Land and Environment Court

New South Wales

Case Name:	Goldcoral Pty Ltd (Receiver and Manager Appointed) v Richmond Valley Council
Medium Neutral Citation:	[2024] NSWLEC 77
Hearing Date(s):	3-6, 11-14 June 2024
Date of Orders:	31 July 2024
Decision Date:	31 July 2024
Jurisdiction:	Class 1
Before:	Preston CJ
Decision:	(1) The appeal is upheld. (2) Development consent is granted to development application DA 2015/00096 for a concept proposal for the subdivision of land at 240 Iron Gates Drive, Evans Head, being Lot 163 in DP831052 and Lots 276 and 277 in DP755624, and a detailed proposal for Stage 1 of the development, subject to conditions, as stated in the development consent annexed and marked as 'Annexure A'.
Catchwords:	ENVIRONMENT AND PLANNING – Consent development application – concept proposal for residential subdivision and detailed proposal for first stage – prior unauthorised works for different subdivision – whether development consent can be granted to amend and use some unauthorised works – mapped coastal wetlands on land – subdivision of whole land but not part of land mapped coastal wetlands – whether development is designated development – applicable environmental planning instrument – current instrument provides for designated development – whether accrued right for application of former instrument – impact on Koala – whether land is

a potential koala habitat or a core koala habitat – no development on either habitat – impact on Wallum Froglet – no development in habitat – impact on littoral rainforest – whether sufficient buffer width to protect – use of neighbouring land for native title rights – impact on – whether sufficient buffer to protect – Aboriginal cultural heritage sites – cultural landscape, midden and burial site – impact on – development will not diminish cultural landscape – no development on midden or burial site
ENVIRONMENTAL PLANNING INSTRUMENTS – saving and transitional provisions – development application lodged under former instruments - former instruments had savings provisions – current instruments do not have saving provisions – operation of Interpretation Act – whether saves accrued right to have development application determined under former instruments

Legislation Cited:

Biosecurity Act 2015 (NSW)
Community Land Development Act 2021 (NSW)
Conveyancing Act 1919 (NSW), ss 88B, 195
Environmental Planning and Assessment Act 1979 (NSW), ss 1.5, 4.10, 4.15, 4.16, 4.22, 4.46, 8.7
Interpretation Act 1987 (NSW), ss 5, 30
Land and Environment Court Act 1979 (NSW), s 39
National Parks and Wildlife Act 1974 (NSW), s 90
Public Roads Act 1902
Roads Act 1993 (NSW), s 138
Rural Fires Act 1997 (NSW), s 100B
Water Management Act 2000 (NSW), s 90

Environmental Planning and Assessment Regulation 2021 (NSW), cl 37
Richmond Valley Local Environmental Plan 2012
State Environmental Planning Policy (Biodiversity and Conservation) 2021
State Environmental Planning Policy (Coastal Management) 2018
State Environmental Planning Policy (Koala Habitat Protection) 2019
State Environmental Planning Policy (Koala Habitat Protection) 2020
State Environmental Planning Policy (Koala Habitat

Protection) 2021
State Environmental Planning Policy No 14 – Coastal Wetlands
State Environmental Planning Policy No 44 – Koala Habitat Protection
State Environmental Planning Policy No 71 – Coastal Protection
State Environmental Planning Policy (Resilience and Hazards) 2021
Biosecurity (Invasive Ant Carriers) Control Order 2023

Cases Cited:

BGP Properties Pty Limited v Lake Macquarie City Council (2004) 138 LGERA 237; [2004] NSWLEC 399
Bandjalang People No 1 and No 2 v Attorney General of NSW [2013] FCA 1278
Bandjalang People No 3 v Attorney General of NSW [2021] FCA 386
CK Design Pty Ltd v Penrith City Council (No 2) [2022] NSWLEC 97
Lorenzato v Burwood Council [2017] NSWLEC 1269
Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc (1992) 81 LGERA 132
Kouflidis v Salisbury City Corporation (1982) 29 SASR 321; 49 LGERA 17
Nalor Pty Ltd v Bankstown City Council (1980) 2 NSWLR 630
Oshlack v Iron Gates Pty Ltd (1997) 130 LGERA 189
Oshlack v Iron Gates Pty Ltd [1997] NSWLEC 89
Oshlack v Richmond River Shire Council and Iron Gates Development Pty Ltd (1993) 82 LGERA 222; [1993] NSWLEC 3
Oshlack v Richmond River Shire Council (1994) 82 LGERA 236
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11
Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel (2018) 235 LGERA 345; [2018] NSWLEC 207
Richmond-Evans Environmental Society Inc v Iron Gates Developments Pty Ltd, unreported Land and Environment Court, No 40158 of 1991, Bannon J, 20 December 1991
Sofi v Wollondilly Shire Council (1975) 2 NSWLR 614
The Dubler Group Pty Ltd v Minister for Infrastructure,

	Planning and Natural Resources (2004) 137 LGERA 178; [2004] NSWCA 424 Wilson v Iron Gates Pty Ltd, unreported Land and Environment Court No 40172 of 1996, Stein J, 2 December 1996
Category:	Principal judgment
Parties:	Goldcoral Pty Ltd (Receiver and Manager Appointed) (Applicant) Richmond Valley Council (First Respondent) Simone Barker (Second Respondent)
Representation:	Counsel: P Tomasetti SC and A Hemmings (Applicant) M Astill (First Respondent) L Sims (Second Respondent) Solicitors: Corrs Chambers Westgarth (Applicant) Wilshire Webb Staunton Beattie Lawyers (First Respondent) King & Wood Mallesons (Second Respondent)
File Number(s):	2022/279591
Publication Restriction:	NIL

JUDGMENT

Mapping the real issues in dispute

1 This planning appeal is an illustration of T.S. Eliot's poetic observation in *The Hollow Men* that "between the idea and the reality… falls the Shadow." The applicant, Goldcoral Pty Ltd (Receiver and Manager Appointed) (Goldcoral) has appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) against the refusal of the Northern Regional Planning Panel, on behalf of the consent authority, Richmond Valley Council (the Council), of a development application that sets out concept proposals and detailed proposals for the first stage of residential subdivision (the development) of land at 240 Iron Gates Drive, Evans Head (the land).

2 The land proposed to be developed for the residential subdivision is legally described as Lots 276 and 277 in DP 755624. To the west of Lots 276 and 277

is Lot 163 in DP 831052. The only development for which consent is now sought on Lot 163 is the demolition of the existing house and other structures on that lot. In between Lot 276 and Lot 163 is a Crown Road Reserve. No development is now proposed in the Crown Road Reserve. Together, these lots and reserve have an area of about 72 hectares.

3 The development is controversial and has had a long history. From at least 1988, various owners of the land have lodged development applications proposing residential subdivision of the land. In 1988 and 1993, the Council granted two development consents for residential subdivision and construction of the necessary access road. Those development consents have been challenged in litigation by community members and organisations opposed to the development of the land and neighbouring land. Some of that litigation has been successful, others not. That litigation is summarised in *Richmond-Evans Environmental Society Inc v Iron Gates Developments Pty Ltd*, unreported, Land and Environment Court, No 40158 of 1991, Bannon J, 20 December 1991; *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc* (1992) 81 LGERA 132; *Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd* (1993) 82 LGERA 222; *Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd* (1994) 82 LGERA 236; *Wilson v Iron Gates Pty Ltd*, unreported, Land and Environment Court, No 40172 of 1996, Stein J, 2 December 1996; *Oshlack v Iron Gates Pty Ltd* (1997) 130 LGERA 189; *Oshlack v Iron Gates Pty Ltd* [1997] NSWLEC 89; *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11.

4 The previous land owners carried out development on the land purportedly in accordance with the development consents, although the lawfulness of the work was disputed. The development included constructing an access road from Evans Head township to the site, named Iron Gates Drive, and erecting a bridge over a creek for the access road, extensive clearing of the land and earthworks, and construction of internal roads and stormwater and sewage infrastructure for the residential subdivision. The previous land owners then encountered financial troubles and ceased carrying out the development. The development was abandoned. Much of the areas cleared for the residential subdivision naturally re-vegetated.

5 The current land owner Goldcoral has proposed a new residential subdivision, partly in the areas of the abandoned subdivision. That is the development the subject of the current development application and the appeal to this Court. The community remains opposed to any residential subdivision of the land. This time the Council has joined the community in opposing the proposed development of the land. The Council defended on the appeal the Panel's decision to refuse development consent. A traditional owner of Country of which the land is a part, Ms Simone Barker, is also opposed to the development. Ms Barker applied to be and was joined as a respondent to the appeal.

6 The Council's, Ms Barker's and the community's opposition are founded on ideas about the development proposed in the amended development application, the environment affected by the development, and the law applicable to assessing the development application, which are not reflective of the reality of the development, the environment and the law. Thus, my reference to T.S. Eliot's observation that there is a shadow between the idea and the reality. The shadow may be dispersed by shining a light to illuminate the reality of the development, the environment and the law. Let me explain.

7 The idea of the development is founded and framed by the excessive and allegedly unlawful developments carried out on the land by the previous land owners, as well as the more extensive and less environmentally sensitive development originally proposed by Goldcoral in the development application first lodged in 2014. Those developments, and their perceived unacceptable environmental impacts, are seared in the memory of the Council, Ms Barker and the community.

8 The reality is that none of those developments is now being proposed by Goldcoral. Goldcoral has amended the development application to propose a residential subdivision that is less extensive and confined to areas of the land that have been previously cleared, many times and over many decades, so as to avoid significant impact on environmentally and culturally sensitive areas of the land.

9 The idea of the environment is founded and framed on conceptions of what the environment might have been at the time those previous developments were proposed and carried out. Those conceptions may have been idealized – the environment was conceived to be more pristine and ecologically intact than it really was. Regrettably, the carrying out of those previous developments continued a transformation of the environment that had begun over 40 years before.

10 The reality is that the northern and eastern parts of the land were extensively sand mined in the mid-1960s to the mid-1970s. This involved the total clearance of all vegetation on those parts of the land, the dredging of those parts of the land for sand, and afterwards the re-grading and revegetation of the land in the late-1970s with plant species not representative of the diversity of the pre-existing vegetation communities.

11 These revegetated areas in the northern and eastern parts of the land were again totally cleared and extensive earthworks undertaken for the previous residential subdivision in the mid-1990s. The roads, stormwater and sewage infrastructure, and drainage channels were constructed at this time. A photograph presumably taken from an aeroplane or helicopter in the mid-1990s shows the significant extent of earthworks involved in constructing the roads and drainage channels in the northern and eastern parts of the land. Two aerial photographs taken after the works had been completed show the northern and eastern parts of the land totally cleared north of the triangular-shaped area of littoral rainforest, except for a small island of vegetation in the north. The second aerial photograph, dated as 1998, shows the cleared areas as being grassed. The first aerial photograph shows the cleared areas as exposed sand or earth, so is likely to have been taken in 1996-1997 before the second photograph in 1998. After the development was abandoned and the Court ordered the land to be remediated in 1997, regrowth vegetation in the northern and eastern parts of the land is evident in the 2012, 2013, 2018 and 2022 aerial photographs. These highly disturbed northern and eastern parts of the land are proposed to be developed by Goldcoral for the northern area of the residential subdivision.

12 The southern and western parts of the land have long been cleared for agriculture. A 1958 aerial photograph shows these areas as having been already cleared, except for the two areas where the littoral rainforest still exists today. The cleared areas, including the hill to the west, are where Goldcoral proposes the southern area of the residential subdivision. Both a 1977 and a 1980 aerial photograph show evidence of ploughed furrows in the cleared southern and western parts of the land, as well as the early stages of revegetation of the sand mined areas in the northern and eastern parts of the land.

13 The 1998 aerial photograph shows the southern and western parts of the land to be grassland, presumably for grazing. By this time, Iron Gates Drive had been constructed providing access to the land. The internal road bisecting the two areas of littoral rainforest had been constructed, as well as a road travelling southwest to northeast following the alignment of the existing electricity powerline. To the west of the powerline, there is evidence of earthworks on the hill in the western part of the land. The aerial photograph taken in around 1996-1997, depicting the exposed areas in the northern and eastern parts of the subdivision, clearly shows the two access roads, one bisecting the littoral rainforest and the other following the powerline, as well as extensive earthworks on the hill in the western part of the land, with the earth in that area being totally exposed. The photograph presumably taken from an aeroplane or helicopter in the mid-1990s also shows the earthworks and excavation on the hill having commenced. The aerial photographs in 2012, 2013, 2018 and 2022 show the southern and western parts of the site being maintained as totally cleared and grassed areas.

14 The idea of the law is founded and framed by a misconception that the strategic planning law does not provide for and facilitate the residential subdivision of the land. The long history of zoning of the land for residential purposes is overlooked in the opposition to any development of the land for the very residential purposes for which the land has been zoned.

15 The reality is that since at least 1983 the land has been zoned to permit development for residential purposes. Under Richmond River Local

Environmental Plan No 3, which commenced in 1983, the land, including the areas of the land now proposed for residential subdivision (within Lots 276 and 277 and Lot 163), was zoned 2(d) Residential, 3(c) Neighbourhood Business, 9(a) Tourist and 6(c) Open Space.

16 Pursuant to that environmental planning instrument, the Council granted development consent on 20 October 1988 for the subdivision of the land in four stages to create 610 residential allotments, a four-hectare lot for tourist development, a six hectare lot for a neighbourhood centre, a 20 hectare lot for open space, and seven lots totalling 8.5 hectares for public reserves. On 19 July 1990, the Council granted development consent for the construction of an access road between Wattle Street, Evans Head and the land (Lot 277) through the wetlands. This became Iron Gates Drive. On 27 September 1991, the land for the access road was gazetted as a public road under the *Public Roads Act 1902* (NSW).

17 The replacement Richmond River Local Environmental Plan 1992, which commenced in 1992, zoned the relevant areas of the land (within Lots 276 and 277 and Lot 163) Residential 2(v) Village. As the development consent granted in 1988 had lapsed, the Council granted another development consent on 22 March 1993, pursuant to the 1992 environmental planning instrument. The development consent was for 110 residential lots, plus reserves for active open space and environmental protection. On 4 June 1993, an alternative route for the access road, which differed from the route shown in the 1991 Gazette, was gazetted as a public road. Iron Gates Drive is in this alternative gazetted route.

18 The next environmental planning instrument, Richmond Valley Local Environmental Plan 2012 (RVLEP), zoned the relevant areas of the land (within Lots 276 and 277 and Lot 163) R1 General Residential, C2 Environmental Conservation and C3 Environmental Management. This is the current environmental planning instrument. Goldcoral's proposed residential subdivision is within the R1 General Residential zone and the littoral rainforest conservation area is within the C2 Environmental Conservation zone. No development on the land is proposed in the C3 Environmental Management Zone. There is a splay in the north-eastern corner of the area zoned R1

General Residential at the interface with the C2 Environmental Conservation zone. That splay coincides with an area mapped as coastal wetlands under successive State environmental planning policies, being State Environmental Planning Policy No 14 – Coastal Wetlands (SEPP 14), State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP) and State Environmental Planning Policy (Resilience and Hazards) 2021 (RAH SEPP). The area mapped as coastal wetlands under these instruments is within the C2 Environmental Conservation zone under RVLEP and does not intrude into the R1 General Residential zone.

19 The proposed subdivision and later development for residential purposes of the land zoned R1 General Residential are consistent with the objectives of the zone. As I have noted, the land has long been zoned for residential purposes to provide for the housing needs of the community. The land, although separated from the Evans Head township, has been identified as being a suitable location for residential development. The proposed development realises this strategic planning objective. The proposed conservation of the littoral rainforest and other environmentally sensitive areas on the land zoned C2 Environmental Conservation and C3 Environmental Management is consistent with the objectives of these zones. The consistency of the proposed development with the objectives of these three zones is a matter to be considered when determining the development application, under cl 2.3(2) of RVLEP.

20 The strategic planning objective promoting residential development of the land, reflected in the zoning of the land as R1 General Residential under RVLEP, has continued since 2012 in subsequent strategic planning documents of both State Government and the Council.

21 The NSW Department of Planning and Environment's North Coast Regional Plan 2036, published in 2016, identifies the Iron Gates land as an "Urban Growth Area" in the Richmond Valley local government area: Figure 17. The Plan's stated purpose is to provide "an overarching framework to guide subsequent and more detailed land use plans, development proposals and infrastructure funding decisions.": p 4.

22 The Council's Local Strategic Planning Statement: Beyond 20-20 Vision, published in May 2020, sets a 20-year planning vision for the Richmond Valley local government area. The Statement identifies one of the "several potentially large developments proposed at Evans Head" as "the Iron Gates subdivision (with potentially 174 residential lots)": p 16. The Statement reproduces, as Figure 15 of the Statement, Figure 17 from the North Coast Regional Plan 2036, which identifies the Iron Gates land as an Urban Growth Area. The Statement records the need to construct Stage 2 of the upgrade of Evans Head's STP to meet the additional demand from future urban growth areas, including the "potential subdivision at the Iron Gates (174 lots).": p 34.

23 The Department of Planning and Environment's North Coast Regional Plan 2041, published in 2021, sets a 20-year strategic planning framework for the North Coast region. It represents a five-year review of the region's strategic planning settings since the North Coast Regional Plan 2036, published in 2016: p 6. The Plan continues to identify the Iron Gates land as an Urban Growth Area: Figure 22. The Plan states that one of the land use planning strategies is to "direct growth to identified urban growth areas": p 61.

24 The Council's Richmond Valley Growth Management Strategy, published in April 2023, states its purpose to be "to support and guide the growth of both residential and employment land in the Richmond Valley", including at Evans Head. The Strategy identifies the Iron Gates land as one of the areas of growth of residential land at Evans Head, noting: "There is existing land zoned for residential purposes at Iron Gates.": p 29.

25 This long history of zoning the Iron Gates land for residential purposes and continuing to identify the land as an Urban Growth Area to meet the demand for residential development at Evans Head needs to be given weight in determining the development application for the subdivision of the land for residential purposes. In *BGP Properties Pty Limited v Lake Macquarie City Council* (2004) 138 LGERA 237; [2004] NSWLEC 399 at [117]-[118], McClellan CJ said:

> "In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site.

> Although the fact that a particular use may be permissible is a neutral factor (see *Mobil Oil Australia Ltd v Baulkham Hills Shire Council (No 2)* 1971 28 LGRA 374 at 379), planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects (*Nanhouse Properties Pty Ltd v Sydney City Council* (1953) 9 LGR(NSW) 163; *Jansen v Cumberland County Council* (1952) 18 LGR(NSW) 167). Part 3 of the *EP&A Act* provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.
>
> In most cases it can be expected that the Court will approve an application to use a site for a purpose for which it is zoned, provided of course the design of the project results in acceptable environmental impacts."

26 McClellan CJ did qualify this statement of general principle where the zoning was imposed many years ago and may no longer reflect contemporary standards, saying at [119]:

> "However, there will be cases where, because of the history of the zoning of a site, which may have been imposed many years ago, and the need to evaluate its prospective development having regard to contemporary standards, it may be difficult to develop the site in an environmentally acceptable manner and also provide a commercially viable project."

27 This qualification is not applicable to the Iron Gates land. The appropriateness of the zoning of the land for residential purposes has been re-assessed continuously since 1983 when the land was first zoned for residential purposes by Richmond River Local Environmental Plan No 3. As I have earlier recorded, the residential zoning of the land was affirmed in 1992 by the Richmond River Local Environmental Plan 1992 and in 2012 by RVLEP. The land continues to be identified as an urban growth area to meet the demand for residential land: in 2016, by the NSW Government's North Coast Regional Plan 2036; in 2020, by the Council's Local Strategic Planning Statement: Beyond 20-20 Vision; in 2021, by the NSW Government's North Coast Regional Plan 2041; and in 2023, by the Council's Richmond Valley Growth Management Strategy. These continuing re-assessments of the suitability of the land for development for residential purposes have had regard to contemporary standards and the capability of the land to be developed for those purposes in an environmentally acceptable manner.

28 This illumination of the reality of the development, the environment and the law disperses the shadow darkening the Council's, Ms Barker's and the community's ideas about the development, the environment and the law. When this is done, the development proposed in the amended development application can be seen to be environmentally acceptable and able to be approved subject to appropriate conditions. Each of the issues raised by the Council and Ms Barker, and the concerns raised by the community, can be adequately addressed.

29 I will structure these reasons for judgment as follows. First, I will explain the development that is now proposed in the amended development application and for which development consent is sought. Second, I will address the principal contested issues raised by the Council and Ms Barker as to why development consent ought not to be granted for that development. For those issues which raise a legal issue, I will explain the law that is applicable and its meaning and application. For those issues which concern an impact on the environment, I will describe the environment that is likely to be affected, and how that impact is to be mitigated to be acceptable. Third, I will summarise the other concerns raised by the community on the appeal and explain how those concerns have been addressed satisfactorily. Fourth, I will address the contested conditions of consent. Fifth, I will conclude by outlining the development consent that should be granted and the conditions of consent that should be imposed.

The proposed development

30 The development proposed by Goldcoral has undergone many changes, a criticism the community makes. But the Court's task on the appeal is to consider and to determine the development application in its final form, howsoever that final form might have been reached.

31 The Court's duty under s 4.16(1) of the EPA Act, exercising the consent authority's function on the appeal, is to determine the development application as finally amended. An applicant may, at any time before a development application is determined, amend the development application. There is a statutory process for amending a development application under cl 37 of the

Environmental Planning and Assessment Regulation 2021 (NSW). This involves applying to the consent authority for its agreement to the proposed amendment, but if it is not agreeable to the proposed amendment, the Court may allow the amendment exercising its power under s 39(2) of the *Land and Environment Court Act 1979* (NSW) (the Court Act). This is the process Goldcoral has followed. The final amendment was made towards the end of the hearing of the appeal. The Council did not oppose that amendment. The development application as finally amended is the application the Court must determine.

32 The Court's duty under s 4.15(1) of the EPA Act, exercising the function of the consent authority, is to take into consideration the matters in that subsection "as are of relevance to the development the subject of the development application." This is the development application as finally amended.

33 I emphasise this point, that the Court must consider and determine the development application as finally amended, because much of the opposition of the Council, Ms Barker and the community appeared to be based on earlier proposals for the development of the land. In the case of the community, their opposition was forged in the campaigns over the last three and a half decades to stop any development of the land. That is understandable. But for the opposition to be relevant to the current proposal, it must be reframed to focus on the development proposed in the development application as finally amended. Likewise, many of the issues raised by the Council and Ms Barker in their Statements of Facts and Contentions lost potency and cogency when the development application was amended to address these issues. It is important, therefore, to describe the development now proposed in the development application as finally amended.

34 The development application as finally amended remains a concept development application under s 4.22 of the EPA Act. Goldcoral had requested the development application when first lodged to be treated as a concept development application, under s 4.22(3) of the EPA Act. Goldcoral maintained that request with its subsequent amendments of the development application, including the final amendment at the hearing.

35 As s 4.22(1) of the EPA Act provides, a concept development application sets out concept proposals for the development of a site, and for which detailed proposals for the site or separate parts of the site are to be the subject of a subsequent development application or applications. A concept development application for staged development may also set out detailed proposals for the first stage of development.

36 Goldcoral's concept development application sets out both concept proposals for the development of the land and detailed proposals for the first stage of the development. The concept proposals are for:

(a) the subdivision of the land; provision and upgrade of infrastructure; and upgrade of Iron Gates Drive;

(b) part of the land to be subdivided as a community title scheme under the *Community Land Development Act 2021* (NSW);

(c) the use of part of the land zoned R1 General Residential under RVLEP identified as "Stage 1" for:

(i) residential development comprised of dwelling houses and dual occupancy development;

(ii) open space purposes associated with the residential development;

(iii) a community building for use by residents and visitors during times of flood and fire emergency and for other facilities, subject to any necessary development consent; and

(d) land zoned C2 Environmental Conservation to be set aside and managed into the future to retain and enhance ecological values of existing and proposed vegetation.

37 The detailed proposals for the first stage of the development involve:

(a) demolition of existing buildings, roads, and stormwater and sewage infrastructure present on the land;

(b) subdivision of the land into 126 lots comprising:

(i) 123 lots subdivided into a community scheme established under the *Community Land Development Act 2021* comprising:

- one community property lot (Lot 1) containing the land retained and managed for conservation purposes and the community building; and

- 122 community development lots, being 121 individual residential allotments (Lots 2 - 122) and one residue lot (Lot 123) for future subdivision (to be the subject of a further development application); and

(ii) the following lots not forming part of the community scheme:

- one public open space lot (Lot 147);
- one sewer pump station (Lot 148);
- one residue lot (Lot 142); and
- public roads including stormwater infrastructure;

(c) construction of internal roads and stormwater, water, sewage and other infrastructure;

(d) vegetation management works on part of the community property, including vegetation removal and retention, environmental protection works, and ongoing environmental management;

(e) bulk earthworks;

(f) upgrades to Iron Gates Drive; and

(g) provision of upgrades to water and sewer infrastructure in Iron Gates Drive as required.

38 Goldcoral does not seek consent for any development with respect to Stage 2 of the subdivision; that is to be the subject of a subsequent development application. Construction of dwellings on the subdivided lots, construction of the community building and embellishment of the proposed open space areas would also be the subject of subsequent development applications.

39 Pursuant to s 4.23(2) of the EPA Act, the making and approval of a concept development application in respect of land satisfies a requirement of an environmental planning instrument for the preparation of a development control plan before any particular or kind of development is carried out on any land. In this case, cl 18 of State Environmental Planning Policy No 71 – Coastal Protection (SEPP 71) required a master plan before the grant of development consent on land within a residential zone if the land is in a sensitive coastal location. The Iron Gates land to be subdivided is in a residential zone (General Residential R1 under RVELP) and a sensitive coastal location under SEPP 71, as the land is located within 100m of the mean high water mark and is within 100m of coastal wetlands identified under SEPP 14: see paragraphs (a) and

(g) of the definition of "sensitive coastal location" in s 3(1) of SEPP 71. By virtue of cl 95(2) of Schedule 1 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017, the requirement of cl 18 of SEPP 71 for a master plan before the grant of a development consent is to be construed as a requirement for a development control plan under the former s 74D of the EPA Act. So construed, s 4.23(2) of the EPA Act operates to cause that requirement for a development control plan to be satisfied by the making and approval of a concept development application in respect of the land. Goldcoral's concept development application serves this purpose.

40 Goldcoral will also be required to obtain other statutory approvals to carry out the development. Under s 4.46(1) of the EPA Act, the development proposed by Goldcoral in the development application is integrated development as, in order for the development to be carried out, it requires development consent and one or more of the following approvals:

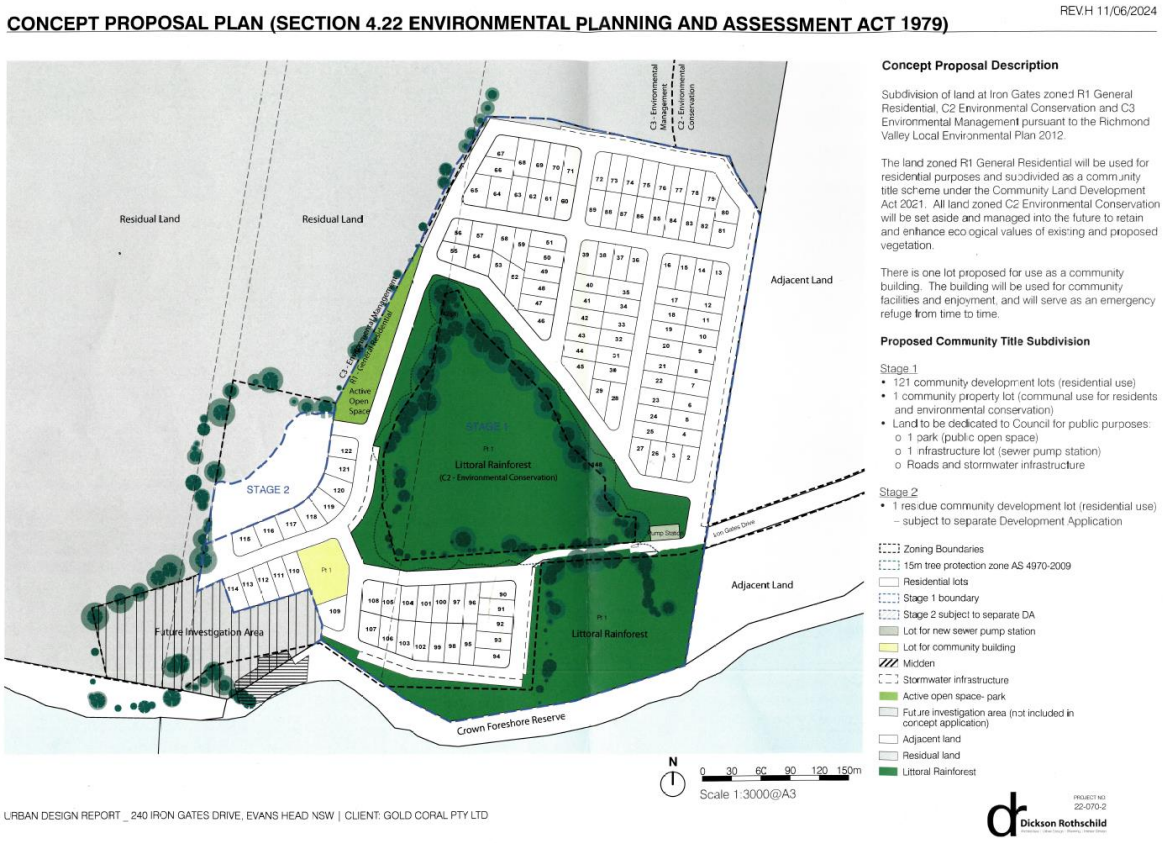
(a) a bush fire safety authority pursuant to s 100B of the *Rural Fires Act 1997* (NSW) for the subdivision of bush fire prone land for residential purposes;

(b) a water supply work approval pursuant to s 90 of the *Water Management Act 2000* (NSW);

(c) an Aboriginal heritage impact permit pursuant to s 90 of the *National Parks and Wildlife Act 1974* (NSW); and

(d) an approval under s 138 of the *Roads Act 1993* (NSW) for works carried out on a public road (Iron Gates Drive).

41 The concept proposal plan, depicting and describing the concept proposal and community title subdivision, is reproduced below.



42 As I have noted, these concept proposals and detailed proposals were amended a number of times to address issues raised by the Council and Ms Barker and concerns raised by the community. Amongst these amendments were:

(a) the contraction of Stage 2 of the development to the hill in Lot 276 to the west of proposed Lots 115 – 122, with the area in the southwest of the land (within Lot 276 and Lot 163) formerly proposed to be part of Stage 2 becoming a future investigation area. This removed conflicts with, and impacts on, a midden and koala feed trees in that area formerly proposed to be developed as Stage 2;

(b) the expansion of vegetated buffer areas along the interfaces of the two littoral rainforest areas with the proposed roads and residential development. This reduced the ecological impacts of the development on those conservation areas;

(c) the expansion of the vegetated buffer area to the south of proposed Lots 90-109, in the southern area of the residential subdivision. This reduced the impacts of the development on nearby areas of land to the south and the waters of Evans River used by the traditional owners of Country for the exercise and enjoyment of their native title rights;

(d) the establishment and inclusion within the road reserve of the roads within the subdivision to be dedicated to the Council of bioretention basins. This overcame an issue of the future maintenance of the bioretention basins by the community association; and

(e) the change from a Torrens title subdivision to a community title subdivision. This overcame an issue of the future establishment and ongoing maintenance of community property for conservation purposes and the community building.

43 These amendments to the development application have significantly reduced the principal contested issues on the appeal.

The principal contested issues

44 Although the amendments of the development application reduced the issues raised by the Council in its Statement of Facts and Contentions and Amended Statement of Facts and Contentions, the Council still pressed two legal issues and two merit issues. The two legal issues were:

(a) development consent cannot be granted for unauthorised works already constructed and not proposed to be removed under the amended development application (contention 1 – unauthorised works issue); and

(b) development consent cannot be granted because the proposed development is designated development under cl 2.7 of RAH SEPP (Contention 2 – designated development issue).

45 The two merit issues were:

(a) the proposed development has not been designed to mitigate and minimise significant environmental impacts, including impacts to the littoral rainforest, Koala habitat, Wallum Froglet habitat and coastal wetlands (contentions 3, 4, 9, 10 and 12 – ecology issues); and

(b) the proposed development is not consistent with the desired future character of the locality and does not incorporate a subdivision layout and design that minimises impacts on the sensitive environmental and cultural areas within and adjacent to the land (contentions 9 and 11 – character and layout issues).

46 The Council did not press the other contentions raised in its Amended Statement of Facts and Contentions filed on 23 May 2024 (the last version filed by the Council).

47 Ms Barker pressed two contentions:

(a) the proposed development will have an unacceptable impact on the exercise and enjoyment of native title rights on land and waters near the land (contention 1 – impact on native title rights issue); and

(b) the proposed development will have an unacceptable impact on the Aboriginal cultural values of the land and surrounding areas (contention 2 – impact on Aboriginal cultural heritage issue).

48 I will deal with the Council's two legal issues first, the Council's two merit issues next, and Ms Barker's two issues finally.

The unauthorised works issue

49 Goldcoral proposes to remove nearly all of the roads and stormwater and sewage infrastructure constructed by the previous land owners purportedly in accordance with the previous development consents. Goldcoral proposes to construct new roads and new stormwater and sewage infrastructure on the land. Only two of the previous infrastructure works on the land will remain. The first is the stretch of internal road bisecting the two areas of littoral rainforest on the land. Some works are proposed to be carried out on this small stretch of road, but these have been kept to a minimum to avoid harming the rainforest on either side of the road. The retention of this existing internal road and carrying out of works on the road have not been opposed by the Council on ecology grounds – it is clearly the most ecologically sensitive approach.

50 The second work that will remain is an unformed drainage channel constructed by the previous land owners running inside the north-eastern edge of the northern area of littoral rainforest. This was referred to as the western drainage line. After the previous land owners abandoned the previous subdivision, native vegetation (largely Acacias) has regrown in and beside the drainage channel. Goldcoral proposes to enhance the revegetation of the area in and around the drainage channel to provide a vegetated buffer between the residential subdivision to the north and the littoral rainforest. The parties' ecologists agreed that the drainage channel should be retained within the littoral rainforest buffer and revegetated: Revised Terrestrial Ecology, Aquatic Ecology and Arboriculture Joint Expert Report (Ecology Joint Expert Report), p 3. Again, the retention and revegetation of this drainage channel is not opposed by the Council on ecology grounds.

51 Goldcoral also seeks to use the existing road, Iron Gates Drive, and the bridge over the creek, which were constructed under the previous development consents. Goldcoral proposes some works to upgrade the road and signage. If necessary, Goldcoral will undertake other works to upgrade the bridge and the sewage and water pipes that run along the road and over the bridge. The Council raised no issue with the works proposed for the road and bridge, subject to there being a structural safety assessment of the bridge, which can be appropriately conditioned in any grant of development consent.

52 Nevertheless, the Council raised a technical legal issue. The Council contended that the internal road and drainage channel constructed by the previous land owners on the land and the public road and infrastructure works on Iron Gates Drive were unlawful. The Council did not seek to prove the unlawfulness of these works on this appeal, but was content to rely on the previous litigation for that purpose. If those works were unlawful, the Council contended that Goldcoral should gain no advantage from those unlawful works. The Council relied on what I said in *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345; [2018] NSWLEC 207 at [128] (*Ralph Lauren*), citing what King CJ said in *Kouflidis v Salisbury City Corporation* (1982) 29 SASR 321 at 324; 49 LGERA 17 at 20 that: “The unlawful user of the land should gain no advantage from having established an unlawful use. Any argument based either directly or indirectly upon the unlawful use should be firmly rejected.” The Council submitted that to the extent that Goldcoral seeks to leave and use the internal road and drainage channel on the land and the road, bridge and infrastructure on Iron Gates Drive, it is seeking to gain an advantage from these unlawful works. That should not be permitted.

53 The Council’s argument is misguided. There is no legal principle that development consent cannot be sought to carry out development to erect a building (which includes a structure) or to carry out works that would amend a building or works that are unlawful, and then to use in the future the new or amended building or works. That was recognised in *Ralph Lauren* at [128]. Contrary to the Council’s contention, development consent can be granted to the development proposed by Goldcoral to carry out works to upgrade the

stretch of internal road through the littoral rainforest, to revegetate and use for conservation purposes the existing drainage channel in the littoral rainforest and to upgrade and use the road, bridge and infrastructure on Iron Gates Drive.

54 The granting of development consent for these works and uses does not allow Goldcoral to gain advantage "from having established an unlawful use". As a matter of fact, Goldcoral did not establish the unlawful use either on the land or on the now dedicated public road, Iron Gates Drive. The works on the land were carried out by the previous owners of the land. Goldcoral purchased the land with those works already constructed. The previous land owners constructed Iron Gates Drive and the Council erected the bridge over the creek, and the road and bridge were dedicated as a public road. Moreover, Goldcoral is not making any argument based either directly or indirectly upon the unlawful use of the works on the land or Iron Gates Drive. The argument that consent be granted for Goldcoral's proposed development is not dependent for its success on the unlawfulness of the works on the land or Iron Gates Drive.

55 The Council's counterfactual argument does not assist. The Council submitted that had the previous land owners complied with this Court's orders made in *Oshlack v Iron Gates Pty Ltd* [1997] NSWLEC 89 on 4 July 1997 to remediate the drainage channel, the drainage channel would no longer exist so as to provide the basis for the proposed development. Maybe, maybe not. But it does not matter. Goldcoral is not seeking to take advantage of the drainage channel as a drainage channel, but rather as a revegetated area that can serve as a buffer to protect the littoral rainforest. This is the same purpose that would have been served if the drainage channel had been removed and revegetated in accordance with the Court's orders.

The designated development issue

56 The Council noted that "designated development" for the purposes of the EPA Act includes development that is declared to be designated development by an environmental planning instrument: s 4.10(1) of the EPA Act. The RAH SEPP

is an environmental planning instrument that declares specified development to be designated development: cl 2.7(2).

57 The Council's contention that the proposed development is designated development depends on the RAH SEPP applying to the development. The RAH SEPP is in force, having commenced on 1 March 2022. On the Coastal Wetlands and Littoral Rainforests Area Map under the RAH SEPP, part of the land (within Lot 277) is identified as "coastal wetlands". This area of coastal wetlands is within the area of the land zoned C2 Environmental Conservation under RVLEP. The land proposed for the residential subdivision is wholly within the R1 General Residential zone, which is to the south and east of the land zoned C2 Environmental Conservation and the area identified as coastal wetlands under the RAH SEPP.

58 Nevertheless, the Council contended that development will still be carried out on land identified as coastal wetlands because one of the lots of the land, Lot 277, will be subdivided under the community title subdivision to create residential lots to the south of the area identified as coastal wetlands. The Council contended that the subdivision of the land is "development" as defined in s 1.5(1)(b) of the EPA Act. Subdivision is defined in s 6.2(1) of the EPA Act to mean "the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition", and by s 6.2(2) of the EPA Act, subdivision of land includes the "procuring of the registration in the Office of the Registrar-General of…a plan of subdivision within the meaning of section 195 of the *Conveyancing Act 1919*" (NSW). The Council noted that these definitions make clear that subdivision of land does not require the carrying out of works on land; merely dividing land by drawing of lines on a plan of subdivision that is registered can suffice. On this basis, by subdividing Lot 277, Goldcoral is carrying out development for the purposes of the EPA Act.

59 The Council submitted that cl 2.7(2) of the RAH SEPP declares that development to be designated development. Clause 2.7(2) provides that development for which consent is required by cl 2.7(1), other than development for the purpose of environmental protection works, is declared to be designated

development. Subsection (1) provides that the development specified in the subsection may be carried out on land identified as “coastal wetlands” only with development consent. One of the developments specified in (d) is “any other development”. The Council submitted that subdivision falls within this category of any other development. Therefore, the subdivision of land identified as coastal wetlands is designated development.

60 The Council submitted that the consequence is that development consent cannot be granted to the subdivision as the development application was not accompanied by an environmental impact statement and the statutory procedures for public notice and consultation for designated development have not been complied with.

61 Goldcoral contested the Council’s argument that the development is designated development for three reasons. First, Goldcoral’s development application is to be assessed under SEPP 14 and SEPP 71, which do not declare the proposed development to be designated development, rather than RAH SEPP. Second, even if RAH SEPP does apply to Goldcoral’s development application, no part of the land identified as “coastal wetlands” under RAH SEPP will be subdivided – the boundaries of the lots shown on the plan of subdivision are outside of the area identified as “coastal wetlands.” The boundary between the residential allotments and the area mapped as coastal wetlands follows the splay at the interface of the R1 General Residential zone and the C2 Environmental Conservation zone, which coincides with the boundary of the area identified as coastal wetlands. Third, the subdivision of the land without carrying out any works on the land does not involve the carrying out development “on land” within the area mapped as coastal wetlands.

62 I find that Goldcoral’s proposed development is not designated development, for the three reasons advanced by Goldcoral.

63 First, Goldcoral, as the applicant who made the development application at a time when the former environmental planning instruments of SEPP 14 and SEPP 71 were in force, has a right to have its development application

determined under those instruments. That right is founded on s 5(6) and s 30(2)(b) and (d) of the *Interpretation Act 1987* (NSW).

64 Goldcoral lodged the development application on 27 October 2014. At that time, SEPP 14 was in force. Clause 7(1) of SEPP 14 restricted a person carrying out specified development on land to which SEPP 14 applied without development consent. The land to which the policy applied was land "outlined by the outer edge of the heavy black line on the map": cl 4(1) of SEPP 14. The map outlined as coastal wetlands a slither in the north-eastern part of the land within Lot 277. The adjoining land to the east was largely mapped as coastal wetlands under SEPP 44, with only a narrow strip of coastal wetlands encroaching across the common boundary with the land. The southernmost encroachment into the land of the mapped coastal wetlands formed the splay that later became the interface between the R1 General Residential zone and the C2 Environmental Conservation zone under RVLEP.

65 The development specified in cl 7(1) of SEPP 14 as requiring consent was to clear land to which the policy applied, construct a levee on that land, drain that land or fill that land. Clause 7(3) of SEPP 14 declared development for which consent is required by cl 7(1) to be designated development for the purposes of the EPA Act. The development proposed by Goldcoral does not involve carrying out on the land outlined as coastal wetlands on the SEPP 14 map any of the developments specified in cl 7(1) as requiring consent. Hence, Goldcoral's proposed development was not declared by SEPP 14 to be designated development.

66 SEPP 71 also applied to the land at the time Goldcoral lodged its development application in 2014. The land proposed to be developed is in the "coastal zone" as defined in s 3(1) of SEPP 71. As the land is located within 100m of the mean high water mark and is within 100m of coastal wetlands identified under SEPP 14, the land is also located within a "sensitive coastal location" as defined in s 3(1) of SEPP 71. SEPP 71 did not contain provisions prescribing any development in the coastal zone or a sensitive coastal location as designated development.

67 On 3 April 2018, the Coastal SEPP repealed and replaced SEPP 14 and SEPP 71. The Coastal SEPP had a savings provision, cl 21(1), which provided:

> "The former planning provisions continue to apply (and this Policy does not apply) to a development application lodged, but not finally determined, immediately before the commencement of this Policy in relation to land to which this Policy applies."

68 The term "former planning provisions" was defined in cl 21(4) to include SEPP 14 and SEPP 71. The phrase "finally determined" refers to a development application finally determined by any court on appeal, including this Court: *CK Design Pty Ltd v Penrith City Council* (No 2) [2022] NSWLEC 97 at [42], [43], [50], [51].

69 As a consequence of this saving clause, SEPP 14 and SEPP 71 continued to apply, and the Coastal SEPP did not apply, to Goldcoral's development application.

70 On 1 March 2022, RAH SEPP repealed and replaced the Coastal SEPP. Clause 2.7 of the RAH SEPP regulated the carrying out of development on land identified as "coastal wetlands" on the Coastal Wetlands and Littoral Rainforests Area Map. Development specified in cl 2.7(1) can only be carried out on that land with development consent. Clause 2.7(2) declares development for which consent is required by cl 2.7(1) to be designated development for the purposes of the EPA Act.

71 The RAH SEPP did not save all of the provisions of the Coastal SEPP. The provisions of the Coastal SEPP were generally transferred into Chapter 2 of the RAH SEPP, but the savings provision in cl 21(1) of the Coastal SEPP was not transferred: Schedule 3, cl 1(1) of the RAH SEPP. This lack of transfer of cl 21(1) of the Coastal SEPP to Chapter 2 of the RAH SEPP is the basis for the Council's argument that the provisions of RAH SEPP, and not the former planning provisions of SEPP 14 and SEPP 71, apply to Goldcoral's development application.

72 Goldcoral, however, relies on the provisions of the *Interpretation Act*, s 5(6) and s 30(2)(b) and (d), as continuing to apply the former planning provisions of SEPP 14 and SEPP 71 to Goldcoral's development application. Section 5(6) of the *Interpretation Act* provides that "the provisions of sections…30… that apply

to a statutory rule also apply to an environmental planning instrument." SEPP 14 and SEPP 71 are both environmental planning instruments. Section 30(2) of the *Interpretation Act* provides:

> "(2) Without limiting the effect of subsection (1), the amendment or repeal of an Act or statutory rule does not affect—
>
> (a) the proof of any past act or thing, or
>
> (b) any right, privilege, obligation or liability saved by the operation of the Act or statutory rule, or
>
> (c) any amendment or validation made by the Act or statutory rule, or
>
> (d) the operation of any savings or transitional provision contained in the Act or statutory rule."

73 Goldcoral submitted that the effect of s 30(2)(b) and (d) is that the repeal of the Coastal SEPP by the RAH SEPP did not affect, first, the operation of the savings provision in cl 21(1) of the Coastal SEPP and, second, the accrued right under cl 21(1) of the Coastal SEPP that the former planning provisions of SEPP 14 and SEPP 71 continue to apply to Goldcoral's development application. That an applicant for development consent can have such an accrued right was established by the Court of Appeal's unanimous decision in *The Dubler Group Pty Ltd v Minister for Infrastructure, Planning and Natural Resources* (2004) 137 LGERA 178; [2004] NSWCA 424 (*Dubler*).

74 I agree with Goldcoral that s 30(2)(b) and (d) of the *Interpretation Act* operate to save Goldcoral's accrued right under cl 21(1) of the Coastal SEPP to have its development application determined under the former planning provisions of SEPP 14 and SEPP 71, and not the provisions of RAH SEPP. Although the Council sought to distinguish the decision in *Dubler* on the basis that the accrued right in that case was under the former s 34(4)(b) of the EPA Act, I find the reasoning of the Court to be equally applicable to the equivalent provision in s 30(2) of the *Interpretation Act*.

75 The "right" saved by cl 30(2)(b) of the *Interpretation Act* was not a right that arose from Goldcoral making the development application. A development application is to be determined by a consent authority, and a court on appeal, on the basis of the law that is applicable at the time of determination of the development application: *Sofi v Wollondilly Shire Council* (1975) 2 NSWLR 614 at 622 and *Nalor Pty Ltd v Bankstown City Council* (1980) 2 NSWLR 630 at

634-635. Rather, the right saved by s 30(2)(b) of the *Interpretation Act* was the right that accrued by the operation of the savings provision of cl 21(1) of the Coastal SEPP. That savings provision created the right of Goldcoral, as the applicant for development consent, to have the development application determined under the former planning provisions of SEPP 14 and SEPP 71. This is the right "saved by the operation of" cl 21(1) of the Coastal SEPP. Once that right accrued, the operation and effect of s 30(2)(b) and (d) of the *Interpretation Act* was that the repeal of the Coastal SEPP by the RAH SEPP did not affect the right saved by, and the operation of, cl 21(1) of the Coastal SEPP to have the development application determined under the former planning provisions of SEPP 14 and SEPP 71, and not the current provisions of the RAH SEPP: see *Dubler* at [26], [30], [36], [38].

76 The consequence is that the development proposed by Goldcoral is not designated development for the purposes of the EPA Act. The provisions of the RAH SEPP that do declare specified development to be designated development do not apply to Goldcoral's development application. The provisions of SEPP 14 and SEPP 71, which do apply to Goldcoral's development application, do not declare the development proposed by Goldcoral to be designated development.

77 If contrary to the first reason the provisions of the RAH SEPP, and not the former planning provisions of SEPP 14 and SEPP 71, apply to Goldcoral's development application, cl 2.7 of the RAH SEPP nevertheless does not operate to declare the development proposed by Goldcoral to be designated development. Goldcoral does not propose to carry out on the land any of the developments specified in cl 2.7(1)(a), (b) or (c) of the RAH SEPP. The Council did not contend to the contrary. Rather, the Council contended that Goldcoral is proposing to carry out "any other development", the phrase in cl 2.7(1)(d) of the RAH SEPP, and the proposed subdivision is any other development. The proposed development is, the Council's argument runs, therefore development for which consent is required by cl 2.7(1) and hence declared to be designated development by cl 2.7(2) of the RAH SEPP.

78 I reject the Council's argument for two reasons. The first is that the proposed subdivision does not involve the division of that part of the land identified as coastal wetlands under the RAH SEPP into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The boundaries of the proposed subdivision run along, but not inside, the outer edge of the line on the Coastal Wetlands and Littoral Rainforest Area Map under the RAH SEPP identifying the coastal wetlands that encroach slightly into the eastern part of the land (Lot 277). Whilst this effects a subdivision of Lot 277, it does not subdivide that part of Lot 277 that is "land identified as 'coastal wetlands'… on the Coastal Wetlands and Littoral Rainforests Area Map." That part of Lot 277 identified as coastal wetlands remains intact, not divided.

79 The second reason for rejecting the Council's argument is that, although subdivision of land is development as defined in s 1.5(1) of the EPA Act, the mere subdivision of land by the procuring of the registration in the Office of the Registrar-General of a plan of subdivision without undertaking any physical work on the land, such as the carrying out of a work, does not involve the carrying out of development "on land." Each of the development for which consent is required by cl 2.7(1) of the RAH SEPP is development that is "carried out on land." The procuring of the registration of a plan of subdivision might involve the subdivision of land, which is development, but that subdivision is not "carried out on land."

80 To carry out development on land involves doing something on the land. That is evident with the development specified in paragraphs (a) to (c) of cl 2.7(1) – they all involve physical work on the land with attendant impacts on the land and its vegetation. The catch-all category of "any other development" in paragraph (d) of cl 2.7(1) is no different. Development other than the developments specified in paragraphs (a) to (c) must also be "carried out on land". The mere procuring of the registration of a plan of subdivision in the Office of the Registrar-General does not involve the carrying out of any development on land.

81 For these two reasons, even if the RAH SEPP were to apply to Goldcoral's development application, cl 2.7 of the RAH SEPP does not declare the development proposed in the development application to be designated development.

The ecology issues

82 The Council raised, in contentions 3, 4, 9, 10 and 12 of the Amended Statement of Facts and Contentions, many ecology issues, but by the close of the hearing only pressed the following issues:

(a) development consent cannot be granted to the development application to carry out development on the land, on which there is a core koala habitat, as there is no plan of management prepared in accordance with Part 4 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) that applies to the land (the Koala issue);

(b) the impact of the development on habitat of the Wallum Froglet, an endangered species (the Wallum Froglet issue); and

(c) the inadequacy of the buffer to the littoral rainforest to protect it from edge effects (the littoral rainforest buffer issue).

The Koala issue

83 The Koala issue raises both a legal question and a factual question. The legal question is which environmental planning instrument applies to Goldcoral's development application. The factual question is how the applicable environmental planning instrument applies.

84 Starting with the legal question, the Council contended that the provisions of Chapter 3 of the Biodiversity SEPP apply, while Goldcoral contended that the former provisions of State Environmental Planning Policy No 44 – Koala Habitat Protection (SEPP 44) apply. The issue joined between the parties is the operation and effect of s 30(2) of the *Interpretation Act* in saving an accrued right to have the development application determined under the provisions of SEPP 44. Consistent with my determination of the similar question raised by the designated development issue, I agree with Goldcoral's submission that the applicable environmental planning instrument is SEPP 44, not Chapter 3 of the Biodiversity SEPP.

85 SEPP 44 was in force on 27 October 2014 when Goldcoral lodged its development application for consent to carry out development on the land. For reasons I will explain later, Part 2 of SEPP 44 applied to land within the Richmond Valley local government area, including the land.

86 State Environmental Planning Policy (Koala Habitat Protection) 2019 (SEPP Koala 2019) repealed and replaced SEPP 44 on 1 March 2020. SEPP Koala 2019 applied to land in the Richmond Valley local government area (cl 5(1) and Schedule 1). Clause 15 saved the application of SEPP 44 to Goldcoral's development application. Clause 15 provided:

> "A development application made, but not finally determined, before the commencement of this Policy in relation to land to which this Policy applies must be determined as if this Policy had not commenced."

87 State Environmental Planning Policy (Koala Habitat Protection) 2020 (SEPP Koala 2020) repealed and replaced SEPP Koala 2019 on 30 November 2020. SEPP Koala 2020 applied to land within the Richmond Valley local government area (cl 5(1) and Schedule 1). SEPP Koala 2020 did not contain a savings clause saving any development application made but not finally determined before the commencement of SEPP Koala 2020.

88 State Environmental Planning Policy (Koala Habitat Protection 2021) (SEPP Koala 2021) amended SEPP Koala 2020 on 17 March 2021. SEPP Koala 2021 applied to the Richmond Valley local government area (cl 6 and Schedule 1). SEPP Koala 2021 did have savings and transitional provisions. Schedule 3 had the effect that SEPP Koala 2020 (as amended) still applied to some local government areas, including Richmond Valley, but only to land zoned RU1 Primary Production, RU2 Rural Landscape and RU3 Forestry, none of which apply to the land here. Clause 18 was the conventional savings clause providing that a development application made but not finally determined before SEPP Koala 2021 commenced was to be determined as if the policy had not commenced.

89 The Biodiversity SEPP came into force on 1 March 2022 and transferred SEPP Koala 2020 to Chapter 3 and SEPP Koala 2021 to Chapter 4 of the Biodiversity SEPP. Because of these transfers of the provisions of SEPP Koala 2020 and

SEPP Koala 2021, which had savings and transitional provisions, the Biodiversity SEPP did not have its own savings and transitional provisions.

90 The effect of s 30(2)(b) and (d) of the *Interpretation Act* is to save the right that accrued under cl 15 of SEPP Koala 2019 for Goldcoral's development application to be determined under the provisions of SEPP 44, not SEPP Koala 2019, and the repeal of SEPP Koala 2019 by SEPP Koala 2020 and the transfer of SEPP Koala 2020 to Chapter 3 of the Biodiversity SEPP did not affect that right. The reasoning in *Dubler* is equally applicable to this accrued right.

91 The result is that Goldcoral's development application is to be determined under the provisions of SEPP 44, to which I now turn.

92 Part 2 of SEPP 44 applies to land in a local government area listed in Schedule 1 (one of which is Richmond River); land in relation to which a development application has been made (which Goldcoral had made); and land that has an area of more than 1 hectare, whether or not the development application applies to the whole, or only part, of the land (Goldcoral's land is about 72 hectares). Part 2 of SEPP 44 therefore applies to the land.

93 Part 2 of SEPP 44 sets out three steps that a consent authority must follow in determining a development application for development on land to which Part 2 of SEPP 44 applies. Step 1 is to decide whether the land is a potential koala habitat. Clause 7(1) of SEPP 44 provides:

> "Before a Council may grant consent to an application for consent to carry out development on land to which this Part applies, it must satisfy itself whether or not the land is a potential koala habitat."

94 The term "potential koala habitat" is defined in cl 4 to mean "areas of native vegetation where the trees of the types listed in Schedule 2 constitute at least 15% of the total number of trees in the upper or lower strata of the tree component." Schedule 2 lists ten koala feed tree species. The consent authority is restricted in how it satisfies itself as to whether land is a potential koala habitat. Clause 7(2) provides that a consent authority "may satisfy itself as to whether or not land is a potential koala habitat only on information obtained by it, or by the applicant, from a person who is qualified and experienced in tree identification." This restriction ensures accurate

identification of whether in any area of native vegetation on the land the trees are of the types listed in Schedule 2. If the consent authority is satisfied that land is not a potential koala habitat, it is not prevented by SEPP 44 from granting consent to the development application. If the consent authority is satisfied that the land is a potential koala habitat, it must comply with cl 8 of SEPP 44, which sets out the second step.

95 Step 2 is to decide whether the land is a core koala habitat. Clause 8(1) of SEPP 44 provides:

> "Before a council may grant consent to an application for consent to carry out development on land to which this Part applies that it is satisfied is a potential koala habitat, it must satisfy itself whether or not the land is a core koala habitat."

96 The term "core koala habitat" is defined in clause 4 of SEPP 44 to mean "an area of land with a resident population of koalas, evidenced by attributes such as breeding females (that is, females with young) and recent sightings of and historical records of a population." The consent authority is restricted in how it satisfies itself as to whether or not land is a core koala habitat. Clause 8(2) provides:

> "A council may satisfy itself as to whether or not land is a core koala habitat only on information obtained by it, or by the applicant, from a person with appropriate qualifications and experience in biological science and fauna survey and management."

97 If the consent authority is satisfied that the land is not a core koala habitat, it is not prevented by SEPP 44 from granting consent to the development application. If the consent authority is satisfied that the land is a core koala habitat, it must comply with cl 9, which sets out the third step.

98 Step 3 is to decide whether development consent can be granted in relation to land that is a core koala habitat. Clause 9(1) provides:

> "Before a council may grant consent to a development application for consent to carry out development on land to which this Part applies that it is satisfied is a core koala habitat, there must be a plan of management prepared in accordance with Part 3 that applies to the land."

99 Part 3 of SEPP 44 sets out the requirements for preparation (cl 11), consultation (cl 12) and approval (cl 13) of a plan of management. Of importance to the Council's argument is the requirement in cl 13(2) that a plan

of management prepared by a person other than the Council, such as the applicant for development consent, has no effect unless it is approved by the Council and by "the Director" (now the Planning Secretary).

100 The Council argued that cl 9(1) and cl 13(2) of SEPP 44 operate to prevent the Court from granting consent to Goldcoral's development application. Although Goldcoral has prepared a Koala Plan of Management, that plan is not prepared in accordance with Part 3 of SEPP 44, and is therefore of no effect, because it has not been approved by the Council and the Planning Secretary. The Council accepted that the Court, under cl 39(2) of the Court Act, could exercise the Council's power of approval under cl 13(2) of SEPP 44, but the Court could not exercise the Planning Secretary's power of approval under cl 13(2) of SEPP 44. Goldcoral's Koala Plan of Management therefore has no effect as it has not been approved by, at least, the Planning Secretary.

101 Goldcoral contested the Council's submission that the Court is precluded by cl 9(1) and cl 13(2) of SEPP 44 from granting consent to the development application. It advanced two reasons. First, Goldcoral submitted that the land on which the development is now proposed to be carried out does not contain a core koala habitat as defined in cl 4 of SEPP 44. The only location where the parties' experts considered there was an area of native vegetation that was a potential koala habitat, as defined in cl 4 of SEPP 44, was in the south-western corner of the land (primarily in Lot 163 but extending partly into Lot 276): see Supplementary Terrestrial Ecological Assessment, p 90. This is where there are trees of the types listed in Schedule 2 of SEPP 44 (feed tree species) under three of which some koala faecal pellets have been found: Supplementary Terrestrial Ecological Assessment, pp 57-58. Although the parties' ecologists agreed in the Ecology Joint Expert Report (p 3) that this area of native vegetation was a core koala habitat, as defined in the Biodiversity SEPP, Goldcoral contested this conclusion.

102 Goldcoral submitted that this area of native vegetation, even if it be a potential koala habitat, is not a core koala habitat as defined in SEPP 44. The experts have not paid proper regard to the terms of the definition of "core koala habitat". Goldcoral submitted that the evidence does not establish that the area

of native vegetation has a resident population of koalas, evidenced by breeding females (that is, females with young) and recent sightings of and historical records of a population. The observation of faecal pellets at three feed trees might evidence use of the area by some koalas, but not a resident population of koalas. That was accepted by Mr McArthur in his Supplementary Terrestrial Ecological Assessment (November 2023), where he noted that, based on prior assessment of the level of koala activity/usage over the land, "a resident/sedentary population was not present on the site at the time" (p 21 and p 57).

103 In any event, Goldcoral submitted that the development application as finally amended no longer proposes to carry out the residential subdivision in this area of the land. All of that area is now within a "future investigation area". The only remaining development in the vicinity of, but not within, that area of native vegetation for which consent is sought is the demolition of the existing house and structures (which are on Lot 163). That demolition will have no effect on the native vegetation, including koala feed trees, in the vicinity.

104 I find that cl 9(1) and cl 13(2) of SEPP 44 do not preclude the Court granting consent to the development application as finally amended, for the reasons advanced by Goldcoral.

105 The first reason is that, notwithstanding that Part 2 of SEPP 44 applies to the whole of the land in relation to which a development application is made, the three-step decision-making process under SEPP 44 focuses attention on any area of native vegetation on that land which is a potential koala habitat and a core koala habitat. That is evident, first, by the definition of "potential koala habitat" requiring there to be an area of native vegetation with trees meeting the type and number requirements in the definition of "potential koala habitat" - a cleared area of land can never meet that definition; second, by a core koala habitat needing first to be a potential koala habitat, by the operation of cl 8(1), and as a consequence a core koala habitat must also be an area of native vegetation; and third, by the use of the indefinite article "a" before "potential koala habitat" in cl 7 and cl 8 of SEPP 44 and before "core koala habitat" in cl 8 and cl 9 of SEPP 44, indicating that one or more areas of a potential koala

habitat or a core koala habitat may occur on the land, but the land as a whole does not thereby become a potential koala habitat or a core koala habitat – only the area or areas within the land that meet the definitions of potential koala habitat and core koala habitat.

106 In this case, the only area of native vegetation that might be a potential koala habitat is in the south-western corner of the land, primarily in Lot 163 but partly extending into Lot 276. The experts agreed that this area of native vegetation has the required type and number of koala feed tree species to be a potential koala habitat: see Ecology Joint Expert Report, p 3. Once the area of native vegetation is considered under cl 7(1) of SEPP 44 to be "a potential koala habitat", the second step is to decide whether the area is "a core koala habitat" under cl 8(1) of SEPP 44. However, the requirement to be satisfied as to whether or not the land is a core koala habitat is only engaged if the development application seeks consent "to carry out development on land… that it is satisfied is a potential koala habitat" (cl 8(1)). That is to say, the development application must seek consent to carry out development in the area of native vegetation on the land that the consent authority is satisfied is a potential koala habitat.

107 In this case, Goldcoral no longer seeks consent to carry out any development on land that is a potential koala habitat. The final amendment of the development application removed any proposal for residential subdivision in the area of native vegetation that is a potential koala habitat. All of the area of native vegetation that is a potential koala habitat is now within the "future investigation area". The only development in the vicinity of, but not within, that area of native vegetation for which Goldcoral still seeks development consent is the demolition of the existing house and structures on Lot 163. The demolition would involve the carrying out of development on land, but not on land that is "a potential koala habitat."

108 As a consequence, the restriction on granting consent in cl 8(1) of SEPP 44 is not engaged and there is no requirement for the Court to satisfy itself whether or not the land is a core koala habitat.

109 If, however, it is necessary under cl 8(1) of SEPP 44 for the Court to satisfy itself whether or not the area of the land that is a potential koala habitat is a core koala habitat, I am not satisfied that the area of native vegetation in the south-western corner of the land, which is a potential koala habitat, is a core koala habitat. The evidence before the Court is insufficient to establish that that area of native vegetation on the land meets the definition of "core koala habitat" in cl 4 of SEPP 44. The presence of a small number of koala faecal pellets beneath three trees of a feed tree species in the area might establish that koalas have used the area, but that falls short of establishing that there is "a resident population" of koalas in the area. That is the test required by the definition of "core koala habitat". Mr McArthur found "the level of koala activity/usage over the subject site was 'low' and…the level of use by the koala is likely to be transitory": Supplementary Terrestrial Ecological Assessment, p 91. Low, transitory use of the land by koalas is not consistent with there being a resident population of koalas on the land.

110 Furthermore, the definition requires a resident population of koalas to be evidenced by attributes such as "breeding females (that is, females with young) or recent sightings of and historical records of a population." No evidence was adduced of breeding females in the area. Although there was some evidence of sightings of and historical records of individual koalas, these sightings and records were outside of this area of native vegetation on the land and in many instances were far removed from the land: Supplementary Terrestrial Ecological Assessment, p 91. Moreover, they were not recent sightings of and historical records of "a population" of koalas, as distinct from individual koalas.

111 On this evidence, I am satisfied, for the purposes of cl 8(1) of SEPP 44, that the land is not a core koala habitat. As a consequence, by dint of cl 8(3), the Court is not prevented by SEPP 44 from granting consent to Goldcoral's development application.

112 This conclusion means that there is no need for compliance with cl 9 of SEPP 44. The restriction in cl 9(1) on granting consent to carry out development on land that the Court is satisfied is a core koala habitat unless a plan of

management prepared in accordance with Part 3 has been approved, is not engaged.

The Wallum Froglet issue

113 Habitat of the Wallum Froglet, an endangered species, occurs on the eastern side of the land. A drainage channel, constructed by the previous land owners when carrying out the previous residential subdivision, runs along the common boundary of Lot 277 with the adjoining land to the east. The northernmost extent of the channel is where the splay between the R1 General Residential zone and the C2 Environmental Conservation zone starts. Goldcoral proposes to remove the channel and construct new drainage infrastructure in its place. The Council raised concern about this removal and replacement of the existing channel.

114 The Council's terrestrial ecologist, Mr M Hallinan, considered that the drainage channel, since being constructed then abandoned, has regenerated with wetland vegetation, which provides confirmed forage habitat and potential breeding habitat, especially in the northern portion of the channel. Goldcoral's terrestrial ecologist, Mr A McArthur, considered the channel contains, at most, potential forage habitat: Ecology Joint Expert Report, p 3. Mr McArthur, on his numerous visits to the land, only recorded the Wallum Froglet calling in a natural depression to the north of the northernmost extent of the drainage channel beyond the splay: Supplementary Terrestrial Ecological Assessment, Figure 13 after p 54. Goldcoral's aquatic ecologist, Dr J Thorogood, considered the channel contained neither forage habitat nor breeding habitat for the Wallum Froglet, as a result of it being "a straight, V-shaped channel that is frequently subject to eutrophication due to poor drainage and restricted tidal flushing.": Ecology Joint Expert Report, p 11. Dr Thorogood considered that not only does the channel provides a hostile environment that would inhabit breeding, any tadpoles that might occur would be subject to predation by fish entering from the southern end of the channel where it meets the Evans River: see Waterway and Coastal Ecology Report, p 18.

115 The parties' experts agreed that there is foraging and breeding habitat to the north of the channel on the land and to the east of the land on the adjoining

land, in the areas identified as coastal wetlands under the Biodiversity SEPP and zoned C2 Environmental Conservation under RVLEP. These areas of habitat will not be disturbed, as no development is proposed in any coastal wetlands or land zoned C2 Environmental Conservation. The parties' engineers agreed with the assessment in the Hydrogeological Impact Assessment that "groundwater was not adversely affected by the development proposal": Joint Expert Report on Flooding, Essential Services, Stormwater, Groundwater and Earthworks, p18. The construction of the replacement drainage channel will not have any unacceptable impact on groundwater dependent ecosystems, such as the coastal wetlands: Hydrogeological Impact Assessment, p 33. Indeed, Mr McArthur considered that the replacement drainage channel may "assist with reducing drawdown of the water from the SEPP 14 wetland area": Supplementary Terrestrial Ecological Assessment, p 12.

116 I find that the proposed residential subdivision, including the removal and replacement of the existing drainage channel, will not affect the Wallum Froglet or its habitat on the land or adjoining land. The only potential effect would be if there was habitat in the existing drainage channel. I accept the evidence of Dr Thorogood and Mr McArthur that there is neither breeding nor foraging habitat in the existing drainage channel. The replacement of that channel will not, therefore, affect any habitat of the Wallum Froglet. The areas of breeding and foraging habitat are to the north and east of the drainage channel, in areas of the land and the adjoining land that will not be developed.

The littoral rainforest buffer issue

117 The Council raised as an issue the width of the buffer to be provided to the littoral rainforest on the land to protect it from edge effects. The Council's terrestrial ecologist, Mr Hallinan, considered a minimum 15m buffer to the littoral rainforest, including a 5m wide, densely planted zone of native rainforest tree, shrub and ground cover, would be required: Ecology Joint Expert Report, p 4 and Supplementary Report Clarifying Joint Expert Witness Report (25 May 2024), p 1. Goldcoral's terrestrial ecologist, Mr McArthur, considered it was sufficient to provide a 15m buffer, measured from the outermost, surveyed, littoral rainforest trees, within which a 5m buffer of retained and revegetated

native rainforest vegetation could be established: Ecology Joint Expert Report, p 4. Mr McArthur's overlaid the tree survey on the mapped littoral rainforest areas: Supplementary Terrestrial Ecological Assessment, p 42 and Figures 9A - 9C. Mr McArthur's measurement of 15m from the surveyed littoral rainforest trees accords with the maximum tree protection zone under Australian Standard - Protection of trees on development sites AS 4970-2509: Supplementary Terrestrial Ecology Assessment, p 74. Mr Hallinan disputed the applicability of this Australian Standard, as it is intended to protect individual trees on development sites, not a vegetation community such as the littoral rainforest endangered ecological community on the land.

118 In the end, this disagreement between the parties' ecologists was more of academic interest than practical consequence. Goldcoral's final amendment of the development application provides at least a 15m buffer to the littoral rainforest, as Mr Hallinan had recommended, in nearly all locations. That was evidenced by the amended plan showing the concept rehabilitation areas and the four cross-sections showing the width of the buffer at those cross sections. The concept rehabilitation areas, as finally amended, were approved by the parties' bushfire experts as providing appropriate bushfire protection.

119 The concept rehabilitation areas plan depicts the littoral rainforest, labelled 'Regeneration Area' and coloured dark green; a 'Revegetation Area - Littoral Rainforest' surrounding on the outside the littoral rainforest 'Regeneration Area' and coloured light green; an additional rehabilitation area outside the 'Revegetation Area - Littoral Rainforest' on most sides, labelled 'Bushfire IPA Standards' and coloured mustard yellow; and in three locations a 'Drainage Reserve' on the outside of either the Revegetation Area - Littoral Rainforest or the Bushfire IPA Standards area. Cumulatively, these areas surrounding and outside of the littoral rainforest Regeneration Area provide greater than 15m separation between the littoral rainforest and the roads in the residential subdivision, there always being a road separating the vegetated areas and the residential allotments.

120 This is demonstrated by the four cross-sections. Cross-section A is over the proposed new road to the south of the northern area of littoral rainforest,

around where Lot 90 is proposed. Running from north to south, the section depicts from the littoral rainforest Regeneration Area, a 15m littoral rainforest buffer zone comprising 6m of dense rainforest plantings and 9m of Bushfire IPA minimum Asset Protection Zone (APZ), and then a 15m road reserve.

121 Cross-section B is over the proposed new road to the north-east of the northern area of littoral rainforest, around where Lot 29 is proposed. Running from south-west to north-east, the section depicts the littoral rainforest Regeneration Area, a 21m littoral rainforest buffer zone comprising 12m of retained/revegetated western drain (this is the drain constructed for the previous subdivision, which the ecologists agreed should be retained as it has naturally regenerated) and 9m of Bushfire IPA minimum APZ, and then a 15m road reserve.

122 Cross-section C is over the proposed new road to the north of the Crown foreshore reserve along Evans River and to the south of the southern area of the residential development, around where Lot 99 is proposed. Running from south to north, the section depicts from the boundary with the Crown foreshore reserve, a 40m setback from the Crown foreshore reserve comprising 17m of retained native vegetation and a 23m littoral rainforest buffer zone with dense rainforest plantings, and then a 7m bioswale and 12m road reserve.

123 Cross-section D is over the proposed new road to the west of the southern area of the littoral rainforest, around where Lot 92 is proposed. Running from east to west, the section depicts from the littoral rainforest Regeneration Area, a 14m littoral rainforest buffer zone with dense rainforest plantings, and then a 4m bioswale and 15m road reserve.

124 The concept rehabilitation areas plan and these cross-sections demonstrate that a buffer zone to the littoral rainforest of around 15m or more will be provided, with an even greater separation between the residential development and the littoral rainforest. I consider these buffers are of sufficient width to provide adequate protection for the littoral rainforest from edge effects. Edge effects can still occur no matter how wide the buffer. Seeds of weed species can be blown in or deposited by birds and animals in the littoral rainforest regardless of the buffer width. The littoral rainforest will need to be managed on

an ongoing basis as a conservation area, including weed removal and ongoing plantings of rainforest species. Having a buffer of sufficient width is one management tool to conserve the littoral rainforest, but it should not be viewed as the only conservation management tool. The ongoing management of the littoral rainforest as a conservation area will be required by the conditions of consent.

The character and layout issues

125 The Council's final merit issues were that the proposed development is not consistent with the desired future character of the locality and does not incorporate a subdivision layout and design that minimise impacts on the sensitive environmental areas and areas of cultural significance within and adjacent to the land. The Council noted that cl 6.6(4)(a) of RVLEP requires development consent not to be granted unless the consent authority is satisfied that "the development is designed, sited and will be managed to avoid any significant adverse environmental impact."

126 The Council's town planner, Ms C Brown, acknowledged that the land has been historically zoned to permit residential development and is currently identified in the North Coast Regional Plan 2041 (Department of Planning and Environment 2022) as an Urban Growth Area and the Iron Gates subdivision is identified as one of severally potentially large developments in Evans Head. Ms Brown accepted that parts of the land are suitable for and able to accommodate residential development. The issue was what level of development can be undertaken without adversely impacting sensitive areas of ecological value and cultural significance. Ms Brown considered that the design and layout of the development proposed originally, and before the development application was finally amended, unacceptably impacted environmentally and culturally sensitive areas on the land: Town Planning Joint Expert Report, pp 19-20.

127 Goldcoral's town planner, Mr M Oliver, and urban designer, Mr N Dickson, disagreed with Ms Brown. They said the design and layout of the development are consistent with the zoning of the land, not only currently under RVLEP but also historically in a series of environmental planning instruments and strategic

planning documents since the early 1980s, including the recent Richmond Valley Local Strategic Planning Statement (Richmond Valley Shire Council 2020) and North Coast Regional Plan 2041. Mr Oliver and Mr Dickson considered that the design and layout of the development do respect, and do not unacceptably impact, the environmentally and culturally sensitive areas on the land: Town Planning Joint Expert Report, p 21. No development is proposed in these areas, including the littoral rainforest. Development is only proposed in areas that are already cleared or were cleared.

128 As with the littoral rainforest buffer issue, this disagreement between the parties' planners became largely academic when the development application was finally amended to reduce further the impact of the development on the environmentally and culturally sensitive areas of the land. The ecological and cultural impacts were reduced by deleting the proposal for Stage 2 of the residential development to be in and around the area of native vegetation that is a potential koala habitat and the midden, an area of Aboriginal cultural heritage value. The area previously proposed for residential development is now a future investigation area, requiring re-assessment of the appropriateness of any residential development in that area.

129 The ecological impacts on the littoral rainforest were reduced by increasing the buffers around the littoral rainforest, as I have earlier explained. The apprehended impacts of the development on the Wallum Froglet have been assessed and found not to be substantiated. The habitat of the Wallum Froglet is removed from the footprint of the development.

130 The potential impacts of the development on neighbouring land uses, of exercising and enjoying native title rights on lands and waters to the south of the land, have been mitigated by dense plantings between the development and the Crown foreshore reserve, as I explain below when dealing with Ms Barker's contentions.

131 The extensive cut and fill previously proposed in the area of the residential subdivision on the hill to the west, has been reduced. On the lower lying parts of the site, significant volumes of fill still need to be imported to protect residential development from flooding impacts. But this is required for any

residential development of these areas of the land and is a necessary consequence of the continuing zoning of the land for residential purposes.

132 These amendments to the design and layout further reduced the impacts of the development on the environmentally and culturally sensitive areas on the land from what the previous design and layout already had achieved. The development already was designed to be located in the areas of the land that are currently cleared or historically have been cleared for the prior activities of agriculture, sand mining and residential subdivision. All of the areas of environmental and cultural value have been avoided.

133 In these circumstances, I am satisfied that the development as finally amended is designed, sited and will be managed to avoid any significant adverse environmental impact, thereby meeting cl 6.6(4)(a) of RVLEP.

Impact on native title rights issue

134 Ms Barker's first contention was that the proposed development would have an unacceptable impact on the traditional owners of Country exercising and enjoying their native title rights on land and waters to the south of the land.

135 Ms Barker is a Bandjalang woman of the Bundjalung nation. The Bandjalang people enjoy the benefit of native title rights and interests in lands and waters near to the land. Those rights and interests were upheld by the Federal Court in *Bandjalang People No 1 and No 2 v Attorney General of NSW* [2013] FCA 1278 and *Bandjalang People No 3 v Attorney General of NSW* [2021] FCA 386. The native title rights and interests are held in trust by the Bandjalang Aboriginal Corporation Prescribed Body Corporate. Ms Barker is a listed member of that corporation.

136 The native title rights and interests recognised by the Federal Court include the following non-exclusive rights:

> a. the right to hunt, fish and gather the traditional natural resources of the Consent Determination Area for non-commercial personal, domestic and communal use;
>
> b. the right to take and use waters on or in the Consent Determination Area;
>
> c. the right to access and camp on the Consent Determination Area;
>
> d. the right to do the following activities on the land:

i. conduct ceremonies;

ii. teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and

iii. to have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to the Bandjalang People under their traditional laws and customs.

137 The lands on which the Federal Court found these native title rights and interests exist, and which could be potentially affected by the development, are to the south of the land, largely on the southern side of Evans River. The waters on which the Federal Court found these native title rights and interests exist include the Evans River.

138 Ms Barker is concerned that the development of the land may impact the exercise and enjoyment of native title rights and interests, largely by reason of visual impacts and acoustic impacts.

139 Goldcoral has sought to mitigate the visual and acoustic impacts in two ways. First, Goldcoral deleted the proposal for Stage 2 of the residential subdivision in the south-western corner of the land, an area which might be able to be seen and heard from the lands and waters to the south. Second, Goldcoral proposes planting a dense screen of vegetation between the southern area of the residential subdivision and the Crown foreshore reserve. Cross-section C on the concept rehabilitation areas plan shows there will be, at that location, a 40m setback from the Crown foreshore reserve, comprising 17m of retained native vegetation and a 23m buffer zone with dense rainforest plantings. This densely vegetated buffer will supplement the already dense vegetation in the Crown foreshore reserve. The Crown foreshore reserve adjacent to the land varies between 23.25m at its narrowest to 41.79m at its widest, with an average width of 28.3m. The combined width of the densely vegetated buffer screening the development from the lands and waters to the south is therefore around 68m. This exceeds the 50m buffer Ms Barker sought to avoid unacceptable impacts on native title rights and interests.

140 The result will be that the residential subdivision will be visually and acoustically screened from the lands and waters to the south, mitigating unacceptable impacts on the exercise and enjoyment of native title rights and interests in those areas.

Impact on Aboriginal cultural heritage issue

141 Ms Barker's second contention was that the proposed development will have an unacceptable impact on the Aboriginal cultural values of the land and surrounding areas. Ms Barker identified three impacts: first, on the significant cultural landscape of the Dirruwung (Goanna) Story; second, on the midden in the southwest corner of Lot 276; and third, on a burial site in the vicinity of the hill in the west of the land. I will explain each.

142 Ms Barker's account of the Dirruwung (Goanna) Story is that the interaction between two mythical beings, the Goanna and the Snake, created the landforms of the Evans River itself and the land either side of the river, including Snake Island, through to where the river meets the sea at Evans Head, including Goanna Headland. On this account, the Story is embodied in a broad cultural landscape, which Ms Barker says includes the land.

143 Ms Barker explained that the traditional belief of the Bandjalang people is that the Goanna protects them and their fear is that the Goanna could be scared away, and the Snake will return, if the landscape in which the story is embodied is disturbed. This concern, as explained by Ms Barker, is not specific to the land proposed to be developed by Goldcoral – it applies to the whole of the Evans River catchment, from the headwaters to the sea. And it is not specific to the development proposed by Goldcoral – any development of land in the broad cultural landscape could have the effect feared.

144 Goldcoral's archaeologist and anthropologist, Mr Muhlen-Schulte, acknowledged the significance of the Story but considered the proposed development will not diminish the Story:

> "The proposed development (project area) is a significant distance west of the loci of this story on the Evans Head headland (Dirawong) and north of the Snake Island within the Evans River.
>
> There is no activity associated with the proposed development within the project area which could impact the landscape which represents The Goanna and The Snake, nor will it diminish the stories [sic] importance or relevance nor impact the Bandjalang Peoples' interdependency with this landscape and dreaming story": Aboriginal Cultural Heritage and Native Title Report, pp 13-14.

145 Whilst I acknowledge and respect that this Story is the traditional belief of the Bandjalang People, as articulated by Ms Barker, I do not accept that it

demands the refusal of consent under the EPA Act for any development of any land within the broad cultural landscape embodying the Dirruwung (Goanna) Story. As Mr Muhlen-Schulte explained, the land proposed to be developed by Goldcoral is not said to embody any particular attribute of the Story or the Goanna or the Snake, such as the geomorphological features of Goanna Headland or Snake Island. There is no particular aspect of the development proposed that impacts to a greater extent on the broad cultural landscape. The proposed subdivision of the land for residential purposes is not intrinsically incompatible with the cultural landscape. Moreover, as I have found when dealing with the ecology issues, the development is designed, sited and will be managed to avoid any significant adverse environmental impact. Insofar as the cultural landscape is, in part, formed and framed by the environment of that landscape, this avoidance of significant adverse environmental impact should mitigate adverse cultural heritage impacts.

146 Ms Barker's second concern was the potential impact of the development on a midden in the southwestern corner of the land. The midden is partly on Lot 276 and partly on the Crown foreshore reserve, extending down to the Evans River. The Iron Gates midden, as described in AHIMS13-1-0204, was assessed in the Aboriginal Cultural Heritage Assessment Report as having moderate to high significance. The parties' Aboriginal cultural heritage experts agreed that there is uncertainty as to the extent of the midden and recommended further investigation by subsurface testing of the midden and the surrounding sensitive landform of the Evans River beach ridge plain.

147 The development originally proposed Stage 2 of the residential subdivision to be near and to the north of the midden. Ms Barker contended that the investigation recommended by the Aboriginal cultural heritage experts should be undertaken before development consent for Stage 2 is granted and that Stage 2 should be designed to incorporate a suitable buffer to protect the full extent of the midden and any other archaeological deposits that might be discovered within the surrounding sensitive landform.

148 To avoid potential impact on the midden, Goldcoral amended the development application to delete the proposed Stage 2 of the residential subdivision near

the midden and instead proposed a future investigation area. This allows the investigation recommended by the Aboriginal cultural heritage experts to occur to assess whether any development can appropriately be carried out in the area. In these circumstances, the development as now proposed will not have an impact, let alone an unacceptable impact, on the midden.

149 Ms Barker's third concern was of the potential impact of the development on a burial site in the vicinity of the hill in the west of the land. The hill is in Lot 276 but rises to the west across the Crown Road Reserve into Lot 163. The part of the hill in Lot 276 is cleared and has been excavated and had earthworks undertaken as part of the carrying out of the previous residential subdivision. The part of the hill in the Crown Road Reserve and in Lot 163 is forested.

150 Ms Barker said she is aware of a burial site in the vicinity of the hill. Ms Barker said that as a woman, she was culturally not allowed to go near the burial site as it is considered men's business, but she has been told of its approximate location by her father. Initially, Ms Barker thought the burial site was on the part of the hill in Lot 276, between Stages 1 and 2 of the residential subdivision. At the hearing, however, Ms Barker marked the photograph taken around 1996/1997, which showed earthworks and excavation in this part of the hill in Lot 276, to show the burial site to be in the undisturbed forested land to the west in Lot 163.

151 Mr Muhlen-Schulte queried the likelihood of a burial site being on the hill, which has hard rocky ground making burial difficult. He said: "Burial sites in Australia are generally found in soft sediments, (ie sandy loam or sand) rock shelters or tree stumps and close to waterways": Aboriginal Cultural Heritage and Native Title Report, p 27. The hill has none of these attributes.

152 I find that the proposed development will not impact on any burial site in the vicinity of the hill. First, if there is a burial site, Ms Barker's settled location of the site is to the west of Lot 276, in the forested and undisturbed land in Lot 163, which is removed from the proposed development. The burial site will not be impacted. Second, the likelihood of a burial site on the hard, rocky ground of the hill is low. I accept Mr Muhlen-Schulte's evidence in this regard. Third, if contrary to the above there was a burial site in the cleared area of the hill in Lot

276, it would likely have been destroyed by the extensive excavation and earthworks in that area which were undertaken for the previous residential subdivision.

153 For these reasons, I find that the proposed development will not have an unacceptable impact on Aboriginal cultural heritage on the land.

The community's concerns

154 As I have earlier noted, individuals and community organisations have been opposed to residential development on the land since the late 1980s. This opposition continues with respect to the current proposal. A bundle of written objections by members of the public to Goldcoral's development application was tendered. Five people gave evidence at the start of the hearing on site and their written speaking notes were tendered, as was Dr P Ashley's later email to the Court. The matters raised in the objections overlapped with the issues raised by the Council and Ms Barker, but also ranged wider. I will group the objectors' concerns by topic and explain how they have been addressed satisfactorily.

Legal concerns

155 The objectors raised similar issues to the Council that development consent cannot be granted because:

(a) the proposed development relies on unlawful clearing and works;

(b) the proposed development is designated development;

(c) the RAH SEPP applies to the development application but has not been complied with; and

(d) a Koala Plan of Management is required under SEPP 44 as the development is on land that is a core koala habitat but has not been prepared and approved.

156 I have dealt with these legal issues earlier in the judgment. In summary, I have found the proposed development does not impermissibly rely on unlawful clearing or works; the proposed development is not designated development; the RAH SEPP does not apply to the development application; and a Koala Plan of Management is not required as no development is proposed in a core koala habitat.

Merit issues

157 The objectors raised the following issues that overlapped with the Council's and Ms Barker's issues:

(a) the ecological impacts of the development have not been adequately addressed;

(b) the unacceptable impacts on koalas; and

(c) the unacceptable impacts on Aboriginal cultural heritage.

158 I have dealt with these issues earlier in the judgment. In summary, the proposed development, as finally amended, is designed, sited and will be managed to avoid any significant adverse environmental impact, including on the littoral rainforest endangered ecological community, threatened species including the Wallum Froglet and Oxleyan Pygmy Perch, and coastal wetlands;

159 Amendments to the development application enhance the width and plantings of the vegetated buffers to the littoral rainforest and Crown foreshore reserve. The bushfire experts have agreed that the design and siting of the enhanced vegetated buffers are compatible with protection for bushfire risk. No additional clearing of native vegetation will be required beyond that identified in the finally amended development application.

160 As finally amended, no residential development is proposed on land in either a potential koala habitat or a core koala habitat. The area with a potential koala habitat is now in a future investigation area. The development application proposes measures to mitigate impacts on koalas. A Vegetation and Fauna Management Plan, required to be prepared and amended by conditions of consent, will incorporate measures to protect koalas. A condition of consent will not allow future residents to keep dogs and cats in the residential subdivision, preventing dog and cat attacks on koalas. Vehicle speeds in the residential subdivision will be low (40kph), minimising vehicle strikes. Koala friendly awareness is proposed through strategic signage in the residential subdivision.

161 The objectors raised other merit issues that the Council had raised in earlier Statements of Facts and Contentions but did not press once the issues were satisfactorily addressed by the expert evidence. These include:

(a) *Flooding impact on neighbouring land*: The Council's contention relating to flooding was resolved between the parties' flood experts. The development has been designed having regard to the most up-to-date flood modelling available, including making allowance for climate change. The experts agreed, in the Engineering Joint Expert Report, p 2, that the development:

> "is located within a region of low velocity flood water and that the proposed filling is located offline from the main river channel flows. The resultant outcome of the development produces no impact to the existing flood regime within the vicinity of the site."

(b) *Flooding impact on the development site*: The flood experts agree that the proposed development has been designed and sited and will be managed to be compatible with existing site flood characteristics and the flood hazard of the land: Engineering Joint Expert Report, p 2. The experts agree that "the amended concept engineering plans now appropriately provide road and building floor levels which are consistent with the Richmond Valley Flood Study inclusive of climate change allowances": Engineering Joint Expert Report, p 2. The proposed development will not cause material offsite impacts or increase risk to life from flooding: see Flood Assessment and Flood Emergency Response Plan, p 42. The flood experts agree that the proposed development incorporates appropriate measures to manage risk to life from flood, including evacuation of the site via Iron Gates Drive and a proposed Emergency Shelter within the development site in the event that residents are not able to evacuate: Engineering Joint Expert Report, p 3.

(c) *Impacts of climate change on flooding*: The flood experts agreed that the proposed development has been designed and sited to be consistent with the Richmond Valley Flood Study 2023, inclusive of climate change allowances: Engineering Joint Expert Report, p 2. The experts agreed that: "The amended site levels and engineering design as documented appropriately considers climate change and projected changes to flood levels and behaviour": Engineering Joint Expert Report, p 3.

(d) *Inappropriate community refuge building*: The proposed community refuge building will serve as both a flood refuge and bushfire refuge. The building is designed to have a minimum building floor level of RL 7.60m AHD, above the nominated Probable Maximum Flood (PMF) level of 7.56m AHD, consistent with the Richmond Valley Flood Study: see Engineering Joint Expert Report, p 3. The parties' bushfire experts agreed that the proposed development mitigates bushfire risk to an acceptable level. The bushfire experts agreed that although the community refuge building would not "form part of the core bushfire protection measures" (other measures do that), it is beneficial to

provide the refuge “as a redundancy option to provide a failsafe option”: Bushfire Joint Expert Report, p 11.

(e) *Insufficient sewer infrastructure capacity*: The proposed development will produce 7.7L/S of peak wet weather flows. The Evans Head Augmentation Strategy Report prepared by GHD (2010) estimated a greater catchment flow of 9.4L/S of peak wet weather flows from the Iron Gates estate. The development flows will therefore not exceed the planned flows. Further, the pump station proposed to be used, EHPS-02, underwent a pump upgrade in 2008 to allow a flow of 20.8L/S, including planned flows of 9.4L/S from the Iron Gates estate and 11.4L/S from the local catchment: see Engineering Services and Civil Infrastructure Report, Appendix D, Sewer Network Capacity Assessment, pp 1-2. The parties’ engineering experts agreed that historical allowances were made in the sewer network planning for the connection of development flows from the site and that augmentations may be required to be undertaken downstream of pump station EHPS-02 to facilitate the servicing of the development upon finalisation of the development yield and resultant outflows: Engineering Joint Expert Report, p 10. This recommendation is included in the conditions of consent.

(f) *Disjointed urban sprawl*: Although the Iron Gates site is separated by coastal wetlands from the Evans Head township, the site has been zoned for residential purposes since 1983 and is identified as part of the housing strategies of both the Council and the NSW Government for development for residential purposes, notwithstanding this known separation.

(g) *Insufficient public amenities*: The town planning experts agreed that the proposed open space at Lot 147 (for a park) is suitably sized to meet the needs of the residents of the future community in terms of passive open space and children’s playground: Town Planning Joint Expert Report, p 24. The proposed community building will serve as a community centre providing facilities at times when it is not needed for a flood or fire refuge.

(h) *Impact on coastal wetlands*: The proposed development will not adversely impact the groundwater of adjoining coastal wetlands. The Hydrogeological Impact Assessment found that “expected groundwater drawdown caused by the proposed development will not create any unacceptable impact on nearby properties, groundwater bores or groundwater dependent ecosystems”: p 33. The proposed development will not cause pollution of the Evans River: “Directed away from sensitive receptors and meeting required standards through appropriate ‘treatment trains’, stormwater will not adversely impact the receiving environment. That is, water quality within watercourses, and key fish habitat, both on-site and within the Evans River, will be protected through implementation of the SWMP [Stormwater Management Plan] and the provision of set-backs to the

estuarine wetlands of the Evans River": Waterway and Coastal Ecology Report, p 26. Natural estuarine processes and the ecosystem health (including water quality) of the Evans River will not be impacted by the development: Waterway and Coastal Ecology Report, p 28.

(i) *Inconsistent with Coastal Development Guidelines*: The proposed development has been designed having regard to the *Coastal Design Guidelines for NSW* prepared by the Urban Design Advisory Service (February 2003). There is, however, no current law requiring a development application to be consistent with the Guidelines.

(j) *Sand fly infestation*: The land contains limited suitable on-site breeding habitat for biting insects. The incorporation of open-space buffers between potential breeding areas and residential allotments makes it unlikely that biting insects will have a significant impact on future residents of the residential subdivision: see Biting Insect Management Plan. The Council withdrew its contention regarding mosquito control.

(k) *Road and traffic impacts*: The traffic generated by the proposed development is within the capacity of the existing external road network: Statement of Environmental Effects (22 November 2023), p 56. Traffic management measures are proposed to manage the increased traffic generated by the development, including:

    (i) upgrades to Iron Gates Drive, including a widening of the sealed carriageway outside of the mapped coastal wetlands, resealing of the existing sealed road pavement, and specific line-marking and signage treatments;

    (ii) installation of slow points at the entrance of those parts of Iron Gates Drive that intersect the mapped coastal wetlands to ensure a reduction in traffic speeds in these ecologically sensitive areas: Statement of Environmental Effects, p 39 and Engineering Joint Expert Report, p 8;

    (iii) installation of speed calming devices on Iron Gates Drive, required by a condition of consent;

    (iv) reorientation of the intersection of Wattle and Cypress Streets to accommodate the increased traffic from the development;

    (v) upgrade of the intersection of Woodburn Street and Wattle Street to accommodate construction traffic, required by a condition of consent; and

    (vi) installation of a Basic Right (BAR) turn facility at the entrance to the site: see Engineering Joint Expert Report, p 8 and Attachment B.

(l) *Land use conflict with RAAF's Evans Head Air Weapons Range*: The original development application was referred to the Department of Defence. In response, the Department recommended design specifications for future dwellings constructed on the site. The current development application for the residential subdivision does not seek consent for dwelling construction. The design specifications for dwellings recommended by the Department of Defence can be addressed in future development applications for dwelling construction.

162 Some objectors also raised concerns about procedural matters, including:

(a) *Impacts of Stage 2 development*: The development application is a concept development application seeking approval of concept proposals for the residential subdivision of the land and detailed proposals for Stage 1 of the development. Stage 2 cannot be carried out until a subsequent development application for Stage 2 is lodged and approved. The impacts of Stage 2 will be assessed then. The concept development application, as finally amended, has reduced the area identified for Stage 2 to be a small area on the hill to the west above the Stage 1 residential subdivision. The area in the south-western corner of the land previously proposed for Stage 2 is now identified as a future investigation area. Any development proposed in this area will need to be investigated and its impacts assessed.

(b) *Amendment of development application*: Goldcoral's development application, originally lodged in 2014, has been amended numerous times in the following decade, including the final amendment at the hearing. Amendment of a development application is not only legally permitted, but appropriate to address concerns of the consent authority and the community. In the case of Goldcoral's development application, the amendments have resulted in the proposed development being designed, sited and managed to avoid significant adverse environmental impact. The Council and the community have had an opportunity to comment on the amendments to the development application.

(c) *Public participation at the site visit:* The hearing of the appeal commenced at the entrance to the Iron Gates land. The hearing was open to the public. Members of the community who objected to the development gave evidence at the on-site hearing. Afterwards, I undertook an inspection of the site accompanied by representatives of Goldcoral and the Council and by Ms Barker, as well as their respective legal representatives and experts. The main purpose of the site inspection was to identify features of the development and the site and to explain the issues that need to be determined by reference to those features. Formal evidence was not given at the site inspection; the evidence was given on the following days at the hearing in the Ballina Court House and

in Sydney at the Land and Environment Court. Partly due to this purpose of being a site inspection and not a formal hearing, and partly because the site is private land with occupier's liability issues, members of the public were not invited to attend the site inspection. This was appropriate in the circumstances. The public have otherwise been permitted to attend the hearing in court or remotely through the Court-provided audio-visual link.

163 This account of the community's concerns and how they have been addressed satisfactorily supports the conclusion that it is appropriate to grant development consent, subject to conditions, to the development proposed in the development application as finally amended. I now turn to the issues concerning the conditions of consent that should be imposed.

Conditions of consent

164 The parties reached substantial agreement on the conditions of consent. The conditions proposed by Ms Barker were agreed to, with minor wording changes, by Goldcoral and the Council and have been included in the conditions of consent. Consequently, Ms Barker took no issue with Goldcoral's proposed conditions.

165 The conditions proposed by Ms Barker and agreed to by Goldcoral and the Council involved:

(a) *Consultation to identify culturally significant trees on Iron Gates Drive*: A condition was proposed to implement Recommendation 5 of Mr Muhlen-Schulte in his Aboriginal Cultural Heritage Assessment Report (ACHAR):

> "Consultation with any Registered Aboriginal Parties identified in the ACHAR, who wish to participate in the consultation, and any other Bandjalang people who may wish to participate, is required prior to any works commencing on Iron Gates Drive in relation to the identification of culturally significant trees. Should any culturally significant trees be identified they should be inspected by a qualified arborist prior to engineering plans being prepared and a construction certificate being issued for those works in accordance with Recommendation 5 of the ACHAR."

(b) *Cultural induction and cultural material finds procedure*: A condition was proposed to implement Mr Muhler-Schulte's Recommendations 6, 7 and 8:

> "The Applicant is to develop an Aboriginal Cultural Heritage Management Plan in consultation with any Registered Aboriginal Parties identified in the ACHAR, who wish to participate in the consultation, and any other representative of

the Bandjalang people who may wish to participate, that provides for:

i. induction for machine operators undertaking initial ground disturbance in Aboriginal cultural heritage, in accordance with Recommendation 6 of the ACHAR; and

ii. protocols for unexpected finds of Aboriginal objects and human remains, in accordance with Recommendations 7 and 8 of the ACHAR."

(c) *Cultural interpretation:* A condition was proposed to implement Mr Muhler-Schulte's Recommendation 3. The detailed landscape plans submitted for approval with the subdivision works certificate application are to show:

"How they have been developed in consultation with Traditional Owners and have had regard to Aboriginal knowledge, story and history, in accordance with Recommendation 3 of the Aboriginal Cultural Heritage Assessment Report prepared by ALICH Group dated 1 May 2024 (ACHAR)".

(d) *Prohibition on dogs and cats*: A condition was proposed requiring an instrument under s 88B of the *Conveyancing Act 1919* (NSW) to include a "prohibition on the keeping of dogs or cats" to protect native fauna in the area.

166 The conditions on which Goldcoral and the Council disagreed fell into eight categories.

167 The first is whether the road reserves containing the internal estate roads and bioretention swales, and the public open space in proposed Lot 147 (the proposed public park) should be dedicated to the Council or retained and managed by the community association. Goldcoral proposes to dedicate those lands to the Council; the Council proposes conditions requiring the concept plan and the plan of community title subdivision to be amended to include proposed Lot 147 and all internal estate roads and bioswales to form part of Lot 1, the community property lot.

168 The Council's opposition to the internal estate roads being dedicated was primarily based on the roads including the bioswales, although it faintly advanced another reason that a community title subdivision is usually responsible for the internal estate roads. This other reason is unpersuasive. The Council was prepared to accept dedication of the internal estate roads when Goldcoral proposed a Torrens title subdivision. The Council's opposition to dedication of the roads opportunistically arose when Goldcoral proposed

community title subdivision to address a concern the Council had raised about the inappropriateness of a Torrens title subdivision for the provision and on-going maintenance of the community building and land for conservation purposes. The change in title of the subdivision effected no change in the internal estate roads. If the roads were appropriate to be dedicated under a Torrens title subdivision, they are equally appropriate to be dedicated under a community title subdivision.

169 I return to the Council's primary reason for opposing the dedication of the road reserves, which is that they include the proposed bioswales. The Council submitted that it is ill-equipped to manage the bioswales, for six reasons:

(a) Bioswales take up considerably less land than a traditional drainage basin, but require significantly higher maintenance costs.

(b) The Council has identified nine gross pollutant traps within the proposed bioswales, which will require regular cleaning, likely quarterly at least.

(c) The Council does not currently manage any bioswales. It anticipates a tractor with a long arm will be required to clean the bioswales, but the Council does not presently own this piece of equipment.

(d) The ongoing costs associated with cleaning are significant.

(e) In other sites in the local government area whether there are gross pollutants traps, but not bioswales, only three gross pollutant traps can be cleaned a day.

(f) The waste cleaned from the gross pollutant traps must be disposed of as trade waste, which incurs another cost to the entity responsible for cleaning the bioswales.

170 Goldcoral submitted that councils all around the State accept the dedication and management of public roads and drainage and stormwater facilities. The bioswales – the abbreviation of bioretention swales – may have a different name, but they are not different in function to a stormwater detention basin. They may be linear in shape rather than rectangular but they serve the same function of protecting environmentally sensitive lands and waters. In this case, the bioswales protect the littoral rainforest, Crown foreshore reserve, coastal wetlands and the Evans River. As the Council concerned, it accepts the dedication of and manages stormwater detention basins in the local

government area, in whatever design and form are those basins. The proposed bioswales might be different in design and form to the stormwater detention basins the Council has accepted in the past, but as they serve the same function, there is no reason in principle for the Council not to accept them and manage them as it does for all other stormwater detention basins it has accepted.

171 Goldcoral submitted that, in relative terms, the Council has far greater knowledge, experience and equipment to manage the bioswales than the community association will ever have. The proper ongoing management and maintenance of the bioswales is important in the public interest to protect environmentally sensitive lands and waters. The Council is in a far better position to do this than a committee of lay people living in the community of the residential estate.

172 Goldcoral acknowledged that the Council's management and maintenance of the bioswales will involve cost, but so does the management and maintenance of all the stormwater detention basins and other drainage and stormwater infrastructure with respect to which the Council has responsibility. For new infrastructure with a different design, the Council may need to upgrade its equipment and upskill its staff to manage and maintain the new infrastructure. But that is not unexpected or unreasonable.

173 Goldcoral submitted that, pursuant to conditions of consent, the Council will have the opportunity to assess and approve the detailed designs and the operation and maintenance plans for the proposed gross pollutant traps and bioswales, and hence will have control over the design of and be prepared to operate and maintain the bioswales.

174 Likewise, Goldcoral submitted, if waste is encountered in cleaning the bioswales that needs to be disposed of as trade waste, the Council has existing waste facilities that can receive that waste. Again, such waste can be expected to be encountered from time to time in all of the stormwater detention basins and infrastructure that the Council already manages.

175 I agree with Goldcoral, for the reasons it advanced, that the bioswales, whilst different in form, are not different in function to the stormwater detention basins

and infrastructure the Council already manages and maintains. The Council is better placed to manage and maintain the bioswales than the community association, thereby better ensuring the protection in the public interest of environmentally sensitive lands and waters. I reject the Council's proposed conditions opposing the dedication of the internal estate roads with the bioswales, and accept Goldcoral's proposed conditions.

176 The Council also opposed the dedication of Lot 147, which is the proposed public park. Its reason was tenuous. The Council said it does not have the financial, human and material resources to manage and maintain the local open space and parks which it currently has, and is considering disposing of existing parks. In these circumstances, the Council submitted it cannot accept and manage an additional local park. I reject this reason.

177 The management of local public parks is a fundamental responsibility of local government. If the Council is not coping with the management of existing public parks, it needs to improve its performance. Discriminating against the residents of one neighbourhood – the residents of the proposed residential estate on the land – by not accepting and managing a local park for those residents is not equitable. Goldcoral will establish all of the facilities in and landscape the park before dedicating it to the Council. The Council only has to maintain the park afterwards.

178 Second, the Council proposed, in Schedule A, a deferred commencement condition requiring a structural safety assessment of the existing bridge on Iron Gates Drive. Goldcoral agreed with the condition requiring the structural safety assessment of the bridge, but submitted the condition should be an operational condition not a deferred commencement condition. Goldcoral included the condition in Schedule B, Part C as a condition (condition 4) that must be complied with prior to subdivision work on the land commencing.

179 I agree with Goldcoral that the condition can be an operational condition that must be complied with prior to subdivision work commencing. The reason the Council gave for imposing the condition, which Goldcoral accepts, is:

> "To determine the condition, structural and serviceability, of the Iron Gates Drive bridge particularly for the demands imposed on the existing bridge by the significant heavy vehicle truck movements during the importation of the site

> filling and construction. Should the bridge require a rebuild or upgrade or widening to meet current standard for load limits that involves filling of land and/or vegetation removal that requires an approval under SEPP Resilience and Hazards then this is to be obtained prior to the works commencing, and that any rectification or reconstruction works are identified and completed appropriately."

180 This appropriate purpose and timing of the structural assessment of the bridge can be achieved by requiring compliance before any subdivision work commences on the land; it does not need to be done before the consent operates. The significant heavy vehicle truck movements during the importation of the site filling and construction will only commence once subdivision work commences. Hence, it is sufficient that the condition must be complied with before subdivision work commences.

181 Third, the Council proposed a condition regulating the importation of red fire ants. Goldcoral opposed the condition. I consider the condition is unnecessary. The Council's condition amounted to an instruction to comply with the law, including the Biosecurity (Invasive Ant Carriers) Control Order 2023. All of the requirements of the proposed condition are requirements of that order or the *Biosecurity Act 2015* (NSW) under which the order was made. Nothing is to be gained by a condition of consent requiring compliance with existing law.

182 Fourth, the Council proposed that the Bulk Earthworks Plan, which Goldcoral is required to submit to the Council, include "Details demonstrating that no more than 149,217 cubic metres of fill material will be imported to the site." Goldcoral accepted the condition requiring the submission of a Bulk Earthworks Plan, but opposed the plan demonstrating that no more than 149,217 cubic metres of fill material will be imported to the site. I reject the Council's proposed amendment to the condition. Goldcoral will be required by the conditions of consent to carry out the development in accordance with the approved plans, including the Bulk Earthworks Plan. These plans detail the location and the maximum filling level of fill material imported to and placed on the site. These plans fix the amount of fill material that can be imported to the site. It is unnecessary to specify a maximum volume.

183 Fifth, the Council proposed, in two conditions fixing the hours of work, to limit the hours of work on Saturdays to 1pm, while Goldcoral sought 4pm. I accept

that site work should be permitted to continue to 4pm on Saturdays. The land is separated from the township of Evans Head and work onsite will not adversely affect the amenity of residents in Evans Head.

184 Sixth, the Council proposed a condition requiring Goldcoral to submit to the Council, prior to the issue of a subdivision works certificate, written confirmation that the Flood Emergency Response Plan was forwarded to the NSW State Emergency Service for review. Goldcoral opposed the addition of the words "for review". The Council agreed to delete those words. With this deletion, the condition was agreed.

185 Seventh, the Council proposed that the s 88B instrument under the *Conveyancing Act 1919* (NSW) required to be created include a restriction "prohibiting certain development types including childcare facilities, family day care, tourist or visitor accommodation such as short-term holiday rentals and Air BnBs." Goldcoral opposed that restriction, submitting that a s 88B instrument should not prohibit otherwise permissible land uses. The use of land within the residential estate for any of those land uses will require a development application to be made, which will allow the Council to assess the proposed use on its merits. I agree with Goldcoral that this condition to effect a private zoning by way of a s 88B instrument that limits what the public zoning under RVLEP allows, is inappropriate.

186 Eighth, the Council sought for the Vegetation and Fauna Management Plan to be amended to include certain matters concerning koalas. The Council had originally sought a condition requiring the conservation lands in the community lot (proposed Lot 1) to be managed in accordance with the approved Koala Plan of Management. The reference to the "approved" Koala Plan of Management was included consistent with the Council's argument that development was being proposed on land in a core koala habitat and therefore required an approved Koala Plan of Management. I have earlier rejected this argument: an approved Koala Plan of Management is not required. On this basis, there is no warrant for the Council's proposed condition that the conservation lands in the community property are managed in accordance with an approved Koala Plan of Management.

187 In this circumstance, the Council's alternative argument was that the Vegetation and Fauna Management Plan, which is required by another condition of consent, should be amended to include certain matters that would otherwise have been in the approved Koala Plan of Management. These matters are to require biennial koala activity monitoring and koala activity monitoring after fire. Both measures were recommended in Goldcoral's draft Koala Plan of Management, which was prepared when Stage 2 of the residential subdivision was proposed in the vicinity of a potential koala habitat.

188 Goldcoral submitted that now it has deleted Stage 2 of the residential subdivision in that area, there is no justification for incorporating these previous recommendations in the Vegetation and Fauna Management Plan. Goldcoral submitted these, now unnecessary, requirements have no sufficient nexus with the development proposed, citing *Lorenzato v Burwood Council* [2017] NSWLEC 1269.

189 I agree with the Council that the Vegetation and Fauna Management Plan should incorporate the requirements previously recommended in Goldcoral's draft Koala Plan of Management to undertake biennial koala monitoring and koala monitoring after fire. It may be accepted that Goldcoral's terrestrial ecology consultant recommended such monitoring when Goldcoral proposed Stage 2 of the residential subdivision in the vicinity of a potential koala habitat, and that Goldcoral has now deleted the proposed Stage 2 in that area. But there still is evidence of koalas using that area. The ecological experts agreed that koalas may range elsewhere on the land, in search of food. Such use of the land now proposed for the residential subdivision may not cause the land to be classified either as a potential koala habitat or a core koala habitat. But such classification is not the only reason to require monitoring of koala activity. The Koala is a vulnerable fauna species that is found on the land and surrounding land and ought to be the subject of monitoring and management under the Vegetation and Fauna Management Plan. In these circumstances, the monitoring requirements have a sufficient nexus to the proposed development.

Conclusion and orders

190 For the reasons I have given, each of the contentions raised by the Council and Ms Barker, and the concerns expressed by the community, has been adequately addressed. The comprehensive conditions of consent will mitigate unacceptable environmental impacts of the development. The carrying out of the proposed residential subdivision will change the environment of the land, but such change has been planned for over 40 years. The land has long been zoned for residential purposes. The current proposal is consistent with, although less ambitious than, the strategic planning and prior approvals for residential development on the land.

191 The Court orders:

(1) The appeal is upheld.

(2) Development consent is granted to development application DA 2015/00096 for a concept proposal for the subdivision of land at 240 Iron Gates Drive, Evans Head, being Lot 163 in DP831052 and Lots 276 and 277 in DP755624, and a detailed proposal for Stage 1 of the development, subject to conditions, as stated in the development consent annexed and marked as 'Annexure A'.

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Annexure A