



*Planning Proposal 22/007*

**» Burns Point Ferry Road**

**West Ballina**

**Appendices**

March 2023 (v2 Exhibition) 22/76024

**ballina**  
shire council



40 cherry street • po box 450 • ballina nsw 2478  
t 1300 864 444 • e [council@ballina.nsw.gov.au](mailto:council@ballina.nsw.gov.au)

[ballina.nsw.gov.au](http://ballina.nsw.gov.au)

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## Appendix 1 – Land & Environment Court Judgement



Land and Environment Court  
New South Wales

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Case Name:	Planners North v Ballina Shire Council
Medium Neutral Citation:	[2021] NSWLEC 120
Hearing Date(s):	2, 3, 4, 5, 6 and 13 August 2021
Date of Orders:	03 November 2021
Decision Date:	3 November 2021
Jurisdiction:	Class 1
Before:	Preston CJ
Decision:	The Court orders: (1) The appeal is dismissed. (2) Development application 2020/192, as amended, for a manufactured home estate on Lot 1 in DP 124173 known as 550-578 River Street, West Ballina is determined by refusal of consent. (3) The exhibits may be returned.
Catchwords:	APPEAL – manufactured home estate – refusal of development consent – proposed development partly on coastal wetlands and littoral rainforests area made under State Environmental Planning Policy No 36 – Manufactured Home Estates – development impermissible under Manufactured Home Estates State Environmental Planning Policy – jurisdictional preconditions to grant of development consent – precondition under cl 9(1) of the Manufactured Home Estates SEPP – satisfaction that development not adversely affect land having special landscape, scenic or ecological qualities under applicable environmental planning instrument – precondition under cl 11(1) of the Coastal Management SEPP – satisfaction that development not significantly impact on biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest – precondition under s 7.16 of the Biodiversity Conservation Act 2016 – opinion that development likely to have serious and irreversible impacts on biodiversity values – preconditions to grant of consent not satisfied – consent refused
Legislation Cited:	Ballina Local Environmental Plan 2012 Biodiversity Conservation Act 2016 ss 6.5, 6.12, 7.2, 7.4, 7.16

Biodiversity Conservation Regulation 2017 cl 1.4, 6.1, 7.1  
Coastal Management Act 2016  
Environmental Planning and Assessment Act 1979 (NSW)  
ss 4.16, 4.17  
State Environmental Planning Policy (Coastal  
Management) 2018 cl 6, 11  
State Environmental Planning Policy No 36 – Manufactured  
Home Estates cl 6, sch 2

Cases Cited: Ballina Shire Council v Palm Lake Works Pty Ltd [2020]  
NSWLEC 41  
Cameron v Nambucca Shire Council (1997) 95 LGERA 268  
Helman v Byron Shire Council (1995) 87 LGERA 349  
Hornsby Council v Vitone Pty Ltd (2003) 132 LGERA 122;  
[2003] NSWLEC 272  
Newcastle & Hunter Valley Speleological Society Inc v  
Upper Hunter Shire Council and Stoneco Pty Limited  
(2010) 210 LGERA 126; [2010] NSWLEC 48  
Reyson Pty Ltd v Minister Administering the  
Environmental Planning and Assessment Act 1979 (2020)  
247 LGERA 277; [2020] NSWCA 281  
Timbarra Protection Coalition Inc v Ross Mining NL (1999)  
46 NSWLR 55; [1999] NSWCA 8  
Tomasic v Port Stephens Council [2021] NSWLEC 56  
Weal v Bathurst City Council (2000) 111 LGERA 181;  
[2000] NSWCA 88

Category: Principal judgment

Parties: Planners North (Applicant)  
Ballina Shire Council (Respondent)

Representation: Counsel:  
Mr P Tomasetti SC (Applicant)  
Mr A Stafford (Respondent)

Solicitors:  
McCartney Young Lawyers (Applicant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2020/249843

Publication Restriction: Nil

## Judgment

### The nature of the appeal and outcome

- 1 The applicant, Planners North, as the agent for Ballina Waterways Pty Ltd, lodged a development application with Ballina Shire Council (the Council) for a manufactured home estate on Lot 1 in DP124173 known as 550-578 River Street, West Ballina (the site). Ballina Waterways Pty Ltd is the owner of the site.
- 2 As amended, the proposed development involves:

“(a) use part of the land at 550-578 River Street, Ballina, being Lot 1 in DP124173 for a manufactured home estate with 230 sites,

(b) carry out earthworks including filling of the land,

(c) carry out engineering works to retain all fill,

(d) construct internal roads with associated drainage and site services,

(e) construct a club house with parking, recreation facilities and recreational vehicle compound,

(f) construct a manager’s residence and summer house with Bocce Court and

(g) carry out landscaping works.” (Applicant’s description of proposed development).

- 3 The site is a large lot (total area of 56.36ha) fronting River Street to the north, Burns Point Ferry Road to the east, Emigrant Creek to the south and west, and residential properties accessed off Emigrant Creek Lane and a caravan park also to the west. The site is in close proximity to priority oyster aquaculture areas within the Richmond River estuary.
- 4 The larger southern part of the site (an area of approximately 42.43ha) is the subject of Biobanking Agreement No 444 made on 30 January 2019 between the Minister for the Environment and Ballina Waterways Pty Ltd under the former *Threatened Species Conservation Act 1995* (Biobanking Agreement). The smaller northern part of the site (an area of approximately 13.93ha) is vacant. The whole of the site is low lying with surface levels ranging from approximately RL0.5m to 1.5m AHD. The site is subject to tidal inundation and flooding.
- 5 The applicant lodged an appeal to the Court against the deemed refusal of the development application by the Council. The Council raised around 19 contentions as to why development consent must or should be refused and 10 contentions relating to insufficient information. The contentions that consent must be refused relate to jurisdictional requirements imposed by the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) and environmental planning instruments made under the EPA Act. One of the statutory provisions sets a jurisdictional precondition to the permissibility of the development on the site while other statutory provisions specify matters about which the Court must be satisfied before development consent can be granted to the development.
- 6 I will start with the statutory provisions setting jurisdictional preconditions to the grant of consent. As I will explain, my consideration of these jurisdictional requirements leads me to determine the development application by refusal of consent. In this circumstance, it is unnecessary to consider other issues of merit joined between the



parties, including statutory provisions raising relevant matters that must be considered before granting consent to the development. No matter how I might decide these merit issues, whether in favour of the applicant or the Council, it would not result in a grant of consent to the development. The appeal should be dismissed and the development application determined by refusal of consent.

### **The permissibility of the development**

- 7 The site is zoned under Ballina Local Environmental Plan 2012 (BLEP) R2 Low Density Residential in the northern part of the site and RU2 Rural Landscape in the southern part of the site, which corresponds with that part of the site that is subject to the Biobanking Agreement. The proposed development is to carry out the manufactured home estate in the R2 zoned land and biodiversity conservation in the RU2 zoned land.
- 8 Development for the purposes of a manufactured home estate is not expressly specified as development permitted with consent in the Land Use Table for either the R2 Zone or the RU2 Zone. The permissibility of the development for the purposes of a manufactured home estate depends on State Environmental Planning Policy No 36 – Manufactured Home Estates (Manufactured Home Estates SEPP). Clause 6 permits development for the purposes of a manufactured home estate to be carried out on any land on which development for the purposes of a caravan park may be carried out, except for certain land, including land within one or more of the categories described in Sch 2. One of the categories of excluded land in Sch 2, in cl 5, is:

“Land which is identified in an environmental planning instrument, or in any planning strategy of the Department or the council approved for the time being by the Director, by words which are cognate with or a description consistent with any one or more of the following—

  - extractive resources,
  - services corridors,
  - airport/industry buffer area,
  - habitat corridor,
  - containing significant remnant vegetation,
  - littoral rainforest,
  - water catchment,
  - wetlands.”
- 9 The Land Use Table for Zone R2 does not expressly specify development for the purposes of a caravan park as being permitted with consent, but such development

would be permitted as an innominate purpose, being “any other development not specified in Item 2 or 4”. Caravan parks are not specified in Item 2 or 4 of the Land Use Table for the R2 Zone. Caravan parks are specified expressly as being permitted with consent in Zone RU2. Development for the purposes of a caravan park may, therefore, be carried out on land in both the R2 Zone and the RU2 Zone.

- 10 However, cl 6 of the Manufactured Home Estates SEPP excludes certain land, including land within the category in cl 5 in Sch 2 to the Manufactured Home Estates SEPP. The Council contended that the site does fall within this category of excluded land.
- 11 The Council contended that parts of the site are identified in an environmental planning instrument, namely the State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP), by words which are cognate with or a description consistent with any one or more of “littoral rainforest” and “wetlands”, being two of the words or descriptions specified in cl 5 of Sch 2. Clause 6 of the Coastal Management SEPP identifies land as the “coastal wetlands and littoral rainforest area” for the purposes of the Coastal Management SEPP and *Coastal Management Act 2016*. Clause 6(1) and (2) provide:

“(1) This clause identifies land for the purposes of the *Coastal Management Act 2016* and this Policy.

(2) The ***coastal wetlands and littoral rainforests area*** is the land identified as such by the *Coastal Wetlands and Littoral Rainforests Area Map*.

**Note—**

The ***coastal wetlands and littoral rainforests area*** is made up of land identified as ‘coastal wetlands’ or as ‘littoral rainforests’ on the *Coastal Wetlands and Littoral Rainforests Area Map*. The land so identified includes land identified as ‘proximity area for coastal wetlands’ and ‘proximity area for littoral rainforest’.”

- 12 The interpretation provision, cl 4(1) of the Coastal Management SEPP, confirms that the “coastal wetlands and littoral rainforest area” is the land identified in cl 6(2) and the “Coastal Wetlands and Littoral Rainforests Area Map” means “the State Environmental Planning Policy (Coastal Management) 2018 Coastal Wetlands and Littoral Rainforests Area Map”.
- 13 The Coastal Wetlands and Littoral Rainforests Area Map is maintained, and is available electronically, on the website of the Department of Planning, Industry and Environment (DPIE). The legend to the map shows that the “coastal wetlands and littoral rainforest area” comprises four subareas, two for coastal wetlands and two for littoral rainforests. The two subareas of coastal wetlands are “coastal wetlands” and

“proximity area for coastal wetlands” and the two subareas of littoral rainforests are “littoral rainforests” and “proximity area for littoral rainforests”.

- 14 The Coastal Wetlands and Littoral Rainforests Area Map identifies a large area of the site as being “coastal wetlands” and “proximity area for coastal wetlands”. The land identified as “coastal wetlands” is a core area within and extending for about a half of the southern part of the site zoned RU2. The land identified as “proximity area for coastal wetlands” surrounds this core area identified as “coastal wetlands” and is largely contained within the southern part of the site zoned RU2 but extends into the southern section of the northern part of the site zoned R2.
- 15 The manufactured home estate is proposed to be constructed in the southern section of the R2 zoned land, including roads, lots on which manufactured homes will be installed, recreational facilities including the club house, earthworks, drainage structures and utility services.
- 16 The Council contended that the identification by the Coastal Wetlands and Littoral Rainforests Area Map of over half of the southern part of the site zoned RU2 as “coastal wetlands” excludes that part of the site from being developed for the purposes of a manufactured home estate under cl 6(a) of the Manufactured Home Estates SEPP. The applicant agreed. This is the reason for this part of the site not being proposed by the applicant to be used for the purposes of a manufactured home estate.
- 17 The Council contended that the identification by the Coastal Wetlands and Littoral Rainforests Area Map of the southern section of the northern part of the site zoned R2 as “proximity area for coastal wetlands” also excludes that land being developed for the purposes of a manufactured home estate under cl 6(a) of the Manufactured Home Estates SEPP. The Council submitted that land identified as being within the “coastal wetlands and littoral rainforest area” is made up of two categories of land, being land identified as “coastal wetlands” and land identified as “littoral rainforests”. Land identified in one or other of these two categories of “coastal wetlands or “littoral rainforests” includes land identified as “proximity area for coastal wetlands” for the first, and “proximity area for littoral rainforests” for the second. Hence, land identified as within a “proximity area for coastal wetlands” is land within the “coastal wetlands and littoral rainforest area”.
- 18 The Council submitted that this construction is corroborated by the notes to cl 6(2) and cl 11 of the Coastal Management SEPP. The note to cl 6(2) states that the coastal wetlands and littoral rainforests area is made up of land identified as “coastal

wetlands” or as “littoral rainforests” and, in turn, land so identified includes land identified as “proximity area for coastal wetlands” and “proximity area for littoral rainforest”. The note to cl 11 states that:

“The *Coastal Wetlands and Littoral Rainforests Area Map* identifies certain land that is inside the coastal wetlands and littoral rainforests area as ‘proximity area for coastal wetlands’ or ‘proximity area for littoral rainforest’ or both.”

- 19 The Council submitted that this construction is also supported by the differential regulation in cl 10 and cl 11 of the Coastal Management SEPP of land identified on the Coastal Wetlands and Littoral Rainforests Area Map as “coastal wetlands” and “littoral rainforests” (in cl 10) and land that is identified as “proximity area for coastal wetlands” and “proximity area for littoral rainforest” (in cl 11). The inclusion of cl 11(2) is important in this regard. Clause 11(1) in terms refers to land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map but cl 11(2) nevertheless states that the clause does not apply to land that is identified as “coastal wetlands” or “littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map. Subclause (2) only has work to do if the land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” is included within “coastal wetlands” or “littoral rainforests” respectively. The subclause operates to apply the clause only to land identified particularly as “proximity area for coastal wetlands” or “proximity area for littoral rainforests” and not to land identified particularly as “coastal wetlands” or “littoral rainforests” on the Coastal Wetlands and Littoral Rainforests Area Map.
- 20 The Council submitted that this construction was accepted by the Court of Appeal in *Reyssson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (2020) 247 LGERA 277; [2020] NSWCA 281 (*Reyssson*). Payne JA, with whom Bell P and Gleeson JA agreed, noted that one function of the Coastal Wetlands and Littoral Rainforests Area Map is “to identify a total area as the ‘coastal wetlands and littoral rainforests area’” (at [93]). Payne JA continued:

“The particular map which has been adopted by the Coastal Management SEPP identifies the sub-areas of ‘coastal wetlands’ and ‘proximity area for coastal wetlands’. It does not follow that the first sub-area is to be construed as being linked to one part of the jurisdictional precondition, whereas the second sub-area is to be construed as being linked to another part. That does not follow either from the nature of the provisions or from the form of the map. These are legislative choices, not classifications driven by the asserted jurisdictional precondition.” (at [94]).

- 21 Payne JA noted that:

“An area identified on the map as either ‘coastal wetland’ or ‘proximity area’ could legitimately include land which, though not itself displaying the hydrological and floristic characteristics of a wetland, adjoined such land.” (at [95]).

- 22 Payne JA observed that, in order to determine whether the appellant’s land (“the Reysson Land”) had been identified as being within the coastal wetlands and littoral rainforests area, “The appropriate starting point in the analysis is to consider the outer boundary of the mapping of the Reysson Land, because this marks out the area that was being identified as being within the coastal wetlands and littoral rainforests area” (at [96]).
- 23 The Council submitted, on the authority of *Reysson*, that all of the site identified as either “coastal wetlands” or “proximity area to coastal wetlands” is land identified as “coastal wetlands and littoral rainforests area” on the Coastal Wetlands and Littoral Rainforests Area Map.
- 24 Returning to the Manufactured Home Estates SEPP, the Council submitted that this land so identified as “coastal wetlands and littoral rainforest area” is land identified by words which are cognate with or a description consistent with “littoral rainforests” and “wetlands”, so as to be within the category of excluded land in cl 5 of Sch 2 of the Manufactured Home Estates SEPP. Accordingly, cl 6 of the Manufactured Home Estates SEPP does not apply so as to permit development for the purposes of a manufactured home estate to be carried out on any part of the site identified as coastal wetlands and littoral rainforests area. The development is proposed to be carried out partly on this land, being the southern section of the northern part of the site zoned R2. Development on this part of the site is not severable from, but rather is integral to, the proposed manufactured home estate. The proposed development is therefore not permissible.
- 25 The applicant submitted that the southern section of the northern part of the site zoned R2 is not land identified in the Coastal Management SEPP by “words which are cognate with or a description consistent with” either “littoral rainforests” or “wetlands”, being the two terms of relevance in the category of excluded land in cl 5 of Sch 2 to the Manufactured Home Estates SEPP, and hence is not excluded land under cl 6(a) of the Manufactured Home Estates SEPP. The applicant noted that the southern section of the northern part of the site zoned R2 is identified as “proximity area for coastal wetlands” in the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP. Areas mapped as “proximity area for coastal wetlands” are separate from areas mapped as “coastal wetlands”, although both are subareas

within the total area of the coastal wetlands and littoral rainforests area: *Reysson* at [93]-[95].

- 26 The applicant submitted that the focus of the inquiry demanded by cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP is whether the section of the site identified as being within a “proximity area for coastal wetlands” can be said to be land identified by words which are cognate with or a description consistent with “wetlands”. The applicant submitted that it is not, relying on the decision in *S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd t/as Planners North v Northern Regional Planning Panel (No 2)* [2019] NSWLEC 199 (*S J Connelly*). There, Pain J held that the words “proximity area for coastal wetlands” alone are not a like descriptor of the words or descriptions “coastal protection” or “natural wetland” in Sch 1 to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP), as the ordinary and natural meaning of “proximity” is land near or close to other land: at [89]. A “proximity area for coastal wetlands” does not itself have an attribute of “coastal protection” or “natural wetland”: at [90]. Accordingly, Sch 1 to the Seniors Housing SEPP did not apply to the part of the applicant’s land identified as within the “proximity area for coastal wetlands” on the Coastal Wetlands and Littoral Rainforest Map: at [91].
- 27 The applicant submitted that this decision in *S J Connelly* is sufficient authority to support the conclusion that land mapped as a “proximity area for coastal wetlands” is not a “wetland” for the purposes of cl 5 of Sch 2 to the Manufactured Home Estates SEPP.
- 28 I find that most of the southern part of the site zoned RU2 and the southern section of the northern part of the site zoned R2 are excluded lands under cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP. The inquiry required is not the particular one suggested by the applicant of ascertaining whether the words or description of “proximity area for coastal wetlands” are words which are cognate with or a description consistent with “wetlands” but rather the general one required by cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP of whether this section of the site is land identified as being within the coastal wetlands and littoral rainforests area by the Coastal Management SEPP. Clause 6(a) excludes from the operation of the Manufactured Home Estates SEPP land “within one or more categories described in Schedule 2”. One of the categories described in Sch 2 is “land which is identified in an environmental planning instrument”, here, the Coastal Management SEPP, “by words which are cognate with or a description consistent with any one or more of the following”, including “littoral rainforests” and “wetlands”. The Coastal Management

SEPP identifies an area of land described as the “coastal wetlands and littoral rainforests area”. The “coastal wetlands and littoral rainforests area” is defined in cl 4(1) and cl 6(2) of the Coastal Management SEPP to be “the land identified as such by the Coastal Wetlands and Littoral Rainforests Area Map.” The Coastal Wetlands and Littoral Rainforests Area Map is defined in cl 4(1) as meaning “the State Environmental Planning Policy (Coastal Management) 2018 Coastal Wetlands and Littoral Rainforests Area Map”. All of the land identified as being within the “coastal wetlands and littoral rainforests area” by the Coastal Wetlands and Littoral Rainforests Area Map is land within the category described in cl 5 of Sch 2 of the Manufactured Home Estates SEPP, as it is identified in the Coastal Management SEPP by words which are cognate with or a description consistent with any one or more of “littoral rainforests” and “wetlands”. These are the very words or description used in identifying the “coastal wetlands and littoral rainforests area”.

- 29 In the present case, the site is identified as being within the coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map, being most of the southern part of the site zoned RU2 except for a small area to the west adjoining Emigrant Creek, and the southern section of the northern part of the site zoned R2. For the purpose of identification of land as being within the coastal wetlands and littoral rainforests area, it is irrelevant that land identified as such might be subclassified as either “coastal wetlands” or “proximity area for coastal wetlands”. For the site, land within the outer boundary of the mapped coastal wetlands and littoral rainforests area contains two subareas, “coastal wetlands” and “proximity area for coastal wetlands”. The mapped subarea “coastal wetlands” is wholly contained within the southern part of the site zoned RU2 and the mapped subarea “proximity area for coastal wetlands” is mostly in that southern part but extends into the southern section of the northern part of the site zoned R2.
- 30 However, this mapping of subareas is not relevant in determining whether land within these subareas is excluded land for the purposes of cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP. What is relevant is that land within these subareas is identified as being within the coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map, under the Coastal Management SEPP. It is this coastal wetlands and littoral rainforests area that is the category described in cl 5 of Sch 2 to the Manufactured Home Estates SEPP. Land only needs to be identified as being within this area in order to be land within this category.

- 31 The applicant's argument separating the subareas of "coastal wetlands" from "proximity area for coastal wetlands" is akin to the flawed argument that was rejected by the Court of Appeal in *Reysson*. The particular map which has been adopted by the Coastal Management SEPP, the Coastal Wetlands and Littoral Rainforests Area Map, does identify subareas on the site as "coastal wetlands" and "proximity areas for coastal wetlands", but this does not mean that land identified on the map as being within either of these subareas has to display the hydrological and floristic characteristics of a wetland for the first or adjoin such land for the second: at [94]. An area identified on the map as either "coastal wetlands" or "proximity areas for coastal wetlands" could legitimately include land which, though not itself displaying the hydrological and floristic characteristics of a wetland, adjoined such land: at [95]. The appropriate starting point for the analysis is not identification of land that is within either "coastal wetlands" or "proximity areas for coastal wetlands", but instead to consider the outer boundary of the mapping of the site as this marks out the area that has been identified as being within the coastal wetlands and littoral rainforest area: at [96].
- 32 The decision in *S J Connelly* is not applicable. It involved a different environmental planning instrument, the Seniors Housing SEPP, and a different inquiry. There, it was considered appropriate to ascertain whether the words "proximity area for coastal wetlands" alone are a like descriptor for the words "coastal protection" or "natural wetland" in Sch 1 to the Seniors Housing SEPP. That is not the inquiry required by cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP.
- 33 For these reasons, all of the site that is land identified as being within the "coastal wetlands and littoral rainforests area" by the Coastal Wetlands and Littoral Rainforests Area Map, which includes most of the southern part of the site zoned RU2 and the southern section of the northern part of the site zoned R2, is excluded land on which development for the purposes of a manufactured home estate may not be carried out. The proposed development involves carrying out development for the purposes of a manufactured home estate on land that includes the southern section of the northern part of the site zoned R2. Development on this section of the site is integral to carrying out the manufactured home estate, as it includes roads, lots on which manufactured homes will be installed, recreational facilities including the club house, earthworks, drainage structures and utility services.
- 34 In this circumstance, development consent cannot be granted, under s 4.16(4)(b) of the EPA Act, to the development for which consent is sought in the development application of a manufactured home estate on the northern part of the site zoned R2



except for that part of the development on the southern section on the northern part of the site, which is excluded land. The applicant accepted this (T 02/08/21 p 62). The appropriate determination is to refuse consent to the development sought in the development application, under s 4.16(1)(b) of the EPA Act.

**Precondition to grant of consent under cl 9(1) of the Manufactured Home Estates SEPP**

35 A number of statutory provisions set preconditions that must be satisfied before development consent can be granted to the development on the site. The first is in cl 9(1)(d) of the Manufactured Home Estates SEPP, which provides:

“A council may grant a development consent pursuant to this Policy allowing development for the purposes of a manufactured home estate only if it is satisfied—

...

(d) that the development will not have an adverse effect on any—

- conservation area
- heritage item
- waterway or land having special landscape, scenic or ecological qualities, which is identified in an environmental planning instrument applicable to the land concerned.”

36 Land having special landscape, scenic or ecological qualities, which is identified in an environmental planning instrument, is the coastal wetlands and littoral rainforests area identified by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP. As I have earlier noted, most of the southern part of the site zoned RU2 and the southern section of the northern part of the site zoned R2 have been identified as within the coastal wetlands and littoral rainforest area by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP.

37 As a consequence, the Court is precluded by cl 9(1) of the Manufactured Homes Estates SEPP from granting development consent allowing the proposed development for the purposes of a manufactured home estate unless it is satisfied that the development will not have an adverse effect on any land within the mapped coastal wetlands and littoral rainforests area.

38 The Council contended that the proposed development will have an adverse effect on land in this area in two ways. First, the development for the purposes of a manufactured home estate will be carried out on the southern section of the northern part of the site that has been identified as being within the subarea of “proximity area

for coastal wetlands” within the coastal wetlands and littoral rainforests area. This section of the site will be cleared and filled and have constructed upon it roads, lots on which manufactured homes will be installed, recreational facilities including the club house, earthworks, drainage structures and utility services. The ecological qualities of this section of the site, that led to its being identified within the coastal wetlands and littoral rainforests area, will be lost.

- 39 Second, the development for the purposes of a manufactured home estate on the northern part of the site, including on this southern section of the northern part, will have an adverse effect on the southern part of the site that has been identified as “proximity area for coastal wetlands” and “coastal wetlands”, both being within the coastal wetlands and littoral rainforests area. The Council contended that surface water runoff and groundwater seepage from the manufactured home estate will adversely affect terrestrial and aquatic biodiversity in the mapped coastal wetlands and littoral rainforests area on the southern part of the site. There was extensive evidence by the parties’ respective experts on hydrology, stormwater and ecology on the nature and extent of these adverse effects. The Council submitted that the proposed, but not yet finalised, management plans, which the applicant suggested could be required by conditions of consent, do not permit the Court to be satisfied that the development will not have an adverse effect on this area.
- 40 The applicant disputed that the proposed development, if mitigation measures were to be taken as proposed by conditions of consent, will have an adverse effect on the southern part of the site that is protected by the Biobanking Agreement and is within the coastal wetlands and littoral rainforests area mapped on the site. The applicant’s defence only addressed the adverse effects of the development on the southern part of the site mapped as being within the coastal wetlands and littoral rainforests area (which is part of the Biobanking area), not the southern section of the northern part of the site that is also mapped as being within the coastal wetlands and littoral rainforests area (in the subarea of “proximity area for coastal wetlands”). The applicant assumed that cl 9(1) of the Manufactured Home Estates SEPP did not apply to this part of the site, so as to preclude the grant of consent for the proposed development on this part of the site.
- 41 I can deal with this precondition in cl 9(1) of the Manufactured Home Estates SEPP briefly. Regardless of whether or not the proposed development on the northern part of the site will have an adverse effect on land in the southern part of the site that is identified as being within the coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management

SEPP, the proposed development on the southern section of the northern part of the site, which is also identified as being within the coastal wetlands and littoral rainforests area, will have an adverse effect on the land in that southern section of the northern part of the site.

- 42 Land identified as within the coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP meets the description in cl 9(1) of the Manufactured Home Estates SEPP of being “land having special landscape, scenic or ecological qualities, which is identified in an environmental planning instrument applicable to the land concerned”. As I have earlier found, all land within the outer boundary of the area mapped as the coastal wetlands and littoral rainforests area is identified as such, regardless of whether the land is included within the subarea of “coastal wetlands” or “proximity area for coastal wetlands”.
- 43 In this case, land in the southern section of the northern part of the site is shown as being within the subarea of “proximity area of coastal wetlands” but it is nevertheless land identified as being within the coastal wetlands and littoral rainforests area. All land within this coastal wetlands and littoral rainforests area is land identified by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP as having special ecological qualities.
- 44 The proposed development on this section of the site identified as being within the coastal wetlands and littoral rainforests area is an integral part of the development for the purposes of a manufactured home estate that is to be carried out on the site. The land will be cleared and filled and have constructed on it roads, lots on which manufactured homes will be installed, recreational facilities including the club house, earthworks, drainage structures and utility services, which will destroy the ecological qualities of the land that led to it being included within the coastal wetlands and littoral rainforests area.
- 45 In these circumstances, I am not satisfied, as I am required to be under cl 9(1)(d) of the Manufactured Home Estates SEPP in order to be able to grant development consent, that the development will not have an adverse effect on any land having special ecological qualities, being land within the coastal wetlands and littoral rainforests area, which is identified by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP. Development consent cannot therefore be granted allowing the development for the purposes of a manufactured home estate on the site.

- 46 This conclusion on the application of cl 9(1) of the Manufactured Home Estates SEPP is consistent with my earlier conclusion on cl 6(a) of the Manufactured Home Estates SEPP. Land in the southern section of the northern part of the site that is identified as being within the coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP is excluded land by cl 6(a) of the Manufactured Home Estates SEPP on which development for the purposes of a manufactured home estate may not be carried out. Consistently, cl 9(1)(d) of the Manufactured Home Estates SEPP operates to prevent development consent being granted allowing development for the purposes of a manufactured home estate if the development will have an adverse effect on land within the coastal wetlands and littoral rainforests area, being land having special landscape, scenic or ecological qualities which is identified in the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP.
- 47 Again, the part of the development on the southern section of the northern part of the site is integral to the manufactured home estate for which consent is sought. Development consent cannot be granted for the manufactured home estate except for the part of the development on this section of the site.
- 48 In this circumstance, it is unnecessary to decide whether the development for the purposes of the manufactured home estate on the northern part of the site will have an adverse effect on land in the southern part of the site identified as being within the coastal wetlands and littoral rainforests area. Even if I were to be satisfied that the development will not have an adverse effect on land in the southern part of the site within the coastal wetlands and littoral rainforests area (which I do not decide), because I am not satisfied that the development will not have an adverse effect on land in the northern part of the site within the coastal wetlands and littoral rainforests area, development consent for the development cannot be granted.

**Precondition to grant of consent under cl 11(1) of the Coastal Management SEPP**

- 49 The second statutory provisions setting a precondition to the grant of consent is in cl 11(1) of the Coastal Management SEPP. Clause 11 applies to land identified in the subarea of “proximity area for coastal wetlands” on the Coastal Wetlands and Littoral Rainforests Area Map. Clause 11(1) provides:

“Development consent must not be granted to development on land identified as ‘proximity area for coastal wetlands’ or ‘proximity area for littoral rainforest’ on the *Coastal Wetlands and Littoral Rainforests Area Map* unless the consent authority is satisfied that the proposed development will not significantly impact on—

(a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or

(b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.”

- 50 The “adjacent coastal wetland” refers to land that is identified as “coastal wetlands” on the Coastal Wetlands and Littoral Rainforests Area Map.
- 51 Applied to this site, cl 11(1) precludes the Court granting consent unless it is satisfied that the proposed development for the purposes of a manufactured home estate on the southern section of the northern part of the site identified as “proximity area for coastal wetlands” by the Coastal Wetlands and Littoral Rainforests Area Map will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland, being the area identified in the centre of the southern part of the site as “coastal wetlands” on the Coastal Wetlands and Littoral Rainforests Area Map, or the quantity and quality of surface and ground water flows to and from that adjacent coastal wetland. The subclause requires the Court to form the positive opinion of satisfaction that the proposed development will not significantly impact the adjacent coastal wetland in these respects. If the evidence before the Court is insufficient to allow it to form the necessary opinion of satisfaction, then the Court is precluded from granting development consent to the development.
- 52 The evidence of the hydrological, stormwater and ecological experts identified four main areas of impact of the development on the adjacent coastal wetland: hydrology, scour, water quality and ecology.
- 53 On hydrology, the concern was that the development would have hydrological impacts by changing the existing split between surface water runoff and groundwater seepage. The northern part of the site will be cleared, filled and developed with hard surfaces, altering groundwater conditions and preventing surface water infiltration on this part of the site. Surface water runoff will be directed into six bioretention basins/Atlantis cell systems that allow infiltration into the groundwater and, in times of excess runoff, overflow into a rip-rap rock lined drain at the boundary with the Biobanking area in the southern part of the site. The hydrological, stormwater and ecological experts agreed that conditions of consent could require sufficient mitigatory measures to be adopted “so that the existing (pre-development) split between surface water runoff and groundwater seepage will be maintained post-development” (Joint Expert Report – Ecology and Fish Habitat, p 6). If this outcome or objective were to be achieved, the experts agreed that “the hydrological impacts of the development will be unlikely to cause adverse ecological effects” (p 6).

- 54 On scour, the concern was that surface water discharges from the outlets of the bioretention basins/Atlantis cell systems might cause scour impacts in the adjacent coastal wetland. The current plans show the outlets from these structures to be located in the development site too close to the boundary with the adjacent coastal wetland in the Biobanking area to control and attenuate by flow expansion in the development site the surface water discharges so as to prevent preferential flow, channelisation and scour in the adjacent coastal wetland. The stormwater engineering and hydrological experts agreed that the design of these structures, including the location and treatment of the discharge points, could be modified to address those concerns. No revised design was, however, put forward by the applicant to demonstrate how this outcome could be achieved.
- 55 On water quality, the Council's ecologist, Dr McLean, raised concern that the stormwater treatment by the bioretention basins/Atlantic cell systems is predicted to remove only 85.6% of total suspended solids, 62% of total nitrogen and 77.4% of total phosphorus, with the remaining sediments and nutrients entering the adjacent coastal wetland (Joint Expert Report – Ecology and Fish Habitat, pp 2, 8). This is likely to adversely affect the Coastal Saltmarsh EEC in this wetland.
- 56 Dr McLean noted the sensitivity of coastal saltmarsh to stormwater flows. Dr McLean referred to studies showing that increased nutrient loading on saltmarsh causes loss of saltmarsh ecosystems, citing Linda A Deegan et al, "Coastal eutrophication as a driver of salt marsh loss" (2012) 490 *Nature* 388-391. Dr McLean opined that this evidence suggests that without undertaking an appropriate assessment of the nutrient and sediment inputs, the development has not demonstrated that it will not have an adverse impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland (p 4).
- 57 Dr McLean considered that the basin-like topography of the adjacent coastal wetland in the Biobanking area makes the area more sensitive to the impacts of sedimentation and eutrophication due to reduced hydraulic connectivity to Emigrant Creek and the Richmond River estuary. The changed flows may also facilitate mangrove incursion into saltmarsh, a phenomenon that is already occurring (pp 2-3). Mr Howland, the Council's hydrologist, confirmed that surface water becomes impounded within the depression/basin immediately to the south and south-east of the development site. He observed that while spring high tides are high enough to reach into the basin and introduce saline water, neap tides are not. Mr Howland also observed mangrove pneumatophore intrusion in former agricultural drains in the Biobanking area, restricting tidal flow within the drains. In making those observations, Mr Howland was

not saying the basin is completely impermeable, only that exchange by groundwater or via small side drains is restricted (p 3).

- 58 Dr Johnson, the Council's hydrologist, considered there was "the potential for the total annual mass loading of nutrients to increase as a consequence of development" (p 9). If this were to occur, Dr Johnson said that "further stormwater control systems may need to be adopted to ensure that no adverse impacts result" (p 9).
- 59 Mr Sutherland, the applicant's hydrologist, asserted that water quality impacts could be mitigated by conditions of consent. He said that he and Dr Johnson had agreed that "the stormwater treatment proposed can be satisfactorily conditioned" (Joint Expert Report – Ecology and Fish Habitat, p 4). If this were to be achieved, Mr Sutherland considered that "there will be no 'nutrient enrichment' post development and that the developed portion of the site, after stormwater treatment, will exhibit better water qualities than now exist" (pp 4, 8).
- 60 The applicant's ecologist, Mr Parker, contented himself with relying on the applicant's stormwater engineers and hydrologists, noting that his understanding was that "the water quality will be matched to background conditions" (Joint Expert Report – Ecology and Fish Habitat, p 5). In oral evidence, he recommended that there be adaptive management and adhere to criteria that set standard best practice (T 05/08/21 p 291). He did not explain what such adaptive management would involve or what was standard best practice to which criteria should adhere.
- 61 On ecology more generally, Dr McLean noted that the adjacent coastal wetland is a known important habitat for migratory wading birds and other wildlife. He considered that an adequate assessment of increased human activity on the development site and edge effects of the development on the adjacent coastal wetland has not been made. Edge effects include artificial lighting at night. Micro bats have been shown to be sensitive to lighting. One of the threatened bat species that is known to occur on the site, the Southern Myotis (*Myotis macropus*), has been shown by a study to be adversely affected by artificial lighting. The study's researcher, Dr Haddock, found: "There was an immediate and substantial decline in *M. macropus* activity, echolocation calls and foraging activity after the introduction of artificial light at our study site. Immediate recovery (to pre-light levels) was observed in both acoustic measures once lights were switched off... When ambient darkness was restored on nights 7-9, two of the three activity measures (echo location calls and radio-tracking fixes) returned to pre-light levels. *Myotis macropus* feeding activity, as measured by feeding buzzes, did not return to pre-light levels." Dr McLean opined that this suggests

that the artificial lighting of the manufactured home estate may have indirect effects (as a surrogate for ecological functionality) within the adjacent coastal wetlands (Joint Expert Report – Ecology and Fish Habitat, p 5).

- 62 Another edge effect of the development is human initiation of flight by birds, including migratory shore birds, using the adjacent coastal wetlands. Dr McLean referred to a study by Hayley K Glover et al, "Towards ecologically meaningful and socially accepted buffers: Response distances of shore birds in Victoria, Australia, to human disturbance" (2011) 103 *Landscape and Urban Planning* 326-334, that examined Flight Initiation Distance (FID) from when a shore bird started to retreat after a human approached. An example is the Sooty Oystercatcher, a threatened bird species found immediately adjacent to the site, whose average FID was 64 metres. Dr McLean noted that as the proposed development will be built to the boundary of the adjacent coastal wetland, such a FID would displace this bird at least 64 metres away from the boundary, lessening the area of habitat available in the adjacent coastal wetland (p 5).
- 63 None of the applicant's experts directly addressed these concerns about increased human activity and edge effects of the development in their reports. Mr Parker said in oral evidence he did not undertake an assessment of whether increased human activity on the development site was likely to impact the adjacent coastal wetland because "my position is that the site is suitably buffered from the adjoining biobanking area so we cannot have indirect impacts" (T 05/08/21 p 273). Mr Parker noted that the amended development plans incorporate setbacks from the boundary with the adjacent coastal wetland in the Biobanking area, where there will be no buildings for the manufactured home estate although there will be roads, retaining walls and fences, and the bio-retention basins/Atlantis cell systems. This means that human activity will be 25 to 30 metres from the boundary with the Biobanking area.
- 64 Mr Parker considered that the only threatened species of fauna likely to occur on the development site was the Southern Myotis. He accepted that clearing, filling and developing the northern part of the site would remove potential habitat of the Southern Myotis, but he thought that it was more likely to inhabit the better quality habitat towards the south of the site.
- 65 Mr Parker did not consider the development site provided suitable habitat for any other threatened fauna species, including shore birds. Mr Parker considered similarly that the adjacent coastal wetland in the southern part of the site did not provide preferred habitat for the shore birds identified by Glover et al, including the Sooty Oystercatcher,



so that he had no concerns about people on the development site initiating flight of shore birds.

- 66 Mr Parker did not address in his reports the impact of artificial lighting on fauna, including the Southern Myotis, but noted in oral evidence that conditions of consent could require a minimisation of the impact on the Southern Myotis through appropriate lighting (T 05/08/21 p 277). What is “appropriate” lighting and how effective this will be in minimising the impact on the Southern Myotis was not explained.
- 67 The Council submitted that the evidence is insufficient to allow the Court to be satisfied that the proposed development will not significantly impact the adjacent coastal wetland in the respects required by cl 11(1)(a) and (b) of the Coastal Management SEPP. The Council submitted the applicant’s evidence is long on promising an outcome of no significant impact on the adjoining coastal wetland but short on demonstrating the means by which this promised outcome will be achieved. The applicant has suggested that design and management measures are capable of being developed, and management plans prepared, that would prevent the development having a significant impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland. The applicant had not, however, put in evidence the design and management measures or the management plans, but contented itself with relying on conditions of consent that would require such measures and management plans to be submitted to the Council for approval after consent has been granted. The only site-based management plan that was proffered by the applicant’s expert, Mr Sutherland, was disavowed by the applicant. The applicant suggested that it would prepare a different management plan after consent had been granted and in accordance with the conditions of consent.
- 68 The Council submitted that this approach of the applicant involved deferring the critical matter of the likely significance of the impact of the development on the adjacent coastal wetland in the respects required by cl 11(1) to a later time after consent has been granted. This is impermissible, citing *Weal v Bathurst City Council* (2000) 111 LGERA 181; [2000] NSWCA 88 at [91]-[92]; *Cameron v Nambucca Shire Council* (1997) 95 LGERA 268 at 274; *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 at [37].
- 69 The Council submitted that while there might have been agreement between the parties’ engineers that design and management measures are capable of being developed to protect the environment, and at a conceptual level the “after

development” conditions could in a number of respects match the “before development” conditions, including as to quantity and quality of water and the absence of scour or preferential flows, the suitability of the means to be employed to protect the environment or to mitigate harm cannot be considered at the current time because there has been a total lack of specificity in how the current design seeks to achieve these goals or what the management and monitoring measures are to be to confirm that these outcomes have been achieved.

- 70 The Council noted the applicant’s ecologist, Mr Parker, relied wholly on the engineers to establish the same conditions onsite before and after the development. If this were to be achieved, Mr Parker opined that the development would not significantly impact the biophysical, hydrological or ecological integrity of the adjacent coastal wetland. The Council submitted, however, that Mr Parker has not turned his own expert mind to whether the measures proposed by the engineers will achieve their promise or whether the concept for ongoing management and monitoring is appropriate. Mr Parker’s evidence was based on facts that were assumed but were not proven.
- 71 The Council submitted that the engineers’ evidence was also based on assumptions, not proven facts. The baseline groundwater monitoring was for an insufficient period of time (particularly to encompass seasonal variation), at an insufficient number of locations, and at locations that are not within the development footprint or on the site. The data collected from the ground water monitoring is therefore insufficiently reliable to set the baseline criteria for the quantity and quality of ground water flows to and from the adjacent coastal wetland. The surface water monitoring points at each of the outlets from the biobasin/Atlantis cell systems have not been identified. Although Mr Sutherland sought to propose monitoring measures, including the sites and criteria for monitoring, in his site-based management plan, the applicant did not adopt that plan and instead proposed to prepare a new management plan pursuant to a condition of consent.
- 72 The Council submitted that the conditions of consent suggested by the applicant do not identify with any specificity what or where monitoring will be undertaken, the criteria for surface water and ground water to be used, what action will be required if the criteria are exceeded or whether that action will be adequate to redress past exceedances and prevent further exceedances. The Council submitted it was incumbent on the applicant to propose, before development consent is granted, the mitigation measures that will ensure that the development will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or the quantity and quality of surface and ground water flows to and from the adjacent

coastal wetland. This cannot be done after development consent has been granted pursuant to a condition of consent. That does not allow the Court, exercising the functions of the consent authority, to be satisfied that the development will not significantly impact the adjacent coastal wetlands before it can grant development consent, which is what cl 11(1) requires.

- 73 The applicant relied on the engineers' joint position that design, management and monitoring measures are capable of being developed to achieve hydrological matching, that is to say, that the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland will be the same before and after the development. The applicant submitted it was appropriate for the applicant's ecologist, Mr Parker, to rely on the engineers' prediction that hydrological matching could be achieved and, if so, to opine that there would be no significant impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland.
- 74 The applicant submitted that these predictions of the engineers and ecologists could be incorporated in the conditions of consent as outcomes or objectives that the development must achieve. The applicant proposed that consent should be granted on conditions that required further design, assessment and management plans to demonstrate achievement of specified outcomes or objectives. These include the following conditions. I have set out relevant parts of the conditions and added in square brackets my own commentary on the conditions.
- 75 Suggested condition 1B required that prior to any construction works being carried out on site, reports, documents and plans in compliance with the below requirements are to be submitted to the satisfaction of the Council:

"(b) The applicant shall develop a detailed Stormwater Management Plan. The Plan is required to consider both the construction and operational phases of the development. The plan shall include the following aspects:"

"(i) Stormwater conveyance to a lawful point of discharge that will ensure there is no flooding, nuisance or damage to adjoining property or road reserves"  
[whether the "adjoining property" included the Biobanking area was unclear];

"(ii) Numerical analysis and water balance to demonstrate that the volume of rainfall being converted to infiltration and the volume to be discharged to environmentally sensitive surface areas remains unchanged post development" [there was no definitive, site-specific numerical analysis or water balance provided to demonstrate the pre-development conditions that will set the baseline for this analysis];

“(iii) Measures necessary to ensure that the development maintains no net increase in the annual mass of suspended solids, total nitrogen and total phosphorus discharged from the site in comparison to pre-development conditions (Rural Residential node) during both the construction and fully developed phase of the project” [again, there was no definitive, site-specific, baseline data of the annual mass of the suspended solids, total nitrogen and total phosphorus in the pre-development conditions to undertake this analysis];

“(ix) A detailed modelling report and design must be submitted to and approved by Council” [such modelling report and design was not yet available];

“(xii) Provide design details and surveys plans to identify the location, depth and sizing of all gravel material to be placed on the development fill pad to allow for filling works to commence. This assessment must include a hydrological assessment to determine whether the placement of the fill will impact on the split between surface runoff and groundwater seepage. This assessment is to include the potential of stormwater leaving the Atlantis cells and spreading laterally through the place gravel material before it [sic] entering as groundwater” [again, neither a detailed, site-specific, hydrological assessment of the existing split between surface runoff and groundwater seepage to set the baseline pre-development conditions, nor an assessment of the potential of stormwater discharge to spread laterally before entering as groundwater was provided];

“(xiii) Details on how construction works will be undertaken protecting the adjacent environment including the land affected by Biobanking Agreement No 444” [this information was not yet available];

“(xiv) Details on how any dewatering can be undertaken without having an adverse impact on the receiving environment including the identification of water quality parameters and legal discharge points” [the final water quality parameters and legal discharge points were not provided]: and

“(xv) Assessment of how fill will be placed on areas of the development site without having an impact [on] the adjacent environment including the land affected by Biobanking Agreement No 444” [such assessment has not yet been done, or baseline parameters for undertaking the assessment fixed].

“(c) A stormwater monitoring plan shall be prepared. This plan shall include the following requirements:

(i) Provision for stormwater sampling which demonstrates that there is no net increase in the annual mass of suspended solids, total nitrogen and total phosphorus discharged from the site to either surface or groundwater in comparison to pre-development conditions. This requirement is to be demonstrated for both the construction and operational phases of the development. Monitoring shall be ongoing until it can be demonstrated that all relevant objectives of the Stormwater Management Plan are being achieved in relation to stormwater/groundwater quality. Notwithstanding this requirement, monitoring shall be carried out for at least a period of 10 years after completion of the installation of the final manufactured dwelling in the final stage of the development (Stage 4)” [again, there was no definitive, site-specific, baseline data for the annual mass of suspended solids, total nitrogen and total phosphorus in the pre-development conditions to enable comparison with the post-development conditions or otherwise to demonstrate that the objectives in the Stormwater Management Plan are being achieved];

“(ii) Details of sampling techniques, methodology and applicable standards” [none yet provided in a finalised state];

“(iii) At a minimum monitoring shall be carried out monthly as follows:

- at locations both within the development site and the adjoining land that forms part of Lot 1;
- at specified locations, the provision of groundwater monitoring wells to monitor both groundwater level and groundwater quality; and
- the above monitoring shall occur for a period of five years” [the finalised locations for monitoring have not yet been specified];

“(v) Details of a minimum of 12 months of stormwater and groundwater quality data sampling regime is required to establish a baseline” [again emphasising that the site-specific, baseline, stormwater and groundwater data is not yet available];

“(d) The applicant is to demonstrate suitable stormwater drainage pathways can be established and maintained along the entire drainage pathway in perpetuity. No native vegetation removal is permitted in complying with this condition of consent. Survey accurate plans depicting all flow pathways are required to be submitted to Council” [at issue is the proximity of the bioretention basin/Atlantis cell systems to the boundary with the Biobanking area, which may leave insufficient space for suitable stormwater

drainage pathways; in order to provide suitable stormwater drainage pathways the bioretention basin/Atlantis cell systems may need to be relocated and redesigned];

“(e) A Stewardship Area Monitoring and Adaptive Management Plan (SAMAMP) shall be prepared to the satisfaction of Council. The objective of the plan shall be to monitor the health of the Stewardship Area and associated hydrology over time to assess whether or not the development is resulting in material adverse changes to the health and composition of the Stewardship Area. The SAMAMP must include a range of remedial actions to address the ecological decline of the wetland resulting from the development in the event such decline occurs. Monitoring of the ecology shall be undertaken in accordance with the Biodiversity Assessment Method (OEH 2017) to determine a Vegetation Integrity Score (VIS). A VIS baseline calculation shall be undertaken prior to any works commencing at the site and subsequent VIS assessments undertaken annually for a period until 10 years after the completion of Stage 4 of the development” [This plan has not yet been prepared. There was no site-specific, baseline data, not only VIS baseline data but more relevantly baseline data on the ecological health and composition of the Stewardship Area, against which any changes resulting from the development can be assessed. The remedial actions have not been identified or assessed as to whether they would be effective in addressing any ecological decline in the wetland];

“(f) To ensure the development does not have an adverse impact on Biobanking agreement No. 444, the applicant is to prepare a Stewardship Area Protection Plan (SAPP). The SAPP is to include but not be limited to the following issues:

- (i) The location [and] dimensions of the drainage network;
- (ii) The environmental safeguards to ensure no impact on the existing hydrology (both surface and groundwater) retained wetland system and/or the Biobank site” [Detailed information on the drainage network and the environmental safeguards was not provided. Without knowing what the environmental safeguards are it is not possible to assess whether they can be effective to ensure no impact on the wetland and Biobanking site].

76 I am not satisfied on the evidence before the Court that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or the quality or quantity of surface and groundwater flows to and from the adjacent coastal wetland. As I am not so satisfied, development consent cannot be granted to the development.

77 The central reason for my not being so satisfied is the insufficiency of the evidence to establish that the development will not significantly impact the adjacent coastal wetland in the respects required by cl 11(1)(a) and (b) of the Coastal Management SEPP. The applicant's approach, of relying on conditions of consent to address the impacts of the development on hydrology, scour, water quality and ecology, fails to recognise that cl 11(1) sets a precondition that must be satisfied before development consent is able to be granted. The satisfaction required by the precondition is that the development will not significantly impact the adjacent coastal wetlands in these respects. Reaching this satisfaction requires evidence, firstly, that the outcomes or objectives required by cl 11(1)(a) and (b) can be achieved, secondly, of the means by which the outcomes or objectives will be achieved, so as to allow the Court to be satisfied that the outcomes or objectives will be achieved, and thirdly, of the clear criteria against which achievement of the outcomes or objectives must be assessed.

78 As to the first, as I have noted in my comments on the applicant's suggested conditions of consent, the evidence did not establish baseline data on hydrology, water quality or ecology in the adjacent coastal site in the pre-development conditions against which the impacts of the development can be measured to determine that the outcomes or objectives will be able to be achieved. The suggested conditions of consent require the collection of this needed baseline data. As to the second, the evidence did not establish the means by which the outcomes or objectives will be achieved. The suggested conditions of consent again required preparation and submission to the Council for approval of the various management and monitoring plans, which would propose the measures and safeguards that would be taken to achieve the outcomes or objectives. Without knowing what these measures and safeguards will be, it is not possible for the Court to evaluate their effectiveness. As to the third, this is the requirement in s 4.17(4) of the EPA Act where a consent is granted subject to a condition expressed in terms of outcomes or objectives. That subsection provides:

“A consent may be granted subject to a condition expressed in a manner that identifies both of the following—

(a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve,

(b) clear criteria against which achievement of the outcome or objective must be assessed.”

79 In the present case, neither the applicant nor its experts specified clear criteria against which achievement of the outcomes or objectives in cl 11(1)(a) and (b) of the Coastal

Management SEPP can be measured. The suggested conditions of consent did not conform to the requirements of s 4.17(4) of the EPA Act.

- 80 Mr Sutherland's site management plan went some way towards suggesting water quality criteria, but it was deficient in a number of respects, including in relation to the particular water quality criteria selected, the number and location of monitoring points, and the adaptive management required to respond to monitoring data. Rather than amending the plan to overcome these deficiencies, the applicant rejected it and suggested instead that it would prepare new management and monitoring plans pursuant to conditions of consent. Any such management and monitoring plans prepared in accordance with conditions of consent would come too late to enable the Court to be satisfied of the matters in cl 11(1)(a) and (b) before it granted development consent. This is the precondition imposed by cl 11(1) of the Coastal Management SEPP. The applicant's approach of addressing the problem after consent has been granted does not allow for the precondition to be satisfied.
- 81 The applicant did not provide amended plans to demonstrate how it would redesign the bioretention basins/Atlantic cell systems and outlets to ensure that surface water discharges will not cause preferential flow, channelisation or scour in the adjacent coastal wetland. There may well be an engineering solution, such as moving the structures further away from the boundary or designing different structures, but the implications of such changes in the location and design of the stormwater treatment system on the development, including on the location of the roads, retaining walls and fences, utility services, recreational facilities and lots on which manufactured homes can be installed, has not been explained.
- 82 The applicant has also not demonstrated how other ecological impacts of the development on the adjacent coastal wetland will be addressed. Again, the suggested conditions of consent proposed the collection of baseline ecological data, monitoring of the ecological impacts on the adjacent wetland and taking of unspecified remedial action to address ecological decline caused by the development, but that comes too late to demonstrate before consent is granted that there will be no ecological impacts on the adjacent coastal wetland. The applicant has also not addressed the impacts of the development on fauna in the adjacent coastal wetland, including the impacts of the manufactured home estate by reason of increased human activity and the edge effects of artificial lighting and flight initiation of birds in the adjacent coastal wetland raised by Dr McLean.



- 83 For these reasons, I am not satisfied that the proposed development will not significantly impact the adjacent coastal wetland in the respects in cl 11(1)(a) and (b) of the Coastal Management SEPP, so that development consent cannot be granted for the development on the site.

**Precondition to grant of consent under s 7.16 of the Biodiversity Conservation Act 2016**

*The relevant statutory framework*

- 84 A third statutory provision setting a precondition to the grant of development consent under the EPA Act is found in s 7.16(2) of the *Biodiversity Conservation Act 2016* (BC Act). This provides:

“The consent authority must refuse to grant consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, in the case of an application for development consent to which this Division applies (other than for State significant development), if it is of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values.”

- 85 The concept of “biodiversity values” is defined in s 1.5(2) of the BC Act to be the following biodiversity values:

“(a) vegetation integrity—being the degree to which the composition, structure and function of vegetation at a particular site and the surrounding landscape has been altered from a near natural state,

(b) habitat suitability—being the degree to which the habitat needs of threatened species are present at a particular site,

(c) biodiversity values, or biodiversity-related values, prescribed by the regulations.”

- 86 Additional biodiversity values have been prescribed by cl 1.4 of the Biodiversity Conservation Regulation 2017 (BC Regulation):

“The following are prescribed as additional biodiversity values for the purposes of the Act—

(a) threatened species abundance—being the occurrence and abundance of threatened species or threatened ecological communities, or their habitat, at a particular site,

(b) vegetation abundance—being the occurrence and abundance of vegetation at a particular site,

(c) habitat connectivity—being the degree to which a particular site connects different areas of habitat of threatened species to facilitate the movement of those species across their range,

(d) threatened species movement—being the degree to which a particular site contributes to the movement of threatened species to maintain their lifecycle,

(e) flight path integrity—being the degree to which the flight paths of protected animals over a particular site are free from interference,

(f) water sustainability—being the degree to which water quality, water bodies and hydrological processes sustain threatened species and threatened ecological communities at a particular site.”

- 87 The expression “serious and irreversible impacts on biodiversity values” of a proposed development is defined in s 7.16(1) of the BC Act:

“In this section, **serious and irreversible impacts on biodiversity values** of proposed development or activity means serious and irreversible impacts on biodiversity values as determined under section 6.5 that would remain after the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity.”

- 88 Section 6.5 of the BC Act explains how serious and irreversible impacts on biodiversity values are to be determined:

“(1) The determination of serious and irreversible impacts on biodiversity values for the purposes of the biodiversity offsets scheme is to be made in accordance with principles prescribed by the regulations.

(2) The Environment Agency Head may provide guidance on the determination of any such serious and irreversible impacts, and for that purpose may publish, from time to time, criteria to assist in the application of those principles and lists of potential serious and irreversible impacts.”

- 89 Pursuant to s 6.5(1) of the BC Act, cl 6.7 of the BC Regulation prescribes the principles that are applicable in determining serious and irreversible impacts on biodiversity values:

“(1) This clause applies for the purposes of determining whether an impact on diversity values is a serious and irreversible impact for the purposes of the biodiversity offsets scheme.

(2) An impact is to be regarded as serious and irreversible if it is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct because—

(a) it will cause a further decline of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline, or

(b) it will further reduce the population size of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very small population size, or

(c) it is an impact on the habitat of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very limited geographic distribution, or

(d) the impacted species or ecological community is unlikely to respond to measures to improve its habitat and vegetation integrity and therefore its members are not replaceable.

(3) For the purpose of this clause, a decline of a species or ecological community is a continuing or projected decline in—

(a) an index of abundance appropriate to the taxon, or

(b) the geographic distribution and habitat quality of the species or ecological community.

(4) If the guidance published by the Environment Agency Head under section 6.5(2) of the Act is changed, a biodiversity assessment report may, during the period of 90 days after the guidance was changed, be prepared on the basis of the guidance in force before the change, but only if the report states that it has been prepared on that basis.”

90 Pursuant to s 6.5(2) of the BC Act, the relevant Environment Agency Head, the DPE, has published criteria to assist in the application of the principles in cl 6.7 of the BC Regulation, in the form of the “Guidance to assist a decision-maker to determine a serious and irreversible impact” (September 2019) (Guidance document). The criteria to interpret the principles in cl 6.7 of the BC Regulation are set out in Appendix A. The Department applied the criteria in Appendix A to all threatened species and threatened ecological communities listed under the BC Act. Entities that meet the criteria under one or more of the principles in cl 6.7 of the BC Regulation are identified as entities at risk of a serious and irreversible impact (SAII) in the Threatened Biodiversity Data Collection housed in BioNet and displayed on the Department website. This list includes a number of species that occur in and around the site on which the development is proposed to be carried out. In section 3, the Guidance document provides a framework for decision-makers to take into account the scale of an impact and the potential for avoidance and mitigation within the context of the principles in cl 6.7 of the BC Regulation and the supporting criteria in Appendix A. The framework involves five steps:

- Step 1: Identify relevant entities at risk of a SAII
- Step 2: Evaluate the extinction risk of the entity to be impacted
- Step 3: Detail measures taken to avoid, minimise and mitigate impacts on the entity
- Step 4: Evaluate a serious and irreversible impact
- Step 5: Decision-making

91 This precondition in s 7.16(2) of the BC Act is distinct from two other requirements in Part 7 of the BC Act dealing with biodiversity assessment and approval under the EPA Act.

92 The first is the requirement in s 7.7(2) of the BC Act that if the proposed development is likely to significantly affect threatened species (which by dint of s 7.2(1) includes

threatened ecological communities), the application for development consent is to be accompanied by a Biodiversity Development Assessment Report (BDAR). A development is likely to significantly affect threatened species if it meets one or more of the three criteria in s 7.2(1) of the BC Act:

- “(a) it is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test in section 7.3, or
- (b) the development exceeds the biodiversity offsets scheme threshold if the biodiversity offsets scheme applies to the impacts of the development on biodiversity values, or
- (c) it is carried out in a declared area of outstanding biodiversity value.”

- 93 The first criterion is that the development is likely to significantly affect threatened species or ecological communities, or their habitats, according to the test in s 7.3 of the BC Act. Section 7.3(1) provides a five part test for determining whether the proposed development is likely to significantly affect threatened species or ecological communities, or their habitats:

“The following is to be taken into account for the purposes of determining whether a proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats—

(a) in the case of a threatened species, whether the proposed development or activity is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered ecological community or critically endangered ecological community, whether the proposed development or activity—

(i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or

(ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction,

(c) in relation to the habitat of a threatened species or ecological community—

(i) the extent to which habitat is likely to be removed or modified as a result of the proposed development or activity, and

(ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed development or activity, and

(iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species or ecological community in the locality,

(d) whether the proposed development or activity is likely to have an adverse effect on any declared area of outstanding biodiversity value (either directly or indirectly),

(e) whether the proposed development or activity is or is part of a key threatening process or is likely to increase the impact of a key threatening process.”

94 The second criterion in s 7.2(1) of the BC Act is that the development exceeds the biodiversity offsets scheme threshold if the biodiversity offsets scheme applies to the impacts of the development on biodiversity values. It was common ground in this case that the biodiversity offsets scheme applies to the impacts of the proposed development on biodiversity values. The issue was whether the proposed development exceeded the biodiversity offsets scheme threshold. The “biodiversity offsets scheme threshold” is defined in s 7.1 in the manner explained in s 7.4 of the BC Act. Section 7.4(1) and (3) provide that:

“(1) Proposed development exceeds the biodiversity offsets scheme threshold for the purposes of this Part if it is development of an extent or kind that the regulations declare to be development that exceeds the threshold.

...

(3) A regulation under this section may apply, adopt or incorporate a map published by the Environment Agency Head from time to time.”

95 Clause 7.1 of the BC Regulation declares the development that exceeds the threshold, while cl 7.3 publishes a Biodiversity Values Map.

96 Clause 7.1(1) of the BC Regulation provides:

“Proposed development exceeds the biodiversity offsets scheme threshold for the purposes of Part 7 of the Act if it is or involves—

(a) the clearing of native vegetation of an area declared by clause 7.2 as exceeding the threshold, or

(b) the clearing of native vegetation, or other action prescribed by clause 6.1, on land included on the Biodiversity Values Map published under clause 7.3.”

97 This refers to two types of clearing of native vegetation. The first type is clearing declared by cl 7.2 as exceeding the threshold. Clause 7.2(1) provides:

“Clearing of native vegetation is declared by this clause to exceed the biodiversity offsets scheme threshold if the area proposed to be cleared is the area set out in Column 2 of the Table to this clause opposite the minimum lot size applicable to the land to be cleared in Column 1 of that Table.”

98 The minimum lot size applicable to the land to be cleared is specified in cl 7.2(2) as being either the standard minimum lot size prescribed in an environmental planning instrument in relation to the land on which the proposed development is to be carried out or, in any other case, the actual size of the allotment of land on which the

proposed development is to be carried out. For this site, the Lot Size Map under BLEP prescribes a minimum lot size of 40ha for the southern part of the site zoned RU2 and 450 sqm for the northern part of the site zoned R2. The area of clearing set out in Column 2 of the Table to cl 7.2 opposite each of these minimum lot sizes is 1ha or more for the 40ha minimum lot size in the R2 zoned land and 0.25ha or more for the 450sqm minimum lot size in the R2 zoned land. In the case of the proposed development for the purposes of a manufactured home estate on the R2 zoned land, nearly all of this land (up to around 14ha) will be cleared, far in excess of the 0.25ha threshold.

- 99 The second type is clearing of native vegetation on land included on the Biodiversity Values Map published under cl 7.3. The published Biodiversity Values Map can, and does, include “land that is the coastal wetlands and littoral rainforests area of the coastal zone referred to in the *Coastal Management Act 2016*”: cl 7.3(3)(a). This area is the same as the coastal wetlands and littoral rainforests area identified as such by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP. The site is mapped as within the coastal wetlands and littoral rainforests area, including the southern section of the northern part of the site zoned R2, which is identified as being within the subarea “proximity area for coastal wetlands”. All native vegetation within this section of the site will be cleared.
- 100 The proposed development of the site, therefore, exceeds the biodiversity offsets scheme threshold for the purposes of s 7.2(1)(b) and s 7.4(1) of the BC Act in both of these ways.
- 101 The third criterion in s 7.2(1) of the BC Act is if the development is carried out in a declared area of outstanding biodiversity value, under s 3.1 of the BC Act. Only a few areas have been so declared, the site not being one of them.
- 102 If one or more of the criteria in s 7.2(1) of the BC Act are met, the development is taken to be likely to significantly affect threatened species or ecological communities and the development application is required to be accompanied by a BDAR: s 7.7(2) of the BC Act. This is a jurisdictional fact. If a BDAR is required to, but does not, accompany a development application, the consent authority will have no power to grant development consent: *Helman v Byron Shire Council* (1995) 87 LGERA 349 at 358-359; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; [1999] NSWCA 8 at [94], [106]-[108] and *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* (2010) 210 LGERA 126; [2010] NSWLEC 48 at [81].

- 103 In the case of the proposed development, the applicant accepted that the application for development consent was required to be accompanied by a BDAR, as the development is likely to significantly affect threatened species and ecological communities, or their habitats, and the development exceeds the biodiversity offsets scheme threshold, being the criteria in s 7.2(1)(a) and (b) of the BC Act.
- 104 In the event a development application is required to be accompanied by a BDAR, a second requirement under Part 7 of the BC Act, in s 7.13, is triggered: s 7.13(1) of the BC Act. Section 7.13(2) requires a consent authority, when determining a development application that is required to be accompanied by a BDAR, to take into consideration under the EPA Act the likely impact of the proposed development on biodiversity values as assessed in the BDAR that relates to that application. Apart from this consideration that is required by s 7.13(2), the consent authority may (but is not required to) further consider under the EPA Act the likely impact of the proposed development on biodiversity values: s 7.13(2) of the BC Act.
- 105 The BDAR, which is required to accompany the development application, is a report prepared in accordance with s 6.12 of the BC Act, which provides:
- “For the purposes of the biodiversity offsets scheme, a biodiversity development assessment report is a report prepared by an accredited person in relation to proposed development or activity that would be authorised by a planning approval, or proposed clearing that would be authorised by a vegetation clearing approval, that—
- (a) assesses in accordance with the biodiversity assessment method the biodiversity values of the land subject to the proposed development, activity or clearing, and
- (b) assesses in accordance with that method the impact of proposed development, activity or clearing on the biodiversity values of that land, and
- (c) sets out the measures that the proponent of the proposed development, activity or clearing proposes to take to avoid or minimise the impact of the proposed development, activity or clearing, and
- (d) specifies in accordance with that method the number and class of biodiversity credits that are required to be retired to offset the residual impacts on biodiversity values of the actions to which the biodiversity offsets scheme applies.”
- 106 The biodiversity assessment method (BAM) referred to in s 6.12(a) is that established by order of the Minister under s 6.7(1) of the BC Act. The current biodiversity assessment method is that published in October 2020.
- 107 The impacts of a proposed development on biodiversity values that the BDAR is required to assess under s 6.12(b) are specified in s 6.3 of the BC Act:

“The impacts of actions on biodiversity values that are subject to assessment and offset under the biodiversity offsets scheme are as follows—

- (a) the impacts of the clearing of native vegetation and the loss of habitat,
- (b) the impacts of action that are prescribed by the regulations.”

108 Additional impacts on biodiversity values are prescribed by cl 6.1(1) of the BC Regulation:

“The impacts on biodiversity values of the following actions are prescribed (subject to subclause (2)) as biodiversity impacts to be assessed under the biodiversity offsets scheme—

(a) the impacts of development on the following habitat of threatened species or ecological communities—

- (i) karst, caves, crevices, cliffs and other geological features of significance,
- (ii) rocks,
- (iii) human made structures,
- (iv) non-native vegetation,

(b) the impacts of development on the connectivity of different areas of habitat of threatened species that facilitates the movement of those species across their range,

(c) the impacts of development on movement of threatened species that maintains their lifecycle,

(d) the impacts of development on water quality, water bodies and hydrological processes that sustain threatened species and threatened ecological communities (including from subsidence or subsidence resulting from underground mining or other development),

(e) the impacts of wind turbine strikes on protected animals,

(f) the impacts of vehicle strikes on threatened species of animals or on animals that are part of a threatened ecological community.”

109 The consent authority, when determining the development application, is not limited in its consideration of the impact of a proposed development on biodiversity values to the consideration that is required by s 7.13(2), as s 7.13(6) makes clear:

“This section does not operate to limit the matters that a consent authority may take into consideration—

(a) in relation to the impact of proposed development on biodiversity values, the measures that a consent authority may require to avoid or minimise those impacts or the power of a consent authority to refuse to grant consent because of those impacts, or

(b) in deciding whether to reduce or increase the number of biodiversity credits to be retired.”



- 110 These other requirements in Part 7 of the BC Act, under s 7.7(2) and s 7.13(2), although distinct from the precondition in s 7.16(2), nevertheless overlap with that precondition. Section 7.16(2) requires the consent authority to refuse consent if it is of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values. In deciding whether or not it is of this opinion, the consent authority must determine the seriousness and irreversibility of the impacts on biodiversity values in accordance with s 7.16(1) and s 6.5 of the BC Act, the principles prescribed by cl 6.7 of the BC Regulation, and the Guidance document published by DPIE under s 6.5(2) of the BC Act. However, the consent authority, when determining in accordance with the EPA Act the development application, may also take into consideration the likely impact of the proposed development on biodiversity values as assessed in any BDAR that relates to and accompanies the development application and otherwise may further consider, under s 4.15(1)(b) of the EPA Act, the likely impact of the proposed development on biodiversity values, as required and permitted respectively by s 7.13(2) of the BC Act.
- 111 As a consequence, a consent authority might form the opinion, for the purposes of s 7.16(2) of the BC Act, that a proposed development is likely to have serious and irreversible impacts on biodiversity values not only by reason of the consideration required by s 7.16(1) and s 6.5 of the BC Act and the principles and guidance prescribed under s 6.5 of the BC Act, but also by reason of the consideration given under s 7.13(2) of the BC Act and s 4.15(1)(b) of the EPA Act.

*The ecological evidence of threatened species and ecological communities*

- 112 Turning to the proposed development, the site contains endangered ecological communities, although the parties' ecological experts differed as to which communities occurred on the site. One explanation for this difference in opinion is the experts' different approaches. The applicant's expert, Mr Parker, identified plant community types (PCT), as required for preparation of the BDAR, rather than endangered ecological communities, as required to undertake the assessments required by s 7.16(2) and s 7.2(1), s 7.3 and s 7.7(2) of the BC Act. Mr Parker only incidentally identified the endangered ecological communities in his tables appended to the BDAR where he determined BAM credits. Dr McLean identified the endangered ecological communities, but responded to Mr Parker's identification of plant community types.
- 113 Mr Parker identified one plant community type, PCT 1125 Saltmarsh Complex of New South Wales North Coast Bioregion, consistent with the endangered ecological community of Coastal Saltmarsh in the New South Wales North Coast, Sydney Basin

and South East Corner Bioregion (Coastal Saltmarsh EEC). Mr Parker identified PCT 1125 (Saltmarsh) in the north-eastern corner of the development site, including at the proposed entrance from Burns Point Ferry Road and in a right-angled, scalene triangle shaped area abutting and crossing over the eastern boundary of the development site with the Biobanking area (see Figure 3 of the BDAR). Mr Parker identified another plant community type, PCT 1235 Swamp Oak Swamp Forest of the Coastal Lowlands of the New South Wales North Coast Bioregion, which he considered was consistent with another endangered ecological community, Swamp Sclerophyll Forest on Coastal Floodplains of the New South Wales North Coast, Sydney Basin and South East Corner Bioregion (Swamp Sclerophyll Forest EEC). Mr Parker identified PCT 1235 (Swamp Oak) as covering the balance of the development site, except for a small area of mangroves on the western side near Emigrant Creek. Mr Parker classified this extensive area of Swamp Oak on the development site as being in three conditions: low condition (9.66ha), low/moderate condition (2.09ha) and moderate condition (4.34ha and 0.09ha). The bulk of the low/moderate condition Swamp Oak occurred in a swathe to the west of the saltmarsh triangular shaped area (along its hypotenuse) and to the east of the low condition Swamp Oak which covers most of the development site (see Figure 3 of the BDAR).

- 114 In the Joint Expert Report on Ecology with Dr McLean, Mr Parker noted that PCT 1235 (Swamp Oak) lists three associated endangered ecological communities, Swamp Oak Floodplain Forest of the New South Wales North Coast, Sydney Basin and South East Corner Bioregions (Swamp Oak Floodplain Forest EEC), Coastal Saltmarsh EEC and Swamp Sclerophyll Forest EEC ([20], p 12). In the joint expert report, Mr Parker appeared to favour the first of these over the third, changing his position from what he had found in the BDAR. Mr Parker quoted from the Final Determination of the Swamp Oak Floodplain Forest EEC (at [21], pp 12-13, [28], p 14 and [35], p 16) and suggested that there is a transition of vegetation communities across the development site between Swamp Oak Floodplain Forest EEC and Coastal Saltmarsh EEC ([20], p 12).
- 115 Dr McLean identified four endangered ecological communities on the site: Coastal Saltmarsh EEC, Swamp Oak Floodplain Forest EEC, Freshwater Wetlands on Coastal Floodplains on the New South Wales North Coast, Sydney Basin and South East Corner Bioregion (Freshwater Wetlands EEC) and Littoral Rainforest in the New South Wales North Coast and Sydney Basin Bioregion (Littoral Rainforest EEC). Dr McLean identified saltmarsh in the triangular shaped area to the east of the development site, although along the unequal sides and in the area of the right angle

rather than along the hypotenuse. He described the vegetation along the hypotenuse as being of another plant community type, PCT 1808 (Estuarine Reedland). Estuarine Reedland is part of the Freshwater Wetlands EEC. He identified Estuarine Reedland as extending across most of the site, including the areas identified by Mr Parker as low and low/moderate Swamp Oak. Dr McLean identified only small areas as Swamp Oak, including two disjunct patches along the hypotenuse of the scalene triangle. Swamp Oak is part of the Swamp Oak Floodplain Forest EEC. Dr McLean identified one patch of rainforest, PCT 1275 (Rainforest), in the north-western corner of the development site, which is part of the Littoral Rainforest EEC (see Figure 1, p 10 of Joint Expert Report – Ecology).

- 116 Once Mr Parker changed his classification from Swamp Sclerophyll Forest EEC to Swamp Oak Floodplain Forest EEC, the difference between the experts became whether Freshwater Wetlands EEC and Littoral Rainforest EEC also occurred on the site.
- 117 In relation to Freshwater Wetlands EEC, Dr McLean found from his field surveys that vegetation on the eastern side of the development site was changing from Coastal Saltmarsh to Freshwater Wetlands, indicated by saltwater-tolerant species such as Sea Rush (*Juncus kraussii*) becoming less common and freshwater-tolerant species such as Twig Rush (*Baumea juncea*) appearing (p 34). Dr McLean noted his purpose was not to determine the extent of the plant community types across the site but to determine the type of vegetation that occurred at and around the areas he surveyed (p 34). This served to check whether Mr Parker’s vegetation mapping in the BDAR was accurate (p 34). Dr McLean identified vegetation in a number of areas he surveyed as being of PCT 1808 (Estuarine Reedland), rather than PCT 1125 (Saltmarsh) or PCT 1235 (Swamp Oak).
- 118 As to being Estuarine Reedland rather than Coastal Saltmarsh, Dr McLean said that Mr Parker had focused on the presence of some species, such as Water Couch (*Sporobolus virginicus*), which are listed in Coastal Saltmarsh plant community types (presumably PCT 1125), but overlooked the presence of other species, such as Marsh Club Rush (*Bolboschoenus caldwellii*) and Common Reed (*Phragmites australis*), which are listed in PCT 1808 but not PCT 1125. Marsh Club Rush is described as occurring in freshwater or brackish environments not saltmarsh. Dr McLean referred to other species recorded, including Common Rush (*Juncus usitatus*), Tall Sedge (*Carex appressa*) and *Commelina* sp, which are not tolerant of saline conditions. This suggests a narrow saline influence in these areas, further supporting these areas

being Estuarine Reedland rather than Swamp Oak Forest or Coastal Saltmarsh (pp 34-35).

- 119 Dr McLean identified the boundary between Saltmarsh and Estuarine Reedland to be in the south-eastern corner of the development site (near the right angle of the scalene triangle). In this area, Sea Rush (*Juncus kraussii*), a diagnostic species for PCT 1125 (Saltmarsh), which is dominant in the Biobanking area to the east and south of the development site, gradually becomes less common and is replaced by isolated plants of the Twig Rush (*Baumea juncea*), which is a diagnostic species of PCT 1808 (Estuarine Reedland) along with Marsh Club Rush (*Bolboschoenus caldwellii*) and eventually the dominant stands of Common Reed (*Phragmites australis*). Dr McLean noted the study area is very flat. The very gradual elevational differences make differentiating the boundary between different plant community types a difficult task, with boundaries becoming very ecotonal over distances of 20-30 metres (p 35).
- 120 In contrast to Mr Parker, Dr McLean considered that PCT 1235 (Swamp Oak) does not occur to a large extent over the slashed area that forms the bulk of the development site, but instead the vegetation community is best assigned to PCT 1808 (Estuarine Reedland). Dr McLean observed very few Swamp Oaks (*Casuarina glauca*) germinating or coppicing from root stocks after slashing. He noted Mr Parker's mapping in the BDAR records very few stands of Swamp Oak, mostly in areas that are at a slightly higher elevation, limiting exposure to waterlogging. In contrast, the low-lying slashed area is regularly waterlogged, which would limit germination of Swamp Oak (p 36).
- 121 Dr McLean also identified a patch of Littoral Rainforest EEC on the site, being an area of PCT 1275 (Rainforest), in the north-western corner of the site. This is due to the species assemblage in the ground layer having a better alignment to PCT 1275 rather than PCT 1235 (Swamp Oak) (p 36). Mr Parker disagreed, not on the basis that rainforest species do not occur in this area, but because he thought the approach demanded by the BAM is to consider the derived vegetation, which would include considering the vegetation that was cleared in the past, rather than the vegetation assemblage at the site today.
- 122 Mr Parker disagreed that Freshwater Wetlands EEC occurs on the site. He classified the vegetation community that Dr McLean classified as Freshwater Wetlands as low condition Swamp Oak, but even this he did not consider to be Swamp Oak Floodplain Forest EEC as it has been substantially modified by slashing and grazing over many decades (Joint Expert Report – Ecology pp 4, 5).

- 123 Mr Parker noted that Common Reed (*Phragmites australis*) is locally abundant in saline swamps of coastal estuaries and is a common understorey species in Swamp Oak Forest (PCT 1235) at the site. He considered it is an indicator of the vegetation community being PCT 1235 (Swamp Oak). Mr Parker did agree, however, that one of the plant community types comprising Freshwater Wetland EEC, PCT 1808 (Estuarine Reedland), is also characterised by dense growth of *Phragmites australis* on the margins of estuaries and brackish lagoons along the New South Wales coastline (p 6). Mr Parker considered that the slashed and grazed pasture lands on the site could not be described as being on the estuarine fringe (p 6).
- 124 Mr Parker considered that the presence of saltwater-tolerant mangrove and saltmarsh remnants in places is an indication that the vegetation community is not PCT 1808 (Estuarine Reedland), even though PCT 1808 tolerates mild levels of salinity (p 7).
- 125 Mr Parker analysed Dr McLean's field survey data for plots where Dr McLean considered the vegetation was better classified as being PCT 1808 (Estuarine Reedland) rather than PCT 1125 (Saltmarsh) or PCT 1235 (Swamp Oak) as Mr Parker had mapped the vegetation. In one plot (plot 8), Mr Parker considered the presence of Water Couch (*Sporobolus virginicus*) indicated the vegetation should be classified as PCT 1125 (Saltmarsh) rather than PCT 1808 (Estuarine Reedland). In another plot (plot 15), Mr Parker noted that the dominant presence of *Phragmites australis* was insufficient to classify the vegetation as PCT 1808 (Estuarine Reedland) because other species characteristic of PCT 1808 were not recorded in the plot, species not characteristic of PCT 1808 were recorded as present, and *Phragmites australis* is also a diagnostic species of PCT 1235 (Swamp Oak). Mr Parker made similar comments about plot 16 (p 11).
- 126 Mr Parker noted that two other plots (plots 17 and 19) were located in areas of tidal inundation mapped by Mr Sutherland, hence could not be a freshwater wetland. In plot 17, the dominance of *Phragmites australis* (90%) with a few Swamp Oak (1%), supported classification as PCT 1235 (Swamp Oak). In plot 19, the presence of *Phragmites australis* and Water Couch, both occurring in PCT 1125 (Saltmarsh), indicated the better classification was PCT 1125 (Saltmarsh) rather than PCT 1808 (Estuarine Reedland) (p 11).
- 127 Finally, Mr Parker considered that the vegetation in plot 20, which Dr McLean classified as PCT 1808 (Estuarine Reedland) on the basis of 50% cover by *Phragmites australis*, which is a diagnostic species of this PCT, should be classified as PCT 1235 (Swamp Oak) because *Phragmites australis* also characterises PCT 1235

- (Swamp Oak). Mr Parker noted there were scattered Swamp Oaks in the vicinity of the plot, although not in the plot (p 12).
- 128 Mr Parker disagreed with Dr McLean's points about slashing and waterlogging. Mr Parker considered that as the site has been slashed for decades, this would have prevented Swamp Oak regenerating. In this respect, he agreed with Dr McLean that Swamp Oak no longer occurs in the slashed area. However, Mr Parker claimed that the BAM requires an assessor to consider what the vegetation would be if left unslashed and unmodified for well over half a century, not what is there today (p 17). Mr Parker did not consider waterlogging would inhibit Swamp Oak growth or regeneration. The reason for the absence of Swamp Oak is not waterlogging but instead the regular slashing (p 17).
- 129 Mr Parker disputed Dr McLean's argument that the emergence of freshwater-tolerant species rather than saltwater-tolerant species in some plots suggested the better classification was PCT 1808 (Estuarine Reedland) rather than PCT 1125 (Saltmarsh), instead suggesting classification as PCT 1235 (Swamp Oak) (p 18).
- 130 Mr Parker disagreed with Dr McLean's classification of the patch of vegetation in the north-western corner of the site as PCT 1275 (Rainforest). Mr Parker stated that past land clearing and vegetation modification demonstrated that it is a derived vegetation community. Mr Parker considered that the presence of Swamp Oak, Broad-leaved Paper Bark and Forest Redgum, which are component trees in the upper storey of PCT 1235 (Swamp Oak), supported this classification, rather than as PCT 1275 (Rainforest). (Mr Parker did identify, however, rainforest tree species in the area, including figs (three species) and Tuckeroo). Mr Parker disagreed with Dr McLean's approach of looking at the emerging rainforest species in the ground layer, as this was not the approach required by the BAM. Mr Parker also reviewed Dr McLean's list of groundcover species in the plot, saying they are not species indicative of PCT 1275 (p 13).
- 131 The ecological experts also disagreed on the number of threatened species of plants and animals that have the potential to occur on the site. Mr Parker used the BAM calculator to identify 35 predicted species which do not require a survey and 57 candidate species which do require a survey or an assessment. Threatened plants listed as candidate species were targeted during surveys but none were recorded. Previous surveys of the site had not located any threatened plants on the site. An assessment of the suitability of habitat for candidate fauna species was undertaken in accordance with the BAM. The habitat features identified in the BAM calculator for

most of the candidate species were either not present or the habitat was unsuitable or degraded. The only fauna species for which Mr Parker assessed there was suitable habitat was the Southern Myotis. A survey was conducted for one candidate fauna species, the Common Planigale, but it was not recorded. A survey was undertaken for a non-candidate threatened fauna species, the Eastern Grass Owl, but it was not recorded. Two other non-candidate threatened fauna species, the Mangrove Honeyeater and the Collared Kingfisher, have been recorded in the southern part of the site, in the Biobanking Agreement area, but Mr Parker considered that the habitat in the northern part of the site which is proposed to be developed for the manufactured home estate was not suitable. In the end, the only threatened species of plant or animal that Mr Parker considered could potentially occur on the northern part of the site proposed to be developed was the Southern Myotis.

- 132 Dr McLean disagreed with Mr Parker. He considered that at least 20 threatened species have the potential to occur on the site, 15 fauna species and 5 flora species. Dr McLean considered that while the habitat in the northern part of the site might not be preferred habitat for a number of fauna species, including the Collared Kingfisher and Mangrove Honeyeater, suitable habitat occurs in and around the southern part of the site and they will forage in adjacent habitats. On this basis, these species should have been the subject of targeted surveys. Dr McLean did record a Black Necked Stork, a threatened fauna species, on the site. He also observed a large dragonfly on the site, which he considered might have been the Coastal Petaltail, another threatened species, but he was unable to validate the sighting. Dr McLean considered that the site contained suitable habitat for the five threatened flora species and that targeted surveys for these species should have been undertaken.
- 133 The disagreement between the ecology experts on threatened species reduced at the hearing to focus on eight species: a butterfly, the Australian Fritillary or Laced Fritillary (*Argynnis hyperbius*); a frog, the Green and Golden Bell Frog; and six bird species, being the Black-necked Stork, Pied Oystercatcher, Curlew Sandpiper, Collared Kingfisher, Mangrove Honeyeater and Beach Stone Curlew.
- 134 Dr McLean opined that the BDAR should, but failed to, undertake the assessment required by subsection 10.2.3 of the BAM for these threatened species:
- Black-necked Stork, due to having an estimated 75 pairs in NSW (see Clancy and Andren 2010).
  - Green and Golden Bell Frog. While this is a species that has not been observed around Ballina for over 30 years, adequate steps have not been taken to eliminate this species as a potential candidate. The species meets criteria 4, in that due to Chytrid fungus recovery actions are limited.

- Pied Oystercatcher, due to a rapid rate of decline.
- Australian Fritillary, which has the potential to use the Study Area as foraging habitat (rather than breeding habitat which is associated with plant species not found in the study area), due to being in a rapid rate of decline.
- Curlew Sandpiper, due to being in a rapid rate of decline.
- Collared Kingfisher and Mangrove Honeyeater, due to a small NSW population size, and very limited geographical distribution.
- Beach Stone Curlew, while this species is very rare in NSW, adequate steps have not been taken to eliminate this species as a potential candidate. The species has a very small NSW Population Size.” (pp 44-45 Joint Expert Report – Ecology).

135 Further in relation to the Black-necked Stork, Dr McLean stated that it is a threatened species in NSW (so that cl 6.7 of the BC Regulation applied) and its population numbers in NSW are low, there being fewer than 250 in NSW (p 45).

136 Mr Parker maintained his position that the only threatened species likely to occur on the site is the Southern Myotis, which Mr Parker recorded in February and March 2021 on the site in the Biobanking area. He considered that there is not suitable habitat for the other threatened species. Mr Parker’s reasons for excluding the eight threatened species put forward by Dr McLean were:

Species	Suitable Habitat	Reason for exclusion
Australian or Laced Fritillary	This butterfly occurs in open swampy coastal habitat with eggs laid singly on a leaf of the caterpillar’s food plant, the Arrowhead Violet ( <i>Viola betonicifolia</i> ).	Suitable habitat does not occur at the site. Not previously been recorded in Ballina Shire. Extensive surveys over many years have not recorded the caterpillar’s food plant required for laying eggs.
Green and golden bell frog	Not a species candidate species in the BAM-C, has not been recorded within the	Not a species candidate species and not recorded.



	Ballina Shire for several decades.	
Black-necked Stork	Not a species candidate species in the BAM-C, so not addressed by Mr Parker.	Not a species candidate species.
Pied Oystercatcher	Intertidal flats of inlets and bays, open beaches and sandbanks. Forages on exposed sand, mud and rock.	Not recorded. No areas of suitable foraging or breeding habitat occur, such as intertidal flats of inlets or bays, open beaches or sandbanks.
Curlew Sandpiper	Only a species candidate species when breeding. Breeds in high arctic coastal tundra of central and eastern Siberia. When it migrates to NSW, it generally occupies littoral and estuarine habitats, mainly found foraging in intertidal mudflats of sheltered coasts. Roosts on beaches; spits or islets on the coast or in wetlands; or sometimes in salt marsh, among beach-cast seaweed or on rocky shores.	While this species has been recorded within estuarine habitat in the Biobanking area of the site, the species would not breed within the site. Impact for this SAll species is defined only for breeding species.
Collared Kingfisher and Mangrove Honeyeater	Not species candidate species in BAM-C, so not addressed by Mr Parker.	Not species candidate species.

<p>Beach Stone Curlew</p>	<p>Only species candidate species when breeding. Found exclusively along the coast, on a wide range of beaches, islands, reeds and in estuaries, and may often be seen at the edges of or near mangroves. They forage in the intertidal zone of beaches and estuaries, on islands, flats, banks and spits of sand, mud, gravel or rock, and among mangroves. They breed above the littoral zone, at the backs of beaches, or on sandbanks and islands, among low vegetation of grass, scattered shrubs or low trees; also, among open mangroves.</p>	<p>Site is &gt;2km from coast, heavily impacted and readily disturbed. No areas of suitable breeding habitat occur at the site as breeding occurs at the back of beaches along the coast. Surveys over successive years have not encountered the species within the site. This species has been recorded in more coastal areas to the east of the site, but the nearest record is more than 3km from the site.</p>
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137 This difference between the ecological experts as to the occurrence of threatened species and ecological communities on the site largely accounts for the difference in opinion as to the impacts of the development on the threatened species and ecological communities.

*The Council's submissions*

138 The Council submitted that the proposed development of the whole of the northern part of the site zoned R2 will have a serious and irreversible impact on biodiversity values, as the whole of the endangered ecological communities that occur on that part of the site, and the habitat of threatened species that potentially occur on that part of the site, will be cleared, filled and developed for a manufactured home estate. The Council submitted that no attempt has been made to avoid or minimise the impact of the development in these respects.

139 There is no avoidance at all of the endangered ecological communities or habitat of the threatened species that occur on the northern part of the site; the whole area is to

be developed. The applicant's ecologist, Mr Parker, sought to justify this lack of avoidance in two ways.

- 140 First, he asserted that there is avoidance of clearing of the endangered ecological communities and habitat of threatened species in the southern part of the site zoned RU2. The Council rebutted that this constitutes avoidance as development for the purposes of a manufactured home estate is not permitted in the southern part of the site. This area is protected by the Biobanking Agreement, which prohibits any development for the purposes of a manufactured home estate on the site. Further, most of the southern part of the site is within the coastal wetlands and littoral rainforests area, including around half of the site in the subarea "coastal wetlands", on which development for the purposes of a manufactured home estate may not be carried out under the Manufactured Home Estates SEPP (it is excluded land) or under BLEP in the RU2 Zone. In this circumstance, the Council submitted, the applicant cannot be avoiding carrying out development for the purposes of a manufactured home estate that it is not permitted to carry out on that part of the site.
- 141 Second, Mr Parker asserted that the area of Coastal Saltmarsh EEC in the north-eastern corner of the site could not be avoided because of the necessity to locate the entrance to the manufactured home estate off Burns Point Ferry Road rather than the classified road of River Street. The Council submitted that, even if locating the entrance at this point were to be necessary, this does not explain the clearance of the majority of the saltmarsh in the south-east of the development footprint that did not need to be cleared in order to provide the entrance in the north-east. The Council submitted that the real explanation for the lack of avoidance in the northern part of the site is the applicant's desire to maximise the area to be developed in the northern part of the site and to rely on offsets being surrendered for the endangered ecological communities and habitat of threatened species that will be lost.
- 142 The Council submitted that there is equally no minimisation of the impact of the development on the endangered ecological communities and habitat of threatened species in the northern part of the site. Any mitigation measures that are proposed are only intended to mitigate the impacts of the development on the endangered ecological communities and habitat of threatened species on the southern part of the site zoned RU2. That is not mitigation of the impacts of the development on the northern part of the site.
- 143 In any event, the Council submitted, the applicant has not established that the proposed measures will mitigate impacts on the endangered ecological communities

and habitat of threatened species in the southern part of the site. The Council reiterated its earlier submissions that the design, management and monitoring measures that the engineers considered were capable of being formulated, but have not yet been finalised, have not been shown to protect the adjacent coastal wetland. The applicant merely asserted, but has not proven, that there will be no significant impact on the adjacent coastal wetland.

- 144 The Council submitted that this failure to avoid and minimise before offsetting impacts is central to the biodiversity conservation scheme. The BC Act establishes a biodiversity mitigation hierarchy that requires, in order, avoiding impacts, minimising impacts, and only then offsetting or compensating for residual impacts that remain after all steps are taken to avoid or minimise these impacts: see s 1.3(k), s 6.2(d), s 6.4(1) and s 6.12(c) and (d) and *Tomasic v Port Stephens Council* [2021] NSWLEC 56 at [169].
- 145 The Council submitted that this deficiency is exacerbated by the failure of the BDAR to address avoidance or minimisation of the endangered ecological communities identified by Dr McLean, particularly the Freshwater Wetlands EEC and the Littoral Rainforest EEC. The Council submitted that Mr Parker incorrectly classified the areas of the site on which these EECs occur as being of different ecological communities. The consequence was that Mr Parker never assessed avoidance or mitigation of impacts on the Freshwater Wetlands EEC or the Littoral Rainforest EEC. The BDAR therefore failed to set out, as it was required by s 6.12(c) of the BC Act to do, the measures the applicant proposed to take to avoid or minimise the impacts of the proposed development on these endangered ecological communities.
- 146 Likewise, the Council submitted that the BDAR failed to address the impact of the proposed development on the threatened species that Dr McLean identified could potentially occur on the site, as Mr Parker dismissed the potentiality for any threatened species of plant or animal occurring on the site except for the Southern Myotis. This also caused the BDAR to fail to address the matters it was required to address under s 6.12 of the BC Act.

#### *The applicant's submissions*

- 147 The applicant submitted the Court would accept Mr Parker's classification of the vegetation communities on the development site as being PCT 1125 (Saltmarsh) to the east and PCT 1235 (Swamp Oak) for the remainder. Mr Parker is accredited for the purposes of the BC Act and undertook mapping of the plant community types in accordance with the BAM. Mr Parker has been involved with the project on the site for

the last 20 years. That accreditation and involvement with the site placed him in a better position to identify the vegetation communities on the site.

- 148 Where the experts disagreed on particular points in the evidence, the applicant submitted that the Court would prefer Mr Parker's evidence to that of Dr McLean, for the reasons Mr Parker gave. In addition, where Mr Parker has relied on the derived vegetation community the applicant submitted that this was consistent with the BAM. The BAM defines "Derived PCT's as being:

"PCTs that have changed to an alternative stable state as a consequence of land management practices since European settlement. Derived communities can have one or more structural components of the vegetation entirely removed or severely reduced (eg over-storey of grassy woodland) or have developed new structural components where they were previously absent (eg shrubby mid-story in an open woodland system)."

- 149 The applicant submitted that in areas of the site that have been severely changed, such as the slashed area and the former homestead site, recourse to the vegetation that would have been there before the change is a better indicator of the vegetation community than the vegetation that is there currently. In the case of both the slashed area and the former homestead site, Mr Parker suggested that the vegetation community would have been PCT 1235 (Swamp Oak). This classification should be adopted for the current vegetation, regardless of whether there are plant species now growing in those areas as a result of the change that might accord with other plant community types. More particularly, the former homestead site has been modified by landscaping, including planting of trees, both exotic and native, as part of the garden around the homestead. The presence of these planted trees is not an indicator of the vegetation community.
- 150 The applicant submitted that the Court should also accept Mr Parker's evidence about the unlikelihood of any threatened species occurring on the site other than the Southern Myotis. Mr Parker gave reasons, in the BDAR, the joint expert reports, and oral evidence, for why he considered the development site does not provide suitable habitat for the threatened species identified by Dr McLean. Again, the applicant submitted that the Court would prefer Mr Parker's evidence on the unsuitability of the habitat on the development site for the threatened species, having regard to his work on the site "over many many years".
- 151 The applicant submitted that the development will avoid and minimise impacts on threatened species and endangered ecological communities on the site. The applicant submitted that avoidance is demonstrated by the development for the purposes of a manufactured home estate only being carried out on the northern part of the site

zoned R2, thereby avoiding the southern part of the site zoned RU2 that is within the Biobanking area. Thus, land of high ecological value in the south of the site is avoided, confining the development to land in the north of the site of lower ecological value.

- 152 The applicant submitted that to do so accords with orderly planning. The planning history demonstrated that precinct 1, the northern part of the site, was zoned R2 to allow for the development of that part for the purposes permitted in the zone, while precinct 2, the southern part of the site, was zoned RU2 allowing for less development. The rezoning also depended on the landowner entering into a voluntary planning agreement and a Biobanking Agreement to conserve precinct 2. The applicant submitted that to ignore that planning history would be to undermine the objective of orderly planning. To say to the landowner who has provided a material public benefit by avoiding precinct 2 that it must also avoid part of precinct 1 would discourage people from entering into biobanking agreements, absent more certainty as to what they may or may not do.
- 153 The applicant also noted that the small stand of mangroves on the western side of the site will also be avoided.
- 154 The applicant accepted that the endangered ecological communities and habitat of any threatened species within precinct 1, the northern part of the site zoned R2, will be cleared, but the planning history has dictated where future development of the site will proceed, which is this area.
- 155 The applicant submitted that the evidence of the stormwater engineers and hydrologists was that the discharge of stormwater from the site will be done in an environmentally sensitive manner and will not adversely affect the endangered ecological communities or habitat of threatened species in the adjacent Biobanking area. Mr Parker's BDAR proceeded on the assumption that impacts on the Biobanking area would be avoided through the design and engineering of the stormwater system. That assumption has been established on the evidence.

*The development's serious and irreversible impacts on biodiversity values*

- 156 I find that the development is likely to have serious and irreversible impacts on biodiversity values, so that I must refuse to grant consent to the development by reason of s 7.16(2) of the BC Act.
- 157 The determination of serious and irreversible impacts on biodiversity values is to be undertaken under s 6.5 of the BC Act, which in turn requires the determination to be made in accordance with the principles prescribed by cl 6.7 of the BC Regulation and

the Guidance document published by DPIE. These statutory provisions focus attention on the impacts of the development on any threatened species or endangered ecological community. Accordingly, the first step in the determination of whether the development is likely to have serious and irreversible impacts on biodiversity values is to identify any threatened species or endangered ecological communities that might be impacted by the development.

- 158 Starting with endangered ecological communities, I find that three endangered ecological communities occur on and adjacent to the development site, being the northern part of the site zoned R2 that is to be developed for the purposes of a manufactured home estate. To the east is an area of Coastal Saltmarsh EEC. This lies within the right-angled, scalene triangle shaped area mapped by Mr Parker. Towards the hypotenuse of this triangle, the Coastal Saltmarsh EEC grades into a Freshwater Wetlands EEC, before reaching a disconnected chain of patches of Swamp Oak Floodplain Forest EEC running roughly along the hypotenuse. As Dr McLean identified by his surveys, there are ecotones between these communities, corresponding with slight differences in elevation and hydrological conditions, including the extent of waterlogging and saline influence. The former agricultural drains have created a mosaic of physiographical and hydrological conditions, which create different abiotic environments favouring the development of different vegetation communities. There is intergrading between these vegetation communities, making precise delineation between the communities difficult. Compounding this environmental complexity is the degree of ongoing disturbance by land management practices. Regular slashing inhibits the growth of certain species, such as Swamp Oak (*Casuarina glauca*), over time leading to a loss of the species in the slashed area.
- 159 To the west of the Swamp Oak Floodplain Forest EEC along the line of the hypotenuse is a disturbed area, which is regularly slashed. As just noted, such disturbed areas are difficult to classify as plant community types. Mr Parker opted for the concept of a derived PCT, looking to the vegetation that would have been there if the ongoing disturbance was not occurring. This led him to classify the vegetation as low condition PCT 1235 (Swamp Oak). Dr McLean opted for PCT 1808 (Estuarine Reedland) on the basis of the absence of certain characteristic species of PCT 1235, such as Swamp Oak, and the presence of other species that are more freshwater-tolerant, such as Twig Rush and Common Reed.
- 160 For the purposes of determining whether there will be a serious and irreversible impact on biodiversity values, it probably does not matter much whether the vegetation is better classified as being PCT 1235 (Swamp Oak) or PCT 1808 (Estuarine Reedland)

or a mosaic of both, provided it is part of an endangered ecological community. Mr Parker, although classifying the slashed area as being PCT 1235 (Swamp Oak), considered the extent of disturbance over the years to be so great as to cause the vegetation to no longer be Swamp Oak Floodplain Forest EEC. Mr Parker did not explain his reasons for so concluding, but it may be that continual slashing has caused the loss of the characteristic Swamp Oak and other tree species. Dr McLean classified much of the slashed area as Freshwater Wetlands EEC notwithstanding the extent of disturbance. Ongoing slashing does not cause the same degree of disturbance to this community as the reed and rush species are better adapted to surviving slashing than tree species.

161 I consider that in circumstances where both experts agree that the vegetation in the slashed area is of a plant community type that is part of an endangered ecological community, either PCT 1235 (Swamp Oak) which is part of the Swamp Oak Floodplain Forest EEC or PCT 1808 (Estuarine Reedland) which is part of the Freshwater Wetlands EEC, the finding should be made that the vegetation is part of an endangered ecological community, whichever one does not matter. The onus is on the applicant to establish that the vegetation, although being of a plant community type that is part of an endangered ecological community, nevertheless is so degraded as to no longer be able to be classified as being part of that endangered ecological community. On the applicant's case, this required demonstrating that the vegetation, although still of PCT 1235 (Swamp Oak), no longer meets the description in the Final Determination of Swamp Oak Floodplain Forest EEC. The applicant did not discharge this onus. Mr Parker did not assay this task of comparing the vegetation in the slashed area of the site that he classified as low condition PCT 1235 (Swamp Oak) with the Final Determination listing the Swamp Oak Floodplain Forest EEC, so as to establish that the vegetation is no longer of that EEC. An example of what needed to be done, but was not done, is *Hornsby Council v Vitone Pty Ltd* (2003) 132 LGERA 122; [2003] NSWLEC 272.

162 This leaves the area of the former homestead in the north-western corner of the site. Mr Parker classified this area as moderate condition PCT 1235 (Swamp Oak), essentially as a derived PCT. Dr McLean classified it as PCT 1275 (Rainforest) because of the presence of rainforest species, particularly in the ground layer. I prefer Mr Parker's classification of the vegetation in this area to Dr McLean's classification. Whilst some rainforest species might have germinated and be growing in this area, this does not establish that PCT 1275 (Rainforest) is the correct classification of the vegetation community in this area. There is merit in looking at the vegetation



community from which the current vegetation is derived to more accurately classify the plant community type that best fits the current vegetation. The area is the site of the former homestead and has been landscaped with exotic and native plantings. The slightly higher elevation of the area, selected for the homestead, would have been suitable habitat for PCT 1235 (Swamp Oak).

- 163 The upshot is that the whole of the northern part of the site zoned R2 is comprised of three endangered ecological communities, Coastal Saltmarsh EEC to the east and south, grading to the west into a mosaic of Freshwater Wetlands EEC and Swamp Oak Floodplain Forest EEC, depending on the different microhabitats across the site, ending in the north-western corner with Swamp Oak Floodplain Forest EEC. There is a small stand of mangrove to the west adjoining Emigrant Creek.
- 164 Turning to threatened species, I find the site is habitat of five threatened species. The first is the bat species, the Southern Myotis, which Mr Parker and Dr McLean agreed is likely to occur on the site and indeed has been recorded by Mr Parker twice in the Biobanking area this year. Mr Parker noted that the site does not contain suitable roosting habitat such as hollow-bearing trees, bridges, caves or other artificial roosting structures. The Southern Myotis forages over streams and pools catching insects and small fish by raking their feet over the water surface. Mr Parker considered that although the development site might not contain suitable waterbodies for foraging, it is proximate to suitable foraging waterbodies, so that it should be concluded that the site is likely to be used for foraging.
- 165 The second is the Black-necked Stork. A Black-necked Stork was photographed by Dr McLean and a Council officer on the site on 25 and 26 February 2021. The Black-necked Stork breeds in trees and forages in freshwater wetlands. The site is evidently suitable habitat as it has been recently used by the Black-necked Stork.
- 166 The next two species are the Collared Kingfisher and Mangrove Honeyeater. Both bird species are restricted to mangroves and adjacent habitats. The Biobanking Agreement that established the southern part of the site as a Biobanking area recognised that a large proportion of the southern part of the site was known habitat for both the Collared Kingfisher and Mangrove Honeyeater containing areas of mangrove and estuarine habitats and adjacent habitats. Mr Parker in the BDAR considered that the northern part of the site was not suitable habitat. Nevertheless, Dr McLean noted that both species are known to forage within adjacent habitats to their preferred habitat. Hence, it is likely that any Collared Kingfisher or Mangrove Honeyeater that might use

the preferred habitat in the Biobanking area could forage in the adjacent habitat of the northern part of the site.

- 167 The fifth species is the Curlew Sandpiper. There are two records of Curlew Sandpiper on the site, in what is now part of the Biobanking area. The Curlew Sandpiper is a migratory bird species, breeding in the Arctic in the Northern Hemisphere summer and migrating to the NSW Coast for the Australian summer. It generally occupies littoral and estuarine habitats, including intertidal mudflats of sheltered coasts and non-tidal swamps, lakes and lagoons on the coast. It forages in or at the edge of shallow water, on exposed algal mats or waterweed, or on the banks of beach-cast seagrass or seaweed. Curlew Sandpipers are omnivorous, feeding on worms, molluscs, insects and some seeds. It roosts on shingle, shell or sand beaches; spits or islets on the coast or in wetlands; or sometimes in saltmarsh, among beach-cast seaweed, or on rocky shores (Final Determination, paragraph 2). Dr McLean considered that the Coastal Saltmarsh and Freshwater Wetlands on the site, when not inundated by tidal or stormwater, provide optimal habitat for the Curlew Sandpiper. Mr Parker did not dispute this, instead relying on the fact that the BAM calculator identified that Curlew Sandpiper is a species candidate species only when it is breeding, which never occurs in Australia. That is an insufficient basis to find that there cannot be a serious and irreversible impact on the species if its optimal habitat for foraging were to be removed. That is the case here.
- 168 I consider it is less likely, but not necessarily unlikely, that the site provides suitable foraging habitat for the Pied Oystercatcher. The Pied Oystercatcher is restricted to the littoral zone of beaches and estuaries. It breeds on the ground just above the tideline. It forages in the intertidal and wave-wash zone, mostly for marine invertebrates, especially bivalve molluscs (Final Determination, paragraphs 2 and 3). This preference restricts the foraging habitats on the site to locations where its food supply occurs, which might be along the banks of Emigrant Creek and along drainage channels where tidal flow occurs and there could be macroinvertebrates. Such foraging habitat is more prevalent in the Biobanking area than in the development site. Pied Oystercatchers have been recorded directly south of the site about ten years ago and less than 1km north-west of the site in March 2021.
- 169 I consider it even less likely that the site provides suitable habitat for foraging or breeding for the Beach Stone Curlew. Whilst the species forages in a wide range of beach and estuarine habitats, including among and near mangroves, the development site is unlikely to provide suitable foraging habitat. The preferred habitat would be along the banks of Emigrant Creek and the Richmond River estuary, and along

drainage channels with mangroves, but these occur mostly on the Biobanking area and not on the development site. Beach Stone Curlews breed at the back of beaches, but the site is not near the beach so would not provide suitable breeding habitat. The Beach Stone Curlew has not been recorded on the site and the nearest record is 3km away from the site.

- 170 I consider it unlikely that the site provides suitable habitat for the Australian Fritillary or Green and Golden Bell Frog. The Australian Fritillary has not been recorded in New South Wales in the last decade and no records have been made in the Ballina Shire. The site does not contain the plant species necessary for breeding, the Arrowhead Violet. The Green and Golden Bell Frog has also not been recorded in the Ballina Shire for several decades. Both species are unlikely to occur on the site.
- 171 Having identified the endangered ecological communities and threatened species likely to be impacted by the development, the next step is to evaluate the likely significance of the impacts that would remain after the measures proposed to avoid or minimise the impact on these endangered ecological communities and threatened species have been taken: see s 7.16(1) of the BC Act.
- 172 The applicant has proposed no measures to avoid the impacts of the development on the endangered ecological communities or habitat of the threatened species that occur on the development site, being the northern part of the site zoned R2 that is to be developed for the purposes of a manufactured home estate. The development of this part of the site involves clearing all native vegetation, except for a small stand of mangroves to the west adjoining Emigrant Creek. The cleared land will be filled with large volumes of fill and have constructed on the filled land, roads, lots on which manufactured homes will be installed, recreational facilities including a club house, manager's residence, retaining walls and fences, drainage structures and utility services. The existing endangered ecological communities and threatened species, and their habitats, on this land will be destroyed.
- 173 The non-development of the southern part of the site zoned RU2, which is the Biobanking area, is not an avoidance measure. That part of the site is not permitted to be developed for the purposes of a manufactured home estate, not only under the relevant environmental planning instruments of the BLEP, Manufactured Home Estates SEPP and Coastal Management SEPP, but also under the Biobanking Agreement. Avoidance of the impact of a development on land presupposes that that development is otherwise permitted to be carried out on the land. If land is not

permitted to be developed for a purpose, there can be no avoidance of the impact of a development that cannot be carried out on the land in any event.

- 174 This otherwise evident proposition is reinforced by the terms of s 7.16(1) of the BC Act. Serious and irreversible impacts on biodiversity values of a proposed development are the serious and irreversible impacts on biodiversity values that would remain after any proposed measures to avoid or minimise the impact on biodiversity values of the proposed development have been taken. The proposed development of land generates the impacts on biodiversity values. Measures are to be taken to avoid or minimise these impacts. The residual impacts that remain after taking the measures to avoid or mitigate the impacts of the proposed development are then to be assessed for their seriousness and irreversibility. If development is not permitted to be carried out on certain land, there can be no impacts of any development of that land to be avoided or mitigated.
- 175 The proposed development also does not involve minimisation of its impacts on the endangered ecological communities or threatened species, or their habitats, that occur on the northern part of the site zoned R2 to be developed for the purposes of a manufactured home estate. As noted earlier, the whole of this part of the site is to be cleared, filled and have constructed on it the manufactured home estate, which will destroy the endangered ecological communities and threatened species, and their habitats, on this part of the site. No mitigation measures are proposed to minimise these impacts of the proposed development.
- 176 The result is that the impacts of the proposed development on the endangered ecological communities and threatened species, and their habitats, on the development site remain unavoided and unmitigated. The seriousness and irreversibility of these unavoided and unmitigated impacts are to be determined under s 6.5 of the BC Act, which in turn requires the determination to be made in accordance with the principles prescribed by cl 6.7 of the BC Regulation, assisted by the Guidance document published by DPIE.
- 177 For the three endangered ecological communities on the development site, the impacts are to be regarded as serious and irreversible as they are likely to contribute significantly to the risk of the endangered ecological communities becoming extinct having regard to the first two principles in cl 6.7(2) of the BC Regulation.
- 178 First, the proposed development will cause a further decline of the ecological communities that are currently in a rapid rate of decline, by the proposed development reducing their geographic extent.

- 179 The Coastal Saltmarsh EEC is recognised in the Final Determination as globally threatened, with the threatening processes including those involved with the proposed development of infilling for residential purposes, construction of roads, modification of tidal flow and discharge of stormwater (paragraphs 8-10). The total area of coastal saltmarsh has been significantly reduced and fragmented, with most fragmented patches being less than 100ha (paragraph 6). The proposed development will reduce the geographical extent of Coastal Saltmarsh EEC on the site and fragment it by clearing the saltmarsh to the eastern and southern boundaries of the development site with the Biobanking area and to Burns Point Ferry Road.
- 180 The Swamp Oak Floodplain Forest EEC is recognised by the Final Determination to have been extensively cleared and modified. In the Tweed lowlands, for example, less than 3% of the original Floodplain Wetlands and Floodplain Forest remained in 1985, and in the over 35 years since then land clearing has continued apace (paragraphs 10 and 11). Remaining stands are severely fragmented by past clearing and further threatened by processes such as are involved with the proposed development of clearing, landfilling and earthworks for urban development (paragraph 11), with consequential changes to hydrology by changed patterns of flooding and drainage (paragraph 12). The saline forms of Swamp Oak Floodplain Forest EEC may adjoin or intergrade with Coastal Saltmarsh EEC, with the boundaries between these communities being dynamic and shifting in response to changes in hydrological regimes and land management practices (paragraph 7). The proposed development will reduce the geographical extent of Swamp Oak Floodplain Forest EEC on the site by clearing it from the development site. Insofar as Swamp Oak Floodplain Forest EEC intergrades with Coastal Saltmarsh EEC on the site, the clearing of the areas of Swamp Oak Floodplain Forest EEC will also affect areas of Coastal Saltmarsh EEC, both on the development site and the adjacent Biobanking area.
- 181 The Freshwater Wetlands EEC is recognised by the Final Determination to have been extensively cleared and modified (paragraph 10). In the Tweed lowlands, for example, less than 3% of the original Floodplain Wetlands remained in 1985, and in the 35 years since then land clearing, drainage and filling has continued to further reduce its extent (paragraph 11). Remaining stands are severely fragmented by past clearing and are further threatened by processes such as are involved with the proposed development of clearing, filling for urban development and drainage works (paragraph 11). The widespread degradation of Freshwater Wetlands has led to regional declines in their dependent fauna including the Black-necked Stork (paragraph 12). The

proposed development will reduce and fragment Freshwater Wetlands EEC on the site.

- 182 Second, the proposed development will further degrade or disrupt the three endangered ecological communities on the site that are currently severely degraded or disturbed. The Final Determinations for the Coastal Saltmarsh EEC, Swamp Oak Floodplain Forest EEC and Freshwater Wetlands EEC describe the current severe environmental degradation of these communities. The proposed development will exacerbate this environmental degradation and disrupt biological processes, including removing habitat for the species assemblages of the communities and for the threatened fauna species that forage, roost or breed in the communities.
- 183 The third and fourth principles in cl 6.7(2) of the BC Regulation do not assist, as the three endangered ecological communities do not themselves have a very limited geographic distribution (although localised occurrences of the communities may have very limited geographical distribution in the locality) and the endangered ecological communities cannot be said to be unlikely to respond to measures to improve their habitat and vegetation integrity, so that they cannot be offset.
- 184 Nevertheless, by reference to the first two principles, the impacts of the proposed development on the endangered ecological communities on the development site are to be regarded as serious and irreversible under cl 6.7(2) of the BC Regulation.
- 185 For the five threatened species, the impacts of the proposed development are to be regarded as serious and irreversible as they are likely to contribute significantly to the risk of the threatened species becoming extinct because of one or more of the principles in cl 6.7 of the BC Regulation.
- 186 For the Southern Myotis, it is identified as a Species Credit Species by the BAM. Threats to the Southern Myotis include clearing adjacent to foraging areas, filling of streams and pools that are foraging areas, and loss or disturbance of roosting sites. The Southern Myotis was recorded foraging on the site this year. For the Black-necked Stork, it has a very small population size (principle 2), estimated to be only 75 pairs in NSW. Black-necked Storks were recorded and photographed on the site this year. For the Curlew Sandpiper, it is in a rapid rate of decline (principle 1). The saltmarsh and wetlands on the site provide foraging habitat for the Curlew Sandpiper. For the Collared Kingfisher and Mangrove Honeyeater, they have a very small population size (principle 2) and a very limited geographic distribution (principle 3). The site contains foraging habitat for both species.

- 187 The proposed development by clearing, filling, constructing roads, buildings and structures on, and using as a manufactured home estate, the development site, will destroy the habitat of these threatened species in this part of the site. Such impacts will exacerbate the current threats to the species. By reference to three of the principles in cl 6.7(2) of the BC Regulation, the impacts of the proposed development on these threatened species and their habitat on the development site are to be regarded as serious and irreversible.
- 188 Accordingly, I determine, in accordance with s 6.5 of the BC Act and cl 6.7 of the BC Regulation, that the proposed development is likely to have serious and irreversible impacts on the three endangered ecological communities and the five threatened species that occur on the development site. These serious and irreversible impacts are taken to be serious and irreversible impacts on biodiversity values for the purposes of s 7.16 of the BC Act: see s 7.16(1).
- 189 In addition, these impacts are serious and irreversible impacts on biodiversity values by reference to the biodiversity values defined in s 1.5(2) of the BC Act and cl 1.4 of the BC Regulation and the impacts on biodiversity values defined in s 6.3 of the BC Act and cl 6.1(1) of the BC Regulation. The proposed development will seriously and irreversibly adversely affect the vegetation integrity, habitat suitability, threatened species abundance, vegetation abundance, habitat connectivity, threatened species movement, flight path integrity and water sustainability of the threatened species and ecological communities, and their habitat, on the development site. The whole of the development site will be cleared of native vegetation, filled, have constructed on it buildings, roads and other structures, and be used as a manufactured home estate. The three endangered ecological communities and the habitat of the five threatened species on the development site will be lost, thereby reducing and fragmenting the geographical extent of the endangered ecological communities and habitat of the threatened species; reducing the abundance of the vegetation species that comprise the endangered ecological communities and habitat of the threatened species; reducing the abundance of the threatened species by removing the habitat of those species; interrupting habitat connectivity and threatened species movement between the development site and adjacent habitats, including the Biobanking area; interfering with flight paths, such as for the Southern Myotis by filling in and developing water bodies used for foraging or by artificial lighting, and disturbing bird species by human initiation of flight; and diminishing water sustainability by filling in water bodies and changing the hydrological processes that sustain the threatened species and ecological communities on the development site. These impacts on biodiversity values

are to be regarded as serious and irreversible taking into consideration the significant degree to which these biodiversity values are likely to be impacted by the proposed development.

190 I am, therefore, of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values. Having formed that opinion, I must refuse to grant development consent to the proposed development, by reason of s 7.16(2) of the BC Act.

### **Determination of development application and disposition of appeal**

191 I have decided that four preconditions to the grant of consent have not been satisfied. First, the proposed development is to be carried out partly on land that is excluded land under cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP, being land within the Coastal Wetlands and Littoral Rainforests Area identified under the Coastal Management SEPP, on which development for the purposes of a manufactured home estate is not permissible.

192 Second, I am not satisfied, under cl 9(1) of the Manufactured Home Estates SEPP, that the proposed development on that excluded land will not have an adverse effect on land having special ecological qualities, which the land within the Coastal Wetlands and Littoral Rainforests Area has.

193 Third, I am not satisfied, under cl 11(1) of the Coastal Management SEPP that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or the quantity or quality of surface and ground water flows to and from the adjacent coastal wetland.

194 Fourth, I am of the opinion, under s 7.16(2) of the BC Act, that the proposed development is likely to have serious and irreversible impacts on the biodiversity values.

195 Under each of these four circumstances, development consent cannot be granted to the proposed development. The development application must therefore be determined by refusal of consent and the appeal dismissed.

196 The Court orders:

- (1) The appeal is dismissed.
- (2) Development application 2020/192, as amended, for a manufactured home estate on Lot 1 in DP 124173 known as 550-578 River Street, West Ballina is determined by refusal of consent.



- (3) The exhibits may be returned.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

## Appendix 2 – Joint Ecologists’ Report

## **Appendix 3 – Council Reports**

## Appendix 4 – Gateway Determination



Department of Planning and Environment

### Gateway Determination

*Planning proposal (Department Ref: PP-2022-3871): to introduce the C2 Environmental Conservation and C3 Environment zones into the Ballina LEP 2012, amend associated clauses, and rezone Lot 1 DP 124173 for conservation purposes and amend associated development standards.*

I, the Executive Director, Local and Regional Planning at the Department of Planning and Environment, as delegate of the Minister for Planning, have determined under section 3.34(2) of the *Environmental Planning and Assessment Act 1979* (the Act) that an amendment to the Ballina Local Environmental Plan 2012 to introduce the C2 Environmental Conservation and C3 Environment zones into the Ballina LEP 2012, amend associated clauses, and rezone Lot 1 DP 124173 for conservation purposes and amend associated development standards should proceed subject to the following conditions and be completed within six months from the date of Gateway determination:

#### Gateway Conditions

1. The planning proposal is to be amended to:
  - utilise one consistent property description;
  - include all the proposed changes within the explanation of provisions;
  - retain the existing R2 Low Density Residential zone and minimum lot size for the area approved for trial fill pads under DA 2019/233, as the primary use of the land is not for environmental management or conservation, unless landowner agreement for the proposed change can be obtained;
  - remove the proposed change to clause 4.1C, as rural workers dwelling is not a use sought to be permitted in the C3 Zone land use table;
  - correctly orientate the proposed minimum lot size map;
  - remove the reference to the Building Height Allowance map in Part 4 Mapping;
  - include current and proposed FSR maps;
  - correctly reference section 9.1 Ministerial Direction 5.3 from 'Flooding' to 'Development Near Regulated Airports and Defence Airfields'.
2. Public exhibition is required under section 3.34(2)(c) and clause 4 of Schedule 1 to the Act as follows:
  - (a) the planning proposal is categorised as complex as described in the *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021) and must be made publicly available for a minimum of 28 days;
  - (b) the planning proposal authority must comply with the notice requirements for public exhibition of planning proposals and the specifications for material that must be made publicly available along with planning proposals as identified in *Local Environmental Plan Making Guidelines* (Department of Planning and Environment, 2021).

- (c) Consistent with the recommendations of the E Zone Review, Council must ensure that any landowner whose land is proposed to have a conservation zone applied, is notified in writing of the planning proposal and consultation arrangements;
- (d) When Council has considered the submissions received during public exhibition and has endorsed the final planning proposal, the landowners whose land will be subject to a conservation zone must be notified in writing of Council's decision and advised that they have 28 days to notify the Department if they would like the Chief Planner (or equivalent) to review the proposed zoning of their property.
3. Consultation is required with the following public authorities and government agencies under section 3.34(2)(d) of the Act and/or to comply with the requirements of applicable directions of the Minister under section 9 of the EP&A Act:
- Department of Primary Industries – Agriculture,
  - Department of Primary Industries – Fisheries,
  - NSW Rural Fire Service,
  - Heritage NSW,
  - Jali Local Aboriginal Land Council,
  - Biodiversity Conservation Division,
  - NSW State Emergency Service,
  - Biodiversity Conservation Trust.
- Each public authority is to be provided with a copy of the planning proposal and any relevant supporting material via the NSW Planning Portal and given at least 40 days to comment on the proposal.
4. A public hearing is not required to be held into the matter by any person or body under section 3.34(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).
5. The final planning proposal is to detail how the E Zone application process for the property has been satisfied in accordance with the review recommendations.

Dated 15th day of December 2022.



**Malcolm McDonald**  
Executive Director  
Local and Regional Planning  
Department of Planning and Environment

Delegate of the Minister for Planning



Department of Planning and Environment

## Alteration of Gateway Determination

*Planning proposal (Department Ref: PP-2022-3871)*

I, Director, Northern Region at the Department of Planning and Environment, as delegate of the Minister for Planning, have determined under section 3.34(7) of the *Environmental Planning and Assessment Act 1979* to alter the Gateway determination dated 15 December 2022 for the proposed amendment to the Ballina Local Environmental Plan 2012 as follows:

1. Change the description of the planning proposal

from to introduce the C2 Environmental Conservation and C3 Environment zones into the Ballina LEP 2012, amend associated clauses, and rezone Lot 1 DP 124173 for conservation purposes and amend associated development standards.

to introduce the C2 Environmental Conservation and C3 Environment zones into the Ballina LEP 2012, amend associated clauses, rezone part of Lot 1 DP 124173 for conservation purposes and amend associated development standards.

2. Delete condition 1 and replace with a new condition 1:

"1. The planning proposal is to be amended prior to public exhibition to include a savings provision which identifies that a development application made on the land but not finally determined before the commencement of the LEP amendment must be finally determined as if the plan has not commenced."

Dated 6 day of March 2023.

A handwritten signature in black ink, appearing to read "J. Gray".

**Jeremy Gray**  
Director, Northern Region  
Local and Regional Planning  
Department of Planning and Environment

**Delegate of the Minister for Planning**

## Appendix 5 – Section 9.1 Directions Checklist

Section 9.1 Directions Checklist Planning Proposal – Burns Point Ferry Road; C Zones	
Direction No.	Compliance of Planning Proposal
<b>Focus area 1: Planning Systems</b>	
1.1 Implementation of Regional Plans	Consistent The planning proposal is consistent with the North Coast Regional Plan 2036 in the protection of important local and regional biodiversity values.
1.2 Development of Aboriginal Land Council Land	Does not apply to planning proposal.
1.3 Approval and Referral Requirements	Consistent This planning proposal does not contain provisions requiring concurrence, consultation or referral of development applications.
1.4 Site Specific Provisions	Does not apply to planning proposal.
<b>Focus area 1: Planning Systems – Place-based</b>	
	None apply to planning proposal.
<b>Focus area 2: Design and Place</b>	
	No applicable Directions.
<b>Focus area 3: Biodiversity and Conservation</b>	
3.1 Conservation Zones	Consistent. The proposal will facilitate the protection and conservation of environmentally sensitive areas.
3.2 Heritage Conservation	Consistent. The proposal will facilitate the protection and conservation of areas of natural environmental heritage.
3.3 Sydney Drinking Water Catchments	Does not apply to planning proposal.
3.4 Application of C2 and C3 Zones and Environmental Overlays in Far North Coast LEPs	Consistent. The introduction of the C2 Environmental Conservation and C3 Environmental management zones is consistent with the <i>Northern Councils E Zone Review Final Recommendations</i> .
3.5 Recreation Vehicle Areas	Consistent. The proposal does not enable land to be developed for the purposes of a recreation vehicle area.
3.6 Strategic Conservation Zoning	Does not apply to planning proposal.
<b>Focus area 4: Resilience and Hazards</b>	
4.1 Flooding	Consistent. The subject land is flood prone. While this is not the focus of the planning proposal, implementation of the C2 Environmental Conservation zoning will prevent filling within the land associated with future urban development.

<b>Section 9.1 Directions Checklist</b>	
<b>Planning Proposal – Burns Point Ferry Road; C Zones</b>	
<b>Direction No.</b>	<b>Compliance of Planning Proposal</b>
4.2 Coastal Management	Consistent. The planning proposal will prevent the development of land identified in chapter 2 of SEPP (Resilience and Hazards) 2021 as Coastal Wetlands. Appendix 5 (below) provides an assessment of the proposal against the mandatory provisions outlined in the draft Coastal Design Guidelines 2022.
4.3 Planning for Bushfire Protection	Does not apply to planning proposal.
4.4 Remediation of Contaminated Land	Does not apply to planning proposal.
4.5 Acid Sulfate Soils	Consistent. The site is mapped as containing acid sulfate soils. The implementation of a C2 Environmental Conservation zone will prevent future disturbance of those soils.
4.6 Mine Subsidence and Unstable Land	Does not apply to planning proposal.
<b>Focus area 5: Transport and Infrastructure</b>	
5.1 Integrating Land Use and Transport	Consistent. The planning proposal will remove an urban zone.
5.2 Reserving Land for Public Purposes	Consistent. The planning proposal does not reserve land for a public purpose or effect any such land already reserved.
5.3 Development Near regulated Airports and Defence Airfields	Does not apply to planning proposal.
5.4 Shooting Ranges	Does not apply to planning proposal.
<b>Focus area 6: Housing</b>	
6.1 Residential Zones	Justifiably Inconsistent. The planning proposal will remove an area of existing residential zoned land. This is justified by the detailed assessment undertaken as part of the NSW Land & Environment Court proceedings, which demonstrated that the site is not suitable for urban use, based on the high biodiversity values across the whole site.
6.2 Caravan Parks and Manufactured Home Estates	Justifiably Inconsistent. The planning proposal will remove areas where caravan parks are currently a permitted use. This is justified by the detailed assessment undertaken as part of the NSW Land & Environment Court proceedings, which demonstrated that the site is not suitable for urban use, based on the high biodiversity values across the whole site.
<b>Focus area 7: Industry and Employment</b>	
7.1 Business and Industrial Zones	Does not apply to planning proposal.
7.2 Reduction in Non-hosted Short-term Rental Accommodation Period	Does not apply to planning proposal.
<b>Focus area 8: Resources and Energy</b>	



<b>Section 9.1 Directions Checklist</b>	
<b>Planning Proposal – Burns Point Ferry Road; C Zones</b>	
<b>Direction No.</b>	<b>Compliance of Planning Proposal</b>
8.1 Mining, Petroleum Production and Extractive Industries	Does not apply to planning proposal.
<b>Focus area 9: Primary Production</b>	
9.1 Rural Zones	Does not apply to planning proposal.
9.2 Rural Lands	Justifiably Inconsistent. The planning proposal replaces an existing area of RU2 Rural Landscape with a C2 Environmental Conservation Zone, based on the detailed assessment undertaken as part of the NSW Land & Environment Court proceedings, which demonstrated that the site is not suitable for urban use, based on the high biodiversity values across the whole site.
9.3 Oyster Aquaculture	Does not apply to planning proposal.
9.4 Farmland of State and Regional Significance on the NSW Far Coast	Does not apply to planning proposal.

## Appendix 6 – Assessment Checklist – Draft Coastal Design Guidelines 2022

Requirement	Applicable (Y/N)	Planning proposal is consistent with Guidelines (Y/N) If no, provide explanation/ justification
A.1a Avoid development on undeveloped headlands or significant coastal landform.	N	
A.1b Identify sensitive coastal ecosystems including coastal wetlands or littoral rainforest that may be impacted by development.	Y	The site contains a significant area mapped as Coastal Wetland under SEPP (Resilience & Hazards) 2021.
A.1c Maintain the presence of beaches, rock platforms, coastal dunes and the natural features of foreshores.	N	
A.2a Identify coastal wetlands and littoral rainforests and do not increase development or intensify land uses in these areas.	Y	Consistent Application of the C2 Environmental Conservation zone will prevent intensification of land use close the mapped coastal wetland.
B.1a In land mapped as coastal vulnerability areas do not allow planning proposals that are likely to alter coastal processes to the detriment of the natural environment or other land.	N	
B.2a Integrate development within the natural topography of the site and ensure building type, scale and height responds sympathetically to coastal landforms.	Y	Consistent The C2 Environmental Conservation will prevent urban development of the site. Such development would require significant landform modification by way of filling (due to flood). The previous application proposed an average fill height of 2.5m across the development site.
B.2b Avoid development that dominates coastal elements, including foreshores, public spaces and other areas of natural beauty.	N	
B.3a Limit ribbon development and coastal sprawl wherever possible.	Y	Consistent C2 Environmental Conservation will prevent urban development, providing Burns Point Road as the western 'end' of the West Ballina urban settlement.
C.2a Avoid reducing public amenity, access to and use of	N	

Requirement	Applicable (Y/N)	Planning proposal is consistent with Guidelines (Y/N) If no, provide explanation/ justification
any beach, foreshore, rock platform or headland, considering both current coastal hazards and projected future coastal hazards.		
C.2b Avoid development on coastal dunes and foreshore reserves for any purposes other than public purposes, such as surf life-saving club buildings. The use of coastal dunes and foreshore areas for residential purposes is not considered appropriate.	N	
C.3a Avoid development that will overshadow the beach or public domain by applying the standard that there is to be no overshadowing before 4 pm midwinter and 7 pm Daylight Saving Time.	N	
E.1a Do not allow development that is likely to cause increased risk of coastal hazards on that land or other land.	Y	Consistent C2 Environmental Conservation zone will prevent urban development on a site likely to be adversely impacted by tidal inundation in future sea level rise scenarios.
E.2a Identify areas on and adjacent to the proposal that are affected by current or future coastal hazards.	Y	Consistent As above
E.2b Account for potential interaction between coastal hazards and other natural hazards, including flooding, bushfires, landslip and heatwaves.	Y	Consistent Land is mapped as flood prone. Urban development would require substantial filling to raise future housing above relevant flood levels. C2 Environmental Protections zoning will prevent such development.
E.2c Do not enable increased development or a more intensive land use in a coastal vulnerability area identified in the Resilience and Hazards SEPP or on any land identified as affected by a current or future coastal hazard.	Y	Consistent As above