

2 RE-SUBDIVISION AT 5 BIRCH AVENUE AND 63 WESTLANDS ROAD, EMERALD

FILE REFERENCE INT1955881

RESPONSIBLE GENERAL MANAGER Peter Benazic

AUTHOR Matthew Schreuder

RECOMMENDATION

That a Refusal to Grant Planning Permit **T180501** be issued for **Resubdivision** at **5 Birch Avenue & 63 Westlands Road Emerald, Emerald** for reasons set out in this report.

Attachments

- 1 Proposed Subdivision 1 Page
- 2 Zoning Map 1 Page
- 3 Aerial Photograph 1 Page

EXECUTIVE SUMMARY:

APPLICATION NO.:	T180501
APPLICANT:	Mr Philip Walton
LAND:	5 Birch Avenue & 63 Westlands Road Emerald, Emerald VIC 3782
PROPOSAL:	Resubdivision
PLANNING CONTROLS:	Low Density Residential Zone, Rural Conservation Zone Schedule 2 Design and Development Overlay Schedule 1, Vegetation Protection Overlay Schedule 1, Environmental Significance Overlay Schedule 1, Bushfire Management Overlay
NOTIFICATION & OBJECTIONS:	Letters to owners and occupiers of adjoining and adjacent land as per the Planning and Environment Act. No objections received
KEY PLANNING CONSIDERATIONS:	Consistency with the purpose and objectives of the relevant zones and overlays, potential environmental impacts.
RECOMMENDATION:	Refusal

BACKGROUND:

This application for re-subdivision was received by Council on 8 August 2018. A request for further information was made on 3 September 2018. The further information request consisted of details of the fencing that would be used along the new boundaries, an arborist report for any vegetation that would be impacted by the proposal and an assessment against Clause 52.17 Native Vegetation, of the Cardinia Planning Scheme for any vegetation which may be removed, destroyed or lopped either directly or indirectly as a result of the proposal.

A number of requests for extension were made by the applicant while the information was sought. As there were questions around whether the application could actually be made under the Cardinia Planning Scheme, legal advice was sought by both the applicant and the Planning Department. It was determined that the application was able to be made and could be considered on its merits.

Further questions were raised by the applicant about the further information that was requested, in particular an assessment against the Native Vegetation provisions, Clause 52.17. While council maintained that the information was required, the application was allowed to proceed to advertising rather than the application being lapsed on the basis of the information not being provided within the required timeframe. No objections were received. The application is before Council due to an officer's recommendation for refusal. The application has been assessed against all the relevant provisions of the Cardinia Planning Scheme and is considered to not be a good planning outcome in the context of the subject site and surrounding area. The potential environmental impacts, the fragmentation of the very high quality natural environment and the creation of a lot in two zones, which is not considered to result in orderly planning, are all factors which make the application one which does not warrant support. Each of these factors are elaborated on within this report.

SUBJECT SITE

The subject site consists of two separate parcels of land in different ownership. The lots are described as follows:

5 Birch Avenue, Emerald

- Described as Land on Plan of Consolidation 169547K, is an irregular shaped lot located at the end of Birch Avenue. The lot has a frontage to Birch Avenue of approximately 18 metres, a western boundary of approximately 135 metres, a northern boundary of approximately 135 metres, an eastern boundary of approximately 67 metres and a southern boundary of approximately 108 metres. The overall area of the lot is 1 hectare.
- The lot is located within the Low Density Residential Zone and currently contains a single dwelling located in the northern corner of the site within close proximity of the Birch Avenue frontage.
- A gully runs through the middle of the lot with the land steeply dropping from Birch Avenue and then rising again towards Steel Road.
- The lot has a significant amount of remnant native vegetation, mostly consisting of large eucalyptus trees.
- The lot is not encumbered by any restrictive covenants or agreements, nor are there any easements shown on the title plan.

63 Westlands Road, Emerald

- Described as Lot 1 on Plan of Subdivision 547975C, is an irregular shaped lot located to the east of Westlands Road, Emerald. The lot has a frontage (to the west) to Westlands Road of approximately 672 metres, a southern boundary of approximately 775 metres, an eastern boundary of approximately 600 metres and a northern boundary of approximately 396 metres. The overall area of the site is approximately 14.7 hectares.
- The lot is located within the Rural Conservation Zone. The northern side of the lot wraps around the adjoining Low Density Residential Land.
- The lot contains a single dwelling located in a cleared domestic area on the western side of the site in an otherwise heavily vegetated bush block. The dense remnant vegetation provides a continuous coverage with more rural conservation land to the south which continues all the way to the closed catchment of the Cardinia Reservoir (town water supply)
- The lot is not encumbered by any restrictive covenants or agreements. A 16 metre wide Power line easement is located towards the south western portion of the site.

The main characteristics of the surrounding area are:

- To the east of the subject site, the land is developed with low density resident development with single detached dwellings on lots with areas of between 0.4 -1.2 Ha. These lots have retained a reasonable tree cover with a mixture of mature remnant native and established exotic vegetation.
- To the south and west of the subject site is larger vegetated lots within the Rural Conservation zone. Most are developed with dwellings and have varying areas of cleared land for domestic or agricultural land uses.
- Further to the south is the Cardinia Reservoir reserve which is a densely vegetated closed water supply catchment.
- The Emerald Township is located within approximately 1 km to the north east.



Figure 1- subject sites highlighted in yellow

PROPOSAL

This application proposes a re-subdivision of the two existing lots to form two new lots. The re-subdivision will transfer land from the larger Rural Conservation zoned lot to the smaller Low Density zoned lot. The Low Density lot is currently 1.001 ha in area and the Rural Conservation lot is approximately 14.73 ha in area. The new areas will be 1.638 ha and 14.09 ha respectively.

The re-subdivision transfers the wedge of land of 63 Westlands Road, between Westlands Road and 5 Birch Avenue. The wedge of land is over 50 metres wide at the southernmost abuttal between the two lots and narrows to a point approximately 263 metres to the north. The portion of land to be transferred is heavily vegetated with environmentally significant remnant native vegetation.

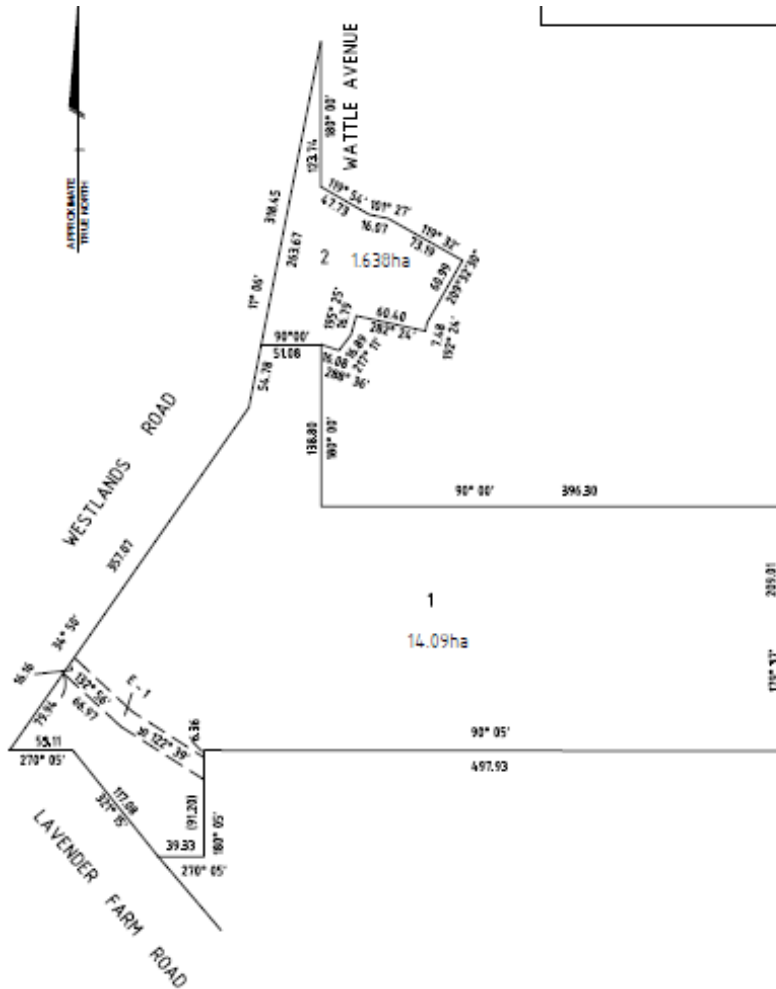


Figure 2 - proposed re-subdivision

The application states that there are no works required to facilitate this re-subdivision. It is also suggested that no vegetation will be required to be removed.

PLANNING SCHEME PROVISIONS

State Planning Policy Framework (SPPF)

The relevant clauses of the SPPF are:

- Clause 11.01-1R Green Wedges – Metropolitan Melbourne
- Clause 12.01 Biodiversity
- Clause 12.01-1S Protection of Biodiversity
- Clause 12.01-2S Native Vegetation Management
- Clause 12.05-2S Landscapes
- Clause 13.02-1S Bushfire Planning
- Clause 15.01-3S Subdivision Design

Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF are:

- Clause 21.01 Cardinia Shire Key Issues and strategic Vision
- Clause 21.02 Environment
- Clause 21.02-3 Biodiversity
- Clause 21.02-4 Wildfire Management
- Clause 21.03-3 Rural Townships
- Clause 21.03-4 Rural Residential and Rural Living Development
- Clause 21.07-3 Emerald, Avonsleigh and Clematis

Relevant Particular/ General Provisions and relevant incorporated or reference documents

The relevant provisions/ documents are:

- Clause 51.02 Metropolitan Green Wedge Land: Core Planning Provisions
- Clause 52.12 Bushfire Protection: Exemptions
- Clause 52.17 Native Vegetation
- Clause 53.02 Bushfire Planning
- Clause 65.02 Approval of an application to Subdivide Land
- Guidelines for the removal, destruction or lopping of native vegetation
- Assessors Handbook – applications to remove, destroy or lop native vegetation
- Applicants Guide – applications to remove, destroy or lop native vegetation

Cardinia Shire's Liveability Plan 2017-2029

This proposal has no relevance to Cardinia Shire's Liveability Plan 2017-2029.

Zone

The land is subject to the **Low Density Residential Zone, Rural Conservation Zone Schedule 2**

Overlays

The land is subject to the following overlays:

- Design and Development Overlay – Schedule 1
- Vegetation Protection Overlay – Schedule 1
- Bushfire Management Overlay
- Environmental Significance Overlay

PLANNING PERMIT TRIGGERS

The proposal for re-subdivision requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 32.03-3, Low Density Residential Zone a planning permit is required to subdivide land.

- Pursuant to Clause 35.06 Rural Conservation Zone a planning permit is required to subdivide land.
- Pursuant to Clause 43.02 Design and Development Overlay a planning permit is required to subdivide land.
- Pursuant to Clause 42.02-2 Vegetation Protection Overlay a planning permit is required to remove, destroy or lop any vegetation.
- Pursuant to Clause 44.06 Bushfire Management Overlay a planning permit is required to subdivide land.
- Pursuant to Clause 42.01-2 Environmental Significance Overlay a planning permit is required for subdivide land
- Pursuant to Clause 52.17 Native Vegetation, a planning permit is required to remove, destroy or lop native vegetation.

While the application does not propose the removal of vegetation, the Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land, Water and Planning, 2017) requires the following:

Where the responsible authority considers that a proposed use and/or development is likely to involve, or lead to, the consequential removal of native vegetation into the future as a result of issuing a permit or approving a plan, the responsible authority should consider whether there is a need for a permit application to be lodged in accordance with Clause 52.17.

This ensures consideration and integration of all issues as part of its decision making. This can include, but is not limited to, the consideration of an application for a permit to subdivide land that will enable native vegetation to be removed in the future without requiring a permit under Clause 52.16 or Clause 52.17

As the proposed subdivision will result in a permit exemption for the removal of vegetation along the new fence lines under Clause 52.17, it is considered that the application should have included the removal of native vegetation as a permit trigger. This was outlined in the further information request to the applicant however no assessment against these provision has been received. These matters are discussed further later in this report.

PUBLIC NOTIFICATION

The application has been advertised pursuant to Section 52 of the Planning and Environment Act 1987, by:

- Sending notices to the owners and occupiers of adjoining land.

Council has received no objections to date.

REFERRALS

Country Fire Authority

The application was referred to CFA as a statutory referral. CFA has not provided a response at the time of writing this report. As no response has been received within the statutory timeframe, the CFA's interest in the application does not need to be taken into account.

DISCUSSION

The assessment of this application largely relates to the recognised environmental values of the area and the potential impacts that could occur as a result of the re-subdivision. There are many policies in the Cardinia Planning Scheme related to environmental protection, and the sites that are subject to this assessment are covered by a higher than usual number of overlays. The objectives of these controls are clear and they require that a high level of scrutiny be applied to the assessment of any proposal that may impact on these values.

A significant level of contention exists in this proposal in terms of what the environmental impacts will be and what the appropriate application of the relevant polices should be. It has been suggested from the very start of the assessment of this application that the environmental impacts, whether direct or indirect, must be considered and are the key considerations of the outcome of the proposal. It has been suggested by the applicant that there will be no vegetation removal as a consequence of the proposal. It is clear in the scheme and associated incorporated documents that even indirect vegetation impacts, such as vegetation removal that may be able to be undertaken as a result of a permit exemption (construction of a fence), created by the approval of a permit, and must be considered at the time of the application.

While this is a significant consideration of the application, there a number of other factors which when assessed on balance with the perceived benefit of the proposal, suggest that the application does not represent a good planning outcome and should not be supported. All of these matters are addressed and discussed below.

Planning Policy Framework

There are numerous State Planning Policies which are directed towards providing strong controls and emphasis in protecting biodiversity and the other environmental values of the increasingly at risk natural landscapes. Clause 11.01-1 'Green wedges', aims to protect the green wedges of Melbourne from inappropriate development (includes subdivision). Local Governments are able to be effective in achieving this objective through adopting a strategy of this policy which require the protection of areas of environmental, landscape and scenic value such as biodiversity assets. It is considered to approve the proposed re-subdivision on the subject site, in particular the reduction in the size of the rural conservation lot would be inconsistent with this policy due to the potential impacts on the high quality natural environment which exists at the subject site.

This position is also supported by the objectives of Clause 12.01-1 S, 'Protection of Biodiversity'. This policy contains a range of strategies which are to be utilised in assessing any application which could be considered to have an impact on the protection and conservation of Victoria's biodiversity. The policy guides applicants and decision makers to use biodiversity information to identify important areas of biodiversity, including key habitat for rare or threatened species and communities, and strategically valuable biodiverse site. Council has recognised that the areas covered by this proposal have these important characteristics and have applied appropriate controls in the form of environmental overlays to manage, and control development in these areas in a manner which does not impact on the environment. The policy requires decision makers to take into account the impacts of land use and development on Victoria's biodiversity, including consideration of:

- Cumulative impacts;
- Fragmentation of habitat; and
- The spread of pest plants, animals and pathogens into natural ecosystems.

It is considered that the proposal fails to recognise and quantify these impacts. Through not providing an assessment of the 'Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land, Water and Planning, 2017)', as recommended in this policy, a full assessment of those impacts has not been able to be made. However what is obvious in the Guidelines is that there is impacted vegetation which must be considered. It is also obvious that where a proposal, such as this one has the ability to result in cumulative impacts, fragmentation of habitat and the spread of pest plants, animals and pathogens into natural ecosystems, it should not be supported in an area which recognised biodiversity values. Through bringing an area of Rural Conservation zoned land into a property which is zoned Low Density Residential, it is beyond doubt that these impacts will occur. Initially the expectations of the

reasonable utilisation of residential land is very different from that which is zoned rural conservation. A re-subdivision creates a line on a plan and where that new boundary does not delineate different ownership but rather brings it into new ownership, it is highly likely that those domestic activities will spill into the areas that are high in environmental value.

The fragmentation of habitat is an inevitable consequence of this erosion of clear and defined boundaries between different landscapes and land use controls and expectations. Any change to a continuous natural landscape, whether that be through physical changes, i.e., fences, clearing, increased human activity, pets, etc., or through changes to the management of the land through matters such as, more parties being involved with different levels of understanding, interest or resources, all these have the effect of fragmenting and diminishing the value of that environment. This is certainly likely in this situation and as already been recognised on-site at 5 Birch Avenue where various domestic materials have been seen to be being stockpiled under vulnerable native vegetation, a real threat to the long term viability of that vegetation. It has even been suggested by the applicant that a purpose of the application is to increase the short frontage of the site at the end of Birch Avenue to allow better utilisation of the site. This in itself suggests an intensification of the use of the site and the portion which is covered by the Rural Conservation Zone.

All of the activities outlined above have the potential to increase the likelihood of the spread of pest plants, animals and pathogens into natural ecosystem, which in the current situation is less likely. Where the environment has been found to be of a very high quality by experienced Council Environmental Officers, this is to be avoided as a priority.

The need to have full consideration of all aspects of a proposal, whether identified by the applicant or recognised and raised in the assessment of the proposal, are strongly emphasised in clause 12.01-2S Native vegetation management. The objective of this policy is to ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. The strategy directs proposals to apply the three-step approach in accordance with the Guidelines. Importantly the strategy states that policy relates to applications that involve, or will lead to, the removal, destruction or lopping of native vegetation. This means that even if the removal of vegetation is not proposed as part of an application, the potential loss must be considered. The policy refers to both the Guidelines as well as the 'Assessor's handbook - applications to remove, destroy or lop native vegetation (Department of Environment, Land, Water and Planning, 2017)'. Each of these documents provide clear direction on when and how to consider native vegetation impacts in making an application. As has been stated earlier the applicant was required to consider and make an assessment of these policy documents as part of the further information requested soon after the lodgement of their application.

Clause 12.05-2S 'Landscapes' is another State Policy that is relevant to the assessment of this application. The objective of the policy is to protect and enhance significant landscapes and open spaces that contribute to character, identity and sustainable environments. Strategies to achieve this objective include:

- Ensure development does not detract from the natural qualities of significant landscape areas.
- Improve the landscape qualities, open space linkages and environmental performance in significant landscapes and open spaces, including green wedges, conservation areas and non-urban areas.
- Recognise the natural landscape for its aesthetic value and as a fully functioning system.
- Ensure important natural features are protected and enhanced.

It is considered that any impact on the quality, continuity and management of the natural environment of the subject lots, in particular the Rural Conservation zoned land results in an unacceptable outcome for this proposal. It is well understood that for ecosystems to function in a manner that enables the various native fauna to exist and thrive, impacts such as vegetation loss causing breaks in the canopies, mid storey vegetation and right down to the understory, must be avoided. Most of Australia's small native mammals, reptiles and birds are significantly more at risk from predation when there are gaps in the habitat and some simply will not cross these voids. This can have very significant impacts on local populations of various species. A classic example being the threatened Southern Brown Bandicoot, found in the southern parts of the Shire.

While the section of land proposed to be transferred to the Low Density land is narrow in parts, the land also adjoins a heavily vegetated road reserve which is effective in protecting the habitat. Any loss in vegetation in

this strip of land, or any change in land use, would be likely to significantly impact on the value and ability of this land to continue as a fully functioning natural system.

While the objective of Clause 13.02-1S Bushfire Planning requires that planning should strengthen the resilience of settlements and communities to bushfire through risk based planning that prioritises the protection of human life, the policy also has specific strategies for areas of biodiversity conservation value. The strategy directs planning to ensure settlement growth and development approvals can implement bushfire protection measures without unacceptable biodiversity impacts by discouraging settlement growth and development in bushfire affected areas that are important areas of biodiversity. While each of the lots is already developed with a dwelling that have been at the sites for considerable time, the approval of the realignment of the boundaries of each lot could be likely to open up the potential for additional vegetation removal under exemptions listed at Clause 52.12 Bushfire Protection Exemptions. While fire protection is to be a first priority, clearing along a fence-line, and up to 120 metres from a dwelling, such as could be possible under these exemptions, would be likely to have more biodiversity impact than bushfire mitigation value. This is the sort of situation that the strategy of this policy seeks to avoid. It could be said that the exemption already exists, and while that is true, it reasonable to say that it would be far more unlikely that the occupant of the dwelling in the Rural Conservation land would remove vegetation on their boundary that is currently up to 500 metres away from their dwelling.

Overall, despite the serious nature of bushfire planning, it is considered that this proposal presents more biodiversity impact than bushfire protection, and it has not been stated as an objective of this application to achieve an improvement in the bushfire threat to either of the properties involved. In fact one of the only stated benefits, to one of the properties, is the widening of the frontage to Birch Avenue. A benefit that in itself cannot be achieved without the removal of vegetation within the rural conservation land.

Finally, State Planning Policy, Clause 15.01-3S Subdivision Design has the objective to ensure the design of subdivisions achieves attractive, safe, accessible, diverse and sustainable neighbourhoods. This proposal is not consistent with one of the strategies which states that subdivision should be designed to create liveable and sustainable communities by protecting and enhancing native habitat. The current pattern of subdivision in the area does successfully achieve this through the appropriate application of the two different zones, well orientated along the historic subdivision pattern which also reflects the landscape qualities. The proposed subdivision will not do this.

Local Planning Policy Framework

There are numerous references to the protection of the environment and biodiversity with the Cardinia Shire Municipal Strategic Statement and local planning policies. The assessment of these policies gives local context to the broad policy objectives considered above in the state planning policies. Some of the key influences in relation to the Municipality listed at Clause 21.01-2 urban growth including pressures on the rural hinterland and management of the green wedge areas, environmentally significant areas and areas of significant landscape value. These themes follow on to the key issues facing Cardinia Shire that are grouped into five strategy areas. The first is Environment which contains strategies that are relevant to this application such as:

- The protection of environmentally areas including the northern hills and the Western Port Coast;
- The protection and management of biodiversity; and
- The maintenance and enhancement of existing significant landscapes

The strategic vision for the Municipality states:

Cardinia will be developed in a planned manner to enable future generations to enjoy and experience the diverse and distinctive characteristics of our shire.

Cardinia Shire is certainly diverse with landscapes ranging from Coastal environments and national significant agricultural land in the south to an urban growth corridor with ever increasing housing and economic development, right up to the northern hills with a wonderful mix of rural residential development and protected natural environments. It is a municipality which celebrates this diversity and has a planning scheme which effectively supports and protects the opportunities of each of these landscapes. The strategic

vision seeks to balance the competing needs of the environment, economic development and the community thorough, among other things, recognising and protecting the diverse and significant environmental and cultural heritage values of the Municipality.

Clause 21.02-3 'Biodiversity' points out that the decline and fragmentation of habitats resulting in the loss of biodiversity is a key issue. Over 75% of the native vegetation in Cardinia Shire has been cleared leaving those areas of remnant vegetation of particular significance and value in terms of maintaining biodiversity within the Municipality. Cardinia Shire forms part of the UNESCO Mornington Peninsula and Westernport Biosphere Reserve, protection of this biosphere relies on good environmental management of the catchment of which Cardinia Shire is a key part. The policy list as a key issue, recognising that native vegetation provides habitat for key fauna species and provides for diverse flora species throughout the municipality.

As the application was not accompanied with an assessment of the vegetation as required by Clause 52.17, it has not been possible to determine just how important the vegetation and broader environmental value of the site is. This makes it impossible to be able to make a full assessment of the application. When this is the case, the precautionary principal must apply.

Clause 21.03-3 Rural Townships aims to retain and enhance the existing rural township character through setting clear limits for development. This has been effectively done in Emerald through the application of appropriate zones. A subdivision that creates a lot in two zones is a clear divergence from this objective and is not orderly planning. The proposal is at odds with the strategies of objective two which is to maintain and enhance the distinct character and environmental qualities of each of the townships. The subdivision does not protect the natural environment and character of the area, particularly areas of remnant vegetation in the hills townships and is therefore inconsistent with this Local policy.

The Emerald District Framework Plan, Clause 21.07-3 Emerald, Avonsleigh and Clematis clearly identifies the different landscape uses and shows the two different sites within two distinct areas, 5 Birch Avenue in traditional residential and 63 Westlands in Rural. What is clear in this plan is that the zoning on the land has been applied very precisely in relation to the zoning and landscape characteristics of the area. Any change to these boundaries can only have a weakening of the relevant controls which apply to each.

Low Density Residential Zone

The purpose of the Low Density Residential Zone is to implement the Municipal Planning Strategy and the planning Policy Framework and to provide for low density residential development on lots which, in the absence of reticulated sewerage, can treat and retain all wastewater.

Pursuant to Cluse 32.03-3 Subdivision, a permit is required to subdivide land. Before deciding on an application, in addition to the decision guidelines of clause 65, the responsible Authority must consider, as appropriate:

- The Municipal Planning Strategy and the planning policy framework.

Subdivision

- The protection and enhancement of the natural environment and character of the area including the retention of vegetation and faunal habitat and the need to plant vegetation along waterways, gullies, ridgelines and property boundaries.
- The availability and provision of utility services, including sewerage, water, drainage, electricity, gas and telecommunications.
- In the absence of reticulated sewerage:
 - The capability of the lot to treat and retain all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria) under the Environment Protection Act 1970.
 - The benefits of restricting the size of lots to the minimum required to treat and retain all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria).
 - The benefits of restricting the size of lots to generally no more than 2 hectares to enable lots to be efficiently maintained without the need for agricultural techniques and equipment.

- The relevant standards of Clauses 56.07-1 to 56.07-4.

It is considered that the proposed subdivision in contrary to the objectives of the LDRZ particularly as it relates to the relevant matters set out in the Municipal Planning Strategy and the Planning Policy Framework. These have been discussed in the previous section of the report.

In terms of the decision guidelines that are specific to subdivision it is considered that the proposal does not support the protection and enhancement of the natural environment and character of the area. Considerations of the environment have been specifically included under subdivision as it is well known that the subdivision of land is more than merely a procedural matter, creating new boundaries on plans of subdivisions, and the possible construction of a post and wire fence. Rather subdivisions have significant potential to impact the environment in a number of ways. These can include the following:

The creation of permit exemptions to remove, destroy or lop native vegetation.

This particular situation applies to this application where under the State Particular Provision, clause 52.17 Native vegetation a permit is not required for the removal of native vegetation where the native vegetation that is to be removed, destroyed, or lopped to the minimum extent necessary to enable:

- Fences the operation or maintenance of an existing fence; or
- the construction of a boundary fence between properties in different ownership

The clearing along both sides of the fence when combined must not exceed 4 metres in width, except where land has already been cleared 4 metres or more along one side of the fence, then up to 1 metre can be cleared along the other side of the fence. This essentially means that in certain circumstances up to 5 metres of vegetation could be removed along a new boundary. Over the entire length of a boundary this has the potential be a significant amount of vegetation and where the particular wedge shape of this lot is at its narrowest this could result in significant clearance.

While an exemption doesn't necessarily mean that someone will act upon the ability to clear the vegetation, there is no way of removing that possibility. The creation of an exemption under clause 52.17 also means that the ability to offset that vegetation is lost. This is clearly inconsistent with the objective of Clause 52.17.

The change in expectations around the management of the vegetation

Where vegetation on an adjoining lot becomes part of a new lot as a result of a subdivision, the expectations around the management and retention of the vegetation is likely to change. Where previously the vegetation was clearly protected remnant vegetation and its removal unlikely to be considered, the new boundary that brings the vegetation into what is predominately a residential lot creates an expectation that the vegetation is able to be managed to support the residential use of the site. This could be quite different to where the vegetation's protection was prioritised through appropriate zones and overlays being applied to the site. While these controls don't change, their value and strength is weakened. Activities which would not have been possible on the lot as a rural conservation lot now become more likely and this has already been identified at the subject site where the applicant has begun to store various domestic materials under and around the trees on the adjoining lot near the shared, unfenced, property boundary.

Rural Conservation Zone

The purposes of the Rural Conservation Zone that are relevant to this proposal include:

- To implement the Municipal Planning Strategy and the Planning Policy Framework.
- To conserve the values specified in a schedule to this zone.
- To protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values.
- To protect and enhance natural resources and the biodiversity of the area.
- To encourage development and use of land which is consistent with sustainable land management and land capability practices, and which takes into account the conservation values and environmental sensitivity of the locality.
- To conserve and enhance the cultural significance and character of open rural and scenic non-urban landscapes.

Pursuant to Clause 36.06-3 a permit is required to subdivide land. Each lot must be at least the area specified for the land in a schedule to this zone. The subject site is located within an area covered by Schedule 2. The schedule sets out the minimum lot area as 15 hectares. The schedule also provides a statement of the conservation values which any development must take into consideration. The schedule provides the following statement:

Protection and conservation of the environmental values and landscape qualities of the land, including habitat of botanical and zoological significance, and the conservation of natural resources, including native vegetation, waterways and soils.

Before deciding on an application to subdivide land, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate the decision guidelines of Clause 35.06-6. The relevant considerations are discussed below.

It is considered that the proposed subdivision is inconsistent with a number of the purposes of the Rural Conservation Zone. As with the low density residential zone, the Municipal Planning Strategy and the Planning Policy Framework have each been discussed earlier in this report. It is considered that the proposal does not support the values specified in the schedule to this zone. The subject site is an area covered by areas of Zoological Significance. Land which contains a consistent cover of dense remnant indigenous vegetation is appropriately zoned as Rural Conservation land. This is the case for this site and it is considered that the subdivision will diminish the value of the controls that apply to the site. This zone is also supported by a wide range of environmental overlays that apply to the site. These will be discussed further later in the report. As the portion of the subject site which is located within the Rural Conservation Zone has Zoological Significance mapped on the site, particular scrutiny must be applied to the assessment of any application.

The decision guidelines for the zone are broken down into five categories, general issues, Rural Issues, Environmental issues, Dwelling issues and design and siting issues. The considerations of each that are relevant to this application are discussed below.

General issues

- How the use or development conserves the values identified for the land in a schedule.
- Whether use or development protects and enhances the environmental, agricultural and landscape qualities of the site and its surrounds.
- Whether the site is suitable for the use or development and the compatibility of the proposal with adjoining land uses.

It is considered that the proposed subdivision does not conserve the conservation values of the lot. As previously discussed, any impact on the continuity, management or land use of the significant vegetation is likely to impact on its functionality as a natural system.

The schedule for the Rural Conservation Zone indicates that the minimum lot area is 15 Ha. While the subject site is already below this threshold, it is considered that a subdivision which further reduces the lot area is unacceptable. While it can be considered it is not a good planning outcome particularly where that land is to be transferred to a lot which does not provide the same emphasis on conservation and is more orientated towards residential land uses.

Environmental issues

- An assessment of the likely environmental impact on the biodiversity and in particular the flora and fauna of the area.
- The protection and enhancement of the natural environment of the area, including the retention of vegetation and faunal habitats and the need to revegetate land including riparian buffers along waterways, gullies, ridgelines, property boundaries and saline discharge and recharge areas.
- How the use and development relates to sustainable land management and the need to prepare an integrated land management plan which addresses the protection and enhancement of native vegetation and waterways, stabilisation of soil and pest plant and animal control.

The application was not supported by any specific environmental assessment and no native vegetation assessment was provide either. While the applicant has suggested that the land owner will not remove any vegetation along the new title boundaries, an ability to do so without an assessment against the native vegetation provisions will exist.

Aside from the removal of native vegetation, a key objective in maintaining the significance of remnant vegetation is through avoiding the fragmentation of intact tracts of vegetation. In planning terms preservation of vegetation can be seen in the application of different zones along the boundaries of distinct landscape formations and uses. This is clearly identified at the subject site where the application of the low density residential zone and the rural conservation zones have been applied to match the residential subdivision pattern and the environmental values of the vegetated rural conservation land. It is not uncommon in zoning mapping for there to be significant discrepancies between land use patterns and environmental values and the application of appropriate zones and overlays to manage and protect the particular expectations of the land. In the context of these two lots and the surrounding land uses it is very obvious that there has been a very thoughtful and logical approach to the applications of the zones. The land that has been zoned low density residential clearly follows the historic subdivision pattern and the relatively smaller lots are adequate to support residential uses and in particular treat and retain wastewater on site. While generally speaking that land which is covered by the rural conservation zone is predominately larger lots with substantial vegetation cover and connectivity with vegetation on adjoining lots and nearby public reserve. In this case the vegetation on the larger lot contributes to an almost continuous vegetation cover all the way to the Cardinia Reservoir.

In a situation where this type of proposal was successful it would be essential to have a detailed property management plan prepared to ensure that the land transfer was appropriately managed and the environmental assets not impacted. This would include fencing areas of rural conservation land, tree protection zones and strict limitations on the use of the land. It would also be important to secure this protection through a Section 173 Agreement that would be registered on the title. Despite the intentions of the current land owners, these could change over time or possible future landowners could have very different expectations.

One matter that could not be protected against would be the vegetation removal exemptions created under Clause 52.17. With the opportunity lost to consider the value of this vegetation and potentially off set it, the proposal is again an unacceptable planning outcome.

Overlays

The subject sites are subject to a range of Environmental Overlays all with similar objectives and all applied as a consequence of the recognised environmental significance of the site. Each of the overlays require planning approval for subdivision to ensure that the environment is not affected by a particular proposal. This recognises that a subdivision has the potential to have a negative impact despite this not always being immediately obvious, or one that occurs immediately upon the approval of the plan.

The Environmental Significance Overlay provides the following statement of significance for the area covered by the land in the rural conservation lot.

The hills to the northern part of the municipality (generally to the north of the Princes Highway) is an area with significant landscape and environmental values. The area is characterised by a geology of Devonian Granitic and Sulrian Sediment origin, moderate to steep slopes, and areas of remnant vegetation. These characteristics contribute to environmental values including landscape quality, water quality, and habitat of botanical and zoological significance. These characteristics are also a significant factor in terms of environmental hazards including erosion and fire risk.

The vegetation supports the ecological processes and biodiversity of this area by forming core habitat areas within a complex network of biolink wildlife corridors. Sites containing threatened flora and fauna are defined as being of botanical and zoological significance. Development within and around these sites need to be appropriately managed to ensure the long term protection, enhancement and sustainability of these ecological processes and the maintenance of biodiversity.

The statement clearly identifies the environmental value to not only the Shire but the states environment more broadly. The decision guidelines very much elaborate on the considerations that have been raised in state and local planning policy and discussed earlier.

While the Vegetation Protection Overlay does not specifically trigger a planning permit for subdivision, it does provide clear and strict controls on the removal of vegetation and it requires that any potential impact on vegetation as a result of any proposal. While the applicant has suggested that the overlay controls limit the ability for the removal of the vegetation along the property boundaries, with a permit being required prior to any vegetation being removed, the opportunity to determine whether the vegetation should be allowed to be removed has essentially been lost by that time as an exemptions is created (under 52.17) at the time of approving the permit. Clause 52.17 is the appropriate policy for the most thorough assessment of the vegetation values and it is a State Policy that is required to be considered. It would also be inappropriate to first allow the creation of a new boundary and then not allow the fence line to be managed by the landowners in the future. Rather it is proper process to determine the acceptability or not of the full extent of a proposal at the time of the initial assessment and if it is considered the environmental impact, direct or indirect, is too great. At that time a decision should be made on the entire proposal. In this instance, in the absence of a Native Vegetation assessment it is not possible to make the full assessment. However the potential impacts to the environment are clear as are the intentions of the policy which relates to a proposal such as this. Therefore the permit should not be supported even in the absence of all the required information.

The Vegetation Protection Overlay also provides a statement of nature and significance of vegetation to be protected which outlines the following in relation to Low Density land:

The low density residential areas within the Shire support substantial areas of remnant indigenous vegetation and mature exotic species. The maintenance and enhancement of the flora habitat is vital for the long term protection of these areas and the native fauna they support. Some of these areas contain small lots which are not protected under the native vegetation controls of Clause 52.17 resulting in areas of vegetation becoming increasingly fragmented.

The remnant vegetation is important for its contribution to habitat and environmental values and processes. This vegetation provides protection to waterways including in the reduction of siltation and contributes to habitat corridors as well as playing a role in supporting soil stability, reducing stormwater runoff, and limiting erosion and salinity.

The Design and Development Overlay Schedule 1 which relates specifically to Low Density Residential land has a design objective specific to subdivision which is to ensure the subdivision of land has regard to the existing pattern of subdivision in the area. This proposal could not be further from that objective. The area have a very clear pattern of subdivision which has been purposeful in being aligned with the zoning and landscape characteristics. The Low Density Residential zone follows precisely the boundary of the smaller lots which have been created through a historic subdivision which created smaller residential lots for the purpose of rural residential living on the edge of the Emerald Township. Beyond these specific areas, the zoning becomes rural conservation, reflecting the larger lots and higher level of vegetation quality and coverage, as well as the connectivity with the Cardinia Reservoir catchment, which is protected for water quality.

Overall on balance it is considered that the application is inconsistent with the objectives of the various overlays which relate to the site.

Clause 52.17 Native Vegetation – Vegetation Impacts

Possibly the most significant provision of the Planning Scheme to which this proposal is considered are the Native Vegetation provisions of Clause 52.17. Under these provisions a permit is required to remove, destroy or lop native vegetation, including dead native vegetation.

The purpose of Clause 52.17 is to ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. This is achieved by applying the following three step approach in

accordance with the Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land, Water and Planning, 2017) (the Guidelines):

1. Avoid the removal, destruction or lopping of native vegetation.
2. Minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided.
3. Provide an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation. To manage the removal, destruction or lopping of native vegetation to minimise land and water degradation.

An application to remove, destroy or lop native vegetation must comply with the application requirements specified in the Guidelines.

While the applicant did not apply for the removal of vegetation as part of the proposal, the request for further information required that the application consider the provisions and provide an appropriate assessment. It is common place for an initial assessment of an application to recognise potential permit triggers or further consequences of an application than what has been presented by an applicant. The further information suggested that Clause 52.17 applies to this property, but has not been addressed in the planning application. Native vegetation in Victoria is protected under state legislation; removal of any native vegetation including trees, shrubs, herbs and grasses must be avoided or minimised as far as possible.

The further information request went on to state that if native vegetation is proposed to be removed, destroyed or lopped (which can include indirect impacts) as a result of the proposal, it will need to be assessed. This assessment should address the State Guidelines for the removal, destruction or lopping of native vegetation, the "Guidelines" (Department of Environment, Land, Water and Planning, 2017).

The applicant considered that as the application did not propose the removal of any vegetation, that the Native Vegetation provisions were not relevant to this application. It is submitted that the Guidelines for the removal, destruction or lopping native vegetation, reveals that this is not the case. What is required under these provision is not only consideration of direct vegetation impacts but also indirect impacts and more specifically 'Consequential Loss'

At Section 2.3.3 'Consequential removal of native vegetation the guidelines outlines the following:

Clause 65 Decision guidelines provides a range of standardised decision guidelines that a responsible authority must consider as appropriate before deciding on a permit application or the approval of a plan. Contained within Clause 65.01 are the following native vegetation specific decision guidelines:

- *The extent and character of native vegetation and the likelihood of its destruction; and*
- *Whether native vegetation is to be or can be protected, planted or allowed to regenerate.*

the responsible authority considers that a proposed use and/or development is likely to involve, or lead to, the consequential removal of native vegetation into the future as a result of issuing a permit or approving a plan, the responsible authority should consider whether there is a need for a permit application to be lodged in accordance with Clause 52.17. This ensures consideration and integration of all issues as part of its decision making.

This can include, but is not limited to, the consideration of an application for a permit to subdivide land that will enable native vegetation to be removed in the future without requiring a permit under Clause 52.16 or Clause 52.17.

This situation specifically relates to this application and demonstrates that the information requested should have been included with the application and in its absence, a decision on the proposal cannot be made to support it.

There are numerous references to consequential loss throughout the Guidelines, the Applicants Guide and the Assessors Handbook all of which make it very clear what is required to be considered and at what stage the information is required. The most important reason for the need to assess consequential loss is that it provides the opportunity to determine whether the application has applied the three principals of avoid, minimise and offset. Regardless of whether permit is required at a later date for vegetation removal, where

an exemption has been created under Clause 52.17, the ability to offset or even consider the strategic biodiversity value of the vegetation has been lost.

The application requirements listed in the Assessors hand book at section 3.1.3 requires that when calculating vegetation loss, that for Consequential Loss that applicants ensure that any consequential removal of native vegetation due to exemptions that would apply following approval of a permit or plan (Appendix 2C) has been included. This includes for example, loss of native vegetation along proposed property boundaries for fence lines. Again the relevance of this policy could not be clearer. The policy demonstrates that the approval of a subdivision would allow the 'Fences' exemption to be relied on for future construction of boundary fences between properties in different ownerships. An area of four metres wide along the proposed property boundary must be included in the total native vegetation to be removed.

Overall without the provision of an appropriate assessment against Clause 52.17, the proposal cannot be supported and it is considered that the applicant is an incomplete proposal.

Clause 65.02 Decision Guidelines – Orderly Planning

The final important consideration of this proposal relates to the decision guidelines listed at Clause 65. Clause 65 outlines a wide range of considerations which should be applied, as relevant to all permit applications. A key consideration in this instance is the 'Orderly planning of the area'. It is considered that this application fails on this most important point. The creation of a new lot which contains land in two zones is not considered orderly or good planning and this position has been supported in a number of cases at VCAT.

In the case of *Balderstone v Mornington Peninsula Shire Council*, while the Council supported the creation of a lot within two zones, they did so on the basis that the applicant would apply for a rezoning of the subject land. The Tribunal considered that such an outcome was unacceptable and stated its concern about the way in which the proposal would result in lots which are in two different zones and went on to state that:

- While the planning scheme did not actively prevent new lots being created which straddled different zones that was not something usually considered to be 'orderly planning'.
- Explain that planning scheme maps generally were designed so that zoning controls match lot boundaries. The purpose of such a design is to avoid overly complex planning situations which arise when a lot has what can be a conflicting set of planning controls applying to it.

It was clear in that case, like this proposal that the zoning provisions were applied so that they followed existing lot boundaries. The proposal would therefore disrupt the existing and 'more orderly planning' situation.

In *Marcus Kalman and Associates v Mornington Peninsula Shire Council* the Tribunal affirmed the Council's decision to refuse a permit for the re-subdivision of two adjoining lots, which would result in there being land in two zones. One of the Council's grounds of refusal was that the proposal would not avoid lot fragmentation as discouraged by policy.

The Tribunal cited the first Practice Notes that supported the Victoria Planning Provisions on which the Mornington Planning Scheme was based. The relevant practice note, titled 'Using Maps in Planning Schemes May 2000', stated:

Zone boundaries should align with title boundaries or other defined features such as road centrelines or watercourses unless there is a deliberate reason not to. Avoid creating land in two zones.

Although the Tribunal recognised that this specific practice note no longer formed part of the suite of Practice Notes, the Tribunal regarded the principle expressed in the cited extract to be relevant today as a matter of 'orderly planning'. The Tribunal further recognised that there may be deliberate reasons for not having zone and lot boundaries coinciding, such as the application of historical zoning. However, if not, there ought to be a strategic basis to that reason.

The following can be distilled from these decisions:

- The Tribunal has placed weight on the principle of 'orderly planning' in regards to the re-subdivision of land which results in lots in multiple zones.
- It is by design that zone controls and lot boundaries generally coincide to avoid an overly complex planning situation in which planning controls potentially conflict.
- There ought to be a compelling strategic basis for the creation of a lot within two zones, which would be contrary to the notion of 'orderly planning'.

Overall it is considered that the proposal if granted, would be contrary to the notion of orderly planning, which is a policy consideration, that Council must take into account under clause 65.01.

CONCLUSION

This application for re-subdivision has been assessed against the relevant Planning Policy Framework and the Local Planning Policy Framework and the relevant provision of the Cardinia Planning Scheme, in particular the Low Density Residential and Rural Conservation Zones, the overlays which apply to the land, Clause 52.17 and the Decision Guidelines of Clause 65. Overall on balance it is considered that the proposal is inconsistent with the objectives and decision guidelines of the above controls.

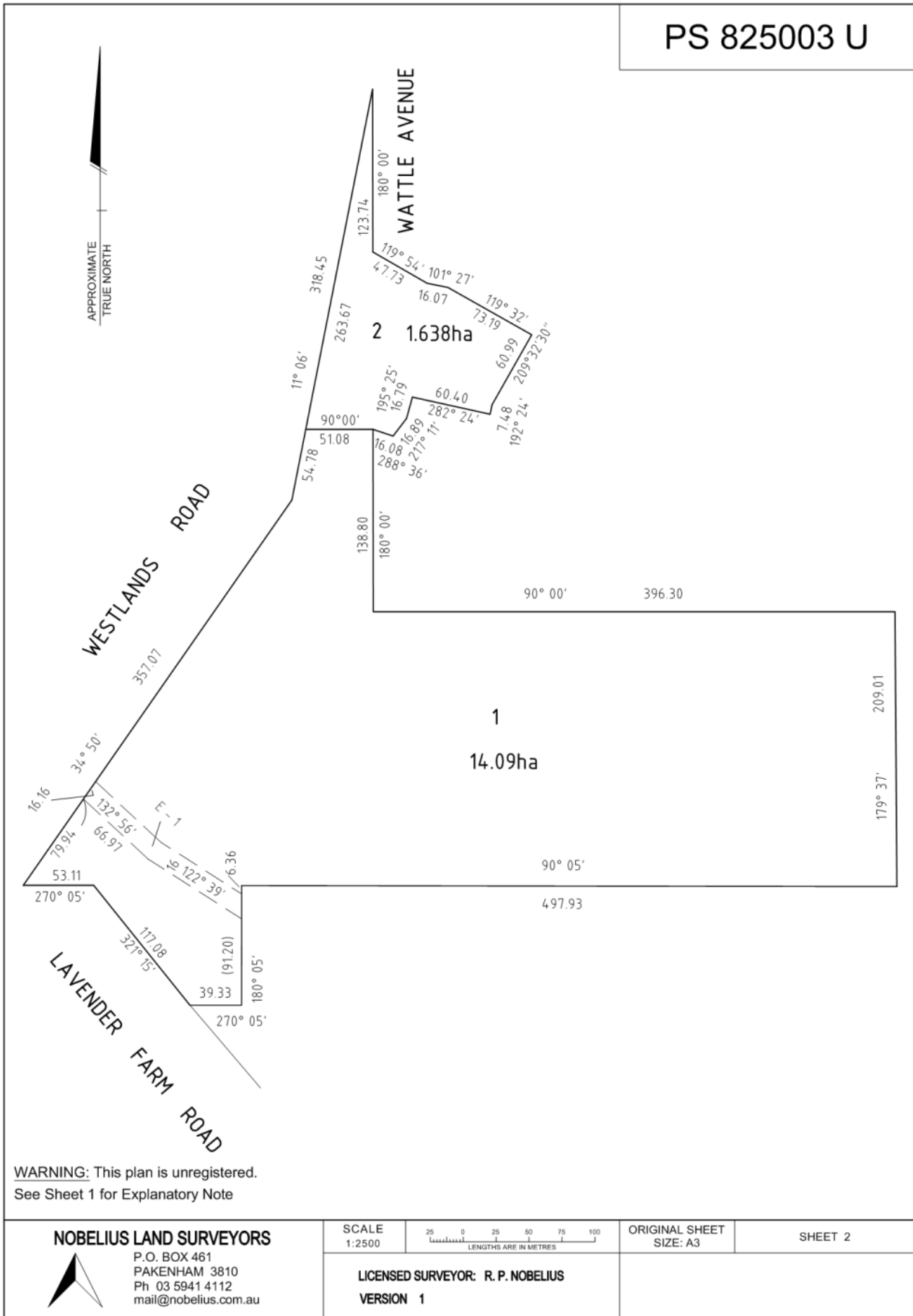
It is considered that the proposal represents a poor planning outcome that has negative environmental impacts, which have not been fully considered by the applicant and does not represent orderly planning of the area.

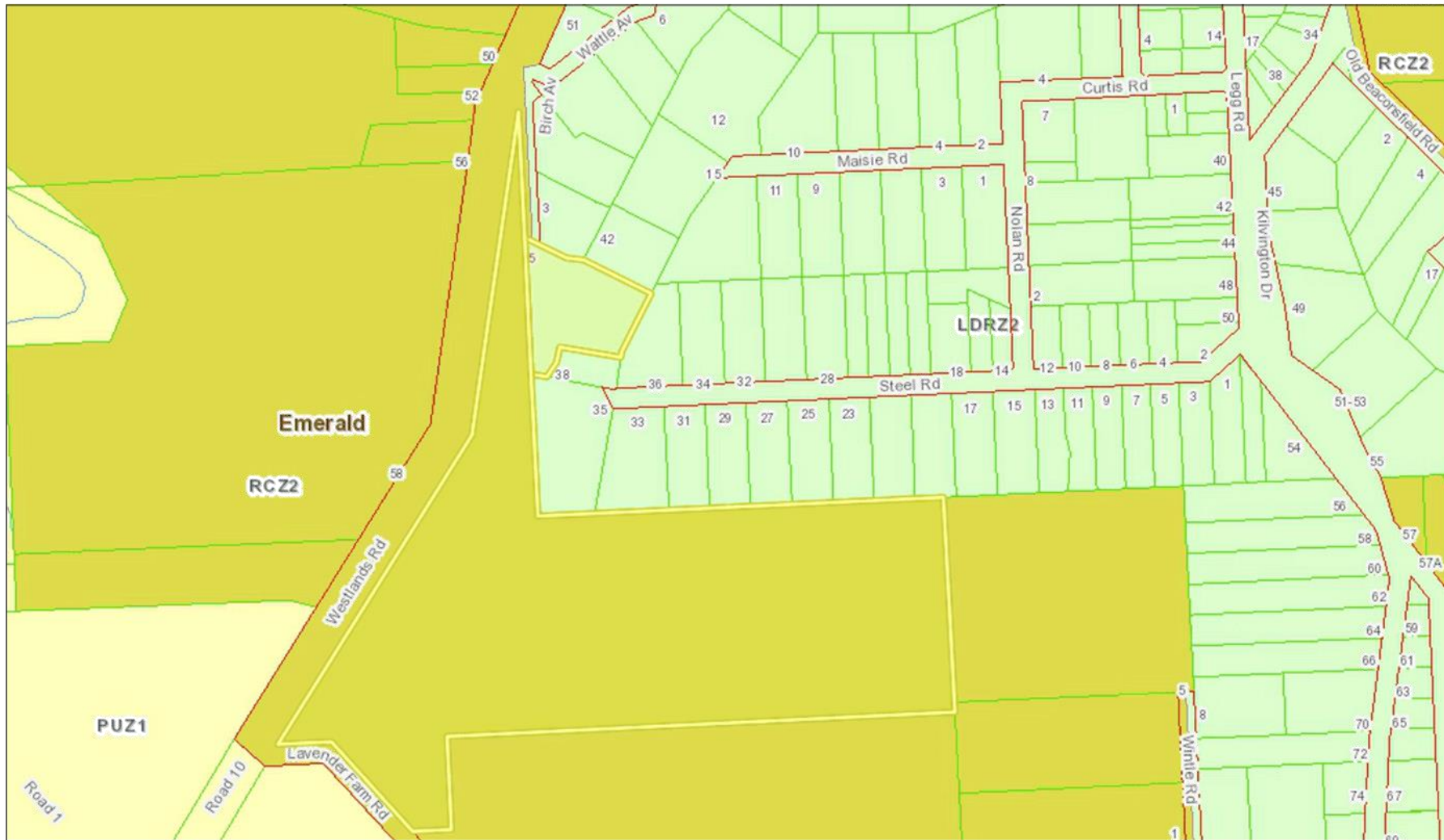
It is recommended that a Refusal to Grant Planning Permit T180501 be issued for Re-subdivision at 5 Birch Avenue & 63 Westlands Road Emerald, Emerald subject to the following reasons:

1. The proposal is inconsistent with various objectives and strategies of the Planning Policy framework, in particular those which relate to the protection of the environment and biodiversity, such as Clause 12.01-1S Protection of Biodiversity, Clause 12.01-2 Native Vegetation Management and Clause 12.05-2S as the proposal presents and unacceptable impact on the environment.
2. The proposal is inconsistent with various objectives and strategies of the Municipal Strategic Statement and strategic Vision which identify and aim to preserve the valuable environmental values of the Shire.
3. The proposal is inconsistent with the following policies of the Local Planning Policy Framework Clause 21.02 Environment, Clause 21.02-3 Biodiversity, Clause 21.02-4 Wildfire Management, Clause 21.03-3 Rural Townships, Clause 21.03-4 Rural Residential and Rural Living Development and Clause 21.07-3 Emerald, Avonsleigh and Clematis as it will result in an impact which is contrary to the objectives and strategies contained in each.
4. The proposal is inconsistent with the objectives and decision guidelines of the Rural Conservation Zone as it will not protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values. Nor will it protect and enhance natural resources and the biodiversity of the area.
5. The proposal is inconsistent with the decision guidelines of the Low Density Residential Zone as it does not consider the protection and enhancement of the natural environment and character of the area including the retention of vegetation and faunal habitat.
6. The proposal is inconsistent with the environmental overlays that apply to the two lots as the proposal will weaken the controls and impact on the local significant environment.
7. The application is inconsistent with the purpose of the Native Vegetation Provisions of Clause 52.17 as it has not correctly identified all the potential vegetation impacts as required in the incorporated documents such as the Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land, Water and Planning, 2017)

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8. The application is an incomplete application as no assessment has been provided against Clause 52.17 'Native Vegetation', of the Cardinia Planning Scheme.
 9. The proposal is inconsistent with the Decision Guidelines of Clause 65 as it does not represent orderly planning of the area through creating a lot in two zones and has not considered the extent and character of native vegetation and the likelihood of its destruction

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