

5.1. MATERIAL CHANGE OF USE FOR A CARETAKER'S RESIDENCE AT 4990R CAPTAIN COOK HWY OAK BEACH

REPORT AUTHOR(S)	Jenny Elphinstone, Senior Planning Officer
GENERAL MANAGER	Nick Wellwood, General Manager Operations
DEPARTMENT	Development Assessment and Coordination
PROPOSAL	Material Change of Use for Caretakers Residence
APPLICANTS	Shane Loughnan, Stephen Hull and Brian Gleeson C/ Gilvear Planning PL PO Box 228 BABINDA QLD 4861
LOCATION OF SITE	4990R Captain Cook Highway Oak Beach
PROPERTY	Lot 1 on RP744764

LOCALITY PLAN



Figure 1- Locality Plan

LOCALITY	Rural Areas and Rural Settlements
PLANNING AREA	Rural
PLANNING SCHEME	Douglas Shire Planning Scheme 2006 (as amended)
REFERRAL AGENCIES	None Applicable.
NUMBER OF SUBMITTERS	Not Applicable.
STATUTORY ASSESSMENT DEADLINE	The 35 business day decision period ends on 31 January 2018.
APPLICATION DATE	The application was properly made on 24 November 2017.

RECOMMENDATION

That Council approves a Preliminary Approval for the development application for the Material Change of Use to convert the existing House to a Caretakers Residence over land described as Lot 1 on RP744764, located at 4990R Captain Cook Highway, Oak Beach, subject to the following:

A. APPROVED DRAWING(S) AND / OR DOCUMENT(S)

The term 'approved drawing(s) and / or document(s)' or other similar expressions means:

Drawing or Document	Reference	Date
Existing Building	RECS Consulting Engineers & Building Designers, Project No.31-2013. SK1 Revision A	Undated, as submitted to Council on 29 November 2017 (Council electronic document D#835666)
Existing Site Plan	RECS Consulting Engineers & Building Designers, Project No. 31-2013, Sheet 1, Revision A, Undated, as submitted to Council on 22 November 2017 (Council electronic document D#834678) and as amended by Condition 2.	Undetermined

B. ASSESSMENT MANAGER CONDITIONS AND ADVICES

The approval is subject to the following conditions and advices

Assessment Manager Conditions

1. Carry out the approved development generally in accordance with the approved drawing(s) and/or document(s), and in accordance with:
 - a. The specifications, facts and circumstances as set out in the application submitted to Council; and
 - b. The following conditions of approval and the requirements of Council's Planning Scheme and the FNQROC Development Manual.

Except where modified by these conditions of approval

Timing of Effect

2. The conditions of the Preliminary Approval must be effected prior to the lodgement of an application for a Development Permit, except where specified otherwise in these conditions of approval.

Currency Period

3. The currency period for the Preliminary Approval is to be two (2) years starting from the day the approval takes effect.

Amended Plan

4. The proposed development must be generally in accordance with the Existing Site Plan, prepared by RECS Consulting Engineers & Building Designers, Project No. 31-2013, Sheet 1, Revision A, Undated, as submitted to Council on 22 November 2017 (Council electronic document D#834678) and as amended to accommodate the following:
 - a. Provision of a private yard area:
 - i. Being of a minimum area of 35m²;
 - ii. That is suitably screened to provide to enable private enjoyment of this area by the caretaker's household;
 - iii. That is for the exclusive use by the Caretaker and the Caretaker's Household;
 - iv. That is directly accessible from the residence;
 - v. That has a minimum dimension of 3 metres;
 - vi. That is be suitably landscaped in accordance with the Planning Scheme General 4.6.3 Landscaping Code;
 - vii. The area of the yard does not impact in any loss of remnant vegetation; and
 - viii. The land used as the private yard must be allocated so as to limit any impact on Good Quality Agricultural Land.

- b. The car parking space must be of suitable dimensions for a disabled car parking space with suitable all abilities access between the car parking space and the building;
- c. The indicative location and extent of curtilage for the proposed House, including any onsite waste water treatment area;
- e. A landscape plan to the curtilage for the proposed Caretaker's Residence;
- d. The indicative location and area for the proposed orchard and any ancillary buildings;
- e. The extent of existing vegetation and cleared areas on the land; and
- f. Provide a suitable setback from natural vegetation and provide firebreaks as necessary for any additional buildings nominated under (c) and/or (d) above having regard to the Natural Hazards Overlay Code.

Details of the above amendments must be included in the subsequent application for a Development Permit.

Approved Use

- 5. Prior to the lodgement of an application for a Development Permit, a non-residential use (e.g., cropping) must be lawfully established on the land. (The issue of the approval for a Caretaker's Residence does not entitle the development of a non-residential use on the land. Any application for non-residential use will be considered on its merits as required by the *Planning Act 2016*.)

Continued Us

- 6. The continued use of the Caretaker's Residence must only be in association with a lawfully established and continued use of the land as required by the Planning Scheme definition for Caretaker's Residence, that being a non-residential use of the land.

Advices

- 1. All building site managers must take all action necessary to ensure building materials and / or machinery on construction sites are secured immediately following the first cyclone watch and that relevant emergency telephone contacts are provided to Council officers, prior to commencement of works.
- 2. This approval does not negate the requirement for compliance with all other relevant Local Laws and other statutory requirements.
- 3. For information relating to the *Planning Act 2016* log on to www.dilgp.qld.gov.au. To access the *FNQROC Development Manual*, Local Laws and other applicable Policies, log on to www.douglas.qld.gov.au.

4. Council takes no responsibility or liability for the Commonwealth Government's taxation implication on the use of land for non-residential purposes. Council recommends land owners seek legal advice regarding this issue.

Advice Statement for Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).

You are advised that the EPBC Act applies to action that has, will have, or is likely to have, a significant impact on matters of national environmental significance.

Further information on the EPBC Act can be obtained from the Department of the Environment's website www.environment.gov.au/epbc EPBC Act Policy Statement 1.1 *Significant Impact Guidelines Matters of National Environmental Significance* (Oct 2009).

LAND USE DEFINITIONS*

In accordance with the *Douglas Shire Planning Scheme 2006*, the approved land use of Caretakers' Residence is defined as follows.

Means the use of premises comprising one Dwelling Unit for the use by a caretaker or manager, including their Household, who is employed for care taking or management purposes in connection with a commercial, industrial, recreational or other non-residential use conducted on the premises.

The use does not include:

- a manager's unit located within Multi-Unit Housing; Holiday Accommodation; or Short term Accommodation.

*This definition is provided for convenience only. This Development Permit is limited to the specifications, facts and circumstances as set out in the application submitted to Council and is subject to the abovementioned conditions of approval and the requirements of Council's Planning Scheme and the FNQROC Development Manual.

C. Further Development Permits

The following Development Permits are required to be obtained before the development can be carried out:

- a. Development Permit for the Caretaker's Residence; and
- b. Development Permit for Building Work for the carport.

D. Properly made submissions

None, no part of the application required public notification.

E. Referral agencies for the application

None, no part of the application required a referral.

F. Currency period for the approval

Under section 85(1)(a)(i) of the *Planning Act 2016*, the relevant period for the Preliminary Approval is to be two (2) years starting from the day the approval takes effect.

G. Reasons for Decision

The reasons for this decision are:

1. **Section 60 of the *Planning Act 2016*:**
 - a. **Conditions and advices as per B Above; and**
 - b. **to ensure the development satisfies the following benchmarks of the 2006 Douglas Shire Planning Scheme (as amended);**
 - c. **to ensure compliance with the *Planning Act 2016* and the 2018 Douglas Shire Planning Scheme for non-residential use of the land.**
2. **Findings on material questions of fact:**
 - a. **the development application was properly lodged to the Douglas Shire Council on 24 November 2017 under section 51 of the *Planning Act 2016* and Part 1 of the Development Assessment Rules; and**
 - b. **The development application contained a report, a response to Council's request for information and further advice from the applicant which Council reviewed together with Council's own investigation in making its assessment manager decision.**
3. **Evidence or other material on which findings were based:**
 - a. **the development triggered assessable development under the Assessment Table associated with the Rural Areas and Rural Settlements Locality, 2006 Douglas Shire Planning Scheme (as amended);**
 - b. **Council undertook an assessment in accordance with the provisions of section 60 of the *Planning Act 2016*; and**
 - c. **the applicant's reasons have been considered and the following findings are made:**
 - i. **The Planning Scheme definition requires a caretaker's residence to care take or manage a non-residential use. No non-residential use has as yet been established. Non-residential uses are not supported under the 2018 Douglas Shire Council Planning Scheme that came into effect on 2 January 2018;**
 - ii. **The application is relies on an orchard being established and will be limited by the intended future residence. The applicant has advised that no details are as yet available for these other uses on the land. The applicant has suggested the caretaker's**

residence could be operated in conjunction with a non-residential use of the land;

- iii. No application has been made nor has any lawful approval been issued for: the proposed orchard; or for any alternative non-residential use, on which the caretaker / manager is to be responsible; nor for a use for a House;**
- iv. The use of the land for a non-residential purpose and/or for House will constrain the use of the available developable land; and**
- v. The issue of a Preliminary Approval conditions the development to being associated with a lawfully established non-residential use and ensures the Caretaker's Residence is afforded appropriate amenity and privacy.**

EXECUTIVE SUMMARY – REASONS FOR DECISION

The developable area of the land is relatively small in size has been developed for the purpose of a House. An application has been made to change the existing House on the premises to a Caretaker's Residence. The Planning Scheme requires that caretaking be for a non-residential use. To date, no non-residential use has been established on the land. No application has been lodged for a House or non-residential use under the current scheme nor for an accepted use under the superseded 2006 Planning Scheme. To address these concerns the report recommends a Preliminary Approval be issued and this be limited for two years having regard to the recent change giving effect of the 2018 Planning Scheme.

TOWN PLANNING CONSIDERATIONS

Background

The land fronts the Captain Cook Highway to the south, abuts a creek to the east, and part of the northern boundary abuts the Esplanade. Approximately half of the land has remnant vegetation, the majority of which lies adjacent to the Esplanade and the creek. The land was created in 1987 under a subdivision approval that separated the land from the balance land, sited west of the Captain Cook Highway. The balance land of the original lot was later reconfigured into rural residential lots.

The application was lodged in 2017 under the 2006 Douglas Shire Planning Scheme. Under the Planning Scheme a minor perennial creek is mapped at the south eastern edge of the property.

The State Government mapping identifies part of the remnant vegetation as *Category A and B of Concern Regional Ecosystem* and a small area of vegetation is mapped as *Category A and B Endangered Regional Ecosystem*. The property is also mapped as *Coastal Land* and

is within a wider *High Risk Area for Protected Plants Flora Survey*. The whole of the land is mapped in the *Class A and B Agricultural Land*.

In 1988, a house was developed on the land under a Building Approval that was issued by the former Douglas Shire Council. At the time when the building application was lodged, the land was unused and undeveloped. A further Building Approval was issued in 2003 to construct a minor addition to the house. During this period of construction a house was a self-assessable land use development. A shed was constructed in November 2013 under a Building Approval issued by a private certifier. The shed lies to the west of the house with the infill area utilised as an unapproved, covered carport structure.

The house has been developed adjacent to the north western boundary, on the cleared, level area. Beyond the cleared area, to the north and east, the land falls away to the Esplanade and to the Creek. These low lying areas are impacted by storm tide inundation and are mapped by the State as in the erosion prone area.

The adjacent Captain Cook Highway is a State-declared road that carries a significant volume of traffic. The house is in the area of *Category 1:58 dB(A) =< Noise Level < 63 dB(A)* noise impact area. The house is currently buffered from Highway impacts by landscaped mounds that have been developed on the land, parallel to the Highway. These mounds were created from excavating part of the land, either side of the entrance driveway creating two ponds, and also from an excavation area towards the rear of the cleared area.

The physical and constructed features developed on the land together with the vegetation are visible on the aerial photograph (taken in 2017) in the Locality Plan in Figure 1. The “star” on this Plan depicts the location of the excavated area. The extent of cleared and excavated area is approximately 40% (1.94 hectares cleared area and the total land area is 4.843 hectares).

Proposal

At the time the application was lodged the land was owned by three persons. These three persons lodged the application and are referred to as “the applicant.”

The report accompanying the application advises, *“it is proposed to develop the site for the purpose of an orchard and undertake a material change of use of the existing dwelling to caretaker’s residence. A concurrent application is to be made to a building certifier for the development of a dwelling house on the site as accepted development.”*

The caretaker’s residence will have a gross floor area of 116m² and will be accompanied by the single carport. The applicant has advised the caretaker will be able to access the entire land. No specific yard area will be allocated to the caretaker’s residence. However if necessary, the applicants are agreeable to a condition requiring a private yard.

The layout plan of the caretaker’s residence and the land, as provided by the applicants, is included in Attachment 1.

The applicant asserts that as the caretaker’s residence will convert an existing House, there is no resulting loss of good quality agricultural land (GQAL). No vegetation clearing is associated with the material change of use.

Further details were requested from the applicants regarding the location and layout of the proposed future house and further details of the proposed orchard, such as plant species, configuration of the orchard and any associated, ancillary equipment sheds. The applicants advised,

“The orchard would be established on the cleared parts of the site and the caretaker would be instrumental in determining the extent of the orchard or any associated sheds that may be required. Consequently, at this stage it is not possible to provide a definitive answer to the question to the extent of orchard or any ancillary primary production sheds.

Notwithstanding the above, the extent of orchard or type of species is not considered relevant to the assessment of the application and is not identified in an assessment benchmark.

Insofar as the use must be a genuine caretaker’s residence in accordance with the relevant definition, it is noted that, as per the finding of the Court in L & RL Gandini v Council of the Shire of Cardwell BC9202657, ..., the caretaker’s residence need not be occupied or used for those purposes for a commercially viable activity; furthermore the caretaker need not be fully employed on the site.

In this instance ... the caretaker’s residence would be associated with a planned orchard on the site and that the caretaker would be instrumental in establishing and ongoing maintenance and management of that orchard.”

In response to a request for business and management plans for the orchard development including the expected date of orchard establishment and the anticipated number of years to a commercial return for the orchard the applicants advised as follows,

“This is not considered to be a matter that falls within the applicable assessment benchmarks contained within the planning scheme.

Notwithstanding, as the caretaker would be instrumental in establishing the orchard and the business plan it is not possible to provide this information at this time.”

In respect to the activities the caretaker would be responsible for, the Applicants advised,

“The caretaker would be responsible for caretaking the premises and undertaking the duties normally expected of a caretaker, including keeping an eye on the property and doing odd work around it as required.”

A copy of the quoted court case was provided to Council. This case relates to an application lodged in another Local Government area, under a different planning scheme (with a differently defined use) and was heard in the Planning and Environment Court before His Honour Judge Row in 1993 under the *Local Government (Planning and Environment) Act 1990*.

Through correspondence the applicant has acknowledged Council officer concerns for the establishment of the use without an identified non-residential use and suggested the approval could be,

“... conditioned to require the continued operation, including establishment, of a non-residential use on the site at all times that the Caretakers residence is in use. This could be conditioned as follows.

1. *The caretaker’s residence shall only be established in association with a continued non-residential use on the site. Such non-residential use shall be established and maintained on the site within 2 years of the date of this approval.*
2. *In the event that the non-residential use is not established or ceases operation on the site, the caretakers residence shall revert to a dwelling house, or, in the event that a dwelling house has already been established on the site, shall have such fixtures and fittings removed to render the caretakers residence it non-self contained.”*

Relevant Matters

Assessment Provisions

The 2006 Douglas Shire Planning Scheme (as amended) defines the use of a *caretaker’s residence* as follows.

Means the use of premises comprising one Dwelling Unit for the use by a caretaker or manager, including their Household, who is employed for care taking or management purposes in connection with a commercial industrial, recreational or other non-residential use conducted on the premises.

The use does not include:

- 2 • *a manager’s unit located within Multi-Unit Housing; Holiday Accommodation; or Short term Accommodation.*

In the Rural Planning Area, the use of a Caretaker’s Residence is code assessable development.

There is currently no non-residential use conducted on the land and no orchard has been developed.

Council has not received any notification of a private building certifier engagement for the development of a further house on the land. Such application could not be made without a planning approval in place for a caretaker’s residence as the development would constitute a dual occupancy.

Under the 2006 Planning Scheme the land is in the Rural Planning Area. Under the 2018 Planning Scheme the land is in the Environmental Management Zone where the use of a House is code assessable development. Unlike the 2006 scheme, the current scheme identifies the uses of a caretaker’s accommodation and cropping (such as a commercial orchard) as impact assessable (inconsistent) development. For a period of one year applicants can request an application is only assessed against the superseded planning scheme. To date, no application such request has been lodged for this land.

During the course of the assessment the land has been under contract for sale and then sold. Council was formally advised on the 18 January 2018, by the lodgement of a Form 21, that

the land ownership has changed. To date no request has been received to change the application, such as a change to “the applicant.”

State Planning Benchmarks Applying To This Development

While the land is in the Coastal Management District the development of a caretaker’s residence does not trigger a referral in respect to the Coastal Management Act. In a similar manner the domestic nature of the development of a caretaker’s residence does not trigger a referral under the Vegetation Management Act.

2006 Douglas Shire Council Planning Scheme (as Amended) Benchmarks

Table 1.

Benchmark Description	Benchmark Reference	Compliance
Rural Settlement and Rural Areas Locality Code	A1.1 Maximum height of buildings is 6.5m.	Complies.
	A2.1 Development has appropriate water supply, onsite sewerage facilities and power supply.	Complies
	A3.1 Landscaping utilises predominantly native species.	Complies through conditions.
	A4.1 Roads and driveways are FNQROC compliant.	Satisfactory.
	P11 No Acceptable Solution. Development does not adversely impact on environmental areas.	Complies through conditions.
Rural Planning Area Code	A2.1 Agricultural land is used for agricultural uses. P1. GQAL is only used for agricultural uses and primary production purposes.	Does not meet Acceptable Solution. Refer to comment below.
	A4.1 Buildings are setback 40m from a State-controlled road.	Complies.
	A6.1 White and shining metallic finishes are avoided.	Complies.
	P7. No Acceptable Solution Native vegetation is protected.	Complies through conditions.

Benchmark Description	Benchmark Reference	Compliance
Natural Hazards Overlay Code	A2.1 Uses involving existing buildings with GFA greater than 50m ² has a reliable water supply at a suitable flow rate or an accessible onsite water storage facility.	The land has two dams that provide sufficient storage for fire fighting purposes as required under the acceptable solution.
	A2.2 Considerations for fire breaks where multiple buildings are proposed.	No detail of multiple buildings provided. Complies through conditions.
	A3.1 Development to comply with a Bushfire Management Plan. P3 Public safety and the environment are not adversely affected by the detrimental impacts of bushfire on hazardous materials manufactured or stored in bulk.	No bushfire management plan has been provided. The application has not nominated any hazardous materials to be manufactured or stored in bulk on the land.
Caretaker's Residence Land Use Code	A1.1 Limit of one caretaker's residence per property that is the same lot as the primary use.	As yet no primary use or non-residential use has been established on the land.
	A1.2 Caretaker's residence is occupied by the proprietor, manager or caretaker of the primary use established on the site, together with an immediate family of that person.	As yet no primary use has been established.
	P1 Limited to one caretaker's residence in association with a legitimate caretaking or property management purpose operating on the Site.	No non-residential use has been established on the land. Concern is raised with the legitimacy of the caretaking or management. Refer to comment below.
	A2.1 Maximum gross floor area for the Caretaker's Residence is 120m ² .	Complies.
	A2.2 Minimum private area of 35m ² with minimum dimensions of 3m.	Complies through conditions.

Benchmark Description	Benchmark Reference	Compliance
	A2.3 Private area is screened or fenced.	Complies through conditions.
	A2.4 Caretaker's residence is accompanied by appropriate facilities, storage and a covered and car parking area.	Complies through conditions.
Landscaping General Code	Landscape design required for land uses other than a House	The applicant contends the caretaker's residence is an existing House and no new landscaping is proposed. A condition of the approval requires the private yard be landscaped together with the front of the Caretaker's residence. This condition is considered a satisfactory compliance with the Code.
Natural Areas and Scenic Amenity General Code	A1.1 Development is constructed within the Designated Development Area (DDA).	No additional buildings are proposed. Conditions of the approval require the private yard to be sited to have least impact on remnant vegetation and this will satisfactorily achieve the Code Purpose.
Vehicle Parking and Access Code	A1.1 Provide one car parking space.	Complies.
	A2.1 Minimum of one disabled driver car space.	Complies through conditions.
	A6.1 Limited to one access point to the site.	Complies.
	A9.1 Driveway is to Australian Standard.	Satisfactory.
	A10.1 Suitable driveway surface.	Satisfactory
	A11.1 Suitable disabled person access.	Complies through conditions
	A12. Provision of safe pedestrian access from parking area.	Complies through condition.
	A14.1 Car parking spaces are suitably dimensioned.	Complies through conditions.

Benchmark Description	Benchmark Reference	Compliance
	A15.1 Driveway is suitably graded, drained and minimises dust and run-off.	Satisfactory.
	A15.2 Parking areas are kept and used exclusively for parking.	Can be conditioned under a future Development Permit.

Non-Compliance with Benchmarks

Table 2.

Benchmark reference	Reasons for the approval or approval subject to conditions despite non-compliance with any of the benchmark.
Rural Planning Area Code: A2.1, P1.	
Caretaker's Residence Land Use Code: A1.1, A1.2 & P1	<p>No primary production has as yet been established on the land.</p> <p>Under the current 2018 Planning Scheme a cropping use is not supported and to establish a use an application would need to be made and approved for consideration under the superseded Planning Scheme (2006 Scheme as amended).</p> <p>Concern remains to the legitimacy of the Caretaker's Residence.</p> <p>Concern also remains about aspects of the application, such as the intended future residence, for which no further details have been provided at this time, but may significantly reduce and impact on GQAL to result in an inability to establish a suitable non-residential use on the land, being an orchard, as stated by the applicants.</p> <p>The development is code assessable and can be conditioned through a Preliminary Approval to meet the Planning Scheme's benchmarks and satisfactorily address the timing of the use dependant on the lawful development of a non-residential use.</p>

ADOPTED INFRASTRUCTURE CHARGES

The proposed development does not trigger Adopted Infrastructure Charges.

COUNCIL'S ROLE

Council can play a number of different roles in certain circumstances and it is important to be clear about which role is appropriate for a specific purpose or circumstance. The implementation of actions will be a collective effort and Council's involvement will vary from information only through to full responsibility for delivery.

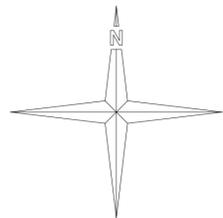
The following area outlines where Council has a clear responsibility to act:

Regulator: Meeting the responsibilities associated with regulating activities through legislation or local law.

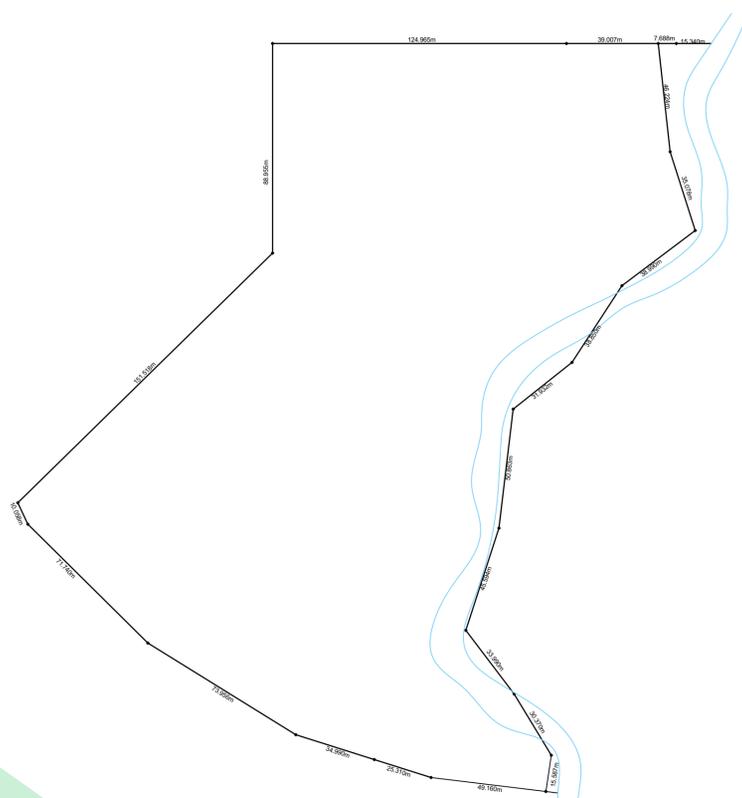
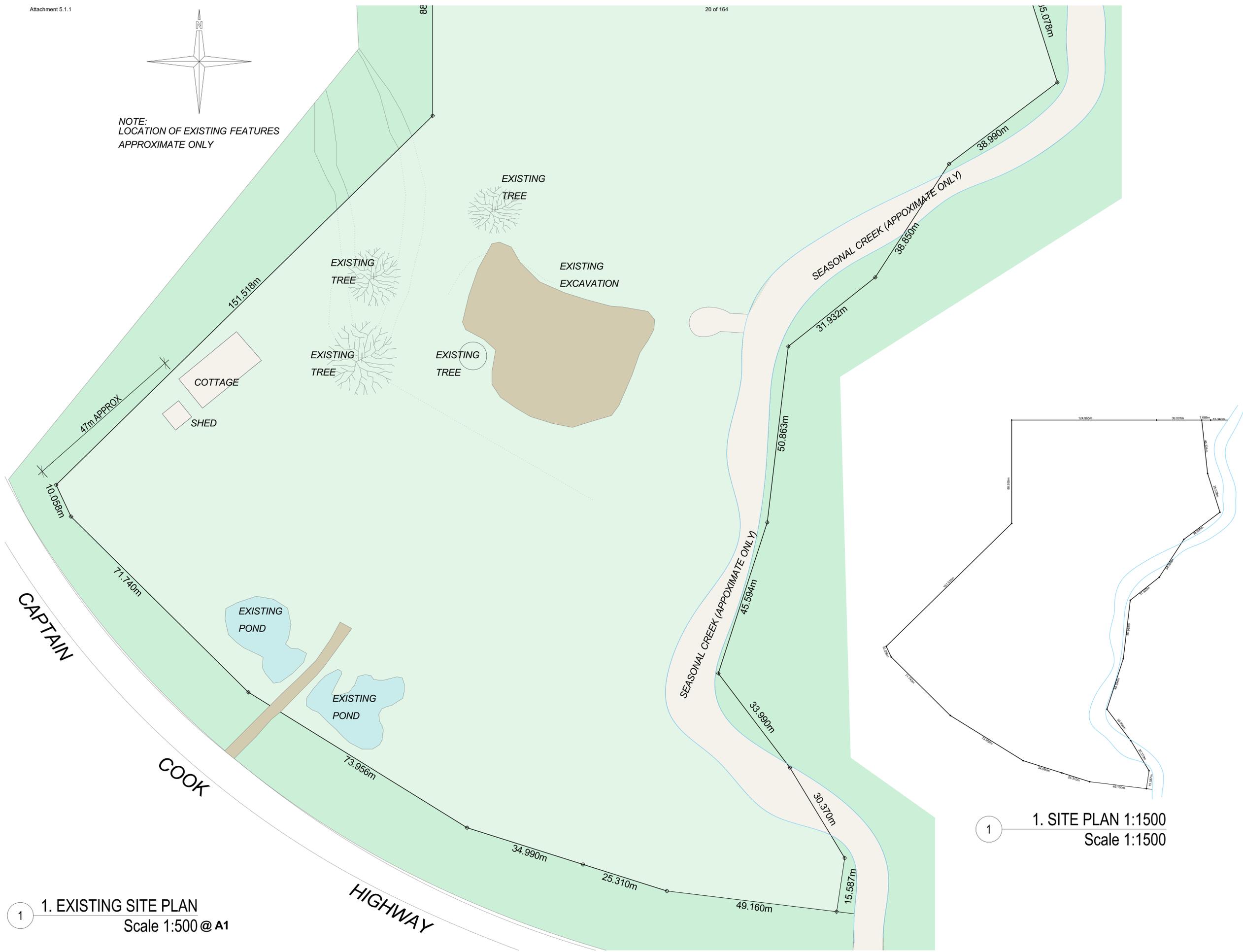
Under the *Sustainable Planning Act 2009* and the *Sustainable Planning Regulation 2009*, Council is the assessment manager for the application.

ATTACHMENTS

1. Attachment 1 Proposed Plans 4990 Capt. Cook Hwy **[5.1.1]**

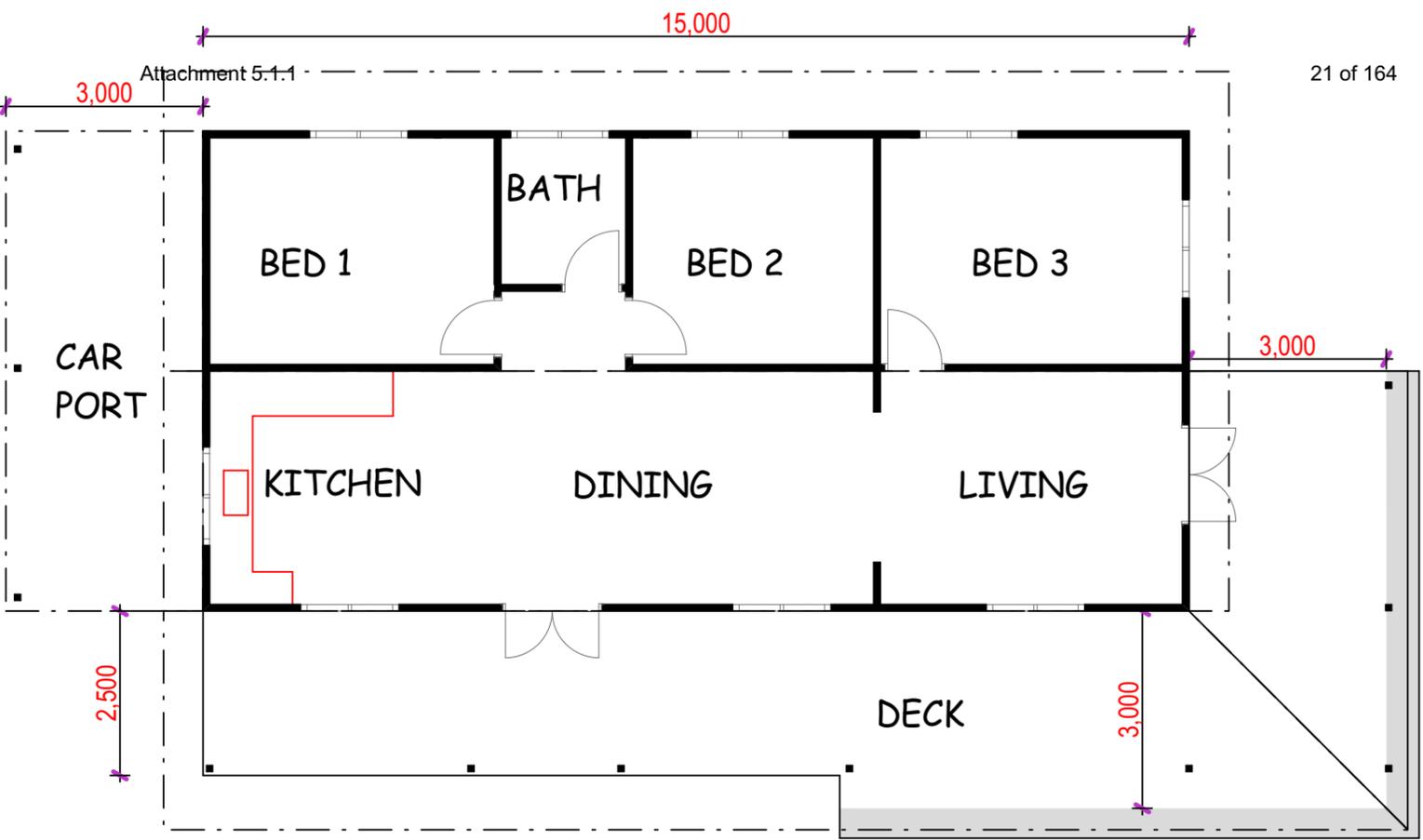


NOTE:
LOCATION OF EXISTING FEATURES
APPROXIMATE ONLY



1. EXISTING SITE PLAN
Scale 1:500 @ A1

1. SITE PLAN 1:1500
Scale 1:1500

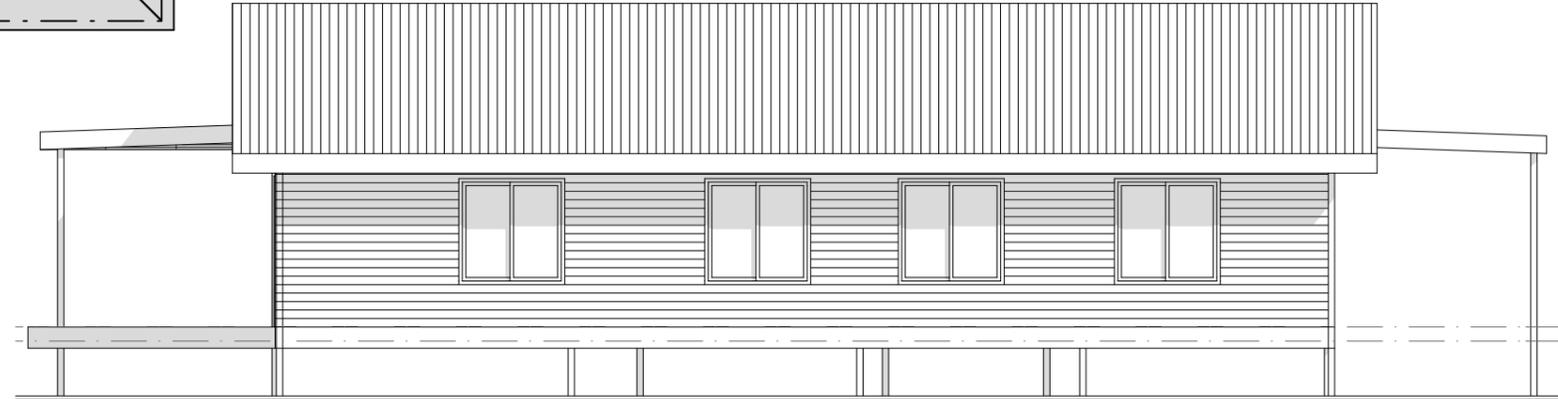


INTERNAL AREA 109sqm
 SHADED DECK AREA 7sqm
 GROSS FLOOR AREA 116 sqm

1 GROUND FLOOR PLAN
 1:100



5 EAST ELEVATION
 1:100



4 NORTH ELEVATION
 1:100



2 SOUTH ELEVATION
 1:100



3 WEST ELEVATION
 1:100