

PLANNING DEPARTMENT

Matthew Brown

**14. FA BREINER – VACANT HOLDING APPLICATION
PT LOT 14 DP 29270, 637 BINGLEBURRA ROAD, SUGARLOAF
171/82/21**

Application No.	171/82/21
Applicant:	F A Breiner – c/o Acroplan
Owner:	F A Breiner
Subject Land:	Pt Lot 14 DP 29270, 637 Bingleburra Road, SUGARLOAF
Area:	Approx 59.59ha
Current Zone:	Rural 1(a) – Dungog LEP 2006
Proposal:	LEP Amendment - Vacant Holding Application

Précis:

This report considers a request for an amendment to Schedule 1 of *Dungog Local Environmental Plan 2006* to facilitate the erection of a dwelling-house on Pt Lot 14 DP 29270, 637 Bingleburra Road, Sugarloaf.

BACKGROUND

Unfortunately, the land is only 0.41 of a hectare from meeting the 'Established Holding' requirement of 60 hectares, which would eliminate the need for this vacant holding process. Council investigated the possibility of assessing the proposal as a development application and utilising SEPP 1 to vary the development standard. However, as a result of the nature and wording of the Dungog LEP 2006, SEPP 1 can't be used to vary a definition i.e. the established holding requirement first, prior to the clear numerical development standard. Council discussed the matter with the Department of Planning regional office and Council formed the opinion that the only legally robust method was to assess the matter via a vacant holding.

The application has been delayed significantly due to the insufficient information being provided. A request from Council for the Applicant to provide sufficient details surrounding access arrangements and sight distance, requested on the 8 January 2009 was not adequately completed until 14 December 2009, almost a year later.

The land was previously zoned Rural 1(b) under the *Dungog Local Environmental Plan 1990* (LEP 1990) and the erection of a dwelling-house was permissible with the consent of Council under Clause 24 of LEP 1990. However, when the 2006 LEP was gazetted the subject property lost its dwelling entitlement.

SUBJECT LAND

The subject land is situated adjacent to Bingleburra Road, approximately nine (9) kilometres by road from the periphery of Dungog.

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The property is approximately 59.59ha in area and is irregular in shape. The land is moderate to steeply undulating and in parts, forms part of a prominent ridgeline. Parts of the property are timbered (dry sclerophyll forest), with other areas clear from vegetation. The location of the proposed building envelope is such that it is removed from the existing vegetation.

The property is currently vacant with three small dams. Access to the property is directly from Bingleburra Road. An internal access road is then identified to be constructed/formalised to the proposed building envelope.

The subject land is currently used as a small scale extensive agricultural operation i.e. the grazing of livestock. Surrounding land is also zoned Rural 1(a) and adjoining properties are predominantly used for grazing/agricultural purposes. All adjoining properties contain single dwelling houses and associated rural ancillary structures.

Figure 1 depicts the subject land.

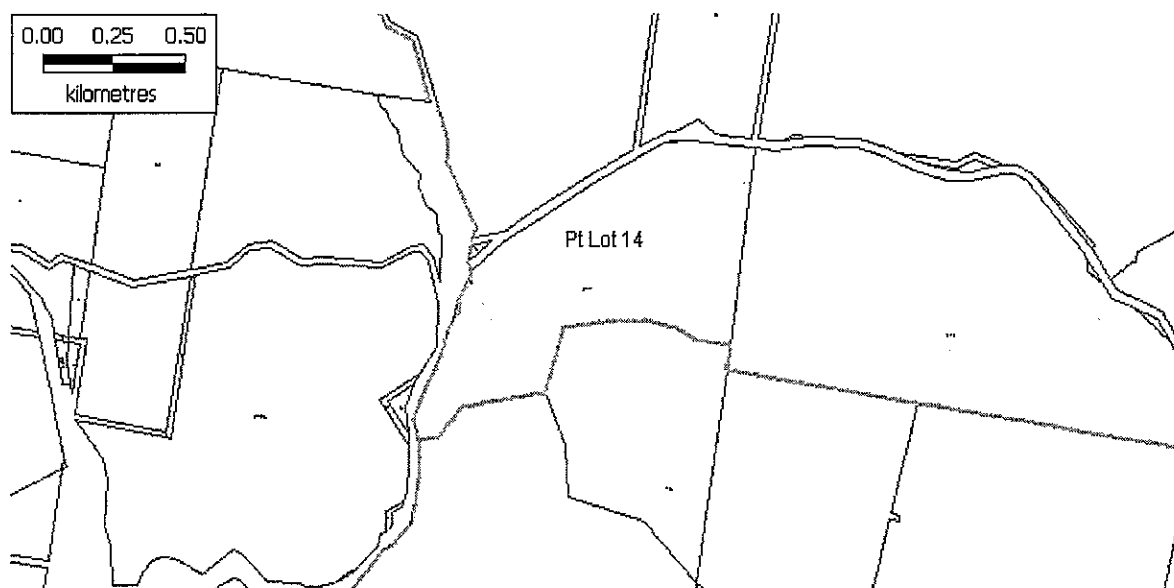


Figure 1: Pt Lot 14 DP 29270 No. 637 Bingleburra Road, Sugarloaf

PURPOSE OF THE PLAN

The application seeks to amend *Dungog Local Environmental Plan 2006* (LEP 2006) by inserting Pt Lot 14 DP 29270, No. 637 Bingleburra Road, Sugarloaf into Schedule 1 – Vacant Holdings, to enable the erection of a single dwelling-house on the lot with consent. It should be noted that the zoning of the land is not proposed to change.

A development application (DA) for a dwelling-house has not yet been lodged. A DA for construction of the dwelling house would need to be lodged following gazettal of the draft LEP/PP.

The applicants have nominated a preferred building envelope. The building envelope is located approximately 115.8m from the southern boundary, 82.9m from the eastern boundary and 370m from the western boundary (refer to **Annexure 'A'**). The building envelope is situated on a small ridgeline between two larger ridges. The actual site of the proposed dwelling is relatively flat but the land slopes steeply away, in particular to the east.

Should the Vacant Holding application be successful, the owners intend to construct a dwelling house comprising four bedrooms. The dwelling will be predominantly two-storey construction, with provision for parking of vehicles underneath. The main materials are likely

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to be steel frame, concrete slab or piers and a masonry/brick exterior. Concept plans have been provided to Council.

SUPPORTING INFORMATION/DOCUMENTS

The applicants have submitted the following information in support of the proposed LEP amendment:

- a plan showing the proposed location of the dwelling-house and house design;
- a bush fire risk assessment;
- a flora and fauna report;
- survey plans in regards to the access crossing;
- a geotechnical report;
- a statement addressing the proposal's compliance with the matters set out in clause 26 of LEP 2006.

Given the relatively minor nature of the proposed amendment, it is considered that a Local Environmental Study is not warranted in this case.

ANTICIPATED EFFECTS OF THE PLAN

The proposed amendment is not expected to result in any significant social, economic or environmental impacts.

The effect of not proceeding with the draft plan at this time would be that a dwelling-house would not be able to be erected on the property.

EFFECT OF EXISTING AND PROPOSED LEGISLATION/POLICIES

Dungog Local Environmental Plan 2006

Clause 27(5) of LEP 2006 states:

"Consent must not be granted to the erection of a dwelling-house or a dual occupancy on land in Zone 1(a), 7 (a) or 9 (a), unless it is erected on:

- a) a lot created in accordance with clause 28 (4) (b), or*
- b) a vacant holding identified in Schedule 1, or*
- c) land comprising an established holding on which there is no dwelling-house, or*
- d) land comprising part of an established holding, providing it will not result in there being more than one dwelling or dual occupancy for each 60 hectares of the holding."*

Lot 14 was not created by a Council approved subdivision after the appointed day. The subject land does not comprise an established holding or part of an established holding. Therefore, in accordance with the provisions of LEP 2006, Council can only consent to the erection of a dwelling-house on the subject land if the land is identified in Schedule 1 of the LEP as a Vacant Holding.

The subject property complies with the LEP definition of a "Vacant Holding" being land in Zone 1(a) or 9(a) that:

- "(a) comprises one lot (which may be a consolidated lot) with an area of less than 60 hectares on which no dwelling is currently located, and*
- (b) was the total area of all adjoining or adjacent land held in one ownership on 1 July 2003."*

Applications for properties to be identified in Schedule 1 as Vacant Holdings must also demonstrate compliance with the provisions of Clause 26(1) of LEP 2006. The table below lists each of the requirements of Clause 26(1) and provides comments about how the particular requirement will/will not be met.

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Clause 26(1) – LEP 2006	Comment
<i>(a) any buildings or works resulting from carrying out the development will blend into the landscape to promote rural amenity and character, and not be silhouetted on a ridgeline in a rural area, particularly when seen from a public road.</i>	Whilst the proposed building envelope is located on a ridgeline, due to existing vegetation and surrounding hills, the dwelling-house would not be silhouetted against the rural landscape. Further due to the vegetation that lines Bingleburra Road, the dwelling would not be intrusive or easily viewed from Bingleburra Road.
<i>(b) the design, bulk and colours of any such buildings will be compatible with the surrounding landscape, they are low buildings, and they are suitably screened from a public road.</i>	The applicants have indicated that the building will be designed to blend into the surrounding landscape. This will be assessed when the DA for the dwelling is lodged.
<i>(c) there will be no, or only minimal, removal of trees or significant areas of native vegetation in carrying out the proposed development, in obtaining access to its site, in drainage from it, or for bush fire hazard protection, unless the development is essential and there is no reasonable alternative.</i>	The applicants have advised that it will not be necessary to remove any additional trees or significant areas of native vegetation to enable construction of the proposed dwelling-house. Should it be necessary to remove any native vegetation to facilitate the construction of a new access track, achieve access sight distance, installation of an on-site sewage management facility or provision of adequate APZs around the proposed dwelling, an updated flora & fauna assessment will be required to be submitted at the time of DA lodgement.
<i>(d) adequate vehicular access can be provided and maintained to and on the site of the proposed development.</i>	Adequate vehicular access should be considered in terms of both legal and practical access. With this particular application safe intersection sight distance is a significant issue. The existing access crossing that is proposed to be utilised for the dwelling does not conform with the minimum sight distance requirements. The Applicant has used a 'driver eye height' of 1.3 metres however the RTA, Council and Austroads all utilise 1.15 metres. Regardless, as Bingleburra Road in the respective location is sign posted as 80km/h – 160m sight distance is required in both directions. In an easterly direction 195.8 metres can be achieved at a 'drivers eye height' of 1.3 metres. It is likely when reduced to the standard of 1.15 metres; this will still be above the required 160 metres. However, sight distance to the west does not conform and in fact is only

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	68.5 metres. The survey plans showing the sight distance in both directions are attached as Annexure 'B'. The central issue for Council is whether this partially non confirming existing access arrangement is such that it constitutes a head of consideration solely to refuse the vacant holding application. The property itself has over 700m metres 'straight road' Bingleburra Road frontage. Therefore, if the intensification of the existing access arrangement was still considered an issue at the DA stage or stage where Council has to consent to access upgrading works on public roads, this could be rectified at this stage, however at a considerable financial and environmental cost. The applicant in their submission to Council states that 'safe access and egress can be provided by the existing access'. The applicant states that the vehicle access is currently used now without incident for agricultural purposes, however constructing a dwelling on the property would greatly increase the usage of the access. There are also a number of other existing accesses in the immediate area that do not comply with the required site distance, however this is also not reason alone to formalise another non conforming access. In terms of practical access, there is an existing gravel access crossing off Bingleburra Road. Legal access is also obtained directly from Bingleburra Road. Other vacant holding applications with a combination of other issues i.e. visual amenity, effluent disposal, bushfire and access sight distance have been refused by Council in the past. However, in this in particular instance as the sight distance in once direction is the sole concerning issue, elected Council must make an informed and balanced decision in this regard. Applying a 'reasonable approach' if the land was only .41 of a hectare larger, than the access crossing would not be under scrutiny until the DA stage. The internal access from within the property boundary to the future dwelling is
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	relatively flat and less than 18 degrees. Regardless, the RFS will require an access track to be constructed or upgraded to comply with <i>Planning for Bushfire Protection 2006</i>. Details will be required to be submitted with the DA for the proposed dwelling. Apart from the access concern the site and its attributes can easily accommodate a dwelling house.
<i>(e) adequate provision has been or will be made for any telecommunication and electricity services needed because of the proposed development.</i>	Telecommunication and electricity services are available to the property.
<i>(f) if the development will be carried out on land that is flood prone, it will not be adversely affected by flood and will not exacerbate flood conditions elsewhere.</i>	The subject land is not flood prone.
<i>(g) the land to be used for development is stable, has a slope of less than 18°, and, if relevant, has minimal disturbance of sodic or dispersive soil.</i>	The actual site of the proposed dwelling is relatively flat but the land slopes steeply away in other directions, with slopes greater than 18 degrees. The property is not known to contain sodic or dispersive soils.
<i>(h) where the development will result in the erection of dwellings, the dwellings have been or will be provided with an inner bush fire asset protection zone and any proposed buildings can be protected from bush fire hazard without creating any additional risk to life or property, fire-fighting personnel or equipment.</i>	A bushfire risk assessment has been submitted with the application demonstrating that the proposed dwelling can be provided with appropriate APZs (35 metres), in accordance with <i>Planning for Bushfire Protection 2006</i>. The Bushfire Risk Assessment also requires level 3 construction. It is anticipated that Council will be required to formally consult with RFS during preparation of the draft LEP.
<i>(i) adequate buffers are provided to any existing or foreseeable future agricultural, intensive agricultural or extractive industry activities which could cause noise, smell, fumes, vibration, spray or other objectionable impacts.</i>	The proposed building envelope complies with Council's boundary setback requirements and is located centrally/at the rear on the lot and should not be adversely affected by existing agricultural activities on surrounding rural land.
<i>(j) adequate buffers are provided to places of Aboriginal heritage or endangered or threatened ecological communities.</i>	No Aboriginal heritage sites or endangered/threatened ecological communities are known to occur on the property or adjoining properties. Should such be uncovered during construction the normal practice in accordance with the NPWA 1974 would be followed.

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	A flora and fauna report was submitted that indicated the effects of the proposal would be minimal.
<i>(k) where relevant, appropriate measures have been taken to protect the amenity and comfort of the occupants of buildings near a rail corridor, or other existing or potential utility installations, from noise and vibration.</i>	The property is not located adjacent to a rail corridor or any other existing or potential utility installations.
<i>(l) where the proposed development will result in the erection of a habitable building, either the building can be connected to a reticulated sewerage system, or it is in accordance with an effluent capability assessment (which takes into account hydrologic loading) demonstrating effective disposal of sewage.</i>	A geotechnical report was submitted with the application. This report indicates the site has sufficient area and soil type, capable of supporting the disposal of on-site wastewater from any future proposed onsite waste water treatment system.
<i>(m) the quality of stormwater run-off from the site will not degrade water quality or the quality of groundwater supplies and complies with any environmental management plan required by Council.</i>	Stormwater run-off from the dwelling site is proposed to be redirected to on-site rainwater storage tanks and the existing dam. Excess stormwater from tank overflow will not impact on water quality or groundwater supplies. The RFS requirements and BASIX will dictate this further at DA stage.
<i>(n) stormwater run-off from the site will not contribute to additional flooding downstream.</i>	No significant creek or stream traverses the property. Stormwater run-off from the dwelling site is to be redirected to on-site rainwater storage tanks and the existing dam and therefore will not contribute to additional flooding downstream.
<i>(o) any relevant harvestable water rights are protected or adequately assessed.</i>	There will be no change to the existing dams on the property and therefore no impact on any harvestable water rights.
<i>(p) the development will not unduly lower the water table or disturb the soil so as to result in the creation of acid sulfate soil.</i>	The property is not known to contain any potential acid sulfate soils.
<i>(q) any impact of the development on biodiversity, and on native habitat on the land, is minimal.</i>	Impact on biodiversity should be minimal, as no additional tree removal is required to enable construction of the proposed dwelling-house. Should it be necessary to remove any native vegetation to facilitate the construction of a new access track, installation of an on-site sewage management facility or provision of adequate APZs around the proposed dwelling, an updated flora & fauna assessment will be required to be submitted at DA stage.

THE GATEWAY

If Council was to support the PP, the PP would be sent to the Minister for Planning (or delegate) for the Gateway determination to specify whether the PP is to proceed and, if so, in what circumstances. The purpose of the Gateway determination is to ensure there is sufficient justification early in the process to proceed with a planning proposal.

Once the planning proposal is forwarded to the Minister for Planning (or delegate), it is assessed by the Department of Planning. The planning proposal and the recommendation of the Department of Planning will then be forwarded to the LEP Review Panel. The LEP Review Panel will consider the planning proposal and the recommendation of the Department of Planning before providing their own recommended Gateway determination to the Minister. The Minister will consider the recommendation of the LEP Review Panel.

The Gateway determination will indicate the following:

- whether the planning proposal should proceed (with or without variation);
- whether the planning proposal should be resubmitted for any reason (including for further studies or other information, or for the revision of the planning proposal);
- community consultation requirements;
- any consultation required with State or Commonwealth public authorities;
- whether a public hearing is to be held into the matter by the Planning Assessment Commission or other specified person or body;
- the times within which the various stages of the procedure for the making of the proposed LEP are to be completed; and
- Whether the function of making the LEP is to be exercised by the Minister for Planning or delegated to the relevant planning authority.

Therefore, in order to proceed with the proposed LEP amendment, Council or the Applicant needs to prepare a planning proposal explaining the intended effect of and justification for the draft LEP and forward the planning proposal to the Minister for a Gateway determination, in accordance with the new plan-making provisions in Part 3 of the EP&A Act.

It is important to note that a gateway determination under section 56 of the EP&A Act must be obtained authorising a planning proposal to proceed before community consultation takes place.

IMPLICATIONS

Financial

This matter has no direct financial impact upon Council's adopted budget or forward estimates.

Policy

The draft plan is unlikely to have any policy implications for Council.

Statutory

The statutory process for preparing an amendment to the Dungog LEP 2006 is detailed in Part 3 of the *Environmental Planning and Assessment Act 1979*.

CONCLUSION

The proposal is generally consistent with relevant environmental planning instruments, section 117 directions, Government policies and Council strategies. The applicants have

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satisfactorily demonstrated compliance with the provisions of clause 26(1) of *Dungog Local Environmental Plan 2006*.

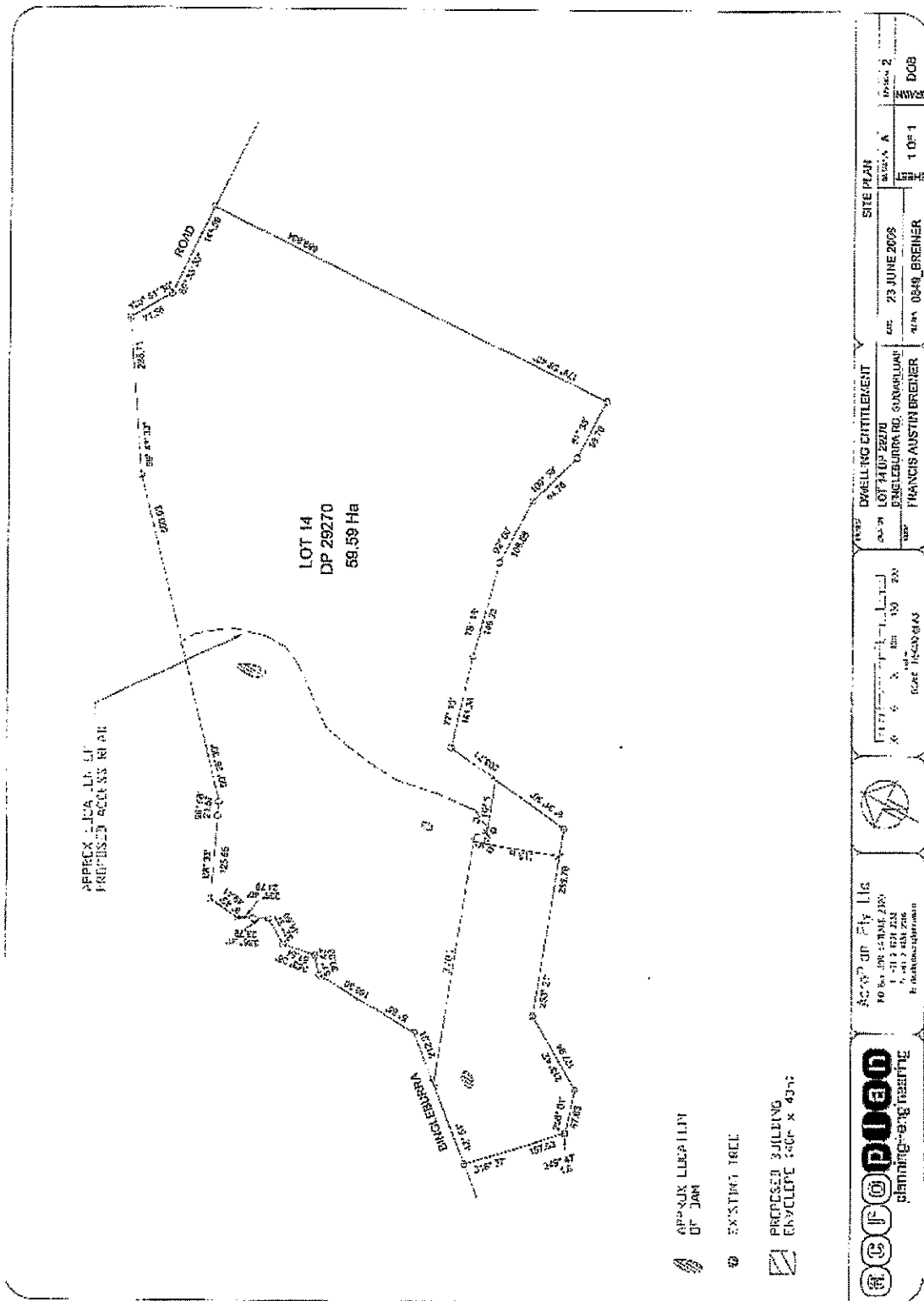
Accordingly, it is recommended that the amendment request be supported.

Minute No. 34847

RESOLVED on the motion of Cr Mitchell and seconded by Cr Wall that:

1. Council resolve to prepare an amendment to *Dungog Local Environmental Plan 2006* to include Pt Lot 14 DP 29270, No. 637 Bingleburra Road, Sugarloaf in Schedule 1 – Vacant Holdings.
2. Pursuant to section 55 of the *Environmental Planning and Assessment Act 1979*, Council prepare a Planning Proposal explaining the intended effect of the proposed LEP and setting out the justification for making the proposed instrument.
3. Pursuant to section 56(1) of the *Environmental Planning and Assessment Act 1979*, Council forward the Planning Proposal to the Minister for Planning for a Gateway determination.

ANNEXURE 'A' TO ITEM NO. 14 – MANAGER PLANNING'S REPORT



ANNEXURE 'B' TO ITEM NO. 14 – MANAGER PLANNING'S REPORT

