

## Planning and Assessment

IRF19/7427

### Gateway determination report

<b>LGA</b>	Tweed
<b>PPA</b>	Tweed Shire Council
<b>NAME</b>	Seabreeze Estate – Proposed School Site Rezoning
<b>NUMBER</b>	PP_2019_TWEED_004_00
<b>LEP TO BE AMENDED</b>	Tweed LEP 2014
<b>ADDRESS</b>	Seabreeze Estate, Pottsville
<b>DESCRIPTION</b>	Lot 1747 DP 1215252
<b>RECEIVED</b>	18/11/2019
<b>FILE NO.</b>	IRF19/7427
<b>POLITICAL DONATIONS</b>	There are no donations or gifts to disclose and a political donation disclosure is not required
<b>LOBBYIST CODE OF CONDUCT</b>	There have been no meetings or communications with registered lobbyists with respect to this proposal

## 1. INTRODUCTION

### 1.1 Description of planning proposal

The planning proposal seeks to rezone land in the Seabreeze Estate, Pottsville from R2 Low Density Residential to SP2 Infrastructure – School for a temporary five-year period and make associated map changes.

### 1.2 Site description

The planning proposal applies to the land at Lot 1747 DP 1215252, Seabreeze Estate, Pottsville (Figure 1, below) and has a total lot size of approximately 6ha. The subject site is vacant.

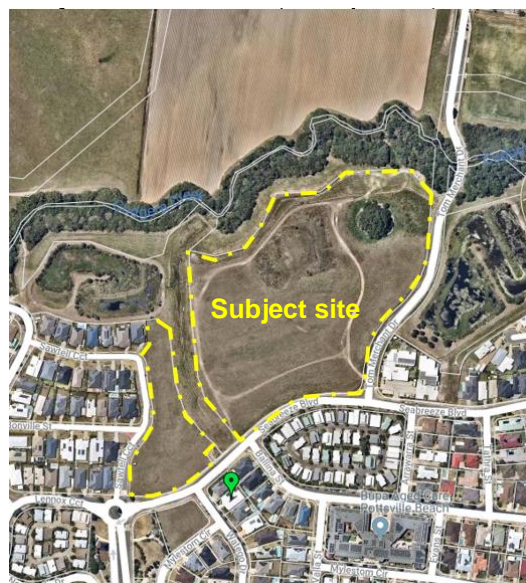


Figure 1: Aerial photo of subject site (outlined in yellow) and surrounding estate.

### 1.3 Site history

The site has been subject to four development applications and requests to change relevant planning controls. Table 1 (below) outlines the development history of the site.

The site forms part of stage 18 of the Seabreeze Estate and has been identified as a 'potential school' site since the conceptual stage of the estate.

Table 1: Development history

Time frame	Description
7 September 2000 – DA approved	The Seabreeze Estate residential stages 1–14 were approved under Development Consent No. K99/1837 and developed approximately 500 residential lots.
2 June 2013 – DA approved	Development consent was granted for stages 15–18 for 88 lots and the subject site under development consent no. DA13/0577. Stages 1–17 are completed.
7 August 2018 – DCP amendment refused	<p>Council received a request on behalf of the landowner to amend section B15 of the Tweed Development Control Plan (DCP) 2008 to delete reference to the subject site as a 'potential school site', allowing the site to be developed for residential purposes. This request was not supported.</p> <p>The applicant noted that School Infrastructure NSW advised "The department does not wish to acquire the school site identified through Council's Development Control Plan".</p>
16 August 2018 – DA refused	A development application (Tweed Council ref: DA 18/0133) seeking 72 residential lots on the subject site was refused by Council on 16 August 2018. The applicant is appealing this decision in the NSW Land and Environment Court.

### 1.4 Existing planning controls

The site is zoned R2 Low Density Residential under the Tweed Local Environment Plan 2014 (Figure 2, next page). The zone has a minimum lot size of 450m<sup>2</sup>, a floor space ratio of 0.8:1 and a maximum building height of 9m. The site is within the coastal environment area and coastal use area under State Environmental Planning Policy (Coastal Management) 2018.

The R2 zone permits a school with consent.

The site is within section B15 of the Tweed DCP 2008. The Tweed DCP 2008 includes a structure plan for the estate that illustrates the indicative layout for development. B15 – Map 7A identifies the subject site as a 'Potential School Site' (Figure 3, next page).

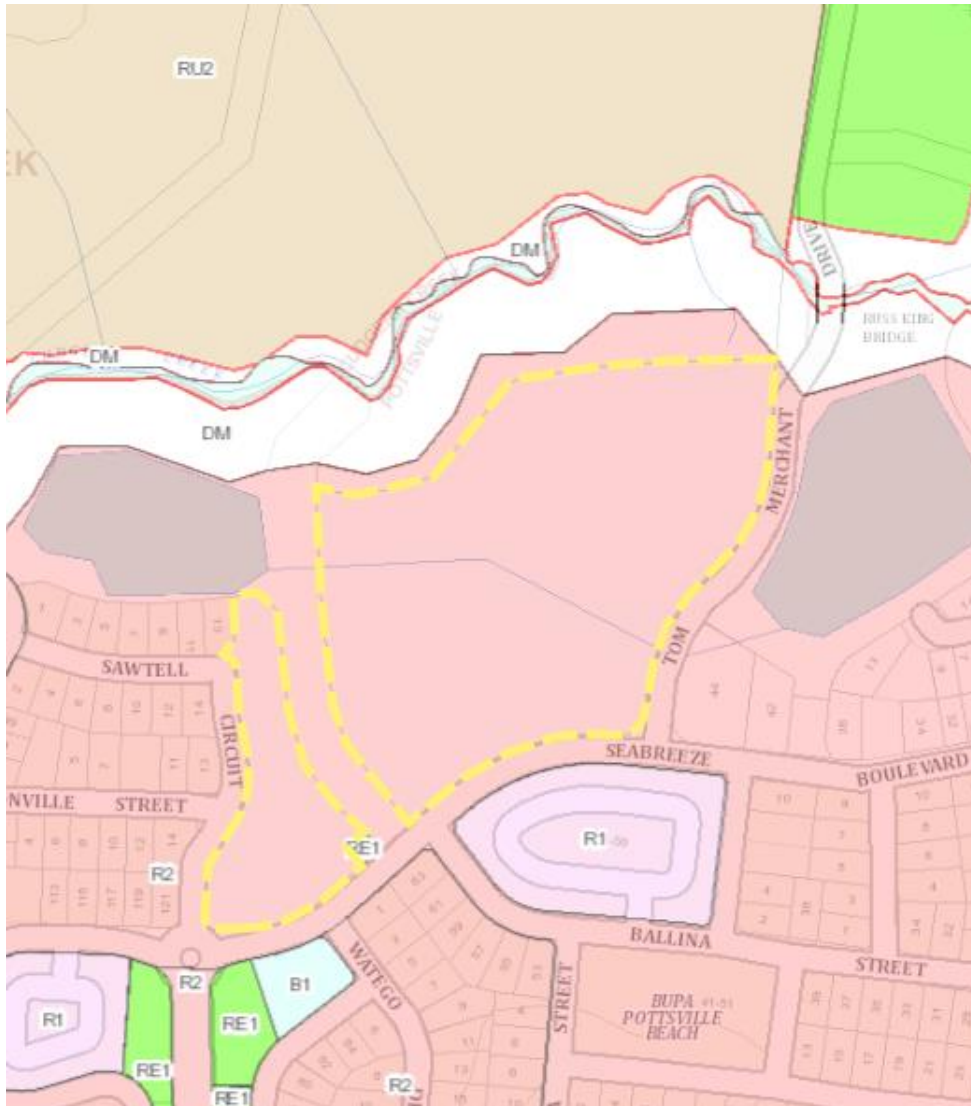


Figure 2: Zoning of subject site (outlined in yellow).

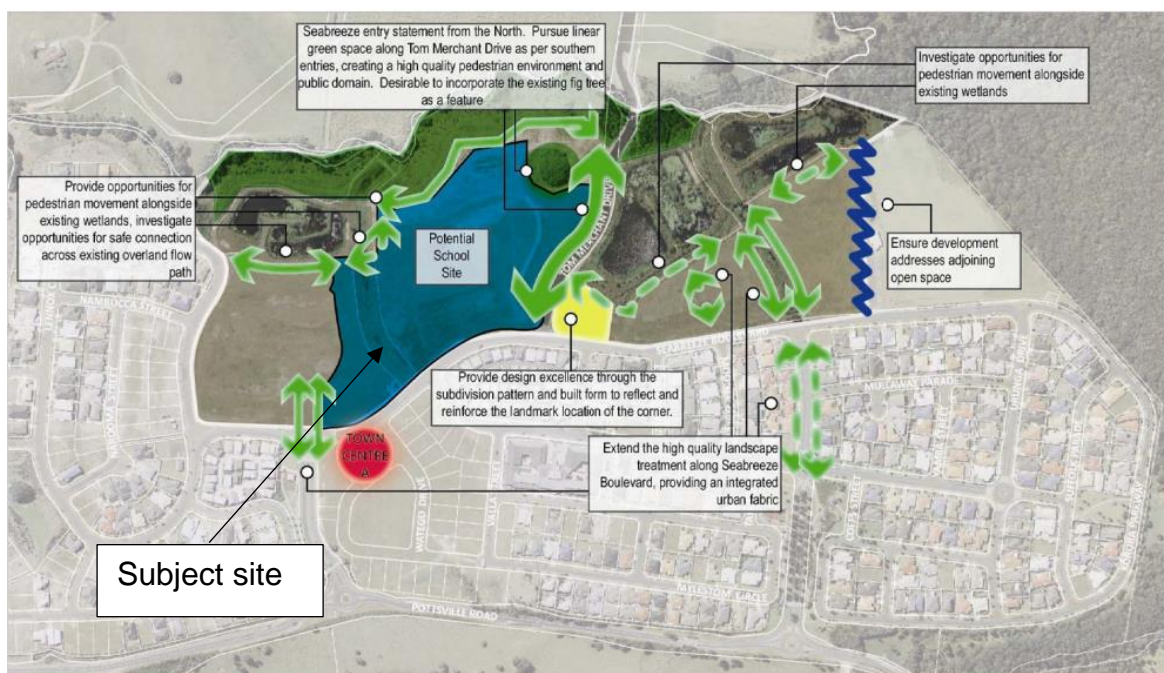


Figure 3: Map 7A – structure plan (source: Tweed DCP 2008).



#### 1.4 Surrounding area

The subject site is within the Seabreeze Estate, which is primarily zoned R2 Low Density Residential. Other areas of the estate are zoned R1 General Residential, RE1 Public Recreation and B1 Neighbourhood Centre. To the north of the site is a mixture of rural, open space and environmental zones under the Tweed LEPs 2000 and 2014 (Figures 4 and 5, below).

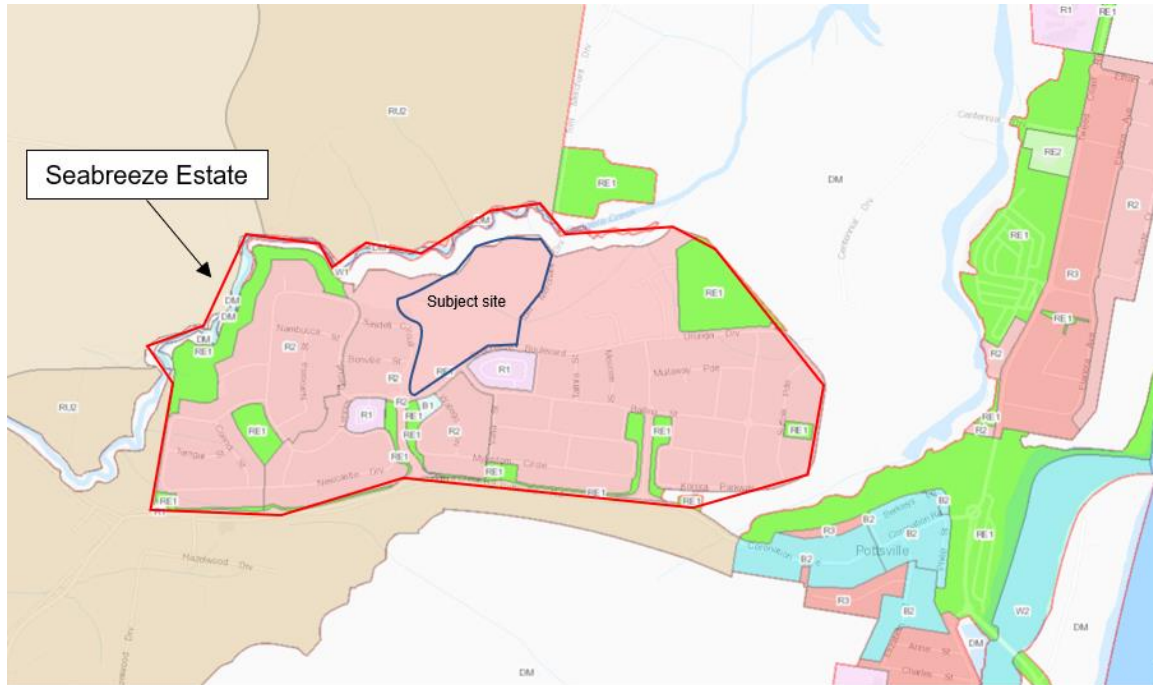


Figure 4: Surrounding area zoning Tweed LEP 2014.

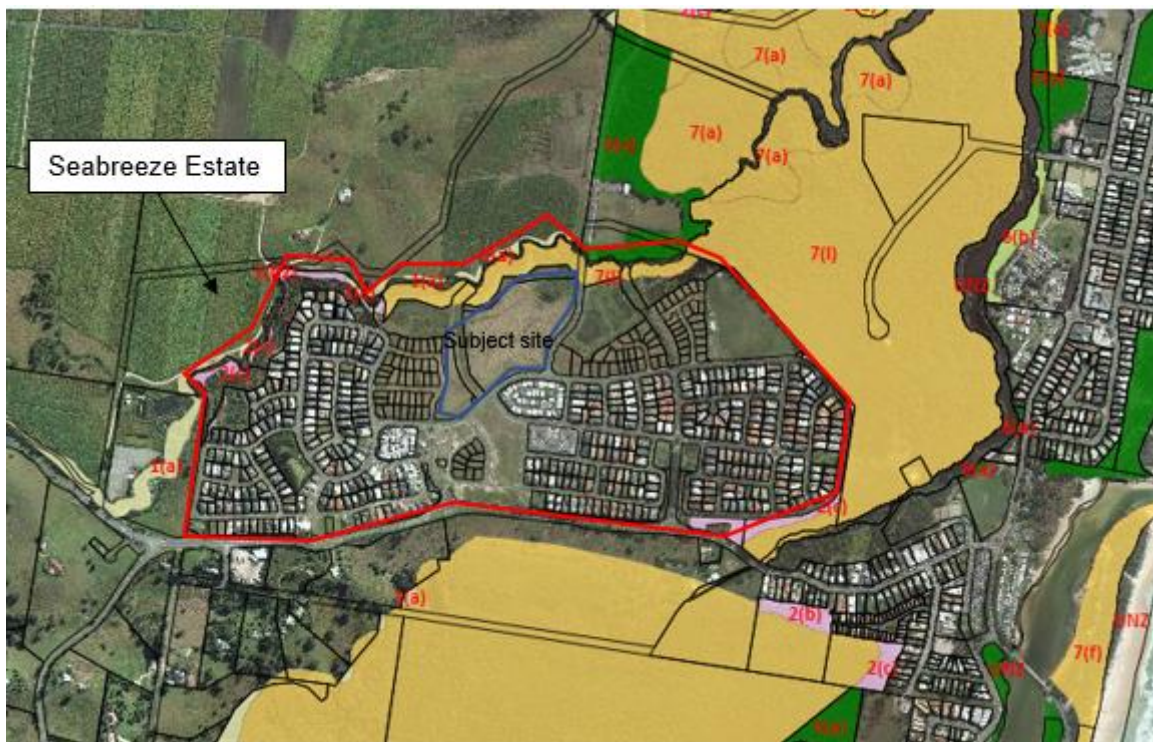


Figure 5: Surrounding area zoning Tweed LEP 2000.

Figure 6 illustrates the locations of public schools in the area.

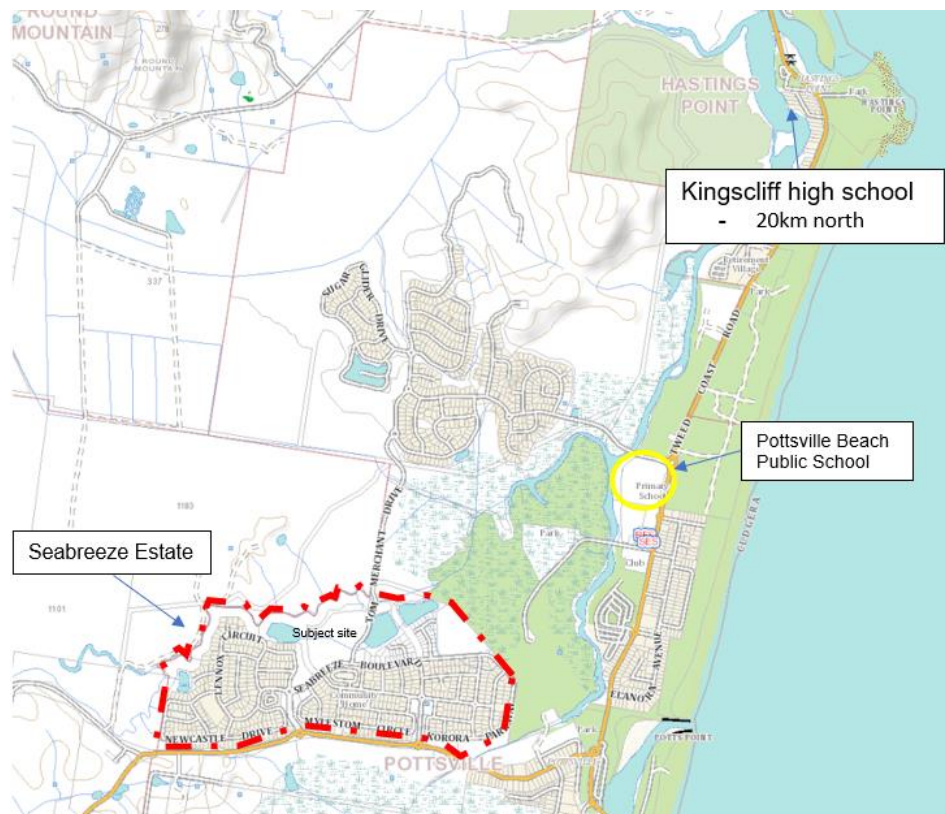


Figure 6: Surrounding area and location of schools.

## 1.5 Summary of recommendation

It is recommended that the planning proposal not proceed as:

- the site is appropriately zoned to enable Council's desired future use as a school;
- it is inconsistent with Department Practice Note PN 10-001 Zoning for Infrastructure in LEPs;
- its inconsistency with section 9.1 Direction 3.1 Residential Zones has not been sufficiently justified; and
- the proposal does not:
  - provide sufficient evidence for the need for a school in the locality and justification for the proposed restrictive zoning;
  - explain the conditional temporary zoning and how the 'alternative net community benefit' will be determined to allow its removal; and
  - outline how it will be effective in preventing the owner from land banking the site until the zoning returns to residential.

## 2. PROPOSAL

### 2.1 Objectives or intended outcomes

The objective of the planning proposal is to facilitate a school on the site by amending the Tweed LEP 2014 to zone the subject site SP2 Infrastructure – School for a temporary five-year period.

The intended outcomes of the planning proposal are to:

- realise the developer's original commitment and the community and Council's expectations to have a school developed on the site;
- improve clarity and certainty regarding the development potential for the landowner, potential developers and the local community; and
- remove the potential for inflated land valuation of the R2 zone by rezoning the land to SP2 Infrastructure – School to align with the intended school use.

The planning proposal is not intended to reserve the land for a specific use in perpetuity.

## **2.2 Explanation of provisions**

The objectives and intended outcomes of the planning proposal will be achieved by using clause 3.14 (3A) of the *Environmental Planning and Assessment Act 1979* to temporarily rezone the site from R2 Low Density Residential to SP2 Infrastructure – School and associated map changes. The temporary zoning is proposed to be in effect for five years.

The planning proposal notes that after the temporary rezoning period concludes, if no reasonable offer is made by a school provider to purchase the site then the site would default back to the original zoning on the condition that an alternate net community benefit is realised. The proposal provides no detail or explanation for how the alternate net community would be determined and the consequences should the landowner not agree.

## **2.3 Mapping**

The proposal seeks to amend:

- land zoning map – sheet LZN\_025;
- lot size map – sheet LSZ\_025;
- height of building map – sheet HOB\_025; and
- floor space ratio map – sheet FSR\_025.

The maps are included in the planning proposal and are considered adequate for public exhibition should the planning proposal proceed.

Further consideration at the final drafting stage would be required on how the temporary rezoning and associated development standard changes would be reflected on the associated maps.

## **3. NEED FOR THE PLANNING PROPOSAL**

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This planning proposal was initiated by Tweed Shire Council to apply a temporary rezoning to the subject site that better aligns with the structure plan for the site under the Tweed DCP 2008 and community expectations. The proposal aims to rezone the land from R2 to SP2 to reduce the land value to make it more viable for an educational institution to buy the property.

The proposal justifies the rezoning based on the area's ongoing strong population growth and that high school students in particular travel long distances to attend school in other areas.

The proposal states that an independent school previously offered to purchase the site based on its valuation of the land for a school. However, the current landowner did not accept the offer. Council considers that the current site zoning is cost



prohibitive for the intended school use of the site based on its residential zoning. To remove the potential land value bias, the planning proposal outlines that rezoning the site would provide certainty that the land would be acquired at a market value aligned with its intended use as a school.

The planning proposal states that it aims to improve clarity and certainty of the future development potential for the landowner, prospective buyers of the land and the local community.

## **4. STRATEGIC ASSESSMENT**

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### **4.1 State**

The planning proposal is considered to be consistent with the state's strategic planning framework.

### **4.2 Regional**

The subject site is within the Tweed urban growth area of the North Coast Regional Plan 2036. The regional plan identifies Pottsville as an area that provides local services and facilities, and has the land capacity to deliver more housing, growth, new employment opportunities and business parks.

An increase in population, housing density and business parks in the Tweed Shire will result in the requirement for additional services and facilities such as schools. The current zoning of the site permits with consent an educational establishment (school) to be developed.

The planning proposal is considered to be consistent with the requirements and actions of the regional plan.

### **4.3 Local**

The intent of the proposal is to better align the zoning with the future intended use of the site as outlined by the Tweed DCP 2008. The proposal outlines that the Tweed Shire is the fastest-growing area in the North Coast region and over the next 20 years will require new homes, jobs and services. The Community Strategic Plan 2017–2027 outlines that this will require a coordinated planning approach.

The planning proposal is considered to be consistent with the requirements and actions of the local planning controls and strategies, including the Tweed DCP 2008 and Community Strategic Plan.

### **4.4 Section 9.1 Ministerial Directions**

#### **Direction 2.2 Coastal Management**

The subject site is within the coastal zone comprising the coastal use area and coastal environment area as defined under the *Coastal Management Act 2016* and State Environmental Planning Policy (Coastal Management) 2018.

The planning proposal is inconsistent with this Direction as the RU1 and RU2 zones contain land mapped within the coastal zone and it does not include provisions that give effect to and are consistent with the *Coastal Management Act 2016* or the associated toolkits and guidelines.

The subject site is part of a residential master planned estate, and most of the earthworks and land disturbance have been carried out.

This inconsistency is considered to be of minor significance as the proposal does not impact on matters of coastal significance and the SEPP (Coastal Management) 2018 contains adequate protections relating to the coastline and coastal processes.

### Direction 3.1 Residential Zones

The proposal is inconsistent with this Direction as it seeks to rezone land from R2 to SP2 and will remove the permissibility of residential development on the land for five years. The future intended use of the land under the Tweed DCP 2008 is for a 'potential school'. The current zone does not prohibit this use.

The R2 zone, while permitting a school, also provides flexibility for the provision of new infrastructure development, redevelopment of sites for alternative uses and disposal of surplus land in accordance with the Department's Practice Note 10-001 Zoning for Infrastructure in LEPs. It is considered that the proposal provides insufficient evidence or justification for the need for a school on the site or the application of a highly restrictive zoning to implement this outcome, which removes the existing residential development potential.

The inconsistency of the proposal with this Direction is not considered to be justified based on the submitted planning proposal.

### Direction 4.1 Acid Sulfate Soils

This Direction applies as the subject site is identified as containing acid sulfate soils. The planning proposal is inconsistent with this Direction as it is not supported by an acid sulfate soils study. This inconsistency is of minor significance as the Tweed LEP 2014 contains suitable provisions that can appropriately address acid sulfate soils at the development application stage.

### Direction 4.3 Flood Prone Land

The planning proposal is inconsistent with this Direction as it affects flood-prone land and does not include provisions that give effect to and are consistent with the NSW Flood Prone Land Policy and the principles of the Floodplain Development Manual (including Guideline on Development Controls on Low Flood Risk Areas). This inconsistency is of minor significance as the Tweed LEP 2014 contains suitable provisions that can appropriately address flood impacts at the development application stage.

### Direction 4.4 Planning for Bushfire Protection

The planning proposal applies to bushfire-prone land. This Direction provides that consultation with the NSW Rural Fire Service is to be undertaken in preparing the planning proposal. Until this consultation has occurred, the inconsistency of the proposal with this Direction remains unresolved. If this proposal were to proceed, consultation with the NSW Rural Fire Service would be required.

## **4.5 State environmental planning policies (SEPPs)**

The planning proposal is considered to be generally consistent with all applicable SEPPs.

## **4.6 Additional considerations**

### 4.6.1 LEP practice note

Practice Note PN 10-001 Zoning for Infrastructure in LEPs was issued by the Department on 14 December 2010. The purpose of the practice note was to provide guidance to councils on zoning public infrastructure land in LEPs. The key intent of the note is:

- the requirement to rezone land as 'Special Purpose' is not required to deliver or cater for future infrastructure (e.g educational establishment) if the use can be facilitated through an existing or adjoining zone; and



- it is preferable that the land use zone be the same as the adjacent zoning so that future uses are compatible with existing surrounding uses.

The planning proposal acknowledges its inconsistency with Practice Note PN 10-001 but notes that “it is reasonably likely that the market value of the land is cost prohibitive”, and to remove the potential land value bias Council has proceeded with the planning proposal. In the absence of the proposal providing an appropriate evidence base justifying the need for a school and the financial impact of the zoning change, the inconsistency of the proposal with the practice note is not supported.

#### 4.6.2 Nomination of acquisition authority

During the initial assessment of the planning proposal, the Department raised concerns that rezoning the land from R2 to SP2 would reserve the land for a specific use and remove most of the existing development potential under the current residential zoning. It was considered that such a rezoning may trigger the need for acquisition of the land and Council should identify an appropriate acquisition authority and identify the land on the LEP’s land reservations acquisition map.

The planning proposal report and additional information provided by Council for assessment outlines that “under section 3.15 of the EP&A Act 1979 and Part 2, Division 3 of the *Land Acquisition (Just terms Compensations) Act 1991* (NSW), the owner-initiated acquisition provisions apply where the land is ‘exclusively set aside for a public purpose’”. Furthermore, the planning proposal notes that, “Given School Infrastructure NSW’s consistent advice in recent years that it has no intention to acquire the land for a school, it is highly unlikely to agree to be specified as the relevant authority to acquire the land for the exclusive use as a public school in the Tweed LEP 2014.”

Despite the intent of the planning proposal, Council believes it does not seek to reserve the site exclusively for a ‘public purpose’ and therefore has not included a relevant acquisition authority as part of the request. The Northern regional team has received advice that an acquisition authority is not required.

#### 4.6.3 Savings provisions and timing of planning proposal

A development application (DA18/0133) for a 72-lot residential subdivision on the subject site, which was refused by Council, is subject to an appeal in the NSW Land and Environment Court.

If the planning proposal were to proceed in its current form, Council has confirmed that it raises no objection to the inclusion of a savings provisions in the LEP to allow the Court to finalise its assessment of the proposal

## **5. SITE-SPECIFIC ASSESSMENT**

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### **5.1 Social**

Council and the local community have an expectation that the site will be developed for a school in accordance with the original master plan developed for the site and Council’s DCP. Council believes the development of the proposed school was a major net community benefit that influenced support for the original rezoning of the Seabreeze Estate.

It is therefore considered possible that if the proposal is not supported and a school is not developed on the site, this will have some negative social impacts for various members of the community due to their expectations (it is understood that while the Seabreeze Estate contains more than 500 dwellings, only 22 submissions opposing

the subdivision of the proposed school site for residential purposes were received in relation to DA18/0133).

This potential impact is considered sufficiently mitigated, noting that development of a school can occur on the site under the current zoning, and it is understood that schools serving the area, such as Kingscliff High School, continue to receive appropriate upgrades to serve the area.

## **5.2 Environmental**

The subject site is a cleared residential site with one large white fig in the north-east corner. The proposed rezoning will not impact on the natural environment.

Any future development application over the site will be required to manage the impacts on the surrounding environmental values, including stormwater management. The proposal identifies that the site is part bushfire prone and part flood prone as discussed above and that these issues can be appropriately managed at the development application stage. The proposal also confirms the site is suitable for its intended use in terms of potential contamination.

## **5.3 Economic**

The proposal justifies the potential economic impact of devaluing the land from its current residential status in the following ways:

- expected population increases in the area will require a school in the locality;
- Council considers it likely that the market land value is cost prohibitive for the primary intended use of the site as a school due to the current residential zoning; and
- Council is of the view that the current zoning of the site may be influencing the level of interest in the site for a potential school.

While the Tweed LGA continues to experience strong growth, particularly in older age groups, the proposal is not supported by a needs assessment for a school in the area based on issues such as growth rates of school-age children, expected catchment, student needs or impacts on existing schools. The proposal does not contain details on the expected market valuation differences to demonstrate the effectiveness of the proposed approach or how the owner will be prevented from land banking the site until the zoning returns to residential.

The proposal will have a significant negative economic impact on the current landowner through the devaluation of the site. In the absence of the planning proposal being able to demonstrate the quantum of this impact, the need for a school in this area or how this approach will be effective in delivering the intended outcome, this impact is not considered reasonable.

## **5.4 Infrastructure**

All infrastructure to the subject site has been provided as part of the Seabreeze Estate development. The planning proposal does not consider impacts on other schools in the locality such as Kingscliff High School, which is undergoing a major upgrade. Further detailed analysis on this matter by Council would be required to justify the appropriateness of the proposed zoning.

# **6. CONSULTATION**

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## **6.1 Community**

The planning proposal does not nominate a period of public exhibition. Should the proposal proceed, a 28-day period is recommended.

## **6.2 Agencies**

The planning proposal does not nominate any agency consultation. Should the proposal proceed, it is recommended that consultation be undertaken with:

- NSW Rural Fire Service; and
- Department of Education.

## **7. TIME FRAME**

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The proposal identifies a nine-month time frame for completion. If the proposal proceeds, this is considered satisfactory.

## **8. LOCAL PLAN-MAKING AUTHORITY**

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The planning proposal outlines that Council is not seeking plan-making delegation for this planning proposal. As the proposal does not have the landowner's support, this is considered appropriate.

## **9. CONCLUSION**

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It is recommended that the planning proposal not proceed for the following reasons:

- the site is appropriately zoned to enable Council's desired future use as a school;
- it is inconsistent with Department Practice Note PN 10-001 Zoning for Infrastructure in LEPs;
- its inconsistency with section 9.1 Direction 3.1 Residential Zones has not been sufficiently justified; and
- it does not:
  - provide sufficient evidence for the need for a school in the locality and justification for the proposed restrictive zoning;
  - explain the conditional temporary zoning and how the 'alternative net community benefit' will be determined to allow its removal; and
  - outline how it will be effective in preventing the owner from land banking the site until the zoning returns to residential.

## **10. RECOMMENDATION**

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It is recommended that the delegate of the Secretary:

1. agree that the inconsistencies with section 9.1 Directions 2.2 Coastal Management, 4.1 Acid Sulfate Soils and 4.3 Flood Prone Land are of minor significance and justified in accordance with the terms of the Directions;
2. agree that the proposal is inconsistent with section 9.1 Direction 3.1 Residential zones; and
3. note that the consistency with section 9.1 Direction 4.4 Planning for Bushfire Protection is unresolved.

It is recommended that the delegate of the Minister for Planning determine that the planning proposal should not proceed for the following reasons:

1. the site is appropriately zoned to enable the intended future use of the site (school) under Council's DCP;



2. the proposal to rezone the site from R2 Low Density Residential to SP2 Special Purpose – School is inconsistent with the Department’s Practice Note PN 10-001, which recommends not zoning sites SP1 or SP2 to facilitate infrastructure if it is permitted within the existing zone of the site;
3. the proposal’s inconsistency with section 9.1 Direction 3.1 Residential Zones has not been justified; and
4. the planning proposal does not:
  - provide evidence for the need for a school in the locality;
  - explain the conditional temporary zoning and how the ‘alternative net community benefit’ will be determined; and
  - outline how it will be effective in preventing the landowner from land banking until the zoning returns to residential.



28/2/20

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3-3-2020

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