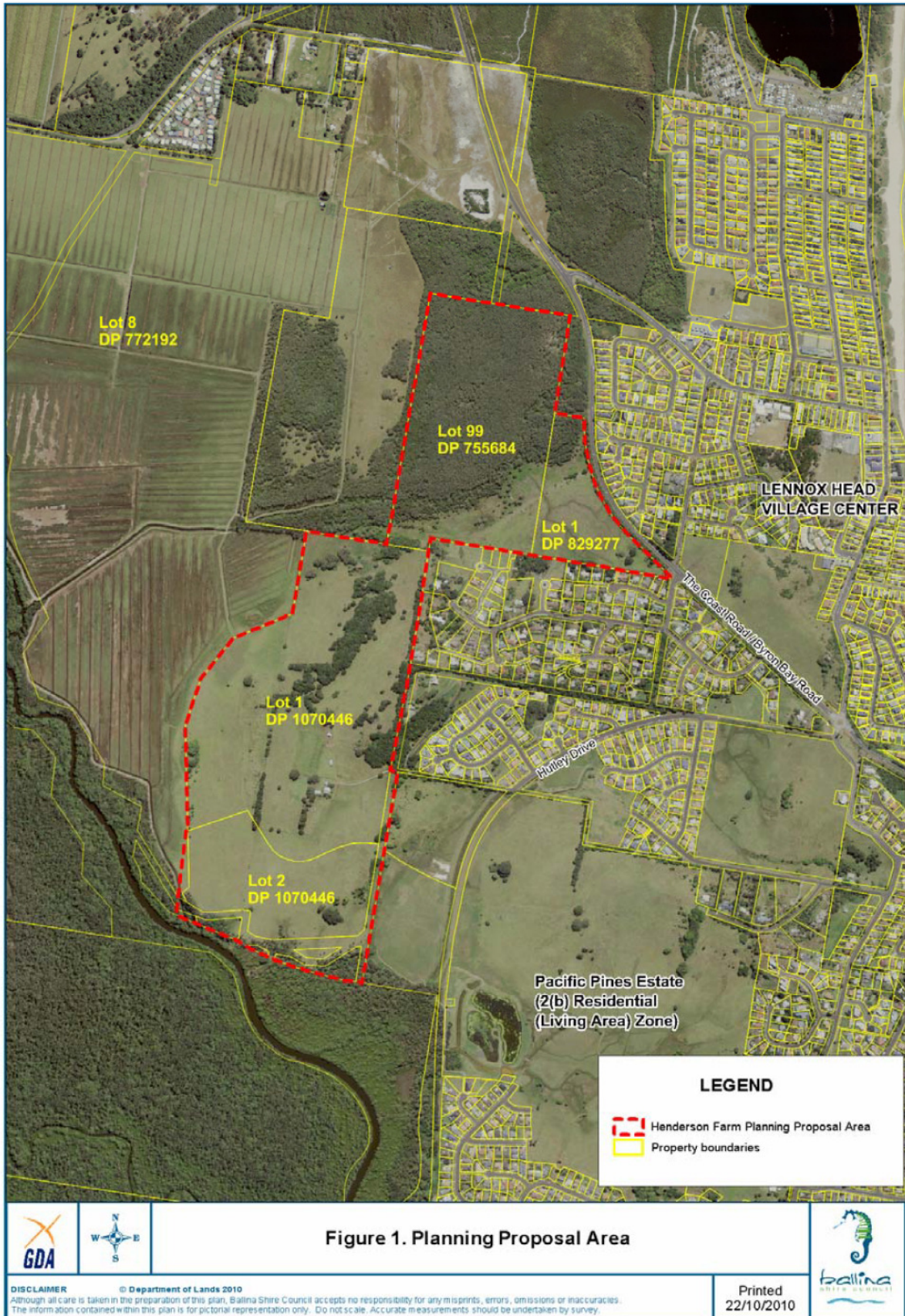
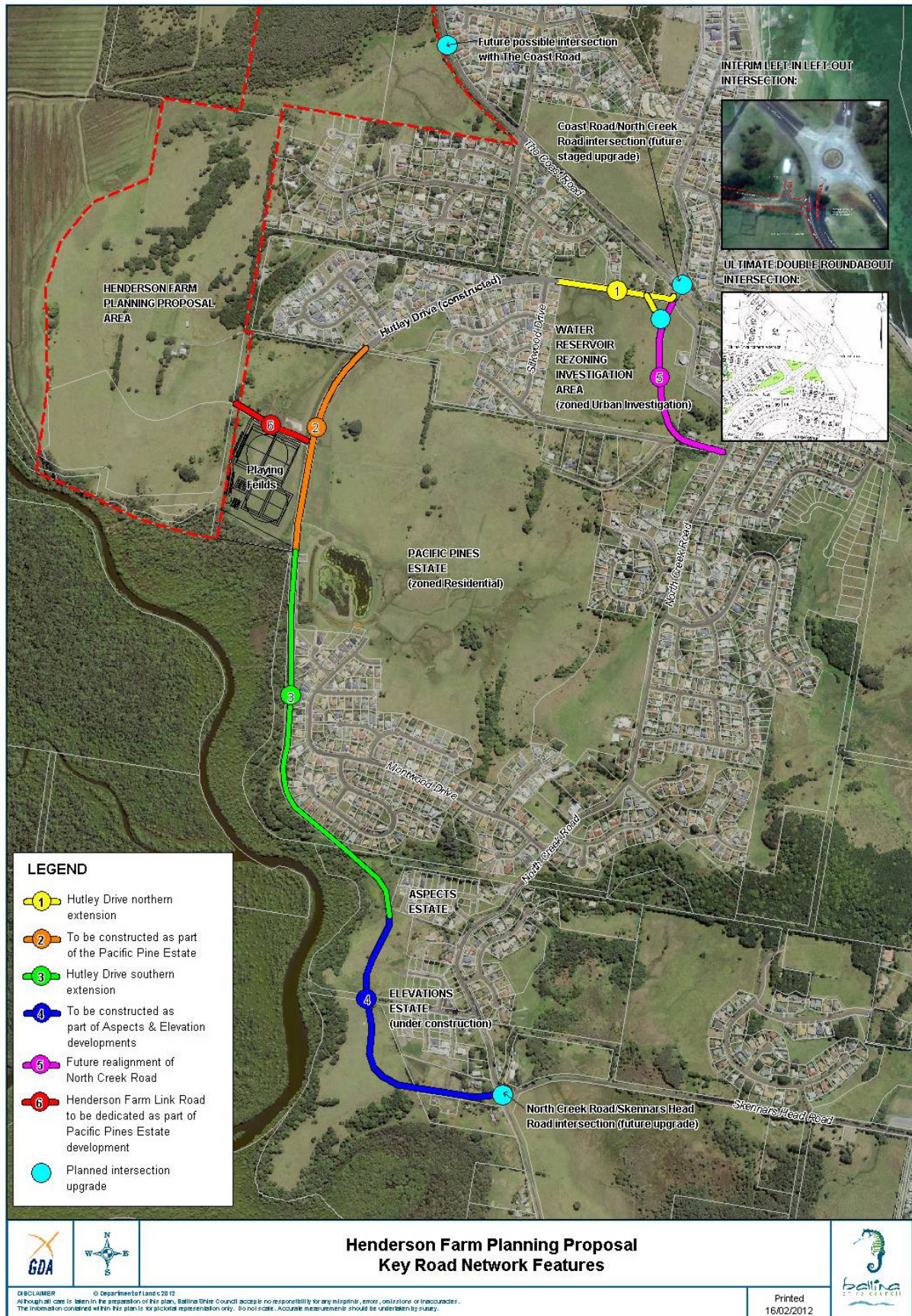


9.1 Henderson Farm Planning Proposal

Attachment 1 - Locality Plan



Attachment 2 - Map of planned road upgrades



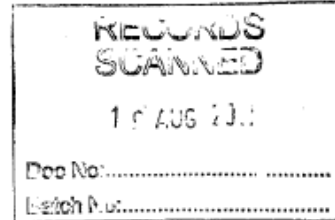
Attachment 3 - Submissions (Agency and public)

Submission 1 - Office of Environment and Heritage (OEH)



**Office of
Environment
& Heritage**

Your reference: Henderson Farm Planning Proposal
Our reference: DOC11/32634.emb.FIL07/9244
Date: 17 August 2011



Mr Paul Hickey
General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Attention: Mr Simon Scott

Dear Mr Hickey

Re: Public exhibition of the Henderson Farm Planning Proposal

I refer to your letter dated 12 July inviting comments from the Office of Environment and Heritage (OEH) on the above Planning Proposal. The following comments are provided for consideration, pursuant to OEH's statutory responsibilities.

Planning Proposal

The *Planning Proposal Henderson Farm, Lennox Head*, dated March 2011, has been reviewed. It is noted that the subject site has been proposed for a measure of urban development since 1987.

The objectives listed in Part 1 are supported.

Part 2 of the planning proposal identifies an area supporting the threatened species Hairy Joint Grass. This area is proposed to be deferred from the planning proposal, to enable resolution of the constraint through development of mechanisms to ensure that there is no significant impact on the species. A planning proposal for the deferred area may be considered in future. OEH supports this approach and the zones as proposed in Part 2 of the planning proposal.

However, the maps in Appendix 3 should accurately reflect the discussion in Part 2, regarding the deferred area on Lot 1 and Lot 99. That is, alternative maps that depict these areas as either 1(d) or RU2 in the respective maps should have been included in addition to those contained in the planning proposal. To provide only one set of maps identifying the area as R2 and R3 zones, even with a hatched overlay, pre-empts resolution of the constraint, and raises expectations of future development opportunities that may not be able to be met. It is noted that only year one of the RTA's Hairy Joint Grass translocation project has been completed. The success or otherwise of the experimental techniques cannot be ascertained until at least two, and preferably more, years of persistence of the species on the experimental site has been documented.

The Department of Environment, Climate Change and Water is now known as the
Office of Environment and Heritage, Department of Premier and Cabinet

Locked Bag 914, Coffs Harbour NSW 2450
Federation House Level 7, 24 Moonee Street,
Coffs Harbour NSW 2450
Tel: (02) 6651 5946 Fax: (02) 6651 6187
ABN 30 841 387 271
www.environment.nsw.gov.au

It is also noted that the designation of residential and medium density residential areas in the conceptual site structure plan in Appendix 4 does not match with the proposed R2 and R3 zones in Appendix 3. The Appendix 3 zone plan is preferred, subject to the above discussion.

Flora and fauna

The flora and fauna reports for the subject site, dated February 2006, March 2007 and May 2007, have been reviewed. It is noted that two threatened flora species, Lace-flower (*Archidendron hendersonii*) and Hairy Joint Grass (*Arthraxon hispidus*) were recorded on the subject site. This result is consistent with a more recent survey for the latter, conducted in 2007. (It is not surprising that Hairy Joint Grass was not recorded on Lot 1 and Lot 99 in the original survey in October 2003, as it is unlikely to have been at an identifiable growth stage at that date; however the Landmark Ecological Services report dated June 2008 confirmed its presence.)

The recommendations at section 5.3 of the report dated February 2006 are supported, subject to the note on *Archidendron hendersonii* below. It is noted that the planning proposal and the supporting zone maps protect high conservation value rainforest remnants, wetland endangered ecological communities and areas where Hairy Joint Grass has been recorded, generally in an environmental protection zone. The protection of these high conservation value attributes and individuals in environmental protection zones is supported, as is the proposal to enhance the littoral rainforest areas and provide linkages between them and remnant vegetation on adjacent lots.

Heritage

Aboriginal cultural heritage – the report *A Cultural Heritage Assessment of Lot 1 DP1070446, Lot 99 DP755684 and Lot 1 DP829277 (known as Hendersons Land) Lennox Head, Northern New South Wales* dated August 2003 has been reviewed with respect to Aboriginal cultural heritage. It is noted that there was limited consultation with only one stakeholder. A second stakeholder group, who did not wish to participate in a site inspection at the same time as the first, appears to not have been given any subsequent opportunity to inspect the site. This is considered inappropriate consultation, as the inspection should be undertaken at the convenience of the stakeholders, not the archaeologist.

Moreover, although this report was finalised in 2003, there appears to have been no attempt to address this inadequate consultation or update the report consistent with the revised consultation guidelines prepared by the former DEC in 2005, and by the former DECCW in 2010. Notwithstanding that the subject land has been significantly modified by farming activities, areas of potential archaeological deposit have been identified in the Report. At least some of these areas are within the proposed development footprint. Further investigation of these areas should have been undertaken once the proposed development footprint was confirmed, and as a minimum the local Aboriginal community should have been specifically consulted regarding these areas, in the intervening years. The report notes (2.9.1.2) that development will impact on cultural values, as identified by the one Aboriginal representative consulted.

It is recommended that, prior to any further development, consultation in accordance with OEH's guidelines be conducted with the local Aboriginal community. It is understood that Ballina Shire Council is developing an Aboriginal Heritage Cultural Management Plan and protocol. It may be possible to undertake consultation via this mechanism for the subject site (or it may have already been conducted).

Otherwise, the recommendations provided in the Report, including the development of a cultural heritage management plan, are supported. It is noted that ground visibility was/is limited but that there was considered to be a low probability of sub-surface material in the areas of potential archaeological deposit (the ridge and elevated areas adjacent to the wetland and North Creek).

Scientific heritage – It is noted that a plant species, *Albizzia hendersonii* (now known as *Archidendron hendersonii*) was named for the original landowner Mr John Austin Henderson. It is assumed that he collected the type specimen in the vicinity (and a plant of the species was recorded on the subject site during the 2003 flora and fauna survey).

To preserve that heritage it is recommended that trees not be artificially propagated and planted (Recommendation 11 of the heritage consultant) but the rainforest habitat surrounding the plant (if still remaining) be restored so that the tree can reproduce naturally, and thus increase in the area. This would ensure that the 'type locality' supports specimens that are 'true to type', which is of considerable significance in taxonomic botany. The species is listed as vulnerable, but not endangered, thus natural regeneration is an appropriate recovery technique.

Non-indigenous heritage (comments from the Heritage Office) – It is noted that the draft LEP will apply to Lot 1 DP 1070446, Lot 99 DP 755684, Lot 1 DP 839277 and Lot 2 DP 1070446 (known as "Henderson Farm") and proposes to rezone the land to allow for residential expansion of Lennox Head in accordance with Ballina Council's Urban Release Strategy.

The draft LEP proposes to rezone the land from 1(d) Rural (Urban Investigation) and 7(a) Environmental Protection (Wetlands) to 2(a) Living Area, 7(a) Environmental Protection (Wetlands) and 7(l) Environmental Protection (Habitat).

It is noted that a Heritage Study/Review and Local Environmental Study (LES) were undertaken. These studies identified a number of European cultural heritage items associated with the former agricultural activities of the site. Whilst some of the identified items will be located outside of the proposed urban areas, some will be located on land proposed for development under the provisions of the Planning Proposal.

The Cultural Heritage Assessment for the site prepared by Davies Heritage Consultants Pty Ltd dated August 2003 identified several potential heritage items of local heritage significance. No items of State heritage significance were identified. The draft LEP proposes to list 16 of the potential heritage items assessed under this Heritage Assessment.

The LES has made a detailed analysis of how the relics can be managed in perpetuity and interpreted where being retained, taking into consideration the recommendations of the Cultural Heritage Assessment and an independent assessment by Ballina Council's Heritage Officer. It is noted that most of the significant items will be retained in situ (including most of those within areas of the site proposed for development) and interpreted where relevant. This is supported.

Some identified items are ruins and may pose a threat to public safety and have been correctly identified for recording and removal. For these items, Ballina Council might reconsider their proposed listing in the draft LEP Schedule. If items are to be recorded and then removed, it is not recommended that they continue to be listed as heritage items. Such sites could still be interpreted (with panels or the like), but do not need ongoing protection and management as heritage items (as afforded by an LEP listing).

It is considered that the appropriate studies and assessments have been made in regard to the subject area. Where items are proposed to be listed in Schedule 1 of the draft LEP as heritage items, Ballina Council should ensure that Heritage Inventory Sheets are prepared with the appropriate heritage assessments and justification for their listing included.

It would appear that the appropriate assessments have also been made in regard to potential zoning conflicts and the retention of significant items within proposed residential zones. Where it has been recommended that items are to be recorded prior their removal, the appropriate processes (and approvals

where relevant to "relics") should be followed, as outlined in the recommendations of the Cultural Heritage Assessment (Davies Heritage Consultants, 2003).

Flood

It is noted that flood is not considered an issue on the subject site, including on the deferred area. Thus there are no objections to the manner in which this issue has been addressed in the Planning Proposal (page 59) and the LES Volume 1 (page 39).

Thank you for the opportunity to comment. If any clarification of these comments is required, or if Council is in possession of information that suggests OEH's statutory responsibilities may be impacted, please contact me on telephone 6659 8256. If any clarification is required regarding non-indigenous heritage, please contact Alice Brandjes, Senior Planner – Heritage, on telephone 9873 8560.

Yours sincerely



ESTELLE BLAIR
A/Head North Coast Planning Unit
Planning and Aboriginal Heritage - North East
Environment Protection and Regulation
Office of Environment and Heritage
Department of Premier and Cabinet

Submission 2 - Rural Fire Service

All communications to be addressed to:

Headquarters
NSW Rural Fire Service
Locked Mail Bag 17
GRANVILLE NSW 2142

Telephone: (02) 8741 5175

e-mail: development.assessment@rfs.nsw.gov.au

Headquarters
NSW Rural Fire Service
15 Carter Street
LIDCOMBE NSW 2127

Facsimile: (02) 8741 5550



The General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Attention: Simon Scott

Your Ref:

Our Ref: LEP/0002

DA 11080979129 GB

ID:79129/73050/5

RECORDS
SCANNED

29 AUG 2011

Doc No:.....

Batch No:.....

23 August 2011

Dear Sir/Madam,

Re: Henderson Farm Planning Proposal

I refer to your letter dated 12 July 2011 advising of the public exhibition of the above proposal and amendment to the Ballina LEP and inviting comments.

In response to the conceptual site structure plan by GeoLINK, dated Aug 2007, contained within Appendix 4, the following comments are made:

- The single vehicular access to and from the site is considered inadequate;
- Vegetation classification for bush fire assessment purposes shall be as per 'Keith' in *Planning for Bush Fire Protection 2006*, which may require greater asset protection zones;
- Consideration should be given to the construction requirements for future dwellings under the revised Australian Standard AS3959-2009 *Construction of buildings in bushfire-prone areas*. Grasslands have now been included as a classification of vegetation which requires evaluation;
- Areas within the site to be restored / revegetated shall have commensurate asset protection zones;
- Where it is proposed to locate asset protection zones on land that is to be zoned 'Environmental Protection', the APZs shall be protected, to ensure the ongoing maintenance, by a plan of management or similar.

For any enquiries regarding this correspondence please contact Garth Bladwell.

Yours faithfully,



Mark Hawkins
A/Team Leader
Development Assessment

For information on *Planning for Bush Fire Protection 2006* visit the RFS web page www.rfs.nsw.gov.au

All communications to be addressed to:

Headquarters
NSW Rural Fire Service
Locked Mail Bag 17
GRANVILLE NSW 2142

Telephone: (02) 6655 7002
e-mail: csc@rfs.nsw.gov.au

Customer Service Centre
NSW Rural Fire Service
PO Box 203
URUNGA NSW 2455

Facsimile: (02) 6655 7008



The General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Attention: Simon Scott

Your Ref:

Our Ref: LEP/0002; L12/0003
DA 12012381880 AB

13 February 2012

Dear Sir,

Re: Henderson Farm Planning Proposal – draft Ballina LEP 2011

I refer to your letter dated 17 January 2012 providing a response in respect to providing a secondary vehicle access to the subject land. In respect to the amended proposal, the Rural Fire Service (RFS) comments are provided below.

It is noted that your correspondence dated 17 January 2012, only addresses dot point one of the RFS letter dated 23 August 2011. The other issues raised in that letter will need to be addressed before any future subdivision application associated with this planning proposal is referred to the RFS under section 100B of the Rural Fires Act 1997.

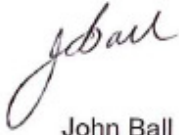
Amended Planning Proposal

The RFS has reviewed the amended vehicle access proposal plans dated November 2011 for Henderson Farm planning proposal and advises that the proposed fire access track appears to satisfy the requirements of Planning for Bush Fire Protection 2006 in both the provision of a secondary vehicle access and in the fire access track design.

The proposed fire access track will need to be formalised on the appropriate land title plans at the time of subdivision of the subject land. Further, the design details for the fire access track will need to be resubmitted at the subdivision application stage of the development.

For any enquiries regarding this correspondence please contact Alan Bawden on 6655 7002.

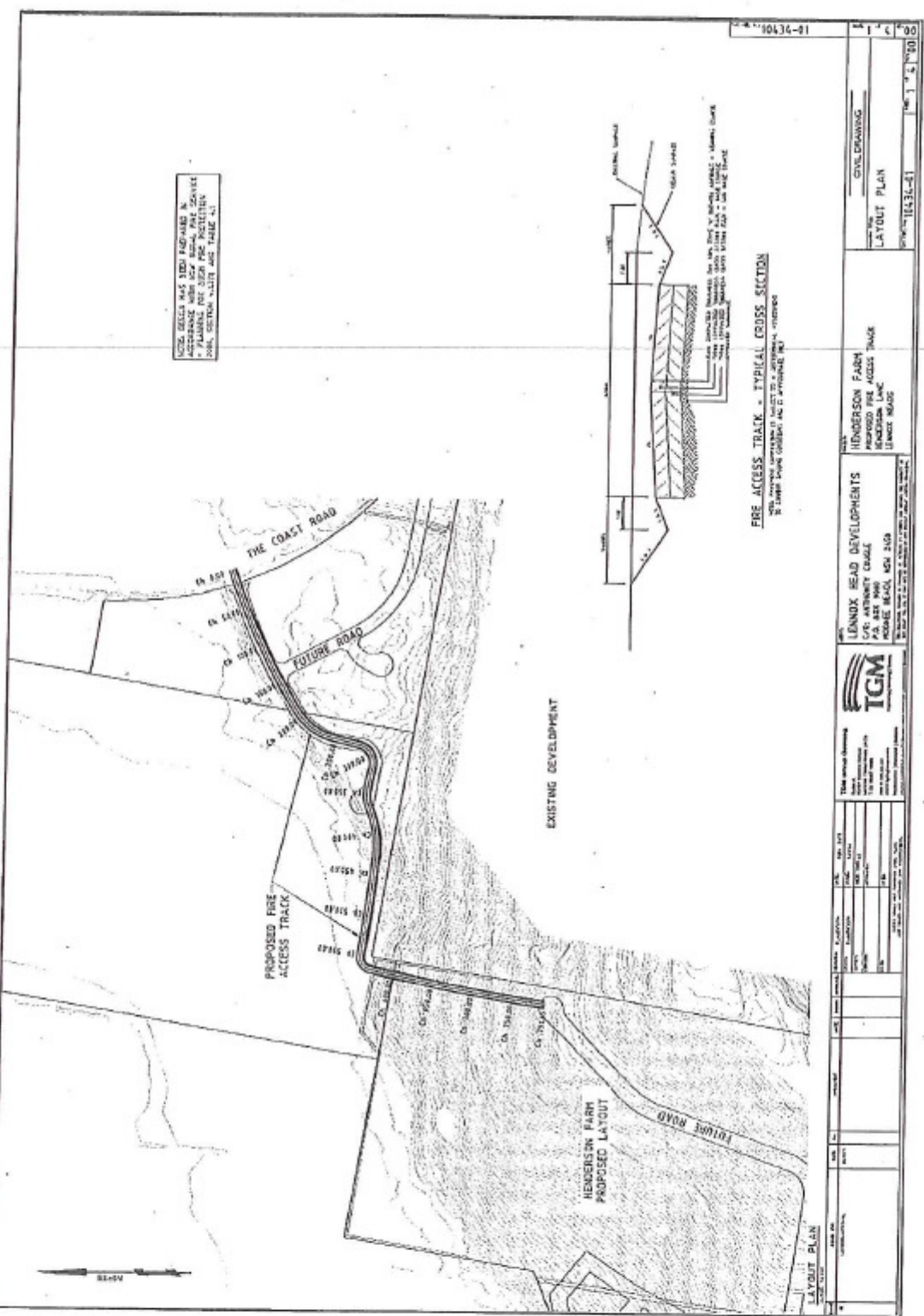
Yours faithfully,



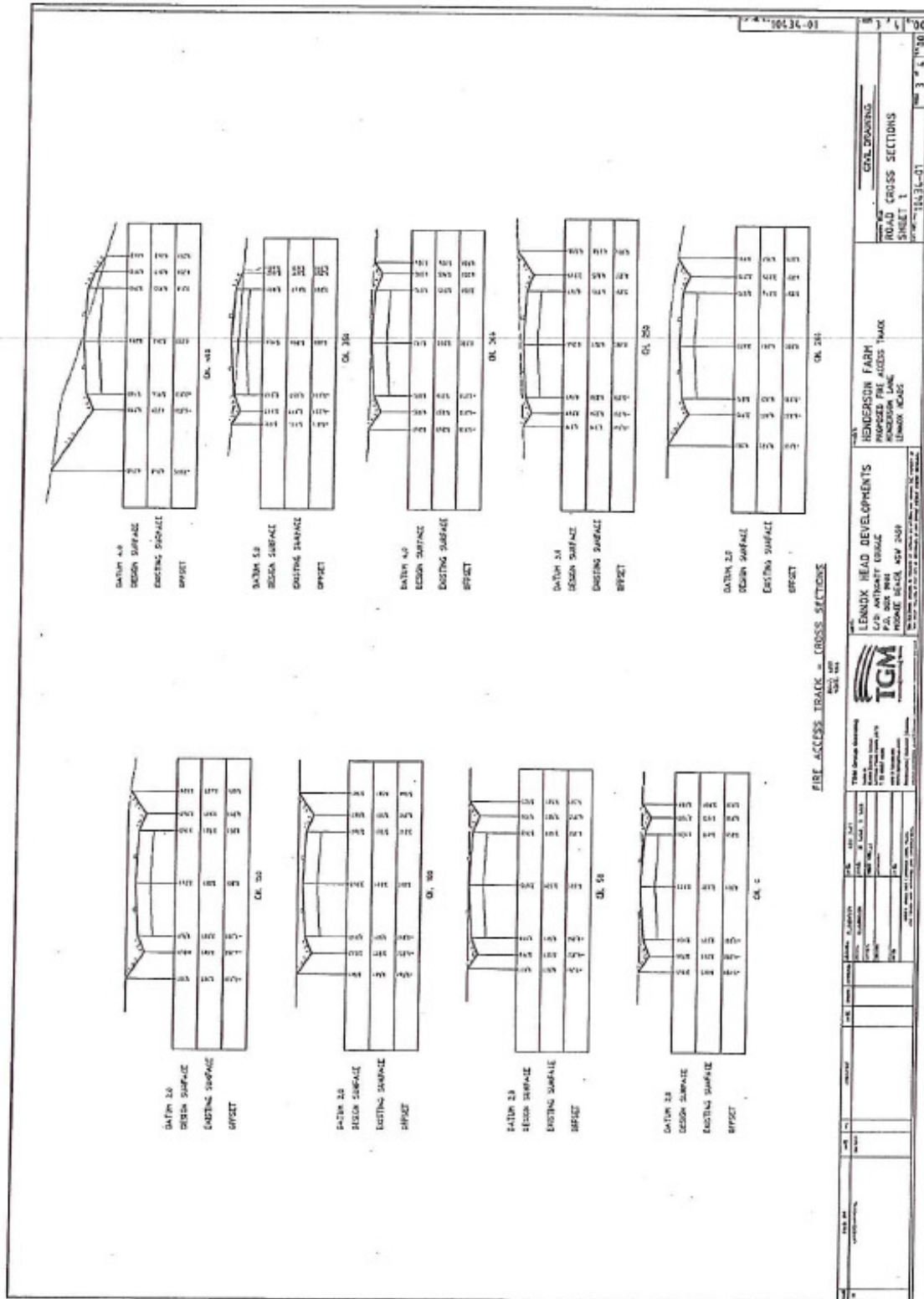
John Ball
Manager
Customer Service Centre – Coffs Harbour

For information on *Planning for Bush Fire Protection 2006* visit the RFS web page www.rfs.nsw.gov.au

ATTACHMENT NO.1 - PROPOSED FIRE ACCESS TRACK



BICA, Check Pty Ltd Bushfire & Building Consultants - PO Box 375, Lennax Head NSW 2478





ABN 60 093 557 233

Burabi Aboriginal Corporation

P.O. Box 123
WARDELL, N.S.W. 2477
Email: burabi2477@bigpond.com

Phone: 0466093831

Ballina Shire Council
Strategic and Community Services
Steve Barnier

Dear Steve,

Burabi Aboriginal Corporation acknowledges the improved recognition of habitat and sustainability in the exhibited concepts proposal to Ballina Shire Council for approval. Though there are other serious issues that require resolution.

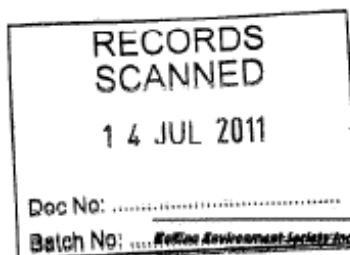
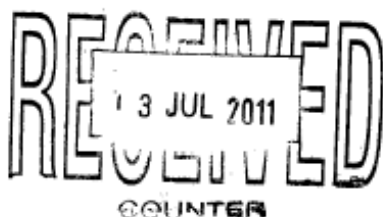
1. Circle of stones Lot 2 DP 1070446 and Half Circle of stones
2. Aboriginal Heritage Impact Assessment.

1. HERITAGE ITEM 34 STONE CIRCLE.

- There is a need for the developer to further consult the Cook family in regards to Aboriginal Heritage and scientific/archaeological significance and that both should be subject of assessment to inform its decision making.
- Aboriginal people are primary determinants of significance of the heritage located at Henderson Farm and a Cultural Heritage Management Plan be developed specifically for the project.
- Cook family and community involvement needs to occur early in the assessment process to ensure that our values and concerns are taken fully into account, and so that our decision making structures are able to function.
- The information arising out of consultation allows the consideration of Aboriginal community views about significance and impact as well as the merits of management or mitigation measures to be considered in an informed way.
- Sue Davis Report 2003 Recommendations to be adhered to for the project to proceed with the understanding that these recommendation are compatible with that of the DECC 's constitutional responsibility.
- The current process hopefully can adequately address our shared heritage concerns, that any development does not infringe on the function of the natural wetlands through nutrient input or alteration to runoff and floodway's.

Yours sincerely

Lois Cook



Doc No:
Batch No:
Ballina Environment Society Inc
PO Box 144 Ballina
NSW 2478 Australia
bes@powernet.com.au



SUBMISSION ON PROPOSED HENDERSON LAND REZONING

Ballina Environment Society respects the improved recognition of habitat and sustainability in the exhibited concepts. Although there remain serious issues requiring resolution:

1. Heritage Item 34 Stone Circle
2. Hairy Joint Grass substitute planting
3. Area E identified in LHCASP Lennox Head Community Aspiration Strategic Plan as uniquely suitable for aged and disability housing
4. Potential Urban Growth, Access to the site, Fire buffer and wildlife corridor
5. Integrated planning versus infrastructure overload.

1. HERITAGE ITEM 34 STONE CIRCLE.

Whilst BES understands the precise location cannot be disclosed, we can only trust adequate protection is ensured. However, we question what other archeologically significant sites remain undiscovered and doubt the current process can adequately address our shared heritage concerns.

2. HAIRY JOINT GRASS SUBSTITUTE PLANTING

BES mourns that 40+m depth of biomass which was 'The Big Scrub' on this site is protected only by Hairy Joint Grass, Pigmy Perch, Wallum Froglet and Stinky Figs.

BES does not support translocation of EECs

BES does not support medium density as proposed on this site.

3. AREA E IDENTIFIED IN LHCASP AS UNIQUELY SUITABLE FOR AGED AND DISABILITY HOUSING

The Lennox Head Strategic Planning process identified Area E as having rare potential for Aged and Disability Housing due to the relatively flat topography and proximity to the CBD. We request further consideration on the suitability of the proposed concept which does not encourage such use. The road network appears to show overdevelopment of infrastructure relative to open space.

Access off the Coast Road is contrary to past planning policies and we lament the lack of integrated planning of adjacent areas, particularly the lack of clarity in the un-coloured area traversing the site from south west to north east.

Therefore BES can not agree with Appendix 4 Concept design for roadways.

4. POTENTIAL URBAN GROWTH, ACCESS TO THE SITE, FIRE BUFFER AND WILDLIFE CORRIDOR

Potential Growth Areas in the proposed amendment identify the potential for a wildlife corridor between existing conservation zones on the fringe of the proposed urban areas. BES would like this connection strengthened and criss-crossing by roads alleviated.

Appendix 1: Locality Plan is unacceptable. We emphasize BES' continual request for Environmental Zones to be dedicated in the new LEP Proposed Urban Growth Areas and recognition of adjacent zonings, not just areas adjacent to UGAs.

The need for a fire buffer on the western boundary means using land that is not included in the concept plans. BES requests conditions regarding this issue of fire buffer not being on the land under Development be clarified. Does it necessitate clearing and is it approved for such use by the land holder.

There is a triangle of Urban Growth Area between Areas E and F on the eastern boundary which has access from a paper road. Is this road feasible? Has the implications of access been addressed? The

adjacent area within the site was not included in the Lennox Head Structure Plan and BES believes it is not supportable as an urban area.

The concept plan is not clear about which un-shaded areas are roads and which areas are parks. There is an area of vegetation west of the homestead ridge which is vegetated and significant. As a park, the natural values of the area will be impacted, but as a road, they will be destroyed. How is this addressed in the development?

Overall, BES respects the need to make the most of the development of UGAs, while retaining the right to object to over development and loss of habitat. We again request Environmental Zoning in all UGAs prior to release of the new draft LEP.

5. INTEGRATED PLANNING VERSUS INFRASTRUCTURE OVERLOAD.

As our country becomes increasingly urbanized, it is essential to ensure our land is capable of sustaining the population increase. This concept plan does not provide the information to judge it's worth against all the alternatives urban investigation releases?

The new LEP will hopefully contain better direction for justifying what growth potential is viable.

Because the concept plans do not include infrastructure, it is difficult to determine the impacts and outcomes. Release of this land will necessitate the construction of Hutley Drive. BES questions if construction of the Southern link of this road is environmentally plausible given the imposition on Ballina Nature Reserve. BES appeals to Council to consider making Hutley Drive North a feeder road for these estate developments, not a bypass through route.

To progress with the development of our place we need to respect our environment, our heritage and our future potential. Do we need the density proposed in the concept? BES considers the need to assess the implications on:

- Resources
- Infrastructure, and;
- Natural environment

as paramount considerations to integrated planning.

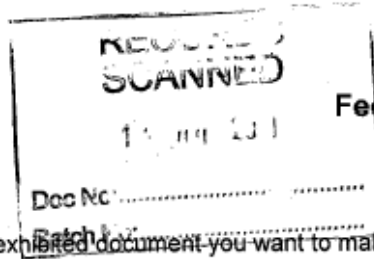
At this stage BES cannot support the proposed amendments to LEP '87 or nLEP10.

Prepared for Ballina Environment Society

By Fiona Folan MSc(Arch)

13/7/2011





Feedback for Documents on Exhibition

1. Name of exhibited document you want to make comment on:

Subdivision of Henderson Farm Kennex Head

2. Your name (anonymous submissions may be disregarded by Council):

Elizabeth Gibbs

3. Phone number (optional):

06877707

4. Email (confirmation of your email address is required to provide feedback from Council):

em.gibbs @ bigpond. com

Please note: Your feedback will be treated by Council as a public document and may be printed in our meeting agendas and made available to the public. If you want your feedback to remain confidential you must provide reasons in the comment box at the end of this survey.

5. Having read the document, is it easy to read and understand?

- Yes
No

6. Please provide any suggestions for improvement (please add extra pages if required):

Having read the proposal concerning sub-division of Henderson Farm, Kennex Head, I would ask Council to abide by proposals put forward in Appendix 8. Interland use & Transport "Hullleg Drive will provide a public transport corridor" p. 45 & 49 of 63 Hullleg Drive is to be linked to pruned a through road & access provided to Ross Lane & The Coast Rd. p 44 links to Greenfield Rd or The Gravel. p 47 of 153 - It is a priority to open the 'missing' section of Hullleg Drive (Traffic Consultant Cardio Eppell Olsen)

7. Do you support the overall objectives and content of the document?

- Yes *only if concerns are addressed*
 No

8. Please provide further comments if you wish (please add extra pages if required):

Residents of North Creek Rd. have been subjected to increased traffic flows with the opening of "Aspects" & "Elevation" estates & soon "Coastal Grove".

** Residents were assured by Council that Mortwood Drive or such would link with Kutty Drive to relieve congestion on Nth. Crk. Rd.*

9. If you wish your feedback to remain confidential please provide reasons for this:

** Please address the existing traffic problems for Nth. Crk. Rd. before allowing Henderson Farm development to further have access to Nth Crk Rd. via Henderson lane.*

** Residents need a LINK ROAD behind the Pines & Meadows Estates*

You can return your feedback form by:

- using prepaid envelope supplied in this folder;
- mail to PO Box 450, BALLINA, NSW, 2478;
- deliver in person to Ballina Shire Council, Corner of Cherry & Tamar Streets, Ballina;
- or provide feedback on Council's website - www.ballina.nsw.gov.au - under documents on exhibition.

*Thankyou
E Gibbs*

12 July 2011
Our Ref: SJC1318-894

The General Manager
Ballina Shire Council
PO Box 450
Ballina NSW 2478

Attention: Mr Simon Scott

Dear Sir,

**Re: Council Draft Local Environmental Plan Amendment
Formerly referred to as Amendment 103 of the Ballina
Local Environmental Plan 1987**

I have been asked by Lennox Developments Pty Ltd to review the planning proposal placed on exhibition by Council in relation to the Henderson Farm at Lennox Head.

I have 3 matters of concern. They are in relation to:

1. Permissibility of an access road through an environmental protection zone simply to service residential land;
2. The extent of the residential zoning proposed to be applied to the subject property; and
3. The early gazettal of this amendment.

Road Permissibility

I observe, that roads are a permissible use in the 7(i) Environmental Protection (Habitat) zone and it would appear from the Structure Plan contained in the exhibition material that road access is intended to service the middle part of the site adjacent to the western extension of the Greenfield Road area.

I note that the access to the property in the south-east is deliberately zoned "residential" but the access to the abovementioned part of the site is not so zoned. I appreciate that "roads" are a permissible use in the 7(i) Zone. However, as Council will no doubt be aware when considering land use permissibility a Council must turn its mind to the intended purpose of the "road" i.e. is it for the purposes of a road or is it for the purposes of "servicing another use". In a recent Land and Environment Court decision adjudicated on by the Chief Judge it was found that land in a similar zoning under the Byron Local Environmental Plan, (where a road was permissible) that the use it was intended to serve, in that case a place of public assembly, was prohibited use in the zone. I am concerned that the same logic can apply in relation to this plan.

Whilst it is clearly intended by the strategic underpinning documents that the residential land is intended to be accessed through land which is shown on the Draft Plan as Environmental Protection (Habitat) zoning this may or may be adequate in the face of a legal challenge.

sjc230678(2)

6 Byron Street
LENNOX HEAD NSW 2478
PO BOX 538

Telephone
02 6687 7171
Facsimile
02 6687 7067
Voice Message
02 9475 0889
Email Facsimile
02 9475 0889


www.connolly.com.au
ABN 40 125 970 783

1 • • • •

Accordingly, I recommend that the zoning of the land be extended to provide the corridor connection as zone 2(a).

The Extent of Zoning

As Council will be aware, every bit of land developed for residential purposes is very important and must be optimised. In looking at the development potential of the subject site, I have arranged for urban designers to review the scheme completed to date. They have made certain recommendations in relation to extending the zoning status. The diagram below illustrates in pink land proposed to be zoned in the LEP. The plan also illustrates other lots that are physically achievable on the site. It is respectfully submitted that Council give consideration to widening the 2(a) zone not merely to provide access as described in point 1 above but to facilitate further subdivision potential as illustrated in the diagram below.



Early Gazettal

Further to the abovementioned points I have been advised by Lennox Developments Pty Ltd that Council may defer consideration of this plan pending the outcome of works external to the subject site for road access. Given there is general agreement in the community in relation to the strategic importance of the land for urban purposes, its designation in Council's strategic planning for the area generally and its designation in the Far North Coast Strategy, I respectfully submit that the land should be rezoned at this time even if road connection matters are not satisfied. In the same way that Council has included a special clause relating to Hairy Jointgrass it could similarly do so in relation to restricting actual physical development until road access is settled. In this way my

sjc230678(2)

2 • • •



client company can proceed with the orderly lodgement of a Development Application for the land in parallel with the road access matters being deliberated upon.

Thank you for the opportunity to make a submission in relation to this project. Should you require any additional information or wish to clarify any matter raised by this submission, please feel free to contact the writer.

Yours faithfully



Stephen J Connelly FPIA
Certified Practising Planner

 S J CONNELLY CPP 
email: steve@connelly.com.au
mobile: 0419 237 982

Encl Conservation of North Ocean Shores Inc v Byron Shire Council & Ors [2009] NSWLEC 69

sjc230678(2)

3 • • • •

Reported Decision : 167 LGERA 52



Land and Environment Court
of New South Wales

CITATION : Conservation of North Ocean Shores Inc v Byron Shire Council & Ors [2009] NSWLEC 69

PARTIES : APPLICANT
Conservation of North Ocean Shores Inc

FIRST RESPONDENT
Byron Shire Council

SECOND RESPONDENT
Billinudgel Property Pty Ltd

THIRD RESPONDENT
Splendour in the Grass Pty Ltd

FILE NUMBER(S) : 41115 of 2008

CORAM: Preston CJ

KEY ISSUES: JUDICIAL REVIEW :- development consent granted for development for a purpose prohibited on part of the land to be developed - failure to form positive opinion that development consistent with objectives of relevant zone - exercise of power to grant consent ultra vires

LEGISLATION CITED: Environmental Planning and Assessment Act 1979 (NSW)
Local Government Act 1993 (NSW)

CASES CITED: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Blair v Blue Mountains City Council (1997) 93 LGERA 189
Bruce v Cole (1998) 45 NSWLR 163
Chambers v Maclean Shire Council (2003) 57 NSWLR 152; 126 LGERA 7
Chamwell Pty Limited v Strathfield Council (2007) 151 LGERA 400
Clifford v Wyong Shire Council (1996) 89 LGERA 240
Coffs Harbour City Council v Arrawarra Beach Pty Ltd (2006) 148 LGERA 11
Currey v Sutherland Shire Council (2003) 129 LGERA 223
Hortis v Manly Council (1999) 104 LGERA 43
Hurstville City Council v Renaldo Plus 3 Pty Ltd [2006] NSWCA 248
Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277

[http://www.lawlink.nsw.gov.au/...9nswlec.nsf/00000000000000000000000000000000/d7000e6d8ff17e58ca2575b3001ab01b?opendocument\[23/06/2011 5:13:23 PM\]](http://www.lawlink.nsw.gov.au/...9nswlec.nsf/00000000000000000000000000000000/d7000e6d8ff17e58ca2575b3001ab01b?opendocument[23/06/2011 5:13:23 PM])

Manly Council v Hortis (2001) 113 LGERA 321
Minister Administering The Crown Lands Act v New South Wales
Aboriginal Land Council (No 2) (1993) 31 NSWLR 106; 80 LGERA 173
Parramatta City Council v Precision Rubber Service Pty Ltd [1995]
NSWLEC 34 (10 March 1995)
Schroders Australia Property Management Ltd v Shoalhaven City Council
[2001] NSWCA 74
Shire of Perth v O'Keefe (1964) 110 CLR 529; 10 LGERA 147
The Australian Gas Light Company v The Valuer General (1940) 40 SR
(NSW) 126
Tuite v Wingecarribee Shire Council (No 2) [2008] NSWLEC 321
Warehouse Group (Australia) Pty Ltd v Woolworths Ltd (2005) 141
LGERA 376
Winn v Director General of National Parks & Wildlife (2001) 130
LGERA 508
Woolworths Ltd v Pallas Newco Pty Ltd (2004) 136 LGERA 288

DATES OF HEARING: 16 February 2009, 17 February 2009 and 18 February 2009

DATE OF JUDGMENT: 6 May 2009

LEGAL REPRESENTATIVES: **APPLICANT**
Mr P C Tomasetti SC and Mr N M Eastman
SOLICITORS
Environmental Defender's Office

FIRST RESPONDENT
Ms K Gerathy (solicitor)
SOLICITORS
HWL Ebsworth

SECOND AND THIRD RESPONDENTS
Mr B A J Coles QC and Ms A M Mitchelmore
SOLICITORS
McCartney Young Lawyers

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

PRESTON CJ

6 MAY 2009

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41115 OF 2008

CONSERVATION OF NORTH OCEAN SHORES INC v BYRON SHIRE COUNCIL & ORS

JUDGMENT

1 HIS HONOUR:

A development consent is challenged

Byron Shire Council granted a development consent dated 6 August 2008 to carry out development described as “temporary place of assembly with camping and associated infrastructure” on land in the Wooyung/North Ocean Shores locality of Byron Shire. The land is formally described as Lots 46, 402, 403, 404 and 410 in Deposited Plan 755687, Lots 2 and 12 in Deposited Plan 848618, Lots 10, 12 and 14 in Deposited Plan 875112, Lot 30 in Deposited Plan 880376, Lots 102 and 107 in Deposited Plan 1001878, Lot 101 in Deposited Plan 856767 and Lot 31 in Deposited Plan 880376. All of the land is zoned under *Byron Local Environmental Plan 1988* but different lots are in different zones and subject to different controls. Of relevance to the challenge in this case, part of the land is zoned 7(k) Habitat Zone. The controls applicable to land in the 7(k) Habitat Zone restrict the purposes for which development may be carried out on that land to seven nominate purposes, all of which require development consent. All other purposes are prohibited. Development for the purpose of place of assembly is not one of the nominate permissible purposes and is therefore prohibited.

2. The applicant, Conservation of North Ocean Shores Inc, challenges the validity of the development consent. Its primary argument is that the consent purports to permit the carrying out of development for a purpose (place of assembly) that is prohibited on part of the land (the land zoned 7(k) Habitat Zone) over which the development is to be carried out and, hence, is ultra vires the power to grant consent.

3. The Council made a submitting appearance. The second respondent, Billinudgel Property Pty Ltd, is the owner of the land. The third respondent, Splendour in the Grass Pty Ltd, is the organiser of the temporary music festival to be called “Splendour in the Grass”. The second and third respondents had common legal representation. They submitted that, notwithstanding that the development consent stated that the development was for the purpose of temporary place of assembly, the proper characterisation of those components of the development on the part of the land zoned 7(k) Habitat Zone, including roads and pedestrian pathways, should be considered to be for the purpose of “roads”. This purpose is a nominate permissible purpose in the 7(k) Habitat Zone and, hence, the exercise of power to grant consent was intra vires.

4. The applicant responds to that argument by saying that the proposed roads and pedestrian pathways in the 7(k) Habitat Zone cannot be characterised as being for an independent purpose of roads, but rather are subordinate to the dominant purpose of place of assembly.

5. The applicant also challenges the consent on other grounds. A second ground was that the Council failed to take into account a relevant consideration, namely whether the proposed development was prohibited. This ground adds nothing to the primary ground. If the applicant is correct on its primary ground, namely, that the development is prohibited on part of the land, then the Council had no power to grant consent to that development and the consent is invalid. If, however, the development is not prohibited on any part of the land but it is permissible, then the applicant’s second ground would be factually wrong. Accordingly, I need not determine this second ground of challenge.

6. A third ground of challenge was that the Council failed to consider and form a positive opinion that the carrying out of the proposed development is consistent with the objectives of the 7(k) Habitat Zone. This ground

focuses on the requirement in cl 9(3) of *Byron Local Environmental Plan 1988* that “the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out”. The applicant argues that the Council failed to form the requisite positive opinion in respect of objectives (a) and (b) of the 7(k) Habitat Zone. The applicant argues that formation of an opinion under cl 9(3) that the proposed development is consistent with the zone objectives, is a necessary pre-condition to the Council having power to grant consent. Since the pre-condition in cl 9(3) was not satisfied, the Council had no power to grant consent.

7. The second and third respondent contest the applicant’s claim that the Council failed to consider the objectives of the 7(k) Habitat Zone. They submit that there is evidence in the Planning Report considered by the Council at its meeting where it resolved to grant development consent, considering each of the objectives, including objectives (a) and (b), of the Habitat Zone.

8. The applicant argues in the alternative to the third ground, and this is its fourth ground of challenge, that the Council’s decision that the development was consistent with the objectives of the 7(k) Habitat Zone was an exercise of discretion that was so manifestly unreasonable or manifestly illogical as to constitute a judicially reviewable error. The applicant argues that the carrying out of the infrastructure works in the 7(k) Habitat Zone and the holding of the music festival will have significant detrimental effects on wildlife habitats and wildlife. Accordingly, the applicant argues, it was manifestly unreasonable for the Council to conclude that the carrying out of the development is consistent with the objectives of the 7(k) Habitat Zone.

9. The second and third respondents submit that the applicant’s submission that the Council’s decision in relation to the consistency of the development with the objectives of the 7(k) Habitat Zone is manifestly unreasonable cannot be sustained on a close analysis of the Planning Report before the Council and its annexures.

10. In respect of both the third and fourth grounds of challenge, again, if the applicant’s primary argument is correct, and the development is prohibited on the land in the 7(k) Habitat Zone, the power to determine a development application by the grant of consent would not be available and there would be no occasion to consider the requirement of consistency with the zone objectives in cl 9(3). The necessity to consider the requirement in cl 9(3) of consistency with the zone objectives can only arise if the development is for a permissible purpose.

Summary of decision

11. I have determined that the applicant’s primary ground of challenge should be upheld. The Council has purported to grant consent to a development for a purpose (place of assembly) that is prohibited on part of the land on which the development is to be carried out (the land in the 7(k) Habitat Zone). The Council had no power to grant consent to a prohibited development.

12. I have also found that the pre-condition in cl 9(3) of the *Byron Local Environmental Plan 1988* was not satisfied because the Council failed to form the requisite positive opinion, and one unaffected by error of law, that the proposed development in the 7(k) Habitat Zone was consistent with objectives (a) and (b) of the 7(k) Habitat Zone, and as a result the Council had no power to grant consent.

13. For each of these reasons, the development consent should be declared invalid and of no effect.

The applicable law

14. Environmental planning instruments made under the *Environmental Planning and Assessment Act 1979* (NSW) classify development into three broad categories: development that does not need development consent, development that needs development consent, and development that is prohibited. A development application may be made seeking development consent only for development that is classified as needing consent (see ss 77(a), 76A(1) and 78A(1)). A consent authority has no power to grant development consent to development that does not

need consent (see ss 76(1) and 77(a) and *Parramatta City Council v Precision Rubber Service Pty Ltd* [1995] NSWLEC 34 (10 March 1995)) or development that is prohibited (see ss 76B and 77(a) and *Chambers v Maclean Shire Council* (2003) 57 NSWLR 152 at 169 [117]; 126 LGERA 7 at 25 [117] and *Currey v Sutherland Shire Council* (2003) 129 LGERA 223 at 231 [34]).

15. In this case, the relevant environmental planning instrument is *Byron Local Environmental Plan 1988*. The land on which development is proposed to be carried out falls within four zones: 1(a) General Rural Zone, 1(b1) Agricultural Protection Zone, 7(k) Habitat Zone and 9(a) Proposed Road Zone.

16. Clause 9 of the *Byron Local Environmental Plan 1988* specified the purposes for which development may be carried out without development consent, or with development consent, or for which development is prohibited, in each zone: see cl 9(2) and the Table for each zone. Of relevance in this case is the 7(k) Habitat Zone. The Table specifies in item 2 (without consent) no purpose for which development may be carried out without development. The Table specifies in item 3 (only with development consent) purposes for which development may be carried out only with development consent, being agriculture (other than animal establishments and clearing of land); bushfire hazard reduction; environmental facilities; home industries; primitive camping grounds; roads; utility installations. The Table then specifies in item 4 that any purpose other than a purpose specified in item 2 or 3 is prohibited. Development for the purpose of place of assembly, not being specified in item 2 or 3, is therefore prohibited.

17. Clause 9 of *Byron Local Environmental Plan 1988* also deals with the objectives of each zone. Clause 9(1) states that the objectives of each zone are those set out in the Table under the heading "Objectives of the Zone" for the relevant zone. The objectives of the 7(k) Habitat Zone are:

"(a) to identify and protect significant vegetation and wildlife habitats for conservation purposes;

(b) to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist;

(c) to enable the carrying out of development which would not have a significant detrimental effect on the wildlife habitats; and

(d) to enable the careful control of noxious plants and weeds by means not likely to be significantly detrimental to the native ecosystem."

18. Clause 9(3) sets a pre-condition by reference to the zone objectives. It provides:

"(3) Except as otherwise provided by this plan, the Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council is of the opinion that the carrying out of the development is consistent with the objectives of the zone within which the development is proposed to be carried out."

19. The clause requires the Council, as the consent authority, to form the requisite opinion that the carrying out of the development is consistent with the relevant zone objectives before it embarks on a consideration of the merits of the development application and before it has power to grant consent: *Clifford v Wyong Shire Council* (1996) 89 LGERA 240 at 249, 251-252; *Hortis v Manly Council* (1999) 104 LGERA 43 at 87 [171], [172], affirmed in *Manly Council v Hortis* (2001) 113 LGERA 321 at 329 [28]-330 [32]; *Schroders Australia Property Management Ltd v Shoalhaven City Council* [2001] NSWCA 74 at [7]; *Coffs Harbour City Council v Arrawarra Beach Pty Ltd* (2006) 148 LGERA 11 at 22 [42]-[44]. If the Council fails to form the requisite opinion that the carrying out of the development is consistent with the relevant zone objectives, the power to grant consent will not be enlivened and any purported exercise of the power will be ultra vires.

20. A consent authority has power, and is under a duty, to determine a development application: see s 80(1). The power may be exercised to grant consent to the application, either unconditionally or subject to conditions, or to refuse consent to the application: s 80(1)(a) and (b). The exercise of the power to grant consent to a development must result in a consent under the statute (that is, that answers the description of a consent under the statute), and furthermore, a consent to the development application made under the statute. A consent for development significantly different to the development for which consent was sought in the development application, is not a consent to the application made: *Winn v Director General of National Parks & Wildlife* (2001) 130 LGERA 508 at 514 [13], [14]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 292 [54]; *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 at [62], [90].

21. Development under the statute is also required to be for a purpose: *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534-535; 10 LGERA 147 at 150; *Minister Administering The Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1993) 31 NSWLR 106 at 121; 80 LGERA 173 at 188; *Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 400 at 406 [27]. This is made clear under the *Byron Local Environmental Plan 1988*. The threefold classification under cl 9 of *Byron Local Environmental Plan 1988* operates by reference to the purpose of the development. Hence, a development application seeks consent to carry out development for a purpose that is classified as being a purpose for which development consent is required.

22. The consequence is that the exercise of the power to grant consent must result in a consent to a development for the purpose or purposes for which consent was sought in the development application made.

23. With these principles in mind, I come to deal with the development application made by the third respondent, the consideration of that application by the Council, and the development consent granted by the Council to that application.

The development application made

24. The third respondent lodged the development application with the Council on 16 August 2007. The development application was in the standard form. Under the heading "Step 3 Describe the development you wish to carry out", the application stated "Temporary Place of Assembly with camping and associated infrastructure – 2008 Splendour in the Grass Festival".

25. The development application form was accompanied by a Statement of Environmental Effects dated August 2007 by Balanced Systems Planning Consultants. The Statement notes on p 5 that:

"Consent is sought for the following development, being the carrying out of work on the land the subject of the application:

- A temporary music festival (Splendour in the Grass) with associated infrastructure, camping and carparking for Friday 1st August to Sunday 3rd August 2008 (or Friday 8th August to Sunday 10th August 2008).

The event is to be undertaken as a trial event to comprehensively monitor the site and impacts of the temporary event."

26. The Statement similarly states on p 7:

"This application is for the purpose of undertaking the 2008 Splendour in the Grass music festival to occur as a 'trial' event to assess and monitor the performance of the site and assess the actual impacts of the single temporary event.

Splendour in the Grass Pty Ltd, festival organisers, seek approval for the temporary use of the North Byron Shire Parklands (NBSP) site at Tweed Valley Way and Jones Road, North Ocean Shores/Wooyung for the following:

- A single trial music festival with associated infrastructure and management, temporary camping and car parking Friday 1st August to Sunday 3rd August 2008 (or Friday 8th August to Sunday 10th August 2008). Camping commences Friday 7am until Monday 4pm.

27. The trial event is summarised on pp 8-9:

“The trial event, in August 2008, is for a maximum of 22,500 patrons plus a maximum of 2000 staff, performers, guests and associated personnel. The patron numbers comprise 7,500 campers with 15,000 day patrons.

...

The trial event comprises the construction phase of the identified infrastructure, the assembly and dismantling of the event (bump in/bump out periods) and the actual event occurrence”.

28. The event layout is summarised on pp 9-10 of the Statement. The event footprint is said to be designed to conform with the existing site zoning provisions. The Statement summarises the associated infrastructure, facilities and works as follows:

“The application nominates the associated infrastructure, facilities and works required to be undertaken to carry out the proposed event on the site. These are detailed within the application and summarised as follows:

- Upgrading of the western portion of Jones Road, from a current unsealed single lane to a sealed two lane road for some 400 metres from Tweed Valley Way east to the existing property entrance
- New site entrance at the main carpark at the southern end of the site
- Carparks as located within the site layout plan
- Internal road and pedestrian network, including underpass at Jones Road
- Drain crossings and drain maintenance and improvements
- Temporary fencing to secure site
- Temporary stages, portable amenities, lighting and facilities such as food stalls, bars, markets and other temporary facilities”.

29. The Statement states at p 10 that it assesses the potential impacts of the temporary event. It was accompanied by various specialist assessments of the potential impacts of the temporary event.

30. The Statement lists on p 28 the event components to be:

- “administration of the site and music festival;
- assembly and dismantling the temporary infrastructure for the event (bump in and out periods) which will occur in the 21 days prior and 7 days following the event;

- entertainment in performance tents and spaces;
- temporary camping with associated infrastructure and services;
- provision of facilities including stalls, food outlets, bars and toilet facilities;
- upgrading of western portion of Jones Road to a two lane sealed road as described within Appendix D1;
- construction of internal road, carparks and pedestrian network, including an underpass under Jones Road, as described within Appendix D1;
- construction of associated infrastructure including drain crossings and drain maintenance, diversion and profiling;
- vehicle car parking and pedestrian access including bus/taxi/car set down and pick up areas;
- management of the site and event as described within this application;
- application and monitoring of management strategies;
- initial implementation of the preliminary Vegetation Management Plan with compensatory plantings.”

31. The “associated infrastructure” is described on pp 37-39 of the Statement. The Statement outlines that “the following works are required in association with undertaking the event” and then lists the works to be site entrances; internal roads and walking paths; upgrading Jones Road; Jones Road underpass; and drainage.

32. The development application also included an application under s 68 of the *Local Government Act 1993* for the installation of temporary structures, use of a building and temporary structures as a place of public entertainment, installation of a fuel heater, carrying out water supply work and operating a temporary camping ground. The period of approval under s 68 was proposed to be four weeks to account for the erection and removal of all structures for which application is sought.

33. After receipt of the development application, the Council responded by letter dated 11 September 2007 which requested additional information. One of the matters the Council requested to be addressed was the permissibility of land use. The Council noted that the development application form describes the proposed development as a “Temporary Place of Assembly with camping and associated infrastructure – 2008 Splendour in the Grass Festival”. The Council noted that the plans submitted with the development application indicate that the proposed development is to be carried out within a number of land use zones, including the 7(k) Habitat Zone. The Council noted that a ‘Place of Assembly’ is a prohibited land use within the 7(k) Habitat Zone. The Council requested the applicant to submit details to demonstrate that the proposed development is both permissible and consistent with the objectives of each of the land use zones in which the development is to be carried out. It noted that the applicant may be required to submit amended plans to contain the development within land use zones where the proposed land use is not prohibited.

34. The third respondent’s consultant, Mr Rob Doolan of Balanced Systems Planning Consultants, responded to the Council’s request for additional information relating to the permissibility of the development by a letter dated 27 November 2007. Mr Doolan noted that the proposed development includes upgrading existing roads and construction of new roads. Mr Doolan states:

“Proposed upgrading of existing roads and construction of new roads comprise the following within the application:

[http://www.lawlink.nsw.gov.au/...9nswlec.nsf/00000000000000000000000000000000/d7000e6d8ff17e58ca2575b3001ab01b?opendocument\[23/06/2011 5:13:23 PM\]](http://www.lawlink.nsw.gov.au/...9nswlec.nsf/00000000000000000000000000000000/d7000e6d8ff17e58ca2575b3001ab01b?opendocument[23/06/2011 5:13:23 PM])

- Upgrading of Jones Road – Jones Road, a public road, unsealed and generally narrow, services the NBSB site, some five small rural holdings and the Billinudgel Nature Reserve. The application seeks to upgrade the first 400 metres of Jones Road to a two lane standard and seal the road. While being used for the proposed event for three days of the 2008 calendar year, the road upgrading will benefit the residents, in terms of safety and amenity and removal of dust, on an ongoing permanent basis.
- The NBSB site – existing roads are to be upgraded with new roads (and the Jones Road underpass) also being constructed. These roads are required for normal farm and property activities and will be utilised for the temporary event. Upgrading of roads is to be minimal to attain a suitable level of service.

As addressed below, the existing and new internal roads, are located within four zones of the Byron LEP, 1988. These roads will provide a functional network for the variety of uses throughout the site. While being utilised for the temporary music event, the roads will be servicing the range of ongoing permanent land uses on the site, independent to the temporary festival use.

It is the intention that the roads will be permanent infrastructure, where required, to service the land uses on the site. The roads works will form the initial stage of implementing the property upgrading program; so as to be able to manage the overall site as an integrated unit. Permanency and staging of infrastructure is dependent on a number of factors including funding and sustainability issues relating to use of resources and energy.”

35. In relation to the proposed roads in the 7(k) Habitat Zone, Mr Doolan states:

“Existing and proposed roads to service and facilitate other uses and the proposed use (for the event) are included within this zone. Roads are permissible within the zone.

...

Parts of the overall site are within the Zone 7(k) Habitat Zone. The site has areas within this zone comprising cleared pasture with existing and proposed roads traversing this zone. The event layout for the proposed temporary event has respected the Zone 7(k) areas and boundaries, irrespective of their current ecological value.

The application only seeks approval for use of existing roads and construction of new roads within this zone. No part of this zone is proposed for use of the temporary place of assembly”.

36. In his conclusion, Mr Doolan states:

“The application is characterised as being for the following:

- temporary use of part of the site within Zones 1(a) and 1(b1) for Place of Assembly, within the defined event area, which is a permissible use within these zones
- temporary use of the southern part of the site within Zone 1(a) for a carpark which is a permissible use within the zone

- roads for vehicle and pedestrian use – use of existing road network and construction of new roads to improve the road network for the site, within a variety of zones, all zones of which permit roads. The roads are to be used for independent ongoing existing land uses including agricultural use in addition to the proposed temporary use of the roads for the event

The proposed uses are demonstrated to be consistent with the applicable zone objectives.

The application involves the use of existing permanent site infrastructure together with new infrastructure such as additional roads and the Jones Road underpass. This infrastructure will service the temporary event and the various independent existing site uses. Such infrastructure is by its nature, permanent. It is not consistent with Ecologically Sustainable Development criteria such as resource conservation and energy avoidance, to consider removal of the underpass or the roads”.

37. On 19 March 2008, Mr Doolan on behalf of the third respondent wrote to the Council amending the development application and providing additional information. One amendment was to change the dates of the event from 2008 to 2009. The dates of the event would be 31st July 2009 and 1st and 2nd August 2009 or 17th and 18th July 2009. There were also amendments to the site layout and provision of another access option to the Jones Road underpass, as an alternative (this option ultimately was not pursued). No amendment was made to the development application to seek consent to use the roads and pathways comprising the permanent infrastructure, whether located in the 7(k) Habitat Zone or any other zone, for the purpose of roads or agriculture or any other purpose.

38. A similar letter was sent by Mr Doolan to the Council on 18 April 2008, describing the amendment of the dates of the event to be three days of actual festival usage with four days of camping usage in the July/August period of 2009.

39. Revised site layout plans were submitted by the third respondent on a number of occasions. These still showed associated infrastructure including roads, pathways and fencing to be located in the 7(k) Habitat Zone.

The Council's consideration of the development application

40. The development application was eventually considered by the Council at its meeting on 31 July 2008. The Council Planning Report to that meeting noted the proposed development to be “Temporary Place of Assembly with camping and associated infrastructure for the 2009 Splendour in the Grass Music Festival.” The Report noted that the land is in part in the 7(k) Habitat Zone. The Report identified, as one of the issues the Council needed to address, the “permissibility within land zones”.

41. In the summary, the Report states:

“Development Consent is sought to host a music festival with associated camping and infrastructure within the subject site. The application is for a one off trial event to be carried out in late July/early August 2009.

To facilitate the one off event, a number of permanent works are required. The most significant of these are roadworks associated with access and internal vehicle and pedestrian movement for the festival. The Applicant has presented two options for Council's consideration. One being the construction of an underpass through Marshall's Ridge/Jones Road to facilitate access from the southern to the northern parts of the property. The second being an at grade crossing. Both options will require vegetation removal from the site and road reserve.

The land is located within a number of land use zones being the 9(a) Proposed Road

Zone, the 7(k) Habitat Zone, 1(a) General Rural Zone and 1(b1) Agricultural Protection Zone. The proposal includes uses that could be inconsistent with the permissible land uses and objectives of the some of the respective zones.

The site includes a number of planning constraints including ecological and archaeological sensitive areas. The proposal will potentially impact on one or more of these areas.

...

It is important to note that this proposal is for one event only.

In considering the proposal under Section 79C of the *Environmental Planning and Assessment Act 1979*, it is concluded that the Development Application as proposed could be granted consent. Additionally, a number of potential reasons of refusal have been provided within this Planning Report. However, should consent be granted to the Development Application, draft conditions of approval have also been included in this report.⁷⁷

42. In the main body of the Report, the proposed development is described under headings of general and infrastructure.

“General

The proposed development is described by the Applicant within the Statement of Environmental Effects that was submitted with the Development Application. This document and the amended Development Application are included as Attachments to this Planning Report. A summary of the development proposed is provided below.

Development consent is sought to hold a temporary music festival (defined as a temporary place of assembly), known as ‘Splendour in the Grass’, within privately owned property located within the far north of the Byron Local Government Area. The proposed temporary festival will attract a maximum of 22,500 patrons per day, of which 7,500 are proposed to camp within the property, and 15,000 will be day patrons.

Approval is sought for a single event only, scheduled to be held over four (4) days commencing in late July 2009. The Applicant intendeds to conduct the event as a one off ‘trial’ so as to determine the capability of the site and the surrounding area for the proposed future use of the site.

The temporary festival is to provide entertainment in the form of local, national and international music artists and performers on a number of stages within a designated event area. It is also to include a number of other performance spaces, food stalls, bars and market stalls within the event area for use by patrons.

The festival (including camping) is proposed to be held on:

- Friday 31 July 2009
- Saturday 1 August 2009
- Sunday 2 August 2009
- Monday 3 August 2009

The Statement of Environmental Effects that was submitted with the Development Application provides that patron camping on the site would commence on Friday morning

and cease on Monday afternoon.”

...

“Infrastructure

The proposed festival is to be carried out within a large rural property that has previously been used for agricultural and residential uses. As with previous Splendour in the Grass music festivals, a substantial amount of temporary infrastructure would be brought onto the site to stage the event. However, due to the size and layout of the proposed event and the associated camping and carparking areas required, the proposal also seeks approval for extensive permanent infrastructure works.

The proposed works are summarised below:

Permanent

Although approval is sought for a one off trial event, the works described below are to remain as permanent infrastructure within the development site:

- Construction of new intersection and property access road from Tweed Valley Way
- Construction of new internal gravel access roads from intersection to carparking areas
- Construction of internal gravel roads from carparking areas to camping and event areas
- Construction of new and upgrading existing internal gravel roads to provide access throughout the site
- Construction of crossings over drains and streams associated with new gravel roads
- Construction of either a vehicle and pedestrian underpass beneath Jones Road (with associated tree removal) or an at-grade crossing (with associated tree removal) to provide a link between the northern and southern portions of the property
- Widening/Upgrading of Jones Road (with associated tree removal) for a distance of approximately 400m from Tweed Valley Way and construction of internal gravel roads from Jones Road to event and camping areas
- Realignment, upgrading and modification of existing drains
- Revegetation/Compensatory planting works

It is noted that the most substantial works proposed is to create a crossing over Jones Road, which runs east – west along a ridgeline known as Marshall’s Ridge. The original Development Application comprised the construction of a vehicle and pedestrian underpass. However, the amended Development Application submitted in March 2008 includes an alternative to the underpass, being ‘at grade’ vehicle and pedestrian crossings over Jones Road.

This assessment report considers both of the proposed options. The Applicant has agreed to Council approaching this issue in this fashion. The Statement of Environmental Effects and supporting information that were submitted with the Development Application

indicates that the proposed underpass would require substantial earthworks to place pre-cast concrete arches within the road reserve to create a tunnel between the northern and southern sections of the property.

The proposed alternative, the 'at grade' crossing, also requires substantial earthworks (including filling) to cross the ridgeline in almost the same location as the underpass option. Each option requires the removal of vegetation. Revegetation works are proposed as part of the Development Application.

Temporary

- Provision of perimeter and internal security fencing and entry gates
- Provision of pedestrian pathways, footbridges and drain crossings
- Erection of stages, tents, bars, market stalls, food stalls, first aid facilities, administration centre, artists areas, ticket booths, bonfires, performance and dance spaces etc. within event area
- Provision of designated camping areas (for both campervans and tents) with toilet and shower facilities
- Provision of designated emergency helicopter pad
- Provision of grass carparking areas
- Provision of water supply, effluent collection and waste removal systems

Generally, the temporary works associated with the proposal require 21 days to set up (known as the 'bump in' period), and 7 days to dismantle (known as the 'bump out' period). It is proposed that workers involved with the 'bump in' and 'bump out' periods will camp within the site for the duration of each of these periods and the festival itself. The permanent construction works proposed will occur over a longer timeframe (several months) prior to the bump-in period.

In light of the works proposed, this Planning Report provides a dual assessment:

1. An assessment of the temporary music festival, camping and associated temporary infrastructure; and
2. An assessment of the permanent infrastructure works and the continued use of such works in the long term."

43. The Report notes that upgrading of existing roads and construction of new roads, pedestrian paths and security fencing will be in the 7(k) Habitat Zone.

44. In the section of the Report dealing with the requirements of *Byron Local Environmental Plan 1988*, the Report notes the requirement to meet the objectives of the 7(k) Habitat Zone and refers to comments within the issues section later in the Report. The Report provides the definition of "place of assembly", and states:

"The proposed use falls within the definition of a temporary *place of assembly*. This use is permissible with the consent of Council within the 1(a) General Rural Zone and the 1(b1) Agricultural Protection Zone. The use is also permissible within the 9(a) Proposed Road Zone subject to the concurrence of the RTA under Clause 44 of Byron LEP 1988. The proposal also includes works within the 7(k) Habitat Zone. A place of assembly is

prohibited within this zone. Refer to Issues Section below”.

45. In the Issues Section, the Report addresses the permissibility of the proposed development, in particular in the 7(k) Habitat Zone. The Report states:

“Clause 9 – Zone objectives and development control table

The site of the proposed development is located within four (4) separate land use zones under *Byron Local Environmental Plan 1988*:

*1(a) General Rural Zone * 7(k) Habitat Zone

* 1(b1) Agricultural Protection Zone * 9(a) Proposed Road Zone

The Development Application form that was submitted to Council describes the proposed development as follows:

*Temporary Place of Assembly with camping and associated infrastructure – 2008
Splendour in the Grass Festival*

The amended Development Application now proposes that the event be held in 2009. From the plans submitted with the amended Development Application, it is clear that the main land uses proposed are the festival, the camping, and all the associated roadworks, carparking, temporary fencing and subsidiary uses associated with the festival and the camping. The Dictionary contained within Byron LEP 1988 defines a place of assembly as below:

place of assembly means a public hall, theatre, cinema, music hall, concert hall, dance hall, open-air theatre, music bowl or any other building of a like character used as such and whether used for the purposes of gain or not, but does not include a place of worship, an institution or an educational establishment.

The proposed temporary festival is consistent with this land use definition as it comprises a use that is ‘of a like character’ to a music hall, an open-air theatre or a music bowl. Council has consistently applied this definition to previous ‘Splendour in the Grass’ and ‘East Coast Blues and Roots’ Festivals over the past seven years. The definition of camping within *Byron Local Environmental Plan 1988* is discussed separately below (refer to 1(a) General Rural Zone).

The proposal also includes a number of other uses associated with the temporary place of assembly. These include:

- Resource Centre
- Market stalls
- Food stalls and restaurants
- Bar areas
- Cinema
- Emergency helicopter pad
- Carparking

With the exception of the carparking, helicopter pad and the Resource Centre, all of the above uses are to be contained within the fenced and gated festival area. As such, they are regarded as ancillary uses to the principal ‘place of assembly’ land use that consent is

being sought for the site. The resource centre, emergency helipad and carparking are also regarded as being ancillary to the 'place of assembly', even though are not located within the fenced event area. Places of assembly are permissible with the consent of Council within the 1(a) General Rural Zone, 1(b1) Agricultural Protection Zone and the 9(a) Proposed Road Zone (subject to the concurrence of the RTA under Clause 44 of Byron LEP 1988). The concurrence of the RTA was provided within email correspondence dated 12 February 2008.

Permissibility within 7(k) Habitat Zone – Place of Assembly and Roads

Large areas of the site, particularly following Marshall's Ridge and extending north and south of the ridge to lower lying areas, fall within the 7(k) Habitat Zone. Places of assembly are prohibited within this zone. Substantial permanent infrastructure works, including the Jones Road underpass/at grade crossing, roads and pedestrian paths are proposed within the 7(k) Zoned areas of the property.

The only land uses that may be carried out with the consent of council within the 7(k) Habitat Zone are listed below:

Agriculture (other than animal establishments and clearing of land); bushfire hazard reduction; environmental facilities; home industries; primitive camping grounds; roads; utility installations

All uses other than those listed above are prohibited within the zone.

During the assessment of the Development Application the Applicant was requested to provide details of how the proposal is permissible with the consent of Council and how it meets the objectives of the land use zones in which it is situated. Of particular concern was the fact that places of assembly are prohibited within the 7(k) Habitat Zone. Following a meeting with Council Management on 23 October 2007, the Applicant provided the following response (in part) to address the provisions of the 7(k) Habitat Zone:

Parts of the overall site are within the 7(k) (Habitat Zone). The site has areas within this zone comprising cleared pasture with existing and proposed roads traversing this zone. The event layout for the proposed temporary event has respected the Zone 7(k) areas and boundaries, irrespective of their current ecological value. The application only seeks approval for use of existing roads and construction of new roads within this zone. No part of this zone is proposed for use of the temporary place of assembly.

The application specifically reflects the habitat zone objectives and includes a range of measures to protect and enhance the ecological values of the site.

(Correspondence from Balanced Systems Planning Consultants dated 27 November 2007) Amended plans were submitted to accompany the details above to ensure no part of the event area, camping areas or carparking areas were located within the 7(k) Habitat Zone. However, permanent infrastructure works, being primarily roadworks, are proposed within the 7(k) Zone.

Inspections of the site confirmed that while large areas of the 7(k) Habitat Zone have previously been cleared of vegetation, substantial stands of vegetation do remain. The proposed underpass and at grade crossing of Jones Road and the proposed roads leading

to these works are located within the 7(k) Zone. Jones Road itself, which is proposed to be widened/upgraded, is also within the 7(k) Zone.

To facilitate both the Jones Road underpass/grade crossing and upgrade it is proposed to remove existing vegetation on either side of the existing carriageway. To compensate for the removal of this vegetation, it is proposed to provide vegetation planting and corridor enhancement planting as outlined within the Preliminary Vegetation Management Plan by Mark Fitzgerald, dated 5 July 2007. This report indicates that planting has already commenced (also confirmed during an inspection of the site) within an area on the southern side of Jones Road. The Preliminary Vegetation Management Plan indicates that an area of approximately 8 hectares (referred to as Area 1) is to be planted with over 3,400 trees over a six year period.

Area 1 is located within the 7(k) Habitat Zone on the southern side of Jones Road. It is bound by the Billinudgel Nature Reserve to the east and Tweed Valley Way to the west. Although this land is to be revegetated, it is proposed to construct a sealed road and a pedestrian path leading to the proposed underpass within this area. In addition, a temporary bus pick up and set down area is proposed adjacent to an existing vehicle access point to Tweed Valley Way. The proposed underpass is located entirely within the 7(k) Habitat Zone shown cross-hatched on the map.

The indicative plans submitted to Council propose a 25 metre long underpass constructed of Humes Bebo pre-cast concrete arches and rock headwalls. It is to be installed using a 'cut and cover' method of construction.

In addition to the works within and adjacent to the Jones Road Reserve, hundreds of metres of other roads (both existing and proposed) to be used for service vehicles, shuttle buses and campers, as well as pedestrian paths and temporary fencing are proposed within the 7(k) Zone.

It is apparent that the works to be carried out are primarily to facilitate the operation of the proposed festival, but are proposed to be used for the existing activities carried out within the property. The Applicant was requested to provide details as to the need for the permanent works proposed. The Applicant provided a detailed response, dated 27 November 2007, stating that the proposed roads (including the underpass) are to 'provide a functional network for the variety of uses throughout the site' such as 'normal farm and property activities'. In addition, the Applicant states:

The current land uses on the NBSF site comprise property maintenance, repair and improvements and agricultural activities including grazing, bee farming and grass seed harvesting. Initial ecological restoration works including environmental weed control, tree planting and fencing of habitat areas are well advanced....

....While being utilised for the temporary music event, the roads will be servicing the range of ongoing permanent land uses on the site, independent to the temporary festival use.

It is the intention that the roads will be permanent infrastructure, where required, to service the land uses on the site. The road works will form the initial stage of implementing the property upgrading program; so as to be able to manage the overall site as an integrated unit. Permanency and staging of infrastructure is dependent of a number of factors including funding and sustainability issues relating to use of resources and energy.

Places of assembly are a prohibited land use within the 7(k) Habitat Zone, the ancillary works proposed within this zone could be problematic. However, 'roads' and 'environmental facilities' (which can include walking tracks and boardwalks) are listed as land uses that are permissible with the consent of Council within the 7(k) Zone. As such, the Applicant could make application to Council for the proposed road/pedestrian network, including the construction of an underpass/at-grade crossing and the upgrading of Jones Road, as a completely separate proposal to the place of assembly, and they would be considered as land uses that are permissible with the consent of Council.

Council could, via a condition of consent, also require the removal of any of the permanent roads within a designated timeframe should this be considered necessary. A draft condition of consent has not been included in the draft conditions attached to this report."

46. The second last paragraph in the quoted section of the Report is of importance. It notes that the applicant "could make" a development application to the Council for the proposed road/pedestrian network as a completely separate proposal to the current development application for the place of assembly and they could be considered as land uses that are permissible with the consent of the Council. But the applicant had not done so. The proposed development remained that described in the development application and quoted earlier in the passage from the Report set out above, namely "Temporary Place of Assembly with camping and associated infrastructure for the 2009 Splendour in the Grass Festival". The applicant had not made application to the Council to use the proposed road/pedestrian network for an independent purpose of "roads" or "agriculture" or any other purpose of land use permissible with the consent of the Council in the 7(k) Habitat Zone.

47. The Report also addressed the consistency of the proposed development with the objectives of the 7(k) Habitat Zone. The Report stated:

"Consistency with objectives of 7(k) Habitat Zone

The objectives of the 7(k) Habitat Zone from *Byron Local Environmental Plan 1988* are as follows:

(a) to identify and protect significant vegetation and wildlife habitats for conservation purposes.

(b) to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist.

(c) to enable the carrying out of development which would not have a significant detrimental effect on the wildlife habitats.

(d) to enable the careful control of noxious plants and weeds by means not likely to be significantly detrimental to the native ecosystem.

The comments provided by the Applicant within the Statement of Environmental Effects and additional information offer very little to demonstrate that the proposed works are consistent with the objectives of the 7(k) Habitat Zone. However, it is ultimately Council's decision as to whether the proposed development is consistent with the objectives of the zone.

The proposed festival has been designed, as much as possible, to avoid vegetation stands. It is proposed to fence off and protect many of the vegetation stands within the 7(k)

Habitat areas. However, the vegetation removal associated with the proposed widening of Jones Road and the construction of the cut and cover tunnel or grade crossing do not serve to protect the existing vegetation within the zone.

The Development Application was referred to Council's Ecologist to provide an assessment of the proposal having regards to the flora and fauna impacts of the development. Whilst Council's Ecologist supported the proposal subject to conditions, the consistency of the proposal with the zone objectives was not specifically addressed.

In relation to Objective (a), land within the subject site has already been identified as containing significant vegetation for conservation purposes. The site was rezoned to its current zones as a result of a Commission of Inquiry conducted by Commissioner Kevin Cleland in late 1997.

While the entire report on the Inquiry can be accessed through the Office of the Commissioners of Inquiry for Environmental Planning website (www.coi.nsw.gov.au), the recommendations of the report pertaining to the subject site are as follows:

I recommend that the subject land be zoned 1(a) General Rural, 1(b1) Agricultural Protection (b1), 7(k) Habitat, and 8(a) National Parks and Nature Reserve as indicated in Figure 5. Cross-hatching should apply to the 1(a) General Rural Zone, 1(b1) Agricultural Protection (b1) Zone and the 7(k) Habitat Zone so that clauses 38A and 38B are relevant. Clause 38B in particular provides for a Property Plan to be developed so that planned agricultural activities need not be subject to any undue control by Council. I do not support other options put to the Inquiry given the environmental and the actual and potential wildlife corridor values of the land. The zonings I recommend recognise both the important agricultural and ecological values of the land based on a thorough and balanced assessment of the evidence before the Inquiry. There is sufficient evidence to consider a 7(j) Scientific zone for the Marshall's Ridge area.

The recommended zonings are generally supported by Council and the NPWS. NSW Agriculture did not object to the proposed zonings. DUAP while expressing some doubt as to the zoning of lands planted to bananas as 7(k) Habitat nevertheless generally supports the recommendations. CONOS and the community members who appeared would prefer an Environmental Protection Zone over the whole of the subject land but are prepared to concede limited agricultural zoning providing cross-hatching is used.

Other than the 8(a) National Parks and Nature Reserve Zone for land purchased by NPWS Greenfields Mountain generally opposes the zones I recommended by claiming its agricultural pursuits will be severely restricted. Greenfields Mountain seeks a 1(a) General Rural Zone without cross-hatching over most of its land with a 7(k) Habitat Zone over the remaining relatively intact natural vegetation. I do not support this option for the reasons I state in the report.

The 8(a) National Parks and Nature Reserve Zone proposed for land purchased by the NPWS is not in dispute.

(Office of the Commissioners of Inquiry for Environmental Planning, Cleland Commission of Inquiry Report. December 1997)

The recommendations above were gazetted by the Minister and remain in place as the current land use zones over the site. The proposal seeks to carry out works and uses within areas that were identified for protection due to their "important ... ecological values".

In relation to Objective (b), the only land uses that may be carried out with the consent of council within the 7(k) Habitat Zone are listed below:

Agriculture (other than animal establishments and clearing of land); bushfire hazard reduction; environmental facilities; home industries; primitive camping grounds; roads; utility installations

All uses other than those listed above are prohibited within the zone. The Development Application submitted to Council seeks consent for a temporary place of assembly with camping and associated infrastructure. The provision of associated infrastructure includes vegetation removal and earthworks to create roads and pedestrian paths to enable the festival to operate effectively.

In relation to Objective (c), whilst 'roads' are listed as a permissible land use within the 7(k) Habitat Zone, the extent of works proposed to create roads within the development site is such that the proposal could have a detrimental effect on the wildlife habitats which exist. While Council's Ecologist acknowledged that the proposed compensatory planting works will be of benefit to wildlife habitats in the long term, his report confirmed the likely impacts of the proposal on existing wildlife habitats and corridors, including Threatened Species habitat and Endangered Ecological Communities. In an attempt to minimise these impacts Council's Ecologist recommended a number of draft conditions.

A review of the Ecologist's report found that the recommended conditions require a substantial increase in works proposed, and (in relation to the possible requirement to increase the length of the underpass tunnel) exacerbate the footprint of permanent infrastructure in what is proposed as a one off trial event. Without applying these conditions to improve the environmental outcomes of the proposal, it is possible the development could detrimentally affect wildlife habitats.

In relation to Objective (d), the proposal includes a preliminary vegetation management plan which aims to direct the commencement of environmental repair and to improve the biodiversity values of the site. Council's Ecologist raises no objections to this plan."

48. In the "Conclusion in relation to Land Use Zones", the Report notes the link between the infrastructure and festival events, not only the trial event in respect of which consent is sought, but also possible future events. It states:

"As discussed within the following Sections of this Planning Report, should consent be granted to the subject Development Application, it is possible, subject to the 'success' of the trial event, that future applications will be received for further festival and camping uses of the site. By granting consent to the Development Application, Council will be endorsing substantial permanent infrastructure that could be used for future events. The 'trial' event is being used as a guide to determine the suitability of the site as an event site within Byron Shire.

A document attached to the Statement of Environmental Effects submitted with the Development Application states that "*The primary goal is to use the study area as a venue for music and arts festivals for around 20 days per year*". Despite this statement the application before Council is only for a one-off trial event in 2009.

The proposed 'trial' event is a stepping stone for the future use of the site. However, it is also possible that no future events may be held on the site and, if that occurs, some of the

permanent infrastructure may need to be removed in the future.”

49. The Conclusion also returns to the problem of the permissibility of certain components of the development. The Report states:

“It is apparent from the assessment of permissibility and consistency with land use zone objectives above that in some areas the current zoning of the site does not necessarily align easily with the uses proposed with the Development Application.

...

When considering the works and uses proposed within the 7(k) Zone, the layout of roads and pedestrian paths, the provision of a shuttle bus stop and the upgrade and crossing of Jones Road, are all obviously important elements of the ‘place of assembly’ use, which is a prohibited land use within the zone. These works, and in particular the removal of vegetation to enable the proposed works to be carried out, are also contrary to a number of the objectives of the zone. However, as stand alone uses, these components may be permissible uses.

As discussed above, counter arguments are available as to the permissibility of the proposed land uses. Given the potential anomalies with the current land use zones, it is appropriate that the long term use of the site be considered as a rezoning application, prior to the submission of a Development Application for the permanent use of the site.

The anomalies with the permissibility and objectives of LEP zones are listed as potential reasons for refusal of the Development Application which may arise if Council are not satisfied with the approach to characterisation of the various components of the proposal as detailed above.”

50. Again, the reference to the roads and pedestrian paths being permissible as “stand alone uses” underscores the fact that they were not proposed as stand alone uses but rather for the purpose of the place of assembly use.

51. Later in the Report, there is a section on long term impacts which notes that the permanent infrastructure is to enable the trial event to function adequately. The Report states:

“As outlined throughout this report, the proposal comprises a three day trial event. However, by granting consent to the Development Application, Council will be endorsing permanent infrastructure that could be a stepping stone for the future use of the property as a permanent event site.

Should consent be granted to the subject Development Application, it is always possible that Council could receive other Development Applications either for one off events within the site, or receive a Development Application for the use of the property as a permanent event site. It is also possible that the existing primary use of the land might continue or that alternative permissible land uses may be pursued.

Whilst the future use of the site is mentioned within the documents submitted with the Development Application, the proposal currently before Council comprises only a single event. As such, only the impacts of the single event have been and can be considered.

The proposal before Council seeks approval for extensive permanent infrastructure works to enable the trial event to function adequately. These works include a vehicle under pass or at grade crossing of Jones Road and roadworks throughout the site.”

52. A little later in the Report in the conclusion on impacts, it states:

“The permanent building works associated with the proposal have considerable weight when considering the impacts of the development. As stated above, they potentially provide a stepping stone for future and/or permanent uses of the property as a festival site. For a one off event, the proposed works seem to be extensive, however in terms of viability the issue is a commercial decision for the applicant.”

53. The final section, being the Conclusion, repeats a number of the statements made earlier. Relevant parts are:

“As discussed throughout this Planning Report, should consent be granted to the subject Development Application, it is likely that future applications will be received for further festival and camping uses. By granting consent to the Development Application, Council will be endorsing substantial permanent infrastructure that could be used for future events.

Concern is raised over the substantial amount of capital investment required to host the proposed trial event. All major events generally require significant capital investment in order to be successful and issues in this regard are commercial decisions for applicants.

...

When considering the works and uses proposed within the 7(k) Zone, the layout of roads and pedestrian paths, the provision of a shuttle bus stop and the upgrade and crossing of Jones Road, are all obviously important elements of the ‘place of assembly’ use, which is a prohibited land use within the zone. These works, and in particular the removal of vegetation to enable the proposed works to be carried out, are also contrary to a number of the objectives of the zone. However, as stand alone uses, these components may be permissible uses.

As discussed above, counter arguments are available as to the permissibility of the proposed land uses. Given the potential anomalies with the current land use zones, it is appropriate that the long term use of the site be considered as a rezoning application, prior to the submission of a Development Application for the permanent use of the site.

The anomalies with the permissibility and objectives of LEP zones are listed as potential reasons for refusal of the Development Application which may arise if Council are not satisfied with the approach to characterisation of the various components of the proposal as detailed above.

...

The submission of the proposal as a ‘trial’ event provides Council, the Applicant, the Community and Government Departments with the opportunity to examine the suitability of the site first hand. The benefits and weaknesses of the site are certain to be exposed should the trial event proceed. However, as the proposal is for a single event only, the suitability of the property as a permanent site is yet to be assessed.

...

The proposal will be of benefit to the community in many areas, but will potentially result in adverse impacts in others. The ‘trial’ nature of the proposed event provides

Council, the Applicant, the Community and Government Departments with the opportunity to examine the suitability of the site first hand.

Upon consideration of all issues affecting the Development Application that has been submitted to Council, it is concluded that consent should be granted to the proposal subject to deferred commencement and other conditions as contained in this report.

Should Council not agree with the recommendation, a list of the potential reasons for refusal are provided within Section 8 of this Planning Report below."

54. The potential reasons for refusal included, as reason 1, that the proposal includes a 'place of assembly' which is a prohibited land use within the 7(k) Habitat Zone, and as reason 3, that "Key components of the proposal are inconsistent with the objective of the 7(k) Habitat Zone."

55. The Council nevertheless resolved to grant consent at its meeting on 31 July 2008.

The development consent

56. The terms of the development consent are important. It is a deferred commencement consent, stated to operate from 6 August 2008. The "Proposed development" in respect of which the consent is granted is described as:

"Temporary Place of Assembly with camping and associated infrastructure for the 2009 Splendour in the Grass Music Festival".

57. Under the heading of "Parameters of this Consent", Conditions 1 and 2 are critical. They provide:

"1. Description of development and structure of consent

Consent is limited to the use of the site as a Temporary Place of Assembly (Splendour in the Grass Music Festival) incorporating temporary camping and carparking, and the provision of temporary and permanent infrastructure to facilitate the event. Only the permanent infrastructure specified within this consent shall be retained for ongoing uses beyond those associated with the temporary place of assembly.

This Development Consent is divided into three (3) parts:

Part A – contains Conditions that are applicable to the permanent infrastructure/site enhancement works as specified within the consent;

Part B – contains Conditions that are applicable to the operation of a temporary place of assembly (music festival) and all carparking areas; and

Part C – contains Conditions that are applicable specifically to the operation of camping areas associated with the temporary place of assembly (music festival).

The 'Parameters of this Consent', 'Terms of Integrated Development Approval' and 'Notes' apply to all three Parts of the development consent. Conditions nominated within each Part also apply to the development consent as a whole.

2. Terms of trial event

This development consent provides approval for the provision of infrastructure and the

use of the site for a one off event only. Any person or body that enacts this development consent does so on the understanding that the works approved as part of the consent provide no leverage for future events to be carried out within the site, whether temporary or otherwise. Nor does the provision of infrastructure and the approval of a one off event guarantee that any future uses of the site will be supported by Council.

Any further temporary or permanent use of the site (other than uses that may be carried out without the consent of Council) must be submitted to Council as a separate Development Application and will be assessed on its merits.”

58. These conditions are limiting in relation to the permanent infrastructure, such as roads and pedestrian paths (the permanent infrastructure is described in condition 10). Condition 1 makes clear that the purpose of the use of the permanent infrastructure is limited to “Temporary Place of Assembly”. No authority is given by the consent to use the permanent infrastructure for any other purpose. The consent does not itself authorise ongoing uses beyond those associated with the temporary place of assembly. This is corroborated by Condition 2 which states that the consent provides approval for the provision of the permanent infrastructure and the use of the site (including of the permanent infrastructure on the site) for a “one off event only”. Condition 2 further states that any further temporary or permanent use of the site, including of the permanent infrastructure on the site, other than uses that may be carried out without the consent of Council (of which there are none in the 7(k) Habitat Zone), must be the subject of a separate development application.

59. As a consequence of these conditions, the consent purports to approve the construction and use of the permanent infrastructure on the site for the purpose of place of public assembly only. The consent cannot be construed as approving the construction and use of the permanent infrastructure on the site for any independent purpose of roads or agriculture or any other purpose permissible with consent in the 7(k) Habitat Zone.

60. The nature and location of the permanent infrastructure is shown in the plans approved as part of the consent and is referred to in the conditions including Conditions 10, 20 and 119.

The development application and development consent are for a prohibited purpose

61. The development application made by the third respondent, the Council’s consideration of that application, and the development consent granted by the Council to that application, are consistent in characterising the proposed development as being for the purpose of place of assembly only.

62. The development application and accompanying Statement of Environmental Effects described the development as being “Temporary Place of Assembly”. The roads and pedestrian paths were proposed as ancillary infrastructure to enable the carrying out of the temporary music event for the purpose of temporary place of assembly.

63. The development application never sought development consent to construct or use the roads and pedestrian paths for the purpose of roads, agriculture or any other purpose which is a permissible purpose in the 7(k) Habitat Zone. It is not sufficient that the third respondent’s consultant, in his letter to the Council dated 27 November 2007, said that the roads and pedestrian pathways constructed for the temporary music event could be used beneficially in the future for “independent ongoing existing land uses including agricultural use”.

64. The proposed upgrading of existing roads and construction of new roads and new pedestrian paths involved the carrying out of development. They were not part of the ongoing, existing land uses on the site; they involved new development. On land in the 7(k) Habitat Zone there are no purposes for which such development could be carried out without development consent. Development for the purpose of agriculture is permissible in the 7(k) Habitat Zone but only with the consent of the Council. However, the upgrading, construction and subsequent use of the proposed roads and pedestrian paths for the purpose of agriculture on that part of the site in the 7(k) Habitat Zone would only be permissible if a development application was to be made and development consent was to be granted to carry out such development for that purpose.

65. The development application made by the third respondent originally did not seek consent to upgrade, construct and use the proposed roads and pedestrian pathways for the purpose of roads or agriculture and, although the application was amended subsequently in certain respects, it was never amended to seek consent for development for the purpose of roads or agriculture. Accordingly, whatever the potential for the proposed roads and paths to service "ongoing existing land uses including agricultural use" on the land, development consent was not sought to use the roads and paths for such purposes.

66. The Council Planning Report found that the purpose of the development, including the permanent infrastructure, for which consent was sought in the development application, was for place of assembly. Whilst the Planning Report noted that the permanent infrastructure could be the subject of a separate development application seeking consent for the roads and pedestrian paths as stand alone uses, the actual development application that had been made did not propose such stand alone uses and no separate development application for such stand alone uses had been lodged.

67. The development consent, particularly conditions 1 and 2, makes clear that consent was granted to the carrying out of the development only for the purpose of place of assembly and not for any other purpose, including roads or agriculture. The development consent also makes clear that it provides approval for the provision of infrastructure and the use of the site for a one off event only (the temporary music festival for a period in July-August 2009) and any further temporary or permanent use of the site (after the one off event) must be the subject of a separate development application. This too speaks against consent having been granted for any ongoing use of the site, including the roads and paths, for any purpose.

68. Insofar as some components of the development, including the roads, pedestrian pathways and security fencing, are to be constructed and used on land in the 7(k) Habitat Zone, the Council's exercise of power to grant consent to that development was outside power. Development for the purpose of place of assembly is prohibited in the 7(k) Habitat Zone. There is no power to grant consent to prohibited development. The components of the development in the 7(k) Habitat Zone are fundamental elements of the development. The roads and paths provide the access for and enable the holding of the event. Accordingly, those components of the development are not able to be severed and the whole consent fails.

69. This case differs from other judicial review cases involving a challenge to a development consent on the ground of characterisation of the purpose of the development the subject matter of the consent. Most challenges involve an applicant seeking consent to carry out development for a purpose that is permissible, not prohibited, and the consent authority granting consent for the permissible purpose. However, the challenger argues that the development proposed is not, in fact, for the permissible purpose, but rather, on a proper characterisation, for a prohibited purpose. The question of the true characterisation of a proposed development has been held to be a jurisdictional fact: see *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288 and *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376 at 410 [76], 420 [132], 421-422 [142]. An example is the *Pallas Newco* case. There the consent was granted for development for a "drive-in, take-away establishment". However, this Court at first instance and the Court of Appeal on the appeal held that the proposed development could not be characterised as falling within the purpose of "drive-in, take-away establishment" and, as there were no other nominate permissible purposes within which the proposed development could fall, the proposed development was prohibited.

70. This case differs from such cases in that the development application sought consent for development for a purpose (place of assembly) that is prohibited in the 7(k) Habitat Zone and the Council granted consent to development for that purpose (place of assembly). There never has been a development application seeking consent for development for the purpose of roads or agriculture or any other purpose permissible with consent in the 7(k) Habitat Zone and the Council did not grant development consent for development for the purpose of roads, agriculture or any other permissible purpose.

71. If a development application were to be made in the future to carry out development for the purpose of roads or agriculture or other purpose permissible with consent on the land in the 7(k) Habitat Zone, the Council will

need to consider whether, having regard to all of the facts disclosed in the development application then made and applying proper principles for the characterisation of the purpose of development, the proposed development can be characterised as being for the purpose of roads, agriculture or any other permissible purpose and not subordinated to the purpose of place of assembly. Such characterisation would be a jurisdictional fact able to be reviewed by the Court, but that is a matter for the future. The current development consent is a determination of the current development application. Neither dealt with development for the purpose of roads or agriculture or any purpose permissible in the 7(k) Habitat Zone.

72. For completeness, I should also note that the development consent cannot be legally sustained on the basis of the existence of an alternative category of permissible development, such as the purpose of roads. A consent granted to a development application for development for a purpose that is prohibited cannot be sustained by the existence of a permissible purpose of development in respect of which no development application has been made: see *Blair v Blue Mountains City Council* (1997) 93 LGERA 189 at 198-199.

Failure to consider relevant matters

73. The above conclusion, that the development consent is outside power in granting consent to development that is prohibited on land in the 7(k) Habitat Zone, makes it unnecessary to consider the applicant's second ground of challenge that the Council failed to consider that the development was prohibited.

Failure to form positive opinion of consistency with the zone objectives

74. The Applicant's third ground of challenge is that the Council failed to form the positive opinion, under cl 9(3) of the *Byron Local Environmental Plan* 1988, that the components of the proposed development to be carried out on land in the 7(k) Habitat Zone were consistent with zone objectives (a) and (b) of the 7(k) Habitat Zone.

75. Where a proposed development is to be carried out in two or more zones, satisfaction of a requirement in an environmental planning instrument that the development be consistent with the objectives of the zone in which the development is to be carried out, such as cl 9(3) of the Byron LEP 1988, necessitates matching each component of the proposed development with the objectives of the zone in which that component is to be carried out: *Tuite v Wingecarribee Shire Council (No 2)* [2008] NSWLEC 321 at [30]. Hence, in this case, it involved comparison of the permanent infrastructure of roads and pedestrian paths and the temporary infrastructure of security fencing to be carried out on land in the 7(k) Habitat Zone and the use of those works for the purpose of the place of assembly, with the objectives of the 7(k) Habitat Zone, for the purpose of ascertaining whether the carrying out of such development is consistent with the objectives of the 7(k) Habitat Zone.

76. The evidentiary material Council had before it to form an opinion under cl 9(3) included the Council Planning Report together with its attachments, including the amended development application and Statement of Environmental Effects.

77. In relation to the applicant's material, as the Council Planning Report correctly noted, "the comments provided by the Applicant within the Statement of Environmental Effects and additional information offer very little to demonstrate that the proposed works are consistent with the objectives of the 7(k) Habitat Zone". It is not to the point, as the second and third respondents sought to argue, that there is material in the Statement of Environmental Effects and accompanying assessments that might be said to be relevant to the subject matter of the objectives of the 7(k) Habitat Zone, such as the vegetation and wildlife and the impacts on them. The mere existence of such general material without any analysis of that material for the purpose of satisfying the requirements of cl 9(3) is insufficient. Clause 9(3) requires separate consideration and satisfaction from the merit considerations of the development, which only come into play if cl 9(3) is satisfied. Clause 9(3) requires positive attention and the making of particular findings and inferences, having regard to the particular wording of cl 9(3) and of the objectives of the relevant 7(k) Habitat Zone. However, the development application, Statement of Environmental Effects and accompanying assessments do not pay positive attention to cl 9(3) and do not contain particular findings or inferences demonstrating that the proposed development is consistent with the objectives of the 7(k) Habitat Zone.

78. The Council was, therefore, left with the analysis in the Council Planning Report of the proposed development's consistency with the zone objectives. (There was also a report of the Council's Ecologist but this did not consider the consistency of the proposed development with the objectives of the 7(k) Habitat Zone).

79. In relation to objective (a) of the 7(k) Habitat Zone, "to identify and protect significant vegetation and wildlife habitats for conservation purposes", the Council Planning Report finds the vegetation removal associated with construction of the roads in the 7(k) Habitat Zone, does "not serve to protect the existing vegetation within the zone". The Report notes "land within the subject site has already been identified as containing significant vegetation for conservation purposes". The site was rezoned to its current zones, including the 7(k) Habitat Zone, as a result of a Commission of Inquiry in late 1997. The Report notes that "[t]he proposal seeks to carry out works and uses within areas that were identified for protection due to their 'important ... ecological values'." Such observations logically would lead to the conclusion that the carrying out of the proposed works and uses within the 7(k) Habitat Zone would not be consistent with objective (a). Whilst this is not expressly stated in this section of the Report addressing objective (a), it is implicit in the subsequent conclusion of the Report that the development is contrary to a number of the objectives of the 7(k) Habitat Zone (see below).

80. In relation to objective (b) of the 7(k) Habitat Zone, "to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist", the Council Planning Report notes that the development application seeks consent for a temporary place of assembly with camping and associated infrastructure, which are prohibited uses in the 7(k) Habitat Zone. The Report states that "[t]he provision of associated infrastructure includes vegetation removal and earthworks to create roads and pedestrian paths to enable the festival to operate effectively". Again, the logical conclusion from the observations that the development application seeks consent for prohibited development and that the provision of associated infrastructure for that prohibited development will involve vegetation removal and earthworks, would be that the proposed development is not consistent with zone objective (b). Whilst this is not expressly stated in this section of the Report dealing with objective (b), it is implicit in the subsequent conclusion that the development is contrary to a number of the objectives of the 7(k) Habitat Zone.

81. At the end of the section analysing the development's permissibility and consistency with the zone objectives, the Council Planning Report makes clear that the development is a prohibited land use in the 7(k) Habitat Zone and is not consistent with a number of the objectives of the 7(k) Habitat Zone and that long term use of the site will require rezoning. Under the heading "Conclusion in the relation to Land Use Zones", the Report states that:

"It is apparent from the assessment of permissibility and consistency with land use zone objectives above that in some areas the current zoning of the site does not necessarily align easily with the uses proposed with the Development Application.

...

When considering the works and uses proposed within the 7(k) zones, the layout of roads and pedestrian paths, the provision of a shuttle bus stop and the upgrade and crossing of Jones Road, are all obviously important elements of the 'place of assembly' use, which is a prohibited land use within the zone. These works, and in particular the removal of vegetation to enable the proposed works to be carried out, are also contrary to a number of the objectives of the zone.

...

Given the potential anomalies with the current land use zones, it is appropriate that the long term use of the site be considered as a rezoning application, prior to the submission of a Development Application for the permanent use of the site".

82. These statements that the works and uses proposed in the 7(k) Habitat Zone are prohibited land uses, are contrary to a number of the objectives of the zone and will require a rezoning to be used permanently, are

repeated in the final conclusion at the end of the Report.

83. The conclusion that the works and uses in the 7(k) Habitat Zone are contrary to a number of the objectives of the zone logically leads to the result that development consent cannot be granted. The forming of a positive opinion under cl 9(3) that the development is consistent with the zone objectives is necessary to enliven the power to grant consent to the development.

84. The Council Planning Report's only "counter argument" is to say that the works and uses proposed in the 7(k) Zone, "as stand alone uses, ... may be permissible". This is not an answer to the requirement in cl 9(3) that the Council form an opinion that the carrying out of the development will be consistent with the zone objectives, but only to the issue of categorisation of the development as to whether it is for a permissible purpose. The requirement of consistency with zone objectives is a separate and posterior step to the requirement that the proposed development be for a permissible purpose. Even if a proposed development is for a permissible purpose, that does not lead necessarily to a conclusion that the development is consistent with the zone objectives. Separate consideration and formation of a positive opinion of consistency with the zone objectives is required. The counter argument involves misdirection in law.

85. The result is that neither the Council Planning Report nor the attachments to the Report, considered by the Council in making its decision under cl 9(3), provided an evidentiary basis for a conclusion that the proposed development is consistent with the objectives of the 7(k) Habitat Zone, and, in fact, supported the opposite conclusion that the proposed development is contrary to a number of the objectives of the 7(k) Habitat Zone.

86. If the Council adopted the analysis in the Council Planning Report concerning consistency with the zone objectives, the Council would have reached the same negative opinion as was reached in that Report that the proposed development was contrary to a number of the objectives of the 7(k) Habitat Zone. Hence, the pre-condition in cl 9(3), namely, the forming of a positive opinion that the proposed development is consistent with the zone objectives, would not have been satisfied.

87. If, however, the Council is to be taken, by reason of it having resolved to grant development consent, implicitly to have formed the opinion that the proposed development is consistent with the zone objectives, such opinion involved error of law. The making of findings and the drawing of inferences without any evidence to support them is an error of law: *The Australian Gas Light Company v The Valuer General* (1940) 40 SR (NSW) 126 at 138; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356; *Bruce v Cole* (1998) 45 NSWLR 163 at 188. A conclusion that the proposed development is consistent with the objectives of the 7(k) Habitat Zone is without evidentiary support in the material before the Council. Insofar as the Council might have sought to overcome the conclusion in the Council Planning Report that the proposed development was contrary to a number of the objectives of the 7(k) Habitat Zone, by adopting the counter argument in the Report that the proposed works and uses in the 7(k) Habitat Zone could, as stand alone uses, be permissible, the Council misdirected itself in law. Accordingly, if the Council did form an opinion that the proposed development is consistent with the objectives of the 7(k) Habitat Zone, such opinion is wrong in law and does not satisfy the pre-condition in cl 9(3).

88. Either way, the pre-condition in cl 9(3) that the Council form a positive opinion that the proposed development is consistent with the objectives of the 7(k) Habitat Zone, and one unaffected by error of law, has not been satisfied. Absent satisfaction of the pre-condition in cl 9(3), there was no power to grant development consent to the development.

89. This provides another ground for setting aside the Council's decision to grant consent to the proposed development.

Manifest unreasonableness of opinion of consistency with zone objectives

90. In light of the earlier conclusions on the first and third grounds of challenge, it is unnecessary to determine the

alternative ground of challenge that any decision of the Council under cl 9(3) that the proposed development was consistent with the objectives on the 7(k) Habitat Zone is manifestly unreasonable or manifestly illogical.

Conclusion

91. The Council's decision to grant development consent was outside power and the consent should be declared invalid and of no effect. Costs should follow the event. As the Council made a submitting appearance, the second and third respondents should pay the applicant's costs.

92. The Court:

1. Declares that development consent dated 6 August 2008 granted by Byron Shire Council to development application No. 10.2007.462.1 for a Temporary Place of Assembly with camping and associated infrastructure for the 2009 Splendour in the Grass Music Festival is invalid and of no effect.

2. Orders the second and third respondents to pay the applicant's costs of the proceedings.

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Last updated 22 February 2011

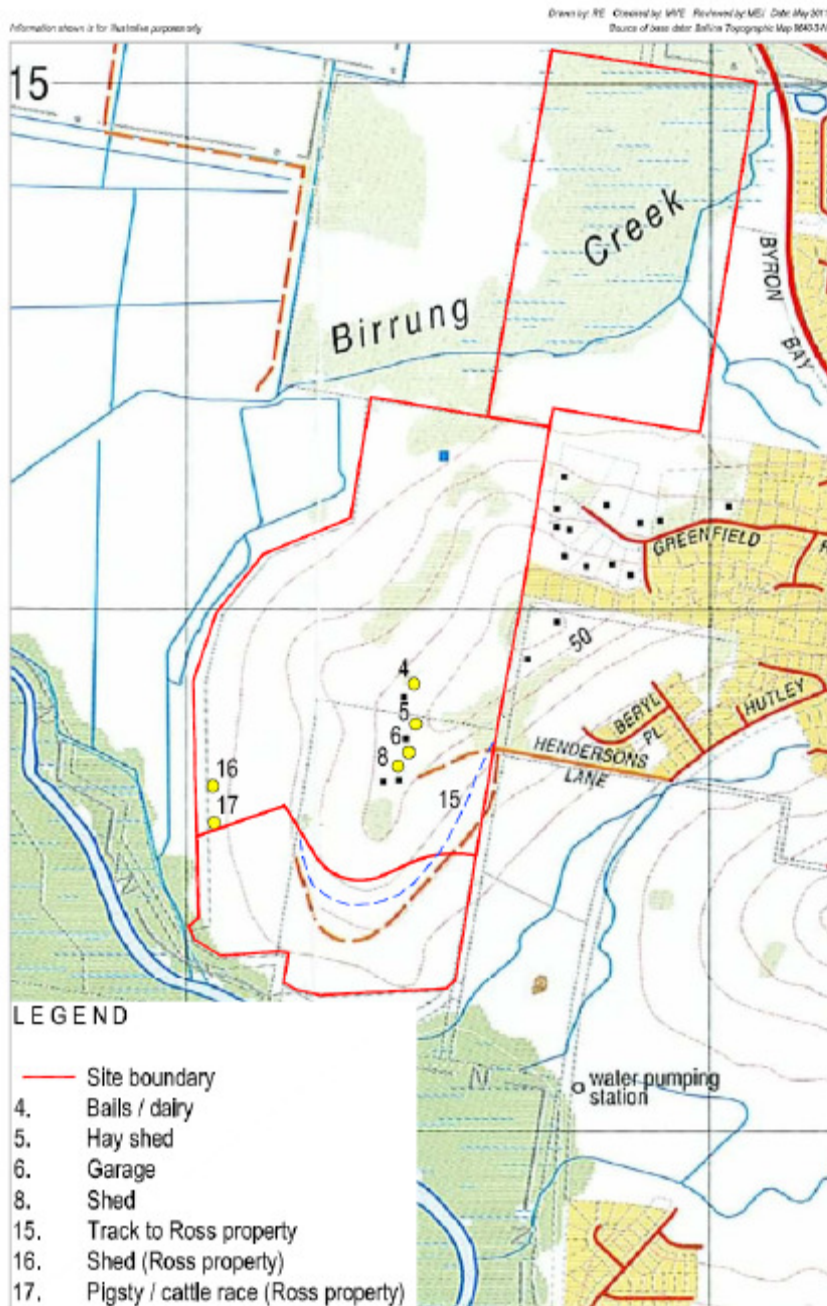
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Attachment 4 - Plan and list of heritage items for archival recording

Henderson Farm Planning Agreement
 Ballina Shire Council
 Lennox Development Pty Ltd



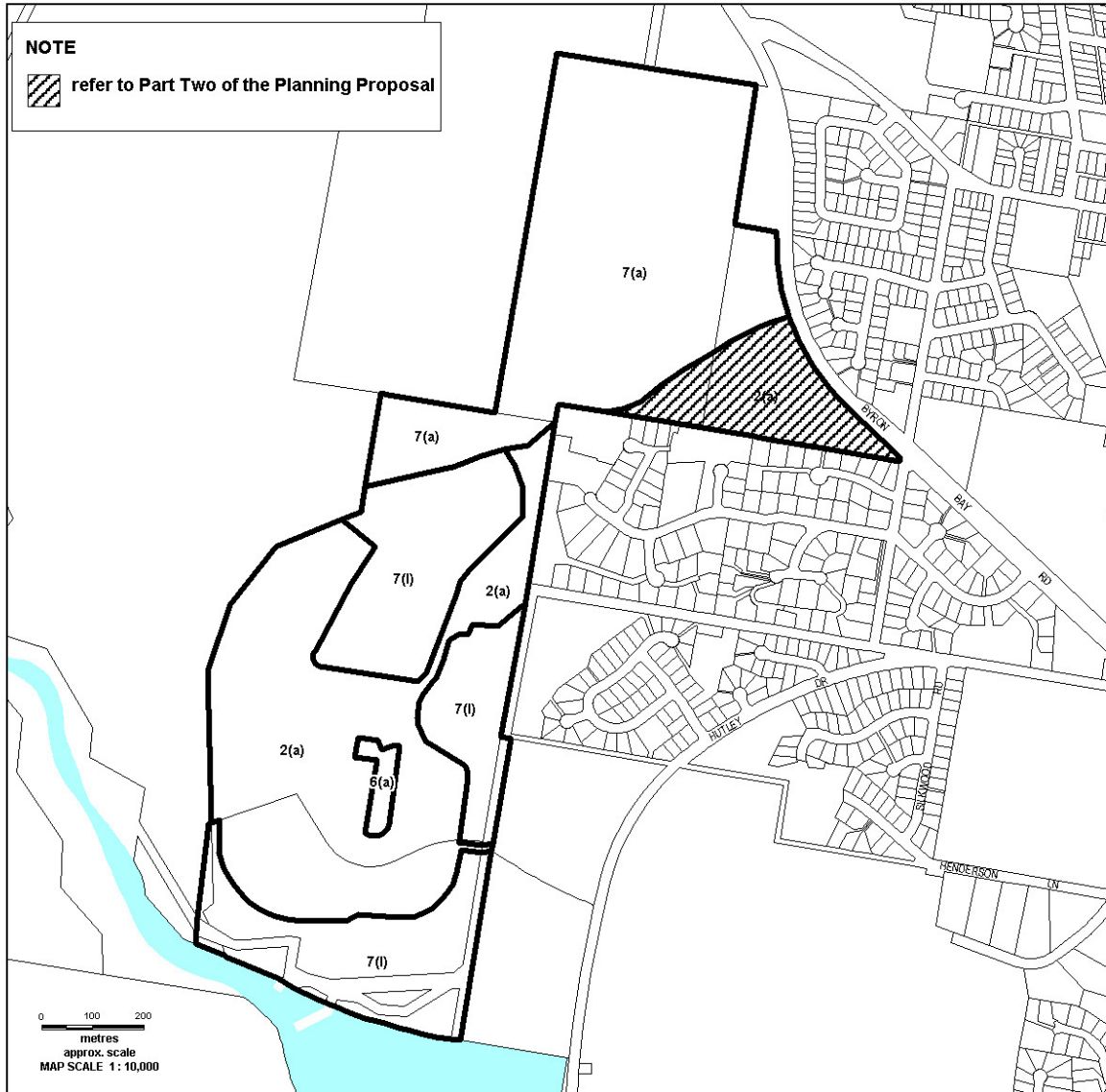
Draft Henderson Farm Planning Agreement
 0371436

Henderson Farm Heritage Items

371547

24

Attachment 5 - Recommended zoning plan



ENVIRONMENTAL PLANNING & ASSESSMENT ACT, 1979 -CITY- MUNICIPALITY SHIRE <h2 style="text-align: center;">DRAFT BALLINA LOCAL ENVIRONMENTAL PLAN 1987</h2> (AMENDMENT No. 103)			
DRAWN BY S.S. DATE 09/03/2012	STATEMENT OF RELATIONSHIP WITH OTHER PLANS AMENDS:- <h3 style="text-align: center;">BALLINA LOCAL ENVIRONMENTAL PLAN 1987</h3>		DISCLAIMER <small>Although all care is taken in the preparation of this plan, Ballina Shire Council accepts no responsibility for any misprints, errors, omissions or inaccuracies. The information contained within this plan is for pictorial representation only. Do not take accurate measurements should be undertaken by survey. © Department of Lands 2012</small>
SUPERVISING DRAFTSMAN S.S.	CERTIFIED IN ACCORDANCE WITH THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979, AND REGULATIONS.		
PLANNING OFFICER Simon Scott			
COUNCIL FILE No. LEP Amend. No. 103	GENERAL MANAGER DATE		
DEPT. FILE No. GRA6323407			
CERTIFICATE ISSUED UNDER SEC. 65 E.P.A. ACT DATE			