
TWEED SHIRE COUNCIL - MEETING TASK SHEET

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ACTION ITEM - Council Meeting - 21 May 2020

TITLE: Request to Prepare a Planning Proposal - Lot 16 DP 856265 225 Terranora Road, Banora Point

STAFF RECOMMENDATION

That, in respect of the request to prepare a Planning Proposal for Lot 16 DP 856265 at 225 Terranora Road, Banora Point, the Council endorses that:

1. Council's resolution of 17 November 2016 stands;
2. The proponent be advised that their request is not supported; and
3. The Department of Planning, Industry and Environment be advised of Council's decision and provided with this report.

MEETING RESOLUTION

Cr Katie Milne (Mayor)

Cr James Owen

RESOLVED that, in respect of the request to prepare a Planning Proposal for Lot 16 DP 856265 at 225 Terranora Road, Banora Point, the Council endorses that:

1. Council's resolution of 17 November 2016 stands;
2. The proponent be advised that their request is not supported; and
3. The Department of Planning, Industry and Environment be advised of Council's decision and provided with this report.

The Motion was **Carried**

VOTE FOR - Cr Katie Milne (Mayor), Cr Chris Cherry (Deputy Mayor), Cr Pryce Allsop, Cr Reece Byrnes, Cr Ron Cooper, Cr James Owen, Cr Warren Polglase

VOTE AGAINST - None

ABSENT. DID NOT VOTE - No

**TITLE: Request to Prepare a Planning Proposal - Lot 16 DP 856265
225 Terranora Road, Banora Point**

Submitted By: Strategic Planning and Urban Design

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

Leaving a Legacy

Looking out for future generations

1.4.1 Strategic Land-use Planning - To plan for sustainable development which balances economic, environmental and social considerations. Promote good design in the built environment.

ROLE:

LEADER - Council grows strong, transparent and visionary leadership promoting unity to make our Tweed community even better tomorrow than it is today.

EXECUTIVE SUMMARY

Council is in receipt of a request to prepare a planning proposal for Lot 16 DP 856265, No. 225 Terranora Road, Banora Point.

The applicant's request is the third of its kind for this property with each conceptual development outcome being substantially the same.

Additional information has been provided with each request and to-date has failed to materially affect the outcome on each occasion when considered by Council. This is likely a result of Council's extensive history of consistently resolving to protect the escarpment, which is a natural asset recognised as a defining feature of the Tweed.

This request seeks to remove the requirement that the development potential be limited to two allotments, as resolved by Council on 17 November 2016. In doing so, the applicant would be free to re-explore their preference for a greater lot yield density, as previously sought and advocated in several concept plans that have ranged between 2 to 30 lots.

In recent years there have been a number of enquiries and requests for residential development within or adjoining the escarpment, the cumulative impact of which, if approved, would likely have a significant impact on the Tweed's scenic landscape, apart from other potential impacts on local infrastructure.

Council has previously resolved (17 November 2016) to support a rezoning of the site conditional upon development being limited to not more than two dwellings, consistent with a previous lapsed Development Consent (K99/0355 - 3 September 2002).

The proponent chose to withdraw an earlier request following a Gateway determination which supported Council's position.

A subsequent request was lodged and resolved by Council on 1 August 2019 which retained Council's 2016 resolution.

Because this latest request has been with Council for more than 90 days, the applicant is now at liberty to seek a Rezoning Review through the Department of Planning, Industry and Environment. The applicant has indicated an intention to seek such a review should they not be able to work with Council to achieve their desired outcome. For the reasons described in this report the applicant's desired outcome for the property,

evidenced in their prior concept subdivision designs, is not supported.

This report recommends retaining Council's currently resolved position that the resolution of 17 November 2016 should stand, reinforcing that the applicant's current request is not supported. Council has an extensive documented history for its decisions in respect of this and previous requests to rezone the land and it will provide a useful resource for the Department of Planning, Industry and Environment should they receive a Rezoning Review from the applicant.

RECOMMENDATION:

That, in respect of the request to prepare a Planning Proposal for Lot 16 DP 856265 at 225 Terranora Road, Banora Point, the Council endorses that:

- 1. Council's resolution of 17 November 2016 stands;**
- 2. The proponent be advised that their request is not supported; and**
- 3. The Department of Planning, Industry and Environment be advised of Council's decision and provided with this report.**

ATTACHMENTS

1. Resolution and Council Report - 17 November 2016
2. Resolution and Council Report - 1 August 2019

COUNCIL IMPLICATIONS:

a. Legislation/Policy/Existing Strategic Plans

A range of local and state and local legislation required consideration in development of this report, including Tweed LEP 2014; Tweed LEP 2000; Tweed DCP 2008.

b. Sustainability:

i. Financial (Budget/Long Term Financial Plan/Whole of Life Cost):

No financial implications would likely arise from a resolution not to proceed with this planning proposal request.

ii. Environmental:

This report seeks to maintain Council's long established position of protecting the Tweed's natural escarpments from development.

iii. Social:

This report supports maintaining Council's existing position and as such the social implications remain unchanged. In particular, the proposal would not make a significant contribution to housing affordability, housing choice or supply if higher density subdivision was supported.

c. Legal Considerations:

Not applicable.

There is no legal impediment to Council resolving not to proceed with the applicant's request and there is no foreseeable legal cost implications associated with such a decision.

d. Risk Considerations:

The applicant has indicated an intention to seek a Rezoning Review by the Department of Planning, Industry and Environment. This presents minimal risk to Council in the form of providing assistance to the Department should they make that request.

e. Engagement/Communication:

Inform - Assisting the community to learn about Council services and programs.

REPORT:

On 13 February 2020 Council received a request to rezone land at 225 Terranora Road, Banora Point (Lot 16 DP856265) to facilitate large lot residential development on land predominantly zoned 7(d) Environmental Protection (Scenic/escarpment) under Tweed LEP 2000.

This request represents the third time in recent years that the applicant has lodged a request seeking the same development outcome for the property.

This report provides a response to the request received and makes a recommendation that Council maintain its position resolved for the two previous requests.

Due to the significant duplication in reports to Council for each of the three requests, this report will reproduce some information from previous reports but has attached the two previous reports to Council of 17 November 2016 and 1 August 2019 for additional details and reference (refer to Attachments 1 and 2).

This report should be read in conjunction with the two previous reports to Council, especially the report of 17 November 2016 which contains a detailed response to the initial request.

THE PROPERTY

- *Area:* 10.04 hectares;
- *Current landuse:* Scenic escarpment and retired hard rock quarry maintained in a mown state (refer to Figure 1);
- *Zoning (LEP 2014):* Predominantly Deferred Matter, with a small area of R5 Large Lot Residential, and RU2 Rural Landscape (refer to Figure 2);
- *Zoning (LEP 2000):* 7(d) Environmental Protection (Scenic/Escarpment);
- *General description:* The site is accessed off Terranora Road and adjoins large lot residential development in The Parapet, and on Terranora Road.

The part of the property subject of the rezoning request is identified in figures below.



Figure 1: 2015 aerial image showing subject site, escarpment and locality

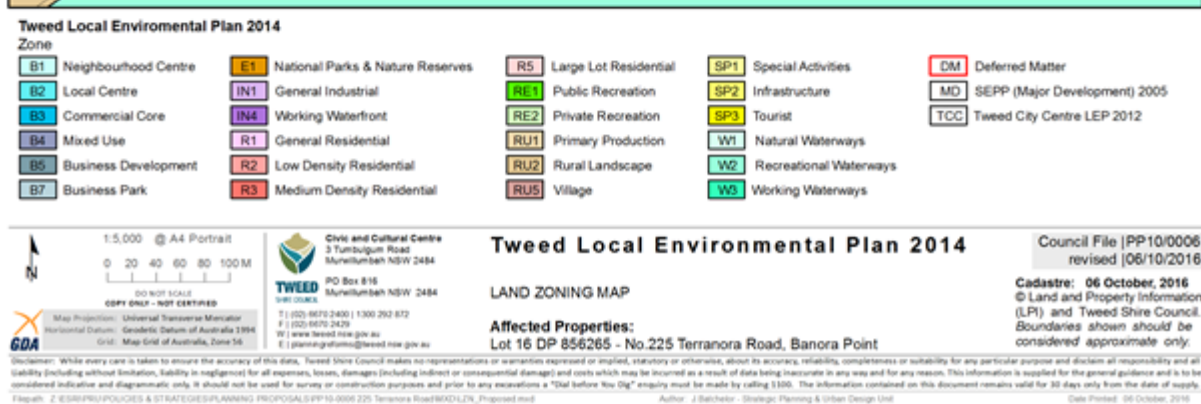
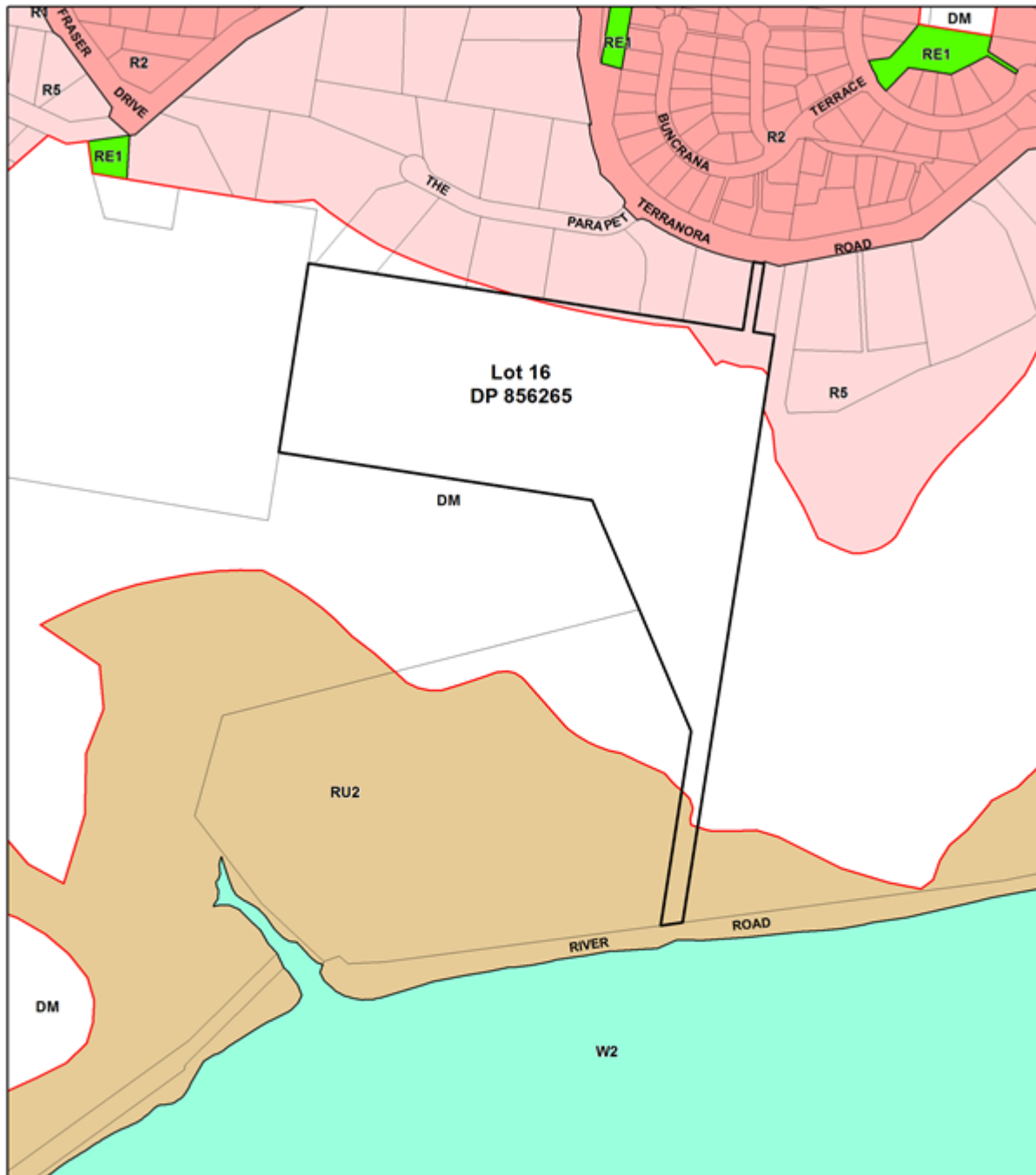


Figure 2: Tweed LEP 2014 – zoning

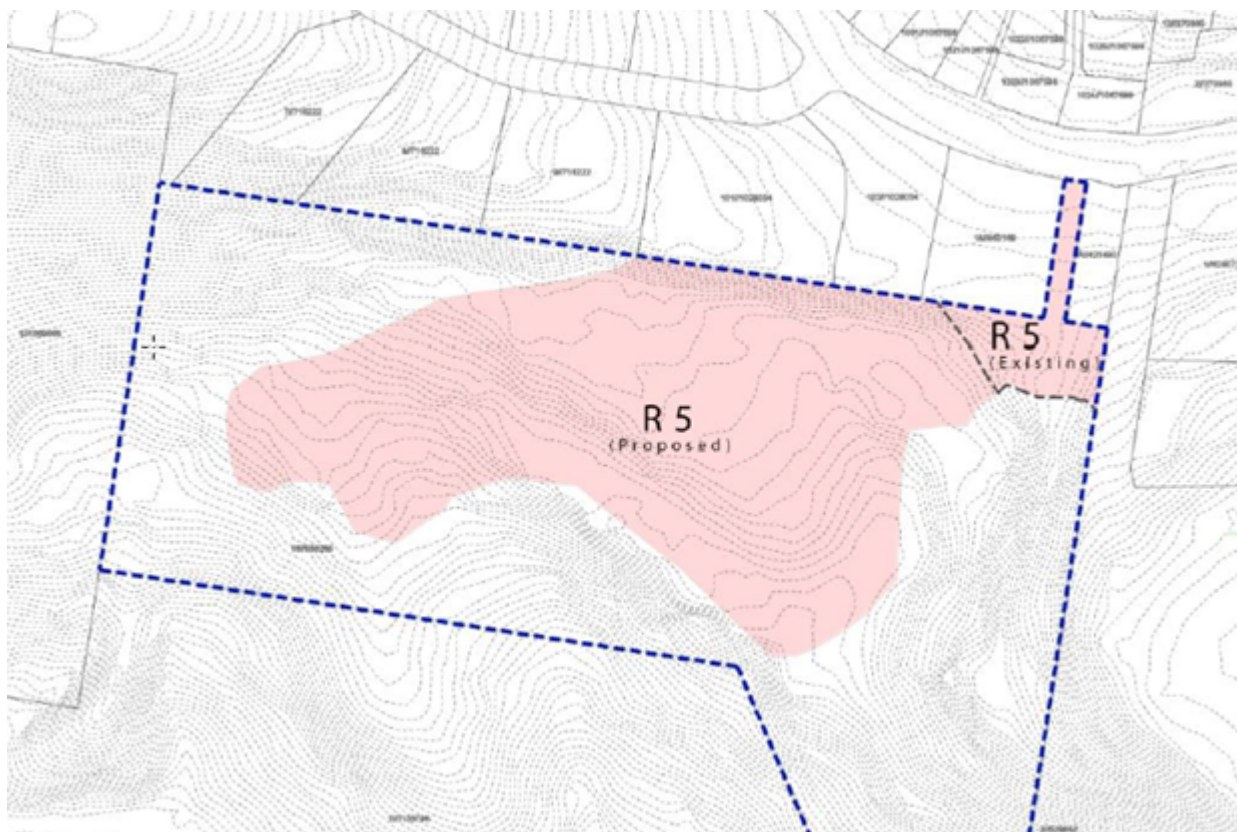


Figure 3: Zoning proposed by the proponent

THIS REQUEST (Third request)

The current request, subject of this report, provides an update on the previous request (resolved by Council on 1 August 2019), and seeks the same planning outcome as the two previous requests (as reported to Council on 17 November 2016 and 1 August 2019).

The request seeks the rezoning of the site to accommodate large lot residential development without a pre-defined limit on the number of allotments that could be created, deferring instead to the lot size requirement for the zone. This approach would allow an applicant to seek to maximise the density potential through a development application, which is the usual practice for already zoned land, whereas at the rezoning stage either or both the extent of zoning or minimum lot size standard can be prescribed to reflect site opportunities and constraints.

In 2016 Council resolved on the first request, the resolution which is copied below sought to reduce the area of rezoning and subdivisional capability to the extent that it permitted only a two lot subdivision for the purpose of residential use, having considered the opportunity and constraints of the land.

A Gateway determination was received for this proposal (dated 8 May 2017) supporting Councils resolution. The applicant subsequently withdrew their request.

A subsequent request was received by Council seeking the same development outcome but with no limit on the development potential of the site. Council resolved on 1 August 2019 that the resolutions of 2016 stand.

This report now deals with the current third request for the same outcome.

The request is accompanied by investigations previously provided to Council with earlier requests, and two new reports. Reports provided with this request include:

- Bushfire Safety Review (March 2015);
- Civil Engineering Investigation (September 2010);
- Addendum Terrestrial Flora & Fauna Assessment (January 2015);
- Preliminary Geotechnical Investigation (January 2019);
- Preliminary Assessment of Onsite Wastewater Disposal and Rainwater harvesting (February 2016);
- Traffic Impact Assessment (March 2015);
- Phase 1 Preliminary Site Investigation (December 2019);
- On-site Sewage Management Assessment Report (December 2019):

While two of the above reports, dated December 2019, have been developed for this current request, the majority of reports have previously been considered for requests of 2016 and 2019.

However, with changes to legislation, Council policies and guidelines, some of these reports will now be out-of-date. While this report recommends that Council's previous resolution stand, and that the planning proposal not proceed, should Council resolve to proceed with the rezoning, a review and update of these reports would be required.

While a range of matter such as scenic impact remain significant issues, as previously reported to Council, several matters have arisen from the applicant's current request and reports dated December 2019, namely:

1. Concept plan not provided;
2. Site contamination investigation;
3. Onsite sewage management, and
4. Rehabilitation of the site post quarry operations.

Concept plans not provided

Notwithstanding Council's previous resolution to limit the development potential of the site to not more than two dwellings, this and previous requests have provided concept plans for development of up to 16 lots on an area of approximately 3.6 hectares, with a much earlier requests seeking up to 30 lots in a community title subdivision (28 October 2004).

This third request has not provided a specific concept plan, but has argued that the request should be assessed on its merit and not development outcomes; however, the proponent's request shows a range of subdivision and lot yield scenarios (refer to Figure 4).

A concept plan is a necessary mechanism to assist in understanding:

- what the development outcome might look like;
- how an increase in residential development would be integrated with the surrounding environment;
- what the likely demand for services would be;
- how development would comply with legislation and Council requirements, and
- allow an assessment of how an increase in the development potential of a site would be consistent with the objectives of the zone and potential impacts both from within the site, and the surrounding locality.

The current request has not demonstrated how development might fit within the escarpment and surrounding locality and has not demonstrated a substantive difference to previous requests resolved by Council.

Council has previously responded to such an approach by reiterating its position that the merits of the proposal have previously been assessed and a development potential of not more than two allotments was

appropriate.

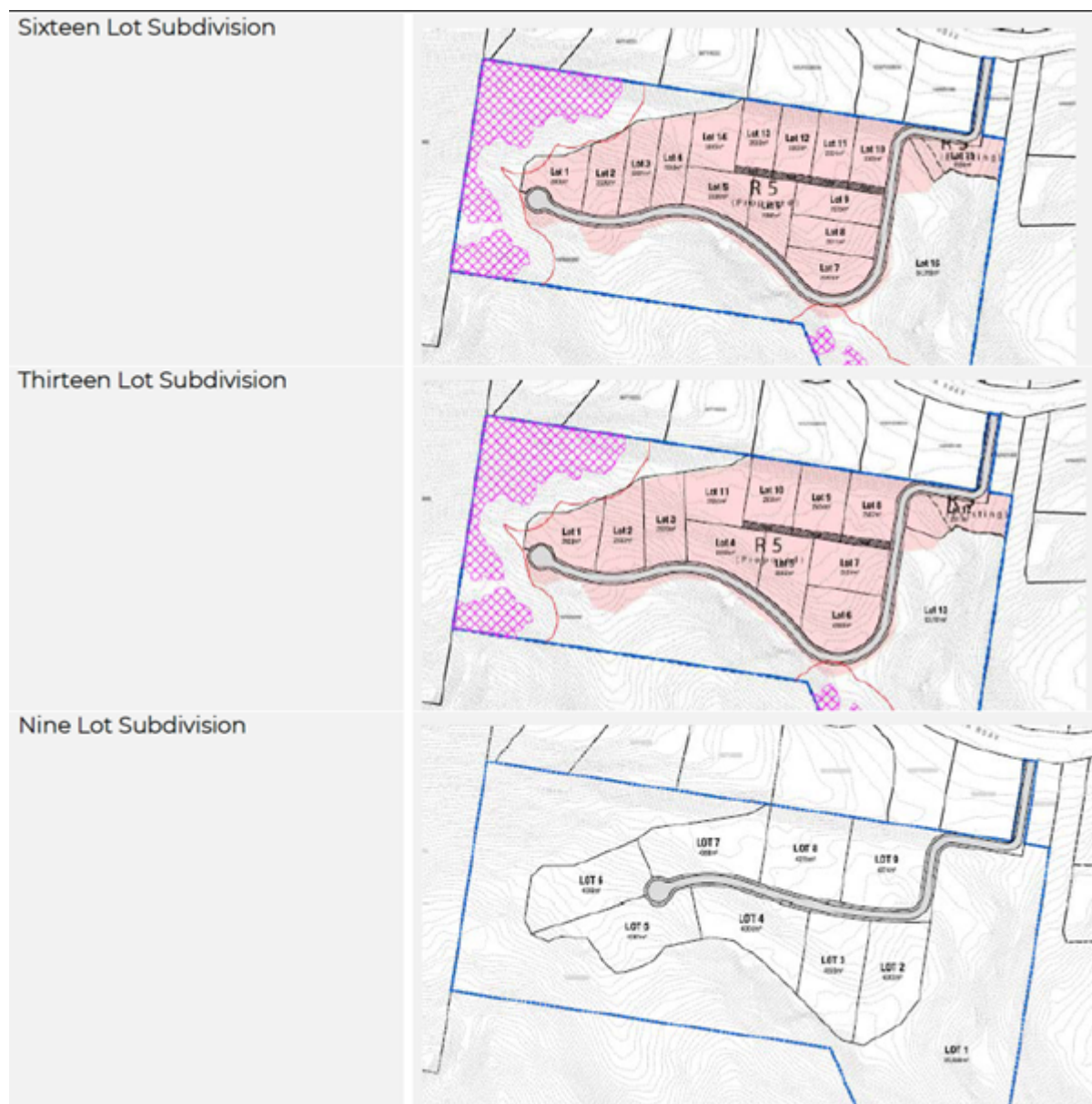


Figure 4: Examples of concept subdivision provided by the applicant

Site contamination investigation

With recent changes to State Environmental Planning Policy No 55 - Remediation of Land (the SEPP), the requirement that matters relating to contamination be resolved prior to sending a planning proposal to the Gateway for a determination has now been relaxed, such that matters relating to contamination must now be resolved prior to finalising any rezoning.

While this report to Council recommends not proceeding with the request, should Council resolve to proceed to the Gateway, a review of the applicant's Phase 1 Preliminary Site Investigation (December 2019) will need to be reviewed and a determination concluded in accordance with the guidelines transferred from the SEPP and now housed in section 9.1 (2) of the Environmental Planning and Assessment Act 1979 Ministerial Direction 2.6 Remediation of Contaminated Land.

Onsite sewage management

The applicant has sought to establish large lot residential development within the escarpment, on land

within the base of the former quarry.

Apart from other matters discussed later in this report and in previous reports to Council, this location is the consequence of the removal of all topsoil, and the extraction of hard rock, leaving a solid rock base upon which a veneer of soil has been replaced following the cessation of quarry operations.

The consequence of this being that the land is subject to seepage flows which currently result in surface flows during wet weather, and will continue to be problematic to the use of the area for disposal of effluent and rainwater.

Assessment of the on-site sewage management reports provided by the applicant (HMC 2019.232.01 dated December 2019, and Onsite Wastewater Disposal and Rainwater Harvesting Report, H10065_L1) has been undertaken in accordance with AS 1547/2012 and NSW Environment and Health Protection Guidelines "On-site Sewage Management for Single Households".

The applicant has not adequately demonstrated that on-site sewage management is suitable for the development.

Further discussion of this issue can be found in previous reports to Council (refer to Attachments 1 and 2), and extracts from those reports later in this report.

Rehabilitation of the site post quarry operations

While the applicant is proposing to undertake rehabilitation works, the site has been a hard rock quarry, stripped of vegetation for a lengthy period.

It is a typical requirement when operations cease to rehabilitate the site. Rehabilitation usually requires vegetation to be re-established consistent with that which pre-existed the operation of the extraction site or vegetation in close proximity and the surrounding area.

This site has not been revegetated as might be expected but maintained in a grassed state.

In addition, what appears to be spoil and overburden remains in an unstable state and is likely to be contributing sediment and nutrients to the floodplain below and the Tweed River.

While rehabilitation requirements post operation of the quarry have not been located at this time, should Council resolve to proceed with the proposal, a review of former rehabilitation requirements should be undertaken to ensure that the site has been rehabilitated as required.

Role of Rezoning Review and repetitious requests

The applicant has sought to secure a development outcome inconsistent with the previous resolutions of Council by lodging the same request on three separate occasions.

While Council has considered this request, there is no substantive change from previous requests that warrant a reconsideration.

One of the clear outcomes sought by the NSW Government with the incorporation of strategic planning into the Environmental Planning and Assessment Act 1979 was to bring strategic planning to the fore, to ensure that strategic planning was given priority and to limit the need for spot rezoning.

However, somewhat at odds with this, under guidelines prepared by the Department of Planning, Industry and Environment (the Department), there is an expectation that councils will address all planning proposal requests.

Should a Council not resolve on a request within 90 days of the date of receipt, the applicant is at liberty to pursue a Rezoning Review from the Department; on 13 May 2020, the 90 day period will expire.

In their cover letter, the applicant has indicated an intention to seek a Rezoning Review by the Department should they not be able to work with Council on this proposal.

Council has previously provided a clear message about what it saw as an appropriate level of development for land within the escarpment, and validated this position referring back in history to demonstrate a prolonged and consistent approach to protection of the escarpment and requests for development within and close to the escarpment.

As such, should Council resolve to maintain its position on this site, it is proposed that the Department be advised of Council's position and sent a copy of this report in support of its position.

PREVIOUS REQUESTS

A summary of reports to Council of 17 November 2016, and 1 August 2019 follows; the full reports can be viewed in Attachments 1 and 2.

Report of 17 November 2016 (first request)

The report to Council on 17 November 2016 noted that the location of the site within the scenic escarpment and previous operation as a hard rock quarry presents some unique issues for consideration including:

1. Scenic amenity;
2. Access from Terranora Road;
3. Potential for contamination from quarry operations and fill material;
4. Water supply and waste water disposal;
5. Geotechnical stability and suitability;
6. Minimum lot size and lot yield;
7. Defining the vegetation boundary, and
8. Illegal dwellings and fill.

Each of these issues was discussed in detail with a summary of findings listed below; extracts from the report are presented in apostrophes:

1. Scenic amenity

a. The potential for construction of dwellings within the scenic escarpment to have adverse impacts on a defining feature of the Tweed, its scenic landscape, is emphasised in both documents provided by the applicant, reports.

b. *"The potential impact of 16 dwellings is considered likely to have a significant impact on both the visual amenity of the site and the character of the locality and not consistent with the objectives of the current 7(d) zone and the proposed R5 zone".*

c. *"The significance of the scenic value of the escarpment and the visual impact of development on the site*

and locality has been addressed in the Tweed Scenic Landscape Evaluation 1995, Tweed DCP section A5 – Subdivision Manual, in previous correspondence to the landowner, Tweed LEP 2000 and 2014, and through a restriction on use of land to the north, as registered on the Land's Title."

d. *"The current zoning reflects the high visibility of the escarpment. While environmental and scenic protection zones under Tweed LEP 2000 will ultimately be translated into the Tweed LEP 2014, the intention of the 7(d) zone is clear with the primary objective of the zone being:*

"to protect and enhance those areas of particular scenic value to the area of Tweed, minimise soil erosion from escarpment areas, prevent development in geologically hazardous areas, and maintain the visual amenity of prominent ridgelines and areas."

e. A Visual Impact Assessment (November 2017) and Addendum (2 April 2019) (the VIA) has been provided by the proponent which demonstrates the extensive views across the Tweed Valley and further south to the coast (refer to Attachment 3).

f. *"The VIA discusses view fields but poorly represents the potential visual impact of 16 dwellings within the escarpment and provides no discussion regarding the significance of the site, previous advice to the landowner, the location within the escarpment and the significance of the escarpment to the character not only of the location but to the Tweed and its identity more broadly."*

g. *"In response to an earlier SEPP 1 appeal by the landowner to vary the minimum lot size for the property to create a two lot subdivision, the proponent was advised on 13 May 1999, that the location of the proposed dwelling "is likely to result in significant visual impacts ...";*

h. Historically Council has demonstrated a consistent will to protect the escarpment from development, and as previously reported included restrictions on title to properties adjoining this site to prevent development within the escarpment, on the land subject of this request, and an increase in separation distance from other residential development at the top of the escarpment.

i. Council has received a number of requests for residential development within the escarpment which. If supported would have the ability to significantly change what is a defining feature of the Tweed.

2. Access from Terranora Road

a. While Council has previously resolved on two separate occasions to limit development potential to not more than two allotments, and notwithstanding other constraints affecting the site, a maximum lot yield for the site based solely on limitations imposed by the allotment's access to Terranora Road is limited to not more than five allotments.

3. Potential for contamination from quarry operations and fill material

a. A Phase 1 Preliminary Site Investigation (December 2019) (the Investigation) was prepared by the applicant which concluded that the site would be suitable for the proposed residential land use.

b. The investigation noted that fill from an unknown source had been placed on the site but samples tested were all below adopted investigation criteria for contaminants of potential concern.

c. The Investigation reported that a site inspection did not generally indicate potentially contaminating activities.

d. An update to this issue is provided in comments to the current request below.

4. Water supply and waste water disposal

a. The site is not connected and will not be connected to Council's reticulated water supply system. The proponent proposes to utilise water harvesting from roof areas of each dwelling.

b. A Preliminary Assessment of Onsite Wastewater Disposal and Rainwater harvesting (24 February 2016) was provided by the applicant;

c. An Onsite Sewage Management Assessment Report (December 2019) was prepared by the proponent.

d. Having previously been operated as a hard rock quarry, with the majority of housing proposed in the bed of the quarry, the matter of onsite disposal is of significance.

e. The site currently has surface seepage suggesting impermeable material at or near to the surface.

f. An update to this issue is provided in comments to the current request below.

For further discussion on these and other issues, refer to Attachment 1:

5. Development consent for a two lot subdivision – September 2002

An exhaustive history of previous requests and development approvals can also be found in the report of 17 November 2017 (refer to Attachment 1).

Of particular note was the issue of Development Consent No. DA K99/0355 (3 September 2002) for a 2 lot rural subdivision providing that lot 1 had a minimum area of 4000 square metres, was entirely within the 1(c) Rural Living zone, and that both lots be connected to Council's reticulated sewerage system.

Consistent with this earlier consent Council has now resolved on two separate occasions to support a similar development outcome.

Report of 1 August 2019 (Second request)

The report to Council of 1 August 2019 reiterates Council's previous position (resolution of 17 November 2016) in regard to the development potential for this site (refer to Attachment 2).

CONCLUSION

While the applicant has undertaken an exhaustive justification against the North Coast Regional Plan 2036, and State planning policies, the request has not acknowledged that the site lies within the scenic escarpment which is recognised a defining feature of the Tweed. A location which Council has consistently over a lengthy period sought to protect from residential development.

The site is heavily constrained, the access does not meet Council's requirements for the densities previously proposed by the applicant.

The request fails to acknowledge the lengthy history of actions consistently applied by Council to protect the

escarpment.

The cumulative impact of an approval to proceed would be considered significant with Council having received previously a number of requests and enquiries for development in the escarpment.

The recommendation of this report is that Council's existing position stand and given the potential for the applicant to seek a Rezoning Review, that the Department be notified of Council's decision and provided with a copy of this report as justification.

OPTIONS:

That Council:

1. Maintains Council's previous position and refuse the request;
2. Proceeds with the request and seek a Gateway determination, or
3. Defers for a workshop

Option 1 is the recommended option.

PREVIOUS COUNCIL RESOLUTIONS:

17 November 2016

Cr R Cooper

Cr W Polglase

RECOMMENDED that, in respect of Planning Proposal PP10/0006 for Lot 16 DP 856265 at 225 Terranora Road, Banora Point, the Council endorses that:

1. The planning request for a zoning redefinition prepared by Planit Consulting Ltd is not supported in so far as it relates to the general extent of the proposed rezoning;
2. A reduced area of rezoning definition and subdivisional capability is supported to the extent that it permits only a two lot subdivision, and for the purpose of residential use;
3. The Proponent is to confirm their acceptance of the reduced area for rezoning investigation and two lot subdivision capability within 21 days of the date of this resolution taking effect;
4. On receipt of the Proponent's acceptance the Director Planning and Regulation is to prepare and submit a Planning Proposal for a Ministerial Gateway Determination for a zoning redefinition based on the reduced land area and restricted subdivision capability, but not before the compliance matters relating to the illegal dwelling(s) and imported fill material have been concluded to the Council's satisfaction; and
5. Should the Proponent fail to confirm their acceptance within the time required or notifies of their non-acceptance at any prior time the Director Planning and Regulation pursuant to s.10A of the Environmental Planning and Assessment Regulation 2000 is to notify the proponent that their planning request is not supported.
6. The Director Planning and Regulation is to take all necessary and reasonable measures to ensure that any breach of planning laws in respect of the illegal dwelling(s) and imported fill material are rectified in accordance with those laws and where appropriate the land is to be reinstated to its natural condition prior to those works or buildings occurring.

The Motion was **Carried**

FOR VOTE - Unanimous

1 August 2019

Cr K Milne
Cr C Cherry

RECOMMENDED that in respect of the request to prepare a Planning Proposal for Lot 16 DP 856265 at No. 225 Terranora Road, Banora Point, Council endorses that:

1. Council's resolution of 17 November 2016 stands;
2. The proponent be advised that their request is not supported; and
3. The Department of Planning, Industry and Environment be advised of Council's decision and provided with this report and the report of 17 November 2016.

The Motion was **Carried**

FOR VOTE - Unanimous

ABSENT. DID NOT VOTE - Cr W Polglase, Cr R Byrnes