

Greater Sydney, Place and Infrastructure

Gateway determination report

LGA	The Hills Shire
PPA	The Hills Shire Council
NAME	The planning proposal seeks to rezone the subject site from RU1 Primary Production to RU2 Rural Landscape to facilitate a rural cluster subdivision outcome in the form of five residential lots and one community title lot where biodiversity values would be mapped through an amendment to the Terrestrial Biodiversity Map.
NUMBER	PP_2018_THILL_008_00
LEP TO BE AMENDED	The Hills LEP 2012
ADDRESS	32-34 Jacks Lane, Maroota
DESCRIPTION	Lot 4 DP 864355
RECEIVED	21 August 2018
FILE NO.	IRF18/4591
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure statement has been provided.
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal.

INTRODUCTION

Description of planning proposal

The proposal seeks to amend The Hills Local Environmental Plan (LEP) 2012 by altering the zone and terrestrial biodiversity maps to allow for the development of the site for rural cluster dwellings. Rural cluster dwellings are a form of community title subdivision made permissible under Clause 4.1AA of The Hills LEP and apply to land zoned RU2 Rural Landscape. A planning proposal is required as Clause 4.1AA does not apply to land zoned RU1 Primary Production.

Site description

The site consists of one parcel of land identified as Lot 4 DP 864355, 32-34 Jacks Lane, Maroota. The site is zoned RU1 Primary Production and has an approximate area of 102,900m² (10.29 ha) and is accessible via private road (Jacks Lane) from Wisemans Ferry Road.

Council advised that the site contains an existing single storey dual occupancy and rural sheds. The site includes both cleared and vegetated areas (including Shale Sandstone Transition Forest which is a critically endangered ecological community under Biodiversity Conservation Act 2016). A watercourse and a dam are present.

The site and the locality are mapped as being bush fire prone land.

The site is mapped as containing both Class 3 and 4 agricultural land.



Figure 1: Subject site (Source: Local Planning Panel Meeting Report 2 June 2018)

Existing planning controls

The site is currently zoned RU1 Primary Production under The Hills LEP 2012 (**Figure 2**) with a minimum lot size of 10ha and a maximum building height of 10m.

The site is not within the mapped area for Terrestrial Biodiversity (**Figure 3**)

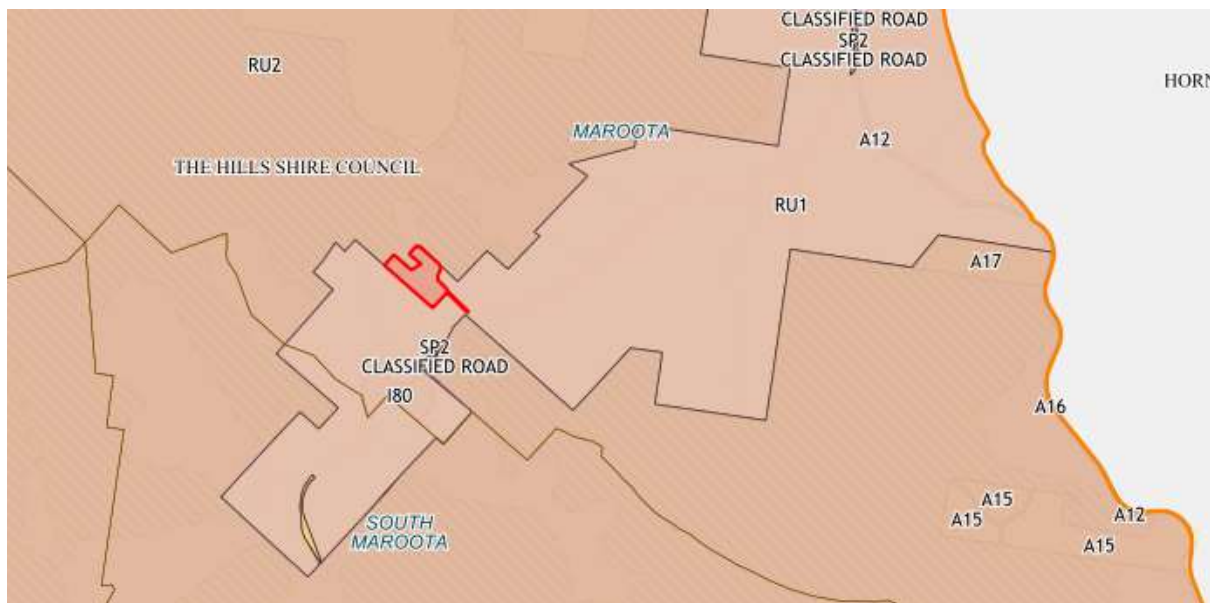


Figure 2: Zoning in locality (Source: Council mapping tool)



Figure 3: Biodiversity (Terrestrial) Map (Source: LEP mapping)

Surrounding area

The locality contains a mixture of agricultural, extractive industry and rural residential land uses. **Figure 4** identifies that there is a heavy presence of existing vegetation in the locality with cleared areas adjacent to Wisemans Ferry Road.



Figure 4: Aerial photo of extended locality (Source: Council website mapping)

Figure 5 identifies the site (in red) with existing agricultural uses (purple) and extractive industries (yellow). The map has been provided by Council in their Council report (**Attachment E**) and is based upon land uses in 2014. **Figure 5** also identifies the area which is subject to Sydney Regional Environmental Plan (SREP) 9 – Extractive Industry in dotted green (noting the site is not within the SREP 9 area).

The property and larger locality is mapped as being bush fire prone (**Figure 5**).

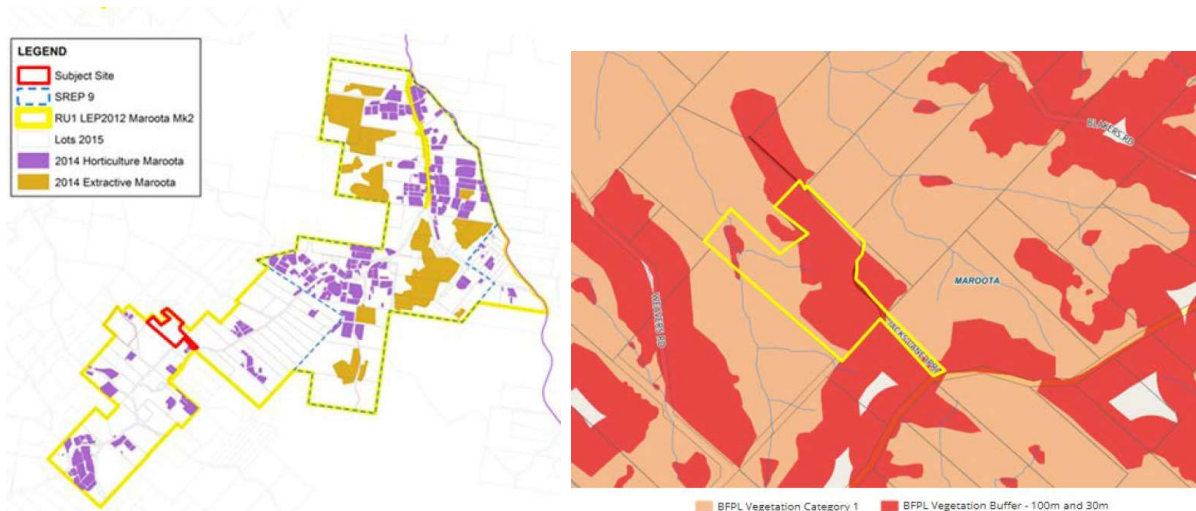


Figure 5: Land uses in locality (Source: Council staff report 10 July 2018) and **Figure 6:** Bush fire prone land mapping (Source: Council staff report 10 July 2018)

Local Planning Panel

Council staff prepared a report (**Attachment F**) briefing the Local Planning Panel (the Panel) on the proposal in accordance with the Local Planning Panels Direction – Planning Proposals. The report did not contain a recommendation to the Panel as council staff did not want to make a recommendation on the basis that it could have undermined the independence of the Panel. This procedure has since been clarified by a Direction under section 9.1 of the *Environmental Planning and Assessment Act 1979* on 27 September 2018 which requires council staff to make a recommendation.

The report was considered by the Panel on 20 June 2018. The Panel resolved to defer the matter so a detailed report including recommendations could be prepared.

Council has not prepared a further report to the Panel and the Panel has not provided advice.

Council Staff Recommendation

Council staff prepared a report (**Attachment E**) to Council on 10 July 2018 which recommended that the planning proposal not proceed. The reasons outlined in the report include:

1. inconsistency with the objectives of state and local strategic policy, specifically the retention and protection of land with agricultural potential;
2. the proposal would facilitate an inappropriate outcome on a site that is unsuitable for intensification of development due to its proximity to bush fire hazard;
3. the proposal would result in the loss of land with agricultural potential and would contribute to the fragmentation and alienation of surrounding agricultural land;
4. the proposal will set a precedent for similar sites in the locality and diminish the role of the locality in encouraging and protecting agricultural land practices;
5. the opportunity to map biodiversity protection does not provide a significant benefit to justify strategic inconsistencies; and

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Explanation of provisions

To facilitate the proposed development outcome the following amendments are proposed to be made to The Hills LEP 2012:

- amend Land Zone Map to rezone the site from RU1 Primary Production to RU2 Rural Landscape; and
- amend Terrestrial Biodiversity Map to identify significant vegetation on site.

Mapping

The proposal seeks to amend the following mapping:

- Land zoning map – Sheet LZN_010 (**Figure 8**), and
- Terrestrial Biodiversity Map – Sheet CL_010 (**Figure 9**)

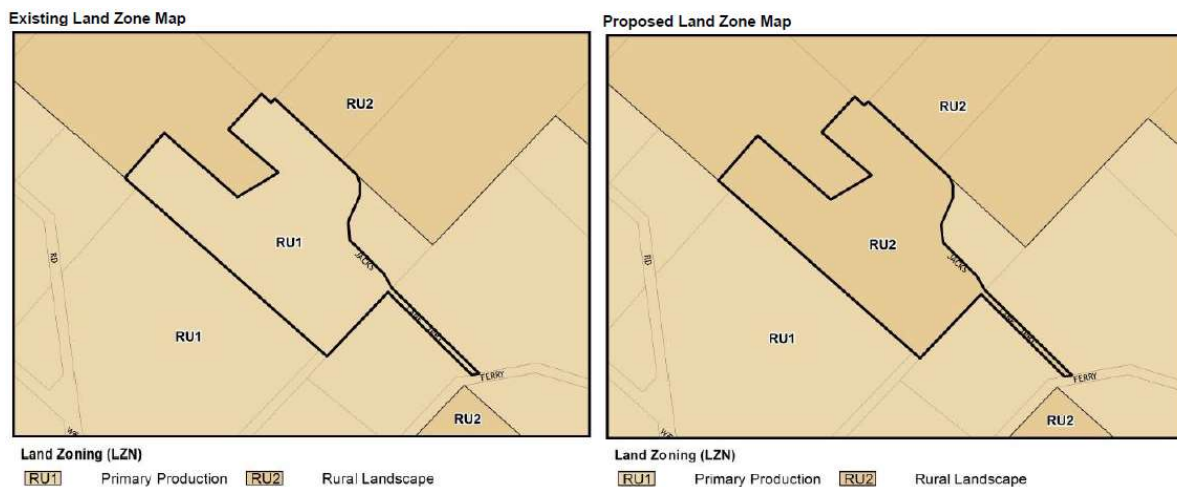


Figure 8: Existing and proposed land zone mapping (Source: Planning Proposal)

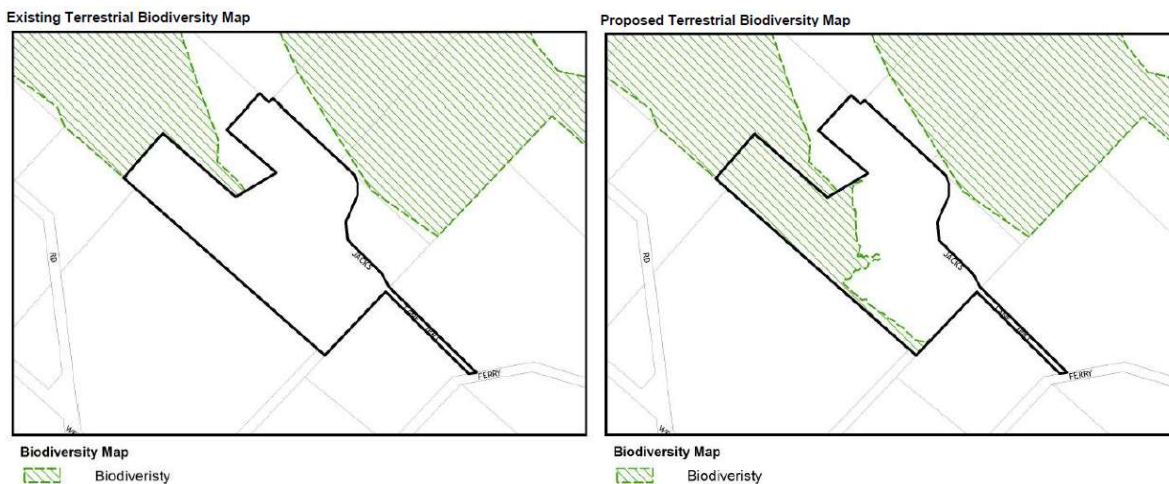


Figure 9: Existing and proposed Terrestrial Biodiversity map (Source: Planning Proposal)

NEED FOR THE PLANNING PROPOSAL

The planning proposal is not the result of any single strategic study or report. The proposal has been initiated by the land owner as a means of enabling subdivision of the land via Clause 4.1AA Minimum subdivision lot size for community title schemes of the LEP (known as rural cluster subdivision).

Clause 4.1AA can only be undertaken on land which is zoned RU2 Rural Landscape or Zone RU6 Transition under the LEP. The site is currently zoned RU1 Primary Production.

Clause 4.1AA allows land to be subdivided if the land is mapped as “Biodiversity” on the Terrestrial Biodiversity Map or a suitably qualified professional has assessed the relevant land and certified that the development will provide a better biodiversity outcome. The proposed amendment to the biodiversity mapping aims to ensure consistency with this clause.

The intended outcome, i.e. development in accordance with Clause 4.1AA, and the proposed changes to the zoning and biodiversity (terrestrial) mapping can only be achieved via an amendment to The Hills LEP 2012.

STRATEGIC ASSESSMENT

Regional / District

Central City District Plan

The planning proposal is required to give effect to the Central City District Plan. The following planning priorities of the Plan are of particular relevance to the planning proposal:

- Planning Priority C12 encourages economic success in certain areas. Maroota has having mineral and extractive resources which are currently being extracted. The plan notes that the introduction of rural residential development within these areas is likely to cause conflict (odour, noise and other pollutants) and there is a need to provide important rural industries with certainty and ensure their operations can continue without encroachment from incompatible land uses.
- Planning Priority C18 Better managing rural areas. This Priority notes most of the rural area in the District is of high environmental value and that urban development should be limited to the existing Urban Area (i.e. outside the Metropolitan Rural Area).
- Planning Priority C20 Adapting to the impacts of urban and natural hazards and climate change. This Priority has a key objective to limit exposure to natural and urban hazards, such as bush fire.

The proposal is not consistent with key Planning Priorities of the Central City District Plan given that it proposes increased density in the Metropolitan Rural Area, does not adequately meet the criteria of *Planning for Bush Fire Protection 2006* and has the potential to fragment the rural values of the locality. As such, the planning proposal does not give effect to the District Plan.

Local

The planning proposal (**Attachment A**) has identified Hills 2026 Looking Toward the Future as a relevant local strategy. This Strategy has not been endorsed by the Department.

The Council staff report dated 10 July 2018 (**Attachment E**) noted inconsistencies with the Hills Shire Rural Land Strategy and Employment Lands Direction.

This planning proposal is similar to a planning proposal at 90 Weavers Road, Maroota (PP_2016_THILL_012_00) which is currently with the Department for finalisation. In this proposal, the issues raised by the RFS are also unable to be resolved.

Section 9.1 Ministerial Directions

The proposal is consistent with relevant Section 9.1 Directions, except for the following:

Direction 1.2 Rural Zones

The objective of this Direction is to protect the agricultural production value of rural land. The Direction states that a planning proposal must not contain provisions that will increase the permissible density of land within a rural zone.

The proposal is inconsistent with this Direction as the proposal seeks to enable rural cluster subdivision allowing the creation of up to five lots which are each capable of containing a dwelling. The remaining land within the subdivision is to be within a community lot and is to consist of the vegetated area managed under a community management plan and vegetation management plan. The proposed lots are unlikely to be of a size to allow future agricultural uses. The community lot cannot be used for agricultural purposes as it is to be set aside for conservation purposes.

The proponent has indicated that the land is not viable or suitable in its current form for agricultural production but has not submitted sufficient evidence to support this assertion or provided a strategy that considers the objectives of the Direction. A soil chemistry profile (**Attachment H**) provided with the planning proposal indicates that the soil is currently not ideal agricultural soil. However, the same report suggests the soil can be restored through the additional of chemicals (lime) and fertilisers. The lack of a current use does not mean that a future agricultural use is not possible or viable.

The Council report (**Attachment E**) identifies that the site contains both Class 3 and 4 agricultural soils (**Figure 10**). The Department of Primary Industries has previously informed Council that Class 3 is the preferred land for soil-based agriculture. The planning proposal acknowledges that the intended outcome would result in the loss of productive land for agricultural purposes.

The Council report identifies that the circumstances of the proposal put forward by the proponent are not unique to the locality. There are possibly up to 20 properties in the vicinity that are on the periphery of the RU1 zone with similar site characteristics and circumstances. **Figure 11** identifies the properties (with red dots) which could also seek to obtain a rezoning to RU2 in order to enable the rural cluster subdivision provisions. The hypothetical rezoning of all nominated sites would result in a significant loss of potential agricultural land, significant land use conflicts, and potential fragmentation and alienation of remaining agricultural land.

It is important to note that the proposal has been initiated by a private land owner to alter the zoning and biodiversity terrestrial maps to allow rural cluster subdivision to occur. The proposal has not been initiated by Council after a strategic review of the rural lands with a view of determining the strategic direction for the locality in accordance with the District Plan.

The proposal is considered inconsistent with the Direction as it is not supported by a suitable strategy, as required by the requirements of the Direction.

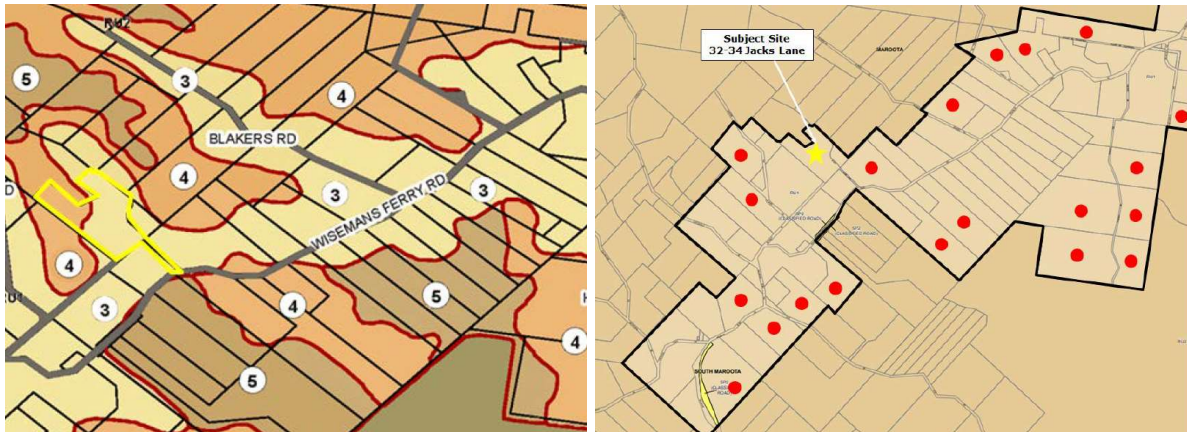


Figure 10: Agricultural soil classes (Source: Council staff report 10 July 2018) and **Figure 11:** Examples of similar sites in locality (Source: Council staff report 10 July 2018)

Direction 4.4 Planning for Bushfire Protection

Direction 4.4 Planning for Bush Fire Protection seeks to protect life, property and the environment from bushfire hazards. The Direction applies to bush fire prone land.

In accordance with the terms of the Direction, a planning proposal must have regard to Planning for Bush Fire Protection 2006 and introduce controls that avoid placing inappropriate developments in hazardous areas.

Council undertook consultation with NSW Rural Fire Service when reviewing the planning proposal. To date, the proponent has not been able to demonstrate to NSW RFS that the proposal is able to satisfy the provisions of Planning for Bush Fire Protection 2006. NSW RFS provided advice (**Attachment J**) raising concern with the planning proposal. The main points of concern are:

- The concept plan does not allow for a perimeter road which is a requirement of Planning for Bush Fire Protection 2006;
- The site is located a distance greater than 200m from a public road. Planning for Bush Fire Protection 2006 notes travel distances of 200 metres or more are difficult to traverse with dense smoke and reduced vision as well as the increased chance of being isolated by the advancing fire; and
- Several of the lots in the indicative plan are narrow and will have multiple exposures to bush fire hazard. Planning for Bush Fire Protection 2006 notes that a subdivision should be designed to minimise exposure to the bush fire hazard.

Council officers formed the view in preparing the planning proposal that it is inconsistent with this Direction as noted in their report to the Local Planning Panel and Council (**Attachments E and F**). The planning proposal (**Attachment A**) notes that it is inconsistent with this Direction due to inconsistency with Planning for Bush Fire Protection 2006.

NSW RFS has issued a fact sheet entitled Multi Lot Residential Subdivision in Bush Fire Prone Areas (Fact Sheet 1/17) (Version 1 – August 2018) (**Attachment K**). The fact sheet was issued in response to the growing concerns of NSW RFS in relation to rural cluster subdivision and their ability to comply with the relevant standards.

The fact sheet notes in many instances access issues will prevent NSW RFS from supporting a proposal.

Council does not consider that this Direction has been satisfied. Furthermore, there are concerns that have been raised by NSW RFS in the consultation that Council undertook prior to the request for a Gateway determination.

If a Gateway determination was issued enabling the planning proposal to proceed subject to conditions, the Direction requires Council to consult with NSW RFS prior to exhibition and make appropriate changes to the planning proposal.

The Direction states a planning proposal may be inconsistent with the terms of the Direction only if the relevant authority has received written advice from the Commissioner of the NSW Rural Fire Service advising NSW RFS does not object to the progression of the planning proposal.

There is an inconsistency with the Direction and the advice of the Commissioner of the NSW Rural Fire Service is required. Based on the most recent consultation with NSW RFS, and the published Fact Sheet, there are ongoing concerns with the ability of the planning proposal to demonstrate consistency with this Direction. The nearby planning proposal at 90 Weavers Road, Maroota, was also unable to achieve consistency.

State environmental planning policies

The aims of the SEPP are to 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. Clause 6 of the SEPP requires when preparing a planning instrument, a planning authority must consider if the land on which a planning proposal is contaminated, whether it is in a suitable condition for the intended use or can be made suitable; and the steps required to make the land suitable (if required).

In a Land and Environment Court judgement, Moorebank Recyclers Pty Ltd vs Tanlan Pty Ltd, it was determined Clause 6 of SEPP 55 must be complied with at the time a planning proposal is prepared under the Environmental Planning and Assessment Act.

The site is zoned RU1 Primary Production and a review of aerial photography suggests the site has been used for agricultural purposes. Agricultural activities have been known to cause contamination.

Council did not consider or address the SEPP when preparing the planning proposal. The planning proposal (**Attachment A**) notes the SEPP is not relevant.

The planning proposal is not consistent with the SEPP in the absence of the consideration of SEPP Clause 6.

SITE-SPECIFIC ASSESSMENT

Social

The proposal would provide the opportunity for additional rural residential lots, each capable of containing a dwelling. The development of the land and erection of dwellings would provide for temporary economic benefits in construction jobs.

The proposal may offer social benefit in the preservation and management of the site's Shale Sandstone Transition Forest within the proposed community, however, as noted in the Council Report (**Attachment E**) this does not provide significant

benefit to justify strategic inconsistencies, particularly given the vegetation is protected under State and Commonwealth legislation.

The creation of additional lots in the locality will place pressure on the resources of emergency services. Of concern is the impact it may have upon the operation of NSW RFS in the event of a bush fire as they have raised objections due to inadequate access and egress.

Environmental

The site is mapped as containing Shale Sandstone Transition Forest which is a critically endangered ecological community under the *Biodiversity Conservation Act 2016*. The proposal seeks to map the majority of the vegetation via the Biodiversity (Terrestrial) map associated with Clause 7.4 of the LEP. The aim of Clause 7.4 is to protect native flora and fauna and the ecological processes necessary for their continued existence.

The site is mapped as containing a watercourse. The watercourse is likely to be located within the community lot of the concept plan of subdivision (**Attachment G**), submitted with the planning proposal.

At this stage it is unknown whether the site is contaminated from past agricultural land uses which are likely to have occurred on the site. Further investigation would be required to determine if contamination is present and the actions required to render the site safe for its intended residential use.

The site is bush fire prone and the locality has been the subject of bush fire in previous years. The site is identified as being of high risk in The Hills Bush Fire Risk Management Plan.

The locality is subject to existing agricultural and extractive industries. There may be some possible environmental conflicts (noise, dust, chemicals etc) associated with the existing uses and the introduction of additional density.

Economic

The planning proposal acknowledges that the proposal would result in the loss of productive land for agricultural purposes. The proponent has argued that the land is not viable or suitable in its current form for agricultural production but has not submitted evidence to support this assertion.

The introduction of additional dwellings has the potential to conflict with existing agricultural land uses and extractive industries in the locality.

Infrastructure

Council's Section 7.11 contributions plan would apply to any future development of the site in order to contribute towards any increase in the demand of local services/infrastructure.

The site is not subject to a state special infrastructure contribution levy.

PROPONENT COMMENT

On 1 September 2018 the proponent wrote to the Department to further justify their planning proposal (**Attachment N1**). The issues raised in the letter deal with suitability of land for agricultural purposes and bush fire.

Suitability for agriculture

It is the view of the proponent that the land is not suited to agricultural use and as such the planning proposal will not result in the loss of agricultural land for reasons discussed below.

The proponent has identified restrictions on title which limit some agricultural uses on the land. The proponent has argued that Council placed the restriction on title and as such there is an implication that the land is not suited to agricultural use. A complete certificate of title was not provided. Notwithstanding the placement of the restriction, Clause 1.9A of The Hills LEP 2012 allows some restrictions to be set aside if it hinders the attainment of the aims of the LEP. Based upon this, any development application which is consistent with the LEP may be approved regardless of any restriction.

The proponent has noted that the site currently has poor quality soils for agricultural purposes. The proponent has acknowledged that the report prepared to identify the poor-quality soils also makes suggestions as to how the soils can be improved to be suitable for agricultural purposes (**Appendix H**).

The proponent argues that the chemicals required to be added to the soil to result in suitable agricultural soils would alter the water quality of the locality and adversely impact upon the Shale Sandstone Transition Forest on site.

The proponent has noted that the site is currently being rated for residential purposes. Land which is not currently being used for agricultural purposes, regardless of its rural zone, can be rated as residential under the *Local Government Act 1919*. The rating of the land for residential purposes is not relevant to its ability to be used for agricultural purposes.

It is not considered that the matters raised by the proponent override the inconsistencies of the proposal with the Central City District Plan, as identified in this report.

Bush Fire

The proponent suggests the advice provided by NSW RFS, prior to council obtaining the pre-gateway advice, was inconsistent and unclear. The proponent's letter goes on to outline the conversations with NSW RFS and their consultant which, in the opinion of the proponent, produced a plan that could be supported by NSW RFS. Regardless of the proponent's previous discussions, NSW RFS has now provided formal commentary which does not indicate support for the proposal (**Attachment J**).

The proponent sought further bush fire advice from their consultant in response to the pre-gateway comments from NSW RFS (**Attachment I2**). Whilst the comments have addressed NSW RFS advice, RFS have not offered support for the planning proposal. Further, in response to a growing number of development applications and planning proposals (such as this proposal and the 90 Weavers Road, Maroota

planning proposal currently with the Department for finalisation); NSW RFS amended their position on rural cluster subdivision (discussed below).

On 7 January 2019 the proponent wrote to the Department providing examples of subdivision development applications which have been approved by Council, where access to the site is provided in a similar manner (**Attachment N2**). That is, access to the site is provided via a private road which has a length exceeding 200m. **Table 1** below identifies the dates on which the applications were lodged with Council and the approval date.

	DA Lodged	DA Approved
Neich Road		
601-2014-ZD	08-11-2013	29-07-2014
1435-2014-ZD	21-05-2014	02-12-2014
1071-2016-ZD	20-01-2016	20-07-2017
Blakers Road		
1505-2014-ZD	09-06-2014	14-04-2015
Mulberry Road		
120-2016-ZD	21-07-2015	23-02-2016
Idlewild Road		
1225-2016-ZD	26-02-2016	23-08-2016
Wisemans Ferry Road		
712-2015-ZD	25-11-2014	28-04-2015
1338-2014-ZD	06-05-2014	02-02-2015
182-2016-ZD	30-07-2015	25-11-2015
1807-2016-ZD	02-06-2016	20-10-2017
619-2018-ZD	05-10-2017	09-10-2018

Table 1 – Development applications and relevant dates

In each instance, the development applications were lodged and approved prior to the recent position established by NSW RFS in their document Multi Lot Residential Subdivision in Bush Fire Prone Areas (Fact Sheet 1/17 Version 1 August 2018) (**Appendix K**). The position was established by NSW RFS in response to its growing concerns with the increased use of rural cluster subdivision within isolated areas.

The NSW RFS document notes that that in many instances access issues will prevent the support of future development applications. In this instance, the comments provided by NSW RFS (**Attachment J**) has raised concerns with access as discussed earlier in the report. The examples provided by the proponent do not support the planning proposal as they were approved under a previous position held by NSW RFS.

CONSULTATION

Consultation is not required as the proposal is recommended to not proceed.

TIME FRAME

No timeframe is required as the proposal is recommended to not proceed.

LOCAL PLAN-MAKING AUTHORITY

There is no requirement to appoint a local plan-making authority.

CONCLUSION

It is recommended that the planning proposal should not be supported to proceed, and that a Gateway determination be issued that details the reasons why the proposal is not supported, as follows:

- the property is bush fire prone and the NSW Rural Fire Service has given preliminary advice in which it have indicated that it does not offer its support;
- the proposal does not give effect to the Central City District Plan; and
- the proposal is inconsistent with Section 9.1 Directions.

RECOMMENDATION

It is recommended that the delegate of the Minister determine that the planning proposal should not proceed due to:

1. inconsistency with section 9.1 directions 1.2 Rural Zones and 4.4 Planning for Bush Fire Protection;
2. the proposal is inconsistent with State Environmental Planning Policy No 55 – Remediation of Land; and
3. the proposal does not give effect to the Central City District Plan.

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