

ECOLOGICAL REFERRAL DEVELOPMENT APPLICATION ASSESSMENT

Document no.# A2021/12468

APPLICATION DETAILS

DA number	10.2021.170.1
Proposal	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
Property title	PT: 1 DP: 1031848
Property Description	951 Broken Head Road BROKEN HEAD
Parcel Number(s)	238081
Applicant	Planners North Pty Ltd
Owner	BHCF Pty Ltd
Zoning	Zone No. E2 Environmental Conservation / PART E3 Environmental Management / PART RU2 Rural Landscape / PART SP1 Special Activities / PART DM Deferred Matter
Planning Officer	Mr I C Holland
Ecologist	Gene Mason

Gene Mason



26/08/2022

Referral Officer Name

Signature

Date

PLEASE RETURN TO: Planning Team

Additional comments added 06/10/2022

PRELIMINARY ECOLOGICAL ASSESSMENT

Desktop Review – E-view Check

FEATURE	Present on Parcel(s)	Absent from Parcel(s)	Comments
Biodiversity Values Map	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Much of the site is identified on the BV Map. These areas are mapped under various criteria including littoral rainforest and coastal wetlands mapped under the CM SEPP in addition to identified rainforest.
Native Vegetation Regulatory Map	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Most of the site is excluded from the NVR Map due to its zoning. The relatively small Deferred Matter areas are included on the Map and are partly mapped as Category 2-Sensitive Regulated Land and partly uncategorised.
Vegetation SEPP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The Vegetation SEPP applies to vegetation clearing not ancillary to development within the parts of the site zoned E2, E3, and SP1.
Coastal SEPP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The site includes littoral rainforest, coastal wetlands and their proximity areas mapped under the CM SEPP. The eastern parts of the site are mapped within the Coastal Use Area and the Coastal Environment Area.
Koala Habitat Protection SEPP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The site is greater than 1 hectare in size and is within the Koala Planning Area. Therefore the Byron Coast Comprehensive Koala Plan of Management applies to the application.
High Environmental Value	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Much of the site is mapped as High Environmental Value, including the majority of mapped vegetation. There are a number of different native vegetation communities on the site, mostly in very good condition. The Keith vegetation formations identified on the site are listed below.
Mapped Vegetation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The site contains a mosaic of native vegetation communities that are contiguous with larger areas of native vegetation within the broader landscape, predominately extending to the north and south, with the coastal sand barrier and Pacific Ocean forming the eastern boundary. Keith vegetation formations occurring on the subject site include: <ul style="list-style-type: none"> - Coastal swamp forests - Coastal heath swamps - Coastal freshwater lagoons - Littoral rainforests - Subtropical rainforests - North coast dry sclerophyll forests - North coast wet sclerophyll forests
Wildlife Corridor	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Almost the entirety of the site is mapped within BSC and NPWS wildlife corridors.

Mapped Threatened Fauna Habitat	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mapped threatened fauna habitat occurs throughout the site.
Mapped Koala Habitat	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The areas mapped as coastal swamp forest are mapped as potential koala habitat in Council's GIS layers (not in the CKPoM).
Threatened Flora Records	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<p>There are records of the scented acronychia (<i>Acronychia littoralis</i>), stinking laurel (<i>Cryptocarya foetida</i>), and rusty plum (<i>Niemeyera whitei</i>) within the site.</p> <p>The biodiversity assessment identified the following additional threatened flora species on the site:</p> <ul style="list-style-type: none"> • coolamon (<i>Syzygium moorei</i>), • native guava (<i>Rhodomyrtus psidioides</i>), • scrub turpentine (<i>Rhodamnia rubescens</i>), • native tamarind (<i>Dipoglottis campbellii</i>), and • Queensland xylosma (<i>Xylosma terrae-reginae</i>). <p>The following threatened ecological communities (TECs) occur within the site:</p> <p>NSW BC Act</p> <ul style="list-style-type: none"> • Littoral rainforest in the NSW north coast, Sydney basin and south east corner bioregions • Lowland rainforest in the NSW north coast and Sydney basin bioregions • Swamp sclerophyll forest on coastal floodplains of the NSW north coast, Sydney basin and south east corner bioregions* • Swamp oak floodplain forest of the NSW north coast, Sydney basin and south east corner bioregions* • Freshwater wetlands of the NSW north coast, Sydney basin and south east corner bioregions* • Themeda grassland on seacliffs and coastal headlands of the NSW north coast, Sydney basin and south east corner bioregions# <p>*The biodiversity assessment report contended that the vegetation communities on the site are not representative of the listed TECs because they do not occur on an alluvial landscape. There is some doubt regarding the importance of the edaphic component to identifying the TECs, and it is considered they should be assumed to be representative based on their floristic composition and geographic location.</p> <p>#The biodiversity assessment report did not</p>

			conclude whether the vegetation community on the site was representative of the listed TEC.
Threatened Fauna Records	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<p>There are records of the common blossom bat (<i>Syconycteris australis</i>), eastern long-eared bat (<i>Nyctophilus bifax</i>), and wallum sedge frog (<i>Litoria olongburensis</i>) within the site.</p> <p>The Broken Head area is a highly important refuge for many additional coastal threatened fauna species (see body of report for further details).</p>
Key Fish Habitats	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Key fish habitat associated with coastal wetlands occurs in the southern portion of the site.
National Parks/Nature Reserves/Marine Park	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Acid Sulphate Soils	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Categories 2, 3 and 4 are mapped on the site.
Bush Fire Category	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Categories 1, 2 and buffer are mapped across the majority of the site.
Flooding (1 in 100 year)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
Landuse Zone	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Part E2 Environmental Conservation, part E3 Environmental Management, part RU2 Rural Landscape, part SP1 Special Activities, part DM Deferred Matter

ECOLOGICAL ASSESSMENT

1. Description of the site

The site is legally described as PT: 1 DP: 1031848, 951 Broken Head Road, Broken Head.

2. Description of the proposed development

The application seeks development consent for a mixed use development. Initially the proposal comprised twenty seven (27) new eco tourist facility cabins, seven (7) ancillary buildings including a wellness facility, refuges, depot, addition of a deck to an 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 proposal was amended during the assessment period, removing a number of the proposed cabins and replacing them with five accommodation units allegedly already approved. The proponent contended that the proposed changes would remove the need to remove any trees, however this has not been clearly demonstrated.

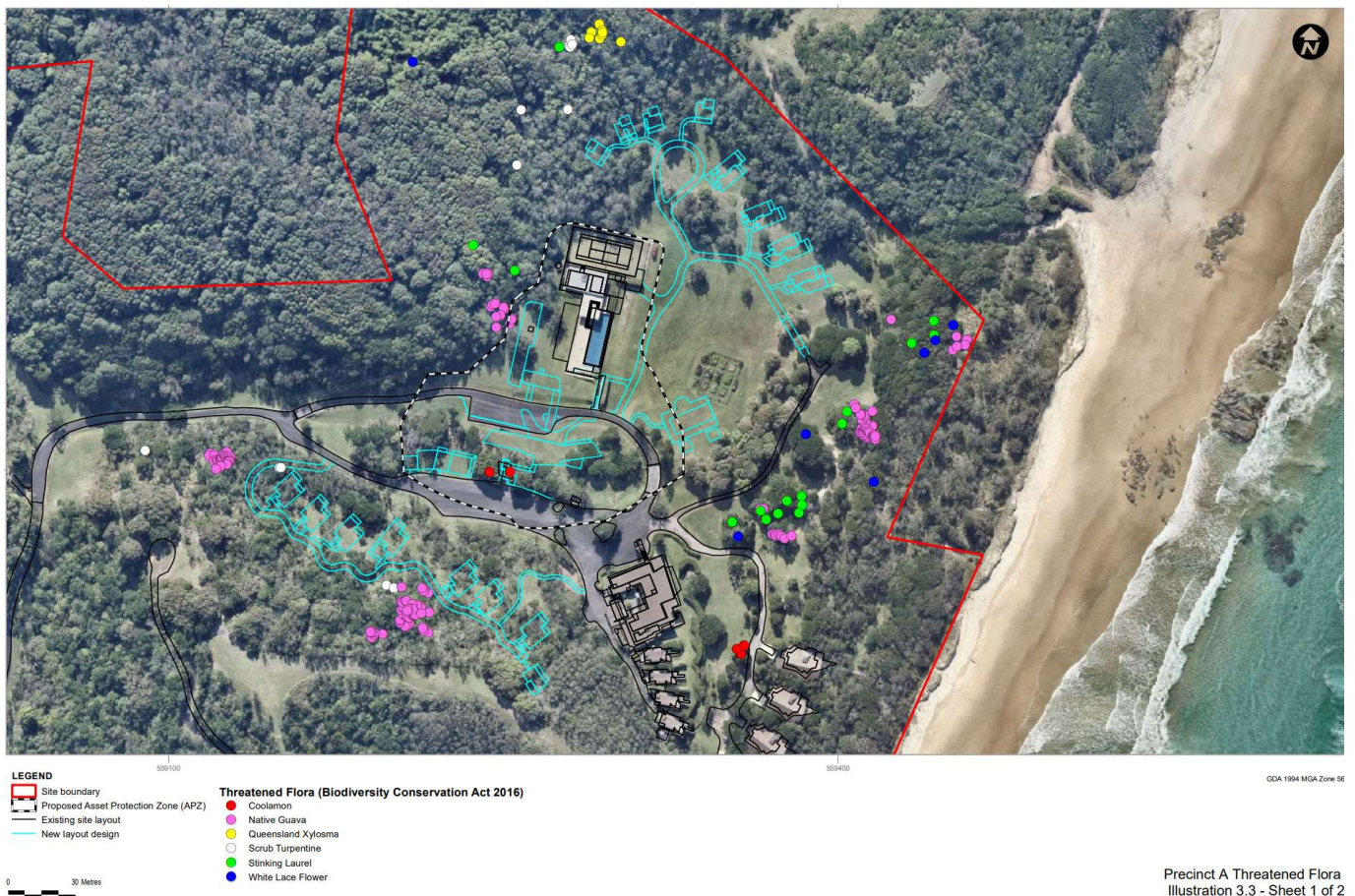


Fig 1 Proposed development footprint and location of threatened plants recorded on site (Geolink report).



Fig 2 Proposed development footprint and extent of littoral rainforest on the site (Geolink report).

3. Site conservation values

Flora

The site is located within a larger area of highly important coastal native vegetation communities. Broadly, the vegetation in the locality comprises coastal swamp forests, littoral rainforests, and coastal heath and wetland communities.

Threatened Ecological Communities (TECs)

The following threatened ecological communities (TECs) occur on the site:

- *Littoral rainforest in the NSW north coast, Sydney basin and south east corner bioregions*
- *Lowland rainforest in the NSW north coast and Sydney basin bioregions*
- *Swamp sclerophyll forest on coastal floodplains of the NSW north coast, Sydney basin and south east corner bioregions**
- *Swamp oak floodplain forest of the NSW north coast, Sydney basin and south east corner bioregions**
- *Freshwater wetlands of the NSW north coast, Sydney basin and south east corner bioregions**
- *Themeda grassland on seacliffs and coastal headlands of the NSW north coast, Sydney basin and south east corner bioregions#*

*The biodiversity assessment report contended that the vegetation communities on the site are not representative of the listed TECs because they do not occur on an alluvial landscape. There is some doubt regarding the importance of the edaphic component to identifying the TECs, and it is considered they should be assumed to be representative based on their floristic composition and geographic location.

#The biodiversity assessment report did not conclude whether the vegetation community on the site was representative of the listed TEC.

Threatened flora species

There are records of the scented acronychia (*Acronychia littoralis*), stinking laurel (*Cryptocarya foetida*), and rusty plum (*Niemeyera whitei*) within the site.

The biodiversity assessment identified the following additional threatened flora species on the site:

- coolamon (*Syzygium moorei*),
- native guava (*Rhodomyrtus psidioides*),
- scrub turpentine (*Rhodamnia rubescens*),
- native tamarind (*Dipoglottis campbellii*), and
- Queensland xylosma (*Xylosma terrae-reginae*).

Fauna

The Broken Head area forms one of the most important biodiversity refuges within the Byron Shire. Threatened fauna known to have resident populations in the Broken Head area include invertebrates such as the coastal petaltail (*Petalura litorea*), birds such as the square-tailed kite (*Lophoictinia isura*), spotted harrier (*Circus assimilis*), pied oystercatcher (*Haematopus leucogaster*) and white-eared monarch (*Carterornis leucotis*), amphibians such as the wallum froglet (*Crinia tinnula*) and wallum sedge frog (*Litoria olongburensis*), megabats such as the common blossom bat (*Syconycteris australis*), microbats such as the eastern long-eared bat (*Nyctophilus bifax*), and dasyurids such as the common planigale (*Planigale maculata*).

Riparian and corridor values

The Broken Head area forms an important component of a critical north-south corridor for many native fauna species including threatened species.



Fig 3 Biodiversity Values Map.



Fig 4 HEV vegetation mapping.

4. Proposed development impact

Preliminary note:

It is understood that Nyangbul representatives have objected to the proposal, stating that the proposed development area is an important ceremonial, dreaming and massacre site (see E2021/71724). On this basis, and separate to any detailed ecological assessment, the proposal is fundamentally not supported.

20/07/2021 - Initial ecological assessment

Biodiversity Conservation Act 2016 (BC Act) – BDAR required

It is considered that the proposal represents a significant impact on biodiversity as defined by the threatened species test of significance in Section 7.3 of the BC Act. In accordance with the BC Act, the proposal therefore triggers entry into the biodiversity offsets scheme and the application must be accompanied by a Biodiversity Development Assessment Report (BDAR). Importantly, this BDAR would be required to demonstrate that the development would avoid and minimise all biodiversity impacts and would not represent a Serious and Irreversible Impact (SII) on biodiversity.

Fauna

The Broken Head area forms one of the most important biodiversity refuges within the Byron Shire. Threatened fauna known to have resident populations in the Broken Head area include invertebrates such as the coastal petaltail (*Petalura litorea*), birds such as the square-tailed kite (*Lophoictinia isura*), spotted harrier (*Circus assimilis*), pied oystercatcher (*Haematopus leucogaster*) and white-eared monarch (*Carterornis leucotis*), amphibians such as the wallum froglet (*Crinia tinnula*) and wallum sedge frog (*Litoria olongburensis*), megabats such as the common blossom bat (*Syconycteris australis*), microbats such as the eastern long-eared bat (*Nyctophilus bifax*), and dasyurids such as the common planigale (*Planigale maculata*).

Furthermore, many of the above species are known to be in an accelerating rate of decline, in part due to habitat loss and the impacts of encroaching anthropogenic development within remaining habitat.

The Biodiversity Assessment Report provided with the application did not include a sufficient fauna survey effort. With the exception of the Anabat call recording (undertaken over two nights), targeted fauna species surveys were not undertaken. It is therefore considered that fauna species were unjustifiably excluded from consideration of potential impacts. In the absence of sufficient data, the precautionary principle suggests that species with the potential to occur on the site should be assumed present.

It is considered that the following impacts on native fauna have been underestimated in the s7.3 test included in the application:

- Habitat loss due to the removal of ~0.44 ha of littoral rainforest (a listed EEC)
- 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*)
- Light and noise impacts likely to impact resident mega and microbat populations
- Loss of roosting and foraging resources for resident mega and microbat populations
- Increased vehicle movements likely leading to increased vehicle strike on fauna moving through the site
- Increased human population density and associated impacts within the site and adjacent areas including the beach to the east which forms an important habitat refuge for shorebirds such as the pied oystercatcher *Haematopus leucogaster* and beach stone-curlew *Esacus magnirostris* (an SII entity)

Given the critical habitat value for the above fauna (and others) represented by the site, it is considered that the proposal represents a significant impact on at least four threatened fauna species with known

populations in the Broken Head area: the white-eared monarch (*Carterornis leucotis*), common planigale (*Planigale maculata*), eastern blossom bat (*Syconycteris australis*), and eastern long-eared bat (*Nyctophilus bifax*). Due to these significant impacts, the proposal triggers entry into the biodiversity offsets scheme.

Flora

Numerous threatened flora species occur on the site as represented by BioNet records and observations made as part of other studies (including the present application's Biodiversity Assessment Report).

Of note is the presence of two critically endangered species that are rapidly declining due to the impacts of myrtle rust caused by the exotic fungus *Austropuccinia psidii*: native guava (*Rhodomyrtus psidioides*) and scrub turpentine (*Rhodamnia rubescens*). These two species are also listed as serious and irreversible impact (SARI) entities under the BC Act. There is presently no known management action to permanently address the effects of myrtle rust in the wild – while fungicide treatment has been shown to be effective, it is an unrealistic option as it needs to be applied every few months in perpetuity. The predominate conservation strategy regarding this threat is to identify genetic resistance in the wild and subsequently breed genetically resistant populations. As such, it is critical that naturally occurring individuals are left *in situ* within well-protected areas distant from anthropogenic activity and monitored to detect if they are producing fruit and seed.

In several areas, the proposed development footprint either overlaps or is directly adjacent to *R. psidioides* and *R. rubescens* individuals. It is considered that this aspect of the development alone represents a significant impact on threatened species (s7.3 BC Act). Furthermore, a number of other threatened flora species are either required to be removed or will be subject to impacts due to the intensification of development on the site. These include the coolamon (*Syzygium moorei*), stinking laurel (*Cryptocarya foetida*), white lace flower (*Archidendron hendersonii*), and Queensland xylosma (*Xylosma terrae-reginae*).

The site also contains threatened ecological communities listed under the BC Act. Most of the native vegetation communities occurring within the general proposal area are representative of the Threatened Ecological Community (TEC) *Littoral rainforest in the NSW north coast, Sydney Basin and south east corner bioregions* (Endangered under the BC Act). Despite the existence of managed derived grasslands proximate to the existing development footprint, the proposal includes the removal of ~0.44 ha of littoral rainforest. Hoop pine forest in the south of the site is representative of the TEC *Lowland Rainforest in the NSW North Coast and Sydney Basin Bioregions* and an area of *Themeda triandra* dominated grassland is potentially representative of the TEC *Themeda grassland on seacliffs and coastal headlands in the NSW North Coast, Sydney Basin and South-East Corner Bioregions*.

Byron Coast Comprehensive Koala Plan of Management

The application addressed the *State Environmental Planning Policy (Koala Habitat Protection) 2020* (Koala SEPP 2020). However, shortly after the application was lodged the Koala SEPP 2021 commenced which approved the Byron Coast Comprehensive Koala Plan of Management (CKPoM).

The CKPoM applies to the proposal for the following reasons:

- The site has an area of greater than 1 ha
- The site is within the Koala Planning Area as defined in the CKPoM

Therefore, the application must address the CKPoM rather than the Koala SEPP 2020. Notwithstanding, it is considered that a Koala Habitat Assessment Report is not required because the land does not contain *potential koala habitat* – no part of the site contains areas of forest and/or woodland wherein primary or secondary food tree species (as defined in the CKPoM) form >15% of the overstorey tree species.

potential koala habitat means any area identified as either Primary, Secondary (A) or Secondary (B) as defined in the table below:

Primary Habitat	means areas of forest and/or woodland wherein <u>primary</u> food tree species comprise the dominant or co-dominant (i.e ≥50%) overstorey tree species.
Secondary (Class A) Habitat	means areas of forest and/or woodland wherein primary koala food tree species form 15-50% of the overstorey tree species; or primary and secondary food tree species combine to form > 15% of the overstorey tree species
Secondary (Class B) Habitat	means areas of forest and/or woodland wherein primary food trees species are absent and secondary food tree species form >15% of the overstorey tree species.

	Common name	Scientific name
Primary	Tallowwood	<i>Eucalyptus microcorys</i> *
	Forest Red Gum	<i>Eucalyptus tereticornis</i> **
	Swamp Mahogany	<i>Eucalyptus robusta</i> **
Secondary	Small fruited Grey Gum	<i>Eucalyptus propinqua</i>
	Scribbly Gum	<i>Eucalyptus racemosa</i> <i>subsp racemosa</i>

* Tallowwood *Eucalyptus microcorys* is considered a secondary food tree on lower nutrient erosional soils – see Habitat Study.

** includes naturally occurring *E. tereticornis* x *E. robusta* hybrid.

Byron Shire Development Control Plan – Chapter B1

The site contains multiple ecologically significant areas ('red flags') as defined in Section B1.2 of the Byron DCP:

- Threatened ecological communities
- Important wetlands
- Threatened and significant species habitat
- Waterways and riparian areas

Pursuant to Section B1.2.1, development must be designed such that it retains any listed ecologically significant areas on-site and incorporates ecological setbacks to these areas at the distances listed in Table 3. Not only does the proposal impact listed ecologically significant areas, but it also includes multiple encroachments within the required ecological setbacks.

The application seeks a variation on these matters and provides several reasons to justify this. Notwithstanding this reasoning, given the high biodiversity values present on the site and the existence of managed, derived grasslands proximate to the existing development footprint, it is considered that the proposed variations to the required setbacks are not justified.

28/03/2022 - Further comments

Ecological assessment documentation reviewed:

There are two ecological assessment reports associated with the proposal, and these were reviewed in forming the subsequent advice:

Biodiversity Assessment – Linnaeus Property – Eco Tourism Mixed Use Proposal, UPR 3080-1086 prepared by GeoLINK and dated 01/02/2021: this report accompanied the original proposal.

Environmental Assessment: Development Application 10.2021.170.1, 951 Broken Head Road, Broken Head prepared by Peter Parker Environmental Consultants Pty Ltd and dated 18 October 2021: this report was submitted in response to Council's initial RFI and supported the amended design.

Statutory assessment:

Byron Shire DCP 2014 Chapter B1 – Does not comply

Pursuant to Section B1.2.1, development must be designed such that it retains any listed ecologically significant areas on-site and incorporates ecological setbacks to these areas at the distances listed in Table 3. The amended proposal would impact listed ecologically significant areas and include several encroachments into the required ecological setbacks to these areas:

Ecologically significant area/feature	Setback required	Non-compliance
Threatened ecological communities	30m	Cabins B1-B4, A1-A8, CB2, CB6 located within setback areas (B1-B4 arguably within the TEC itself)
Threatened flora species habitat	10m	APZs overlap with <i>R. psidioides</i> individuals. Additional individuals immediately adjacent to outer edge of APZ.
First and second order streams	10m (first order), 20m (second order)	Several of the proposed structures (CB2, CB5, CB6, B1-B4) appear to be either <u>on top of</u> or immediately adjacent to the existing waterways. Proposed pit toilets are located 300mm from the creek invert.

The ecological assessment report provided with the amended proposal documents (*Environmental Assessment: Development Application 10.2021.170.1, 951 Broken Head Road, Broken Head* prepared by Peter Parker Environmental Consultants Pty Ltd, 18 October 2021) assessed the specific location of the proposed cabin footprints. It did not address the numerous encroachments within the ecological setback areas, nor did it include any information regarding the biodiversity impacts of the APZ around the proposed refuge buildings.

Given the high biodiversity values on the site, the importance of the Broken Head area as a refuge for threatened biodiversity, and the existence of managed, derived grasslands elsewhere on the site, variations to the requirements of Chapter B1 are not supported.

Biodiversity Conservation Act 2016 - Likely significant impact on biodiversity

It is considered that the proposal represents a likely significant impact on biodiversity as defined by the threatened species test of significance in Section 7.3 of the BC Act. In accordance with the BC Act, the proposal therefore triggers entry into the biodiversity offsets scheme and the application must be accompanied by a Biodiversity Development Assessment Report (BDAR). Importantly, this BDAR would be required to demonstrate that the development would avoid and minimise all biodiversity impacts and would not represent a Serious and Irreversible Impact (SAII) on biodiversity.

Direct impacts on native guava (*Rhodomyrtus psidioides*)

Native guava (*Rhodomyrtus psidioides*) is a critically endangered species that is rapidly declining due to the impacts of myrtle rust caused by the exotic fungus *Austropuccinia psidii*. It is also listed as a serious and irreversible impact (SAIL) entity under the BC Act. There is presently no known management action to permanently address the effects of myrtle rust in the wild – while fungicide treatment has been shown to be effective, it is an unrealistic option as it needs to be applied every few months in perpetuity. The predominate conservation strategy regarding this threat is to identify genetic resistance in the wild and subsequently breed genetically resistant populations. As such, it is critical that naturally occurring individuals are left *in situ* within well-protected areas distant from anthropogenic activity and monitored to detect if they are producing fruit and seed.

Council and the applicant are currently awaiting the updated GTAs from the NSW RFS. Notwithstanding, the bush fire protection measures are inferred from previous documentation provided with the application. Illustration 3.3 of the original biodiversity assessment report (*Biodiversity Assessment – Linnaeus Property – Eco Tourism Mixed Use Proposal*, UPR 3080-1086 prepared by GeoLINK and dated 01/02/2021) shows several *R. psidioides* individuals within the proposed APZ west of the proposed 'wellness facility'. As the footprint of this component of the development appears comparable between the original and amended designs, it is assumed that the proposed APZ is unchanged. Establishment of an APZ in this area would result in permanent, ongoing modification of the understorey (including regenerating plants and accumulated leaf litter) and canopy.

It is considered that this aspect of the proposed development alone represents a significant impact on threatened species (s7.3 BC Act). There are several additional *R. psidioides* just outside the proposed APZ that are likely to be impacted by vegetation management in the proximate area and the resulting edge effects including increased risk of pathogen transport into and out of the littoral rainforest area.

Indirect impacts on *Rhodamnia rubescens*

Another critically endangered flora species threatened by myrtle rust, *Rhodamnia rubescens*, occurs in littoral rainforest proximate to and contiguous with the location of proposed cabins B1-B4, and less so A1-A8. As with *R. psidioides*, it is critical that individuals of this species that are naturally occurring in intact habitat are protected and separated from development by appropriate buffers. Introducing additional anthropogenic activity to these areas is not supported.

Fauna impacts uncertain

Neither of the two ecological assessment reports provided with the application included a sufficient fauna survey effort. With the exception of the Anabat call recording (undertaken over two nights) in the Geolink report, targeted fauna species surveys were not undertaken. It is therefore considered that fauna species were unjustifiably excluded from consideration of potential impacts. In the absence of sufficient data, the precautionary principle suggests that species with the potential to occur on the site should be assumed present.

In the absence of targeted survey data, it is considered that the proposal has the potential to represent a significant impact on at least four threatened fauna species with known populations in the Broken Head area: the white-eared monarch (*Carterornis leucotis*), common planigale (*Planigale maculata*), eastern blossom bat (*Syconycteris australis*), and eastern long-eared bat (*Nyctophilus bifax*). Potential impacts of the proposal on fauna include:

- 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*)
- Light and noise impacts likely to impact resident mega and microbat populations
- Loss of roosting and foraging resources for resident mega and microbat populations
- Increased vehicle movements likely leading to increased vehicle strike on fauna moving through the site
- Increased human population density and associated impacts within the site and adjacent areas including the beach to the east which forms an important habitat refuge for shorebirds such as the pied oystercatcher *Haematopus leucogaster* and beach stone-curlew *Esacus magnirostris* (an SAIL entity)

It is not possible to conclude that the proposal does not represent a significant impact on threatened fauna based on the information provided.

08/08/2022 – Updated comments - revised proposal

Ecological assessment documentation reviewed:

As with the comments provided on 28/03/2022, two ecological assessment reports were reviewed in forming the below advice:

Biodiversity Assessment – Linnaeus Property – Eco Tourism Mixed Use Proposal, UPR 3080-1086 prepared by GeoLINK and dated 01/02/2021: this report accompanied the original proposal.

Environmental Assessment: Development Application 10.2021.170.1, 951 Broken Head Road, Broken Head prepared by Peter Parker Environmental Consultants Pty Ltd and originally dated 18 October 2021, updated for revised proposal: this report was originally submitted in response to Council's initial RFI and was subsequently updated to support the revised proposal.

Outline of revised proposal and ecological issues:

The proposal was further revised. Importantly, the revised proposal includes several structures that were already approved under a previous development consent (10.2013.600.1). It is unclear why these were incorporated into the submitted plans and documentation given they cannot be assessed as part of the present application (Fig 5).

In summary, the following major changes were made:

- The cabins within the littoral rainforest area to the north of the site were removed and replaced by 12 cabins in the managed grassland east of the existing pool and tennis court.
- Cabins A9-A22 and C1 were removed and replaced by five (5) cabins that are already approved under development consent 10.2013.600.1 (Fig 5).
- The workers' car parking area and change rooms in the west of the site were removed.
- The main 'refuge building' was reduced in size to act as a reception building.
- The shed building (CB.5) was removed.
- The 'wellness facility' (CB.4) was moved and reduced in size, including its associated APZ.
- APZs were added around the 12 proposed cabins, where the previous cabins were planned to avoid the need for APZs by utilising a refuge building.
- Two walkable waterway crossings were added south of the proposed reception building.

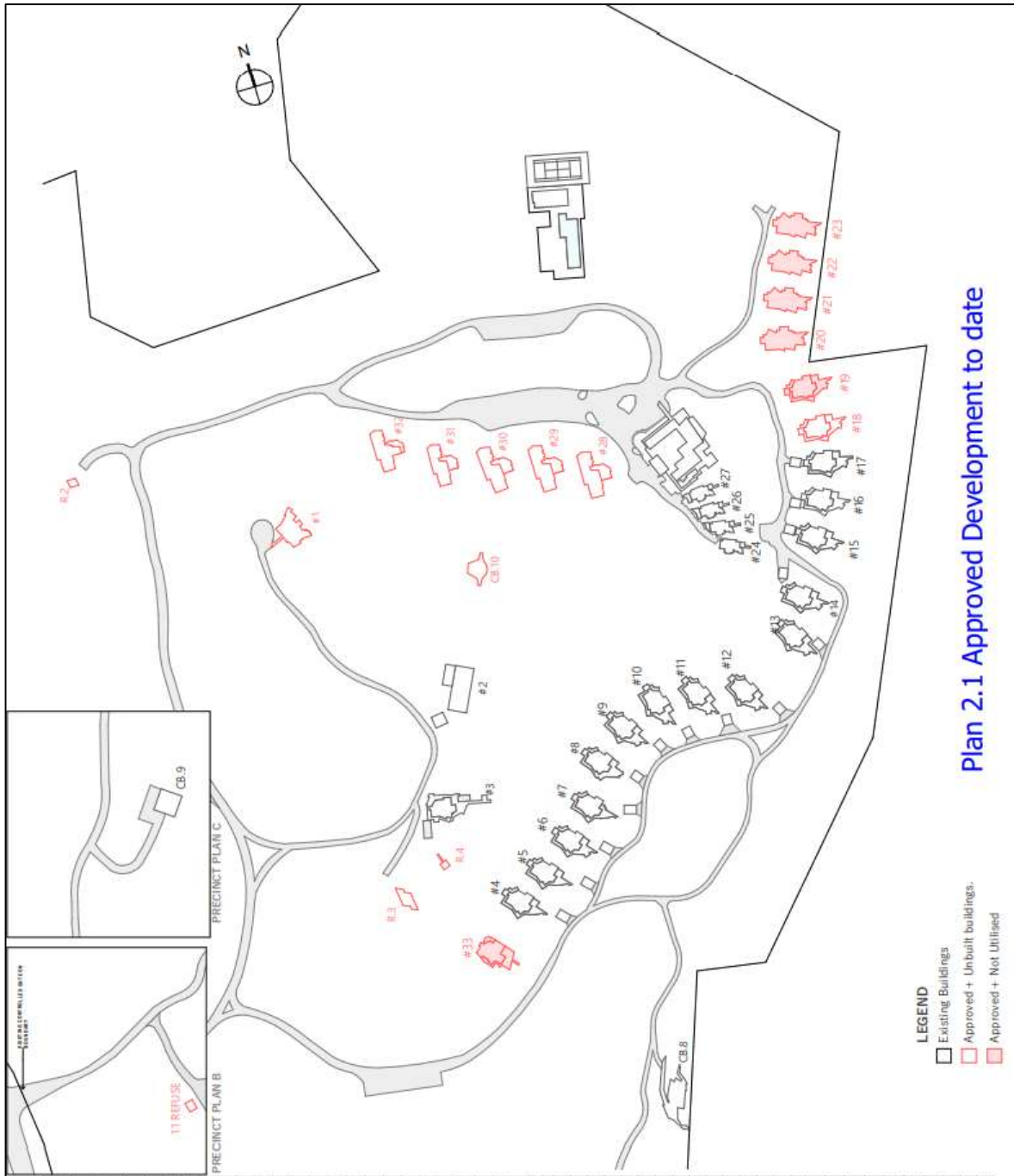


Fig 5 Site plan of existing approved development on the site.

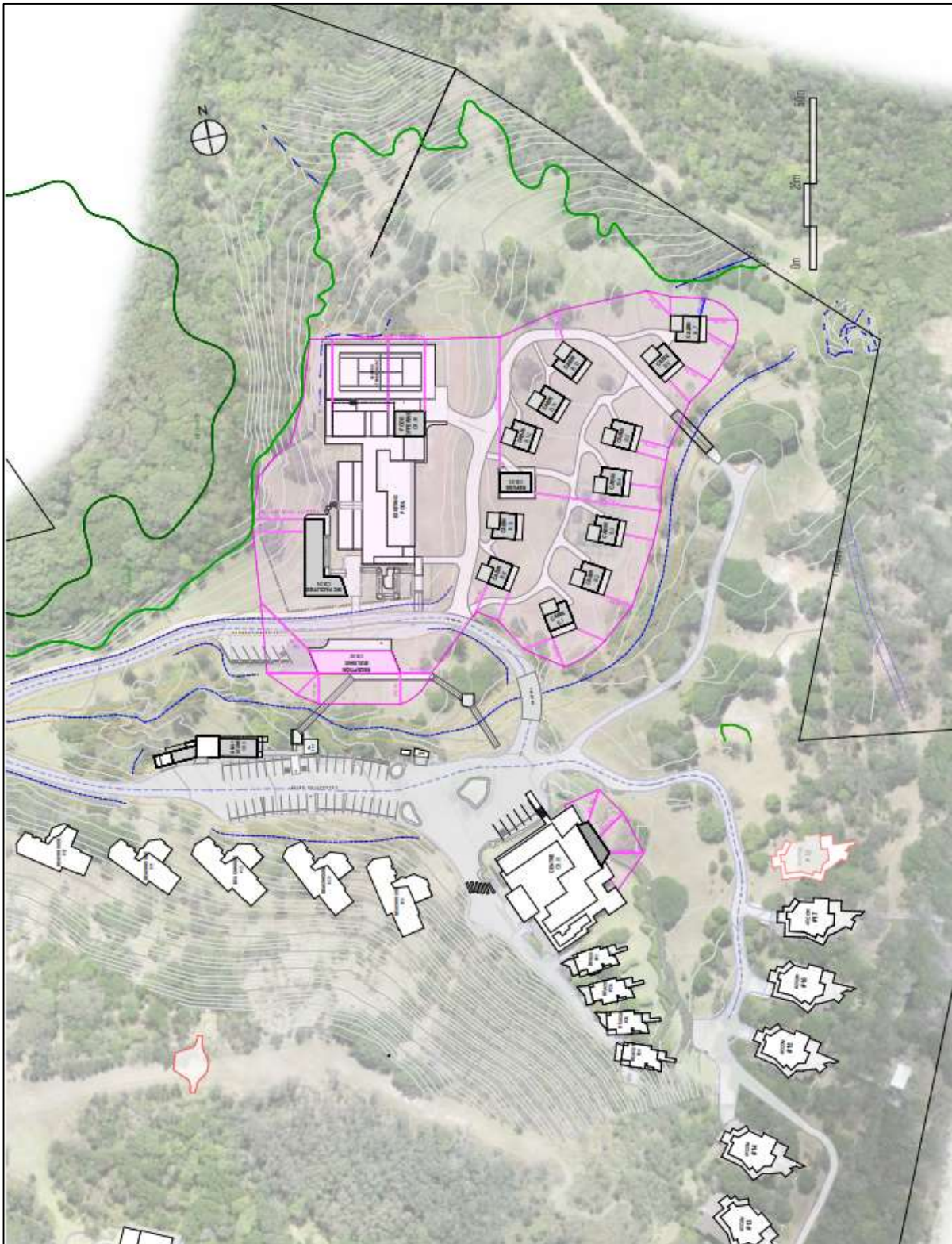


Fig 6 Proposed revised site plan including APZs (shown in pink).

From an ecological perspective, in some ways the revised proposal is preferable to the original proposal as it:

- does not include any removal of littoral rainforest vegetation
- mostly restricts development to the existing managed grassland areas in the centre of the existing developed areas
- modifies the APZs to avoid the inclusion of any *R. psidioides* or areas of closed canopy littoral rainforest

However, many ecological issues that were raised in previous advice remain unresolved (and/or were not addressed in the response), and additional ecological issues have been raised. Issues previously

raised largely relate to the insufficient fauna survey effort undertaken by the application and the potential impacts of the proposal on fauna. As previously advised, in the absence of targeted survey data, it is considered that the proposal has the potential to represent a significant impact on threatened fauna due to, at least, the following impacts:

- 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*)
- Light and noise impacts likely to impact resident mega and microbat populations
- Increased vehicle movements likely leading to increased vehicle strike on fauna moving through the site
- Increased human population density and associated impacts on flora and fauna within the site and adjacent areas including:
 - additional human activity on the beach to the east which forms an important habitat refuge for shorebirds such as the pied oystercatcher *Haematopus leucogaster* and beach stone-curlew *Esacus magnirostris* (an SAI entity)
 - impacts on the rose-crowned fruit dove *Ptilinopus regina*, a species known from the area and particularly prone to window strikes
 - loss of habitat for species known from the Broken Head area that are sensitive to human disturbance including the white-eared monarch *Carterornis leucotis*, square-tailed kite *Lophoictinia isura*, eastern blossom-bat *Synconycteris australis*, and eastern long-eared bat *Nyctophilus bifax*.

Additional ecological issues raised by the revised proposal are as follows:

- The new APZs around the 12 proposed cabins overlap with existing native vegetation and encroach substantially into the ecological setbacks to TECs (littoral rainforest), threatened flora habitat and first and second order streams as required by Chapter B1 of the DCP.
- Two waterway crossings connected to the proposed reception building have been added, introducing additional impacts to the waterway and its riparian zone. A vehicle crossing to the east of the proposed cabins is retained from the previous version of the proposal. None of these are supported.

Given the conservation importance of the subject site and the broader Broken Head area, it is considered that any further development in the locality will result in impacts on biodiversity that cannot be supported. The subject site is already highly developed in comparison to the surrounding landscape, exceeding what is appropriate given the biodiversity values of the locality. If the impacts of the existing development and the additional proposed development are taken together, the cumulative total represents a drastic escalation of development impacts to the Broken Head area. Even acknowledging that the ecological restoration requirements required by the DCP may form some compensation for the impacts, it is still highly unlikely that the proposed development will have a positive, or indeed a neutral, effect on biodiversity. In the face of unprecedented changes in Australian biodiversity, further development of areas like Broken Head is incompatible with any scenario in which biodiversity and ecosystem loss is halted or reversed. The ideal outcome of the present application is for the proposed development to not occur.

Statutory assessment of revised proposal:

Biodiversity Conservation Act 2016 (BC Act)

Although the reduction of vegetation clearing has partially addressed some of the impacts previously raised, it is still considered likely that the proposal represents a significant impact on threatened biodiversity as defined by the threatened species test of significance in Section 7.3 of the BC Act. Previous comments should be read regarding this conclusion. Pursuant to Section 7.7(2) of the BC Act, development that is likely to significantly impact threatened species, ecological communities, or their habitats triggers entry into the biodiversity offsets scheme and the requirement for a Biodiversity Development Assessment Report (BDAR). Importantly, this BDAR would be required to demonstrate that the development would avoid and minimise all biodiversity impacts and would not represent a Serious and Irreversible Impact (SAII) on biodiversity.

It should be noted that, given that the application of the threatened species test of significance is somewhat vague, and the impacts posed by the proposal (largely related to artificial noise/light and human disturbance) are not well defined in the applicable legislation and policies, there is some uncertainty whether a significant impact on biodiversity (as defined by s7.3) could be established under the scrutiny and legal gymnastics of planning bureaucrats and consultants that have an interest in the application being approved.

State Environmental Planning Policy (Resilience and Hazards) 2021 (R&H SEPP) - Chapter 2 Coastal management

The site contains coastal wetlands and littoral rainforests mapped under the R&H SEPP. The proposed APZs overlap with vegetation representative of littoral rainforest. However, these areas are not mapped under the R&H SEPP, which only maps littoral rainforest further east of the proposed development area. Most of the proposed development footprint is within the proximity area for littoral rainforest, the proximity area for coastal wetlands, the Coastal Environment Area and the Coastal Use Area.

Section 2.8 of the R&H SEPP requires that development consent must not be granted on land identified as 'proximity area for coastal wetlands' or 'proximity area for littoral rainforest' unless the consent authority is satisfied that the proposed development will not significantly impact on:

- the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or
- the quality and quantity of surface water flows to and from the adjacent coastal wetland or littoral rainforest.

The original biodiversity assessment report (*Biodiversity Assessment – Linnaeus Property – Eco Tourism Mixed Use Proposal*, UPR 3080-1086, GeoLINK, 01/02/2021) provided the following commentary to address Section 2.8 of the R&H SEPP:

While the Proposal will not affect adjacent coastal wetlands or littoral rainforest, it occurs within the proximity area to both communities. The Proposal is unlikely to affect the biophysical, hydrological or ecological integrity of adjacent coastal wetlands due to the restricted project footprint which does not affect significant wetland vegetation. The Proposal would be unlikely to alter surface water or ground water flows which would negatively affect adjacent coastal wetlands or littoral rainforest. On this basis, the Policy does not require further consideration.

It did not address Sections 2.10 or 2.11 of the R&H SEPP, which specify the requirements for development within the Coastal Environment Area and the Coastal Use Area.

The updated ecological assessment report (*Environmental Assessment: Development Application 10.2021.170.1, 951 Broken Head Road, Broken Head* prepared by Peter Parker Environmental Consultants Pty Ltd, 18 October 2021) provided the following commentary regarding the R&H SEPP:

The Coastal Management SEPP was replaced with the State Environmental Planning Policy (Resilience and Hazards) 2021 Policy. No part of the proposed development is mapped under this Policy (Fig. 6).

This is incorrect – as stated above, the proposed development area is within several of the coastal management areas mapped under the R&H SEPP.

The proposed development is likely to introduce (and/or increase already existing) impacts to the biophysical, hydrological or ecological integrity of the mapped littoral rainforest. These include reducing plant dispersal ability due to increasing the hostility of adjacent areas to seed dispersers, increasing the risk of weed introduction and dispersal to the site, and increasing pollutant runoff into littoral rainforest

areas. Notwithstanding, to the present author's knowledge, the meaning of 'significantly impact' for the purposes of the R&H SEPP is not clearly defined anywhere.

In relation to the Coastal Environment Area, pursuant to Section 2.10(1) of the R&H SEPP, the proposed development is likely to cause adverse impacts on:

- the integrity and resilience of the biophysical and hydrological environment (s2.10[1][a]),
- native vegetation and fauna and their habitats (s2.10[1][d]), and
- Aboriginal cultural heritage, practices and places (s2.10[1][f], see preliminary note at the start of Section 4 of this report).

Under s2.10(2) of the R&H SEPP, development consent must not be granted to development that does not reasonably avoid these adverse impacts.

In relation to the Coastal Use Area, pursuant to Section 2.11(1) of the R&H SEPP, the proposed development is likely to cause an adverse impact on:

- Aboriginal cultural heritage, practices and places (s2.11[1][a][iv], see preliminary note at the start of Section 4 of this report).

As with s7.3 of the BC Act, due to the somewhat indirect impacts of the proposal on coastal values (with the exception of Aboriginal cultural heritage which has been explicitly stated), there is some minor uncertainty whether significant/adverse impacts under Chapter 2 of the R&H SEPP could be established under the scrutiny of planning bureaucrats.

Byron Coast Comprehensive Koala Plan of Management (CKPoM)

As explained previously, the application addressed the *State Environmental Planning Policy (Koala Habitat Protection) 2020* (Koala SEPP 2020). However, shortly after the application was lodged the Koala SEPP 2021 commenced which approved the Byron Coast Comprehensive Koala Plan of Management (CKPoM).

The CKPoM applies to the proposal for the following reasons:

- The site has an area of greater than 1 ha
- The site is within the Koala Planning Area as defined in the CKPoM

Therefore, the application must address the CKPoM rather than the Koala SEPP 2020. The Peter Parker Environmental Consultants Pty Ltd report did not address the CKPoM.

Notwithstanding, as explained above it is considered that a Koala Habitat Assessment Report is not required because the land does not contain *potential koala habitat* – no part of the site contains areas of forest and/or woodland wherein primary or secondary food tree species (as defined in the CKPoM) form >15% of the overstorey tree species.

Byron Shire DCP 2014 Chapter B1 Biodiversity

Pursuant to Section B1.2.1, development must be designed such that it retains any listed ecologically significant areas on-site and incorporates ecological setbacks to these areas at the distances listed in Table 3. The revised proposal would impact listed ecologically significant areas and include several encroachments into the required ecological setbacks to these areas:

Ecologically significant area/feature	Setback required	Non-compliance
Threatened ecological communities	30m	Buildings and APZs for CB.02, CB.04, CB.6, B.1-B.7 are within the ecological setback area. APZs overlap with littoral rainforest in the south.
Threatened flora species habitat	10m	APZ for pool/tennis court/WC facilities overlaps with <i>R. psidioides</i> individuals. Additional individuals are immediately adjacent to the outer edge of the APZ.

First and second order streams	10m (first order), 20m (second order)	CB.02 immediately adjacent to an existing waterway. Three proposed crossings overlap with waterways.
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The updated ecological assessment report provided with the amended proposal documents (*Environmental Assessment: Development Application 10.2021.170.1, 951 Broken Head Road, Broken Head*, Peter Parker Environmental Consultants Pty Ltd, 18 October 2021) did not address the numerous encroachments within the ecological setback areas, nor did it include any information regarding the biodiversity impacts of the proposed APZs. The Appendix at the back of the report deemed these ecological setbacks to be “NA”. The ecological setbacks are not “NA”, they are a Prescriptive Measure for the application, as they are for any application on land subject to the Byron LEP 2014 and DCP 2014.

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.

Byron Shire DCP 2014 Chapter D3 Tourist Accommodation

Chapter D3 specifies controls that apply to development applications for tourist accommodation (including eco-tourism) in zones RU1, RU2, RU5, R2, R3, R5, B1, B2, B4, SP3 and RE1. The proposed development area is within zone SP1, so technically the Chapter does not apply. However, it is considered that the Chapter sets out Council’s expectations for eco-tourism development, and as such should form part of Council’s assessment framework for the application.

Section D3.3.5 specifies the controls that apply to eco-tourist facilities. These include the requirement for an ecological restoration component comprising 900 local native trees per cabin or eco-tourist facility. For the present proposal this equates to 10,800 local native tree plantings or equivalent assisted natural regeneration area.

The biodiversity assessment report accompanying the original proposal (*Biodiversity Assessment – Linnaeus Property – Eco Tourism Mixed Use Proposal*, UPR 3080-1086, GeoLINK, 01/02/2021) included proposed compensatory plantings totalling 1,670 native littoral rainforest trees to be planted on the site (Fig 7). This falls short of the 10,800 tree planting effort required by Chapter D3. Furthermore, as raised in earlier comments, planting of littoral rainforest species in the proposed area of grassland/wetland may result in habitat loss for the eastern grass owl *Tyto longimembris* and common planigale *Planigale maculata*. If any ecological restoration were to be carried out on the site, it should be informed by the aforementioned targeted fauna survey effort, focusing on areas that presently have low habitat value for native flora and fauna. It is noted that there are many drainage lines on the site that may benefit from riparian restoration (though not necessarily with tree species).

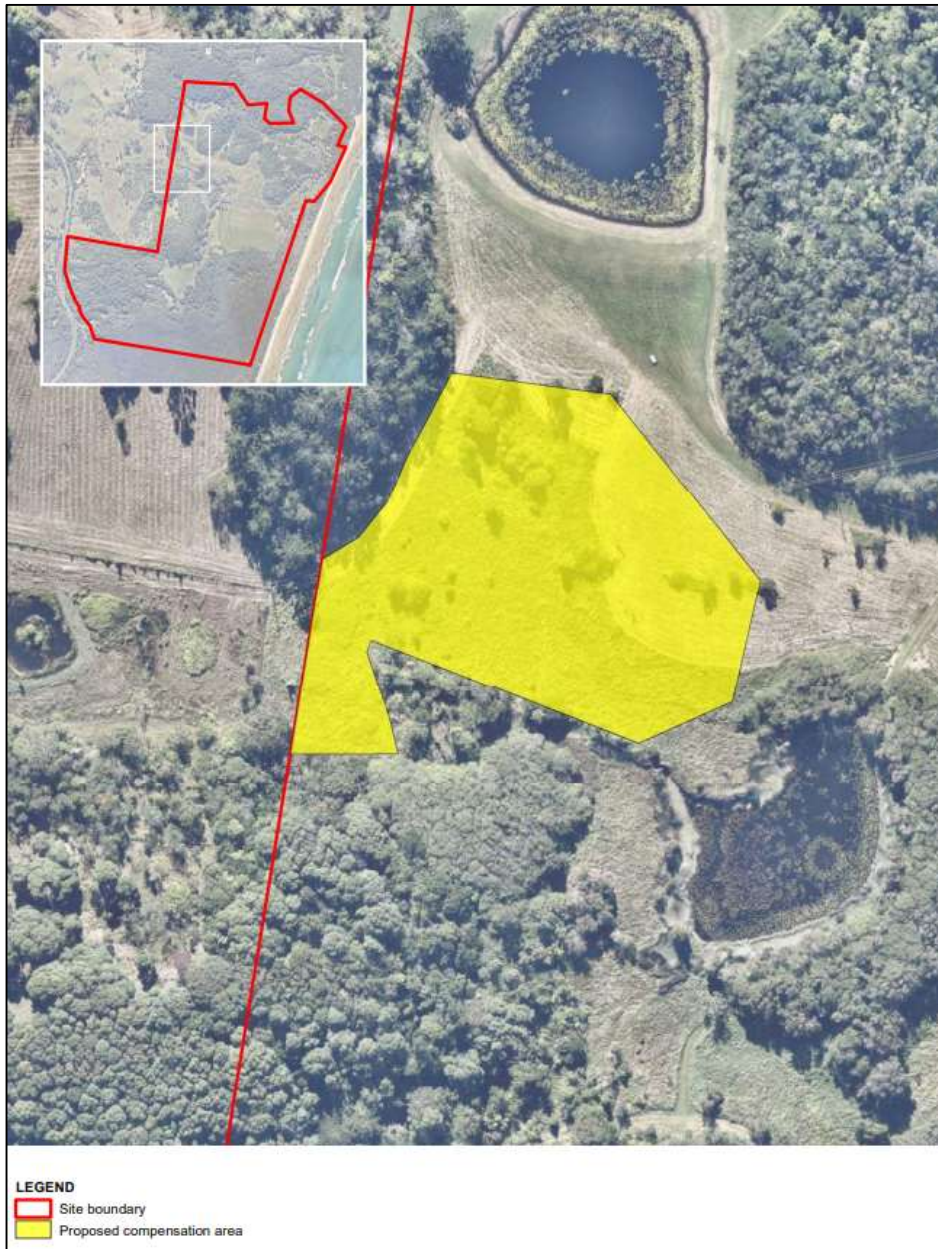


Fig 7 Proposed compensation area.

06/10/2022 – Further revised proposal

Once again, the proposal was amended. The latest amendment made some minor changes to the plans by removing one of the two pedestrian waterway crossings and the vehicle crossing and relocating the bins store to the centre building area. Some additional items of information were also provided, and these are discussed below.

Letter from Peter Parker Environmental Consultants regarding artificial noise and light impacts on biodiversity

The letter received from Peter Parker Environmental Planning Consultants dated 30th September 2022 was written to address concerns relating to the impacts of noise and light pollution on biodiversity.

Regarding artificial light impacts, the letter summarised the six Principles of Best Practice Lighting Design as described in the National Light Pollution Guidelines for Wildlife (DAWE 2020), and essentially stated that the proposed development will follow these principles where possible. No specifics were provided regarding the location of proposed lighting, the amount of light spill to the surrounding area, the wavelength range of the proposed lighting, or how these factors relate to impacts on wildlife.

Regarding artificial noise impacts, the letter summarised parts of the noise impact assessment previously submitted for the proposal and listed generalised measures to minimise the amount of noise produced by the proposed development (e.g., patrons encouraged to be quiet, amplified music restricted in the pool area). No specifics were provided regarding the noise impacts of the proposed development on wildlife, or how these are proposed to be mitigated (e.g., by using noise-attenuating walls, restricting hours of operation, etc.).

Conservation Agreement

The letter received from Planners North dated 27th September 2022 explained that some 50.4ha of the site has been protected under a Conservation Agreement (CA) registered with the NSW Biodiversity Conservation Trust. A search of the public register confirmed this CA exists (Agreement CA0319) as of 23rd March 2022. No further detail was provided to illustrate which parts of the site the CA applies to. Importantly, CAs do not carry any requirement for active conservation management, only providing protection from additional impacts. Therefore, the CA does not contribute towards the ecological restoration requirements set out in the DCP and previously raised.

Ecological restoration

The letter received from Planners North dated 27th September 2022 explained that a 3,360m² area of land to the north of the proposed cabins has been marked out for revegetation. This area has also been shown on the amended plans (see Fig 8 below). No actual restoration plan (VMP or BCMP) was provided detailing these proposed works, nor were any calculations provided demonstrating how the works would meet the required effort of 10,800 tree planting or equivalent assisted natural regeneration. The issues raised in all previous comments regarding planting of littoral rainforest species in the areas of grassland/wetland potentially resulting in habitat loss were not addressed. Again, if any ecological restoration were to be carried out on the site, it should be informed by the aforementioned targeted fauna survey effort, focusing on areas that presently have low habitat value for native flora and fauna.

Amended plans

The amended plans, as with all previous plans, are not supported. The removal of one of the two pedestrian waterway crossings and the vehicle crossing (see Fig 8) is welcomed, but in relation to biodiversity impacts the proposal was not meaningfully changed. The issues raised in previous comments, including non-compliances with statutory requirements, have not been resolved.

Again, given the conservation importance of the subject site and the broader Broken Head area, it is considered that any further development in the locality will result in impacts on biodiversity that cannot be supported. The subject site is already highly developed in comparison to the surrounding landscape, exceeding what is appropriate given the biodiversity values of the locality. If the impacts of the existing development and the additional proposed development are taken together, the cumulative total represents a drastic escalation of development impacts to the Broken Head area.

See the following section for conclusions and recommendation.

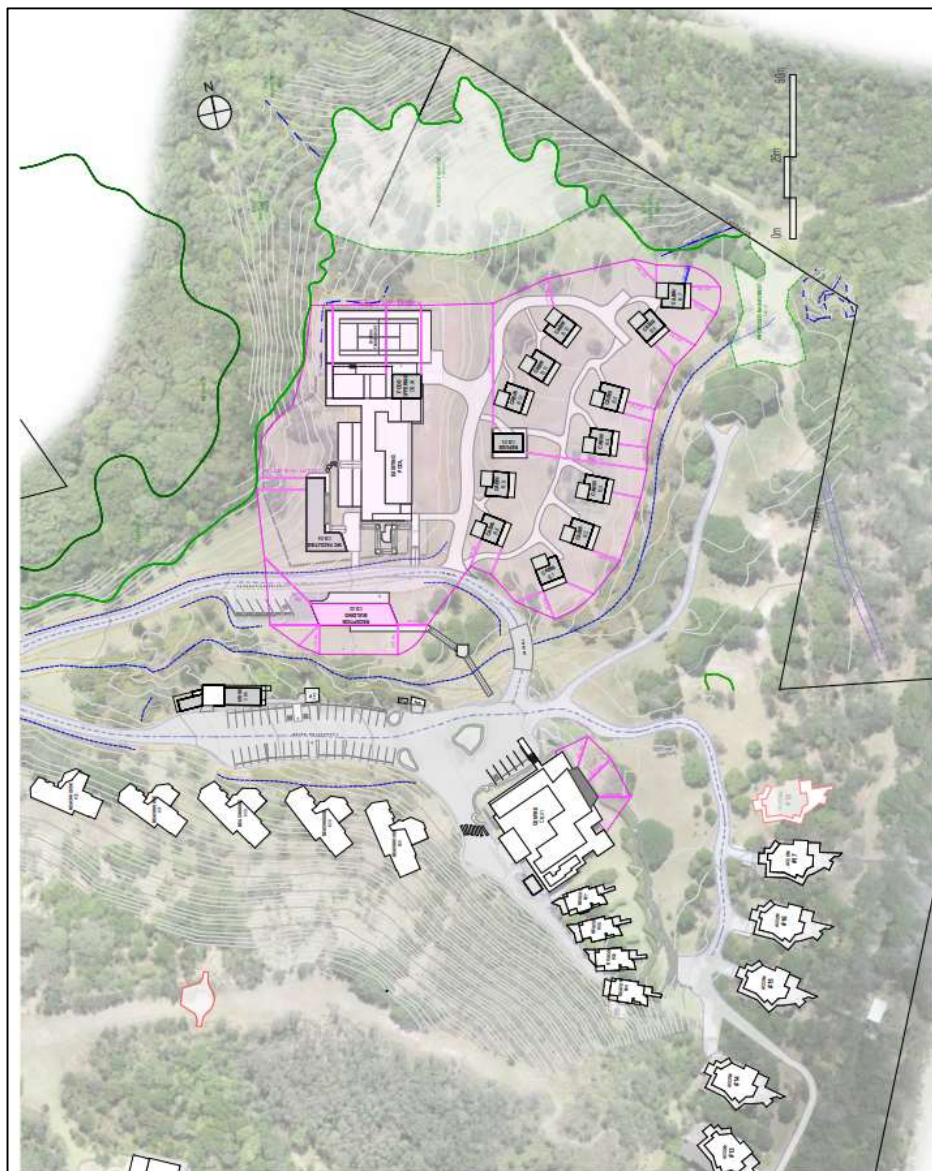


Fig 8 Proposed amended site plan with APZs (shown in pink).

5. Conclusion

It is considered that the development cannot be supported for the following reasons:

1. Pursuant to s7.7(2) of the *Biodiversity Conservation Act 2016* (BC Act), based on the information provided, it is not possible to conclude that the proposed development does not represent a significant impact on biodiversity*. Hence, it is assumed that a significant impact is likely, and therefore the application should have been accompanied by a biodiversity development assessment report (BDAR). If a BDAR had accompanied the application, it is uncertain whether it could have demonstrated that reasonable measures were undertaken to avoid and minimise biodiversity impacts in accordance with s6.12 of the BC Act.
2. The proposed development does not comply with Section 2.10 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* as it is likely to cause adverse impacts on:
 - the integrity and resilience of the biophysical and hydrological environment[#]
 - native vegetation and fauna and their habitats[#]
 - Aboriginal cultural heritage, practices and places
3. The proposed development does not comply with Section 2.11 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* as it is likely to cause adverse impacts on:
 - Aboriginal cultural heritage, practices and places
4. The proposed development does not comply with the requirements of Chapter B1 of the Byron Shire DCP 2014.

**it is noted that there is some uncertainty whether a significant impact on biodiversity (as defined by s7.3) could be established under legal scrutiny.*

#it is noted that there is some uncertainty regarding the interpretation of 'adverse impact' in the context of these coastal values.

Additional note: It is understood that Nyangbul representatives have identified the proposed development area as an important ceremonial, dreaming and massacre site and have strongly objected to the proposal. For this reason alone, the proposal is fundamentally not supported. Decisionmakers should be aware that approving the application would be acting directly and harmfully against the interests of the local traditional owners.

RECOMMENDATION:

☐ Additional Information Required ☐ Supported ☒ Not Supported

The development as proposed cannot be supported for the reasons stated above.

IGNORE THE FOLLOWING SECTION

6. ~~Conditions~~

~~The following conditions are to be complied with prior to issue of a Construction Certificate~~

~~1. Biodiversity Conservation Management Plan/Vegetation Management Plan~~

~~A Biodiversity Conservation Management Plan/Vegetation Management Plan must be prepared in accordance with the attached Guidelines for preparing a Vegetation Management Plan (VMP) or Biodiversity Conservation Management Plan (BCMP) and the plan submitted to and approved by Council. Such plan must detail protection and compensation measures proposed to protect native flora and fauna and their habitats and must retain and improve habitat on that part of the site covered by the Management Plan.~~

~~The plan must~~

- ~~a. illustrate on maps of a suitable scale (1:200 or better) the accurate extent of approved asset protection zones on the subject site.~~
- ~~b. indicate the location of compensatory plantings in plan and word form at the compensation ratio defined by the Byron Biodiversity Conservation Strategy and/or Byron Development Control Plan 2014 Chapter B2.~~
- ~~c. detail the methodology for habitat restoration and specify the use of qualified and experienced bush regenerators only. Areas outside the approved development footprint and APZs must be restored or replanted.~~
- ~~d. specify that planting and/or restoration works will commence immediately upon approval of the Management Plan.~~

~~Optional—use next points only where relevant to the site~~

- ~~e. include lists of locally occurring native tree, shrub and ground cover plant species suitable for planting as part of the ecological restoration program and site landscaping.~~
- ~~f. Include a list of environmental weeds, comprising introduced plant species known to have the capacity to invade native vegetation communities to prevent their introduction to the site. This list must be reproduced in separate form to inform individual community members when establishing plantings about future dwellings and detailing the threats posed by environmental weeds to local vegetation communities.~~
- ~~g. contain details of the designs and locations of the nest/den/roost boxes proposed to be provided for hollow dependent birds, small scansorial and arboreal mammals and micro-chiropteran bats in the restoration areas, together with details of the monitoring and reporting to Council of their use.~~
- ~~h. include details of strategies to be used to restrict breeding opportunities for the introduced Cane Toad Bufo marinus, such as the planting of dense sedges to widths of up to 5 m along watercourses.~~
- ~~i. Provide and implement strategies to decrease the likelihood of bird strike against windows of buildings including monitoring of effectiveness.~~

~~2. Vegetation Management Plan to be incorporated into the Community/Neighbourhood Management Statement~~

~~Use this one for Rural Landsharing/ Community Title developments only~~

~~Prior to the issue of a Construction Certificate, a detailed Vegetation Management Plan (VMP) must be prepared by a suitably qualified and experienced ecologist in conjunction with a suitably qualified and experienced bush regenerator for ecological restoration and management of the native vegetation in the site.~~

~~The VMP must be incorporated into the Community Management Statement (CMS) and be integrated with any Bushfire Management Plan, Landscape Standards and Environmental Habitat Areas also included in the CMS.~~

~~The VMP is to include all proposals and recommendations for ecological restoration and maintenance contained in the following reports provided in support of the DA unless varied by this consent:~~

- ~~• List report names, author, date~~

~~The BCMP/VMP must not be assessed for the purpose of compliance or deemed acceptable by any person other than an officer or representative of Byron Shire Council or an AABR-accredited Bush Regenerator (Australian Association of Bush Regenerators), see~~

~~<http://www.aabr.org.au/do/business-directory/wpbdm-category/aabr-accredited-bush-regenerators/>~~

3. No Tree Removal prior to CC

~~No native trees or vegetation may be cleared or removed until a Construction Certificate has been issued.~~

4. Trees to be retained and protected

~~Trees to be retained are to be protected by a Tree Protection Zone (TPZ) exclusion fence. The fence is to be constructed in accordance with Sections 3.2 and 4.3 of AS4970-2009 Protection of trees on development sites (Standards Australia 2009). The fence must:~~

- ~~a) Be located outside the dripline of the tree so as to minimise disturbance to tree roots;~~
- ~~b) have a minimum height of 1.8 metres;~~
- ~~c) be constructed of wire mesh panels, plywood, steel star pickets or similar, with a maximum distance of 2 metres between star pickets;~~
- ~~d) have a minimum of 3 strands of steel wire or similar;~~
- ~~e) have high visibility barrier mesh (eg orange), shade cloth or similar, attached to the outside of the fence and continuing around its perimeter;~~
- ~~f) include at least one Tree Protection Zone (TPZ) sign in accordance with Section 4.4 of AS4970-2009.~~

~~Activities that are excluded within the TPZ (as per section 4.2 of AS4970-2009) include excavation, construction activity, grade changes, surface treatment and storage of material. If these activities are required within the TPZ they may only occur under the supervision of the project arborist (minimum AQF level 5 qualified arborist).~~

~~The Tree Protection Zone (TPZ) exclusion fence is to be maintained for the duration of the site clearing, preparation, construction and landscaping works.~~

5. Retained Trees

~~All trees to be retained in accordance with this development consent must be illustrated on any and all relevant Construction Plans, along with their Tree Protection Zones formulated in accordance with AS 4970-2009 — Protection of Trees on Development Sites.~~

6. Retained Trees and Offset area

~~All trees and vegetation communities to be retained in accordance with this development consent must be illustrated on any and all relevant Construction Plans, along with their Tree Protection Zones for any trees retained in proximity to approved works or structures. The proposed compensation area must be generally in accordance with the marked-up submitted plan entitled *name of plan with Lot & DP and address with author and date* and must be illustrated on any and all relevant Construction Plans.~~

7. Care to be taken when placing services near trees

~~To minimise root disturbance where services are to be laid in close proximity to trees, any excavation within the Tree Protection Zone (TPZ) for installation of underground services is to be done by directional drilling or in manually excavated trenches in accordance with Section 4.5.5 of AS4970-2009. Works must be conducted under the supervision of the project arborist (minimum AQF level 5 qualified arborist), and may include the use of pneumatic or hydraulic tools such as air knives.~~

8.—Landscaping

~~All landscaping on any part of the site must accord with the requirement to plant only appropriate local native species as marked on the stamped plans.~~

9.—Detailed landscaping plan required

~~Prior to the issue of a Construction Certificate for each Stage, a detailed landscaping plan must be submitted and approved by Council's Ecologist. The detailed plan must include all landscaping within the site. The landscaping plan must incorporate adequate detail to demonstrate compliance with the provisions of Chapter B9 of Development Control Plan 2014. The plan must not include species that represent translocation of native plants outside their geographic range, potential or known environmental weeds or species with potential for genetic pollution. The landscaping plan must indicate:~~

- ~~a) proposed location for planted shrubs and trees~~
- ~~b) botanical name of shrubs and trees to be planted~~
- ~~c) mature height of trees to be planted~~
- ~~d) location of grassed and paved areas, and~~
- ~~e) location of trees identified for retention in the development application plans and any required Tree Protection Zones measured in accordance with AS 4970-2009—Protection of Trees on Development Sites.~~

~~The plan is to be prepared by a suitably qualified landscape architect / ecologist who has appropriate experience and competence in landscaping. Following approval by Council's Ecologist, such plans and specifications must be approved as part of the Construction Certificate.~~

10. Water Management Act 2000

~~If a controlled activity approval under the Water Management Act 2000 is required to be obtained for the proposed works within and adjacent to existing watercourses it must be obtained and a copy of the approval submitted to the Principal Certifying Authority prior to issue of the Construction Certificate.~~

11. Fisheries Management Act 1994 (Stages 3A & 3B)

~~If an activity approval under the Fisheries Management Act 1994 is required to be obtained for the proposed works within and adjacent to existing watercourses it must be obtained and a copy of the approval must be submitted to the Principal Certifying Authority prior to issue of the Construction Certificate.~~

~~The following conditions are to be complied with prior to any building or construction works commencing~~

12. Compensatory planting and/or Primary ecological restoration work

~~Compensatory planting and/or primary ecological restoration work as defined within the approved Biodiversity Conservation Management Plan or Vegetation Management Plan must be completed prior to any native tree removal on the site.~~

~~The following conditions are to be complied with during construction:~~

13. Protection of Native Trees

~~All trees nominated to be retained by notation or condition as a requirement of the development consent shall be maintained and protected during demolition, excavation and construction on the site in accordance with AS 4970-2009—Protection of Trees on Development Sites.~~

14. Protection of koalas/ native fauna from disturbance

- ~~a) Clearing of native vegetation and/or earthworks as part of any development approval from Council must be temporarily suspended within a range of 25m from any tree which is concurrently occupied by a koala and must not resume until the koala has moved from the tree~~

of its own volition.

- ~~b) Any clearing of land must not commence until the area proposed for clearing has been inspected for the presence of koalas and approval given in writing by a suitably qualified individual.~~
- ~~c) Approval to proceed with the clearing of vegetation in accordance with this section is only valid for the day on which the inspection has been undertaken.~~
- ~~d) The individual referred to in (ii) above, or a nominated representative, must remain on site during any approved clearing of vegetation.~~

The following conditions are to be complied with at all times

15. No Tree Removal

~~This development consent does not authorise any native tree to be ringbarked, cut down, lopped, removed or damaged, or caused to be ringbarked, cut down, lopped, removed or damaged in contravention of Byron Development Control Plan 2014 and Development Control Plan 2010 as applicable to the land.~~

16. Limited Tree Removal

~~Removal of existing native trees from the site is limited to those expressly permitted by this development consent as marked on stamped plans (or as defined within the plan entitled....by....dated...). All other trees and native plants within the site are to be retained and protected.~~

17. Protection of Native Trees

~~All trees nominated to be retained by notation or condition as a requirement of the development consent shall be maintained and protected during demolition, excavation and construction on the site in accordance with AS 4970-2009 – Protection of Trees on Development Sites.~~

18. Protection of native fauna from disturbance

- ~~a) Any clearing of native vegetation and/or earthworks must not commence until the area proposed for clearing has been inspected for the presence of all fauna species using the site by a suitably qualified and experienced individual;~~
- ~~b) Should fauna be present at the time of proposed clearing, relevant fauna spotter/catcher protocols must be followed to prevent injury to wildlife;~~
- ~~c) Any injured wildlife must be taken to a local wildlife vet for treatment.~~
- ~~d) Approval to proceed with the clearing of vegetation in accordance with this section is only valid for the day on which the inspection has been undertaken.~~
- ~~e) The individual referred to in (ii) above, or a nominated representative, must remain on site during any approved clearing of vegetation.~~

19. Replanting and restoration works

~~Replanting and restoration works must be undertaken and continued until the performance criteria have been achieved in accordance with the approved Biodiversity Conservation Management Plan/ Vegetation Management Plan/Environmental Enhancement Plan for a minimum period of five years, during which annual monitoring reports must be submitted to Council for approval.~~

20. Retention of native vegetation within 10/50 Vegetation Clearing Entitlement Area

~~All native vegetation that the 10/50 Vegetation Clearing Code of Practice would otherwise authorize to be removed, destroyed or pruned must be retained for conservation purposes.~~

21. Native vegetation is not permitted to be cleared under Schedule 5A and/or Division 5 of the Local Land Services Act 2013

~~Clearing of native vegetation that would be authorised under Schedule 5A and Division 5 of the Local Land Services Act 2013 (LLS Act) is not permitted to be carried out without development~~

consent under part 4 of the *Environmental Planning and Assessment Act 1979*.

In accordance with the Objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act), Section 1.3(e) of that Act the purpose of this condition is “to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats”.

Section 60Q(2) of the LLS Act provides that “Schedule 5A does not permit clearing or any other activity—

- a. without an approval or other authority required by or under another Act or another Part of this Act (or in anticipation of the grant of any such approval or other authority), or
- b. in contravention of any provision of or made under (or in contravention of any agreement made under) another Act or another Part of this Act.”

Similarly, Section 60S(4) of the LLS Act provides that “A land management (native vegetation) code does not permit clearing or any other activity—

- a. Without an approval or other authority required by or under another Act or another Part of this Act, or
- b. In contravention of any provision of or made under another Act or another Part of this Act”

As this condition is imposed under section 4.17 of the EP&A Act, sections 60Q and 60S of the LLS Act apply and the clearing of native vegetation under Schedule 5A and Division 5 of the LLS Act is not permitted.

22. Window screening

To minimize the risk of bird strikes, measures to prevent the reflection of sky and adjacent vegetation on windows must be retained in perpetuity.

The following conditions are to be complied with prior to the issue of a subdivision / occupation certificate:

23. Habitat Compensation works to be completed

Plantings and/or restoration works required as compensation for loss of native trees and koala habitat are to be completed in accordance with the approved Vegetation Management Plan/ Biodiversity Conservation Management Plan/ Environmental Enhancement Management Plan prior to issue of the occupation certificate/ subdivision certificate (delete the non-applicable one) for the development. The site must be assessed to determine satisfaction of performance criteria by Council. Alternatively, Independent sign-off may be undertaken by (Australian Association of Bush Regenerators) AABR accredited Bush Regenerators, see <http://www.aabr.org.au/do/business-directory/wpbdm-category/aabr-accredited-bush-regenerators/>. In all cases a final monitoring report must accompany any application for satisfaction of this condition.

24. Completion of Vegetation Management Plan works

Prior to the issue of a *Subdivision/Occupation Certificate*, a report from a qualified and experienced ecologist and/or Bush Regenerator to demonstrate that all works required by the approved Vegetation Management Plan (VMP) for the site have been completed and that all performance criteria have been met, must be submitted and approved by Council and any private certifier. In this regard the VMP is named *insert Lot & DP and address: Vegetation Management Plan insert author and date of plan*.

25. Landscaping works to be completed

Landscaping is to be implemented in accordance with the revised and approved Landscape Plan prior to issue of the *occupation certificate/subdivision certificate* (delete the non-applicable one) for the development. A site meeting must be arranged with Council to determine satisfaction of this condition or alternatively a report must be provided from a qualified and experienced Landscape Architect / Ecologist /AABR accredited Bush Regenerator (delete the non-applicable ones).

26. Restriction on the keeping of cats and dogs

The creation of a restriction as to use that prohibits the keeping of cats and dogs on the land other than “assistance animals” as defined by the Companion Animals Act 1998. Evidence is to be provided that a restriction via a Section 88E instrument is in place prior to issue of the occupation certificate.

27. Section 88B Instrument

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

1) — Easement of conservation

A restriction applying to the area as shown in red on the approved ‘*Plan name/number/date author*. The restriction on user must prohibit, except as otherwise permissible by law, all of the following within the area covered by the restriction on user:

- a) — the destruction or removal of any local indigenous trees, shrubs, grasses or other vegetation, or the planting of any flora other than local indigenous flora;
- b) — any act or omission which may adversely affect any local indigenous flora or any indigenous fauna or their related habitats;
- c) — any act or omission which may result in the deterioration in the natural state or in the flow, supply, quantity or quantity of any body of water or in the natural moisture regime of the area;
- d) — the creation or maintenance of any tracks through the area;
- e) — the removal, introduction or disturbance of any soil, rock or other minerals;
- f) — any structures or dwellings;
- g) — No deposition or accumulation of rubbish or refuse, including garden refuse and weed propagules, nor the use of any of the area for storage of any substance or material.

The s88B Instrument must contain a provision identifying Byron Shire Council as the only person or authority having the power to revoke, vary or modify the restriction on user.