

enquiries refer
Naomi McCarthy
in reply please quote
143-09/ DA 2018/321



3 September 2020

Ms Gina Davis
Senior Planner, Northern Region
Department of Planning, Industry and Environment
Tamworth Regional Office NSW 2340
gina.davis@planning.nsw.gov.au

Dear Gina,

**Re: Application for Site Compatibility Certificate – SEPP Housing for Seniors or People with a Disability) 2004
Lot 11 DP 1245510, 120 North Creek Road, Ballina**

I refer to your email received by Council on 15 July 2020 advising Council that the Department has received an application for a Site Compatibility Certificate for Lot 11 DP 1245510, 120 North Creek Road, Ballina under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP).

Please find attached Council's comments in relation to the application and proposal, as required under clause 25 of the Seniors Housing SEPP.

If you have any enquiries in regard to this matter please contact Naomi McCarthy of Council's Planning and Environmental Health Division on 6686 1254

Yours faithfully

Naomi McCarthy
Senior Town Planner
Planning and Environmental Health Division

Comments on Site Compatibility Certificate Application – 120 North Creek Road, Ballina – Palm Lake Works Pty Ltd

Criteria within Clause 25 (5) (b) of *SEPP (Housing for Seniors or People with a Disability) 2004*

- (i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,
- (ii) the impact that the proposed development is likely to have on the uses that, in the opinion of the relevant panel, are likely to be the future uses of that land,
- (iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,
- (iv) in the case of applications in relation to land that is zoned open space or special uses—the impact that the proposed development is likely to have on the provision of land for open space and special uses in the vicinity of the development,
- (v) without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,
- (vi) if the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the [Native Vegetation Act 2003](#)—the impact that the proposed development is likely to have on the conservation and management of native vegetation,
- (vii) the impacts identified in any cumulative impact study provided in connection with the application for the certificate,

In responding to the above matters within Clause 25 (5) (b) of the Seniors Housing SEPP, the following submission is made by the Council in relation to the current SCC application and development proposal contained therein.

It must be noted that the proposal shown in the SCC application is the same as that which was subject to proceedings in the Land and Environment Court as part of DA 2018/321, as instigated by the applicant.

It is also noted that the SCC application area as shown in the plans lodged with the application is identical to that granted by the Department on 12 October 2017.

Background (DA 2018/321 and Court Proceedings)

By way of background, DA 2018/321 was submitted to Council in June 2018 for the staged erection of an extension to the existing Seniors Housing Development (Palm Lake Resort) under SEPP (Housing for Seniors or People with a Disability) 2004 comprising of 156 self-care dwellings, recreation facilities and associated car parking, infrastructure works, site filling and associated works. The application was to be determined by the Northern Regional Planning Panel, as the CIV for the development exceeded the \$30 Million threshold.

After extensive requests for additional information, the applicant lodged a Class 1 Appeal in the Land and Environment Court against the deemed refusal of DA 2018/321, in late October 2018. Council was listed as the Respondent in the matter and responded to the Appeal in

accordance with the requirements of the Land and Environment Court. The proposal was amended seven times during this appeal period, with the final amendment made in September 2019. The hearing for the appeal was held in July and August 2019.

On 4 October 2019, Commissioner Dickson handed down her judgement in relation to the application, resolving that the appeal be upheld and that DA 2018/321, for the staged erection of 75 serviced self-care dwellings, car parking, road construction (including an access way off North Creek Road), earthworks, site filling, stormwater management, infrastructure works, vegetation removal, environmental protection works and other associated works under SEPP (Housing for Seniors or People with a Disability) 2004, at 120 North Creek Road (Lot 11 DP 1245510), be approved, as a deferred commencement consent, subject to conditions.

It must be noted that the plans referenced in the consent orders and conditions are those which form part of the SCC Application that was lodged in June 2020 and which is currently before the Department.

Council lodged an appeal in relation to the Commissioner's decision, under Section 56A of the Land and Environment Court Act 1979 in late October 2019. The appeal was based on six grounds:

1. The Commissioner failed to consider the likely impacts of construction of road, civil and infrastructure works in the North Creek Road reserve, as required by s 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 ("EPA Act") ("the likely impacts ground").
2. The Commissioner erred in forming an opinion of satisfaction under cl 28(1) of State Environmental Planning Policy (Housing for Seniors or People with Disability) 2004 ("Seniors SEPP") in the absence of written evidence that the development will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage ("the provision of water and sewage services ground").
3. The Commissioner erred in characterising the access way from North Creek Road to the proposed development across land zoned RU2 Rural Landscape as being for the purpose of "road" (which is permissible with consent in the RU2 Zone) instead of serviced, self-care housing (seniors housing) (which is prohibited in the RU2 Zone) ("the characterisation of the access way ground").
4. The Commissioner failed to consider whether the development, because of its nature and location, may have an adverse effect on a priority oyster aquaculture area, as required by cl 15B of State Environmental Planning Policy 62 – Sustainable Aquaculture ("Sustainable Aquaculture SEPP") ("the impact on aquaculture ground").
5. The Commissioner erred in finding that the precondition in cl 7.1(3) of Ballina Local Environment Plan 2012 ("Ballina LEP") had been met in the absence of an Acid Sulfate Soils Management Plan that included all of the proposed works, including works to the Western Creek line ("the Acid Sulfate Soils Management Plan ground").
6. The Commissioner erred in finding that State Environmental Planning Policy (Coastal Management) 2018 ("Coastal Management SEPP") did not apply, and instead that State Environmental Planning Policy 14 – Coastal Wetlands ("SEPP 14") did apply, when the opposite was the case, and further failed to form the required opinion of satisfaction that the proposed development would not significantly impact on the matters in cl 11(1) of the Coastal Management SEPP ("the Coastal Management SEPP ground").

Council submitted that the errors of the Commissioner on questions of law were material and vitiated the Commissioner's decision to grant consent.

The case was heard by Chief Judge Preston on 17 April 2020, with a decision handed down on 29 April 2020. Chief Judge Preston found that Council established five of the grounds of error on questions of law (the likely impacts ground, the provision of water and sewage services ground, the impact on aquaculture ground, the Acid Sulfate Soils Management Plan ground and the Coastal Management SEPP ground). Chief Judge Preston ordered that Council's appeal be upheld, the decision and orders of Commissioner Dickson dated 4 October 2019 be set aside and the proceedings be remitted to Commissioner Dickson for determination according to Chief Judge Preston's reasons for judgment.

Notwithstanding the decision of Chief Judge Preston, the applicant (Palm Lake Works) sought orders for delay in the proceedings on several occasions, in order to obtain a fresh Site Compatibility Certificate (as the previous certificate expired in October 2019) and also to re-open the case to provide further evidence. After consideration of arguments from Palm Lake Works and Council, Commissioner Dickson ruled in Council's favour and ordered a hearing date of 8 July 2020 to determine the proceedings.

On 30 June 2020, Council received advice from the applicant that it sought to discontinue the whole of the proceedings, rather than proceed to a hearing on 8 July 2020. The proposed discontinuance was accepted by Council staff, and a formal Notice of Discontinuance (as accepted by both parties) was lodged in the Land and Environment Court shortly after.

The summary of the outcome for DA 2018/321 is that the development within that application has not been approved and the discontinuance concluded that application.

The judgements handed down by Commissioner Dickson and Chief Judge Preston can be viewed via the following links:

<https://www.caselaw.nsw.gov.au/decision/5d9578d1e4b0c3247d71236b>

<https://www.caselaw.nsw.gov.au/decision/5ea78eeee4b0f66047ed8da3>

<https://www.caselaw.nsw.gov.au/decision/1727c7b2f327f15eae37d83>

<https://www.caselaw.nsw.gov.au/decision/172e8a18a3fbbc3c9182087c>

Council acknowledges that the applicant has lodged the current SCC application in relation to the subject site prior to the conclusion of the above proceedings. Advice has been provided to Council that regardless of the outcome of DA 2018/321, the applicant seeks to proceed with the current SCC application.

In relation to the previous SCC granted by the Department over the subject site (dated 12 October 2017), the majority of issues listed in Schedule 2 (as had been raised by Council in responses to that application in January and July 2017, as critical issues in any future development of the site and reasons as to why Council could not support the proposal), being:

- drainage, flooding and site filing
- traffic
- bushfire protection
- acid sulfate soil management
- mosquito management; and
- flora, fauna and tree removal (including impact on SEPP 14 wetlands and potential compensation for the loss of former rehabilitation area associated with DA 2004/328)

were all issues raised by Council in the assessment of DA 2018/321 and were also the basis of most of the contentions that Council had with that proposal in the court proceedings. The

This remains Council's position in relation to the current SCC application (as was lodged with the Department in June 2020). The applicant has not sufficiently addressed the concerns and issues raised by Council in the two court proceedings within the SCC application material, such that Council would change its position in relation to any future development of the subject site. It is also noted that Council has expended extensive time and resources, including the engagement of external professional experts in the fields of town planning, bushfire, entomology, arboriculture, ecology, traffic and roads, flooding, geotechnical and hydrology and stormwater, to provide expert evidence to the Land and Environment Court on the appeal for DA 2018/321, and then on the section 56A appeal.

Submitted Plans

[illegible]

Figure 1. Area proposed for residential development

The plan in the SCC application lodged in June 2020 is provided below.

Seniors SEPP is sought is illustrated in the diagram provided at Figure 2. The SCC boundary is outlined in red,



Figure 2 Proposed site compatibility certificate boundary

It would appear appropriate for the applicant to identify a revised SCC Application area, given that the development shown within the proposed application:

- is not to extend into the coastal wetland;
- extends further south to connect to North Creek Road; and
- extends further west into the western creekline (with civil works proposed in that area) with a connecting roadway/bridge over the creekline into the existing Palm Lake Resort.

The SCC Application area should, at least, be defined by the outer extremity of all works to be undertaken, which includes roads, earthworks, Asset Protection Zones, infrastructure servicing and area of vegetation removal. If this is not undertaken and the SCC Application is granted approval, then questions will arise as part of the assessment of any future development application as to the consistency of the proposal with the granted SCC area and permissibility issues. This was an area of contention raised by Council and its engaged experts as part of the court appeal for DA 2018/321.

It is surmised that the area shown within the current SCC application has been identified to be identical to the previous SCC for the site, in order to expedite the SCC process, as opposed to being relevant to the proposal for which the proponent will seek a future DA for. The area shown within the current SCC application does not consider the Site Analysis for the development, which has been included in Annexure B to their application.

Resolution of issues with DA 2018/321

The premise of much of the applicant's current SCC application is that their application is a formality only, with the previous assessments, reports and plans prepared for DA 2018/321 being largely applicable, given the original findings of Commissioner Dickson in relation to DA 2018/321. However more relevantly, Chief Judge Preston ordered that Council's appeal be upheld, the decision and orders of Commissioner Dickson dated 4 October 2019 be set aside and the proceedings be remitted to Commissioner Dickson for determination. Despite the attempt by the applicant to have the matter re-opened, which Commissioner Dickson did not grant, the applicant chose to discontinue the whole proceedings.

Council continues to contend that a significant range of issues remain with the proposal. Evidence was not provided by the applicant that allowed Council's experts to compromise or reach agreement in relation to the contentions raised by Council as part of the court proceedings. Many of these issues were not able to be appealed through the Section 56A appeal, given they are merit based assessment issues.

The issues that remain with the SCC proposal (the proposal being identical to what was originally determined by the Commissioner on 4 October 2019) are outlined below and are the basis of Council's objection to the issue of a Site Compatibility Certificate for the proposal on the subject site. These issues are not just related to the scale of the proposal, and when considered together, determine that the site is not at all compatible for future intensified urban uses. The below issues are raised with reference to the provisions of Clause 25 (5) (b) (i), (ii), (v) and (vi).

Bushfire Impacts

As has been identified in the SCC application documentation, the subject land is mapped as bushfire prone. In this regard, any future development will be subject to an assessment under the provisions of Planning for Bushfire Protection (PBP) 2019.

It is noted that as part of DA 2018/321 and the appeal proceedings the application was assessed under Planning for Bushfire Protection (PBP) 2006. Additionally, the NSW RFS did not issue General Terms of Approval/Bush Fire Safety Authority and the Commissioner dealt with this in her decision on the proposal.

In addressing compliance with PBP 2019, any future application will need to identify the works to be carried out to the land, in order to provide compliant Asset Protection Zones (APZs) (proposed landscaping works and any removal of vegetation), compliant access (grades, widths, passing bays etc.), compliant building construction (BAL), compliant water supply and utilities (access to Council's water supply and hydrant coverage) and emergency management. In the case of the proposal, given extensive earthworks (filling) are to be undertaken to achieve minimum floor levels, compliant grades and slopes for access roads, APZ's etc. will also need to be addressed. A report addressing these matters will need to be prepared by a suitably qualified BPAD practitioner as part of any future application.

Whilst this might appear to be relatively straightforward through the commissioning of a consultant report, the bushfire implications as a result of the proposal are linked in and tied to other disciplines. Additionally, the report needs to address bushfire management for the existing Palm Lake Resort, which was not sufficiently dealt with as part of the proceedings for DA 2018/321. These issues are expanded upon below.

Concerns are raised as to the level of vegetation that will need to be removed to facilitate a compliant APZ. The existing vegetation should be classified as a constraint, particularly in those areas which have been noted as an Endangered Ecological Community, Threatened Plant Community and/or within a mapped coastal wetland proximity area. It is noted that this

has not been the avoidance approach taken (in the SCC application or in the previous DA), from the outset, and the applicant has elected to prepare a Biodiversity Development Assessment Report to address the removal of vegetation to facilitate an acceptable bushfire outcome for the new development. This approach is not supported by Council and does not stem from an appropriate site analysis.

One of the key issues that was previously raised by the NSW RFS (in their request for information relating to the development proposed as part of DA 2018/321) was the relationship and conflict between the proposed development (including its proposed Vegetation Management Plan – VMP) and the existing Palm Lake Resort development (as approved via DA 2004/328). This issue was also raised by Council's retained bushfire expert as part of the court appeal proceedings. It is noted that the documentation lodged as part of the SCC Application, does not reference or discuss any bushfire implications for the existing development.

The existing development (DA 2004/328) has a Bush Fire Safety Authority (BFSA), as issued by NSW Rural Fire Service pursuant to s100B of the Rural Fires Act 1997. As part of this BFSA, there is a requirement for a 50m Asset Protection Zone consisting of a 35m Inner Protection Area and 15m Outer Protection Area. The APZ is measured from the extremities of the existing dwellings outwards (as outlined in Section 1.4 dot point 3 of the approved Creek and Vegetation Plan of Management (CVPM), dated July 2008 – approved via conditions of consent for DA 2004/328 and Section 2.2.4 AS 3959-2009 and Section 3.1(a) Planning for Bushfire Protection 2006).

Existing dwellings in the eastern section of the Palm Lake Resort are within close proximity to the western creekline, which divides the existing resort from the site of the proposed SCC area. The western creekline has not been maintained by the developer for around 10 or so years, despite the requirements of the approved CVPM. This has resulted in natural regeneration of the area and this western creekline now comprises a thickly vegetated riparian corridor. This natural regeneration presents as an improved amenity for existing residents of the resort that adjoin it, and also a habitat for birdlife and fauna.

The VMP provided as part of the SCC Application is identical to that provided as part of the proceedings for DA 2018/321. It is considered that the VMP is insufficient and does not assess how the proposed development will affect the bushfire management of the existing Palm Lake Resort development. There are conflicts with existing and proposed planting areas (and therefore fuel loads) and required (and conditioned) APZ's for the existing development.

The vegetation within the western creekline, when managed as proposed by the VMP, has the potential to create a bushfire risk to the existing Palm Lake Resort, which is unacceptable. This is also currently the case, with this area not (currently or previously) being managed in accordance with conditions of consent and now exists as a significantly vegetated riparian corridor. In this regard, it has become (and is proposed to remain) a bush fire hazard. In the case of the existing Palm Lake Resort and conditions of DA 2004/328, this is a matter that Council will need to separately liaise with the owner of the land to achieve compliance with the terms of that consent and any approved documentation. Given the conflicts between bushfire management and ecology, this will need to be finely balanced, with input from bushfire consultants and the NSW RFS.

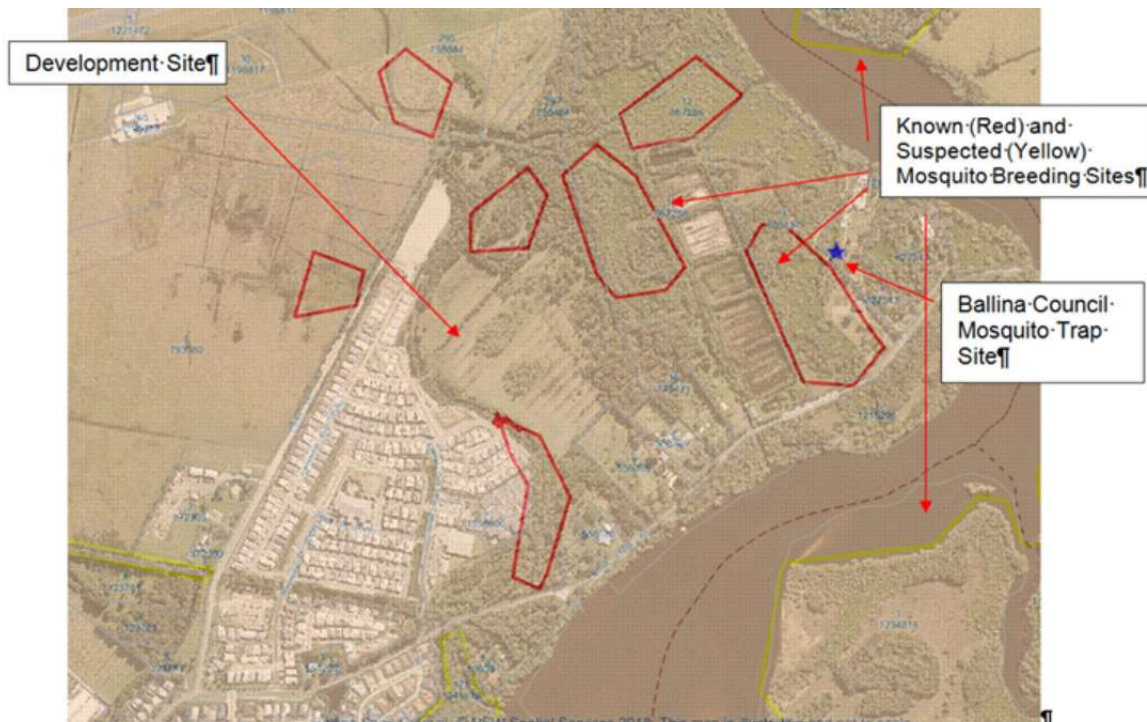
Any future development application, therefore, will need to comprehensively demonstrate that a proposed development conforms to the specifications and requirements of PBP 2019. It will also need to adequately demonstrate compliance with the aim and objectives of PBP 2019 in relation to the impact the VMP has on the existing development, primarily to –

- afford occupants of any building adequate protection from exposure to a bush fire;
- provide appropriate separation between a hazard and buildings which, in combination with other measures, prevent direct flame contact and material ignition.

In Council's opinion (and as substantiated and corroborated by Council's engaged experts and the fact that the NSW RFS would not issue a Bush Fire Safety Authority for the development), this was not demonstrated as part of the previous proceedings and will be very difficult to address, in view of the other issues associated with the western creekline. These issues are identified and discussed within this response.

Mosquito Impacts

The proposed development site is located on the coastal plains and lowlands in an area of high risk, close to known and suspected mosquito breeding sites (shown below) as identified on Council's Mosquito Management Maps. These areas are much more likely to be affected by significant mosquito outbreaks, depending on particular events and climatic circumstances.



The SCC application site is in close proximity to coastal wetlands (as identified under the SEPP Coastal Management 2018) and a tidally influenced creekline (western creekline), as the predominant mosquito hazards.

In relation to the management of mosquito issues for any future development within the SCC application area, there has been acknowledgement previously from both the applicant and Council (as part of the proceedings for DA 2018/321) that the land presently contains an abundance of mosquitoes. This issue stems, in part, from the developer's lack of action and compliance (over the past 10 years) with the requirements of the CVPM, which was approved for the existing Palm Lake Resort development.

The lack of maintenance of the western creekline has resulted in the creation of an additional breeding and harbourage area. It is also noted that existing stormwater management devices on the existing Palm Lake Resort site have not been maintained and do not drain as required, resulting in mosquito breeding areas.

As part of the assessment of DA 2018/321 and the subsequent court proceedings, current residents of the Palm Lake Resort provided details of their experiences of mosquito nuisance on the existing resort site. This nuisance has resulted from poor and ineffective management of existing stormwater basins within the Resort and the western creekline (in accordance with the approved CVPM). Some residents have had to resort to construction of mosquito enclosures to enjoy the outdoors, given the severity of the nuisance experienced.

In relation to the SCC Application area, it is bounded by coastal wetlands, riparian areas, and vegetation linkages that would also present mosquito breeding and harbourage areas. In order to provide a development that would not be subject to the same mosquito nuisance as is currently experienced by existing residents, the applicant would need to ensure that there would not be the opportunity for mosquitoes to travel to the development site from the existing breeding and harbourage sites, and also maintain the existing and proposed developments from harbourage and breeding areas. It is noted that the proposal under DA 2018/321 included a mosquito buffer around parts of the development site in order to address this issue, along with ongoing vegetation and water management to reduce harbourage opportunities. This is stated in the SCC application.

Council's assessment of the proposal as part of DA 2018/321 was that mosquito risk could not be adequately managed for future residents of a development on the SCC Application site.

The reasons for this are:

- The *Verrallina funerea* mosquito breeding in coastal protection habitat east of the development, will not be adequately managed by the proposed mosquito buffer zone and Asset Protection Zone.
- The open space Mosquito Buffer would not be effective at managing *Aedes vigilax* (Salt-marsh Mosquito). The *Aedes vigilax* is a seasonal nuisance biting and public health pest over most of the coastal regions of Australia where tidal saltmarsh exists, and it affects communities over the wider Ballina region in general including this development.

Taking into consideration the location of the proposed development and the proximity of estuarine and brackish water wetlands, representing a source of locally important mosquitoes of pest and public health concern (e.g. *Aedes vigilax* and *Verrallina funerea*), the proposal would not satisfy Section 3.6 Mosquito Management within Chapter 2 of the Ballina Shire Development Control Plan 2012, in that it does not substantially minimise nuisance and health risk associated with mosquitoes or minimise human contact with mosquitoes.

There may be aspects of a future proposal on the SCC application area that will assist in minimising contact between mosquitoes and people, but there is still likely to be substantial nuisance caused by mosquitoes impacting the residents and visitors to the new development. The potential for mosquitoes to impact the health and wellbeing of local residents and visitors is substantial.

Notwithstanding the risk of mosquito-borne diseases caused by Ross River virus and Barmah Forest virus (two viruses active in the local region), the adverse impact on quality of life that results for being exposed to mosquitoes, there may be considerable direct consequences of being bitten, beyond any potential of mosquito-borne disease. Reactions to bites can be significant and with prolonged irritation including swelling and itchiness. These bites can also become infected, leading to further skin irritation. With consideration given to the expected demographics of the community in this new development (over 55 years of age), the relative impact may also be greater.

For residents, during much of the year, there will be significant nuisance impacts due to mosquitoes. It will be unpleasant to spend time outdoors, even immediately around the properties. Any time spent outdoors, especially during the cooler parts of the day, such as

dawn, dusk and the early evening, it is likely that residents and visitors will need to routinely apply insect repellents or wear long sleeves shirts, long pants, and covered shoes to avoid nuisance biting mosquitoes. Given this inconvenience and reluctance to wear insect repellents that may cause skin irritation, many residents will be confined indoors as the only way to avoid mosquito bites. This is not considered to be an appropriate outcome for residents of a development within the Ballina locality, where the lifestyle is an outdoors one for most of the year.

Any future application will need to provide credible sampling results in relation to trapping of mosquito populations to ensure that there is a reliable measure of current and future mosquito activity and subsequent nuisance impacts current and future mosquito impacts. This was not undertaken as part of the proceedings for DA 2018/321, whereby there was reliance on historical trapping over 15 years prior and on a single evening. Mosquito sampling should be carried out at multiple sites and on multiple occasions, specifically following environmental conditions conducive to increased mosquito abundance.

The requirements of the proposed VMP for the development site to maintain the western creekline and stormwater management devices, is no different to the requirements for the existing Palm Lake Resort, within its CVPM and maintenance of stormwater management devices, which have not been effective to date. No explanation has been provided by the applicant as to how the proposal would be better managed to ensure compliance where maintenance has clearly failed in the past. This is a real concern for Council, with ongoing compliance requirements (and the resourcing for such) on the existing development and would also be required for the future development.

As part of the hearing for the court appeal for DA 2018/321, the applicant's experts could not identify what works needed to be carried out to the western creekline under the existing CVPM in order to achieve compliance with that plan and to reduce mosquito issues. There is no confidence that management of the western creekline would be any better than existing, given the same uncertainty about what works need to be carried out to rectify issues for the existing resort.

Stormwater, impacts on Hydrology and Groundwater

The SCC application documentation does not address the issues of stormwater, impacts on hydrology and groundwater except to say that:

“Water quality and associated downstream impacts of development were dealt with at length by the hydraulic and ecological experts in relation to the amended DA before the Court.”

“Having regard to the evidence provided by the experts during the proceedings, the Commissioner ultimately found that there are no hydrological matters that would warrant the refusal of the application (at [157]) and that there were no detrimental downstream impacts on ecology that warrant the refusal of the development application (at [238]).”

The applicant additionally notes that *“these matters were raised in the successful appeal by the Respondent in relation to the original decision. Notwithstanding, it is acknowledged that the granting of a SCC does not absolve the applicant from needing to undertake further detailed technical work in relation to a series of environmental matters and it is the applicant's position that these technical matters can be addressed and would not warrant a different decision to the granting of a new SCC from that reached in relation to the original SCC.”*

The comments made by the applicant in the SCC application in relation to the successful appeal can only apply to the “impact on aquaculture ground” as determined by Chief Judge Preston. There were no hydrological (merit) grounds contended in the S56A appeal. In this regard, the previous assessments and decisions made by the Commissioner in relation to DA

2018/321 cannot be guaranteed by the applicant and Council still contends its issues with the information provided as part of the proposal via DA 2018/321 and that within the SCC application in relation to stormwater, impacts on hydrology and groundwater. These issues are discussed below.

The SCC application does not specifically address stormwater management. The previously submitted stormwater management plan did not demonstrate that water quality in North Creek would not be adversely affected by the development. As there is a priority oyster growing area in close proximity to the development site, it is necessary that the applicant demonstrate that there will not be a worsening effect from stormwater discharges from the site. A MUSIC model needs to demonstrate and achieve a non-worsening effect, which was not the case with the proposal considered as part of DA 2018/321. Significant rework of the material prepared for DA 2018/321 will be required in this regard.

Issues that Council raised with the previous stormwater assessments carried out by the applicant as part of the Court appeal include:

- Use of incorrect input data into the MUSIC model [the current state of the land is not a rural residential condition as was claimed by the applicant, but instead is more likened to a forested condition, covered in vegetation and grass and minimal exposed soils (less than 1%). It is evident from an inspection of the site that the land is not subject to the range of disturbance as was claimed by the applicant].

It is noted that the effect of the incorrect input data into the MUSIC model, thereby relying on data that is based on a disturbed site, is that the development would have a detrimental impact on the mass of suspended solids exported from the land, being a greater mass of discharged water quality contaminants than presently exists. This risks contamination to the surrounding environment, including priority oyster growing areas, other aquaculture activities in the locality, coastal wetlands and Endangered Ecological Community (EEC) vegetation. A conservative approach is required in the circumstances, given that the western creekline drains to coastal wetlands, groundwater dependent ecosystems, mangroves, endangered ecological communities and key fish habitat.

- There was not a collection of baseline water quality data from the land and its surrounds to demonstrate what the actual water quality is and its current condition. Without this, incorrect assessments will be made in relation to impacts of the development on water quality, water bodies and hydrological processes. This has great importance and is intrinsically linked to the sensitivities of the surrounding environment, including coastal wetlands, EEC's, mangroves and priority oyster growing areas.

If no data or incorrect data is provided, it is difficult to determine and quantify impacts on biodiversity values and thus comply with the requirements of the Biodiversity Assessment Method (BAM) and provide an appropriate and correct Biodiversity Development Assessment Report (BDAR) – refer to ecology comments in this response.

- The existing hydrological processes that sustain and interact with the existing waterways in the locality (i.e. western creekline, coastal wetlands and North Creek) were not identified by volumes and seasonal patterns, flow paths and seasonal patterns and baseline water quality data. The change in flow rate also should have been determined but has not been.
- A change in water quality by increasing the quantity of fresh water into the western creekline will impact on the fine balance of salinity in this water body. Additional impacts resulting from this include the mobilisation of monosulfidic black ooze (MBO), which has been identified by Council's experts as being present within the western creekline.
- A 'lawful' point of discharge for stormwater was not sufficiently demonstrated by the applicant – the discharge of stormwater into the western creekline, which is tidally

influenced, but not fully tidal, was considered by the applicant as compliant with Council's Stormwater Management Standards for Development (DCP Chapter 2). It was deemed by the applicant that drainage to tidal water meets Council policy and there is no requirement for further assessment or consideration, even if the tidal waters have little tidal flushing. The lawfulness of "running water" and the additional water not interfering with downstream or upstream properties was not proven. The applicant did not assess potential nuisance and also unmitigated discharge to the creek. In this regard, Council contends that there is not the lawful discharge of stormwater and the applicant did not consider the actual nature of the water body in which they sought to discharge to.

A legal point of discharge is not obtained through connecting the drainage system to tidal waters. There is a requirement that no actionable nuisance will result from increased rates of discharge in comparison to pre-development conditions. A legal point of discharge could be attained through the provision of on-site detention to achieve water leaving the land as close as possible to the existing conditions. The applicant did not provide sufficient information to demonstrate that sufficient on-site detention could be provided within the development of the size and scale that had been proposed as part of DA 2018/321. This would also be the case for the proposed development in the SCC application.

- Council's argument that the western creekline is tidally influenced and not fully tidal, that there is clear evidence of impoundment of water upstream of the mangroves and North Creek was not challenged by the applicant in the appeal for DA 2018/321.
- As the details of some of the stormwater management and drainage measures that were proposed were scant, a conclusion could not be drawn as to whether the measures would be sufficient or whether they would impact upon other aspects of the development or surrounding environment. This is a key consideration in the assessment of a SCC application against Clause 25 (5) (b) (i) and (v) of the Seniors Housing SEPP.

The SCC application does not address groundwater impacts, however Council considers that based on the information provided as part of DA 2018/321, the proposal will have detrimental impacts on the existing groundwater regime of the site and consequently the surrounding environment.

The subject site is surrounded by a sensitive environment, including land mapped on the biodiversity values map, coastal wetlands, EEC vegetation, key fish habitat, north creek (including tributaries thereto – namely the western creekline) and priority oyster growing areas. A change in the groundwater regime of the site has the real potential to impact on and upset this delicate environment.

The previously submitted information for DA 2018/321 did not:

- Make any assessment as to whether the discharge of water from the development into the western creekline, in an uncontrolled manner, will mobilise acid sulfate soil products into the surrounding environment. As the assessments have not been undertaken, there cannot be a proper and fully-informed ecological assessment of the proposal.
- Demonstrate that there has been a realistic appreciation of groundwater impacts, where the balance between rainfall, infiltration, tidal influence, evaporation and evapotranspiration has been assessed.
- Consider or assess the varying dynamic levels and flows that typify groundwater in this near tidal environment. This is required as the development of the land to an urban purpose will modify the infiltration rate of rain falling on the land, where a shallow near-surface aquifer exists.
- Demonstrate that the proposed bio-retention systems can cope with actual rainfall conditions (which are dynamic, rather than an averaging) – the systems proposed in DA

2018/321 were not sized adequately to capture and infiltrate actual rain conditions, resulting in rainfall that is lost to the groundwater system.

- Demonstrate, via numerical analysis, that the volume of rainfall being converted into infiltration (and therefore maintaining groundwater level) remains unchanged post development.

In the absence of this information, there cannot be a conclusive assessment as to ground water levels and whether there will be adverse impacts on Endangered Ecological Communities and groundwater dependent ecosystems that are located within and/or adjoin the subject site. In view of this, Council remains extremely concerned with the proposal included in the SCC application and that significant rework is required to address these issues, such that support for the proposal cannot be provided.

Requisite consideration and satisfaction with provisions of applicable SEPPs

1. SEPP Housing for Seniors and People with a Disability 2004 (Seniors Housing SEPP)

Any future application will need to comprehensively address the requirements of the Seniors Housing SEPP, as contained in Parts 2, 3, 4, 5, 7 and Schedule 3 of the policy.

Specific attention needs to be given to the following matters, which were not agreed to in relation to the proposal in the SCC application (which is identical to that proposed via DA 2018/321), whereby amended materials would be required as part of a future development application, should a SCC be granted over the site.

- Access

Any future application will need to comprehensively address the requirements of Clause 41 and of Schedule 3 of the Seniors Housing SEPP. It is noted that in addressing these clauses, full construction plans would be required to be prepared to demonstrate compliance with the required access provisions. This was not included in DA 2018/321, with the applicant seeking a reliance on conditions to be imposed on a consent to demonstrate compliance with the provisions of the Seniors Housing SEPP. This is not the usual manner (and would not have been the intent of the provisions) in which development applications are considered and assessed (leaving assessment matters to post consent phase, particularly where any non-compliances and then changes can impact on the remainder of the 'approved' development).

- Solar Access

Any future application will need to comprehensively demonstrate that clause 50 (e) of the Seniors Housing SEPP is complied with. A failure to meet the solar access requirements would be a further indication of the unsuitability of the site to accommodate the intensity of development proposed.

- Bushfire Prone Land

The Seniors Housing SEPP [Clause 27(1)] requires the consent authority must not consent to a development on bush fire prone land unless the development complies with PBP 2019. Additionally, there are matters in Clause 27 (2) that need to be comprehensively addressed by the applicant in order for Council and the NSW RFS to make a proper assessment.

Refer to previous comments made in relation to bushfire management and Council's concerns with the proposal.

- Infrastructure servicing

Any future application will need to demonstrate compliance with the provisions of Clause 28 of the Seniors Housing SEPP. As previously stated in this response, this was a matter in the Section 56A appeal as determined by CJ Preston in favour of the Council, as there was no written evidence that the development will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage.

In the case of DA 2018/321, the applicant was reliant on future works to be carried out in the North Creek Road reserve, including water and sewer servicing, for the proposal, however could not demonstrate that this could be achieved via plans and a proper impact assessment of those works. This situation should not occur as part of any future development proposal and compliance with Clause 28 needs to be demonstrated as achieved.

2. SEPP Primary Production and Rural Development 2019 (PPRD SEPP) - Priority Oyster Aquaculture Areas

Land mapped as priority oyster aquaculture areas and protected under State Environmental Planning Policy (Primary Production and Rural Development) 2019 (PPRD SEPP) are located within North Creek in close proximity to the site (less than 20 metres). The proposal within the SCC application also involves a stormwater management regime for the development that directs discharge into North Creek, at which is close to a Priority Oyster Aquaculture Area.

There is an existing oyster shed at the site of the Priority Oyster Aquaculture Area in North Creek. This shed is utilised/occupied by a local resident who farms oysters in the northern rivers region. It is noted that no oyster farming currently occurs at this location in North Creek, for a range of reasons including water quality issues resulting from surrounding development and construction activities in the locality. However, Council is regularly contacted by that resident as to issues of water pollution in North Creek, with photographic evidence provided of water discolouration (presumably from sediment and building contaminants) impacting the water quality adjacent to and within the Priority Oyster Aquaculture Area. These issues appear to stem from building and construction works (including that related to the existing Palm Lake Resort) in the area.

Despite the information provided in the SCC application, that *“further detailed technical work will need to be undertaken in relation to a series of environmental matters and that these technical matters can be addressed and would not warrant a different decision to the granting of a new SCC from that reached in relation to the original SCC”*, it is uncertain as to whether this information can actually demonstrate that a proposed seniors housing development, of the scale shown in the SCC application, would be compatible with the surrounding environment, including receiving waters of coastal wetlands and priority oyster growing areas.

The NSW DPI Fisheries provided advice in relation to DA 2018/321 and identified adverse effects that the development may have on priority oyster aquaculture areas (water pollution from the discharge of urban stormwater) and that the development as was proposed is incompatible with existing priority oyster aquaculture areas. NSW DPI Fisheries also advised that the proposal risks degrading of water quality in North Creek

and the Richmond River estuary, which is especially relevant to priority oyster aquaculture areas.

Water quality is critical in determining whether a future proposal will have an adverse effect on, impede or be incompatible with priority oyster aquaculture areas.

Clause 31 of the Primary Production and Rural Development (PPRD) SEPP 2019 requires consent authorities and the Secretary of the Department of Industry to consider the *NSW Oyster Industry Sustainable Aquaculture Strategy*. The Strategy indicates in its executive summary that the importance of farmed oysters to healthy estuaries should not be underestimated and are a first indicator of estuarine health. The Strategy (which supports the provisions of Clauses 29 to 31 of the PPRD SEPP) sets out water quality protection guidelines, which encourages actions to improve water quality for oyster aquaculture.

The previous development application did not provide baseline data in relation to estuarine water quality in North Creek, which was of major concern to Council and its experts. There needed to be an assessment of whether the proposal would lead to a net deterioration of estuarine water quality and without the collection and assessment of baseline data, appropriate hydrology modelling was not undertaken. This remains a major and significant concern for Council in reviewing the proposal lodged as part of the SCC application.

The previously submitted hydrology modelling for DA 2018/321 did not assess all of the criteria as required by the *NSW Oyster Industry Sustainable Aquaculture Strategy* and consultants engaged by the applicant did not consider the requirements for assessment. These are requirements that need to be considered in the assessment of any future application, with all required provisions of the PPRD SEPP and the *NSW Oyster Industry Sustainable Aquaculture Strategy* to be considered, relevant assessments made and compliance demonstrated.

If this is not undertaken, the provisions of Clause 30 of the PPRD SEPP place the consent authority in the position of refusing a future development application, if it is satisfied that the development will have an adverse effect on, impede or be incompatible with any oyster aquaculture development that may, in the future, be carried out within a priority oyster aquaculture area OR if it is not satisfied that appropriate measures will be taken to avoid or minimise such adverse effect, impediment or incompatibility.

Given the issues raised above, it is uncertain as to whether the applicant can actually provide competent technical assessments addressing these issues and the relevant provisions of the PPRD SEPP and associated Strategy. Further comments in relation to water quality and the proposal are provided in this response.

3. Coastal Management SEPP 2018

The subject site contains land mapped under Clauses 10, 11, 13 and 14 of the Coastal Management SEPP. Any future application therefore needs to address the relevant provisions of the SEPP.

It is noted that the footprint of the development, as shown in the SCC Application documentation, is not located within the mapped Coastal Wetlands area, however the development is partially located within the coastal wetland proximity area (Clause 11). The coastal wetlands proximity area, therefore, has not been regarded as a constraint to the development from the outset, however this should have been the case. It is noted that the elements of the development that protrude into the proximity area include extensive earthworks (filling), Asset Protection Zones, internal road ways and car

parking spaces, civil and drainage infrastructure, stormwater management devices, pathways, landscaping, removal of existing vegetation and a small amount of the proposed dwellings (and/or their yard space) at the north-eastern and south-eastern extremities.

The provisions of the Coastal Management SEPP (Clauses 3, 5 and 6) and Coastal Management Act 2016 (Sections 5 and 6) provide a framework for the mapping, management objectives and values of coastal wetlands and their associated proximity areas. In this regard, the land that is mapped as “proximity area for coastal wetlands” in reference to the subject land, is considered to be an indication of the coastal wetland values that are to be conserved. It is not merely a ‘marker’ of an area that is a certain distance outwards of the coastal wetland itself.

The definition of coastal wetlands (and littoral rainforests) area in Section 6 of the Coastal Management (CM) Act 2016 highlights that the mapped land displays the ‘*hydrological and floristic characteristics of coastal wetlands... and land adjoining those features*’ and aims to manage those values through the objectives set out in Section 6 (2) of the CM Act 2016.

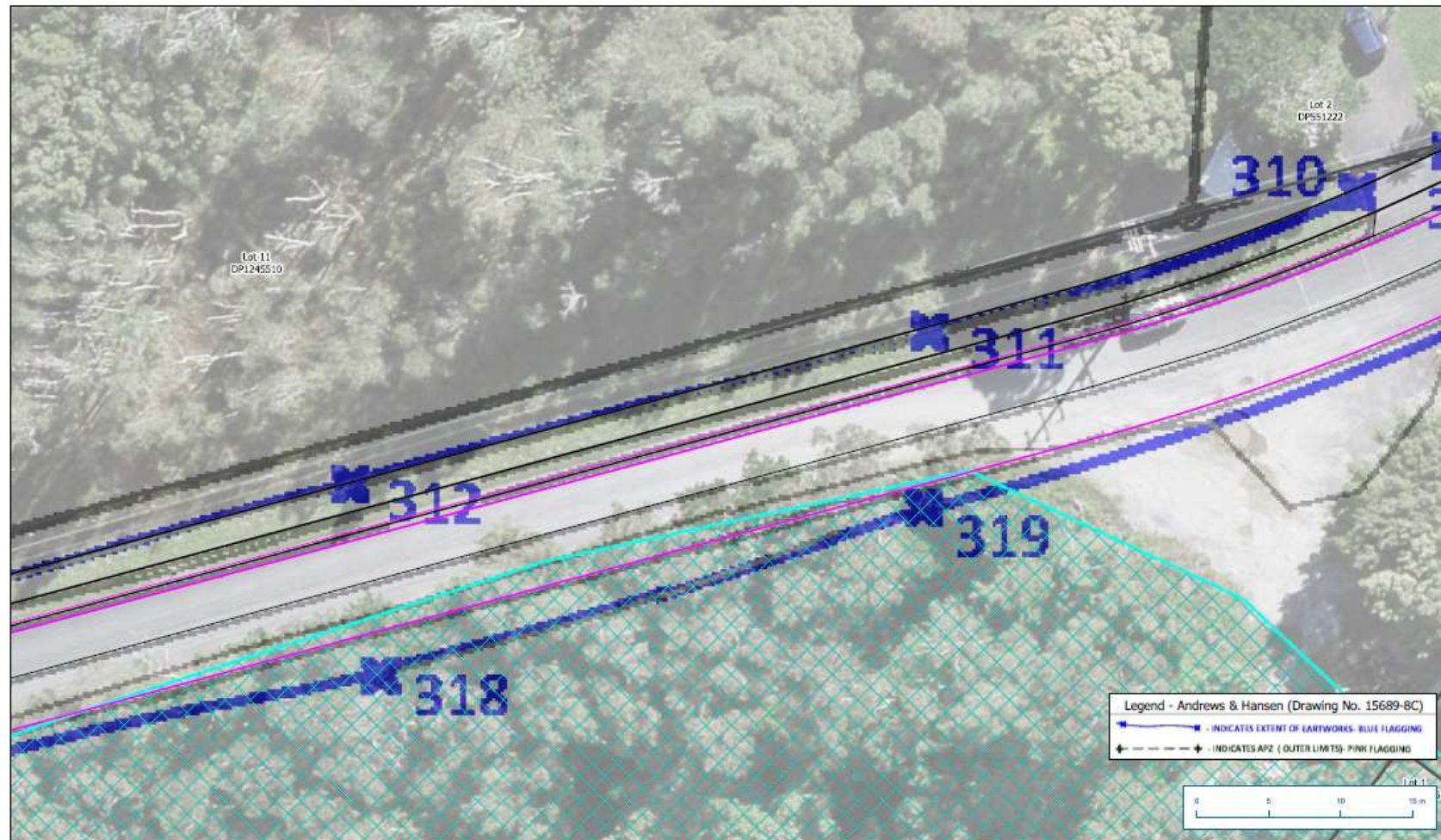
It must be noted that the subject land was not subject to the Coastal Management SEPP at the time of the issue of the previous SCC for the site (in October 2017), with SEPP 14 – Coastal Wetlands being the applicable instrument at the time. However, since that time, a Ministerial Direction (2.2 – issued 3 April 2018) has been issued to indicate that it is not appropriate to zone such land for more intense development. The SCC Application has not considered this ministerial direction and it is therefore highly questionable as to whether the land is suitable for the proposed development and also whether the proposed intensity of the proposal is appropriate, when considering the suitability of the land under the SEPP Seniors Housing SEPP and Clause 25 (5) (b) (i), (v) and (vi).

In addition to the issues raised above, the SCC application does not address the road access to the SCC development footprint area, at which the road access is outside the proposed SCC footprint area and then connects to North Creek Road. The road/driveway access is located in the coastal wetland proximity area with a linkage to the road reserve of North Creek Road.

The SCC Application does detail that the Traffic Impact Assessment report “*explains that the anticipated increase in traffic volume along North Creek Road between the existing “BUPA intersection” and the proposed new access driveway requires that the road be upgraded to “collector street standard” involving the delivery of half the collector road width standard along the site frontage. The TIA Report found that the anticipated trip generation associated with development of the land for the purposes of seniors housing is not expected to significantly impact on the operation of the local road network, subject to the delivery of documented road upgrades. Road upgrades will be dealt with by a separate Roads Act approval*”.

Portions of North Creek Road that will be subject to the “upgrades”, as required as a result of the proposed development, are located within the coastal wetland itself. In this regard, new pavement, road batters, supporting infrastructure etc. will need to be located within the coastal wetland. It is noted that detailed design of the road upgrade has not been provided, however these components of the development were stated to be carried out as part of Stage 1 of the development proposed via DA 2018/321.

****Refer to the plan on the following page which shows the works to be carried out in the North Creek Road reserve overlain with the Coastal Wetland mapping. This was provided as part of the appeal for DA 2018/321.**



SOURCES:
 AAM Pty Ltd captured the Aerial photography used in this map on the 12th May 2018 for Ballina Shire Council.
 Proposed development footprint was supplied by Martens (plan number PS01-C002 Rev G).
 Plan indicating earthworks extent was provided by Andrews & Hansen (Drawing No. 15689-8C). This plan was notified to Martens (plan number PS01-C002 Rev G) using image georectification techniques with a maximum error of 0.27 pixels (0.08m).
 State Environmental Planning Policy for Coastal Management 2018 was supplied by NSW Department of Planning and Environment.

Palm Lake Resort, Ballina Proposed North Creek Road Upgrade - Coastal SEPP Legend

- Pathway Footprint
- Lot Boundary
- Proposed Road Footprint
- State Environmental Planning Policy (Coastal Management) 2018
- Coastal Wetlands
- Proximity Area to Coastal Wetlands



DISCLAIMER
 This is based on the information supplied to the author of this map. The author of this map is not responsible for any errors or omissions in the information supplied to the author of this map. The plan was prepared by John Whitehead, 2018, for Ballina Shire Council.

HD Ref: 150157
 Printed: 9/7/2018



The SCC application states that the road upgrades will be dealt with by a separate Roads Act approval. If this was a vehicular crossing or a re-sheet of an existing road surface, that may be an appropriate way to deal with this matter, however this is not the case. Of direct relevance to this, is the findings and decision made by Chief Judge Preston on 29 April 2020, in relation to Council's appeal to the decision made by Commissioner Dickson.

As detailed in the CJ Preston's findings, the Commissioner found that the road access from the North Creek Road to the proposed development was "a fundamental element of the development", that was necessary "to provide safe and efficient traffic movement to and from the development". The Commissioner however, did not consider the likely impacts of any road, civil and infrastructure works that might be carried out in the North Creek Road reserve, at which works the Commissioner had found were a fundamental element of the development. This is consistent with what the applicant had requested as part of DA 2018/321, whereby they did not provide the required assessments in order for a conclusion to be reached as to the 'likely impacts'.

The Commissioner sought to impose a deferred commencement consent requiring the approval of the works in North Creek Road prior to the consent operating as appropriate in the circumstances of the case. The deferred commencement condition required "complete environmental assessment of all works proposed in the North Creek Road reserve...to be prepared and submitted with the application" for approval of the works in North Creek Road. The Commissioner appears to have thought that requiring, by the deferred commencement condition of consent, such later environmental assessment of the works in North Creek Road, justified her not taking into consideration the likely impacts of the works in determining to grant consent to the development application. As iterated by CJ Preston, this involved misdirection.

The power in s 4.16(3) of the EPA Act to grant consent to a development application subject to a deferred commencement condition does not relieve a consent authority from the obligation to take into consideration all matters of relevance to the development the subject of the development application under s 4.15(1) of the EPA Act. In the present case, the Commissioner did not have an understanding of the likely impacts of the road, civil and infrastructure works in the North Creek Road reserve or undertake an evaluation of the relevant matter of the likely impacts of the proposed development with that understanding. The Commissioner instead deferred for later consideration "a complete environmental assessment of all works proposed in the North Creek Road" by granting consent subject to a deferred commencement condition under s 4.16(3) of the EPA Act. The Commissioner thereby failed to take into consideration a mandatory relevant matter.

What can be taken from the above commentary, is that a detailed assessment has not been undertaken by the applicant to date, as to the impacts on the coastal wetland which would result from the road upgrades to North Creek Road. In this regard, it is not considered appropriate to defer dealing with this to a separate Roads Act approval. Importantly, it therefore cannot be determined that access can be provided to the site for the purpose of the proposal and that there has been due consideration for the relevant provisions of the Coastal Management SEPP 2018 and Coastal Management Act 2016.

Additional to the points above, is that if works are to be carried out in the Coastal Wetland, Clause 10 of the Coastal Management SEPP indicates that these works are classified as designated development (refer Clause 10 (2) of the SEPP) and result in the requirement to prepare an Environmental Impact Statement. This has not been discussed by the applicant in their SCC application and further adds to questions as to the suitability of the site for development, if a portion of the proposal results in a designated development process.

In the alternative, if the works were confirmed to not encroach into wetlands (which is contrary to the preliminary design work carried out by the applicant as part of DA 2018/321 and as shown in the plan on page 17 of this response), the upgrade works may be considered as development without consent pursuant to clause 94(1) of the SEPP (Infrastructure) 2007, where it is carried out by or on behalf of a public authority. This would require the preparation of a Review of Environmental Factors or potentially an Environmental Impact Statement. This work has not been carried out and so there are questions raised and assessment pathways unknown.

Additionally, Council, as the landowner of North Creek Road reserve, may not support the proposed works within North Creek Road, given they are to support a private development and do not have a material benefit of Council. Additionally, it may be that the proposed works may compromise (or add additional cost to) the upgrade to North Creek Road (refer to comments in this response in relation to this).

The works within the North Creek Road reserve potentially impact upon:

- EEC vegetation;
- Aboriginal archaeology (as a midden is located on the northern side of North Creek Road);
- Salt marshes;
- Hydrology of the wetland system;
- Vegetation on public and private land; and
- Fish Habitats.

In relation to the portions of the development in the proximity area of the coastal wetland, the proposal needs demonstrate that it will not significantly impact on—

- (a) the biophysical, hydrological or ecological integrity of the adjacent coastal, or
- (b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland.

As part of DA 2018/321, Council raised extensive issues with the proposal in relation to hydrology, groundwater and ecology and the resultant impacts of the proposal on the coastal wetland. These issues are discussed in this response and it is concluded that satisfaction cannot be reached in relation to Clause 11.

The subject land is also identified as being completely contained within the mapped coastal environment area and partially contained within the mapped coastal use area. As is the case with the provisions of Clause 11 of the Coastal Management SEPP, the proposal (and the various documentation provided as part of the previous application - DA 2018/321) does not satisfactorily address the provisions of Clause 13 (coastal environment area).

The proposal has not demonstrated that it will not cause an adverse impact on:

- (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
- (b) coastal environmental values and natural coastal processes,
- (c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014),
- (d) marine vegetation, native vegetation and fauna and their habitats, and

(f) Aboriginal cultural heritage, practices and places.

The issues that Council raises in relation to the above provisions are addressed elsewhere in this response.

Any future development application, will need to comprehensively demonstrate that a proposed development conforms with the objectives for the coastal use area and the provisions of Clause 14 of the Coastal Management SEPP.

Ecology

Ecological constraints on the subject site are protected and assessed under both Federal and State legislation. The following legislation and instruments are relevant.

- Environmental Protection and Biodiversity Conservation Act 1999
- Environmental Planning & Assessment Act 1979
- Biodiversity Conservation Act 2016
- Fisheries Management Act 1994
- SEPP Coastal Management 2018
- SEPP Primary Production and Rural Development 2019

The subject land and areas adjacent to it sustain the following significant plant communities, as listed under legislation:

- Swamp Oak Swamp Forest of the Coastal Lowlands of the NSW North Coast Bioregion, EEC pursuant to the EPBC Act / Swamp Oak Floodplain Forest of the NSW North Coast, Sydney Basin and South East Corner Bioregion, EEC pursuant to the BC Act.
- Paperbark Swamp Forest of the Coastal Lowlands of the NSW North Coast Bioregion and Sydney Basin Bioregion, EEC pursuant to the BC Act
- Coastal Saltmarsh in the NSW North Coast, Sydney Basin and South East Corner Bioregions, EEC pursuant to BC Act / Coastal Saltmarsh in the NSW North Coast, Sydney Basin South East Corner Bioregions, Vulnerable Ecological Community pursuant to EPBC Act.
- Mangrove – Grey Mangrove Low Closed Forest of the NSW Coastal Bioregion, listed key fish habitat under Fisheries Management Act.

Note - The EPBC Act applies to the land and makes it an offence for any person to take an action that is likely to have a significant impact on matters protected by the EPBC Act, unless they have the approval of the Australian Environment Minister. Whether an action is likely to have a significant impact falls largely to self assessment and is a separate process to the SCC application and DA process. If the SCC is granted and a subsequent DA granted consent, the applicant would need to determine whether their development will have a significant impact on Swamp Oak Forest and Coastal Saltmarsh and whether the proposal would need to be referred to the Minister for approval in accordance with Chapter 4 of the EPBC Act.

On the basis of the information provided as part of the SCC Application, (and as was the case with the proceedings for DA 2018/321), Council continues to contend that the proposal will have unacceptable impacts on the terrestrial and aquatic environments. The legislation that is

relevant to this is the Biodiversity Conservation Act 2016 (animals and plants) and the Fisheries Management Act 1994 (fish and marine vegetation).

Issues with submitted information

1. The Biodiversity Development Assessment Report (BDAR) included with the SCC Application is that which was prepared as part of the proceedings for DA 2018/321. The BDAR only prescribes that the proposed development will result in the removal of Swamp Oak Floodplain Forest and Swamp Sclerophyll Forest TECs for the construction of the seniors housing development, APZ and ancillary works. Notwithstanding the information provided in the SCC Application, the BDAR was only updated to state 'there is some potential for minor road upgrade works in association with North Creek Road to indirectly impact the wetland habitats that adjoin the road, and down-stream environment, including Priority Oyster Aquaculture Areas to the south'. Additionally, as previously stated, in the Access and Roads section of this response, only indicative plans were provided as part of the appeal for DA 2018/321, with no detailed design carried out. In this regard, the BDAR is not sufficient to address all impacts of the proposal.

The BDAR, in part, relies fauna surveys undertaken by a different ecological consultant. However, the timing, and effort of the reported surveys did not comply with published Guidelines as is required by Sections 6.5.1.3 and 6.5.1.4 of the Biodiversity Assessment Method (BAM) and are therefore deficient and inconsistent with the legislation.

The western creekline has not been subjected to any hydrologic and/or *hydraulic* assessment and the existing hydrological functioning of remains unknown. However, it is evident that tidal flows into the western creek are restricted by the existing a series of downstream culverts under North Creek Road.

Thus, increased stormwater discharge has the real potential to have an adverse impact on downstream TEC's and coastal wetlands. The BDAR only includes a cursory assessment of this issue and as such is deficient with the requirements of the legislation relating to Sections 6.1 of the *Biodiversity Conservation Regulation 2017* and Sections 4.2.1.6, 4.2.1.7, 9.1, 9.2 and 9.3 of the BAM.

The BDAR also relies on the Groundwater Dependent Ecosystem (GDE) Atlas to identify the location of GDE's, rather than conducting an on-ground assessment to determine the presence of GDE's. However, the swamp forests, saltmarsh, and mangrove assemblages, which occur on the development site, are GDE's thus the BDAR has failed to address these issues.

As stated above, the BDAR was prepared as part of the proceedings for DA 2018/321. One of the primary concepts of the of the BC Act 2016 is the principle of avoidance and, as such, the purpose of a BDAR is to identify ecological constraints at the start of a project and exclude/avoid ecologically important features from the development footprint e.g. coastal wetlands and proximity to wetland areas. Consequently, the preparation of a BDAR after a footprint had been identified is inconsistent with the principle of avoidance as described in Section 8 of the BAM.

2. The SCC application includes comments that the proposed development will predominantly avoid TEC vegetation, and will not remove any areas of coastal wetlands. This statement cannot be verified as correct, as detailed design has not been undertaken of the proposed works to be carried out to North Creek Road and within the road reserve. The applicant did not carry out any detailed design work and assessment as part of the proceedings for DA 2018/321. As has been previously stated, the outcomes of the Section

56A appeal required the assessment work be undertaken prior to the determination of the DA (and therefore there is a requirement for detailed design), given there is a clear reliance on the road upgrade to facilitate road access to the subject site. Further comments are provided below in relation to works within North Creek Road and ecological impacts.

3. The SCC application details that the proposal will involve the retention and restoration of riparian habitats within the North Creek tributary under a Vegetation Management Plan (VMP). However, the previous material lodged as part of DA 2018/321 did not address the current state of the western creekline, its hydrology and ecology.

There are wide ranging conflicts in relation to the western creekline, as stated in this response, all of which have not been assessed either appropriately or at all by the applicant.

- The risk of disturbance of monosulfidic black ooze (MBO) through increased water flows, mosquito management works, installation of a new bridge to connect the proposed development to the existing resort over the western creekline. Additional to this is that the ASSMP did not extend over this portion of the site, when civil works were clearly proposed to be undertaken as part of the development.
 - The applicant's experts in the court appeal for DA 2018/321 could not identify what works needed to be carried out to the western creekline under the existing approved Creek and Vegetation Plan of Management (CVPM) in order to achieve compliance with that plan and to reduce mosquito issues and result in compliance with the bushfire requirements for the existing Palm Lake Resort. This carries through into the VMP, which largely adopts the CVPM.
 - Conflicts with existing and proposed planting areas (and therefore fuel loads) and required (and conditioned) APZ's for the existing development. The vegetation within the western creekline, when managed as proposed by the VMP, has the potential to create a bushfire risk to the existing Palm Lake Resort, which is unacceptable. This is also the case currently, with this area not (currently or previously) being managed in accordance with conditions of consent and now exists as a significantly vegetated riparian corridor. In this regard, it has become (and is proposed to remain) a bush fire hazard.
4. There has not been an assessment of the aquatic functioning of the western creekline or the aquatic species present, identification of ecological sensitivities and how the development may influence aquatic ecology.
 5. There has not been a detailed assessment undertaken of the proposal with respect to the *Guidelines for controlled activities on waterfront land* and the required width of riparian buffers for the western creekline.

As part of the proceedings for DA 2018/321, there were issues surrounding the provision and maintenance of a riparian buffer to the western creekline. This related to the works proposed in the VMP (to address riparian ecology, bushfire management and mosquito management) and other development works to be carried out as part of the proposal that would impact on this creekline (construction of the proposed bridge, retaining walls etc.).

The western creekline is considered to be a 2nd order stream utilising the Strahler System of ordering water courses, whereby the Office of Water recommends that a vegetated riparian zone (VRZ) width of 20m (each side of the creek) applies to 2nd order streams.

However, it was also determined as part of the proceedings for DA 2018/321 that the western creekline is tidally influenced, but not fully tidal. Vegetation within and adjacent to the western creekline includes mangroves, saltmarsh and swamp-oak floodplain forest, which all suggest a tidal saline influence on parts of the site.

The *Guidelines for controlled activities on waterfront land* provide that for a tidally influenced waterbody, the recommended VRZ width is 40m, measured from the top of the 'highest bank' on both sides of the watercourse to provide an 80m+ wide corridor. The applicant has not made any attempt to define the location of the 'highest bank' and their documentation indicates that the proposal utilises the centreline of the creek.

The western creekline is a second order watercourse under the Strahler system. Table 1 of the *Guidelines for controlled activities on waterfront land* states that "4th order and greater (includes estuaries, wetlands and parts of rivers influenced by tidal waters)" require a 40 metre VRZ on each side of the watercourse. The *Guidelines* state that the recommended total RC (riparian corridor) width is 80 m + the channel width.

As part of documentation lodged in the proceedings for DA 2018/321, the applicant did not locate or define the top of the bank of the western creekline. The VMP lodged as part of the proceedings for DA 2018/321 (which is identical to that included in the SCC application) uses the centre line of the western creekline as the starting point for the riparian buffer distance. The proposal included as part of the SCC application shows that development is within 'a 20m riparian buffer'.

The applicant has previously not had adequate consideration stream buffer width requirements. This is also the case for the information lodged as part of the SCC application. The applicant will need to demonstrate how the development complies with the *Guidelines for controlled activities on waterfront land*.

6. There has not been sufficient assessment undertaken by the applicant as to the impacts of the development on Key Fish Habitats. Key Fish Habitats include tidal waterways extending to the Highest Astronomic Tide limit (generally considered to be +1.0 m AHD), mapped Coastal Wetlands (under the Coastal Management SEPP) and waterways mapped as 3rd order and more significant. Issues were raised by NSW DPI Fisheries in relation to DA 2018/321 that the proposed buffer distances between the proposal and key fish habitats was inconsistent with DPI Fisheries' long- established policy. Bushfire APZ's Mosquito Management Zones, and infrastructure for stormwater management and other activities should be located more than 100 metres from TYPE 1 - Highly Sensitive Key Fish Habitats.

Key Fish Habitat also relies on adequate riparian buffers, which have not been provided (refer to discussion below).

It is also noted that as part of the proceedings for DA 2018/321, it was accepted that several vegetation communities on the land contain elements of marine vegetation and therefore are considered to comprise key fish habitat. These communities are Tall Closed Forest, Mangrove Closed Forest and Coastal Saltmarsh.

Issues with the proposal

- Development within Proximity Areas for Coastal Wetlands

It is considered that the inclusion of Proximity Areas for Coastal Wetlands is recognition by the State government of the susceptibility of these important ecosystems and the overall level of threat to these areas on a broad scale. Coastal Wetlands are also considered Key Fish Habitat, which also have recommended buffers of 100m, thereby corresponding with Proximity Areas.

Ecologically, Proximity Areas provide a separation between development and the mapped wetlands proper, and thereby help to ensure protection of water quality, hydrological processes and provides some degree of protection from weed invasion and 'edge' effects. It may be that some incursions of the development into Proximity Areas could be acceptable, but a similar concept to the averaging rule for riparian buffers would be applied such that an acceptable overall level of protection remains.

The proposal as included in the SCC application proposes to impinge on the Coastal Wetland Proximity Area, however there does not appear to be any defined proposal to enhance the environmental condition of the remaining Proximity Area to compensate.

It is acknowledged that coastal wetland communities do occur close to existing developments, however there has been no evidence provided that demonstrates that the existing Palm Lakes development, in proximity to Coastal Wetlands, has had no detrimental effects.

As part of the material lodged with the SCC application and that included as part of the proceedings for DA 2018/321, it has not been established that there will be no detrimental effect on wetland hydrology.

It is considered that the proposal does not adequately establish a sound rationale for compromising the Coastal Wetland Proximity Area and that the claim of low risk of hydrological change to the wetlands has not been sufficiently demonstrated.

- Upgrade of North Creek Road

The upgrade of North Creek Road to facilitate the proposal, should be considered in evaluating the overall impacts of the proposal. The upgrade of the road is a necessary component of the proposal, however, design work is required to be undertaken to define the drainage solution, spatial extent of construction and impacts on environmental areas. Without detailed plans, it is not possible to carry out an ecological assessment of the proposed upgrade works.

The BDAR report (at section 7.1.3) states that there is potential for at least indirect impacts on the 'wetland habitats that adjoin the road and the down-stream environment, including Priority Oyster Aquaculture Areas to the south'. The report goes on to note that the 'impacts on adjacent habitat or vegetation are likely to be long term' and that there is 'elevated potential for impacts to adjoining wetlands during the construction phase' with specific mention of sedimentation as an impact in that same report.

It should be noted that the mangrove-filled creek at this location is the key hydraulic control for the western creekline and any sedimentation, restriction and/or clearing could have significant implications for upstream hydrology, tidal intrusion and marine vegetation growth over much broader area, than just the southern road verge.

A detailed assessment of the proposed design, with reference to Coastal Management SEPP and Key Fish Habitat boundaries, with consideration of risks to the hydrological and ecological functioning of the connected creek system is required. Plans showing whether there is to be the removal of any vegetation/trees should be provided in order to make an ecological assessment. In addition, the plans should also show the excavation footprint and other works areas.

Figure 4.4 of the BDAR indicates that vegetation on the southern side of the North Creek Road reserve will be removed for the proposed roadworks. This vegetation is considered to be located in a Coastal Wetland.

A portion of the creek that links the estuary to the south with the western creekline is close to part of the road. This is a sensitive area and information is required to be provided that demonstrates that no impacts from the roadworks will occur to this area. It is unlikely that this has been considered as a constraint during the preparation of the preliminary road designs.

- Hydrology/groundwater impacts on ecology

As part of the proceedings for DA 2018/321, there was insufficient definition of the likely hydrological regime post-development. There is likely to be an engineering solution in relation to the management of average rainfall conditions by stormwater management systems, however questions still arise as to whether hydrology during wet weather conditions will remain unaffected post-development.

There has not been an appropriate assessment of the duration, frequency and timing of any hydrological changes at key hydrologically-sensitive sites.

As previously stated in this response, there has not been the collection of baseline hydrology data and therefore, there cannot be a conclusive hydrological assessment of pre and post development. This has direct relationship with groundwater recharge via rainfall infiltration, as this is responsible for maintaining the health of GDE's.

GDE's which may be affected on the subject site include, Saltmarsh, Swamp Oak Forest, Swamp Sclerophyll Forest and Freshwater Wetlands, which are all listed as EEC's pursuant to the BC Act (2016). Not all of these GDE's are mapped by the Australian Government in the GDE Atlas, and the applicant has not undertaken their own surveys to determine and confirm what GDE's are present on the subject site. This means that a proper ecological assessment has not been undertaken and that there are likely to be detrimental impacts to GDE's as a result of the proposal.

Construction related issues

1. Geotechnical

The SCC Application does not provide details of the extent of filling and earthworks required in order to address compliance with Council's minimum fill levels. However, the applicant advises that Annexure C provides details of the extent of land modification works. These plans do show the civil works that would be proposed to be undertaken, however the plans do not provide easy reference to the extent of changes to landform that will be required. It can be determined from the plans, that there will be a height difference of up to nearly 5m from the outer extremities of the development (i.e. outside the APZ) of 1m AHD to the finished floor levels of the dwellings being up to 5.83m AHD.

The applicant states that the typical finished earthworks levels will be 3.2m AHD across the site. The earthworks plans provided as part of the appeal for DA 2018/321, showed that some areas of the site would be subject to filling works of over four metres on top of existing ground level, with the majority of the site being subject to two to four metres of fill over the existing ground level.

As part of the appeal for DA 2018/321 and the documentation lodged as part of the DA and in the court, almost 173,000m³ of material was identified as required to be imported into the site to achieve compliance with the fill levels and to address fall and cover for drainage and services.

Notwithstanding the earthworks (filling) required to comply with minimum fill heights and provide flood protection, the SCC application does not indicate the extent of geotechnical constraints that exist over the site or provide details that pre-loading of the site will be required in order to achieve a suitable ground conditions for future construction. This was an issue in the appeal relating to DA 2018/321, as outlined below.

The information provided by the applicant in the proceedings for DA 2018/321, in relation to geotechnical engineering, was not comprehensive and experts for both Council and the applicant identified that whilst there may not be a geotechnical reason why the development could not proceed, the information that had been provided did not fully investigate the site conditions and further deeper investigations were required. The further investigations that would be required included cone penetration tests/boreholes to a point of refusal in stiff to hard clayey soils and a minimum depth of 35m or to prior refusal. This investigative work would have needed to be undertaken in areas of the site that had not been subject to testing previously, including areas where fill is proposed to exceed three metres in height above the natural ground surface. After this time, a settlement analysis would need to be undertaken and recommendations then made as to construction methods and whether surcharge loading is required.

The fill levels that were proposed as part of DA 2018/321 were higher than have previously been constructed in this locality and so would have imposed significantly greater loads than have been applied to the typical soil profiles in the area, therefore warranting further investigation. Layers of clay have been encountered below 25m depth on sites elsewhere in the area which would be normally consolidated, relative to the proposed higher development loads.

In terms of whether any temporary filling beyond the design levels is required to achieve the necessary settlement objectives [known as 'surcharge' loading, which prepares the fill to safely receive the load of the proposed development and is removed once settlement objectives are achieved] and the until the additional studies are completed, the actual extent of earthworks on the site will not be known. This will have an impact on the ability of other disciplines to prepare their final assessments.

The effect of insufficient information is that there is no certainty as to whether temporary filling (or surcharge loading) is required beyond the design levels of the land. Until all this work is carried out, the actual extent of earthworks on the site, will not be known. Additionally, if it is determined that surcharge loading is required (likely), there is no idea of how long surcharge loads would remain on site and how much additional fill would be required for the loading. This then flows to an assessment of truck movements that would be required to import the fill and the length of time it would take the trucks to import and then in cases, export the surcharge fill from the land.

2. Traffic associated with earthworks

The SCC application has not referred to any construction impacts as a result of the earthworks that will be required to be carried out for the proposal. These impacts will result primarily from the additional heavy vehicle traffic (comprising truck plus dog combination) hauling the substantial amounts of fill onto and off the site.

As was the case with DA 2018/321, and without any information stating otherwise, it is expected that the construction access and haulage routes will occur at the proposed new entry/exit point onto North Creek Road (between the properties at No.'s 174 and 186 North Creek Road).

The assessments made as part of the proceedings for DA 2018/321 indicated that on the basis of the fill required for the proposed design levels (which excludes any temporary filling/ surcharge loading), the construction will require just under 10,364 deliveries by a truck and dog combination. This means that there will be just under 20,728 heavy vehicle movements for the filling of the land. When broken down further, this would be 100 truck movements per day, over 207 days at a frequency of 17 trucks per hour (on a 6 hour day), which equates to one truck every four minutes.

Depending on whether temporary filling/surcharge loading is required (and this is likely given Council's previous experiences in the area and wider locality with the subject soil type), then the number of heavy vehicle movements will increase. It must be noted that the amount of fill required for surcharge loading had not been quantified as part of the appeal for DA 2018/321, as the applicant had not undertaken assessment in relation to this (and therefore it remained a contention and concern for Council).

If a SCC is granted for the subject site and the proposal, a construction management plan should be provided with any future development application, addressing impacts of the development and proposing mitigation measures in relation to the adjoining properties at No.'s 174 and 186 North Creek Road. These properties each contain a single dwelling house, surrounded by an open landscape setting and are zoned RU2 Rural Landscape, being the same zoning as the subject development site. The owners/occupiers expectation for the type of development that would adjoin their properties would reasonably be the range of uses permitted in the RU2 Rural Landscape zone, that can accommodate the constraints of the site.

The truck movements associated with the importation of fill (and temporary filling/surcharge loading) will have a significant impact on the amenity and enjoyment of the adjoining properties. The only mitigation measures proposed as part of DA 2018/321 included the provision of a two metre acoustic wall on their side property boundary. It was considered as part of DA 2018/321, that this mitigation measure is not appropriate in the setting of a non-urban environment.

The impacts that will be experienced by the adjoining properties will be in the form of:

- Noise;
- Dust;
- Disturbance to the enjoyment of the property; and
- Alteration to outlook.

In addition, the construction of the road/driveway access into the subject site and the expected road works within the North Creek Road reserve to facilitate the proposal will result in tree impacts and/or tree removal on adjoining properties. These trees are considered to be important to the landscape setting and outlook.

The lack of preparation and submission of a Construction Management Plan means that the actual impacts and possible mitigation measures would not be fully understood. Additionally, it may be that alternate means of construction access have not been explored that may limit impacts on adjoining properties. This work should be carried out by the applicant.

Notwithstanding this, the construction impacts are a direct function of the need to import an excessive amount of fill to make the site suitable for the proposed development. The site is constrained and is not suitable for this intensity of development. The construction impacts are just one example of the unreasonable and unnecessary impacts on adjoining properties as a result of the proposal.

Additional to this issue is that no assessment was made as part of the proceedings for DA 2018/321 by the applicant as to construction noise impacts (including noise and vibration levels of the construction traffic).

The consent authority needs to have sufficient information before it to assess the construction impacts of the development and determine whether it is a matter that can be conditioned or not. Relevantly, it is necessary to have a clear understanding of the amount of fill that will be transported to the land and the acoustic and vibration impact of that transport on neighbouring properties. The two dwellings at No.'s 174 and 186 North Creek Road directly adjoin the 10m wide construction driveway to the land, and will be directly affected.

These are all matters that go to the requirements of Clause 25(5) (b)(i), (ii) and (v) of the Seniors Housing SEPP, as to impacts of the proposed development on the surrounding locality.

Access and Roads

1. Existing Access

The SCC application details that the proposal will gain access onto the wider road network via a new access driveway on North Creek Road and via the existing "BUPA Aged Care" access i.e. an internal link with the existing Palm Lake Resort. Internal roads will be delivered as a shared space and designed to allow a heavy rigid vehicle to service the site.

It is noted that the existing "BUPA Aged Care access" is not within the development site, being located on an adjoining parcel, but for which a right of carriageway exists over the access, to the benefit of the existing Palm Lake Resort development.

Council has previously received complaints in relation to parking along this access, however it is a private road where parking restriction cannot be enforced by Council and cars routinely park on the pavement and pedestrian footpath, despite signs being erected to the contrary.

As part of construction of a future proposal, it is acknowledged that construction vehicles will likely utilise the new North Creek Road access. However, residents of the existing Palm Lake Resort, along with residents of the new development would need to utilise the BUPA Access Road as entry and exit to the land, to ensure that there is no conflict with construction vehicles.

As part of a solution to this issue, the applicant proposed a future construction of a new parking area for the BUPA Aged Care Facility. Development applications have been lodged with Council in 2019 and 2020 to facilitate this outcome, and are currently under assessment.

In order for this issue to be resolved, these applications would need to be determined by way of approval, and then the approved developments completed, and for staff and visitors to the BUPA development to park in the new parking area, as opposed to on the access road and footpath (which is currently the case).

2. Intersection Design

The proposed new intersection with North Creek Road, as shown within the plans attached to the SCC application, should be designed and constructed to a standard that will allow safe and efficient operations and not prejudice the existing and future operation of North Creek Road.

As the new intersection is to be located on a future Sub-Arterial to Arterial Road (Note: the upgrade and extension of North Creek Road, to provide a strategic link to SKennars Head is identified in the Ballina Shire Roads Contribution Plan Version 4.1, which allocates funding for this project (Ref: Work Schedule [Table 4.6]), and is proposed to provide access to a private road servicing 77 dwellings, it should be designed to achieve the Safe Intersection Sight Distance requirements as defined in Austroads Guide to Road Design, Part 4A: Unsignalised and Signalised Intersections (2017).

There needs to be regard given to the future upgrading of North Creek Road, as it is anticipated that the posted and design speed is likely to increase, which will result in greater sight distance requirements for any intersections. The proposed design is not adequate to ensure the long term operational safety at this location.

Given the location of existing adjoining properties, it is unknown whether compliance can be achieved with the abovementioned sections of AUSTRoads, given the sight distances do not currently exist. Additionally, there will be a reliance on land acquisition from adjoining properties, which even if this is able to be carried out, sight distances may still be non-compliant.

3. Future upgrade to North Creek Road

The SCC application states that the anticipated increase in traffic volumes along North Creek Road between the existing “BUPA intersection” and the proposed new access driveway requires that the road be upgraded to “collector street standard” involving the delivery of half the collector road width standard along the site frontage.

The existing standard and formation of North Creek Road, between the BUPA Access Road and the proposed new access driveway, is of a low standard of rural type pavement of four to six metres, with no kerb and channelisation, insufficient to cater for the anticipated increase in traffic volume for a future 77 dwelling development.

As part of the proceedings for DA 2018/321, the applicant did not seek approval for any of the works in the North Creek Road reserve and requested the imposition of a condition to ensure that the required works were assessed, approved and completed prior to the commencement of any approved development (i.e. via a deferred commencement consent).

Notwithstanding this, the experts for the applicant and Council agreed that the following road works would be required to cater for a 77 dwelling development:

- Increase in pavement width to 7m
- Construction of a pathway of 2m width on the northern side of North Creek Road
- Road standard to comply with Northern Rivers Road Geometric Road Design; and
- Lighting on the southern side of North Creek Road.

Only “typical” details of the road works were provided as part of the proceedings for DA 2018/321, which showed:

- a. An extension to the road pavement to the north and south, to a 7m road pavement width
- b. Kerb and gutter to the road extension to the north
- c. 2m wide concrete footpath to the north
- d. Road having a ‘crown’ finish so that water will drain to the north and south of the pavement
- e. Batter for the edge of development to the north and south (shown as ‘varies’)
- f. Typical cross section of a culvert crossing, with a kerb and gutter on both sides of North Creek Road and footpath shown as a ‘boardwalk’ over the ‘approximate extent of shell middens’.
- g. Notations that proposed works in North Creek Road are for ‘discussion purposes’.

The plans did not show:

- h. The extent of works proposed to the south, including any works within the coastal wetlands (as mapped under the Coastal Management SEPP).
- i. The number and location of culverts to be constructed and any assessment of stormwater that will be directed to Priority Oyster Growing Areas, coastal wetlands or the coastal protection area.
- j. Any precision as to the works around the existing trees in North Creek Road.
- k. An assessment of precisely how many trees (and what species they are) that will need to be removed as a result of the proposed works.
- l. Any assessment of whether the proposed pavement will comply with the Northern Rivers Road Geometric Road Design and how much excavation will be required to comply with the pavement design requirements.
- m. Any assessment of whether the road design will comply with Part 6 of AUSTROADS, especially in relation to the proximity of the pedestrian footpath to the road and whether realignment would be required further to the north to provide separation between the road and pedestrians, especially at the frontage to No. 174 North Creek Road (safety fencing could be required, but no assessment on sightlines or impacts to neighbours was undertaken).
- n. The drainage proposal for the change in grade to North Creek Road including the new driveway crossings that are required for No.’s 174 and 186 North Creek Road.
- o. The location of services within the road reserve.
- p. Whether any trees will need to be removed for safety purposes.

Further design was identified as being required, in order to resolve the design, including horizontal alignment, vertical alignment, cross section and a drainage solution, which

would then confirm the spatial extent of construction and any impacts upon the defined environmental areas.

Arboricultural experts for both Council and the applicant for the proceedings for DA 2018/321 also confirmed that the indicative design surface was outside the pegged extents of the road works. These experts additionally commented that further arboricultural review of post consent/CC plans would be required to confirm the impact of the final design of the road works. This means that the impacts of the proposed design have not been assessed, due to uncertainty with the final design.

Ecologists for Council (staff and engaged experts) were concerned that the full scope of the project, including road widening should be assessed and that road widening could cause impact to the coastal wetlands. There was insufficient information provided regarding the design of the road cross section and how the footprint of the works would be feasibly contained, to avoid impact on the mangroves on the southern side of North Creek Road.

The planned extent of trimming of mangroves in North Creek Road for construction and long term maintenance of sight lines was not provided or undertaken or really known. Assessment should have been made of any impacts to the mangroves on the southern side of North Creek road, as this may have implications for hydrology, salinity regime and ecology, and there is insufficient information to make an assessment.

The drainage solution for the road works remains unknown and at least some trees will be impacted along the southern side of North Creek Road.

As there is a lack of information provided with the application, in relation to the works in the North Creek Road reserve (and the assessment of the impacts of these works cannot be left to another day/a subsequent application, and need to be assessed as part of any future development application), questions are raised in relation to the ultimate pathway for approval – i.e. designated development, a development application or Part V approval. In the case of DA 2018/321, there was no ability to assess impacts of the works within North Creek Road, which is an integral component that will service the development. This outcome should not be repeated.

Flooding

The subject site is located within a Flood Planning Area under BLEP 2012. Clause 7.3(3) of the BLEP 2012 states that development consent must not be granted to development on land within a flood planning area unless the consent authority is satisfied that the development is compatible with the flood hazard of the land, will not significantly adversely affect flood behaviour and incorporates appropriate measures to manage risk to life from flood.

The SCC application provides minimal detail on the matters considered and dealt with as part of the proceedings for DA 2018/321.

It is acknowledged that the proposal seeks to fill the land in order to provide compliance with Council's minimum fill levels and so provide flood protection to the proposed future dwellings.

Other issues to be considered as a result of the proposed filling for flood protection, include the offsite impacts that would be experienced by surrounding properties as a result of the proposed filling works. As part of the proceedings for DA 2018/321, cumulative impacts external to the site were predicted to be up to 50mm flood level increases due to the proposed development.

Council has consistently applied the 5cm maximum cumulative impact test on all previous development flood assessments since 2009. As part of the proceedings for DA 2018/321,

consideration was given to the fact that previous development approvals have already resulted in cumulative impacts of 5cm, and therefore additional caution is warranted in the assessment of development impacts, consistent with the approach of the Office of Environment and Heritage, which requires impacts off site to be limited to 1cm. This is because previous development has already increased flood levels to, and in some cases above, the 5cm cumulative limit. The cumulative impact is relevant, as minor increases from every development site can lead to a larger overall impact.

The proposal will additionally result in a loss of floodplain storage.

The SCC application indicates that a “shelter in place” approach, as included in a Flood Evacuation and Emergency Management Plan, is an acceptable emergency response approach in the circumstances and that this approach was accepted by the Court in the proceedings for DA 2018/321. However, this document was not prepared as part of the proceedings, with conditions imposed by the Commissioner requiring its preparation prior to the issue of the first Construction Certificate for the development.

As part of the proceedings for DA 2018/321, the applicant *loosely* proposed a ‘shelter in place’ approach combined with voluntary evacuation. The applicant provided evidence in the appeal that a flood management plan would need to be prepared to address the shelter in place requirement and how residents can be provided with critical services in an emergency event. There was no specific written detail provided in this regard.

The applicant did however, provide an operational management plan which noted that an Emergency Management Plan including evacuation procedures would be implemented as per the Australian Standard and in consultation with an industry expert. Six monthly evacuation drills would be carried out for both staff and residents.

Notwithstanding this proposed approach, it was noted that the local egress route would be flooded and impassable for about 40 hours and in times of a flash flood, about 12 hours. In this regard, there needed to be demonstration that the ‘shelter in place’ concept was feasible and workable.

The applicant advised that water will ‘likely’ be available at all times and toilets will still flush. The applicant based their advice on a back-up power supply and a water supply that required a design solution of a holding tank, to temporarily hold water of about 30 cubic metres [Note: 30 cubic metres of water would be required per day for 150 persons (over the 77 households and potential staff on site)].

Council did not (and will not) support the proposed ‘shelter in place’ approach. As part of the proceedings for DA 2018/321, Council’s opposition was founded partly on the basis that it was unlikely that potable water and flushing toilets would be available to residents that shelter in place. There was no proposal to include a storage tank and its associated infrastructure to reach each dwelling in the documentation or plans. No explanation was provided as to where on the site that back-up power supply and water supply would be located. As part of the SCC application documentation and plans, there is no indication that these facilities would be provided as part of the proposal and so the issues remain for Council in its consideration of the SCC application.

Further explanation of the remaining issues that Council staff and its experts had with the proposed ‘shelter in place’ approach as part of the proceedings for DA 2018/321 are outlined more fully below.

Clause 7.3 of BLEP 2012 sets out requirements for flood planning. Objective (a) of Clause 7.3 is to minimise the flood risk to life and property associated with the use of the land.

Clause 3.7.2 of Chapter 2b of Council’s DCP sets out performance criteria to manage risk of floods. Subclause (iv) of Clause 3.7.2 requires ‘Appropriate procedures (such as warning

systems, signage or evacuation drills) for land use categories of 'critical uses and facilities' and 'sensitive uses and facilities' be in place, if necessary, so that people are aware of the need to evacuate personnel and relocate goods and motor vehicles during inundation, and are capable of identifying an appropriate evacuation route.'. Seniors housing is nominated as a sensitive use in the DCP.

The Ballina Floodplain Risk Management Study (January 2012) is the document that provides an evacuation capability assessment of the Ballina LGA. Within this document, the SES is the lead agency for evacuation planning supported by other agencies and parties. It is noted that the local community is nominated as a party and has a responsibility to be familiar with local flood risk and flood safe guides, including 'private flood plans', where appropriate. The study notes that there are no formal flood warning processes in place for Ballina and responsibility lies with the SES to make a decision on whether to evacuate Ballina.

The Study also assumes unlimited availability of SES resources with door knocking by SES teams to be the method of warning the public. The evacuation warning by the SES requires 243 teams made up of 486 people.

As part of the work carried out for DA 2018/321, it was revealed that the applicant did not approach the SES as to the availability of SES resources in times of flood. At the time of the hearing for DA 2018/321, Council received advice that the SES had about 95 members, many new to the organisation, were being trained and it was advised that not every member is available 24/7.

The applicant's operational management plan indicated that the "Village Manager" would be on call 24/7, but staff generally leave the premises by 4.30pm (other than catering staff that may remain until 9pm if required). No information was provided as to how staff will manage an emergency event and which staff would be trained.

Logistically, advising all residents and moving a large number of elderly people, getting them out of their accommodation, onto transport and off site, is significant, particularly when special needs groups such as those with walkers and wheel chairs are taken into account, and because of the number of people proposed on site, existing on site in the Palm Lake Resort and in the adjacent BUPA facility, the number of bus movements and return trips would also be large.

It is acknowledged that seniors housing developments will, over time, include a significant number of people who are unsuited to being isolated for extended periods of time, due to higher than normal population health and medical conditions. The reliance on the SES will place an unacceptable burden on that agency, which will result in an unacceptable risk to residents.

There was no evidence provided by the applicant as part of the proceedings for DA 2018/321 that there is an adequate plan or workforce to assist with evacuation of residents. This is also the case, in the instance that residents do shelter in place (i.e. no adequate plan or workforce to assist), and additionally there are no medical services or facilities on site or a plan for back-up power or water supply.

A flood management plan is considered a threshold issue that must be dealt with as part of any development application, to ensure that it is possible to adequately manage risk within practical limits. Several points can be made, including whether shelter in place is an appropriate strategy and how that will be appropriately managed? How will residents be cared for during a flood event? This was not demonstrated as part of the proceedings for DA 2018/321 and on this basis, Council remains extremely concerned that the applicant is not able to achieve this as part of any future application.

It is noted that the applicant still does not have a flood evacuation strategy for the existing Palm Lake Resort, as required via conditions of DA 2004/328. Any strategy should be an

integrated approach. The applicant has not sought to remedy the existing situation for DA 2004/328 and there was no integrated strategy for DA 2018/321.

Strategic Planning

The site is mapped on the Strategic Growth Areas Map under BLEP 2012 as a Strategic Growth Area. Clause 7.8 of the BLEP 2012 applies to land identified on the Strategic Urban Growth Area Map and has one objective which is:

“to ensure that strategic urban development opportunities in the Strategic Urban Growth Area are maintained.”

It is acknowledged that Clause 7.8 seeks to limit development that may prejudice future urban or employment land uses on the land.

The Ballina Growth Management Strategy, adopted on 26 July 2012, includes the subject site as a Strategic Urban Growth Area. The Strategy states in its Executive Summary that:

“The document also identifies ‘strategic urban growth areas’, in non-urban parts of the shire that appear at a broad strategic level to have potential to accommodate future urban growth. These strategic growth areas will be subject to detailed consideration through the statutory rezoning process prior to the land being available for development. Such considerations will include the analysis of environmental constraints to development, and the capacity of urban and community infrastructure. Infrastructure requirements for strategic growth areas will be outlined in Infrastructure Delivery Plans (IDPs) prepared by the Council, prior to development occurring.”

The North Coast Regional Plan 2036 identifies the subject site on the “Urban growth area map for Ballina Local Government Area” and as an “Investigation Area – Urban Land”. A series of regional priorities for Ballina are discussed in the Plan, and in relation to housing, these include to “deliver housing at Cumbalum, Wardell, North Creek Road and Lennox Head.” The only area identified as urban area (versus Employment Land) on North Creek Road is the subject site and land to its south. Urban Growth Areas are defined in the Plan as follows:

“Includes all land zoned for various urban purposes and all future potential urban land releases as illustrated on the Urban Growth Area Maps. These areas will provide housing, business, industrial, infrastructure and community facilities to accommodate future regional population. Not all land identified within the Urban Growth areas will be suitable for development and further detailed assessment will be required.”

It is noted that Figure 13 of the Plan includes a note that “Land that is subject to significant natural hazards and/or environmental constraints will be excluded from development.”

The Far North Coast Regional Strategy and its review, was a precursor to the gazettal of the BLEP 2012 and development of the North Coast Regional Plan 2036. A review of this Strategy was undertaken in 2010/2011. Council in a letter to the Department dated 28 March 2011 in relation to the review, acknowledged the existing Palm Lake Resort and the proposed zoning under the (then) Draft Ballina LEP 2010 for it and the subject site. It is noted that a rural zone was to apply to the subject site “...on the basis that the area of the lot outside the approved development (i.e. existing Palm Lake Resort) is not suitable for further urban development being important as a buffer area and subject to a range of constraints including mosquitos and ecological values...it is requested that the FNCRS town and village growth boundary be amended to reflect the approved development footprint...”

Council’s request was not ultimately accepted by the Department and the subject site has been mapped as Strategic Growth Area in the BLEP 2012 and as Investigation Area - Urban Land under the North Coast Regional Plan 2036.

It was considered by Council as part of the proceedings for DA 2018/321 (and this consideration still remains) that this designation is an *indication* of an area identified for further review. These designations do not automatically mean that the site is suitable for more intense urban development. Council's assessment in 2011 and as part of the proceedings for DA 2018/321 indicated that this was not the case and that the site is not suitable for more intense urban development. It is noted that the outcome of a more detailed review could also just as easily remove the lands from this designation (as qualified on Figure 13 of the North Coast Regional Plan).

There cannot be reliance on the designation of the site as a Strategic Growth Area as a determination of the suitability for the site for more intense urban development and/or the development proposed within the SCC application. The designation of the site as a Strategic Growth Area has only occurred at a Regional level (which was not supported by Council at that time), which is limited by its ability to recognise particular site constraints.

Ballina Local Environmental Plan 2012

- Zone objectives and character

The subject site is located in the RU2 Rural Landscape Zone. The proposed use is not a permissible use in the zone and it is acknowledged that the SCC is effectively a mechanism which permits a use that is not permitted. However, the SCC is a gate to permissibility and like all other development that is permissible in the zone, there is a requirement to test it against the objectives of the zone.

The objectives for RU2 Rural Landscape zone are as follows:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To maintain the rural landscape character of the land.*
- *To provide for a range of compatible land uses, including extensive agriculture.*
- *To minimise the fragmentation and alienation of resource lands.*
- *To minimise conflict between land uses within the zone and land uses within adjoining zones.*
- *To enable small-scale tourist-orientated development that is compatible with the rural nature of the land.*
- *To encourage development that involves restoration or enhancement (or both) of the natural environment if consistent with the production and landscape character of the land.*
- *To enable development that does not adversely impact on the natural environment, including habitat and waterways.*
- *To ensure that there is not unreasonable or uneconomic demands (or both) for the provision of public infrastructure.*

When considering the proposal in the SCC application and the provisions of Clause 25 (5) (b) of the Seniors Housing SEPP, relative to the objectives of the RU2 zone, the following comments are made.

- The proposal fails to maintain the rural landscape character of the land in that the extent and intensity of development results in a form of development that is the same as that on the adjoining R3 Medium Density Development.

The proposal, as a result of its intensity and degree of land form change, does not maintain the rural landscape character. If the proposal had responded to rural character, it is expected that there would be a less intense development form.

- The subject site is not a transition site, as the current zoning has deliberately sought to establish a demarcation of lands, distinct from the urban area.
- The range of uses in the RU2 zone varies and many of the permissible uses would not result in the need for road layouts and the intensity of development (as is proposed in the development in the SCC application) and they are more likely to be able to have built form dispersed across the site.
- The proposal would result in land use conflict within the zone, as it results in an urban traffic impact and mitigation measures in the form of a two metre high acoustic wall and the removal of vegetation on adjoining RU2 zoned properties.
- The proposal (and supporting infrastructure) encroaches into mapped coastal wetlands and mapped proximity to coastal wetland areas. The proposal does not result in the restoration or enhancement of the environment, which has been demonstrated in the proceedings for DA 2018/321, whereby a range of impacts to the natural environment were identified, namely and most significantly in relation to ecology and hydrology.

Council therefore considers that the proposal in the SCC application does not satisfy the objectives of the RU2 zone.

In relation to rural character, Council's engaged town planning expert for DA 2018/321 provided detailed consideration of the proposal. The conclusions in relation to rural character are as follows.

"In respect to character in this context, this is essentially a question of where the edges of the urban area should be. It is one generally answered by a differentiation of zones and a change from urban or rural living to rural or environmental zones.

Those decisions have been made with the designation of zoning as RU2 Rural Landscape. However, they are impacted by the identification of the site or Strategic Growth Area – an indication for the area to be investigated.

The proposed development changes the character and nature of the land and its relationship to adjoining lands. While it is unlikely to be visible from North Creek Road, the impacts of the development function will be seen in the acoustic measures, noise and potential loss of vegetation on private properties and the North Creek Road access. These areas exhibit low scale natural landscape features.

The proposal has replicated the form and scale of land to the west currently zoned R3 Medium Density Residential, a form that is very different from single dwellings on larger rural lots.

A more sensitive approach would be a development that was less intensive and set in a landscape setting. Because of Asset Protection Zones, mosquito buffers and lot sizes, this will not be the case."

- **Aboriginal Heritage**

Clause 5.10 (8) of BLEP 2012 reads as follows:

(8) Aboriginal places of heritage significance

The consent authority must, before granting consent under this clause to the carrying out of development in an Aboriginal place of heritage significance:

(a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and

(b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.

A midden has been identified as being located in the proximity of the North Creek Road upgrade works, between the BUPA access to North Creek Road and the new road/driveway access for the proposal. The proposal within the SCC application has the potential to impact the midden and these impacts would not be able to be assessed in the absence of detailed information regarding the works in the North Creek Road reserve, including road works, installation of infrastructure servicing and pedestrian pathways. Comprehensive information and detailed plans would be required as part of any future development application, to enable proper assessment against the provisions of Clause 5.10 of the BLEP 2012.

- Acid Sulfate Soils

Clause 7.1 of the BLEP 2012 is relevant in the assessment of a future development application for the proposal. The land is identified as containing Class 2 Acid Sulfate Soils on the Acid Sulfate Soils Map attached to the BLEP 2012. The matters to be considered and satisfied by the consent authority include:

(1) The objective of this clause is to ensure that development does not disturb, expose or drain acid sulfate soils and cause environmental damage.

(3) Development consent must not be granted under this clause for the carrying out of works unless an acid sulfate soils management plan has been prepared for the proposed works in accordance with the Acid Sulfate Soils Manual and has been provided to the consent authority.

These provisions require that development consent must not be granted under this clause for the carrying out of works unless an acid sulfate soils management plan has been prepared for the proposed works in accordance with the Acid Sulfate Soils Manual and has been provided to the consent authority.

As detailed previously, this was a matter that Council was successful on in relation to the Section 56A appeal, as the applicant had not provided an Acid Sulfate Soils Management Plan (ASSMP) that included all of the proposed works, including works to the Western Creekline.

The SCC Application details that a revised ASSMP will be updated to capture management of ASS in relation to necessary stormwater management and vegetation management works in the western creekline and (will be) furnished with any future application.

The provision and acceptance of the ASSMP is a precondition of the grant of development consent. Any future application will need to address the state of the western creekline and the testing/sampling for the presence of monosulfidic black ooze (MBO) within the creek. This is specifically relevant to changes in water flow into the creekline, as a change in peak discharge within the creekline has the potential to scour the creek bed, expose MBO and

risk downstream water quality. MBO's have potential for significant deoxygenation and acidification of the water column and pose risks for local and downstream environments.

It is noted that the risk of disturbance of MBO through increased water flows, mosquito management works, the installation of a new bridge to connect the proposed development to the existing resort over the creekline and retaining wall works proposed within the creekline, was not assessed by the applicant as part of the proceedings for DA 2018/321.

Council cannot be certain that there is the ability to provide an appropriate and compliant ASSMP for the proposal, particularly in relation to the western creekline. The applicant will need to describe, assess and prepare plans for the works to be undertaken in the western creekline including drainage thereto.

The mobilisation of ASS from the development site and MBO from the western creekline poses risks to water quality in North Creek, and therefore key fish habitats, coastal wetlands, EEC, priority oyster growing areas.

- Earthworks

Clause 7.2 of the BLEP 2012 is relevant in the assessment of a future development application for the proposal. The matters to be considered and satisfied by the consent authority include:

(a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,

(b) the effect of the development on the likely future use or redevelopment of the land,

(c) the quality of the fill or the soil to be excavated, or both,

(d) the effect of the development on the existing and likely amenity of adjoining properties,

(e) the source of any fill material and the destination of any excavated material,

(f) the likelihood of disturbing relics,

(g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,

(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

The issues that had been raised in relation to DA 2018/321 relevant to this clause are as follows:

- There was not the provision of details of the quality of the fill or its source.
- The effect of the importation of such a large amount of fill results in adverse amenity impacts in terms of traffic, noise, loss of vegetation and erection of acoustic fencing.
- The mitigation measures to address these earthworks impacts are not appropriate.
- The erection of a two metre high acoustic fence is an urban response and both the road works and fence potentially impact on vegetation on private lands.
- The proposed works within the North Creek Road reserve will impact upon Aboriginal archaeology.
- The information provided in support of the proposal did not properly address the potential impacts on key fish habitats or priority oyster areas.

For these reasons, it was considered that the proposal did not appropriately respond to the site's constraints. This continues to be the case in relation to the proposal within the SCC application.

- Flood Planning

Clause 7.3 of BLEP 2012 is relevant in the assessment of a future development application for the proposal. The matters to be considered and satisfied by the consent authority include:

(1) The objectives of this clause are as follows:

- (a) to minimise the flood risk to life and property associated with the use of land,*
- (b) to allow development on land that is compatible with the land's flood hazard, taking into account projected changes as a result of climate change,*
- (c) to avoid significant adverse impacts on flood behaviour and the environment.*

(2) This clause applies to:

- (a) land identified as "Flood planning area" on the Flood Planning Map, and*
- (b) other land at or below the flood planning level.*

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

- (a) is compatible with the flood hazard of the land, and*
- (b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and*
- (c) incorporates appropriate measures to manage risk to life from flood, and*
- (d) will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and*
- (e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.*

(4) A word or expression used in this clause has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0) published by the NSW Government in April 2005, unless it is otherwise defined in this clause.

(5) In this clause:

land at or below the flood planning level means land at or below the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metres freeboard."

Refer to the discussion provided previously in relation to flooding in this response. The matters included in Clause 7.3 are considered to be threshold issues and the consent authority needs to be satisfied that a proposal meets the criteria in Clause 7.3 (3). If satisfaction cannot be reached, the conclusion is that the site is not suited to intense urban development. Based on the information provided in the proceedings for DA 2018/321 and the information provided in the SCC application, Council considers that the provisions of Clause 7.3 will not be able to be satisfied.

- Servicing

Clause 7.7 of the BLEP 2012 is relevant in the assessment of a future development application for the proposal. The matters to be considered and satisfied by the consent authority include:

(2) Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required—

(a) the supply of water,

(b) the supply of electricity,

(c) the disposal and management of sewage,

(d) stormwater drainage or on-site conservation,

(e) suitable vehicular access,

(f) telecommunication services.

As detailed in this response, as part of the proceedings for DA 2018/321, Council considered that the applicant could not demonstrate compliance with 7.7 (2) (a), (c), (d) or (e). All of this servicing is essential for the development and as part of any future application, the applicant will need to demonstrate essential servicing can be provided to the development, via the preparation and submission of detailed plans and a proper impact assessment of those works. There remains significant reservations that the essential services cannot be provided for a future proposal, on account of the impacts of those works.

Upgrade to North Creek Road and works in the road reserve – conflicts and competing interests

The ability to access and service the subject site is a fundamental and threshold issue to the acceptability or otherwise of the merits of this proposal. Documentation provided by the applicant in the SCC application identifies the need to upgrade North Creek Road.

As part of the proceedings for DA 2018/321, Council raised concerns about the conclusions reached in relation to the works required for the upgrade and the lack of detail in the information submitted. This is a concern also for the proposal within the SCC application.

From a planning perspective, the environmental impacts of the upgrade need to be understood. This is not an urban environment where there are minimal environmental constraints, where the road alignment may fit within an existing reserve, that is already modified and tree removal and access points are clear.

The scenarios require a detailed understanding of the road geometry and extent of earthworks and service location, in order to accurately identify the environmental impacts and correct approval pathways.

The degree of impact is not isolated to one particular issue or concern. The impacts that appear to result from the works in the North Creek Road reserve include:

- Encroachment to coastal wetlands;
- Impact on land within proximity to coastal wetlands area;
- Impacts on ecological significant vegetation and vegetation generally (trees);

- Impacts on Aboriginal archaeology;
- Impacts on amenity of adjoining properties;
- Impacts on key fish habitat and priority oyster aquaculture areas;
- Hydrological and stormwater management.

The assessment of these impacts would, depending on the approval pathway (either designated development application or Part V application), be in the form of an Environmental Impact Statement or Review of Environmental Factors. This assessment cannot be deferred to a subsequent application, as it is an integral aspect of the proposal, and is only required because of the proposal, and should therefore be properly considered as part of the assessment of the future development application for the proposal (not as part of a subsequent application, as was proposed as part of the proceedings for DA 2018/321).

Vegetation Management Plan – conflicts and competing interests

From a planning point of view, there needs to be a clear understanding of what, in some cases, can be competing objectives for different disciplines. For example, the feasibility of retaining vegetation in an Asset Protection Zone or a requirement for dense vegetation as part of proposed rehabilitation, which may contribute to mosquito habitats.

The documentation and plans lodged by the applicant as part of the proceedings for DA 2018/321 contained a series of inconsistencies, particularly between bushfire, mosquito, riparian and vegetation management outcomes. This is also the case for the information provided as part of the SCC application.

The land subject of the SCC application is required to be managed under a Creek and Vegetation Plan of Management, as approved via the consent conditions of DA 2004/328. The land was not earmarked for future development.

The information lodged as part of the appeal for DA 2018/321 and that which is provided as part of the SCC application, seeks a revisitation to this plan. It is therefore considered that the entire CVPM is up for review, not just particular aspects. Any future development should not result in a lesser outcome to that required to be achieved under the current plan and outcomes in the plan should not be undermined.

The overarching objectives for this site from broad site planning and recognition of constraints would be to keep all development clear of proximity to wetlands and riparian buffers. The need for APZ and mosquito management arises from a development proposal and should not impact upon the riparian or proximity area ecological outcomes.

The proposed VMP, as included in the SCC application package includes the slashing and/or removal of vegetation in Zone 5. There does not appear to be a reason for this, and the proposal included in the SCC application does not require it. Furthermore, questions are raised as to the appropriateness of riparian areas being managed for bushfire purposes. This is a clear conflict of disciplines that has not been addressed by the applicant, either as part of the proceedings for DA 2018/321 or as part of the SCC application.

There are inconsistencies in the Vegetation Management Plan and the appropriate offsets for the loss of vegetation need to be determined. The proposal within the SCC application should not result in the loss of vegetation within:

- Riparian Areas;
- Coastal Wetlands and Proximity to Coastal Wetland Areas;

- Areas previously identified for retention and rehabilitation for previous SEPP 14 Regeneration Areas; and
- Adjoining properties.

Any future development on the subject site should provide vegetated outcomes in addition to what is already being provided under DA 2004/328 and at least should not undermine them. They were outcomes arising from a particular form and intensity of development.

Site suitability

The land is considered to be fundamentally unsuitable for the proposed development having regard to the following:

- Portions of the subject site is mapped as proximity to coastal wetlands on the Coastal Wetlands and Littoral Rainforest Map under the Coastal Management SEPP. Portions of North Creek Road, and works required to be undertaken thereto to facilitate the proposal, are located within coastal wetlands on the Coastal Wetlands and Littoral Rainforest Map under the Coastal Management SEPP. The majority of the subject site is also mapped as Coastal Environment Area under the Coastal Management SEPP.

The encroachment of any development into the coastal wetland and the proximity to coastal wetland area, in the context of this site, is not something that can reasonably be supported on planning grounds. It is a known constraint, and unless specific circumstances warrant, future development should remain clear of it. In considering a site for development, the proximity to coastal wetland areas should essentially be treated as a significant constraint to development, such that all development is contained outside of this area.

- The subject site contains stands of ecologically significant vegetation as identified in the applicant's BDAR and as confirmed by Council staff in their assessment of DA 2018/321.

The proposal within DA 2018/321 and within the SCC application results in the removal of vegetation from areas mapped as proximity to coastal wetlands both within the site and as a result of the construction of the road/driveway access from North Creek Road to the site.

Riparian areas are proposed to be managed to accommodate APZ and mitigate mosquito impacts. These areas include the western creekline, although specific details of this management were not provided as part of the proceedings for DA 2018/321 (and have not been provided as part of the SCC application materials).

The whole of the site, the subject of the SCC application is required to be managed in accordance with the approved Creek and Vegetation Rehabilitation Plan – a requirement of conditions of DA 2004/328. It is noted that this has not been carried out the landowner for at least the past ten years.

The proposed development results in the loss of vegetation required to be retained and managed as part of the approved CVPM, including two large tracts in the centre of the subject site.

The acceptability of the development of the existing Palm Lake Resort (primarily via DA 2004/328 and somewhat via DA 2017/434) relied on the vegetation outcomes arising from those consents and the implementation of the CVPM. Both previous DA's permitted vegetation removal for a range of trees, noting the extensive amount of landscape being provided on the existing Palm Lakes Resort site and the rehabilitation works on the subject site.

There are inconsistencies between bushfire management and vegetation outcomes.

To accommodate potential road upgrades and road access, the proposed development potentially requires removal or impacts on vegetation in the RU2 Rural Landscape zone within the road reserve and from adjoining properties at 174 and 186 North Creek Road.

The extent of impact on vegetation in the coastal wetland and the proximity to coastal wetland area in order to construct road upgrades to North Creek Road and the provision of servicing and infrastructure in the road reserve to service the proposal has not been investigated or defined. This unknown means that adequate assessment in relation to impacts cannot occur.

- The subject site is also identified as Flood Planning Land on the Flood Planning Map under the BLEP 2012. To address the flooding impacts, 172,775m³ of fill is required to be brought to the site, resulting in increases to land levels in the order of three to 4.5 metres and potentially more above the existing levels. The requirement to modify the landform to the extent proposed to fill the area in the order of 3m to 4.5m and potentially more to address flood impacts is indicative of the unsuitability of the site.

The extent of proposed land modification means that the majority of the 77 dwellings will have a top RL equal to or just below RL 10.4m (RL 1.9 + 8.5 = RL 10.4m). This means that a large percentage of the proposed single storey dwellings have been designed to comply with the upper extremity of the 8.5m Height of Building development standard (within clause 4.3 of the BLEP 2012), as calculated in accordance with clause 4.3A of the BLEP 2012. This is clearly indicative of the excessive amount of fill required for the site to be suitable for residential use. This is not typical of single storey dwelling development in the Ballina Shire.

- The subject site is a known mosquito hazard area and is mapped on the Mosquito Management Map under BDCP 2012. Refer to further comments in this response regarding mosquito impacts.
- The subject site is mapped on the Ballina Bushfire Prone Land Map as Category 1 Bushfire Prone Vegetation. Refer to further comments in this response regarding bushfire impacts.
- The subject site is mapped as containing Class 2 Acid Sulfate Soils (ASS) on the Acid Sulfate Soils Map under the BLEP 2012. Refer to further comments in this response regarding inadequate investigation in relation to ASS.
- Options for access to the site are available (through the existing facility at connections from Cork Lane or North Creek Road, a new point of access off North Creek Road at two (2) locations and a new point of access off Cork Lane). However, the proposed point of access is between two small rural residential properties, located at Lot 1 DP 555386 (No. 186 North Creek Road) and Lot 2 DP 551222 (No. 174 North Creek Road). The width of this land is in places less than 16m. The dwelling at No. 186 North Creek Road is in close proximity to the new road/driveway, being three to 3.5m from the property boundary.
- The development will significantly alter the amenity currently enjoyed by property owners at No.'s 174 and 186 North Creek Road. The construction of the road/driveway access between these two properties, as required to service the development, results in the potential removal or impact on trees on these properties.

The fill material for the proposal is to be transported along designated transport routes and brought to the site through the proposed access between the two dwellings at No.'s 174 and 186 North Creek Road. These dwellings, and immediately adjoining lands, are zoned RU2 Rural Landscape under the BLEP 2012.

The proposed development, to mitigate the impacts arising from the traffic and construction noise, requires the construction of a two metre high acoustic fence along the currently open boundaries of the rural landscape zoned properties at No.'s 174 and 186 North Creek Road. A two metre high acoustic fence to mitigate acoustic impacts is only marginally acceptable in a wholly urban environment – it is essentially an urban response to an impact. The properties impacted enjoy open boundaries and vegetated sites. These boundary conditions and open vegetated outlook and aspect are a key feature of the site enjoyed by residents. The acoustic mitigation measures result in unreasonable amenity impacts, in the context of the rural character of these sites.

- At particular times of bushfire and flood events, residents will be required to shelter in place with limited access to meal services and medical services, as these facilities are not on site but provided by a third-party contractor. During the proceedings for DA 2018/321, the applicant's experts advised that a medical emergency at the proposal, while isolated, will likely need a boat or helicopter as there are no dedicated medical services on site and that the isolation times could be in the order of 1-2 days, depending on the type of storm.
 - The degree of modification required to the site to accommodate the development, the alteration of proximity areas to wetlands and riparian areas, the amenity impact in terms of change to rural outlook, traffic and acoustic mitigation measures are indicative of the site's unsuitability. It is Council's view that, having regard to the provision of clause 25(5)(b), the proposed development is not compatible with surrounding land uses as:
 - The development unreasonably encroaches in lands identified as proximity to wetlands and results in the removal of Ecologically Endangered Communities.
 - The degree of land form change to accommodate the form and scale of the use is unreasonable.
 - Precludes more sensitive and appropriate uses being made for the lands.
 - Entrenches vulnerable uses in lands subject to flooding.
 - The intensity of development is inconsistent with that found or anticipated in an RU2 Rural Landscape Zone and on adjoining lands in the east and south.
-

As part of the exhibition of DA 2018/321, including that proposal subject to proceedings in the Land and Environment Court, public submissions were received from surrounding property owners/occupiers and also residents of the existing Palm Lake Resort. A summary of the issues raised is provided below, for the information of the Department.

- Flooding and drainage impacts on adjoining properties (and resulting odour, mosquito breeding issues) and the surrounding area.
- The proposal does not take into account climate change and frequency and severity of extreme weather events. The proposal only has a 100mm freeboard over the minimum fill level for the site.
- Inadequate information provided in relation to proposed development and impacts on surrounding properties (during and post construction) – filling of the "expansion" site, impacts on ground water, drainage and flooding.

- Overloading of communal facilities in existing Seniors Housing Development from the proposal in the expansion site.
- Insufficient car parking within existing Seniors Housing Development (around communal facilities) to cater for proposed dwellings in expansion site.
- Internal traffic and pedestrian impacts for the existing Seniors Housing Development from additional vehicles (pedestrians and vehicles share road space).
- Impacts of construction traffic, earthworks and construction works on residents of the existing Seniors Housing Development, the surrounding environment (vegetation and tidal waterways) and surrounding locality.
- Concerns regarding emergency vehicles access for the existing Seniors Housing Development, proposed development, BUPA aged care facility and surrounding locality.
- Existing vegetation along western creekline should be retained and there is no greenspace in the proposed development.
- The land should be preserved as wetlands.
- Inadequate information provided in relation to flora and fauna impacts resulting from the proposal.
- The use of offset credits on other land or making a financial offset in relation to the removal of EEC vegetation does not negate the degradation of the local environment.
- Inadequate consideration of the provisions of SEPP 62, including Healthy Estuaries for Healthy Oysters, NSW DPI 2017).
- Non-compliance with Ballina Shire Stormwater Management Guidelines.
- Impacts of stormwater from the proposed development on existing oyster growing areas.
- Cumulative stormwater impacts of surrounding developments on existing oyster growing areas and other marine species.
- Questions raised over the veracity of the submitted Stormwater Report and Plan – detaining flows, design parameters of bio-retention basins (incorrect pH), incorrect statements made regarding lawful point of discharge, flow direction and drainage.
- Increased siltation and foetid water pooling to the east along North Creek Road has resulted from the existing Seniors Housing Development.
- Impacts on quality of estuarine environment and oyster growing areas.
- Questions raised in relation to Developer's compliance with DA 2004/328 – insufficient street and villa numbering, non-compliance with Building Standards and conditions of consent relating to roof colour, mosquito screening and crime prevention.

Many of the concerns raised by residents are similar to the issues raised by Council in relation to the proposal.

The following response is made in relation to the provisions of Clause 25 (5) (b) (iii).

(iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision, particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26)

In relation to this clause:

- Services

The SCC application documentation states that *“the site has water, sewer, electricity, and telecommunications connections available because of its proximity to existing residential development.*

Service layout plans were prepared in relation to the amended DA before the Court and involve delivery of works within the North Creek Road reserve which will be dealt with under a separate application under the Local Government Act 1993.

The relevant panel can be satisfied that the proposed development is compatible with surrounding land uses having regard to service provision.”

As discussed above in this response, there are questions raised about the ability to service the site in terms of water and sewer infrastructure, given that detailed design has not occurred and there is no clarity in terms of impacts on the environment (including Aboriginal heritage, hydrology and ecology) within the North Creek Road reserve. The impacts (and assessment of those impacts) of the proposed servicing therefore needs to be addressed and cannot be dealt with under a separate Local Government Act application.

- Location and access to facilities

The comments made in the SCC application documentation are largely agreed with, in that as part of DA 2018/321, the applicant provided details that private transport would be provided for residents to access shops, bank service providers and other retail and commercial services, community services and recreational facilities and the practice of a general medical practitioner.

It would be required as part of any future application that this private community bus service be made available to the residents of the 77 serviced self-care dwellings. The bus service is to be available to transport residents from the development site to the Ballina Fair Shopping Centre and Ballina Central Shopping Centres at least once per day between 8am and 12pm and once per day between 12pm and 6pm, seven days a week. The private community bus will be required to have a capacity for seating a minimum of 10 passengers, plus driver.

In relation to services available on site, the SCC application details that “several services will be made available to residents on site such as caretaker and emergency services, registered nurse, personal care, meal services, and housekeeping services. Detailed operational information concerning on provision of site services and the proposed private transport service was produced in relation to DA2018/321 and has been provided at Annexure F”.

It is noted that the operational detail is provided in Annexure G to the SCC application and not Annexure F (which is the Traffic Impact Assessment). The proposal does not

identify these services to be provided on the subject site, as no such building from which these services can operate, is proposed. Instead, it is expected that these services will be provided from the adjoining existing Palm Lake Resort, which contains community buildings from which these services could operate.

It would be required as part of any future application that:

- The recreation, community and communal facilities within the existing Palm Lake Resort (as approved via DA 2004/328) are made available for use by the residents of the proposed 77 serviced self-care dwellings.
- The applicant provide written evidence from appropriate service providers that service (or are able to service) the Ballina locality such that the residents of the 77 x serviced self-care dwellings will have access to:
 - home delivered meals, and
 - personal care and home nursing, and
 - assistance with housework,
- An operational management plan outlining the provision of on-site services and the proposed private transport service in accordance with the above be prepared.