

Addendum Report

REPORTS THROUGH THE GENERAL MANAGER

REPORTS FROM THE DIRECTOR PLANNING AND REGULATION

a10 [PR-CM] Unauthorised Works at Lot 2 DP 1060215 Soorley Street Tweed Heads South

SUBMITTED BY: Development Assessment and Compliance

Valid



Caring for the Environment

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 4 Caring for the Environment
 - 4.1 Protect the environment and natural beauty of the Tweed
 - 4.1.3 Manage and regulate the natural and built environments
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UPDATED SUMMARY

At its meeting of 16 July 2015, Council resolved the following in respect of a report on this matter:

“RESOLVED that:

1. *Council, in respect of premises at Lot 2 DP 1060215 Soorley Street, Tweed Heads South, engages legal representation to evaluate the legality of the alleged ‘existing use rights’ contention by Reysson Pty Ltd regarding vegetation clearing for fencing and cattle grazing purposes, in association with the agricultural use of the land and a report to be brought back to the Council Meeting of 20 August 2015.*
2. *ATTACHMENT 1 is CONFIDENTIAL in accordance with Section 10A(2) of the Local Government Act 1993, because it contains:*

(g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.”

Legal advice has now been received from Council’s solicitors in respect to the issue of existing use rights that affect this matter. A copy of this advice is provided as a confidential attachment to this report. In summary, the solicitors are of the opinion that the owners of the subject site have not provided sufficient information or evidence to Council to establish that the land benefits from existing use rights. It is recommended that Council instructs its solicitors to seek the required information from the owners of the subject site.

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PREVIOUS SUMMARY:

Council investigated a complaint in relation to vegetation clearing for fencing. The landowner was given written directions to cease works and demonstrate under what legislation and/or approvals these works were being undertaken. In response, Council received correspondence from the landowner's legal representative arguing that:

- 'existing use rights' for agricultural purposes apply to the subject land.
- The activities which are the subject of investigation (vegetation clearing and fencing) have been undertaken ancillary to those agricultural purposes.

The owners 'existing use rights' argument conflicts with rehabilitation works undertaken in 2007 as directed under a Court order to address previous unlawful disturbance of ecologically significant habitat.

Accordingly, it is recommended that legal action be taken to challenge this 'existing use rights' argument. Further, it is recommended that this action be taken urgently as the land owner appears to have failed to remove the cattle which are currently grazing and causing a detrimental impact upon ecological values supported on Lot 2 DP1060215.

The land currently has a mixed zoning of principally DM (Deferred Matter), with small sections of RE2 (Private Recreation) and R1 (General Residential). 'Agriculture' is prohibited in each of these zones.

RECOMMENDATION:

That:

1. **Council, in respect of the alleged unauthorised use affecting the premises, Lot 2 DP 1060215 Soorley Street, Tweed Heads South, instruct its solicitors to write to the owners of the site requesting information to demonstrate existing use rights for agriculture.**
2. **ATTACHMENT 1 is CONFIDENTIAL in accordance with Section 10A(2) of the Local Government Act 1993, because it contains:**
 - (g) **advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.**

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REPORT:

Background:

- Council inspected the site on **12 December 2014** in response to a complaint lodged by nearby residents. The inspection revealed some limited vegetation clearing along the perimeter boundary and the commencement of some perimeter fencing.
- On **12 December 2014** correspondence was sent to the landholder requesting a written response as to the extent and nature of works, and under what approval or Legislation those works were being undertaken.
- A follow up inspection was undertaken **23 December 2014**. It was noted that further vegetation clearing for fencing works had been undertaken. Contractors were advised to stop work until such time as a response to Council's letter was received and the lawful nature of the works clarified.
- The landholder responded briefly on **29 January 2015** to Council's initial letter indicating that the works had been carried out in accordance with '*NSW Environmental Planning Policy (Exempt and Complying Development Codes) 2008*'.
- Council responded on **9 February 2015** by stating the response was unsatisfactory and again requested detailed information as to the purpose/nature and legislative foundation for which the works could lawfully be undertaken. The significance of the site's ecological values was highlighted and further direction given to cease all onsite work until the matter had been resolved.
- A written response was received from the landholder's legal representatives on **27 February 2015** advising that the property had been used, and intended to be used, for agricultural purposes since the property was acquired in the 1970's and therefore enjoys agricultural 'existing use rights'. It was claimed that development consent for the works to date (fencing and clearing) was therefore not necessary as fencing is ancillary to the agricultural use.
- A site inspection was undertaken by Council officers and the landholder's town planning representative on **18 March 2015**. The site inspection revealed that further clearing and fencing works had occurred and there were now cattle present on site.
- Following the inspection and in response to the letter dated 27 February 2015, Council sent a further letter on **20 April 2015** requesting the landholder to "demonstrate what 'existing use rights' exist for Lot 2 DP 1060215 and provide evidence of precisely what agricultural activities have occurred on the site since the 1970's, matching the time of use with the zoning provisions of the relevant Tweed Local Environmental Plan and Interim Development Order."

In addition to demonstrating any 'existing use rights', the landowner was directed to **immediately remove cattle** from the property given that this type of land-use is prohibited under the TLEP 2000 (within the 2e Residential Tourist zone).

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- To date, there has been no written response to Council's final letter. A site inspection on 22 May 2015 confirmed that cattle still occupy Lot 2.

Assessment:

Two matters are outstanding: there has been no written response clarifying or demonstrating any 'existing use rights', and secondly the cattle appear to be still grazing on land regarded as supporting ecologically significant habitat.

Existing Use Rights:

In 2007, the current landowner cleared approximately 2ha of Lot 2. Council took effective compliance action and required a full Vegetation Rehabilitation Plan. Those remediation works were completed and the area has regenerated quite well. It is interesting to note that the land owner did not present the 'existing use rights' contention at that time, but cooperated in the rehabilitation of that same land (Lot 2). This regeneration would not have been possible if in fact cattle had been grazing on Lot 2 since 2006.

There is doubt that cattle have had access to Lot 2 because a wide drainage canal has traditionally separated Lot 2 from the larger parcel of land to the south (Lot 4 DP 4228424) where it is accepted that cattle and agricultural activity have occurred uninterrupted over the years. This drainage canal makes Lot 2 inaccessible and suggests uninterrupted cattle grazing would be unlikely.

It is contended that no 'existing use rights' exist for Lot 2. This means that the clearing of vegetation for fencing are unauthorised works. Further, these current fencing works are intended to reintroduce cattle which, in view of the demonstrated ecological value and sensitivity of the site, should be stopped before any more environmental damage is done.

Environmental damage:

It is estimated that approximately 1.6ha of vegetation has been removed which is mapped (TVMS 2004 – Update 2009) as Vegetation Code 601 – Swamp She oak Closed Forest to Woodland. It is noted that more refined vegetation mapping (provided by Ecograph in *Ecological Assessment of Remnant Vegetation Lot 2 DP1060215 and Lot 4 – Soorley Street South Tweed Heads dated March 2005* – Figure 3) was completed as part of a previous Land and Environment Court Order No. 07/40433 of 2007 issued 07 March 2008 (described above). This mapping showed a more heterogeneous complex of vegetation across the site to that of the 2009 mapping more notably identifying:

- A unit of Littoral Rainforest (equivalent TVMS Code – 101) along the Soorley Street Boundary;
- One patch of salt-marsh (TVMS Code 603) (Lot 2 - south-east) appears to be discretely identified yet not assigned a specific code.

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Whilst the 2005 mapping was more detailed and field verified, given the time period between this mapping and recent inspections, significant growth has occurred and may not be an accurate representation of current site conditions (or that immediately prior to clearing/grazing activity). In broad terms however, the most recent site inspection confirmed that vegetation clearing has occurred within Swamp She-oak Closed Forest to Woodland and Littoral Rainforest. Some disturbance of a Salt-marsh community was also evident.

The three communities identified above may be recognised as candidate Endangered Ecological Communities (EEC) listed under the *Threatened Species Conservation Act 1995* whilst two of the communities may be regarded as Threatened Ecological Communities (TEC) under the *Environment Protection & Biodiversity Conservation Act 1999* (EPBC Act). Further site inspection and field survey is required to make an accurate determination as to the EEC and TEC status of each vegetation unit having regard for the respective listing advice.

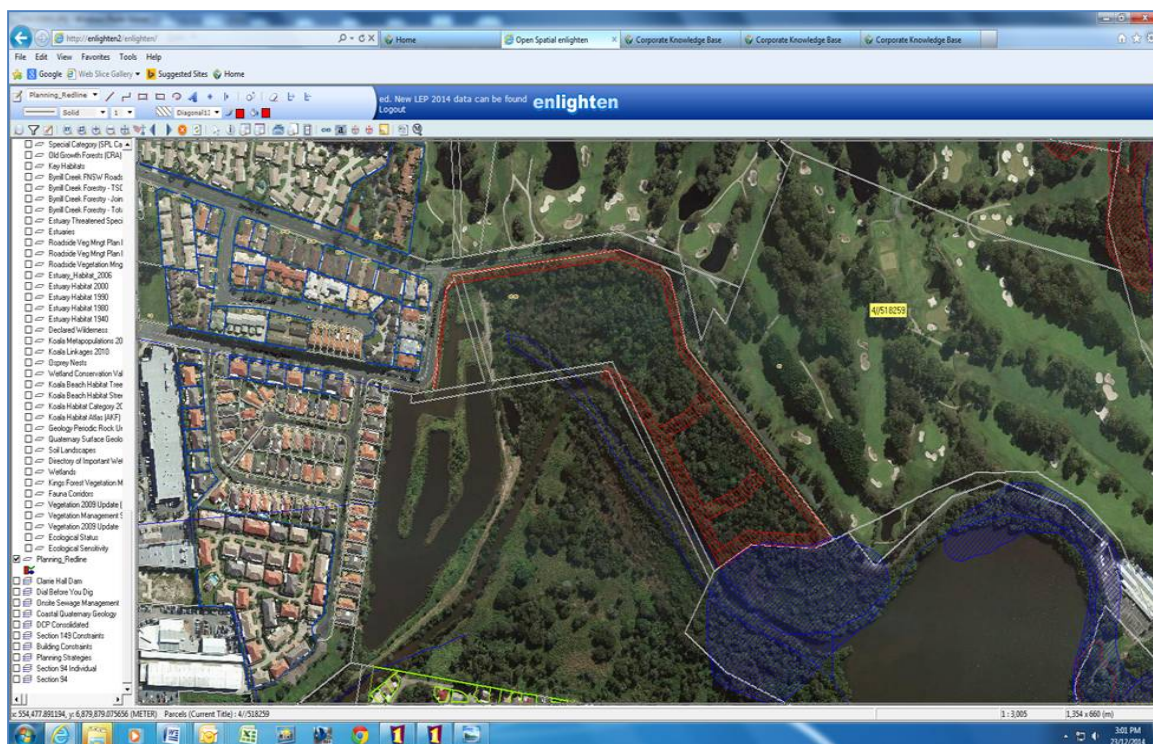


Figure 1 Approximate area of clearing (red hatching) as of 23 December 2014

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Figure 2 Approximate area of clearing (red hatching-not to scale) at 18 March 2015. Purple hatching remediation area Court Order No. 07/40433 of 2007



Figure 3 Vegetation Mapping (Eco-graph Report 2005) Court Order No. 07/40433 of 2007

The matter has been referred to The Office of Environment and Heritage (OEH) as it is considered that certain Endangered Ecological Communities (EEC's) are listed under the

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Threatened Species Conservation Act 1995. The OEH has responded but will not take further action if Council is pursuing the matter.

Environmental Zones

Consistent with recommendations to amend LEP 2000 (Amendment 21), the deferred area (LEP2014) was intended to be rezoned E2 (refer to mapping completed as part of Draft LEP 2010) pending 'E-zone review'.

OPTIONS:

- 1 Take no action.
- 2 Engage legal representation to seek the required information from the owners.

CONCLUSION:

The owner was issued a show cause notice on 9 February 2015 to substantiate the lawful works that were occurring on the site. The response provided on 27 February 2015 was that the vegetation removal, fencing and grazing of cattle has occurred under 'existing use rights' and therefore development consent is not required.

Council's Natural Resource Management Unit recommended that legal advice be sought on the matters of 'existing use rights' to test whether the activities may be considered lawful under each of the relevant legislative provisions. In the case where there is doubt/clear grounds to challenge the landowner's claims, legal action by Council should be taken for the unlawful removal of vegetation, erection of fencing and the grazing of cattle (agriculture) on Lot 2 DP1060215.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable

b. Budget/Long Term Financial Plan:

Financial resources will be required to initiate any legal challenge.

c. Legal:

Legal representation will be required.

d. Communication/Engagement:

Inform - We will keep you informed.

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UNDER SEPARATE COVER/FURTHER INFORMATION:

(Confidential) Attachment 1. Legal advice from Council's solicitors dated 12 August 2015
(ECM 3762240)
