

**TITLE: [PR-PC] Unauthorised Works - Development Application DA05/0308 for a Staged Residential Subdivision (3 Stages) Comprising 89 Single Dwelling Lots, 7 Duplex Blocks, 1 Drainage Reserve, 1 Residue Lot & 2 Public Reserves at Lot 13 DP 793985; Lot B DP 368706; Lot 1 DP 392245, Barnby Street, Murwillumbah**

**ORIGIN:**

**Development Assessment**

**FILE NO: DA05/0308 Pt12**

**SUMMARY OF REPORT:**

It has been brought to Council's attention that unauthorised works have occurred in conjunction with DA05/0308.

Council approved DA05/0308 (a residential infill subdivision comprising 96 allotments) in June 2006. The site earthworks were proposed to result in a balanced cut and fill approach to negate the need for importation of fill.

An excess of material (35,000m<sup>3</sup>) is now being placed on that part of the site zoned for agricultural protection. Council is of the opinion that such works are not authorised by the existing consent and are therefore unlawful.

Negotiation attempts with the developers to date have not produced any satisfactory outcomes and therefore to resolve this matter it is considered necessary to commence legal proceedings (for a breach of the Environmental Planning & assessment Act 1979) in respect of the unauthorised works at Lot 13 DP 793985, Barnby Street, Murwillumbah.

**RECOMMENDATION:**

**That Council engages solicitors to commence legal proceedings (for a breach of the Environmental Planning & Assessment Act 1979) in respect of the unauthorised works at Lot 13 DP 793985, Barnby Street, Murwillumbah.**

**REPORT:**

**Applicant:** Metricon (Qld) Pty Ltd  
**Owner:** Barnby Developments Pty Ltd  
**Location:** Lot 13 DP 793985; Lot B DP 368706; Lot 1 DP 392245, Barnby Street Murwillumbah  
**Zoning:** 2(a) Low Density, 2(c) Urban Expansion & 1(b2) Agricultural Protection  
**Cost:** \$6,000,000

**BACKGROUND:**

In July 2006 Council approved an infill subdivision (3 stages) comprising 89 single dwelling lots, 7 duplex blocks, 1 drainage reserve, 1 residue lot & 2 public reserves.

The application proposed site earthworks to fill the low lying flood prone areas of the site. The central ridge within the site was to provide the material for fill, however, the ridge was to remain as a feature of the estate. This approach was meant to create a balanced cut and fill approach so that no importation of fill was required.

On Friday 19 September 2008 Council started receiving complaints from residents in the local area stating that the developers had started moving excess fill material to that part of the site zoned 1(b2) Agricultural Protection.

Council Officers investigated the complaints and met with the developers on site.

The developers explained that final earthwork levels on the site had now been achieved in accordance with the approved plans, but that as a result they had an excess of approximately 35,000m<sup>3</sup> of material (from 400,000m<sup>3</sup> of material that formed the earthworks).

The developers explained that they had reviewed their options in relation to the excess material and decided to place the fill on that part of the site the site zoned 1(b2) so they did not have to truck the material off site.

Whilst the land being used as a stockpile site formed part of the DA, the stockpile site is outside the site works area and is zoned for agricultural protection. Furthermore, the applicant has a current application before Council seeking this area be re-zoned to residential to allow for the expansion of the residential estate. Placement of fill in this location is unlawful and is furthermore presumptuous and premature without lawful development consent and without resolution of the rezoning application.

The stockpile is approximately 150m x 150m and has approximately 20,000m<sup>3</sup> (of the intended 35,000m<sup>3</sup>) of material sitting there at the moment. This creates a height of approximately 2m.

Council has formally asked the developers to stop placing fill in this location as it is Council's opinion that this constitutes earthworks which needs a separate development approval. The land is a low lying cane paddock that is on the floodplain adjoining Rous River. Any development assessment would need to consider amenity, flooding and storm

water dispersal. Furthermore, such DA would normally be publically notified and advertised.

The developers were requested to attend a meeting with Council's Executive staff on Thursday 25 September in an attempt to rectify this matter. No resolution was forthcoming with the developers advised to go away and review their options and report back to Council with a lawful resolution.

Below are extracts from written communications between Council and the developers to date:

Tweed Shire Council Letter to Metricon 26 September 2008:

*I refer to the above application and recent discussions held between Council Officer's, representatives from Metricon and Jim Glazebrook, in regards to illegal stockpiling of excess material on Lot 13 DP 793985.*

*As discussed with you on Wednesday 24 September 2008, the excess site material (approximately 25,000m<sup>3</sup>) that has been placed west of the Joshua Street link road, has been stockpiled without prior development approval.*

*Council further notes that you have a remaining excess of approximately 10,000 -15,000m<sup>3</sup> of material that has yet to be moved to the illegal stockpile site.*

*On Monday 22 September 2008 Council Officers instructed you to stop work with regards to the illegal stockpile. The remaining excess material should not be moved to the illegal stockpile. Any additional work in this regard will result in Council pursuing legal action for works without development approval.*

*As discussed on Wednesday 25 September 2008, this matter requires resolution as soon as possible.*

*Council is allowing Metricon time to come up with a mutually acceptable lawful resolution to this matter. Such resolution is to be presented to Council by Monday 29 September 2008. Such resolution will probably necessitate the lodgement of a Development Application and or S96 Modification Application. However, please note that the lodgement of such application/s will need to be assessed on their merits and may not be capable of support by Council. Subsequently please consider all options available to you and liaise with Council regarding your options on Monday 29 September 2008.*

Tweed Shire Council Letter to Metricon 8 October 2008:

*"I refer to discussions that took place between Metricon representatives and Council staff at a meeting held at Council on Thursday, 25 September, 2008 in respect of the above activity undertaken in association with the adjoining Barnby Street residential subdivision proposal of DA05/0308.*

*At that meeting, it was acknowledged by all parties that the recent soil stockpiling activity on property known as Lot 13 DP 793985 Joshua Street, Murwillumbah was unauthorised by Council, and would have, under normal circumstances, necessitated prior development approval under the Tweed Council Local Environmental Plan 2000.*

*As part of the meeting, Council officers provided the following advice to Metricon representatives:*

- 1. Council is currently considering whether any punitive or legal action is warranted in this instance, particularly in light of the sensitive nature of the subject site and its current 1(b) Agricultural Protection zoning, as well as the seriousness of the perceived breach of the NSW Environmental Planning and Assessment Act;*
- 2. A development application would be required should the proponent of the adjoining subdivision proposal seek to retain the stockpiled soil on property known as Lot 13 DP 793985 Joshua Street, Murwillumbah; alternatively, approval for a modification of DA05/0308 under Section 96 of the Act would be required should the proponent seek to remove and re-locate the stockpiled soil from this site; Council officers advised that they could not provide any assurance at this stage that either of these applications would be approved by Council; and*
- 3. The proponents were given notice that all works on the subject land should be ceased, and that a response to the matters raised by Council officers should be provided by no later than Monday, 29 September, 2008.*

*Despite a verbal acknowledgement of the above matters at the recent meeting, Council has yet to receive a satisfactory written response on these matters.*

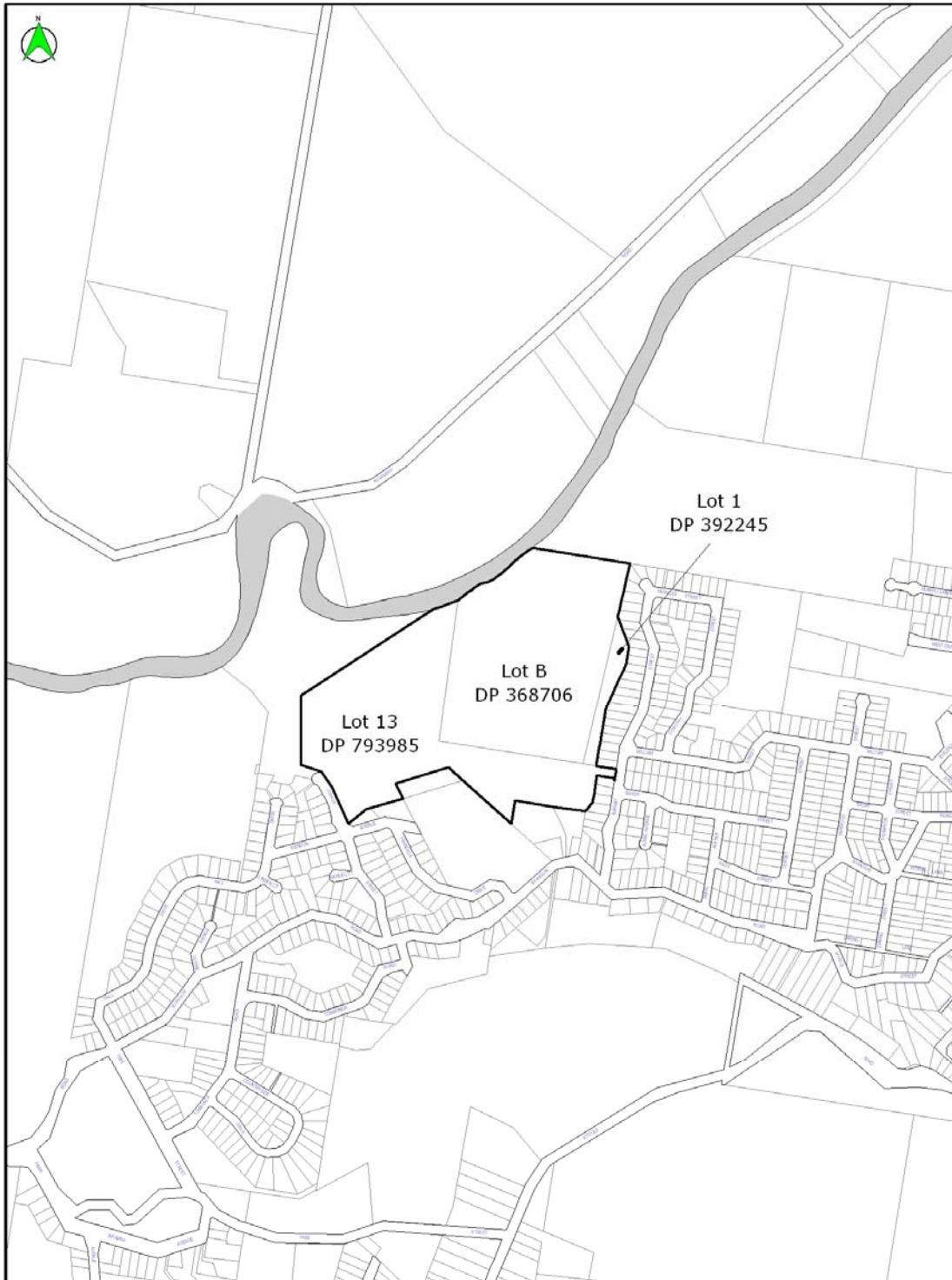
*Given the time elapsed since the 25 September meeting, as well as the serious nature of the unauthorised works, I now wish to give notice that, if a satisfactory written response to these matters is not received by 5.00pm, Friday, 10 October, 2008, Council will consider the issuing of a Penalty Infringement Notice (PIN) and commencement of legal proceedings against the proponents of DA05/0308.*

*Please contact me if you wish to discuss these matters further."*

On 13 October 2008 the developer's solicitors wrote to Council stating that it was their opinion that placement of fill in the stockpile area is incidental to the works authorised in the consent.

Council Officers do not concur with this advice and hence it is now considered necessary to commence legal proceedings to resolve this matter.

**SITE DIAGRAM:**



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*Tweed Shire Council*  
 Lot 1 DP 392245, Lot B DP 368706, Lot 13 DP 793985  
 Barnby Street, Murwillumbah  
 File: N:\MapInfo 7...IA4P Site Plan.Wor Author: C.Davis Date: 6/Dec/2005

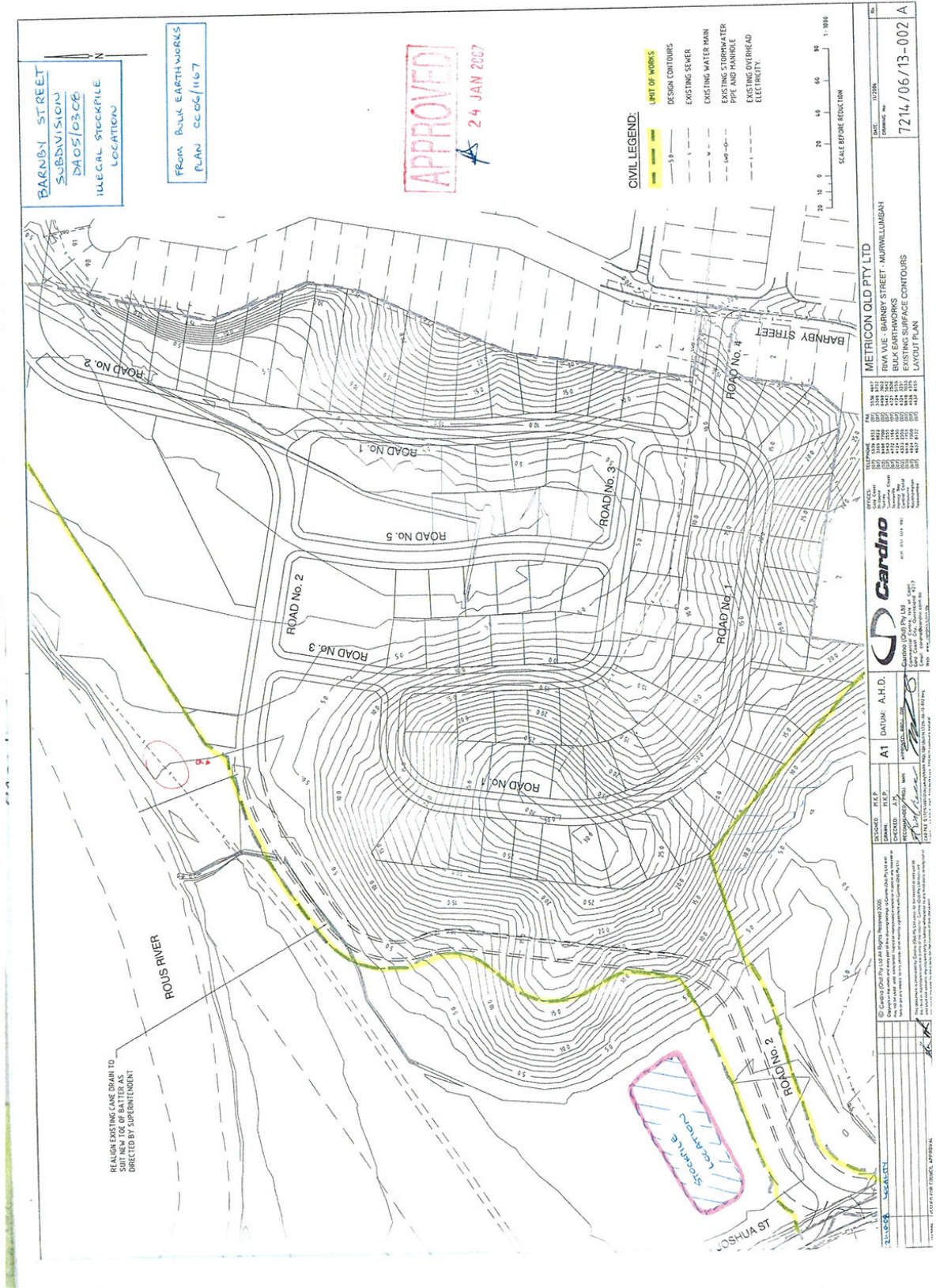


STRATEGIC  
 PLANNING UNIT  
**Site Plan**  
 Sheet: 1 of 1

Scale: 1:10,000



STOCKPILE LOCATION PLAN:



BARNBY STREET  
SUBDIVISION  
D405/03/06  
ILLEGAL STOCKPILE  
LOCATION

FROM BULK EARTHWORKS  
PLAN CC06/1167

**APPROVED**  
24 JAN 2007

- CIVIL LEGEND:**
- LIMIT OF WORKS
  - DESIGN CONTOURS
  - EXISTING SEWER
  - EXISTING WATER MAIN
  - EXISTING STORMWATER PIPE AND HANDLE
  - EXISTING OVERHEAD ELECTRICITY

SCALE BEFORE REDUCTION  
0 20 40 60 80 1:1000

REGION EXISTING CANE DRAIN TO  
SUIT NEW TOE OF BATTER AS  
DIRECTED BY SUPERINTENDENT

<p><b>Cardino</b> CARDINO OLD PTY LTD RVA VUE - BARNBY STREET - MURWILLUMBAH BULK EARTHWORKS EXISTING SURFACE CONTOURS LAYOUT PLAN</p>	
<p>DATE: 10/03/06 DRAWN BY: [Name] CHECKED BY: [Name] SCALE: 1:1000</p>	<p>PROJECT NO: 7214/06/13-002 A</p>
<p>PROJECT: [Name] CLIENT: [Name] SITE: [Name] DRAWN BY: [Name] CHECKED BY: [Name] DATE: 10/03/06</p>	<p>PROJECT: [Name] CLIENT: [Name] SITE: [Name] DRAWN BY: [Name] CHECKED BY: [Name] DATE: 10/03/06</p>
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**PHOTO'S OF UNAUTHORISED STOCKPILE SITE:**









**OPTIONS:**

1. Engage solicitors to commence legal proceedings (for a breach of the Environmental Planning & Assessment Act 1979) in respect of the unauthorised works at Lot 13 DP 793985, Barnby Street, Murwillumbah.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Council will incur costs as a result of legal action, however, upon resolution of the matter the Land & Environment Court may award costs.

**POLICY IMPLICATIONS:**

It is imperative that Council pursue unauthorised works to uphold the integrity of Council's policies and any lawfully issued development consents.

**CONCLUSION:**

This is a very clear case of extensive site works outside the parameters of an existing development approval (DA05/0308). Council has a responsibility to ensure that all developers undertake works as approved, not in excess of that approved.

Whilst this resolution seeks to engage solicitors to commence legal proceedings, should a negotiated resolution be achieved in the interim then Council need not pursue a full legal hearing.

**UNDER SEPARATE COVER/FURTHER INFORMATION:**

*To view any "**non confidential**" attachments listed below, access the meetings link on Council's website [www.tweed.nsw.gov.au](http://www.tweed.nsw.gov.au) or visit Council's offices at Tweed Heads or Murwillumbah (from Friday the week before the meeting) or Council's libraries (from Monday the week of the meeting).*

Nil.

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