



## COUNCIL ASSESSMENT REPORT – MODIFICATION APPLICATION

### NORTHERN REGIONAL PLANNING PANEL

<b>PANEL REFERENCE &amp; DA NUMBER</b>	PPSNTH-329 – Byron – 10.2017.661.2
<b>PROPOSAL</b>	Section 4.56 to modify condition of consent number five and staging of development located in the eastern section of the West Byron Urban Release Area (WBURA) in order to allow for Stages 11 and 12 in the western section of the site to proceed concurrently, separately and non-sequentially with stages 1-10.
<b>ADDRESS</b>	<ul style="list-style-type: none"> <li>• Lot 1 DP 201626 – Ewingsdale Road Byron Bay</li> <li>• Lot 2 DP 542178 – 394 Ewingsdale Road Byron Bay</li> <li>• Lot 1 DP 780242 – 412 Ewingsdale Road Byron Bay</li> <li>• Lot 2 DP 818403 – Melaleuca Drive Byron Bay</li> <li>• Lot 1 DP 520063 – 364 Ewingsdale Road Byron Bay</li> <li>• Lot 7020 DP 1113431 – Ewingsdale Road Byron Bay (swale drain)</li> <li>• Lot 105 DP 1297628 – 288 Ewingsdale Road Byron Bay</li> </ul>
<b>APPLICANT</b>	Stuart Murray
<b>OWNER</b>	<ul style="list-style-type: none"> <li>• Gousse Holdings Pty Ltd</li> <li>• Telicove Pty Ltd</li> <li>• Mr DJ O'Connor &amp; Mrs CF O'Connor</li> <li>• Byron Shire Council (swale drain)</li> <li>• Mr AR &amp; Mrs JD Smith &amp; Fletcher Project Developments Pty Ltd</li> <li>• Byron Bay Industrial Pty Ltd</li> </ul>
<b>MOD LODGEMENT DATE</b>	12/07/2024
<b>ORIGINAL DA DETERMINATION DATE</b>	<ul style="list-style-type: none"> <li>• 8 March 2022, the judgment of <i>Site R &amp; D Pty Ltd v Byron Shire Council</i> [2022] NSWLEC 1121 was published and Development Consent 10.2017.661.1. was approved.</li> <li>• On 21 April 2022, the Conditions of Consent were filed</li> </ul>
<b>APPLICATION TYPE</b>	Modification Application under Section 4.56

<b>REGIONALLY SIGNIFICANT CRITERIA</b>	Section 2.19(1) and Section 2 of Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021: General development over \$30 million				
<b>CIV</b>	\$40,000.000				
<b>CLAUSE 4.6 REQUESTS</b>	Not applicable				
<b>KEY SEPP/LEP</b>	<p>Relevant Environmental Planning Instruments</p> <ul style="list-style-type: none"> <li>State Environmental Planning (Biodiversity and Conservation) 2021</li> <li>State Environmental Planning Policy (Planning Systems) 2021</li> <li>State Environmental Planning Policy (Resilience and Hazards) 2021</li> </ul> <p>Relevant Local Environment Plan</p> <ul style="list-style-type: none"> <li>Byron Local Environment Plan 1988</li> </ul> <p>Proposed Local Environmental Plan</p> <ul style="list-style-type: none"> <li>Byron Local Environmental Plan 2014 (Council Reference 26.2023.7.1 – West Byron Zone transition PP, Portal reference PP-2023_2829)</li> </ul> <p>Relevant Development Control Plan</p> <ul style="list-style-type: none"> <li>Byron Development Control Plan 2014</li> </ul>				
<b>TOTAL &amp; UNIQUE SUBMISSIONS ISSUES KEY IN SUBMISSIONS</b>	No submissions				
<b>DOCUMENTS SUBMITTED FOR CONSIDERATION</b>	<ul style="list-style-type: none"> <li>Statement of Environmental Effects</li> <li>Ecological statement of support</li> <li>Amended Subdivision Plans</li> </ul>				
<b>SPECIAL INFRASTRUCTURE CONTRIBUTIONS (\$7.24)</b>	Not Applicable				
<b>RECOMMENDATION</b>	Approval				
<b>DRAFT CONDITIONS TO APPLICANT</b>	Yes – copy of amended conditions sent to applicant				
<b>SCHEDULED MEETING DATE</b>	10 December 2024				
<b>PLAN VERSION</b>	Figure 15.1 Rev R	Stormwater Infrastructure Sheet 1	Stanhold Consulting Engineer/ BTE Consulting	17.10.2024	

	15024-9R	Dimensioned Lot Size Plan	Abbott and Macro	21.10.2024
	Figure 22.1	Staging Plan	Stanhold Consulting Engineer/BTE Consulting	Feb 2020
	Rev M			
<b>PREPARED BY</b>	Chris Larkin			
<b>DATE OF REPORT</b>	26 November 2024			

## EXECUTIVE SUMMARY

This Section 4.56 Modification seeks approval to enable Stages 11 and 12 within the western side of West Byron Urban Release Area (WBURA) to be developed prior to Stages 1-10. Justification for this nonsequential staging is a result of the Harvest Estate completing works within its early stages and constructing the new public road to link with Melaleuca Drive.

A secondary minor change to the development is the consolidation of a buffer lot (Lot 157) with the residual environmental lots within Stages 11 which will be “common property” within the proposed community title development.

The proposed modification and the consequential amendments to the conditions of consent are supported.

The application was lodged on 12/07/2024 and placed on public exhibition from 24/07/24 to 06/08/24. No Submissions or objections were received.

A detailed consideration of the applicable environmental planning instruments was provided in the Commissioner’s Judgement on the original application (Site R and D Pty Ltd v Byron Shire Council [2022] NSWLEC 1121). The modification application does not raise any new issues in relation to the environmental planning instruments; proposed instruments; development control plans; planning agreements; and the regulations; applicable to the original development application, other than those listed below.

### Relevant State Environmental Planning Policies

The proposed amendments do not raise any specific issues under the relevant SEPPS which apply to the site including the SEPP (Biodiversity & Conservation) 2021 and SEPP (Resilience and Hazards) 2021.

### Byron LEP 1988

The proposed development remains consistent with the LEP 1988 zone objectives and other provisions contained as applicable to the WBURA. It is noted a condition of consent is recommended to ensure development contributions to be paid under a Planning Agreement with the Minister for Planning and Infrastructure are not missed during the subdivision process. In this regards this condition links in part also to Clause 99 of Byron LEP 2014 for the provision of infrastructure.

DCP 2014

Many of the prescriptive measures for the staging plan were not met with the approval of separate DAs for the WBURA. (eg DA10.2017.201.1 – Harvest Estate and DA10.2017.661.1 – Site R and D – This consent). Notwithstanding, the commencement of Stages 11 and 12 out of numerical order is logical considering that the access road through the Harvest Estate is now constructed and links to Ewingsdale Road at the Bayshore Drive Roundabout.

Further, the completion of stages 11 and 12 absent the construction of the through Spine Road and a separate access to Ewingsdale Road raises no issues with the current access arrangements with the Bayshore Drive roundabout. This is considered to have capacity to cater for these lots and the Harvest Estate being a total of 173 residential lots plus one industrial parcel (Lot 158 in Stage 12).

S7.11 Development Contributions

The proposed amendment to staging conditions does not require any amendment to conditions regarding S7.11 Development Contributions.

Likely impacts of the development

The proposed changes to the staging are unlikely to involve negative, social, economic or environmental impacts.

Submissions

No Submissions were received.

Conclusion

Following consideration of the matters for consideration under Section 4.15(1) and 4.56 of the EP&A Act, it is considered that the proposed modification can be supported, and the application is recommended for approval subject to amended conditions of consent.

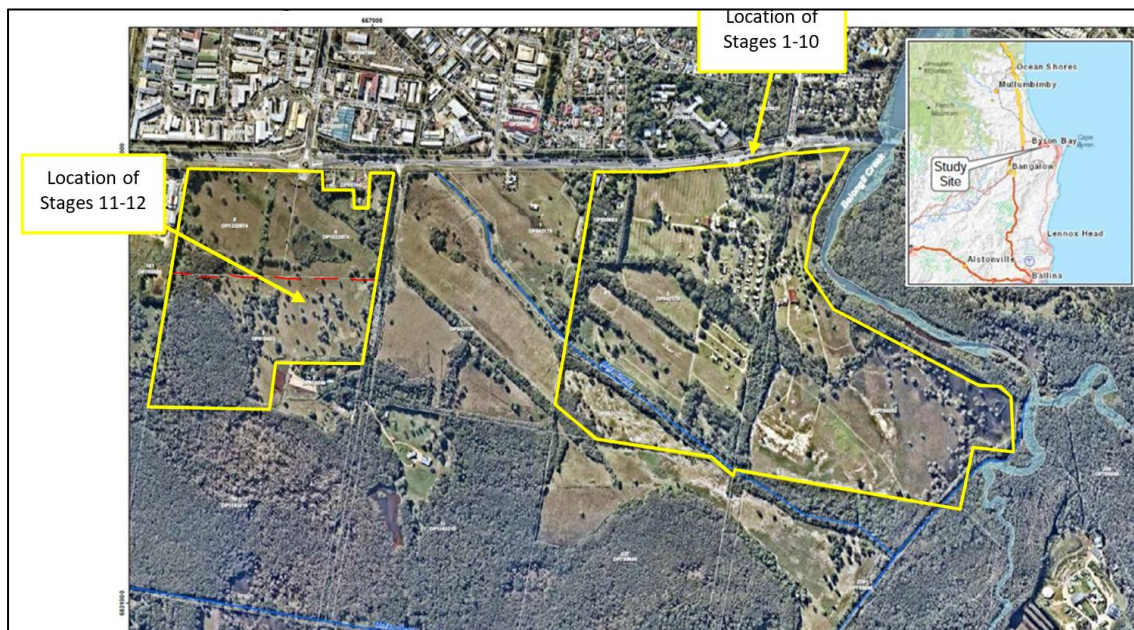
## 1. THE SITE AND LOCALITY

### 1.1 The Site

The site has frontage to Ewingsdale Road and is legally comprised of the following lots:

- Lot 1 DP 201626 – Ewingsdale Road Byron Bay
- Lot 2 DP 542178 – 394 Ewingsdale Road Byron Bay
- Lot 1 DP 780242 – 412 Ewingsdale Road Byron Bay
- Lot 2 DP 818403 – Melaleuca Drive Byron Bay
- Lot 1 DP 520063 – 364 Ewingsdale Road Byron Bay
- Lot 7020 DP 1113431 – Ewingsdale Road Byron Bay (swale drain)
- Lot 105 DP 1297628 – 288 Ewingsdale Road Byron Bay

The site is divided into two separate sections, the eastern section includes Stages 1-10 (“the eastern section”) and the western section includes stages 11-12 (“the western section”). The overall site is known as “Site R & D”. An aerial photograph showing the approved development site, as it was at the time that the development application was made, is included below in Figure 1. Including the general location of stages 1-10 and stages 11-12.



**Figure 1** – The site (Site R & D), as it was at the time the development application was made, is shown outlined in yellow. The area above the dashed red line at Stages 11 & 12 is common land with the Harvest Estate.

The eastern section of the site has a northern boundary to Ewingsdale Road, an eastern boundary along Belongil Creek, a southern boundary and western boundary bordering the

“Harvest Estate” (approved under 10.2017.201.1 as amended by 10.2017.201.3). The eastern section has a total area of 42.5ha.

The western section of the site is generally rhomboidal in shape. The western section has a northern boundary and eastern boundary to the Harvest Estate, a southern boundary against 46 and 50 Melaleuca Drive, Byron Bay, and a western boundary against 268, Ewingsdale Road, Byron Bay, and 66 Citriadora Drive, Ewingsdale. The western section has a total area of 11.64ha.

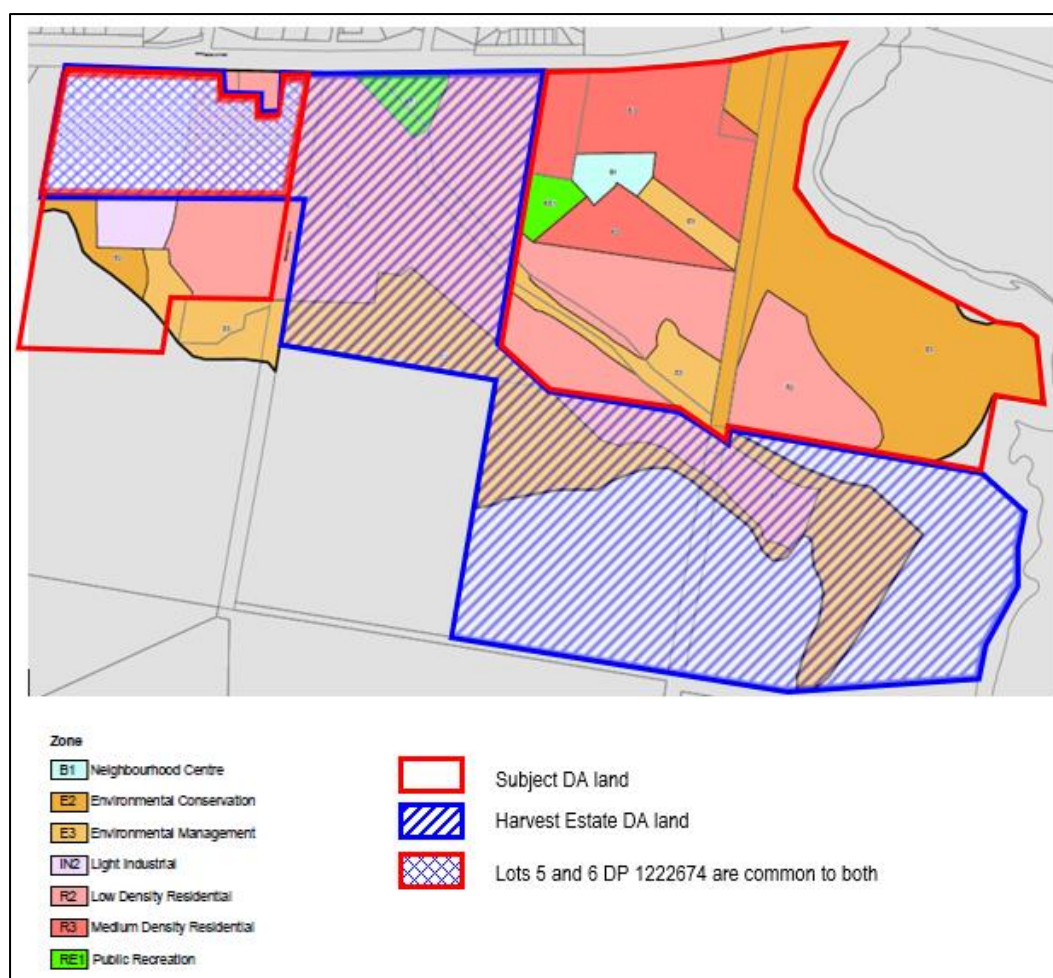
Combined, the eastern and western sections have a total area of 54.14ha. Site R & D is generally level with elevations ranging between 2m to 4m AHD.

The eastern portion of the site is presently occupied by the Belongil Fields camping ground and associated structures; two of the allotments within the eastern portion contain dwelling houses; and a significant area of coastal wetlands. The western portion of the site is vacant and includes a significant area of coastal wetlands.

#### The Harvest Estate

The eastern and western portions of the subject site (Site R & D) are largely separated by the “Harvest Estate” (approved under DA 10.2017.201.1 as amended). Stages 1 - 4 of the Harvest Estate development and subdivision align with stages 11 and 12 of the subject modification application. However, Lot 105 DP 1297628 and Lot 2 DP 818403 are common to both Site R & D and the Harvest Estate. The land common to both is shown in Figure 2.

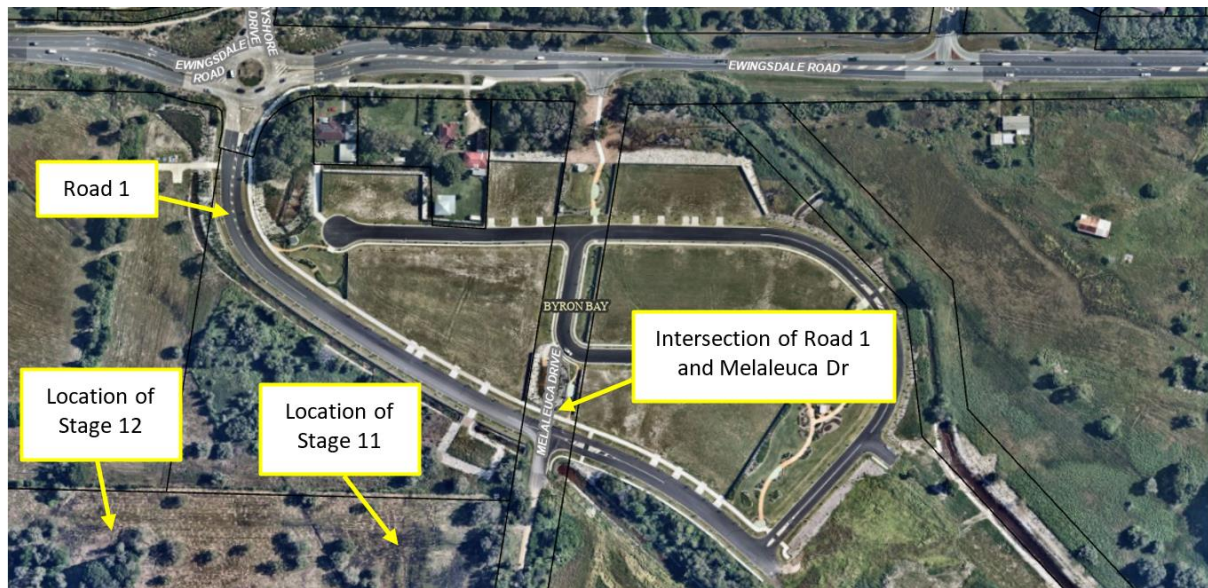




**Figure 2** – Location and interrelationship between the two subdivision development consents in the West Byron Urban Release Area (WBURA), overlaid with Byron LEP 1988 zoning map. Harvest Estate shown hatched, Site R & D no hatching.

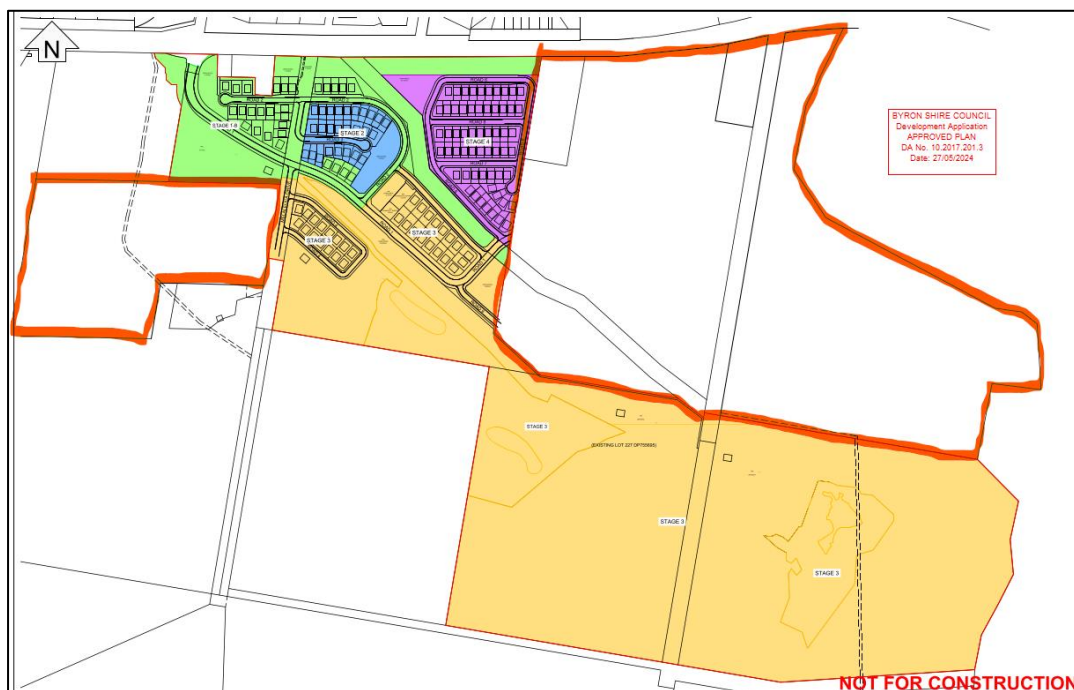
The Site R & D development consent (10.2017.661.1) requires Harvest Estate subdivision works to be completed prior to stages 11 and 12 of consent 10.2017.661.1 being commenced under condition 5 of that development consent.

Construction of Road 1 has taken place under the Harvest Estate development and connects to the common lots of the subject modification application. An aerial photograph of Road 1 is provided at Figure 3:



**Figure 3 - Aerial photograph showing roads constructed on the Harvest Estate subdivision site including adjoining approved Stages 11 & 12 for Site R & D**

Figure 4 below provides the most recent approved staging plan for the Harvest Estate with Site R & D (the subject of this report) highlighted in red. Access to the site for stages 11 and 12 is now available, following the recent release and registration of the early stages within the Harvest Estate Subdivision including the provision of a sealed access road (Road 1) through to Ewingsdale Road. This road has been dedicated to Council as a public road.



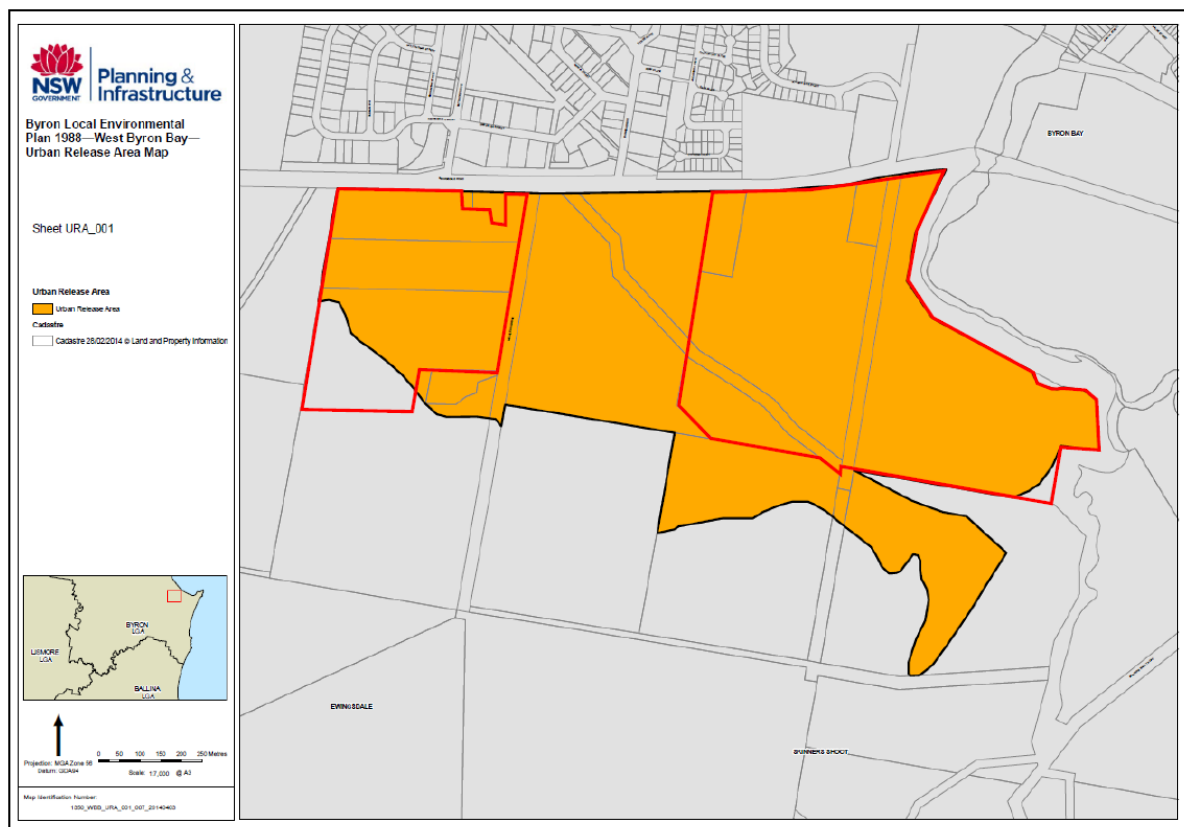
**Figure 4 – Approved Staging Plan for Harvest Estate showing surrounding Site R & D in red highlight**



## 1.2 The Locality

The site is located approximately 2.5km west of the Byron Bay town centre with access to Ewingsdale Road along its northern frontage.

The site is located within the West Byron Urban Release Area (WBURA) pursuant to the Byron Local Environmental Plan 1988. An extract from the Urban Release Area Map referred to in Byron LEP 1988 with the site outlined in red is provided at Figure 7.



**Figure 5** – West Byron Urban Release Area Map

## 2. THE PROPOSAL AND BACKGROUND

### 2.1 The Proposed Modification

The S4.56 modification proposes to amend the original approval: DA No. 10.2017.661.1 granted by the Land and Environment Court of NSW on 8 March 2022 for the subdivision of land within the West Byron Urban Release Area (WBURA) with frontage to Ewingsdale Road.

Original consent 10.2017.661.1 to subdivide land in two separate areas within the West Byron Urban Release Area (WBURA) was approved on 8 March 2022 by the NSW Land and Environment Court and permits the creation of one hundred and sixty two (162) lots comprising one hundred and twenty seven (127) residential lots, twenty five (25) super (master) lots, two (2) business lots, one (1) recreation lot, two (2) industrial lots and five (5) residue lots, associated infrastructure and habitat restoration works.

The modification application seeks to modify subdivision staging to enable Stages 11 and 12 to proceed separately and non-sequentially with stages 1 to 10. In order to achieved this, it is proposed to amend condition 5 of the consent.

The proposed amended Condition 5 is provided below:

**Note.** Blue strikethrough text proposed for deletion and blue underlined text proposed for insertion.

#### *5. Staged development*

*The development is to be carried out in the stages approved under condition 4E above, noting the addition of Stage A.*

*Stage A must comprise: All Year 1 planting and weed control including, but not limited to, works within management zones 2A, 2D, 3 and the Belongil Creek restoration area as specified in the KPOM, the KHMP, the TSMP, the VMP and the BCMP as amended in accordance with these conditions.*

*The development is to progress sequentially as per the approved stages with Stage A being the first stage. With the exception of Stage A (noting that Stage A is addressed in condition 13 of this consent) **the previous stage is to be completed to Council's satisfaction prior to works commencing on the next stage.***

*Notwithstanding the above, Stages 11 and 12 ~~must not~~ may be commenced, and may be constructed concurrently, until when the access road from Ewingsdale Road to Melaleuca Drive has been constructed as approved by consent 10.2017.202.1. ~~and~~ The upgrade works to Melaleuca Drive have been completed as approved by consent 10.2017.201.1 are to be in accordance with Condition 54 of this consent. and/or approved by the consent. ~~For the purposes of this requirement, the access road will be taken to be completed when a subdivision certificate has been issued for all stages of the subdivision approved by consent 10.2017.201.1 and this consent shall include any part of the access road works described above.~~*

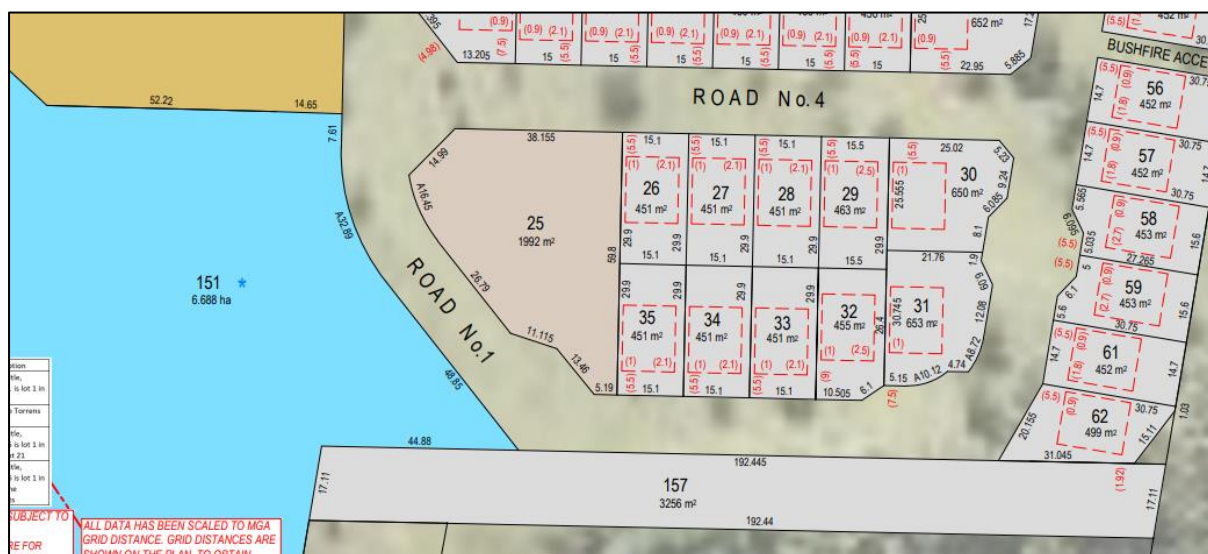
*A maximum of one (1) stage, with the exception of Stages 11 and 12 which may be undertaken concurrently, may be under construction at any one time with only the*

following exception being the construction of temporary turning heads where roads terminate on stage boundaries.

Where conditions are required to be satisfied prior to a particular event, those conditions are the conditions relevant to the works being carried out in the stage. For clarity, if a condition of consent requires a matter to be addressed prior to the issue of a Subdivision Works Certificate and does not specify a stage of development for the issue of that Subdivision Works Certificate, it is taken to be applicable to each separate stage. That is, the condition must be satisfied prior to the issue of a Subdivision Works Certificate for each stage.

### Other amendments

The applicant has also proposed to remove a long narrow buffer lot previously approved as Lot 157 which was located adjacent to the southern boundary with a neighbouring lot of Melaleuca Drive. The subject Lot is to be consolidated with the remaining residual land in stages 11 and 12 identified as Lot 151.



**Figure 6 Extract from Approved Plans showing Lot 157**

With the subject changes to the Plan of subdivision Proposed Lot 151 will increase in size and area from 6.688 ha to 7.014 ha. An extract of the proposed plan is provided below. The proposed buffer lot 157 was also to be onsold/ transferred to the adjacent land owner to the south with a condition of consent to that effect. The condition states:

### 121. Lot 157

*Lot 157 must be transferred to the owner of the adjoining allotment to the south within 3 months of the registration of that subdivision.*

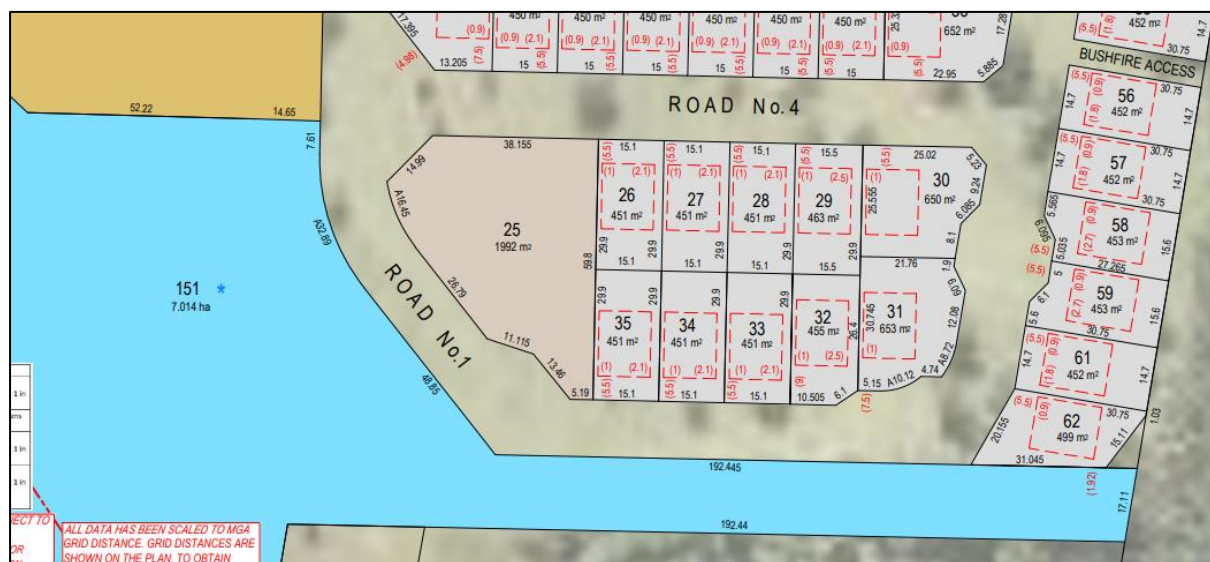
Condition 99 (q) also placed a restriction on this lot removing any potential for a dwelling to be constructed on the land. The condition states:

### 99. Section 88B Instruments

*A Section 88B Instrument, under the Conveyancing Act 1919, and one (1) copy are to be submitted with the application for a subdivision certificate. The final plan of subdivision and accompanying Section 88B Instrument are to provide for:*

#### **q) Restriction on use of lot 157**

*A restriction on the use of Lot 157 which prohibits the carrying out of any residential development on that lot.*



**Figure 7 Extract from Proposed plan showing the deletion of Lot 157 which has been consolidated with Lot 151**

The applicant has provide a copy of the Deed of Agreement signed by the relevant land owner to the south and property developers for Stages 11 and 12 rescinding the requirement to transfer the subject buffer lot (Lot 157). As such it will be recommended that condition 121 be deleted.

As to Condition 99 it is recommended that the Lot description be amended to Lot 151.

Although it is unlikely that any residential development would ever be proposed on this residual land, as it is low lying and will contain a batter supporting earthworks within stage 11, a sizeable area is zoned R2 Low Density Residential. Accordingly, it is prudent to amend Condition 99(q) to read:



**q) Restriction on use of lot ~~157~~ 151**

*A restriction on the use of Lot ~~157~~ 151 which prohibits the carrying out of any residential development on that lot.*

Discussions have also been ongoing with the applicant regarding landscaping this residual buffer area within the new proposed Lot 151. They are amenable to such a condition and the following amendments are proposed to Condition 48 by adding in the additional words as follows:

**48 Landscaping Plan required**

*A detailed landscaping plan must be submitted as part of the subdivision works certificate application for each stage. The landscaping plan must be prepared by a suitably qualified and experienced landscape architect / architect / ecologist and demonstrate consistency with the relevant requirements of Chapter B9 of Byron Development Control Plan 2014.*

*The detailed landscaping plans must indicate the following as a minimum:*

- a. Details of the landscaping to be carried out in the Main Drain corridor and all other areas identified as public or recreational open space.*
- b. Use of “fauna-neutral” plant species adjacent to Ewingsdale Road to minimise likelihood of colonisation by native fauna and consequently risk of vehicle strike. For the purposes of this condition, “fauna neutral” plant species are not plant species known to be used as food resources by native fauna, namely plants which provide foliage, blossoms, fruit or other ecologically relevant attributes. A “fauna neutral” plant species list must be submitted to Council for approval.*
- c. Details of pedestrian links to/from the Main Drain corridor from footpaths and cycleways. The pedestrian links to the Main Drain corridor should avoid the use of concrete and asphalt surfaces in favour of timber, gravel and other “soft” pathway surface options.*
- d. The environmental embellishment of the Main Drain including removal of weed species.*
- e. Landscaping associated with stormwater treatment and conveyance devices and infrastructure.*
- f. Landscaping treatments throughout the public road reserves including provision of street trees at a minimum of one street tree per 15 metres of residential lot street frontage. Street trees are to have a general maturity height of 10 metres and a canopy diameter of 8 metres.*
- g. Landscaping and planting for drainage lines, car parking areas and recreational reserves to be dedicated to Council.*

- h. Demonstrated consistency with the adjacent, approved subdivision (DA 10.2017.201.1) in relation to footpaths, cycleways, street trees, Main Drain embellishment and the area adjacent to Ewingsdale Road.*
- i. Proposed location for planted shrubs and trees – trees should be located clear of infrastructure and service pits.*
- j. Common and botanical name of shrubs and trees to be planted. Locally indigenous species are to be predominantly used in landscaping. No species listed as undesirable in Chapter B2 of Byron Development Control Plan 2014 are to be used in landscaping of the site.*
- k. Mature height, location and density of trees to be planted.*
- l. Location of grassed and paved areas.*
- m. Locations and design of acoustic barriers.*
- n. Details of how landscape planting will be maintained, including weed control, and a description of any passive watering arrangements through water sensitive urban design.*
- o. A landscape plan to be provided for the subject land within proposed Lot 151 and adjacent to Lot 2 DP878549 46 Melaleuca Drive, Byron Bay for Stage 11. The plan to be prepared in accordance with the requirements of this conditions with species dominated by native grasses indigenous to the local area (North Coast of NSW/ South East Qld).*

*The landscaping plan must be approved as part of the Subdivision Works Certificate for each Stage.*

## Proposed Changes to Conditions

As a result of the above amendments there are other subsequent changes to conditions of consent. The following table provides a brief outline of the conditions and changes required.

**Table 1: Proposed Changes to Conditions**

<b>Condition No</b>	<b>Condition requirements</b>	<b>Change Proposed and reason</b>
1	Approved plans and documents	Modify condition to reflect new subdivision plans and added to the list of plans accordingly.
4B	Updated Engineering Plans Stage 11 and 12	Change wording to reflect Stage 11/12 to proceed out of numerical order
4D	Provision of amended subdivision plans	Change wording to reflect Stage 11/12 to proceed out of numerical order

4E	Provision of Amended Staging plan	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
4F	Provision of Amended Engineering Plan	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
13	Environmental Restoration and Enhancement and Landscaping works	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
13A	Retirement of Biodiversity Credits	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
14	Hydrological Assessment	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
17	Additional Monitoring and reporting Requirements	Change wording to remove reference to stage 12 and change to "the final stage of construction within the development".
18	Baseline Surface Water Quality Assessment	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
28	Master Stormwater Management Plan	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
42	Updated Koala Plan of Management	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
43	Baseline Surface Water Quality Assessment	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
45	Updated CEMP to include details of monitoring and reporting	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
54	Detailed design required For Stage 11 and 12	Change wording to remove reference to stage 1 as Stage 11/ 12 to proceed out of numerical order
99A	Community title Subdivision	Lot Numbers amended to correct error
100	Section 88E Instrument	Lot Numbers amended to correct error

### Conditions quoting General Terms of Approval from the NSW Rural Fire Service

A number of conditions quoted the date of the general terms of approval from NSW Rural Fire Service being 18 June 2021. This relates to the Bushfire Safety Authority

issued under Section 100B of the Rural Fires Act 1997 when the DA was originally considered. To simplify the consent this date has been removed from Conditions 52, 55(d), and 99 (o) which are located within the middle of the consent, with those conditions referencing only the general terms of approval from the NSW Rural fire Service. Should the bushfire safety authority be updated again, then these three conditions won't need changing, which due to their position in the consent can be missed. The two other conditions (11 and 116) which are specific to the Section 100B Approval have been amended specifically to include the new date of the re-issued general terms of approval being 26 November 2024. In addition to this a copy of the Bushfire Safety Authority is to be appended to the consent within Schedule 1.

## 2.2 Background

The S4.56 modification application was lodged on **12 July 2024**. A chronology of the modification application since lodgement is outlined in **Table 1**.

**Table 1: Chronology of the S4.56 Modification and combined 'parallel' Class 1 LEC appeal**

Date	Event
19-06/2024	S4.56 Modification submitted on NSW Planning Portal
27/06/2024	Applicant commenced proceedings in Class 1 of the Land and Environment Court seeking to modify Development Consent 10.2017.661.1.
12/07/2024	S4.56 Modification lodged fees paid with Council
17/07/2024	S4.56 referred to RFS – 100B – Updated GTA's provided
24/07/2024 to 06/08/2024	Exhibition of the application – no submissions received
30/07/2024	Request for information to confirm no additional costs associated with the proposed modification
31/07/2024	Applicant confirmed no additional costs in relation to proposed modification
29/08/2024	Request for owner's consent from Council to applicant by email
03/09/2024	Owner's consent received by email



12/09/2024	Request for additional information from Council to applicant – response pending. Refer to Section 2.4 and Attachment C for further detail
24/09/2024	Applicant requested additional time to respond to request for information
09/10/2024	S107(4) EP&A Regs 2021 notify LEC
22/10/2024	Panel briefing
24/10/2024	Written response to Request for more information
31/10/2024	Additional plans provided in support of Written response dated 24/10/2024

### 2.3 Site History

- 8 March 2022, the judgment of *Site R & D Pty Ltd v Byron Shire Council* [2022] NSWLEC 1121 was published and Development Consent 10.2017.661.1. was approved.
- On 21 April 2022, the Conditions of Consent were filed.

## 3. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in 4.56] of the EP&A Act in relation to modification of consents provisions, Section 4.15(1) of the EP&A Act in relation to matters for consideration for applications and Part 5 of the 2021 EP&A Regulation in relation to information requirements and notification. These matters are considered below.

### 3.1 Section 4.56 of the EP&A Act

Table 2 provides an assessment of the proposal against Section 4.56 of the EP&A Act 1979.

**Table 2 – S4.56 EP&A Act 1979**

Section	Assessment comments
4.56(1)	<ul style="list-style-type: none"> <li>• The applicant is a person who is entitled to act on the consent which was issued by the Court.</li> <li>• The development to which the consent as modified relates is substantially the same as the originally approved development.</li> </ul>

	<ul style="list-style-type: none"> <li>• Public notification of the application in accordance with the EP&amp;A Regulation 2021 and the Byron Community Participation Plan.</li> <li>• No submissions received.</li> </ul>
4.56(1A)	Section 4.15(1) matters as are of relevance to the development the subject of the application are considered below.
4.56(1B)	Repealed.
4.56(1C)	<p>The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.</p> <p>Noted</p>
4.56(2)	<p>A copy of the notice of determination is required to be sent to each person who made a submission in respect of the application.</p> <p>Noted – but no submissions received in this instance.</p>
4.56(3)	<p>The deemed refusal provisions of the regulations are noted.</p> <p>The applicant commenced proceedings in Class 1 of the Land and Environment Court seeking to modify Development Consent 10.2017.661.1 on 27/06/2024. The proceedings are running parallel to this S4.56 modification application.</p>
4.56(4)	Repealed.

### 3.2 Section 4.15(1) of the EP&A Act

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.56(1A), which are of relevance to the application.

These matters include the following, which are considered in detail below:

- (a) *the provisions of—*
- (i) *any environmental planning instrument, and*
  - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
  - (iii) *any development control plan, and*

- (iiia) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
- (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (b) *that apply to the land to which the development application relates, the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

### **3.2.1 Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations**

The relevant provisions under s4.15(1)(a) are considered below.

The Site R&D is located within the following zones under Byron LEP 1988.

<b>BLEP 1988 Zone</b>	<b>Western portion (site of Stages 11 &amp; 12)</b>	<b>Eastern portion</b>
IN2 Light Industrial	✓	
R2 Low Density Residential	✓	✓
E2 Environmental Conservation	✓	
E3 Environmental Management	✓	✓
B1 Neighbourhood Centre		✓
RE1 Public Recreation		✓
R3 Medium Density Residential		✓

Refer to Figure 8 for Land Zoning Map below.

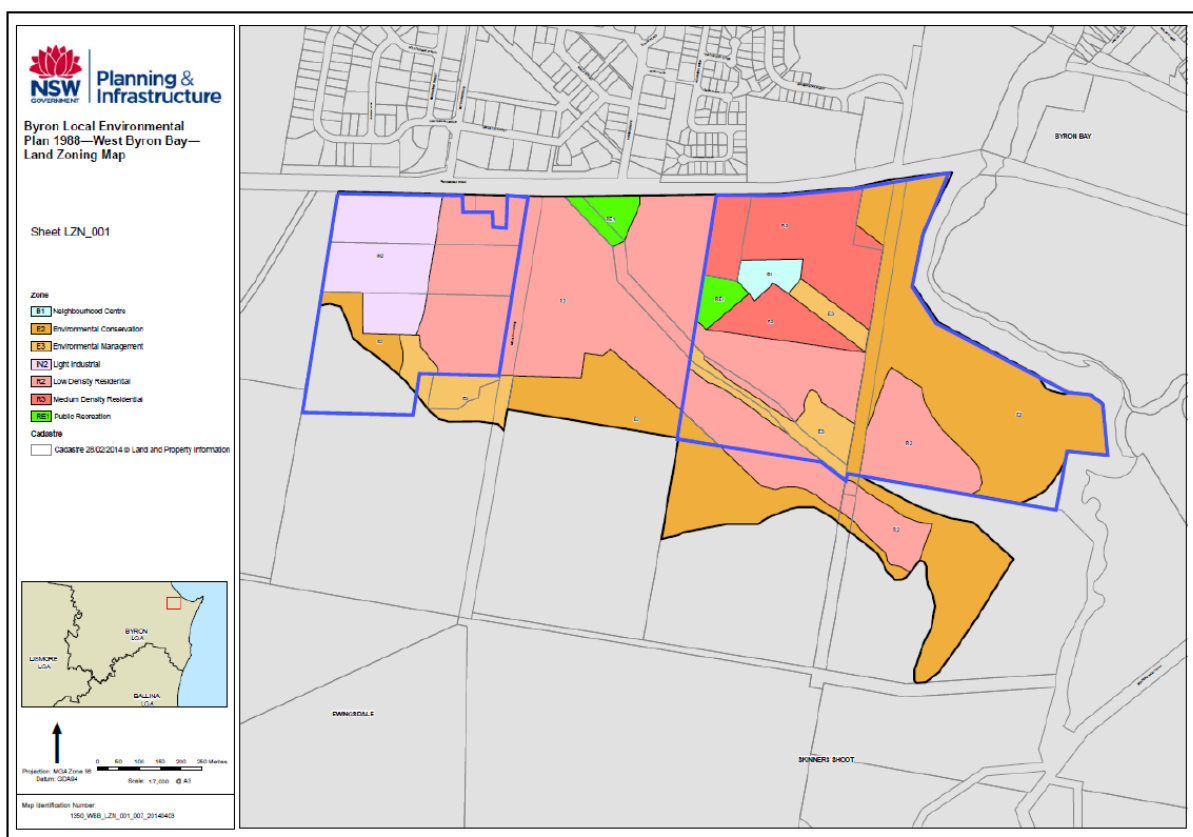
It is noted that there is a draft planning proposal to transition West Byron Bay Urban Release Area to the current Standard Instrument Zones, among other things, under Byron LEP 2014. (Council Reference 26.2023.7.1 – West Byron Zone transition PP, Portal reference PP-2023\_2829) This transitional planning proposal will likely be finalised early 2025, with Council resolving the following on 14 November 2024

### **Resolution No. 24 - 485**

**Resolved that Council:**

1. *Revise the West Byron transition to Byron LEP 2014 planning proposal (Attachment 1 E2024/60126) to include zoning changes as described in Table 1 of this report and forward the planning proposal to NSW Parliamentary Counsel's Office (PCO) requesting that a draft LEP instrument be prepared;*
2. *Requests confirmation from the NSW Department of Planning, Housing and Infrastructure that the changes made to the planning proposal post-exhibition are of such a minor nature that re-exhibition is not required; and*
3. *Pending receipt of PCO opinion that the plan can be made, forwards the plan to the NSW Department of Planning, Housing and Infrastructure requesting notification on the NSW Government legislation website. (Dods/Lyon)*

*The motion was put to the vote and carried unanimously.*



**Figure 8 – Land Zoning Map**

[1350\\_WBB\\_LZN\\_001\\_007\\_20140403.pdf \(eplanningdlprod.blob.core.windows.net\)](https://eplanningdlprod.blob.core.windows.net/1350_WBB_LZN_001_007_20140403.pdf)

### 3.3 Summary of Key Matters in the Relevant EPIs and DCP



A detailed consideration of the applicable environmental planning instruments was provided in the Commissioner's Judgement on the original application (*Site R & D Pty Ltd v Byron Shire Council* [2022] NSWLEC 1121). The modification application does not raise any new issues in relation to the environmental planning instruments or DCP provisions applicable to the original development application, other than those discussed in the body of the report below.

In particular, the applicants rational with developing Stages 11 and 12 out of numerical order, is a result of the adjacent development known as the Harvest Estate completing the initial stages and providing vehicle access through to Ewingsdale Road. With that access road now completed there is no impediment to stages 11 and 12 commencing first and as such should the application be supported a number of conditions need to be amended to enable Stage 11 and 12 to commence out of sequence. Having regards to Object 1.3 (c) of the EPA Act 1979, the commencement of these stages now is considered "to promote the orderly and economic use of the land".

#### 4. STATUTORY CONSIDERATIONS

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When determining a development application, the consent authority must take into consideration the matters outlined in Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act'). These matters as are of relevance to the development application include the following:

- (f) *the provisions of any environmental planning instrument, proposed instrument, development control plan, planning agreement and the regulations*
  - (i) *any environmental planning instrument, and*
  - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
  - (iii) *any development control plan, and*
  - (iiia) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
  - (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*  
*that apply to the land to which the development application relates,*

- (g) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (h) *the suitability of the site for the development,*
- (i) *any submissions made in accordance with this Act or the regulations,*
- (j) *the public interest.*

These matters are further considered below.

#### **4.1 Environmental Planning Instruments, proposed instrument, development control plan, planning agreement and the regulations**

The relevant environmental planning instruments, proposed instruments, development control plans, planning agreements and the matters for consideration under the Regulation are considered below.

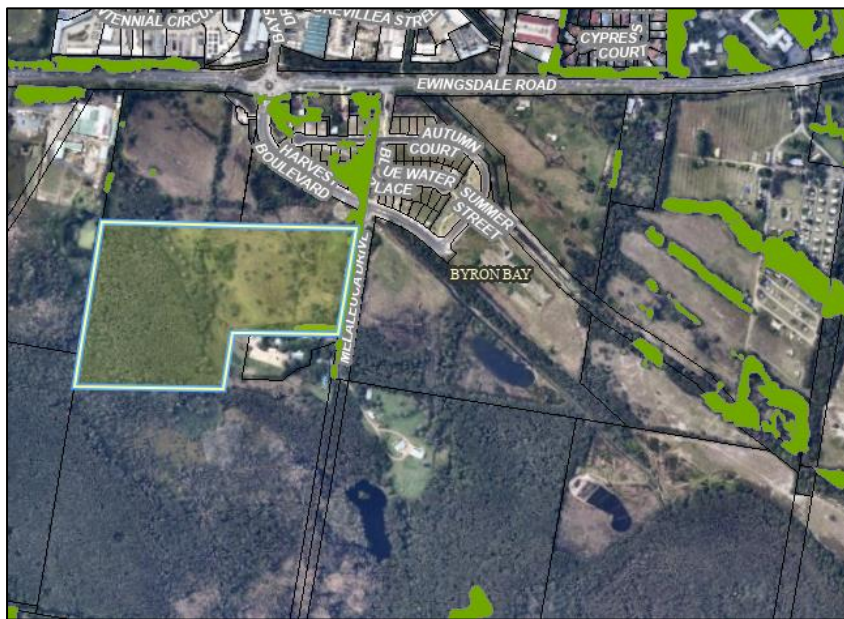
A detailed consideration of the applicable environmental planning instruments was provided in the Commissioner's Judgement on the original application (*Site R & D Pty Ltd v Byron Shire Council* [2022] NSWLEC 1121). The modification application does not raise any new issues in relation to the environmental planning instruments; proposed instruments; development control plans; planning agreements; and the regulations; applicable to the original development application, other than those listed below.

##### **(a) Section 4.15(1)(a)(i) - Provisions of Environmental Planning Instruments**

<b>EPI</b>	<b>Matters for Consideration</b>	<b>Comply</b>
State Environmental Planning Policy (Biodiversity & Conservation) 2021	<p>Chapter 4: Koala Habitat Protection 2021</p> <p>In relation to koala habitat protection, the subject site falls within the area of an approved Koala Plan of Management under the State Environmental Planning Policy (Biodiversity and Conservation). In accordance with clause 4.8 of the SEPP, the Byron Coast Comprehensive Koala Plan of Management (BCKPoM) applies.</p> <p>The management objectives for the West Byron Koala Management Precinct are "<i>to consolidate the existing sub-populations and improve the exchange of genetic material with other KMPs to the north and south</i>".</p> <p>The modification application does not seek to change the subdivision layout, extent of works, tree removal or</p>	Yes

EPI	Matters for Consideration	Comply
	<p>retention or environmental restoration works. As such, a detailed review of the proposal against the BCCKPoM has not been carried out but is generally consistent with the BCCKPoM as the proposal as originally approved:</p> <p>Further, it is also noted the development as approved also considered this issue in detail with conditions of consent incorporating the need for an updated KPOM to be submitted to Council for approval. The applicant has requested a minor modification to Condition 42 to reflect that Stages 11 and 12 will be commencing first.</p>	
SEPP (Resilience & Hazards) 2021	<p><b>Chapter 2: Coastal Management</b></p> <ul style="list-style-type: none"> <li>• <b>Section 2.8(1)</b> - Development on land in proximity to coastal wetlands or littoral rainforest</li> </ul> <p><i>(1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map unless the consent authority is satisfied that the proposed development will not significantly impact on—</i></p> <p><i>(a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or</i></p> <p><i>(b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.</i></p> <ul style="list-style-type: none"> <li>• <b>Section 4.6 - Contamination and remediation to be considered in determining development application.</b></li> </ul> <p><i>(1) A consent authority must not consent to the carrying out of any development on land unless—</i></p> <p><i>(a) it has considered whether the land is contaminated, and</i></p> <p><i>(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and</i></p> <p><i>(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed</i></p>	Yes

EPI	Matters for Consideration	Comply
	<p><i>to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.</i></p> <p>The proposed changes to the staging raises no issues under the SEPP (including previous SEPP 14 – Coastal Wetlands, SEPP 26 – Littoral Rainforest and SEPP 55 Remediation of Land ) that have not been previously considered</p>	



**Figure 11 – Koala Habitat Map (Subject property for Stage 11 and 12 highlighted)**

Byron Local Environmental Plan 1988

The proposed S4.56 modification application does not raise any new issues in relation to the Byron LEP 1988 other than those listed below.

Byron LEP 1988	Matters for Consideration	Comply
Clause 72 - Zone objectives and control of development	Pursuant to Clause 72 Byron LEP 1988 the proposal is permissible in the zone with consent. The proposal is consistent with the zone objectives.	Yes
Clause 73 – R2 Objectives	<u>Clause 73 – Zone R2</u>	Yes



Byron LEP 1988	Matters for Consideration	Comply
<p>Clause 76, 78 and 79 (IN2 Light Industrial Zone, E2 Environmental conservation and E3 Environmental Management Zones)</p>	<p><i>a) to provide for the housing needs of the community within a low density residential environment,</i>  <i>(b) to enable other land uses that provide facilities or services to meet the day to day needs of residents.</i></p> <p>The development of stages 11 and 12 prior to the other stages is logical in that access via the other subdivision with the Harvest Estate has now been constructed and dedicated to Council as a road reserve. The development of this land as such is consistent with the objectives of the zone and enables further residential land to be developed and released to the market in a more timely fashion.</p> <p><u>Clause 76 – Zone IN2</u>  <u>The proposed amendments retain the same industrial shaped lot as approved (Lot 158) The proposal has no impact on this parcel.</u></p> <p><u>Clause 78 – Zone E2 and Clause 79 – Zone E3</u></p> <p>The residual land within Stages 11 and 12 is identified as Lot 151. Other than the subject parcel increasing in size and area with the consolidation of previously approved buffer lot along the southern boundary to the adjacent property to the south, the proposed amendments raise no issues which have not been previously considered.</p>	<p>Yes</p>
<p>Clause 80 Subdivision</p>	<p><u>80 Subdivision—consent requirements</u>  <u>(1) Land within the West Byron Bay site may be subdivided, but only with development consent.</u>  <u>(2) Development consent must not be granted for the subdivision of land on which a secondary dwelling is situated if the subdivision would result in the principal dwelling and the secondary dwelling being situated on separate lots, unless the resulting lots are not less than the minimum size shown on the Lot Size Map in relation to that land.</u></p> <p>The applicants have proposed a minor change of the subdivision layout within stages 11 and 12 with a buffer lot adjacent to the southern boundary incorporated into the larger residual lot (lot 151) The subject change to the lot layout does not offend the minimum lot size map requirements under the clause.</p>	<p>Yes</p>

Byron LEP 1988	Matters for Consideration	Comply
Clause 99 – Arrangements for designated State Public Infrastructure	<p>99 – <u>Arrangements for Designated State Public Infrastructure</u></p> <p>Appropriate mechanisms are in place for the applicant to contribute additional contributions by way of a planning agreement with the State Government (Minister for Planning and Infrastructure)</p> <p>It is noted the consent as issued by the LEC does not include a condition requiring evidence of such monies to be paid, whilst the other consent for the Harvest Estate includes the following condition.</p> <p><b>108. Compliance with Planning agreement</b>  <i>Prior to the release of a subdivision certificate the developer shall provide Council with documentary evidence that the developer contribution as set out in schedule 4 of the planning agreement between the landowners and the Minister for Planning and Infrastructure have been paid.</i></p> <p>It is recommended that for consistency that should the application be approved a similar condition of consent be recommended.</p>	Yes Subject to additional condition of consent

**(b) Section 4.15 (1)(a)(ii) - Provisions of any Proposed Instruments**

There is one proposed instruments which has completed public consultation under the EP&A Act, and is relevant to the proposal:

The proposal is to transition zones, minimum lot size, land use table and the like from LEP 1988 to LEP 2014. It is generally a “like for like” transition and the amended proposal raises no issues against the proposed instrument. As discussed above this draft planning instrument is likely to be finalised in the new year as per Council Resolution 24-485

**(c) Section 4.15(1)(a)(iii) - Provisions of any Development Control Plan**

The proposed S4.56 modification application does not raise any new issues in relation to the Byron DCP 2014 other than those listed below.

<b>Byron DCP 2014</b>	<b>Matters for Consideration</b>	<b>Comply</b>
Chapter E8 West Byron Urban Release Area	Chapter E8 of the DCP 2014 applies to land identified as the West Byron urban release Area which includes the subject land of this development application.	Yes
E8.10.1 Staging Plan	<p>Many of the prescriptive measures for the staging plan were not met with the approval of separate DAs for the West Byron Urban Release Area. (WBURA) (eg DA10.2017.201.1 – Harvest Estate and DA10.2017.661.1 – Site R and D – This consent). Notwithstanding the commencement of Stages 11 and 12 out of numerical order is logical considering that the access road through the Harvest Estate is now constructed and links to Ewingsdale Road at the Bayshore Drive Roundabout.</p> <p>Further the completion of stages 11 and 12 absent the construction of the through Spine Road and a separate access to Ewingsdale Road raises no issues with the current access arrangements with the Bayshore Drive roundabout. This is considered to have capacity to cater for these lots and the Harvest Estate being a total of 188 residential lots plus one industrial parcel (Lot 158 in Stage 12).</p>	Yes

#### Byron S7.11 Development Contributions Plan 2014

Development Contributions are payable under Byron S7.11 Development Contributions Plan 2014 in the current consent (10.2017.661.1). No variation to the contributions condition is required as the condition (Condition 113) is worded to provide flexibility for payment as a lump sum or proportional to any staging regime.

#### **(d) Section 4.15(1)(a)(iia) – Planning agreements under Section 7.4 of the EP&A Act**

The following planning agreement/s has been entered into under Section 7.4 of the EP&A Act:

A voluntary planning agreement (VPA) 2013/8948 was executed on 21 October 2014 between the Minister for Planning and the Byron Bay West Landowners Association (the developer) on Lots described as 5/DP622736, 6/DP622736, 1/DP542178, 227/DP755695, 229/DP755695, 9/DP111821, 1/DP1166535, 1/DP201626,

2/DP542178, 1/DP780242, 2/DP818403 and 1/DP520063. The executed agreement facilitates the delivery of the developer's contribution towards the provision of regional infrastructure and to ensure conservation land is appropriately rehabilitated and maintained.

The proposal is consistent with this Planning Agreement.

#### **(e) Section 4.15(1)(a)(iv) - Provisions of Regulations**

The proposed amendments raise no issues against the relevant regulations in this instance which have not been previously considered.

#### **4.2 Section 4.15(1)(b) - Likely Impacts of Development**

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above and the Key Issues section below.

<b>Impact on:</b>	<b>Likely significant impact/s?</b>
<b>Natural environment</b>	Proposed amendments raise no additional environmental issues which have not been previously considered
<b>Built environment</b>	The proposed amendments will not have a significantly adverse impact on the built environment of the locality.
<b>Social Environment</b>	The proposed amendments will not have a significant adverse social impact on the locality.
<b>Economic impact</b>	The proposal will not have a significant adverse economic impact on the locality, however will enable a number of residential allotments to be released into the property market ahead of schedule, which are generally in short supply for this local government area.

#### **4.3 Section 4.15(1)(c) - Suitability of the site**

The proposed modification to the staging and the changes to Lot 151 do not impact on the suitability of the site for the development as previously considered and approved by the LEC.

#### **4.4 Section 4.15(1)(d) - Public Submissions**

No Public submissions were received.

#### **4.5 Section 4.15(1)(e) - Public interest**

The proposal is unlikely to prejudice or compromise the public interest or create an undesirable precedent.

## REFERRALS AND SUBMISSIONS

### 4.6 Agency Referrals and Concurrence

The S4.56 Modification application has been referred to various agencies for as required by the EP&A Act and outlined below in Table 3.

**Table 3: Concurrence and Referrals to agencies**

Agency	Concurrence/ referral trigger	Comments (Issue, resolution, conditions)	Resolved
<b>Concurrence Requirements (s4.13 of EP&amp;A Act)</b>			
N/A			
<b>Referral/Consultation Agencies</b>			
NSW Land and Environment Court	DA 10.2017.661.1 was approved by the NSW LEC. The subject S4.56 modification required the notification of the LEC pursuant to S 107 of the EP&A Regulation 2021.	No response from the LEC required.  On June 27, 2024, Applicant has also commenced a separate proceedings under Class 1 of the Land and Environment Court's jurisdiction seeking to modify Development Consent 10.2017.661.1	Y
<b>Integrated Development (S 4.46 of the EP&amp;A Act)</b>			
RFS	Bush fire safety authority GTA's issued under S100B - <i>Rural Fires Act 1997</i> for DA 10.2017.661.1 (subdivision). The subject S4.56 also referred to NSW RFS under S100B.	The 4.56 modification application has been referred to the Rural Fire Service for an updated Bush Fire Safety Authority and general terms of approval (GTA). An updated Bush Fire Safety Authority has been issued and the consent to be amended accordingly as discussed above.	Y

### 4.7 Council Officer Referrals

The development application has been referred to various Council officers for technical review as outlined **Table 4**.

**Table 4: Consideration of Council Referrals**

Officer	Comments	Resolved
Environmental Health Officer	No objection to the changes to the staging arrangements as proposed.	Yes
Development Engineering	No objections subject to conditions.	Yes
7.11 Contributions Officer	Referral not required. No variation to the contributions condition is required as the condition (Condition 113) is worded to provide flexibility for payment as a lump sum or proportional to any staging regime.	Yes
Water And Sewer ET Engineers	No Objection to the proposed amendments.	Yes

#### 4.9 Community Consultation

The proposal was notified in accordance with the Council's Community Participation Plan from 24/07/24 to 06/08/24. No Submissions or objections were received.

### 5. KEY ISSUES

As discussed in the body of this report the proposed changes to the staging are logical and with the construction and dedication of an access road linking Melaleuca Drive to Ewingsdale, there is no specific reason to not enable Stages 11 and 12 to be developed now. A range of conditions are to be amended to facilitate Stages 11 and 12 to occur in a nonsequential manner.

The other modification included is the consolidation with the Buffer Lot 157 with the residual environmental common property Lot 151. Again amended conditions of consent are recommended to support this change to the subdivision plans.

### 6. CONCLUSION

This Section 4.56 modification application has been considered in accordance with the requirements of the EP&A Act and the Regulations as outlined in this report. Following a thorough assessment of the relevant planning controls, it is considered that the application,



can be supported and is recommended for approval subject to the recommended draft conditions at Attachment A.

## **7. RECOMMENDATION**

That the Section 4.56 Modification Application 10.2017.661.2 to modify condition of consent number five and staging of development in the West Byron Urban Release Area (WBURA) in order to allow for Stages 11 and 12 in the western section of the site to proceed concurrently, separately and non-sequentially to stages 1-10, and consequential amendments to development Consent DA10.2017.661.1 be approved pursuant to Section 4.16(1)(a) or (b) of the Environmental Planning and Assessment Act 1979 subject to the draft conditions of consent attached to this report at Attachment A.

### **The following attachments are provided:**

Attachment A: Draft Conditions of Consent

Attachment B: Amended Subdivision Plans

Attachment C: Existing Notice of Determination 10.2017.661.1 as issued by LEC