



New South Wales Government
Independent Planning Commission

ipcn.nsw.gov.au

Nambucca Valley Gateway Review

PP-2022-2086/GR-2022-18

Advice Report

Dr Peter Williams (Chair)
17 October 2022



1. Introduction

1. On 20 September 2022, the NSW Independent Planning Commission (**Commission**) received a request from the NSW Department of Planning and Environment (**Department**) to provide advice pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in relation to planning proposal PP-2022-2086 (**Planning Proposal**).
2. On 6 June 2022, Nambucca Valley Council lodged the Planning Proposal with the Department, seeking to amend the Nambucca Local Environmental Plan 2010 (**Nambucca LEP**) to prohibit caravan parks on land zoned RU2 Rural Landscape (**RU2**) and R5 Large Lot Residential (**R5**).
3. On 19 July 2022, as delegate of the Minister for Planning (**Minister**), the Department issued a Gateway Determination that the Planning Proposal should proceed subject to conditions (the **Gateway Determination**).
4. On 25 August 2022, Council initiated a Gateway Determination Review (**GR-2022-18**), seeking the removal of conditions relating to savings provisions and section 9.1 Ministerial Direction 6.2. The review also sought to amend conditions relating to the exhibition and completion date (**Review Request**).
5. On 20 September 2022, the Department requested the Commission review the Planning Proposal, consider the merits of the Review Request and provide advice including a clear and concise recommendation to the Minister's delegate as to whether the Gateway Determination should be amended.
6. Dianne Leeson, as the nominee of the Chair of the Commission, nominated Dr Peter Williams to constitute the Commission Panel to provide advice to the Department on the Gateway Determination Review Request.

2. The Review Request

2.1 The Planning Proposal

7. The Department's Gateway Determination Report dated 19 July 2022 (**Gateway Determination Report**), states that the objective of the Planning Proposal is to amend Nambucca LEP 2010 to prohibit caravan parks on land zoned RU2 and R5. Caravan parks will remain permissible on land zoned RU5 Village, SP3 Tourist, RE1 Public Recreation and RE2 Private Recreation under the LEP.
8. The Planning Proposal applies to all land zoned RU2 and R5 in the Nambucca Valley Local Government Area (**LGA**).

2.2 Background

9. According to the Department's Gateway Determination Report, Ingenia Lifestyle entered into an option agreement to acquire a property at Way Way (in proximity to Scotts Head) with a view to submitting a development application for the construction of a caravan park. The subject land is zoned part RU1 Primary Production and part RU2.

10. Prior to the lodgement of a development application, Ingenia Lifestyle undertook preliminary community engagement including a community information day on 19 February 2022.
11. A Notice of Motion was considered by Council at the Ordinary Council meeting on 17 March 2022, with the objective of seeking to prohibit the construction of caravan parks on land zoned RU2 and R5 within the Nambucca LGA.
12. A General Manager's Report was tabled on 31 March 2022, in response to the resolution regarding the Notice of Motion of 17 March 2022. Council resolved to submit a planning proposal to the Minister for Planning seeking to prohibit caravan parks on land zoned RU2 and R5.
13. Two successive Planning Proposals were then submitted to the Department by Council proposing the prohibition of caravan parks on land zoned RU2 and R5 in the Nambucca LEP 2010. PP-2022-1501 was submitted 26 April 2022 and PP-2022-1782 was submitted 16 May 2022. Both Planning Proposals were returned to Council at lodgement by the Department on the grounds that further strategic justification and comment on section 9.1 Direction 6.2 was required. The current Planning Proposal (PP-2022-2086) was subsequently lodged and accepted by the Department on 6 June 2022.
14. A Development Application for the construction of a caravan park at 11 Ocean Ridge Drive, Way Way NSW 2447 was submitted in July 2022 (**DA2022/233**). This land is subject to this Planning Proposal and Gateway Review. The Commission notes that there is some dispute over the lodgement date of DA2022/233 and has provided comment on this in section 3.4 below.
15. The Department has provided further detail regarding the background of the Planning Proposal in the Department's Gateway Review Justification Assessment, dated 19 September 2022 (**Justification Assessment**).

2.3 Review Request

16. Council's letter to the Department, dated 25 August 2022 requested a review (**Review Request**) of four conditions of the Gateway Determination (GR-2022-18), seeking the removal of Condition 1 Point 1 and Condition 1 Point 4 and the amendment of Conditions 2 and 5. Council's request is set out below:
 - *Gateway condition 1 point 1 – Remove the requirement for the planning proposal to be updated to note that the proposal is justifiably inconsistent with section 9.1 Direction 6.2 Caravan Parks and Manufactured Home Estates*
 - *Gateway condition 1 point 4 – Remove the requirement for the planning proposal to be updated to include a savings provision which identifies that a development application for a caravan park made but not finally determined before the commencement of the LEP amendment must be finally determined as if the plan has not commenced.*
 - *Gateway condition 2 – Amend the requirement for exhibition of the planning proposal. This condition is requested to be extended given the progression of the planning proposal is pending the outcome of this review*
 - *Gateway condition 5 – Amend the completion date for the LEP to be completed by 19 January 2023. The condition is requested be extended given progress is subject to the findings of this review application. It is considered 6 months from the conclusion of the review is reasonable.*

3. The Commission's Consideration

3.1 The Commission's Meetings

17. As part of its advice, the Commission met with various persons as set out in Table 1. Transcripts and presentation material were made available on the Commission's website.

Table 1 – Commission's Meetings

Meeting	Date	Transcript available on
Council	5 October 2022	11 October 2022
Department	6 October 2022	11 October 2022

3.2 Material Considered by the Commission

18. In its review, the Commission has considered the following material (**Material**):
- Council's Notice of Motion, dated 17 March 2022;
 - Council's General Manager's Report, dated 31 March 2022;
 - Council's Resolution, dated 31 March 2022;
 - Council's Planning Proposal Report, dated June 2022;
 - the Department's Gateway Determination, dated 19 July 2022;
 - the Department's Gateway Determination Report, dated 19 July 2022;
 - Council's Review Request, dated 25 August 2022;
 - the Department's Justification Assessment, dated 19 September 2022;
 - presentation material and comments made during the Commission's meetings set out in Table 1;
 - Council's Response to the Commission, dated 6 October 2022; and
 - Scotts Head Community Group letter to the Minister, dated 9 October 2022.

3.3 Condition 1 Point 1 – Section 9.1 Direction 6.2 Caravan Parks and Manufactured Home Estates

19. The Gateway Determination states that under section 3.34(2) of the EP&A Act an amendment to the Nambucca LEP 2010 to prohibit caravan parks on land zoned RU2 and R5 should proceed subject to conditions. Condition 1 Point 1 of the Gateway Determination states:

1. *Prior to exhibition, the planning proposal is to be updated to:*
 - *note that the proposal is justifiably inconsistent with section 9.1 Direction 6.2 Caravan Parks and Manufactured Home Estates; and*

20. Section 9.1 Direction 6.2(1) states:

- (1) *In identifying suitable zones, locations and provisions for caravan parks in a planning proposal, the relevant planning authority must:*
 - (a) *retain provisions that permit development for the purposes of a caravan park to be carried out on land, and*
 - (b) *retain the zonings of existing caravan parks, or in the case of a new principal LEP zone the land in accordance with an appropriate zone under the Standard Instrument (Local Environmental Plans) Order 2006 that would facilitate the retention of the existing caravan park.*

21. Council in its Review Request was of the view that the terms of the Direction are to be applied to the LEP as a whole and do not limit consideration solely to the RU2 and R5 zones. Council's Planning Proposal identifies that the RU2 and R5 zones are not suitable for caravan parks and retains existing provisions in the LEP permitting development for the purposes of a caravan park within the RE1 Public Recreation, RE2 Private Recreation, SP3 Tourist and RU5 Village zones. Council is of the view that retaining these provisions which permit caravan parks is consistent with Direction 6.2 and has requested that Condition 1 Point 1 be removed from the Gateway Determination. Council, in its response to the Commission dated 6 October 2022, confirmed that there are no current caravan parks in the RU2 and R5 zones within the Nambucca Valley LGA.
22. The Department's Justification Assessment maintained that a planning proposal is inconsistent with Direction 6.2 if the proposal:
- removes the opportunity for new caravan parks to be developed in the LGA; or
 - if the planning proposal changes the zoning of land on which a caravan park already exists so that new caravan parks are no longer permitted on land in the zone.
23. The Department states in its Justification Assessment that the Planning Proposal seeks to remove the opportunity for a new caravan park to be developed in the LGA and is contrary to the objectives of this Direction. The Department is of the view that Council has not provided sufficient justification for the removal of Condition 1 Point 1.

3.3.1 The Commission's Findings

24. The Commission notes that the Department and Council have conflicting views on the interpretation of Section 9.1 Direction 6.2 – specifically (1)(a), as described in paragraphs 21 to 23 above. Given the differing interpretations, the Commission acknowledges that Section 9.1, Direction 6.2(1)(a) is reasonably open to interpretation.
25. Nonetheless, when considering and applying the reasons provided by the Department in its Justification Assessment for the Planning Proposal's inconsistency with Direction 6.2, it is the Commission's view that the Proposal does appear to comply with the Direction. This is because, firstly, although the Planning Proposal will prohibit caravan parks on land zoned RU2 and R5, it does not remove the opportunity for new caravan parks to be developed in the LGA as a whole, as they will remain permissible development in the RU5, SP3, RE1 and RE2 zones. Secondly, the Planning Proposal does not change the zoning of land on which a caravan park already exists (see paragraph 21 above). For the reasons set out above, the Commission is of the view that maintaining the condition is not appropriate. Accordingly, the Commission's advice is that there is merit in removing Condition 1 Point 1.

3.4 Condition 1 Point 4 – Savings Provision

26. Condition 1 Point 4 of the Gateway Determination states:
1. *Prior to exhibition, the planning proposal is to be updated to:*
 - *include a savings provision which identifies that a development application for a caravan park made but not finally determined before the commencement of the LEP amendment must be finally determined as if the plan has not commenced.*

3.4.1 Council's View

27. Council in its Review Request stated that the inclusion of the savings provision above will result in *“any Development Application (DA) for a caravan park in the RU2 or R5 zones made before the Gateway Determination but not yet determined must be assessed as if the gateway determination (draft LEP) had not been made”*.
28. Council stated that the Applicant (for DA2022/233) was aware of Council's intention to amend the LEP to prohibit caravan parks on RU2 and R5 zoned land, but nonetheless proceeded to prepare a development application during the months following Council announcing its intentions on 31 March 2022.
29. Council states that DA2022/233 was submitted to Council on Friday 8 July 2022 at 5:01pm and not formally lodged until 21 July 2022. Council notes that the Gateway Determination was signed off on 19 July 2022 and that this was two days prior to the formal lodgement of DA2022/233.
30. Council contends that had the Gateway Determination been issued within expected timeframes the savings provision would not be applicable to DA2022/233. Council is of the view that DA2022/233 is deemed to have been made 11 days before the commencement of the LEP amendment. Council stated that having regard to the delays in submitting the Planning Proposal (referenced in paragraph 13 above) it is not considered reasonable that DA2022/233 should be captured by a savings provision.
31. Council in its Review Request raised concerns about the impacts of unplanned expansion of public infrastructure, most notably water and sewer infrastructure resulting from the development of caravan parks on RU2 and R5 zones with specific reference to DA2022/223. Council also raised concerns regarding the vulnerability of caravan parks on RU2 and R5 zoned land to natural disasters. Council stated that not only is the land the subject of DA2022/233 flood prone, but it is highly bushfire prone. Council stated that *“Given the intent of the planning proposal was to make a strategic decision to ensure caravan parks are located in the most appropriate areas to protect them from natural disasters, it is considered appropriate to remove the savings provision for DA2022/233”*.
32. For the reasons set out above, Council have requested that Condition 1 Point 4 be deleted from the Gateway Determination.

3.4.2 Department's Assessment

33. According to the Department's Justification Assessment, the Planning Proposal is not the result of a Local Strategic Planning Statement, Department-approved local housing strategy, employment strategy or strategic study or report. Rather, it is in response to the Council resolution referenced in paragraph 12 above.
34. The Department's Justification Assessment states that DA2022/233 is identified to be the only development application that the savings provision currently affects. However, the Department notes that this provision will also relate to any new development application(s) for caravan parks lodged prior to the LEP being made.
35. The Department stated that Council's Development Application tracker indicates DA2022/233 was lodged on 15 July 2022 rather than 21 July 2022 and noted that the Gateway Determination was issued after DA2022/223 was lodged with Council.

36. The Department stated that “*Site-specific matters such as those raised by Council in relation to water and sewer infrastructure required to service DA2022/233 are merit-based matters to be considered during the assessment of a development application*”. The Department also stated that “*Matters pertaining to flooding and bushfire affectation should be considered as part of the development application’s merit-based assessment process*”. (Department’s Justification Assessment)
37. The Department’s Justification Assessment stated: “*While the Department supports the overall strategic direction of the proposal it is considered inappropriate the planning proposal process be used to determine the outcome of a specific development application*”. The Department in its meeting with the Commission stated: “*It is considered that inclusion of a savings provision on the Gateway determination is consistent with the principles of procedural fairness and natural justice*”.
38. The Department does not consider Council’s Review Request to have provided justification or evidence for the removal of Condition 1 Point 4.

3.4.3 Commission’s Findings

39. Condition 1 Point 4 requires that the Planning Proposal include a savings provision which identifies that a development application for a caravan park made but not finally determined before the commencement of the LEP amendment must be finally determined as if the plan has not commenced.
40. The Commission notes that Council’s interpretation of the Gateway Determination is that the LEP amendment commenced when the Gateway Determination was issued on 19 July 2022 (see paragraph 30 above).
41. It is the Commission’s view the prohibition of caravan parks on land zoned RU2 and R5 would only be in force from the commencement of the LEP amendment, that is, from its making into law - not from the date of Gateway Determination (although proposed LEPs that are or have been the subject of public consultation are still capable of *consideration* in determining development applications under section 4.15(1)(a)(ii) of the EPA Act).
42. The Commission notes that there is some contention between Council and the Department (see paragraphs 29 and 35) regarding the date of lodgement of DA2022/223. However, the Commission notes that the dispute between these lodgement dates is not material in that the savings provisions will apply to any development application lodged up until the commencement (i.e. making) of the LEP amendment.
43. The Commission acknowledges the matters raised by Council in paragraph 31 above regarding water and sewer infrastructure, flooding and bushfire risk. However, the Commission agrees with the Department and is of the view that these are merit-based matters to be considered during the assessment of a development application.
44. The Commission agrees with the Department that the inclusion of a savings provision in the Gateway Determination is appropriate and desirable. The Commission is of the view that there is sufficient justification from the Department above for the inclusion of the savings provision.
45. In addition to the above, section 30(1)(b) of the *Interpretation Act 1987* states:
- 30 Effect of amendment or repeal of Acts and statutory rules**
- (1) *The amendment or repeal of an Act or statutory rule does not—*
- (b) *affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule...*

46. Thus, the Commission notes that even if the savings provisions in the Gateway Determination were removed, section 30(1)(b) of the *Interpretation Act 1987* as set out above, would still apply (per section 5(6) of that Act) to any development application lodged for determination. It follows that even absent of a specific savings and transitional provision, any development application lodged up until the date of the making of Nambucca LEP amendment could still be subject to the provisions of the Nambucca LEP as in force at the date of lodgement.
47. For the reasons set out above, the Commission finds that Condition 1 Point 4 should not be removed from the Gateway Determination.

3.5 Condition 2 – Exhibition of the planning proposal

48. Condition 2 of the Gateway Determination states:
- 2. Public exhibition is required under section 3.34(2)(c) and clause 4 of Schedule 1 to the Act as follows:*
- (a) the planning proposal is categorised as standard as described in the Local Environmental Plan Making Guidelines (Department of Planning and Environment, 2021) and must be made publicly available for a minimum of 20 working days; and*
- (b) the planning proposal authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in Local Environmental Plan Making Guidelines (Department of Planning and Environment, 2021).*
- Exhibition must commence within two months following the date of the gateway determination.*
49. Council, in its Review Report requested that the timeframe to begin exhibition included in Condition 2 be extended given that the progress of the Planning Proposal was pending the outcome of this Gateway Review process and would still require amendments once the review is complete. Alternatively, Council was of the view that this requirement could be deleted from Condition 2 given that Condition 5 has a date the LEP amendment should be completed by.
50. The Department in its Justification Assessment did not object to the amendment of Condition 2 to accommodate this Review of the Gateway Determination.

3.5.1 Commission's Findings

51. The Commission agrees with Council above and is of the view that Condition 2 should be amended. The Commission notes that the Department did not object to this amendment. Given the impact on timeframes as a result of this review process, the Commission finds that it is appropriate to amend Condition 2 to alter the date from which exhibition must commence - from the date of Gateway Determination to the date of the completion of the Gateway Determination Review.

3.6 Condition 5 – Completion date

52. Condition 5 of the Gateway Determination states:
5. *The LEP should be completed within six months from the date of the Gateway determination.*
53. Council, in its Review Request, stated that the requirement in Condition 5 “*for the LEP to be completed by 19 January 2023 should be extended given progress is subject to the findings of this review application*”. Council was of the view that 6 months from the conclusion of the review is reasonable.
54. The Department, in its Justification Assessment did not object to the amendment of Condition 5.

3.6.1 Commission’s Findings

55. The Commission agrees with Council and is of the view that Condition 5 should be amended. The Commission notes that the Department did not object to this amendment. Given the impact on timeframes as a result of this review process, the Commission finds that it is appropriate to amend Condition 5 to extend the timeframe in which the LEP amendment must be completed - from 19 January 2023, to six (6) months from the conclusion of the Gateway Determination Review.

4. The Commission's Advice

56. The Commission has undertaken a review of the Gateway Determination as requested by the Department. In doing so, the Commission has considered the Material, submissions by the Department and Council and the reasons given for the determination in the Department's Gateway Report.
57. In relation to Condition 1 Point 1, the Commission is of the view that section 9.1, Direction 6.2(1)(a) is reasonably open to interpretation. Nonetheless, the Commission is of the view that the Planning Proposal does comply with Direction 6.2. Accordingly, the Commission's advice is that there is merit in removing Condition 1 Point 1.
58. The Commission agrees with the Department that the inclusion of a savings provision in Condition 1 Point 4 of the Gateway Determination is appropriate and desirable. The Commission is of the view that there is sufficient justification from the Department for the inclusion of the savings provision. The Commission recommends that the Gateway Determination should not be amended to delete the savings provision required under Condition 1 Point 4.
59. The Commission agrees with Council and finds that it is appropriate to amend Condition 2 to alter the date from which exhibition must commence - from the date of the Gateway Determination to the date of the Gateway Determination Review.
60. The Commission also agrees with Council and finds that it is appropriate to amend Condition 5 to extend the timeframe in which the LEP amendment must be completed - from 19 January 2023, to six (6) months from the conclusion of the Gateway Determination Review.
61. The Commission recommends that Condition 2 and Condition 5 are amended accordingly.
62. The Commission advises the Minister's delegate that the Gateway Determination issued on 19 July 2022 should be amended in accordance with the Commission's recommendations in this Advice Report, dated 17 October 2022.



Dr Peter Williams (Chair)
Member of the Commission



New South Wales Government
Independent Planning Commission

**For more information, please contact
the Office of the Independent Planning
Commission NSW.**

ipcn.nsw.gov.au

Phone (02) 9383 2100

Email ipcn@ipcn.nsw.gov.au

Mail Level 15 135 King Street Sydney NSW 2001

Disclaimer

While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.

The Independent Planning Commission NSW advises that the maps included in the report are intended to give visual support to the discussion presented within the report. Hence information presented on the maps should be seen as indicative, rather than definite or accurate. The State of New South Wales will not accept responsibility for anything, or the consequences of anything, done or omitted to be done in reliance upon the mapped information.