

TITLE: [PR-CM] Tomewin Road Equestrian Pad Compliance Matter

ORIGIN:

Development Assessment

FILE NO: PF5510/1295

SUMMARY OF REPORT:

Since May 2008 Council staff has been receiving complaints about the lawfulness of the construction of an equestrian pad at No. 308 Tomewin Road, Dungay.

The construction of the equestrian pad involved the importation of fill and the levelling and top dressing of this fill with sand to make a suitable equestrian pad.

The matter was investigated in 2008 by Council's Compliance Officer, Council's Subdivision Technical Officer, Council's Planning and Infrastructure Engineer (Flooding Engineer), Council's Coordinator Development Assessment and Council's Manager Development Assessment. At that time the height of the fill averaged 300mm with a maximum height of 400mm and it was proposed to surface the pad with a further sand layer. Given the limited extent of proposed filling at that time, Council wrote to the complainants and the owners of the subject site in September 2008 advising that:

- The fill pad is extremely unlikely to cause any adverse flooding impact on adjoining land or local flood behaviour.
- The works are to facilitate ancillary development associated with the keeping of livestock (horses) and are thus best defined as agriculture for the purposes of the Tweed LEP 2000. Agriculture is exempt development and does not necessitate a Development Application;
- The applicant does however need a permit from the then Department of Water & Energy for works within 40m of a waterway in accordance with the Water Management Act.

The subsequent permit issued by Department of Water & Energy in December 2008 authorised an equestrian pad 20m x 70m and approximately 600mm high.

The equestrian pad is now complete and Council has received further complaints regarding the location, extent and height of the finished equestrian pad.

The Department of Water & Energy has signed off on the completed equestrian pad satisfied that the equestrian pad is generally in accordance with their issued permit.

Notwithstanding this, Council staff have re-inspected the equestrian pad and taken GPS measurements to depict the actual height of the pad in relation to the pre-existing ground level and surrounding topography. At its lowest point, along the north western boundary, the fill formation is approximately 450mm above pre existing ground level. This is consistent with Council's original inspections in 2008. At its highest point in the south eastern corner the fill is 900mm above pre existing ground level.

This report seeks to analyse this new data and determine whether Council's opinion as expressed in September 2008 is still valid given the additional height of the equestrian pad. It is considered that Council has three options available to it:

- Option 1: Require modification of the fill pad to achieve fill heights of a maximum 450mm above pre existing ground level;
- Option 2: Require submission of a development application for the current configuration of the fill pad. The DA must be accompanied by a flood impact assessment, including flood modelling, of the development;
- Option 3: Require no action, and allow the matter to proceed as a civil matter between neighbouring parties.

RECOMMENDATION:

That:

1. **Council advises the owners of the subject site that a review of the completed equestrian pad has revealed a fill height of greater than that previously considered by Council and that accordingly the owners are requested to undertake either Option 1 or Option 2 as detailed below:**

Option 1:

The owner is to modify the fill pad to achieve fill heights of a maximum 450mm above pre existing ground level.

or

Option 2:

The owner is to lodge a development application for the current configuration of the fill pad (the DA must be accompanied by a flood impact assessment, including flood modelling, of the development).

Failure to undertake Option 1 or 2 as detailed above (within 60 days from the date of notification) will result in Council pursuing this matter legally.

2. **ATTACHMENT 3 is CONFIDENTIAL in accordance with Section 10A(2)(g) of the Local Government Act 1993, because it contains advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of level professional privilege.**

REPORT:

Owner: Mr Darryl James Colby and Mrs Leanne Gaye Colby
Location: 308 Tomewin Road, Dungay
Zoning: 1(a) Rural and 1(b2) Agricultural Protection
Cost: N/A

BACKGROUND:

Following is a brief chronology of how this compliance matter has evolved since May 2008:

5 May 2008 - Council received objections to the works being undertaken at 308 Tomewin Road. Council's Compliance Officer investigated and determined that the works were minor and required no compliance action.

19 August 2008 - Council received additional objections to the works being undertaken. Council's Subdivisions Technical Officer attended the site and consulted Council's Flooding Engineer. At that time the height of the fill averaged 300mm with a maximum height of 400mm and it was proposed to surface the pad with a further sand layer. On this basis Council's Flooding Engineer verbally confirmed that the works would have no significant impact on the flood pattern within the area. Therefore again Council's Subdivision Technical Officer determined that the works were minor and required no compliance action.

24 August 2008 – Further written objections were received by the General Manager again objecting to the works being undertaken on the basis that they need Development Approval, and approval from the Department of Water & Energy (for works within 40m of the creek).

Tuesday 9 September 2008 – Council's Manager Development Assessment and Coordinator Development Assessment attended the subject site and viewed the fill pad area. The fill was 300mm to 400mm high and was limited in size to 70m x 20m. While the fill required further compaction and an additional top dressing layer to make it suitable for its equestrian use, it appeared minimalistic. The site visit included a visit to the neighbouring site to discuss with the reasons for objecting to the filled pad. The neighbour was concerned about a bund built along the creek bank approximately 200 mm in height and a dam built within another nearby creek, built in the last 18 months. The neighbour was concerned about the construction of a levee wall type structure and the potential to worsen future flooding in the area.

11 September 2008 - Council's Manager Development Assessment and Coordinator Development Assessment and Council's Planning & Infrastructure Engineer (Flooding Engineer) attended the subject site with the owners present to obtain full access to the site.

12 September 2008 – Council wrote to the owners and complainants generally advising as follows:

Following numerous site visits and investigations Council can now provide you with the following information:

Council's Flooding Engineering has stated that:

The following observations are made in regard to flooding and the potential for the fill pad in question to impact on local flooding behaviour:

- *The fill pad, which is intended as a level platform for horse riding / dressage, is approximately 300mm in height above natural surface level. This height varies in some areas due to slight undulations in the natural surface, but would not exceed 400mm.*
- *The area of the fill pad is approximately 20m x 70m, which represents just over 1% of the 10.2 hectare property.*
- *According to Council's ground level contours, the site is at approximately 4m AHD. Tweed River Q100 flood level for this property is 4.7m AHD. The flood model does not account for additional flood gradient coming down Dungay Creek, which runs along the northern property boundary and is adjacent to the fill pad.*
- *Contour mapping and site inspection confirms that during large flood events, water from the creek will preferentially pass through the property via existing gullies and back channels in a generally straight path from upstream of the dwelling, across the access road and through paddocks about 100m south of the fill pad. The fill pad is not located in an obvious out-of-creek flowpath.*
- *The level of fill is not considered significant as it is generally consistent with, and does not exceed by any significant amount, the level of the creek bank and other natural and man-made land formations in the area.*
- *While some flood storage will potentially be lost due to the filling, the size of the fill pad is considered insignificant, and therefore should not adversely affect flood levels in the locality.*
- *Overall, I consider the fill pad acceptable, and extremely unlikely to cause any adverse flooding impact on adjoining land or local flood behaviour. I do not consider that further investigations or major modifications to the fill pad are warranted at this time.*

In regards to permissibility the subject site is zoned part 1(a) Rural and part 1(b2) Agricultural Protection. In both of these zones agriculture is exempt development and is defined as:

includes horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees, and the growing of fruit, vegetables and the like. It does not include forestry, or the use of an animal establishment or a retail plant nursery.

Given the minimalistic nature of the equestrian area, it is Council's opinion that the works are ancillary to the keeping of livestock (horses), and thus constitutes exempt

development under the LEP 2000. Hence no Development Application will be required.

However, you are still required to obtain a Permit from the Department of Water & Energy for works within 40m of a waterway in accordance with the Water Management Act.

2 December 2008 – The Department of Energy and Water issued the owners with a controlled activity permit under the Water Management Act 2000 for works within 40 m of the waterway.

December 2008 - Councillor enquiries resulted in the Councillors being advised of Council's letters dated September 2008.

July - August 2009 - Council's Flood Management Committee enquired about the status of the equestrian pad as members had received complaints about the works. A request for the Floodplain Management Committee to undertake a site visit was refused by the landholders, as based on Council correspondence and the Department of Water and Energy approval there were no grounds for reinvestigation by the Committee. Council's Acting Flood and Stormwater Engineer undertook an independent site visit to observe the works from neighbouring properties, without entering the Colby's land, and concluded that:

"The height of the mound is between 300mm and 400mm and, in my view, overland flow would only be affected for flow depths up to the height of the mound and then to a lesser extent for flows which overtop the mound.

In my opinion, these potential effects, such as Eddy currents and minor increases in water levels, would be limited to the immediate perimeter of the mound, and possibly up to a maximum of 3 or 4 metres either side.

Whilst the neighbour considers the mound to be "large", the size of the mound is relatively small in relation to the surrounding landscape and floodplain either side. (the size is approximately 20m x 70m),

I have discussed the matter with Council's Coordinator Development Assessment to ascertain what Council's position would be if further fill is added to the mound. It would appear that the mound is compatible with the permissible uses for the zoning and would only become a matter of concern if it adversely affected flood behaviour.

It would therefore seem that Council has no basis for taking any further action and the neighbour can only consider the other remaining options explained to him whilst on site, or accept the situation as it now stands."

31 August 2009 – The owners' solicitor (Ellis & Baxter) notified Council in writing that works would be recommencing in accordance with the Department of Energy and Water permit as issued on 2 December 2009.

Despite Council officers forming the above opinion Council continued to get objections to the works being undertaken on the site. Such objections were coming from nearby neighbours and the NSW Cane Growers Association.

Council maintained its position formed in September 2008 and continued to respond to complainants accordingly.

September 2009 - Councillor enquiries received resulted in this matter being reported to the Executive Management Team for review. The Executive Management team deemed it would be appropriate for Council's Waterways Officer to inspect the site and provide advice on what can be done to prevent erosion and ensure stabilisation of the adjoining creek bank.

4 September 2009 – Council's Waterways Officer inspected the subject site and that of the adjoining owners. The officer concluded that *"It is highly unlikely that the filling has had an impact on the condition of the channel and stream banks at this point"*. A full copy of the Officer's Report is annexed to this agenda.

23 September 2009 – Council's Executive Management Team reconsidered the advice of Council's Waterways Officer and made a:

Decision that, following the Executive Management Team's review of the investigations to date by Council Officers in relation to the fill placed on 308 Tomewin Road, Dungay, the Director Community & Natural Resources advises Cr Milne that:

1. *Planning staff have reviewed the activity and have advised that development consent is not required and that the relevant works are being undertaken under the approval of the Department of Water and Energy applicable to works within 40 metres of a waterway,*
2. *Engineering staff have reviewed the activity and advised that the works is of a minor nature and there will be no significant impact on flooding behaviour and;*
3. *Natural Resource Management staff have inspected the site and determined that the placing of fill is unlikely to have caused any erosion to the adjacent creek banks.*

25 November 2009 - Despite Council's Executive Management Team forming the above opinion Council continued to get objections to the works being undertaken on the site. Council maintained its position formed in September 2008 and continued to respond to complainants accordingly.

January 2010 – Council continued to receive objections from the nearby neighbours and further enquiries from Councillor Milne. It was alleged that the fill was now 1m high which was more than that originally considered by Council. Council staff asked for credible evidence demonstrating the additional depth of fill before again investigating this matter.

11 January 2010 – The Department of Water & Energy (now known as the Department of Environment Climate Change and Water – NSW Office of Water) inspected the completed equestrian pad and concluded that:

"The NSW Office of Water is satisfied that the dimensions of the structure generally comply with the Controlled Activity Approval (ERM2008/1309)"

8 April 2010 – Council staff met with Thomas George (MP) and the complainants regarding this matter. The complainants again suggested that the fill height was now at least 1100mm above natural ground level. It was resolved that if the complainants gave Council credible evidence demonstrating the additional depth of fill the matter would be re-investigated.

23 April 2010 – The complainants produced a letter detailing their dissatisfaction with the manner in which this matter had been investigated and produced photo's that suggested the equestrian pad had been built to higher than that originally reviewed by Council. A copy of this letter is annexed to this agenda

20 May 2010 – Council staff wrote to the owners of 308 Tomewin Road seeking permission to access the site for the purpose of surveying the height of the recently completed equestrian pad. Access was granted for 27 May 2010 with the accompaniment of the owners solicitors (Ellis & Baxter).

27 May 2010 – A site visit was conducted by Council's Coordinator Development Assessment, Council's Planning & Infrastructure Engineer, and Council's Surveyor. Photos and GPS data of the equestrian pad were taken. Following this Council staff then met on site with the complainants and took further GPS data of adjoining property levels and photos of any adjoining matter pointed out by the complainants.

Council's Planning and Infrastructure Engineer has since produced the following notes summarising the results of this site visit:

On the morning of Thursday 27 May 2010, Council's Planning & Infrastructure Engineer, Coordinator Development Assessment and Surveyor attended a site inspection of the equestrian pad on the subject property. The inspection commenced on the subject property, in the presence of Liz Ellis, on behalf of the property owners (Leanne and Darryl Colby). Later the inspection moved onto the adjoining properties, in the presence of Barry Sweetnam, Trevor Baker and Tom Gresham. Numerous survey measurements and photographs were taken throughout the inspection.

A previous inspection of the site was carried out on 11 September 2008, which was not long after the fill was first placed for the equestrian pad. In terms of the potential flood impact of the fill, the following assessment was made at that time:

"The fill pad, which is intended as a level platform for horse riding / dressage, is approximately 300mm in height above natural surface level. This height varies in some areas due to slight undulations in the natural surface, but would not exceed 400mm.

The area of the fill pad is approximately 20m x 70m, which represents just over 1% of the 10.2 hectare property.

According to Council's ground level contours, the site is at approximately 4m AHD. Tweed River Q100 flood level for this property is 4.7m AHD. The flood model does not account for additional flood gradient coming down Dungay Creek, which runs along the northern property boundary and is adjacent to the fill pad.

Contour mapping and site inspection confirms that during large flood events, water from the creek will preferentially pass through the property via existing gullies and back channels in a generally straight path from upstream of the dwelling, across the access road and through paddocks about 100m south of the fill pad. The fill pad is not located in an obvious out-of-creek flowpath.

The level of fill is not considered significant as it is generally consistent with, and does not exceed by any significant amount, the level of the creek bank and other natural and man-made land formations in the area.

While some flood storage will potentially be lost due to the filling, the size of the fill pad is considered insignificant, and therefore should not adversely affect flood levels in the locality.

Overall, I consider the fill pad acceptable, and extremely unlikely to cause any adverse flooding impact on adjoining land or local flood behaviour. I do not consider that further investigations or major modifications to the fill pad are warranted at this time."

The purpose of the latest inspection was to:

- a) determine the actual extent of the works, following concerns raised by neighbouring landholders in a meeting at Council offices on 8 April 2010, and in a written submission dated 19 April 2010, and*
- b) determine whether the completed works are consistent with the previously inspected works, and whether the assessment made at that time remains valid.*

The latest site inspection confirmed the previous observations regarding local flood behaviour and patterns. In large flood events the most significant out of creek flows would occur to the south of the fill site, however some flow is retained in the creek and from a tributary from the north. This has to negotiate the area in proximity to the fill pad.

A central concern of the neighbouring landholders is previous landforming works undertaken on the subject land several years previous to the equestrian pad works. According to the neighbouring landholders an overflow channel from the creek has been filled in the vicinity of the existing shed and the equestrian pad, preventing the breakout of water from the creek in a southerly direction. According to the neighbouring landholders this confines more water to the main creek line, and they fear this detrimentally affects downstream properties. Council officers are unable to make an assessment of any works undertaken prior to or separately to the equestrian pad, and as such, these works have not been considered in determining the "pre-existing" or "natural" ground level in the vicinity of the fill pad.

The survey measurements of the equestrian fill pad confirmed that the finished formation has been significantly raised since the last inspection. At its lowest point, along the north western boundary, the fill formation is approximately 450mm above pre-existing ground level. This is consistent with the initial inspection of 300-400mm high in its rough, uncompacted form, with the addition of a working surface. However at its highest point in the south eastern corner, the fill formation is

approximately 900mm above pre-existing ground level, and far exceeds the initial assessment. As the pad surface is generally level at approximately 5.0m AHD, this variation can be attributed to the slope of the natural ground.

In light of these measurements, the fill pad is not considered to be consistent with the formation that was initially assessed. Further, the potential impact of the fill pad in its current configuration and level on adjoining land cannot be properly determined, without a flood impact assessment and flood modelling.

It is understood that this matter will be reported to Council. There are three options available to Council:

Option 1: Require modification of the fill pad to achieve fill heights of a maximum 450mm above pre existing ground level;

Option 2: Require submission of a development application for the current configuration of the fill pad. The DA must be accompanied by a flood impact assessment, including flood modelling, of the development;

Option 3: Require no action, and allow the matter to proceed as a civil matter between neighbouring parties.

Option 1 and 2 are recommended, and the landholder can determine which of these to undertake. It is noted that Option 1 is likely to be the cheaper of these two options, due to the high cost of flood modelling.

From a planning perspective the subject site is zoned part 1(a) Rural and part 1(b2) Agricultural Protection.

Since 2008 the nature of the works has always been defined as either agriculture or earthworks.

Agriculture is defined as “includes horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees, and the growing of fruit, vegetables and the like. It does not include forestry, or the use of an animal establishment or a retail plant nursery”

Earthworks are defined as “the addition or removal of any solid material on, to or from land, or any other work which will substantially alter the existing ground level or character of the surface of the land”

Agriculture is permitted without development consent while earthworks require development consent in these zones.

To assist in determining the most suitable definition Council has always used the Planning & Infrastructure Engineer’s comments to establish whether any impact has been associated with the works.

Up until May 2010 Council’s Planning & Infrastructure Engineer had advised that, based on a fill formation of approximately 300mm to 400mm plus an additional working surface, the fill pad was acceptable and extremely unlikely to cause any adverse flooding impact on adjoining land or local flood behaviour.

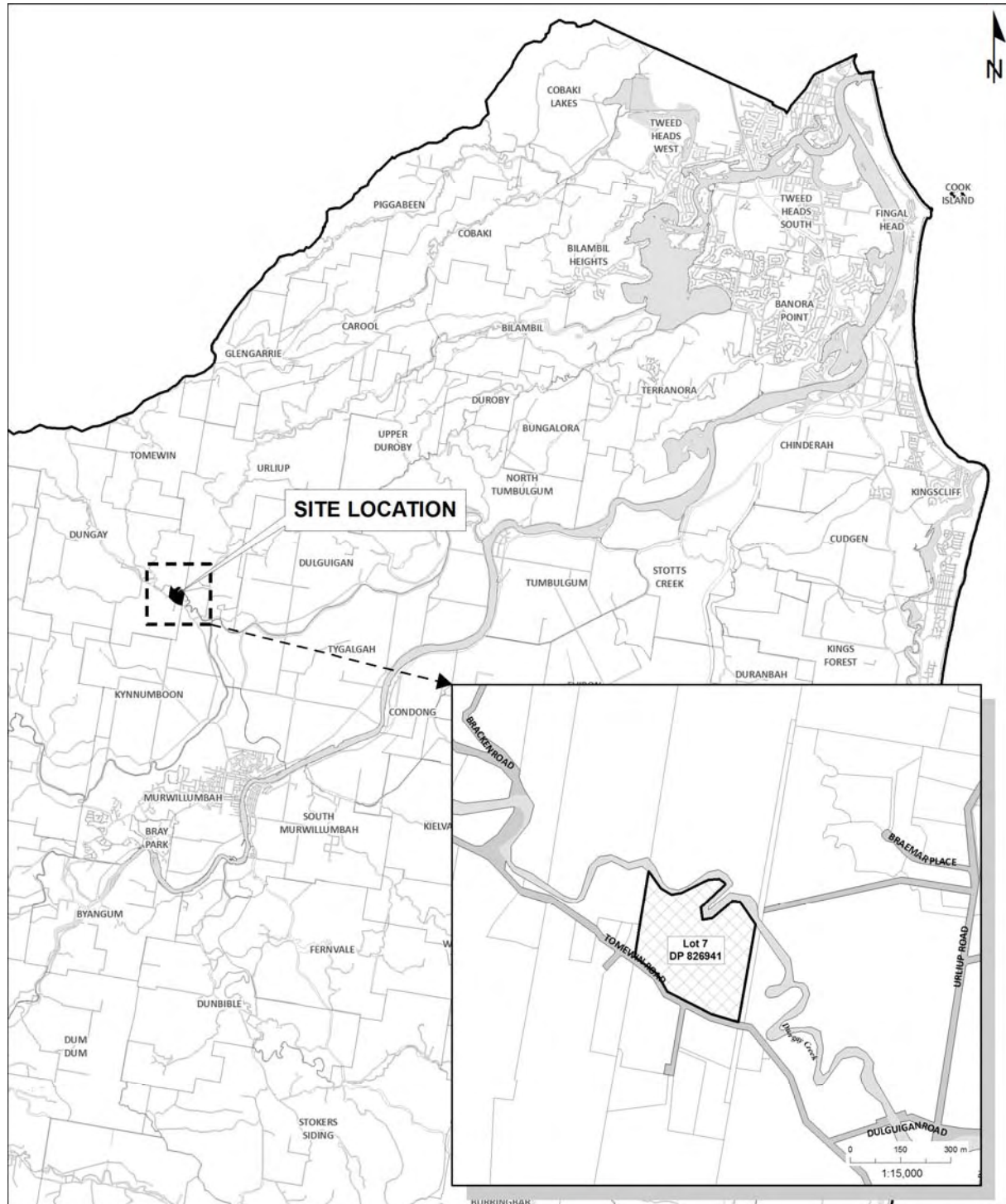
Accordingly given the minimalistic nature of the equestrian area, it was Council's opinion that the works were ancillary to the keeping of livestock (horses), and thus constituted exempt development under the Tweed LEP 2000.

Following the May 2010 inspection Council's Planning & Infrastructure Engineer advised that the fill pad is not considered to be consistent with the formation that was initially assessed. Further, the potential impact of the fill pad in its current configuration and level on adjoining land cannot be properly determined, without a flood impact assessment and flood modelling.

Accordingly the latest evidence suggests that the most suitable definition is now "earthworks" thus necessitating a development approval.

Alternatively the owner should be given an opportunity to reduce the height of the equestrian pad to a level of not greater than 450mm which is the level previously considered acceptable to constitute exempt agriculture. This route would attract additional issues about where the excess fill should be moved to. However, this could be resolved between Council staff and the owner.

SITE DIAGRAM:



LOCALITY PLAN

Lot 7 DP 826941
No. 308 Tomewin Road, Dungay

0 1 2 3 Km
1:125,000

Filename: z:\esri\planning\mxd\A4P_B&W SitePlan.mxd

Author: J. Batchelor - Planning Reforms Unit

Date Printed: 24 June, 2010

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Cadastre: 25 June, 2010
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Coordinate System - MGA Zone 56
Datum - GDA 94

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TWEED
SHIRE COUNCIL

AERIAL IMAGE SHOWING APPROXIMATE LOCATION OF FILL PAD:



GPS DATA SHOWN ON AERIAL:



PHOTOGRAPHS:



August 2008



August 2008



September 2008



September 2008



May 2010



May 2010



May 2010



May 2010

OPTIONS:

- A. That Council advises the owners of the subject site that a review of the completed equestrian pad has revealed a fill height of greater than that previously considered by Council and that accordingly the owners are requested to undertake either Option 1 or Option 2 as detailed below:

Option 1:

The owner is to modify the fill pad to achieve fill heights of a maximum 450mm above pre existing ground level.

or

Option 2: The owner is to lodge a development application for the current configuration of the fill pad (the DA must be accompanied by a flood impact assessment, including flood modelling, of the development).

Failure to undertake Option 1 or 2 as detailed above (within 60 days from the date of notification) will result in Council pursuing this matter legally.

- B. That Council advise the owners of the subject site that a review of the completed equestrian pad has revealed a fill height of greater than that previously considered. However advise the owners that no further action will be taken from Council as the works continue to be considered ancillary to the keeping of animals (agriculture).

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Should Council adopt Option A which encompasses both Options 1 and 2 the owners may challenge such a request and contest any subsequent legal action. Council would incur legal costs if this were to happen.

Should Council adopt Option B which takes no further action in regards to this matter the complainants may pursue civil action against the subject property and/or Council. Council could incur legal costs if this were to happen.

POLICY IMPLICATIONS:

Council's position in regard to this matter could set a precedent in terms of establishing suitable levels of fill as exempt development when in association with agriculture. However, it should be noted that each case still needs to be looked at on its merits to interpret the applicable legislation for each site.

CONCLUSION:

This compliance matter has been continually investigated since September 2008.

Recent evidence suggests that the finished height of the equestrian pad is 900mm at its highest point above natural ground level. Council's Planning & Infrastructure Engineer has concluded that the potential impact of the fill pad in its current configuration and level

on adjoining land cannot be properly determined, without a flood impact assessment and flood modelling.

This advice changes Council's previous planning advice in regards to the structures permissibility.

If the flood impact can not be determined the extent of fill is sufficient enough to change the applicable definition from agriculture (which is exempt) to earthworks (which requires development approval).

Accordingly it is recommended that the owner either reduce the height of the fill pad to that originally considered acceptable (450mm) or lodge a development application with flood modelling to consider the equestrian pad as it is in its present form.

UNDER SEPARATE COVER/FURTHER INFORMATION:

1. Department of Energy and Water - Controlled Activity Permit dated 2 December 2008 (Water Management Act 2000) for works within 40 m of the waterway (ECM 18635608)
 2. Waterways Program Leader Memorandum on Erosion Issues at Dungay Creek, dated 4 September 2009 (ECM 18634568)
 3. **Confidential Attachment** Letter of complaint dated 19 April 2010 (ECM 18634590)
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