greenhouses are ancillary would be arguable should a dispute arising from these structures be the subject of court proceedings. However, the advice directs Council on the appropriate position Council should take with regards to regulation of such structures and in any court proceedings.

Should the recommendation be adopted any potential dispute over whether development consent is required for the structures will be irrelevant. This is because horticulture will require development consent and any ancillary structure will also require development consent.

When the City of Coffs Harbour changed their position to require development consent for structures supporting horticulture, their position was to undertake regulatory action on those structures erected after their change in position. It is the intention of staff to replicate this approach from the date of this report.

Receive a report on a Rural Land Use Strategy.

Staff Comment – Undertaking a Rural Land Use Strategy to inform a potential amendment to the LEP is not recommended as it will only delay the imposition of measures which will enable the potential impacts of horticulture operations to be minimised. The preparation of a Rural Land Use Strategy would take approximately 12 months and would need to be outsourced as staff do not currently have the capacity to take on this work. There is currently no budget allocation for the preparation of a strategy.

It is considered to be clear what impacts can result from horticulture if not undertaken following best practices and that the imposition of land use conflict buffers cannot be enforced by Council unless development consent is required.

Having regard to the above, it is considered more appropriate for Council to decide if it wants to enforce land use conflict buffers and enable more proactive regulation to the impacts of horticulture. If it does then proceeding with the recommendation will enable this to occur, rather than deferring to prepare a strategy to advise what is already known.

That Council report back on the need for regular community meetings on land use conflicts and the intensive plant agriculture.

Staff Comment – The recommendation is to amend the LEP. If Council supports the recommendation updates on the amendments progress will be made public in Councils business paper twice a month in the Councils Outstanding Actions Report, with discussion able to be had at each meeting on that item.

Irrespective of Councils decision on the LEP amendment, regular community meetings are not recommended as it is not considered that there would be any more valuable dialog other than what could be achieved by dealing with individual reports of noncompliance as they arise or giving updates on the progress of the amendment.

CONSULTATION:

Lawyers
EPA
Oz Group

SUSTAINABILITY ASSESSMENT:**Environment**

There will be environmental benefits from the recommended LEP amendment as outlined in this report.

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Social

There will be social benefits from the recommended LEP amendment as outlined in this report.

Economic

While the LEP amendment would result in a cost to the farmer with regards to DA fees, it is not considered that these would be substantial.

Risk Analysis

Identified	Risk Likelihood (H,M,L)	Impact of risk (H,M,L)	Strategy to manage risk	Risk Assessment
Impacts as identified in report	M/H	H	Recommendation	H

FINANCIAL IMPLICATIONS:**Direct and indirect impact on current and future budgets**

Nil.

Working funds – justification for urgency and cumulative impact

N/A

Impacts on 10 Year Long Term Financial Plan

N/A

Service level changes and resourcing/staff implications

It is not considered that the recommendation will result in adverse impacts on Councils staffing resources.

ATTACHMENTS:

- 1 15404/2024 - Oz Group Submission
- 2 15406/2024 - Letter from Water Minister Delegate
- 3 15407/2024 - Letter from Environment Minister
- 4 15409/2024 - Legal Advice