

**TITLE: [PR-CM] Development Application DA09/0685 for a Two (2) Lot Subdivision at Lot 2 DP 772129, Hogan's Road, Bilambil**

**ORIGIN:**

**Development Assessment**

**FILE NO: DA09/0685 Pt1**

**SUMMARY OF REPORT:**

Council is in receipt of a development application to undertake a two (2) lot rural subdivision of a 95.23 hectare parcel of land zoned 1(a) Rural in Bilambil.

The proposed subdivision will result in the following configuration:-

Proposed Lot 1: Having an area of approximately 76.17 hectares with a frontage and access from Hogan's Road. This proposed lot also contains an existing dwelling house. However, a search of Council's records has revealed that this dwelling is not approved and therefore is unlawful.

Proposed Lot 2: Having an area of approximately 19.06 hectares and a frontage to Cavendish Road (unformed) and access is via an existing right of carriageway located off Duroby Creek Road. This proposed lot contains an existing dwelling house approved by Council via DA86/028 on 25/3/1986. The subject lot is benefited by a right of way through adjoining properties. The proposed subdivision will not alter the current access arrangements.

The lot as it currently exists (95.23ha) would enable a two lot subdivision that meets the minimum lot size of 40 ha for the zone. The applicant states that the purpose of the subdivision not complying with the 40 ha standard is to create two allotments of land capable of maintaining the rural character of the area and ensuring the protection of a scenic ridgeline and quality vegetation/wildlife corridor within the locality. The application as proposed would result in an approximate 52% variation to the standard, in terms of the size of proposed Lot 2.

Council Officers consider that the proposed lot layout has been designed to allow for proposed Lot 1 to be potentially further subdivided at some future date. Should this occur, it is considered that the end result would be contrary to the aims and objectives of the zone as well as the planning principles of the Rural Lands SEPP (2008).

Also, it must be noted that Cavendish Road is not a formed road. Access to proposed Lot 2 is to be via an existing right of carriageway which the dwelling of the subject allotment already uses.

Council's Development Control Plan Section A5 – Subdivision Code states that the maximum number of allotments to share in a right of way access is 5 allotments. Deposited Plans (DP 566611 and DP 246020) specify that 9 allotments are already

currently benefited or burdened by the right of carriageway. Given that the current access arrangements will not be altered by the subdivision the continued access arrangements are considered acceptable.

Given the magnitude of the variation to Council's development standard, Council Officers are unable to support the subdivision as proposed and are recommending refusal.

#### **RECOMMENDATION:**

**That Development Application DA09/0685 for a two (2) lot subdivision at Lot 2 DP 772129, Hogans Road, Bilambil be refused for the following reasons:**

- 1. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated compliance with the development standard as being unreasonable or unnecessary in accordance with State Environmental Planning Policy No. 1 – Development Standards.**
- 2. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated due consideration or compliance with State Environmental Planning Policy (Rural Lands) 2008 as the proposal will result in:**
  - development being incompatible with surrounding agricultural uses,**
  - potential to create land use conflicts**
  - the proposed subdivision not supporting or enhancing the agricultural production of the site.**
- 3. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated due consideration or compliance with the 1(a) zone objectives within Clause 11 of the Tweed Local Environmental Plan 2000, as the proposed development does not protect the rural character and amenity;**
- 4. Pursuant to Section 79C(1)(a)(i) the development proposal in seeking a subdivision for a residential purpose is not consistent with Clause 20(2)(a) of the Tweed Local Environmental Plan 2000, as the proposed Lot 2 is below the minimum requirement of 40 hectares.**
- 5. Pursuant to Section 79C(1)(c) the development site is not considered suitable for the development as proposed.**
- 6. Pursuant to Section 79C(1)(e) the proposed development will result in a development with a dwelling house located on an undersized allotment (Lot 2) that does not enjoy a dwelling entitlement.**
- 7. Pursuant to Section 79C(1)(e) the proposed development, is not within the public interest as the development would create and undersized lot (Lot 2) in the 1(a) Rural zone.**

**REPORT:**

**Applicant:** Mr B Ricker  
**Owner:** Ricker Pastoral Company Pty Ltd  
**Location:** Lot 2 DP 772129, Hogans Road, Bilambil  
**Zoning:** 1(a) Rural  
**Cost:** N/A

**BACKGROUND:**

Council is in receipt of a development application to undertake a two (2) lot rural subdivision of a 95.23 hectare parcel of land zoned 1(a) Rural in Bilambil.

Proposed Lot 1: Having an area of approximately 76.17 hectares with a frontage to Hogan's Road. This proposed lot also contains an existing dwelling house. However, a search of Council's records has revealed that this dwelling has no Council approval.

Proposed Lot 2: Having an area of approximately 19.06 hectares and a frontage to Cavendish Road (unformed) and access is via an existing right of carriageway located off Duroby Creek Road. This proposed lot contains an existing dwelling house approved by Council via DA86/028 on 25/3/1986

Clause 20 of the Tweed Local Environmental Plan 2000 allows for a minimum lot size of 40ha in the 1(a) zone; therefore, proposed Lot 2 does not comply with the development standard for subdivision in the zone. The application as proposed would result in an approximate 52% variation to the development standard.

It is considered that the lot as it currently exists (95.23ha) would easily enable a two lot subdivision that complies with the minimum lot size of 40ha in the 1(a) zone. However, the applicant states that the purpose of the non-compliant subdivision is to create two allotments of land capable of maintaining the rural character of the area and ensuring the protection of a scenic ridgeline and quality vegetation/wildlife corridor within the locality.

As Lot 2 is not complying with Clause 20 an objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) and the concurrence of the Department of Planning (DoP) was required.

The DoP wrote to Council on 17 December 2009 (copy attached) stating that they were concerned that if they were to approve concurrence of the application, a real potential exists for proposed Lot 1 to be further subdivided at some future date. Should this occur, it is considered likely that the end result would be contrary to the aims and objectives of the zone as well as the planning principles of the State Environmental Planning Policy (Rural Lands) 2008 (Rural Lands SEPP).

The DoP also enclosed with the response two (2) suggested options which Council was required to discuss with the applicant. These options proposed Lot 2 to be increased to 27 ha or 38 ha.

Council Officers referred these options to the applicant on 18 December 2009. The applicant responded via a letter dated 26 February 2010 (copy attached) stating that they do not wish to amend the application to either of the two options. This response was referred to the DoP for their further consideration.

On 26 March 2010, Council received a response from the DoP advising that Concurrence has been granted to vary the 40 ha subdivision development standard contained in Clause 20 of the Tweed LEP to permit the creation of an allotment of 19.06 ha. The DoP advised that Concurrence was granted in this instance for the following reasons:

- The proposed subdivision does not raise any issues of state or regional significance, and
- The agricultural viability of the proposed Lot 1 will be maintained.

The DoP also stated that *“it is difficult for concurrence to be refused based on the impact of future subdivision potential.”*

Council Officers disagree with these reasons and consider that the opportunity for potential subdivision is in fact a due planning consideration and is contrary to the aims and objectives of the zone as well as the planning principles of the Rural Lands SEPP.

Notwithstanding this, Council’s Development Engineer has raised concerns regarding proposed Lot 2 gaining lawful access. It must be noted that Cavendish Road is not a formed road. However, an existing right of carriageway nearby is also known as “Cavendish Road” and properties which are benefited and burdened by this right of carriageway use “Cavendish Road” as their address.

Council’s Development Control Plan Section A5 – Subdivision Code states that the maximum number of allotments to share in a right of carriageway access is five (5) allotments. Nine (9) allotments are already currently benefited or burdened by the right of carriageway and as such the subdivision does not alter this existing situation.

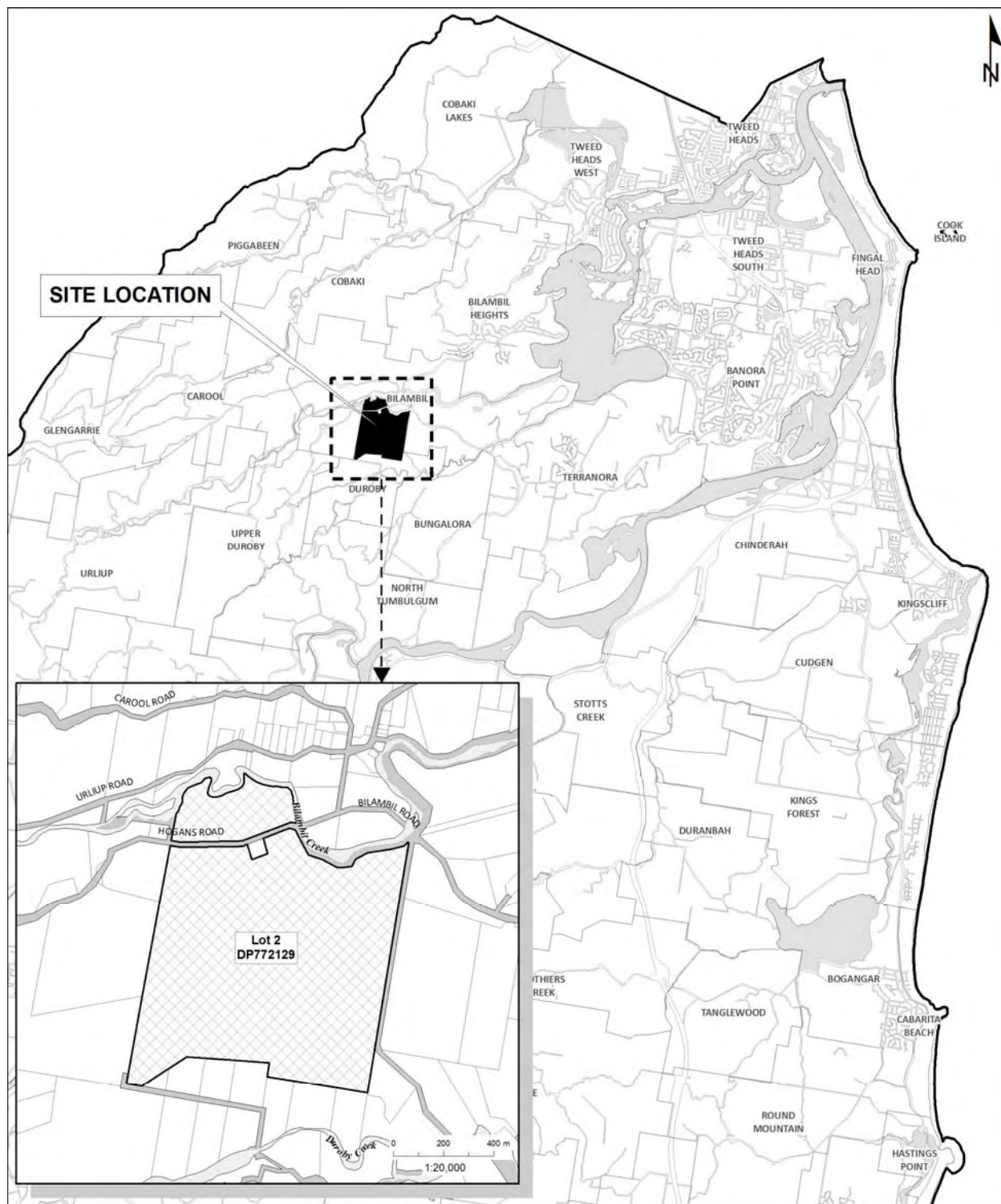
The subject land is described as Lot 2 DP 772129 and is known as Lot 2 Hogans Road, Bilambil. The subject site is of an irregular shape with a northern frontage to Hogans Road and an eastern frontage to Cavendish Road which is unformed. The land has a total site area of 95.23 hectares.

As discussed, the site contains two dwellings. One dwelling is located in the northern portion of the site and has access to Hogans Road. A search of Council’s records has revealed that this dwelling does not have the prior approval of Council and therefore is unlawful (this has also been confirmed by the applicant). A second dwelling also exists in the southern portion of the site, and currently gains access via an existing right of carriageway located off Duroby Creek Road. This dwelling house was approved by Council via DA86/028 on 25/3/1986.

The land that comprises proposed Lot 1 has previously been used for grazing; however, the land is currently used primarily as a macadamia crop with some continued grazing. The land that comprises proposed Lot 2 constitutes the southern part of the subject land and is made up of densely vegetated natural bushland. Access between the two proposed lots is restricted due to the steepness of the slope that makes up the northern

boundary of proposed Lot 2. The surrounding area is characterised by a mixture of small and large rural holdings.

**SITE DIAGRAM:**



**LOCALITY PLAN**

Lot 2 DP 772129,  
Hogans Road, Bilambil

0 0.5 1 1.5 2 Km  
1:100,000

Filename: z:\esri\planning\mxd\A4P\_B&W SitePlan.mxd

Author: J.Batchelor - Planning Reforms Unit

Date Printed: 04 May, 2010

Disclaimer: While every care is taken to ensure the accuracy of this data, Tweed Shire Council makes no representations or warranties expressed or implied, statutory or otherwise, about its accuracy, reliability, completeness or suitability for any particular purpose and disclaim all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which may be incurred as a result of data being inaccurate in any way and for any reason. This information is supplied for the general guidance and is to be considered indicative and diagrammatic only. It should not be used for survey or construction purposes and prior to any excavations a "Dial before You Dig" enquiry must be made by calling 1100. The information contained on this document remains valid for 30 days only from the date of supply.



Cadastre: 04 May, 2010  
© Dept. of Lands & Tweed Shire Council

Coordinate System - MGA Zone 56  
Datum - GDA 94

DO NOT SCALE  
COPY ONLY - NOT CERTIFIED

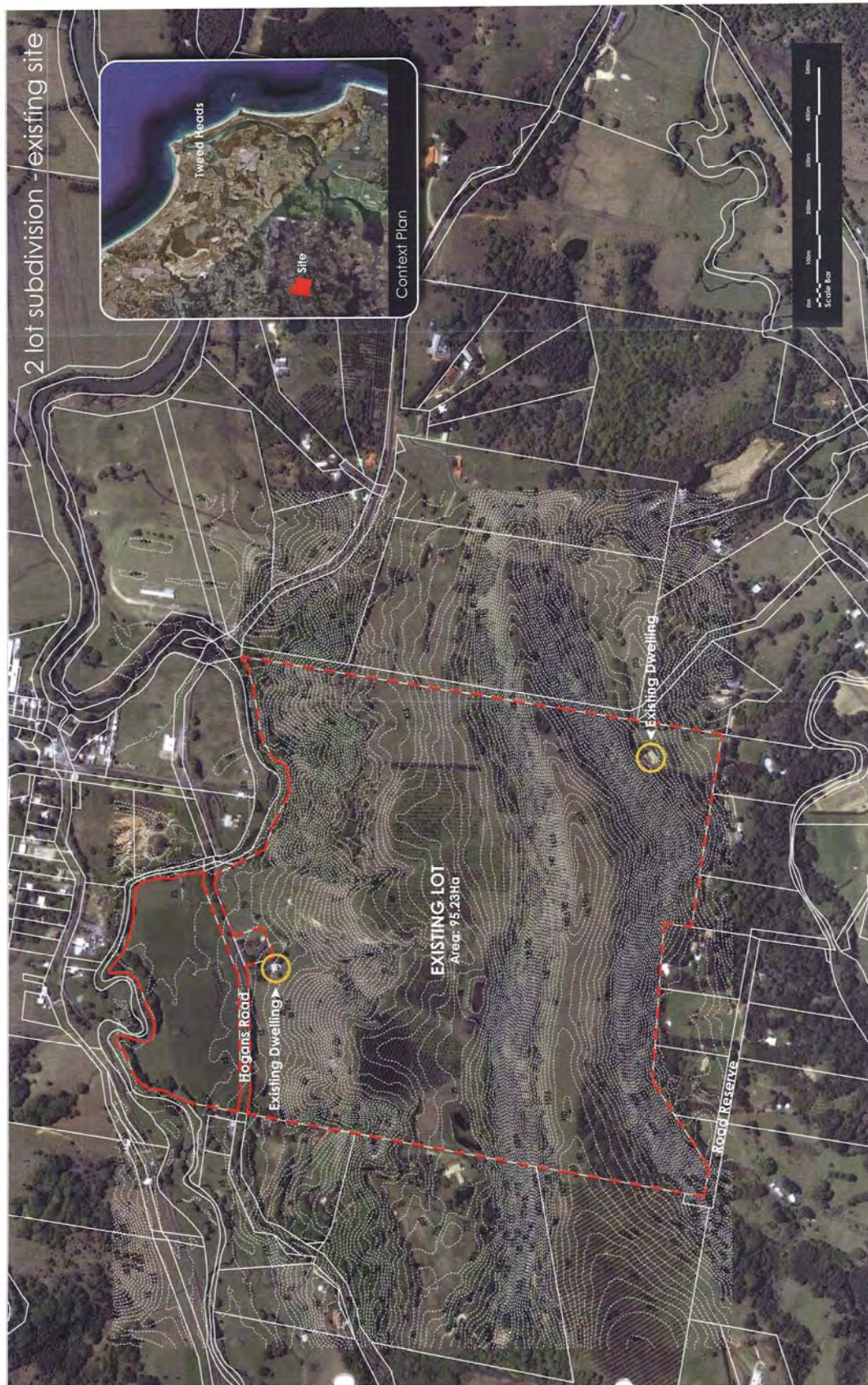
Civic and Cultural Centre  
3 Tumbulgum Road  
Murwillumbah NSW 2484  
PO Box 816  
Murwillumbah NSW 2484  
T: (02) 6670 2400 / 1300 292 872  
F: (02) 6670 2483  
W: www.tweed.nsw.gov.au  
E: planningreforms@tweed.nsw.gov.au



**TWEED**  
SHIRE COUNCIL



# DEVELOPMENT PLANS: Existing Lot Layout



2 lot subdivision - existing site

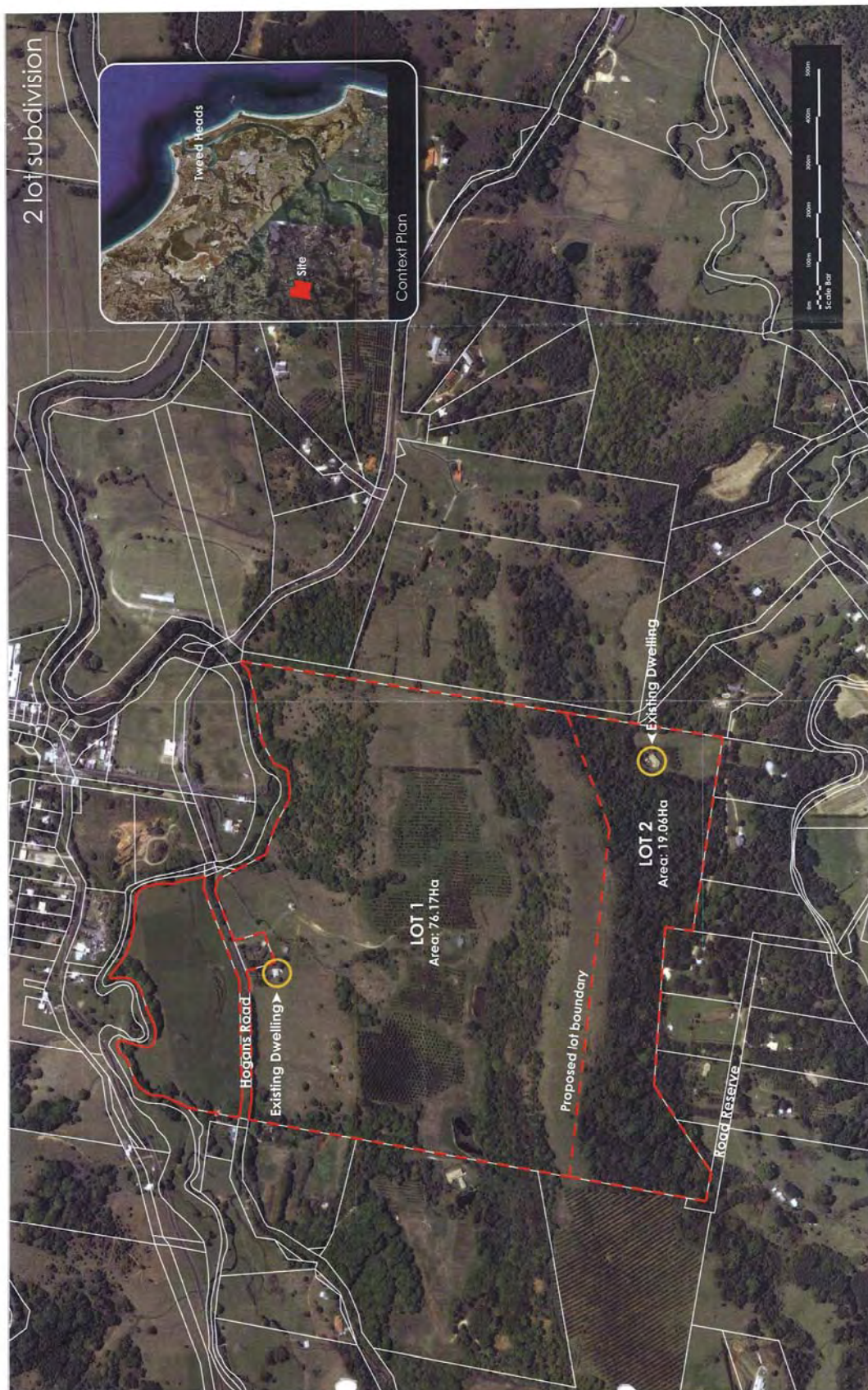
RICKER PASTORAL - 2 LOT SUBDIVISION  
EXISTING SITE

CURT  
DATE: SEPTEMBER 2009  
DRAWN: JB

PLANT CONSULTING  
Level 10/25, Pitt Street  
PO Box 250, Sydney NSW 1585  
Tel: 02 9551 1500  
www.plantconsulting.com.au



# Proposed Lot Layout



RICKER PASTORAL - 2 LOT SUBDIVISION

CURT: DATE: SEPTEMBER, 2009 DRAWN: JB

PLANIT CONSULTING

Level 1, 100 South Street, Tweed Heads NSW 2486  
PO Box 558, Tweed Heads NSW 2486  
Tel: 07 5533 1122 Fax: 07 5533 1123  
www.planitconsulting.com.au



## CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

### (a) (i) The provisions of any environmental planning instrument

#### Tweed Local Environmental Plan 2000

##### Clause 4 - Aims of the Plan

The proposed development is considered not to be consistent with the aims of the Tweed Local Environmental Plan. The proposed development is not considered to be consistent with the vision of the shire “to manage growth so that the unique natural and developed character of the Tweed Shire is retained.” The proposed development is for a two lot subdivision which does not comply with the development standards contained within the Tweed Local Environmental Plan 2000.

The proposed development is significantly non-complying with the Tweed LEP; therefore, it is considered not to be in keeping with the aim of the plan.

##### Clause 5 - Ecologically Sustainable Development

The proposed development is considered to be generally compliant with the principles of ecological sustainable development. The proposed development is considered to have minimal impact on the environment and in keeping with the precautionary principle, inter generational equity and the conservation of biological diversity and ecological integrity.

##### Clause 8(c) - Cumulative Impact

Clause 8(1)(c) Cumulative Impact: The proposed development, if approved, would be considered to create an adverse cumulative impact in the Shire. The Tweed Shire currently has a number of properties that have similar situations. The approval of this application would encourage other non conforming applications to be lodged. Therefore, the proposed development if approved would establish an adverse cumulative impact in the Shire.

##### Clause 11 - Zone objectives

The subject land is zoned 1(a) Rural. The objectives of the 1(a) Rural zone include:

###### *Primary objectives*

- *to enable the ecologically sustainable development of land that is suitable primarily for agricultural or natural resource utilisation purposes. and associated development.*
- *to protect rural character and amenity.*

### *Secondary objectives*

- *to enable other types of development that rely on the rural or natural values of the land such as agri- and eco-tourism.*
- *to provide for development that is not suitable in or near urban areas.*
- *to prevent the unnecessary fragmentation or development of land which may be needed for long-term urban expansion.*
- *to provide non-urban breaks between settlements to give a physical and community identity to each settlement.*

The proposed subdivision's configuration and proposed lot sizes will have a significant impact on the agricultural potential of the site, particularly for Lot 1 as Lot 2 will be used for the purpose of a rural residential allotment. This configuration may lead to rural land use conflicts which will result in the rural character and amenity being compromised.

Also, approval of an allotment substantially below the development standard, that will then allow the potential lawful creation of an additional allotment, contradicts the objective of protecting rural character and amenity by allowing the creation of smaller holdings that cannot be suitably used for agricultural pursuits.

The proposal is therefore not consistent with the relevant zone objectives.

### Clause 15 - Essential Services

Water supply is currently provided to each dwelling house by rainwater tanks. Onsite effluent treatment and disposal systems exist for each dwelling house.

Electricity and telecommunications are connected to both existing dwellings on the land. No additional infrastructure or physical works are required to service the proposed subdivision.

### Clause 20 - Subdivision

This clause requires a minimum allotment size of 40 hectares in the 1(a) zone. The proposed lots do not comply with this development standard. An objection under State Environmental Planning Policy No.1 has been prepared by the applicant in this regard and is addressed later in this report.

### Clause 57 – Protection of Existing Dwelling Entitlement

The proposed subdivision will result in proposed Lot 2 being under the minimum allotment size, and therefore, should the application be approved Lot 2 will not enjoy a dwelling entitlement in accordance with the Tweed LEP. Clause 57 does not provide for the protection of these existing dwelling entitlements as the allotments are not being created for public purpose. In this case, for the existing dwelling to remain lawful, existing use provisions will allow the continuation of previous rights to have a dwelling house on the parcel of land. However, this may create some restrictions should the owners of these allotments intend on doing future development or building works.

## **SEPP (North Coast Regional Environmental Plan) 1988**

### **Clause 12: Impact on agricultural activities**

The council shall not consent to an application to carry out development on rural land unless it has first considered the likely impact of the proposed development on the use of adjoining or adjacent agricultural land and whether or not the development will cause a loss of prime crop or pasture land.

The proposed subdivision will create an undersized allotment (proposed Lot 2) that will not have any agricultural viability and will essentially be a rural residential allotment. Also, approval of this subdivision will potentially lead to further subdivision of proposed Lot 1 which will affect the continuance and potential productive sustainable activities to be undertaken on the property.

### **SEPP No. 1 - Development Standards**

As discussed, the applicant seeks to vary the development standard identified within Clause 20 (2)(a) of the Tweed LEP, specifically seeking variance to the 40 hectare minimum lot size development standard for the 1(a) zone.

Clause 20(2)(a) states:

- (2) Consent may only be granted to the subdivision of land:
- (a) within Zone 1(a), 1(b2), 7(a), 7(d) or 7(l) if the area of each allotment created is at least 40 hectares

The underlying objectives of the development standard are to prevent the fragmentation of rural land, ensure the scenic and natural environments are protected and maintain agricultural viability.

The SEPP 1 objection relates to proposed Lot 2 being below 40 hectares. The applicant contends that *the proposed development raises no matters of adverse significance in local, regional or state terms and no public benefit will result from the maintenance of the subject development standard in this case.*

A SEPP No. 1 submission may be supported where the applicant demonstrates that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case and specifies the grounds of that objection. The applicant must also demonstrate consistency with the aims of the SEPP.

**In support of the proposed variation, the applicant has provided the following:**

- *The proposal clearly identifies two distinct and separate landforms within the existing rural allotment, with one land area (proposed Lot 1) lending itself to continued rural/agricultural land use, whereas the land area of proposed Lot 2, due to the constraints of very steep slopes to either side of a ridge and significant remnant vegetation across this ridge, is unlikely*



*to be considered suitable for agricultural pursuits now or in the future. Taking this into consideration the subdivision design has seen the location of the proposed boundary following approximately the line of the vegetation to the northern toe of the slope of the ridge. This ensures that all of the existing cleared and economically viable agricultural land is contained within the boundary of proposed Lot 1.*

- *The proposal is considered to be sustainable in that to maintain the land area of proposed Lot 2, within the existing site area, is costly to the land owner as the small cleared area of the site that contains the dwelling and a small number of macadamia trees cannot be accessed from the area of the site that will become Lot 1. To gain access to this part of the site south of the ridge requires a trip of approximately 4.5km by road in one direction. This along with having to maintain the additional dwelling, fencing and this cleared area south of the ridge is an expense that is not considered by the proponent to be economically viable into the future and affects the land owners ability to continue to operate the greater land area north of the ridge, as finances are unnecessarily expended maintaining the area south of the ridge for no return.*
- *The subdivision design also ensures that the larger proposed land parcel (Lot 1) cannot be later subdivided as the design provides for a land area of 76.17 hectares and the Rural 1(a) zoning requires subdivided land to have a minimum allotment size of 40 hectares. To further subdivide this land parcel would not be considered appropriate and would not meet the objectives of Clause 20 of the LEP as much of this area is unconstrained land in regard to agricultural use.*
- *The land area that is considered useable for present and future agricultural activities is wholly contained within proposed Lot 1 which ensures that this land is not fragmented and provides for the continuance of the use of this land for agricultural pursuits.*
- *It is clear that the proposed subdivision would not fragment ownership of rural land that would adversely affect the continuance of sustainable agricultural units within the locality.*
- *The existing site currently contains two dwellings. One dwelling is located along Hogans Road with access to this road and the other is located with access via Cavendish Road. These two dwellings are separated by the ridge to the south of the site and neither dwelling can be accessed from the other through the site due to the steep slopes of the ridge and existing dense vegetation on these slopes. Essentially these two dwellings are contained within different catchments divided by the ridge line. The dwelling on Hogans Road is contained within that catchment associated with Bilambil Creek and the dwelling on Cavendish Road is within that catchment associated with Duroby Creek.*
- *It is not considered that this proposed subdivision would generate pressure to allow isolated residential development as both dwellings already exist and the two areas of the existing site either side of the ridge essentially function as if they were two separate properties. The area*

*south of the ridge is characterised by smaller rural residential land holdings. Many of these allotments do not contain agricultural pursuits but are largely covered with native vegetation and this would be the case with proposed Lot 2, although some potential remains for small scale rural/agricultural activities on this proposed lot.*

- *It is submitted that the proposed subdivision design protects both the ecological and scenic values of the land. The scenic values of the site are recognised as the heavily vegetated slopes of the ridgeline which dominates the site and is visible to many locations within the Bilambil Creek Catchment and the Duroby Creek catchment. The ecological values of the site are also largely contained within this area of the site which is proposed to be contained almost entirely within proposed Lot 2. The existing vegetation will be maintained as no clearing of vegetation is required or proposed under this application.*
- *Through this subdivision the upper slopes of the ridge will be protected, as the only area not constrained by the steepness of the slope has already been cleared in the southwest corner (location of the dwelling on proposed Lot 2) and it would be inappropriate to clear any of the steep sloping areas for any agricultural purpose. By subdividing this area of scenic and ecological importance from the area containing proposed Lot 1 this will ensure that cattle are not encroaching into this remaining pocket of healthy bushland as the boundary will be fenced.*

*By separating proposed lot 2 from the remainder of the site through this subdivision the lot will essentially become a rural residential allotment similar to many of the smaller allotments along Cavendish Road. This in itself will ensure the protection of the scenic and ecological values of this area of the site to the locality along with the fact that the majority of the area of proposed Lot 2 is severely constrained in regard to topography and existing vegetation.*

- *The proposal further protects the ecological value of the land by maintaining a large lot in proposed Lot 1, which has pockets of vegetation on the steeper lower slopes north of the ridge. The size of the Lot to be maintained will ensure that these pockets of vegetation can also be retained whilst leaving ample area of land for continuing agricultural pursuits.*

#### **Assessment of the applicant's submission:**

The following assessment of the SEPP No. 1 objection is based on the principles set by Chief Justice Preston (*Wehbe v Pittwater Council [2007] NSW LEC 827*).

1. *The applicant must satisfy the consent authority that "the objection is well founded" and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

Comment:

It is considered that all the reasons outlined above do not attest the development standard as being unreasonable or unnecessary as the existing allotment being 95.23 ha is large enough to allow a two lot subdivision to be compliant with Council's subdivision development standard being 40 ha. It is clearly evident that the applicant has disregarded Council's development standard to enable the land to be configured to allow for future subdivision potential.

2. *The consent authority must be of the opinion that "granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3".*

The aims of the policy are as follows:

*"This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act".*

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Comment:

The proposed development will affect the proper management, conservation of natural resources and the promotion and co-ordination of the orderly and economic use of the land as it is fragmenting productive rural land for the purpose of configuring allotments to allow for potential future subdivision. The proposed departure is significant and granting consent to such would be inconsistent with the aims of the Policy.

3. *The consent authority must be satisfied that a consideration of the matters in clause 8(a) "whether non-compliance with the development standard raises any matters of significance for State or regional environmental planning; and (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Comment:

The proposed non-compliance raises matters for state and regional planning. On a state level the DoP has gazetted SEPP (Rural Lands) 2008, which gives directions for Councils when considering an application to which the SEPP



applies. Approval of an allotment substantially below the development standard which will then allow for the potential lawful creation of an additional allotment contradicts the rural planning and subdivision principles within the SEPP. This has been discussed in greater depth below.

Also, on a regional level, approval of this subdivision will undermine the integrity of the Tweed LEP 2000 and create a precedent through the creation of an undersized allotment from a lot that currently exceeds the minimum lot size.

Chief Judge Preston also expressed the view that there are five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment:

Whilst the comments are noted from the applicant, the creation of a substantially undersized allotment is contrary to the objectives of the zone and the development standard, particularly when there is sufficient land area to allow two compliant lot sizes. It is considered that the proposal is likely to create conditions that will cause the fragmentation of rural land.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment:

The underlying objective and purpose of the standard is to restrict lot sizes so as not to cause the fragmentation of rural land. The submission of an undersized allotment when a compliant size can be achieved is considered unnecessary in this case.

3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment:

If compliance was required, the underlying purpose would be achieved.

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

Comment:

The creation of a non-conforming lot size when a conforming lot size can easily be achieved is seen to undermine the integrity of the Tweed LEP 2000 and accordingly, it is not considered reasonable or necessary to vary from the

minimum lot sizes established within Clause 20(2)(a). The creation of an undersized lot from a lot that currently exceeds the minimum lot size will set an undesirable precedent.

5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment:

The zoning of the area is appropriate and the surrounding locality has rural character and agricultural uses have been established.

### **SEPP (Rural Lands) 2008**

The land is within the 1(a) Rural Zone and the provisions of this SEPP apply to the proposed development.

### **Clause 7 Rural Planning Principles**

The principles are stated and addressed as follows:

*The Rural Planning Principles are as follows:*

- (a) *the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas,*
- (b) *recognition of the importance of rural lands and agriculture and the changing nature of agriculture and of trends, demands and issues in agriculture in the area, region or State,*
- (c) *recognition of the significance of rural land uses to the State and rural communities, including the social and economic benefits of rural land use and development,*
- (d) *in planning for rural lands, to balance the social, economic and environmental interests of the community,*
- (e) *the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land,*
- (f) *the provision of opportunities for rural lifestyle, settlement and housing that contribute to the social and economic welfare of rural communities,*
- (g) *the consideration of impacts on services and infrastructure and appropriate location when providing for rural housing,*
- (h) *ensuring consistency with any applicable regional strategy of the Department of Planning or any applicable local strategy endorsed by the Director-General.*

The proposed development is not consistent with the rural planning principles as the lot configuration does not promote and protect opportunities for current and potential productive and sustainable economic activities.

Also, it is considered that the creation of an undersized allotment is not in the social, economic and environmental interests of the community as it will create unwanted precedence.

#### Clause 8 - Rural Subdivision Principles

The principles are stated and addressed as follows:

*The Rural Subdivision Principles are as follows:*

- (a) *the minimisation of rural land fragmentation,*
- (b) *the minimisation of rural land use conflicts, particularly between residential land uses and other rural land uses,*
- (c) *the consideration of the nature of existing agricultural holdings and the existing and planned future supply of rural residential land when considering lot sizes for rural lands,*
- (d) *the consideration of the natural and physical constraints and opportunities of land,*
- (e) *ensuring that planning for dwelling opportunities takes account of those constraints.*

The proposed undersized allotment is not considered to be in accordance with the Clause 8 rural subdivision principles as the subdivision will lead to unnecessary land fragmentation because a compliant lot size is achievable.

#### Clause 10 - Matters to be considered in determining development applications for rural subdivisions or rural dwellings

The matters to be considered in determining a development application are stated and addressed as follows:

- (1) *This clause applies to land in a rural zone, a rural residential zone or an environment protection zone.*
- (2) *A consent authority must take into account the matters specified in subclause (3) when considering whether to grant consent to development on land to which this clause applies for any of the following purposes:*
  - (a) *subdivision of land proposed to be used for the purposes of a dwelling,*
  - (b) *erection of a dwelling.*
- (3) *The following matters are to be taken into account:*
  - (a) *the existing uses and approved uses of land in the vicinity of the development,*
  - (b) *whether or not the development is likely to have a significant impact on land uses that, in the opinion of the consent authority, are likely to be preferred and the predominant land uses in the vicinity of the development,*



- (c) *whether or not the development is likely to be incompatible with a use referred to in paragraph (a) or (b),*
- (d) *if the land is not situated within a rural residential zone, whether or not the development is likely to be incompatible with a use on land within an adjoining rural residential zone,*
- (e) *any measures proposed by the applicant to avoid or minimise any incompatibility referred to in paragraph (c) or (d).*

As stated continually throughout this report, approval of an allotment substantially below the development standard, which will then allow for the potential lawful creation of an additional allotment, contradicts the rural planning and subdivision principles within the SEPP. Approval of this application will almost ensure a third dwelling will be able to be built on the subject land which is likely to have a significant impact on adjoining land uses and may cause potential land use conflicts.

**(a) (ii) The Provisions of any Draft Environmental Planning Instruments**

Council is preparing a new Shire-wide Local Environmental Plan based upon the NSW Department of Planning LEP Standard Instrument template. The Draft Tweed Local Environmental Plan 2010 (draft LEP) was placed on public exhibition from 27 January to 31 April 2010.

The draft LEP proposes to rezone the subject site from 1(a) Rural to RU2 Rural landscape. The objectives of the RU2 zone include:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To provide for a range of tourist accommodation-based land uses, including agri-tourism, eco-tourism and any other like tourism that is linked to an environmental, agricultural or rural industry use of the land, such as bush foods, forestry, crafts and the like.*

The subdivision development standard is to be unchanged and will remain as 40 ha. It is considered that the proposed subdivision will not achieve the objectives of the zone as it will compromise the rural landscape character of the land.

Also, as part of these reforms, the use of SEPP 1 will be superseded by Clause 4.6 of the draft LEP which contains provisions to enable exceptions to development standards within the draft LEP.

Clause 4.6(6) states:

*Consent must not be granted under this clause for a subdivision of land in zone ...RU2... if:*

- a) *The subdivision will result in 2 or more lots of less the minimum area specified for such lots by a development standard, or*

- b) *The subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Therefore, as proposed Lot 2 is to be only 19.06 ha, Council would not be able to consider the application as submitted as the proposal has a variation of 52%.

**(a) (iii) Development Control Plan (DCP)**

Tweed Development Control Plan

A5-Subdivision Manual

Council's Development Engineer has reviewed the application with respect to the provisions of Section A and has advised the following:

With regard to access, the application states within their Statement of Environmental Effects that:

*"Proposed Lot 1 will gain access from Hogans Road, while proposed Lot 2 will gain access off Cavendish Road. Both of these roads are sealed rural roads" and "Cavendish Road is not wholly contained within the dedicated road reserves in this area."*

The above statements are incorrect as Cavendish Road is not a formed road. However, an existing right of carriageway nearby located off Duroby Creek Road is also known as "Cavendish Road" and properties which are benefited and burdened by this right of carriageway use "Cavendish Road" as their address.

Council's Development Control Plan Section A5 – Subdivision Code states that the maximum number of allotments to share in a right of carriageway access is five (5) allotments. It is noted that Deposited Plans 246020 & 566611 (adjoining properties to the south of the subject lot) both have a right of carriageway created in 1974 servicing 9 different allotments the proposed subdivision does not alter the current access arrangements and are considered acceptable.

**(a) (iv) Any Matters Prescribed by the Regulations**

Bushfire

The application required an Integrated Referral to the NSW Rural Fire Service due to the bushfire prone nature of the land. In a response dated 15 December 2009, a Bushfire Safety Authority was granted subject to certain conditions of consent.

- (b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality**

Investigation of the likely impacts of the proposal upon the built or natural environment is not considered to be required in light of the concerns detailed earlier in this report.

**(c) Suitability of the site for the development**

Given the earlier comments detailed within this report, the subject land is not suitable for the development as proposed.

**(d) Any submissions made in accordance with the Act or Regulations**

The application did not require notification under Council's Notification Policy.

**(e) Public interest**

The proposed subdivision is considered to compromise the public interest as it is not in accordance with both State and Local planning policies and the subdivision will create an undersized allotment to potentially create an additional allotment.

**OPTIONS:**

1. Determine the application in accordance with the recommendation.
2. Support the proposal and request appropriate conditions for approval be submitted to the next Council Meeting.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Should the applicant be dissatisfied with the decision of the determination the applicant may determine to lodge an appeal with the Land & Environment Court.

**POLICY IMPLICATIONS:**

Should the recommendation of this report not be upheld, no direct policy implications will occur, however a precedent will be set for similar applications to be approved.

**CONCLUSION:**

Council Officers consider that approval of an allotment substantially below the development standard, will allow for the potential lawful creation of an additional allotment, thus the proposal is contrary to the zone objectives and the rural planning and subdivision principles within State and Local Environmental Planning Policy Frameworks.

**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. Letter from the Department of Planning dated 17 December 2009 (ECM 15981438)

2. Letter from the applicant dated 26 February 2010 (ECM 15980433)
-

**TITLE: [PR-CM] Development Application DA09/0685 for a Two (2) Lot Subdivision at Lot 2 DP 772129, Hogan's Road, Bilambil**

**ORIGIN:**

**Development Assessment**

**FILE NO: DA09/0685 Pt1**

**SUMMARY OF REPORT:**

At its meeting on 18 May 2010, Council considered an application to undertake a two (2) lot rural subdivision of a 95.23 hectare parcel of land zoned 1(a) Rural in Bilambil.

Council Officers recommended refusal of the application, however, the Council resolved as follows:

*“that this item be deferred for further consultation and Workshop with Council.”*

Since the previous meeting a Councillor workshop was held on 25 May 2010.

The original report has been resubmitted for Council's determination.

**RECOMMENDATION:**

**That Development Application DA09/0685 for a two (2) lot subdivision at Lot 2 DP 772129, Hogans Road, Bilambil be refused for the following reasons:**

- 1. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated compliance with the development standard as being unreasonable or unnecessary in accordance with State Environmental Planning Policy No. 1 – Development Standards.**
- 2. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated due consideration or compliance with State Environmental Planning Policy (Rural Lands) 2008 as the proposal will result in:**
  - development being incompatible with surrounding agricultural uses,**
  - potential to create land use conflicts**
  - the proposed subdivision not supporting or enhancing the agricultural production of the site.**
- 3. Pursuant to Section 79C(1)(a)(i) the development proposal has not demonstrated due consideration or compliance with the 1(a) zone objectives within Clause 11 of the Tweed Local Environmental Plan 2000, as the proposed development does not protect the rural character and amenity;**



- 4. Pursuant to Section 79C(1)(a)(i) the development proposal in seeking a subdivision for a residential purpose is not consistent with Clause 20(2)(a) of the Tweed Local Environmental Plan 2000, as the proposed Lot 2 is below the minimum requirement of 40 hectares.**
- 5. Pursuant to Section 79C(1)(c) the development site is not considered suitable for the development as proposed.**
- 6. Pursuant to Section 79C(1)(e) the proposed development will result in a development with a dwelling house located on an undersized allotment (Lot 2) that does not enjoy a dwelling entitlement.**
- 7. Pursuant to Section 79C(1)(e) the proposed development, is not within the public interest as the development would create an undersized lot (Lot 2) in the 1(a) Rural zone.**

**REPORT:**

**Applicant:** Mr B Ricker  
**Owner:** Ricker Pastoral Company Pty Ltd  
**Location:** Lot 2 DP 772129, Hogans Road, Bilambil  
**Zoning:** 1(a) Rural  
**Cost:** N/A

**BACKGROUND:**

Council is in receipt of a development application to undertake a two (2) lot rural subdivision of a 95.23 hectare parcel of land zoned 1(a) Rural in Bilambil.

Proposed Lot 1: Having an area of approximately 76.17 hectares with a frontage to Hogan's Road. This proposed lot also contains an existing dwelling house. However, a search of Council's records has revealed that this dwelling has no Council approval.

Proposed Lot 2: Having an area of approximately 19.06 hectares and a frontage to Cavendish Road (unformed) and access is via an existing right of carriageway located off Duroby Creek Road. This proposed lot contains an existing dwelling house approved by Council via DA86/028 on 25/3/1986

Clause 20 of the Tweed Local Environmental Plan 2000 allows for a minimum lot size of 40ha in the 1(a) zone; therefore, proposed Lot 2 does not comply with the development standard for subdivision in the zone. The application as proposed would result in an approximate 52% variation to the development standard.

It is considered that the lot as it currently exists (95.23ha) would easily enable a two lot subdivision that complies with the minimum lot size of 40ha in the 1(a) zone. However, the applicant states that the purpose of the non-compliant subdivision is to create two allotments of land capable of maintaining the rural character of the area and ensuring the protection of a scenic ridgeline and quality vegetation/wildlife corridor within the locality.

As Lot 2 is not complying with Clause 20 an objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) and the concurrence of the Department of Planning (DoP) was required.

The DoP wrote to Council on 17 December 2009 (copy attached) stating that they were concerned that if they were to approve concurrence of the application, a real potential exists for proposed Lot 1 to be further subdivided at some future date. Should this occur, it is considered likely that the end result would be contrary to the aims and objectives of the zone as well as the planning principles of the State Environmental Planning Policy (Rural Lands) 2008 (Rural Lands SEPP).

The DoP also enclosed with the response two (2) suggested options which Council was required to discuss with the applicant. These options proposed Lot 2 to be increased to 27 ha or 38 ha.

Council Officers referred these options to the applicant on 18 December 2009. The applicant responded via a letter dated 26 February 2010 (copy attached) stating that they do not wish to amend the application to either of the two options. This response was referred to the DoP for their further consideration.

On 26 March 2010, Council received a response from the DoP advising that Concurrence has been granted to vary the 40 ha subdivision development standard contained in Clause 20 of the Tweed LEP to permit the creation of an allotment of 19.06 ha. The DoP advised that Concurrence was granted in this instance for the following reasons:

- The proposed subdivision does not raise any issues of state or regional significance, and
- The agricultural viability of the proposed Lot 1 will be maintained.

The DoP also stated that *“it is difficult for concurrence to be refused based on the impact of future subdivision potential.”*

Council Officers disagree with these reasons and consider that the opportunity for potential subdivision is in fact a due planning consideration and is contrary to the aims and objectives of the zone as well as the planning principles of the Rural Lands SEPP.

Notwithstanding this, Council's Development Engineer has raised concerns regarding proposed Lot 2 gaining lawful access. It must be noted that Cavendish Road is not a formed road. However, an existing right of carriageway nearby is also known as "Cavendish Road" and properties which are benefited and burdened by this right of carriageway use "Cavendish Road" as their address.

Council's Development Control Plan Section A5 – Subdivision Code states that the maximum number of allotments to share in a right of carriageway access is five (5) allotments. Nine (9) allotments are already currently benefited or burdened by the right of carriageway and as such the subdivision does not alter this existing situation.

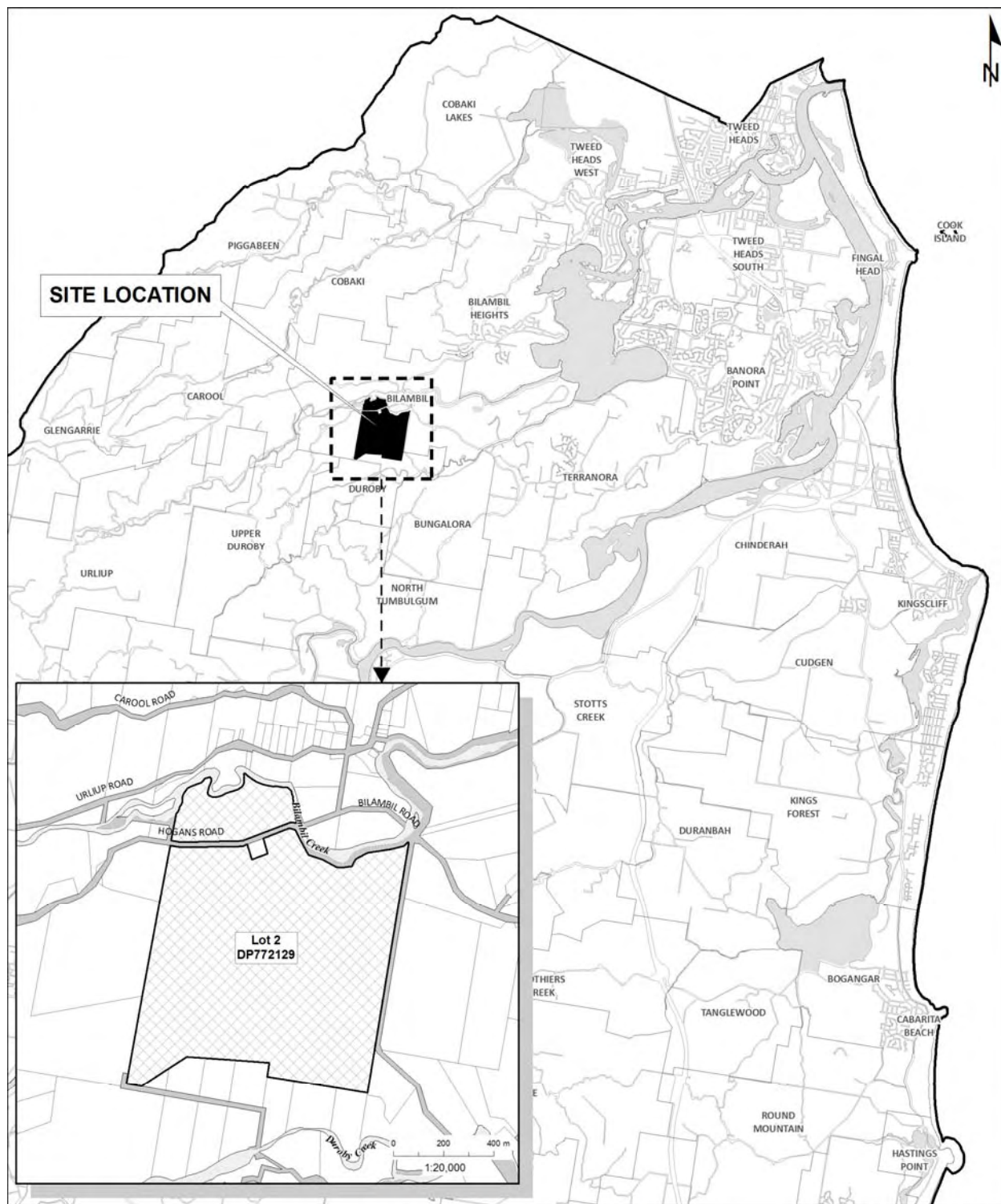
The subject land is described as Lot 2 DP 772129 and is known as Lot 2 Hogans Road, Bilambil. The subject site is of an irregular shape with a northern frontage to Hogans Road and an eastern frontage to Cavendish Road which is unformed. The land has a total site area of 95.23 hectares.

As discussed, the site contains two dwellings. One dwelling is located in the northern portion of the site and has access to Hogans Road. A search of Council's records has revealed that this dwelling does not have the prior approval of Council and therefore is unlawful (this has also been confirmed by the applicant). A second dwelling also exists in the southern portion of the site, and currently gains access via an existing right of carriageway located off Duroby Creek Road. This dwelling house was approved by Council via DA86/028 on 25/3/1986.

The land that comprises proposed Lot 1 has previously been used for grazing; however, the land is currently used primarily as a macadamia crop with some continued grazing. The land that comprises proposed Lot 2 constitutes the southern part of the subject land and is made up of densely vegetated natural bushland. Access between the two proposed lots is restricted due to the steepness of the slope that makes up the northern

boundary of proposed Lot 2. The surrounding area is characterised by a mixture of small and large rural holdings.

**SITE DIAGRAM:**



**LOCALITY PLAN**

Lot 2 DP 772129,  
Hogans Road, Bilambil

0 0.5 1 1.5 2 Km  
1:100,000

Filename: z:\esri\planning\mxd\A4P\_B&W SitePlan.mxd

Author: J.Batchelor - Planning Reforms Unit

Date Printed: 04 May, 2010

Disclaimer: While every care is taken to ensure the accuracy of this data, Tweed Shire Council makes no representations or warranties expressed or implied, statutory or otherwise, about its accuracy, reliability, completeness or suitability for any particular purpose and disclaim all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which may be incurred as a result of data being inaccurate in any way and for any reason. This information is supplied for the general guidance and is to be considered indicative and diagrammatic only. It should not be used for survey or construction purposes and prior to any excavations a "Dig before You Dig" enquiry must be made by calling 1100. The information contained on this document remains valid for 30 days only from the date of supply.



Cadastre: 04 May, 2010  
© Dept. of Lands & Tweed Shire Council

Coordinate System - MGA Zone 56  
Datum - GDA 94

DO NOT SCALE  
COPY ONLY - NOT CERTIFIED

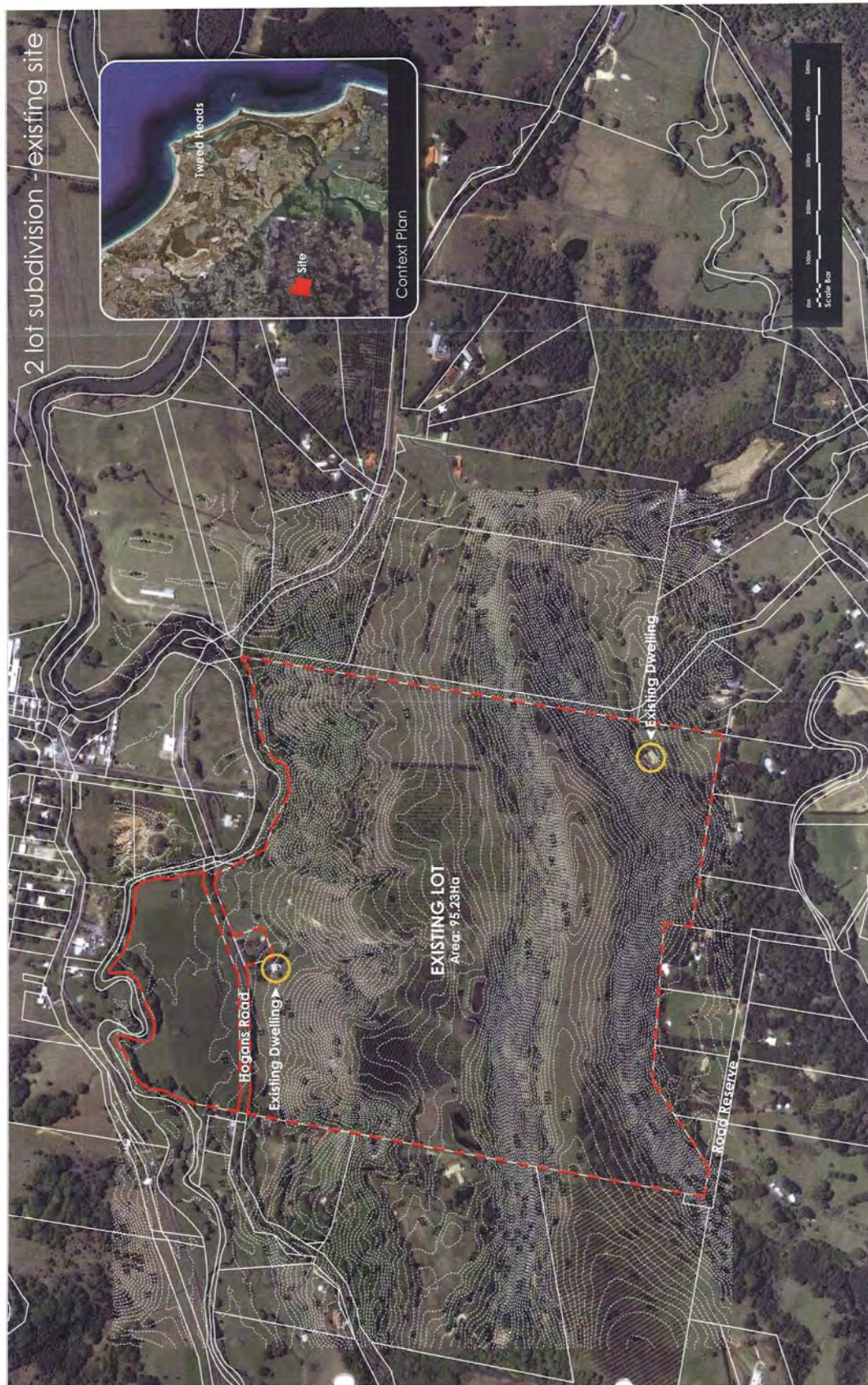
Civic and Cultural Centre  
3 Tumbulghum Road  
Murwillumbah NSW 2484  
PO Box 816  
Murwillumbah NSW 2484  
T: (02) 6670 2400 / 1300 292 872  
F: (02) 6670 2483  
W: www.tweed.nsw.gov.au  
E: planningreforms@tweed.nsw.gov.au



**TWEED**  
SHIRE COUNCIL



# DEVELOPMENT PLANS: Existing Lot Layout



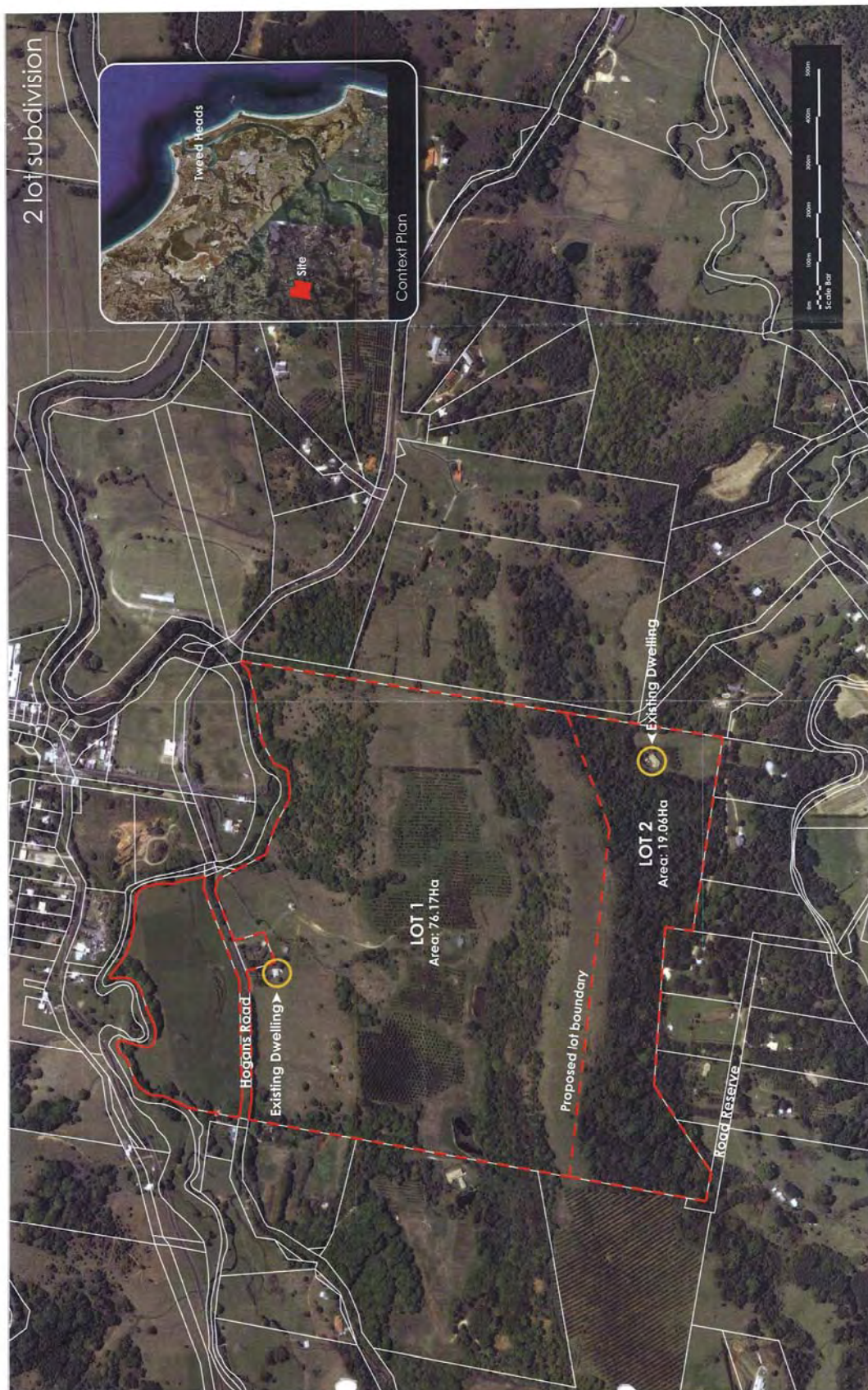
RICKER PASTORAL - 2 LOT SUBDIVISION  
EXISTING SITE

CURT  
DATE: SEPTEMBER 2009  
DRAWN: JB

PLANT CONSULTING  
Level 10/25, Pitt Street  
PO Box 250, Sydney NSW 1585  
Tel: (02) 9551 1500  
www.plantconsulting.com.au



# Proposed Lot Layout



RICKER PASTORAL - 2 LOT SUBDIVISION

CURTIS  
DATE: SEPTEMBER, 2009  
DRAWN: JB

PLANIT  
Planning & Construction  
PO Box 558, Valley Road, Grafton NSW 2470  
Tel: 06 7523 1111  
www.planit.com.au

## CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

### (a) (i) The provisions of any environmental planning instrument

#### Tweed Local Environmental Plan 2000

##### Clause 4 - Aims of the Plan

The proposed development is considered not to be consistent with the aims of the Tweed Local Environmental Plan. The proposed development is not considered to be consistent with the vision of the shire “to manage growth so that the unique natural and developed character of the Tweed Shire is retained.” The proposed development is for a two lot subdivision which does not comply with the development standards contained within the Tweed Local Environmental Plan 2000.

The proposed development is significantly non-complying with the Tweed LEP; therefore, it is considered not to be in keeping with the aim of the plan.

##### Clause 5 - Ecologically Sustainable Development

The proposed development is considered to be generally compliant with the principles of ecological sustainable development. The proposed development is considered to have minimal impact on the environment and in keeping with the precautionary principle, inter generational equity and the conservation of biological diversity and ecological integrity.

##### Clause 8(c) - Cumulative Impact

Clause 8(1)(c) Cumulative Impact: The proposed development, if approved, would be considered to create an adverse cumulative impact in the Shire. The Tweed Shire currently has a number of properties that have similar situations. The approval of this application would encourage other non conforming applications to be lodged. Therefore, the proposed development if approved would establish an adverse cumulative impact in the Shire.

##### Clause 11 - Zone objectives

The subject land is zoned 1(a) Rural. The objectives of the 1(a) Rural zone include:

###### *Primary objectives*

- *to enable the ecologically sustainable development of land that is suitable primarily for agricultural or natural resource utilisation purposes. and associated development.*
- *to protect rural character and amenity.*

### *Secondary objectives*

- *to enable other types of development that rely on the rural or natural values of the land such as agri- and eco-tourism.*
- *to provide for development that is not suitable in or near urban areas.*
- *to prevent the unnecessary fragmentation or development of land which may be needed for long-term urban expansion.*
- *to provide non-urban breaks between settlements to give a physical and community identity to each settlement.*

The proposed subdivision's configuration and proposed lot sizes will have a significant impact on the agricultural potential of the site, particularly for Lot 1 as Lot 2 will be used for the purpose of a rural residential allotment. This configuration may lead to rural land use conflicts which will result in the rural character and amenity being compromised.

Also, approval of an allotment substantially below the development standard, that will then allow the potential lawful creation of an additional allotment, contradicts the objective of protecting rural character and amenity by allowing the creation of smaller holdings that cannot be suitably used for agricultural pursuits.

The proposal is therefore not consistent with the relevant zone objectives.

### Clause 15 - Essential Services

Water supply is currently provided to each dwelling house by rainwater tanks. Onsite effluent treatment and disposal systems exist for each dwelling house.

Electricity and telecommunications are connected to both existing dwellings on the land. No additional infrastructure or physical works are required to service the proposed subdivision.

### Clause 20 - Subdivision

This clause requires a minimum allotment size of 40 hectares in the 1(a) zone. The proposed lots do not comply with this development standard. An objection under State Environmental Planning Policy No.1 has been prepared by the applicant in this regard and is addressed later in this report.

### Clause 57 – Protection of Existing Dwelling Entitlement

The proposed subdivision will result in proposed Lot 2 being under the minimum allotment size, and therefore, should the application be approved Lot 2 will not enjoy a dwelling entitlement in accordance with the Tweed LEP. Clause 57 does not provide for the protection of these existing dwelling entitlements as the allotments are not being created for public purpose. In this case, for the existing dwelling to remain lawful, existing use provisions will allow the continuation of previous rights to have a dwelling house on the parcel of land. However, this may create some restrictions should the owners of these allotments intend on doing future development or building works.

## **SEPP (North Coast Regional Environmental Plan) 1988**

### **Clause 12: Impact on agricultural activities**

The council shall not consent to an application to carry out development on rural land unless it has first considered the likely impact of the proposed development on the use of adjoining or adjacent agricultural land and whether or not the development will cause a loss of prime crop or pasture land.

The proposed subdivision will create an undersized allotment (proposed Lot 2) that will not have any agricultural viability and will essentially be a rural residential allotment. Also, approval of this subdivision will potentially lead to further subdivision of proposed Lot 1 which will affect the continuance and potential productive sustainable activities to be undertaken on the property.

### **SEPP No. 1 - Development Standards**

As discussed, the applicant seeks to vary the development standard identified within Clause 20 (2)(a) of the Tweed LEP, specifically seeking variance to the 40 hectare minimum lot size development standard for the 1(a) zone.

Clause 20(2)(a) states:

- (2) Consent may only be granted to the subdivision of land:
  - (a) within Zone 1(a), 1(b2), 7(a), 7(d) or 7(l) if the area of each allotment created is at least 40 hectares

The underlying objectives of the development standard are to prevent the fragmentation of rural land, ensure the scenic and natural environments are protected and maintain agricultural viability.

The SEPP 1 objection relates to proposed Lot 2 being below 40 hectares. The applicant contends that *the proposed development raises no matters of adverse significance in local, regional or state terms and no public benefit will result from the maintenance of the subject development standard in this case.*

A SEPP No. 1 submission may be supported where the applicant demonstrates that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case and specifies the grounds of that objection. The applicant must also demonstrate consistency with the aims of the SEPP.

### **In support of the proposed variation, the applicant has provided the following:**

- *The proposal clearly identifies two distinct and separate landforms within the existing rural allotment, with one land area (proposed Lot 1) lending itself to continued rural/agricultural land use, whereas the land area of proposed Lot 2, due to the constraints of very steep slopes to either side of a ridge and significant remnant vegetation across this ridge, is unlikely*



*to be considered suitable for agricultural pursuits now or in the future. Taking this into consideration the subdivision design has seen the location of the proposed boundary following approximately the line of the vegetation to the northern toe of the slope of the ridge. This ensures that all of the existing cleared and economically viable agricultural land is contained within the boundary of proposed Lot 1.*

- *The proposal is considered to be sustainable in that to maintain the land area of proposed Lot 2, within the existing site area, is costly to the land owner as the small cleared area of the site that contains the dwelling and a small number of macadamia trees cannot be accessed from the area of the site that will become Lot 1. To gain access to this part of the site south of the ridge requires a trip of approximately 4.5km by road in one direction. This along with having to maintain the additional dwelling, fencing and this cleared area south of the ridge is an expense that is not considered by the proponent to be economically viable into the future and affects the land owners ability to continue to operate the greater land area north of the ridge, as finances are unnecessarily expended maintaining the area south of the ridge for no return.*
- *The subdivision design also ensures that the larger proposed land parcel (Lot 1) cannot be later subdivided as the design provides for a land area of 76.17 hectares and the Rural 1(a) zoning requires subdivided land to have a minimum allotment size of 40 hectares. To further subdivide this land parcel would not be considered appropriate and would not meet the objectives of Clause 20 of the LEP as much of this area is unconstrained land in regard to agricultural use.*
- *The land area that is considered useable for present and future agricultural activities is wholly contained within proposed Lot 1 which ensures that this land is not fragmented and provides for the continuance of the use of this land for agricultural pursuits.*
- *It is clear that the proposed subdivision would not fragment ownership of rural land that would adversely affect the continuance of sustainable agricultural units within the locality.*
- *The existing site currently contains two dwellings. One dwelling is located along Hogans Road with access to this road and the other is located with access via Cavendish Road. These two dwellings are separated by the ridge to the south of the site and neither dwelling can be accessed from the other through the site due to the steep slopes of the ridge and existing dense vegetation on these slopes. Essentially these two dwellings are contained within different catchments divided by the ridge line. The dwelling on Hogans Road is contained within that catchment associated with Bilambil Creek and the dwelling on Cavendish Road is within that catchment associated with Duroby Creek.*
- *It is not considered that this proposed subdivision would generate pressure to allow isolated residential development as both dwellings already exist and the two areas of the existing site either side of the ridge essentially function as if they were two separate properties. The area*

*south of the ridge is characterised by smaller rural residential land holdings. Many of these allotments do not contain agricultural pursuits but are largely covered with native vegetation and this would be the case with proposed Lot 2, although some potential remains for small scale rural/agricultural activities on this proposed lot.*

- *It is submitted that the proposed subdivision design protects both the ecological and scenic values of the land. The scenic values of the site are recognised as the heavily vegetated slopes of the ridgeline which dominates the site and is visible to many locations within the Bilambil Creek Catchment and the Duroby Creek catchment. The ecological values of the site are also largely contained within this area of the site which is proposed to be contained almost entirely within proposed Lot 2. The existing vegetation will be maintained as no clearing of vegetation is required or proposed under this application.*
- *Through this subdivision the upper slopes of the ridge will be protected, as the only area not constrained by the steepness of the slope has already been cleared in the southwest corner (location of the dwelling on proposed Lot 2) and it would be inappropriate to clear any of the steep sloping areas for any agricultural purpose. By subdividing this area of scenic and ecological importance from the area containing proposed Lot 1 this will ensure that cattle are not encroaching into this remaining pocket of healthy bushland as the boundary will be fenced.*

*By separating proposed lot 2 from the remainder of the site through this subdivision the lot will essentially become a rural residential allotment similar to many of the smaller allotments along Cavendish Road. This in itself will ensure the protection of the scenic and ecological values of this area of the site to the locality along with the fact that the majority of the area of proposed Lot 2 is severely constrained in regard to topography and existing vegetation.*

- *The proposal further protects the ecological value of the land by maintaining a large lot in proposed Lot 1, which has pockets of vegetation on the steeper lower slopes north of the ridge. The size of the Lot to be maintained will ensure that these pockets of vegetation can also be retained whilst leaving ample area of land for continuing agricultural pursuits.*

### **Assessment of the applicant's submission:**

The following assessment of the SEPP No. 1 objection is based on the principles set by Chief Justice Preston (*Wehbe v Pittwater Council [2007] NSW LEC 827*).

1. *The applicant must satisfy the consent authority that "the objection is well founded" and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

Comment:

It is considered that all the reasons outlined above do not attest the development standard as being unreasonable or unnecessary as the existing allotment being 95.23 ha is large enough to allow a two lot subdivision to be compliant with Council's subdivision development standard being 40 ha. It is clearly evident that the applicant has disregarded Council's development standard to enable the land to be configured to allow for future subdivision potential.

2. *The consent authority must be of the opinion that "granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3".*

The aims of the policy are as follows:

*"This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act".*

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Comment:

The proposed development will affect the proper management, conservation of natural resources and the promotion and co-ordination of the orderly and economic use of the land as it is fragmenting productive rural land for the purpose of configuring allotments to allow for potential future subdivision. The proposed departure is significant and granting consent to such would be inconsistent with the aims of the Policy.

3. *The consent authority must be satisfied that a consideration of the matters in clause 8(a) "whether non-compliance with the development standard raises any matters of significance for State or regional environmental planning; and (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.*

Comment:

The proposed non-compliance raises matters for state and regional planning. On a state level the DoP has gazetted SEPP (Rural Lands) 2008, which gives directions for Councils when considering an application to which the SEPP

applies. Approval of an allotment substantially below the development standard which will then allow for the potential lawful creation of an additional allotment contradicts the rural planning and subdivision principles within the SEPP. This has been discussed in greater depth below.

Also, on a regional level, approval of this subdivision will undermine the integrity of the Tweed LEP 2000 and create a precedent through the creation of an undersized allotment from a lot that currently exceeds the minimum lot size.

Chief Judge Preston also expressed the view that there are five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment:

Whilst the comments are noted from the applicant, the creation of a substantially undersized allotment is contrary to the objectives of the zone and the development standard, particularly when there is sufficient land area to allow two compliant lot sizes. It is considered that the proposal is likely to create conditions that will cause the fragmentation of rural land.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment:

The underlying objective and purpose of the standard is to restrict lot sizes so as not to cause the fragmentation of rural land. The submission of an undersized allotment when a compliant size can be achieved is considered unnecessary in this case.

3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment:

If compliance was required, the underlying purpose would be achieved.

4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

Comment:

The creation of a non-conforming lot size when a conforming lot size can easily be achieved is seen to undermine the integrity of the Tweed LEP 2000 and accordingly, it is not considered reasonable or necessary to vary from the

minimum lot sizes established within Clause 20(2)(a). The creation of an undersized lot from a lot that currently exceeds the minimum lot size will set an undesirable precedent.

5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment:

The zoning of the area is appropriate and the surrounding locality has rural character and agricultural uses have been established.

### **SEPP (Rural Lands) 2008**

The land is within the 1(a) Rural Zone and the provisions of this SEPP apply to the proposed development.

### **Clause 7 Rural Planning Principles**

The principles are stated and addressed as follows:

*The Rural Planning Principles are as follows:*

- (a) *the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas,*
- (b) *recognition of the importance of rural lands and agriculture and the changing nature of agriculture and of trends, demands and issues in agriculture in the area, region or State,*
- (c) *recognition of the significance of rural land uses to the State and rural communities, including the social and economic benefits of rural land use and development,*
- (d) *in planning for rural lands, to balance the social, economic and environmental interests of the community,*
- (e) *the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land,*
- (f) *the provision of opportunities for rural lifestyle, settlement and housing that contribute to the social and economic welfare of rural communities,*
- (g) *the consideration of impacts on services and infrastructure and appropriate location when providing for rural housing,*
- (h) *ensuring consistency with any applicable regional strategy of the Department of Planning or any applicable local strategy endorsed by the Director-General.*

The proposed development is not consistent with the rural planning principles as the lot configuration does not promote and protect opportunities for current and potential productive and sustainable economic activities.

Also, it is considered that the creation of an undersized allotment is not in the social, economic and environmental interests of the community as it will create unwanted precedence.

#### Clause 8 - Rural Subdivision Principles

The principles are stated and addressed as follows:

*The Rural Subdivision Principles are as follows:*

- (a) *the minimisation of rural land fragmentation,*
- (b) *the minimisation of rural land use conflicts, particularly between residential land uses and other rural land uses,*
- (c) *the consideration of the nature of existing agricultural holdings and the existing and planned future supply of rural residential land when considering lot sizes for rural lands,*
- (d) *the consideration of the natural and physical constraints and opportunities of land,*
- (e) *ensuring that planning for dwelling opportunities takes account of those constraints.*

The proposed undersized allotment is not considered to be in accordance with the Clause 8 rural subdivision principles as the subdivision will lead to unnecessary land fragmentation because a compliant lot size is achievable.

#### Clause 10 - Matters to be considered in determining development applications for rural subdivisions or rural dwellings

The matters to be considered in determining a development application are stated and addressed as follows:

- (1) *This clause applies to land in a rural zone, a rural residential zone or an environment protection zone.*
- (2) *A consent authority must take into account the matters specified in subclause (3) when considering whether to grant consent to development on land to which this clause applies for any of the following purposes:*
  - (a) *subdivision of land proposed to be used for the purposes of a dwelling,*
  - (b) *erection of a dwelling.*
- (3) *The following matters are to be taken into account:*
  - (a) *the existing uses and approved uses of land in the vicinity of the development,*
  - (b) *whether or not the development is likely to have a significant impact on land uses that, in the opinion of the consent authority, are likely to be preferred and the predominant land uses in the vicinity of the development,*



- (c) *whether or not the development is likely to be incompatible with a use referred to in paragraph (a) or (b),*
- (d) *if the land is not situated within a rural residential zone, whether or not the development is likely to be incompatible with a use on land within an adjoining rural residential zone,*
- (e) *any measures proposed by the applicant to avoid or minimise any incompatibility referred to in paragraph (c) or (d).*

As stated continually throughout this report, approval of an allotment substantially below the development standard, which will then allow for the potential lawful creation of an additional allotment, contradicts the rural planning and subdivision principles within the SEPP. Approval of this application will almost ensure a third dwelling will be able to be built on the subject land which is likely to have a significant impact on adjoining land uses and may cause potential land use conflicts.

**(a) (ii) The Provisions of any Draft Environmental Planning Instruments**

Council is preparing a new Shire-wide Local Environmental Plan based upon the NSW Department of Planning LEP Standard Instrument template. The Draft Tweed Local Environmental Plan 2010 (draft LEP) was placed on public exhibition from 27 January to 31 April 2010.

The draft LEP proposes to rezone the subject site from 1(a) Rural to RU2 Rural landscape. The objectives of the RU2 zone include:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To provide for a range of tourist accommodation-based land uses, including agri-tourism, eco-tourism and any other like tourism that is linked to an environmental, agricultural or rural industry use of the land, such as bush foods, forestry, crafts and the like.*

The subdivision development standard is to be unchanged and will remain as 40 ha. It is considered that the proposed subdivision will not achieve the objectives of the zone as it will compromise the rural landscape character of the land.

Also, as part of these reforms, the use of SEPP 1 will be superseded by Clause 4.6 of the draft LEP which contains provisions to enable exceptions to development standards within the draft LEP.

Clause 4.6(6) states:

*Consent must not be granted under this clause for a subdivision of land in zone ...RU2... if:*

- a) *The subdivision will result in 2 or more lots of less the minimum area specified for such lots by a development standard, or*

- b) *The subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Therefore, as proposed Lot 2 is to be only 19.06 ha, Council would not be able to consider the application as submitted as the proposal has a variation of 52%.

**(a) (iii) Development Control Plan (DCP)**

Tweed Development Control Plan

A5-Subdivision Manual

Council's Development Engineer has reviewed the application with respect to the provisions of Section A and has advised the following:

With regard to access, the application states within their Statement of Environmental Effects that:

*"Proposed Lot 1 will gain access from Hogans Road, while proposed Lot 2 will gain access off Cavendish Road. Both of these roads are sealed rural roads" and "Cavendish Road is not wholly contained within the dedicated road reserves in this area."*

The above statements are incorrect as Cavendish Road is not a formed road. However, an existing right of carriageway nearby located off Duroby Creek Road is also known as "Cavendish Road" and properties which are benefited and burdened by this right of carriageway use "Cavendish Road" as their address.

Council's Development Control Plan Section A5 – Subdivision Code states that the maximum number of allotments to share in a right of carriageway access is five (5) allotments. It is noted that Deposited Plans 246020 & 566611 (adjoining properties to the south of the subject lot) both have a right of carriageway created in 1974 servicing 9 different allotments the proposed subdivision does not alter the current access arrangements and are considered acceptable.

**(a) (iv) Any Matters Prescribed by the Regulations**

Bushfire

The application required an Integrated Referral to the NSW Rural Fire Service due to the bushfire prone nature of the land. In a response dated 15 December 2009, a Bushfire Safety Authority was granted subject to certain conditions of consent.

**(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality**

Investigation of the likely impacts of the proposal upon the built or natural environment is not considered to be required in light of the concerns detailed earlier in this report.

**(c) Suitability of the site for the development**

Given the earlier comments detailed within this report, the subject land is not suitable for the development as proposed.

**(d) Any submissions made in accordance with the Act or Regulations**

The application did not require notification under Council's Notification Policy.

**(e) Public interest**

The proposed subdivision is considered to compromise the public interest as it is not in accordance with both State and Local planning policies and the subdivision will create an undersized allotment to potentially create an additional allotment.

**OPTIONS:**

1. Determine the application in accordance with the recommendation.
2. Support the proposal and request appropriate conditions for approval be submitted to the next Council Meeting.

**LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:**

Should the applicant be dissatisfied with the decision of the determination the applicant may determine to lodge an appeal with the Land & Environment Court.

**POLICY IMPLICATIONS:**

Should the recommendation of this report not be upheld, no direct policy implications will occur, however a precedent will be set for similar applications to be approved.

**CONCLUSION:**

Council Officers consider that approval of an allotment substantially below the development standard, will allow for the potential lawful creation of an additional allotment, thus the proposal is contrary to the zone objectives and the rural planning and subdivision principles within State and Local Environmental Planning Policy Frameworks.

**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. Letter from the Department of Planning dated 17 December 2009 (ECM 15981438)

2. Letter from the applicant dated 26 February 2010 (ECM 15980433)
-