

<b>DATE OF DETERMINATION</b>	29 June 2022
<b>DATE OF PANEL DECISION</b>	28 June 2022
<b>PANEL MEMBERS</b>	Paul Mitchell (Chair), Angus Gordon, Greg Britton, Joe Vescio and Simon Richardson
<b>APOLOGIES</b>	None
<b>DECLARATIONS OF INTEREST</b>	None

Papers circulated electronically on 14 June 2022.

#### **MATTER DETERMINED**

PPSNTH-136 – Byron Shire Council 10.2021.630.1 at 2 Massinger Street and Bay Street Byron Bay – coastal protection works (as described in Schedule 1).

#### **PANEL CONSIDERATION AND DECISION**

The Panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

#### **Development application**

The Panel determined to approve the development application pursuant to section 4.16 of the *Environmental Planning and Assessment Act 1979*.

The decision was unanimous.

#### **REASONS FOR THE DECISION**

The Panel determined to approve the application for the following reasons:

1. The Panel carefully considered relevant legal decisions (Ralph Lauren, Stewartville and Robert Watson v Transitional Coastal Council, NSWLEC 207) where the Chief Judge said, in summary, that the lawfulness of existing sea walls does not preclude applications for development consent being made, that consent for the future use of existing works can be granted but that in making such decisions no regard can be had for the past unlawful works and use [at 128]. Accordingly, in making this determination the Panel has not had any regard to the existence of the current protective structures on the land, the consent for which has now lapsed.
2. In granting approval the Panel notes the following features of the subject application which distinguish it from the proposed works at Belongil Beach which were not approved. The subject works:
  - will not restrict public access to or along Clarkes Beach whereas the works at Belongil would have restricted public access;
  - will protect coastal features that are of environmental or social value – middens, littoral rainforest and the cage – whereas the works at Belongil would not have protected any publicly valuable assets; and
  - will not impede implementation of any Coastal Management Program for the whole embayment whereas the works at Belongil could have impeded such a Program.

For the reasons given above approval of this application does not create a precedent for approval of other unlawful works which differ from the subject application.

3. The proposal is permissible in the 7(f1) zone and is consistent with relevant zone objectives because it will not have a detrimental impact on habitats or the scenic quality of the locality.
4. The proposal, as conditioned by this approval, will not have any significant effects on the coastal zone including on the integrity of the nearby littoral rainforest. The proposal does not involve any removal of vegetation and, as conditioned, will not exacerbate erosion or 'end effect' risks meaning the relevant provisions of the SEPP Resilience and Hazards 2021, Byron LEP 1988 and Byron DCP 2010 are all satisfied.
5. The proposal, as conditioned, will not adversely affect coastal values in the immediate vicinity because access to the beach, surfing and swimming will not be materially restricted and potential water quality impacts will be avoided.
6. Local Aboriginal heritage items, the Holiday Park and the Beach Café will be protected by the proposed use for a period of up to 5 years to enable appropriate actions to be undertaken to address the long-term management of the identified threat from coastal processes. There are considered to be socially beneficial outcomes provided by this approach.
7. The Panel notes that no objections were received on the application and believes approval is in the public interest for the reasons given above.






### CONDITIONS

The Development Application was approved subject to the conditions in the Council Assessment Report with the following amendments.

- Condition A2 reads as follows: 'The coastal protection works (geobag structure) must be removed at the earliest of the following:
  - (a). By the 5<sup>th</sup> anniversary of the date of this approval; or
  - (b). As soon as reasonably practicable following an event causing significant failure of the coastal protection works and where reinstatement of the works is not feasible, with 'significant failure' and the feasibility of reinstatement to be determined by a suitably qualified and experienced coastal engineer appointed by DPE- Crown Lands; or
  - (c). The presence of the protection works would impede implementation of a certified Coastal Management Program.
- Condition B1, the third paragraph is to read 'The CPWMP must be prepared in consultation with a suitably qualified and experienced coastal engineer, ecologist, the BoBBAC and the Crown Lands Holiday Park owners/ managers.'
- Condition B3, the words "and Council" are to be added after 'Holiday Park owners/managers'.
- In all conditions where the word 'restoration' is used, it is to be replaced by 'rehabilitation'.

### CONSIDERATION OF COMMUNITY VIEWS

In coming to its decision, the Panel notes that no written submissions were made during public exhibition and therefore no issues of concern were raised.

PANEL MEMBERS	
 Paul Mitchell OAM (Chair)	 Angus Gordon
 Greg Britton	 Joe Vescio
 Simon Richardson	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSNTH-136 – Byron Shire Council 10.2021.630.1
2	PROPOSED DEVELOPMENT	<p>Development consent is sought to retain the existing temporary coastal protection works (geobag structure) for a five-year period. The applicant states that this will provide a degree of temporary protection to the Beach Byron Bay café site (and Aboriginal middens) from coastal erosion and provide sufficient time to achieve the reconfiguration and/or relocation of the café. Other works that are part of this application include dune stabilisation and revegetation, dune forming fencing, regular monitoring of the works, maintenance of the geobags and beach nourishment (the importation of sand). Temporary machinery compounds are proposed to be used when maintenance is required. Tree removal will only be required if trees collapse or become dangerous.</p> <p>The existing geobag structure and works are located mostly on Lot 18 DP 1269368 and partly on Lot 9 DP 1049827. The existing wall includes 6 x layers of bags and is 90m in length. The wall contains approximately 650 geobags. The total development footprint is approximately 1,500 m2. It is a Crown development. It is also Integrated development because approvals are required under section 90 of the National Parks and Wildlife Act 1974 (known Aboriginal sites - AHIP).</p> <p>It is Designated Development because it affects land mapped in SEPP (Resilience and Hazards) as littoral rainforest.</p> <p>It requires a marine parks permit as part of the geobag structure is partly below Mean High Water Mark.</p> <p>The development is defined as coastal protection works and is permitted in the 7(f) (1) zone under Byron LEP 1988.</p>
3	STREET ADDRESS	2 Massinger Street, Byron Bay
4	APPLICANT OWNER	Robyn Campbell, Hydrosphere Consulting Pty Ltd NSW Department of Planning, Industry & Environment - Housing and Property / Crown Lands
5	TYPE OF REGIONAL DEVELOPMENT	Certain Coastal Protection Works
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> <li>• Environmental planning instruments: <ul style="list-style-type: none"> <li>○ State Environmental Planning Policy (Resilience and Hazards) 2021</li> <li>○ State Environmental Planning Policy (Planning Systems) 2021</li> <li>○ State Environmental Planning Policy (Transport and Infrastructure) 2021</li> <li>○ Coastal Management Act 2016</li> <li>○ Marine Estate Management Act 2014</li> <li>○ NPWS Act 1974</li> <li>○ Byron Local Environmental Plan YYYY</li> </ul> </li> <li>• Draft environmental planning instruments: Nil</li> <li>• Development control plans: <ul style="list-style-type: none"> <li>○ Byron Development Control Plan 2010</li> </ul> </li> <li>• Planning agreements: Nil</li> <li>• Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Nil</li> <li>• Coastal zone management plan: Nil</li> <li>• The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality</li> <li>• The suitability of the site for the development</li> </ul>

		<ul style="list-style-type: none"> <li>Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations</li> <li>The public interest, including the principles of ecologically sustainable development</li> </ul>
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> <li>Council Assessment Report: 8 June 2022</li> <li>Written submissions during public exhibition: nil</li> </ul>
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> <li>Briefing: 9 February 2022 <ul style="list-style-type: none"> <li><u>Panel members</u>: Paul Mitchell (Chair), Hannah Power, Angus Gordon, Joe Vescio and David Brown</li> <li><u>Council assessment staff</u>: Mike Svikis, Chris Larkin and Chloe Dowsett</li> <li><u>Department staff</u>: Stuart Withington, Cameron Brooks, Jane Gibbs, Verity Rollason and Lisa Foley</li> </ul> </li> <li>Site inspection: <ul style="list-style-type: none"> <li><u>Angus Gordon</u>: 30 May 2022</li> <li><u>Joe Vescio</u>: 21 June 2022</li> </ul> </li> <li>Final briefing to discuss council's recommendation: 21 June 2022 <ul style="list-style-type: none"> <li><u>Panel members</u>: Paul Mitchell (Chair), Angus Gordon, Greg Britton, Joe Vescio and Simon Richardson</li> <li><u>Council assessment staff</u>: Mike Svikis, Chris Larkin and Shannon Burt</li> <li><u>Department staff</u>: Jane Gibbs, Carolyn Hunt, Verity Rollason and Lisa Foley</li> </ul> </li> <li>Applicant Briefing: 21 June 2022 <ul style="list-style-type: none"> <li><u>Panel members</u>: Paul Mitchell (Chair), Angus Gordon, Greg Britton, Joe Vescio and Simon Richardson</li> <li><u>Department staff</u>: Jane Gibbs, Carolyn Hunt, Verity Rollason and Lisa Foley</li> <li><u>Applicant representatives</u>: Catherine Knight, Malcolm Robertson, Robyn Campbell and James Carley</li> </ul> <p><u>Note</u>: Applicant briefing was requested to respond to the recommendation in the council assessment report</p> </li> </ul>
9	COUNCIL RECOMMENDATION	Approval
10	DRAFT CONDITIONS	Attached to the Council Assessment Report