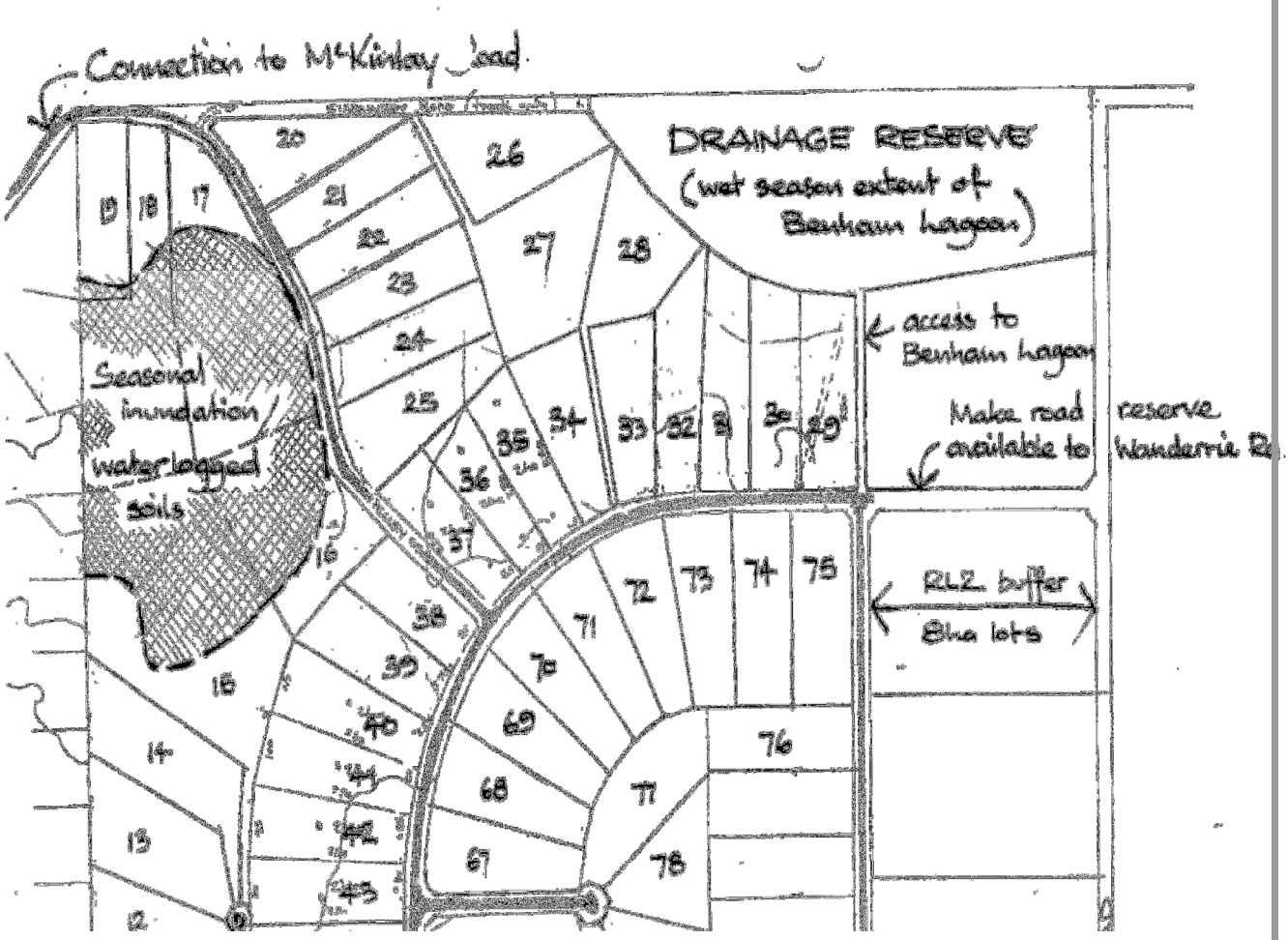
Report of an Investigation into:

THE APPROVAL FOR DEVELOPMENT AND SUBDIVISION OF LAND FOR RESIDENTIAL PURPOSES AT BEDDINGTON ROAD and PELLY ROAD HERBERT



"If you fail to plan, then you plan to fail."

Harvey MacKay

20 August 2012

Cover Image:

Drawing supplied as part of Application by Mr Graham Chrisp (the Developer) for Subdivision (PA00/0317) in May 2000. The land the subject of this investigation is highlighted in the top left (north-west) corner.

'Seasonal inundation/waterlogged soils.'

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TRANSMISSION LETTER

The Hon. Paul Henderson MLA
Chief Minister
Parliament House
Darwin NT 0800

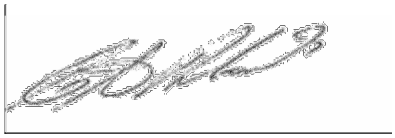
16 August 2012

Dear Chief Minister

I present to you this report which is the result of an investigation conducted pursuant to section 14(1)(a) of the *Ombudsman* Act (the Act), into the Development application process regarding the subdivision of Sections 3103 to 3105 and part sections 3100 to 3102 and 3106 to 3111, Hundred of Strangways, Beddington Road and Pelly Road, Herbert.

This report is delivered under Section 153 of the Act for tabling in the Legislative Assembly within the next six sitting days.

Yours faithfully



Carolyn Richards
Ombudsman

EXECUTIVE SUMMARY

This report is about an investigation of a number of complaints to my office in relation to the subdivision of land in the Herbert area, approximately 40 kilometres south east of Darwin.

In 2006, the Northern Territory Development Consent Authority (DCA) approved the subdivision of land which had previously been identified as not suitable for subdivision owing to significant land constraints in that it was prone to seasonal inundation and waterlogging. A number of Northern Territory Government agencies, non-government organisations and private citizens provided substantial evidence which proves beyond all doubt, that the land the subject of this investigation was never suitable for subdivision for residential purposes.

Significant prior knowledge and substantial evidence existed and was readily available to the agencies responsible for and involved with the assessment of the development application. That information and evidence appears to have been ignored and overlooked by each agency, resulting in consent being granted by the DCA for the development to proceed, because of the DCA not being informed about vital facts and opinions known to the Development Assessment Services, a unit of the Department of Lands and Planning.

A number of the subdivided blocks were later sold to unsuspecting parties who were unaware that the land, for which they had paid considerable amounts of money, was subject to seasonal inundation and flooding. In early 2011, several of the subdivided blocks, on which homes had been built, were severely inundated by floodwater following a period of heavy rain.

Consent for development in the Northern Territory is the responsibility of the Northern Territory Government and specifically within the portfolio of the Minister for Lands and Planning. The Development Consent Authority, established under the Northern Territory *Planning Act*, determines if land can be developed to comply with the planning and development guidelines and concepts which are promulgated by the government and the DLP on behalf of Government and is reliant upon sound advice and evidence collected and collated by the Development Assessment Services, a unit within the Department of Lands and Planning. It has been established that both the Department of Lands and Planning and the Department of Natural Resources, Environment, the Arts and Sport, each had significant input throughout the assessment of the subdivision application to which this investigation relates. It appears that the final assessment for the subdivision was flawed and that the Development Consent Authority was ill-informed regarding the capabilities of the land and its suitability for residential development.

Information obtained throughout my investigation leads me to conclude that a number of public servants, from two agencies within the Northern Territory, failed to perform their required duties when assessing the development application and advising the DCA. These failures resulted in the subdivision of land which was not suitable for its intended purpose. The applicant to the DCA may also have culpability but I have no remit to inquire into the conduct of the Developer.

It is my view, that the Northern Territory Government should implement each of my recommendations as a matter of priority to ensure the identified failings and resultant consequences do not occur again and the victims of the maladministration are compensated.

One member of the public who complained to me about a flooded rural block (not the subject of this investigation) said very aptly:

> ***"When you buy a piece of land that has been approved by the government as land for housing you expect to be able to rely on the fact that the Government has approved it and it is safe to buy it".***

In the case of the lots approved for subdivision and which were identified in 2000 by the Developer as subject to ***"seasonal inundation and waterlogged soil"*** for which approval was refused on five occasions by the DCA, the complainant's comment was poignantly apt. The systems planning regulation processes for approval of development failed the purchasers of the land. Regardless of the legal technicalities there is a moral imperative for the Government to take urgent action, preferably before the beginning of the next wet season to approve the recommendation of the DLP and of the Minister for Lands and Planning that the Government acquire the affected properties, do the necessary remedial work and re-sell the properties. Anything less would be shameful and grossly unfair.

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ABBREVIATIONS

BAS	Building Advisory Services, Department of Lands and Planning
BOM	Bureau of Meteorology
DAS	Development Assessment Services
DCA	Development Consent Authority
DCM	Department of the Chief Minister
DFA	Defined Flood Area
DIPE	Department of Infrastructure, Planning and Environment
DLP	Department of Lands and Planning
DLPE	Department of Lands, Planning and Environment
DOHCS	Department of Health and Community Services
EPA	Environment Protection Authority
ESCP	Erosion and Sediment Control Plan
LAP	Litchfield Area Plan
LUO	Land Use Objectives
LSC	Litchfield Shire Council
MLA	Member of the Legislative Assembly
NRETAS	Department of Natural Resources, the Arts and Sport
PEM	Priority Environmental Management

CHRONOLOGY OF EVENTS

DATE	EVENTS
4 May 2000	The Developer lodges Application PA00/0317 for approval to create 123 lots.
15 June 2000	Development Consent Authority defers Application for Subdivision to create 123 Lots (PA00/0317). At that time, DLPE considered ***'that the proposal is not consistent with the NT Planning Scheme.'***
4 July 2000	The Developer lodges amended plans having deleted sections 3103, 3104 and 3105 from the Development Application ***'to avoid any contentious issues.'***
10 August 2000	Development Consent Authority rejects Application for Subdivision – Amended Proposal for 74 Lots (PA00/0317) on the basis that ***'there is a large depression in the north west corner that is subject to seasonal inundation.'***
4 January 2005	The Developer lodges Application PA2005/0059 for approval to create 66 lots.
25 February 2005	Development Consent Authority defers Application for Subdivision to create 66 Lots (PA2005/0059).
15 July 2005	Development Consent Authority defers Application for Subdivision to create 50 Lots (PA2005/0059).
6 September 2005	The Developer amends the proposed subdivision design by excising Sections 3102 – 3106 from the application.
7 October 2005	Development Consent Authority issues Development Permit on a proposal that was an amendment to Application No. PA2005/0059 excluding the ***'seasonal depression in the north western corner.'***
8 May 2006	The Developer makes Application for Subdivision to create 26 Lots (PA2006/0430). Proposal includes subdividing ***'wet area'*** in north western corner.
25 May 2006	Litchfield Shire Council recommended to DAS that ***'the wet area in the north west of the subdivision be contained within one lot…'***
12 July 2006	The Developer provides an internal assessment report to NRETAS and DAS concluding that **'The depression does not overflow'** and **'The area of the depression does not contain standing water generally…'**
21 July 2006	Development Consent Authority meet to consider Subdivision Application and consents to Application for Subdivision to create 26 Lots (PA2006/0430). No notice of the hearing of this application was given to the parties who had objected to the applications heard in 2000 and 2005.

16 August 2006	Development Consent Authority issues Development Permit DP06/0432 for the purpose of subdivision and consolidation to create 26 lots, including lots within the depression in the north western corner.
15 – 19 Feb. 2011	More than 600 mm of rain recorded in area of subdivision. A number of properties within the '***wet area'*** were inundated by flood water.
15 March 2012	Draft of the report of this investigation containing recommendations for the Government to purchase the properties of the affected landowners delivered to Chief Minister's Advisor by the Ombudsman.
18 March 2012	Affected landowners report their properties were again inundated by floodwater.

RECOMMENDATIONS

1. The Northern Territory Government support the recommendation made by the CEO of the Department of Lands and Planning on 23 February 2012 and recommended by the Minister for Lands and Planning.

   Pursuant to Section 31A of the Lands Acquisition Act, the Minister for Lands and Planning approve the acquisition of Sections 3407, 5212 and 5215 Hundred of Strangways (acquisition by agreement).

2. The Northern Territory Government acquire, in consultation and by agreement with the current owner/s, any other property within the former Sections 3103 to 3105 identified as having less than 1 hectare of unconstrained land, free from inundation, and compensate the landowners for the following in accordance with law:

   (i) The price of the value of their land and improvements at market value to be determined by a valuer agreed between the parties and if not agreed to be appointed by the Director of the Real Estate Institute of the NT.

   (ii) Waiver of any stamp duty payable on a property purchased in substitution for the flooded land.

   (iii) All conveyancer's LTO fees and other expenses on purchase of a substitute property.

   (iv) Removal and relocation expenses.

   (v) General damages to be assessed or agreed for stress and inconvenience and any other financial loss such as alternate accommodation or of remedial attempts undertaken.

   (vi) Transfer by the landowners of any cause of action they may have against the Developer, Real Estate Agent, Building Certifier, or any other person and co-operation if the Northern Territory conducts proceedings under rights of subrogation in the name of the landowners.

   (vii) Legal costs incurred by the landowners.

3. Where acquisition is not agreed, the Northern Territory Government, in consultation with remaining landowners, immediately identify, fund and implement effective flood mitigation and resolution strategies to the satisfaction of all parties.

4. The Department of Lands and Planning review existing legislation policies and procedures regarding the Development Assessment process to ensure all proposed development applications are thoroughly investigated and information validated prior to delivery to the Development Consent Authority. Specifically I recommend that persons lodging an objection to an application

for development or subdivision be given access to the reports of DAS to the DCA at least 5 business days in advance of a hearing of the application.

5. The Northern Territory Government establish minimum standards for flood mapping to ensure records remain contemporary and meet the minimum requirements as stipulated by the NT *Planning Act*, the NT Planning Scheme and associated Land Use Objectives.

6. The Northern Territory Government undertake regular and comprehensive flood mapping studies, with data and details updated and published on agency websites, as recorded and mapped by suitably qualified environmental experts.

7. Both DLP and NRETAS introduce an electronic Information Management system to capture and retain all available information and data including both corporate and local knowledge, planning file documents, land capabilities, waterlogged soils, seasonal inundation and flood mapping for future reference and consideration throughout development assessments.

8. The Minister for Lands and Planning seek an immediate review of and amendments to the NT *Planning Act* to provide legislative requirements on all Developers, including penalty and enforcement provisions for non-compliance.

9. The Chief Minister appoint a Board of Inquiry under the *Inquiries Act* to review, investigate and report on the operations, processes and functions of the Development Consent Authority to inform the Government and the public of the Northern Territory whether the interests of the Northern Territory would be better served if changes to the *Planning Act*, and to the operations of the Development Consent Authority and Development Assessment Services be made. The *Ombudsman Act* does not give the Ombudsman jurisdiction to enquire into the Development Consent Authority unless a referral is made to the Ombudsman by the Legislative Assembly.

10. That the Minister for Natural Resources , Environment and Heritage release for public access the report of the Environment Protection Authority to him relating to the land the subject of this report, namely, Sections 3103 – 3105 and part Sections 3100 to 3102 and 3106 – 3111 Hundred of Strangways.

BACKGROUND TO INVESTIGATION

Complaint to the Ombudsman

In March 2011, a complaint was made to the Office of the Ombudsman by Mr Gerry Wood, MLA, on behalf of a group of affected property owners, regarding **'*a number of flooded blocks in the Beddington Road estate*' and the administrative actions '*surrounding the approval process by the Development Consent Authority and others which led to the subdivision of these blocks*'[1].** (the subdivision)

Preliminary inquiries[2] identified that since May 2000, a number of applications for a Development Permit were submitted to the Department of Lands and Planning (DLP) by the Sole Director of an Adelaide based company (the developer).

Between May 2000 and July 2006, the developer sought permission to subdivide land, described as Sections 3103 to 3105 and Part Sections 3100 to 3102 and 3106 to 3111 Hundred of Strangways, Beddington Road and Pelly Road Herbert.

Throughout these application processes, concerns were raised by interested parties in relation to an area situated within the north-west corner of the proposed development which was subject to 'Seasonal Inundation' and could best be described as a 'Wet Area' containing 'Waterlogged Soils'.

In July 2006, the proposed subdivision was approved by the Development Consent Authority (DCA) with the respective Development Permit issued on 16 August 2006.

The Chairman of the DCA wrote to one of the objectors in August 2006 stating that during the 2006 development assessment process:

> ***'Advice received by the Authority from the Department of Natural Resources, Environment and Arts specifically confirmed there was a minimum of 1ha of unconstrained land situated on each proposed lot and there were no concerns from a water allocation or drainage perspective'.[3]***

The land was subsequently subdivided by the developer and a number of two (2) hectare lots were sold to interested parties throughout 2010. At the time of purchasing their blocks of land, none of the current landowners were aware, **nor were they advised**, that the properties were subject to localised flooding and seasonal inundation.

In February 2011, following significant rainfall, the north-west corner of the developed land was subjected to significant flooding with several of the lots being severely inundated by water.

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[1] Email to Office of the Ombudsman – March 2011
[2] Section 28 of the *Ombudsman Act*
[3] Letter to affected landowner by DCA Chairman on 29 August 2006

Complaints regarding this matter are specific in that it is believed that both DLP and NRETAS did not sufficiently examine the identified 'Wet Area', nor did either agency adequately consider the proposed development having regard to the significant land capability issues, documented history and previous applications, including many objections by concerned residents, public figures and potentially affected third parties.

During the preliminary inquiries conducted by my office, it was established that several anomalies within the Development Application process required explanation and further investigation. On 10 August 2011, I decided to commence an investigation[4] into the administrative actions taken by a number of public authorities. I would have liked to have seen the records of the DCA and to have interviewed the members who approved the subdivision but I have no authority to do so.

Throughout the initial stages of the investigation, negotiations to resolve the issues of concern commenced between the relevant parties. Accordingly, I suspended investigation pending the result of that process and each party was notified of that determination on 5 October 2011. Throughout the period this investigation was suspended, a watching brief of the negotiations and proposals to solve the residents' problems was maintained by my office.

In late January 2012, I was advised by one of the parties[5] that negotiations were not successful and it appeared the issues would remain unresolved. Clarification was sought from all parties as to the status of negotiations and on 6 February 2012, my investigation was re commenced.

A Draft Investigation Report was compiled and I arranged to meet with a staff member from the Office of the Chief Minister who had been engaged in ongoing discussion with each of the agencies, Mr Gerry Wood MLA and the affected landowners. I hoped that those discussions might still reach a compromise.

On Thursday 15 March 2012, a Draft Investigation Report was provided to one of the Chief Minister's advisors for the information and consideration of the Chief Minister, the Treasurer and the Minister for Lands and Planning. The draft contained recommendations one and two of this report in substantially similar terms.

In a follow up meeting on Tuesday 20 March, I was informed by the Chief Minister's advisor that a response to the solution recommended by the Minister for Lands and Planning, Mr Gerry McCarthy MLA, would be made within two (2) weeks and that I would be notified accordingly. I expressed my opinion that the proposed solution was the reasonable thing to do and that it was the only way to be fair to the landowners.

Despite the assurances by the Chief Minister's Advisor, no such response was provided to my office at the end of the 2 week period and I have not received any formal advice from any of the relevant Ministers regarding any proposed outcome or solutions.

[4] Section 47 of the *Ombudsman Act*
[5] OCM Staff member

On 19 April 2012, the CEO's of each agency were provided a copy of my Draft Investigation Report for consideration and comment.
Their comments appear later in this report. I do not accept that responsibility for the plight of the affected landowners lies entirely with the DCA. The DCA does not have staff or resources to carry out a full assessment of an application.

The DCA relies on DAS to assess each application for compliance with the *Planning Act*, the Development Plans and Principles and to make the detailed enquiries about technical compliance and the details of any application. If there is any objection DAS gathers details of the grounds for objection and presents to the DCA a submission commenting on the objections. In practice, where there is no objection lodged, if DAS reports that the application complies with the various requirements established to regulate development the DCA rarely makes a decision contrary to the opinion expressed by DAS, and without any opportunity to make its own enquiries other than of the applicant/developer. There is no right of appeal for a third party from a DCA decision.

Methodology

On receipt of the complaint, I made some preliminary inquiries with the Litchfield Shire Council and the Department of Lands and Planning. Each agency provided me with an assortment of documents which were reviewed and considered.

In June 2011, my investigator inspected the area in and around Pelly Road and Lorikeet Court and over the following months, relevant documents, legislation and government policies were obtained and reviewed. The Planning Files alone had been collated over a period of eleven (11) years and it was necessary to retrieve archived data from a variety of different areas.

A number of interviews were held with key stakeholders, affected residents and technical experts. Regular face to face meetings, telephone discussions and email correspondence was necessary to ensure all of the available historical and relevant information was obtained.

INVESTIGATION

Significant Rainfall

Historically, the Darwin area experiences two (2) distinct seasons, the 'Wet' and the 'Dry'. Each season generally lasts for six (6) months of the year, with the 'Wet' occurring from October through to the April the following year. The 2010 – 2011 'Wet' has been described by some as the wettest 'Wet' on record. Records[6] show that 2011 experienced above average annual rainfall and that it was the second wettest year on record.

In the area surrounding the development, rainfall data is captured by the nearest Bureau Station – 'Girraween Station', site number 14192, and monitored by the Bureau of Meteorology (BOM).

[6] www.bom.gov.au

In January and February 2011, the Bureau of Meteorology recorded a combined total of 1319.3 mm of rainfall in the area of the subdivision (Girraween). In the five (5) days, 15 to 19 February inclusive, 604.8 mm of rainfall was recorded in the Girraween area which is almost 25% of the overall annual rainfall total for 2011 of 2527.2 mm.

This significant amount of rainfall was attributed to Tropical Cyclone Carlos[7] which caused wide spread damage and significant flooding for a number of areas in the Darwin and surrounding areas.

This rainfall resulted in localised flooding in and around the subdivision. Each of the properties in the vicinity of the 'depression' was severely inundated by floodwater with some of the properties remaining underwater for several months following the weather event.

MR GERRY WOOD, MLA

Since the first Planning Application was submitted in May 2000, Mr Wood continually and consistently objected to the subdivision of the land the subject of the complaint. In many ways, Mr Wood raised his concerns and on most occasions those concerns and objections contributed to the Development/Planning Applications being deferred or rejected.

Following the events of February 2011, Mr Wood initially made a complaint to the NT Environment Protection Authority (EPA). The EPA identified that there appeared to be a lack of scientific data to corroborate information supplied to DAS and DCA at the time the application was approved in 2006. The report of the EPA was made to the Minister who decides whether to make it public or not. It has not been released to the public. The EPA suggested to Mr Wood that my office may provide an appropriate avenue for redress.

On 12 March 2011, Mr Wood forwarded a written complaint to my office regarding the subdivision and the subsequent flooding issues.

In a subsequent letter to the Minister for Lands and Planning, dated 23 March 2011, Mr Wood asserted:

> ***'…The Department of Lands and Planning and the DCA seemed to have approved this subdivision outside their own rules…;***
>
> ***…It appears that none of the above requirements for subdivision approval were taken into account and seem to have been ignored or at least given very little serious consideration;***
>
> ***…These people have put their life savings into their blocks to make it their home and the system meant to protect these people has failed them; and***

[7] Very heavy rainfall associated with TC Carlos broke many rainfall records in the region. The heavy rain had a major impact on Darwin and surrounding areas, causing widespread flooding of low lying areas, inundating many houses and damaging roads and properties (B.O.M.)

…This is about justice for people who bought their land in good faith…'

AFFECTED LANDOWNERS

The land within and surrounding the subdivision consists of two (2) hectare lots and at the time the Development Application was approved, the land was zoned for Rural Living. This zoning is to provide for low-density rural living and a range of rural land uses including agriculture and horticulture.

The owners of five (5) properties affected by the flooding also made a complaint to my office following the flood event of February 2011.

Two (2) of the landowners have been actively campaigning against the subdivision since the first application of May 2000 and provided my investigator with a variety of documents to support their on-going belief that the subdivision would result in localised flooding, as occurred in February 2011. The properties owned by these people adjoin the subdivision, and each of the landowners are long term residents with extensive local knowledge and a sound understanding of water flows during and following heavy rainfall.

Property 1 is situated at Lot 3407 McKinlay Road, Herbert. The current owners Residents A and B, purchased the property in 1996 and have actively campaigned against the subdivision of the 'wet area' since the first application was submitted in May 2000.

Having resided on the property for a considerable period of time, the property owners have observed many years of adverse weather and, prior to the 2011 rain event, had come to know and understand the nature of the water flows following heavy rainfall on and surrounding their property.

In August 2006, the landowners wrote a letter of complaint to the Chairman of the DCA following the granting of the development permit. Within that letter, the landowners advised:

> ***'…Although we have been pro-actively engaged in discussions regarding the development of the northwestern corner of this development since June 2000, we were not notified of the recent application, or the latest hearing, or the new ruling.***
> ***Additionally, though strict time constraints exist regarding appealing such decisions, when we asked for the above information from DCA we were advised that this would take 'several weeks' to provide.***
>
> ***…Should we have known about the hearing, we would have definitely attended to ensure our concerns regarding the northwestern corner were reiterated; and***
>
> ***…We suggest that an environmental impact study surveying this probable recharge aquifer should be completed immediately to allow informed decision-making for sustainable development, before adverse***

and irreparable affects are experienced by the surrounding landowners and environment.'

Property 2 is located at Lot 3408 McKinlay Road, Herbert and the current owners have lived on the property since late 1998. Together with their neighbours at lot 3407, the property owners have actively campaigned against the subdivision of the 'wet area' since May 2000 and also have significant experience regarding the nature of water flows following heavy rainfall on and surrounding their property prior to February 2011.

In their letter of complaint to my office, the residents advise:

'…Prior to the approval of this development, multiple objections were submitted regarding the area due to known seasonal concerns as expressed by local residents (Objection to DCA Feb 2005); which were supported by independent investigations (Greening Australia Report June 2000); and identified by the DCA themselves in point 3 of their Reasons for the Decision for Permit DP05/0450 (DCA Permit Oct 2005).'

The remaining three (3) properties were purchased by the respective owners in late 2010, each unaware that significant issues and concerns had been raised over the previous ten (10) years regarding the land constraints and potential for localised flooding.

Property 3 is located at Lot 5214 McKinlay Road, Herbert and was purchased by the current owners in September 2010. The owners constructed a shed at the front of the property and fitted it out for temporary accommodation, intended as a short term option while building their new home. Those plans were abandoned however, following the rainfall during January and February 2011 when approximately 70% of the land was inundated by flood water. The owners advise that these floodwaters remained on their property until early April 2011.

As is evidenced by the level of the floodwater in 2011, this property doesn't appear to have the required 1 hectare of unconstrained land, as warranted by the developer to NRETAS and DLP in 2006.

Property 4 is located at Lot 5215 Pelly Road, Herbert and was also purchased by the current owners in September 2010. Over a short time period, the owners constructed their home and commenced establishing the property. The rainfall of January and February 2011 resulted in this property being more than 80% under water.

The inundation rendered the newly constructed residence unliveable and the owners sought alternate accommodation while the flood waters receded.

On 18 March 2012, the property flooded again, following rainfall of approximately 200 millimetres (mm) during the previous week. The landowners advised me that the water level on the property came to within approximately 500 mm of the highest level from the weather event of February 2011. This is a significant occurrence when considering the 2011/2012 wet season has recorded below average rainfall.

On 19 March 2012, the landowners sent photographs of the floodwater to both the Chief Minister and a staff member from the Department of Lands and Planning. In the accompanying email, the landowners stated:

> ***'…Thought I would send you guys some pics of our blocks at the moment ... Photos are attached.***
>
> ***The water is about 500mm lower than last year and even at this level our septic drain is Inundated. We have had about 200mm of rain in a week to cause this and that is not exceptional wet season rain by any standards.***
>
> ***I have mapped our block this year and currently we have .9Ha above the seepage line. Feel free to come out and have a look.'***

The DLP staff member acknowledged receipt of the email and thanked the landowner for the photographs. As at 15 August 2012, neither the OCM nor DLP have had any further contact with the landowners.

Property 5 is located at Lot 5212 Pelly Road, Herbert and was purchased by the current owner in October 2010 for the sum of $300,000. This property was approximately 90% inundated with flood water in February 2011 with both the bore and septic remaining underwater for approximately four (4) months.

As a result of being inundated, this property was rendered unliveable and, in the owners' opinion, unsellable owing to the fact it is prone to flooding.

Throughout my investigation, the landowner and her family maintained their belief that Government would ultimately resolve the issues to the satisfaction of all concerned.

On 20 April 2012 however, 14 months following the flood event, an email was forwarded to my office by the landowners' mother who advised in part:

'…I think you can appreciate that our daughter … is at her wits end. This is not fair!

…We aren't interested in blaming anyone; we don't care who stuffed up; we do expect government as a whole to take responsibility for ruining people's lives.'

In a document attached to that email, the landowner's mother provided a number of comments and observations including:

'… (name withheld) was finally able to move back on to her block. … had to have her baby (early May) and live elsewhere until the septic was out of the water. This was an incredibly difficult time for her;

…In the period from March 2011 to present day (13 months) meetings – about 20 at last count – have been convened between this residents group and various government officials, all promising to go away and sort out what can be done to resolve the problem;

Despite the suggestion by government of consulting widely, the only "offer" that has been formally proposed is to build a drain across about 4 residents properties to take some of the water away. For this (name withheld) was offered the princely sum of $5000 for about 800sq m of her land – a joke!!;

… this drain will not solve her problem! Even with a bloody great unfenced drain at the back of her block (with a 1year old baby) no government official will guarantee that the front of (name withheld) block will not flood and therefore she is unable to site a house and septic anywhere on this block of land;

Her life and that of her baby's has now been on hold for 12 months. She cannot set herself up; she cannot build (without the fear of flooding every average wet season and remaining flooded out for anything up to 5 months);

There is no point in doing lawns and gardens that will go under water and stay under (and die!); and she did not buy the block to be surrounded by huge waterways with a baby/toddler and the risk of drowning; and

She has been totally frustrated by ALL her dealings with government officials, mostly because they make lots of promises and NEVER return her calls.'

DEVELOPMENT CONSENT AUTHORITY (DCA)

Role of DCA

The DCA is established pursuant to the Northern Territory *Planning Act and consists of a chairman and thirty (30) members, delegated to preside over seven (7) divisions throughout the Northern Territory (NT). Each division* has five (5) members and, along with the chairman, determine development applications within their nominated area.

The Development Applications relevant to this matter were considered by the Litchfield Division of the DCA and, in the six (6) years of consideration, membership of the division changed a number of times.

Given the large amounts of information that is to be relied upon for DCA to make an informed decision, Development Assessment Services (DAS) provide secretariat and administrative support which includes the corroboration or validation of information supplied and the collation of all available evidence which either supports, contradicts or refutes that information.

Section 16(1) of the Act precludes me from investigating any administrative actions of the DCA, however pursuant to Section 10 of the Act, the administrative actions and information provided to DCA by agencies of the Northern Territory Government is within my jurisdiction.

Development Applications

In the six (6) years between May 2000 and May 2006, the developer lodged four (4) applications to subdivide the land subject to investigation.

The first application was submitted on 4 May 2000 and it was proposed to subdivide forty (40) x eight (8) hectare lots to create 123 lots varying in size between two (2) and eight (8) hectares.

At the scheduled meeting on 15 June 2000, the DCA deferred the application following information being provided by two (2) objectors and the then named Department of Lands, Planning and Environment (DLPE).

The first objection was raised by a representative of Greening Australia[8]. In a comprehensive, five (5) page submission, Greening Australia identified significant and relevant issues with the north-west corner of the proposed subdivision. In particular, the soil type and areas of seasonal inundation were described:

[8] Greening Australia provides commercial vegetation and environmental services to clients from all levels of government, industry, the private sector, and community. (www.greeningaustralia.org.au)

> ***'The land unit described in the Application as 3e[9] in the north-west corner is subject to seasonal inundation which was evident upon investigation …' and;***
>
> ***'We have concerns in regards to the installation of septics in seasonally inundated areas. …'***

In the final recommendations, Greening Australia stated:

> ***'…that no development should be conducted on these inundated areas and that they be excised out of the proposed development…'***

The second objector (Resident A) informed DCA that his property backs on to the proposed subdivision. At the time, the fall of the land caused some flooding to his property and that if the development application was successful, more water would flow onto his property and make the property unliveable. The resident also advised of the 'natural lagoon' within the subdivision and requested consideration for a drain to be constructed which would allow any surplus water to be diverted into the 'lagoon' which has been identified as the 'Wet Area' or 'Depression' as previously mentioned.

The then named Department of Lands, Planning and Environment (DLPE) wrote to the DCA on 9 June 2000, advising that a number of blocks, as proposed by the developer, were unsuitable for subdivision owing to *'severe waterlogging and inundation'*. The internal memo relied upon to formulate that letter states in part:

> ***'… Blocks 41 – 44, 70, 71, 110 & 111 all have indications of severe waterlogging / inundation. Blocks 35, 36 &69 are impeded similarly…***
>
> ***… Runoff from the area of proposed lots 41 – 44 already appears to cause problems for the owners of section 3407 McKinlay Road …; and***
>
> ***…The land in general is suitable for subdivision with the exception of the areas covered by the blocks mentioned above as having severe waterlogging / inundation limitations.'***

A copy of the plan for the proposed development, as provided to DCA by the developer in May 2000 is reproduced on page 22. The areas highlighted green are those identified by DLPE as being subject to severe waterlogging / inundation.

The land highlighted in yellow also falls within Sections 3103, 3104 and 3105. Lots 35, 36 and 41 – 44, as identified in the DLPE memo, is the land subject to my investigation.

[9] Land Unit 3e describes drainage areas within gently upland surfaces. Soils are slow draining with high water tables in the wet season. Vegetation consists of minor open woodland forest with dense patches of *Pandanus spiralis* and *Grevillea pteridiifolia* and dense grasses and sedges. (www.nretas.nt.gov.au)

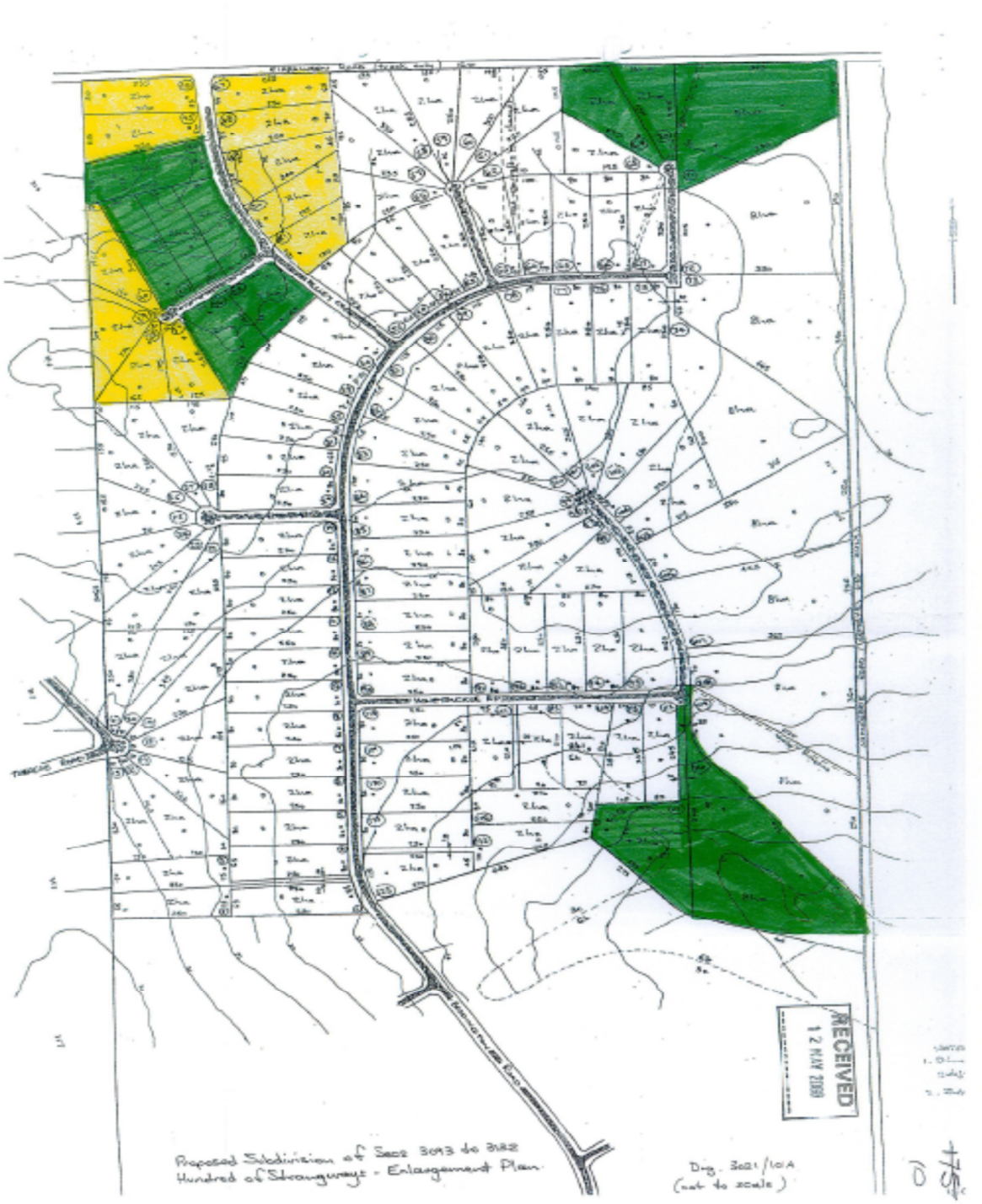

RECEIVED
12 MAY 2009
Proposed Subdivision of Secs 3043 to 3122
Hundred of Strangways - Enlargement Plan
Dwg. 3021/101A
(not to scale)

Figure 1

It is important to note that throughout the various development applications, the developer amended the shape, size, layout and numbering of the lots a number of times. With regard to the 'wet area' of the north-west corner subject to investigation inconsistencies with the lot numbering appears to have caused some confusion between staff from both DLP and NRETAS when information was sought by my office.

A number of various other drawings/plans relevant to each of the subdivision applications, as submitted by the developer, are also reproduced throughout this report.

The land subject to investigation is that contained within the original Sections 3103, 3104 and 3105 which, prior to subdivision, comprised an approximate area of twenty four (24) hectares. I have also highlighted those relevant areas for ease of reference.

In a memo submitted by a DAS employee at the time, DCA was advised of a site inspection on the morning of 23 May 2000. As with the DLPE, DAS also identified the three (3) areas within the proposed subdivision that were subject to seasonal waterlogging. In part, the memo stated:

> ***'…The main purpose of the visit was to map any areas of the subject site constrained by seasonal waterlogging. Three such areas were identified:***
>
> - ***the southern wet season extents of Benham's Lagoon north of Girraween Road (Top Right)***
> - ***a seasonal lagoon in the north-west corner (Top Left); and***
> - ***the wet season extents of a small billabong in the south-east corner (Bottom Right).***
>
> ***…Apart from these areas, the site appeared to be generally suitable…..With respect to … … and the constrained areas, the currently submitted proposal will need substantial redesign.'***

The 'wet areas' identified by DAS are clearly one and the same as those identified by DLPE (see Figure 1) and it is obvious from these documents that the north-west corner is also the land subject to my investigation.

In a more detailed document, Agenda Item 9 from the meeting of 15 June 2000, DCA provided a number of comments and observations including:

- ***Department of Land, Planning and Environment consider that the proposal is not consistent with the NT Planning Scheme.***
- ***Seasonal inundation and poor soil types were not adequately acknowledged in the application.***

- ***Major concerns include areas of seasonal inundation and severe waterlogging that have not been adequately addressed in the subdivision design.***

- ***There is a large depression in the north west corner that is subject to seasonal inundation.***

- ***Of particular importance is the need to amend the proposed layout to minimise fence lines across the seasonally inundated areas and to ensure that all lots have at least 1 hectare of 'dry' land; and***

- ***The proposed lots do not adequately respond to the site's constraints and infrastructure requirements. Multiple lots are designed in areas prone to severe seasonal inundation and do not meet minimum Development Consent Authority policies for the provision of 1 hectare of dry land adjacent to a public road.***

At the request of the developer, DCA deferred consideration of the application pending resolving a number of issues including:

> ***Amendments of lot design to take into consideration the wet areas in the northwest and south east, and to comply with the Development Consent Authority policies for the provision of dry land adjacent to a public road.***

On 24 July 2000 the DCA Chairman provided written reasons for that decision as follows:

> 1. ***The proposal is not in accordance with the NT Planning Scheme*, Litchfield Area Plan 1992 and the proposed Land Use Objectives, and can be considered premature before proposed rezoning has been gazetted or approved; and**
>
> 2. ***Considerable amendments are required to address present concerns with this application, before the Development Consent Authority can fully consider the proposal.***

On 4 July 2000, the developer forwarded a detailed letter and an amended subdivision proposal to DAS which excluded a number of lots, including those proposed within Sections 3103, 3104 3105 and 3106. **The amendments were made, by the developer, on the basis that these lots were not suitable for subdivision due to the 'wet area'.** This amended proposal was submitted for consideration and determination by DCA at the scheduled meeting of 10 August 2000.

In a document prepared by the then manager of DAS, DCA was informed of all matters for consideration at the meeting, including:

- ***Particular concerns include areas of seasonal inundation and severe waterlogging that have not been adequately addressed in the subdivision design.***

- ***There is a large depression in the northwest corner that is subject to seasonal inundation; and***

- ***Litchfield Shire Council and Department of Lands, Planning and Environment identify several natural constraints impacting on certain areas of the subject site. Of particular importance is the need to amend the proposed layout to minimise fence lines across the seasonally inundated areas and to ensure that all lots have at least 1 hectare of 'dry' land.***

In addition to all of the information from the meeting held on 15 June 2000, DCA considered each aspect of the proposed subdivision and determined to formally reject the amended Development Application. A Rejection Notice was issued by the chairman of DCA on 7 September 2000.

On 4 July 2005, the developer submitted another application for subdivision to create 66 lots. The land subject to application again included Sections 3103, 3104 and 3105.

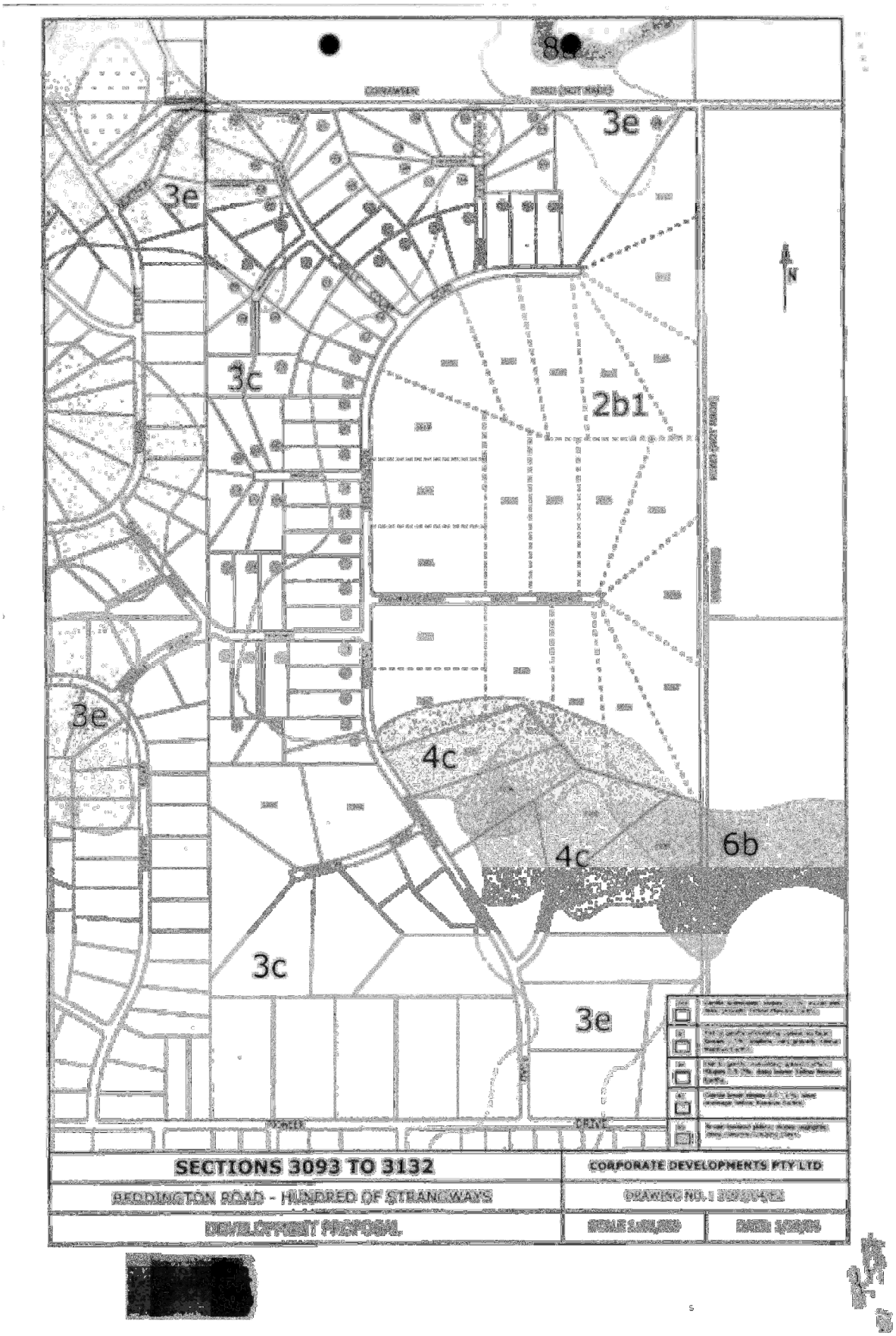

3e
3e
3c
2b1
3e
4c
4c
6b
3c
3e
SECTIONS 3093 TO 3132
CORPORATE DEVELOPMENTS PTY LTD
REDDINGTON ROAD - HUNDRED OF STRANGWAYS
DEVELOPMENT PROPOSAL

Figure 2

Of significance to this investigation is two (2) Memoranda submitted by the Natural Resources Division (NRD) of the then named Department of Infrastructure, Planning and Environment (DIPE) regarding the application. In both these documents, particular attention is again paid to the north-west area of the proposed subdivision.

The first Memorandum, dated 3 February 2005, advises specifically in relation to the north-west corner and in its' opening sentence, states:

> ***'Conservation and Natural Resources Group supports this proposal? NO'***

Under the sub heading ***Biodiversity Comment*** on page two (2) of the document, the department advises:

> ***'…The north west portion being Sections 3103, 3104 and 3105 contain rainforest/riparian habitat that warrant specific consideration in this proposal. The proximity of this patch of rainforest/riparian habitat to nearby lakes/wetlands increases the significance of this area for biodiversity…'***

The second Memorandum is incorrectly dated 15 February 2004 as it relates to a file generated in January 2005. This document also specifically advises in relation to the north-west corner of the subdivision and as with the first, does not support the proposal.

Two (2) reasons were provided for that statement, the first being:

> ***'Lots 23 – 27 do not have the required one hectare of dry land accessible land [sic].'***

Additionally, under the subheading ***'Land Use Comment'***, the department advises:

> ***'Ground truthing indicates that proposed lots 23-27 contain seasonally inundated areas and as a consequence do not have the required one hectare of dry accessible land. A seasonally inundated depression, considered to be of ecological importance has been identified at the end of the proposed Pelly Court extension.'***

The drawing/plan at page 28 shows the aforementioned lots as being wholly within the north-west corner, which is clearly the land subject to my investigation (Sections 3103, 3104 and 3105). Those five (5) lots have been highlighted green for ease of reference.

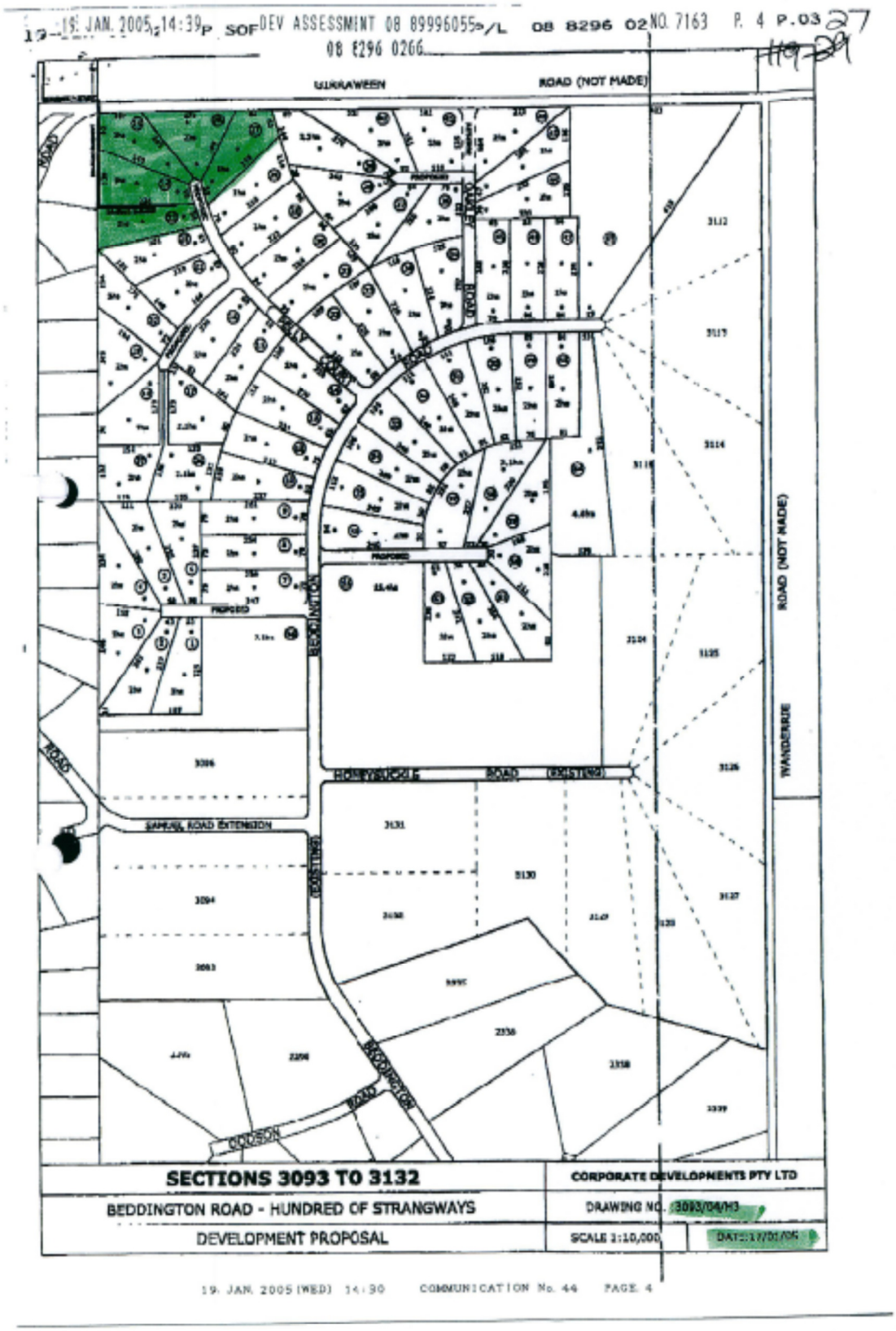

19 JAN. 2005 14:39 P SOF DEV ASSESSMNT 08 89996055 P/L 08 8296 02 NO. 7163 P. 4 P.03
08 8296 0266
GURRAWEEN
ROAD (NOT MADE)
ROAD (NOT MADE)
WANDERRIE
PROPOSED
PROPOSED
ROAD (EXISTING)
SAMUEL ROAD EXTENSION
BEDDINGTON ROAD
GODSON
SECTIONS 3093 TO 3132
BEDDINGTON ROAD - HUNDRED OF STRANGWAYS
DEVELOPMENT PROPOSAL
CORPORATE DEVELOPMENTS PTY LTD
DRAWING NO. 3093/04/H3
SCALE 1:10,000
19. JAN. 2005 (WED) 14:30 COMMUNICATION No. 44 PAGE. 4

Figure 3

As with the previous application, DAS provided a summary report for the information and consideration of DCA members. Advice within that report included:

> ***'…The proposal has the potential to adversely affect the amenity of the shire through the disturbance of seasonally inundated land in the northwest corner of the property.***
>
> ***A depression associated with the 3e land unit type in the northwest corner seasonally floods. It would be inappropriate to subdivide this land on the basis that required firebreaks, fence lines and permitted clearing (less than one hectare per parcel) could have significant impacts on this sensitive area.***
>
> ***Lots 23 – 27 in the north west of the subdivision are located in an area with a soil type 3e and may not be suitable for the installation of a standard septic tank; and***
>
> ***The proposed design does not take into consideration the land constraints associated with the area of 3e land type in the northwest portion of the proposed development.'***

At the DCA meeting of 25 February 2005, there was considerable discussion in relation to the north-west corner and a Conservation and Natural Resources (NRETAS) employee personally addressed the members, advising that:

- **Vegetation [is] consistent with waterlogged soils;**
- **No [sic] really rainforest or monsoonal or within proper definition of riparian; and**
- **A seasonally inundated depression.**

At this same meeting, Mr Gerry Wood and the owners of properties 1 and 2 again raised their objection owing to significant drainage, the potential for flooding, erosion and sedimentation control issues regarding the wet area of the subdivision.

Several other public submissions were also summarised in the DAS report for consideration of the DCA members. Objections to the subdivision, in particular the north western corner included:

> ***'…There is no recognition of wet areas in the northwest and northeast of the proposed development.***
>
> ***Existing localised flooding may be exacerbated by additional runoff from road development. Implications of this include flooding of existing residential lots, environmental degradation and increased numbers of mosquitos.***
>
> ***Progressive clearing of lots will further increase surface runoff and erosion.***

> ***(Name withheld) object to the development on the basis that existing flooding has already caused significant damage to their property. If approved, this development will significantly impact upon surrounding residences.***
>
> ***Development of proposed lots 23-27 will exacerbate existing flooding problems on their properties associated with insufficient draining and increases of run-off.***
>
> ***The objectors are concerned about how well the drainage easement in the northwest corner will function, it is anticipated that the channel will cause severe flooding on their adjoining properties; and***
>
> ***It was noted that it is becoming difficult to understand which subdivision applications are current. A proposal different to those formally submitted was distributed to neighbouring properties...'***

Under the heading Land Unit information on page 6 of the report, DAS advises:

> ***A seasonally inundated depression, considered to be of ecological importance has been identified at the end of the proposed Pelly Court extension. As a consequence of this 3e land unit, proposed lots 23-27 do not have one hectare of dry accessible land.***

The drawing on page 33 of this report is included to again show that the land subject to my investigation is that referred to in the information summarised.

The DAS report summarises all of the information and I note reference is made to several of the drawings supplied by the developer which show the land in the north-west corner is identified on different documents with different lot numbers.

As highlighted, the top left corner of Figure 4 shows the subject land to be lots 23 to 27 whereas other drawings supplied by the developer show that same land to be lots 42 to 46. The drawings, as supplied by the developer, are further discussed in the DAS report to the DCA, with comments including:

> ***'…there is less than 1 hectare of dry land on proposed lots 44, 45 and 46. Furthermore the position of the waterlogged area indicates that although proposed lots 42 and 43 do have one hectare of dry land, it is not adjacent to the road and may therefore be inaccessible at times.***
>
> ***…the topographical information confirms that the lowest point of the depression is equal to or lower than the wet season water level of Benhams lagoon. During the wet season, and under the normal laws of gravity, the proposed drain would not flow.***
>
> ***…the proposed drain could have significant impact on adjacent residential properties to the west and those approved across Girraween Road…***

> ***A seasonally inundated depression, considered to be of ecological importance has been identified at the end of the proposed Pelly Court extension.***
>
> ***A depression associated with the 3e land unit type in the northwest corner seasonally floods…; and***
>
> ***…the drainage easement proposed between lots 43 and 44 ends up on private land outside the proposed subdivision. The applicant needs to liaise with the owner of that land, particularly with respect to implications on future development.'***

This last comment refers to both the owners of 3407 and 3408 McKinlay Road who have continually objected to the subdivision since it was first proposed in May 2000. Each of those landowners advise that there has never been any liaison or genuine consultation with the developer regarding this drainage issue.

The Department of Health and Community Services (DOHCS) provided information for inclusion in the DAS report. Some of the advice provided includes:

> ***'…Lots 23-27 in the north west of the subdivision are located in an area with a soil type 3e and may not be suitable for the installation of a standard septic tank, alternate methods of wastewater disposal may be required.***
>
> ***Proposed Lots 23-27 appear to be located entirely, or mostly, within land subject to moderate to high levels of soil waterlogging. Landholders of these lots should be made aware that any disturbance to seasonally waterlogged areas that leads to water ponding is likely to create new mosquito breeding sites, which would require rectification by the landholder; and***
>
> ***Lots 40-46 in the north west of the subdivision are located in an area with a soil type 3e and may not be suitable for the installation of a standard septic tank.'***

The last comment above was recorded in the DAS report, prepared for the same DCA meeting, in relation to an additional application (PA2005/0008) submitted by the developer. That application was superseded by PA2005/0059 for which the remaining comments have been applied.

Within the relevant DAS report, the Office of Environment and Heritage advised:

> ***'…Lots 21 – 27 appear low-lying and highly susceptible to water logging. To ensure the long term conservation of natural processes and aesthetic appeal, it is recommended that these areas are not cleared…'***

On reviewing the associated plans, it was evident that Lots 21 – 27 and 40 – 46, as referred to above, is the land the subject to this investigation.

The Developer had submitted multiple and slightly varied documents which appears to have caused confusion when each of the applications were being assessed.

DAS also commented regarding the DCA's own policies which were used as a guide for assessing whether the development is consistent with the relevant land use objectives.

Specific to those policies, the following comments were provided by DAS:

> ***'…Proposed Lots 23-27 do not have at least one hectare of dry accessible land; and***
>
> ***The north-western portion of the subject site is recognised as being unsuitable for subdivision into 2ha parcels on the basis of land constraints.'***

After considering all of the available information, DCA deferred the application and in written reasons for that decision, the DCA Chairman stated in part:

> ***'…The proposed lot sizes do not reflect the land capabilities. The application does not demonstrate that each lot can be provided with at least one hectare of accessible dry land or an adequate water supply that will be appropriately separated from effluent or disposal systems…***
>
> ***…Ideally, the seepage area should be consolidated into one or several larger lots to ensure long-term conservation of natural processes, maintenance of habitat and improved aesthetic appeal.***
>
> ***The northwest portion of the proposed subdivision (Sections 3103, 3104 and 3105) contain a biodiversity rainforest/riparian habitat which is in close proximity to nearby wetlands. A corridor linking this habitat to adjacent wetland areas to the northwest would be strongly supported.'***

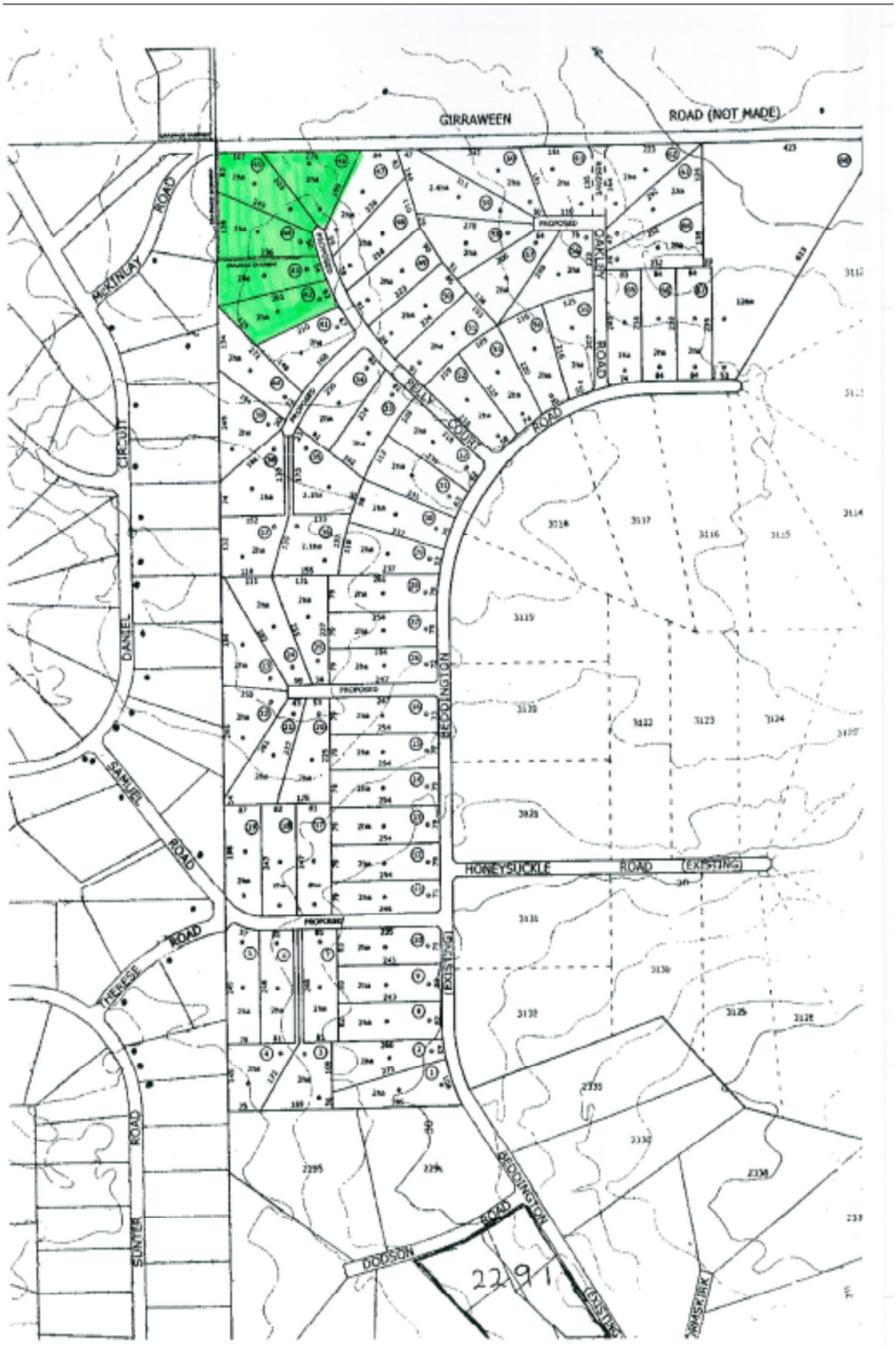

GIRRAWEEN
ROAD (NOT MADE)
McKINLAY
ROAD
CIRCUIT
DANIEL
SAMUEL
ROAD
THERESE
ROAD
SUNTER
ROAD
KELLY
COURT
ROAD
OAKLEY
ROAD
REDDINGTON
ROAD
HONEYSUCKLE
ROAD
(EXISTING)
REDDINGTON
ROAD
(EXISTING)
DODSON
ROAD
2291
HAMSWORTH
(EXISTING)

Figure 4

On 15 July 2005, the third application was reconsidered by DCA. Residents A and B attended the meeting as objectors, as did Mr Gerry Wood. In a written summary of the meeting, it is stated that Resident B advised DCA of several matters including:

- ***…she showed (the developer) the lay of the land at the top of the rise and explained that once he started subdividing that the water will run into their lot;***
- ***There will be a large amount of water that will come down the gully;***
- ***They were advised by council that their lot has been subject to flooding complaints since it was subdivided;***
- ***This has to be done properly.***
- ***They would not be able to see all the water flow until we have a big wet;***
- ***They can deal with the water at present but if there is subdivision they will have more; and***
- ***As the subdivision area is cleared the water will be coming quicker.***

Mr Wood also raised a number of concerns including:

- ***There is a large depression, definitely wet land with melaleuca's which occur in very high water table areas and flood areas ….;***
- ***More than a minor depression and probably plays a key role in the recharge of the aquifer;***
- ***Policy not to drain wetlands; and***
- ***Needs to be combined into one lot or handed to Council as a protected area…***

Resident A is reported to have *'questioned about continual changes made to the plans and that the main concern is that if they go away, eventually in the end there will be no one to object to it.'*

The DCA deferred this application and advised the developer that further determination would be subject to the receipt of additional information addressing:

- **Status of water flows in north west (lot 14 from drawing number 3093/stage02/A2) area, associated land capability constraints and engineering details of the proposed stormwater drainage;**
- **The stormwater drainage details shall be submitted to the Authority once the Litchfield Shire Council supports the proposed solutions; and**

- **…Seepage zones and low-lying areas are generally not suitable for subdivision due to seasonal inundation implications. The Authority supports the large consolidated lot to ensure long-term conservation of natural processes, maintenance of habitat and improved aesthetic appeal.**

Following that determination, the developer submitted an amended proposal for consideration of DCA. In that proposal, the 'wet area' in the north-west section of the proposed subdivision was excluded. In the accompanying drawing, Sections 3103 3104 and 3105 had been excised from the proposal and a hand drawn outline of the 'wet area' was included as existing predominantly on Section 3104.

In correspondence between the developer and the Shire Manager for Litchfield Shire Council (LSC) in September 2005, the developer provided written assurances that as part of any future application to subdivide the depressed area in the north-west, the developer will:

1. ***… undertake a formal engineering drainage study of the area; &***

2. ***In the event this study shows a need to augment the existing drainage system external to the subdivision as a result of the proposed subdivision, we will agree to undertake this work at our cost.***

The developer also advised the LSC;

> ***'…Further, the drainage from Pelley [sic] Road flows SE, so nothing we are doing will impact on or change the water flows in the area; and***
>
> ***… From discussions with neighbours, they say water flows into the depressed area, & no one can recall if overflowing (particularly on their side)…'***

In a letter to the Manager of DAS at the time, the Shire Manager for Litchfield Shire Council confirmed that the developer has asked that Sections 3103, 3104 and 3105 be excised out of the application. LSC confirmed the advice of the developer as per the correspondence referred to above.

On 7 October 2005, the DCA Chairman issued a Development Permit for the amended subdivision and, in his written reasons for the decision stated in part;

> ***'… There is an area of Priority Environmental Management (PEM) within the subject site, however potential impacts on sensitive areas have been minimised through an appropriate subdivision redesign. The area being subdivided at this stage is not identified in the Land Use Objectives (LUO's) as a priority in relation to Environmental Values…; and***
>
> ***The approved design does not include subdivision of the seasonal depression in the north western corner.***

The retention of this large consolidated lot recognises that seepage zones and low-lying areas are generally not suitable for subdivision due to seasonal inundation implications. Further it will aid conservation of natural processes, maintenance of habitat and improved aesthetic appeal, thereby minimising detrimental impacts of development on the environment and surrounding amenity.'

This last comment was referred to in the letter of complaint to my office by the residents of Lot 3408 McKinlay Road and is supported by the information obtained throughout this investigation.

The following two (2) drawings, provided by the developer, were relied upon by the DCA in consideration of this subdivision application. As is clearly shown, the land subject to my investigation (highlighted green) was excised from the proposed subdivision and a permit was issued for the rest of the land. As is also clearly shown, Sections 3103, 3104 and 3105 make up the ***'large consolidated lot'*** referred to by the DCA Chairman on 7 October 2005.

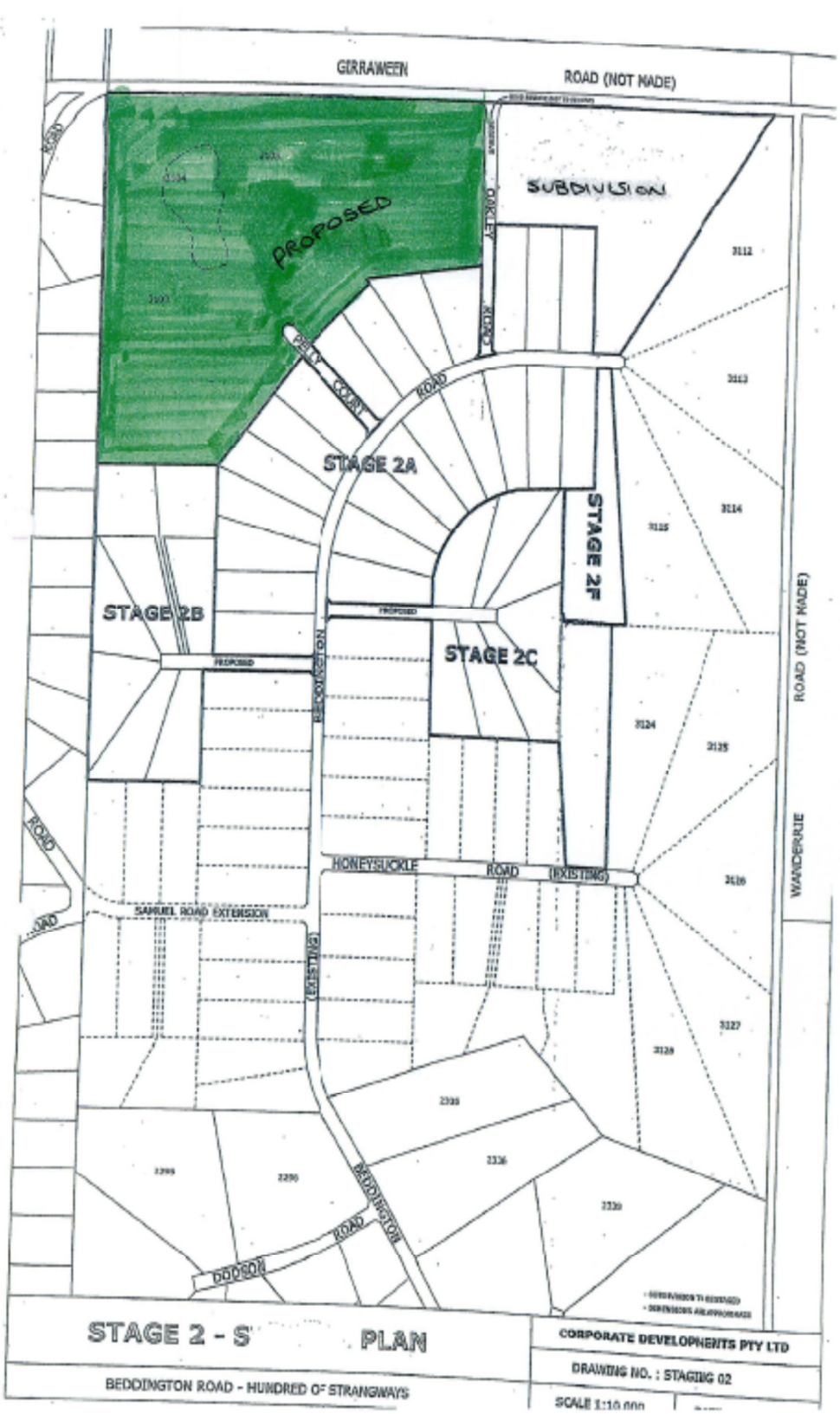
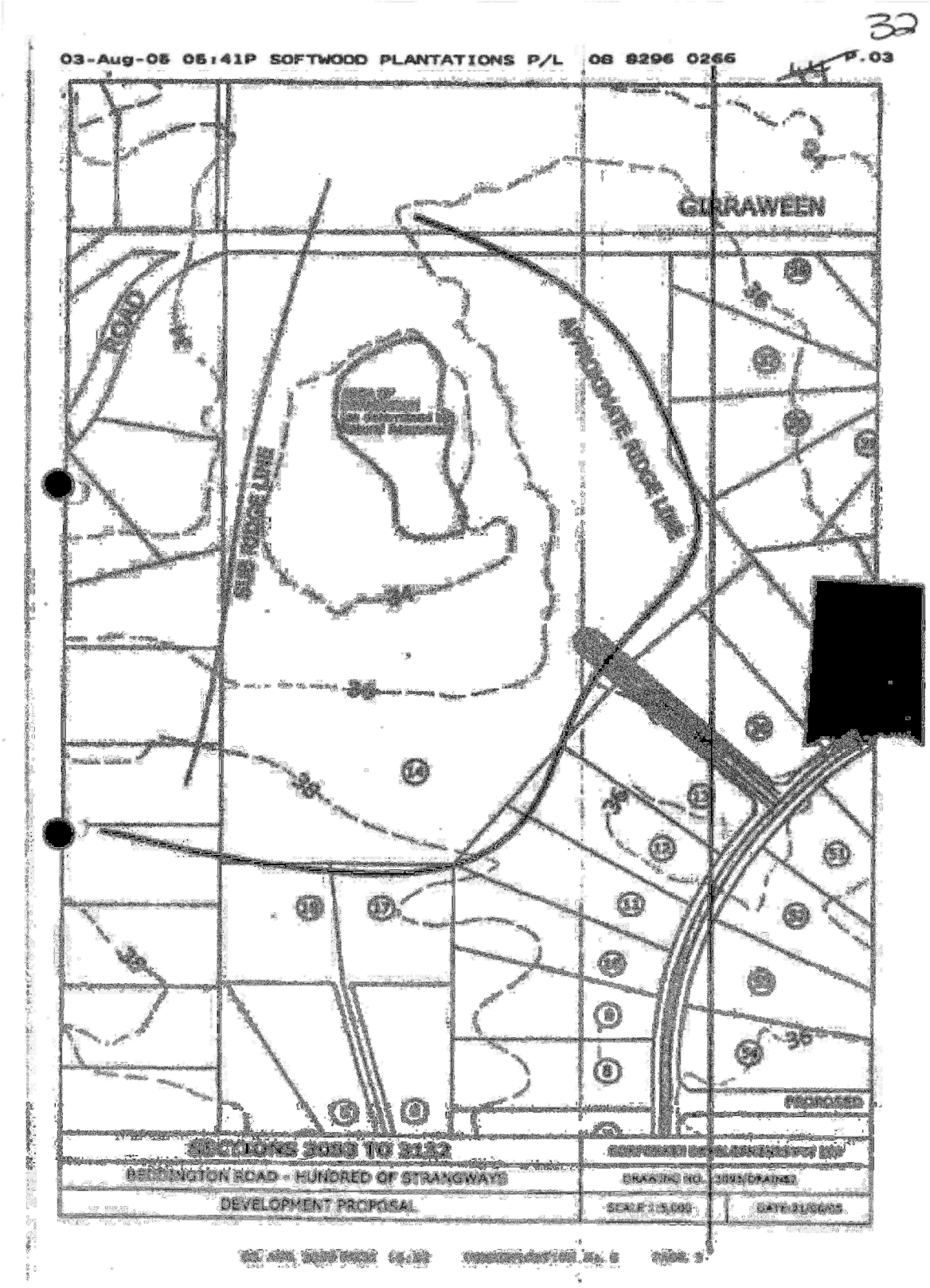

GIRRAWEEN
ROAD (NOT MADE)
PROPOSED
SUBDIVISION
STAGE 2A
STAGE 2B
STAGE 2C
STAGE 2F
ROAD (NOT MADE)
WANDERRIE
HONEYSUCKLE ROAD (EXISTING)
SAMUEL ROAD EXTENSION
BEDDINGTON ROAD
STAGE 2 - S PLAN
BEDDINGTON ROAD - HUNDRED OF STRANGWAYS
CORPORATE DEVELOPMENTS PTY LTD
DRAWING NO. : STAGING 02

Figure 5


32
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GIRRAWEEN
APPROXIMATE RIDGE LINE
SECTIONS 3083 TO 3132
BERRINGTON ROAD - HUNDRED OF STRANGWAYS
DEVELOPMENT PROPOSAL
PROPOSED

Figure 6

Final Development Application

On 8 May 2006, the developer submitted another application for subdivision which included the 'wet area' as previously described. This application included two (2) options, both of which were outlined in the application and included relevant drawings.

In an email to the LSC on 4 May 2006, the developer advised:

> ***'…In regard to the wet area, this has recently been the subject of several investigations. The water in this area is stagnant (no flow), very shallow & stays only for a short period of time. The design in respect to the wet area is practically the same for both options.'***

On making application, the developer also provided a document with information and advice as to the merits of the proposal. Within that document, the developer advised:

> ***'…A depressed area of about 3 hectares in the north west of the subject land is subject to very shallow standing water (i.e. no flow) only after major storms; however this water soaks quite quickly…;***
>
> ***Although it contains scrubby vegetation there is no vegetation of merit within the depression; and***
>
> ***Previous studies show the depression does not overflow, and so fence lines crossing this area will not erode, catch debris etc.'***

In each of the supplied drawings, the developer proposed that the three (3) Sections (3103, 3104 and 3105) previously excluded due to the identified 'wet area', could now be subdivided to create fourteen (14) lots. A further twelve (12) lots proposed in the application were not affected by any constraints and included land previously approved for subdivision in earlier matters.

On 23 May 2006, Mr Gerry Wood wrote to the DCA Chairman objecting to the subdivision, again in relation to the 'wet area' in the northwest corner. Mr Wood advised that the wetland should be treated as a complete entity and should not be subdivided.

On 24 May 2006, the local member for Goyder, Mr Ted Warren wrote to DAS advising that the application does not meet the intent of a well planned development and cited the Litchfield Land Use Objectives in support of his submission. This is the first objection submitted by Mr Warren yet it is important to note that he was a member of the DCA when consideration was had in relation to the subdivision at the meeting of 25 February 2005. At that meeting, considerable discussion was had regarding the 'wet area' of the northwest corner, specifically Sections 3103, 3104 and 3105 which ultimately resulted in the subject land being again considered unsuitable for subdivision.

The LSC Manager also wrote to DAS on 25 May 2006 recommending that the wet area in the north west of the subdivision be contained within one lot, and that it not have boundaries bisecting the wet area. LSC also raised concerns regarding proposed drainage works and the potential for increased run off due to the increased number of lots.

In relation to the application for subdivision of the land subject to my investigation NRETAS was requested by DAS to ***'examine the proposal and provide comments on any aspects pertaining to your area of concern'.***

In a document prepared and supplied to DCA on 22 June 2006, NRETAS advised:

> ***'The area is considered suitable for the proposed subdivision.'***

Further to that comment, under the sub-heading '*Land Use Comment'*, NRETAS informed the DCA:

> ***'An inspection of a site at 31 Pelly Road in early April 2006 found the following.***
>
> ***A water table was encountered at 30cm below the soil surface (photographs taken). Considering that the inspection was undertaken at the end of an average wet, annual inundation would probably not occur. However, during above average wet seasons such as those encountered in the mid to late 1990's, some waterlogging for short periods of time would be expected.***
>
> ***Blocks within the North-eastern corner of the development area all satisfy the required 1 hectare of dry land adjacent to public access.'***

Note – Second comment only relates to blocks in the North-eastern corner, not the land subject to investigation.

It appears that the developer, DLP and NRETAS were engaged in ongoing discussion regarding subdivision of the 'wet area', as is evidenced by NRETAS advising of a site inspection in early April 2006, at least 1 month prior to the application being submitted. The area said to have been inspected (31 Pelly Road) has been identified as Section 3104[10], previously excluded owing to seasonal inundation and waterlogged soils.

On 12 July 2006, the developers' son submitted a letter for consideration of the DCA summarising his findings from an ***'Inspection of the 'Depression' in the north-west corner on 22 January 2006'.*** In concluding that letter, DCA is advised:

1. **The depression does not overflow; and**
2. **The area of the depression does not contain standing water generally, &the small area where shallow water was noted soaked away very quickly.**

[10] Land Titles Office (Surveyor General) 16 May 2006.

DAS collated all of the supplied information and compiled a report for consideration by the DCA. In that report, DAS advised:

> ***'There are no land capability constraints to the proposed subdivision…***
>
> ***The proposed subdivision complies with the purpose of the RL1 zone through the provision of 2ha lots each with a minimum of 1ha unconstrained land capable of supporting a bore and effluent disposal system.***
>
> ***…but notes that it may be inappropriate to subdivide land to the minimum area due to land constraints.***
>
> ***Land resource information and field inspections indicate that the site is suitable for the proposed subdivision. There are some which during prolonged rainfall may become waterlogged for short periods however sufficient unconstrained land is present on each lot.***
>
> ***There is no potential for localised flooding identified for this proposal.***
>
> ***The proposed lot has in excess of the minimum of 1ha of unconstrained land accessible by a public road.***
>
> ***NRETA has confirmed that the land is capable of supporting the proposed subdivision.'***

On 21 July 2006, DCA met to consider the information supplied by Development Assessment Services, in addition to issues raised by the developer and a number of objectors.

During that meeting, the chairman asked about the north-west corner and was advised by the developer:

> ***'…his son (name withheld) walked out the site and [it] is not all wet country, it drains away quickly and does not have a standing water problem. NRETA have done some soil tests on the site.'***

Mr Gerry Wood was also in attendance and again raised his concerns regarding the 'wet area' of the proposed subdivision. In the minutes of that meeting, Mr Woods' submission is recorded, in part, as follows:

- **The wetland should not be subdivided but should wholly be in one lot;**
- **It is important as a wet land and as a recharge area and should be given some significance and protected;**
- **He is surprised that there were no comments on that area; …**

The developer spoke of the 'wet area' and advised that in his opinion, it is not particularly important.

The developer also advised that despite the many submissions from previous applications regarding the 'wet area', he had not spoken with any of the objectors and that he does not think there are any problems at all in relation to 'water on their land'.

From the minutes of that meeting, that was the extent of discussion and consideration regarding the 'wet area' of the north-west corner. Despite numerous past objections, technical advice and refused applications, little importance was placed on the very issues of concern. The previous objectors were not at the hearing and had not lodged any objection. Part of their complaint was that they were not given notice of the application and were not informed of any hearing date.

The following three (3) drawings/plans are reproduced to show that the land for which the previous applications were either deferred or rejected (owing to 'waterlogging' and seasonal inundation) is the exact same land for which the DCA had again been asked to consider suitable for subdivision in this final application.

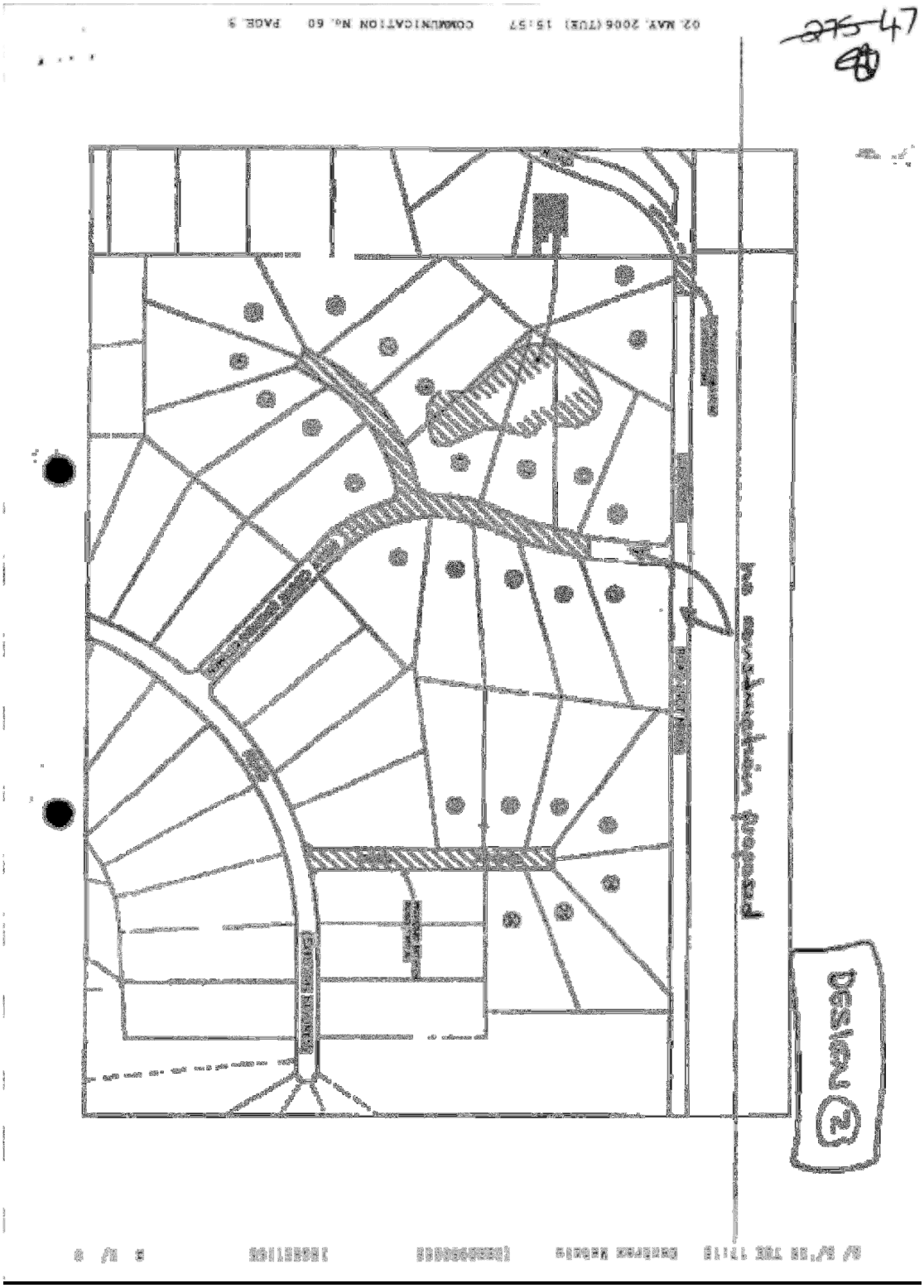


Figure 7

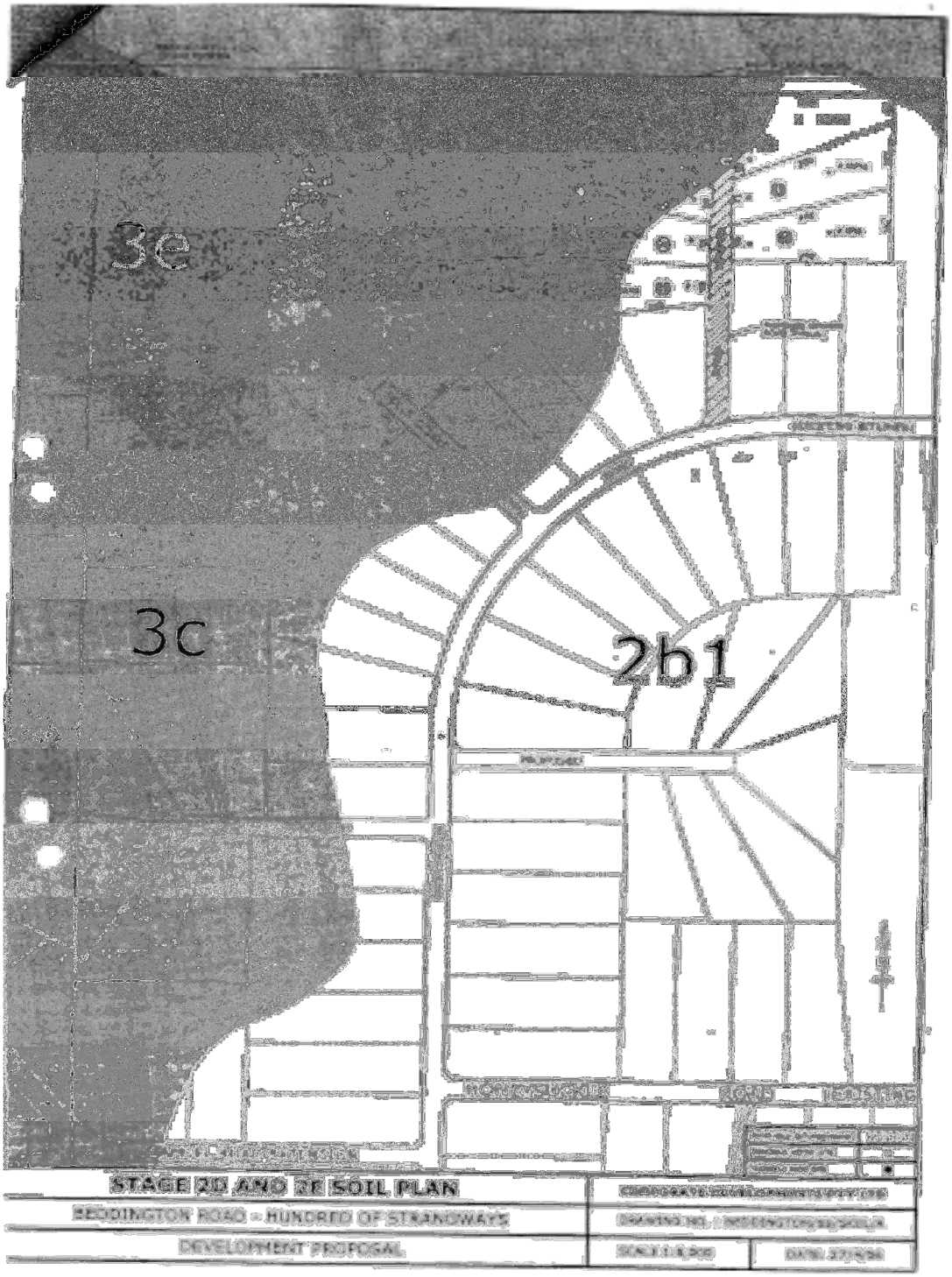


Figure 8

Note: Land type 3e in the north west corner which is subject to seasonal inundation and waterlogging. Each of the lots subject to investigation consist predominantly of this land type which is *'subject to runon and wet season waterlogging'* and is *'not suited'* for subdivision as there is *'major limitation present'*.[11]

[11] Fogarty et al. (1984)

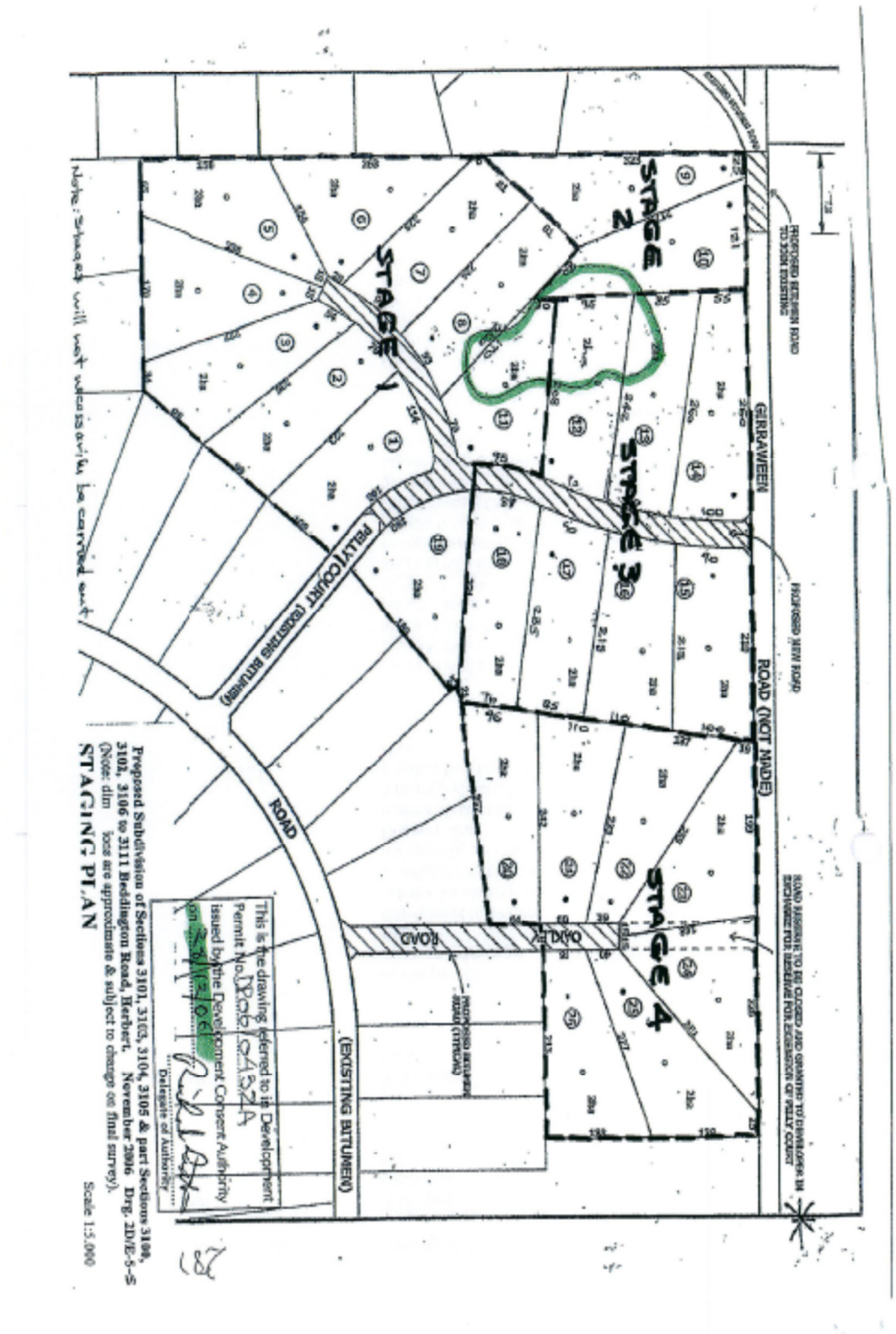

STAGE 1
STAGE 2
STAGE 3
STAGE 4
GERRAWEEN
ROAD (NOT MADE)
ROAD
(EXISTING BITUMEN)
PEALT COURT (EXISTING BITUMEN)
PROPOSED NEW ROAD
PROPOSED BERM TO JOIN EXISTING
DCVO
DCVO
PROPOSED RESERVE ROAD (STRUCK)
This is the drawing referred to in Development Permit No. DP08/0434A issued by the Development Consent Authority on 24/12/08
Delegate of Authority
Proposed Subdivision of Sections 3101, 3103, 3104, 3105 & part Section 3108, 3102, 3106 to 3111 Beddington Road, Herbert. November 2006 Drg. 2D/E-5-S
(Note: dim lines are approximate & subject to change on final survey).
STAGING PLAN
Scale 1:5,000

Figure 9

DCA consented to the application and later provided four (4) written reasons behind that decision. Within the fourth (4th) reason, DCA provided:

> ***'…The Department of Natural Resources Environment and the Arts have no objections to the proposal from a land capability perspective…'***

On 16 August 2006, the DCA chairman issued the Development Permit for the subdivision and consolidation to create 26 lots, including those within the previously identified 'wet area' subject to the complaint made to my office.

A number of those present at the DCA Meeting on 21 July 2006 had also been present at a variety of the previously held meetings referred to above. I reiterate my previous comments and note that one attendee was the then Regional Planner for DAS who had previously performed the Planning functions in relation to several of the previously rejected and/or deferred applications.

During the latest application assessment, this staff member communicated with the developer and relevant service providers. He also had line responsibility for other DAS employees who had carriage of this particular matter.

It appeared obvious to me that this one staff member alone had considerable corporate knowledge and that throughout the development assessment, he should have readily advised those subordinate to him regarding the numerous objections and issues surrounding the proposed subdivision of land previously considered unsuitable.

In my view, when the proposed subdivision was under assessment, the staff member concerned failed to perform his required functions and that those failures have contributed to the issues of complaint. At the time of writing this report, the staff member concerned is no longer an employee of DLP, yet he is still employed within the NT Government.

In the six (6) years prior to the subdivision being approved, significant data knowledge and scientific evidence was provided to the DCA which substantially proved, beyond all doubt, that the land in the north-west corner was unsuitable for subdivision. Despite that overwhelming evidence, and the many years of discussion objection and consideration regarding the 'Wet Area' in the north-west corner, it appears that those concerns were either overlooked by inexperienced DLP and NRETAS staff or that vital information was not accurately recorded and relayed to the appropriate people in order for a fully informed and accurate decision to be made. In my view, these failures contribute to the issues of complaint.

The main focus of my inquiries was to determine what, if any, changes to the capabilities of the subject land had occurred specifically between October 2005 when the 'Wet Area' was considered by all parties, including the developer, to be unsuitable for subdivision, and June 2006 when the application was supported by both DLP and NRETAS.

Despite the evidence and all of the information previously considered, the 'Wet Area' of the north-west corner was in 2006 deemed by DCA to be suitable for subdivision yet there is no adequate explanation for the previous information having been overlooked, ignored and/or disregarded, resulting in the final determination being made. Despite the evidence, neither DLP nor NRETAS have accepted responsibility for these failings.

Nothing has come to light to explain why DAS failed to recognise and inform DCA of the full history surrounding the various applications to subdivide the affected land nor has anything been discovered that would be reasonable grounds for DAS or NRETAS making a decision or recommendation in June 2006 that the land was suitable for subdivision, when all existing evidence was to the contrary.

My investigation has not uncovered any additional tests, expert opinions or altered circumstances to justify the information given to the DCA for consideration in July 2006.

DEPARTMENT OF LANDS AND PLANNING (DLP)

DEVELOPMENT ASSESSMENT SERVICES (DAS)

The **Development Assessment Services** is a part of the NT Lands Group within the Department of Lands and Planning and provides for the development assessment and control processes within the provisions of the *Planning Act*. DAS also provides professional advice and administration support to Government, the Development Consent Authority, industry and the community, on the use of land.[12]

Throughout the various application processes subject to this investigation, DAS was responsible for the coordination of all inquiries and the collation of information to be relied upon by DCA. Ultimately, DCA rely upon the technical advice and due diligence of DAS employees in order to be fully informed prior to any determination being made.

The DCA does not have any staff of its' own to make any independent inquiries or obtain any expert or technical advice. It is totally reliant on DAS and its' ability to require information from an applicant.

In March 2011, DLP provided me with a variety of documents collated over an eleven (11) year period. Following a review of those documents, it was clear to me that in the years leading up to approval being granted for the subdivision of the 'wet area', significant anecdotal evidence was provided and considerable discussion was held by a number of interested parties, indicating that the area was not suitable for subdivision.

Having considered the advice provided by NRETAS in January and February 2005, in addition to reasons provided by the DCA in October 2005, I was unable to discern any changes in the land capabilities which would support the approval for the subdivision application on 21 July 2006.

[12] www.lands.nt.gov.au

The only obvious difference was that the developer submitted his final application which was assessed by DLP and NRETAS staff not previously involved or aware of the history surrounding the subject land.

Aside from the developers own assessment, in addition to a vague and somewhat ambiguous report prepared by NRETAS in June 2006, no scientific data or other credible information exists to validate the information relied upon by DCA in July 2006 when approving the application.

In August 2011, I wrote to the CEO of DLP, advising of my intention to conduct a formal investigation. In response, the CEO acknowledged that DLP staff had provided documents during preliminary inquiries and enclosed additional documents in the form of *'Ministerial correspondence and memoranda; briefing notes and a copy of a newsflash provided to the Minister for Lands and Planning.'*

In a Memorandum by a DLP lawyer, dated 27 May 2011, advice was provided that an independent assessment by a suitably qualified expert was required to determine the cause(s) of the inundation. That advice also indicated that:

> ***'…As a matter of good risk management I would not leave it to the Ombudsman to engage such an expert. I recommend that the Department of Lands and Planning considers obtaining an expert report sooner, rather than later, so that the issue of liability can be explored further.'***

This advice was not actioned by DLP and it was followed by similar advice provided by the Solicitor of the Northern Territory in November 2011. By email dated 16 November 2011, the Solicitor of the Northern Territory referred to the submissions of Mr Gerry Wood and Mr Ted Warren during the assessment process for the 2006 application. In his advice, the Solicitor of the Northern Territory stated:

> ***'...The written determination does not purport to conduct any assessment of those competing submissions, or to resolve the inconsistency between them. It may be concluded from the result that the DCA accepted the assessment by the relevant Territory Agency.'***

On Wednesday 1 February 2012, I notified the CEO of DLP and key agency staff members of my intention to recommence the investigation, owing to the advice that negotiations between government and the affected landholders had failed to resolve the issues of concern. Accordingly, I requested copies of any and all documents additional to those provided before my investigation was suspended in October 2011.

I also sought advice regarding the NRETAS memoranda of 2005 where it was determined at least five (5) of the proposed blocks did not have the required 1 hectare of dry land and as such, were not considered suitable for subdivision. Additionally, I sought clarification as to the changes to that advice which ultimately resulted in the development application being approved in July 2006.

In response, DLP advised that a more detailed assessment of land capability was undertaken by both the developer and NRETAS. It was stated that NRETAS carried out a specific site assessment including digging test holes and that the overall assessment at the time was that the area was suitable for the proposed subdivision.

When requested to provide further details regarding that assessment, both DLP and NRETAS advised that neither agency has any notes or other documents, including copies of the photographs referred to in the final assessment report of 22 June 2006 to support or clarify when and by who the particular assessment was carried out.

In the absence of any supportive documents or other evidence, I am unable to compare that data against the significant and overwhelming evidence, from between May 2000 to October 2005 which proves the land was unsuitable for subdivision. Accordingly, I can only conclude that all previous data and recorded information is accurate and that the land should have not been subdivided.

When questioned further regarding the *'significant changes'* to land capability resulting in the subdivision approval, DLP advised that the developer appears to have conducted his own commercial assessment. In my view, this 'commercial assessment' appears only to consist of statements by the developer, with no scientific data to support those claims. There is no evidence that either DLP or NRETAS sought to validate the claims made by the developer in 2006.

As previously highlighted, it is my view that DAS have primarily relied upon the developers self-assessment of the subject land and in doing so, have failed to apply due diligence in corroborating or discounting that advice.

When questioned regarding the Independent Expert Assessment, as recommended by the Departments in-house lawyer and the Solicitor General, DLP advised:

> ***'…it was considered that it would add little value in terms of resolving the issue for landowners. Focus was on finding a solution for the landowners and not on protecting the Department from any potential liability.'***

That comment can be seen as insightful as the documents and information supplied by DLP throughout my investigation indicate every effort was made to exculpate the Northern Territory as the party liable for actions and omissions of it's agencies of any liability issues long before any potential solutions were proposed.

From the outset, DLP maintained that NRETAS assessed the land as being suitable for subdivision and based on that advice, DAS employees acted in good faith throughout the assessment process. DLP therefore concluded that it was not legally liable.

It was stated to my investigator that 'caveat emptor' applies and that the current landowners should accept some responsibility as they failed to conduct their own inquiries as to the capabilities of the land prior to purchase. I do not accept that proposal and consider that to be the role of suitably skilled, qualified and

experienced staff within both DLP and NRETAS in order for DCA to be fully informed.

In my view, if the necessary inquiries were made and the information validated, as required by legislation and government policy, no potential property owner should ever be concerned that land for which they have purchased or are considering purchasing is anything but suitable for its' intended purpose. That is the duty of the public servants of both DLP and NRETAS.

On Friday 9 March 2012, I was advised that the DLP CEO had altered the agencies position and had recommended to the Minister for Lands and Planning (the Minister) that several of the flood affected blocks be purchased by the NT Government so that a drainage easement could be constructed.

It was further recommended that once the drainage easement had been constructed government could on sell the land and recover costs. In the Ministerial Briefing dated 23 February 2012, the CEO advised in part:

> ***'…Two submissions made to the DCA during the course of the application process raised anecdotal evidence that parts of the land had in the past been subject to inundation. The DCA relied on information provided by the Natural Resource Management (NRM) Division of the (then) Department of Natural Resources, Environment and the Arts (NRETA) and the developer about the suitability of the land for residential development;***
>
> ***…It is proposed that the Department of Lands and Planning purchase, by agreement with the owners, … affected lots in order to undertake the required drainage works. …When the works are completed, drainage easements will be established and arrangements made with the Litchfield Council to secure effective long term maintenance of the new drains;***
>
> ***… This proposal enables Government to facilitate the retrospective construction of the required drains to prevent future flooding, which will, in turn, enable the properties to be re-sold as viable rural residential land to recover the costs involved; and***
>
> ***This course of action may be characterised by as a precedent "that Government will buy out any property subject to flooding". The proposed purchase does not involve 'compensation' for damages or assumption of any legal liability.***

Predicated on the advice and recommendations of the DLP CEO, the Minister forwarded a memorandum to the NT Treasurer, stating in part:

> ***'…I have carefully considered this request and am of the opinion that there is justification to support the purchase of these lots.'***

The drainage easement proposed by both the developer and DLP has been designed to cap the future water levels of the subdivided land to ensure each lot would always have 1 hectare of dry or unconstrained land and that localised flooding and inundation would be less likely to occur following significant rainfall.

It was my assertion when that drainage easement was first raised that the proposal confirmed earlier advice that the land was considered unsuitable for subdivision and that there never was 1 hectare of dry land available at the time approval was granted.

Documents provided to my investigator on 12 March 2012 confirm that the intention of the developer and DLP is to permanently cap the water levels and ensure that each of the lots would always have 1 hectare of dry land. In my view, this confirmation vindicates the position of Mr Gerry Wood, the affected landowners and each of the objectors to this subdivision since the first application in May 2000.

The proposed drainage easement has been considered by each of the affected landowners who advise they have been informed by DLP that it is the only option available to them in order to resolve the inundation issues. Despite the assurances by DLP that consultation, negotiation and discussion has been ongoing, the landowners advise me of significant delays and ongoing difficulties with information being conveyed to them by government staff. Some have stated that 'no consultation' has taken place whatsoever.

On 13 March 2012, I requested both DLP and NRETAS to clarify and explain the obvious and glaring discrepancies between the advice provided in February 2005 compared to that of June 2006.

In response, DLP advised:

> ***'…in February 2005, the developer had three (3) applications for subdivision being considered at the same time. Two (2) of those applications each included Sections 3103 - 3105 and both applications were considered at the same meeting on 25 February and the minutes for both applications were identical. DLP also advised that Biodiversity is the purview of NRETAS and that any questions in this regard are best directed to them.'***

This response fails to explain, and in no way advises regarding the discrepancies. It is obvious, given two (2) of the applications included Lots 3103, 3104 and 3105, as to why the minutes in relation to both applications were identical.

Since the weather event of February 2011, DLP has provided advice to the Minister for Lands and Planning (the Minister), detailing the many and varied issues following the subdivision of land subject to this investigation.

In a NEWSFLASH dated 18 July 2011, DLP informed the Minister regarding a media release issued by Mr Gerry WOOD the previous day. Within that document, DLP advised in part:

'…The subdivision was approved by the Development Consent Authority (DCA) in 2006. At the time, two submissions [Mr Gerry WOOD and Mr Ted WARREN] were received by the DCA and both raised concerns about the lots not being suitable for rural living. However, there were no submissions received specifically in relation to flooding or inundation;

Mr Wood has held the view from the onset of this issue that Government should acquire the affected lots;

…This department has sought legal advice on whether the Crown is required to compensate land owners whose lots are affected by flooding. Preliminary advice indicates that the Crown would not be legally liable to rectify the situation. The advice further states that the advice is not likely to change unless the assessment by suitably qualified experts suggests clear negligence on the part of DCA; and

…Legal advice also states that purchasers of land need to satisfy themselves that the land is fit for the intended purpose and the Department of Lands and Planning and NRETAS can assist prospective purchasers in obtaining the required information for them to make an informed decision.'

As previously mentioned, I do not accept the last statement regarding DLP Legal advice. Should the Government employees responsible for the assessment of Development Applications be performing their core function adequately, and with due diligence, no potential buyers should ever need to 'satisfy themselves' by making any inquiries as to land capability. Should that premise be accepted, I submit that there is no need for the Development Assessment Services of DLP to exist.

A number of Ministerial Briefings were also reviewed during my investigation. Despite the overwhelming evidence, collected and collated by the Department between May 2000 and October 2005, that the land was not suitable for subdivision DLP only advised the Minister in relation to the 2006 application. It is my view, had all of the relevant information been supplied to the Minister, a more reasonable and timely resolution would have been achieved long before now.

I have summarised some of the additional information contained within those documents as follows:

Ministerial Briefing: DA2011/0003 – 5 October 2011

'…At the last meeting on 2 September 2011, the residents collectively rejected the drainage solution put forward by the developer and resolved to submit a statement of claim direct to the Chief Minister's office for consideration;

…The potential for flooding was not identified by any of the service agencies at the time and the developer also submitted documentation to the DCA that there was no risk of flooding; and

…This Department has encouraged the developer to put forward a proposal to construct a drain across several of the properties to take excessive water to McKinlay Road to prevent a reoccurrence of the extent of flooding experienced this year. As consent of the affected landowners is required to lodge a development application, this option cannot proceed until such time as consent is granted;

Ministerial Briefing: PA2011/0408 – 20 December 2011

…The information provided by the developer clearly indicated at the time, that each of the proposed lots within the subdivision contained the necessary one hectare of unconstrained (dry) land to support rural living.

This is consistent with the NT Planning Scheme requirements and the DCA was satisfied that the lots met this unconstrained land requirement;

The Chief Minister has made media comments that the NT Government clearly got the assessment of this subdivision wrong;

…This Department has been unable to reach agreement with the affected land owners over the past 10 months. On this basis and given the likelihood of some extent of inundation reoccurring this wet season, there is some urgency to address this matter;

…this department, in consultation with NRETAS, could have, at the time, sought out additional detailed information from the developer in relation to the low lying depression. This information could have included detailed contour information at one meter intervals of the low lying depression and an independent hydrological assessment; and

…The Office of the Chief Minister, in discussions has requested that this Department develop an acquisition package by agreement to purchase by consent all or part of the affected land…;

…The starting point for any negotiations under this proposal would be what the owners paid for the lot at the time of transfer; and

Government will be highly criticised in the media should these affected lots experience flooding this wet season.'

Ministerial Briefing: AQ2011/0013 – 23 February 2012

'…Two submissions made to the DCA during the course of the application process raised anecdotal evidence that parts of the land had in the past been subject to inundation;

…NRETA advised that some of the lots might be susceptible to seasonal inundation, but that all proposed lots contained a minimum one hectare of land free from flooding, as required by the Litchfield Area Plan 2004.

> ***…The most obvious failure in the design and approval of this development is the drainage. Responsibility for this legally rests with the developer and the Litchfield Council. However, during the development assessment process, Government agencies (NRETA, the Department of Lands and Planning and the DCA) could have (but did not) include stronger recommendations about the need for drainage.***

In a Draft Copy of that latest Ministerial Briefing (AQ2011/0013), the then Acting CEO of DLP advised:

> '…***The Office of the Chief Minister has requested this Department purchase the properties under a civil contract agreement;***
>
> ***…The Department has sought legal advice on its ability to enter into civil contracts for the purchase of properties. The Department has been advised that at common law the Chief Executive Officer on behalf of the Northern Territory of Australia can enter into a civil contract for the purchase of property; and***
>
> ***In accordance with the principles of the acquisition process only the Minister for Lands and Planning can approve the purchase (or acquisition) of properties.***

It is clear, from the information and advice provided to the Minister, that DLP have identified a number of shortcomings on behalf of the agency. DLP has also provided a workable, reasonable and satisfactory solution to the issues in suggesting the outright purchase of land affected by the substandard decision making processes of 2006. It is again apparent that despite all of the information and evidence obtained DLP have failed to explain the differences in land capabilities to support the advice of 22 June 2006 that the land was suitable for subdivision. I also comment that the three briefings to the Minister, although not inaccurate, failed to frankly and extensively inform the Minister of all relevant history.

A Draft Investigation Report was provided to the CEO on 19 April 2012 and the Department was invited to provide a response prior to the compilation of this Final Report.

On 22 May 2012, advice was sought from the CEO as to a timeframe for the agency response. In an email to my office, the CEO stated:

> ***'…The Department will provide the Ombudsman with a response to the draft report on the development application process in Herbert. As you are aware the Department is still in the process of engaging with affected landowners about preventing flooding of their properties from reoccurring. In order for our response to be informed by this work I propose to provide the Department's response to the Ombudsman by the end of this month.'***

Following that advice, inquiries were made with the affected landowners and I was informed that no recent contact had been made and no further correspondence had been received by any of them in relation to the department's proposal to prevent any future flooding. Comments made by three (3) of the affected landowners are as follows:

> ***'…No one from Department of Lands and Planning has been in the process of engaging with me about anything.***
>
> ***I have not received any contact and/or documentation for Department of Lands and Planning and don't know what their definition of engagement is....***
>
> ***I have not had any contact or engagement from Department of Lands & Planning, or anyone for that matter…; and***
>
> ***…have had no contact from any department, including the Department of Lands and Planning – thus I can confirm that no-one is/has been engaging with us about preventing flooding from reoccurring.'***

On 1 June 2012, DLP provided a response to my draft report and, where relevant I have reflected the agencies submissions throughout this report. Of note however are the following comments and additional advice from DLP as follows:

> ***'…Landowners have the right to develop their land to achieve the highest and best use permitted under the Planning Scheme. Applications for development are made in the expectation that as long as they comply with the Planning Scheme they will be approved – unless there are compelling reasons for withholding approval.***
>
> ***It was the DCA which had previously considered, and rejected, the developer's earlier applications; an almost identically constituted DCA received submissions from the only two objectors to the 2006 application but made no clear attempt to resolve the differences between that evidence and the report prepared by DAS.***
>
> ***The DCA were aware of the history of the applications to subdivide this land and they were aware of the central issues that had to be resolved. Their final decision to approve the application was informed by this knowledge.'***

Throughout this investigation, DLP has provided advice to my office which, on a number of occasions, has been contradicted by the information and advice of the affected landowners, in addition to the available evidence. Much of that evidence is contained within the agencies own file documents.

A thorough review of those documents clearly identifies that the subject land was never suitable for subdivision and that approval should not have been granted in 2006.

Litchfield Planning Concepts and Land Use Objectives 2002

In 2002, the then named Department of Infrastructure, Planning and Environment (DIPE) formulated Litchfield Planning Concepts and Land Use Objectives (LUO's). The LUO's were an identified requirement and provided broad principles to guide development in the Litchfield area. The various LUO's are made by the Minister in accordance with the Planning Act.

Within the introduction on page one (1) of the LUO's, DIPE provided commentary which includes:

> ***'Strong growth and increasingly complex development pressures combined with the significant constraints (particularly waterlogging and rugged terrain) which exist on much of the undeveloped land within the shire contribute to the need for a review of existing land use policies and controls.'***

Section 4.1 of the LUO's deals specifically in relation to Land Resources/Capability and broadly defines ***Land subject to Flooding, Waterlogging and Inundation.*** Reference is made to a map of the same name which is highlighted according to identified levels of waterlogging. The particular section of land subject to my investigation is highlighted, in its entirety, and is described as having ***'Moderate to high level of soil waterlogging.'***

Having reviewed that document, I am satisfied that in assessing the subdivision application of May 2006, both DLP and NRETAS have each ignored and overlooked these very important and very relevant LUO's. As with the issues surrounding land capability, nothing has come to light which would explain the disregard of the LUO's throughout the assessment process.

Litchfield Area Plan 2004

The Litchfield Area Plan 2004 (LAP) provides general guidelines, aims and objectives for the use of land within the Litchfield Shire. It also provides clear definition and requirements in relation to land zones, matters for which the use of land is permitted or prohibited, and in relation to development consent. In the opening pages of the LAP, it is stated:

> ***'Interpretation of this Plan and the determinations of the consent authority must have regard to the planning principles and concepts contained in the Litchfield Planning Concepts and Land Use Objectives 2002 and ensure that a use or development is consistent with them.'***

Section 7.5 of the LAP relates to estate development and provides in part:

'…to ensure estate rural living development does not unreasonably detract from the amenity of adjacent rural living areas or detrimentally impact on the environment; and

…Applications for consent for estate development must demonstrate consideration of and the Authority must have regard to –

(a) Detailed evaluation of the capability of the land to accommodate dwellings and associated water supply and waste disposal infrastructure;
(b) Retention and protection of significant and natural and cultural features;
(c) Provision of appropriate waste disposal and water supply infrastructure;
(d) …
(e) …
(f) …

As with the LUO's, I am of the view that little consideration was given to the requirements of the Litchfield Area Plan during the assessment of the proposed subdivision application in 2006.

Department of Natural Resources, The Arts and Sports (NRETAS)

During each of the assessments since the first application for subdivision was lodged by the developer in May 2000, NRETAS have been requested by DAS to provide technical and professional advice by staff, qualified in natural resource assessment. When requested for advice and information, a report is prepared and submitted to DAS for consideration by the DCA.

As previously mentioned, NRETAS had completed a number of assessments and provided advice up to and including February 2005, specifically reporting that Sections 3103, 3104 and 3105 were considered unsuitable for subdivision due to the 'wet area' and potential for 'seasonal inundation'.

NRETAS advise that land resource data, compiled and published in 1984, was relied upon by agency staff when assessing the land capabilities for each of the subdivision applications between May 2000 and July 2006. The document, titled '***The Land Resources of the Elizabeth, Darwin and Blackmore Rivers'***[13]***,*** was produced in March 1984 by the Land Conservation Unit attached to the Conservation Commission of the Northern Territory. Written and compiled by P.J.FOGARTY, B.LYNCH and B.WOOD, it is referred to also as Technical Report – Number 15, and is considered by NRETAS staff to be an accurate guide when conducting land capability assessments. To this day, the information and data within that report is relied upon by NRETAS staff when conducting land capability assessments. As highlighted, land unit ***'3e',*** identified as existing predominantly within the north-west corner of the subdivision, is to this day still considered unsuitable for subdivision.

[13] A full copy can be located at www.nretas.nt.gov.au

A summary of the land capabilities, as provided by NRETAS, describes land unit 3e as having ***'Slow drainage'*** and that it is ***'subject to runon and wet season waterlogging.'*** In relation to its suitability for subdivision, it is highlighted as being ***'not suited, major limitation present.'***

On 22 June 2006 however, NRETAS advice changed and, as previously mentioned reported to DCA:

> ***'The area is considered suitable for the proposed subdivision.'***

In response to specific questions regarding this anomaly, NRETAS advised me:

> ***'As at 22 June 2006 when it commented on the proposal, NRETAS assessed and considered the proposed subdivision area to be suitable for subdivision in its entirety.'***

In general advice provided by NRETAS, I was informed:

> ***' ...NRETAS provides comment only in relation to the aspects pertaining to its area of concern, being the natural environment and the location subject to the application.***
>
> ***It is not possible for NRETAS to provide comment on the impact of proposed engineering works or other developments which may take place up or down stream which may or may not impact on storm water drainage in the application area as this is not our area of expertise.'***

On 13 March 2012, I requested clarification and an explanation from NRETAS regarding the obvious and glaring discrepancies between the advice provided in February 2005 compared to that of June 2006. The land subject to investigation clearly consists mainly of land unit ***'3e'*** which has always been considered unsuitable for subdivision owing to poor drainage and waterlogging yet NRETAS cannot or will not explain why the information, relied upon since 1984, was ignored during the assessment of the subdivision application in May-June 2006.

The NRETAS response, in part, advises:

> ***'...the variation in comments largely reflect the fact that each document was commenting on a different version of the subdivision plan;***
>
> ***...There were significant differences between the subdivision plans submitted in 2005 and the subdivision plan submitted in 2006 in respect of which the letter dated 22 June 2006 was prepared; and***
>
> ***...The Land Use Comment section of the letter dated 22 June 2006 reiterates the Department's previous concerns that water logging may occur in higher than average wet seasons in the lots in the north-western corner of the proposed development near Pelly Road, however, it is significant to note that by 22 June 2006, the lots in this area had***

been redesigned and the lot size increased by the developer (as it reflected on the map).'

The proposed subdivision applications of 2005 and 2006 each contained Sections 3103, 3104 and 3105. Each subdivision proposed since May 2000 shows the relevant blocks to all be at least two (2) hectares in size.

Aside from some minor amendments to the layout and shape of the lots, the only real difference is the staging of the subdivision which altered the number of lots in the area surrounding the affected land. Overall, the north-west corner of the subdivision still contained the 'wet area' as identified from the first application of May 2000.

Two (2) versions of the proposed subdivision were provided by the developer in 2006 and the only significant difference between the 2 proposals is the extension of the then named Pelly Court. By not extending Pelly Court, several of the proposed lot sizes had been increased in size by up to .07 ha (700 square metres). In my view such a marginal increase makes little difference to the land capabilities and would therefore not alter the fact that there never was 1 hectare of unconstrained land accessible by public road, on the lots subject to investigation.

NRETAS further advised that records other than already supplied cannot be located and that staff involved in the previous assessments have since left the Department. Additionally the staff member involved with the assessment in 2005 is no longer employed by the NT Government and resides interstate.

In relation to the 2006 assessment, NRETAS advised that only the relevant comments were put into a database however no action officer's name was included to identify who made the comment. The Department is unable to conclusively identify which officer made the comment on this particular application. The agency further advised that no additional information in relation to the comments already provided (such as the photos referred to in the letter) can be located.

As with DLP, it is my view that the responses provided by NRETAS also fail to explain, and in no way adequately advise regarding the discrepancies. In fully reviewing all of the available information, it is obvious that all of the applications assessed by NRETAS included Sections 3103, 3104 and 3105 which, after assessment and consideration by DCA, were deemed unsuitable for subdivision between 2000 and 2005.

The 2006 application also included Sections 3103, 3104 and 3105 yet no adequate explanation, information or evidence has been forthcoming, from either department as to any changes to the land capability which would justify the advice of 22 June 2006 that ***'the area is considered suitable for the proposed subdivision.'***

NRETAS was provided a draft report on my investigation in April 2012 for consideration and response and, on 27 April 2012, I was advised:

'…the CEO had 'no further comment/response regarding the report'.

In June 2012 however, a Senior Executive Director from NRETAS sought an opportunity to provide a response, having considered the agencies position and responsibilities. This was of significance because Thursday 21 June 2012 was the last day during the sittings of the Legislative Assembly that this report could have been tabled before the proroguing of the Legislative Assembly for the election. The report was virtually complete at the time of the request.

On Monday 2 July 2012, NRETAS provided a brief written response to my Draft Report. Within that document, advice includes:

> ***'NRETAS accepts there were some shortcomings in its internal record keeping systems and processes in relation to the development application process.***
>
> ***NRETAS has taken all necessary steps to address the deficiencies identified above, which include ensuring officers providing comment on development applications record all relevant documents, file notes and comments on hard and electronic databases and files. The identity of the relevant officer making the comments or preparing reports is also now recorded on those databases and files; and***
>
> ***NRETAS' function in the development application process is to provide comment, to experienced decision makers who then decide the application, about matters in which NRETAS has specific technical expertise.'***

At no time has NRETAS provided any adequate explanation regarding the significant evidence against subdividing the land, gathered between May 2000 and October 2005 and the changed advice of 22 June 2006.

NRETAS maintains that the advice of 22 June 2006 was sound, and that it was based on specific technical advice. There is however, no evidence to support the advice of 22 June that '***the area is considered suitable for subdivision.'*** On the contrary, significant evidence exists which substantiates the issues of complaint by Mr Wood and the affected landowners.

Vegetation Assessment:

In June 2011, at the request of DLP, NRETAS staff conducted a rapid assessment of the vegetation in the vicinity of the land subject to this investigation. The field work for the assessment was carried out on both 6 and 8 June 2011.

As stated in the final assessment report:

> ***'The aim was to provide a vegetation map and vegetation descriptions of the area showing dominant communities and species.'***

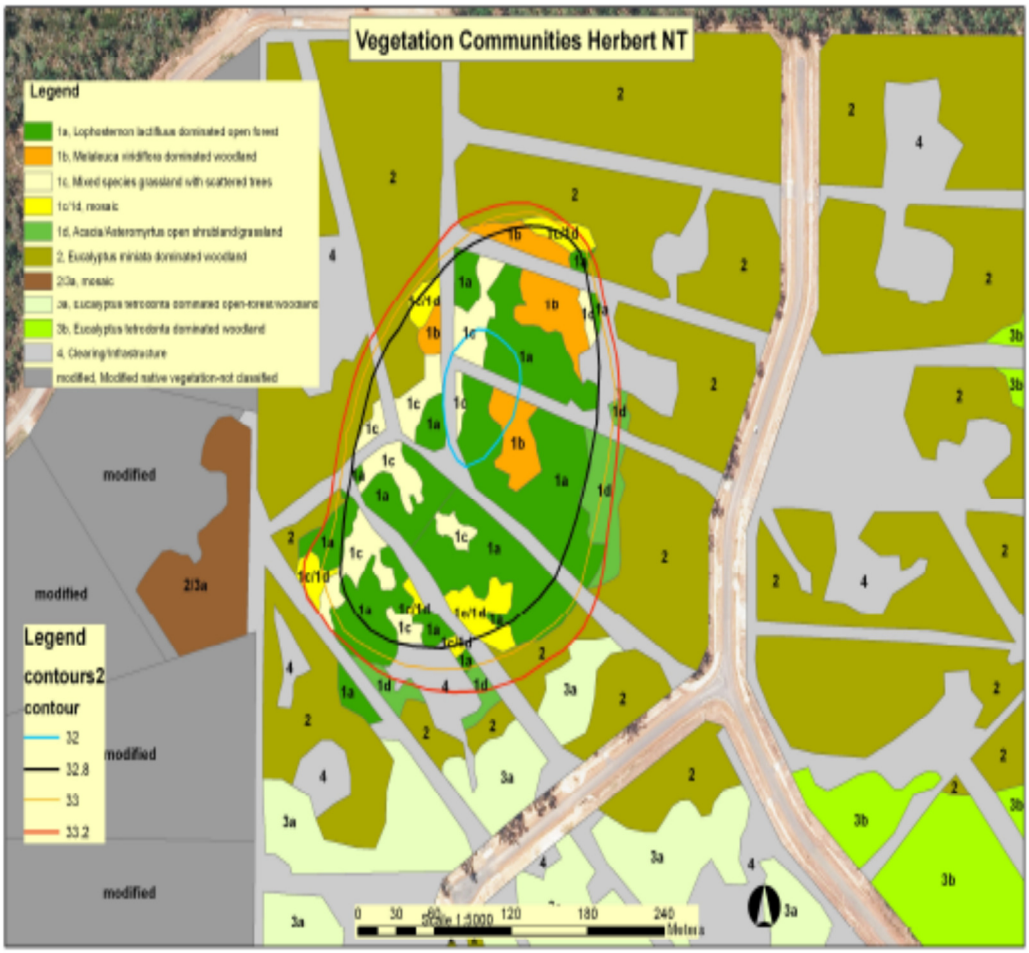
In particular, the 'wet area' within the land subject to my investigation was accurately assessed and the results provided in a final assessment report which contained two (2) pictorial maps.

One of those maps, reproduced below, shows the vegetation contained within the 'wet area' ('darker green') is commonly located in close proximity to watercourses, along streams, in swampy areas and where the land may be seasonally flooded.

Complainants regarding this matter, in particular Mr Gerry Wood, have long held the belief that the vegetation within the 'wet area' is consistent with that as described above.

The Vegetation Assessment supports the views of each complainant and is consistent with all of the available information, held by the NT Government and obtained throughout my investigation, that the land subject to my investigation was never suitable for subdivision.

Figure 2 Vegetation in the vicinity of Lorikeet Court



Litchfield Shire Council (LSC)

Between May 2000 when the developer submitted the first application for subdivision and July 2006 when the subdivision was approved, the Litchfield Shire Council maintained that the 'wet area' in the north-west of the subdivision was not suitable for development.

In documents supplied by LSC at the start of my investigation, it was identified that the developer submitted a drawing of the proposed subdivision in May 2000 which clearly shows the 'wet area' to be approximately twenty (20) hectares in size. In later drawings however, the developer proposed that the 'wet area' was contained mostly within Section 3104, which prior to development was eight (8) hectares in size.

In relation to an amended subdivision proposal submitted by the developer in July 2000, LSC wrote to DAS, outlining council's objections. Of relevance to my investigation is the following statements:

> ***'…As a general principle, the Council does not support the elimination of the contentious parts of the subdivision in order that approval be obtained for the balance of the land. The areas of concern which the applicant will eventually want to subdivide need to be looked at in association with all the land (the revised application) so that the best solution can be achieved for the constrained land; and***
>
> ***…The subdivision should be treated as a whole and all contentious areas resolved as part of the subdivision.'***

In September 2005, LSC wrote to DAS in relation to another application submitted by the developer. LSC advised that the developer had asked to excise the 'wet area' contained within Sections 3103, 3104 and 3105. LSC further advised that council had agreed to that proposal, on the basis that should the developer choose to subdivide the excised area, he would undertake a formal engineering study of the area.

From this correspondence, it is again obvious that the 'wet area' contained within Sections 3103, 3104 and 3105 was deemed unsuitable for subdivision, as identified by the developer himself.

In May 2006 however, when the final application was submitted, it appears that no formal engineering study of the 'wet area' had been undertaken.

LSC were again requested by DAS to comment on the proposed subdivision application and on 25 May 2006, recommended:

> ***'…That the wet area in the north west of the subdivision be contained within one lot and not have boundaries bisecting the wet area which will require clearing for fence lines and fire breaks; and***
>
> ***The applicant should be required to provide details of proposed drainage scheme to ensure that blocks to the west of the subdivision are***

not impacted by the potential for increased run off due to the increased number of lots.'

The LSC maintained its advice for the six (6) years leading up to the subdivision being approved by the DCA. Despite my requests for clarification, neither DLP nor NRETAS have been forthcoming with any information or advice which would explain how or why both DAS and DCA failed to recognise this previous advice which, if appropriately considered, should have resulted in the proposed subdivision again being rejected.

Environment Protection Authority (EPA)

As previously mentioned, Mr Gerry Wood initially forwarded an email to the EPA in March 2011, seeking an urgent investigation into the actions of the developer and his proposals to drain the 'wet area' and permanently reduce the level of flood water on the affected blocks. The developer had made arrangements to pump water away from the 'depression' and Mr Wood sought to have the pumping stopped pending advice on a number of issues, including:

'…an independent assessment of the lagoon, the contours around the lagoon and the vegetation types around the lagoon; and

…an assessment to see if land that was subdivided around the lagoon did have the 1ha of unconstrained land as required by the planning scheme.'

Mr Wood further advised EPA that the intention of the developer was to construct a drain to permanently lower the water levels of the lagoon ***'simply as a quick way of fixing poorly subdivided land…'*** and ***'the Government Departments seem to be wiping their hands of this mess?'***

The EPA made a number of inquiries and later wrote to Mr Wood, advising in relation to those inquiries and providing a brief chronology of the subdivision since being proposed in 2006. EPA further informed Mr Wood that the Minister for Natural Resources, Environment and Heritage would also be provided with advice including:

'… that the Land capability assessment stage of the Development consent process is not supported by robust evidentiary processes …; and

… Departments providing advice to the DCA should undertake this task with sufficient rigour and attention to detail as would be required if they were authorising the land use themselves as this is essentially the weight the Consent authority gives their advice. In conjunction with this, the DCA should demand an exacting standard of advice that would withstand integration at the development consent hearing.'

In concluding the advice to Mr Wood, the EPA explained its' limitations and suggested my office may provide an appropriate avenue for redress.

On 3 May 2011, the EPA wrote to the Minister for Natural Resources, Environment and Heritage, informally advising of the matters raised by Mr Wood and the findings of the EPA. The minister was advised that the issues did not fall within the criteria approved by the EPA Board for matters warranting full review by the EPA and that Mr Wood was referred to my office as a more appropriate avenue for resolution.

Conclusion

From all of the available information, I am satisfied that in 2006, both DLP and NRETAS failed to perform their respective duties, resulting in the provision of inaccurate and incomplete information and opinions to the DCA for consideration. In my view, a number of Northern Territory Government employees were negligent in failing to bring to the attention of the DCA all known information about the Wet Area.

There is significant and overwhelming evidence that both DLP and NRETAS were aware that the land in the north-west corner of the then proposed subdivision was subject to inundation and waterlogging prior to the final development application of May 2006. That evidence was ignored by each agency when assessing the May 2006 application and, despite my repeated requests, neither agency has provided any explanation for that significant omission.

Pursuant to the *Ombudsman Act*, I am satisfied that the administrative actions of both the Department of Lands and Planning and the Department of Natural Resources, Environment, the Arts and Sport appear to have been taken contrary to law[14]. I am also satisfied that the administrative actions of both agencies were unreasonable and unjust[15], based partly on a mistake of fact[16] and that the action was wrong[17].

At the time of writing this report, neither DLP nor NRETAS have engaged any suitably qualified 'independent expert' to determine the cause(s) of the inundation despite the very sound advice of both the DLP lawyer and the Solicitor General for the Northern Territory.

No formal information has been forthcoming regarding any decision/s by the Treasurer following the advice and recommendation of the Minister. I have received verbal advice only that despite the recommendations of both the CEO and the Minister, this request has been denied by the Treasurer. DLP advise having not received any return correspondence from either the Treasurer or the Minister for Lands and Planning in relation to that recommendation.

The Northern Territory Government and relevant agencies have made it quite clear that a heavy reliance as to any future decisions has been placed on the outcomes from my investigation and the provision of this report.

It is not my role to formulate government policy, nor is it to determine the direction of any agency regarding their internal policies and governance. Accordingly, it is

[14] Section 59(1)(a)(i)
[15] Section 59(1)(a)(ii)
[16] Section 59(1)(a)(vii)
[17] Section 59 (1)(a)(viii)

irresponsible of Government and the relevant agencies to defer any decisions and the implementation of any resolution strategies pending my investigation outcomes.

A report such as this is required to be given to the Chief Minister who, by the *Ombudsman Act*, is required to table it within 6 sitting days. The last sitting day of the Legislative Assembly for 2012 before the proroguing of the Legislative Assembly was 21 June 2012. At that date my draft report, including recommendations to buy out the affected landowners, had been made available to the Government for some months. The CEO of NRETAS had requested an opportunity to respond to the Draft. I have not in the past made public any report prior to it being tabled by the Chief Minister because I consider that would be disrespectful to the Parliament. However, I have decided to publish this report in the interests of the landowners who will be very soon facing another wet season. The need to address the remedy for them is, in my view, urgent. The Ministerial Briefing of 20 December 2011 (p.53) expressed the same opinion. Because of the coming election this report will not be tabled until the sixth sitting day of the September sittings. I have taken legal advice and I am advised that there is no legal impediment under the *Ombudsman Act* preventing me from publishing this report prior to its tabling in the Legislative Assembly. For all of those reasons and because I consider it to be in the public interest I am publishing this report.

CAROLYN RICHARDS
Ombudsman

16 August 2012