



S8.2(1)(a) Review of Determination
Development Application
No.10.2023.287.1

Coastal Protection Works at Lot 1 DP1215893
144 Bayshore Drive
BYRON BAY

PLANNERS NORTH, December 2024

COMPLIANCE AND USAGE STATEMENT

This Section 8.2(1)(a) Review of Development Application No. 10.2023.287.1 has been prepared and submitted under Part 4 of the *Environmental Planning and Assessment Act 1979* by:

Preparation

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In respect of: Section 8.2(1)(a) Review of Development Application No. 10.2023.287.1

Application

Proponent: GANRA Pty Ltd
Address: c/ - PLANNERS NORTH
P.O. Box 538, Lennox Head NSW 2478
Land to be developed: Lot 1 DP1215893, 144 Bayshore Drive, Byron Bay
Proposed development: Proposed Coastal Protection Works comprising extension to existing geobag wall
Environmental Assessment: Review of Determination

Certificate

I certify that I have prepared the content of this submission and to the best of my knowledge:

- it is in accordance with the Act and Regulations, and
- it is true in all material particulars and does not, by its presentation or omission of information, materially mislead.

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Date: December 2024

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1. INTRODUCTION

This section of the report provides background information, including the history of the development application and outlines the structure and scope of the report.

1.1 BACKGROUND

PLANNERS NORTH has been engaged by GANRA Pty Ltd, the owners of Lot 1 DP1215893, No.

144 Bayshore Drive Byron Bay, to provide Town Planning advice with respect to the preparation and lodgement of a S8.2(1)(a) Review of the Determination of Development Application No.10.2023.287.1 for coastal protection works comprising the temporary extension of an existing geobag wall on private property of about 40 metres on private land.

1.2 STRUCTURE OF REPORT AND ITS SCOPE

Section 1 of this report provides the background and history of the Application. Section 2 addresses the grounds for refusal. Section 3 provides an assessment of the proposal against the relevant provisions of the Environmental Planning and Assessment Act and Section 4 contains a conclusion.

Appendix A to this report contains a list of relevant documents relied on for the purpose of this review including: the original development application material submitted; State government agency comments; requests for further information; responses to requests for further information; Byron Shire Council's assessment of the Application; and the determination of the Northern Regional Planning Panel. **Appendix B** contains further material prepared by Royal Haskoning DHV dated 6 December, 2024, comprising an Outline of Monitoring and Management/Maintenance Plan and Geobag Structure Removal Plan. A letter of legal submission from King & Wood Mallesons is provided at **Appendix C** dealing with a number of legal issues which are summarised in this report.

1.3 HISTORY

Development Application 10.2023.287.1 for coastal protection works, comprising an extension to an existing geobag wall, was lodged by PLANNERS NORTH with Byron Shire Council (Council) on 20 October 2023. The proposal consists of an extension approximately 40 metres in length and 2.1 metres in height. Consent was sought on a temporary basis for a period of five (5) years, or following the implementation of a valid Coastal Management Plan (CMP) if prior to the five (5) years.

The purpose of the interim protection works is to stabilise the existing dune slope and revegetate the dune to mitigate further erosion of the existing dune behind the beach on a temporary basis. It is in the public interest to maintain the existing naturally occurring dune behind the beach pending a CMP, rather than permitting it to continue to erode.

The Development Application (DA) was refused on 26 September, 2024 by the Northern Regional Planning Panel (the Panel), the consent authority for the proposed works.

1.4 OVERVIEW

Viewed in isolation, it is on its face surprising that a small extension of about 40 metres of an existing geobag wall on private land sought on a temporary basis could not be approved under the current planning regime.

The application was fully supported by Byron Shire Council. The application is very similar to another application for a temporary geo bag wall in the Byron Bay Embayment which the Panel did approve in 2022.

In the following sections we have analysed the differences in the approach by the Panel in the second application now under review which have apparently led to this divergence and inconsistency in outcome. These can be summarised as:

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- (a) Failure to give requisite priority to Section 27 of the Coastal Management Act;
- (b) Incorrect interpretation and application of Section 2.12 of State Environment Planning Policy (Resilience and Hazards) 2021;
- (c) Failure to have regard to the detailed outline maintenance plan which had been submitted and impose conditions accordingly;
- (d) Taking account as relevant a concern not to pre-empt the coastal management program of Byron Shire Council which was under preparation which the Council itself submitted was not a relevant factor and which was not a relevant factor given the temporary nature of the works proposed and the uncertainty of timing re a coastal management program of Byron Shire Council.

Each of these matters is analysed below and is also the subject of the legal submission at Appendix C.

1.5 FURTHER INFORMATION

Should Council or the Panel require any additional information or wish to clarify any matter raised by this proposal or submissions made to same, Council is requested to consult with **Kate Singleton** on **1300 66 00 87** prior to determination of this Application.

2. GROUNDS FOR REFUSAL

This section of the report provides the grounds for refusal and our response, including the base on which we request review of each of the grounds.

The grounds for refusal and our response to each is provided as follows:

2.1 RESILIENCE AND HAZARDS SEPP

Section 2.12 (Division 5) of the Resilience and Hazards SEPP (the SEPP), provides that *Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.*

The Panel is not satisfied, pursuant to Division 5 section 2.12, that the proposed development is not likely to cause increased risk of coastal hazards on the subject land or other land. As this is a necessary prerequisite to the granting of consent, the Panel determined to refuse the Application.

In reaching its decision, the Panel notes the Applicant's Statement of Environmental Effects and the appended Coastal Engineering Assessment acknowledge the proposed works will likely result in additional or compounding "end effect" or erosion; a view shared by the Department of Primary Industries and the Department of Climate Change, Energy the Environment and Water (BCS) in their submissions.

The Panel further notes that the degradation of the area proposed to be protected is at least partially attributable to the existing works to the south, giving weight to the likelihood of increased coastal hazard risk beyond the northern limit of the proposed works.

Comment:

It is our submission that:

- a) conflict between the provisions of Division 5 section 2.12 of State Environmental Planning Policy (Resilience and Hazards) 2021 (the SEPP) and the provisions of section 27 of the Coastal Management Act 2016 (CM Act); the Act applies.
- b) in any event in respect of this application, Section 2.12 of the SEPP was not applicable as there was no evidence of increased risk of coastal hazard.

We address both points below:

The provisions of section 27 of the CM Act state:

27 Granting of development consent relating to coastal protection works

- (1) *Development consent must not be granted under the [Environmental Planning and Assessment Act 1979](#) to development for the purpose of coastal protection works, unless the consent authority is satisfied that—*
 - (a) *the works will not, over the life of the works—*
 - (i) *unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or*
 - (ii) *pose or be likely to pose a threat to public safety, and*
 - (b) *satisfactory arrangements have been made (by conditions imposed on the consent) for the following for the life of the works—*
 - (i) *the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,*
 - (ii) *the maintenance of the works.*

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- (2) *The arrangements referred to in subsection (1) (b) are to secure adequate funding for the carrying out of any such restoration and maintenance, including by either or both of the following—*
- (a) *by legally binding obligations (including by way of financial assurance or bond) of all or any of the following—*
- (i) *the owner or owners from time to time of the land protected by the works,*
- (ii) *if the coastal protection works are constructed by or on behalf of landowners or by landowners jointly with a council or public authority—the council or public authority,*

Note—

The [Environmental Planning and Assessment Act 1979](#), section 4.17(6) provides that a development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of making good any damage caused to any property of the consent authority as a consequence of the doing of anything to which the consent relates.

(b) by payment to the relevant council of an annual charge for coastal protection services (within the meaning of the [Local Government Act 1993](#)).

(3) The funding obligations referred to in subsection (2) (a) are to include the percentage share of the total funding of each landowner, council or public authority concerned.

The provisions of section 27(1)(b)(i) clearly envisage that coastal protection works may result in an increase in erosion of the beach or adjacent land and require arrangements for restoration in circumstances where this occurs.

This issue was identified in the Coastal Engineering Assessment prepared by Royal Haskoning DHV dated 29 May 2023, which was submitted with the DA and states as follows:

It is noted here that the wording of Clause 2.12 in State Environmental Planning Policy (Resilience and Hazards) 2021 is somewhat at odds with Section 27(1)(b)(i) in the Coastal Management Act 2016 which specifically anticipates that coastal protection works may increase erosion but that this is only acceptable if conditions can be imposed to restore it. It is understood that if there is any inconsistency between the Policy and the Act, the Act would override the Policy.

It is noted that this issue was also highlighted by Mr Greg Britton of Royal Haskoning DHV at the site meeting held on 29 February, 2023 and attended by Council staff and officers from the NSW Department of Planning & Environment – Office of Environment and Heritage. No request for further information was made in relation to this issue.

It is our submission that the CM Act overrides the provisions of the SEPP as a matter of law.

Further, on the evidence before the Panel, Section 2.12 of the SEPP did not apply.

Section 2.12 is for a different purpose. It is headed – “Development in Coastal Zone Generally – development not to increase risk of coastal hazards”. Section 2.12 is dealing with the impact of any development on coastal hazards. **Coastal hazards** is a defined term in section 4 of the CM Act.

The applicable provisions of Chapter 2 of the Resilience SEPP can be analysed as follows:

- (a) Words in Chapter 2 of the Resilience SEPP have the same meaning as in the CM Act (section 2.2(2) of the Resilience SEPP);
- (b) s.2.12 provides that development consent must not be granted to any development or land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land;

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(c) The term **coastal hazard** is defined in Section 4 of CM Act to mean:

- (i) Beach erosion,
- (ii) Shoreline recession,
- (iii) Coastal lake or watercourse entrance instability,
- (iv) Coastal inundation,
- (v) Coastal cliff or slope instability,
- (vi) Tidal inundation,
- (vii) Erosion and inundation of foreshores caused by tidal waters and the action of waves, including the interaction of those waters with catchment floodwaters.

The decision of the Panel was:

"The Panel is not satisfied, pursuant to Division 5 section 2.12, that the proposed development is not likely to cause increased risk of coastal hazards on the subject land or other land. As this is a necessary pre-requisite to the granting of consent, the Panel determined to refuse the Application."

In reading its decision, the factual matters relied by the Panel were:

"In reaching its decision, the Panel notes the Applicant's Statement of Environmental Effects and the appended Coastal Engineering Assessment acknowledge the proposed works will likely result in additional or compounding "end effect" or erosion; a view shared by the Department of Primary Industries and the Department of Climate Change, Energy the Environment and Water (BCS) in their submissions."

On the wording of the Determination, the Panel was concerned with the evidence before it about the limited "end effects" of erosion due to the presence of the proposed coastal protection works.

The evidence before the Panel was that any end effects would be on the adjacent land on the dune behind the beach. There was no suggestion in the evidence before the Panel of an increase in coastal hazards as that term is properly understood in Chapter 2 of the Resilience SEPP.

The report prepared by Royal HaskoningDHV accompanying the DA states on Page 30"

*"Accordingly, the proposed works would not be expected to cause any increased scour/erosion immediately seaward of the works.....
Increased erosion of the immediately adjacent land particularly to the north of the works is predicted to occur due to end effects, caused by the presence of the works...
Since some increased erosion would be caused by the presence of the works to meet the requirements of the Coastal Management Act 2016, satisfactory arrangements would need to be made by conditions imposed on the consent) for restoration of the increased erosion for the life of the works..."*

The Council accepted the findings of the Applicant's expert that the only likely impact was on the adjacent property and that any impact on the beach was unlikely.

"2. End Effects Erosion

Given the nature of coastal processes in this location, and the erosion experience immediately north of the existing geobag wall, it is reasonable to assume that there will

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be some erosion north of the proposed extension during the 5-year lifespan of a consent.

The coastal engineering advice submitted with the application concludes that any such erosion is not expected to impact areas outside the subject lot or unreasonably limit public access to the **beach over the 5-year lifespan of the proposal ...**"

[Extracted from page 5 of Council Assessment Report dated 10 September 2024.]

This evidence underpinned the submission made by Planner North in October 2023 that s.2.12 of the Resilience SEPP did not apply:

"2.12 Development in coastal zone generally-development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land."

Comment:

As provided in the Engineering Assessment, the proposed development is not likely to cause any increased risk in coastal hazards on the subject land or other land. Measures are proposed to address potential end effects to the north."

There was no evidence before the Panel to suggest that the modest proposed extension of a small geo-bag wall would cause an increase in "coastal hazards" as that term is defined in the CM Act. Accordingly, there was no basis to reject the Application on the basis that Section 2.12 applied to prevent approval of the Application.

2.2 S.27 COASTAL MANAGEMENT ACT 2016

Section 27 of the Coastal Management Act provides that:

- (1) *Development consent must not be granted under the Environmental Planning and Assessment Act 1979 to development for the purpose of coastal protection works, unless the consent authority is satisfied that –*
 - ...
- (b) *satisfactory arrangements have been made (by conditions imposed on the consent) for the following for the works –*
 - (i) *The restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,*
 - (ii) *The maintenance of the works.*

The Panel considers that s. 27(1)(b)(i) provides for any uncertainty that increased erosion will occur as a result of works should they be approved whereas the SEPP requires satisfaction that the works are not likely to cause increased risk. As indicated above, the Panel is not satisfied that increased risk and erosion will not occur.

In consideration of s.27 Council has recommended condition 81 for a Monitoring and Management/ Maintenance Plan. Notwithstanding the Panel's decision to refuse the Application, the Panel considers insufficient documentation was provided to demonstrate the proposed methods and therefore prospects of viable and ongoing maintenance and remediation.

Comment:

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The DA as initially submitted was accompanied by a Coastal Engineering Assessment prepared by Royal Haskoning DHV dated 29 May, 2023. That report stated that:

Measures are proposed to minimise and mitigate the risk, including imposing a condition on restoration if any increased erosion is caused by the works, for the life of the works, and the importation of 800m³ of sand as part of the development proposal.

Following a site meeting with representatives from Byron Shire Council and the Department of Planning & Environment – Office of Environment & Heritage on 29 February, 2024, a further addendum report was prepared by Royal Haskoning DHV, dated 14 May 2024.

That addendum report states that:

A Monitoring and Management/Maintenance Plan for the works should be prepared as a condition of consent. The Plan should cover the proposed extension to the geobag coastal protection works, the beach, and land adjacent to the beach.

The report outlines the matters to be addressed in the plan in detail, to be submitted for approval by Council and the relevant State government authorities, including the following monitoring and inspection activities:

The following monitoring and inspection activities are proposed:

- *UAV imagery at intervals not exceeding three months and following ocean storm or creek flooding events which cause damage to the works and/or impacts to beach and adjacent land as identified by the owner of Elements of Byron Resort or Council. If there is uncertainty whether damage or impacts have occurred, UAV images and additional ground level oblique photography should be supplied to the Coastal Engineer¹ who may carry out an inspection at this time (refer below)*
- *detailed land survey at the completion of the works and at such other times as may be directed by the Coastal Engineer during the life of the works*
- *high resolution aerial photos or satellite photos*
- *inspections by the Coastal Engineer at intervals not exceeding six months, or more frequently if in the opinion of the Coastal Engineer damage to the works, or impacts due to the works, has or is likely to have occurred following an ocean storm or creek flooding event.*

The report also details the scope of management and maintenance activities as follows:

The scope of the management/maintenance activities may include the following depending on the results of the monitoring activities:

- *replacement of geobags which may have become displaced, torn, vandalised, deteriorated or deformed, or the like*
- *grading of erosion scarps to a safe angle where they present an unacceptable risk to public safety*
- *restoration of increased erosion caused by the presence of the works, through importation of nourishment sand or beach scraping in consultation with Council*
- *restoration of public beach access where access has been adversely impacted by the presence of the works, in consultation with Council*
- *revegetation where vegetation has been lost due to the presence of the works.*

No request for further information in relation to monitoring and maintenance of the works was made following the submission of the additional report.

The draft conditions of consent recommended by Byron Shire Council officers included conditions addressing the following:

- a) A bond for removal of the geo-bag protection works at 150% of the estimated cost of the works (draft condition A3);

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- b) Council to use the bond to remove the geo-bags in the event of non compliance with the conditions of removal (draft conditions A2 and A3);
- c) Prior to the issue of a construction certificate, a monitoring and management maintenance plan to be prepared and approved by the Council prepared in accordance with the outline in the letter from Royal Haskoning DHV of 14 May 2024 (draft condition B.1);
- d) Prior to the issue of the construction certificate, a detailed geo-bag structure removal plan documenting methodology and timeframes for the removal of the works had to be submitted to, and endorsed by the Council prior to the issue of a construction certificate (condition B3).

Notwithstanding the Council assessment, the Panel considered this detailed outline was not sufficient and stated:

"The Panel considers insufficient documentation was provided to demonstrate the proposed methods and therefore prospects of viable and ongoing maintenance and remediation".

No further detail was provided by the Panel as to why the submitted documentation was not sufficient.

In order to further assist the consideration of the review of determination, Royal Haskoning DHV has prepared an expanded monitoring, maintenance and management plan and geo-bag structure removal plan. This is provided at **Appendix B**.

2.3 COASTAL MANAGEMENT PROGRAM

The Panel notes a Coastal Management Program ('the Program') is in preparation by Council, and currently at Stage 3 studying risks, vulnerability and opportunities. The purpose of the Program is to set the long-term strategy for the coordinated management of land within the coastal zone, in accordance with the Act, and consequently afford greater consistency and certainty in decision making.

Whilst there is no clear date for finalisation of the OAP, the Panel recorded two related concerns with approving the proposed works before the Program is adopted:

1. A decision made in isolation of an holistic approach to coastal management in the area, noting Council's policy of 'planned retreat' as outlined in Part J of the Byron Development Control Plan 2010) and clause 3.3 of Byron LEP 1988, and
2. Pre-empting the ultimate direction of the Program with respect to Belongil Creek area through construction of works.

In forming its decision and with regard to the above concerns, the Panel notes that the area where the works are proposed is largely undeveloped open space with no habitable buildings or critical infrastructure in the immediate vicinity that require urgent protection.

Comment:

Council is currently proceeding to develop a new CMP under the CM Act. This commenced with Stage 1 comprising a Scoping Study for Cape Byron to South Golden Beach which was adopted in June 2020. A separate Scoping Study for the southern Byron coastline and Belongil Estuary was adopted in August 2021. Stage 2 of the required process identified risks, vulnerabilities and opportunities and has also been completed.

Stages 3 and 4 are yet to be completed and Council has advised that it is unclear how long these stages will take. Council officers have also advised that they are yet to form any view in relation to the coastal management policies and strategies likely to be adopted. Stage 3 comprises the development of management options and Stage 4 involves the exhibition and adoption of the CMP prior to seeking Ministerial Certification.

The Council assessment report relating to the subject DA states:

"There is, as yet, no timeframe for the completion of the Coastal Management Program but later stages of the work will review the planned retreat policy together with other relevant management options." (Council Assessment Report dated 10 September 2024).

The Council Assessment Report prepared in relation to Development Application No. 10.2021.698.1 for coastal protection works at Clarke's Beach, informed the Panel as follows:

*"...as the CMP **may never be finalised**. Coastline management planning has been underway in Byron Shire for more than 25 years in one form or another and it may **continue for another 20 years**. So a direct link between the removal of the temporary geo-bag structure and the completion of the CMP (which is an incomplete process over an unknown time frame) is not legal appropriate and is not recommended."*

[Our emphasis].

The Council staff assessment report in relation to the subject DA recommended approval subject to conditions of consent, which is consistent with the assessment and approval of the Clarke's Beach DA by the Panel.

It is submitted that the proposed minor and temporary works are not and could not be pre-emptive. They seek to address the ongoing erosion of the dune and the resort property pending the completion of the CMP, or for a period of five (5) years. The resort land in question is a key area of the site which is utilised for ancillary events including weddings and the ongoing erosion of the land has a direct negative economic impact on this site which is one of a select few specifically identified in the Byron LEP for tourism purposes.

2.4 FURTHER COMMENT - INCONSISTENCY OF DECISION MAKING

As discussed above, Development Application No. 10.2021.698.1 for Designated Development - Coastal Protection Works - Geobags, Seawall and Dune Rebuilding/Beach Nourishment Works to the front of Reflections Holiday Park, Clarkes Beach, was approved by the Panel on 29 June, 2022.

Appendix C to this report contains a submission from King & Wood Mallesons including the following review of the approved works in comparison with the subject proposal:

"There are a number of features of objective commonality between that 2022 DA and the Elements

DA now under review. These can be summarised as follows:

- a) the 2022 Application involved the protection of the Reflection Clarkes Beach Holiday Park site and a beach café. Thus, both applications protect properties on which there is accommodation for tourists and café and restaurant facilities;*
- b) both applications involve geo-bag protection. In the case of the 2022 DA, there was two existing sandbag walls of four layers of 60 to 70 metres each giving an approximate length of 120 to 140 metres. As this geo-bag wall was unlawful, the 2022 DA proceeded on the basis that this was a new application. In the case of the Elements DA, the initial existing geo-bag is lawful and the application proposes only a short extension of about 40 metres;*
- c) in both applications, the geo-bag wall protects the existing dune system sitting behind the beach from erosion;*
- d) in both applications, the duration of the consent was proposed as temporary for a five year period. This ensures the geo-bags can be removed if and when a CMP comes into force;*
- e) both applications include very similar monitoring and maintenance schedules (and in the case of the 2022 DA a detailed plan for geo-bag removal);*

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- f) *at the date of determination of both applications, there was no CMP in place. In the 2022 DA, the Council frankly conceded as follows:*

"... the CMP may never be finalised. Coastline management planning has been underway in Byron Shire for more than 25 years in one form or another and it may continue for another 20 years. So a direct link between the removal of the temporary geo-bag structure and the completion of the CMP (which is an incomplete process over an unknown timeframe, is not legally appropriate and is not recommended."

We note that the Panel did not in any way suggest that the ongoing preparation of a CMP was in anyway an obstacle to approval in the 2022 DA. Conversely, for the Elements DA the Panel expressed concerns about approving the works before the CMP is completed by Council;

- g) *in both applications, it was conceded by the Applicant that there would be erosion in the form of 'end-effects', although we note in the Elements DA this end effect impact was only on the dune and not the beach;*
- h) *in both applications, the Panel had to consider s.27 of the CM Act and s 2.12 of the Resilience SEPP;*
- i) *in both applications, details addressing the mitigation of the risk of coastal hazards were provided. We note that the evidence in the 2022 DA was that there was an increased risk of coastal hazards. Notwithstanding that finding, the Panel approved the 2022 DA under s.2.12 and s.27 of the CM Act on the basis that the increased risk of coastal hazards was minor and able to be managed by the conditions attached to the consent. The Panel determining the Elements Application however did not take into account the effect of the conditions that were offered for on-going maintenance to mitigate this risk which in any event was not on the beach and not a coastal hazard;*
- j) *the conditions of the 2022 DA and the draft conditions proposed by Council for the Elements Application are almost identical, including:*
- i. a limitation on the geo-bag wall for a five year term;*
 - ii. the use of imported sand to offset sand locked up by the geo-bag walls to avoid the next long-term sand loss;*
 - iii. proposed conditions requiring beach nourishment to be used to address any 'end effects'; and*
 - iv. implementation of a detailed monitoring and maintenance regime.*

Despite these similarities, the 2022 DA was approved subject to conditions whilst the Elements DA was refused, notwithstanding that it involved a much smaller proposal for a temporary geo-bag wall on private property and Council supported its approval subject to conditions.

In all of the abovementioned circumstances it should be accepted by the Panel that there is no difference between these two applications that could have formed a reasonable basis for a different outcome to have been achieved by the Panel in respect of the Elements DA than the 2022 DA.

The Panel's determination to refuse the Elements DA is inconsistent with its approval of the 2022 DA, as both Applications share a number of objective commonalities".

In fact this Application more easily complies with the applicable planning regime than the 2022 Application. This is because in the 2022 Application it was accepted that the works would have an erosion impact on the beach. This is not the case in the present application.

3. PROVISIONS OF ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

S8.2(1)(a) provides for a review of Development Applications as follows.

8.2 Determinations and decisions subject to review

(cf previous ss 82A(1), 82B(1))

- (1) *The following determinations or decisions of a consent authority under Part 4 are subject to review under this Division—*
 - (a) *the determination of an application for development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*
 - (b) *the determination of an application for the modification of a development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*
 - (c) *the decision of a council to reject and not determine an application for development consent.*
- (2) *However, a determination or decision in connection with an application relating to the following is not subject to review under this Division—*
 - (a) *a complying development certificate,*
 - (b) *designated development,*
 - (c) *Crown development (referred to in Division 4.6).*
- (3) *A determination or decision reviewed under this Division is not subject to further review under this Division.*

Comment:

The subject application seeks a review of the determination by a regional planning panel to refuse DA 2023.287.1 in accordance with Clause 8.2(1)(a).

8.3 Application for and conduct of review

(cf previous ss 82A(2)–(4) (6), 82B(2)–(4))

- (1) *An applicant for development consent may request a consent authority to review a determination or decision made by the consent authority. The consent authority is to review the determination or decision if duly requested to do so under this Division.*
- (2) *A determination or decision cannot be reviewed under this Division—*
 - (a) *after the period within which any appeal may be made to the Court has expired if no appeal was made, or*
 - (b) *after the Court has disposed of an appeal against the determination or decision.*
- (3) *In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.*
- (4) *The review of a determination or decision made by a delegate of a council is to be conducted—*

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- (a) *by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or*
- (b) *by another delegate of the council who is not subordinate to the delegate who made the determination or decision.*
- (5) *The review of a determination or decision made by a local planning panel is also to be conducted by the panel.*
- (6) *The review of a determination or decision made by a council is to be conducted by the council and not by a delegate of the council.*
- (7) *The review of a determination or decision made by a Sydney district or regional planning panel is also to be conducted by the panel.*
- (8) *The review of a determination or decision made by the Independent Planning Commission is also to be conducted by the Commission.*
- (9) *The review of a determination or decision made by a delegate of the Minister (other than the Independent Planning Commission) is to be conducted by the Independent Planning Commission or by another delegate of the Minister who is not subordinate to the delegate who made the determination or decision.*

Comment:

The proposed application for review has been made within the prescribed period. This request for review is accompanied by additional material prepared by Royal Haskoning DHV dated 6 December, 2024, comprising an Outline of Monitoring and Management/Maintenance Plan and Geobag Structure Removal Plan. This additional material is provided at Appendix B.

4. CONCLUSIONS

The subject application seeks consent for interim coastal protection works comprising an extension to an existing geobag wall on the subject land. Having regard for the minimal potential impact of the proposal, the temporary nature of the works and the recent approval of similar applications in the locality, it is respectfully requested that the Panel approve the application.

This application should be made on the condition that there be full compliance with a maintenance and removal plan approved by the Panel or the Council...

If the Panel requires further information or clarification on any aspect of the application, we ask that those matters be notified to us for a response prior to any decision on this application.



Kate Singleton RPIA

PARTNERSHIP PRINCIPAL

PLANNERS NORTH

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APPENDICES

APPENDIX A

List of Application Documents

Development Application 10.2023.287.1

List of Documents

Development Application Form and Owner's Consent Statement			20 October 2023
Northern Regional Planning Panel Determination Refusal and Statement of Reasons			26 September 2024
Statement of Environmental Effects prepared by Planners North			October 2023
Coastal Engineering Assessment prepared by Royal Haskoning DHV			29 May 2023
Design Drawings prepared by Royal Haskoning DHV			29 May 2023
<i>Drawing no</i>	<i>Title</i>	<i>Issue</i>	<i>Date</i>
PA3267-RHD-00-XX-DR-ME-1000	General Arrangement and Location Plan	P02	29 May 2023
PA3267-RHD-00-XX-DR-ME-1101	Cross Sections Sheet 1	P02	29 May 2023
PA3267-RHD-00-XX-DR-ME-1102	Cross Sections Sheet 2	P02	29 May 2023
PA3267-RHD-00-XX-DR-ME-1103	Cross Sections Sheet 3	P02	29 May 2023
PA3267-RHD-00-XX-DR-ME-1104	Re-establishment of Dune Profile Sheet 1	P01	29 May 2023
PA3267-RHD-00-XX-DR-ME-1105	Re-establishment of Dune Profile Sheet 2	P01	29 May 2023
PA3267-RHD-00-XX-DR-ME-1106	Re-establishment of Dune Profile Sheet 3	P01	29 May 2023
Ecological Assessment prepared by Biodiversity Assessments & Solutions			20 June 2023
Community Engagement Report prepared by Caroline Desmond			26 October 2023
Flora Assessment prepared by Biodiversity Assessments & Solutions			18 December 2023
Department of Primary Industries Referral Response			27 November 2023
Department of Planning and Environment – Land & Asset Management (North Coast)			23 January 2024
Department of Climate Change, Energy, the Environment and Water Referral Response			9 February 2024

Department of Planning and Environment – Water General Terms of Approval	15 August 2024
Byron Shire Council Assessment Report	10 September 2024
Byron Shire Council Draft Conditions of Consent	10 September 2024
Byron Shire Council Updated Draft Conditions of Consent	-
Byron Shire Council Request for Additional Information	3 November 2023
Byron Shire Council Request for Additional Information	14 February 2024
Construction Methodology Statement prepared by Lockyer Valley Quarry Solutions - Revised	24 June 2024
Response to Request for Additional Information prepared by Planners North	12 July 2024

APPENDICES

APPENDIX B

Monitoring, Management and Removal Plan



**PLANNERS
NORTH**

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Kate Singleton
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Date:	16 December 2024	Contact name:	Greg Britton
Our reference:	PA3267-RHD-XX-XX-CO-X-0002	Telephone:	+612 8854 5000
Classification:	Internal use only	Email:	greg.britton@rhdhv.com

Dear Kate

Elements of Byron - Extension to Existing Geobag Coastal Protection Works: Outline of Monitoring and Management/Maintenance Plan and Geobag Structure Removal Plan

As you know, [the requirement[for preparation] of] an approved Monitoring and Management/Maintenance Plan and a Geobag Structure Removal Plan would be included as conditions of any consent issued for the proposed approximately 40m extension to the existing geobag coastal protection works at the Elements of Byron Resort.

Set out below is a detailed draft proposal for both the proposed Monitoring and Management/Maintenance Plan and the Geobag Structure Removal Plan. This draft Monitoring and Management/Maintenance Plan is an expansion of the outline first prepared in May 2024. The draft outline of the Geobag Structure Removal Plan is a new document. The completed Plans would be submitted to Council prior to the issue of a Construction Certificate.

Both the above Plans have been prepared to accompany lodgement of a S8.2(1)(a) Review of the Determination of Development Application No.10.2023.287.1 for the extension to the existing geobag coastal protection works.

Outline of Monitoring and Management/Maintenance Plan

Responsibility

Implementation of the Monitoring and Management/Maintenance Plan will be the responsibility of the owner of Elements of Byron Resort (Ganra Pty Ltd) at its cost.

Area Subject to the Monitoring and Management/Maintenance Plan

The area subject to the Monitoring and Management/Maintenance Plan is to comprise the footprint of the extension to the existing geobag coastal protection works plus the beach adjacent to the works (to approximately low tide mark) plus the frontal dune system extending from the commencement of the proposed extension works northwards for a distance of approximately 160m beyond the

northern limit of the proposed works (inclusive of the existing public beach accessway opposite the end of Bayshore Drive).

Monitoring and Inspection Activities

The following monitoring and inspection activities are to be carried out:

- UAV imagery at intervals not exceeding three months and within two weeks following ocean storm events or creek flooding events which cause damage to the works and/or impacts to beach and adjacent land, as identified by the owner of Elements of Byron Resort or Council. If there is uncertainty whether damage or impacts have occurred, UAV images and additional ground level oblique photography shall be supplied to the Coastal Engineer¹ who may carry out an inspection at this time (refer below)
- detailed land survey at the completion of the works and at such other times as may be directed by the Coastal Engineer during the life of the works
- high resolution aerial photos or satellite photos
- inspections by the Coastal Engineer at intervals not exceeding six months, or more frequently if in the opinion of the Coastal Engineer damage to the works, or impacts due to the works, has or is likely to have occurred following an ocean storm event or creek flooding event. Any inspection by the Coastal Engineer triggered by an ocean storm event or a creek flooding event shall be carried out within two weeks of the event.

The inspection by the Coastal Engineer shall consider the following checklist as a minimum:

- structural: Number of displaced geobags
- serviceability: Number of geobags with tearing, vandalism, deterioration, or deformation
- erosion: Evidence of erosion above the crest of the works, below the toe of the works, and due to end effects.

The inspection carried out by the Coastal Engineer is to be documented in a report. The report shall include a photographic record of the inspection. The report shall identify and make recommendations as to whether management/maintenance activities are required and, if so, the form that these activities should take. The report should be submitted to Council within four weeks of the inspection. Copies of the report must be retained by the coastal engineer and the owner.

Scope of Management/Maintenance Activities

The scope of the management/maintenance activities shall be in accordance with the following:

- replacement of geobags which may have become displaced, torn, vandalised, deteriorated or deformed, or the like. Replacement geobags shall be of the same size as the original geobags
- removal of any geobags that have become displaced from the structure
- no part of the coastal protection works as a consequence of maintenance shall extend beyond the approved extent

¹ Coastal Engineer means a suitably qualified and experienced engineer with experience in geobag coastal protection works and coastal processes/hazards, engaged by the owner of Elements of Byron Resort and approved by Council.

- grading of erosion scarps to a safe angle where they present an unacceptable risk to public safety
- restoration of increased erosion caused by the presence of the works, through importation of nourishment sand and/or beach scraping in consultation with Council
- restoration of public beach access where such access has been adversely impacted by the presence of the works, in consultation with Council
- revegetation where vegetation has been lost due to the presence of the works
- existing trees and native vegetation are to be retained and protected from damage during any management/maintenance work
- maintenance shall be undertaken to the extent, and only to the extent, in the opinion of the Coastal Engineer, required to provide protection by the coastal protection works equivalent to that at the completion of the original works authorised under the development consent
- when determining a requirement for maintenance works the Coastal Engineer must consider public safety and the requirement for public access to and use of the beach.

In terms of the replacement of geobags due to damage by wave impacts, Coghlan et al (2009) provides a useful damage classification system to guide maintenance. The failure/damage of a geobag coastal protection structure was expressed in percentage terms and defined as the number of displaced geobags divided by the total number of geobags within a reference region x 100%. The damage classification system is summarised in Table 1 for a double layer design as is the case for the proposed extension. Maintenance of the works shall be carried out prior to 15% damage or as directed by the Coastal Engineer.

Sand used to fill replacement geobags shall not be sourced from the beach, but from an external source approved by the Coastal Engineer.

Table 1 Damage classification system for geobag coastal protection structures

Damage Classification	Percentage Displaced (Double Layer)
No Damage	0%
Initial Damage	0-2%
Intermediate Damage	2-15%
Failure	≥ 15%

Timing of Management/Maintenance Activities

The management/maintenance activities recommended by the Coastal Engineer shall be carried out as soon as practicable following submission of the Coastal Engineer's report to Council, subject to factors such as beach state, inclement weather, safety considerations, and procurement of a Contractor. The expectation would be that the activities would be commenced within a period of 1 to 2 months from submission of the report.

Certification of Management/Maintenance Activities

At the completion of any management/maintenance activities, the Coastal Engineer shall certify that the activities have been undertaken in accordance with his/her recommendations. A copy of the certification must be provided to the Council and retained by the Coastal Engineer and the owner.

Access for Management/Maintenance Activities

Access to the area for management/maintenance activities shall be via Elements of Byron Resort wherever practicable.

Any management/maintenance activities that require access to Belongil Beach, outside the private land, must be subject to a Cape Byron Marine Park Permit and Crown Lands Licence.

Relevant authorities should be provided a minimum of 2 business days written notice when management/maintenance activities are proposed to be carried out, unless in an emergency when, nevertheless, prior written notice shall be given.

Ceasing of Responsibility by the Owner of Elements of Byron Resort

The owner of Elements of Byron Resort (Ganra Pty Ltd) would cease to be responsible for monitoring and management/maintenance activities following removal of the extension to the existing geobag coastal protection works and upon completion of any management/maintenance obligations due to the presence of the works.

Outline of Geobag Structure Removal Plan

Timeline for Geobag Removal and Site Rehabilitation

The extension to the geobag coastal protection works shall be removed by the 5th anniversary of the determination date of the development consent or on the adoption by Byron Shire Council of an endorsed Coastal Management Program, whichever is the sooner.

Site rehabilitation following removal of the extension to the geobag coastal protection works shall commence immediately following removal of the works. The object of the site rehabilitation is to:

- (1) remove the geobags comprising the extension to the geobag coastal protection works and
- (2) restore the area on which these geobags were placed and surrounds to their condition prior to the installation of the extension to the geobag wall.

Site Rehabilitation

Site rehabilitation shall be in accordance with an approved Site Rehabilitation Plan prepared by a suitably qualified person(s) engaged by the owner of Elements of Byron Resort and approved by Council, having regard to the then existing conditions. The Plan shall be submitted to Council for approval three months prior to proposed commencement of the site rehabilitation.

Access to the area for site rehabilitation shall be via Elements of Byron Resort wherever practicable. Any site rehabilitation activities that require access to Belongil Beach, outside the private land, must be subject to a Cape Byron Marine Park Permit and Crown Lands Licence.

All native vegetation used in the rehabilitation is to be endemic to Byron Bay.

Waste Management and Recycling

The Site Rehabilitation Plan shall include details of waste management and recycling. The individual geobags utilised in the extension to the coastal protection works shall be carefully cut and the sand within the geobags released onto the beach and/or within the dunal system and shaped to a natural profile. All geobags removed from the extension works shall be taken off site to an approved waste and recycling centre.

Maintenance Period for Site Rehabilitation

The maintenance period for rehabilitation shall be included in the approved Site Rehabilitation Plan but shall not be less than three months.

Yours sincerely,



Greg Britton

Technical Director
Water & Maritime

APPENDICES

APPENDIX C

Letter of Advice provided by King & Wood Mallesons

Submission re Review of Determination
Development Application No. 10.2023.287.1

INTRODUCTION

This development application No. 10.2023.287.1 lodged on 20 October 2023 by Kate Singleton for Elements of Byron Pty Ltd (“**Elements DA**”) involved a modest proposal to extend an existing lawful geo-bag wall on private property at Bayshore Drive, Byron Bay for about 40 metres and at a height of about 2.1 metres on a temporary basis for 5 years or until Byron Shire Council (“**Council**”) has a valid coastal management plan in force. The purpose of the proposed interim works is to stabilise the existing dune slope and revegetate the dune to mitigate prevent further erosion of the existing dune behind the beach. It is in the public interest to maintain the existing naturally occurring dune behind the beach pending a coastal management plan rather than permitting it to continue to erode. The Elements DA was refused by the Northern Regional Planning Panel (“**Panel**”). This submission deals with certain legal issues arising in the refusal.

1 The Application of Section 2.12 of the Resilience SEPP

1.1 The first basis of the Panel decision is stated as follows:

“The Panel is not satisfied, pursuant to Division 5 section 2.12, that the proposed development is not likely to cause increased risk of coastal hazards on the subject land or other land. As this is a necessary pre-requisite to the granting of consent, the Panel determined to refuse the Application.”

“In reaching its decision, the Panel notes the Applicant’s Statement of Environmental Effects and the appended Coastal Engineering Assessment acknowledge the proposed works will likely result in additional or compounding “end effect” or erosion; a view shared by the Department of Primary Industries and the Department of Climate Change, Energy the Environment and Water (BCS) in their submissions.”

The Panel proceeded on the basis that it could not be satisfied under Section 2.12 of *State Environment Planning Policy (Resilience and Hazards) 2021* (“**the Resilience SEPP**”) that the proposed development is not likely to cause increased risk of **coastal hazards on that land or any other land** because of the “end effect” of the proposed extension of the geo-bag wall in private property. In dealing with the interaction between Section 2.12 of the Resilience SEPP and Section 27 of the *Coastal Management Act 2016* (“**CM Act**”), the Panel did not give priority to the CM Act as an Act of Parliament that prevails over the Resilience SEPP. It sought to reconcile the operation as follows:

“The Panel considers that s.27(1)(b)(i) provides for any uncertainty that increased erosion will occur as a result of works should they be approved whereas the SEPP requires satisfaction that the works are not likely to cause increased risk. As indicated above, the Panel is not satisfied that increased risk and erosion will not occur.”

1.2 The Panel did not give an opportunity to the Applicant to address this interpretation of Section 2.12 in the current situation and its interaction with Section 27 of the CM Act. If it had, the Applicant would have been able to submit that in attempting to reconcile the operation of Section 27 of the CM Act and Section 2.12 of the Resilience SEPP, the Panel:

- (a) has not given due weight to the supremacy of Section 27 of the CM Act, which has precedence over any provision in the Resilience SEPP;
- (b) has failed to consider the proper application of Section 2.12 of the Resilience SEPP as a matter of fact having regard to the definitions which apply in Chapter 2 of the Resilience SEPP;

- (c) has purported to rely on information about the predicted end effects which when properly considered, do not apply to the situations set out in Section 2.12; and
- (d) the result is that Panel has misapplied Section 2.12 both as a matter of law and as a matter of fact.

We have elaborated on these conclusions below. The Panel also did not address why the conditions for monitoring and maintenance which have been proposed by the Applicant and supported by the Council were not sufficient for the purposes of Section 27. We have discussed this further in Section 4 below.

- 1.3 At the outset, it is important to consider how the provisions in Section 27 of the CM Act interact with the provisions in the Resilience SEPP, bearing in mind the paramountcy of the provision in the CM Act. While there is overlap in the subject matter of what the two provisions are addressing, careful attention must be paid to the differences in application and ambit. In this respect we make the following observations:
 - (a) Section 27 is concerned with applications for the purpose of coastal protection works only. It is not a general provision about development in the coastal zone;
 - (b) in Section 27(1)(b) the consent authority is directed to require arrangements to be in place if any increased **erosion of the beach or adjacent land** is caused by the presence of the works; and
 - (c) it is not possible for the Resilience SEPP as matter of statutory hierarchy to constrain the application of Section 27 of the CM Act.
- 1.4 Section 27(1)(b) has a relatively narrow compass. It is not concerned with other aspects which are the province of Section 2.8 to Section 2.11 of the Resilience SEPP such as reduction in the public amenity, change in coastal processes, coastal environment values, existing safe access to the beach, overshadowing. Section 27.1(b) is concerned with only one issue: namely coastal protection works resulting in increased erosion of the beach or adjacent land to the beach. It requires satisfactory arrangements to be in place for the restoration of the beach or land adjacent to the beach if any increased erosion is caused by the presence of the works. The provisions in the Resilience SEPP cannot be read so as to limit the power of consent authority granted by Section 27 to deal with increased erosion of the beach or adjacent land if caused by the presence of the coastal protection works. The legislation is paramount over the SEPP.
- 1.5 Section 2.12 is headed - "Development in Coastal Zone Generally - development not to increase risk of coastal hazards". Section 2.12 is dealing with the impact of any development on coastal hazards. **Coastal hazards** is a defined term in Section 4 of the CM Act.
- 1.6 The applicable provisions of Chapter 2 of the Resilience SEPP are as follows:
 - (a) Words in Chapter 2 of the Resilience SEPP have the same meaning as in the CM Act (Section 2.2(2) of the Resilience SEPP);
 - (b) Section 2.12 provides that development consent must not be granted to any development or land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause **increased risk of coastal hazards** on that land or other land;
 - (c) So Section 2.12 requires analysis of whether there is likely to be an increased risk of **coastal hazards** on "that land or any other land";
 - (d) The term **coastal hazard** is defined in Section 4 of CM Act to mean:
 - (i) Beach erosion,
 - (ii) Shoreline recession,

- (iii) Coastal lake or watercourse entrance instability,
- (iv) Coastal inundation,
- (v) Coastal cliff or slope instability,
- (vi) Tidal inundation,
- (vii) Erosion and inundation of foreshores caused by tidal waters and the action of waves, including the interaction of those waters with catchment floodwaters.

1.7 The decision of the Panel was:

“The Panel is not satisfied, pursuant to Division 5 section 2.12, that the proposed development is not likely to cause increased risk of coastal hazards on the subject land or other land. As this is a necessary pre-requisite to the granting of consent, the Panel determined to refuse the Application.”

1.8 In reading its decision, the factual matters relied by the Panel were:

“In reaching its decision, the Panel notes the Applicant’s Statement of Environmental Effects and the appended Coastal Engineering Assessment acknowledge the proposed works will likely result in additional or compounding “end effect” or erosion; a view shared by the Department of Primary Industries and the Department of Climate Change, Energy the Environment and Water (BCS) in their submissions.”

1.9 On the wording of the Determination, the Panel was concerned with the evidence before it about the limited “end effects” of erosion due to the presence of the proposed coastal protection works.

1.10 The evidence before the Panel was that the end effects were on the dune behind the beach and not on the beach. There was no suggestion in the evidence before the Panel of an increase in coastal hazards as that term is properly understood in Chapter 2 of the Resilience SEPP. We refer to the Report of Royal HaskoningDHV dated 29 May 2023, page 30 .

1.11 The Council accepted the findings of the Applicant’s expert that the only likely impact was on the private property and that any impact on the beach was unlikely.

“2. End Effects Erosion

Given the nature of coastal processes in this location, and the erosion experience immediately north of the existing geobag wall, it is reasonable to assume that there will be some erosion north of the proposed extension during the 5-year lifespan of a consent.

*The coastal engineering advice submitted with the application concludes that any such erosion is not expected to impact areas outside the subject lot or unreasonably limit public access to **the beach over the 5-year lifespan of the proposal ...**”*

(Extracted from page 5 of Council Assessment Report dated 10 September 2024.)

1.12 This evidence underpinned the submission made by Planner North in October 2023 that Section 2.12 of the Resilience SEPP did not apply (page 15):

“2.12 Development in coastal zone generally-development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.”

Comment:

As provided in the Engineering Assessment, the proposed development is not likely to cause any increased risk in coastal hazards on the subject land or other land. Measures are proposed to address potential end effects to the north.”

- 1.13 There was no evidence before the Panel to suggest that the modest proposed extension of a small geo-bag wall would cause an increase in “coastal hazards” as that term is defined in the CM Act.
- 1.14 Furthermore, the approach of the Panel in this application is inconsistent with the approval adapted by the Panel in a similar application in 2022. In that case, it was accepted that the proposed works would have an impact on the beach itself. This was not treated as a bar to proceeding. Rather, the Panel imposed conditions under Section 27. This is discussed in more detailed below in Section 4.

2 Maintenance and Remediation Plan

- 2.1 As part of the Elements DA, the Applicant submitted a detailed outline to the Council and the Panel about its proposed maintenance plan (see Royal HaskoningDHV Report dated 14 May 2024 submitted to the Council).
- 2.2 The extent of detail can be compared favourably to the consent conditions approved by the Panel in respect of development application No. 10.2021.698.1 for coastal protection works elsewhere in the Byron Bay embayment.
- 2.3 The proposal of the Applicant in this DA had the following features:
 - (a) Specification of the area subject to monitoring and maintenance;
 - (b) Detailed description of monitoring activities including UAV imagery at intervals not exceeding 3 months and inspections by the coastal engineer at intervals not exceeding 6 months;
 - (c) A checklist of considerations to be addressed by the coastal engineer;
 - (d) A report by the coastal engineer to be submitted with recommendations to council after each inspection, including identification of the types of maintenance to be undertaken;
 - (e) Management and maintenance activities recommended by the coastal engineer to be carried out as soon as practicable;
 - (f) Specification regarding access.
- 2.4 The Council recommended conditions which included:
 - (a) A bond for removal of the geo-bag protection works at 150% of the estimated cost of the works (draft condition A3);
 - (b) Council to use the bond to remove the geo-bags in the event of non compliance with the conditions of removal (draft conditions A2 and A3);
 - (c) Prior to the issue of a construction certificate, a monitoring and management maintenance plan to be prepared and approved by the Council prepared in accordance with the outline in the letter from Royal HaskoningDHV of 14 May 2024 (draft condition B.1);
 - (d) Prior to the issue of the construction certificate, a detailed geo-bag structure removal plan documenting methodology and timeframes for the removal of the works had to be submitted to and endorsed by the Council prior to the issue of a construction certificate (condition B3).

- 2.5 It is unclear why the Panel considered the detailed outline was not sufficient. Their decision records:

“...the Panel considers insufficient documentation was provided to demonstrate the proposed methods and therefore prospects of viable and ongoing maintenance and remediation”.

- 2.6 No such concerns were expressed by the Panel whilst the application was proceeding. No mention is made in the determination by the Panel of the details provided by Royal HaskoningDHV (Section 4) nor was the Council’s support for the Applicant’s proposed maintenance plan acknowledged. It is therefore unclear what consideration was given by the Panel to these details provided by Royal HaskoningDHV that provided the basis for the imposition of conditions proposed by Council as part of its recommendation to approve the Elements DA.
- 2.7 In order to assist with the consideration of proposed geo-bag maintenance details, the Applicant has prepared an expanded monitoring, maintenance and management plan and geo-bag structure removal plan.

3 Relevance of the Coastal Management Program

- 3.1 Council has had a coastal zone protection plan or a coastal management plan (“CMP”) under preparation since about the year 2000. During that period, no plan has been approved by the applicable State Minister and brought into operation.
- 3.2 Council is currently proceeding to develop a new CMP under the CM Act. According to Council, it has completed Stages 1 and 2 of the required process and is still to undertake Stages 3 and 4. It is unclear how long these stages will take or how long it will take the Council to complete a plan, obtain approval from the Minister and adopt a binding CMP.
- 3.3 In the Council Assessment Report (page 65) in respect of development application 10.2021.698.1 at Clarkes Beach for coastal protection works, the Council informed the Panel as follows:

*“...as the CMP may never be finalised. Coastline management planning has been underway in Byron Shire for more than 25 years in one form or another and it may **continue for another 20 years**. So a direct link between the removal of the temporary geo-bag structure and the completion of the CMP (which is an incomplete process over an unknown time frame) is not legal appropriate and is not recommended.”*

(Our emphasis)

- 3.4 It is also important that the Council informed the Applicant for the Elements DA that it had not yet formed any views on the coastal management policies and strategies which it would ultimately adopt. All strategies, including the possibility of planned retreat which had been the Council’s policy in the past, were up for review. We refer to the following quote (page 5):

“There is, as yet, no timeframe for the completion of the Coastal Management Program but later stages of the work will review the planned retreat policy together with other relevant management options.” (Council Assessment Report dated 10 September 2024 - page 5)

- 3.5 Moreover, the Council itself did not suggest that approval for these temporary works should be delayed pending preparation of the Coastal Management Plan. To the contrary, the Council supported the temporary works as **proposed** in the Elements DA pending the CMP. The Council recommended the Elements DA for approval, subject to its proposed draft conditions of consent.
- 3.6 Other important features of the Applicant’s proposal are:
- (a) it is accepted that further erosion of the natural dune beyond the beach may occur if interim protection is not permitted pending the Council formalising the CMP;

- (b) the Applicant has sought to deal with these issues by a very modest proposal which involves restoring the eroded dune to its previous state and a modest extension of the existing geo-bag wall for only about 40 metres and to a height of 2.1 metres AHD;
 - (c) the works for which the Applicant sought approval were temporary in nature. The Applicant does not seek a permanent approval but rather a temporary approval for five years or until the CMP of Byron Shire Council is in place, in effect to maintain the status quo.
- 3.7 The Panel expressed concern that a short temporary extension of an existing geo-bag wall could pre-empt the decisions of the Council or prevent a holistic view being taken regarding the preparation of the CMP.
- 3.8 The decision of the Panel refers in particular to:
- (a) The decision on this application being made in isolation of a holistic approach to the coastal management in the area; and
 - (b) not wishing to pre-empt the ultimate decision of the program with respect to the Belongil Creek.
- 3.9 In this respect, it appears that the Panel has not had sufficient regard to the following aspects of the Elements DA:
- (a) The proposed coastal protection works are temporary in nature;
 - (b) the protection takes the form of small geo-bags that can be quickly and easily removed and in that sense could not amount to a pre-emption of any decision ultimately taken by the Council;
 - (c) there is already coastal protection on this site; and
 - (d) the proposed extension represents only a modest addition to the existing protection.
- 3.10 Further, it is submitted that avoiding further erosion of the existing vegetated dune would preserve the existing conditions on the naturally occurring dune behind the beach pending the management decisions in a CMP, which may by Council's own admission may not occur for a very long period of time. This non-pre-emptive approach attempts to try and maintain the dune vegetation and dune behind the beach pending these management decisions of the Council.
- 3.11 Temporary protection in the form of a short extension of the geo-bag wall is not a permanent decision which has the ability to pre-empt later decisions about the whole of coastal management made by Council. The geo-bags can be removed easily and Applicant's proposal is neutral in relation to those aspects. It has clearly been specified as a modest and temporary extension of an existing geo-bag wall which does not have the **ability to pre-empt any ultimate decision or** approach chosen by Council.
- 3.12 Furthermore, the Panel's decision is also contrary to its own approach adopted recently in 2022 in respect of development application 10.2021.698.1 for a temporary geo-bag wall at 1 Lighthouse Road, Byron Bay to prevent further dune erosion at another part of the Byron Bay Embayment (2022 DA). At that time, the draft CMP was under preparation by Council but not as advanced as that preparation of that plan as is in 2024. The Panel in approving the 2022 DA did not suggest that any concern that approving a temporary geo-bag wall of 120-140m in length would pre-empt the ultimate decision of Council, nor raise any concern about the decision being made in isolation of a holistic approach to coastal management in the CMP.
- 3.13 The differences in approach by the Panel to two very similar applications for temporary protection are analysed in greater depth in the next section below.

4 Inconsistency of Decision-Making

- 4.1 In 2022, the Panel considered the 2022 DA, which as stated at Section 3.16 above involved a similar proposal for temporary geo-bag protection at another stretch of the beach in the Byron Bay embayment.
- 4.2 The Panel determined to approve that 2022 DA.
- 4.3 There are a number of features of objective commonality between that 2022 DA and the Elements DA now under review. These can be summarised as follows:
- (a) the 2022 Application involved the protection of the Reflection Clarkes Beach Holiday Park site and a beach café. Thus, both applications protect properties on which there is accommodation for tourists and café and restaurant facilities;
 - (b) both applications involve geo-bag protection. In the case of the 2022 DA, there was two existing sandbag walls of four layers of 60 to 70 metres each giving an approximate length of 120 to 140 metres. As the consent for this geo-bag wall had lapsed, the 2022 DA proceeded on the basis that this was a new application. In the case of the Elements DA, the initial existing geo-bag is lawful and the application proposes only a short extension of about 40 metres;
 - (c) in both applications, the geo-bag wall protects the existing dune system sitting behind the beach from erosion;
 - (d) in both applications, the duration of the consent was proposed as temporary for a five year period. This ensures the geo-bags can be removed if and when a CMP comes into force;
 - (e) both applications include very similar monitoring and maintenance schedules (and in the case of the 2022 DA a detailed plan for geo-bag removal);
 - (f) at the date of determination of both applications, there was no CMP in place. In respect of the 2022 DA, in the Council Assessment Report (page 65), the Council frankly conceded as follows:

“... the CMP may never be finalised. Coastline management planning has been underway in Byron Shire for more than 25 years in one form or another and it may continue for another 20 years. So a direct link between the removal of the temporary geo-bag structure and the completion of the CMP (which is an incomplete process over an unknown timeframe, is not legally appropriate and is not recommended.”

We note that the Panel did not in any way suggest that the ongoing preparation of a CMP was in anyway an obstacle to approval in the 2022 DA. Conversely, for the Elements DA the Panel expressed concerns about approving the works before the CMP is completed by Council;

- (g) in both applications, it was conceded by the Applicant that there would be erosion in the form of ‘end-effects’, although we note in the Elements DA this end effect impact was only on the dune and not the beach;
- (h) in both applications, the Panel had to consider Section 27 of the CM Act and Section 2.12 of the Resilience SEPP;
- (i) in both applications, details addressing the mitigation of the risk of coastal hazards were provided. We note that the evidence in the 2022 DA was that there was an increased risk of coastal hazards. Notwithstanding that finding, the Panel approved the 2022 DA under Section 2.12 and Section 27 of the CM Act on the basis that the increased risk of coastal hazards was minor and able to be managed by the conditions attached to the consent. The Panel determining the Elements Application however did not take into account the effect

of the conditions that were offered for on-going maintenance to mitigate this risk which in any event was not on the beach and not a coastal hazard;

(j) the conditions of the 2022 DA and the draft conditions proposed by Council for the Elements Application are almost identical, including:

- (i) a limitation on the geo-bag wall for a five year term;
- (ii) the use of imported sand to offset sand locked up by the geo-bag walls to avoid the next long-term sand loss;
- (iii) proposed conditions requiring beach nourishment to be used to address any 'end effects'; and
- (iv) implementation of a detailed monitoring and maintenance regime.

4.4 Despite these similarities, the 2022 DA was approved subject to conditions whilst the Elements DA was refused, notwithstanding that it involved a much smaller proposal for a temporary geo-bag wall on private property and Council supported its approval subject to conditions.

4.5 The Panel's determination to refuse the Elements DA is inconsistent with its approval of the 2022 DA, as both Applications share a number of objective commonalities (as explained at paragraph 4.4 above).

4.6 We note that the NSW Court of Appeal decision of *Segal v Waverley Council* [2005] NSWCA 310 (**Segal**) illustrates that the principle of consistency in administrative decision-making applies to planning and environment decisions made by local government.

At paragraph 97 of the judgement, the following passage was cited with approval from Finkelstein J in *Applicant WAIW of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* [2002] FCA [62] where His Honour held as follows:

*"It would be strange indeed if, on substantially similar facts, two judges of this Court arrived at different results. If nothing else, that would tend to suggest a **breakdown in the rule of law in favour of idiosyncratic law making**, a concept much discussed in recent times. Of course there will some occasions when it is necessary for one judge to reach a conclusion which is different from another although the facts of both cases are similar but this would be a rare case and this is not one of them"*



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