

**P2 [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**

**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.*

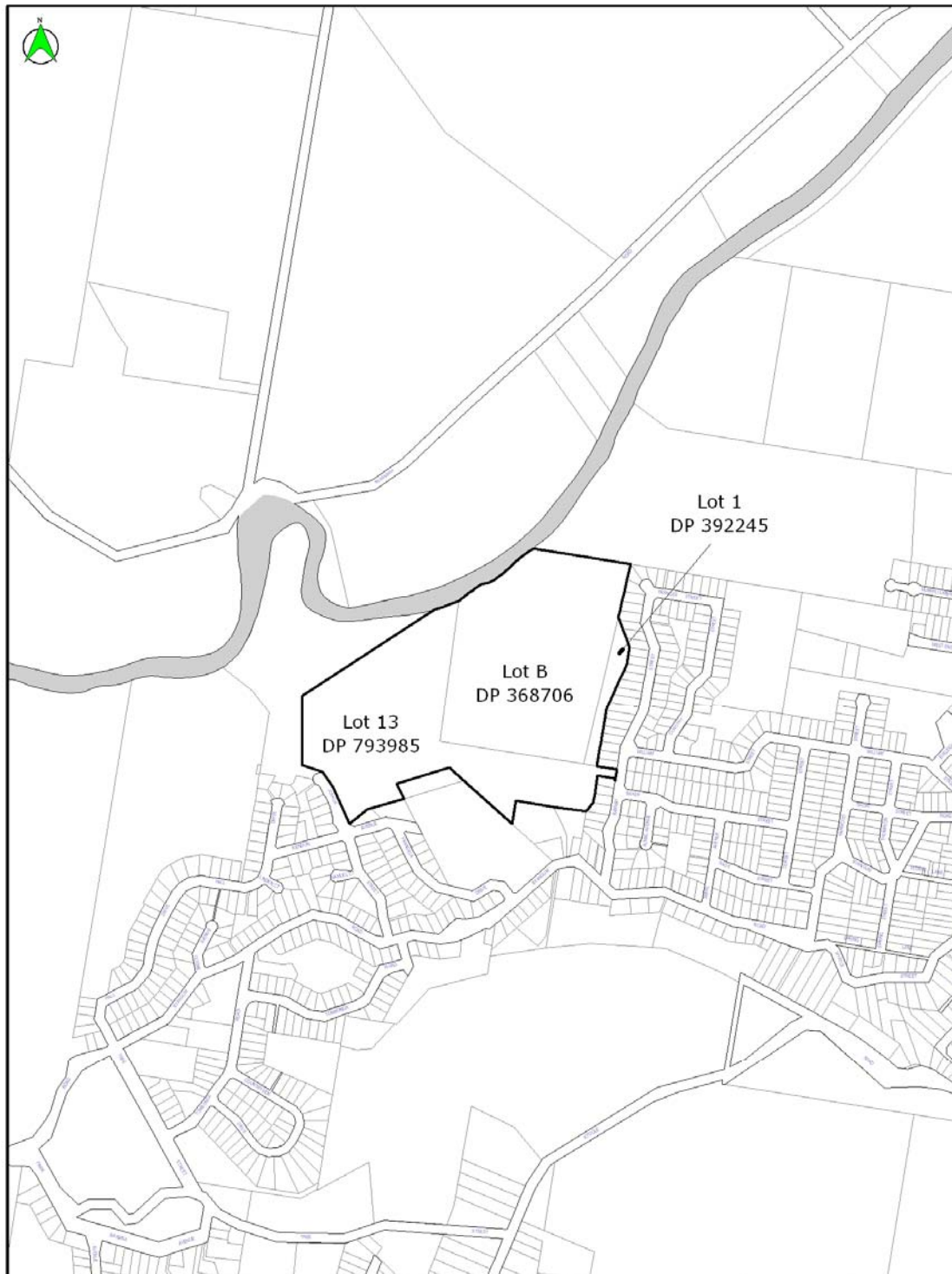
*Given the time elapsed since the 25 September meeting, as well as the serious nature of the unauthorised works, I now wish to give notice that, if a satisfactory written response to these matters is not received by 5.00pm, Friday, 10 October, 2008, Council will consider the issuing of a Penalty Infringement 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

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



**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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**P3 [PR-PC] Residential and Tourist Code - Section A1 of Tweed DCP - Hastings Point Review**

**ORIGIN:**

**Planning Reforms**

**FILE NO: GT1/DCP/A1**

**SUMMARY OF REPORT:**

This report seeks a resolution to adopt the exhibited amendments in draft Tweed Development Control Plan (DCP), Section A1 – Residential and Tourist Code. The amendments include interim development controls for Hastings Point, south of Cudgera Creek Bridge, relating to building height and density.

On 21 August 2007 Council engaged Ruker Urban Design to assess the appropriateness of the height and density controls under the Tweed LEP 2000 for development in Hastings Point. The final report was considered by Council on 22 April 2008 whereupon it was resolved:

1. *Council amend Section A1 of the Tweed Development Control Plan to include interim development controls in relation to the height and density limit in Hastings Point applicable to all land south of the Cudgera Creek Bridge, restricting height to two (2) storeys only with such provision being reviewed no later than 12 months from the date of adoption.*
2. *That the draft amendment be publicly exhibited in accordance with s 74E of the Environmental Planning Assessment Act 1979.*

A draft development control plan was prepared and publicly exhibited between 7 May and 6 June 2008. An extensive range of public submissions were received during this period comprising of completed feedback forms and correspondence.

The submissions presented a mixed range of views ranging from landowners who purchased their land for investment and development purposes, whom considered the interim controls too restrictive, and conversely, other landowners who were of the opinion that the controls did not go far enough, particularly in the absence of a locality based plan, and they expressed the view that the controls should be stricter.

In light of recent Land and Environment Court and Supreme Court of Appeal proceedings brought in respect of multi-dwelling residential and seniors housing development in Hastings Point, it is an imperative for Council to provide a clearer direction on the preferred form of housing development in this locality and to adopt more legally definable planning controls in the form of the exhibited draft DCP amendments.

Upon adoption the draft DCP controls they should provide a more effective interim planning mechanism for Council that can be readily enhanced through the preparation of a more detailed locality plan and DCP for the Hastings Point Area.

**RECOMMENDATION:**

**That: -**

- 1. Council adopts the exhibited draft amendments to Section A1 of the Tweed Development Control Plan – Residential and Tourist Code, as it applies to development controls for the Hastings Point area, and in accordance with s21 of the *Environmental Planning Assessment Regulation 2000* gives public notice of the resolution to adopt the Plan in its newspaper, the Tweed Link, within 28 days of that resolution.**
- 2. A detailed Locality Plan and Development Control Plan be prepared for the Hastings Point locality in a timeframe consistent with Council's Strategic Planning priorities.**

## **REPORT:**

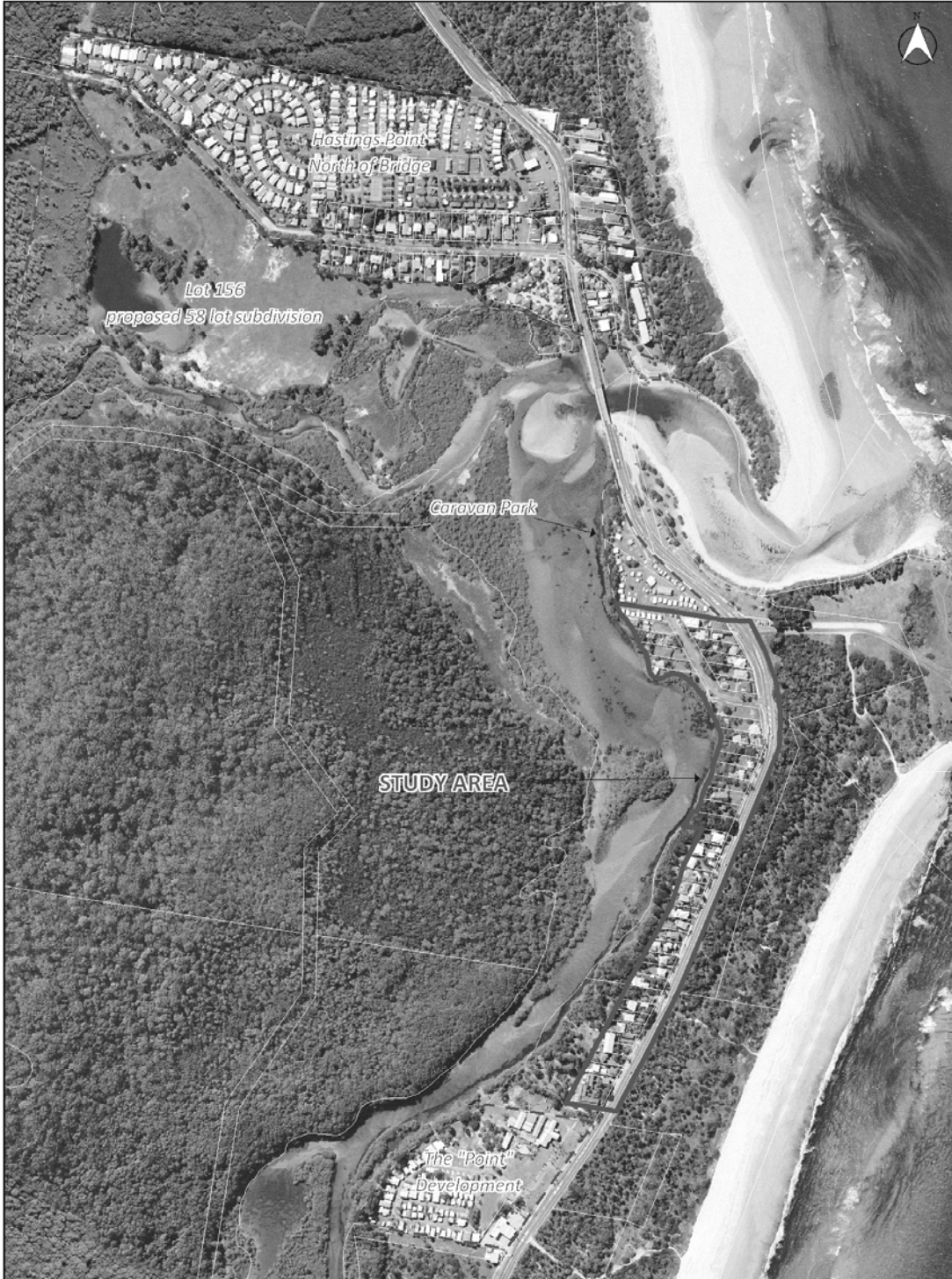
### **Background**

In July 2005 Council resolved to amend the Tweed LEP 2000 (Draft Amendment No. 81) with a proposal to reduce the maximum height of buildings south of Cudgera Creek Bridge at Hastings Point from 3 to 2 storeys. Following advice from the Department of Planning, Council resolved to abandon the draft LEP process in December 2006, in light of the need to provide a broader strategic context to building heights across the Tweed Shire.

In response to the public opposition to various three-storey redevelopment proposals, such as the seniors living proposal at Nos. 87-97 Tweed Coast Road, known as the "Point", and a multi-dwelling development at No. 21 Tweed Coast Road, Council resolved at its August 2007 Meeting to engage the services of the consultant, Ruker Urban Design, with a brief for a study focused on determining if the 3-storey height and density controls under the Tweed LEP 2000 are appropriate for development in Hastings Point. The study was to comprise the residential area south of the Cudgera Creek Bridge, which consists of 44 lots.

The map below illustrates the Hastings Point study area, the area of Hastings Point north of Cudgera Creek Bridge, and other key local sites.

**HASTINGS POINT LOCALITY MAP - NORTH AND SOUTH OF CUDGERA CREEK BRIDGE:**



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## Preparation of the Ruker Urban Design Report

Following Council's decision at the August 2007 Meeting, Ruker Urban Design commenced the preparation of the Hastings Point Study. The Consultant and Council's Staff convened two consultation workshops with the study area residents, landowners and representatives of the Hastings Point Residents Association. This feedback was used to finalise the study report.

The concluding recommendations in the Consultant's report states:

### *Concluding Recommendations*

*This report finds that the current controls under the Tweed LEP 2000 will not provide the necessary level of certainty to ensure new buildings achieve a desirable built form outcome for Hastings Point.*

*After consideration of the built and natural attributes of Hastings Point it is apparent that the control in Tweed LEP 2000; building height, alone is not enough to ensure that developments result in buildings that suit the present and future character of Hastings Point.*

*Primarily this results from the issue that larger scale and denser building forms have greater impacts to the natural and urban environments and as such require a higher degree of design control specific to the context of the place and to achieving high quality buildings.*

*In particular multi-dwelling developments and three storey developments will have a significant impact on the character of Hastings Point as a small coastal village. The existing position can be rectified by:*

- Council developing a structure plan (locality plan) for the whole of Hastings Point.*
- Council developing as part of the structure plan detailed site and building design guidelines on a street by street basis (block by block) and building types that suit Hastings Point to supplement and add to the Draft RTDC. This would look at all building types, of both two and three storeys.*

*In the case where the two recommendations above are not undertaken or in the interim during the development of the Hastings Point plans a two storey limit should be enforced.*

*As an outcome of this report the structure plan should include (but not be limited to):*

- Clearly defining the boundary and footprint of the settlement in line with the Tweed Local Environmental Plan and the Far North Coast Regional Strategy.*
- Exploration of, testing and detailing the capacity of the settlement within the context of it reaching the size of a small coastal village.*

- *Exploration of, testing and detailing the environmental constraints of the settlements waterways and estuary in relation to the effects of multi-dwelling developments including both design and construction.*

### **Council Resolution to Publicly Exhibit Draft Amendments to Tweed DCP – Hastings Point**

As outlined above, the Consultant concluded that the Tweed LEP 2000 height control is not adequate in the context of the established character of the Hastings Point area, south of the Cudgera Creek Bridge, and as such it does not provide a clear direction for the redevelopment of the area.

A report was submitted to Council's Meeting of 22 April 2008, including the final Ruker Urban Design Report, with a recommendation to publicly exhibit a draft amendment to Section A1 of the Tweed DCP.

On the basis of this recommendation, Council resolved the following:

- "1. *Council amend Section A1 of the Tweed Development Control Plan to include interim development controls in relation to the height and density limit in Hastings Point applicable to all land south of the Cudgera Creek Bridge, restricting height to two (2) storeys only with such provision being reviewed no later than 12 months from the date of adoption.*
2. *That the draft amendment be publicly exhibited in accordance with s 74E of the Environmental Planning Assessment Act 1979."*



An extract of the draft amendment to the DCP is provided below:

Tweed Development Control Plan  
Section A1 - Residential and Tourist Code  
**Area Specific Development Controls**

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## AREA SPECIFIC DEVELOPMENT CONTROLS

### INTRODUCTION

This section of the Plan provides development provisions that have been formulated in response to an identified specific need of a particular site(s) or locality. This section is to prevail to the extent of inconsistency with any other development provision in this Plan.

#### **Area of Application**

Hastings Point – all land south of the Cudgera Creek Bridge.

#### **Objectives**

- \* To implement the recommendations of the Hastings Point 'Review of Height, FSR and Setback Controls' Report, prepared by Ruker and Associates dated 26 March 2008, as resolved by Council on 22 April 2008.
- \* To limit the impact of new development on the existing character and amenity of this coastal settlement prior to any further locality based planning by:
  - o Implementing interim restricting height and density provisions for new development until provisions appropriately tailored to larger and more dense development (where appropriate) is adopted following community consultation, that will
  - o Provide greater certainty to the protection and preservation of the areas natural and built environment.

#### **Controls**

- a. The maximum building height is 2-storeys and 8 metres.
- b. The maximum density on any lot or combination of lots is one dwelling per 250m<sup>2</sup> of site area.

#### **Review Period**

The review period for interim development controls outlined above for Hastings Point is 12 months from the adoption of this Plan, except where a locality or structure plan, or area specific planning controls are in preparation in which case it will be the adoption date of that body of work and the subsequent repeal of the interim provisions.

## **Results of Public Exhibition - Draft DCP s A1 – Interim Hastings Point Controls**

The draft DCP was publicly exhibited between 7 May and 6 June 2008.

To assist in gaining greater feedback for the preparation of the Hastings Point Report feedback forms were prepared and distributed by Ruker Urban Design and Council staff.

A summary of the overall feedback in respect of the exhibition of the draft DCP amendments is provided below.

### Written Submissions

A total of 25 individual submissions were received.

**6** submissions were in support of the draft controls, however, raised the following issues:

- Greater protection of the uniqueness of Hastings Point is needed;
- Building density should be restricted to a maximum of 2 dwellings per development pending the completion of a locality plan;
- The draft controls should also include the area of Hastings Point north of the Cudgera Creek Bridge;
- Residential flat buildings should not be allowed;
- The building site cover and landscape requirements should be tightened;
- Preparation of a locality plan for the whole of Hastings Point;
- Stop development from contaminating the creek;
- Remove the current 3-storey height limit; and
- Current redevelopment is against the aims of the Tweed LEP 2000.

**19** submissions were opposed to changes in the height and land-use zoning, and raised the following issues:

- Properties were purchased on the basis of the present zoning;
- 3-storey development reduces the need for new release areas;
- More impressionable buildings are needed to tidy up the area;
- 3-storey buildings should be designed to be more sympathetic to the character of the area and need not be inappropriate;
- New development controls are needed to guide the redevelopment of the area.

Of the individual submissions received 68% were opposed to changes in current zoning, however, they generally noted a need for greater certainty in Council's planning controls.

There are requests in the submissions for the exhibited draft amendments to be extended to land north of the Cudgera Creek Bridge. This area is located outside of the project study area and no detailed assessment of this area was undertaken in the preparation of the Ruker Urban Design Report. Recommendations are provided in the conclusion section of this report should the application of the interim controls need to be extended to cover the area north of the bridge.

### Feedback Forms

The Hastings Point Residents Association made a submission requesting that the feedback forms generated out of the public consultation workshops be taken into consideration in respect of the draft DCP.

A total of **85** individual forms were received during the second consultation workshop and are relevant to the draft DCP amendments. The following table is taken from the Ruker Urban Design Report as it summarises the number of responses to questions that were raised on the feedback forms.

Because not all feedback forms were completed in full there is not exactly 85 responses to each question in the table shown.

	Agree	Perhaps	Disagree
A locality plan is needed	77		
A style guide is needed	76	1	
Appropriate Buildings are necessary	75		
Houses, Dual Occs and Granny flats have a fair chance of being in keeping with HP	66	6	4
Villas may be in keeping with the settlement	32	35	13
Is there less chance that 3Stroey Res Flat Buildings are appropriate for HP	6	20	53

The comments below were those included over and above responses to specific questions raised in the feedback forms:

Don't want to down zone land	23
No 3 storeys. No place in Hastings Point for this building form due to visual impact	19
Need specific prescriptive controls for HP ie height, setback, overshadowing, site coverage etc	4
Natural landscape to dominate, not buildings. Green space coverage on individual sites paramount to retain character and protect amenity	11
Villas may be appropriate without 3 storey and high site coverage	1
Beautiful natural environment important, 'greenbelts' important. Built form should not detract.	4
Retain character, village atmosphere and promote quality of life	15
No underground carparking / threat to estuary resulting from surface water runoff	20
Protect pristine natural estuary and native wildlife	13
Traffic Management a problem	3
Low coast holiday destination, safe swimming, holiday feel (keep camping and caravan park)	16
Overhaul sewerage treatment plant. Potential for major contamination of estuary.	17
Formalise access to beach and pedestrian networks, public carparks. Improve Pedestrian safety	8
No residential flat building development	3
No large population increase	6
Moratorium to be reinstated	9
2 or 3 Storey acceptable, however aesthetics MUST improve. This would be better than some existing buildings	2
Want to rezone to low density	1

### The Need for Both Immediate and Medium-Term Council Action

The findings of the Hastings Point Report, public consultation and exhibition of the draft DCP highlight the following:

- The limited supply of coastal and estuarine land increases the pressure for development and the potential for future legal challenges;
- The immediate need to adopt the exhibited interim draft development controls; and
- a medium-term goal for producing a locality plan and more comprehensive DCP controls that build on the Ruker Urban Design Report, for the whole of the Hastings Point area.

### Preparation of a Locality Plan

Council staff are currently reviewing a quotation from Ruker Urban Design to prepare a locality plan and detailed development controls for Hastings Point. It is anticipated that an agreement on this further work will be finalised following the Council's affirmative resolution of the recommendations provided in this Report.

The expected timeframe for completion of the project is six months, including professional investigations, community consultation and reports to Council for final adoption.

### CONCLUSION:

It is concluded that the following action is necessary to address the current planning and development pressures facing the Hastings Point Locality:

1. Adopt the draft DCP A1- Residential and Tourist Development Code, as it relates to the interim development controls for Hastings Point.
2. The preparation of locality plan and detailed development controls for the Hastings Point locality.

In response to recent representations of the Hastings Point Residents Association, Council may also wish to consider the adoption of the following further matters:

1. Resolve to prepare a new draft DCP to extend the interim development controls to north of the Cudgera Creek Bridge, and
2. To further restrict the interim density ratio to no more than 2 dwellings per site through a new draft DCP.

#### **LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

There would be no implications on Council's forward budget estimates arising from the recommendations in this report relating to the preparation of a locality plan and detailed development control plan. Funds may be available in the 2008/09 Planning and Regulation Division Budget for the additional consultancy based work, pending prioritisation of Council's Strategic Planning Program.

#### **POLICY IMPLICATIONS:**

The recommendations of this report would represent a policy shift through amendment in the Tweed DCP relating to building height and density in Hastings Point, south of Cudgera Creek Bridge. It may lead to amendments in the Tweed LEP at a later stage.

#### **UNDER SEPARATE COVER/FURTHER INFORMATION:**

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Nil

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**P4 [PR-PC] Draft Tweed Local Environmental Plan 2000 Amendment No. 82  
- Dwelling Entitlement Lot 2 DP 586869 Cavendish Road, Duroby**

**ORIGIN:**

**Development Assessment Unit**

**FILE NO: GT1/LEP/2000/82**

**SUMMARY OF REPORT:**

On 2 May 2006 Council resolved, pursuant to Section 54 of the *Environmental Planning and Assessment Act 1979*, to prepare Tweed Local Environmental Plan 2000, Amendment No 82.

The purpose of Amendment No 82 is to amend Schedule 3 of the Tweed Local Environmental Plan 2000, to enable a dwelling house to be established on Lot 2 DP582869, Cavendish Road, Duroby.

The draft Plan was publicly exhibited for 28 days from Wednesday, 16 July 2008. No submissions were received.

Adoption of the draft Plan, as exhibited, will enable a dwelling house to be established on the subject site.

The draft Plan, as exhibited, can be forwarded to the Minister to make the Plan.

**RECOMMENDATION:**

**That Council:**

- 1. Adopts draft Tweed Local Environmental Plan 2000, Amendment No 82, as exhibited.**
- 2. Obtains any necessary advice from Parliamentary Counsel with respect to the draft Plan and prepare and furnish a section 69 report in respect of the draft *Tweed Local Environmental Plan 2000 (Amendment No. 83)*, as exhibited, to the Minister, requesting the Plan be made in accordance with Section 70 of the *Environmental Planning & Assessment Act 1979*.**

**REPORT:****Background**

In 1979 a subdivision was created by the dedication of a road reserve through Lots 16 and 17 DP574016. The road split the previous two (2) lots into four (4) lots on DP582869. Lots 1 and 2 on DP58769 had one dwelling entitlement between them based on the original lot entitlement. A restrictive covenant was placed on Lot 1 which prevented the erection of a dwelling on it without the consent of the registered proprietor of Lot 2. This covenant also required the owner of Lot 1 to agree to any future application for a dwelling on Lot 2. There was no covenant on Lot 2, which was purchased by Mr and Mrs McDonald in 1979.

In 1985 the solicitor acting for the owner of Lot 1 requested Mr and Mrs McDonald to sign a consent to allow the construction of a dwelling on Lot 1. In this letter to Mr and Mrs McDonald the solicitor advised that their consent to allow a dwelling on Lot 1 "*in no way affects you or your property and that such consent is a mere formality as required by the Local Authority*". This statement was entirely misleading as far as the legal position is concerned.

A building application for Lot 1 was submitted and approved by Council. The procedure at that time was to allow the building entitlement to be on either allotment in these circumstances, i.e. subdivisions created by roads, if there was agreement between the separate owners. Council's procedures have changed over time whereby all of the landowners must grant consent to the lodgement of a Development Application where there are multiple parcels of land that share an entitlement or are affected by the application.

Mr and Mrs McDonald lodged a complaint with the NSW Ombudsman about the matter after receiving several letters from Council that there were no measures available for Council to grant another building entitlement for Lot 2. An extract of the Ombudsman's letter (dated 7 December 2005) is as follows:

*"I have been told that although Council appreciates the unfortunate circumstances, Council considers it was under no obligation to ensure that the landowners of Lot 2 were cognisant of the impact of granting their consent for the construction of a dwelling on Lot 1. Council maintains that its only obligation was to ensure the consent from the owners of Lot 2 was obtained prior to the assessment of the development application (DA) for Lot 1.*

*I understand that Council's procedures have since changed. In such cases Council now requires a DA to be lodged which includes all parcels of the land that share the entitlement and that all landowners must grant consent for the lodgement of the DA. This approach should ensure that, before granting such consent, affected landowners are aware of the possible consequences the development may have on their own lot and entitlements.*



*It appears likely that the McDonalds genuinely believed that this consent would not impact on their own property rights, particularly their own right to build a dwelling on Lot 2. It also appears that Council staff could have been more prudent in examining the wording of the 'consent letter' and clarifying this with the complainants.*

*Even though we do not consider there is sufficient public utility in pursuing this matter, having reviewed the circumstances of this matter and the seriousness of its consequences for the complainants, I suggest Council further considers possible outcomes for resolving their unfortunate situation."*

On 7 February 2006 Council resolved that:

- "1. Council makes representations to the Department of Planning in Grafton to ascertain whether an exception can be made to the Far North Coast Rural Settlement Policy for Mr and Mrs McDonald in view of their special circumstances;*
- 2. The NSW Ombudsman be advised accordingly".*

A response on the matter was received from the Department of Planning on 28 March 2006. An extract of the Department's letter is noted below:

*"It would appear that there are limited options available to resolve this issue. As the provision limiting a house in the rural areas to lots of at least 40 hectares is contained in the table of uses, it is not a development standard that is subject to State Environmental Planning Policy No. 1.*

*The only other option is to amend the Tweed LEP 2000 to specifically allow a dwelling on the individual lot. However, it is not clear what sort of precedent this would set for other lots in the Shire in a similar situation. The minister has also been reluctant to consider spot re-zonings, preferring Councils to put resources into a new shire wide plan under the Governments planning reforms. In such circumstances, Council would have to make a persuasive case to treat such a proposal outside the normal course of LEP amendments".*

Council resolved on 2 May 2006 that:

- "1. Council informs the Director-General of the Department of Planning that pursuant to section 54(1) of the Environmental Planning and Assessment Act, 1979 Council intends to prepare a draft Local Environmental Plan to amend Schedule 3 of Tweed Local Environmental Plan 2000 to enable a dwelling house to be established on Lot 2 DP582869 Cavendish Road, Duroby;*
- 2. Council advises the Director-General that it does not consider a Local Environmental Study is needed;*
- 3. Council staff prepare a detailed submission to address the section 117 Ministerial directions and the proforma for the LEP Review Panel in view of the exceptional circumstances of Mr and Mrs McDonald".*

The Department of Planning replied on 10 December 2006, noting the following:

*“Council should continue with the preparation of the draft LEP. The Department recognises that the issues relating to this parcel of land has existed for many years, and given the recommendations of the Ombudsman, would support the Council taking action to resolve the issue”.*

The Department also advised that there is no need for an environmental study to be prepared in respect of the draft LEP. As such, sections 57 and 61 of the EP&A Act do not apply and consultation with the Department under section 62 of the Act is not required in this instance.

### **Public Exhibition**

Pursuant to Section 66 of the *Environmental Planning and Assessment Act 1979*, draft Local Environmental Plan 2000, Amendment No 82 was placed on public exhibition from Wednesday, 16 July 2008 to Wednesday, 13 August 2008. See Locality Plan, Aerial Photo and Zoning Map below.


No submissions to the exhibition of the draft Plan were received.

**LOCALITY PLAN:**

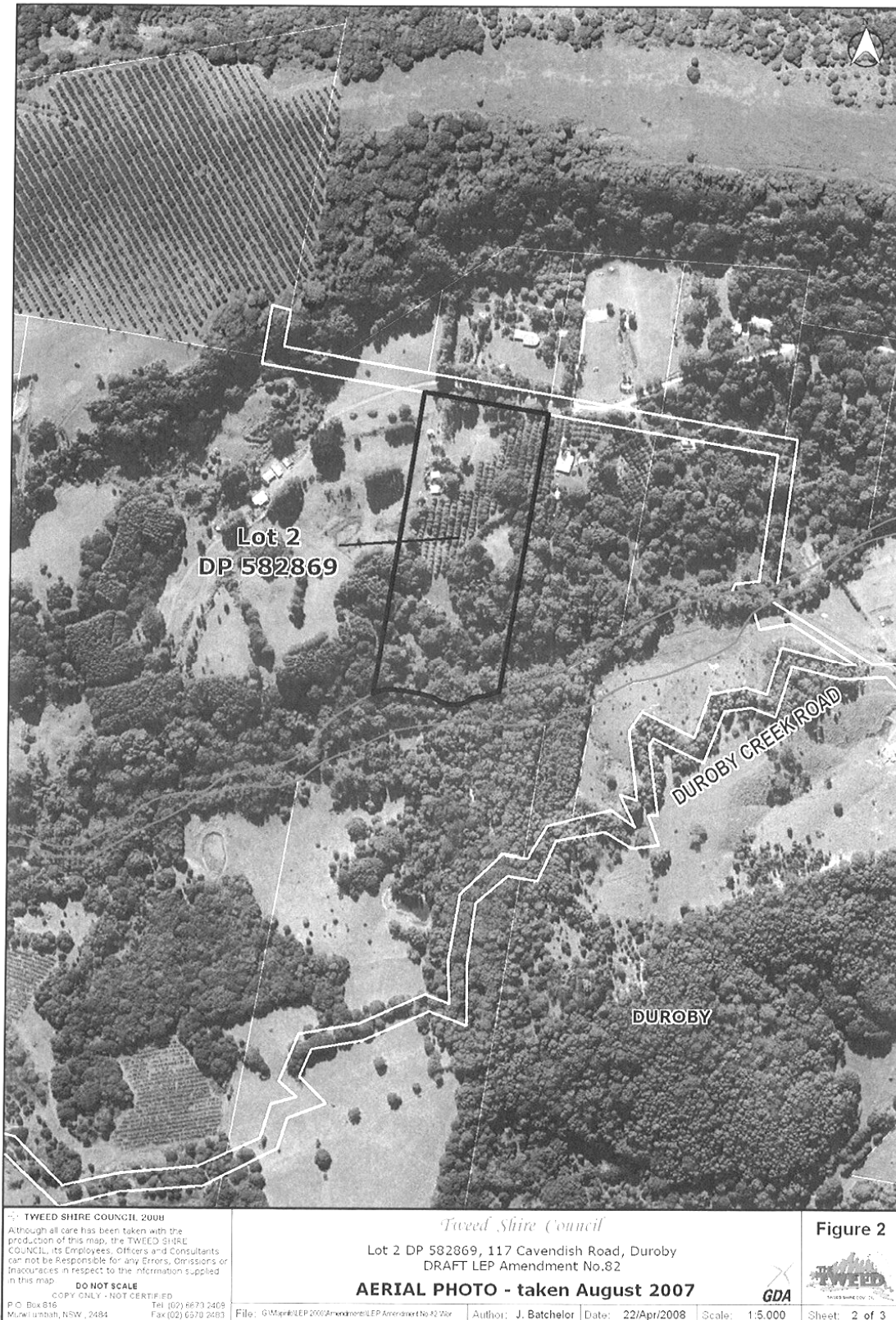


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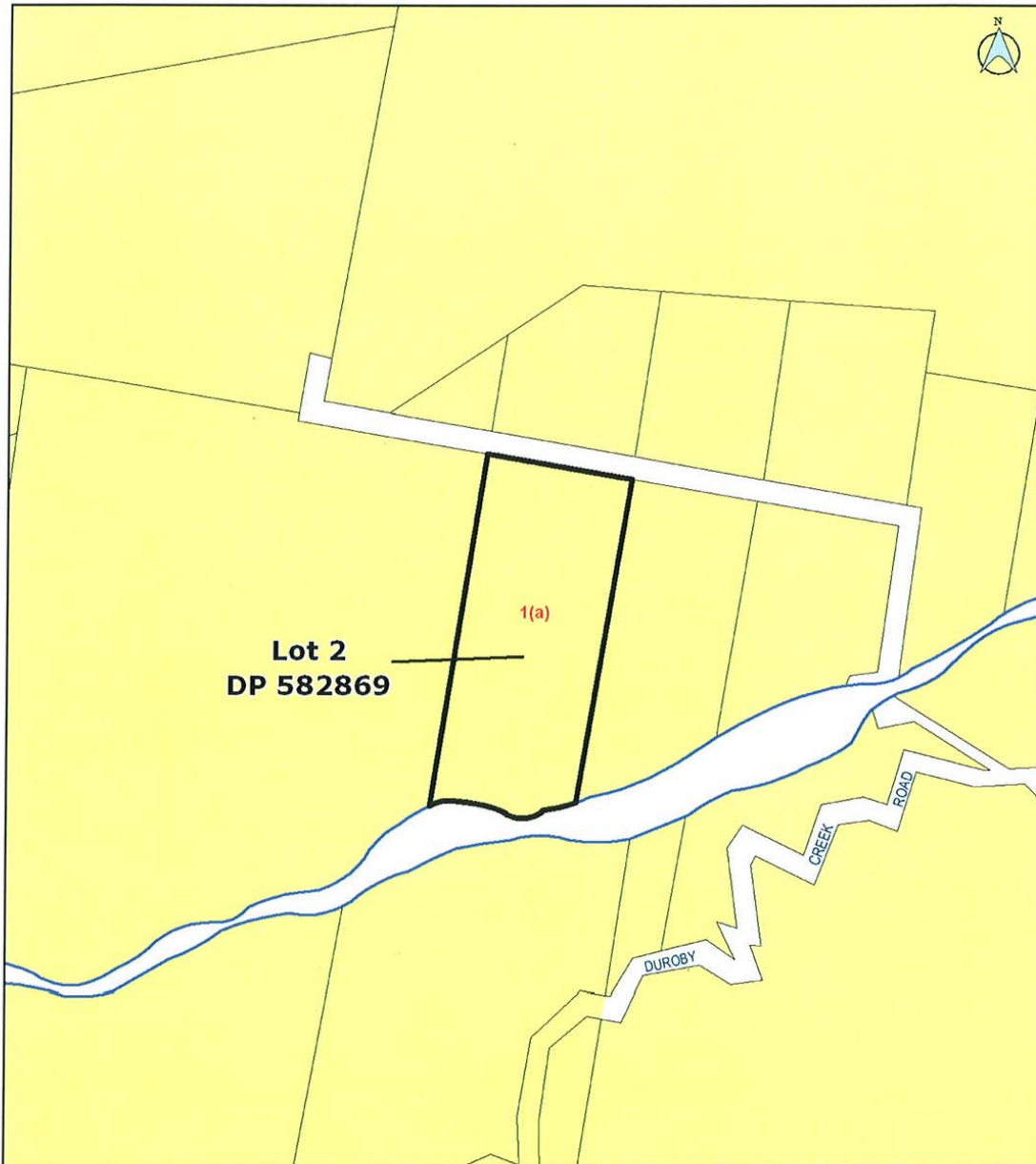
*Tweed Shire Council*  
 Lot 2 DP 582869, 117 Cavendish Road, Duroby  
 DRAFT LEP Amendment No.82  
**LOCALITY PLAN**  
 GDA  
 File: G:\Map\LEP 2000\Amendments\LEP Amendment No.82\Wkr  
 Author: J. Batchelor Date: 22/Apr/2008 Scale: 1:5,000

**Figure 1**  
  
 Sheet: 1 of 3

**AERIAL PHOTO:**



ZONING MAP:



LEGEND - TWEED LOCAL ENVIRONMENT PLAN 2000			
<b>RURAL</b> 1(a) Rural 1(b1) Agricultural Protection 1(b2) Agricultural Protection 1(c) Rural Living <b>RESIDENTIAL</b> 2(a) Low Density Residential 2(b) Medium Density Residential 2(c) Urban Expansion 2(d) Village 2(e) Residential Tourist 2(f) Tourism	<b>BUSINESS</b> 3(a) Sub-Regional Business 3(b) General Business 3(c) Commerce and Trade 3(d) Waterfront Enterprise 3(e) Special Tourist <i>(Jack Evans Southside)</i> <b>INDUSTRIAL</b> 4(a) Industrial <b>SPECIAL USES</b> 5(a) Special Uses <b>OPEN SPACE</b> 6(a) Open Space 6(b) Recreation	<b>ENVIRONMENTAL PROTECTION</b> 7(a) Environmental Protection (Wetlands & Littoral Rainforests) 7(a) Environmental Protection (Scenic / Escarpment) 7(f) Environmental Protection (Coastal Lands) 7(i) Environmental Protection (Habitat) <b>NATIONAL PARKS &amp; NATURE RESERVES</b> 8(a) National Parks and Nature Reserves	<b>ADDITIONAL CONTROLS</b> Clause 37 (Transmission Line Corridor) Clause 38 (Future Roads) Clause 41 (Heritage Conservation Area) Clause 52 (Kings Beach / Kings Forest / Osprey Nest) Clause 52 (Pottsville) Clause 52 (Stormwater and Fill) Clause 52 (Minimum Lot Sizes) Clause 52 (Cobaki Lakes) Clause 52 (Existing and Future Dam Areas) Clause 53 (Schedule 3 Item)

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Tweed Shire Council  
 Lot 2 DP 582869, 117 Cavendish Road, Duroby  
 DRAFT LEP Amendment No.82  
**EXISTING LEP 2000**

File: G:\Map\LEP 2000\Amendments\LEP Amendment No.82\Map Author: J. Batchelor Date: 22/Apr/2008 Scale: 1:5,000

**Figure 3**  
  
 Sheet: 3 of 3

**CONCLUSION:**

Adoption of the draft Plan, as exhibited, will enable a dwelling house to be established on the subject site.

The draft Plan, as exhibited, can be forwarded to the Minister to make the Plan.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Nil.

**POLICY IMPLICATIONS:**

Nil.

**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).*

1. Nil
-

