



DARRYL ANDERSON CONSULTING PTY LTD
TOWN PLANNING & DEVELOPMENT CONSULTANTS

REPORT ON EXISTING & CONTINUING USE RIGHTS COBAKI LAKES

PREPARED FOR:

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Existing Uses

Section 106 of the Environmental Planning and Assessment Act defines an existing use as, among other things;

"The use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would have the effect of prohibiting that use."

Section 107 of the Act provides that;

"Nothing in the Act or an environmental planning instrument prevents the continuance of an existing use however nothing authorizes;

- a) *any alteration or extension to or rebuilding of a building or work; or*
- b) *any increase in the area of the use made of a building, work or land from the area actually, physically and lawfully used immediately before the coming into operation of the instrument there in mentioned; or*
- c) *without affecting paragraph a) or b), any enlargement or expansion or intensification of an existing use; or*
- d) *the continuance of the use therein mentioned in breach of any consent in force under this Act; or*
- e) *the continuance of the use therein mentioned where that use is abandoned."*

Section 107(3) of the Act provides that without limiting the generality in sub-section 2(e) above, the use is to be presumed, unless the contrary is established, to be abandoned if it is ceased to be actually so used for a continuous period of 12 months.

Continuing Uses

Section 109 of the Environmental Planning and Assessment Act authorises the continuance of a use of a building, work or land for a **lawful** purpose for which it was being used immediately before the coming into force of an environmental planning instrument which requires consent to be obtained.

Section 109 contains similar limitations on the expansion, intensification and rebuilding of continuing uses as those that apply to existing uses referred to above.

Clauses 41, 42, 43, 44 and 45 of the Environmental Planning and Assessment Regulations, 2000 provide that an existing use may be enlarged, expanded, intensified, altered, extended, rebuilt or changed to another use **only** with Development Consent.

The onus of proof in relation to establishing existing and/or continuing use rights rests with the person asserting those rights. There are two key elements involved in establishing those rights. Firstly, the use must be lawful (in a planning sense). Secondly, the use must not have been "abandoned".

Where a particular use enjoys the benefits of existing or continuing use rights, it may continue but it cannot be intensified, expanded, rebuilt etc unless Development Consent is first obtained.

5.0 PLANNING HISTORY

To enable the question of what existing and/or continuing use rights apply (if any), the history of planning controls applying to the Cobaki Lakes site must be identified, together with relevant provisions of each environmental planning instrument or deemed environmental planning instrument. The following table showing the planning history of the land has been compiled based on our knowledge and records.

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DATE	INSTRUMENT	ZONING	LAND USE	PERMISSIBILITY
		Part 7(a) Environmental Protection Wetlands	Agriculture Forestry	Development Consent Required and must satisfy Clause 8 of the LEP Prohibited
		Part 7 (d) Environmental Protection Scenic Escarpment	Agriculture Forestry	Development Consent Required and must satisfy Clause 8 of the LEP
		Part 7(l) Environmental Protection Habitat	Agriculture Forestry	Development Consent Required and must satisfy Clause 8 of the LEP

Tweed Local Environmental Plan 1987 adopted the 1980 model provisions which contain the following definitions of agriculture and forestry:

“Agriculture” has the meaning ascribed to it in Section 514A of the Local Government Act 1919 as follows”:

“Agriculture” and cultivation include horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees and the growing of fruit, vegetables, and the like, and “agriculture” and “cultivate” have a corresponding meaning”.

“Forestry” includes Aboriculture, Sylviculture, forest protection, the cutting, dressing and preparation, other than in a sawmill of wood and other forest products and the establishment of roads required for the removal of wood and forest products and for forest protection”.

Tweed Local Environmental Plan 2000 contains the following definitions of agriculture and forestry:

“Agriculture” includes horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees, and the growing of fruit, vegetables and the like. It does not include forestry, or the use of an animal establishment or a retail plant nursery”.

“Forestry” includes Aboriculture, Sylviculture, forestry protection, the cutting, dressing and preparation, other than in a sawmill, of wood and other forest products and the establishment of roads required for the removal of wood and forests products and for forest protection”.

6.0 DEVELOPMENT CONSENTS ISSUED

TABLE 1 – DEVELOPMENT CONSENTS ISSUED			
DEVELOPMENT CONSENT NO.	DESCRIPTION	DATE OF CONSENT	COMMENT
92/315	Boyd Street Extension	5 January 1993	The development has been commenced and the Development Consent is preserved
94/438	Bulk Earthworks	27 January 1995	The development has been commenced and the Development Consent is preserved
S94/194	730 Lot Urban Subdivision – Parcels 1 to 5 + 13 Englobo Parcels (The Entrance, The Sand Ridge)	19 September 1995	The development has been commenced and the Development Consent is preserved

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TABLE 1 – DEVELOPMENT CONSENTS ISSUED			
DEVELOPMENT CONSENT NO.	DESCRIPTION	DATE OF CONSENT	COMMENT
96/271	Bridge over Cobaki Creek (Tweed Shire Council)	8 April 1997	It is understood from Council that the development has been commenced and therefore the consent remains in force
S97/54	430 Lot Residential Subdivision – Parcel 7 to 10 (The Knoll, Piggabeen)	21 October 1997	Check Commencement Was the development commenced before 21 October 2002
K99/1124	560 Lot Urban Subdivision (The Foothills, The Plateau, Valley East, Valley West, East Ridge)	21 July 2000	Development Consent will lapse on 21 July 2005 unless the development is commenced prior to that date
1162/2001 DA	8 Management Lots and Bulk Earthworks (Town Centre)	8 October 2002	Development Consent will lapse on 8 October 2007 unless the development is commenced prior to that date

7.0 LAND USE HISTORY

The Cobaki Lakes Local Environmental Study (Ian Pickles Town Planning, March 1992) indicates at pages 51 and 73 that;

"The site is currently used and managed as a pastoral property for approximately 350 head of cattle based on improved and native pastures with a program of slashing in the recent past, to facilitate a relocation of noxious weeds and promote pasture."; and

"The property has been operated and managed for some time as a pastoral cattle grazing property, with bushfire management and pasture management activities through mechanical slashing, drainage works, clearing etc."

Relevant extracts from the Local Environmental Study are attached at **Annexure A**.

The development statement for Cobaki Lakes project DA No. 2 (Cardno & Davies, August 1999) includes information from a Mr Jack Smith indicating that the primary use of the whole of the land has been associated with cattle together with 2 very small areas of corn. An extract from that report (Page 59 is attached at **Annexure B**)

**Statutory Declaration of Mr Harry Ellis Dated 31 January 2005
Director of Calsonic Management Services Pty Ltd (the property owners from 1989 to 1995)**

"Throughout the period of my appointment as a Director of Calsonic the entire Cobaki property was utilised for cattle grazing. This eliminated any need for supplementary feeding, as sufficient natural feed was available by rotation of the herd through the various fenced areas of the entire property."

A copy of this Statutory Declaration is attached at **Annexure C**.

**Statutory Declaration of Mr William Robert EII Dated 28 January 2005
Director of Leda Manorstead Pty Ltd**

"During the entire period of Leda Manorstead's ownership of Cobaki Lakes the entire property has been and is currently put to the following uses:

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-
- a) *On average approximately 400 head of cattle has been grazed on the property; and*
- b) *Pasture improvement activities have been carried out.*"

A copy of this Statutory Declaration is attached at **Annexure D**.

8.0 CONCLUSION

8.1 Grazing

As reflected in the table at Section 5.0, the relevant date in so far as existing and/or continuing use rights are concerned is the 29 January 1988, being the date on which consent was required for agriculture and forestry pursuant to Tweed LEP 1987. The whole of the property was used immediately before the relevant date for the purpose of grazing cattle and that use has continued to the present time as reflected in the landuse history at Section 7.0.

Based on our investigations we therefore conclude that the whole of Cobaki Lakes enjoys existing and/or continuing use rights pursuant to Sections 107 and 109 of the Environmental Planning and Assessment Act, 1979 (As Amended) for the purposes of grazing up to 400 head of cattle.

8.2 Ancillary Uses

Various items of farm infrastructure including access roads, culverts, open drains, fences, gates, dams and other structures exist within the Cobaki property. They form integral elements of routine grazing and pasture improvement activities undertaken on the site.

In accordance with the principles established by the Court of Appeal in Taggett versus Tweed Shire Council (NSW Court of Appeal No. 40520 of 1992), these uses should not be characterised as separate and independent uses of the land. Rather, they are ordinarily incidental and ancillary to the use of the land for the purposes of grazing, for which existing and/or continuing use rights are considered to apply in respect of the site.

It follows from the above that the existing farm infrastructure can continue to be used and maintained subject to the limitations contained in Clauses 41 to 45 of the Environmental Planning and Assessment Regulations 2000.



FIGURE 1

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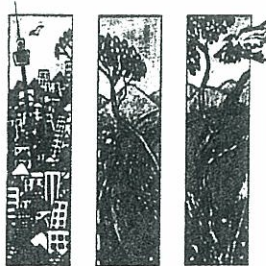
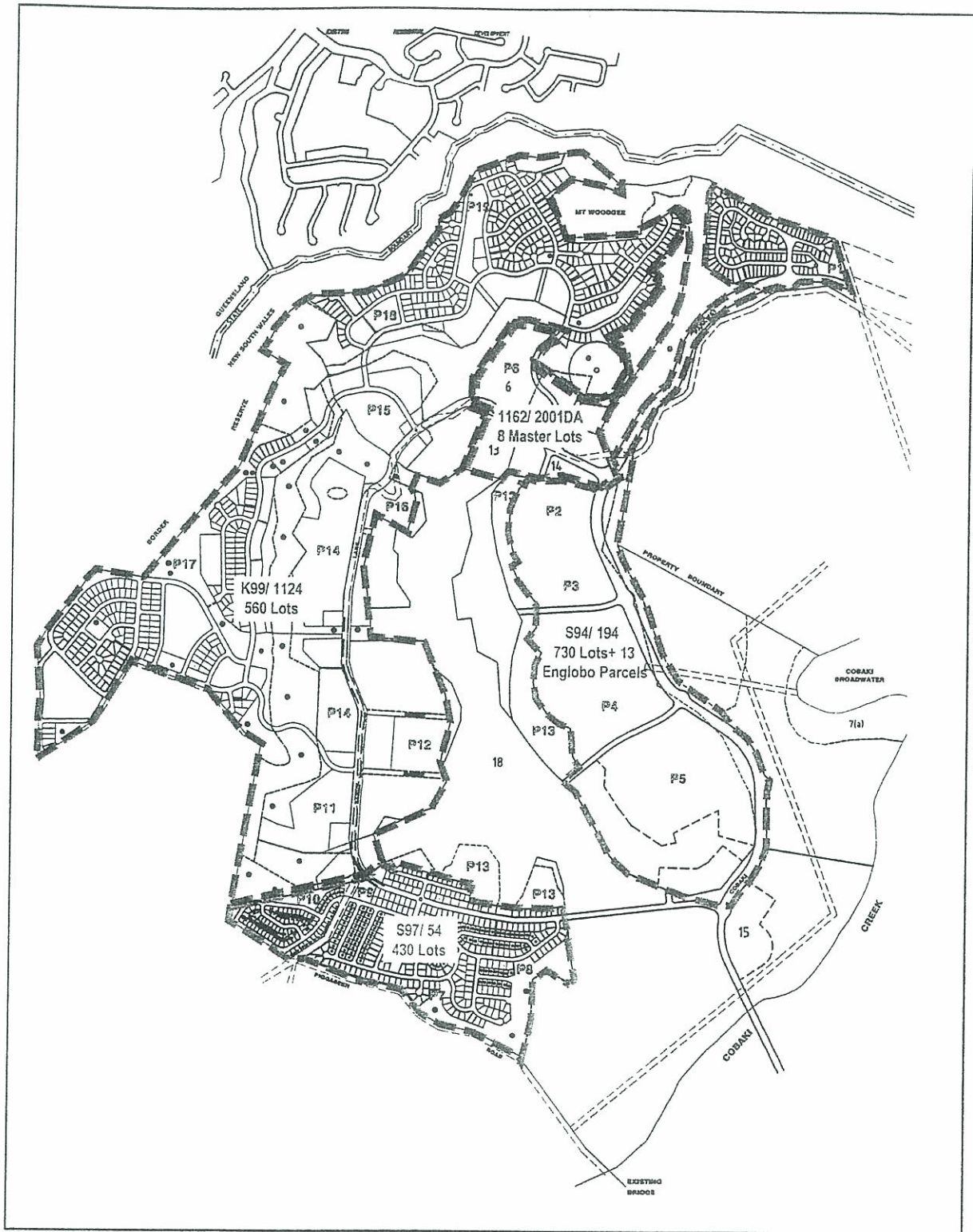


FIGURE 3: EXISTING SUBDIVISION CONSENTS

Base map source: Cardno MBK

Job No.G03056 – Cobaki Lakes
Review of Master Plan

Gary Shiels & Associates



ANNEXURE A

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COBAKI LAKES ENVIRONMENTAL STUDY

4 HUMAN ENVIRONMENT

4.1 LAND USE

The site is currently used and managed as a pastoral property for approximately 350 head of cattle based on improved and native pastures with a program of slashing in the recent past, to facilitate eradication of noxious weeds and promote pasture. The site contains three (3) dwelling houses, one (1) located adjacent to Piggabeen Road one (1) at the southern end of Sandy Lane, and one (1) located at the northern end of the site. A cattle dip is located in the middle of the site, with a gravel access road known as Sandy Lane constructed along one of the road reserves through the site. Approximately 13.05 hectares of road reserve are located on the site. Reference should be made to Section 6.3 of this study for further discussion concerning the dip site. Other rural properties are located to the south and south west of the site, with vacant Crown Land to the north and the State Border and Coolangatta, the Moran Hospital of Excellence and the residential estate of Currumbin at the southern end of the Gold Coast City.

Parts of the site were mined for mineral sands in the 1960s and 1970s.

4.2 ARCHAEOLOGY AND HERITAGE

An archaeological assessment of the land was carried out by H J Hall of the Department of Anthropology and Sociology at the University of Queensland in March 1990. This included a review and extension of a previous archaeology study carried out by Lilly in 1981, and included liaison with the local Aboriginal community through the Tweed/Byron Local Aboriginal Land Council with respect to Aboriginal values and sensibilities. The site was the territory of the Minjungbil people, of the diverse Bundjalung Aboriginal language group.

The survey discovered no archaeological sites or any relic relating to past Aboriginal relic on the land. This may have been due to modification of the site by sand mining and ploughing and logging activities. An Aboriginal land claim has been lodged in respect of the vacant Crown Land wetland area adjacent and to the east of the Study area, and this claim affects the area proposed for the proposed Boyd Street Extension.

The National Parks and Wildlife Service has commented that notwithstanding the apparent lack of actual archaeological Aboriginal sites located on the site, appropriate arrangements should be made for ongoing liaison with the local Aboriginal community in regard to possible discovery of relics during the development phase. The National Parks and Wildlife Act 1974, requires notification to the Service of any Aboriginal relic found.

There are no known heritage sites relating to European settlement of the land.

COBAKI LAKES ENVIRONMENTAL STUDY

These criteria will be included in a draft Development Control Plan.

In view of the importance of ensuring adequate water quality controls as development proceeds, it is proposed to include appropriate statutory controls in the draft Planning Instrument applying to the land, involving formal liaison with the State Pollution Control Commission in the process of assessment, approval and monitoring of water quality control and sediment control measures.

6.3 LAND USE AND ARCHAEOLOGICAL CONSTRAINTS

The property has been operated and managed for some time as a pastoral cattle grazing property, with bushfire management and pasture management activities through mechanical slashing, drainage works, clearing, etc. A small quarry exists on part of the site. A cattle dip adjacent to Sandy Lane in the mid section of the property poses a local constraint due to the presence of toxic chemical residues in the soil which will need appropriate remediation and isolation measures such as capping to ensure no future human disturbance and potential for contamination.

Preliminary sampling by Golder Associates and by the Department of Agriculture/State Pollution Control Commission, has determined the extent of arsenic and organochlorine contamination, and contact in continuing between these authorities and the landowner's representatives on appropriate ways to remediate the site. The site is some 60 metres from proposed Residential zones and is proposed itself to be zoned Open Space. The developer proposes to seal and cap the site as part of a golf course maintenance depot area.

The archaeological studies determined that there are no obvious Aboriginal relics on the site which act as constraints to development. However, appropriate management procedures will need to be recognised together with the potential for Aboriginal relics being discovered, including subsoil relics to be found during the development phase.

6.4 PHYSICAL, SLOPE AND TERRAIN CONSTRAINTS

Some parts of the site offer constraints to certain types of development land uses, particularly buildings and construction of roads, etc, with steep slopes having potential for general instability problems identified in the geo-technical surveys in the western and northern part of the site (within the foothills) and also all parts of the site having slopes in excess of 1:4 or 25% offer general constraints on urban development due to instability for foundations or erosion problems. Many areas of steep slopes are to be zoned Environmental Protection 7(d) Scenic/Escarpment Zone. It should be noted that 25% slopes do not necessarily pose an absolute constraint on development but require special design and geotechnical assessment. Parts of the low lying areas with underlying estuarine clays and muds with organic material offer poor foundation conditions. These general terrain constraints are recognised in avoidance of extensive urban residential zoning on those parts of the site identified in the constraints mapping. No geological resources of any value require protection or are likely to be "sterilised" by development.



ANNEXURE B

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- ii) In relation to contaminated lands generally reference is made to the letter by Cardno & Davies NSW Pty Ltd to Tweed Shire Council, dated 18.11.1997 on Council File No GS4/97/83, which is reproduced hereunder:

"Reference is made to your letter of 7 November 1997. We have held further consultations with Mr Jack Smith who has confirmed that the primary use of the whole of the land has been associated with cattle.

Mr Smith has further confirmed that, within the last thirty (30) years or so, the ancillary uses of the land are as shown on the sketch dated 17 November 1997 enclosed herewith, being:

- a) A small area of domestic vegetable gardens in the vicinity of the still-existing caretaker's residence on the west side of Sandy Lane, about 200 metres from Piggabeen Road (not shown on sketch);
- b) About 2.4ha of corn, located opposite the existing residence, as shown on the sketch;
- c) Turner's Dip site, as shown on the sketch, for which a Management Plan has been adopted, and a copy of which is included in "DA No 2".
- d) A further area of corn, of about 2.5ha, located on the flat land north of Turner's Dip and Sandy Lane, as shown on the sketch.

In relation to the corn-growing generally, Mr Smith has advised that the crop was planted primarily for cattle fodder, but in any case proved unsuccessful in either location due to periodic inundation and poor drainage. Mr Smith also confirmed that no herbicide, pesticide or other chemical treatment was associated with the corn growing.

We have furthermore perused the 1:50 000 Military Map Series Sheet reference 9541-1 (Edition No 1) dated 1966, a coloured copy of which would undoubtedly be held by Council. The map reveals no prior use of the land which would render it unsuitable for residential development.

A black and white copy of the relevant section of the map is also enclosed herewith, on which the boundaries of the subject land have been shown.

The map indicates only scrubland, floodplain and dense forest, and no evidence of cultivation or plantation is shown. A colour copy of the map is available if required."



ANNEXURE C

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STATUTORY DECLARATION

Queensland

To Wit

I Harry Ellis of Master Planning Services Australia, PO Box 5778, Gold Coast Mail Centre, 9726 in the State of Queensland do solemnly and sincerely declare that:

1. During the period 9 August 1989 to 28 March 1995 I was a Director of Calsonic Management Services Australia Pty Ltd ("Calsonic") a company associated with Calsonic International Inc.
2. During the period from my appointment as a Director of Calsonic to January 1995, Calsonic International Inc was the registered proprietor of the property known as Cobaki Lakes ("Cobaki") and Calsonic was responsible for the management of Cobaki.
3. Cobaki is located in northern New South Wales (approximately 6.5 km west of Tweed Heads), has a total area of 593 hectares and is described as Lot 228 in DP 755740, Lot 305 in DP 755740, Lot 1 in DP 562222, Lot 1 in DP 570077, Lot 202 in DP 755740, Lot 1 in DP 570076, Lot 2 in DP 566529, Lot 199 in DP 755740, Lot 200 in DP 755740, Lot 201 in DP 755740, Lot 205 in DP 755740, Lot 206 in DP 755740, Lot 209 in DP 755740, lot 46 in DP 755740, Lot 54 in DP 755740, Lot 55 in DP 755740 and Lot 1 in DP 823679.
4. Throughout the period of my appointment as a Director of Calsonic the entire Cobaki property was utilised for cattle grazing. This eliminated any need for supplementary feeding, as sufficient natural feed was available by rotation of the herd through the various fenced areas of the entire property.
5. Cattle operations were under the supervision of a full-time Farm Manager employed by the company.
6. Records of cattle purchases, sales, natural increase and deaths were maintained by accountants KPMG Gold Coast, on behalf of the company.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1867-1981.

TAKEN AND DECLARED before me,
at *Bundall*
this *31st* day of *January*
2005

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)
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A Justice of the Peace
SOLICITOR



ANNEXURE D

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