

‘GATEWAY’ PLANNING PROPOSAL

Land

Lot 2 DP 537488
2 Tickles Road
Upper Coopers Creek NSW

Proposal

Amendment of Schedule 7 of the Byron Local
Environmental Plan 1998 for a dwelling
entitlement on the land

Prepared by

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19 September 2011

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1 Introduction

This Planning Proposal has been prepared for land known as Lot 2 DP 537488, 2 Ticks Road, Upper Coopers Creek, NSW.

The purpose of the Planning Proposal is to seek a dwelling entitlement on the land by listing the land in Schedule 7 of the Byron Local Environmental Plan 1988.

Byron Shire Council (Council) considered a report (No. 12.10) at its Ordinary Meeting 10 February 2011 in regard the land and issue of a dwelling entitlement for the land. **Appendix No. 1** is copy of the report.

Council resolved (No. 11-18) the following in relation to the matter:

- 1. That Council support an amendment to Schedule 7 of Byron LEP 1988 in order to provide a dwelling entitlement to Lot 2 DP 537488 – 2 Ticks Road, Upper Coopers Creek.*
- 2. That Council advise the land owner of the need to prepare a Planning Proposal in accordance with Section 55 of the EPA Act 1979 for submission to the Minister under Section 56 of the EPA Act 1979 through the LEP 'Gateway' process and that the Planning proposal be submitted to Council within 12 months of the date of the resolution.*
- 3. That the Planning Proposal be submitted to the Department of Planning for a 'Gateway' determination without the need to report back to Council, and that the Minister be advised that further studies are likely to be required to address Bushfire, Contamination (SEPP 55 Remediation of Contaminated Lands) and Onsite Effluent Disposal to enable Byron LEP 1988 to be amended.*

Appendix No. 2 is copy of the minutes of Council in regard Report No. 12.10.

Council has advised the Landowner (Ms Rose McKinley) that she can proceed with the preparation of a Planning Proposal to enable the LEP amendment process to commence.

Appendix No. 3 is copy of Council's letter dated 23 February 2011 to Ms McKinley.

The land has an area of 1.247ha and it is located approximately:

- 22km from Mullumbimby
- 10km from Rosebank and
- 32km from Lismore.

Maps No. 1 & No. 2 shows the location and approximate boundaries of the land.



Map No. 1 Location of the land
Source base map Google Maps 2011



Map No. 2 The land – aerial image
Source base image Google Earth 2004

2 Proposal objectives and outcomes

2.1 Objectives

The objectives of the Planning Proposal are:

1. to demonstrate that the land can sustain a dwelling and
2. to seek an amendment of the Byron Local Environmental Plan 1988 (BLEP 1988) to include the land in Schedule 7 which provides a dwelling entitlement on the land.

2.2 Outcomes

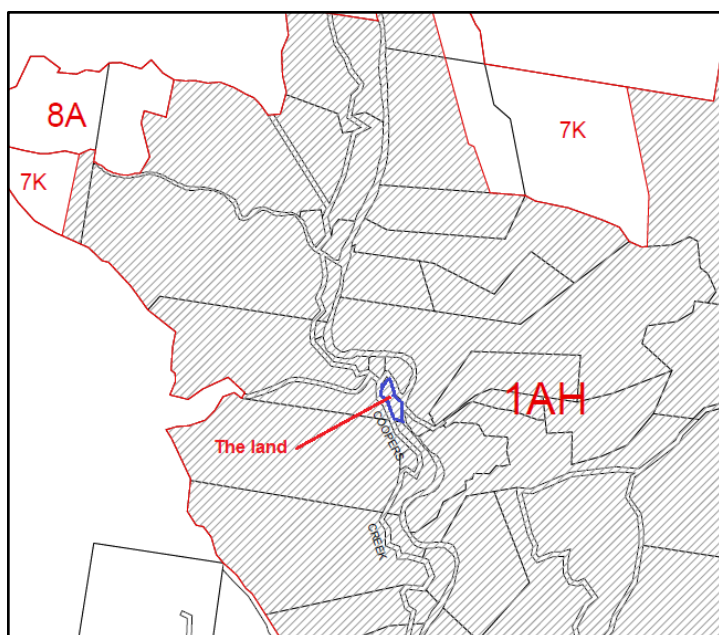
The outcomes of the Planning Proposal and amendment of the BLEP 1988 are:

1. The resolution of an administrative ambiguity that has existed since 1988 in regard whether or not the land has a dwelling entitlement and
2. Enabling Ms McKinley to lodge a Development Application to either:
 - a. undertaking the works necessary to formalise the use of an approved farm shed for habitable purposes or
 - b. to erect a new dwelling on the land.

3 Explanation of provisions in local plan

The land is zoned 1(a)(General Rural - hatched) under the Byron Local Environmental Plan 1988 (BLEP 1988).

Map No. 3 is a section of the BLEP 1988 map showing the current zoning of the land and the existing pattern of settlement in the locality of the land.



Map No. 3 Existing zoning of the land (BLEP 1988)
Source Byron Shire Council LEP Map 0604

Clause 15 of the BLEP 1988 includes provisions controlling the erection of dwellings on rural land in Byron Shire.

Clause 15 states:

Dwelling-houses

15. (1) *This clause applies to land within Zone No. 1(a), 1(b1), 1(b2), 1(c1), 1(c2), 1(d), 7(c) or 7(d). ins Amd.55 17/7/98; ins Amd.70 17/3/00*

(1A) *A dwelling-house may not be erected on land to which this clause applies except in accordance with this clause. Ins Amd.102 6/9/02*

(2) *In subclause (2A), **existing holding** means:*

(a) *an allotment, lot or portion in existence on the relevant day that was not on that day held in the same ownership as any adjoining or adjacent allotment, lot or portion, and that has not been subdivided since that day, or*

(b) *each area of land comprised of all adjoining or adjacent allotments, lots or portions that were held in the same ownership on the relevant day, and that have not been subdivided since that day.*

*In this definition, **relevant day** means:*

(a) *in the case of land formerly subject to Interim Development Order No 1 - Shire of Byron, 8 November 1968, or*

(b) *in the case of land formerly subject to Interim Development Order No 1 - Municipality of Mullumbimby, 9 November 1973.*

(2A) *Consent may be granted to the erection of a dwelling-house on land to which this clause applies only if there is no dwelling already on the land and only if the land is:*

(a) *an existing holding, or*

(b) *an allotment created in accordance with clause 11, 11B, 12(3) or 13, or*

(c) *a lot or portion referred to in Schedule 7, or*

(d) *if a deposited plan is referred to in Schedule 7 without reference to any particular lot or lots in it, any of the lots in the deposited plan, or*

(e) *a portion or a lot (not included by paragraph (c) or (d)) that was created between 8 November 1968 and 21 April 1988 under the provision of Interim Development Order No 1 – Shire of Byron or Interim Development Order No 1 - Municipality of Mullumbimby and is subject to a certificate of subdivision signed during that period by the Council's Clerk. Ins Amd. 113 11/6/04*

(2B) *However, subclause (2A) does not prevent consent being granted to the erection of a dwelling-house on land described in that subclause that has been affected only by the following:*

(a) *a minor boundary adjustment, such as to rectify an encroachment on an allotment,*

(b) *a consolidation of lots, but not so as to reduce the area of the land on which the dwelling-house will be erected,*

(c) *excision of part of the land if the part is to be acquired by a public authority,*

(d) *excision of part of the land if the Council is satisfied the part is, or is intended to be, used for a public purpose. om/ins Amd. 97 6/12/02*

(3) *The council shall not consent to the erection of a dwelling-house in accordance with this clause unless it has satisfied itself that the dwelling will have adequate access and services and will not cause significant adverse environmental impact. om/ins Amd.1 14/7/89*

Consideration of existing holding and dwelling entitlement

The subdivision to create the allotment was approved by Byron Shire Council on 17th September 1968 and created on 25th September 1968 in accordance with the Local Government Act 1919. The creation of the allotment pre-dates the

commencement of Shire of Byron Interim Development Order No. 1 (8th November 1968) by 45 days and was owned, together with Lots 1 & 3 DP 537488, by Mr G Basso. The land was then purchased by Mr R Patch on 6 April 1969, some 5 months after the commencement of the Interim Development Order. Council's rates assessment map (c. 1968) suggests that the land together with an adjoining allotment (Lot 2 DP 508050) was owned by Mr P Leadbeater, however the records of the Land Titles Office do not support this.

The land existed on the relevant date (8th November 1968) as a separate allotment, which has not changed in area. However it was owned at that date together with Lots 1 & 3 DP 537488 by Mr G Basso.

Therefore the land does not appear to be an 'existing holding' which has a dwelling entitlement in accordance with Clause 15.

However, the circumstances of the case are strong and have merit. These are outlined in the report No. 12.10 to the Ordinary Meeting of Council (refer **Appendix No. 1**) and it is reasonable that a dwelling can be approved to be erected on the land.

The Planning Proposal seeks an amendment of the BLEP 1988 to include in Schedule 7 of the plan, the real property description of the land (Lot 2 DP 537488) which is the recognition of a dwelling entitlement.

4 Justifications for objectives, outcomes & provisions

4.1 Need for planning proposal

The need for the Planning Proposal is a result of:

1. The need to enact Council's resolution No. 11-18 prior to February 2012 and
2. The unknown time frame for the exhibition and gazettal of the comprehensive Byron local environmental plan prepared in accordance with the Standard Instruments (Local Environmental Plan) Order 2006.

4.1.1 Previous strategic studies

The issue of dwelling entitlements on rural land was generally considered in Section 5.93 and 7.6.10 of the Byron Local Environmental Study 2007 (BLES 2007), prepared by Parsons Brinkerhoff & Byron Shire Council.

The request for a dwelling entitlement was addressed in the assessment provided in Appendix M of BLES 2007. The assessment in regard the land and request for a dwelling entitlement failed to sufficiently and fully consider circumstances of the case, which included Council's advice to the landowner pursuant to s. 149 of the *Environmental Planning and Assessment Act 1979*, the history of the land and merit and public interest issues.

4.1.2 Achieving objectives, outcomes & alternatives

The objectives and intended outcomes of the Planning Proposal are best achieved by inserting the Real Property description of the land in an amendment of Schedule 7 of the BLEP 1988.

4.1.3 Community benefits

The community benefits are the resolution of an administrative ambiguity that has existed since 1988 and facilitating the appropriate and proper management of the land by permitting Ms McKinley to legally occupy it. The lawful erection of a dwelling on the land is consistent with the existing pattern of settlement and use in the locality of the land.

4.2 Relationship to strategic planning framework

4.2.1 Regional strategy

The Far North Coast Regional Strategy 2006 - 31 (Strategy 2006 - 31) is the regional strategy applicable to the land.

Enabling a dwelling on the land is not inconsistent with the Strategy 2006 - 31.

4.2.2 Local strategic plans

Council's Rural Settlement Strategy 1998 established aims, objectives and contains performance criteria / provisions for applications for dwelling entitlements and inclusion of land into Schedule 7 of the BLEP 1988.

The Rural Settlement Strategy states that allotments will be considered for inclusion in Schedule 7 if:

- the allotment was created prior to 1 January 1998
- it contains lands not mapped as significant vegetation, slopes greater than 20%, flood prone, not within the buffer areas to agriculture, horticulture dip site garbage tips and quarries and
- it has adequate road access and provision of services.

The Planning Proposal demonstrates that the land achieves those performance criteria / provisions.

Additionally the request for a dwelling entitlement is consistent with the principles and criteria previously adopted by Council in similar situations as evidenced within Report No. 3.1 to the Council's Environmental Planning and Local Approvals Committee Meeting of 19 August 2003.

Appendix No. 4 is copy of Report No. 3.1 to the Council's Environmental Planning and Local Approvals Committee Meeting of 19 August 2003.

4.2.3 State environmental planning policies

A number of State Environmental Planning Policies (SEPPs) apply to the land. The following identifies each of the key Policies and makes brief comment in regard to each.

SEPP 14 Coastal Wetlands

There are no SEPP 14 wetlands on or in the locality of the land.

SEPP 26 Littoral Rainforests

There are no SEPP 26 littoral rainforests on or in the locality of the land.

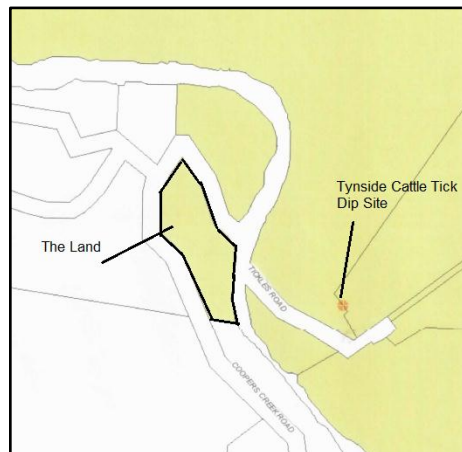
SEPP 44 Koala Habitat Protection

The land is subject to the provisions of the Policy as it is greater than 1ha in area. Near the creek, the land does contain some planted Tallowwood trees which are a Koala food trees. As the Tallowwood trees are significantly less than 15% of the number of trees on the land the Policy does not apply.

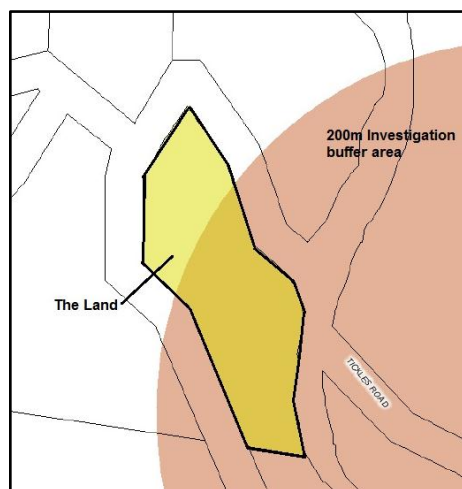
SEPP 55 Remediation of Land

The land has been cleared and was previously used for grazing (dairy farming) purposes. Grazing has not occurred on the land for at least 22 years. The land is within the 200m investigation buffer of the former now decommissioned 'Tynside' Cattle Tick Dip. The land is separated by Coopers Creek and both horizontally and vertically from the former dip. The potential for contamination of the land from either historic grazing animals or the use of the cattle dip is very low.

Maps No. 4 & No. 5 shows the land and Council's GIS mapping of the location of 'Tynside' Cattle Tick Dip and 200m investigation buffer area.



Map No. 4 Location of 'Tynside' Cattle Tick Dip



Map No. 5 'Tynside' Cattle Tick Dip – 200m investigation buffer

The existing farm shed and potential dwelling site is outside the 200m investigation buffer area.

Notwithstanding, a land contamination assessment is proposed to be undertaken following the determination of the 'gateway' by Department of Planning and Infrastructure and prior to the public exhibition of the Planning Proposal.

SEPP Infrastructure 2007

All essential infrastructure services are provided to the land.

SEPP Rural Lands 2008

The SEPP requires the consent authority to consider existing uses and approved uses of land in the vicinity and whether or not (in this instance) the approval of a dwelling and occupation of the land is likely to have a significant impact on those existing and approved land uses.

Maps No. 2 & No. 3 shows the pattern of land use and settlement in the vicinity of the land.

Formalising existing arrangements or the erection of a dwelling on the land and its occupation is consistent with and will not alter the existing pattern of settlement nor have the potential for significant impact on the existing and approved land uses in the vicinity of the land.

SEPP North Coast Regional Environmental Plan

The land is not prime crop and pasture land and the amendment to the BLEP 1988 does not seek to change minimum allotment size in the 1(a) zone. The allotment is the same size as it was when it was created on 25th September 1968 and is in effect a concessional allotment created prior to the introduction of the Shire of Byron Interim Development Order No. 1.

Recognising a dwelling entitlement is consistent with the Council's Rural Settlement Strategy 1998 (refer Section 4.2.2). The land is; physically capable of supporting a dwelling, close to existing settlements, physically capable for septic effluent disposal, not likely to be required for future urban expansion and not prime crop and pasture land. The most potentially significant environmental hazard (bushfire risk) can be appropriately managed and the land does not have significant value for the conservation of wildlife.

The Planning Proposal is reasonably consistent with the Policy.

4.2.4 Ministerial directions

A number of Ministerial Directions made under s. 117 of the *Environmental Planning and Assessment Act 1979* apply to the land. The following identifies each of the key Directions which are relevant to the land and Planning Proposal and makes brief comment in regard to each.

Direction 1.2 - Rural Zones

The Direction applies if the permissible density of rural land use not be increased. The Planning Proposal does not seek to change the zoning of the land, though it seeks (by default) to increase the permissible residential density

of it. The land area is too small and not of an agricultural class to be considered farmland of State and Regional Significance or significant non-contiguous farmland or prime crop and pasture land.

The justification for the inconsistency with the Direction that the permissible density of land use (if expressed as a dwelling entitlement) not be increased are that; the area of land is small, the land is not prime crop and pasture land and the Planning Proposal is of minor significance.

Direction 1.3 - Mining, Petroleum Production and Extractive Industries

The objective of this Direction is to protect the future extraction of State or regionally significant reserves of coal, other minerals, petroleum and extractive materials from inappropriate development. No known State or regionally significant reserves of coal, other minerals, petroleum and extractive materials exist in the locality of the land.

Direction 1.5 - Rural Lands

This direction applies when a planning proposal will affect land within an existing or proposed rural or environment protection zone (including the alteration of any existing rural or environment protection zone boundary) or changes the existing minimum lot size on land within a rural or environment protection zone.

The Planning Proposal does not seek to change the existing zoning of the land or the existing minimum lot size permissible in the zone, which is 40ha. The land has existed since 1968 and has an unchanged area of 1.247ha.

Direction 2.1 - Environment Protection Zones

The land is not in or in the vicinity of an environmental protection zone. The Direction does not apply.

Direction 2.2 - Coastal Protection

The land is not in the coastal zone. The Direction does not apply.

Direction 3.1 - Residential Zones

The land is not in the residential zone. The Direction does not apply.

Direction 4.1 - Acid sulfate Soils

The land is not mapped or otherwise identified on Council's Geographic Information System (GIS) as having potential acid sulfate soils. The Direction does not apply.

Direction 4.3 - Flood Prone Land

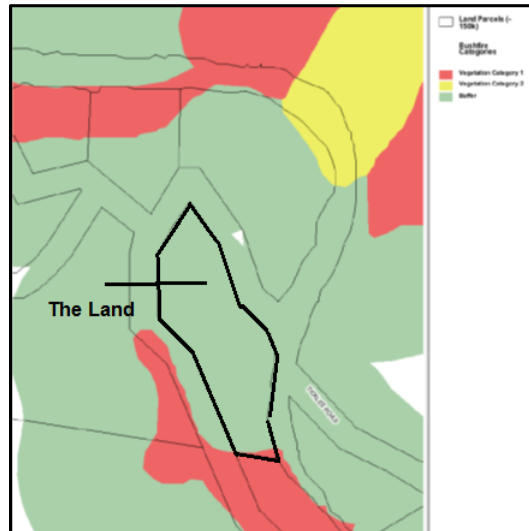
Whilst parts of the land adjoining Coopers Creek maybe flood prone, those parts of the land on which the farm shed and other structure have been built are not. Council's GIS does not show the land as flood prone. The Direction does not apply.

Direction 4.4 - Planning for Bushfire Protection

Council's GIS identifies that the land contains bushfire prone vegetation and is within the vegetation buffer to Category 1 bushfire prone vegetation. Management of development in bushfire prone land is subject to provisions of s

79BA of the *Environmental Planning and Assessment Act 1979* and s. 100B of the *Rural Fires Act 1997*.

Map No. 6 shows the land and Council's GIS mapping of bushfire prone vegetation.



Map No. 6 Bushfire prone vegetation

A bushfire threat assessment is proposed to be undertaken following the determination of the 'gateway' by Department of Planning and Infrastructure and prior to the public exhibition of the Planning Proposal.

Direction 5.1 - Implementation of Regional Strategies

The land area is small and formalising a dwelling entitlement on it a benign land use. A dwelling on the land is consistent with the existing pattern of settlement and development in the vicinity of the land. The Planning Proposal does not undermine the achievement of its vision, land use strategy, policies, outcomes or actions of the Strategy 2006 – 31.

Direction 5.3 - Farmland or State and Regional Significance on the NSW Far North Coast

The land is too small and not of an agricultural class to be considered or mapped as farmland of State and Regional Significance or as significant non-contiguous farmland. The Direction does not apply.

Direction 6.1 - Approval and Referral Requirements

The Planning Proposal does not seek to add any additional approval and referral requirements or change the BLEP 1988 other than to include the land into Schedule 7. The Planning Proposal is consistent with the Direction.

Direction 6.3 - Site Specific Provisions

The Planning Proposal seeks an amendment of the BLEP 1988 to enable Ms McKinley to lodge a Development Application with Council to either

- undertake the works necessary to formalise the use of an approved farm shed for habitable purposes or
- to erect a new dwelling.

The Planning Proposal does not seek to rezone the land or to enable a land use not otherwise permissible on the land and is consistent with the Direction.

4.3 Potential environmental, social and economic impacts

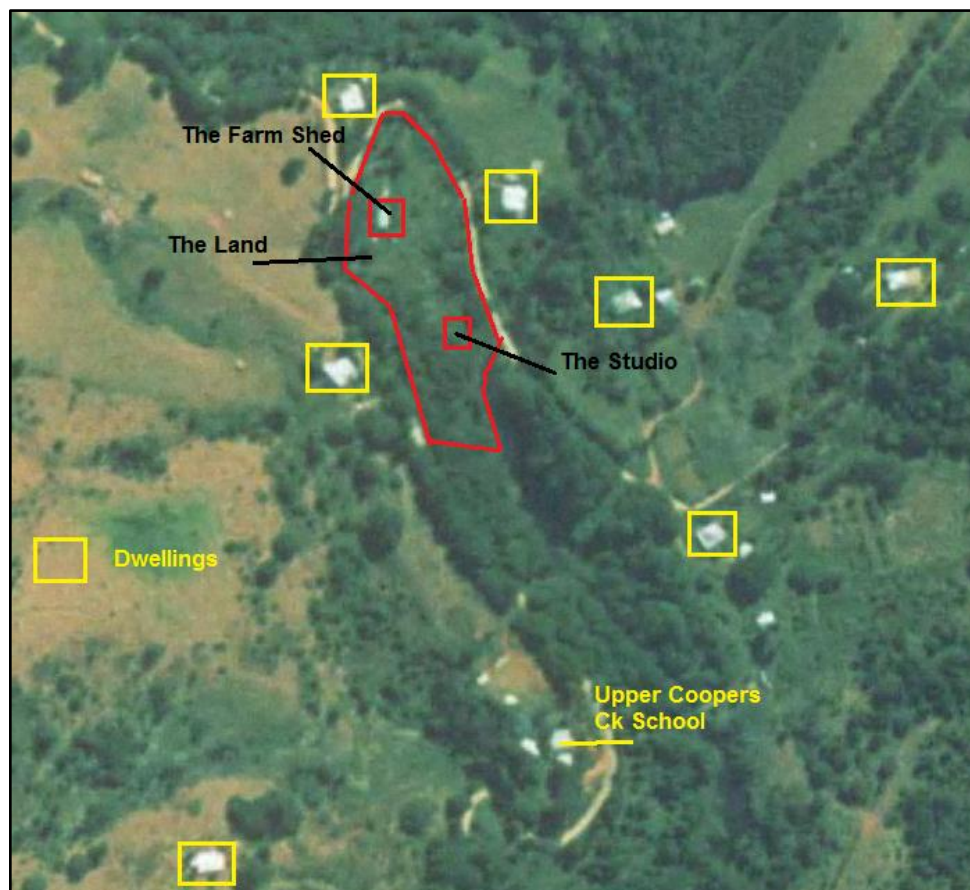
4.3.1 Existing buildings

The farm shed on the land was built following development (DA No. 90/141) and building (BA No. 90/2202) approvals from Council in November 1990.

The farm shed is in good condition, built on a concrete slab, steel framed and clad with colourbond steel with colourbond steel roofing.

The other building on the land is the studio. The studio is located approximately 71m from the farm shed. The studio has an internal floor area of approximately 40m², it is in good condition, built on wooden piers, is timber framed and clad with hardwood weatherboard with colourbond metal roofing.

Map No. 7 shows the land, location of the farm shed and studio on the land and development on adjoining lands in the immediate locality.

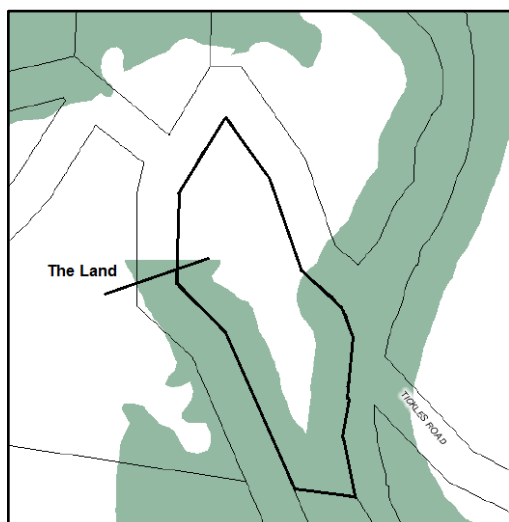


Map No. 7 Development on the land and adjoining lands
Source base image Dept. of Lands

4.3.2 Critical habitat, threatened species

Council's GIS identifies that part of the land supports high conservation value vegetation. Vegetation of 'high conservation value' was identified in the Byron Flora and Fauna Study 1999.

Map No. 8 shows the land and Council's mapping of 'high conservation value' vegetation.



Map No. 8 High conservation value vegetation

The land has been cleared and was previously used for grazing (dairy farming) purposes. Grazing has not occurred on the land for at least 22 years. The majority of the land is now vegetated due to natural regrowth, tree planting and landscaping.

That part of the land on which the existing farm shed (or potential new dwelling site) and studio is located does not support high conservation value vegetation and comprises a small orchard with some scaled domestic landscaping maintained as 'bush gardens'.

If required a flora and fauna assessment will be undertaken to assess the impact and mitigatory measures of providing bushfire asset protection zones.

4.3.3 Slope, soils and ground surface conditions

In general the land 'falls' to the east and has a slope of approximately 9%.

The maximum slope at the shed is approximately 7% (4° or 1 in 14).

The general topography of the land remains unaltered. The excavations that created the benching on which the access road from Ticks Rd and farm shed is built have existed since 1989 and remain stable.

Morand categorises the soil landscape of the land, as a 'Rosebank' soil landscape. In general terms this soil landscape occurs on lands that comprise rolling low hills and hills with a relief of 70-100m with slopes 20-40%. Typically soils in the landscape are derived from Lismore Basalts.

General soil landscape limitations of the 'Rosebank' soil landscape may include steep slopes, mass movement hazard and foundation hazard. Localised limitations may include waterlogging, shallow soils and rocky outcropping.

A geotechnical assessment of the geology and soil conditions of the land was undertaken for the farm shed. The land in general and area near the farm shed and potential dwelling site appears stable.

There is no visible surface evidence of soil instability (such as a cracking concrete slab or movement in walls) in the shed.

Further geotechnical investigations for a future dwelling and wastewater management system would be undertaken as part of the documentation for a dwelling on the land.

4.3.4 Traffic and roads

Vehicular access to the land and farm shed is via Ticks Rd and Coopers Creek Rd.

Ticks Rd is a gravel rural road and Upper Coopers Creek Rd is a bitumen and gravel rural road.

Ticks Rd and Coopers Creek Rd provide access to the land.

The creation of the land was approved by Council and the farm shed on the land approved by Council. The formalisation of a dwelling entitlement will not generate additional traffic to the land.

4.3.5 Services

Water supply

Potable water is supplied by roof capture and storage of stormwater at the farm shed. The land has a riparian right to Coopers Creek.

Wastewater disposal

Council has recently approved the installation of a new on-site wastewater system at the farm shed (Section 68 Local Government Act Approval No. 70.2011.1038.1, dated 23 August 2011). The system is installed but not yet fully commissioned.

Electricity

A reticulated 240 volt supply is connected to the farm shed and an underground supply provided to the studio.

Telecommunications

A telephone and internet service is connected to the farm shed.

4.3.6 Environmental effects and management

The environmental risks and effects as a consequence of the formalisation of a dwelling entitlement on the land are the same as currently exist, though more

appropriate provision will be made for bushfire protection and on-site wastewater disposal.

4.3.7 Social and economic effects

The resolution of a dwelling entitlement for the land will have a substantial positive social and economic benefit to Ms McKinley and allow her to 'get on with her life' without the doubt and worry that currently exists.

The resolution of a dwelling entitlement for the land will have a substantial benefit for Council as it will have participated in and resolved an administrative ambiguity that has existed since 1988.

4.4 State and Commonwealth interests

4.4.1 Public infrastructure

All essential public infrastructure services necessary to occupy a dwelling are currently provided to the land.

Other public infrastructure in the form of community facilities and recreation facilities are conveniently available in either Rosebank, Mullumbimby or Lismore. Upper Coopers Creek primary school is located near the land.

4.4.2 State and Commonwealth consultation

This part of the Planning Proposal will be completed following determination of the 'gateway' by the Dept. of Planning and Infrastructure and consultation with relevant State and Commonwealth agencies in the 'gateway' exhibition and determination processes.

5 Community consultation

The request for a dwelling entitlement was considered by Council at its Ordinary Meeting of 10 February 2011. Council places advertisement in the local press notifying the public of its meetings.

Following determination of the 'gateway' by the Dept. of Planning and Infrastructure notification of the Planning Proposal will be provided to adjoining landowners and it will be publicly exhibited with bushfire threat, land contamination and on-site wastewater assessments in accordance with the Dept. of Planning and Infrastructure guidelines titled '*A Guide to Preparing Planning Proposals*'.

6 Conclusion

This Planning Proposal has been prepared to facilitate the provision of a dwelling entitlement on the land.

The land has the capability and suitability to either:

- undertake the works necessary to formalise the occupation of an approved farm shed for habitable purposes or
- to erect a new dwelling and

- the studio
- without potential for adverse or irreversible environmental impact.

There is no land use planning reasons for not permitting a dwelling entitlement on the land.

Following amendment of the BLEP 1988 and recognition of a dwelling entitlement for the land a Building Certificate Application pursuant to Section 149 of the *Environmental Planning and Assessment Act* should be obtained for the farm shed and studio.

References

1. Byron Shire Council. Byron Local Environmental Plan 1988, as amended.
2. Parsons Brinkerhoff & Byron Shire Council. Byron Local Environmental Study 2007.
3. Byron Shire Council. Draft Byron Local Environmental Plan 2008.
4. Byron Shire Council. Rural Settlement Strategy 1998.
5. NSW Dept of Planning. Far North Coast Regional Strategy 2006 - 31 (Strategy 2006 - 31).
6. Morand DT. 1994. 'Soil Landscapes of the Lismore – Ballina 1:100,000 Sheet'. Soil Conservation Service of NSW, Dept. of Conservation and Land Management, Sydney.
7. Department of Planning. 'A Guide to Preparing Planning Proposals' & 'A Guide to Preparing Local Environmental Plans'

Usage note

This Planning Proposal was prepared for the purpose and exclusive use of Ms Rose McKinley and is not to be used for any other purpose or by any other person or corporation. Malcolm Scott, Consultant Town Planner, accepts no responsibility for any loss or damage suffered, however so arising, to any person or corporation who may use or rely on this Planning Proposal for a purpose other than that described above.

The source of the maps, development plans and exhibits shown in this Planning Proposal are shown on the maps, development plans and exhibits. They are suitable only for the purposes of this Planning Proposal. No reliance should be placed this information for any purpose other than for the purposes of this Planning Proposal. No extract of this Planning Proposal may be reproduced, stored or transmitted in any form without the prior consent of Malcolm Scott, Consultant Town Planner.

End

19 September 2011

APPENDIX No. 1

Report No. 12.10 Ordinary Meeting of Council 10 February 2011

BYRON SHIRE COUNCIL

ORDINARY MEETING

10 FEBRUARY 2011

(67)

Report No. 12.10. PLANNING - Bi-annual Planning Proposal - Dwelling entitlement for 2 Tickles Road, Upper Coopers Creek

Executive Manager: Environment and Planning
File No: PLN560000 x 93590 #1024394

Principal Activity: Land and Natural Environment

Summary: The purpose of this report is to provide Council with details pertaining to a request for a dwelling entitlement and ultimately an amendment to Schedule 7 of *Byron Local Environmental Plan (LEP), 1988*. The circumstances of the case, history of the lands creation and the merit issues have been considered and it is concluded that the land can sustain a dwelling house without prejudicing Council's planning controls or creating an undesirable precedent.

It is recommended that Council support an amendment to Byron LEP 1988 by including the property in Schedule 7.

5

NOTE TO COUNCILLORS:

10 In accordance with the provisions of S375A of the Local Government Act 1993, a Division is to be called whenever a motion for a planning decision is put to the meeting, for the purpose of recording voting on planning matters. Pursuant to clause 2(a) under the heading Matters to be Included in Minutes of Council Meetings of Council's adopted Code of Meeting Practice (as amended) a Division will be deemed to have been called by the mover and seconder of all motions relating to this report.

15

RECOMMENDATION:

1. That Council support an amendment to Schedule 7 of Byron LEP 1988 in order to provide a dwelling entitlement to Lot 2 DP 537488 – 2 Tickles Road, Upper Coopers Creek.
2. That Council advise the land owner of the need to prepare a Planning Proposal in accordance with Section 55 of the EPA Act 1979 for submission to the Minister under Section 56 of the EPA Act 1979 through the LEP 'Gateway' process and that the Planning proposal be submitted to Council within 12 months of the date of the resolution.
3. That the Planning Proposal be submitted to the Department of Planning for a 'Gateway' determination without the need to report back to Council, and that the Minister be advised that further studies are likely to be required to address Bushfire, Contamination (SEPP 55 Remediation of Contaminated Lands) and Onsite Effluent Disposal to enable Byron LEP 1988 to be amended.

Attachments:

- Site Plan #1029995 [1 page].....Annexure 6(a)
- Deposited Plan 537488 #1030994 [1 page]..... Annexure 6(b)
- Section 149(2) Certificate #1030995 [1 page].....Annexure 6(c)
- Section 149(5) Certificate dated 1994 #1030993 [4 pages]..... Annexure 6(d)

40

BYRON SHIRE COUNCIL

ORDINARY MEETING

10 FEBRUARY 2011

(68)

Report

On 12 August 2010 Council considered the report *Biannual LEP Amendments Review of Process* (#973447). Council resolved:

10-617 (relevant extract only):

1. That Council adopt the revised Process to initiate a Local Environmental Plan as presented in Annexure 13(b) #973633.

The process adopted specifies that Council will consider a report on proposed LEP amendments biannually in June and December. On 23 September 2010 a report was presented to Council considering a Strategic Land Planning Work Program which included a recommendation that further bi-annual LEP amendments be classed as low priority and placed on hold until the draft Shire-wide LEP is close to gazettal. Council resolved:

10-742 **Resolved** that the Committee resolve under delegated authority to adopt the Strategic Land Planning Work Program as per the recommendations in Table 3 of this report as amended below:

- To include Gateway applications up until 30 September 2010 as item No. 39, Recommendation High Priority.

Consequently, this request for an LEP amendment has been submitted for Council to consider whether they should proceed under the Gateway process as a Planning Proposal.

This report seeks Council's resolution to proceed with the preparation and submission to the Department of Planning of a planning proposal to amend Byron LEP 1988 to allow a rural property a dwelling entitlement by listing the property in Schedule 7, pursuant to clause 15 of Byron LEP 1988. The property description for the subject land is:

- Lot 2 DP 537488, 2 Tickles Road, Upper Coopers Creek. See Annexure 6(a) for site plan.

The justification as to why the property should be listed in Schedule 7 of Byron LEP 1988 to allow dwelling entitlements is presented below.

LEP amendment request for 2 Tickles Road, Upper Coopers Creek (Lot 2 DP 537488)

The applicant has submitted a request seeking an amendment to Byron LEP 1988 by including the subject property in Schedule 7 of the plan, thus allowing a dwelling to be erected on the property, pursuant to Clause 15 of the LEP.

The subject land is identified as Lot 2 DP537488, and more commonly known as 2 Tickles Road, Upper Coopers Creek. The land has an area of 1.217 ha and contains a shed being used as a dwelling and a second two storey timber building overlooking Coopers Creek. The land is zoned 1(a) Rural.

A thorough search and investigation of the subject property and history has been carried out to determine whether or not the land has a dwelling entitlement or not. The following information is of relevance.

History

- The subject land was part of Portion 49, County of Rous, Parish of Whian Whian.
- The land was owned at the appointed day of 8 November 1968 by Mr Giovanni Basso. This has been confirmed by Council's Rates Books and Land Transfer Documents.

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- 5 • An application for Subdivision was approved by Council on the 24 September 1968 creating three lots with the subject land having the title of Lot 2 DP 537488 and an area of 3 acres and 13 perches. A Council Clerks certificate is included on the registered Deposited Plan and the land was registered and formally created on 12 September 1969. See Annexure 6(b) for copy of Deposited Plan.
- The subject parcel was then acquired from Mr Basso on 6 April 1969 by a Mr Raymond Patch and then subsequently sold to George Webb on the 9 November 1977.
- 10 • The current owners, Rose McKinley and David Hanaford, purchased the land from George Webb on 27 July 1989.
- 15 • A Section 149(2) Certificate was issued by Council in either 1988 or 89 (Annexure 6(c)). The certificate in answer to the standard question "where the land is vacant is there a prohibition to the erection of a dwelling by reason of a development standard relating to the minimum area of the land?" Stated "No".
- 20 • This is correct – there are no specific clauses in the Byron LEP 1988 which have development standards relating to a minimum lot size for rural dwellings. However the minimum lot size for the subdivision of rural land under Clause 11 of the Byron LEP is 40 hectares if that subdivision is for residential purposes. As the land was less than 40 hectares, an argument could be made that greater scrutiny and investigation of this question would give rise that the land is undersized and as such may not have a dwelling entitlement.
- 25 • A further Section 149(5) Certificate was issued by Council on the 15 August 1994 (Annexure 6(d)) which did provide a further answer as to whether or not a dwelling house could be constructed upon the land. The Certificate in answer to the question "Whether the property has a dwelling entitlement pursuant to Clause 15 of Byron Local Environmental Plan 1988?" stated "Yes". The owners contend that they applied for the S149(5) Certificate when they
30 were preparing an application to construct a studio on the property that they could live in. Due to family circumstances no such application was ever made.
- As to how Council came to this conclusion is unknown, however it is noted the registered Deposited Plan of Subdivision for Lot 2 DP 537488 has a Council Clerks Certificate and
35 references the subdivision application Number 33/68. These details are also registered in Council's subdivision register for that period. It is not unreasonable to assume staff in 1994 looked at the Deposited Plan, saw it was an approved subdivision by Council and concluded it had a dwelling entitlement. However, the Council Clerks certificate is dated prior to the gazettal of Byron Interim Development Order No.1.
- 40 • Council has now advised the subject land owner via a new Section 149 Certificate that the land was part of an existing holding at the appointed day in 1968, which has now been broken by way of a Council approved subdivision, and as such does not have a dwelling entitlement as the land owner of the adjoining Lot 3 DP 537488 has utilised the entitlement.
- 45 • Development Consent was sought in 1990 and granted under DA90/141 and BA 90/2202 for the construction of a shed on the property. The shed from inspection appears to have been now converted into a dwelling sometime during the 1990's and is currently being lived in.
- 50 • A further structure has also been constructed upon the land, which has the appearance of a small two storey dwelling. This more recent structure was the subject of investigation by Council staff and no approvals have been granted for the building. Correspondence from the owner of the land indicates that its intended purpose could be a tea house or similar recreational facility. Initial investigations have been carried out by Council but no further

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action has been taken in terms of legitimising this structure at this point in time by the landowner.

- A request for a dwelling entitlement was previously submitted to Council in its deliberations on Draft Byron LEP 1988 (Amendment 113). The matter was not considered favourably at the time as it was considered the land, although created with the consent of Council was an existing holding and not worthy of an entitlement. The matter was reported to Council on the 10 February 2004. No assessment of the circumstances of the case, or merit issues were considered by Council at that time.
- The Local Environmental Study (LES) prepared for the Shire Wide LEP also considered the site. On further review of the history of the property the LES failed to acknowledge Section 149 Certificates had been issued in error for the property, or that the Deposited Plan was signed off with Shire Clerks Certificate. It is noted other properties considered in the LES for a dwelling entitlement were considered favourably whereby Section 149 Certificates had been issued in error. The assessment of this property in the same manner is not inconsistent with Council's previous methodology employed for the Shire Wide LEP.

Site Suitability/Environmental Constraints

Geotechnical Issues

The subject land has an area of 1.217 ha and generally falls to the north east towards Coopers Creek. There are no identifiable geotechnical constraints which would restrict the land from being utilised for residential purposes.

Flora and Fauna

A large part of the site is clear of vegetation and historical information with Council indicates the property was in all likelihood utilised for the grazing of livestock. Any future dwelling should be sited within the cleared areas of the property to minimise environmental impacts.

Bushfire

The subject land is identified under Council's Bushfire Maps as prone to bushfire. This issue will need to be addressed to ensure any future dwelling house complied with the requirements of the Rural Fire Service. It is noted though this is not an impediment to the development of the property for residential purposes and siting of the dwelling within a cleared area of the property, combined with the normal construction standards for building within a bushfire prone area would ensure compliance with the Rural Fire Services Document "Planning for Bushfire Protection 2006".

Effluent Disposal

The site is not connected to reticulated sewer and effluent will need to be disposed of onsite. It is estimated there is approximately 2800m² of area available for onsite effluent disposal outside of a 40 metre buffer to Coopers Creek and 1300m² of area available for onsite effluent disposal outside of a 100 metre buffer to Coopers Creek. Having regard to the various systems available for effluent disposal including composting toilets combined with grey water disposal, aerated wastewater treatment systems, advanced tertiary treatment systems, it is considered effluent can be disposed of onsite in accordance with Council's requirements.

Water Supply

Like most of the Shire's rural areas, rainwater will need to be harvested from the roof of the dwelling for domestic purposes.

Power/ telecommunication

Power and phone services are available to the property.

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Contamination

Although Council has no specific details addressing SEPP 55 Remediation of Contaminated Lands, as discussed above it is understood the land historically has been utilised for the grazing of livestock. The decommissioned Tynside Dip is located to the east of the property on totally unrelated land and on the other side of Coopers Creek. It is unlikely this would have led to contamination on the property, having regard to the topography of the land and the history of different landowners, however the issue of contamination will need to be addressed with any Planning Proposal, should Council determine to support the granting of a dwelling entitlement to the land in any case.

Flooding

The land is elevated above Coopers Creek and a suitable area for a dwelling and effluent disposal should be available above the 1:100 year flood level.

Access

The subject lot has frontage to both Upper Coopers Creek Road and Tickles Road. The existing driveway comes off Tickles Road.

Surrounding Land Uses

The locality is characterised by small lot rural residential development and larger residual holdings. No Intensive horticultural activities are occurring within the immediate vicinity of the property. A public school for infants and primary school students is located on Upper Coopers Creek Road. The formal development of the land for residential purposes would not be out of character with the locality.

Relationship to Management/Strategic Plan

The Byron Rural Settlement Strategy includes guidelines under Section 6.5 for matters to consider when determining whether or not to include a property under Schedule 7 to enable consent to be sought for a dwelling house upon the land pursuant to Byron LEP 1988. The proposal being a rural property without a dwelling entitlement can be considered under these guidelines listed in the Strategy. The Strategy includes three headings with comments following:

Where Can it Occur?

Council can consider lots for inclusion into Schedule 7 if the allotment was created prior to 1/1/98 and it contains lands not mapped as significant vegetation, slopes greater than 20%, flood prone, within buffers to agriculture, horticulture, dip sites, garbage tips, quarries, has adequate road access and provisions of services.

Comment: The subject lot was created in 1968, and although partly vegetated with High Conservation Value Vegetation, a large part of the site is clear of native vegetation which would be suitable for a dwelling house. Any future house can also be sited to ensure a minimum 50 metre buffer is provided to ensure suitable separation for neighbouring rural properties. As discussed above the property has suitable road frontage and is serviced with power and telecommunications. The Decommissioned Tynside Cattle Dip is located to the east of the property on the other side of the Coopers Creek and approximately 220 metres from the existing shed on the subject lot. A 200 metre buffer is required under the NSW DPI Handbook – Living and working in rural areas. As discussed above potential contamination will need to be addressed. The property is not near quarries, garbage dumps.

When Can it Occur?

Council can indicate requests for inclusion into Schedule 7 on a site specific basis and timing will depend on Council's work program.

Comment: Recent changes to the EPA Act 1979 enable Council to consider site specific rezoning requests more readily. Should Council resolve to add the subject property to Schedule 7 of the

BYRON SHIRE COUNCIL

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Byron LEP 1988 a planning proposal needs to be prepared. Such work should occur over the next 12 months.

How will it Occur?

- 5 Council needs to determine what further studies are required and sources of funding to undertake such studies.

10 Comment: The landowner will need to fund and prepare the Planning Proposal in the appropriate format having regards to Section 55 of the EPA Act 1979 for submission by Council to the Minister under Section 56 of the EPA Act 1979 (Gateway Determination). Should the proposal be acceptable, it is considered further studies are likely to be required by the Minister in relation to Bushfire, Contamination (SEPP 55 Remediation of Contaminated Lands) and Onsite Effluent Disposal to enable Byron LEP 1988 to be amended. Such additional studies will be highlighted to the Minister at the time the Planning Proposal is forwarded under Section 56 of the Act. These additional studies will need to be funded by the landowner.

Other Issues/ Public Interest

The proposal raises questions of procedural fairness and equity in two ways.

- 20 1. Council has issued a Section 149(5) Certificate in error and potentially an argument could also be made that the S149(2) Certificate was issued without full disclosure of information relating to whether or not a dwelling could be constructed upon the land; and
- 25 2. The original owner in 1968 applied to Council to subdivide land which was approved, plans of subdivision were registered and the land then on sold to third parties as rural residential land. The land owner at the time did not breach or subvert any local government planning controls that were in place under either, the Local Government Act 1919, nor Byron Interim Development Order (IDO) No.1. In this regard, this was a time when Council could approve small lot subdivisions in rural areas, with the Byron IDO 1968 including specific provisions for concession allotments as small as 0.25 of an acre. This is evidenced by the surrounding land pattern and directly to the north of the site are two small lots which were approved by Council in 1965, registered under Deposited Plan DP508050 with an area of (Lot 1) 2 roods and 20 perches and (Lot 2) 3 acres and 5 perches. These two lots were on-sold to different owners such that both parcels are considered for the purposes of Clause 15 of Byron LEP 1988 as each being an existing holding and having a "dwelling entitlement".

40 It is apparent the current landowners predicament of being part of an existing holding as defined under Clause 15 of Byron LEP 1988 relates directly to the original landowner's timing of applying to subdivide the land and when it was registered. That is had the land been registered and sold to Raymond Patch prior to Byron IDO No.1 being gazetted, the parcel would be considered an existing holding in its own right. Alternatively had the land owner applied for the subdivision after the gazettal of the IDO, the land would have an entitlement as per Clause 15(2A)(e) of Byron LEP 1988.

45 Conclusion

Although the subject land is less than the required 40 hectares for subdivision in rural areas, the granting of a dwelling entitlement to the subject land is recommended having regard to the history of the lands creation, the physical characteristics of the land and surrounds, and Councils ambiguous advice on various planning certificates. It is also submitted the granting of a dwelling entitlement is not inconsistent with the Byron Rural Settlement Strategy, nor is it inconsistent with the methodology utilised by Council for the Shire Wide LEP whereby rural properties were considered favourable for dwelling entitlements when Section 149 Certificates have been issued in error.

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It is recommended that Council support an amendment to the LEP, by placing the subject land into Schedule 7 of the Byron LEP 1988, and the applicant be invited to prepare a formal planning proposal for submission to the Minister (Department of Planning) for consideration.

5 **Financial Implications**

The granting of a dwelling entitlement to the subject land will resolve past errors in relation to the S149 Certificates and provide a path forward for the landowner from a planning perspective in terms of the shed being utilised as a dwelling and the other structure on the land.

10

Statutory and Policy Compliance Implications

The proposed amendment to Byron LEP 1988 is not inconsistent with any State, regional or local policy or plan.

Lot 2 DP 537488, Tickles Road UPPER COOPERS CREEK



Disclaimer : While all reasonable care has been taken to ensure the information contained on this map is up to date and accurate, no warranty is given that the information contained on this map is free from error or omission. Any reliance placed on such information shall be at the sole risk of the user. Please verify the accuracy of the information prior to using it.
Note : The information shown on this map is a copyright of the Byron Shire Council and the NSW Department of Lands.

Scale = 1:5,000
Metres 100 200 300

(Scale correct at A4 size)



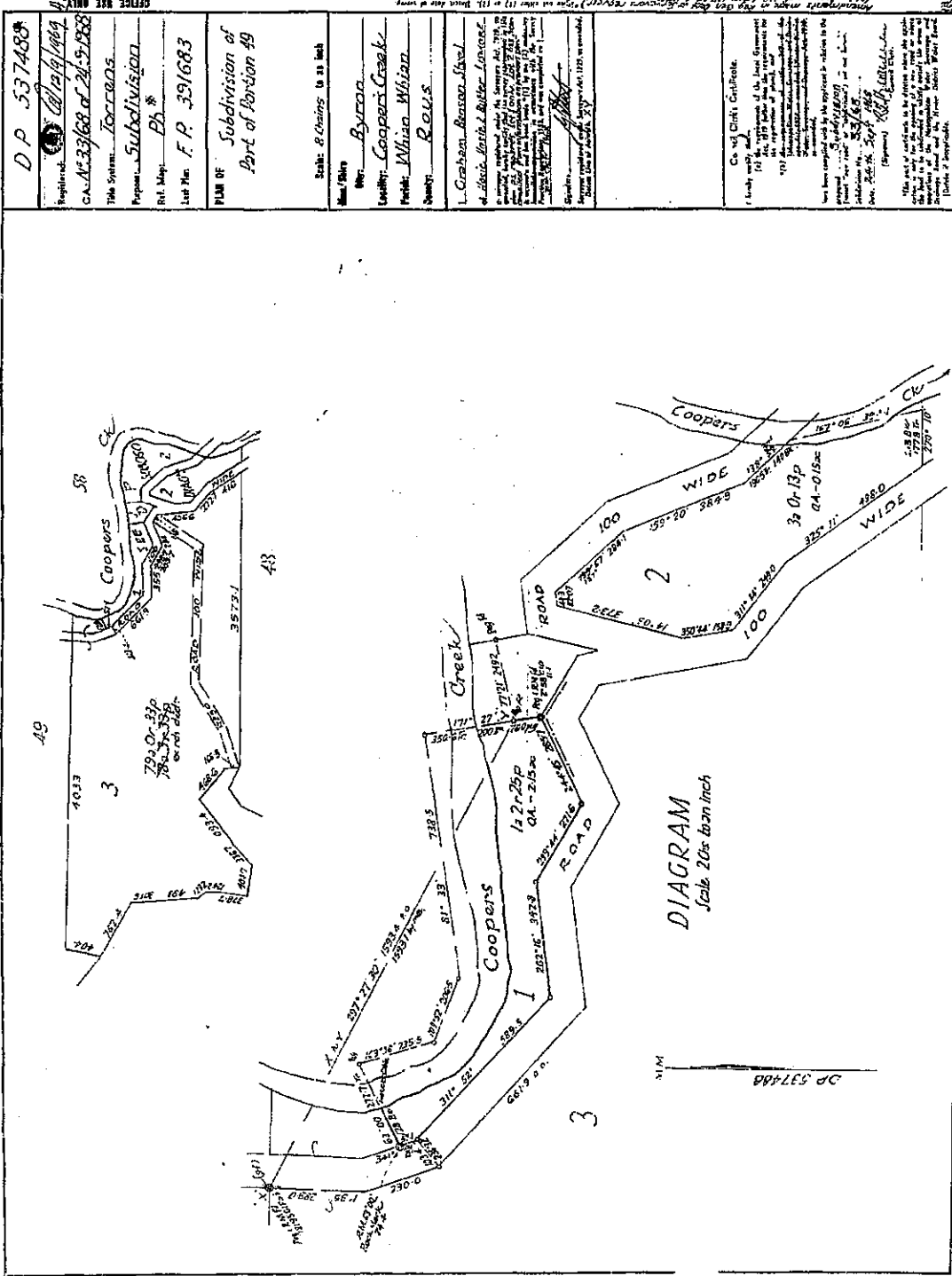
CONVERSION TABLE ADDED IN
REGULAR GENERAL'S DEPARTMENT
DP 537488 CONTINUED

AC RD P	SW 1/4
1 2 3	6703
AC RD P	1A
3 - 13	1,217
79 - 45	32,005

CONVERSION TABLE ADDED IN
REGULAR GENERAL'S DEPARTMENT
DP 537488

LYNKS	FEET
1.6	0.322
1.8	0.366
2.0	0.409
2.2	0.452
2.4	0.495
2.6	0.538
2.8	0.581
3.0	0.625
3.2	0.668
3.4	0.711
3.6	0.754
3.8	0.797
4.0	0.840
4.2	0.883
4.4	0.926
4.6	0.969
4.8	1.012
5.0	1.055
5.2	1.098
5.4	1.141
5.6	1.184
5.8	1.227
6.0	1.270
6.2	1.313
6.4	1.356
6.6	1.399
6.8	1.442
7.0	1.485
7.2	1.528
7.4	1.571
7.6	1.614
7.8	1.657
8.0	1.700
8.2	1.743
8.4	1.786
8.6	1.829
8.8	1.872
9.0	1.915
9.2	1.958
9.4	2.001
9.6	2.044
9.8	2.087
10.0	2.130
10.2	2.173
10.4	2.216
10.6	2.259
10.8	2.302
11.0	2.345
11.2	2.388
11.4	2.431
11.6	2.474
11.8	2.517
12.0	2.560
12.2	2.603
12.4	2.646
12.6	2.689
12.8	2.732
13.0	2.775
13.2	2.818
13.4	2.861
13.6	2.904
13.8	2.947
14.0	2.990
14.2	3.033
14.4	3.076
14.6	3.119
14.8	3.162
15.0	3.205
15.2	3.248
15.4	3.291
15.6	3.334
15.8	3.377
16.0	3.420
16.2	3.463
16.4	3.506
16.6	3.549
16.8	3.592
17.0	3.635
17.2	3.678
17.4	3.721
17.6	3.764
17.8	3.807
18.0	3.850
18.2	3.893
18.4	3.936
18.6	3.979
18.8	4.022
19.0	4.065
19.2	4.108
19.4	4.151
19.6	4.194
19.8	4.237
20.0	4.280
20.2	4.323
20.4	4.366
20.6	4.409
20.8	4.452
21.0	4.495
21.2	4.538
21.4	4.581
21.6	4.624
21.8	4.667
22.0	4.710
22.2	4.753
22.4	4.796
22.6	4.839
22.8	4.882
23.0	4.925
23.2	4.968
23.4	5.011
23.6	5.054
23.8	5.097
24.0	5.140
24.2	5.183
24.4	5.226
24.6	5.269
24.8	5.312
25.0	5.355
25.2	5.398
25.4	5.441
25.6	5.484
25.8	5.527
26.0	5.570
26.2	5.613
26.4	5.656
26.6	5.699
26.8	5.742
27.0	5.785
27.2	5.828
27.4	5.871
27.6	5.914
27.8	5.957
28.0	6.000
28.2	6.043
28.4	6.086
28.6	6.129
28.8	6.172
29.0	6.215
29.2	6.258
29.4	6.301
29.6	6.344
29.8	6.387
30.0	6.430
30.2	6.473
30.4	6.516
30.6	6.559
30.8	6.602
31.0	6.645
31.2	6.688
31.4	6.731
31.6	6.774
31.8	6.817
32.0	6.860
32.2	6.903
32.4	6.946
32.6	6.989
32.8	7.032
33.0	7.075
33.2	7.118
33.4	7.161
33.6	7.204
33.8	7.247
34.0	7.290
34.2	7.333
34.4	7.376
34.6	7.419
34.8	7.462
35.0	7.505
35.2	7.548
35.4	7.591
35.6	7.634
35.8	7.677
36.0	7.720
36.2	7.763
36.4	7.806
36.6	7.849
36.8	7.892
37.0	7.935
37.2	7.978
37.4	8.021
37.6	8.064
37.8	8.107
38.0	8.150
38.2	8.193
38.4	8.236
38.6	8.279
38.8	8.322
39.0	8.365
39.2	8.408
39.4	8.451
39.6	8.494
39.8	8.537
40.0	8.580
40.2	8.623
40.4	8.666
40.6	8.709
40.8	8.752
41.0	8.795
41.2	8.838
41.4	8.881
41.6	8.924
41.8	8.967
42.0	9.010
42.2	9.053
42.4	9.096
42.6	9.139
42.8	9.182
43.0	9.225
43.2	9.268
43.4	9.311
43.6	9.354
43.8	9.397
44.0	9.440
44.2	9.483
44.4	9.526
44.6	9.569
44.8	9.612
45.0	9.655
45.2	9.698
45.4	9.741
45.6	9.784
45.8	9.827
46.0	9.870
46.2	9.913
46.4	9.956
46.6	10.000

WARNING: CREATING OR FOLLOWING WILL LEAD TO REJECTION



4289

WARNING: Plan Drawing only to appear in this space.

I, Jack Myerand Wilson, Registrar General for New South Wales, certify that this register is a true and correct copy of the original as it appears in the office of the Registrar General for New South Wales, as of the date of this document in my custody this day of July, 1976.

Jack Wilson

EXHIBIT FIVE


 Box 150,
ONE 85 6500

 SHIRE OF BYRON
 CERTIFICATE UNDER SECTION 149,
 ENVIRONMENTAL PLANNING AND
 ASSESSMENT ACT, 1979

CERTIFICATE No. 743/8

INFORMATION PROVIDED PURSUANT TO SECTION 149(2)

Subject land lot 2 DP537488 c/c 33/68 being part c
 Lot or Portion 2 Section Whian Whian
 Description of land Shire of Byron, County of Ross, Parish of Whian Whian
 Area Dimensions: Frontage Depth
 Town, Village Rosebank Street Croppers Creek Road House No. or Name
 Owner and address recorded by Council G. Webb
Upper Croppers Creek Rosebank

AS AT THE DATE OF THIS CERTIFICATE, THE MATTERS REFERRED TO IN COLUMN 1 OF THE FOLLOWING TABLE AFFECT THE
 LAND IN THE MANNER SET OUT IN COLUMN 2 TO THE EXTENT INDICATED IN COLUMN 3.

Column 1 Matters that may affect the land	Column 2 Affected	Column 3 The manner in which the land is affected
a. Environmental Planning Instrument Draft Local Environment Plan	Yes Yes/No	Name: <u>Byron LEP 1988</u> Name: <u>Franklin Anderson</u> (See attachments for details) <u>1.2.4.6.</u>
b. The land is zoned (Environmental Planning Instrument) Proposed Zoning (Draft Local Environment Plan)	Zone: Proposed Zone:	<u>1(a) General Rural Zone</u> (See attachments for details)
c. State Environmental Planning Policies or Regional Environmental Plans (including Draft SEPP's or REP's)	Yes	<u>J.9.N.25 North Coast R.</u> (See attachments for details) <u>1988</u>
d. Where the applicant indicates that the land is vacant, is there a prohibition to the erection of a dwelling by reason of a development standard relating to minimum area of the land?	Yes/No	
e. Requirement to obtain development consent to the demolition of any building on the land.	Yes/No	
f. Development Control Plans	Yes/No	<u>DCP 1. General</u>
g. Ministerial Direction under Sec. 101(1) of the Act	Yes/No	<u>*ALL APPLICATIONS OTHER THAN APPLICATION BY PUBLIC AUTHORITIES TO CARRY OUT DEVELOPMENT FOR THE PURPOSES OF CANALS OR OTHER ARTIFICIAL WATERWAYS*</u>
h. Coastal Protection Act, 1979, Section 38 or 39	Yes/No	
i. Proclamation of Mine Subsidence District under Section 15 of Mines Subsidence Compensation Act	No	
j. Road widening or re-alignment under Section 262 of Local Government Act, Environmental Planning Instrument or resolution of Council.	Yes/No	
k. An adopted policy to restrict development by reason of the likelihood of a hazard, being landslip, bush fire, flooding, tidal inundation, subsidence, storm, tempest.	Yes/No	<u>Site inspection required to date</u> Nature of hazard: <u>building location</u> <u>last normal impact & slip-back</u> (See attachments for details) <u>Earth time column required for it</u>

Information is provided only to the extent that Council has been notified by the Dept. of Environment and Planning or relevant Authority administering the Act.

 NOTE:
 EITHER

A The prescribed fee (\$20) E.P.A. Regulation Clause 68(2) not having been received and no request having been received the Court expressly declines to include in this Certificate advice within the meaning and for the purpose of S. 149 (6) of the Environmental Planning and Assessment Act, 1979. This Certificate is limited to the matters provided for in S. 149 (1) and (2) of the said Act and clause 68(3) of Regulations under the Act.

OR

EXHIBIT SIX

BYRON COUNCIL

Certificate Under Section 149(2) Environmental Planning and Assessment Act 1979

Applicant: ELLIOT & SOCHACKI
DX 20003
MULLUMBIMBY

Certificate No: 9401096
Date: 15/08/1994
Your Ref:

Fee: 40.0 Receipt No: 516756 Receipt Date: 10/08/1994

Owner's Name: MR. DJ HANNAFORD; MS. R MCKINLEY
Assessment: 0738635000000 Property No: 996800
Street Addr: TICKLES ROAD, ROSEBANK 2480
Property: Lot 2 DP 537488

Locality:
Parish: Whian Whian County: Rous

- a) The following environmental planning instruments (being local environmental plans, deemed environmental planning instruments or draft local environmental plans placed on exhibition pursuant to s 66(1) (b) of the Environmental Planning & Assessment Act, 1979, as the case may be) restrict or purport to restrict, the purposes for which development may be carried out on the land:

- Byron Local Environmental Plan 1988
- Draft Local Environmental Plan/s No/s placed on exhibition pursuant to s 66(1)(b) of the Act on (not applicable).

The purposes for which development may be carried out in accordance with that/those instrument(s) without development consent and with development consent and for which the carrying out of development under that/those instrument(s) is prohibited are as per attached Annexure(s) No(s) 1.

- b) The zone within which the land is situated under Byron Local Environmental Plan 1988 is zoned:
- 1(a) GENERAL RURAL

The purpose for which development may be carried out within that zone without development consent and with development consent and for which the carrying out of development is prohibited within that zone are as per attached Annexure No.1

Note: Regard must be had for other clauses in the instrument which may restrict purposes for which development may be carried out.

Certificate No: 9401096 Date: 15/08/1994 Page: 2 of 4

- c) Other planning instruments (being state environmental planning policies, regional environmental plans, draft state environmental planning policies and draft regional environmental plans which the Minister has notified Council should be included in this certificate) applying to the land are as follows:
See attached Annexure(s) No(s) 2,2a.

NOTE: Any concerned person, or any person advising him/her, should make further enquiries as to the precise application of the above instruments, as well as any other instruments (whether or not referred to in this certificate).

- d) The erection of a dwelling house is affected by a development standard relating to the minimum area on which a dwelling-house may be erected?
- Yes/No
- e) Does demolition of any building on the land require development consent to be obtained?
- No
- f) The following Development Control Plans approved under Cl 24(1) of the Environmental Planning & Assessment Regulation 1980 apply to the land (irrespective of whether or not they are in force)
- Yes
- DCP No.1 General
- f1) The following contributions plans approved under cl 41J of the Environmental Planning & Assessment Regulation 1980 apply to the land (irrespective of whether or not they are in force).
- Byron Council Section 94 Contributions Plan
- g) Would an application to carry out development on the land at the time the application for this certificate was lodged, be the subject of a direction under s 101(1) of the Environmental Planning & Assessment Act, 1979?
-Yes. All applications, other than applications by public authorities, to carry out development for the purpose of canals or other artificial waterways.
- h) Is the land affected by the operation of s38 or s39 of the Coastal Protection Act, 1979, but only to the extent that Council has been notified by

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the Department of Public Works?

- No

- i) Has the land been proclaimed to be a mine subsidence district within the meaning of Section 15 of the Mine Subsidence Compensation Act 1961.

- No

- j) Is the land affected by road widening or road realignment under:

- (i) Section 262 of the Local Government Act, 1919
(ii) any environmental planning instrument; or
(iii) any resolution of Council?

- ~~Yes~~/No

- k) Has Council by resolution adopted a policy to restrict the development of the land by reason of the likelihood of land slip, bushfire, flooding, tidal inundation, subsidence or any other risk.

- Yes. Medium Fire Danger. Refer DCP No.1.

The land is affected by a Tree Preservation Order as per attached Annexure No. 3

Council advises that private covenants exist in Ocean Shores and some other land within the local government area of Byron. Whilst Council has no jurisdiction over private covenants, you are advised that local residents may take legal action should any such covenant be contravened.

In accordance with s 149(5) of the Environmental Planning & Assessment Act 1979, Council provides the following additional advice on other relevant matters affecting the land of which Council is aware:

1. Any State Environmental Planning Policies and Draft State Environmental Planning Policies which are applicable to the land but have not been notified by the Minister: See Annexure 2a.
2. Whether the property has a dwelling entitlement pursuant to Clause 15 of the Byron Local Environmental Plan 1988.

- Yes/~~No~~

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3. Whether the property is likely to be affected by a proposal to develop a dam at Federal.

- Yes/No

4. Whether the land is within an area identified as being unstable at Ocean Shores.

- Yes/No

Any advice provided pursuant to S149(5) of the Environmental Planning & Assessment Act, 1979 has been taken from Council's records, after a search thereof, but Council cannot accept any omission or inaccuracy.

Any statement made or information given in this certificate does not relieve the property owner of obtaining Council's approval required under the Local Government Act 1993, the Environmental Planning & Assessment Act 1979, or any other Act.

.....
Max Eastcott
General Manager
Byron Council
PO Box 159

BYRON BAY 2481 Phone (066) 856 500

APPENDIX No. 2

Part copy minutes Ordinary Meeting of Council 10 February 2011

BYRON SHIRE COUNCIL

ORDINARY MEETING MINUTES

10 FEBRUARY 2011

(6 of 39)

- 11-15 **Resolved** that Council receive and note the record of investments for the months of November 2010 and December 2010. (Staples/Woods)
-

Report No. 12.6. Monthly Finance Report – December 2010 and January 2011

File No: FIN100500 #1050594

- 11-16 **Resolved** that Council note this Report. (Staples/Woods)
-

ENVIRONMENT AND PLANNING – EXECUTIVE MANAGER’S REPORTS

Report No. 12.9. PLANNING - Site specific Development Control Plan for certain land in Bangalow – Public Exhibition

File No: PLN453005 #1046174

- 11-17 **Resolved:**

1. That Council adopt the content of the draft site specific Bangalow Development Control Plan – Chapter 22 (Annexure 11 #1044693) together with any recommended amendments, for staff to revise to ensure consistency with relevant legislation and draft planning instruments prior to public exhibition.
2. That Council exhibit the draft ‘Chapter 22 – Bangalow Urban Release Areas’ Development Control Plan for at least 28 days in accordance with the *Environmental Planning and Assessment Act 1979* and section 18 of the *Environmental Planning and Assessment Regulation 2000*.
3. That the draft ‘Chapter 22 – Bangalow Urban Release Areas’ be reported back to Council with any submissions received after the public exhibition period for adoption and inclusion into the Byron Development Control Plan 2010. (Staples/Woods)

The motion was put to the vote and declared carried.

Crs Tucker, Woods, Heeson, Staples, Barham, Cameron, Morrissey and Tabart voted in favour of the motion.

No Councillors voted against the motion.

Cr Richardson was not present during reservation of items.

Report No. 12.10. PLANNING - Bi-annual Planning Proposal - Dwelling entitlement for 2 Tickles Road, Upper Coopers Creek

File No: PLN560000 x 93590 #1024394

- 11-18 **Resolved:**

1. That Council support an amendment to Schedule 7 of Byron LEP 1988 in order to provide a dwelling entitlement to Lot 2 DP 537488 – 2 Tickles Road, Upper Coopers Creek.
 2. That Council advise the land owner of the need to prepare a Planning Proposal in accordance with Section 55 of the EPA Act 1979 for submission to the Minister under Section 56 of the EPA Act 1979 through the LEP ‘Gateway’ process and that the Planning proposal be submitted to Council within 12 months of the date of the resolution.
-

BYRON SHIRE COUNCIL

ORDINARY MEETING MINUTES

10 FEBRUARY 2011

(7 of 39)

3. That the Planning Proposal be submitted to the Department of Planning for a 'Gateway' determination without the need to report back to Council, and that the Minister be advised that further studies are likely to be required to address Bushfire, Contamination (SEPP 55 Remediation of Contaminated Lands) and Onsite Effluent Disposal to enable Byron LEP 1988 to be amended. (Staples/Woods)

The motion was put to the vote and declared carried.

Crs Tucker, Woods, Heeson, Staples, Barham, Cameron, Morrisey and Tabart voted in favour of the motion.

No Councillors voted against the motion.

Cr Richardson was not present during reservation of items.

Report No. 12.14. PLANNING – 10.2010.535.1 Subdivision boundary adjustment at 359-411 Upper Wilson's Creek Road Wilson's Creek

File No: 99050x99070 #1021899

- 11-19 **Resolved** that pursuant to Section 80 of the Environmental Planning & Assessment Act 1979, development application No. 10.2010.535.1 for Subdivision - Boundary Adjustment, be granted consent subject to the conditions listed in Annexure 23(b) #1049878. (Staples/Woods)

The motion was put to the vote and declared carried.

Crs Tucker, Woods, Heeson, Staples, Barham, Cameron, Morrisey and Tabart voted in favour of the motion.

No Councillors voted against the motion.

Cr Richardson was not present during reservation of items.

ORGANISATIONAL SUPPORT – EXECUTIVE MANAGER'S REPORTS

Report No. 12.17. PLANNING - BSC ats Williams LEC 10988/2010

File No: COR653000 x 84370D x 80.2010.18.1 x 10.2005.688.3 #1047431

- 11-20 **Resolved** that this report be noted and the General Manager be authorised to manage the litigation in accordance with the General Manager's general delegations. (Staples/Woods)

The motion was put to the vote and declared carried.

Crs Tucker, Woods, Heeson, Staples, Barham, Cameron, Morrisey and Tabart voted in favour of the motion.

No Councillors voted against the motion.

Cr Richardson was not present during reservation of items.

Report No. 12.20. PLANNING - BSC ats Optus Mobile Pty Ltd LEC 10859/2010

File No: COR653000 x 12480D x 80.2010.16.1 x 10.2009.300.1 #1048653

- 11-21 **Resolved** that the report be noted. (Staples/Woods)

The motion was put to the vote and declared carried.

Crs Tucker, Woods, Heeson, Staples, Barham, Cameron, Morrisey and Tabart voted in favour of the motion.

No Councillors voted against the motion.

Cr Richardson was not present during reservation of items.

APPENDIX No. 3

Letter Byron Shire Council 23 February 2011



23 February 2011

Rose McKinley
2 Tickles Road
Upper Coopers Creek
NSW 2480

Dear Rose

Dwelling Entitlement for 2 Tickles Road, Upper Coopers Creek

At the Ordinary meeting held on 10 February 2011, Council considered the report "PLANNING – Bi-annual Planning Proposal – Dwelling entitlement for 2 Tickles Road, Upper Coopers Creek". Council made the following resolution:

11-18 Resolved:

1. That Council support an amendment to Schedule 7 of Byron LEP 1988 in order to provide a dwelling entitlement to Lot 2 DP 537488 – 2 Tickles Road, Upper Coopers Creek.
2. That Council advise the land owner of the need to prepare a Planning Proposal in accordance with Section 55 of the EPA Act 1979 for submission to the Minister under Section 56 of the EPA Act 1979 through the LEP "Gateway" process and that the Planning Proposal be submitted to Council within 12 months of the resolution.
3. That the Planning Proposal be submitted to the Department of Planning for a 'Gateway' determination without the need to report back to Council, and that the Minister be advised that further studies are likely to be required to address Bushfire, Contamination (SEPP 55 Remediation of Contaminated Lands) and Onsite Effluent Disposal to enable Byron LEP 1988 to be amended.

As referred to in point 2 of the above resolution, please be advised that you now need to prepare a Planning Proposal to enable the LEP amendment process to commence. A Planning Proposal is a document that explains the intended effect of the proposed LEP amendment and sets out the justification for making that amendment. It must be technically accurate and for that reason it is suggested that you use the services of a planning consultant to assist you in its preparation.

Please also note that the Planning Proposal must be submitted to Council within 12 months of the date of the above resolution (10 February 2011).

If you have any queries in regard to the above matter please do not hesitate to contact me on ph: 6626 7118 or email: julie.francombe@byron.nsw.gov.au.

Yours sincerely

Julie Francombe
Planner – Strategic Land Planning

ALL COMMUNICATIONS TO BE ADDRESSED TO THE GENERAL MANAGER

APPENDIX No. 4

**Report No. 3.1 to the Council's Environmental Planning and
Local Approvals Committee Meeting of 19 August 2003**

ENVIRONMENTAL PLANNING SERVICES – ACTING DIRECTOR’S REPORTS

Report No. 3.1. Byron LEP 1988 - Proposed Amendments to Schedule 7

Click here to see Resolution No. 03-723

Director: Environmental Planning Services

File No: PLN559580 #402392

Principal Activity: Environmental Planning

Purpose: To report on apparent inconsistencies with Byron LEP 1988 Schedule 7 including an omission and past typographical errors.

Summary: It has recently been brought to Council's attention that a Deposited Plan created in 1980 as a consequence of a Council approved subdivision creating 8 lots, was not included in Schedule 7 to Byron LEP 1988. The intent of the deposited plan listings in Schedule 7 is to identify all those rural lots created legally pursuant to Interim Development Order Shire of Byron and Municipality of Mullumbimby (with Council consent and issued by the Shire Clerk), and that therefore are eligible to have a dwelling erected on them with consent of Council.

It has also recently come to light that in a review of Schedule of 7 in 1992, two DPs were incorrectly typed into the LEP and subsequently gazetted. These need to be amended.

It is also possible that there are further legally created subdivisions that were issued with the Shire Clerk's Certificate that may not be listed in Schedule 7. If there are any of these and staff verify that they are genuine, then they also need to be included.

This LEP is effectively an administrative amendment to the LEP as all of the subdivisions affected are existing and have existed lawfully for many years. Most lots have dwellings constructed on them. This Amendment is not inconsistent with Council's Byron Rural Settlement Strategy as it was not a foreseen circumstance and Schedule 7 was assumed to be accurate.

RECOMMENDATION:

1. That Council prepare a Local Environmental Plan amendment pursuant to Section 54 of the Environmental Planning and Assessment Act 1979 to address omissions and errors in Schedule 7 of Byron LEP 1988.
2. That the Draft LEP be placed on exhibition pursuant to Section 66 of the Environmental Planning and Assessment Act 1979.
3. That if there are no objections received to the Draft LEP that the matter be forwarded to the Minister for Planning for finalisation.
4. That a Local Environmental Study is not warranted in the circumstances.

Attachments:

- Letter from Bush Pavilions [#404308 1 page] **Annexure 1(a)**
 - Email from Peter A Smith, Solicitor [#403643 1 page] **Annexure 1(b)**
 - DP 261332 [# 404565 2 pages] **Annexure 1(c)**
-

Background

Schedule 7 is linked to Clause 15 of Byron LEP 1988. Individual properties or Deposited Plans listed in Schedule 7 are eligible to have a dwelling erected on them with Council consent only if there is no dwelling already erected on the land. The intention of Schedule 7 is to identify all subdivisions created legally with Council consent and with the Shire Clerk's signature prior to LEP 1988. Byron Rural Settlement Strategy 1998 assumes that Schedule 7 is accurate and that all lots subject to Schedule 7 would either have a dwelling erected on them or would retain the right to request consent for a dwelling. (Note: The Strategy acknowledges that there were lots in the rural area of Byron Shire that were not created with the consent of Council and do not have the Shire Clerk's signature. These lots would be judged on their merits and require individual LEP amendments. They are not the subject of this report.)

Key Issues

- Omissions from Schedule 7;
- Typographical errors in Schedule 7;
- Dwelling entitlement / permissibility on rural land in Byron Shire.

Relationship to Management/Strategic Plan

The proposed LEP amendment is an additional administrative amendment to Byron LEP 1988. Although it is not desirable to have an abundance of such amendments in the circumstances it is warranted that it proceed as a stand alone LEP amendment. The draft LEP is consistent with Byron Rural Settlement Strategy in that it is effectively acknowledging existing rural residential development that was created by an approved Council subdivision and was always assumed to be in Schedule 7 to Byron LEP 1988.

Consultation

All landowners affected by the Deposited Plans and/or adjacent landowners will be advised by mail. An exhibition will be mounted consistent with the Environmental Planning and Assessment Act 1979. Given the administrative nature of the LEP, it is proposed that consultation with public authorities, including Department of Agriculture and Department of Infrastructure Planning and Natural Resources, take place simultaneous with the public exhibition process.

If any other genuine omissions from Schedule 7 are brought to Council's attention by the public exhibition process then they should also be addressed by the LEP amendment.

Finance/Resource Implications

Council would normally recover the costs of processing LEP amendments directly from the property owners likely to benefit from that amendment. However in this case there is a responsibility for Council to ensure that Schedule 7 is accurate and it is appropriate that the cost of this LEP be absorbed into existing Council budgets with no cost to the individual land owners affected.

Legal/Policy Implications

Any omission or error in which Council is involved in relation to its Environmental Planning Instruments could create legal implications in terms of civil action against Council. Civil action is not currently on foot in relation to any of these matters.

Given the administrative nature of this LEP amendment, a Local Environmental Study is not warranted.

Sustainability Implications**Social / Cultural**

Minimal impact or implications given that the subdivisions exist already and have for many years.

Economic

Will have minimal economic impact.

Environmental

Given that the subject lands are predominantly occupied by existing dwellings there will be little environmental impact.

Options

Council's options in this matter are that:

1. it could choose not to proceed with the amendments to Schedule 7;
2. it could choose to wait until a new Shirewide plan is produced and amend Schedule 7 at this time (this is likely to be 3 to 5 years away); or
3. it could proceed with an amendment now with 3 options for covering the costs of advertising, staff time, stationery/postage and administration of the LEP amendment:
 - a) absorbs these costs in its existing budget;
 - b) shares these costs with the relevant owners on a basis to be agreed;
 - c) require the owners pay the costs in full.

Option 3(a) is recommended.

Information

It has come to Council's attention that a deposited plan, ie DP261332, Sheaffes Road Goonengerry created in 1980 has never been listed in Schedule 7. It would appear this is an administrative error and these properties should always have been listed. Of the 8 lots created in this deposited plan 7 still exist in the form created in 1980 and five of these are known to have Council approved houses on them. The matter of the DP not being listed in Schedule 7 has come to light through a development application for a replacement dwelling on one of the lots and a request for a Section 149 Certificate for one of the vacant lots. Both of the owners of these lots have formally requested Council provide them with the opportunity to construct a dwelling pursuant to Clause 15 of Byron LEP 1988 by listing the deposited plan in Schedule 7. They have also requested that in the circumstances, Council not require them to supply a development application for a dwelling and not require them to pay for the cost of processing the LEP amendment (Annexures 1a and 1b). In principle this is inconsistent with Council resolution 01-1009:

"That Council advise future applicants for spot rezonings related to specific development proposals that they should concurrently submit a development application to ensure Council and the public can fully gauge the impacts and effects of the proposal."

It is also inconsistent with Council resolution 01-1238:

BYRON SHIRE COUNCIL

ENVIRONMENTAL PLANNING AND LOCAL APPROVALS COMMITTEE MEETING

19 AUGUST 2003

(5)

"That Council advise future applicants for joint LEP Amendments / Development Applications that Council will offer each applicant the opportunity to pay all of Council's costs in processing their applications including paying for Council's consultants fees and administrative costs."

It is considered that the LEP amendment is substantially an administrative one given that the subdivision has existed since 1980 and is substantially developed with housing. Council should have listed DP261332 in Schedule 7 and this would have been consistent with the intent of Clause 15 and the creation of the Schedule in 1988. Effectively this is not new rural residential development, but acknowledgement of rural residential development that is already in place.

The typographical errors that have been located in Schedule 7 were inserted into the LEP on 17 July 1992. It is appropriate that Deposited Plan 71250 (which does not actually exist in Byron Shire) should be deleted from Schedule 7 and Deposited Plan 712250 (which does exist in Byron Shire) should be inserted consistent with Council's intent from 1992. Similarly Deposited Plan 5950947 (which does not exist in Byron Shire) should be deleted and replaced by Deposited Plan 595097.

It is possible that there are other omissions in Schedule 7. That is, Deposited Plans that should have been listed as having been lawfully created (with Council's consent and the Shire Clerk's signature) but were not. During the exhibition period Council will check Schedule 7 against Deposited Plan records held by the NSW Lands Title Office. If further genuine omissions are found then they also should be added to Schedule 7. It is unlikely this will affect a significant number of properties.