

ITEM NO: 9

SUBJECT: DEVELOPMENT APPLICATION NO. S/15/2005 FOR A TWO LOT INTO FORTY TWO LOT SUBDIVISION ON LOT 400 DP 591224, NO. 292 GREAT WESTERN HIGHWAY, WARRIMOO AND LOT 401 DP 591224, 25 THE MALL, WARRIMOO.

FILE NO: S/15/2005

Recommendations:

That the Development Application No. S/15/2005 for a two lot into forty two lot subdivision on Lot 400 DP 591224, No. 292 Great Western Highway and Lot 401 DP 591224, 25 The Mall, Warrimoo be determined pursuant to S.80 of the Environmental Planning and Assessment Act 1979 by refusing consent to the application for the following reasons:

1. *The proposed subdivision does not comply with the following provisions of the Blue Mountains LEP 1991, in that:*
 - a) *The proposed lot yield exceeds the maximum yield calculated in accordance with the LEP 1991 (Clauses 34.1(b) & 34.4((b));*
 - b) *All proposed lots (other than lots for a public purpose) created in the Residential Bushland Conservation zone do not include a minimum of 750m² of land which is not Development Excluded Land, and which is suitably configured to be capable of being the site of a dwelling house and accommodating development ordinarily incidental and ancillary to a dwelling house (Clause 34.1(c));*
 - c) *The proposed subdivision achieves a lot density in excess of the Density Control Provision (Clause 34.4(a)).*

2. *The proposed subdivision does not comply with the following objectives of the Residential Bushland Conservation zone of the Blue Mountains LEP 1991, in that it does not:*
 - a) *Ensure that the development is environmentally sensitive and site responsive and maintains and facilitates sustainable natural ecosystems and biodiversity within the Blue Mountains (Clause 6.3(a));*
 - b) *Utilise best practise water management techniques to protect and improve existing non-perennial watercourses and the associated riparian zones, to protect and improve water quality, and to maintain pre-development downstream flow patterns (Clause 6.3(b));*
 - c) *Ensure that the proposed bushfire protection measures are able to be implemented without unacceptable adverse environmental impact (Clause 6.3(e)).*

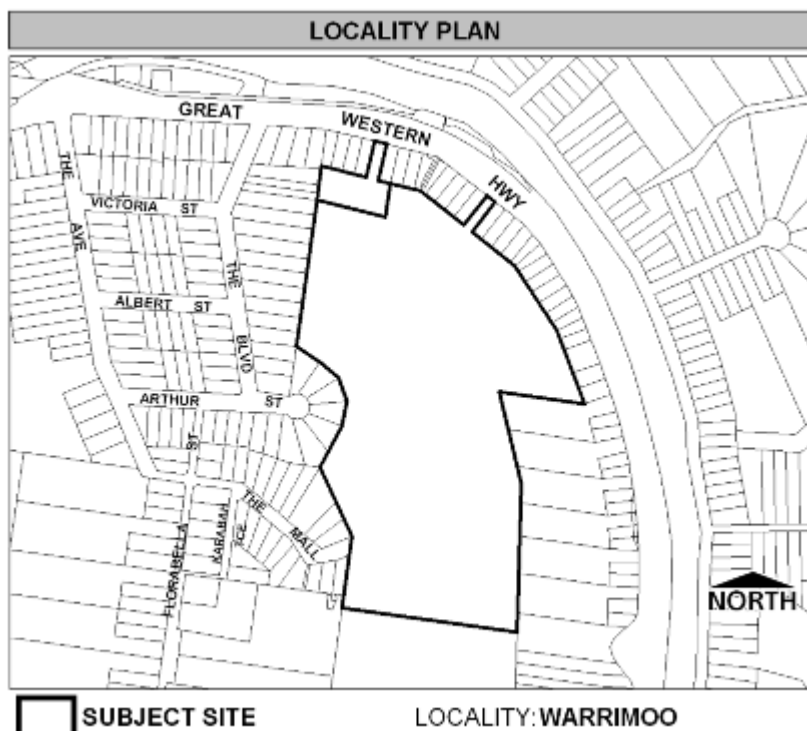
3. *The proposed subdivision does not comply with the following objectives of the Protected Area – Environmental Constraint Area of the Blue Mountains LEP 1991, in that it does not:*

- a) *Protect environmentally sensitive land (Clause 7.2(a));*
 - b) *Provide a buffer around areas of ecological significance (Clause 7.2(b));*
 - c) *Restrict development on land that is inappropriate by reason of its physical characteristics and its bushfire risk (clause 7.2(c)).*
4. *As the proposed subdivision does not comply with the relevant objectives of the Residential Bushland Conservation zone and the Protected Area – Environmental Constraint Area of the Blue Mountains LEP 1991, in accordance with Clause 9.3 of the Blue Mountains LEP 1991, the Council shall not grant consent to this development.*
5. *The proposed subdivision results in adverse environmental impact, in that it:*
- a) *Does not incorporate measures specified in accordance with any Development Control Plan that shows requirements for erosion and sedimentation control (Clause 105(a)(i));*
 - b) *Does not incorporate best management practice water management techniques to protect the surface and ground water regimes and water quality for the site (clause 10.5(a)(iv));*
 - c) *Does not ensure that the bushfire protection measures required to protect the land to be subdivided do not have any adverse environmental impact on any development excluded land (Clause 10.5(c));*
 - d) *Does not incorporate effective measures, satisfactory to the Council, to ensure that the development has no adverse environmental impact on any development excluded land (Clause 10.5(db));*
 - e) *Does not include a detailed environmental assessment that demonstrates compliance with the Protected Area – Environmental Constraint Area objectives relevant to the development and will comply with the relevant criteria of Clause 10 of LEP 1991 (Clause 11.3).*
6. *The proposed subdivision does not comply with the relevant provisions of the Council's Better Living DCP, in particular:*
- a) *E3.1 Matrix of Plans and Documentation – the application does not include a dimensioned proposed plan of subdivision, a detailed environmental assessment of the impacts of the proposal, a vegetation/bushland management plan, a geotechnical report, an erosion and sediment control plan, or a new archaeological site survey;*
 - b) *E3.2 Biodiversity – the proposal does not minimise the number of lots that contain Development Excluded Land;*
 - c) *E3.4 Stormwater – the proposal does not demonstrate how the stormwater system shall achieve post construction water quality objectives listed in the Better Living DCP;*
 - d) *E3.5 Streetscape and Character – Not all proposed lots are able to provide a Development Space that does not include any Development Excluded Land*
 - e) *E3.7 Bushfire – the proposal includes bushfire protection measures that intrude into Development Excluded Land and buffers to the watercourse;*
 - f) *E3.10 Wastewater – the proposal does not demonstrate that the development space on each lot is capable of being drained by a gravity sewer connection without any constraint on the floor level;*

- g) *E3.11 Vehicular Access, parking & Roads – the proposed road reserves are under width;*
 - h) *E3.12 Accessibility – The application does not address the requirement for pedestrian pathways in accordance with AS1428 – Design for Access & Mobility*
7. *The proposed subdivision is considered to be an overdevelopment of the site.*
 8. *The proposed subdivision is contrary to the General Terms of Approval issued by the Department of Infrastructure Planning and Natural Resources, in that the bushfire protection measures extend into the riparian zones*
 9. *The SEPP1 Objection is not well founded in that it has not demonstrated that strict compliance with the standards is unreasonable and unnecessary.*

Report by Group Manager, Environmental and Customer Services:

Reason for report	Referred by Councillors and generated significant public interest.
Applicant	Burrell, George & Co
Owner	Bendent Pty Limited
Application lodged	18 March 2005
Property address	Lot 400 DP 591224, No. 292 Great Western Highway, Warrimoo and Lot 401 DP 591224, No. 25 The Mall, Warrimoo.



Site description

The subject land is located in Warrimoo, on the south-eastern side of the Great Western Highway.

The site has three road frontages, two to the Great Western Highway and one to The Mall. The frontages to the Highway are located at 279 and 292 Great Western Highway.

The site is bound on the north and east by a mix of commercial and residential development fronting the Highway. On the west it is bound by residential development fronting The Boulevard, Arthur Street and The Mall. The land immediately to the south of the site is Council Public Reserve.

The site is an irregularly shaped vacant parcel of land with a total area of 12.76 hectares.

The site is characterised by a deep gully and watercourse extending from the north-east corner of the site to the south side of the site. Three other watercourses within the site connect to the main gully. All of the watercourses are deemed to be 'Rivers' in accordance with the Water Management Act 2000.

The site is steeply sloping, with a large proportion of the site steeper than 20%. The site includes numerous rock outcrops and ledges and is moderately vegetated.

The site is known to contain nationally rare and regionally significant species of flora, and a vulnerable species of fauna.

The site is mapped as Bushfire Prone Land, and was hazard reduced by a controlled burn during the bushfires of 2001/2002. This work included the construction of an informal, unsealed fire trail within the site.

Three known Aboriginal sites have been located within the subject property.

History

This site has a significant history relevant to the application before the Council.

The Council refused a development application (S99/0009) for a two into 72 residential lot subdivision on 22 June 1999. The applicant appealed to the Land and Environment Court. That appeal was subsequently dismissed on 2 March 2001. The application was refused by the Land and Environment Court in summary because the proposal was *'not sufficiently responsive to the constraints of the site and ... it would have significant and adverse impacts on the site caused by engineering requirements for road and culvert construction and removal of rock outcrops and vegetation.'*

(Judgement of Cowdroy, J at para 63)

A copy of the Court refused plan of proposed subdivision is included as Attachment 3 to this report.

The applicant then lodged a further appeal to the Court of Appeal on 2 July 2001. The applicant lodged a Notice of Discontinuance on 30 January 2002, and withdrew from the appeal.

At the Council meeting of 28 May 2002, the Council resolved to rezone the site to better reflect the limits to development of the site. In the absence of site specific environmental data to effect a change to the actual zoning of the land (whether provided by the Council or the applicant), the rezoning of this site has not substantially progressed. It is envisaged that the rezoning of the site would be completed as part of the review process for LEP 1991, given the position of the Department of Planning in relation to progressing site specific rezoning.

The previous development application, which was refused by the Land and Environment Court, was assessed prior to the gazettal of Amendment 25 to LEP 1991. As it stands, LEP 1991 (and Amendment 25 in particular) expressly provides for the recognition and protection of environmental constraints that are exhibited on the subject site. As will be demonstrated in this report, the proposal as assessed against the existing planning framework of LEP 1991 serves to provide an assessment of land capability and the impacts of the proposal in a similar manner to that which would be achieved by any subsequent LEP amendment.

The applicant submitted an application for a 2 into 43 lot subdivision of the subject property on 11 February 2005. That application was rejected by the Council on 25 February 2005 due to a significant lack of crucial information and a shortfall in fees.

On the 18 March 2005, the applicant lodged a 2 into 43 lot subdivision of the subject property.

On 6 April 2005, four Councillors requested that this application be reported to the Council for determination.

On 16 May 2005, the Council received the General Terms of Approval (GTA) from the Department of Infrastructure Planning and Natural Resources (DIPNR). The GTA required amendments to the proposal, including provision of 20m wide riparian zones either side of the full extent of the watercourses within the site, and exclusion of the APZs and fire trails from within the riparian zone. A copy of DIPNR's GTA was subsequently provided to the applicant to incorporate the changes into an amended application.

The Council wrote to the applicant on 31 May 2005 requesting additional information, and for the proposal to be pegged onsite to enable assessment.

On 24 June 2005 the Council received advice from the Rural Fire Service (RFS) that a Bush Fire Safety Authority (BFSA) would not be issued as the development is sited too close to the bushfire hazard, the Asset Protection Zones (APZ) do not comply, and due to the inappropriate access for the locality. The Council forwarded this advice to the applicant on 29 June 2005 and recommended withdrawal of the application.

On 21 July 2005 the applicant advised by telephone that the application would not be withdrawn, and that negotiations would be undertaken with the RFS. The applicant advised that the requested additional information would be provided within two weeks.

On 9 January 2006, the Council again wrote to the applicant noting that the requested information had not been submitted.

The applicant provided an amended plan for a 2 into 42 lot subdivision and some supporting information on 7 February 2006. The amended plan responded mainly to the issues raised by the RFS. This plan is the subject of the report, and a copy of this plan is included as Attachment 1 to this report.

The amended plan and supporting information was referred to the RFS (23 March 2006) and DIPNR (4 April 2006) for their assessment.

The RFS issued a BFSA for the 42 lot subdivision on 4 May 2006.

A joint site inspection was carried out on 1 June 2006 between the applicant and Council Officers.

On 6 June 2006 the Council wrote to the applicant requesting a revised and updated flora and fauna report to progress the application.

On 6 July 2006 Council received additional comments from DIPNR. Their position had not changed in regard to the classification of the watercourses as 'Rivers', the provision of riparian zones and the exclusion of APZs and fire trails from within the riparian zone.

Council forwarded the DIPNR response to the applicant on 31 July 2006 and repeated the request for additional information.

On 12 September 2006 the Council requested the applicant provide an update on the progress of the additional information requested.

On 12 February 2007 a meeting was held between the applicant, owner & Council Officers. The Council officers outlined fundamental problems with the application and recommended withdrawal of the application.

On 27 February 2007 the applicant requested an extension of time to consider its position. The Council responded allowing an extension to 2 March 2007.

On 5 March 2007 the applicant advised the Council that it would not withdraw the application but requested that the Council accept an alternate proposal for a 20 lot subdivision. The alternate proposal generally maintained the original road and fire trail layout, and consolidated various lots to achieve a reduced lot yield of 16 residential lots. A copy of this plan is included as Attachment 2 to this report.

On 6 March 2007 Council Officers advised the applicant that the alternate proposal was significantly different to the original proposal and that it could not be considered as an amendment to the current application. Nevertheless, Council Officers also advised that they still had concerns with the alternate proposal due to impacts of the proposal on Development Excluded Land (DEL). Council Officers recommended that the application be withdrawn and redesigned in close consultation with Council Officers.

On 29 March 2007, the applicant advised the Council that the application will not be withdrawn and requested that the Council Officers accept the alternate proposal. The Council Officers acknowledged the applicant's request and indicated that the request would receive further consideration.

No further correspondence occurred between the applicant and the Council until 29 April 2008 when Council Officers recommended the application be withdrawn and advised the applicant in the absence of a withdrawal, the application was intended to be reported to the Council with a recommendation of refusal.

No response has been received from the applicant or the owner at the time of writing this report.

Proposal

It is proposed to carry out a 42 lot subdivision of the site. The current application has no proposed lot numbered 3.

The subdivision is proposed to be a Community Title subdivision, with public dedicated roads.

Thirty four lots are proposed for single dwelling entitlements. Lots 1, 2, and 4 to 35 range in area from 757m² to 4,122m².

Proposed Lot 36 is intended for potential future cluster housing. It is 7,901m² in area. The cluster housing proposal is not part of the subject application.

Proposed Lots 37, 38, 39 & 40 are intended to be utility lots for riparian zones, fire protection and environmental open space. They range in area between approximately 4,000m² and 8,000m².

Proposed Lot 41 is 34,129m² in area and is proposed to be private reserve for Environmental Constraint Area.

Proposed Lots 37 to 41 are intended to be owned and managed by the Community Title Association.

Proposed Lots 42 and 43 are intended to be dedicated as public roads. They are 13m and 11m wide respectively, and are a total of 9,089m² in area.

The proposal includes the construction of roads, fire trails, access handles, watercourse crossings, drainage & outlets, water quality controls, static water supplies, service extensions, sewer pumping stations and bushfire hazard reduction.

Development controls

Zoning

- Most of the site (approximately 12.69ha) is zoned Residential Bushland Conservation (8/ha) and Environmental Constraint Area under Local Environmental Plan 1991; and

As the application was lodged prior to the Gazettal of LEP 2005

- The remainder of the site (approximately 595m² fronting the Highway) is zoned Residential 2(a1) under Local Environmental Plan No. 4;
- This portion of the site is also zoned 'Living General' under Local Environmental Plan 2005. However, this plan is subject to a Savings and Transitional Provision, whereby the zoning under LEP 4 applies, but the zoning under LEP 2005 is considered as if it had been exhibited but the plan not finally made.

Development Control Plan

- Better Living DCP;
- DCP 31 Public Infrastructure Works in Subdivisions and Developments.

Regional Environmental Plan

- Sydney Regional Environmental Plan No. 20.

State Environmental Planning Policy

- SEPP1 with regard to cl 34.1(c) of LEP 1991 which requires the provision of 750m² of land on each lot that is not Development Excluded Land (DEL).

Integrated Development

- Section 100B of the Rural Fires Act, 1997;
- Part 3A of the Rivers and Foreshores Improvement Act, 1948 (retained due to transitional provisions), and
- Section 90 of the National Parks and Wildlife Act, 1974

Notification

The application was advertised from 6 April 2005 to 6 May 2005 and again from 18 May 2005 to 15 June 2005 in the Blue Mountains Gazette as well as written notification to adjoining and nearby properties.

54 submissions were received in response to the exhibition. All but one submission objected to the proposal.

Issues

Resident issues –

- Traffic impacts on the surrounding streets, including amenity, pedestrian safety, narrow widths of existing carriageways, lack of footpaths, construction vehicle access and bushfire/emergency vehicle access;
- Environmental impacts within the site, including impacts on flora and fauna, loss of bushland, water quality, intrusion of the APZs within DEL, lack of building spaces free of rock outcrops and claims that the site contains Shale Sandstone Transitional Forest (SSTF);
- The flora and fauna report is inadequate and has an incomplete list of species onsite, including rare, threatened and vulnerable species;
- The proposal contradicts the flora and fauna assessment;
- The proposal is out of character with the surrounding area and Warrimoo would lose its village character;
- Loss of vegetation would result in an increase in noise impacts to surrounding properties and a reduction in visual amenity;
- Bushfire risk to the site and the proposed lots;
- Lack of adequate water supply for bushfire protection;
- Road, fire trail and services construction impacts on watercourses, rock outcrops and Aboriginal sites;
- The proposal is an over development of the site and is not site responsive;
- The increased sealed areas would result in more stormwater runoff, erosion and impacts on watercourses and water quality;

- Non-compliance with LEP 1991 including City and zone objectives, and adverse impacts on DEL;
- Unknown impacts of the future cluster housing proposal on Lot 36;
- Lack of services and inadequate capacity of local sewer system;
- Concerns over the long term maintenance of infrastructure, including stormwater quality and quantity controls;
- Requests for Council to rezone the site to better reflect its environmental constraints;
- Current lack of open space in Warrimoo;
- Concern over the potential for the proposed lots to be re-subdivided;
- The proposal would result in improved bushfire protection to the surrounding properties; and
- The site is currently used for dumping of rubbish etc.

Assessment issues –

- Assessment of proposal against the provisions of LEP1991;
- Assessment of the proposal against the provisions of the Better Living DCP;
- SEPP1 Objection regarding cl 34.1(c) of LEP 1991;
- Bushfire protection measures;
- Environmental impact of the proposal;
- Aboriginal Archaeological sites. and
- Alternate subdivision proposal

Variation to Policy –

- Provision of a minimum area of 750m² per lot which is not DEL (cl 34.1(c) LEP 1991).

Discussion of Issues

1. Local Environmental Plan 1991

Clause	Provision	Proposed/Comment/Assessment	Compliance
Objectives			
cl 3.1	The principal objectives for the City	<p>The proposal does not comply with the relevant objectives for the City, in particular:</p> <ul style="list-style-type: none"> • The identification and protection of the Blue Mountains’ natural and cultural heritage. <p>The submitted flora and fauna report is inadequate and despite several requests, the applicant has not provided additional information in this regard. The application does not undertake a new survey of the site for Aboriginal site. It</p>	No

		<p>relies on a reassessment of three sites found as part of a previous application;</p> <ul style="list-style-type: none"> • The implementation of a bush fire management plan which will not cause unacceptable impact on environmentally sensitive areas. <p>The proposed bushfire protection measures include intrusion of the APZS and fire trails within DEL and riparian zones. LEP 1991 defines sensitive site features as ‘Development Excluded Land’ (DEL). These areas are discussed in detail throughout the report;</p> <ul style="list-style-type: none"> • The achievement of unpolluted stream and attain water quality appropriate for recreational use in the headwaters of the Blue Mountains’ streams. <p>The proposal has not demonstrated that the development will not have an adverse impact on stream water quality within the site or downstream of the site. The application suggests that this outcome will be achieved without demonstrating how it will be done.</p>	
cl 3.2	Additional Objectives for the Blue Mountains Ridge	<p>The proposal does not comply with the relevant objectives for the Blue Mountains Ridge, in particular:</p> <ul style="list-style-type: none"> • The assurance that the impacts of the development do not have an adverse effect on stream catchments associated with the Blue Mountains National Park. <p>The proposal has not demonstrated that the development will not have an adverse impact on stream water quality within the site or downstream of the site. The application suggests that this outcome will be achieved without demonstrating how it will be done.</p>	No
Zone Objectives			
cl 6.3	Residential Bushland Conservation	<p>The proposal does not comply with the relevant zone objectives for the Residential Bushland Conservation (RBC) zone , in particular:</p> <ul style="list-style-type: none"> • The assurance that the development is environmentally sensitive and site responsive and maintains and facilitates sustainable natural ecosystems and biodiversity within the Blue Mountains. 	No

		<p>The flora and fauna assessment submitted with the application did not comment on the potential impacts of the proposed development, in particular on the vulnerable Red-Crowned Toadlet and locally significant flora species. The proposal includes unacceptable impacts on DEL for road, fire trail, services and future dwelling construction, and the implementation of bushfire protection measures;</p> <ul style="list-style-type: none"> • The utilisation of best practice water management techniques to protect and improve existing non-perennial watercourses and the associated riparian zone, to protect and improve water quality, and to maintain pre-development downstream flow patterns. <p>The application contains ‘motherhood’ statements regarding water management, but provides no detail of the proposed methods to enable an assessment of their suitability, function or construction impacts;</p> <ul style="list-style-type: none"> • The assurance that the proposed bush fire protection measures are able to be implemented without unacceptable adverse environmental impacts. <p>The proposed bush fire protection measures including the proposed roads, APZs and the fire trails intrude into DEL, and result in unacceptable environmental impacts.</p>	
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Protected Area Objectives			
cl 7.2	Environmental Constraint Area	<p>The proposal does not comply with the relevant Protected Area objectives for the Environmental Constraint Area (ECA), in particular:</p> <ul style="list-style-type: none"> • The protection of environmentally sensitive land, the provision of a buffer around areas of ecological significance, and a restriction on the development on land that is inappropriate by reason of its physical characteristics and its bushfire risk. 	No

		The site contains mapped ECA, as well as other areas steeper than 33% (and therefore deemed to be ECA by cl 10.5(e)). ECA within the site is adversely affected by the impacts of road, drainage, fire trail and services construction, impacts of hazard reduction to achieve APZs, and impacts of stormwater drainage discharge.	
General Control of Development			
cl 9.1	Permissibility within the RBC zone	Subdivision is permissible within the RBC zone with Council consent	Yes, with Council's consent
cl 9.3	Compliance with the relevant objectives of the plan, zone and protected area	As described above, it is considered that the proposal does not comply with all of the relevant objectives of the plan, zone and protected area. cl 9.3. On this basis, the Council shall not grant consent to this development.	No
Development Criteria - General			
cl 10.2	Access	Part (b) of this clause states: <i>'The Council shall not consent to development which requires an on-site access road unless such road is designed and constructed to minimise grades, to suit contours, and to be stable, taking into account the characteristics of the site and the locality and should avoid slopes of 33% or greater.'</i> The proposal includes onsite access roads. A longitudinal section of the proposed road alignments were submitted with the original application. Given the route of the proposed roads, and the topography of the site, the submitted longitudinal section minimises the grades of the proposed roads. However, the grade of the proposed roads are up to 18.5%, which exceeds the desirable (12%) and absolute maximum (16%) grades permitted in Council's DCP31. Relatively minor changes to the design could achieve compliance with the absolute maximum gradient. Compliance with the desirable maximum grades would require significant changes to the design in both the	No

		<p>horizontal and vertical alignments. These changes to the horizontal and vertical alignments are likely to require a total redesign the subdivision layout.</p> <p>The route of the proposed roads varies between parallel, diagonal and perpendicular to the contours. The longitudinal gradient of the road could be reduced by realigning the road more parallel to the contours, however this is likely to significantly increase the length of the road (and hence site resultant disturbance) to provide access to all of the proposed lots.</p> <p>Should the application be approved, the roads would be conditioned to be constructed in asphalt or concrete, and as such would be stable.</p> <p>The proposed road alignment affects land steeper than 33% (based upon the applicant’s contours) adjacent to proposed lots 13 and 28. It is unlikely that an access could be redesigned to totally avoid land steeper than 33% without wholly redesigning the subdivision layout.</p> <p>A possible solution to reduce the extent of the road construction could be to focus development into precincts off The Mall, the Great Western Highway and (subject to land ownership) off Arthur Street.</p>	
<p>cl 10.5 (a)</p>	<p>Environmental Impact</p>	<p>This clauses states:</p> <p><i>‘(a) The council shall not consent to development unless the development:</i></p> <ul style="list-style-type: none"> <i>(i) incorporates measures specified in accordance with any Development Control Plan that shows requirements for erosion and sedimentation control; and</i> <i>(ii) avoids any unnecessary clearing of indigenous plants; and</i> <i>(iii) minimises site disturbance and soil erosion; and</i> <i>(iv) incorporates best practice water management techniques to protect the surface and ground water regimes and water quality for the site.’</i> 	<p>No</p>

		<p>Council’s Better Living DCP in the Matrix of plans and documentation (E3.1) indicates the range of documentation that may be required to be submitted with a subdivision application. In particular, it indicates a potential for a stormwater management plan, erosion and sediment control plan, and a soil and water management plan to be submitted.</p> <p>Despite a request from the Council, the applicant declined to provide such documentation suggesting that adequate controls were capable of being put in place during construction.</p> <p>Given the scale of the proposed development, the slopes within the site, the proximity of watercourses to the proposed construction areas, the shallow erodable soils on the site, and the potential for the works to expose dispersible soils within the site, it is imperative that a Soil and Water Management Plan be submitted for assessment at the DA stage of this proposal. The location, size, constructability and environmental impacts of the construction of the proposed controls must form part of the DA assessment, particularly when they are likely to be located within DEL.</p> <p>It is considered that a more site responsive design would result in a reduced loss of vegetation and a minimisation of site disturbance onsite.</p> <p>The application provides no detail on how the surface and ground water regimes and water quality for the site will be protected.</p>	
<p>Cl 10.5 (b)</p>	<p>Environmental Impact</p>	<p>This clause requires that where land on which development is proposed has been cleared, the development is to take place as far as is practicable within the cleared area.</p> <p>Very little of the site is cleared. There has been some clearing within the site behind the properties fronting the Highway. This clearing approximately coincides with the eastern portions of proposed lots 29 to 35.</p>	<p>Yes</p>

<p>cl 10.5 (c)</p>	<p>Environmental Impact</p>	<p>This clause states:</p> <p><i>‘(c) The Council shall not consent to subdivision, unless the bushfire protection measures required to protect the land to be subdivided are contained within a perimeter road or boundaries of the property to be subdivided, and do not have any adverse environmental impact on any water supply catchment area or any development excluded land.’</i></p> <p>The proposal includes bushfire protection measures such as APZs and fire trails, which intrude into the DEL.</p> <p>It is Council Officers’ assessment that these measures do have an adverse environmental impact on the DEL due to:</p> <ul style="list-style-type: none"> • the loss of vegetation within the DEL for creation and maintenance of the APZs; • site disturbance resulting from the access into the DEL for ongoing maintenance of the APZs; and • site disturbance due to the construction of the fire trails within the DEL. 	<p>No</p>
<p>cl 10.5 (db)</p>	<p>Environmental Impact</p>	<p>This clause states:</p> <p><i>“The Council shall not consent to development, other than development referred to in clause 10.5(da), on any lot created otherwise than in accordance with clause 34.1(c), unless the development incorporates effective measures, satisfactory to Council, to ensure that the development has no adverse environmental impact on any development excluded land.”</i></p> <p>As noted previously, the application includes the construction of roads, drainage fire trails and services within the DEL, and the creation and maintenance of APZs within the DEL. This assessment concludes that these works will have an adverse impact on the DEL.</p>	<p>No</p>
<p>cl 10.8 (e)</p>	<p>Services</p>	<p>The proposal includes the provision of a reticulated sewerage system, and Sydney water have advised that they have no objections to the development, subject to a condition requiring the provision of a Section 73 Certificate prior to the issue of the Subdivision Certificate.</p>	<p>Yes</p>
<p>Development Criteria – Protected Areas</p>			

cl 11.3	Environmental Constraint Area	<p>The proposal includes works within the mapped and deemed ECA within the site. The application does not include a detailed environmental assessment demonstrating compliance with the ECA objectives or compliance with the relevant criteria in clause 10 of the LEP.</p> <p>This assessment concludes that the proposal will not comply with the ECA objectives, or the relevant criteria in clause 10 of the LEP.</p>	No
Subdivision			
cl 34.1 (b)	Total number of lots in the RBC zone.	<p>Clause 34.1(b) sets out the method for calculating the maximum lot yield on a site with a Density Control provision. It notes that the maximum number of lots (other than lots for a public purpose) existing after the subdivision will not exceed the notional development area (NDA) of the original lot, in hectares, multiplied by the maximum number of lots per hectare specified in the Density Control Provision, rounded down to the nearest whole number.</p> <p>The NDA of a lot is defined in the LEP as that part of a lot not zoned Environmental Protection, or designated on the zone map as being ECA.</p> <p>Clause 34.4(b) is relevant at this stage as it notes that in the RBC zone which is subject to a Development Control Provision of 8.ha, the NDA is further restricted by the exclusion of any land steeper than 20%.</p> <p>The current application before the Council is for a 2 into 42 lot subdivision.</p> <p>Thirty five of these lots are proposed to be for residential development.</p> <p>Five proposed lots are intended to be owned and maintained by the 35 residential lots. These 5 lots are described by the applicant as being utility lots for riparian zones, fire protection, environmental open space and private reserve.</p> <p>The final 2 lots are to become public dedicated roads.</p>	No

		<p>Accordingly, the application proposes to create a total of 40 allotments which are not lots for a public purpose.</p> <p>Based upon the Council’s mapping of the ECA affecting the site, and the applicant’s own contour survey of the site, Council Officers have calculated that the maximum lot yield within the RBC zone is 35 lots. Accordingly the proposal does not comply with this clause.</p> <p>It is noted that if the 5 utility lots were to become public reserve, or if an argument was otherwise justified under SEPP1, then the proposal would not exceed the maximum yield within the RBC zone.</p>	
cl 34.1 (c)	Development Excluded Land	<p>This clause requires that each new lot created in the RBC zone (other than lots for a public purpose or lots created as part of a cluster housing development), and intended to be the site of a dwelling house, must include a minimum of 750m² of land which is not DEL, and is suitably configured to be capable of being the site of a dwelling house and accommodating development ordinarily incidental and ancillary to a dwelling house.</p> <p>DEL is defined in the LEP. The DEL relevant to this site is:</p> <ul style="list-style-type: none"> • mapped ECA, together with any buffers required by the Council to protect such area; • land on which any Schedule 3 environmentally sensitive vegetation unit is located, together with any buffers required to protect that unit; • land that is the habitat of any threatened species, populations or ecological communities within the meaning of the Threatened species Conservation Act 1995, which if developed would have a significant effect on the species, population or communities; • Land on which any rare species of flora is located, together with any buffers required by Council to protect that flora; • Land that comprises a watercourse or any buffers required by Council to protect that watercourse; 	No

		<ul style="list-style-type: none"> • Land that has a slope in excess of 20%;and • Land comprising any significant landscape or special feature, such as rock outcrops and escarpments, which in the opinion of the Council is worthy of preservation. <p>The application acknowledges that proposed lot 28 does not satisfy this requirement, and an application to vary this development standard has been submitted as a SEPP1 Objection. This SEPP1 Objection is considered later in this report.</p> <p>Based solely upon the mapped ECA, rock outcrops and land steeper than 20% (based upon the applicant’s own contour plan) and buffers to watercourses, this assessment has determined that a further 12 of the proposed residential allotments do not comply with the 750m² of not DEL per lot requirement.</p> <p>The number of non-compliant lots may increase as a result of a competent flora and fauna survey of the site.</p>	
<p>cl 34.1 (d)</p>	<p>Cluster housing development</p>	<p>This clause notes that the Council may consent to the subdivision of any land for the purpose of cluster housing development only if:</p> <ol style="list-style-type: none"> 1. all development for the purpose of any dwelling house proposed to be erected as part of the cluster housing development; and 2. all development, ordinarily incidental and ancillary to dwelling house, is not located on any DEL. <p>In summary, the LEP defines cluster housing development as development that:</p> <ul style="list-style-type: none"> • concentrates development onto the land within the development site that is most suited to the development; • is subdivision of land into five or more lots; • includes the erection of a dwelling house on each lot; 	<p>No</p>

		<ul style="list-style-type: none"> • consolidates the majority of the DEL into a neighbourhood or community property lot; and • includes management measures to create and maintain APZs and to protect and enhance the environmental value of the DEL. <p>Whilst the application does not propose cluster housing, it persists in noting on proposed lot 36 possible cluster housing. It can be seen by the yield calculations in regards to clause 34.1(b) that there is no scope for a re-subdivision of Lot 36 into 5 allotments.</p> <p>It is however considered appropriate that the cluster housing provisions may facilitate a supportable approach to the development of this site as a whole.</p>	
cl 34.4	Residential Bushland Conservation Zone – Special Provisions	<p>This clause notes that subdivision of land to a density exceeding that shown by the Density Control Provision is prohibited.</p> <p>The site has a density control provision of 8lots per hectare of NDA.</p> <p>The proposal includes 40 lots which are not for public purposes, which equates to a density of 8.7 lots per hectare of NDA.</p>	No

2. Compliance Table: Better Living DCP

Clause	Standard	Proposed	Compliance
cl E3.1	Matrix of plans and documentation	<p>The application is not supported by the full complement of plans and documentation required in this matrix. The plans and documentation submitted is deficient in that:</p> <ul style="list-style-type: none"> • The proposed plan of subdivision does not include proposed lot dimensions; • No detailed environmental assessment of the impacts of the proposal has been provided. This is particularly relevant given the proposal includes direct and indirect impacts on DEL; • No vegetation/bushland management plan has been provided. This is particularly relevant as the site contains rare, sensitive, threatened and vulnerable 	No

		<p>flora and fauna and the proposal necessitates significant removal of vegetation for infrastructure construction and creation of APZs;</p> <ul style="list-style-type: none"> • No geotechnical report has been submitted. This is particularly relevant given the significant rock out cropping impacted upon by the development, the proximity of the works to the watercourses, and the need to identify the soil type and structure to enable appropriate sedimentation and erosion control design; • No erosion and sediment control plan or soil and water management plan has been submitted. This is particularly relevant given the significant works proposed, the proximity of the works to the watercourses, and the need to assess the appropriateness, location and impacts of the proposed sedimentation and erosion controls; and • No new archaeological site survey was carried out to support the current proposal. A further survey is warranted as the site is known to contain 3 Aboriginal archaeological sites. 	
cl E3.2	Biodiversity	<p>The DCP recommends that the subdivision be designed so as to minimise the number of lots that contain DEL. Based upon land steeper than 20% alone, only two of the proposed lots do not contain DEL. As previously noted, if a competent flora and fauna study were to be submitted, it is likely to indicate additional lots as being impacted by DEL.</p>	No
cl E3.4	Stormwater	<p>The proposal provides no documentation to demonstrate that the stormwater system shall achieve post construction water quality objectives listed in the DCP.</p>	No
cl E3.5	Streetscape & Character	<p>The applicant claims that only Lot 28 cannot provide a 300m² Development Space (with dimensions 12 by 25m or 15 by 20m) that does not include any DEL.</p> <p>It is the Council Officers' assessment that a total of 9 proposed lots are not capable of accommodating the appropriately configured</p>	No

		Development Space without intruding on DEL, and that a further 10 lots have questionable Development Spaces due to the need to access them through DEL and their location in respect to intrusion into front building setbacks and APZs.	
cl E3.7	Bushfire	<p>This DCP requires that any measures proposed to protect development against bushfire shall be undertaken on those parts of the site that are not DEL, and that APZs are not to intrude into the buffer to a watercourse.</p> <p>Further, the DCP requires that perimeter roads must be 7m wide kerb to kerb. The proposal includes a perimeter road 6m wide kerb to kerb.</p> <p>The BFSAs issued by the RFS requires that the roads comply with Section 4.3.1 of Planning for Bushfire Protection 2001. This document requires 8m wide carriageways for roads in bushfire prone areas.</p> <p>Roads of this width would clearly exacerbate the adverse impacts on the DEL already generated by the design as submitted.</p>	No
cl E3.10	Wastewater	<p>The DCP requires that all of development space on each proposed lot is to be capable of being drained by a gravity connection without any constraint on the floor level.</p> <p>The application has not included an indicative design of the proposed sewer works to demonstrate that all lots can be serviced with reticulated sewer. The original Statement of Environmental Effects attempts to describe in words a potential solution to provide sewer to the site. This solution included two sewer pumping stations (SPS), 1150m of sewer reticulation and 230m of rising main. The proposed SPS locations are within DEL, and part of the reticulation would cross proposed lot 41 – the lot intended to encompass the mapped ECA.</p>	No
cl E3.11	Vehicular access, parking & roads	The applicant’s Statement of Environmental effects states that the ‘...streets will be dedicated public roads...’ (Page 1 SOEE dated 11 February 2005).	No

		<p>The proposed road reserve widths are generally 11 and 13m wide.</p> <p>This DCP requires that the road reserve widths for public access and roads is to be at least 15m wide unless the road is a shareway, in which case a minimum reserve width shall be 12m.</p> <p>The DCP limits the number of dwellings or lots to be accessed from a shareway to a maximum of 4. Both proposed roads provide access to more than 4 allotments. Accordingly the proposed roads should be contained within reserves of at least 15m in width.</p> <p>Further, as Road No.1 accesses more than 20 lots, this DCP requires that a 1.2m wide concrete footpath be constructed along one side of the new road.</p>	
cl E3.12	Accessibility	<p>The DCP requires that where more than five allotments are created with a full street frontage, pedestrian pathways shall meet the requirements of AS1428 – Design for Access & Mobility.</p> <p>The application does not address this matter, and does not demonstrate that pedestrian pathways meet the requirements of AS1428.</p>	No

3. SEPP1 Objection

Clause 34.1(c) of LEP 1991 states that:

“The Council may consent to subdivision of any land that is zoned Bushland Conservation or Residential Bushland Conservation only if each new lot proposed to be created, (other than lots for a public purpose, and other than lots created as part of a cluster housing development), and intended to be the site of a dwelling house, includes land with a minimum area of 750m2, no part of which is development excluded land, and which is so configured as to be capable of being the site of a dwelling house and accommodating development ordinarily incidental and ancillary to a dwelling house.”

The application acknowledges that proposed Lot 28 does not comply with this requirement, and seeks an exemption for Lot 28 under SEPP1.

The applicant claims that Lot 28 contains at least 750m2 of developable land, but this land is unsuitable to locate a dwelling as it is too close to the cliff-top and ECA, and falls wholly within the proposed APZs. The applicant suggests that Lot 28 contains a suitable building area on partly disturbed land outside the APZ. The applicant notes that this area is ‘notionally within development excluded land’.

The SEPP1 objection is considered to be not well founded as the applicant has not demonstrated that it is both unreasonable and unnecessary to comply with the development standard, and that despite the non-compliance, the underlying objectives of the development standard are achieved.

As it stands, proposed Lot 28 does not contain any land which is not DEL that is appropriately configured to be the site of a dwelling house and to accommodate development ordinarily incidental and ancillary to a dwelling house.

It is considered reasonable that all proposed lots should comply with this clause, as the site does contain suitable areas of land which is not DEL. The creation of lots which do not comply with this requirement is considered to constitute an over development of the site which should not be facilitated via SEPP1.

It is considered necessary that all proposed lots should comply with this clause; so as to ensure that allotments are created that can be reasonably developed without any adverse environmental impact on DEL.

It is the Council Officers' assessment that the SEPP1 Objection should not be supported in the circumstances of this case.

4. Bushfire protection measures

The RFS was not prepared to issue a BFSAs to the original 2 into 43 lot subdivision due to the siting of the development in close proximity to a bush fire hazard, the non-compliance of the APZs, and the inappropriate access for the locality.

The applicant submitted an amended application for a 2 into 42 lot subdivision (the subject of this report) to address the RFS concerns. The RFS issued a BFSAs for this proposal on 26 April 2006.

The bush fire protection measures for the 42 lot subdivision include:

- An APZ between the house sites and the fire source that varies between 35 and 50m wide. The APZ comprises a 25m wide Inner Protection Area (IPA) and a minimum 10m wide Outer Protection Area (OPA);
- Three fire trails that encompass the dwellings sites. The fire trails include passing bays, connections to the proposed roads and a turning facility; and
- Four 25,000 litre water tanks located at the junctions of the proposed roads and fire trails.

The proposed APZs and fire trails intrude onto DEL, being land steeper than 20% and within the riparian zones.

5. Environmental impact of the proposal

The proposal includes works within 40m of the top bank of watercourses that are considered to be rivers in accordance with The Rivers and Foreshores Improvement Act, 1948 (RFI Act). Accordingly the proposal was referred to the Department of Infrastructure, Planning and Natural Resources (DIPNR) for their approval as Integrated Development. DIPNR have issued their General Terms of Approval (GTA) for the issue of a permit under Part 3A of the RFI Act in a letter dated 10 April 2005.

However, the terms of the GTA required the proposal to be amended such that a riparian corridor was provided 20m either side of the watercourses within the site, and that APZs and fire trails be wholly relocated outside the riparian corridors.

DIPNR's GTA was provided to the applicant who responded with a submission arguing that the watercourses were not in fact 'Rivers' pursuant to the RFI Act, and as such the proposed riparian zones were adequate. This submission was reviewed by DIPNR who confirmed their original comments.

The 42 lot subdivision of the site still maintains APZs and fire trails within the riparian zones contrary to the terms of DIPNR's GTA.

Council Officers have also reviewed the proposal with regard to environmental impacts, and raised several concerns.

The site survey for the submitted flora and fauna assessment of the site was conducted over 5 days in August and September 2002. This is approximately 30 months prior to the lodgement of the current application and approximately 9 months after the site was burnt during the 2001/2002 bushfire season.

The timing of the site survey after the burning of the site is considered likely to have had a significant impact on the consultant's ability to detect threatened species. Particular species may have vacated the area in the short term due to the impacts of the burn, but may have returned when the vegetation had adequately recovered. Accordingly a current site survey is warranted to enable an assessment to be completed.

Notably, the survey did not identify any of the vulnerable red-crowned toadlets previously found on the site. It is considered likely that the removal of the ground litter and vegetation due to the fire was a significant factor in the toadlets not being found during this survey. It is expected that earlier distribution of the toadlets would return to their pre-fire levels if the site is left undisturbed.

Red-crowned toadlets had previously been found in areas affected by the proposed subdivision works. It is considered that a subdivision of this scale will result in a significant effect upon this population, not only from diffuse impacts of urban development, but the actual disturbance that will occur during the construction of the subdivision infrastructure and APZs. It is considered likely that a Species Impact Statement would be required for this species.

The flora and fauna assessment does not include targeted surveys directed at the threatened, rare and unusual flora & fauna identified by previous surveys on the site. The report makes no assessment of the impacts of the proposal on the nationally rare plant species *Lissanthe sapida* and *Lomandra fluviatilis*, or the regionally significant *Gratiola pedunculata*.

The flora and fauna assessment makes no reference to the proposed plan of subdivision, and appears to contain no details or assessment of the proposed civil and services works and bushfire management controls, such as fire trails and APZs. Accordingly the environmental impacts of the subdivision have not been addressed in the flora and fauna assessment report. However that report states that the proposal is a class of development or activity that is recognised as a threatening process due to the clearing of native vegetation, removal of dead

wood/trees and removal of bushrock, yet concludes no significant effects are likely. The report provides no justification for this conclusion.

The Council initially requested an updated and revised flora and fauna report from the applicant in May 2005. To date no additional flora and fauna assessment or report has been provided in support of the application.

The proposal does not include a Soil and Water Management Plan to enable assessment of the nature, location and impacts of any sediment basins or any other soil and water management works required to protect the stability and environmental values of the site during construction.

The proposal provides inadequate information regarding permanent water quality or quantity controls required to ensure the Stormwater performance Criteria of the Better Living DCP are met. These criteria state that 'the quality of the surface or groundwater leaving the site shall not be reduced in the short or long term'. This lack of appropriate information is also relevant to the RBC zone objectives (Clause 6.3(b)) and the environmental impacts criteria (Clause 10.5(a)(v)) of LEP 1991 relating to best practise water management techniques.

It is the Council Officers' assessment that in terms of environmental impacts, this proposal is an over-development of the site. The site is considered to have some subdivision potential subject to that proposal being effectively designed to prevent any adverse effect on DEL, identified flora, fauna and natural site values through excessive clearing, weed incursions, and reduced water quality through nutrification, sedimentation and erosion.

6. Aboriginal Archaeological sites

The application included a report that undertook a reassessment of three Indigenous sites previously recorded on the site in 1998. It is clear from the report that the consultant's brief was to only undertake a reassessment of the three sites, not to carryout a new survey of the site.

The reassessment of the three sites was only able to locate two of the sites, an open camp site (WOS1), and grinding grooves (WGG2). The third site, grinding grooves (WGG1) was unable to be found again.

The report concludes that WOS1 would not be directly impacted by the proposal as it lies in the northern portion of proposed Lots 19 and 20, within the APZ area immediately to the south of the proposed fire trail. The report notes that whilst the site was once considered significant, the impacts of fire trail construction during the 2001/2002 bushfire period have reduced its significance. The report recommends no further investigation of the site.

The grinding groove site WGG1 was previously located along the watercourse adjacent to proposed Lot 9. The site was previously considered to be of moderate to low significance. WGG1 was unable to be relocated; possibly due to disturbance caused by the fire trail construction.

The grinding groove site WGG2 was located again in the main gully of the site, in an area intended to become private reserve. This site is well removed from any direct impacts of the proposal.

The report includes comments from the Deerubbin Local Aboriginal Land Council (DLALC), the Darug Tribal Aboriginal Corporation (DTAC) and the Darug Custodian Aboriginal Corporation (DCAC). DLALC and DTAC support the findings of the report. DTAC however indicated that 13 artefacts were found around WOS1, and recommended that test pitting be conducted around this site.

The recommendations of DTAC correlate with the recommendations of the site survey previously conducted in 1998.

Sub-surface investigation of an archaeological site requires a permit from the Director-General of the National Parks and Wildlife Service in accordance with Section 87, and consent under Section 90 of the National Parks Act, 1974. This would then lead to the proposal being Integrated Development in accordance with Section 91 of the Environmental Planning and Assessment Act, 1979.

The application and archaeological assessment report were referred to the Cultural Heritage Unit of the National Parks and Wildlife Service on 31 May 2005 for their review. No response has been received to date.

7. Alternate subdivision proposal

The applicant submitted an alternate subdivision proposal for a 20 lots subdivision of the site on 5 March 2007. A copy of this plan is included as Attachment 2 to this report. That proposal reduced the number of residential lots to 16. The plan indicates that two of the lots (36 & 37) are intended for cluster housing. No supporting information was submitted with the plan.

Council Officers declined to accept this as an amended proposal as it was considered to be significantly different from the original 43 lot subdivision proposal. Nevertheless, a brief assessment of the proposal revealed the following concerns:

- The development spaces for Lots 23 to 28 extend into the APZs;
- The vehicle accesses to the building spaces on Lots 7, 16, 18, 19, 23, 26 and 28 will require works through DEL;
- The APZs and fire trails still extend into DEL;
- The proposed roads and services installation will affect DEL; and
- The APZs and the fire trails still intrude into the riparian zones contrary to the requirements of DIPNR.

The alternate proposal is largely a consolidation of the proposed residential lots in the 42 lot proposal, into 16 residential lots. The road and fire trail layout are similar, and so their impacts are similar.

Whilst no economic feasibility of the alternate proposal has been carried out by Council, it appears that the infrastructure costs of the alternate proposal would be similar to those of the 42 lot proposal. There appears to be opportunity to achieve a similar yield with a significantly reduced road and fire trail system, and servicing infrastructure.

Council Officers are concerned that should the alternate proposal be consented to and constructed, it would be very difficult to not support subsequent re-subdivision of the 16 lots.

The bulk of the impacts would have already occurred, and the infrastructure would already be in place.

Conclusion

It is considered that the extent of site disturbance and the environmental impacts of a 42 lot subdivision make this proposal unsupportable. The impacts of the civil and services works and bushfire protection measures for the 42 lot subdivision are considered to be comparable to the impacts of the 72 lot subdivision that the Land and Environment Court considered to be unacceptable.

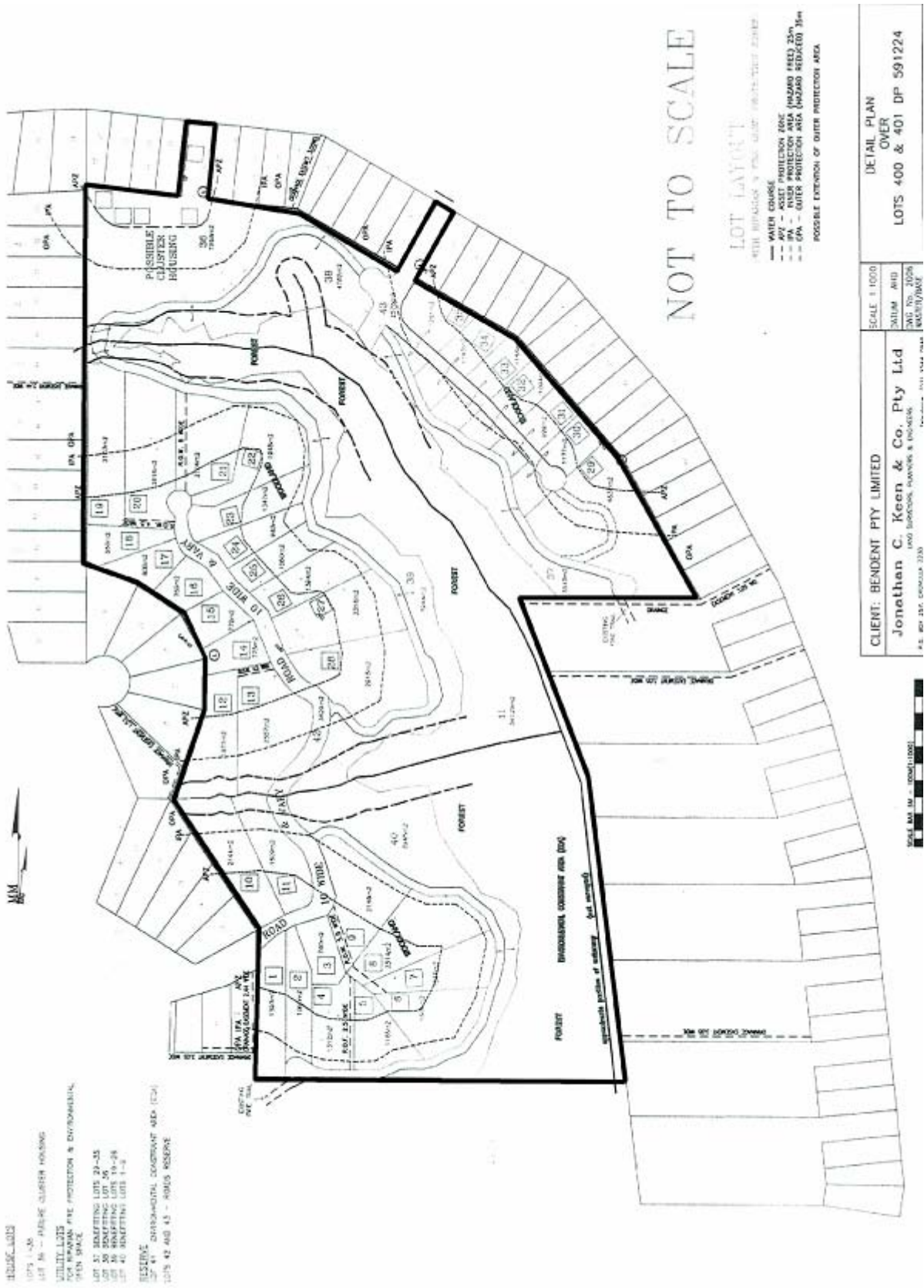
The 20 lot alternate subdivision presented by the applicant still results in significant site impacts due to the extent of road and fire trail construction. A similar yield is very likely possible with a significant reduction in the extent of road and fire trail construction.

The site has some development potential, but a supportable proposal would need to recognise and respect the constraints within the site. A supportable proposal would significantly reduce the extent of the road and fire trail construction, have no watercourse crossings and minimise the extent of clearing required for bushfire hazard reduction by grouping future dwellings into tight precincts. It is considered that a cluster housing development could be a suitable development solution for this site.

It is considered that the performance based controls of LEP 1991 provide clear limits to the development capacity of the site, and that it is unnecessary to proceed with rezoning of the site in order to better reflect the limits to the development of the site.

* * * * *

Attachment 1 – Amended Plan for a 2 into 42 Lot Subdivision



Attachment 2 - 16 Lot Subdivision Proposal

