

## DEVELOPMENT APPLICATION EVALUATION REPORT

Doc No. #A2021/12422

<b>Panel Reference</b>	PPSNTH-83
<b>DA Number</b>	10.2021.170.1 (PAN – 76902, CNR – 20640)
<b>LGA</b>	Byron Shire Council
<b>Proposed Development</b>	Twelve (12) New Eco Tourist Facility Cabins, Five (5) Ancillary Buildings comprising a Reception/Administration building, a Bush Fire Refuge building, a Maintenance/Storage building, a Wellness building and a Pool facilities building and Addition of a Deck to the Centre building, and Use of the Centre building as a restaurant and café ancillary to the ecotourism and private education development
<b>Street Address</b>	951 Broken Head Road BROKEN HEAD
<b>Applicant/Owner</b>	Planners North Pty Ltd / BHCF Pty Ltd
<b>Date of DA lodgement</b>	13 April 2021
<b>Total number of Submissions</b> <b>Number of Unique Objections</b>	<ul style="list-style-type: none"> <li>• Total number of submissions - 2648</li> <li>• Total number of submissions in opposition – 2602 and support - 46</li> <li>• Total number of submissions received after close of submission period – 478</li> <li>• Total number of unique submissions - ~535</li> </ul>
<b>Recommendation</b>	<p><b>Pursuant to Section 4.16 of the Environmental Planning &amp; Assessment Act 1979, Development Application No. 10.2021.170.1 for Twelve (12) New Eco Tourist Facility Cabins, Five (5) Ancillary Buildings comprising a Reception/Administration building, a Bush Fire Refuge building, a Maintenance/Storage building, a Wellness building and a Pool facilities building and Addition of a Deck to the Centre building, and Use of the Centre building as a restaurant and café ancillary to the ecotourism and private education development, be granted subject to “deferred commencement” and further conditions to operate on satisfaction of the deferred commencement requirements.</b></p> <p><b>The recommended deferred commencement requirements relate to:</b></p> <ul style="list-style-type: none"> <li>• <b>Approval for the proposed development being obtained from Essential Energy.</b></li> <li>• <b>Provision of detailed management of indirect impacts from the development on fauna including, but not limited to, noise and light.</b></li> <li>• <b>Provision of a detailed vegetation management plan or biodiversity conservation management plan for the development that proposes compensatory planting in location/s appropriate for the mix of species to be planted, that avoids impacts on existing habitat values, is of a complimentary scale, includes monitoring of habitat maintenance or regeneration effort and is consistent with Council guidelines.</b></li> <li>• <b>Removing inconsistencies in current consents relating to wastewater management</b></li> </ul>
<b>Regional Development Criteria (SEPP (Planning Systems) 2021)</b>	The proposal is regionally significant development (Eco-tourist facilities over \$5 million) (cl.2.19 and schedule 6).
<b>List of all relevant s4.15(1)(a) matters</b>	<ul style="list-style-type: none"> <li>• State Environmental Planning Policy (Biodiversity and Conservation) 2021</li> <li>• State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</li> <li>• State Environmental Planning Policy (Resilience and Hazards) 2021</li> <li>• State Environmental Planning Policy (Transport and Infrastructure) 2021</li> <li>• Byron Local Environmental Plan 2014</li> <li>• Byron Shire Development Control Plan 2014</li> </ul>
<b>List all documents submitted with this report for the Panel's consideration</b>	1 – Development Advisory Panel (DAP) meeting minutes (ref. 22.2019.14.1). 2 – Northern Regional Planning Panel records of briefing 3 – Plans of September 2022 amended proposal 4 – Council Environmental Health Officer referral 5 – Council Development Engineer referral

	6 – Council Ecological referral 7 – Rural Fire Service general terms of approval and bush fire safety authority for June 2022 amended proposal dated 30 August 2022 (ref: DA20210422001572-CL55-1) 8 – Transport for NSW comments on the October 2021 amended proposal (ref: NTH19/00203/03). 9 – Essential Energy additional information request on 26 August 2022 10 – Department of Planning and Environment general terms of approval for June 2022 amended proposal dated 2 September 2022 (ref: IDAS-2022-10095).
<b>Clause 4.6 requests</b>	Not applicable
<b>Summary of key matters raised in submissions</b>	<ul style="list-style-type: none"> <li>• Impact on bush fire threat</li> <li>• Assessment, and impacts, of the development on ecology/habitat/ biodiversity. Requirement for a Biodiversity Development Assessment Report</li> <li>• Noise impacts on neighbours</li> <li>• Failure to refer the proposal under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)</li> <li>• Permissibility of the proposal</li> <li>• Lack of compliance with past consents</li> <li>• Issues with previous rezoning of the property</li> <li>• Servicing</li> </ul>
<b>Report prepared by</b>	Ivan Holland
<b>Report date</b>	12 October 2022

#### Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report? Yes

#### Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarised, in the Executive Summary of the assessment report? Yes  
*e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP*

#### Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? Not applicable

#### Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)? Not applicable  
*Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions*

#### Conditions

Have draft conditions been provided to the applicant for comment? Yes  
*Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report*

## EXECUTIVE SUMMARY

The amended development application seeks consent for twelve (12) Eco tourist facility cabins, five (5) ancillary buildings comprising a reception/administration building, a bush fire refuge building, a maintenance/storage building, a wellness building and a pool facilities building and addition of a deck to the centre building, and use of the centre building as a restaurant and café ancillary to the eco-tourism and private education development.

The property containing the development site is 110.7 hectares in area at the south-eastern corner of Byron Shire and has an eastern frontage to Seven Mile Beach of over 1 kilometres and a western frontage to Broken Head Road of over 500 metres. Current development on the property is a 'private education' facility, largely in the northeast of the property, that includes nineteen (19) accommodation buildings and ancillary buildings, including a centre "community building", a swimming pool and recreation area and a manager's residence, and associated infrastructure including a water treatment plant and wastewater treatment and disposal system. The property is zoned a combination of C2 Environmental Conservation, C3 Environmental Management, RU2 Rural Landscape, SP1 Special Activities and 7(f1) Coastal Land. The site of the proposed development is in the northeast of the property being approximately 70 metres, at its closest, from the northern and eastern property boundaries.

The subject property has numerous interconnected hills, both in the north and southwest site, most reaching just over 40 metres above sea level. Areas in between the hills and to the southeast of the property are largely level and low-lying (less than 10 metres above sea level). Council's GIS maps the property as including:

- Bushfire prone land
- Acid sulfate soils - Classes 2, 3, 4 and 5
- High environmental value vegetation
- A cattle dip buffers
- Coastal erosion land - Precincts 1 and 3
- Biodiversity values
- Key fish habitat
- Koala potential habitat

The development application was received by Council on 13 April 2021. Council requested further information from the applicant on 16 August 2021 following a briefing of the Northern Regional Planning Panel on 28 July 2021. The applicant responded to the further information request on 21 October 2021 which included an amended proposal. A further briefing was provided by Council to the Northern Regional Planning Panel on 20 April 2022. The applicant was advised by Council of issues with the application on several occasions during the assessment. The applicant provided further information and amended plans to address identified issues most recently on 27 September 2022.

The development is integrated development requiring a bushfire safety authority and an activity approval for work on waterfront land. The NSW Rural Fire Service issued updated general terms of approval and bush fire safety authority for the amended proposal on 30 August 2022 and the Department of Planning and Environment – Water issued updated general terms of approval for the amended proposal on 2 September 2022.

In determining the application, the consent authority must be satisfied about the following matters:

- *State Environmental Planning Policy (Resilience and Hazards) 2021* – The Reception/Administration building (CB.02) and the deck addition to the Centre building are within the coastal wetlands proximity area and all proposed eco-tourist cabins, the Reception/Administration building (CB.02) and the deck addition to the Centre building are within the littoral rainforest proximity area (cl.2.8). Council's Ecological referral notes that the proposed development is likely to result in impacts on the biophysical, hydrological or ecological integrity of the adjacent littoral rainforest particularly relating to the development being within ecological setbacks in conjunction with the conservation importance of the subject site (cl.2.8(1)(a)).

Deferred commencement requirements have been recommended to require details of measures to minimise and manage indirect impacts associated with a general increase in human occupation of the property and of compensatory/environmental enhancement planting. Council's Environmental Health Officer has reviewed the site contamination assessment and is satisfied the land is suitable for the proposed uses (cl.4.6).

- *State Environmental Planning Policy (Transport and Infrastructure) 2021* – The subject property has frontage to Broken Head Road which is a classified road. Based on advice from Transport for NSW and Council's Development Engineer, the current access arrangement is satisfactory for the expected increase in traffic and as such, the 'safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development' (cl.2.119).

The following matters are relevant to the subject development and must be taken into consideration in determining the development application:

The provisions of any environmental planning instrument

- *SEPP (Transport and Infrastructure) 2021* - Components of the proposed development are proximate to electricity transmission and distribution infrastructure and consequently the application was referred to Essential Energy for comment (cl.2.48). Essential Energy confirmed on 30 June 2022 and again on 26 August 2022 that additional information was required for Essential Energy to finalise their review of the amended development application. Details of management of impacts on Essential Energy infrastructure were provided by the applicant on 27/9/22 and forwarded to Essential Energy by Council on 6/10/22. Written approval from Essential Energy has been included as a deferred commencement requirement. The proposal is considered to be "traffic-generating development" and was referred to TfNSW for advice (cl.2.122 and schedule 3). TfNSW provided comments on the development application on 25 March 2022 which did not raise any concerns regarding "potential traffic safety, road congestion or parking implications of the development".
- *SEPP (Biodiversity and Conservation) 2021* - The subject property is located within the koala planning area under the Byron Coast Comprehensive Koala Plan of Management (BCKPoM) and consequently, determination of the development application must be consistent with the BCKPoM (cl.4.4, 4.8 and Schedule 2). However, the subject property is not within a koala management precinct and does not contain any mapped koala habitat.
- *Byron Local Environmental Plan 2014* – The proposed development does not contravene any relevant development standards (Part 4) and has the necessary essential services or adequate arrangements have been made to make essential services available when required (cl.6.6). The proposed upgrades to the wastewater system are likely to conflict with previous approvals for the property and identification and correction of any conflicts/inconsistencies has been recommended as a deferred commencement requirement. The consent authority must not grant consent to eco-tourist facilities unless satisfied as to the listed matters (cl.5.13(3)). The proposed development does not satisfactorily address all listed matters particularly:
  - The number, scale, use and location of ancillary buildings and structures;
  - Overlap of bush fire mitigation (asset protection zones) with existing vegetation and areas of high ecological value;
  - Failure to properly address indirect impacts of the development on ecology such as light and noise; and
  - Inadequate measures for, and details of, maintenance and enhancement of the natural environment.

Specific measures to address indirect impacts of the development and a more substantial and detailed plan of enhancement of the natural environment has been required by way of a deferred commencement requirement. However, it is disappointing that a development application for an eco-tourist facility has not adequately addressed environmental impacts and has not proposed additional enhancement of the vegetation on the property to the extent expected by Council's Development Control Plan.

### The provisions of any development control plan

*Byron Shire Development Control Plan 2014* – But for Chapter B1: Biodiversity, the proposed development is generally consistent with relevant provisions relating to services, traffic and parking, cycling, landscaping, waste management, albeit subject to recommended conditions.

The proposed development encroaches minimum setbacks to ecologically significant areas, primarily through bush fire asset protection zones (APZs), but does not explain the need for the encroachments and/or does not adequately justify the need for a variation to the required ecological setbacks (Chapter B1: Biodiversity). The development application does not adequately consider practicable options to minimise or avoid direct impacts of the development encroaching ecological setbacks such as relocating buildings and/or increasing the building construction level in order to reduce APZs. The development application did not include sufficient detail on the proposed mitigation and management of 'indirect' impacts from the development on the surrounding ecology associated with a general increase in human occupation such as light and noise impacts on fauna and an increased risk of vehicle strike from additional traffic. It is recommended that these shortfalls are addressed by way of deferred commencement requirements.

### Likely impacts of the development

The proposal will result in adverse impacts on the natural environment of the locality. The identified impacts include direct impacts such as the overlap of bush fire asset protection zones with native vegetation and indirect impacts associated with a general increase in human occupation of the property such as light and noise impacts on fauna and an increased risk of vehicle strike from additional traffic. The likely impacts on the natural environment are exacerbated by proposed environmental enhancement and revegetation lacking detail, not being based on robust data and/or known ecological characteristics and being significantly less than the scale and effort expected for such development. Several deferred commencement requirements and a suite of consent conditions have been recommended to address potential adverse impacts of the development on the natural environment.

The proposal is anticipated to result in minimal social and economic impacts in the locality and negligible impacts on the built environment.

### Site suitability

Subject to satisfactory resolution of the identified issues, the site is capable of being adequately serviced, has manageable constraints, has high ecological values and capacity for environmental enhancement and is suitable for the proposed development.

### Public interest/submissions

The development application was placed on public exhibition from 21 April to 4 May 2021. Council received approximately 2600 submissions on the application of which the vast majority were in opposition with approximately 535 of the submission in opposition being unique (46 submissions in support were received).

Most of the relevant issues raised in the submissions in opposition to the development are considered in the assessment such as permissibility, servicing, impacts on the environment/biodiversity, revegetation/compensatory planting, noise/amenity impacts and management of bush fire risk.

Subject to the outstanding matters being satisfactorily addressed through deferred commencement requirements and conditions of consent, particularly those relating to environmental impacts and revegetation/compensatory planting, the proposal will not be contrary to public interest.

*NB - The following assessment report needs to be read in conjunction with the various attached reports and submissions from government agencies and Council staff.*

## 1. INTRODUCTION

### History/Background

#### Property

The following site development history is taken from the recently completed Town Planning Audit Report: 951 Broken Head Road, BROKEN HEAD (Ref: M210019, 29/7/2021):

## 3. Planning History

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The subject site has an extensive planning history. The most relevant development consents are summarised below:

- **1998/0146.1** - Development application No. 98/0146 was approved by Court Orders issued on 8 December 1998 for a private educational facility with a capacity of no more than 72 persons at any one time. The approval included a masterplan for the site with 30 buildings across the site, identified as:
  - (a) Building 1 – Centre (Community Building)
  - (b) Buildings 2 to 12 – Accommodation Type A
  - (c) Buildings 13 to 22 – Accommodation Type B
  - (d) Buildings 23 and 24 – Staff Residence
  - (e) Building 25 – “M.V. Killara” Retreat
  - (f) Building 26 – “G.B. Shaw” Retreat
  - (g) Building 27 – “Pavilion” Retreat
  - (h) Building 28 – “Tower” Retreat
  - (i) Building 29 – Primitive camping ground community building
  - (j) Building 30 – Underground chapel
- **17.2001.7046.1** – Section 96 application No. 01/7046 was approved by Court Orders issued on 6 July 2001 for amendments to the configuration of approved Buildings 2-12 (“Type A”) and 13-22 (“Type B”).
- **5.1998.146.2** – Section 96 application No. 98/0146.2 was approved by Court Orders issued on 10 March 2003 for amendments to approved Building 1 configuration.
- **5.1998.146.3** – Section 96 application No. 98/0146.3 was approved by Court Orders on 17 May 2004 for amendments to the approved development, including:
  - (a) Delete Condition C6 and F12 to allow an increase in wastewater treatment capacity from 6,000 to 16,800 litres per day;
  - (b) Amend Condition F3 to allow an increase in capacity from 72 to 112 people; and
  - (c) Delete Condition F7 to permit laundry facilities in accommodation buildings.
- **5.1998.146.4** – Section 96 application No. 98/0146.4 was approved by Court Orders on 17 May 2004 to modify the plan indicating areas for irrigating water with Exhibit 4.7A.
- **2005.290.1**– Development application was approved by Council on 3 August 2005 for a swimming pool and associated works.
- **2008.532.1** – Development application was approved by Council on 3 November 2008 for provision of managers’ residence in “Building 23”.



- *Further facilities to be used as eco-tourist facilities, including: 4 new “C” buildings, 14 new treehouse cabin “D” buildings, 14 new “A” buildings and 1 new treehouse retreat “D” building;*
- *Bush fire refuge building, ancillary buildings, enhance poolside facilities and minor additions to the existing centre.*

Advice was sought on the following specific matters:

- What Reports are required to support a Development Application
- Any issues that may arise due to it being a designated development in Coastal Management SEPP

Council provided a record of the DAP meeting which included a response to the specific matters and general advice (**Attachment 1**).

Development related advice (DRA) was sought from the Council in relation to proposed design changes and revised land use capability for the on-site wastewater disposal system on 13 November 2019 (ref. 29.2019.145.1). A meeting to discuss the advice sought was held on 26 November 2019 and a record of the meeting was provided by Council on 4 December 2019.

### Assessment

The development application was publicly notified and exhibited from 21 April to 4 May 2021. Council received approximately 2600 submissions on the application with the vast majority in opposition (46 submissions in support were received).

A briefing was provided by Council to the Northern Regional Planning Panel on 28 July 2021 following which the Planning Panel published a record of briefing (**Attachment 2**). In accordance with the record of briefing, Council requested further information from the applicant on 16 August 2021 relating to:

- Requirements for “eco-tourist facility”,
- Current site approval and operation,
- Characterisation of development and permissibility,
- Biodiversity and environmental impacts,
- Eco-tourist facility management,
- Site contamination,
- Wastewater management,
- Potable/drinking water, and
- Public submissions.

The applicant provided a response to Council’s further information request on 21 October 2021 which included an amended proposal.

The amended application was not re-notified or re-exhibited as it is similar in location and character to the original proposal but of a reduced scale.

The applicant was advised on 6 April 2022 of several outstanding issues with the proposal following a preliminary assessment of the October 2021 amended proposal. A further briefing was provided by Council to the Northern Regional Planning Panel on 20 April 2022 following which the Planning Panel published a record of briefing (**Attachment 2**).

In response to the issues identified, the applicant provided a further amended proposal to Council on 9 June 2022 with an updated bush fire assessment provided on 26 July 2022 and the remaining updated supporting information received on 2 August 2022.

The applicant was advised on 9 September 2022 of the following matters, identified during drafting of the assessment report, requiring resolution:

1. Support for the proposed development has not been obtained from, provided by, Essential Energy.



2. Review of construction standards for proposed buildings to demonstrate bush fire asset protection zones are reduced to the lowest safe distance and to minimise overlap with native vegetation and riparian zones.
3. Review, and consideration, of relocation of the waste storage area and cycle storage area away from the watercourse.
4. Review of the need for and/or removal of proposed crossings of the watercourse (new walkways and road crossing).
5. Consideration, and further detail, of management of indirect impacts from the development on fauna including, but not limited to, noise and light.
6. Provision of a vegetation management plan or biodiversity conservation management plan for the development that proposes compensatory/offset planting (additional to that already committed to) in a location/s appropriate for the mix of species to be planted, that avoids impacts on existing habitat values, is of a complimentary scale, includes monitoring of habitat maintenance or regeneration effort and is consistent with Council guidelines.

The applicant responded to the above matters requiring resolution on 27 September 2022 with further amended plans, details of management of impacts on Essential Energy infrastructure and a consideration of noise and light impacts from the development on surrounding ecology. The key changes identified in the amended plans are:

- an area to the north of the eco tourist cabins to be revegetated;
- removal of two of the three proposed waterway crossings with one walkway crossing to remain; and
- relocation of the waste storage area to the Centre building.

This assessment is primarily of the June 2022 amended proposal including the additional changes put forward by the applicant on 27 September 2022. Several reports provided with the original application have been considered however most of these documents are now inconsistent with the most recent proposal and plans.

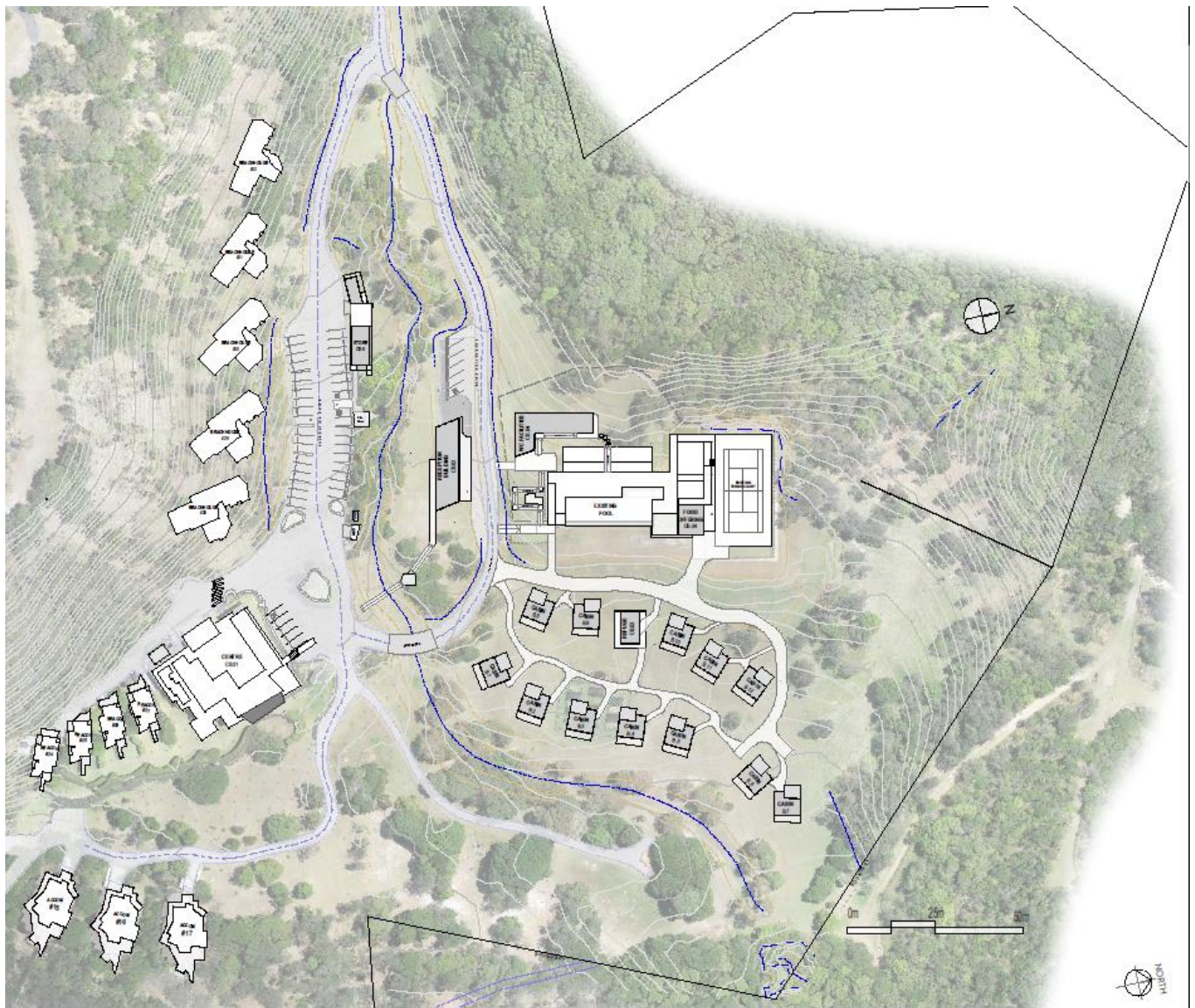
## **Description of the proposed development**

The original application sought approval for:

*Mixed Use Development comprising Twenty Seven (27) New Eco Tourist Facility Cabins, Seven (7) Ancillary Buildings including Wellness Facility, Refuges, Depot, Addition of Deck to Existing Centre and Associated Earthworks and Vegetation Removal, and Change of Use of Fourteen(14) Private Education Accommodation Units to Eco Tourist Facility Units.*

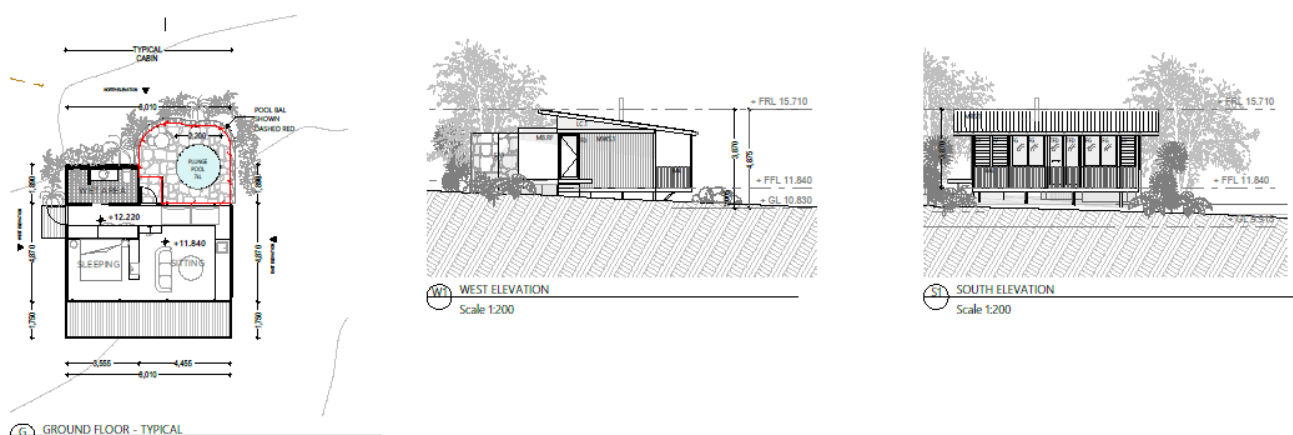
The June/September 2022 amended application seeks approval for:

Twelve (12) New Eco Tourist Facility Cabins, Five (5) Ancillary Buildings comprising a Reception/Administration building, a Bush Fire Refuge building, a Maintenance/Storage building, a Wellness building and a Pool facilities building and Addition of a Deck to the Centre building, and Use of the Centre building as a restaurant and café ancillary to the ecotourism and private education development. (See Figure 2 and **Attachment 3**)



**Figure 2. Site plan. Proposed development is shaded grey (Precinct Plan A – Satellite, Revision 15, 27/09/2022).**

The twelve new eco tourist facility cabins (labelled B1 to B12) are to be located at the northeast of the property. Each cabin, referred to as “Rainforest Retreat”, comprises an entry, ‘open-plan’ bedroom, lounge and kitchen area, bathroom, swimming pool and deck (see Figure 3).



**Figure 3. Eco tourist facility cabin plans (B – Rainforest Retreat TYPICAL, Revision 14, 29/07/2022).**

The four (4) ancillary buildings are:

- The Reception/Administration building (also referred to as 'Onsite Evacuation Building 1' – CB.02).
- The Bush Fire Refuge building (also referred to as 'Onsite Evacuation Building' – CB.03).
- The Wellness building (also referred to as 'CB.04 – Wellness + Pool Facilities).
- The Maintenance/Storage building (also referred to as CB.06 - Bins and Store).

The Reception/Administration building is ~24m in length and ~6.4m in width and includes a reception area, two office rooms, a baggage store, an IT store, bathrooms and two decks.

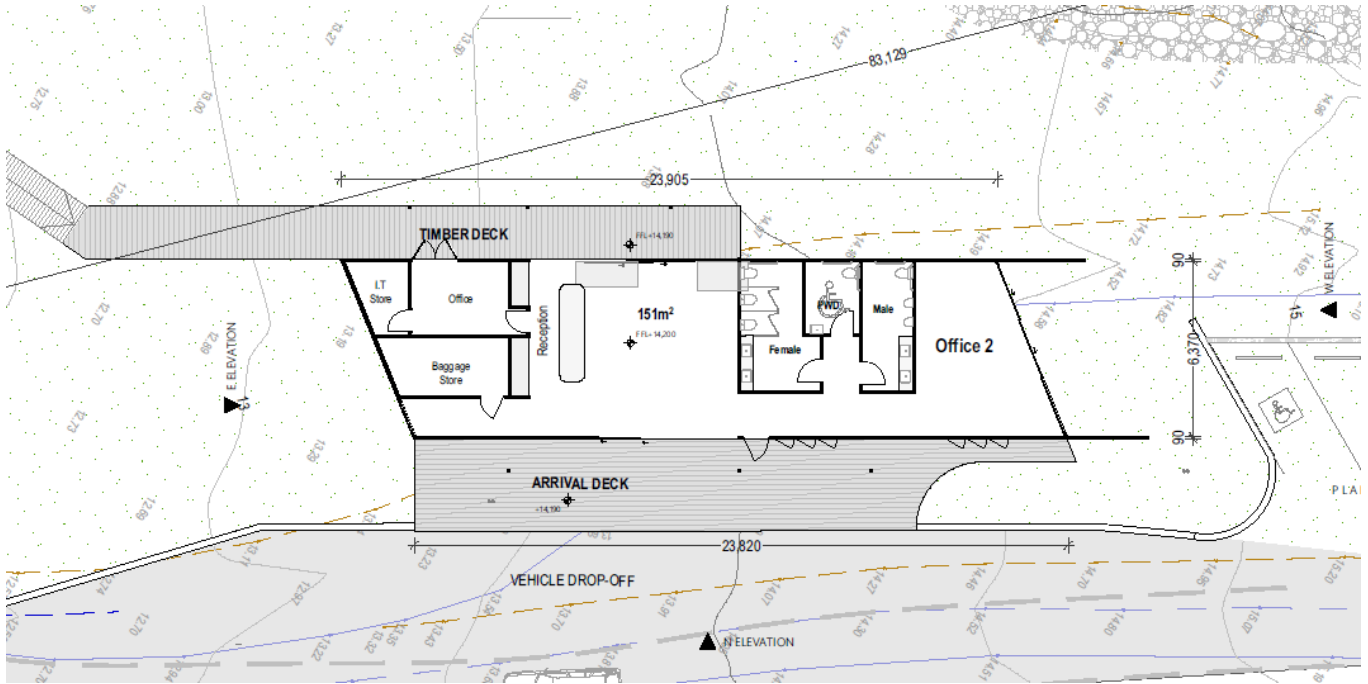


Figure 4. Reception/Administration building (CB.02 – Reception Building, Revision 15, 27/09/2022).

The Bush Fire Refuge building is 9m in length and 5.6m in width and includes no internal partions, rooms or facilities (see Figure 5).

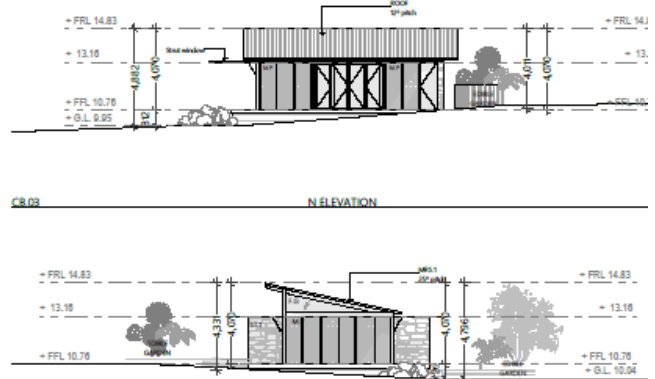
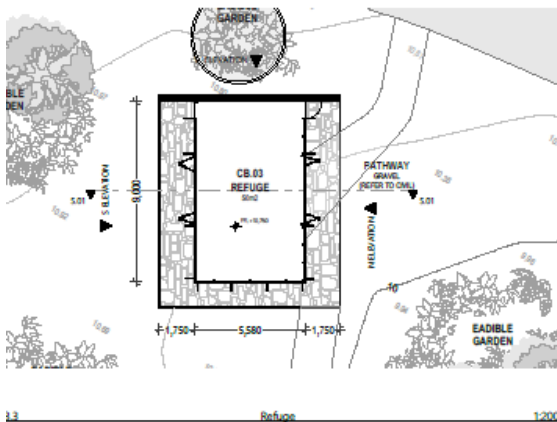
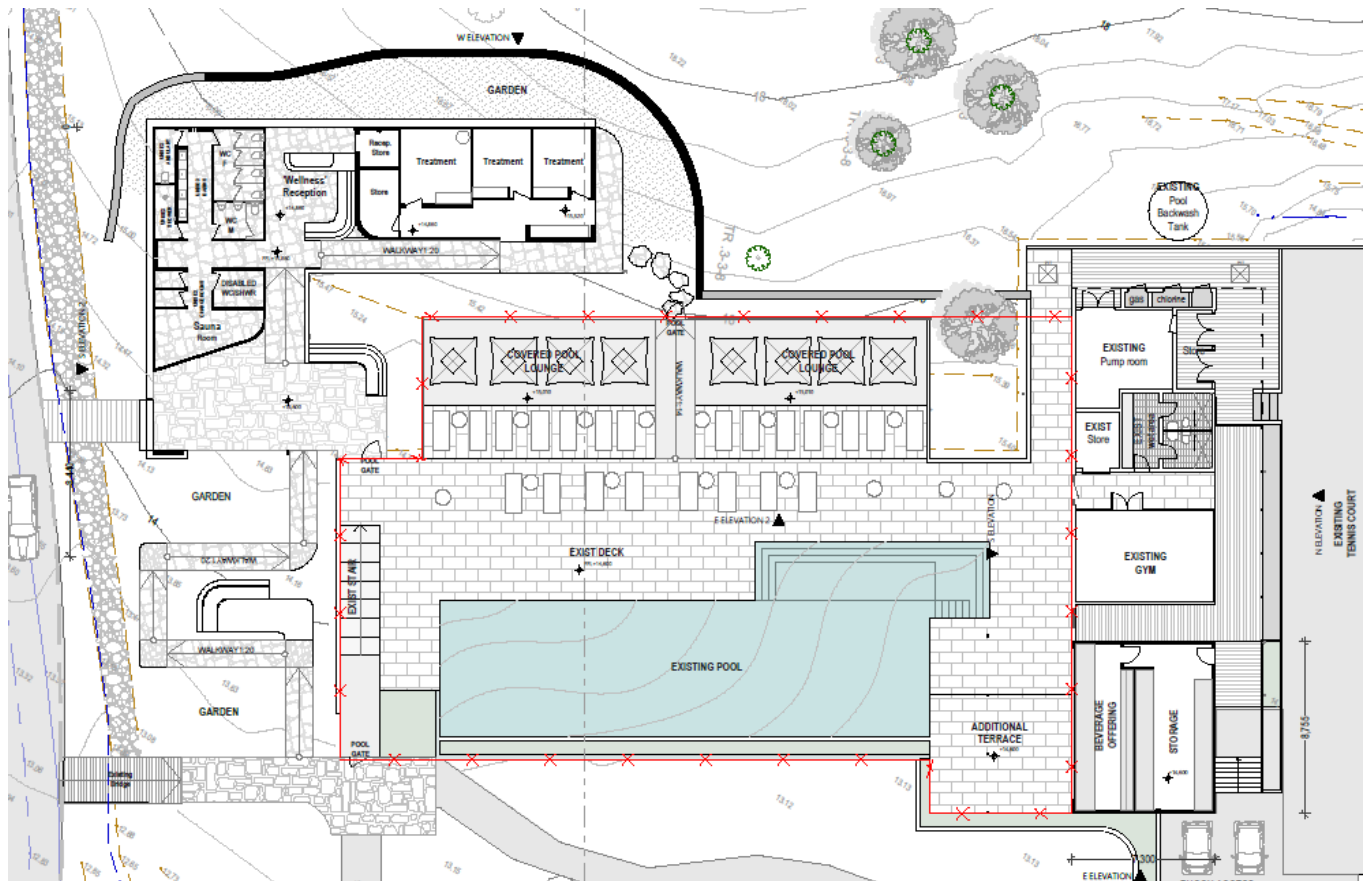


Figure 5. Bush Fire Refuge building (CB.03 – Onsite Evacuation Building, Revision 14, 29/07/2022).

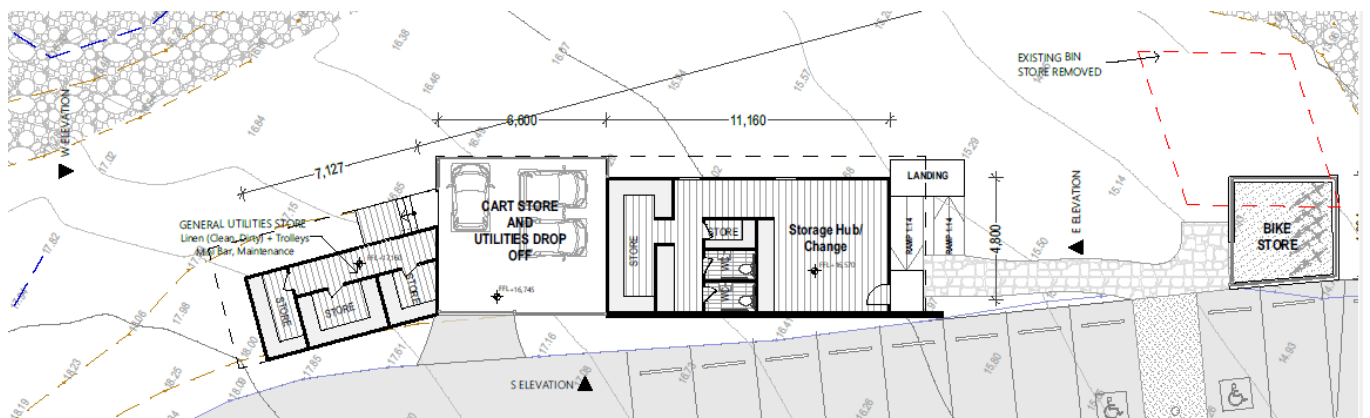


The Wellness building is 'L'-shaped and located to the southwest of the swimming pool area and includes a reception area, three treatment rooms, a sauna, bathrooms and storage rooms. The Pool facilities building includes a storage room and a bar (labelled as 'Beverage Offering') (see Figure 6).



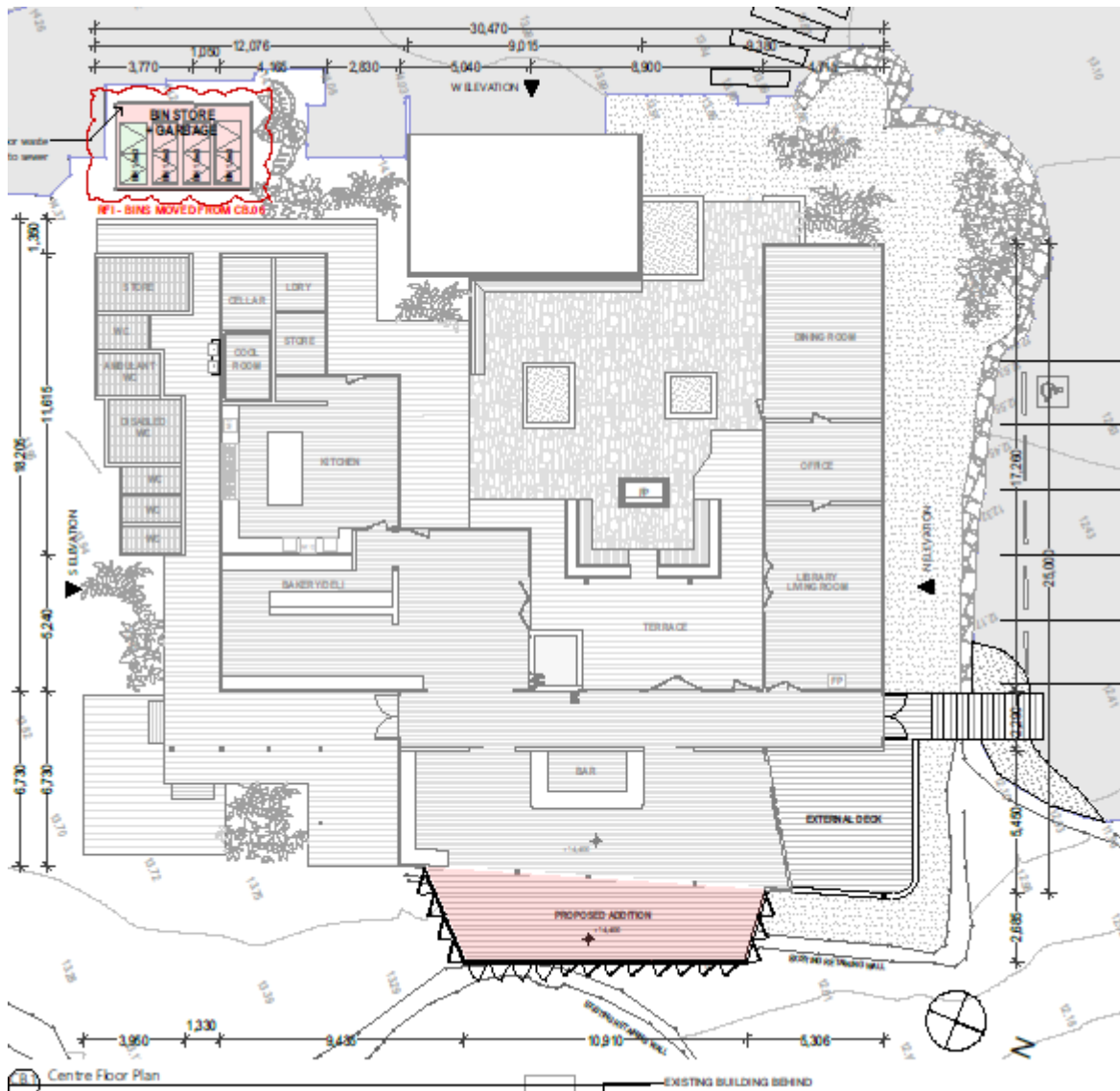
**Figure 6. Wellness building (CB.04 – Wellness + Pool Facilities, Revision 14, 29/07/2022).**

The Maintenance/Storage building is ~30m in length and between 3.4 and ~5.4m in width and includes toilets, five storage rooms, parking for carts (Note: the bin storage area has been relocated to the Centre building). A 'Bike Store' is shown on the floor plan near to the Maintenance/Storage building but no other details of the bike store are provided.



**Figure 7. Maintenance/Storage building (CB.06 - Bins and Store, Revision 15, 27/09/2022).**

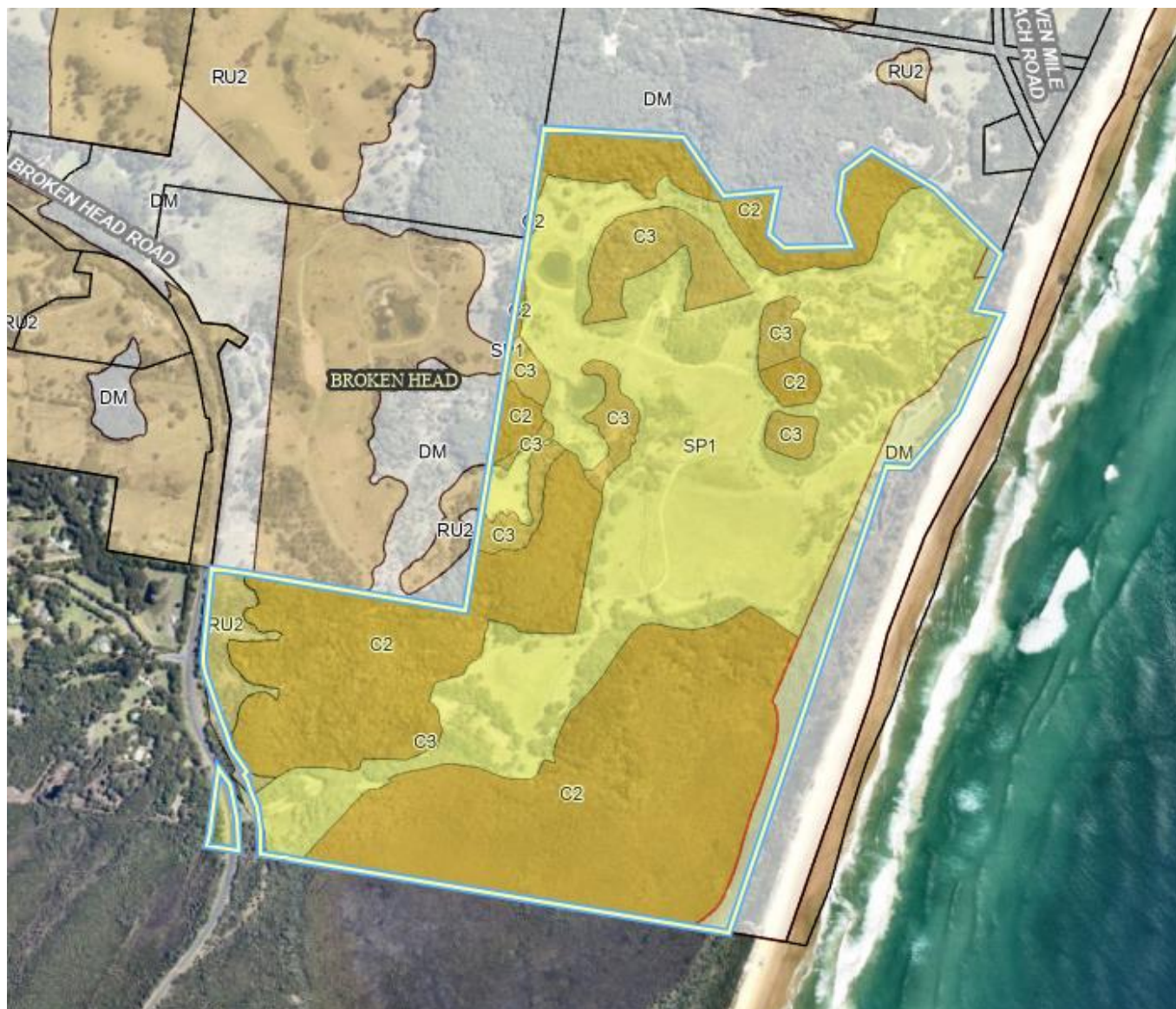
The additional deck area proposed for the Centre building is to be located on the eastern side of the building. In the further information provided on 27 September 2022, the bin store has been relocated from the Maintenance/Storage building to the Centre building (see Figure 8).



**Figure 8. Maintenance/Storage building (CB.01 – Centre Additions, Revision 15, 27/09/2022).**

### Description of the site

The site of the proposed development comprises a beachfront property at the south-eastern corner of Byron Shire. The property containing the development site has a frontage to Seven Mile Beach of over 1km and a frontage to Broken Head Road of over 500 metres. Current development on the property is a 'private education' facility, largely in the northeast of the property, that includes nineteen (19) accommodation buildings and ancillary buildings, including a centre "community building", a swimming pool and recreation area and a manager's residence, and associated infrastructure including a water treatment plant and wastewater treatment and disposal system. The property is zoned a combination of C2 Environmental Conservation, C3 Environmental Management, RU2 Rural Landscape, SP1 Special Activities and 7(f1) Coastal Land (see Figure 9).



**Figure 9. Aerial photo with land zoning overlay. Subject property identified by yellow polygon.**

Land is legally described	LOT: 1 DP: 1031848
Property address	951 Broken Head Road BROKEN HEAD
Land is zoned:	PART C2 Environmental Conservation / PART C3 Environmental Management / PART RU2 Rural Landscape / PART SP1 Special Activities / PART 7(f1) Coastal Land
Land area is:	110.7 ha
Property is constrained by:	<ul style="list-style-type: none"> <li>• Bushfire prone land</li> <li>• Acid Sulfate Soils - Classes 2, 3, 4 and 5</li> <li>• High Environmental Value vegetation</li> <li>• Cattle Dip Buffers</li> <li>• Coastal Erosion - Precincts 1 and 3</li> <li>• Biodiversity values</li> </ul>



	<ul style="list-style-type: none"> <li>• Key fish habitat</li> <li>• Koala potential habitat</li> </ul>	
	Is a BDAR required due to the location of the proposed development? ( <u>Note</u> : Council's Ecological referral advises that a BDAR may be required if ecological issues, particularly associated with overlap of APZs with native vegetation, are not resolved).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	Are there any easements in favour of Council affecting the site?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	Is there a Vegetation Management Plan which might affect the proposal?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
	Is there a Voluntary Planning Agreement which might affect the proposal?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

A site inspection was carried out on 16 June 2021



Photo 1 – View southwest from location for proposed cabin A8 through to location of proposed cabin A1



Photo 2 – View south to proposed location for cabins B2 and B3





Photo 3 – View north to proposed location for cabins B3 and B4



Photo 4 – View downstream to proposed location for road bridge



Photo 5 – View upstream to proposed location for road bridge



Photo 6 – Location of proposed additions to 'Centre' (CB.01).



Photo 7 – View west from current carpark to location of proposed 'Onsite Evacuation Building 1' (CB.02)



Photo 8 – View west from drive (south of carpark) to location of proposed 'Onsite Evacuation Building 1' (CB.02)



Photo 9 – View east from drive to location of proposed 'Onsite Evacuation Building 2' (CB.03)



Photo 10 – View east from drive to location of proposed 'Wellness + Pool Facilities' (CB.04)







Photo 11 – View west from waterway to location of proposed 'Bins and Store' (CB.06)



Photo 12 – View of current drive bridge between proposed buildings CB.02 and CB.05.

## 2. SUMMARY OF REFERRALS

Referral	Issue
Environmental Health Officer	No objections, subject to conditions ( <b>Attachment 4</b> )
Development Engineer	No objections, subject to conditions ( <b>Attachment 5</b> )
Building Surveyor	No objections, no conditions.
Systems Planning Officer	No objections, no conditions.
Contributions Officer	No objections. s.7.12 contributions payable.
Ecologist	Due to potential impacts on biodiversity, the biophysical environment and native fauna and their habitats and a lack of detail to fully address these issues the proposal is not supported – If approved, deferred commencement requirements and conditions of consent have been recommended to address these shortcomings. ( <b>Attachment 6</b> )
Rural Fire Service (RFS)	The proposal is integrated development (s.4.46 of the EP&A Act) in that authorisation under the <i>Rural Fires Act 1997</i> (s.100B) is required in respect of bush fire safety of development of land for a special fire protection purpose. RFS issued general terms of approval (GTAs) and a bush fire safety authority for the original proposal on 27 September 2021 (ref: DA20210422001572-Original-1) . The updated bush fire assessment for the June 2022 amended proposal was received by Council on 26 July 2022 and referred to RFS on 27 July 2022 with updated GTAs being provided by RFS on 30 August 2022 ( <b>Attachment 7</b> ).
Transport for NSW (TfNSW)	TfNSW provided comments on the development application on 25 March 2022 (ref: NTH19/00203/03)( <b>Attachment 8</b> ). In relation to the June 2022 amended proposal, TfNSW confirmed on 2 September 2022 that a further response was not required. It is

Referral	Issue
	understood from this that the March 2022 comments remain relevant to the current proposal.
Essential Energy	Essential Energy confirmed on 26 August 2022 that further information was required to complete the assessment. <b>(Attachment 9)</b> . Details of management of impacts on Essential Energy infrastructure were provided by the applicant on 27/9/22 and forwarded to Essential Energy by Council on 6/10/22.
Natural Resources Access Regulator (NRAR) / Department of Planning and Environment - Water	NRAR issued GTAs for proposed work on waterfront land for the original proposal on 12 November 2021 (ref: IDAS-2021-10095). Department of Planning and Environment – Water issued updated general terms of approval for the June 2022 amended proposal on 2 September 2022 (ref: IDAS-2022-10095)( <b>Attachment 10</b> ).
Jali Land Council	No response received.

### 3. SECTION 4.14 – BUSH FIRE PRONE LAND

The proposal is integrated development (s.4.46 EP&A Act) in that it requires authorisation under s.100B of the *Rural Fires Act 1997* being development of land for special fire protection purposes. Before granting development consent, the consent authority must, in accordance with the regulations, obtain from the RFS, general terms of approval in relation to the development. RFS issued general terms of approval and a bush fire safety authority for the original proposal on 27 September 2021 (ref: DA20210422001572-Original-1). The updated bush fire assessment for the June 2022 amended proposal was received by Council on 26 July 2022 and referred to RFS on 27 July 2022 with updated GTAs being provided by RFS on 30 August 2022.

The bushfire assessment provided with the original application (Bushfire Certifiers, 15/2/2021) proposed that the eco-tourist facility cabins would not be provided with asset protection zones (APZs) but that asset protection zones would be provided for most of the ancillary buildings and "...will be extended into existing open areas capable of being managed in order to address the performance of pathway travel distances from the new cabins to the refuge building, and also reduce the bushfire risk to adjoining properties by providing separation and defendable space to counter additional planting proposed." (see yellow shaded area in the Figure below). In lieu of APZs for the cabins, a bush fire refuge building was proposed for the occupants/guests in the event of a bush fire.







Effect of 10/50 rule on significant vegetation: The subject parcel of land is in a designated 10/50 vegetation entitlement clearing area. However, the 10/50 exemption cannot be used to clear vegetation on this parcel of land (Rural Fire Service online tool accessed 21/2/22). This land is excluded from the operation of the 10/50 Code as it has been identified as being wholly or partially within:


- Littoral Rainforest (not including the 100 metre buffer)
- 100 metres of the coastline or estuaries of New South Wales
- records of Critically Endangered Plants
- Coastal Wetlands

#### 4. SECTION 4.15C – MATTERS FOR CONSIDERATION – DISCUSSION OF ISSUES

Having regard to the matters for consideration detailed in Section 4.15(1) of the *Environmental Planning & Assessment Act 1979* (EP&A Act), the following is a summary of the evaluation of the issues.


##### State Environmental Planning Instruments (SEPP)


Considerations	Satisfactory	Unsatisfactory
SEPP (Resilience and Hazards) 2021 Chapter 2 Coastal management	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Considerations	Satisfactory	Unsatisfactory
<p>In relation to the mapped areas under the SEPP (Coastal Management), the development is located as follows:</p> <ul style="list-style-type: none"> <li>• The entire proposed development is within the <u>coastal use area</u>.</li> <li>• All proposed eco-tourist cabins are wholly or partially, within the <u>coastal environment area</u> as is the deck addition to the Centre building.</li> <li>• The Reception/Administration building (CB.02) and the deck addition to the Centre building are within the <u>coastal wetlands buffer</u>.</li> <li>• All proposed eco-tourist cabins, the Reception/Administration building (CB.02) and the deck addition to the Centre building are within the <u>littoral rainforest buffer</u> (see map below).</li> </ul>  <p><b>Aerial photo of subject site with mapped littoral rainforest (yellow stripes) and associated buffer (green shading) overlay.</b></p> <p>The development is not expected to result in adverse impacts on any of the coastal use area listed matters (cl.2.11).</p> <p>However, in relation to the coastal environment area, coastal wetland buffer and littoral rainforest buffer, Council's Ecological referral notes that the proposed development is likely to result in impacts on several listed matters particularly:</p> <ul style="list-style-type: none"> <li>• the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest (cl.2.8(1)(a));</li> <li>• the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment (cl.2.10(a)); and</li> <li>• native vegetation and fauna and their habitats (cl.2.10(d)).</li> </ul>		

Considerations	Satisfactory	Unsatisfactory
<p>The identified impacts include direct impacts such as the overlap of bush fire asset protection zones with native vegetation and indirect impacts associated with a general increase in human occupation of the property such as light and noise impacts on fauna and an increased risk of vehicle strike from additional traffic.</p> <p>The subject property is considered to have high conservation value in the Broken Head area and already has a relatively high level of constructed and approved development (See History/Background and Figure 1). This context makes a determination of the significance of likely adverse impacts of the proposed development difficult (cl.2.8(1)). This is further exacerbated by concerns raised in Council's Ecological referral regarding the location and approach proposed for compensatory/environmental enhancement planting. The applicant provided a plan on 27/9/22 (Precinct Plan – APZ, Revision 15) that proposes areas to the north and northeast of the development, with a combined area of 3360m<sup>2</sup>, be revegetated with littoral rainforest. The applicant has also indicated they are amenable to planting of the riparian areas of the ephemeral drainage that runs south and east of the development however the ecological value of this revegetation is limited by the overlapping bush fire APZ. Vegetation allowed in APZs is strictly limited by Appendix 4 of Planning for Bushfire Protection 2019 (PBP 2019).</p> <p>Deferred commencement conditions have been recommended to require detail of measures to minimise and manage indirect impacts associated with a general increase in human occupation of the property, and of compensatory/environmental enhancement planting.</p> <p><u>Chapter 4 Remediation of land</u></p> <p>A Stage 1 Contamination Assessment was prepared by Env Solutions (September 2019) for the proposed development. Council's Environmental Health Officer has reviewed the assessment and notes that the results indicate compliance with the contaminant levels for residential use with access to gardens, the assessment considered contaminated land risks for all areas of the lot intended for use (based on the June 2022 proposal) and the assessment report is satisfactory (cl.4.6).</p>		
<p><i>SEPP (Building Sustainability Index: BASIX) 2004</i></p> <p>Consideration: The cabins are BASIX affected development and a 'Multi Dwelling' BASIX Certificate was provided with the application. <u>Note:</u> This has not been updated to reflect the amended proposal.</p>	☒	☐
<p><i>SEPP (Transport and Infrastructure) 2021</i></p> <p><u>Chapter 2 Infrastructure</u></p> <p>Elements of the proposed development are proximate to electricity transmission and distribution infrastructure (see map below) and consequently the application was referred to Essential Energy for comment (cl.2.48) (see map below).</p>	☒	☐



Considerations	Satisfactory	Unsatisfactory
 <p><b>Aerial photo of subject site with electricity transmission and distribution infrastructure overlay.</b></p> <p>As noted above, Essential Energy confirmed on 30 June 2022 and again on 26 August 2022 that additional information was required for Essential Energy to finalise their review of the amended development application. Details of management of impacts on Essential Energy infrastructure were provided by the applicant on 27/9/22 and forwarded to Essential Energy by Council on 6/10/22. A deferred commencement condition has been recommended to require written approval for the development, relating to impacts on, changes to, electrical infrastructure, from Essential Energy.</p> <p>The subject property has frontage to Broken Head Road which is a classified road. The application was referred to TfNSW for advice in relation to whether the proposed development is likely to adversely affect the safety, efficiency and ongoing operation of Broken Head Road and being “traffic-generating development” (cl.2.119, 2.122 and schedule 3).</p> <p>As noted above, TfNSW provided comments on the development application on 25 March 2022 (ref: NTH19/00203/03). In relation to the June 2022 amended proposal, TfNSW confirmed on 2 September 2022 that a further response was not required. It is understood from this that the March 2022 comments remain relevant to the current proposal.</p>		
<p><u>SEPP (Biodiversity and Conservation) 2021</u></p> <p><u>Chapter 4 Koala habitat protection 2021</u></p> <p>The subject property is located within the koala planning area covered by the Byron Coast Comprehensive Koala Plan of Management (BCCKPoM) and consequently, determination of the development application must be consistent with the BCCKPoM (cl.4.4, 4.8 and Schedule 2).</p> <p>The subject property is not within a koala management precinct and does not contain any mapped koala habitat (see map below).</p>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Considerations	Satisfactory	Unsatisfactory
 <p>Koala management precincts (yellow hatched area) and koala habitat (green shaded areas) – subject property identified by yellow polygon.</p> <p>Council's Ecological referral notes that the BCCKPoM was not considered in the development application but that a koala habitat assessment report is not required as the land does not contain mapped potential koala habitat.</p>		
<p><i>SEPP (Planning Systems) 2021</i></p> <p>The proposal is regionally significant development (Eco-tourist facilities over \$5 million) (cl.2.19 and schedule 6). The consent authority for the development is the Northern Regional Planning Panel (s.4.5(b)) of the EP&amp;A Act.</p>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

#### 4.2A Byron Local Environmental Plan 2014 (LEP 2014)

The proposed development will be wholly located within land zoned SP1 Special Activities.

##### Characterisation of development and permissibility

The purpose shown on the Land Zoning Map for the subject development site is “*Mixed use development*” (cl.2.2). The Statement of Environmental Effects (SEE) provided for the July 2022 amended proposal states that the application is for “mixed use development” comprising two uses being ecotourism facility and restaurant or café (see section 4.1 of SEE) and the continued use of the land for ‘private education’ (see Note). The proposed uses are defined as follows (Dictionary):

***mixed use development*** means a building or place comprising 2 or more different land uses.

***eco-tourist facility*** means a building or place that—

- (a) provides temporary or short-term accommodation to visitors on a commercial basis, and
- (b) is located in or adjacent to an area with special ecological or cultural features, and



*(c) is sensitively designed and located so as to minimise bulk, scale and overall physical footprint and any ecological or visual impact.*

*It may include facilities that are used to provide information or education to visitors and to exhibit or display items.*

**restaurant or cafe** means a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided.

The proposed *restaurant or cafe* is an ancillary to the *eco-tourist facility* and not an independent use as (Planning Circular PS 13-001):

- The supporting assessments provided with the application (e.g., wastewater, traffic, engineering) do not assess the impacts of the proposed *restaurant or cafe* as an independent use.
- The property is gated and does not have 'free' public access.
- The *restaurant or cafe* is a relatively small component of the development.
- The *restaurant or cafe* is to be physically proximate to the *eco-tourist facility*.

It has been argued in a submission that the application is not for a *mixed use development*, but for the single use of *eco-tourist facility*, and on this interpretation the proposal is not permissible. However, in combination with the current approved use on the property, the application, will result in mixed use development of the site being the *eco-tourist facility* and *private education* and, on this basis, the proposed development is permissible. The later approach is considered to be a reasonable and pragmatic application of the relevant provisions relating to permissibility.

Provided this approach is accepted, the ancillary uses and buildings are also permissible as the SP1 Special Activities zone allows "any development that is ordinarily incidental or ancillary to development for that purpose" (Land Use Table).

The final consideration is whether the proposed development meets the definition of *eco-tourist facility*. Criteria (a) and (b) of the definition are met as the proposal comprises twelve cabins that are suitable for providing short-term accommodation for visitors and the property is clearly an area with special ecological features in that "Large areas of intact native vegetation occur at the site, with extensive areas of coastal wetlands and littoral rainforest" (Section 1.3 of Biodiversity Assessment, GeoLink, 1/2/21). Determining satisfaction of criteria (c) is more complicated. The development does not require the removal of native trees and is largely located on land that is currently grassed. However, bushfire asset protection zones overlap vegetation and at least two buildings are located unnecessarily close to a waterway. The proposal incorporates several ancillary buildings some of which are not essential for the operation of the *eco-tourist facility* and/or over cater for the expected number of guests. Likely ecological and visual impact are discussed in more detail in the body of the assessment report.

The subject property has the benefit of additional permitted uses, pursuant to cl.2.5, owing to being identified in Schedule 1. Schedule 1 (sub. 8) provides the following for the Linnaeus Estate property:

*(2) Development for the purposes of mixed use development that includes tourist or visitor accommodation is permitted with development consent.*

*(3) Development consent may only be granted under this clause if the consent authority is satisfied that the proposed development—*

*(a) is ancillary to a lawful existing land use, and*

*(b) is for the purpose of providing education or training for professional and personal development through a variety of academic, cultural and vocational programs.*

The definition of 'tourist [and] visitor accommodation' expressly excludes *eco-tourist facilities* and as such these provision are not considered to be of relevance to this development application.

**Note:** The current approval is for a 'private education facility' which is not defined under BLEP2014 or BLEP1988.

Regard is had for the Zone Objectives as follows (cl.2.3(2)):

SP1 Zone Objective	Consideration
<ul style="list-style-type: none"> <li>• To provide for special land uses that are not provided for in other zones.</li> <li>• To provide for sites with special natural characteristics that are not provided for in other zones.</li> <li>• To facilitate development that is in keeping with the special characteristics of the site or its existing or intended special use, and that minimises any adverse impacts on surrounding land.</li> </ul>	<p>Development of an eco-tourist facility is appropriate for the subject property being of high natural/ecological value.</p> <p>Some aspects of the proposal such as the number, scale and location of ancillary buildings and overlap of bush fire mitigation with existing vegetation are not considered to be consistent with the requirement to minimise any adverse impacts on surrounding land.</p>

#### Height of buildings (cl.4.3)

The proposed buildings are all less than the applicable 9m building height limit.

#### Heritage conservation (cl.5.10)

An Aboriginal Heritage Information Management System (AHIMS) web search was carried out on 22 February 2022, using a 200m buffer, did not identify any Aboriginal sites or Aboriginal places. The application included a heritage assessment report (Everick Heritage, November 2019) that made two recommendations, should the development proceed being:

- An Aboriginal object find procedure; and
- A procedure for the discovery of Aboriginal remains.

#### Eco-tourist facilities (cl.5.13)

The consent authority must not grant consent to eco-tourist facilities unless satisfied as to the listed matters (cl.5.13(3)), which are considered below:

- (a) there is a demonstrated connection between the development and the ecological, environmental and cultural values of the site or area, and*
- (b) the development will be located, constructed, managed and maintained so as to minimise any impact on, and to conserve, the natural environment, and*
- (c) the development will enhance an appreciation of the environmental and cultural values of the site or area, and*
- (d) the development will promote positive environmental outcomes and any impact on watercourses, soil quality, heritage and native flora and fauna will be minimal, and*
- (e) the site will be maintained (or regenerated where necessary) to ensure the continued protection of natural resources and enhancement of the natural environment, and*
- (f) waste generation during construction and operation will be avoided and that any waste will be appropriately removed, and*
- (g) the development will be located to avoid visibility above ridgelines and against escarpments and from watercourses and that any visual intrusion will be minimised through the choice of design, colours, materials and landscaping with local native flora, and*
- (h) any infrastructure services to the site will be provided without significant modification to the environment, and*
- (i) any power and water to the site will, where possible, be provided through the use of passive heating and cooling, renewable energy sources and water efficient design, and*
- (j) the development will not adversely affect the agricultural productivity of adjoining land, and*
- (k) the following matters are addressed or provided for in a management strategy for minimising any impact on the natural environment—*
  - (i) measures to remove any threat of serious or irreversible environmental damage,*

- (ii) *the maintenance (or regeneration where necessary) of habitats,*
- (iii) *efficient and minimal energy and water use and waste output,*
- (iv) *mechanisms for monitoring and reviewing the effect of the development on the natural environment,*
- (v) *maintaining improvements on an on-going basis in accordance with relevant ISO 14000 standards relating to management and quality control.*

The application addresses sub (a) to (d) as follows:

- sub (a) - this matter is addressed by the “harmonious relationship between the development use and the site’s special values” and that “The proposal is one where the landscape features predominate with the Eco-tourism structures taking a subordinate role and blending into the surrounding landscape” (see section 4.1 of SEE).
- sub (b) - this matter is addressed as “the eco-tourism construction and operations will only utilise previously disturbed areas and are only located on lower value habitats”.
- sub (c) - this matter is addressed as “experienced guides will be available to provide expert advice in relation to the cultural values of the site and locality generally”.
- sub (d) - this matter is addressed through “the protection of sensitive habitat areas and avoiding activity in vulnerable or highly valued areas”, that “Buildings have been carefully sited in relation to watercourses and swales” and by using “pole house” design characteristics for cabins.

The proposed eco tourist cabins are modest in size and footprint and located on grassed areas of the site. But for the overlap between bush fire mitigation (i.e., APZs) and ecologically valuable and sensitive areas, the eco tourist cabins are consistent with the requirements under sub (a) to (c).

The number, scale and location of ancillary buildings and structures is not entirely consistent with the eco tourist facility requirements in that:

- There is no demonstrated connection between the Wellness building and the ecological, environmental and cultural values of the site;
- The proposed bush fire mitigation (i.e., APZs) for several ancillary buildings overlaps ecologically valuable and sensitive areas, being existing native vegetation and the riparian zone of the adjacent watercourse. Other than the ‘refuge building’, APZs are not required for ancillary/non-habitable buildings associated the eco tourist cabins ((PBP 2019 – Section 6). As such, it is not clear why APZs for these buildings (and the addition to the Centre building) have been proposed by the applicant and subsequently required by the RFS.
- The removal (27/9/22 plans) of one of the two pedestrian waterway crossings and the vehicle waterway crossing will minimise potential impacts on the watercourse. The remaining waterway crossing is ~15m from the existing bridge and on this basis is superfluous. It is noted that no structural or engineering details have been provided for the remaining waterway crossing and in the absence of these details approval of this feature is not supported by Council’s Development Engineer.
- The relocation of the bin/garbage area from the Maintenance/Storage building to the Centre building (27/9/22 plans) will minimise potential impacts on the watercourse (e.g., from contaminated stormwater and litter).
- The application has not justified the need for a separate bike store and this building/structure is not supported as:
  - There is ample space in other ancillary buildings for bike storage;
  - The proposed bike store is in the riparian zone; and
  - No design details of the bike store have been provided.
- Whilst the offer of “experienced guides” is appreciated, ensuring this service is provided via a development consent is problematic. Other mechanisms to “enhance the appreciation of the environmental and cultural values of the site” should be considered including but not limited to,

internal and external signage and information provided at the time of booking, check-in and in the eco tourist cabins.

- A consideration of light and noise impacts from the development on surrounding ecology was provided (Peter Parker, 30/9/22) however this document did not include any specific measures and/or design commitments to minimise light impacts on fauna and the noise impact assessment did not consider impacts on ecology/fauna, only humans.

In relation to sub (e), the application states that implementation of an approved (under DA 10.2013.600.1) Biodiversity Conservation Management Plan (AWC, 2017) has commenced. Additional mitigation and compensation for biodiversity impacts from the development is recommended in the Biodiversity Assessment (Geolink, 1/2/2021) provided with the application (see Section 6) including protection of existing native vegetation, compensatory planting, weed control, Myrtle Rust monitoring and management and minimisation of external light spill. Council's Ecological referral raises concerns regarding the proposed compensatory planting (Geolink, 1/2/2021) in that it may result in habitat loss due to the proposed planting of littoral rainforest species in an area of grassland/wetland (likely habitat for the eastern grass owl *Tyto longimembris* and common planigale *Planigale maculata*). This compensatory planting was offered with the initial proposal (which include native tree removal) and now appears to have been withdrawn. The applicant provided a revised revegetation plan (see Figure 10) on 27/9/22 that proposes areas to the north and northeast of the development, with a combined area of 3360m<sup>2</sup>, be revegetated with littoral rainforest. No further detail of the proposed revegetation has been provided. As noted above, the applicant has also indicated they are amenable to planting of the riparian areas of the watercourse that runs south and east of the development however the ecological value of this revegetation is limited by the overlapping bush fire APZ.



**Figure 10. Proposed rainforest revegetation areas are shaded translucent pale green (Precinct Plan – APZ, Revision 15, 27/09/2022).**

The proposed revegetation falls well short of that required under Council’s DCP 2014 for eco tourist facilities (see Note). Based on the recommended spacing for rainforest restoration of 2.5m/tree, and the requirement of “900 local native trees per cabin”, the estimated area for planting/restoration for the development (i.e., 12 cabins) should be 6.72 ha (10,800 planted trees or equivalent) rather than 3360m<sup>2</sup> as proposed. Council’s Ecological referral advises that, ecological restoration on the site should be informed by targeted fauna survey effort, focusing on areas that presently have low habitat value for native flora and fauna.

**Note:** It is acknowledged that the planting requirement discussed above does not strictly apply to this DA due to the zoning which is discussed further below. However, it is considered to be an appropriate guide as to the extent of regeneration for an eco-tourist facility proposal (cl.5.13(3(e))).

The application includes a waste management plan for construction of the development (Appendix O of original SEE) that details proposed waste minimisation and management measures. Details of expected waste generation from the operation of the development (Appendix N of original SEE) was provided however this document does not include any details of proposed waste minimisation and management during operation. Subject to provision of an operation waste minimisation and management plan, that addresses relevant requirements, the proposal is considered to satisfy sub (f).

The development is entirely situated in a low-lying area of the property and below prominent ridgelines. Several proposed buildings are to be located ~10m from a watercourse however, this watercourse is

within the property and not publicly accessible. All buildings are restricted to a single storey with predominantly timber cladding, metal sheet roofing and natural stone walls and screening. Retention of current vegetation is proposed however the landscaping plan provided with the original application has not been updated to reflect the amended proposal. Subject to provision of an updated landscaping plan, the proposal is considered to satisfy sub (g).

For the most part, the development can rely on existing infrastructure (sub (h)) with the following exceptions:

- A pedestrian bridge/walkway crossings of the watercourse is proposed associated with the Reception building. An existing bridge/crossing over the watercourse is located just east of the proposed walkway. The impact of these walkways crossings on the watercourse has not been adequately considered and is not justified considering the proximate existing crossing.
- The proposed services plan (L.01, Revision 14, 29/7/2022) and the proposed new cable route sketch (ECL Power Services, Revision A, 23/9/22) show a new power cable crossing the watercourse just east of the proposed Reception building. The impact of construction of this new power cable on the watercourse has not been considered. In any event, the new power cable should follow the current road alignment to minimise impacts.
- Wastewater treatment system would need to be upgraded to accommodate the additional wastewater expected to be generated from the proposed development. Details of the proposed upgrades to the wastewater treatment system were provided with the application (Aerofloat, 2018). Council's Environmental Health Officer is satisfied the wastewater treatment plant has the ability to manage and dispose of wastewater from the proposed development, subject to completion of proposed upgrades, construction and use of the full irrigation system, continues management and monitoring and use of the ancillary components of the development being restricted to ecotourist and/or private education guests (i.e., no external visitors).

The application addresses sub (i) through provision of a sustainability management plan (Hip V. Hype) that details building design elements to maximise energy efficiency, proposed solar energy generation and storage systems, water efficiency and reuse measures (Appendix F of original SEE). The provision of individual swimming 'plunge' pools for each of the twelve cabins, despite the property having a large communal swimming pool and being adjacent to the ocean, is contrary to the water efficiency design requirement and is not supported.

Based on a review of aerial photography, there is no evidence of agricultural use of adjoining land to the north. Impacts of the development on potential agricultural use of land to the north are expected to be negligible based on the topography and existing vegetation between the development and the northern property boundary (sub (j)).

The SEE proposes development and implementation of an environmental management plan, environmental policy, environmental impacts and aspects identification, targets and objectives and operational emergency procedures. However, these documents do not appear to have been provided for assessment (sub (k)). The Biodiversity Assessment does not propose monitoring of habitat maintenance or regeneration effort however this could be required, by way of a condition, for inclusion in the vegetation management plan (VMP) for the development.

#### Acid sulfate soils (cl.6.1)

The development site does not overlay any areas mapped as containing acid sulfate soils.

#### Earthworks (cl.6.2)

Earthworks up to ~1.3m in depth are expected to be required for the development based on the sections and elevations provided. Minimal detail of required earthworks and/or erosion and sediment control was provided in the application. Although the scale of expected earthworks is not significant, this is a critical omission due to the proximity of several buildings to the watercourse and these ancillary buildings being 'slab on ground'. As such it is recommended that impacts of earthworks are addressed by conditions that require management of excavated material, response to the disturbance of relics and an erosion and sediment control plan that demonstrates adequate measures to prevent earthworks impacting on the adjacent watercourse.

## Essential Services (cl.6.6)

Council's Development Engineer is satisfied:

- the current vehicular access to Broken Head Road is suitable for the proposed development.
- with proposed stormwater management noting that:
  - The proposal will increase the impervious area of the site by ~0.2% which is minimal and unlikely to create adverse impacts to the site and its surrounds;
  - Rainwater harvesting will be used wherever possible, collecting roof water rather than allowing it to generate runoff. Overflow from rainwater tanks will be directed to basic gravel pits, encouraging infiltration; and
  - The existing network of open swale drains will be expanded to ensure stormwater flow has a minimal impact on the amenity, usability and integrity of the infrastructure. The central gully along with the other open swale drains will be vegetated to provide water quality treatment during the flow of stormwater through the site.

Council's Environmental Health Officer is satisfied:

- The wastewater treatment system is capable of treating and disposing the additional wastewater expected to be generated from the proposed development, subject to implementation of identified upgrades and use restrictions;
- Water supply for the development will be self-sufficient using a combination of rainwater harvesting/tanks and water from the current treatment system. The application estimates the water demand of the proposed development as 29.2 kL/d and that the on-site wastewater treatment plant has sufficient capacity (41 kL/d) for the current and proposed development's water demands.

The property has electricity supply. Subject to the applicant addressing outstanding concerns raised by Essential Energy, supply of electricity to development will be possible when required.

## Conclusion

The proposed development complies with relevant clauses of LEP 2014 (in some cases subject to the need for conditions), except in relation to eco-tourist facilities (cl.5.13) particularly:

- The number, scale, use and location of ancillary buildings and structures;
- Overlap of bush fire mitigation (asset protection zones) with existing vegetation and areas of high ecological value;
- Failure to properly address indirect impacts of the development on ecology such as light and noise; and
- Inadequate measures for, and details of, maintenance and enhancement of the natural environment.

Deferred commencement requirements and consent conditions have been recommended to address these issues.

## **Clause 4.6 Exceptions to Development Standards**

Not applicable

### **4.3 Any proposed Instrument that has been the subject of public consultation and has been notified to the consent authority**

No proposed instruments were identified that are relevant to his application.

### **4.4A Byron Shire Development Control Plan 2014 (DCP 2014)**

#### B1 Biodiversity

Council's Ecological referral notes that the June 2022 amended proposal is preferable from an ecological perspective as it:



- Does not require removal of littoral rainforest vegetation for construction of the development;
- Largely restricts development to existing managed grassland; and
- Modifies the APZs to avoid the inclusion of any *R. psidioides* or areas of closed-canopy littoral rainforest.

However, the June 2022 amended proposal (and minor amendments dated 27/9/22) encroaches buffers to ecologically significant areas (referred to as 'red flags') as follows (B1.2.1):

Ecologically significant (Red flag) area/feature	Setback required	Consideration
Threatened ecological communities	30m	Buildings (CB.02, CB.04, CB.6, B.1-B.7) and associated APZs encroach the required setback. APZs overlap with littoral rainforest in the south.
Threatened flora species habitat	10m	APZ for CB.04 building encroaches required setback for <i>R. psidioides</i> individuals. Additional individuals are immediately adjacent to the outer edge of the proposed APZ.
First and second order streams	10m (first order), 20m (second order)	Proposed pedestrian bridge/crossings of the waterway and new power cable crossing of the waterway.

The updated ecological assessment report (Peter Parker Environmental Consultants Pty Ltd, 18 October 2021) provided with the June 2022 amended proposal documents did not address the components of the proposed development that will encroach the setbacks to ecologically significant areas, nor did it address the impacts of the proposed APZs on biodiversity.

Minor variations to ecological setbacks may be considered however, any such application must:

- clearly demonstrate the variation sought;*
- demonstrate that alternative layouts have been considered and that the impacts cannot be reasonably be avoided;*
- show how the variation impact is consistent with the relevant planning principles and objectives of this DCP Chapter.*

None of the documentation provided with the original development application or June 2022 amended proposal addresses and/or justifies the need for a variation to the required ecological setbacks. Council's Ecological referral concludes that "Given the conservation importance of the subject site and the broader Broken Head area, and as stated in earlier comments, variations to the requirements of Chapter B1 are not supported".

The development application does not adequately consider practicable options to minimise or avoid direct impacts of the development encroaching ecological setbacks including (B1.2.1):

- A review the construction standards for proposed buildings to demonstrate bush fire asset protection zones have been reduced to the lowest safe distance and to minimise overlap with native vegetation and riparian zones. As noted above, other than the 'refuge building', PBP 2019 does not require APZs to be provided for ancillary/non-habitable buildings associated the eco tourist cabins. As such, it is not clear why the APZs for these buildings (and the addition to the Centre building) have been proposed by the applicant and subsequently required by the RFS.
- The relocation of the waste and bins storage area is acknowledged however, relocation of certain structures (i.e., bike store) to increase setbacks to ecologically significant areas would enable compliance with red flag setbacks. It is acknowledged that the number of new waterways crossings was reduced in the 27/9/22 amended plans. The remaining footbridge is superfluous, particularly considering the proximate existing road crossing; and



- A review, and redesign, of proposed compensatory planting/ecological restoration works to ensure it is to be carried out in appropriate locations, is of a complimentary scale and consistent with Council guidelines (B1.2.5).

As identified above, the development will also cause 'indirect' impacts on the surrounding ecology associated with a general increase in human occupation such as light and noise impacts on fauna and an increased risk of vehicle strike from additional traffic. The noise impact assessment provided with the application (Greg Alderson & Associates, January 2021) did not consider the impacts of noise from the development on fauna in the surrounding environment and the biodiversity assessment (Geolink, 1/2/2021) referred to "soft lighting principles" to minimise light impacts on fauna but did not offer any details on what this would entail (B1.2.2). A consideration of light and noise impacts from the development on surrounding ecology was subsequently provided (Peter Parker, 30/9/22) however this document did not include any specific measures and/or design commitments to minimise light impacts on fauna and the noise impact assessment did not consider impacts on ecology/fauna, only humans (as per the previous report).

### B3 Services

As noted above, Council's Environmental Health Officer is satisfied, (a) the wastewater treatment plant has the ability to manage and dispose of wastewater from the proposed development, subject to completion of proposed upgrades, construction and use of the full irrigation system, continues management and monitoring and use of the ancillary components of the development being restricted to ecotourist and/or private education guests (i.e., no external visitors), and (b) the development has access to an adequate system to provide water to the development. It is important to note that the wastewater and drinking water reports do not include external visitors to the site in the capacity assessments. As such, a condition has been recommended to limit the use of, and access to, site facilities to guests only.

Subject to recommended conditions, Council's Development Engineer is satisfied (a) with the current road access with no requirement to upgrade being identified; and (b) with proposed stormwater management (noting that an erosion and sediment control plan is required for the construction phase of the development).

### B4 Traffic Planning, Vehicle Parking, Circulation and Access

Council's Development Engineer is satisfied with the proposed car parking arrangements, internal access and traffic impacts from the development subject to recommended conditions.

### B5 Providing for Cycling

In relation to providing for cycling, the sustainability management plan (Hip V. Hype) proposes the following:

- Provision of electric bicycles for guests.
- Provision of undercover bike storage within the front gate.
- Electric bicycles charging will be provided for within each villa.
- The plans indicate bicycle parking (labelled 'Bike Store') near the Maintenance/Storage building (CB.06).

The proposed bicycle storage is not adequate as it does not appear to be covered/roofed, it is not located with end-of-trip facilities (i.e., toilets/showers), is not in view/obvious to guests contrary to requirements (B5.2.4).

### B8 Waste Minimisation and Management

As noted above, details of expected waste generation from the operation of the development (Appendix N of original SEE) were provided however this document does not include any details of proposed waste minimisation and management during operation (but for a composting/worm farm system to accommodate up to 25kg of wood waste per day, with a maximum of 46kg/day of food waste expected to be generated). Provision of an operation waste minimisation and management plan should be required, and approved by Council, prior to construction of the development.

## B9 Landscaping

A landscape plan is required to be provided with the development application (B9.2.1). As noted above, a landscaping plan was provided with the original application but has not been updated to reflect the amended proposal. There are general requirements for landscaping plans (B9.2.2), design principles (B9.3.1) and specific requirements for eco-tourist facilities (B9.6.2) being:

- a) retention of suitable existing vegetation;*
- b) landscaping that minimises visual impacts of the development;*
- c) landscaping that minimises bushfire hazard;*
- d) planting selection that is locally indigenous to locality and improves biodiversity where possible.*

An updated landscaping plan that addresses relevant requirements should be required to be submitted to Council for approval, prior to the issue of a construction certificate (B9.2.4).

## B14 Excavation and Fill

Earthworks up to ~1.3m in depth are expected to be required for the development based on the sections and elevations provided. No details of required earthworks were provided in the application but appear likely that the earthworks will be limited to building and infrastructure footprints. The proposed development site is generally low in gradient however erosion and sediment control details are required particularly for buildings in proximity to the watercourse (B14.2).

## C3 Visually Prominent Sites, Visually Prominent Development and View Sharing

The proposed development is on a visually prominent site and visually prominent development by virtue of being “wholly or partly within the coastal zone. The proposed development will not be visible from Broken Head Road due to substantial setback and established vegetation. The proposed development will not be easily visible from public vantage points, particularly the beach and Seven Mile Beach Road, due to a combination of the topography (ridges largely surround the proposed development site) and established vegetation (see map below). The buildings at 492 Seven Mile Beach Road were the only structures identified that potentially overlook the development site. On this basis, the proposed development is not expected to result in adverse visual impacts and consequently a visual impact assessment is not considered necessary (C3.2.1).



**Aerial photo with drainage lines and 10m contours.**

## D3 Tourist Accommodation

This chapter does not expressly apply to tourist accommodation development in zone SP1 (B3.1.2). However, the provisions of this chapter are a useful guide in determining whether the proposed eco-tourist facility is of a satisfactory standard and meets the requirements under cl.5.13 of BLEP 2014.

As detailed above, the location and siting (D3.2.1) of the proposed eco-tourist facility development is generally acceptable but for:

- Bush fire APZs overlapping native vegetation and riparian zones; and
- proximity of several structures/infrastructure to the watercourse.

### **D3.3.5 Eco-Tourist Facility**

The amended proposal is consistent with many of the prescriptive measures for ecotourism including:

- density – 12 bedrooms proposed with property being greater than 20ha.
- floor area – gross floor area of cabins is ~40m<sup>2</sup> (Note: several of the ancillary buildings are greater than 40m<sup>2</sup> in floor area).
- pedestrian access is provided between the buildings.
- that the development benefits from existing road and physical infrastructure.

However, several aspects of the proposal deviate from the prescriptive measures for ecotourism including:

- Failure to provide a vegetation management plan or biodiversity conservation management plan for the development. The compensatory planting proposed is significantly below that expected (900 trees per cabin).
- The water assessment does not detail “how rainwater is to be harvested from the roofs of buildings or other sources and stored in tanks for use”.
- The application does not clearly demonstrate that power for the development will be provided by renewable sources including wind and solar generators. Application documents and correspondence indicate that power for the development will be sourced from the existing power network in combination with ~250kW of photovoltaics will be installed as part of the development (Ref. Sustainability Management Plan (Hip V. Hype)).
- Waste management documentation provided with the application does not include any details of proposed waste minimisation and management during operation of the development.

### **Conclusion**

The proposed development is consistent, or capable of being made consistent subject to suggested modifications/provision of further detail, with most of the relevant development controls in DCP 2014. Some of the suggested modifications and recommended additional information could be adequately addressed through conditions of consent. Others, such as avoiding and minimising biodiversity impacts (Chapter B1) would be better addressed prior to commencement or determination of the development application.

## **4.5 Environmental Planning & Assessment Regulation 2000 Considerations**

<b>Clause</b>	<b>This control is applicable to the proposal:</b>	<b>I have considered this control as it relates to the proposal:</b>	<b>If this control is applicable, does the proposal comply?</b>
<b>92</b>	No	N/A	N/A
<b>93</b>	No	N/A	N/A
<b>94</b>	No	N/A	N/A
<b>94A</b>	No	N/A	N/A

#### 4.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

Impact on:	Likely significant impact/s?
<b>Natural environment</b>	<p>The proposal will result in adverse impact on the natural environment of the locality. The identified impacts include direct impacts such as the overlap of bush fire asset protection zones with native vegetation and indirect impacts associated with a general increase in human occupation of the property such as light and noise impacts on fauna and an increased risk of vehicle strike from additional traffic. The likely impacts are exacerbated by concerns regarding the location and approach proposed for compensatory/environmental enhancement planting.</p> <p>The subject property is considered to have high conservation value in the Broken Head area and already has a relatively high level of constructed and approved development. This context makes a determination of the significance of likely adverse impacts of the proposed development difficult. Subject to recommended deferred commencement requirements and consent conditions, the adverse impacts of the development on the natural environment should be less than significant.</p>
<b>Built environment</b>	No. The proposal will not have a significantly adverse impact on the built environment of the locality.
<b>Social Environment</b>	No. The proposal will not have a significant social impact on the locality.
<b>Economic impact</b>	No. The proposal will not have a significant economic impact on the locality.
<b>Construction Impacts</b>	The development will generate minor impacts during its construction. Conditions of consent recommended to control hours of work, builders waste, construction noise, installation of sedimentation and erosion control measures and the like to ameliorate such impacts.

#### 4.7 The suitability of the site for the development

Subject to satisfactory resolution of the identified issues, the site is capable of being adequately serviced, has manageable constraints, has high ecological values and capacity for environmental enhancement and is suitable for the proposed development.

#### 4.8 Submissions made in accordance with this Act or the regulations

The development application was notified at Level 3 (Byron Shire Council Community Participation Plan / Part A14 DCP 2014) with a public exhibition period from 21 April to 4 May 2021. Council received approximately 2650 submissions on the development application. Just over 40 of the submissions received were in support of the development application with the remaining submissions being in opposition.

The applicant provided a detailed response to the submissions (Planners North, October 2021) of which some key items regarding the nature of submissions in opposition are summarised below:

- just over 2100 submissions were an identical form letter.
- a further 209 submissions were a form letter with further comments.
- approximately 260 unique submissions were received.

The majority of the issues raised in the submissions in opposition to the development are considered in the assessment report above. Owing to the number of submissions received it is not practicable to

discuss all matters raised in this report however, consideration of relevant, key issues raised in submissions, are summarised below:

Key issues raised in submissions	Consideration
Impact on bush fire threat	The application provided a bush fire risk assessment by a suitably qualified bush fire expert. This bush fire risk assessment was provided to the RFS who subsequently issued a bush fire safety authority and general terms of the approval for the amended development proposal.
Assessment, and impacts, of the development on ecology/habitat/ biodiversity. Requirement for a BDAR	<p>The impacts of the development on the natural environment are discussed in detail above. Although removal of over 150 native trees was initially proposed, the amended proposal does not require any tree removal. The ecological significance of the property is acknowledged as are the deficiencies in the proposal in relation to minimising impacts and enhancing ecological values. Council's Ecological referral does not support the proposal however a suite of deferred commencement requirements and conditions have been recommended, should consent be granted, that address the environmental impacts and ecological enhancement effort.</p> <p>Council's Ecological referral advises that a Biodiversity Development Assessment Report (BDAR) is required if ecological issues, are not adequately resolved (see Attachment 6).</p>
Noise impacts on neighbours	<p>Potential impacts of the development on neighbours particularly from noise have been considered in the assessment. The development site is between 60-70m from the nearest property boundaries and over 100m to the nearest neighbouring dwelling according to aerial photographs.</p> <p>Council's Environmental Health Officer reviewed the noise impact assessment (Greg Alderson &amp; Associates, January 2021) provided with the original development application and is satisfied that the noise criteria presented in the acoustic report are reasonable and can be achieved subject to recommended conditions.</p>
Inadequate servicing (e.g., wastewater & waste management, access/traffic)	Servicing of the development has been considered in the assessment. Council's Environmental Health Officer and Development Engineer have reviewed the proposed servicing and traffic impacts of the development (see Attachments 4 and 5) and are satisfied it is adequate subject to recommended conditions.
Failure to refer the proposal under the EPBC Act	The development assessment process does not require Council to consider whether referral under

	the EPBC Act is required or to refer and action or project that may be covered by the EPBC Act ( <a href="https://www.dcceew.gov.au/environment/epbc">https://www.dcceew.gov.au/environment/epbc</a> ).
Permissibility of the proposal	Permissibility of the proposal has been considered in the assessment. On the basis that the application will result in mixed use development of the site being an <i>eco-tourist facility</i> and <i>private education</i> (the current approved use), the proposed development is permissible.
Lack of compliance with past consents	<p>Concerns about compliance (or lack thereof) was raised in several submissions however this is not a listed matter for consideration under s.4.15 of the EP&amp;A Act.</p> <p>A Town Planning Audit Report (Planning Ingenuity, 20 June 2021) was prepared for Council that reviewed the development approval history and works on the site.</p> <p>The audit report found:</p> <ul style="list-style-type: none"> <li>• The majority of buildings on the property have Council approval albeit with some minor inconsistencies being identified. It is understood there is a willingness to rectify the identified inconsistencies.</li> <li>• Over time the number and quantum of 'non-educational' buildings has expanded under the auspice of being ancillary to the private education use.</li> </ul>
Previous rezoning of the property	Concerns about the previous rezoning of the property was raised in several submissions however this is not a listed matter for consideration under s.4.15 of the EP&A Act.
The site access controlled gate should be moved further into the site a minimum of 4m to accommodate 24m of traffic queue length on the driveway.	This request by Ballina Shire Council is not opposed and the proposed condition should be included as a condition of consent is granted for the development.
Department of Planning, Industry & Environment – Crown Land does not support the applicant undertaking any activity on the adjoining Crown land or using the Crown land for any purpose associated with the development.	The proposal is entirely situated on private land with no works proposed on, or impacting, the adjacent Crown land.

A submission from two of the three adjoining property owners (in Byron Shire) was identified. Key issues raised in these submissions are:

- potential for development to increase risk of bush fires that may impact neighbours.
- potential for development to impact surrounding ecosystems and ecological communities.
- insufficient setback to neighbours will result in amenity impacts.

#### 4.9 Public interest

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

## **5. DEVELOPER CONTRIBUTIONS**

### **5.1 Water & Sewer Levies**

No Section 64 levies will be required.

### **5.2 Developer Contributions**

Section 7.12 Contributions will be payable.

## **6. DISCLOSURE OF POLITICAL DONATIONS AND GIFTS**

<b>Disclosure details</b>	<b>Response</b>
Has a Disclosure Statement been received in relation to this application? If Yes, Provide Disclosure Statement register reference: 91.	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Have staff received a 'gift' from anyone involved in this application that needs to be disclosed.	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>

## **7. ATTACHMENTS**

- 1 - Development Advisory Panel (DAP) meeting minutes (ref. 22.2019.14.1).
- 2 - Northern Regional Planning Panel records of briefing
- 3 – September 2022 amended plans
- 4 – Council Environmental Health Officer referral
- 5 – Council Development Engineer referral
- 6 – Council Ecological referral
- 7 – Rural Fire Service general terms of approval and bush fire safety authority for June 20222 amended proposal dated 30 August 2022 (ref: DA20210422001572-CL55-1)
- 8 – Transport for NSW comments on the October 2021 amended proposal (ref: NTH19/00203/03).
- 9 - Essential Energy additional information request on 26 August 2022
- 10 - Department of Planning and Environment general terms of approval for June 2022 amended proposal dated 2 September 2022 (ref: IDAS-2022-10095).