

# 5.6 T220009 PA - Two lot subdivision - 4 Hamilton Road Emerald

Responsible GM:Lili RosicAuthor:Ben McGeehan

## **Recommendation(s)**

That Council issue a Notice of Refusal to Grant a Permit for Two (2) lot subdivision (boundary re-alignment) generally in accordance with the endorsed plans, on the following grounds:

- 1. The proposed subdivision is inconsistent with the intent of the Section 173 Agreement registered on the title to the land.
- 2. The layout of the subdivision results in a subdivision pattern which is inconsistent with the purpose of the zone.
- 3. The lot areas are inappropriate when taking into account the minimum lot areas stipulated within the schedule to the zone.

# **Attachments**

- 1. T220009 PA Locality Map [5.6.1 1 page]
- 2. T220009 PA Officer Report [5.6.2 10 pages]
- 3. T220009 PA Proposed Plan of Subdivision [5.6.3 1 page]

APPLICATION NO.:	T220009
APPLICANT:	Mr Ross Nicolaci
LAND:	L1 PS408220 V10382 F436, L2 PS740739 V11897 F858 14 Hamilton Road, Emerald VIC 3782
PROPOSAL:	Two (2) lot subdivision (boundary re-alignment)
PLANNING CONTROLS:	RCZ2 - Rural Conservation Zone Schedule 2 BMO - Bushfire Management Overlay ESO1 - Environmental Significance Overlay Schedule 1 SLO1 - Significant Landscape Overlay Schedule 1
NOTIFICATION & OBJECTIONS:	No public notice, no objections
KEY PLANNING CONSIDERATIONS:	Response to policy with the zone Inconsistent with neighbourhood character

## **Executive Summary**



	Inconsistency with s173 Agreement registered on title
REASON FOR MEETING	Recommendation for Refusal
RECOMMENDATION:	Notice of Refusal to Grant a Permit

# **Executive Summary**

The purpose of this report is to consider an application for a two lot subdivision (boundary realignment) at L1 PS408220 V10382 F436 and L2 PS740739 V11897 F858, 14 Hamilton Road, Emerald VIC 3782.

The application was intitially submitted to Council on 7 January 2022. The relevant statutory fee was paid on 11 January 2022. A preliminary assessment was undertaken and request for further information was sent to the applicant on 4 February 2022. The applicant was advised that the proposal contravenes Section 6 of the Section 173 Agreement registered on the title to the land and accordingly officers were likely to recommend refusal of the application.

During March and April of 2022 the applicant provided various details pertaining to the Section 173 Agreement and legal advice as to why this did not preclude officers (legally) supporting the proposal.

On 22 February 2023 the permit applicant formally amended the proposal pursuant to Section 50 of the Planning Environment Act 1987 to rectify a conflict between the proposed subdivision line and an existing habitable outbuilding on the lot.

On 7 March 2023 the application was referred to the Country Fire Authority (CFA) as statutory authority pursuant to Section 55 of the Planning and Environment Act 1987. The CFA responded with no objection on 17 April 2023.

It is policy to support efficient and effective use and development of land in the State of Victoria, including ensuring that lots have adequate dimensions to facilitate the type and scale of development contemplated by the zones, overlays and policies which apply to the land. The zone which applies, Rural Conservation, contemplates low density development, where land management and low-intensity occupancy is the prime consideration. To facilitate this outcome, the schedule to the zone sets out a minimum lot size of 15ha. The subject lots have an area of 0.6ha and 0.15ha respectively; both well below the current minimums.

In this circumstance, the 'smaller' lot was the result of road closure / privatisation of excess public land. Its current size precludes any practical future use and development, which was the reason why during the disposal of the land (by Council to the current owner), a requirement was included within the terms of the sale to consolidate the small lot with the larger lot.

This requirement to consolidate the lots was to ensure that the smaller lot, which is undevelopable, could contribute to the purpose of the RCZ by forming part of the larger lot.

The proposal to realign to create two small lots (when considered against the zoning requirements which seek 15ha lots) is not considered to be consistent with State policy.

Policy at clause 21.07, Local Areas – Hills Region, seeks to respond to changing demographics whilst managing the high quality environmental constraints. When considered hand-in-hand with the complementary policy within the zone, setting out lot size expectations, the proposal to create smaller lots, and introduce additional occupancy opportunities, is considered inconsistent with relevant local policy which seeks to balance residential opportunities with sensitivities such as environmental outcomes set out within other overlays, and lot size provisions within relevant zones.



The purpose of the RCZ is, inter alia, to protect the natural environment features and provide for agricultural outcomes. It is noted the lots in question are each less than 1ha.

Clause 35.06-3 requires that each lot be greater than 15ha (as per Schedule 2) however an exemption applies provided the proposal is for a subdivision which does not increase the number of lots and the number of dwellings that the land could be used for (which this proposal satisfies). Whilst this exemption permits Council to consider the proposal (ie: it is not prohibited) it does not require Council to support the proposal. The existence of a smaller-than normal lot does not necessarily mean that further impacts and compromises should be allowed to proliferate.

The proposed outcome is considered to be inconsistent with the purposes of the zone, and is directly inconsistent with the intent of the s173 which formed part of Council's decision making when selling the land to the owner.

The smaller lot was formed by a road closure, and sold to the land owner on the basis that it would, within 6 months of the issue of the title, be consolidated into the larger lot. This was in consideration of the zoning and local policy in place at the time (which has not fundamentally changed).

The proposed two (2) lot subdivision (boundary re-alignment) will inappropriately decrease the size of the larger (eastern) lot and introduce a development opportunity on the smaller (western) lot, both are outcomes which are generally inconsistent with the policy settings for the land.

Whilst the proposal is not prohibited, it is counter to State and Local policy, which seeks to decrease the intensity of development on land zoned for Rural Conservation.

The proposal is also directly in contravention of a requirement set out within the registered s173 Agreement, which required the smaller lot to be consolidated with the larger lot. Again, whilst this does not prohibit a decision to support the subdivision, it clearly weighs heavily against approval.

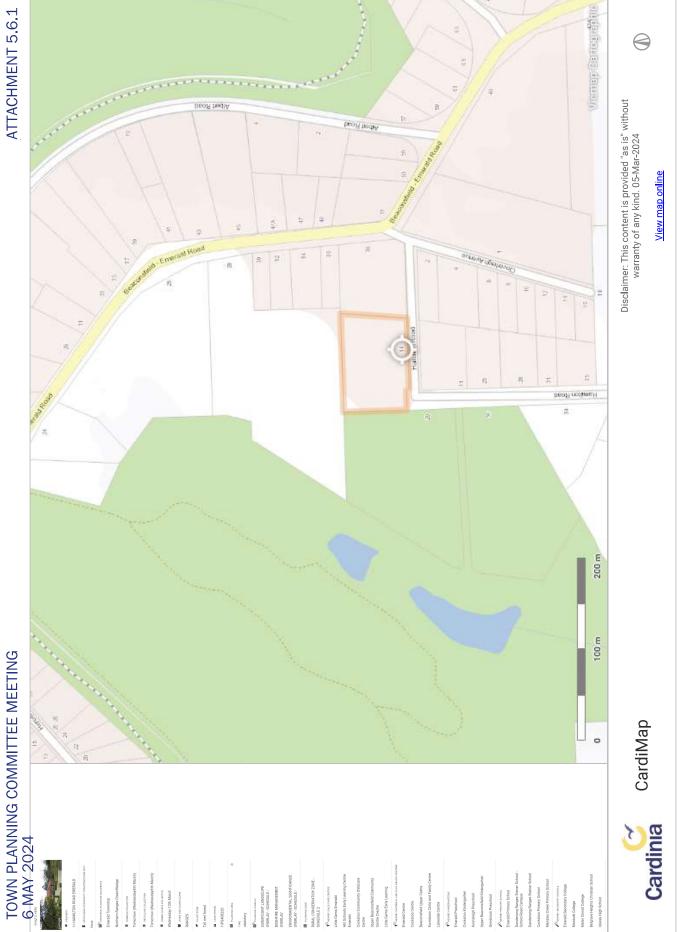
In light of strong policy against, and the content of the s173 Agreement, the proposal should not be supported.

# **Relevance to Council Plan**

#### 5.1 We practise responsible leadership

5.1.1 Build trust through meaningful community engagement and transparent decisionmaking.





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# TOWN PLANNING COMMITTEE MEETING 6 MAY 2024 APPLICATION FOR CONSIDERATION OFFICER REPORT



Application Details:			
Proposal	Two (2) lot subdivision (boundary re-alignment)		
Applicant	Mr Ross Nicolaci		
Date Received:	07 January 2022		
Statutory Days:	434 @ 6 May 2024		
Section 50/50A/57A Amendment	□ None ⊠ Yes, date: s50 on 27 February 2023 to alter the boundary to ensure the new boundary between the lots did not dissect the existing habitable outbuilding on the lot.		
Application Number	T220009		
Planner	Ben McGeehan		
Land/Address	L1 PS408220 V10382 F436 and L2 PS740739 V11897 F858 14 Hamilton Road, Emerald VIC 3782		
Property No.	2359100050		
Zoning	RCZ2 - Rural Conservation Zone Schedule 2		
Overlay/s	BMO - Bushfire Management Overlay ESO1 - Environmental Significance Overlay Schedule 1 SLO1 - Significant Landscape Overlay Schedule 1		
Permit Trigger(s)	Clause 35.06-3 subdivide land in the RCZ Clause 44.06-2 subdivide land in the BMO Clause 42.01-2 subdivide land in the ESO		
Aboriginal Cultural	No 🗆 Yes; a CHMP is:		
Sensitivity		Not required	
Section 55 Referrals	□ None	☑ Yes, list below:	I
	Country Fire Authority		
Registered restrictions on Title	□ None	<ul> <li>Yes,list below:</li> <li>\$173 AC971492S on L2 PS740739</li> <li>The agreement was entered into between the land owner and Council as part of the closure of a road (which L2 PS740739 is) and sale of the land to the adjoining land owner.</li> <li>The Agreement provides for the following obligation at point 6:</li> </ul>	

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	6. COVENANTS OF OWNER	
	The Owner covenants to procure registration of a plan which consolidates the title to the subject land with the title to the Owner's Land within six months from the date of this Agreement, or any later date to which Cardinia has agreed in writing.	
	The two lots in question have NOT been consolidated.	
	The applicant's land surveyor provided the following background information in support of the position that the s173 noted above does not have force or effect, or obligation:	
	Since our recent correspondence to Council on the abovementioned application I have received a copy of the attached correspondence (Maddocks – March 2017) from our client.	
	That letter clarifies matters as to the delay between the registration of the Sec 173 agreement and the transfer to Mr Nicolaci of the land contained within lot 2/PS740739N in 2017.	e
	The attached email correspondence indicates that there had been an error in the land originally transferred to R & CS Nicolaci (Inst AC971312X – 9th July 2004) and this land was encumbered by the Sec 173 agreement (AC971492S – 9th July 2004). As best as we can determine at this time the land transferred was CA 2003 being part of a closed Government Road (refer OP121765 attached) with dimensions of approx. 52.7m by 20.8m. The land in this transfer is described as Vol 10799-Fol634 which is the same land described and affected by the Sec173 agreement.	f
	The email correspondence from Maddocks (March 2017-attached) indicates not all the land was originally transferred and steps were undertaken to rectify this matter by undertaking a further subdivision ("not in common ownership").	
	Plan of subdivision PS 740739N was registered on 10th July 2017 creating Lot 2 (approx. 72.2m by 20.8m which issued as Vol 11897 – Fol 585 to Mr R Nicolaci. Certificate of Title Vol 10799-Fol634 was on of the parcels included in this "not in common ownership plan of subdivision".	
	Certificate of Title Vol11897-Fol585 (Lot 2/PS740739N) which issued from this plan of subdivision is "partly" affected by the aforementione Section 173 agreement.	
	It is apparent the additional land included within Lot 2 / PS 740739N (over and beyond the land contained in the original CA2003) is not affected by the section 173 agreement and Mr Nicolaci is under no obligation to consolidate that land.	
	As the land affected by the agreement does not exist as a separately transferable parcel it would appear the agreement as it stands cannot be enacted without encumbering land not affected by the agreement.	t.
	Council disagrees with the above advice in that the Section 173 Agreement is still enforceable although it does not include the entire portion of the land.	
	The presence of a s173 Agreement does not preclude Council issuing a permit (as opposed to the impact of a Covenant, which generally mandates a refusal based on legislation expressly set out in the <i>Planning and</i> <i>Environment Act 1987</i> ).	
	A refusal is recommended on the basis of policy, not strictly due to a legal requirement.	'
Recommendation	Permit	

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	⊠ Refusal	
Documents relied on	<ul><li>Plan of Subdivision prepared by Bortoli Wellington Pty Ltd</li><li>Title Documents</li></ul>	
Plans to be endorsed?		
	☑ No, refusal recommended	

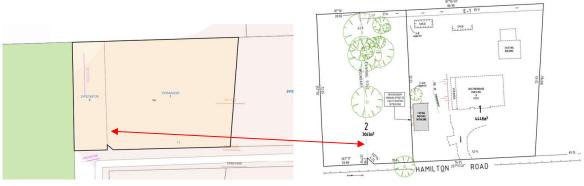
#### Proposal

The application proposes a two lot subdivision (boundary realignment, but the quantum is greater than that allowed under the provisions to be exempt from needing a planning permit and is therefore a subdivision).

The land is currently made up of two lots, as depicted in the extract from the State Government Land and Spatial Services Information (LASSI) database. L1 PS408220 has an area of 6,003m2 and L2 PS740739 has an area of 1,506m2.

As noted earlier in this report, the land should currently be consolidated, representing a single lot with an area of 7,509m2, as required by the s173 agreement attached to the title to the land when the road discontinuance took place and the 'road' was sold to the current land owner. The current land owner has not consolidated, as required, and is in breach of the s173 agreement on the title to the land.

The proposed subdivision will essentially increase the size of L2 PS740739 to 3,063m2 and decrease the area of L1 PS408220 to 4,448m2, as depicted in the extract of the proposed plan of subdivision provided below.



Extract from LASSI showing existing title boundaries

Proposed plan of subdivision

It is noted that the plan of subdivision was amended (pursuant to s50) during the processing of the application to cater for the existing habitable outbuilding to the south-west of the dwelling on L1 PS408220. The originally lodged plan dissected the outbuilding, and unfortunately such an outcome would create a 'chicken and egg' scenario; the subdivision could not occur first, dissecting the outbuilding before it was to be moved to the western lot, but equally a permit is required to place the outbuilding on the western lot which could not occur until the lots were registered. The boundary was moved slightly west to ensure the habitable outbuilding is unaffected, and should it be relocated to the western lot in the future, a permit can be sought, considered and determined, on the basis of registered lots at that time.

### Subject site & locality



Aerial image of subject site (GIS, 27 December 2023)

A virtual inspection of the site and the surrounding area has been undertaken using Council's electronic records and information provided to Council by the permit applicant.

The site is located on the north side of Hamilton Road, approximately 90m west of the intersection with Beaconsfield-Emerald Road.

A crossover is located just east of the middle of the frontage, providing access to an existing dwelling and habitable outbuilding. There is an easement (E-1) in favour of drainage running along the northern boundary.

The site currently contains an existing detached, single storey dwelling (with attic), habitable outbuilding and a number of non-habitable outbuildings. The habitable outbuilding was constructed generally in accordance with planning permit T200533 issued 31 May 2021 (plans were endorsed 19 August 2021). An extract of the endorsed plans is provided below.



There is no significant vegetation which would be impacted by the proposed subdivision.

The topography of the land moderately slopes downhill to the west, with a fall of 16m over 108m (1 in 6.75 or 14.8%).

The main characteristics of the surrounding area are:

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- To the north, rural residential properties containing dwelling which front Beaconsfield-Emerald Road.
- To the east, rural residential property containing a dwelling and outbuilding with access from Beaconsfield-Emerald Road.
- To the south, Hamilton Road and beyond low density residential lots with areas between 1000 and 3000m2.
- To the west, vacant land zoned RCZ, beyond which is land zoned PPRZ (Pepi's Reserve).



Aerial image of surrounding area (GIS, 27 December 2023)

# Permit/Site History

The history of the site includes:

• Planning permit T200533 was issued on 31 May 2021 allowing the development of a habitable outbuilding on the land. Details of this were provided earlier in this report.

## **Planning Scheme Provisions**

#### Zone

The land is subject to the following zones:

RCZ2 - Rural Conservation Zone - Schedule 2

#### Overlays

The land is subject to the following overlays:

- BMO Bushfire Management Overlay
- ES01 Environmental Significance Overlay Schedule 1
- SLO1 Significant Landscape Overlay Schedule 1

#### Planning Policy Framework (PPF)

The relevant clauses of the PPF are:

11.01 Victoria

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- 11.03 Planning for places
- 13.02 Bushfire
- 13.07 Amenity, human health and safety
- 15.01 Built environment

#### Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF are:

- 21.02 Environment
- 21.07 Local areas Hills Region
- 21.07-3 Emerald, Avonsleigh & Clematis

#### Relevant Particular/General Provisions and relevant incorporated or reference documents

The relevant provisions/ documents are:

- 53.01 Public open space contribution
- 65 Decision guidelines
- 66.01 Subdivision referrals

# Planning Permit Triggers

The proposal requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 35.06-3 of the Rural Conservation Zone (RCZ) a planning permit is required to subdivide land. The extent of the boundary realignment means the proposal is not exempt under relevant clauses.
- Pursuant to Clause 44.06-2 of the Bushfire Management Overlay (BMO) a planning permit is required to subdivide land.
- Pursuant to Clause 44.01-2 of the Environmental Significance Overlay (ESO) a planning permit is required to subdivide land.

There are no buildings and/or work proposed.

## **Public Notification**

Pursuant to Section 52 of the *Planning and Environment Act 1987*, the proposal was not advertised as it was considered that it would not result in material detriment to any person for the following reasons:

- The number of lots will not increase.
- A planning permit is required for a dwelling on the proposed lot at which time public notice of buildings and works and a use would take place.
- There are no buildings or works proposed.
- There is no new access proposed.

#### Referrals

External Referrals/Notices:

Referrals/ Notice	Referral Authority	Brief summary of response
Section 55 Referrals	Country Fire Authority [Recommending]	No objection, no conditions. CFA further acknowledges and supports the decision to waive the application requirements of Clause 44.06-3 as it is satisfied that future development of Lot 2 (western lot) can comply with Clause 53.02, and as a permit is required, matters can be adequately addressed at that time.
Section 52 Notices	None	N/A

Pursuant to clause 66.01, a subdivision of land into two lots does not require referral to relevant authorities, rather, clause 66.01-1 sets out standard conditions which must be included on any subdivision permit which does not require referral. The mandatory conditions include:

- The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity and gas (where it is proposed to be connected) services to each lot shown on the endorsed plan in accordance with the authority's requirements and relevant legislation at the time.
- All existing and proposed easements and sites for existing or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
- The plan of subdivision submitted for certification under the *Subdivision Act 1988* must be referred to the relevant authority in accordance with Section 8 of that Act.

The condition relating to telecommunications network equipment does not apply to a permit granted in relation to a two lot subdivision which relates to a boundary realignment.

Internal Council Referral	Advice/ Response/ Conditions
None	No internal referrals undertaken as the realignment will not impact any access or drainage arrangements.
	As any future dwelling will require a permit, considerations of such matters would be undertaken during any such application.

#### Internal Referrals:

#### Assessment

#### Planning Policy Framework

The proposed realignment of the common boundary between the two lots (which is defined as a two lot subdivision by virtue of the area in question exceeding that which is 'exempted') is considered inconsistent with policy for the following reasons.

The subject site should currently be a single lot of 7,509m2 in area – the smaller lot should have been consolidated with the larger lot in accordance with the s173 agreement which was placed on the lot at the time of creation.

It is policy to support efficient and effective use and development of land in the State of Victoria, including ensuring that lots have adequate dimensions to facilitate the type and scale of development

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contemplated by the zones, overlays and policies which apply to the land. The zone which applies, Rural Conservation, contemplates low density development, where land management and low-intensity occupancy is the prime consideration. To facilitate this outcome, the schedule to the zone sets out a minimum lot size of 15ha. The subject lots have an area of 0.6ha and 0.15ha respectively; both well below the current minimums.

In this circumstance, the 'smaller' lot was the result of road closure / privatisation of excess public land. Its current size precludes any practical future use and development, which was the reason why during the disposal of the land (by Council to the current owner), a requirement was included within the terms of the sale to consolidate the small lot with the larger lot.

This requirement to consolidate the lots was to ensure that the smaller lot, which is undevelopable, could contribute to the purpose of the RCZ by forming part of the larger lot and increasing its area.

The proposal to realign to reconfigure these two small lots (when considered against the zoning requirements which seek 15ha lots) is not considered to be consistent with State policy.

#### Local Planning Policy Framework

Policy at clause 21.07, Local Areas – Hills Region, seeks to respond to changing demographics whilst managing the high quality environmental constraints. When considered hand-in-hand with the complementary policy within the zone, setting out lot size expectations, the proposal to create smaller lots, and introduce additional occupancy opportunities, is considered inconsistent with relevant local policy which seeks to balance residential opportunities with sensitivities such as environmental outcomes set out within other overlays, and lot size provisions within relevant zones.

#### Rural Conservation Zone

The purpose of the RCZ is, inter alia, to protect the natural environment features and provide for agricultural outcomes. It is noted the lots in question are each less than 1ha and were required to be consolidated within 12 months of the creation of the smaller lot (which was a section of discontinued road sold to the current owner). That has not taken place, the subject site is in breach of the s173.

Clause 35.06-3 requires that each lot be greater than 15ha (as per Schedule 2) however an exemption applies provided the proposal is for a subdivision which does not increase the number of lots and the number of dwellings that the land could be used for (which this proposal satisfies). Whilst this exemption permits Council to consider the proposal (ie: it is not prohibited) it does not require Council to support the proposal. The existence of a smaller-than normal lot does not necessarily mean that further impacts and compromises should be allowed to proliferate.

The proposed outcome is considered to be inconsistent with the purposes of the zone, and is directly inconsistent with the intent of the s173 which formed part of Council's decision making when selling the land to the owner. The planning scheme does not support the creation of small lots in this area.

The smaller lot was formed by a road closure, and sold to the land owner on the basis that it would, within 6 months of the issue of the title, be consolidated into the larger lot. This was in consideration of the zoning and local policy in place at the time (which has not fundamentally changed).

For these reasons, it is considered inappropriate to approve the subdivision.

#### Environmental Significance Overlay

Schedule 1 to the ESO (Northern Hills) sets out the significance of the environment, namely the soil types, resulting slopes and remnant vegetation. The proposal to realign the boundary between the lots does not directly impact these attributes. Further, any new boundary would not directly impact significant vegetation, as the new boundaries would not create new tree removal exemptions, or similar.

Any future use and/or development would require a planning permit, and impacts from such development would be considered at that time.

#### **Bushfire Management Overlay**

As the land is affected by the BMO, which represents the heightened risk to life and property from bushfire due to the landscape both close to, and distance to, the subject site, consideration must be given to the level of risk which will be associated with future development of the lots.

The application has been referred to the CFA who has agreed to waive the up-front requirements to provide a BMS / BMP in lieu of addressing these in the event that a future application is lodged for development of the vacant (western) lot. This is considered an acceptable and pragmatic way forward given any development of the land associated with a place of assembly, dwelling, office (etc.) will require a permit under the BMO, at which time a statutory referral will be undertaken to the CFA, and relevant assessment undertaken, and conditions applied (should a permit issue) accordingly.

#### **Objections**

Whilst the application is not exempt from notice by any of the provisions within the relevant triggers, the application was not subject to public notice, as previously described. Council has not received any objections to date.

#### Conclusion

The proposed two (2) lot subdivision (boundary re-alignment) will inappropriately decrease the size of the larger (eastern) lot and introduce a development opportunity on the smaller (western) lot, both are outcomes which are generally inconsistent with the policy settings for the land.

Whilst the proposal is not prohibited, it is counter to State and Local policy, which seeks to decrease the intensity of development on land zoned for Rural Conservation.

The proposal is also directly in contravention of a requirement set out within the registered s173 Agreement, which required the smaller lot to be consolidated with the larger lot. Again, whilst this does not prohibit a decision to support the subdivision, it clearly weighs heavily against approval.

In light of strong policy against, and the content of the s173 Agreement, the proposal should not be supported.

#### Recommendation

#### Notice of Refusal

That Council having considered all the matters required under Section 60 of the *Planning and Environment Act 1987* in relation to Planning Application No. T220009 decides to issue a Notice of Refusal to Grant a Permit in respect of the land known and described as L1 PS408220 V10382 F436 and L2 on PS740739 V11897 F858, 14 Hamilton Road Emerald, for Two (2) lot subdivision (boundary re-alignment) generally in accordance with the endorsed plans, on the following grounds:

- 1. The proposed subdivision is inconsistent with the intent of the Section 173 Agreement registered on the title to the land.
- 2. The layout of the subdivision results in a subdivision pattern which is inconsistent with the purpose of the zone.
- 3. The lot areas are inappropriate when taking into account the minimum lot areas stipulated within the schedule to the zone.

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