

8.2 **DA 2011/506 - Section 96 South Ballina Beach Caravan Park.DOC**



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**DA 2011/506.3 - 440 South Ballina Beach Road,  
South Ballina**

**ballina** shire council  
geographical information system  
Department of Planning & Infrastructure  
Scale: 20/000000

**8.2 DA 2011/506 - Section 96 South Ballina Beach Caravan Park****8.2 DA 2011/506 - Section 96 South Ballina Beach Caravan Park**

<b>Applicant</b>	Merkat Investments Pty Limited (Directors being Bernard and Rikki Grinberg)
<b>Property</b>	Lot 1 DP 1186674 and Lot 1712 DP 597523, No. 440 South Ballina Beach Road, South Ballina
<b>Proposal</b>	To modify various Conditions of Consent as set out in the report below relating to bushfire, ecological impact, fox baiting covenant, and road upgrade requirements.
<b>Effect of Planning Instrument</b>	The land is categorized as a "Deferred Matter" under the provisions of the Ballina LEP 2012 and is therefore zoned 7(f) Environmental Protection (Coastal Lands) under the provisions of the 1987 Shire Plan.
<b>Locality Plan</b>	The subject land is depicted on the locality plan attached

**Introduction**

Council at its Ordinary Meeting of 28 November 2013 resolved to grant consent to DA 2011/506 to expand the use of the existing Caravan Park known as "South Ballina Beach Holiday Village" or "Ballina Beach Village" herein described as the "park" by:

- an additional 65 short term caravan sites
- adding 58 camping sites
- regularising the additional office and deck area including internal configuration changes to the reception/kiosk building by deletion of the manager's residence and its relocation to an on-site cabin; and
- constructing a 200m<sup>2</sup> recreation hall and amenities building.

As part of this resolution, Council also requested that staff review the developer contributions in recognition that this is an isolated park.

At Council's Ordinary Meeting 19 December 2013 Council reconsidered the developer contributions and resolved to retain the contributions as outlined in the November 2013 report to Council.

On 12 February 2014, the applicant lodged a Section 95 Modification Application seeking to modify the consent by deleting the following conditions:

1. Condition 8 – which confirmed the kiosk and associated deck area is not to be used as a refreshment room for people who are not guests staying at the premises
2. Condition 11 – which required a public positive covenant that prohibits guests from keeping dogs on-site, requires the owner's/manager's dog to be within a fenced enclosure during the fox baiting program and the recognition of the implementation of the fox baiting program by the owners/occupants and
3. Condition 34 – which required the applicant to pay developer contributions in respect of the development.

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Despite the applicant lodging a Deemed Refusal with the NSW Land and Environment Court (LEC) prior to determination of the modification application, Council at its Ordinary Meeting 24 April 2014 resolved to refuse the modification application on a number of grounds.

This action culminated in a formal Mediation Process being conducted by the LEC.

During the LEC Section 34 mediation, Council and the applicant reached agreements on the matters that were accepted by both parties.

The LEC issued Consent Orders dated 15 August 2014 (which was entirely consistent with the mediated agreement), on the 30 September 2014, however the applicant then submitted another Section 96 Modification Application requesting further modification to, or deferral of, a significant number of LEC issued conditions. It is this modification application which is the subject of this report.

The current modification application originally related to approximately 32 conditions, which the applicant described in the following broad categories:

- (a) Landscaping and vegetation management (including measures to protect and encourage the threatened Glossy Black Cockatoo);
- (b) Construction and particularly construction of the amenities block and car parking (including disabled car parking);
- (c) Matters associated with the infrastructure for the park and the operation of the park; and
- (d) Matters pertaining to bush fire safety and particularly the requirements of the NSW Rural Fire Service (NSW RFS).

During the past two years of assessment, Council has allowed the park to continue to operate under 12 month interim Approvals to Operate, issued under the provisions of the Local Government Act.

The current interim Approval to Operate is due to expire on 24 December 2016.

The Interim Approvals have allowed the park to operate during peak periods of Christmas and Easter holidays and have enabled the operators to demonstrate peak capacities/impacts, particularly in relation to compliance with on-site wastewater management.

They have also allowed the applicant time to comply with a number of conditions that originally formed part of the modification application and satisfy Council in respect to the park's compliance with the majority of consent conditions that originally formed part of the modification application.

On the 13 October 2015 Council staff also attended mediation with the NSW Small Business Commissioner and the applicant to primarily discuss the outstanding (or not agreed) matters regarding the current modification application.

As a consequence of all of the above actions, the originally submitted 32 conditions to be modified by the applicant have been substantially reduced to the following outstanding (or not agreed) conditions/matters:

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1. Fox Baiting Covenant (Condition No. 11)
2. Bush Fire/Ecological Issues (primarily Condition Nos. 12 & 14, however also interrelated to Conditions 13, 16, 67, 96, 102 and 103)
3. Sealing of Loop Road (Condition No. 45)

This report is presented to Council seeking its consideration and direction in relation to the outstanding (or not agreed) conditions/matters (some of which are interrelated).

Council is entitled to believe that it had reached agreement with the applicant and the LEC in good faith about all the issued conditions of consent at its previous mediation.

Despite various attempts by Council staff to outline/negotiate potential solutions, the applicant has continued to question the need for these conditions and agreement has not been reached.

Nonetheless, the Council will need to consider the current Modification Application on its merits.

**Reportable Political Donations**

Details of known reportable political donations are as follows:

Nil

**Public Exhibition**

Due to the extensive history of the originally approved application and the previous modification application (both placed on public exhibition), and the extent of the modifications sought, the current modification application was not again placed on public exhibition.

Further referral to the NSW RFS, however, was conducted and the responses are attached and discussed later in this report.

**Applicable Planning Instruments**

The applicant has submitted the modification under Section 98(1A) of the Environmental Planning and Assessment Act 1979, being of minimal environmental impact.

As will be outlined in this report, this can only be considered procedurally correct if the ecological matters for the threatened Glossy Black Cockatoo are not considered to be substantially negatively impacted.

If Conditions 12 and 14 are deleted, or modified, as proposed by the applicant, it is considered that the modification sought is not likely to be of minimal environmental impact and should have been submitted under Section 98(2).

**Report**

**Fox Baiting Covenant (Condition No. 11)**

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Condition No. 11 currently requires:

*A public positive covenant is to be imposed on the land (Lot 1712 DP 597523 and Lot 1 DP 1186674) in favour of Council and the National Parks and Wildlife Service (NPWS) under Section 88E of the Conveyancing Act 1919, requiring the following:*

*c That the owner/occupant recognise that a fox baiting program is implemented by the relevant Government Agencies from time to time and the owner/occupant must not raise objection to any fox baiting carried out in accordance with the South Ballina Fox Baiting Program.*

*c In the event that dogs registered and/or owned by the managers are kept on the property, the following fenced dog enclosures and controls are to be established and maintained at all times:*

*There shall be constructed and maintained a fenced enclosure immediately adjoining to the manager's residence which is designed and constructed so as to provide a secure enclosure for keeping dogs.*

*Any gate forming part of the fenced enclosure shall be a self-closing gate.*

*No gate to the fenced enclosure shall be propped open or otherwise kept open other than for the purpose of passing through.*

*During a fox baiting program on the subject land or on adjoining Crown land, and/or Nature Reserve, dogs are not permitted on any part of the property outside a fenced dog enclosure (that complies with the provisions outlined above) except under least.*

*c The development must be conducted at all times in accordance with the Plan of Management for the keeping of dogs on site dated June 2014 (or as amended)(POM). Any amendments to the POM must be approved by Council and OEH.*

Condition No. 11 has been formulated from Council's DCP for South Ballina, which is designed to ensure the existing fox baiting program undertaken within the Richmond River Nature Reserve and along South Ballina Beach is not affected by adjacent developments.

The DCP was developed in consultation with the OEH, NPWS, Department of Lands, the Pied Oystercatcher Working Group and the general public through the public exhibition process.

The covenant in question has been consistently applied to properties along South Ballina Beach since 2007. The covenant was first applied as a Condition of Consent by the LEC for the "Ringtank" properties.

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To date, a total of 13 properties along South Ballina Beach have had this Condition of Consent applied to the land. On 23 October 2014 the LEC again applied this restriction to a development application located at South Ballina.

The covenant should not affect the owners of the park given that domestic dogs are not permitted to enter the Ballina Nature Reserve and it is not accepted that the condition should be modified to only reference the Plan of Management, as this would be contrary to the DCP provisions and the consistent application of this requirement by the Council and the LEC.

The applicant is not accepting Council's position in relation to this matter as most recently outlined in the applicant's letter of 6 June 2016 and letter from McCartney Young Lawyers, on behalf of the applicant dated 11 August 2016 (copy of letters attached) and considers the condition as unreasonable and unnecessary in the circumstances.

It is recommended that Condition No. 11 remain as agreed in the previous Section 34 Mediation held by the LEC and should not be amended as requested by the applicant.

**Sealing of Road (Condition No. 45)**

Condition No. 45 currently requires:

*The half loop road circling the amenities building (sites 10 to 59) that connects to the existing sealed road is to be sealed with asphaltic concrete and comprise of an all weather seal. This is to be completed prior to use.*

The applicant's contentions as to why Condition No. 45 should be deleted are outlined in the more recent letters of 6 June 2016 from the applicant and of 11 August 2016 from McCartney Young Lawyers, on behalf of the applicant (copy of letters attached).

Essentially, the applicant contends, "...There appears to be no good environmental, practical or planning reason to compel the sealing (bitumen) of this road. It is a part of the park that is intended to give campers a "wilderness" experience. A tarred road is contrary to this experience."

Clause 89 of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 requires:

*All access roads, including all passing and parking bays, must have an all-weather sealed or other surface finish specified in the approval for the caravan park or camping ground, and must be adapted to the topography to allow for adequate drainage and to eliminate excessive grades.*

Consequently, Council has consistently maintained that the half loop road servicing the additional approved sites within the western portion is required to be sealed.

Council's accepted standard is for this sealing to be of asphaltic concrete or two coat bitumen seal.

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The remaining roads within the western portion can be of a lesser standard acceptable to the Council to maintain the desired "wilderness" feel desired by the applicant.

Council's Infrastructure Manager has considered the applicant's further objections to the sealing of the half loop road attributable to the additional 123 sites proposed and approved via DA 2011/506 predominately within the western portion of the park and maintains that the half loop road is required to be sealed as it is one of the main two way circulation roads for both vehicles and pedestrians accessing other facilities within the park and also for amenity.

The wording of Condition No. 45, despite its placement within the "During Construction" section of the consent notice, requires the sealing with asphaltic concrete to be completed "...prior to use". As the applicant is currently using the additional 123 sites and has built the amenities building servicing some of the additional sites, it is suggested that the road be upgraded as a matter of immediacy.

Consequently, based on the above and as the length of the loop road is relatively short, particularly when compared to the other roads within the park, it is recommended that this Condition (as agreed within the Section 34 Mediation as part of the LEC) remain.

**Bush Fire/Ecological Issues (primarily Condition Nos. 12, 14)**

The regulated bush fire measures, required by the NSW RFS, impact on the ecological issues/measures relating to the threatened Glossy Black Cockatoos.

The applicant has requested that Conditions 12 (requiring revegetation management works including buffers around eight Glossy Black Cockatoo feed trees), 14 (planting of 44 She oak feed trees) and related Conditions 13, 16, 67, 96, 102 and 103) be deleted as these would cause the site to be non-compliant with the requirements of the NSW RFS and "Planning for Bush Fire Protection 2006" and therefore be unlawful (**refer to attached letters**).

During the assessment of the original application, and after lengthy discussions with the applicant's ecologist/bushfire consultant (no longer retained by the applicant as part of the current modification application), it was confirmed that additional plantings could occur adjacent to the eight Glossy Black Cockatoo feed trees without impacting on bush fire safety.

In addressing impacts to known Glossy Black Cockatoo feed trees, the applicant's ecological consultant also proposed to plant 44 additional feed trees elsewhere. The bush fire risk of the additional plantings was also assessed by the applicant's consultant as part of this proposal.

Based on this agreement conditions of consent were applied requiring these outcomes.

The applicant, through a different bush fire consultant, now contends that in order to comply with buffer and additional plantings for the Glossy Black Cockatoo feed trees, that there will be a breach of the NSW RFS bush fire requirements/General Terms of Approval (GTA's) that were incorporated into the consent conditions.

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In late 2015, Council sought and received further clarification/advice from the NSW RFS regarding the potential conflict between ecological/bush fire requirements. It is important to note that the NSW RFS have also specifically noted the environmentally sensitive nature of the site and the transient and informal nature of the approved "short term" camp tent sites within the western portion (i.e. no habitable permanent buildings).

Consequently, the RFS have reduced standards (i.e. reduced asset protection zones to 10 metres) and camping sites have been permitted within the asset protection zones.

Additionally, the RFS have suggested that it is possible to replace existing vegetation in the developed portion of the site with further feed trees or other landscaping to achieve ecological matters.

Council attempted to inspect the site on 16 May 2016 to identify for the applicant those areas of senescing and/or undesirable vegetation which could be considered for removal to offset the feed tree plantings required by Condition 12(d).

However, due to different points of view between Council and the landowners, this inspection was not conducted.

In addition, the landowners now contend that the feed trees are no longer used by Glossy Black Cockatoos. Due to the lack of access to the site this observation cannot be confirmed.

If this is correct, it may indicate the increased usage of the park as provided for by the development consent 2011/506 has had an adverse impact on the foraging patterns of the Glossy Black Cockatoo therefore reinforcing the need to provide adequate buffering as required by Condition 12.

Based on this advice and revised GTA's, Council staff consider that the approved development could satisfactorily achieve both the need for further vegetation plantings for the Glossy Black Cockatoos and the bush fire modified GTA's subject to the following:

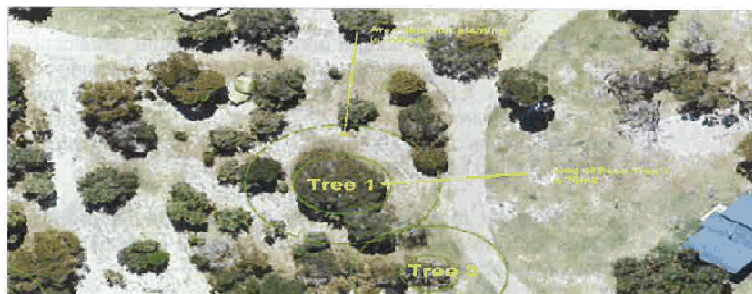
1. The applicant's bush fire consultant (and NSW RFS) have confirmed that the western portion of the site (i.e. where the majority of the additional 123 camp sites are approved) currently has 14% vegetation canopy coverage.

As the NSW RFS have confirmed a maximum 15% canopy coverage is permitted, a small number of additional plantings to achieve some buffers around the eight Glossy Black Cockatoo She Oak feed trees as required by Condition No. 12(d) can still occur.

The canopy diameter of each of the eight feed trees (as identified in the consent) has been mapped and the required planted buffer added to the mapped feed tree. **Figure 1** below shows this process.



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In addition, given a number of feed trees are already surrounded by vegetation, areas of existing vegetation were then excluded from the planting buffer area. This process is demonstrated in Figure 2 below.



Table 1 as follows, highlights the amount of the replanting that would be required to achieve compliance with the buffer planting requirements of Condition 12(d). While the total area of the required buffer equates to 1,515m<sup>2</sup> only 600m<sup>2</sup> requires planting as the remainder is already vegetated.

Table 1: Planting and buffering requirements of Glassy Black Cockatoo feed trees.

Tree Number	Radius of Buffer measured from trunk (m)	Area of existing feed tree m <sup>2</sup>	Area of buffer m <sup>2</sup>	Total Area of tree and buffer m <sup>2</sup>	Area of Buffer requiring planting (m <sup>2</sup> )
1	10	79	235	314	188
2	4	13	140	153	19
3	6	28	172	200	112
4	6	28	172	200	83
5	7	38	189	227	137
6	3	7	125	133	54
7	4	13	140	153	None due to road

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8	3	7	125	133	11
<b>Totals</b>				<b>1,513</b>	<b>604</b>

Due to the minimal area of additional planting and the non-continuous canopy spread as shown in Figure 2, it is difficult to agree with the conclusions of the applicant's bush fire consultant that the additional plantings will create a "spine" or "ladder" of continuous canopy through the site.

To allow the full extent of required buffer plantings to occur without exceeding the 15% canopy coverage it is suggested that, in consultation with Council, the applicant nominate a one for one replacement of trees as part of the current modification application, (i.e. identify any unhealthy trees within the western portion suitable for removal to allow their replacement by She oaks or the buffer plantings).

It is important to note that the trees nominated for removal would need to be confirmed by Council as being suitable and comprise a canopy similar to the replacement trees to ensure the canopy spread does not exceed 15%.

Based on the limited additional buffer planting area required (600m<sup>2</sup>), when compared to the area of the site (76,220m<sup>2</sup>), it is considered that appropriate offsets can be found to ensure canopy coverage is not exceeded. The applicant would not want the additional buffer plantings around the feed trees as this may reduce the number of available camp sites.

2. The 44 Black She oak trees required by Condition No. 14 being provided within the southern portion of the site (i.e. within the heathland) rather than the approved Landscaping Plan area prepared by Chris Lonergan "L1" dated 12 February 2013.

The NSW RFS have also identified this as the preferred area as "the unmanaged land to the southern portion of the lot".

The planting of 44 trees would require approximately 925m<sup>2</sup> of land. This could be suitably accommodated in the southern portion of the site (as preferred by the NSW RFS) without affecting bush fire requirements as demonstrated below.



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If these suggestions were incorporated into the current modification application it is considered they would allow a balance between the bush fire requirements and the ecological interests to be achieved and would enable the consent modification to be maintained in accordance with the LEC's mediated agreement.

Based on the above and the fact that they can be suitably accommodated on-site, the provision of the additional 44 plantings within Council's road reservation (i.e. South Ballina Beach Road), as proposed by the applicant, is not supported.

**Conclusions**

It is considered that Condition Nos. 11, 12, 14, and 45 (and interrelated conditions) are fair and reasonable and should remain each in their entirety as their effect has a specific planning purpose and nexus, that is to mitigate the impacts caused by an increase in the number of approved sites predominately in the western portion of the site.

The Section 96 application is not supported by a revised ecological report inclusive of the mandatory Section 5A assessment. If Conditions 12 and 14 (i.e. vegetation buffers and revegetation plantings for feed trees) are not adequately provided due to conflict with bush fire requirements, the ecological conclusions reached regarding the impact of the development on the threatened Glossy Black Cockatoo previously made may no longer be correct.

That is, the conclusion drawn that the original proposal will have no significant impact on the Glossy Black Cockatoo under Section 5A and that a Species Impact Statement (SIS) was not required subject to a number of mitigation measures that were included in the conditions of consent.

Without the provision of Conditions 12 and 14 it may be reasonable to conclude that the impact on the Glossy Black Cockatoo is significant and that a SIS would now be required. If this was the case, the proposed modifications would not be able to be determined under the current S.96(1A) application.

Having regard for the outcomes of the assessment undertaken, Council has the following options with regard to determining the modification application:

**Option 1**

That Council refuse the modification application in its entirety. This is the recommended option based on the matters outlined in this report and due to the applicants not having been prepared to modify the application to address suitably the Glossy Black Cockatoo habitat protection.

**Option 2**

That Council approve the modification application in its entirety. This is not supported due to the impact on the threatened Glossy Black Cockatoo, inconsistency with Council's Development Control Plan and the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005.

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This is also considered to be procedurally incorrect due to the provisions relied upon by the applicant in lodging the modification application and the potential need for a Species Impact Statement, or at least, on the basis that the proposed modification is not of minimal environmental impact as lodged by the applicant under Section 96(1A) of the EP&A Act 1979.

**Option 3**

That Council approve parts of the modification application only. This option is not preferred as the assessment does not support any of the modifications being sought for the reasons outlined in the report.

**RECOMMENDATION**

That the Section 96 modification application to DA 2011/506 to delete or revise Condition Nos. 11, 12, 14 and 45 (and any interrelated conditions) from the consent relating to the creation of an additional 123 short term accommodation sites (65 being caravan/recreational vehicle sites and 58 being camping sites), indoor recreation hall and associated amenities building, additional deck adjoining the existing kiosk/shop and office/reception, manager's cabin, associated facilities, infrastructure and rehabilitation works on Lot 1712 DP 597523 & Lot 1 DP 1186674, No. 440 South Ballina Beach Road, South Ballina be **REFUSED**.

**Attachment(s)**

1. Locality Plan
2. Applicant's Contentions Regarding Amendments - Letters dated 6 June 2016 and 11 August 2016
3. Applicant's Advice through McCartney Young
4. NSW RFS responses to modification application
5. Loop Road to be sealed (highlighted in yellow)

**Janelle Snellgrove**

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**From:** Bernard Grinberg <bgrinberg@telstra.com>  
**Sent:** Sunday, 28 August 2016 11:27 AM  
**To:** Andrew Smith  
**Subject:** Consent Conditions Planting - BBV DA2011/506 & s.96  
**Attachments:** BBV\_Planting\_44.jpg

Hi Andrew,

Re: confirming details of agreement regarding consent conditions 12, 13, 14 and related conditions 16, 67,96, 102 and 103 being satisfied by the following.

1. As requested, please see the attached aerial picture with plantings indicated by red dots.
2. Each red dot indicates the approximate position of a pair of black sheoaks to be planted.
3. There are 32 trees (16 pairs) on our land and 12 trees (6 pairs) on the Council road reserve to be planted for the total of 44 trees.
4. The plantings on our land are to be either where there is no camping and no trees or in camping areas where there are few or no trees. If planted in camping areas they will be planted on campsite corners, the sites being about 8m\*8m. The trees on the road reserve will be planted at least 3m from the edge of the bitumen. The aim is to have eventual 5m minimum separation between tree canopies on our land and 2m on the road reserve.
5. The planting will be carried out over a two year time frame is to allow for propagating from local seed and allowing time for the seedlings to be robust enough to be planted (over 300mm). Once planted the trees will be protected with stakes and wallaby guards until well established, with mulching.
6. All RFS rules will be followed – including no vegetative buffers, canopies separated by 2-5m, canopy cover kept to 15%, grounds to be mowed to protective stakes and to trunk once trees are over 2m, branches below 2m removed once the trees are high enough.
7. Weeds will be removed in the planting areas, as we have done throughout the property for over 6 years and is the current practice.
8. New trees will be regularly watered by BBV grounds staff as appropriate – on planting & in dry periods every 2 -4 days initially, extending to every 7 days after 6 months.
9. New trees that die will be replaced as soon as replacements are ready.

Please note that the above has been reviewed with the bushfire consultant Barry Eadie and we are of the opinion that it complies with both RFS rules and the principles & vegetation management plan as detailed in the Land & Fire Addendum dated 7 October 2013 by Tony Coyle – Senior Ecologist.

We trust that this is all satisfactory, and we look forward to that being confirmed & receiving the timetable for the DA and 5 year licence, thank you, Bernard

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