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18 June 2018

Andrew Smith
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By Email

Dear Andrew

**Ballina Shire Council ats Planners North
Land and Environment Court Proceedings 27368 of 2017
End of Matter Report**

As you are aware, these proceedings are reaching an end and we thought that it was timely to provide a summary of the history of the proceedings and the main changes made by the Applicant to Development Application 2016/184 (**DA**) throughout the course of the proceedings.

Until final orders are made, it will not be possible to know exactly what form the approved development will take. However, for the purpose of this note, we have assumed that the consent granted by Commissioner Brown of the Land & Environment Court will approve the plans submitted by the Applicant on 22 February 2018 as amended between February and the hearing on 15 May 2018. The full list of the approved plans will appear in the consent granted by Commissioner Brown.

1 Summary

The Applicant's DA has been amended significantly since the commencement of the proceedings, including:

- (a) reduction of 185 residential lots;
- (b) reduction of 5 rural residential lots;
- (c) reduction of 3 open space/public reserve lots; and
- (d) increase in the key site (future development) lots from 4 to 9.

The many concerns about the original development that were identified by Council in mid-2016, shortly after lodgement of the application, were in most cases supported by Council's independent experts. This consistent expert support for Council's concerns ultimately resulted in the Applicant amending its plans and agreeing to conditions of consent that will result in a development that appropriately responds to the environmental and other site constraints and which largely meets Council's requirements.

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2 History of Proceedings

The history of this DA and appeal is summarised below:

- (a) Council provided feedback on the original proposal on two occasions prior to the formal lodgment of the DA to the Council on 15 April 2016. The DA that was submitted largely failed to respond to the many concerns raised by Council as part of the pre-lodgement process.
- (b) Council wrote to the Applicant on 29 April, 12 May, 3 June and 29 July 2016 requesting additional information about the submitted DA.
- (c) Following further discussions and correspondence between Council and the Applicant during September 2016, which involved the submission of a draft revised proposal by the Applicant, the provision by Council of comprehensive comments as to whether the draft revision addressed the concerns raised in the request for additional information letters and a meeting between the Applicant, consultants and Council staff, the DA was subsequently amended on 31 October 2016.
- (d) Council wrote to the Applicant on 3 November 2016 seeking clarification with respect to the revised DA, with clarification being provided by the Applicant with respect to the amended proposal on 8 and 14 November 2016. Again, the revised DA largely failed to respond to the concerns raised by Council in the correspondence issued to the Applicant in April, May, June, July and September of 2016.
- (e) The Applicant commenced proceedings in the Land and Environment Court on 27 January 2017. Notwithstanding the commencement of proceedings by the Applicant, Council proceeded to complete its assessment of the DA.
- (f) On 14 February 2017, Council sent the Applicant a Completion of Assessment letter, attaching copies of independent hydrology and ecology expert reports prepared on behalf of Council. The letter set out the main issues with the DA, many of which, until very late in the proceedings, continued to remain issues for Council, including:
 - (i) absence of owner's consent;
 - (ii) insufficient information due to lack of site investigation to satisfy the requirements of SEPP 55;
 - (iii) insufficient survey work and analysis of the impact on Hairy-Joint Grass (*HJG*), Endangered Ecological Communities (*EECs*) (Lowland Rainforest EEC and Freshwater Wetland EEC) and local broilga populations within the development site;
 - (iv) failure of the Applicant to provide a Vegetation Management Plan, HJG Management Plan and details of domestic and feral animal fencing in accordance with Chapter 3 of the *Ballina Shire Development Control Plan 2012 (Ballina DCP)*;
 - (v) the lack of a comprehensive Bushfire Threat Assessment;
 - (vi) inadequate assessment of the impact of Asset Protection Zones on threatened species;
 - (vii) inadequate assessment of the ecological and hydrological impacts of the proposed development on the downstream environments, including SEPP 14 wetlands, EECs, the Ballina Nature Reserve, private properties and lack of hydrological modelling;
 - (viii) uncertainty as to the location and management of stormwater systems;
 - (ix) inadequate assessment of water flows through the Ballina Nature Reserve and Newrybar Swamp system;

- (x) inadequate assessment of the inter-relationship of rainfall events with groundwater recharge and the health of groundwater dependent ecosystems;
 - (xi) lack of suitability of open space reserve allotments, and lack of regard to the minimum requirements of the Ballina Shire DCP 2012 and the Cumbalum Views Structure Plan;
 - (xii) inadequacy of a number of the proposed road designs and retaining walls;
 - (xiii) inadequate vegetation retention plans; and
 - (xiv) non-compliance with the provisions of the *Ballina Local Environmental Plan 2012* and the Ballina DCP.
- (g) On 25 April 2017, Council filed its Statement of Facts and Contentions, which largely reflected the issues set out in this letter noted at paragraph (f).
- (h) On 2 May 2017, the Applicant was granted leave by the Court to further amend its DA. These amendments did not address Council's contentions. Instead, further contentions were raised in relation to retaining walls, biodiversity offsets and the ecological impact of stormwater measures. In particular, the Applicant proposed new unnecessary public reserve areas and to dedicate land to Council to enable Council to deliver the sporting fields required by the DA.
- (i) On 18 May 2017, Council's Amended Statement of Facts and Contentions was filed in response to the amended DA. The contentions remained largely unchanged.
- (j) A s34 conciliation conference process occurred over a period of three months, between 29 May 2017 and 31 August 2017, during which period informal joint conferencing took place between the parties' experts.
- (k) The s34 conciliation conference commenced on 29 May 2017 in Sydney at the Land and Environment Court, with the Applicant, Council, legal representatives and Counsel in attendance. The s34 conference was adjourned to allow the Applicant to further amend its plans and materials and provide these to Council. These further amended materials were provided on 30 June 2017. We refer to our letters dated 15 June 2017, 9 July 2017 and 28 July 2017 where Council provided extensive feedback on the amended materials and revised plans provided by the Applicant, noting where further information, plans and reports were needed due to insufficient information and requesting same.
- (l) The Applicant provided further materials on 22 August 2017, and Council again provided a detailed response on 30 August that identified insufficient information and inconsistencies within the materials. The s34 conference was terminated on 31 August 2017.
- (m) On 6 October 2017, the Applicant filed a further amended DA and was subsequently granted leave to amend its DA on 25 October 2017.
- (n) The amended DA failed to respond to most of Council's contentions and, in fact, created new contentions that were included in the Further Amended Statement of Facts and Contentions filed on 27 October 2017.
- (o) On 9 November 2017, the Applicant issued a request for further and better particulars. Council furnished a response to the request on 20, 21 and 27 November 2017. We note that, at the time of Council's response, concerns were expressed regarding further information still not received including a revised Plan of Management, correct mapping of all threatened species and ecologically endangered communities, comprehensive and detailed mapping including ecologically endangered communities, vegetation and feral animal fence mapping,

lack of detail or missing details on plans and absence of hydrodynamic and hydraulic modelling.

- (p) Joint conferencing of the experts commenced in late October 2017 and ended on 12 January 2018. During this period, there were significant amendments made to the Applicant's DA, with revised plans being 'drip fed' to Council's experts. During joint conferencing, the Applicant amended its entire hydrology scheme and finally provided the ecology mapping (in part assisted by Council's ecology expert through his individual expert reporting) which was highlighted as needed in the original Statement of Facts and Contentions and Council's Completion of Assessment letter dated February 2017.
- (q) Further joint conferencing took place between 25 January 2018 and 11 February 2018, during which time further mapping and updated materials were requested from the Applicant to enable Council to properly assess the DA. A number of these materials were not received from the Applicant until 22 February 2018.
- (r) The Applicant provided revised plan set Revision I on 31 January 2018, only two weeks before the hearing was to commence. These plans had significant flaws, as set out initially in our letter of 1 February 2018 then in more detail in our letter of 7 February 2018. This plan set was followed by revisions J, K and L which were all subsequently reviewed by Council and its experts, with comments provided on each occasion.
- (s) The proceedings were set down for a week long hearing in the Land and Environment Court, from 12 to 16 February 2018. Day one of the hearing commenced on the development site, with a site inspection attended by the Commissioner, the Applicant, Council, the parties' experts and legal representatives, and public submitters. At the request of the Applicant and as agreed by the Commissioner and Council, the hearing did not proceed on 13 to 16 February, with these days instead involving a number of lengthy meetings in Sydney, during which Council staff and experts engaged with (and provided direction to) the Applicant and its experts to assist in resolving the issues raised by Council through the joint conferencing process and in the Further Amended Statement of Facts and Contentions, and to work through proposed draft conditions of consent.
- (t) The Applicant provided Revision M of the Plan Set and further outstanding materials on 22 February 2018.
- (u) Further joint conferencing between the experts took place between 1 May 2018 and 7 May 2018 in preparation of addendum expert reports prior to a one day hearing on conditions of consent set down on 15 May 2018.
- (v) The Applicant provided Revision N of the Plan Set on 14 May 2018, one day before the hearing.
- (w) Conditions of consent were also negotiated over a considerable period (three and a half months) resulting in largely agreed conditions of consent (on 1 June 2018).
- (x) Ultimately, there was only one matter that remained in dispute between the parties at the hearing in the Land and Environment Court in Sydney on 15 May 2018. This was whether a stewardship agreement under the *Biodiversity Conservation Act 2016* should be required in order to provide a funded mechanism for future landowners of the three residual rural allotments to protect rehabilitated environmental lands or whether a covenant on the titles of the three allotments and a condition of consent requiring compliance with the agreed Plan of Management and Vegetation Management Plans will be sufficient to ensure protection of the rehabilitated environmental lands.

- (y) That question was the subject of submissions by both parties before Commissioner Brown on 15 May 2018 and he has reserved his judgement.
- (z) The current status is that plans and conditions of consent have been agreed and the parties are awaiting Commissioner Brown's judgment on the stewardship issue. Once that judgement is delivered, consent will be granted and then the question of costs will need to be determined.

3 Amendments to Development Application

The first DA submitted in these proceedings was a staged DA which sought development consent for:

- (a) 642 residential lots;
- (b) 4 key site/future development lots;
- (c) 8 rural residential lots; and
- (d) 13 open space/public reserve lots.

There have been a series of significant amendments to the Applicant's plans and indeed overall application. The current DA as amended now provides for:

- (a) 457 residential lots;
- (b) 9 key site/future development lots;
- (c) 3 rural residential lots; and
- (d) 10 open space/reserve lots.

The result of Council's efforts can be fully appreciated once all of the amendments to the DA within the differing disciplines are reviewed. We refer to Council's Statement of Facts and Contentions, Amended Statement of Facts and Contentions and Further Amended Statement of Facts and Contentions and relevantly set out the current status of the issues, as resolved or conditioned.

3.2 Arboricultural Issues

- (a) The DA now incorporates paddock tree mapping, which has identified the majority of native and exotic trees across the development site.
- (b) The Council has negotiated the retention of 23 native trees on private residential lots, which can accommodate suitable buffering and tree protection zones to future dwelling houses. In some instances, this has involved the consolidation of private residential lots in order to retain and protect existing vegetation and provide for a suitable building envelope.
- (c) The Council has negotiated the retention of the three significant fig trees as required by the provisions of the Ballina DCP. One fig tree is to be located in public open space (District Park) and the other two fig trees in private residential lots, all with suitable buffering and tree protection zones to public infrastructure and future dwelling houses.

3.3 Ecological Issues

- (a) The DA now incorporates more comprehensive ecological mapping, which has been incorporated into a satisfactorily updated Plan of Management.
- (b) The revised Plan of Management now largely meets the requirements of the Ballina DCP and sets out the revegetation and rehabilitation requirements of the majority of identified environmental lands within the DCP.

- (c) The Plan of Management and three individual Vegetation Management Plans will provide for substantial areas of retention and revegetation of rainforest species on the three residual lots.
- (d) The proposed clearing of at least 5.5 hectares of Hairy-Joint Grass (**HJG**), as estimated by Council, has been mitigated through additional survey, mapping and offsets. The Plan of Management now adequately provides for HJG conservation and management, and provides that alternative offsets may be provided on site if HJG management zones fail. Smaller areas of HJG will also be revegetated with rainforest species.
- (e) Stormwater infrastructure and corresponding access roads have been removed from EEC vegetation, resulting in the retention of the majority of Lowland Rainforest and Swamp Sclerophyll Forest in these locations.
- (f) Hydrological modelling, on site detention of stormwater and a monitoring and adaptive framework plan for stormwater have significantly reduced the potential impact of stormwater on downstream EECs, threatened species, groundwater dependant ecosystems, SEPP 14 wetlands and the Ballina Nature Reserve.
- (g) The final Broilga Addendum Report and Plan of Management include an assessment of the impact to the Broilga population and provide for a widened buffer to reduce the impacts of the use of the sporting fields on Broilga foraging and nesting. Construction activities will also be limited during Broilga mating and nesting periods. Ongoing surveying and monitoring of Broilga population will also be provided under the final Plan of Management.
- (h) The Applicant will now propagate and plant a minimum of 15 Rose Walnut and 50 Rough Shelled Bush Nut Trees.
- (i) A feral animal exclusion fence will be constructed from the existing fence at the Ballina Heights Estate through the development site to the northern boundary of the sporting fields.

3.4 Hydrological Issues

- (a) A complete redesign of the stormwater management strategy for the development has been negotiated, now comprising on site detention measures to ensure existing groundwater and surface flow conditions are maintained.
- (b) An updated Monitoring and Adaptive Framework Plan has been provided by the Applicant that largely reflects the findings and conclusions of the detailed modelling undertaken on behalf of the Applicant.
- (c) The final Monitoring and Adaptive Framework Plan will provide for monitoring of vegetation and hydrology from the date of development consent until either 3 years after the registration of the plan of subdivision for the 350th residential lot or 2 years after the issue of an occupation certificate for a dwelling constructed on the 250th residential lot, whichever is later. The monitoring is to assess whether the development results in changes downstream of the site in relation to hydrology and the health or composition of ecological communities.
- (d) Additional monitoring including revisions to the MUSIC model have been undertaken to demonstrate that the post development hydrological response will adequately mimic existing hydrological site responses. As noted, this significantly reduces the potential impact on downstream ecologically endangered communities, threatened species, groundwater dependant ecosystems, SEPP 14 wetlands, the Ballina Nature Reserve and private rural properties.
- (e) Additional stormwater detention is to be implemented on the development site in the event that the monitoring carried out in accordance with the final Monitoring and Adaptive

Framework Plan identifies that the development has caused a significant changes to the hydrology (increase in water levels) and/or ecology (tree mortality, change in composition etc). An independent auditor is to determine what actions are required of the developer to prevent or stop any adverse environmental impacts arising from the development.

3.5 Mosquito Issues

- (a) A more comprehensive Mosquito Assessment has been provided that addresses the revegetation and rehabilitation measures within the DA.
- (b) Mosquito buffers of up to 25 metres have now been incorporated into the development.

3.6 Owner's Consent Issues

- (a) These issues have now fallen away as the Applicant obtained consent from New South Wales Department of Industry – Crown Lands & Water Division dated 15 November 2017.

3.7 Roads Issues

- (a) The Crown Roads end use is now clear, and which Crown Roads are remaining and which are now proposed to be closed have been identified within the application.
- (b) Excess roads infrastructure has been removed or minimised.
- (c) The layout of the subdivision has been redesigned to largely achieve compliance with the Northern Rivers Local Government Design Manuals and to respond to Council's concerns. This included the deletion of narrow lanes and excess road infrastructure and changes to the horizontal and vertical alignment of some roads.

3.8 Town Planning Issues

- (a) The height of retaining walls within the development has been substantially reduced, with improved finishes and appropriate grades and slopes.
- (b) The development of more steeply sloping land and excessive retaining wall structures has been removed from the application and this land now forms part of the allotments known as key site/future development lots, which will be the subject of future development applications. Road layouts connecting to and fronting these allotments have been designed to enable the future development of this land without the need for extensive retaining wall structures.
- (c) The development now has a district park and local parks that are largely compliant with the provisions of the Ballina DCP, in relation to their area, location and grade. Embellishments and structures to be provided within dedicated parks are to be compliant with Australian Standards and Council requirements and their design is to provide for appropriate pedestrian and vehicular safety.
- (d) The development now provides for sporting fields that are largely compliant with the provisions of the Ballina DCP, in relation to their area, location, grade and facilities to be provided. All sporting codes to be catered for will have fields/courts that have compliant dimensions and suitable run off areas. Buffer planting and the feral animal exclusion fence is to be provided along the eastern perimeter of the sporting fields.
- (e) There is to be security for community infrastructure and staging to ensure an orderly delivery of the development.
- (f) The development now provides for residential allotments that are compliant with Council's minimum lot size and rural residual lots that can be created under the provisions of the *Ballina Local Environmental Plan 2012*.

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- (g) Updated Bushfire Threat Assessment Reports have been undertaken for the purposes of the application and to address the revegetation and rehabilitation measures within the DA. However, the DA is to be deferred until a revised Bush Fire Safety Authority has been obtained from the NSW Rural Fire Service which has been issued in relation to the approved plan set and is consistent with the other materials forming part of the DA.

While the conduct of the Applicant in this appeal resulted in a long and expensive process, the appeal has resulted in a much improved development that largely responds to Council's concerns.

We would like to acknowledge and commend the very substantial efforts of Council officers including yourself, Naomi McCarthy, Ian Gaskell and Paul Wilson in the conduct of this appeal. Your efforts were very substantial and your persistence, knowledge and commitment to acting in the public interest played a key role in ultimately ensuring that the approved development will be of a high standard and protects and enhances the environment.

Yours sincerely



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