

NOTICE OF MEETING



ORDINARY MEETING

An Ordinary Meeting of Byron Shire Council will be held as follows:

Venue	Council Chambers, Station Street, Mullumbimby
Date	Thursday, 17 May 2012
Time	10.30am

This meeting will be open to the public and the press.

Public Access relating to items on this Agenda can be made between 9.00am and 10.30am on the day of the Meeting. Requests for public access should be made to the General Manager or Mayor no later than 12.00 midday on the day prior to the Meeting.

Submissions and questions from the public - Anyone wishing to make a submission to Council on an item outside the Agenda or to ask a question of a general nature to Councillors or to the General Manager will be able to do so at the completion of the Public Access period (refer note above) time permitting and at the discretion of the Mayor.

Graeme Faulkner
General Manager

CONFLICT OF INTERESTS

What is a “Conflict of Interests” - A conflict of interests can be of two types:

Pecuniary - an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated.

Non-pecuniary – a private or personal interest that a Council official has that does not amount to a pecuniary interest as defined in the Local Government Act (eg. A friendship, membership of an association, society or trade union or involvement or interest in an activity and may include an interest of a financial nature).

Remoteness – a person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to a matter or if the interest is of a kind specified in Section 448 of the Local Government Act.

Who has a Pecuniary Interest? - a person has a pecuniary interest in a matter if the pecuniary interest is the interest of the person, or another person with whom the person is associated (see below).

Relatives, Partners - a person is taken to have a pecuniary interest in a matter if:

- The person’s spouse or de facto partner or a relative of the person has a pecuniary interest in the matter, or
- The person, or a nominee, partners or employer of the person, is a member of a company or other body that has a pecuniary interest in the matter.

N.B. “Relative”, in relation to a person means any of the following:

- (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descends or adopted child of the person or of the person’s spouse;
- (b) the spouse or de facto partners of the person or of a person referred to in paragraph (a)

No Interest in the Matter - however, a person is not taken to have a pecuniary interest in a matter:

- If the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative or company or other body, or
- Just because the person is a member of, or is employed by, the Council.
- Just because the person is a member of, or a delegate of the Council to, a company or other body that has a pecuniary interest in the matter provided that the person has no beneficial interest in any shares of the company or body.

Disclosure and participation in meetings

- A Councillor or a member of a Council Committee who has a pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council or Committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.
- The Councillor or member must not be present at, or in sight of, the meeting of the Council or Committee:
 - (a) at any time during which the matter is being considered or discussed by the Council or Committee, or
 - (b) at any time during which the Council or Committee is voting on any question in relation to the matter.

No Knowledge - a person does not breach this Clause if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.

Participation in Meetings Despite Pecuniary Interest (S 452 Act)

A Councillor is not prevented from taking part in the consideration or discussion of, or from voting on, any of the matters/questions detailed in Section 452 of the Local Government Act.

Non-pecuniary interests - Must be disclosed in meetings.

There are a broad range of options available for managing conflicts & the option chosen will depend on an assessment of the circumstances of the matter, the nature of the interest and the significance of the issue being dealt with. Non-pecuniary conflicts of interests must be dealt with in at least one of the following ways:

- It may be appropriate that no action be taken where the potential for conflict is minimal. However, Councillors should consider providing an explanation of why they consider a conflict does not exist.
- Limit involvement if practical (eg. Participate in discussion but not in decision making or vice-versa). Care needs to be taken when exercising this option.
- Remove the source of the conflict (eg. Relinquishing or divesting the personal interest that creates the conflict)
- Have no involvement by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in S451 of the Local Government Act apply (particularly if you have a significant non-pecuniary interest)

RECORDING OF VOTING ON PLANNING MATTERS

Clause 375A of the Local Government Act 1993 – Recording of voting on planning matters

- (1) In this section, **planning decision** means a decision made in the exercise of a function of a council under the Environmental Planning and Assessment Act 1979:
 - (a) including a decision relating to a development application, an environmental planning instrument, a development control plan or a development contribution plan under that Act, but
 - (b) not including the making of an order under Division 2A of Part 6 of that Act.
- (2) The general manager is required to keep a register containing, for each planning decision made at a meeting of the council or a council committee, the names of the councillors who supported the decision and the names of any councillors who opposed (or are taken to have opposed) the decision.
- (3) For the purpose of maintaining the register, a division is required to be called whenever a motion for a planning decision is put at a meeting of the council or a council committee.
- (4) Each decision recorded in the register is to be described in the register or identified in a manner that enables the description to be obtained from another publicly available document, and is to include the information required by the regulations.
- (5) This section extends to a meeting that is closed to the public.

BUSINESS OF ORDINARY MEETING

1. APOLOGIES

2. REQUESTS FOR LEAVE OF ABSENCE

3. DECLARATIONS OF INTEREST – PECUNIARY AND NON-PECUNIARY

4. TABLING OF PECUNIARY INTEREST RETURNS (s450A Local Government Act 1993)

5. ADOPTION OF MINUTES FROM PREVIOUS MEETINGS

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Councillors are encouraged to ask questions regarding any item on the business paper to the appropriate Executive Manager prior to the meeting. Any suggested amendments to the recommendations should be provided to the Administration section prior to the meeting to allow the changes to be typed and presented on the overhead projector at the meeting.

NOTICES OF MOTION

Notice of Motion No. 8.1. Submission to the Report on 'The Review of the NSW Livestock Health and Pest Authority (LHPA) Model'

COR405527 #1224636

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I move that Council endorse and forward the attached submission to the Report on 'The Review of the NSW Livestock Health and Pest Authority (LHPA) Model', initiated by the NSW Government prior to the closing date of 23 May 2012.

10 **Signed: Cr Patrick Morrisey**

Councillor's Background Notes:

15 Council made an initial submission to the latest review into the LHPA in 2011. The recently released 'Ryan Review' recommends landmark and far reaching changes to the delivery of animal health, pest management and biosecurity services.

20 The Report makes reference to the alternate arrangements for pest animal control that Byron Shire Council has implemented by engaging a private professional wild dog, fox and feral cat trapper to assist landholders fulfil their responsibilities (p.40) and recommends a broader role for local governments, community groups, landholders and private service providers via the governments commitment to biosecurity through **NSW2021** (State Plan).

25 The NSW Government is encouraging the community to have a say stating that the feedback will inform the governments final response to the report.

30 Council funds the control and management of invasive species across the shire via at least 5 different methods - noxious weed control via Far North Coast Weeds (FNCW), environmental weed control via Council Natural Resource Management programs, working with community groups and external funding opportunities, pest animal control via administrative support for a Pest Animal Officer position (funded by NRCMA) and via the services of professional pest animal control trapper. Given the far reaching recommendations in the review that include how both weed species and pest animals could be controlled within a broader biosecurity framework in NSW in the future, Council has both legitimate and important reasons to lodge a submission.

35

The attached submission identifies the salient points relevant to local government, provides general support for the review findings and recommends further ways the delivery of frontline biosecurity control in NSW can occur.

40 Recommended priority relative to other Management Plan tasks:
High – Byron Shire Biodiversity and Conservation Strategy

Definition of the project/task:

45 Council endorse and forward the attached submission to the Independent Review of the Livestock Health and Pest Authority (LHPA), initiated by the NSW Government prior to the closing date of 23 May 2012.

Source of Funds (if applicable):

50 N/A

Attachment:

A Submission

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Management Comments:

(Management Comments must not include formatted recommendations – resolution 11-979)

Clarification of project/task:

- 5 Council is able to make the submission to the Independent Review of the Livestock Health and Pest Authority prior to the closing date of 23 May 2012.

Executive Manager responsible for task implementation:

- 10 Environment and Planning

Relationship to, priority of, and impact on other projects/tasks:

No impact

Financial and Resource Implications:

- 15 Nil

Legal and Policy Implications:

Nil

Attachment A

Submission by Byron Shire Council

5

April 2012

“Report on the Review of the NSW Livestock Health and Pest Authority (LHPA) Model” – The Ryan Review

10 We support the Review’s context being **NSW2021** (State Plan) and in particular Goal 28: *Ensure NSW is ready to deal with major emergencies and natural disasters specifically to: ‘Maintain preparedness to deal with biosecurity threats’ by:*
15 ***Building capacity within local government, community groups and landholders to effectively manage invasive animals, plants and diseases.*** **NSW2021** (State Plan)

Byron Shire and others local governments are already managing invasive pest animals and plants species with community groups and landholders and look forward to seeing the detail about how further capacity can be built within local government by the NSW Government to facilitate opportunities for innovation and competition in the way invasive plants and animals are managed with adequate resources.

25 Council supports a new risk based funding model that distinguishes between funding the biosecurity functions unique to the livestock industry (eg disease, e-PIC Register, District Vets & National Livestock Identification System etc) from funding for the broader biosecurity functions associated with invasive species be they pest animals or pest weed species. The former biosecurity risk primarily arises from the livestock industry (risk creators) whereas the latter (invasive species) are a broader community wide issue and could arguably be funded from the broader community of NSW (risk bearers).

30 We support separating the regulatory functions associated with controlling invasive species (declared pest animals and noxious pest weeds) from the delivery of services designed to manage these species and that the delivery of front line invasive species management services be based on an open, transparent, competitive tendering process (p.17). Lead agencies at a regional level will still need to play a key role in the development and review of strategy, compliance, extension and surveillance actions.

40 A number of front line services could be delivered through private contractors however the degree or span of what services are placed on the open market would need to be considered carefully to ensure coordination and achievement of planned outcomes. Lead agencies will still need to retain a responsibility in facilitating the delivery of services outside the regulatory function.

45 The creation of ‘one-stop-shops’ or ‘new regional service delivery organisations’ (p.15-16) should not undermine the ability of various service providers, including private contractors, from competing to deliver front line services.

50 Arbitrary rating all landholders with more than 20, 10, 6 or 4 hectares, irrespective of whether they pose a higher biosecurity risk or not, and not rating those with less than a particular size landholding even though they may carry livestock and therefore pose a higher risk has always been and will continue to be a divisive issue until an equitable funding model is developed. The ‘Ryan Review’ can finally resolve this inherent flaw in the current funding model if they adopt The Beale Review’s (2008) definition of ‘shared responsibility’ meaning the ‘Commonwealth, States, business and the general community’ and where ‘business’ refers to the livestock industry and ‘general community’ refers to all residents of NSW, not for example an arbitrary ‘rural’ land size. In

terms of the 'risk-return principle' threats posed by invasive animal and weed species do not stop in rural residential / peri-urban areas but extend on a continuum to urban areas as well.

- 5 In relation to where the prime responsibility for biosecurity lies between 'risk creators and risk bearers' (Review p. 7) clarification and evidence is required by the Government to determine what biosecurity risk landholders with livestock pose to the livestock industry compared with those landholders that do not carry livestock in order to transparently and equitably determine how funding for a new user pay system for livestock health and invasive species can be developed.
- 10 With regards Pest Animals, the Review's statement that "all landholders should be treated equally" (p.41) to ensure the most efficient and least cost means of controlling these biosecurity risks from spreading, makes sense in relation to funding compliance programs, but not for funding control programs as it would remove the incentive for individuals to take personal responsibility. Incentives are required to encourage all landholders to reduce their biosecurity risks.
- 15 Many landholders have a general lack of understanding on what their obligations are for 'declared' and 'noxious' pest management. Education and building community's capacity and commitment to management of invasive species is a priority.
- 20 Currently LHPAs, Local Governments, CMAs, Weeds Authorities and other agencies are all involved in managing invasive species, via at least 2 rating systems, various tax bases and providing overlapping services.
- 25 Models for funding local governments (and other service providers), such as via State funding and/or levying a rate for invasive species management regionally rather than a one size fits all funding formula decreed from a central authority should be developed to provide the level of detail required to make **NSW2021's** commitment to building capacity with local government a reality.
- 30 Nevertheless Rates collected by any authority, be it LHPAs, CMA's or Local Governments should not necessarily mean that only those agencies can spend those Rates collected. Whilst compliance programs may require a particular authority to administer, any rates collected by an agency to deliver on ground works should be contestable and awarded on merit through an open competitive tendering process.
- 35 Council also supports the Review recommendations:
- For a new management system which reduces excessive ... and extremely high administrative overheads relative to ... local governments (p.56), over governance and staff diverted to servicing too many meetings on too many non-crucial issues, too often by dissolving the existing 14 LHPAs and State Management Council (p10);
 - That on average 1 Director for every 3 staff in the organisation is excessive (p.58);
 - That case studies for two LHPAs indicate that overheads account for 42% of net expenditure for one authority and 57% for another one is extremely high (p.56); and
 - that moving to the local government rating base would achieve significant savings (p.54);
 - that Travelling Stock Reserves be devolved to appropriate NSW Government agencies (p.46);
 - the need for cost centre accounting, improved transparency and accountability to NSW Government and ratepayers (p12);

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- that there is a conflict of interest in the current arrangement to control wild dogs whereby the LHPA are both the regulator and the monopoly supplier of products (1080 baits) to control and that this function should be contestable, that is open to competition (p41);
- 5
- To investigate alternate rating methodologies for matching the benefits to the industry with the costs incurred in ensuring those benefits (p55).

Conclusion

10 The independent Review identifies considerable deficiencies in the existing LHPA system and provides far reaching recommendations. Unfortunately the LHPA itself in its submission to the review recommended the current rating methodology, which causes so much conflict, be maintained (p51). Maintaining the status quo is not an option open to the government.

15 It is hoped that the NSW Government acts on the Review findings and also seriously considers the added recommendations in this submission to make the control of biosecurity in NSW as efficient, effective and as equitable as a frontline biosecurity system needs to be.

Notice of Motion No. 8.2. CCTV Cameras in Byron Bay

COR405527#1224220

I move:

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1. That Council give in principle support to the installation of CCTV cameras in Byron Bay.
2. That staff negotiate with Byron Bay Police and Byron United to determine the hot spots where cameras would prove to be the most efficient.
3. That funding opportunities be sought for the purchase and installation of cameras.

10

Signed: Cr Diane Woods

15

Councillor's Background Notes:

It has been stated that Byron Bay is the fourth worst place in NSW for violence on the streets and in particular the area of Jonson Street.

20

It is fair to say that drugs and alcohol play a significant part in the anti-social behaviour and the police have supported the use of CCTV to assist with the control of such behaviour

Recommended priority relative to other Management Plan tasks:

25

High

Definition of the project/task:

30

Not provided

Source of Funds (if applicable):

35

Not provided

Management Comments:

(Management Comments must not include formatted recommendations – resolution 11-979)

Clarification of project/task:

40

Council to give in principle support to the installation of CCTV cameras in Byron Bay. Following this, staff to discuss hotspots with Police and Byron United to determine locations where cameras would be most effective. Following this consultation, staff to identify and pursue funding opportunities for the purchase and installation of cameras.

45

Executive Manager responsible for task implementation:

Executive Manager Society and Culture

50

Relationship to, priority of, and impact on other projects/tasks:

This task is closely related to the development of the Safer Community Compact, which has just come off public exhibition, and is scheduled to be reported back to Council on 7 June 2012. It

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would therefore be preferable for this issue to be deferred and dealt with at the same time as the draft Safer Community Compact at the Council Ordinary meeting of 7 June 2012.

5 If Council decides to proceed with in principle support for CCTV, it would be desirable for CCTV to be included in the Safer Community Compact. The Safer Community Compact will ultimately be endorsed by the Attorney General's Department, and then will be used to support bids for funding (including from the Attorney General's Department). It would therefore be highly desirable for any action relating to CCTV to be incorporated into the Safer Community Compact.

10 Staff presented a draft Safer Community Compact (formerly Crime Prevention Strategy and Action Plan) to Council on a number of occasions during 2011-12. The draft document included a proposed Action 8.5, 'Lines of Sight', to seek funding for CCTV cameras in the Byron Bay CBD at locations identified as hotspots by Tweed Byron Police.

15 The proposed CCTV project flowed from the recommendations of the Tweed Byron Police 2008 Safety Audits; more recent advice from the Tweed Byron Police; and requests from Byron United to install a CCTV system within the Byron Bay CBD.

20 Council considered the draft Safer Community Compact on 1 March 2012, and resolved (Res **12-125**) to remove Action 8.5 and all references to CCTV in the draft Safer Community Compact prior to exhibition.

25 A number of submissions have been received on the draft Safer Community Compact following public exhibition and these are currently being reviewed by staff for report to Council on 7 June 2012. Submissions in favour of CCTV have dominated feedback on the draft. However, it is difficult to estimate community feeling against CCTV, given that it was not included in the draft placed on public exhibition.

Financial and Resource Implications:

30 As noted in the report to Council of 1 March 2012, the start-up cost of establishing a CCTV system has been estimated at between \$120,000 to \$200,000 depending on the number of cameras installed and the nature of the monitoring regime introduced. Ongoing funding would then also be required for maintenance of systems, monitoring of footage, and storage of data. It is important to
35 note that Police will not allocate resources to monitoring the footage, although they may request access to the footage in the event of a crime being committed and evidence being required.

40 Council could consider a range of options in relation to monitoring: from having fixed cameras with no 'real time' monitoring of footage, to working with partners including Police and potentially Byron United / the Liquor Accord to actively monitor footage at 'peak times' for criminal activity. Some training and potentially vetting would likely be required from Police, and these options would also need to be canvassed with community partners.

45 Management would not recommend that Council staff be engaged to monitor CCTV footage.

Council has been advised that State and Federal Government funding may be available to assist with installation should Council wish to proceed with CCTV in Byron Bay. For example, as noted in the report to Council of 1 March 2012, funding of up to \$150,000 was recently available via the Proceeds of Crime Act (POCA) funding round, which specifically provided for "provision of CCTV
50 and / or lighting for graffiti hotspots."

Council should note that, once installed, Council would also need to find funds for ongoing monitoring, maintenance and data storage costs.

Legal and Policy Implications:

5 As noted in the report to Council of 1 March 2012, should Council resolve to proceed with (or to provide in principle support for) the installation of a CCTV system, it would need to do so with due consideration of the *NSW Government Policy Statement and Guidelines for the Establishment and Implementation of Closed Circuit Television (CCTV) in Public Places*.¹

10 This document sets out a range of considerations including the need for community consultation on the proposed installation of CCTV, and the determination of roles and responsibilities of key players, including the local authority and the Police. Among other things, it also recommends that a Code of Practice be developed to set the standards for, and guide the operation of, a CCTV scheme.

¹ [http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwfiles/cctv.pdf/\\$file/cctv.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwfiles/cctv.pdf/$file/cctv.pdf)

Notice of Motion No. 8.3. Byron Bay Writers' Festival Support 2012

COR405527 #1226841

I move:

- 5
1. That Council offers support to the Byron Bay Writers' Festival 2012 and become an Event Sponsor and provide promotional material for display.
 - 10 2. That the support involve the use of Council signage and associated materials for traffic management and staff assistance in placing those materials in position with respect to the Traffic Management Plan and identified as a donation of \$1,500.
 3. That Council advertises this sponsorship support as a S356 donation.

15 **Signed: Cr Jan Barham**

Councillor's Background Notes:

Definition of the project/task:

20 Support for the Byron Bay Writers' Festival and sponsorship agreement.

The Byron Bay Writers' Festival is one of the regions most successful festivals and Council has for the last five years supported the event and been recognised as a sponsor.

25 The festival has a broad audience and a high level of community involvement.

Definition of the project/task:

30 Donation to community group

Source of Funds (if applicable):

S356

Management Comments:

35 (Management Comments must not include formatted recommendations – resolution 11-979)

Clarification of project/task:

The Byron Bay Writers Festival is to be held from 3 - 5 August 2012.

40 The Notice of Motion is seeking Council to become an Event Sponsor and to consider the making of a S356 Donation of \$1,500, as a contribution towards the provision and set up of signage and associated materials for the event in accordance with an approved Traffic Control Plan (TCP).

45 The Byron Bay Writers' Festival could hire the signage and undertake installation by external suppliers, or the works could be provided by Council at the applicable hire rates in accordance with Council's Fees and Charges. Community Infrastructure provided similar and associated works for the 2011 event at a total cost of \$2,317.69.

50 A donation for assistance with traffic management utilising Council's facilities and Development Application fees can be considered under Policy 4.15 Assistance to Festivals and Community Events, of which the objective is to "To provide appropriate levels of assistance to community organisations through the use of Council's works resources."

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Council is presently advertising for applications for donations under the Assistance for Festivals and Community Functions Policy. Closing date for receipt of these applications is 29 June 2012. It is proposed that the allocation of these donations for assistance with holding community events for the 2012/13 financial year will be considered at a Council Meeting in August 2012.

5 Council could resolve to provide in principle support to the application and then consider the amount of the donation after all requests for applications for a donation under the Assistance for Festivals and Community Functions Policy have been received and reported to Council in August 2012.

10 Executive Manager responsible for task implementation:
Community Infrastructure and Corporate Management

15 Relationship to, priority of, and impact on other projects/tasks:
The provision of works from Community Infrastructure would have an impact on Council's routine operation and exposes Council to potential risks and liability.

20 Financial and Resource Implications:
In accordance with the draft 2012/13 Budget the total allocation of moneys for a donation under Assistance for Festivals and Community Functions Policy is \$7,000. As mentioned above the distribution of these moneys will be considered by Council at a meeting in August 2012.

25 On the basis that in considering this request, along with any other similar requests for financial assistance for festivals, Council allocates an amount of \$1,500 contribution from Section 356 donation allocation, then the organisers of the 2012 Byron Bay Writers Festival would be responsible for all other costs in excess of this amount.

30 Legal and Policy Implications:
The TCP is required to be endorsed by the Local Traffic Committee (LTC) which will require advertising in accordance with the Roads Act 1993.

This request to be considered under Policy 4.15 Assistance to Festivals and Community Events. This Policy is available to be viewed on Council's Website at <http://www.byron.nsw.gov.au/policies>

35 As stated in the Policy "Moneys will be allocated depending on the estimate of Council's costs for the road closure, moneys donated to charity, size of community involvement and the distribution of events across the Shire."

Notice of Motion No. 8.4. Compliance Action - Mr Anderson

COR405527 #1226785

I move:

- 5
1. That the compliance action relating to Mr John Anderson (aka FastBuck\$) be referred to Councillors for consideration of the prosecution of the action to date and its future management.
 - 10 2. That a full timeline of the action so far with costs incurred be provided. This information to include legal costs, staff time, administrative costs (e.g. aerial photography, vehicles, police) and any other related costs.
 - 15 3. That a report on the outcome of the action regarding the validity of the MO application for Mr Anderson's property be provided.

Signed: Cr Tom Tabart

20 **Councillor's Background Notes:**

This matter has been in progress for an inordinate time and has doubtless incurred considerable cost with the prospect of a lot more to come.

25 As Councillors have voted not to pursue a formal conciliation process in favour of bringing controversial matters to council for resolution, this case would seem to be one in need of attention.

30 While Mr Anderson would appear to be a resourceful and knowledgeable plaintiff the zeal with which he is being pursued could give rise to a perception that a personal element may be involved.

It has been brought to my attention that certain aspects of the action against Mr Anderson so far could give rise to some concerns, although these matters are open to conjecture and value judgements. These matters include:

- 35
1. The withdrawal of a \$3000 penalty notice after an appeal and the withdrawal of a set of orders shortly after, following another appeal.
 2. The handling of an action over three smoke alarms which appears to have gone nowhere and the contrast with the usual handling of such matters i.e. warnings etc.
 3. A question over whether Council should be pursuing Mr Anderson or his company Rising Damp.
 - 40 4. Ongoing conjecture and claims over the validity of the search warrants executed which may be the genesis of future actions for trespass.
 5. The risk of a claim of Council acting in bad faith which could derail the entire process.

45 Priority

High

50 Funding

To be advised.

Management Comments:

(Management Comments must not include formatted recommendations – resolution 11-979)

5 The following information is provided for Councillors consideration and relates to the information requested in Part 2 of the Notice of Motion.

On 11 August 2011 Council resolved (Resolution **11-642**):

10 *“that Council authorise the General Manager to commence and continue enforcement action against the registered landowner and its director including commencing Class 4 enforcement proceedings in the Land and Environment Court, requiring:*

- 15
- a) cessation of unauthorised use of the property; and*
 - b) demolition or decommissioning as determined appropriate by the General Manager of all unauthorised structures and development; and*
 - c) removal of all waste and potential sources of pollution from the property.”*

20 Between the date of the resolution and 21 September 2011 staff continued to compile and finalise the brief of evidence. In accordance with resolution 11-642, staff instructed solicitors on 21 September 2011. Coincidentally that was the same day on which Rising Camp Corporation Pty Ltd lodged its Class 4 proceedings seeking, amongst other things, declarations that development consent 90/31 had not lapsed.

25 Given the lodgement of the Class 4 proceedings relating to development consent 90/31 (which approved multiple occupancy development on the subject land) it was determined that it would be appropriate to put the enforcement action on hold pending the outcome of the Class 4 proceedings. This was because, as Council had previously advised, seeking a declaration and final determination as to the status of consent 90/31 could impact what actions might be available to the landowner to try to regularise apparent unauthorised development on the subject property.

30 The landowner’s Class 4 proceedings (relating to development consent 90/31) were reported to Council on 13 October 2011 with the following recommendation:

35 *“That Council, subject to legal advice confirming it is appropriate for Council to do so, not defend the proceedings and file a submitting appearance.”*

Council adopted the recommendation (Res **11-765**) which management then enacted by the filing of a submitting appearance.

40 Judgement in the Class 4 proceedings was delivered on 1 February 2012 (refer Annexure 14(b)) which confirmed that the Court accepted the Affidavit evidence lead on behalf of the Applicant and declared that Consent 90/31 has not lapsed. The Court also declared that the consent was for 6 dwellings on Lot 9 which rectified typographical errors contained in the 1990 Notice of Determination.

45 It is now a matter for the landowner to determine whether it will implement development consent 90/31 (ie seek approval for up to 6 dwellings in accordance with the currently approved plans) or to seek a new consent or an amendment to the existing consent (if either is legally possible which is a matter for the landowner to determine) to attempt to regularise some of the unauthorised work by reference to consent 90/31. Council cannot do this for the landowner and since the delivery of the judgment in February 2012 to date, the landowner has not lodged any applications nor indicated its intention to do so, notwithstanding that the landowner is aware of standing Res 11-642 and the need to regularise alleged unauthorised development on the property.

55 Absent an acknowledgment from the landowner as to the need to, and details of its intended actions to, regularise the alleged unauthorised development on the property and/or absent a

further Council resolution, standing resolution 11-642 needs to continue to be enacted. Therefore, post the finalisation of the Class 4 proceedings in February, Council reinstated its instructions to solicitors and has been proceeding with preparation of enforcement action in relation to the substantive allegations of unauthorised development.

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By way of summary a chronology is as follows:

21/9/11: Instructions provided to advise on commencement of Class 4 proceedings concerning 15 apparently unauthorised structures on the land. On same day Council received Class 4 Summons from Rising Damp seeking declarations concerning a DA granted for multiple occupancy on the land.

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21/9/11 to 21/10/11: Staff research material and documents to support potential Class 4 proceedings.

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16/09/11: As had been suggested for many years as a possible way forward on one issue, the company commences LEC Class 4 Application (LEC 40847/2011) with regard to DA 90/31.

13/10/11: Council resolved (Resolution 11-765) that subject to legal advice confirming it is appropriate for Council to do so, not defend the proceedings (LEC 40847/2011) and file a submitting appearance.

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21/10/11: Council defers further work on possible compliance/enforcement action pending outcome of Class 4 application.

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25/11/11: Submitting appearance to the Class 4 application filed after consideration of legal advice.

1/2/12: Judgement of LEC delivered in respect of declaration proceedings (Rising Damp Corporation Pty Ltd v Byron Shire Council [2012] NSWLEC 7 (Biscoe J)).

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29/2/12: Council reactivates work on possible compliance/enforcement action pending as per Res 11-642).

6/3/12 to 2/4/12: Additional material researched and provided to Council's solicitors.

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7/5/12: A draft final letter to Rising Damp seeking voluntary compliance being considered.

The Notice of Motion identifies 5 numbered matters said to be capable of giving "*rise to some concerns, although these matters are open to conjecture and value judgments*". Some general comments in relation to those matters are as follow:

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1. "*The withdrawal of a \$3000 penalty notice after an appeal and the withdrawal of a set of orders shortly after, following another appeal*".

In relation to the first issue, Council issued a penalty infringement notice with regard to a blue coloured caravan which at the time was being fitted with a 'wheely' bin type on-site sewerage management system (without a s68 Local Government Act approval) and a deck/verandah and roof. It appeared at the time that the van with these additions/alterations would be capable of use as a dwelling and issued a penalty notice accordingly.

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The landowner requested a review of the penalty notice giving reasons, which is the right of every person issued with a penalty notice. In accordance with Council's adopted Enforcement Policy that review was considered by Council's Compliance Action Panel, as is always the case. In this particular matter the Panel re-looked at the various definitions for 'development', 'dwelling', 'building', 'caravan' and 'moveable dwelling' etc under both the Environmental Planning and Assessment Act, the Local Government Act and the Local Government (Manufactured Home

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Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulations 2005. They formed the view on the available evidence that an offence had occurred but that while it was arguable, it was not certain, that the penalty notice had issued for the correct offence and that the penalty notice should be withdrawn, which it was.

5 In relation to the second issue, the Land and Environment Court appeal against Orders issued by Council was reported to Council on 11 November 2010. That report contained the following information:

10 *“Council has previously been advised in similar matters that defending appeals against Orders is not the most efficient or cost effective way in which to pursue enforcement action. This is because even if the Court determines that Council issued Orders are valid and enforceable, that can sometimes have no practical effect, as further Class 4 enforcement*
 15 *action can still become necessary if the landowner fails to comply with the Orders. That is, as a general rule, it is usually more cost efficient and effective for Councils, upon receipt of Class 1 or 2 appeals against Notices of Intention to Issue Orders and/or Orders, to withdraw the Notices or Orders and commence Class 4 enforcement action instead. Management will consider the previous advice, together with advice received on this particular matter, to determine which is likely to be the most cost effective and efficient way for Council to*
 20 *proceed.”*

At that time, Council resolved to note that report (10-923). Subsequently, Council confirmed the continuing currency of previous advice and made a commercial decision to not expend money defending the Orders on technical grounds because that would not result in any actual compliance changes ‘on the ground’. The actions taken and the final outcome of that Land and Environment Court case was reported to Council on 16/12/2010. That report contained the following information:

30 *In accordance with the previous advice received by Council in similar matters involving appeals against Orders, Council made a commercial decision to withdraw the Orders rather than defend any technical challenges. This is because, even if the Court were to dismiss the landowner’s appeals, ie find in favour of Council, that would not necessarily assist Council in enforcing the Council Orders and therefore considerable legal costs could have been incurred defending the Class 1 and 2 appeals with potentially no practical effect.*

35 *That is, even where the Court determines that Council issued Orders are valid and enforceable, that can sometimes have no practical effect, as further Class 4 enforcement action can still become necessary if the landowner fails to comply with the Orders. Therefore, as a general rule, it is usually more cost efficient and effective for Councils, upon receipt of Class 1 or 2 appeals against Notices of Intention to Issue Orders and/or Orders, to withdraw the Notices or Orders and commence Class 4 enforcement action instead...”*
 40

The cost effective approach taken by Council in that case and the reasons for it were the subject of two public reports at the time and it is the same approach that has been taken in other similar circumstances, both pre and post this particular matter, see for example BSC ats Hinder
 45 10686/2008 and BSC ats Freedman 10345/2011.

2. *“The handling of an action over three smoke alarms which appears to have gone nowhere and the contrast with usual handing of such matters ie warnings etc.”*

50 The issue of smoke alarms in tenanted accommodation is a matter of public safety.

Taking enforcement action, including either Issuing penalty infringement notices and/or Court attendance notices, for failure to comply with smoke alarm requirements meets Council’s statutory obligations to enforce that legislation and is a matter within current delegations. NSW Fire and
 55 Rescue support Council taking enforcement action regarding fire safety breaches, whether it occurs in illegal backpacker /tourist accommodation or unauthorised dwellings etc.

In relation to this specific matter, during an inspection on 15 September 2011 Council officers observed and NSW Fire and Rescue officers expressed concerns about the lack of working smoke alarms installed in 3 habitable structures. As a result Council issued 3 penalty notices for offences under s186AA(2)(b) of the Environmental Planning and Assessment Regulations.

5 The Defendant then elected to have the penalty notices dealt with by the Local Court and since then the matters have followed the usual Court processes and are set down for hearing on 4 June 2012.

10 Council's adopted Enforcement Policy articulates the matters which must be taken into consideration when deciding on types of enforcement action. Clause 12.4.4(ii) lists the matters which must be taken into account and which can justify exercising discretion by the issuing of a caution (warning) as follows (none of which were applicable, or considered applicable, in this particular case):

- 15 a. the offence did not involve risks to public safety;
- b. there are reasonable grounds to believe the offender has a mental illness or intellectual disability, is homeless, is under 18 years old or has a special infirmity or is in very poor physical health;
- 20 c. the offence is at the lower end of the scale of seriousness for that offence or is minor in nature;
- d. the offender claims on reasonable grounds that they did not knowingly or deliberately commit the offence;
- 25 e. the offender admits the offence and shows remorse; the offender is cooperative and/or likely to comply with a request to stop the offending conduct;
- 30 f. there are other reasonable grounds for giving a caution in all the circumstances of the case, for example, the offence was committed because of a medical or other serious emergency, or the person is a visitor from interstate or overseas and was not aware that their conduct constituted an offence or the person doesn't speak or read English and/or is unable to read or comprehend signs, directions etc.

35 3. *"A question over whether Council should be pursuing Mr Anderson or his company."*

This is a matter for Council. Council's current resolution is Res 11-642 which authorises the commencement or continuation of enforcement action in accordance with the terms.

40 If the statement is meant to go to a question whether action that might be taken, if any, should be against the company or the individual, there is no 'blanket answer' because it will always depend on the particular facts and circumstances involved in the particular action on foot, if any.

45 It is however, a matter that Council is aware of and Res 11-642 refers to both the landowner company and its sole director/shareholder. Further, there a number of case authorities dealing with individuals, companies and the "*corporate veil*" which will be applied/followed as necessary, as they are in all matters involving corporate landowners (of which there are many).

50 4. *"Ongoing conjecture and claims over the validity of the search warrants executed which may be the genesis of future actions for trespass."*

The search warrants were issued by a Magistrates Court on application from Council and are believed to have been validly applied for and validly issued. The circumstances in which Council has to apply for search warrants are many and varied – refer to Compliance Services Status reports.

55

The authority to apply for search warrants is expressly granted by State legislation and every application is the subject of independent assessment by the Court in accordance with statutory obligations imposed on the Court. For example, section 118k of the Law Enforcement (Powers and Responsibilities) Act 2002, provides:

- (1) A person generally or specially authorised by a council for the purposes of this section may apply to an authorised officer if the authorised person has reasonable grounds for believing that the provisions of this Act, the regulations, an environmental planning instrument or the terms of a development consent, complying development certificate or order under this Act have been or are being contravened in or on any premises.
- (2) An authorised officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised person named in the warrant:
 - (a) to enter the premises, and
 - (b) to search the premises for evidence of a contravention of this Act, the regulations, an environmental planning instrument or the terms of a development consent, complying development certificate or order under this Act.
- (3) Division 4 of Part 5 of the Law Enforcement (Powers and Responsibilities) Act 2002 applies to a search warrant issued under this section.
- (4) Without limiting the generality of section 71 of the Law Enforcement (Powers and Responsibilities) Act 2002 , a police officer:
 - (a) may accompany an authorised person executing a search warrant issued under this section, and
 - (b) may take all reasonable steps to assist the authorised person in the exercise of the person's functions under this section."

As far as Council is aware, the only person who alleges the search warrant issued on 14 September 2011 and executed on 15 September 2011 was invalid is the sole shareholder/ director of the landowner company. To date, no action has been taken in any Court to challenge the issue or execution of the search warrant although the director of the landowner company has foreshadowed such a challenge may be raised in the current Local Court matter started by the landowner's representative against the 'smoke alarm' penalty infringement notices. If that occurs, Council will defend the challenge and the Court will independently determine the issue and put it beyond all doubt.

Council has been advised by the director of the landowner company that a complaint made by him about issue of the search warrants to the NSW Attorney Generals Department was dismissed.

5. *"The risk of a claim of Council acting in bad faith which could derail the entire process."*

Council has repeatedly requested the landowner and/or its representative (directly and through solicitors) to voluntarily comply with planning and environmental legislation, and to meet with staff and with Councils Development Assessment Panel (DAP) to discuss development issues on the property and potential ways to rectify them. Neither the landowner company nor its representative has taken up these invitations.

In past correspondence in the past the landowner's representative has advised that he was in the process of removing nearly all dwellings from the property but subsequent inspection found that no action to remove any of the dwellings had commenced at the time of the inspection. The landowner refuses to provide undertakings or even to indicate that it will voluntarily comply, provide an indication of what actions it will take and a timeframe to achieve voluntary compliance or any indication that it is willing to take even small interim steps towards compliance, such as installing operational smoke alarms, removal of old car bodies or starting decommissioning of unoccupied structures etc.

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That is, Council has attempted over a long period of time to secure cooperation and commitment towards voluntary compliance with environmental and planning laws but all attempts have been resisted.

- 5 As far as Council are aware, Council, both the elected body and the administration, has acted in good faith on all matters arising in relation to this property.

Clarification of project/task:

- 10 Part 1 of the proposed motion would required a report to be prepared on any compliance action currently underway or proposed to be undertaken against Mr John Anderson. It is presumed, that if required the report would also address any current or proposed compliance or enforcement action involving the landowner company as well, as per Res 11-642.

- 15 Part 2 of the proposed motion requests a chronology and details of costs including legal costs, staff time, administrative costs and any other related costs. In terms of staff time, all work done by staff in this matter has been accommodated within the usual day to day operations.

- 20 Part 3 of the proposed Motion requests a report on the outcome of the Class 4 Land and Environment Court proceedings commenced by Rising Damp Corporation Pty Ltd regarding the commencement of works relating to the consent for DA 90/31.

- 25 Details of these proceedings are included in the Compliance Services Status Report as at 30 April 2012 included in the Agenda for this meeting. A copy of the Land and Environment Court Judgement is included at Annexure 14(b).

Executive Manager responsible for task implementation:

- 30 Executive Manager Corporate Management

Relationship to, priority of, and impact on other projects/tasks:

- 35 The preparation of the report will require the allocation of staff resources and have a minimal impact on the management of other Compliance matters.

Financial and Resource Implications:

- 40 Nil with regard to preparation of a report. All costs associated with all compliance matters are managed within existing legal and compliance budgets. Staff impacts for preparation of the report will be minimal as much of the information will be able to be collated from previous Council reports. Similarly, preparation of these comments has taken minimal staff time due to the existing availability of the information.

Legal and Policy Implications:

- 45 Nil with regard to preparation of the report. Legal implications of possible enforcement/compliance action have previously been reported to Council.

- 50 Previously, Council has received information and an independent report which indicate that Council does have the right to review individual compliance/enforcement matters and if it wishes to do that it should establish a robust governance structure to ensure that all matters are dealt with openly, transparently and fairly and review its Enforcement Policy 11/005 to include the new compliance governance structure. Council has not done that and has continued instead with its Enforcement Policy 11/005 which was last reviewed and publicly exhibited in May-June 2011 and adopted by Council Res 11-380.
- 55

On 13 October 2011 in a speech entitled "The enduring importance of the rule of law in times of change" the Chief Judge of the Land and Environment Court of NSW said;

"Enforcement of the law

5 *The existence of laws which meet the required standards, and of institutional arrangements and machinery to enforce the law, are a necessary components of the rule of law. But they will be insufficient unless there is actual enforcement of the law... There is, of course, a discretion as to whether to enforce the law. However, a miscarriage of that discretion can subvert the rule of law."*

10 In respect of environmental law His Honour adopted the following quotation *"The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes or the crimes committed by certain classes of offenders."*

15 Clause 12.3 of Council's Enforcement Policy provides;

Irrelevant considerations in choosing an enforcement response

The decision as to the appropriate action will not be influenced by:

- 20 1. *the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;*
2. *the personal feelings of the investigating officers concerning the offence or the alleged offender;*
- 25 3. *the possible political advantage or disadvantage to the Government, Council or to any political party, group or individual;*
4. *the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct; or possible media or community reaction to the decision.*

30 In respect of all compliance matters staff apply Council's Enforcement policy and ensure that procedural fairness is afforded to people the subject of compliance action. In relation to this particular matter:

- 35 i) investigations resulted from complaints received from members of the public and have been carried out in accordance with the legislation, with Councils Enforcement Policy and with the compliance priorities programs;
- 40 ii) the property owner has been provided numerous opportunities, and has been requested on a number of occasions, to voluntarily comply with planning and environmental instruments but to date has actively resisted such entreaties.

NOTICE OF RESCISSION MOTION

Notice of Rescission Motion No. 9.1. Arakwal Application for Exemption from Section 64 Charges

ENG700000 #1224269

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We move that Council rescind Resolution No. 12-279 from its Ordinary Meeting held on 12 April 2012 which reads as follows:

12-279 Resolved that Council:

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1. *Grant the Arakwal Corporation an exemption from the water and sewer section 64 development contribution charges associated with DA 10.2011.150.1 Lot 435 DP 729107, Bangalow Road, Byron Bay.*

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2. *Request that Rous Water consider a similar exemption for the DA 10.2011.150.1 Lot 435 DP 729107, Bangalow Road, Byron Bay.
(Barham/Richardson)*

20

**Signed: Cr Diane Woods
Cr Tony Heeson
Cr Patrick Morrissey**

If successful we intend to move:

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That Council not grant the Arakwal Corporation an exemption from the water and sewer section 64 development contribution charges associated with DA 10.2011.150.1 Lot 435 DP 729107, Bangalow Road, Byron Bay and also note that any exemption for applicable bulk water section 64 charges is a matter for the determination of Rous Water.

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Comments Executive Manager Water and Recycling:

The report to Council on 12 April included the following comments which remain unchanged.

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The historical circumstances of the case brought forward by the Arakwal Corporation are unique and a factor for Council to consider. However, there are many not for profit organisations who aspire to community based outcomes that would also believe that their developments should be exempt from applicable S64 charges. Council will need to consider if granting the Arakwal Corporation request establishes both a precedent and therefore an expectation amongst other organisations.

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Council has an adopted Section 64 plans for developer charges for water supply and sewerage headworks. These plans make no provisions for waiving of charges based on a type of development or the nature of the applicant; as such the management recommendation is that the request of the Arakwal Corporation not be granted.

GENERAL MANAGER'S REPORT

Report No. 13.1. Management Plan Review 2011-2014 for the period January to March 2012

5 **General Manager**
File No: FIN451010 #1218542

Principal Activity: General Manager

Summary: This report summarises the performance of the organisation against the adopted indicators in the Management Plan 2011-2014 for the quarter January to March 2012. The majority of key performance indicators are on target.

RECOMMENDATION:

10 **That Council receive and note the quarterly report and associated Annexures on the 2011-2014 Management Plan Review for the period 1 January to 31 March 2011.**

15 **Attachments:**

- March 12 Review of Principal Activities 1 to 21 #1218518 [84 pages]**Annexure 1(a)**
- March 12 Overview of Capital Expenditure – General Fund #1210827 [6 pages]..... **Annexure 1(b)**
- March 12 Overview of Capital Expenditure – Water Fund #1210827 [2 pages].....**Annexure 1(c)**
- 20 • March 12 Overview of Capital Expenditure – Sewer Fund #1210827 [2 pages] **Annexure 1(d)**
- Status Report – Grants Register March quarter #1217969, #1217967, #1217966 [5 pages] **Annexure 1(e)**
- Status Report Project Reference Groups #1223345 [7 pages]..... **Annexure 1(f)**

Report

5 The purpose of this report is to advise Council of the performance of the organisation against the specific measures and indicators for identified priorities in the Management Plan for the Quarter January to March 2012.

This is the Quarterly Report on the 2011-2014 Management Plan for the period to 31 March 2012.

10 The quarterly review report is provided for the public record.

Substantial work has been undertaken in relation to the activities and targets in the 2011-2014 Management Plan, with good progress recorded.

15 Details of progress are provided in Annexures 1(a) to 1(f).

Finance Implications

20 The Council's financial performance for the Quarter is addressed separately in the Quarterly Budget Review.

Statutory and Policy Compliance Implications

It is a statutory requirement that progress against the indicators in the Management Plan be considered by Council each Quarter.

COMMUNITY INFRASTRUCTURE – EXECUTIVE MANAGER’S REPORTS

Report No. 13.2. Refuge for the Homeless Lot 4 DP841856 Mullumbimby

Executive Manager: Community Infrastructure

5 **File No:** ENG091000 #1224925

Principal Activity: Community Services

Summary: At the Ordinary meeting of 22 March 2012, Council resolved the following Resolution **12-190**:

1. *That Council request consultants BMT WBM consider conducting appropriate flood studies or provide any other assistance they may choose for the purposes of creating a low key primitive camping site, as a refuge for the homeless, at Lot 4 DP 841856 as a philanthropic initiative in Byron Shire at no cost to Council.*
2. *That Council request the NSW Minister for Transport and John Holland Rail P/L for a Formal Access Agreement for use of the rail corridor between Byron Shire Council Chambers north to Brunswick River as part of an evacuation plan for a proposed primitive camping ground at Lot 4 DP 841856 which expressly states the potential for return of Rail Services.*
3. *That Council request support for this Formal Access Agreement from the NSW Government via Don Page MP.*

BMT WBM has provided flood advice at no cost to Council as a philanthropic initiative. The consultants have concluded that the site is unfit for the use as a camping site for homeless people, without significant structural modification which may exacerbate flood problems to other developed areas.

RECOMMENDATION:

- 10 1. **That Council note consultants BMT WBM advice “*that Lot 4 DP841856 Mullumbimby is unsuitable for use as a camping site for homeless people without significant structural modification*” and that the use of this site for such purpose should not be pursued further.**
- 15 2. **That Council thank BMT WBM for providing flood advice for this matter as a philanthropic initiative at no cost to Council.**
- 20 3. **That Council confirms that the preparation of a flood evacuation plan for Lot 4 DP 841856 Mullumbimby in regard to Part 3 of Council Resolution 12-105 is not required.**

Attachments:

- 25 • Council’s letter to BMT WBM – Refuge for the Homeless #1212297 [1 page].....**Annexure 9(a)**
- Flood Advice from BMT WBM – Refuge for the Homeless #1224958 [3 pages]..... **Annexure 9(b)**

Report

At the Ordinary Meeting of 22 March 2012, Council considered a Notice of Motion regarding the provision of flood advice as a philanthropic initiative to assist in establishing a primitive camping ground for the homeless on Lot 4 DP 841856 Mullumbimby, which is land owned by Council's sewer fund. Council resolved:

Res 12-190

1. *That Council request consultants BMT WBM consider conducting appropriate flood studies or provide any other assistance they may choose for the purposes of creating a low key primitive camping site, as a refuge for the homeless, at Lot 4 DP 841856 as a philanthropic initiative in Byron Shire at no cost to Council.*
2. *That Council request the NSW Minister for Transport and John Holland Rail P/L for a Formal Access Agreement for use of the rail corridor between Byron Shire Council Chambers north to Brunswick River as part of an evacuation plan for a proposed primitive camping ground at Lot 4 DP 841856 which expressly states the potential for return of Rail Services.*
3. *That Council request support for this Formal Access Agreement from the NSW Government via Don Page MP.*

Council has previously considered a Notice of Motion on this matter and Council resolved the following at the Ordinary Meeting of 1 March 2012:

12-105 Resolved that Council:

1. *receive a report by Ordinary Meeting 22 March 2012 documenting progress and constraints on actioning outstanding Council resolutions regarding investigating a primitive camping ground at Lot 4 DP 841856 Mullumbimby;*
2. *allocate an additional \$5,000 (making a total of \$10,000) to conduct a site specific study of Lot 4 DP 841856 in relation to flood levels, flow velocities, depths and water surface levels and for Council to run spot surveys from the corner of Mill Street and Station Street along the access road and along the more elevated portion to determine ground levels (RLs) to assist in planning for future access and egress (\$5,000 was allocated in Resolution 10-808 and has not been spent to date);*
3. *prepare a flood evacuation plan for Lot 4 DP 841856 in relation to using the land as a Primitive Camping Site;*
4. *identify possible grant funding and/or consideration of an allocation in the 2012/13 budget process to transfer Lot 4 DP 841856 from the Sewer Fund to the General Fund for the purpose of primitive camping subject to the flood study in point 2. Valuation was completed as per Resolution 09-137;*
5. *consult with the Northern Rivers Social Development Council in relation to regional funding opportunities.*

A report was also considered at the Ordinary Meeting of 22 March 2012 which provided advice to Council on the status of actions pertaining to this matter in accordance with Part 1 of Resolution 12-105. At that time Council resolved:

12-145 Resolved that Council note the report.

Flood Advice

Part 1 of resolution **12-190** states:

- 5 1. *That Council request consultants BMT WBM consider conducting appropriate flood studies or provide any other assistance they may choose for the purposes of creating a low key primitive camping site, as a refuge for the homeless, at Lot 4 DP 841856 as a philanthropic initiative in Byron Shire at no cost to Council.*
- 10 BMT WBM were requested to and have provided flood advice regarding the proposed development of a low key primitive camping site as a refuge for the homeless at Lot 4 DP 841856 Station Street, Mullumbimby at no cost to Council as a philanthropic initiative. Council's letter to BMT WBM is included as an attachment to this report (Annexure 9(a)).
- 15 BMT WBM is currently developing a flood model for Byron Shire Council, known as the North Byron Coastal Creeks Flood Study (the flood study). The flood study is to examine and define the flood behaviour of the North Byron Coastal Creeks area, including Brunswick River, Marshalls Creek and Simpsons Creek. The land proposed to be used as a primitive camping site as a refuge for the homeless is located adjacent to the Brunswick River.
- 20 The design flood event results from the flood study are not yet available. To expedite a response to Council, BMT WBM has utilised preliminary flood model results of historical flood behaviour from the May 1987 and June 2005 flood events to assess the flood risk.
- 25 The flood advice provided by BMT WBM is included as an attachment to this report (Annexure 9) and shows that the site is flood prone, being partially inundated in 2005 and almost completely inundated during the 1987 flood event. The flood advice also states that the *"proposed use of the rail corridor as an evacuation route is not feasible given that it becomes inundated during major flood events"*.
- 30 BMT WBM has concluded that the site is unfit for the use as a camping site for homeless people without significant structural modification, such as filling of the site above the 100 year ARI flood level and that the site lacks critical evacuation routes in times of major floods, rendering it generally unsafe for permanent or semi-permanent habitation.
- 35 As advised by BMT WBM filling of the site and / or evacuation route may exacerbate flood problems to other developed areas. A detailed flood impact assessment would need to be undertaken to ensure that any proposed flood mitigation measures for the site do not increase flood levels elsewhere, which may not be possible to achieve.
- 40 Having regard to the advice of BMT WBM, it is recommended that Council note that the site is unsuitable for use as a camping site for homeless people without significant structural modification and that the use of this site for such purpose should not be pursued further.
- 45 Part 3 of resolution **12-105** states:
- 50 3. *prepare a flood evacuation plan for Lot 4 DP 841856 in relation to using the land as a Primitive Camping Site;*
- 50 Should Council agree with the recommendations of this report, it is appropriate that Council also acknowledge that the preparation of a flood evacuation plan in relation to using the Lot 4 DP 841856 as a primitive camping site for the homeless is no longer required.

Access Agreement

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Part 2 of resolution **12-190** states:

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- 5 2. *That Council request the NSW Minister for Transport and John Holland Rail P/L for a Formal Access Agreement for use of the rail corridor between Byron Shire Council Chambers north to Brunswick River as part of an evacuation plan for a proposed primitive camping ground at Lot 4 DP 841856 which expressly states the potential for return of Rail Services.*

In accordance with the resolution of Council, letters were sent to the NSW Minister for Transport and John Holland Rail Pty Ltd (JHR).

- 10 On 30 April, Council received advice from the Minister that the request of Council had been referred to the Department of Transport.

- 15 To date there has been no written response from JHR however via a phone conversation Mr Grant Warren advised that a meeting has been scheduled for 3 May at Parramatta, Sydney to discuss Council's proposal with a variety of stakeholders including Rail Safety, Property Management, existing leasees, etc.

NSW Government Support

- 20 Part 3 of resolution **12-190** states:

3. *That Council request support for this Formal Access Agreement from the NSW Government via Don Page MP.*

- 25 In accordance with the resolution of Council, a letter was sent to the Minister for Local Government, Don Page.

- 30 On 2 May Council received a copy of a letter to Minister Page from the Hon Gladys Berejiklian, Minister for Transport advising that John Holland Rail Pty Ltd, who manage the country regional network on behalf Country Rail Infrastructure Authority (CRIA), had contacted Council on 9 March to request a formal application be lodged such that the proposal could be progressed. Council completed the application and with a letter dated 3 April was forwarded to JHR. On 16 April Council received a formal acknowledgement from JHR.

- 35 To date there has been no other written response from Minister Page.

Financial Implications

- 40 There are no further costs to Council unless the site is pursued further for the proposed use.

Statutory and Policy Compliance Implications

Council has a policy regarding the issue of the homeless, Policy 08/106.

- 45 Lot 4 DP 841856 is owned by the sewer fund and any consideration of potential uses and outcomes for this property must be in accordance with section 409 of the Local Government Act which states:

- 50 (a) *money that has been received as a result of the levying of a special rate or charge may not be used otherwise than for the purpose for which the rate or charge was levied, and*
- (b) *money that is subject to the provisions of this or any other Act (being provisions that state that the money may be used only for a specific purpose) may be used only for that purpose*

Report No. 13.3. Report of the Roads and Asset Management PRG Meeting held 24 April 2012

Executive Manager: Community Infrastructure
File No: COR710146 #1225226

Principal Activity: Infrastructure Planning and Project Definition

Summary: This report provides the Unconfirmed Report of the Roads and Asset Management (RAM) PRG Meeting held 24 April 2012.

Council's adoption of the recommendations from the meeting, or management's recommendations, will allow for the project to be progressed.

5

RECOMMENDATION:

10 **That Council note the unconfirmed Minutes (Annexure 8(a) #1225228) of the Roads and Asset Management PRG meeting held on 24 April 2012.**

Attachments:

- 15
- Unconfirmed Report RAM PRG meeting 24 April 2012 #1225228 [3 pages].....**Annexure 8(a)**
 - Agenda RAM PRG meeting 24 April 2012 #1225223 [39 pages]..... **Annexure 8(b)**

Annexure 8(b) has been provided on the Councillor's Agenda CD only; an electronic copy can be viewed on Council's website.

Report

This report provides the recommendations of the Roads and Asset Management (RAM) PRG meeting of 24 April 2012 for determination by Council.

5

PRG Recommendation RAM 5.1

In relation to Resolution **12-157**, part 3, the RAM PRG note the action that staff are to write to Whian Road residents with an update on progress including RAM PRG recommendations, the Whian Road report (#1201842) that was submitted to the 22 March 2012 Ordinary Meeting and council's resolution (**12-137**) that proposes funding be allocated to the Whian Road pilot project as part of the draft delivery plan. The letter will also seek residents' input on Council's draft 2012/13 Works budget.

10

15 Management comment

Management notes this recommendation.

PRG Recommendation RAM 7.1

20

Cr Morrisey requested an update on Federal Drive, noting that the three planning applications be referred to the designer for information.

Management comment

25

Management notes this recommendation.

Financial Implications

30 Nil

Statutory and Policy Compliance Implications

Nil

CORPORATE MANAGEMENT – EXECUTIVE MANAGER’S REPORTS

Report No. 13.4. Council Resolutions Review for the period January to March 2012

Executive Manager: Corporate Management

5 **File No:** COR405520 #1218583

Principal Activity: Administration

Summary: This report provides an update on the status of Council resolutions outstanding and proposed actions, and on resolutions completed, for consideration by Council.

RECOMMENDATION:

- 10
1. That Council receive and note the information provided in this report on outstanding Council resolutions.
 2. That Council note the completed resolutions in Annexure 2(b) (#1226835).

15

Attachments:

- 20
- Summary Report on Council Resolutions – March 2012 Quarter #1226828 [1 page].....**Annexure 2(a)**
 - Completed Resolutions – January to March 2012 #1226835 [81 pages] **Annexure 2(b)**
 - Outstanding Council Resolutions status as at 31 March 2012 #1226847 [237 pages]**Annexure 2(c)**

25 *Please note: Annexure 2(b) and 2(c) will be provided to Councillors on the Agenda CD and a hardcopy available in the Councillor’s Room. The public may view these annexures online at www.byron.nsw.gov.au/meetings or at the Administration Centre.*

Report

This report provides a quarterly update on the status of Council resolutions to 31 March 2012.

5 Council resolutions relate across all Principal Activities in Council's Management Plan with responsible officers within Council providing input into this status report.

A summary status report is at Annexure 2(a).

- 10
- 324 outstanding resolutions balance from previous quarter
 - 159 new resolutions created during the January to March 2012 quarter
 - 161 resolutions completed during period 1 January to 31 March 2012
 - 317 outstanding Council resolutions current Council (2008-2012)
 - 5 outstanding Council resolutions from previous Council (2004-2008)
 - 0 outstanding Council resolution from 1999-2004 Council
- 15 322 closing balance of outstanding resolutions as at 31 March 2012

Details of completed resolutions for the period 1 January to 31 March 2012 are provided at Annexure 2(b).

- 20 An update on the status of outstanding resolutions is provided at Annexure 2(c) which made up of:
- previous Council 2004-Sept 2008 (pages 1 to 7 of Annexure 2(c))
 - current Council Oct 2008-2012 (pages 8 to 237 of Annexure 2(c))

Financial Implications

- 25 A number of resolutions note that resource constraints limit completion of action required. Council may consider the priority of the respective resolutions and whether further action is still required.

Statutory and Policy Compliance Implications

- 30
- Council requires a quarterly report be prepared to allow it to consider the quarterly Management Plan and Budget reviews along with a review of Council resolutions.
 - Implementation of Council resolutions in accordance with the Local Government Act 1993.

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Report No. 13.5. Budget Review - 1 January 2012 to 31 March 2012

Executive Manager: Corporate Management

File No: FIN451010 #1216309

Principal Activity: Financial Services

Summary: This report is prepared to comply with Clause 203 of the Local Government (General) Regulation 2005 and to inform Council and the Community of Council's estimated financial position for the 2011/2012 financial year, reviewed as at 31 March 2012.

This report contains an overview of the proposed budget variations for the General Fund, Water Fund and Sewerage Fund. The specific details of these proposed variations are included in Annexure 3(a) and 3(b) for Council's consideration and authorisation.

Annexure 3(c) contains the new Integrated Planning and Reporting Framework (IP&R) Quarterly Budget Review Statement (QBRs) as outlined by the Division of Local Government in circular 10-32.

5

RECOMMENDATION:

1. That Council authorise the itemised budget variations as shown in Annexure 3(b) (#1226044) which includes the following results in the 31 March 2012 Quarterly Review of the 2011/2012 Budget:
 - (a) General Fund - \$31,200 increase in accumulated surplus
 - (b) Water Fund - \$913,300 increase in reserves
 - (c) Sewerage Fund - \$378,200 decrease in reserves
2. That Council transfer \$20,000 to the Structural Change reserve.
3. That Council transfer \$332,200 to the Legal Services reserve funded by a reduction in the General Fund Legal Budget allocations of \$332,200.
4. That Council allocate \$50,000 in the 2011/2012 budget for the purposes of Land Acquisition and Site Investigations into the proposed sports fields at Billinudgel with \$50,000 funding provided from Section 94 Open Space – Ocean Shores catchment.
5. That Council adopt the revised working fund surplus of \$193,400 for the 2011/2012 financial year.

Attachments:

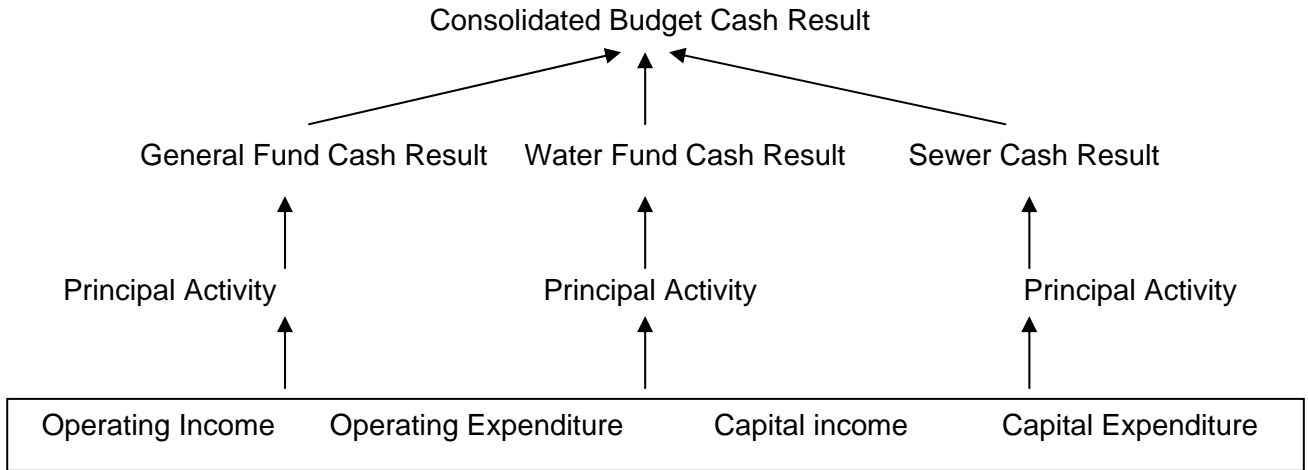
- Budget Variations for the General, Water and Sewer Funds #1226039 [78 pages]..... **Annexure 3(a)**
- Itemised Listing of Budget Variations for the General, Water and Sewerage Funds #1226044 [5 pages]..... **Annexure 3(b)**
- New Integrated Planning and Reporting framework (IP&R) required Quarterly Budget Review Statement (QBRs) components #1226010 [17 pages]..... **Annexure 3(c)**

Report

Council adopted the 2011/2012 budget on 30 June 2011 via resolution **11-546**. It also considered and adopted the budget carryovers from the 2010/2011 financial year, to be incorporated into the 2011/2012 budget, at its Ordinary Meeting held 25 August 2011 via resolution **11-693**. Since that date, Council has reviewed the budget taking into consideration the 2010/11 Financial Statement results and progress through the first half of the 2011/2012 financial year in the September and December 2011 Quarter Budget Reviews. This report considers the March 2012 Quarter Budget Review.

The details of the budget review for the Consolidated, General, Water and Sewer Funds are included in Annexure 3(a), with an itemised listing in Annexure 3(b). This aims to show the consolidated budget position of Council, as well as a breakdown by Fund and Principal Activity. The document in Annexure 3(a) is also effectively a publication outlining a review of the budget intended to provide Councillors with more detailed information to assist with decision making regarding Council’s finances.

Contained in the document at Annexure 3(a) is the following reporting hierarchy:



The pages within Annexure 3(a) are presented (from left to right) by showing the original budget as adopted by Council on 30 June 2011 plus the adopted carryover budgets from 2010/2011 followed by the September review, resolutions between October and December, the December Review resolutions between January and March and the revote (or adjustment for this review) and then the revised position projected for 30 June 2012 as at 31 March 2012.

On the far right of the Principal Activity (pages 9 – 63 of 78), there is a column titled “Note”. If this is populated by a number, it means that there has been an adjustment in the quarterly review. This number then corresponds to the notes at the end of the Annexure 3(a) (pages 66 – 78 of 78) which provides and explanation of the variation.

There is also information detailing restricted assets (reserves) to show Council estimated balances as at 30 June 2012 for all Council’s reserves (pages 7 – 10 of 78).

A summary of Capital Works is also included by Fund and Principal Activity (page 65 of 78).

Division of Local Government Budget Review Guidelines:

The Division of Local Government on 10 December 2010 issued the new Quarterly Budget Review Guidelines via Circular 10-32, with the reporting requirements to apply from 1 July 2011. This report includes for the third time a Quarterly Budget Review Statement (refer Annexure 3(c)) prepared by Council in accordance with the guidelines.

5 The Quarterly Budget Review Guidelines set a minimum standard of disclosure, with these standards being included in the Local Government Code of Accounting Practice and Financial Reporting as mandatory requirements for Council's to address. This is Council's third attempt at preparing the Quarterly Budget Review Statement and as future quarterly budget reviews are undertaken the information provided will be further enhanced.

10 Since the introduction of the new planning and reporting framework for NSW Local Government, it is now a requirement for Councils to provide the following components when submitting a Quarterly Budget Review Statement (QBRs):-

- A signed statement by the Responsible Accounting Officer on Councils financial position at the end of the year based on the information in the QBRs
- 15 • Budget review income and expenses statement in one of the following formats:
 - Consolidated
 - By fund (e.g. General, Water, Sewer)
 - By function, activity, program etc to align with the management plan/operational plan
- 20 • Budget Review Capital Budget
- Budget Review Cash and Investments Position
- Budget Review Key performance indicators
- 25 • Budget Review Contracts and Other Expenses

The above components are included in Annexure 3(c):

30 **Income and Expenditure Budget Review Statement by Type** – This shows Councils income and Expenditure by type. The original estimate in the far left column is reflective of pages 121 to 124 of the 2011-2014 Management Plan. This has been split by Fund. Adjustments are shown, looking from left to right. These adjustments are commented on through pages 66 to 78 of Annexure 3(a).

35 **Capital Budget Review Statement** – This statement identifies in summary Council's capital works program on a consolidated basis and then split by Fund. It also identifies how the capital works program is funded. As this is the second quarterly review for the reporting period, the Statement may not necessarily indicate the total progress achieved on the delivery of the capital works program.

40 **Cash and Investments Budget Review Statement** – This statement reconciles Council's restricted funds (reserves) against available cash and investments. Council has attempted to indicate an actual position as at 31 March 2012 of each reserve to show a total cash position of reserves with any difference between that position and total cash and investments held as available cash and investments. It should be recognised that the figure is at a point in time and may vary greatly in future quarterly reviews pending on cash flow movements.

45 **Key Performance Indicators (KPIs)** – Council is currently developing a series of KPI's to be built into the Long Term Financial Plan (LTFP currently under development). At this stage, the KPI's within in this report are:-

- **Debt Service Ratio** - This assesses the impact of loan principal and interest repayments on the discretionary revenue of Council.

55

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- o **Rates and Annual Charges Outstanding Ratio** – This assesses the impact of uncollected rates and annual charges on Councils liquidity and the adequacy of recovery efforts
- o **Asset Renewals Ratio** – This assesses the rate at which assets are being renewed relative to the rate at which they are depreciating.

5

These may be expanded in future to accommodate any additional KPIs that Council may adopt to use in the Long Term Financial Plan (LTFP.)

- 10 **Contracts and Other Expenses** - This report highlights any contracts Council entered into during the January to March quarter that are greater than \$50,000.

CONSOLIDATED RESULT

- 15 The following table provides a summary of the overall Council budget on a consolidated basis inclusive of all Funds budget movements for the 2011/2012 financial year projected to 30 June 2012 but revised as at 31 March 2012.

2011/2012 Budget Review Statement as at 31 March 2012	Original Estimate 1/7/2011	Adjustments to March including Previous Reviews & Resolutions	Proposed March Review Revotes	Revised Estimate 30/6/2012
Operating Revenue	58,926,500	140,500	576,800	59,643,800
Operating Expenditure	66,927,200	4,747,300	352,900	72,027,400
Operating Result – Surplus/Deficit	(8,000,700)	(4,606,800)	223,900	(12,383,600)
Add: Capital Revenue	6,433,200	1,470,700	33,000	7,936,900
Change in Net Assets	(1,567,500)	(3,136,100)	256,900	(4,446,700)
Add: Non Cash Expenses	13,397,800	3,098,200	0	16,496,000
Add: Non-Operating Funds Employed	1,351,600	(150,000)	0	1,201,600
Subtract: Funds Deployed for Non-Operating Purposes	(29,350,965)	(634,335)	338,700	(29,646,600)
Cash Surplus/(Deficit)	(16,169,065)	(822,235)	595,600	(16,395,700)
Restricted Funds – Increase / (Decrease)	(16,482,165)	(691,335)	564,400	(16,609,100)
Forecast Result for the Year – Surplus/(Deficit) – Working Funds	313,100	(130,900)	31,200	213,400

- 20 As the table above highlights, the forecast result for the year has improved by an estimated \$31,200 during the review period including Council resolutions. Results by General, Water and Sewerage Fund are provided below:

GENERAL FUND

- 25 In terms of the General Fund projected Accumulated Surplus (Working Funds) the following table provides a reconciliation to the estimated position as at 31 March 2012:

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Opening Balance – 1 July 2011	320,700
Plus original budget movement and carryovers	313,100
Council Resolutions July – September Quarter	(30,000)
September Quarter Budget Review – increase / (decrease)	38,300
Council Resolutions October – December Quarter	0
December Quarter Budget Review – increase / (decrease)	19,400
Council Resolutions January – March Quarter	(158,600)
March Quarter Budget Review – increase / (decrease)	31,200
Recommendations within this Review – increase/(decrease)	(20,000)
Forecast Working Funds Result – Surplus/(Deficit) – 30 June 2012	193,400
Estimated Working Funds Closing Balance – 30 June 2012	514,100

The General Fund financial position has improved by \$31,200 (including budget movements and Council resolutions) in total as a result of this budget review. The various factors that have impacted on this result have been highlighted in the Annexure 3(a) and summarised further in this report below.

Council Resolutions January 2012 – March 2012 Quarter

During the January 2012 to March 2012 Quarter, the following resolution of Council was adopted that impacted the 2011/2012 Budget result:

Byron Regional Sport and Cultural Complex - Resolution 12-39, point 2 stated “That Council allocate an additional budget for 2011/2012 of \$158,600 from the General Fund Accumulated Surplus to implement internal management by Council and note that a budget for 2012/13 will be required for the balance of the 12 month interim arrangement period.

The following Council resolutions identified below have also been included in the 2011/2012 Revised Budget but have no impact on the 2011/2012 Budget Result. Whilst the resolutions were adopted prior to the January 2012 to March 2012 Quarter, they have not been included in the 2011/2012 Budget until the reporting of this Quarterly Budget Review:

\$10,000 - Bus stop, car parking and pedestrian movement, resolution 11-823, part 3 resolved:

3. *“That Council allocate \$10,000 from the s94 Rural Road Upgrading Works program to commence the work recommended by the Local Traffic Committee as detailed within.”*

\$140,000 - Energy Efficient Street Lighting, resolution 11-193, part 3 resolved:

3. *“That Council authorise the capital contribution to Country Energy identified in the report be funded from the Plant Reserve by way of loan with the Plant Fund be subsequently reimbursed from the expected savings until the contribution is repaid. Further ongoing savings be returned to the General Fund. “*

\$130,000 - Lighthouse Road Slope Stabilisation - Additional Stormwater Funding, resolution 11-877, resolved:

“That additional funding (\$129,996.75) be allocated to the Lighthouse Road – Slope Stabilisation project (job number 4429) as follows:

a) *\$50,832.78 from the pre 1993 Section 94 Plan, Byron Bay Urban Roadworks*

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- b) \$37,663.97 from the pre 1993 Section 94 Plan, Byron Bay Drainage
- c) \$21,900 from Roads to Recovery, unallocated funds
- d) \$19,600 from Roads to Recovery rehab various locations rural road (items 16 and 18) “

5 **\$274,700 - Byron Regional Sport and Cultural Complex - Budget Review, resolution 11-848, part 4, resolved that**

4. “approves the proposed budget adjustments identified in Table 1 of the report totalling an additional funded expenditure of \$274,700.”

10

\$6,500 - Byron Bay Rural Fire Brigade Building Upgrade, resolution 11-967, resolved that

“Council allocate up to \$6,500 to complete the upgrade of the Byron Bay Rural Fire Brigade building at Suffolk Park to provide a shower, laundry and toilet and that the funds be allocated from S94 Pre Plan Civic and Urban Infrastructure funds.”

15

\$16,000 - Disability lift acquisition, resolution 11-997, resolved that

“Council allocate funds from S94 Shire Support services to purchase a disability lift that would be available for use at the Byron Regional Sport and Cultural Complex but would also be available for other facilities in the Shire as a transportable piece of equipment.”

20

Budget Adjustments

25 The budget adjustments identified in Annexure 3(a) and 3(b) for the General Fund have been summarised by division in the following table:

Division	Expenditure Increase/ (Decrease) \$	Revenue Increase/ (Decrease) \$	Accumulated Surplus (Working Funds) Increase/ (Decrease) \$
General Managers Office	0	0	0
Organisational Support	25,600	25,600	0
Society and Culture	(10,700)	(100)	10,600
Corporate Management	21,800	62,000	40,200
Community Infrastructure	481,800	477,800	(4,000)
Environment and Land Use	83,300	67,700	(15,600)
Waste Management	33,300	33,300	0
Total Budget Movements	635,100	666,300	31,200

Budget Adjustment Comments

30

Within each of the Divisions of the General Fund, are a series of budget adjustments identified in detail at Annexure 3(a) and 3(b). More detailed notes on these are provided in Annexure 3(a) from pages 66 to 78 of 78 but in summary the major additional items included are summarised below by Division and are included in the overall budget adjustments table above:

35

Organisational Support

- Within the Legal Services Program, both revenue and expenditure have increased by \$25,600. This is due to legal fees being recovered and transferred to the legal services reserve.

40

Society and Culture

- 5 • Within the Economic Development program, expenditure decreased by \$10,000 due to the budget for the Economic development – project 2 – priority sectors/issues not being required. This is to be expended on the sustainable business directories within the Land & Natural Environment program. There is also a \$32,000 reduction in tourism expenditure that is not required from the reserves with the reduction returned to reserve.
- 10 • Within the Community Development program, \$600 is required for Senior Citizens week. The grant was more than the estimated budget.
- 15 • Within the Public Libraries program, the Local Priorities grant for \$31,300 was received. This is an annual grant that is used to purchase items for the libraries which has had a corresponding amount added to capital expenditure for the libraries.

Corporate Management

- 20 • Within the Administration program, \$1,500 has been received from the DEEWR for the Administration Trainee position that was previously not budgeted.
- 25 • Within the General Purpose Revenues program income has increased by \$53,200 due to actual rate income achieved being higher than the budgeted amount.
- 30 • Within the Financial Service program expenditure has increased by \$17,100 due to the increase of sundry expenses of \$10,400 relating to the engagement of Genesis Accounting Pty Ltd along with other Council's in NSW to advise on a proposed ruling with the Australian Taxation Office on division 81 legislation of the GST Act. As of 1 July 2012, the previous Division 81 Treasurers determination that listed those taxes, fees and charges of Council that are exempt from GST is no longer applicable to any taxes, fees and charges imposed after that date in terms of their GST status. Councils will have to self determine whether GST needs to be levied on these taxes, fees and charges. Council will be required to assess each and every one of their taxes, fees and charges on an individual basis to determine whether they are exempt under one or more of the six new exemption categories. Genesis Accounting Pty Ltd will obtain an ATO GST ruling and review Councils fees and charges, alleviating the risk of financial penalties for incorrect assessment and consistency for NSW Local Government. There was a \$6,700 increase in rates valuations fees from the NSW Valuer General than budgeted. Councils' insurance premiums are less than budget by \$59,100 with this amount proposed to be transferred to the risk management reserve
- 40 • Within the Information Services program income has decreased by \$1,600. Expenditure adjustments have been made to fund corporate phone expenses that in the original budget estimates were assumed budgeted by directorates individually which is not the case. The required budget has been funded from other savings in Information Services.
- 45 • Within the Property Services program income has increased by \$10,800 due to the budget for community and operational property income expected being less than actual income expected. Expenditure has increased by \$3,300 as the Byron Bay Pool contract budget is not sufficient for the contracted amount. \$134,000 is also required to be transferred from the Byron Bay Library project to the Projects Co-ordinator position for the duration of the project.
- 50 • Within the Holiday Park program, capital works increased by \$11,000 due to a new electrical switchboard required at Suffolk Park Holiday Park. This is funded through the
- 55 Holiday Park reserve.

- Within the Environment Services program income has increased by \$4,900 and expenditure has increased by \$4,000 due to fees received for the Blues Festival and costs associated with employee's time during the festival.

5

- Within the Compliance Program revenue has decreased by \$17,800 due to income from the Blues Festival not being as high as budgeted for (\$23,800) and an increase in dog and cat registrations (\$6,000). Expenditure has reduced by \$13,600 due to a reduction in expenditure for the Blues Festival.

10

Community Infrastructure

- Within the Emergency Services program revenue has increased By \$8,000 due to an increase In grant funding for the Belongil Creek Floodplain Management Study. This is offset by an increase in expenditure of \$12,000. \$8,000 of this is funded through the grant, and \$4,000 is funded through a reduction to Planning Studies in the Land and Natural Environment program.

15

- Within the Local Roads and Drainage Program, the overall increase in revenue and expenditure of \$46,500 is primarily associated with the additional costs for the street lighting upgrade (\$15,100) funded from the plant reserve, and the increase in costs to Main Arm road works (\$30,000) funded through Section 94 funds.

20

- Within the RTA program, revenue and expenditure has increased by \$367,900 due to approval of the variation of works to the Lighthouse Road project. This is to be funded through the Roads and Maritime Services.

25

- Within the Open Space and Recreation Program, revenue and expenditure for the program overall is increasing by \$55,400. This relates to budget alterations for a variety of projects and increased revenue expenditure associated with Council's cemeteries.

30

Environment and Land Use

- Within the Development Assessment Program, revenue has decreased by \$37,000 mainly due to a reduction in fees received for construction certificates. Expenditure has decreased by \$5,000 due to a budget for legal advice no longer being required.

35

- Within the Land and Natural Environment Program, revenue has increased by \$108,100. This is due to \$78,000 for new grants, \$14,800 received for the revolving energy fund and \$20,000 from reserves to fund the LEP Exhibition. Expenditure has increased by \$117,000 due to the grant expenditure of \$78,000, a transfer to the revolving energy reserve of the \$14,800, \$20,000 expended on the LEP exhibition, savings of \$11,900 on applicant funded proposals for the LES as these are now completed, an increase in legal expenses of \$10,000, \$4,000 to fund the Tidal Inundation Mapping to the Belongil Creek as part of the Floodplain Risk Management Study and Plan (as mentioned in the Emergency Services program) and \$10,000 for the sustainable business directories as mentioned in the Economic Development program.

40

- Within the Certification and Customer Services Program, the transfer to reserves has reduced. This is due from the December 2011 budget review where revenue was decreased by \$24,000 due to footpath dining fee income not expected to reach budget for the year. This should have also reduced the amount Council transferred to the reserve.

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Waste Management Services

- Capital works within the Waste management program have increased by \$33,300. This is funded through the waste management reserve.

5

Recommendation

Addition to the Structural Change Reserve

10 As part of the December 2011 Budget Review, Council adopted a recommendation "To create a Structural Change reserve for the purpose of funding structural changes decided by Council as permitted under the Local Government Act 1993. It was recommended to cap this reserve at \$300,000, initially funded through a \$100,000 transfer from the Employee Leave Entitlement (ELE) reserve. Subsequent allocations to this reserve would be through identified savings, including any that are reported pursuant to the quarterly financial reviews and consequently would build up over time." It is recommended that Council consider to transfer a further \$20,000 to this reserve through the identified savings made in this Quarterly Budget Review.

15

WATER FUND

20

After completion of the 2010/2011 Financial Statements the Accumulated Surplus (Working Fund) balance for the Water Fund, as at 30 June 2011, is \$1,529,538 with capital works reserves of \$1,739,500. It also held \$8,569,400 in section 64 developer contributions at this time.

25

The estimated Water Fund reserve balances as at 30 June 2012, and forecast in this Quarter Budget Review, is derived as follows:

Capital Works Reserve

Opening Reserve Balance at 1 July 2011	\$1,739,500
Plus original budget reserve movement	\$222,800
Less reserve funded carryovers from 2009/2010	\$(487,000)
Resolutions July - September Quarter – increase / (decrease)	\$(15,000)
September Quarterly Review Adjustments – increase / (decrease)	\$(77,600)
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$(30,400)
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$583,400
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$196,200
Estimated Reserve Balance at 30 June 2012	\$1,935,700

30

Section 64 Developer Contributions

Opening Reserve Balance at 1 July 2011	\$8,569,400
Plus original budget reserve movement	\$(490,000)
Less reserve funded carryovers from 2009/2010	\$(139,600)
Resolutions July - September Quarter – increase / (decrease)	\$0
September Quarterly Review Adjustments – increase / (decrease)	\$90,000
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$329,900
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$(209,700)
Estimated Reserve Balance at 30 June 2012	\$8,359,700

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Movements for Water Fund can be seen in Annexure 3(a), (pages 53 to 57 of 78) with a proposed estimated increase to reserves (including S64 Contributions and unexpended loans) overall of \$913,300 from this Quarter.

5 SEWERAGE FUND

After completion of the 2010/2011 Financial Statements the Accumulated Surplus (Working Fund) balance for the Sewer Fund, as at 30 June 2011, was \$1,450,700 with capital works reserves of \$632,400, plant reserve of \$667,200 and lab reserve of \$47,200. It also held \$3,284,200 in section 64 developer contributions and \$2,136,100 in unexpended loans.

Capital Works Reserve

Opening Reserve Balance at 1 July 2011	\$632,400
Plus original budget reserve movement	\$(54,200)
Less reserve funded carryovers from 2010/2011	\$(725,100)
Resolutions July - September Quarter – increase / (decrease)	\$(685,000)
September Quarterly Review Adjustments – increase / (decrease)	\$(6,100)
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$300,150
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$895,400
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$(274,850)
Estimated Reserve Balance at 30 June 2012	\$357,550

15 Plant Reserve

Opening Reserve Balance at 1 July 2011	\$667,200
Plus original budget reserve movement	\$0
Less reserve funded carryovers from 2010/2011	\$0
Resolutions July - September Quarter – increase / (decrease)	\$0
September Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$0
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$0
Estimated Reserve Balance at 30 June 2012	\$667,200

Lab Reserve

Opening Reserve Balance at 1 July 2011	\$47,200
Plus original budget reserve movement	\$(47,600)
Less reserve funded carryovers from 2010/2011	\$0
Resolutions July - September Quarter – increase / (decrease)	\$0
September Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$0
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$(47,600)
Estimated Reserve Balance at 30 June 2012	\$(400)

20

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Section 64 Developer Contributions

Opening Reserve Balance at 1 July 2011	\$3,284,200
Plus original budget reserve movement	\$(429,000)
Less reserve funded carryovers from 2010/2011	\$(319,400)
Resolutions July - September Quarter – increase / (decrease)	\$0
September Quarterly Review Adjustments – increase / (decrease)	\$10,000
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$10,000
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$(1,273,600)
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$(2,002,000)
Estimated Reserve Balance at 30 June 2012	\$1,282,200

Unexpended Loans

5

Opening Reserve Balance at 1 July 2011	\$2,136,100
Plus original budget reserve movement	\$0
Less reserve funded carryovers from 2010/2011	\$(2,136,100)
Resolutions July - September Quarter – increase / (decrease)	\$0
September Quarterly Review Adjustments – increase / (decrease)	\$1,482,500
Resolutions October - December Quarter – increase / (decrease)	\$0
December Quarterly Review Adjustments – increase / (decrease)	\$0
Resolutions January – March Quarter – increase / (decrease)	\$0
March Quarterly Review Adjustments – increase / (decrease)	\$0
Forecast Reserve Movement for 2011/2012 – Increase / (Decrease)	\$(653,600)
Estimated Reserve Balance at 30 June 2012	\$1,482,500

Movements for the Sewerage Fund can be seen in Annexure 3(a), (pages 58 to 63 of 78) with a proposed estimated overall decrease to reserves (including S64 Contributions and unexpended loans) of \$378,200 from this review.

10

Legal Expenses

One of the major financial concerns for Council over previous years was legal expenses. Not only does this item represent a drain on rate income, but it is also susceptible to large fluctuations.

15

The table that follows indicates the allocated budget and actual legal expenditure within Council on a fund basis.

Total Legal Income & Expenditure as at 31 March 2012

20

Program	2011/2012 Budget (\$)	Actual (\$)	Percentage To Revised Budget
Income			
Compliance	0	25,000	0%
Development Assessment	0	470	0%
Total Income	0	25,470	0%
Expenditure			
General Managers Office	105,700	6,630	6%
Administrative Services	2,500	4,355	17%
Property Services	10,000	0	0%
Crown Property	1,000	0	0%

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Council Caravan Parks	5,000	0	0%
Asset Management Services	1,500	0	0%
Development Assessment	555,500	36,856	7%
Building Certification	1,000	0	0%
Environmental Health Services	1,000	0	0%
Compliance Services	183,000	78,355	43%
Ranger Services	3,000	0	
Community Planning	55,000	13,818	25%
Total Expenditure General Fund	924,200	140,014	15%
**Financial Services – S94	15,000	3,516	23%
**Sewerage Fund	30,000	0	0%

** These are restricted funds.

In addition to the above actual expenditure there is approximately another:

- 5
- (a) \$130,000 of committed to the estimated costs of cases which are currently before the Court, representing another 14% of the General Fund budget; and
 - (b) \$43,400 of accounts issued which were outstanding at the end of the quarter, representing another 5% of the General Fund Budget.
- 10

That is, at the end of third quarter, approximately 34% of the General Fund legal budget had been expended and/or committed, with a potential saving against budget to the third quarter of approximately 41% or \$379,000. This saving will only be realised, of course, if expenditure in the final quarter can be quarantined to budget, which at this stage does look likely.

15

As noted in Report 13.2 to Council 12 April 2012 Ordinary Meeting titled “Draft 2012/2013 Budget Estimates and Draft 2012/2013 Fees and Charges” there is a proposed reduction to the General Fund Legal Budget for 2012/2013 of \$332,200, which was recommended on the basis that Council commit to replenishing the Legal Services Reserve to a minimum balance of \$500,000. Additional information provided regarding the risks associated with reducing the Legal Budget included the following statement:

20

25 *“Management will need to make a recommendation in the next quarterly budget report that Council resolve to transfer any legal budget surpluses for 2011/2012 and/or 2012/13 to the legal reserve until a reserve balance of \$500,000 has been achieved, to support the current draft budget. If Council are not of a mind to replenish the legal reserve, it may need to consider not proceeding with the currently recommended reduction in the 2012/13 legal budget.”*

30

Recommendation

Part 3 of the Recommendation in this report is that Council return \$332,200 of the third quarter potential General Fund Legal Budget savings to the Legal Services Reserve to start the process of replenishing the reserve. The circumstances with the legal budget could then be reviewed at the end of this financial year, with any deficit being able to be drawn back from the reserve or any additional surplus being able to be committed to the reserve, at least to the minimum recommended balance of \$500,000.

35

40 The current status of the Legal Services Reserve is shown below:

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Legal Reserve

Opening Reserve Balance at 1 July 2011	\$553,100
Less amount committed for Complaints investigations (Res 09-350)	\$(54,100)
Less Resolution 10-960	\$(420,000)
Balance as at 30 March 2012	\$79,000
Add Proposed Transfer to Reserve from this Review	\$332,200
Estimated Reserve Balance at 30 June 2012 if recommended transfer to reserve adopted	\$411,200

5 Because fluctuations in legal expenditure can happen from year to year, it is important to ensure that a legal reserve is maintained at a level that enables Council to manage these fluctuations, particularly if Council reduces the 2012/2013 General Fund legal budget as is currently proposed.

Summary

10 The 31 March 2012 Quarter Budget Review of the 2011/2012 Budget has produced an estimated surplus result of \$31,200. This result will increase the estimated accumulated surplus (working funds) position attributable to the General Fund by \$31,200 from \$502,900 to \$534,100. This amount would be reduced by \$20,000 to \$514,100 if Council adopts part 2 of the recommendation to this report. Part 3 of the recommendation does not have any impact on the 2011/2012 Budget result.

15

Statutory and Policy Compliance Implications

20 In accordance with Clause 203 of the Local Government (General) Regulation 2005 the Responsible Accounting Officer of a Council must:-

- 25
- (1) *Not later than 2 months after the end of each quarter (except the June quarter), the responsible accounting officer of a council must prepare and submit to the council a budget review statement that shows, by reference to the estimate of income and expenditure set out in the statement of the council's revenue policy included in the operational plan for the relevant year, a revised estimate of the income and expenditure for that year.*
 - (2) *A budget review statement must include or be accompanied by:*
 - 30 (a) *a report as to whether or not the responsible accounting officer believes that the statement indicates that the financial position of the council is satisfactory, having regard to the original estimate of income and expenditure, and*
 - (b) *if that position is unsatisfactory, recommendations for remedial action.*
 - (3) *A budget review statement must also include any information required by the Code to be included in such a statement.*
- 35

Statement by Responsible Accounting Officer

40 This report indicates that the short term financial position of the Council is satisfactory for 2011/2012, having consideration of the original estimate of income and expenditure at the 31 March 2012 Quarter Budget Review.

45 This opinion is based on the estimated accumulated surplus (working funds) position and the anticipated improvement to that position by the current indicative budget surplus of \$193,400 for 2011/2012 (including adjustment for adoption of part 2 of the recommendation to this report).

That being said, the estimated Working Funds closing balance of \$534,100 is still significantly below Council's adopted target of \$1,000,000 by an estimated \$465,900.

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Report No. 13.6. Investments – April 2012

Executive Manager: Corporate Management

File No: FIN252000 #1225600

Principal Activity: Financial Services

Summary: This report includes a list of investments as at 30 April 2012.

5

RECOMMENDATION:

That Council receive and note the record of investments for the month of April 2012.

10

Attachments:

- Investment Valuations and Graphs April 2012 #1225601 [2 pages].....**Annexure 13(a)**

Report

5 Council has continued to maintain a diversified portfolio of investments. The average 90 day bank bill rate for the month of April was 4.21%. Council's performance for the month of April is a weighted average of 4.59%. This performance is again slightly higher than the benchmark. This is largely due to the active ongoing management of the investment portfolio, maximising investment returns through secure term deposits. Council's investment portfolio should continue to out-perform the benchmark as the capital protected investments earning 0% interest begin to mature or are able to be switched favourably. There are still a number of Council's capital protected investments being partially and fully allocated to an underlying zero coupon bond. This is part of the "Capital Protection Mechanism" and coupons will not be paid if any allocation is made to this bond.

15 The current value of an investment compared to the principal value (face value or original purchase price) provides an indication of the performance of the investment without reference to the coupon (interest) rate. The current value represents the value received if an investment was sold or traded in the current market, in addition to the interest received.

20 For the month of April, the current value of investments has remained lower than the principal amount. The table below shows a decrease in the unrealised loss for Council from March to April 2012.

Movement in Principal and Current Market Valuations

Month	Principal	Current Value (at end of month)	Unrealised Gain/(Loss)
MARCH	59,253,744.24	57,829,769.24	(1,423,975.00)
APRIL	60,344,009.47	59,060,499.47	(1,283,510.00)

25 This unrealised loss is a consequence of the lingering effects of the Global Financial Crisis. Some of Council's investments are linked to the Credit and Equity Markets which have been adversely affected and are yet to recover. A breakdown of this can be seen in the table below. The figures are for April 2012.

30 **Dissection of Council Investment Portfolio as at 30 April 2012**

Principal (\$)	Investment Linked to:-	Current Value	Unrealised Gain/(Loss)
37,505,800.00	TERM DEPOSITS	37,505,800.00	0
2,538,209.47	BUSINESS ONLINE SAVER	2,538,209.47	0
3,500,000.00	MANAGED FUNDS	3,124,550.00	(375,450.00)
7,000,000.00	CREDIT	6,866,770.00	(133,230.00)
9,800,000.00	EQUITY	9,025,170.00	(774,830.00)
60,344,009.47		59,060,499.47	(1,283,510.00)

35 Council uses a diversified mix of investments to achieve short, medium and long-term results. Council's historical strategy is to use credit/equity markets for exposure to long term growth. It should be noted that Council's exposure to credit/equity products is capital protected when held to maturity, which ensures no matter what the market value of the product is at maturity, Council is insured against any capital loss. The investment strategy associated with long term growth is now prohibited under the current Ministerial Investment Order utilising credit/equity markets to seek investment products. However, the 'grandfathering' provisions of the Ministerial Investment Order provides Council can retain investments now prohibited until they mature. Council is also looking

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continually at 'switch' opportunities for these investments in conjunction with its independent investment advisors. Any 'switch' opportunities undertaken are reported to Council in the investment report relating to the month the 'switch' occurred. Notwithstanding the current valuations of credit/equity investments, these products will trend toward their full principal value as they approach maturity.

5

Investments held as at 30 April 2012

Date	Principal (\$)	Description	CP*	Rating	M'ty	Type	Rate	Current Value
24/7/07	1,000,000	AVERON II	CP	AAA	07/14	CR	0.00%*	857,000.00
17/1/08	1,000,000	ANZ SUB DEBT	N	A+	01/13	CR	5.59%	996,570.00
30/1/08	1,000,000	SELECT ACCESS INVESTMENTS	CP	AA	11/12	CR	5.40%	1,000,000.00
22/4/08	2,000,000	ANZ TRANSFERABLE DEPOSIT	N	AA-	04/13	CR	5.64%	2,017,780.00
14/11/08	2,000,000	ANZ TRANSFERABLE DEPOSIT	N	AA-	12/12	CR	4.88%	1,995,420.00
26/9/05	1,500,000	EMU NOTES	CP	AAA-	10/15	MFD	0.00%*	1,291,350.00
29/6/06	2,000,000	ALL SEASONS NOTE	CP	AA+	08/14	MFD	0.00%*	1,833,200.00
22/6/06	1,000,000	HIGH INCOME NOTES	CP	A	06/13	E	0.00%*	949,040.00
5/9/06	800,000	MGD GLOBAL PROPERTY	CP	A	09/12	E	0.00%*	784,560.00
22/11/06	1,000,000	LIQUIDITY	CP	A+	10/12	E	0.00%*	980,700.00
30/3/07	1,000,000	INFRASTRUCTURE AND UTILITIES NOTE	CP	A	03/14	E	0.00%*	907,920.00
28/9/07	1,000,000	TRI-SECTOR LINKED NOTE	CP	A	09/14	E	0.00%*	880,350.00
5/11/07	1,000,000	ELN 2	CP	AA-	11/12	E	3.00%	992,600.00
28/11/07	3,000,000	CLIENT MANAGED NOTE	CP	A	11/14	E	0.00%*	2,598,000.00
20/12/07	1,000,000	DANDELION NOTE	CP	AA	12/12	E	0.00%*	932,000.00
20/4/12	1,000,000	HERITAGE BUILDING SOCIETY	P	NR	07/12	TD	5.35%	1,000,000.00
6/3/12	2,000,000	SUNCORP	P	A	06/12	TD	5.95%	2,000,000.00
4/4/12	4,200,000	SUNCORP	N	A	05/12	TD	5.47%	4,200,000.00
29/9/08	2,000,000	WESTPAC BANK	P	AA	09/13	TD	8.00%	2,000,000.00
16/12/08	1,000,000	WESTPAC BANK	N	AA	12/13	TD	6.00%	1,000,000.00
28/9/09	785,000	INVESTEC BANK	P	BBB+	01/14	TD	8.02%	785,000.00
2/10/09	1,734,800	ELDERS RURAL BANK	P	BBB	07/12	TD	6.93%	1,734,800.00
13/12/11	1,000,000	CREDIT UNION AUSTRALIA	P	BBB+	06/12	TD	5.94%	1,000,000.00
17/6/10	786,000	SUNCORP	N	A	06/14	TD	7.30%	786,000.00
23/4/12	2,000,000	COMMUNITY CPS	P	NR	07/12	TD	5.80%	2,000,000.00
26/4/12	1,000,000	ME BANK	P	BBB	06/12	TD	5.70%	1,000,000.00
26/4/12	1,000,000	NEWCASTLE PERMANENT	P	NR	07/12	TD	5.65%	1,000,000.00
7/3/12	2,000,000	SOUTHERN CROSS CR UNION	P	NR	06/12	TD	5.80%	2,000,000.00
12/5/11	1,000,000	INVESTEC BANK	N	BBB+	05/14	TD	7.48%	1,000,000.00
27/3/12	2,000,000	ING BANK (AUSTRALIA)	P	A1	10/12	TD	6.17%	2,000,000.00
27/7/11	1,000,000	RABO BANK	P	AAA	5/12	TD	6.30%	1,000,000.00
8/8/11	1,000,000	RABO BANK	N	AAA	8/13	TD	6.50%	1,000,000.00

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27/2/12	1,000,000	GREATER BUILDING SOCIETY	P	NR	5/12	TD	5.65%	1,000,000.00
26/4/12	1,000,000	WIDE BAY LTD	P	NR	5/12	TD	5.45%	1,000,000.00
27/2/12	2,000,000	ST GEORGE BANK	P	AA-	05/12	TD	5.90%	2,000,000.00
30/11/11	1,000,000	NATIONAL AUSTRALIA BANK	P	AA-	07/12	TD	5.96%	1,000,000.00
4/4/12	1,000,000	ME BANK	N	BBB	06/12	TD	5.65%	1,000,000.00
10/2/12	1,000,000	AMP BANK	P	A	09/12	TD	6.00%	1,000,000.00
10/2/12	1,000,000	AMP BANK	N	A	09/12	TD	6.00%	1,000,000.00
9/3/12	2,000,000	ING DIRECT (AUSTRALIA)	N	A1	07/12	TD	6.04%	2,000,000.00
13/3/12	2,000,000	CREDIT UNION AUSTRALIA	N	BBB+	10/12	TD	6.00%	2,000,000.00
N/A	2,538,209	CBA BUSINESS ONLINE SAVER	N	A	N/A	CALL	4.75%	2,538,209.47
Total	60,344,009					AVG	4.59%	59,060,499.47

5 It should be noted that at the time of writing this report, Council had not received valuations for investments purchased through ANZ, or for the EMU Note, All Seasons Note and the Select Access investment for 30 April 2012. These are the investments highlighted bold in the table above with valuations reflective from the 31st March 2012.

10 **Note 1.** CP = Capital protection on maturity
 N = No Capital Protection
 Y = Fully covered by Government Guarantee
 P = Partial Government Guarantee of \$250,000

15 **Note 2.** **Type** **Description**

CR	Credit	Principal varies based on valuation, interest payable via a floating interest rate that varies except for those capital protected investments that have transferred to their capital protection mechanism
E	Equity	Principal varies based on valuation, interest payable via a floating interest rate that varies except for those capital protected investments that have transferred to their capital protection mechanism.
MFD	Managed Fund	Principal varies based on fund unit Price valuation, interest payable varies depending upon fund performance.
TD	Term Deposit	Principal does not vary during investment term. Interest payable is fixed at the rate invested for the investment term.
CALL	Call Account	Principal varies due to cash flow demands from deposits/withdrawals, interest is payable on the daily balance at the cash rate +0.50%

30 **Note 3.** Floating rate notes and Term Deposits can be traded on a day-to-day basis, and therefore Council is not obliged to hold the investments to the maturity dates. Managed funds operate in a similar manner to a normal bank account with amounts deposited or withdrawn on a daily basis. There is no maturity date for this type of investment.

40 **Note 4.** The coupon on these investments is zero due to the Capital Protection mechanism working. This occurs when the investment falls below a certain level. This coupon may be paid again in the future as the market recovers.

Other Information – Financial Claims Scheme (FCS)

On 1 February 2012, the Financial Claims Scheme (FCS - or Government guarantee) coverage for any one investor in deposits will reduce to \$250,000 from \$1,000,000 per Approved Deposit Institution (ADI). The Financial Claims Scheme was introduced as a result of the Global Financial Crisis (GFC), essentially to provide investors confidence when taking out deposit's with all ADIs and to ensure that their primary business of lending money was not significantly hindered due to lack of funding. NSW Local Government Councils have under the Ministers Order always been able to invest with ADIs without a dollar limit on any one institution.

Under Australian Prudential Regulatory Authority (APRA) regulation Building Societies and Credit Unions must meet the same capital requirements as a Bank. Whilst the majority are much smaller in terms of balance sheet size to the Banks they are still considered to be strong business' and investing in their term deposits still low risk. Most of Councils' term deposits have now been amended to show a partial guarantee of this \$250,000 per deposit taking institution.

Financial Implications

The reduction of the current value of Council's portfolio is a result of the downturn in global markets stemming from the global financial crisis. It should be noted that Council's exposure to the credit/equity markets is supported by capital protection which ensures that the initial value of the investment is not reduced when held to maturity. In downward cycles, the capital is protected by allocating the investment to an underlying bond. If the investment is 100% allocated to this bond, no interest will be paid up to maturity. This will impact negatively on Council's interest earnings on investments.

Council's investment strategy is to invest for the long term while maintaining sufficient liquid investments to meet short term requirements. It is important that this strategy is maintained to ensure that principal attached to credit/equity investments is recovered over time as maturity occurs or 'switch' opportunities to alternative investments present themselves.

Statutory and Policy Compliance Implications

In accordance with clause 212 of the Local Government (General) Regulation 2005, the Responsible Accounting Officer of Council must provide Council with a monthly report detailing all monies Council has invested under section 625 of the Local Government Act 1993.

The Report must be presented at the next Ordinary Meeting of Council after the end of the month being reported. In this regard, the current Council Meeting cycle does not always allow this to occur, especially when the second meeting of a month is a Strategic Planning Meeting or when the meeting dates are brought forward. Under normal circumstances it is not possible to present the investment report to the first Ordinary Meeting in the month, as investment valuations required for the preparation of the report, are often received after the deadline for the submission of reports for the meeting.

Council's investments are carried out in accordance with section 625(2) of the Local Government Act 1993 and Council's Investment Policy. The Local Government Act 1993 allows Council to invest money as per the Ministers Order – Forms of Investment, last published in the Government Gazette on 11 February 2011.

Council's Investment Policy includes the objective of maximising earnings from authorised investments and ensuring the security of Council Funds.

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Report No. 13.7. 2011/2012 Loan Borrowings

Executive Manager: Corporate Management

File No: FIN254000 #1227431

Principal Activity: Financial Services

Summary: Council in the adoption of the 2011/2014 Management Plan by resolution **11-546** approved loan borrowings for a number of projects for the 2011/2012 financial year

This report has been prepared to advise that the loan funding is no longer required for the subject projects.

Council though has two existing loans from the 2008/2009 loan borrowing program that need to be refinanced.

This report seeks a Resolution to undertake an expression of interest process to refinance the loans and to delegate to the General Manager the authority to negotiate with financial institutions to borrow the funds at the best rate and terms for Council.

5

RECOMMENDATION:

- 10 1. That Council note that that loan funds are not required in the 2011/2012 financial year for the projects listed below:

Loan Funded Project	Loan Amount \$
General Fund	
Roundhouse Subdivision Development Costs	985,000
Total General Fund	985,000
Water Fund	
Argyle St Southside Watermain Renewal	150,000
Total Water Fund	150,000
Total Loan Borrowings	1,135,000

- 15 2. That Council refinance \$2,769,765 of outstanding loan principal from the 2008/2009 financial year loan borrowings program, relating to Council loan no 57 and 55, and approve these borrowing as its 2011/2012 loan borrowing program.
- 20 3. That Council delegates authority to the General Manager to negotiate with financial institutions to acquire the refinanced loans listed in recommendation 2 above and accept the best offer made available to Council.
4. That Council authorise the affixing of the Council seal to all documents that may require it, in regards to the accepted loan borrowings for the 2011/2012 financial year.

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Report

5 Council in the adoption of the 2011/2014 Management Plan by resolution **11-546** approved loan borrowings for a number of projects for the 2011/2012 financial year. The projects to be funded by loan borrowings for 2011/2012 financial year are as follows:

Loan Funded Project	Loan Amount \$
General Fund	
Roundhouse Subdivision Development Costs	985,000
Total General Fund	985,000
Water Fund	
Argyle St Southside Watermain Renewal	150,000
Total Water Fund	150,000
Total Loan Borrowings	1,135,000

10 Given the current timing in the 2011/2012 financial year, it has become apparent that the loan borrowings identified for 2011/2012 will not be required for the following reasons:

- Council at its Ordinary Meeting held on 26 April 2012 received report 15.2 concerning the Roundhouse Subdivision. The status of this project will therefore not require loan funding for development costs of \$985,000 in the 2011/2012 financial year.
- The Argyle Street Southside Watermain Renewal project has been reduced to an expenditure allocation of \$40,000 in the 2011/2012 budget, from the original estimate of \$150,000 with the funding source changed to Water Fund Capital Works Reserve through the Quarterly Budget Review process. Consequently the \$150,000 loan funding identified for 2011/2012 for this project is no longer required.

20 Council at its Ordinary Meeting of 12 February 2009 received a report on loan borrowings required for the 2008/2009 financial year totalling \$8,950,000. Council resolved to borrow the loan funds required through Resolution 09-28. Provided in this borrowing amount was \$1,000,000 for Donaghy's Bridge but this amount was not required in the 2008/2009 financial year and subsequently not borrowed. The loan funding actually borrowed in 2008/2009 that was sourced through the Commonwealth Bank was for the following purposes through three physical loans:

Council Loan No	CBA Loan	Purpose	Amount \$
57	1	Byron Regional Sport and Cultural Complex	1,300,000
		Suffolk Park Child Care Centre	400,000
		O'Possum Creek Bridge	250,000
		Total for Loan 57 (CBA Loan 1)	1,950,000
55	2	Byron and Mullumbimby Pools	1,000,000
		Total for Loan 55 (CBA Loan 2)	1,000,000
56	3	Brunswick Valley Sewerage Treatment Plant	5,000,000
		Total for Loan 56 (CBA Loan 3)	5,000,000
		Total Loan Borrowings 2008/2009	7,950,000

5 Loan 57 (CBA Loan 1) for \$1,950,000 was borrowed over a nominal twenty-five year term but the interest rate applicable was fixed for three years only. Loan 55 (CBA Loan 2) for \$1,000,000 was borrowed over a nominal twenty year term but the interest rate applicable was fixed for a three year period. Loan 56 (CBA Loan No 3) for \$5,000,000 was borrowed over a nominal twenty five year period but the interest rate applicable was fixed for a five year period.

10 The three loans borrowed for the 2008/2009 loan borrowing program were drawn down on 25 June 2009. This means the fixed interest rate period for loan 57 (CBA Loan No 1) and loan 55 (CBA Loan No 2) will expire on 25 June 2012 and for loan 56 (CBA Loan No 3) will expire on 25 June 2014.

Due to Loan 57 (CBA Loan No 1) and Loan 55 (CBA Loan No 2) expiring in terms of the fixed interest rate period on 25 June 2012, this provides the following options for Council:

- 15
- Refinance the loans over the remaining term (subject to Bank approval) with the current funder – Commonwealth Bank at the interest rate the Commonwealth Bank determines.
 - Conduct an Expression of Interest (EOI) process to refinance the loans through Council testing the market to obtain the best possible outcome in terms of borrowing term and interest rate applicable. Council is able to do this as tenders are not required for the provision of loan funds by Section 55(1)(f) of the Local Government Act 1993.
- 20

25 Generally due to interest rate markets, offers made to Council relating to loan borrowings are only valid for a very short period of time ie can be less then 24 hours. This is also due to the size of loans borrowed by Councils and where financial institutions are sourcing the funds. It is on this basis that the recommendation regarding Council delegating authority to the General Manager to accept a loan offer on Councils behalf is requested. The approval to borrow loans and the amount is covered by Council resolution if this report is approved. The delegation to the General Manager provides the ability to implement Council's resolution.

30

Financial Implications

35 It is suggested that Council should undertake an Expression of Interest (EOI) process to ensure it is able to get the best financial outcome available by testing the market. Current market conditions are suggesting an environment where interest rates are falling so an Expression of Interest (EOI) process may possibly generate some financial savings for Council if the loan borrowings are sourced at an interest rate that is less then the current interest rate paid.

40 The amount that Council will need to finance for its 2011/2012 loan borrowing program will be the current outstanding principal balance of \$2,769,765 as at 25 June 2012 as follows:

- Loan 57 (CBA Loan No 1) \$1,849,185
- Loan 55 (CBA Loan No 2) \$920,580

45 It should be noted the 2011/2012 financial year loan borrowings are not additional loan borrowings by Council but are borrowings to refinance loan borrowings undertaken in the 2008/2009 financial year. Loan 56 (CBA Loan No 3) does not require refinancing at this time but will need to be addressed prior to 30 June 2014

50 Statutory and Policy Compliance Implications

Council has adopted Policy 2009/006 regarding loan borrowings.

55 Section 55(1)(f) of the Local Government Act 1993 provides that Council does not need to call tenders for a contract relating to loan borrowings.

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Section 377(1)(f) of the Local Government Act 1993 stipulates that a Council may by resolution delegate to the General Manager or any other person or body (not including another employee of the Council any of the functions of the Council except the borrowing of money.

5 Section 621 to 624 of the Local Government Act 1993 provides:

- That Council can borrow at any time for purposes allowed under the Local Government Act 1993,
- 10 • That Council may borrow by way of overdraft or loan or by other means approved by the Minister.
- That Council may give security for any borrowings in such manner as may be prescribed by the regulations with such securities ranking on equal footing despite any other Act.
- The Minister may, from time to time, impose limitations or restrictions on borrowings by a particular Council, or Councils generally despite the other provisions of this Part.

15 Clause 229 of the Local Government (General) Regulation 2005 provides the repayment of money borrowed by a Council (whether by way of overdraft or otherwise), and the payment of any interest on that money, is a charge on the income of the Council.

20 Clause 230 of the Local Government (General) Regulation 2005 provides that the General Manager must notify the Director-General within 7 days of the borrowing of loan funds that the borrowing has occurred.

25 Clause 400(4) of the Local Government (General) Regulation 2005 provides the seal of a Council must not be affixed to a document unless the document relates to the business of the Council and the Council has resolved by resolution specifically referring to the document that the seal be so affixed.

30 The Minister for Local Government issued a revised Borrowing Order for Councils in New South Wales on 13 May 2009. The stipulation in the Borrowing Order is that Councils are not to borrow from any source outside the Commonwealth of Australia or in any other currency other than Australian currency.

Report No. 13.8. Compliance Services Status Report as at 30 April 2012

Executive Manager: Corporate Management

File No: COR652000 #1224802

Principal Activity: Compliance Services

Summary: This is a report on completed court matters managed by the Compliance Services. The report also outlines the status of uncompleted matters managed by the Compliance Services.

The following summaries include details of 'Legal costs YTD' and 'Expert Witness Cost YTD'. These amounts are costs billed this financial year to date. They do not necessarily reflect the amounts *incurred* in this financial year to date only the amounts billed to date. Inclusion of this column in the regular Compliance Services status report will keep Councillors informed of the amount billed in matters as they progress.

5

RECOMMENDATION:

That this report be noted.

10

Attachments:

15

- **CONFIDENTIAL** Signed copy Whittaker's undertakings #1227273 [1 page]..... **Annexure 14(a)**
- Land and Environment Court Judgement – Rising Damp Corporation #1227160 [4 pages]. **Annexure 14(b)**
- **CONFIDENTIAL** Letter for SP Lawyers dated 17 January 2012 #1187629 [5 pages]..... **Annexure 14(c)**
- **CONFIDENTIAL** Signed copy Fletcher Johnson Pty Ltd's undertaking #1201116 [4 pages] **Annexure 14(d)**
- **CONFIDENTIAL** Brief of Evidence Re Anderson # 1227339 [14 pages]..... **Annexure 14(e)**

Report

This is the Compliance Services Status Report to Council on completed Local Court prosecutions relating to compliance matters.

5

Matter: DARSANA AND DARSANA

Compliance Priorities addressed: Very High 1.1 development that places peoples lives at risk.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$1,500

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter: Fail to comply with an Order x 4

Date of commencement of proceedings: 1 December 2011

Address: 12 Robin Street, South Golden Beach

Status:

1. The Defendant Sophia Darsana is the registered proprietor of the property 12 Robin St South Golden Beach (the subject property).
2. On 26 May 2009 Council received a Customer Action Request alleging that the downstairs area of the subject property had been converted into a flat and was being rented out. Council officers inspected the subject property and observed that the downstairs area had been converted into a separate habitable dwelling without development consent. A representative with power of attorney from the owner advised at this time that her bedroom was in the downstairs converted area.
3. On 8 September 2009 Council received correspondence from Sophia Darsana which advised that she was intending to seek copies of approved plans from Council and was considering applying for Development Consent (to try and regularize the unapproved development). Council officers had reason to believe from this correspondence that Sophia Darsana was intending to comply with planning law and instruments. However no Development Application was received by Council.
4. On 21 December 2010 Council officers attended the property in relation to an inspection notice that had been issued. They were met at the front of the property by a representative of the owner who advised them that she had power of attorney and that she did not want Council to enter the property. Officers observed a sign at the front of the premises purporting to withdraw any implied licence to enter the property. Officers left the premises.
5. On 24 December 2010 Council sent the owner a letter advising that Council intended to issue orders No.1 and 15 under the Environmental Planning and Assessment Act 1979 to cease use of the downstairs area for habitation and to comply with her Development Consent.
6. On 16 March 2011 Council issued a Notice of Proposed Order No1 and 15 under the Environmental Planning and Assessment Act 1979.
7. At 10.15am on 19 March 2011 Council served a copy of a Notice of Proposed Order No 1 and 15 under section 121B of the Environmental Planning and Assessment Act on the Defendants.
8. No response was received by Council in response to the Notice of Intention and on 22 June 2011 Council issued an Order No1 & 15. The Order required compliance by sixty (60) days for Order No. 1 (by 21 August 2011) and ninety (90) days for Order No. 15 (by 20 September 2011).
9. On 28 July 2011 Council issued an inspection notice to inspect the property.
10. On Monday 21 August Council officers attended the property. No one was present and no inspection was undertaken.
11. On Tuesday 30th August 2011 Council obtained a Search Warrant from Byron Bay Local Court

- in order to confirm if the unapproved downstairs area was still being used as a habitable area or dwelling and if Order No 1 had been complied with. The Search Warrant was executed with the assistance of NSW Police on Thursday the 1 September 2011. Entry was gained with the assistance of a locksmith.
12. At the rear of the dwelling (downstairs area) Council officers observed at ground level an outdoor type lounge/dining area underneath a veranda and a semi enclosed kitchen and bathroom that included a hand basin, toilet and shower. The kitchen included a sink, cupboards, refrigerator and microwave oven.
 13. Officers observed that to the western side of the downstairs area there was an enclosed room that could be used as a bedroom or storage room. This room was at the end of the garage that has been built along the western wall of the dwelling.
 14. The door entered at the rear of the premises lead into a bedroom, and to the left was a door leading into another room. Officers entered this other room and observed a spiral staircase from the ground floor of the downstairs area leading to the upstairs area. The spiral staircase had been blocked at the upstairs area floor level by the placement of timber sheeting, with cloth material or rags used to seal cracks between the timber sheeting and the floor where these did not fit flush. This room also had a door leading to the front of the property.
 15. Numerous personal effects were observed throughout the downstairs area leading to the belief that that this area was being occupied as a separate habitable dwelling without development consent.
 16. A number of breaches of the Building Code of Australia were also noted. The rear verandah had been extended with a poor quality bracket arrangement and neither of the stairs had complying handrails. No smoke detectors were observed in any of the converted downstairs living areas of the premises.
 17. At approximately 1.40pm on Thursday 15 December 2011 Council officers attended the subject property after the issue of an EP&A Act Inspection Notice dated 9 December 2011. Attendance at the property was to determine if Order No.15 had been complied with.
 18. Council officers entered the subject property with the consent of a representative of the owner and observed personal effects and items piled up in front of the downstairs area.
 19. Inside the downstairs area the room with the spiral staircase had most items of furniture and personal effects removed from the room and placed outside, or in the downstairs room at the rear of the premises. The unapproved spiral staircase had been 'opened up' to allow access from the ground floor to the first floor.
 20. The room inside the downstairs area that had been used as a bedroom previously had most items and furniture boxed up. A bed was still present but was stored on its end.
 21. At the rear of the downstairs area officers observed that the shower/toilet facility still appeared to be in use. Personal effects were present.
 22. At the rear of the downstairs area officers observed that the kitchen had been cleaned and tidied since the inspection on 1 September 2011 but still appeared to be in use. Officers observed cutlery, crockery, kitchen utensils and a large tin of olive oil in the kitchen. A refrigerator was also present.
 23. Officers observed personal items and effects in the outside area such as shoes, towels and clothes hung out to dry, personal items on a dresser cabinet.
 24. A search of Council records reveals that no Development Application or Consent for the works which had been undertaken.
 25. The property owner had not taken any reasonable steps over a period of 21/2 years to regularize the unapproved development or to cease the use of the downstairs area. (May 2009 to December 2011).
 26. In the Mullumbimby Local Court on 12 January 2012 each Defendant was convicted and each

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was fined the total sum of \$3,000 and ordered to pay council's professional costs of \$750. Total fines \$6,000. Total costs \$1,500.

27. The owner will still be required to comply with the Orders issued.

Matter: BLANEY

Compliance Priorities addressed: Very High 1.1 legal compliance action against holiday let establishments.

Solicitor: Ralph James, Manager Governance

Legal Costs YTD: \$1000

Expert Witness Costs YTD: Nil

Date Last Reported: N/A

Type of Matter Fail to comply with a Notice

Date of commencement of

(Obstruction of authorized persons) S118N(1)(a)

proceedings: 19 January 2012

Environmental Planning & Assessment Act 1979 (NSW)

Address: 21 Bay Vista Lane, Ewingsdale

Status:

1. Council's records show that the sole owner of the property being Lot 9 in Deposited Plan (DP) 258951, NSW 2481 is a Mr J Blaney.
2. Council and the NSW Police have received complaints about a number of issues at Lot 9, including holiday letting, overflowing sewage, rubbish, noise, disturbance and loss of local amenity.
3. Lot 9 has been the subject of investigations and actions by Council's environmental health officers regarding on site sewage management issues. A penalty notice for the offence of 'Pollute Land – Individual' was issued to the owner on 6 August 2010 in relation to an onsite sewage management system failure polluting neighbours land.
4. Lot 9 has been advertised on an internet address www.stayz.com.au/69034 under the name 'Byron Bay Sacred Sanctuary' or 'The Byron Sanctuary – The Healing Retreat'.
5. Lot 9 has been advertised as available as a tourist facility for short term holiday letting (including use of the premises by 'schoolies'), as a recreational establishment and for functions (eg conferences, hens weekends). Advertisements claim that in addition to providing accommodation ('Price from \$300 per night, Max. Guests 14, Minimum stay 2 nights') 'we can provide a comprehensive range of healing and health therapies'.
6. Lot 9 is also described as a 'resort sanctuary retreat' with a 'modern Feng Shui Pavillion'.
7. Lot 9 is zoned as Zone No. 1(c2) (Small Holdings (c2) Zone) under the Byron Shire Local Environment Plan (LEP) 1988. Commercial premises, hostels, motels, residential flat buildings, rural tourist facilities and tourist facilities are prohibited development in Zones 1(c1) and 1(c2).
8. A bed and breakfast establishment, boarding-house and recreational establishment are permitted in Zone No. 1(c2) but only with development consent. A search of Councils records has revealed that Council has not issued any consent or approval for a bed and breakfast establishment, boarding-house or recreational establishment at Lot 9.
9. From information available Council formed a reasonable suspicion that the property was being used as a tourist facility for holiday letting which is a prohibited use in this zone. In order to obtain information and evidence required to confirm/not confirm its reasonable suspicion Council issued the owner with a notice requiring information and/or records to be provided under the

Environmental Planning & Assessment Act 1979.

10. The date of the first notice was 11 May 2011 and a response was required by 4pm Friday 10 June 2011. The notice was sent by registered post (receipt number 480690959015) and was received and signed by the property owner on 20 May 2011. No responses or replies to this notice were received from the property owner.
11. Council officers inspected the property on 21 June 2011 and met the owner on site. During this inspection the owner said certain things in relation to use of the property and these comments were recorded by Council officers in file notes, compliance inspection reports and statements.
12. Whilst the property did not respond to the Notice to provide information and/or records at other times conflicting information has been provided regarding the use of Lot 9. eg:
 - (a) *"My family stay here but I do not holiday let the property"* (7 December 2010),
 - (b) *"Its not available for holiday letting now and I've withdrawn all web site advertisements. I'm a bit surprised that you were able to find any internet advertising as it hasn't been widely advertised"* (21 June 2011),
 - (c) *"we've only let it once this year but its no longer available for holiday letting. To be truthful, we've never made much money from it, the market at the moment is very bad. I'm still a member of HLO though"* (21 June 2011),
 - (d) *"we have removed listings from some web sites and only have a casual renting arrangement with Stayz"* (18 November 2011).
13. Following a complaint received about noise and disturbance that occurred at the property on 5 August 2011 Council issued the property owner with a Noise Abatement Direction issued under s276 of the Protection of the Environment Operations Act 1997. The date of issue of this Direction was 9 August 2011 and it remained in force until 5 September 2011.
14. On 30 September 2011 Council officers attended the above property in relation to overflowing sewage. On arrival at the property, officers spoke with a female adult who advised that she was employed as a cleaner who came in to clean during the changeover between guests departing and arriving. This person advised that more guests were arriving the next day. An inspection revealed that a shed was being used as a bedroom and that the septic tank was overflowing.
15. Council received 3 complaints about this property during the period June 2011 to October 2011. Two of these complaints related to alleged holiday letting and the third involved alleged sewage leaking onto a neighbouring property.
16. In light of comments and complaints received and observations made since meeting the owner on site on 21 June 2011, Council continued to hold a reasonable suspicion that the property was being as a tourist facility for holiday letting.
17. Council issued the owner with a second notice requiring information and/or records to be provided under the Environmental Planning & Assessment Act 1979. The date of the second notice was 13 October 2011 and a response was required by 4pm on 12 November 2011. This notice was sent by registered post (receipt number 566891507016) and was received and signed by the property owner on 27 October 2011.
18. On 2 November 2011 Council sent the property owner a reminder email about the 2nd request – Notice requiring information and/or records to be provided
19. Council became aware on 1 November 2011 that the property was still being advertised for short term holiday letting at www.stayz.com.au/69034. Council wrote to the property owner on 3 November 2011 and sought clarification from him about the current use of the premises. No response was received from the property owner.
20. On 1 December 2011 a Council officer attended Lot 9 as a follow up to ongoing issues with a failing on site sewage management system. During this attendance the officer noted that a

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number of young males and females were present on the property and that these people could be described as 'schoolies'.

21. The officer also observed on 1 December 2011 that a small farm shed at the rear of the property had beds in it and appeared to be used for habitable purposes as a bedroom. Consent condition 8 of Complying Development Certificate No. 16.2010.96.1 issued by Council on 9 November 2010 specifically prohibits use of this building for habitable purposes without Council approval. Council has not given approval for this building to be used for habitable purposes.
22. On 3 November 2011 the property owner sent Council an email with the Subject title: 'Re 21 Bay Vista Lane, Ewingsdale' and that included the a message as to why action had not been taken but confirming that the owner would "be in touch" regarding Council's requests but that the owner could not comply with the due date for compliance with the Notice.
23. In response to the email dated 3 November 2011 from the property owner, Council wrote to the property owner on 11 November 2011 and advised that it would extend the deadline for complying with the notice dated 13 October 2011 to provide information and/or records until close of business 16 December 2011.
24. By letter dated 22 November 2011 Council advised that if its notice dated 13 October 2011 to provide information and/or records was not complied with by close of business 16 December 2011 Council may commence formal enforcement action.
25. The property owner had not complied with Councils second Notice to provide information and/or records by the due date of 4pm 16 December 2011, so Council issued a Court Attendance Notice for failure to comply with Notice (obstruction of authorised person).
26. The matter came before the Byron Bay Local Court on 19 January 2012 when the defendant was convicted and fined \$1,000 with court costs of \$81 and professional costs of \$1,000.
27. The owner will still be required to cease unauthorised use of the property.

Matter: JACONA

Compliance Priorities addressed: Very high 1.3 action, works or activity causing or likely to cause environmental harm or pollution.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$500

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter:

Date of commencement of proceedings:

OFFENCE ONE: Fail to comply with clean-up notice.
Protection of the Environment Operations Act 1997
Section 91(5)(a)

8 December 2011

OFFENCE TWO: Pollute land Section 142A (1.)
Protection of the Environment
Operations Act 1997

OFFENCE THREE: Owner/occupier cause/permit/use
land as waste facility Section 144 (1).

Protection of the Environment Operations Act 1997

OFFENCE FOUR: Cause permit transport waste to
unlawful waste facility. Section 143(1)(a)

Protection of the Environment Operations Act 1997

Address: 3822 Pacific Highway TYAGARAH NSW 2481

Brief History of Substantive Matter: See below under Status

Status:

1. The Defendant is the sole owner and occupier of the subject property.
2. On 6 July 2010 Council received a complaint that there had been clearing on the property. Council officers attended the property and met with the Defendant who walked the officers through parts of the property in a generally west-to-east direction and indicated various works that he said he had carried out. These works included construction of dirt access trails and drainage channels, tree clearing and the placement of a large pile of material consisting of rock, brick rubble and concrete pieces. The Defendant told Council officers that this pile of material was the foundation or 'pad' for a proposed dwelling house.
3. Officers observed quantities of waste materials located throughout the property. This waste material included plastic sheets and containers, timber, paper and cardboard, rubber tyres, polystyrene boxes, metal components, rolls of wire mesh, car bodies, drums and tins and brick/masonry rubble.
4. Council officers also observed earth moving equipment on the property, including a bulldozer.
5. During the attendance the Defendant agreed to cease all tree removal, dumping of waste, construction of a house/house site and construction of tracks and trails.
6. Council wrote to the Defendant on 21 July 2010 and requested that he *'confirm in writing to Council within 10 days of the date of this letter that you will fully comply at all times with all relevant planning and environmental legislation, and with Byron Shire Council's Local Environment Plan (LEP), Development Control Plan (DCP) and Tree Preservation Order (TPO)'* The letter also noted that *"failure to provide this written undertaking within the specified time will result in Council commencing enforcement action'."* Council did not receive a reply to this request.
7. A Consulting ecologist/botanist attended the property on 12 July 2010 and reported that *'The agricultural viability of the flood liable component of the property is marginal; and the site is wholly unsuited to be used as a waste disposal area. Such use threatens the hydrological patterns and ecological integrity and function of the site, and adjacent low nutrient wetland, swamp and waterways that connect to estuarine areas and habitats'*. The report recommended that *'The simplest and most expedient hypothetical solution is to advocate for the complete remediation of the site, the total removal of all waste disposed of to date, and the return of the land to a condition reflective of that prior to the unauthorised activities having been implemented.'*
8. This property has significant land use planning and environmental constraints. The property adjoins Simpsons Creek Sanctuary Zone within the Cape Byron Marine Park. That part of Simpsons Creek adjacent to this property is tidal. The NSW Marine Parks Authority has advised Council that *'gross debris and other waste entering Simpsons Creek from this property could potentially influence water quality, habitat and species beyond the boundary of Simpsons Creek, by entering the open ocean and other parts of Cape Byron Marine Park'*.
9. On 19 October 2010 Council sent the Defendant a proposed Direction to take Clean-up Action under Section 91 of the Protection of the Environment Operations Act 1997. Council served a Direction to Take Clean-up Action – Final notice to the Defendant on 2 February 2011. Council did not receive any response from the Defendant.
10. On 19 April 2011 Council wrote to the Defendant advising him that Council would commence enforcement action without further notice or reference to him.
11. The Defendant sent a handwritten letter to Council dated 29 April 2011 stating *"I regret to advise Council that I can't and will not under these circumstances further assist in this matter. Council has a complete misunderstanding and/info on a agenda which is directed from elsewhere. In either case I am not prepared to tolerate intervention in my person affairs, direction or indirectly"*

and that I am afraid 4 u is that".

12. Council sent a letter dated 7 July 2011 to the Defendant advising that he had not complied with Council's clean-up direction dated 2 February 2011, that it appeared from his letter dated 29 April 2011 that he had no intention of complying, and that Council officers and environmental consultants would enter his property within 2 months to further inspect, assess and report on the waste that was present on his property. Council received no reply from the Defendant.
13. A Council officer and environmental/pollution consultants engaged by Council attended the property on 11 August 2011 and observed further land clearing and earthworks and new waste material (piles of soil material that includes waste such as bricks, masonry and rubble) which had occurred on the property since officers attended on 6 July 2010.
14. The Council officers inspection of the 11 August 2011 confirmed that Council's POEO Act Clean-up Direction notice dated 2 February 2011 had not been complied with, that significant quantities of waste were still present on the property, that the property was being used as a waste facility without approval, , that activities were being carried out on the property in an environmentally unsatisfactory manner and that pollution of land was occurring or was likely to occur.
15. Council issued a Court attendance Notice for 4 offences under the Protection of the Environment Operations Act – refer to summary table above for details.
16. The matter came before the Byron Bay Local Court on 8 December 2011 when the Defendant was convicted and fined \$8,000 plus court costs of \$81 and professional costs of \$550. The Defendant appealed to the Lismore District Court. On 13 April 2012 the appeal was dismissed.
17. The owner will still be required to clean up the property, remove all potential pollutants and cease storing waste on the property.

Matter: LANGTON

Compliance Priorities addressed: Very high 1.3 action, works or activity causing or likely to cause environmental harm or pollution.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$2,200

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter: Removal of 220 trees in breach of the Byron Shire Council Tree Preservation Order. Section 76A(1)(a) of the Environmental Planning and Assessment Act 1979 carrying out development without consent in circumstances where development consent is required.

Date of commencement of proceedings: 7 October 2011

Address: 1360 Main Arm Road, Upper Main Arm

Status:

1. The Defendant jointly owns the premises 1356 Main Arm Road Upper Main Arm which forms part of a multiple occupancy.
2. During the course of a fire inspection on 30 October 2009 a Council officer observed some recent tree removal activity adjacent to the Defendant's dwelling. The matter was reported to Council and as a result an inspection notice was served to carry out an inspection on 4 November 2009.
3. On 4 November 2009 a Council officer and ecological consultant carried out an inspection of the tree removal. It became apparent on this day that a significant breach of Council's tree preservation order had occurred. The site is extremely steep, and in combination with hot weather and a high number of destroyed trees to be counted, a second inspection was

scheduled for 13 November 2009.

4. On 13 November 2009 the same personnel carried out a second inspection of the site.
5. On 26 November 2009 Council received an ecological assessment report. The report identified a total of 220 trees removed in breach of Council's tree preservation order. It said *"A total of 220 trees greater than 3 m in length (height) were detected, and positively identified, and tallied as felled in this assessment of the impacts. These included 11 primary browse trees species for Koala, and 2 individual stems of a ROTAP species."*
6. On 17 November 2009 Council served a notice on the Defendant requiring information to be provided and on 21 December 2009 Council received a letter from the Defendant. The defendant admitted that he carried out the tree removal over winter 2009 and continued to remove trees up until Council officers arrived on site on 30 October 2009. The Defendant only stopped clearing trees when Council officers arrived on site and raised the matter with him.
7. In his letter dated 18 December 2009 the Defendant claimed that removing the trees was for the purpose of bushfire hazard reduction.
8. The existing development consent for multiple occupancy on the premises does not permit the tree removal the Defendant carried out. Under section 100C(4) of the Rural Fires Act 1997 a hazard reduction certificate is required to carry out the tree removal. The NSW Rural Fire Service advice that a hazard reduction certificate was not in force at the time the tree removal occurred.
9. Council obtained a bushfire threat assessment report which was to the effect that the tree removal undertaken by the Defendant did not make any considerable improvement in regards to fire protection. This was confirmed during the course of Council inspections when it was observed that thick vegetation is in close proximity to the south west, west and north west sides of both dwellings. Firewood and other flammable articles were also stacked within close proximity to one of the dwellings.
10. The Defendant had not offered to provide any rehabilitation. On 7 October 2011 Council issued a Court Attendance Note for carryout out development (tree removal) without consent.
11. The Defendant pleaded guilty and on 16 February 2012 in the Mullumbimby Local Court was convicted and fined the sum of \$11,000 and ordered to pay Council's professional costs of \$2,200.

Matter: WHITTAKER

Compliance Priorities addressed: Very high 1.3 action, works or activity causing or likely to cause environmental harm or pollution.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$1650

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter: Failure to comply with LGA order x 2

Date of commencement of proceedings: 8 December 2011

Address: 2 Coachwood Court, Federal

Status:

1. The Defendant is one of the registered proprietors and occupants of 2 Coachwood Court Federal Lot 1 DP 814436 (Parcel No 150810).
2. On 24 March 2009 the Defendants has been Ordered (Order 15) under the provisions of the Local Government Act, to:
 - a. Cease use of the failing onsite sewage management system (OSMS) disposal trench immediately.
 - b. Immediately isolate the 'sewage contaminated area' around the septic tank and disposal

- trench to prevent human or animal contact with untreated sewage.
- c. Maintain the septic tank on 'pump-out' until a new onsite sewage management system has been installed.
 - d. Provide written evidence to Council (eg receipt) that pump-outs are occurring in a timely manner ie prior to the septic tank filling to capacity.
3. The Order was issued to ensure compliance with standards for the protection of public health and the environment in accordance with the Local Government Act 1993 and Regulations 2005 and on the basis that;
- a. Council had not received any representations in regard to a Notice of Proposed Order dated 2 October 2008.
 - b. An inspection, 29 September 2008, found that the disposal trench was failing and likely to be a risk to public health and environmental health.
 - c. There has been no response to a previous Order issued 24 October 2007 in which the owners were required to repair the failing onsite sewage management system.
 - d. There was no approval to operate the OSMS.
4. On 24 March 2009 the Defendants were further Ordered (Order 22) under the provisions of the Local Government Act, to:
- (a) Within thirty days (30) days from the date of this Order, submit plans to Council for the upgrade of the existing on-site sewage management system (OSMS) at the dwelling. As a minimum standard the design must comply with:
 - a) The hydraulic standard required for land application areas in Byron Shire Council's "*Design Guidelines for On-Site Sewage Management for Single Households (2004)*". The design must treat all wastewater generated by the occupants of the dwelling.
 - b) On confirmation of Council approval for the above plans, to install the Council approved OSMS within thirty (30) days of the Approval being issued by Council.
 - c) Prior to installation of the OSMS, apply to Council for a plumbing permit for the work to be carried out.
 - d) Prior to installation of the OSMS, provide Council with scale plan drawings showing the location of all system components in relation to the dwelling. Where an irrigation system is proposed the plans should include design calculations used to size the pump (and associated infrastructure), the plans should also show the location of all irrigation infrastructure, in sufficient detail that all components can be identified during subsequent inspections.
 - e) All components of the OSMS are to be installed by a licensed plumber in accordance with AS/NZS 3500:2003 (and any amendments), and must be inspected by Council plumbing inspectors during installation.
 - f) The OSMS is not to be used until it is completed, inspected, a final plumbing certificate issued, and an approval to operate issued.
 - g) The existing septic tank and trench is to be decommissioned on completion of the upgrade to the OSMS.
 - h) The OSMS, and associated infrastructure, is to be maintained as per the manufacturer's maintenance manual. Aerated Wastewater Treatment Devices, or similar, must be serviced on a quarterly basis with copies of service reports submitted to Council.
5. On 13 September 2011 Council again inspected the Defendants' property.
6. Council found that the OSMS was in such a poor condition that it was considered to be a potential public and environmental health risk. The onsite sewage management system is located close to property boundaries, public stormwater drainage system and a rural residential built up area. Such was the potential public and environmental health risk that an Emergency

- Order (Number 15) was issued.
7. Neither Orders of 24 March 2009 had been complied with.
 8. There have been no representations made in respect of the Order 15 issued 04 October 2011.
 9. Council issued a Court Attendance Notice for failure to comply with 2 Local Government Act Orders.
 10. The matter came before the Byron Local Court on a number of occasions to allow the court to monitor and assess progress toward compliance. On 16 February 2012 the Court required undertakings from the defendant relating to compliance – refer to Confidential Annexure 14(a).
 11. On 19 April 2012 the Defendant was convicted and fined \$500 plus Council’s professional costs of \$1,650. By that time, the Court was satisfied that the Orders had been complied with.

Matter: TINLEY
Compliance Priorities addressed: High 2.4 Traffic and Parking enforcement.
Solicitor: Ralph James Manager Governance
Legal Costs YTD: \$550 **Expert Witness Costs YTD:** Nil
Date Last Reported: N/A
Type of Matter: Wilful obstruction of an employee of a council. LOCAL GOVERNMENT ACT 1993 - SECT 660 **Date of commencement of proceedings:** 5 April 2012
Address: 33 Blackbean Road, Wilsons Creek

- Status:**
1. On Sunday 8 January 2012 a Council Ranger was conducting parking duties in uniform in Main Beach Car Park. He was on the path on the northern side of the car park opposite the pool when he was approached by a male person whom he had spoken to earlier about a parking offence. The Ranger did not know his identity.
 2. The male approached the Ranger in an extremely agitated manner. He had his arms out from his sides, shoulders raised and the veins in his neck were standing out. He stood toe to toe with the Ranger, his face about 100mm from the Ranger’s and yelled abuse.
 3. The Ranger managed to calm the situation to the point where the incident had come to a conclusion.
 4. At this point the Defendant, a female, approached from the Ranger’s left side and stood about a 500mm from him and the male. She started abusing the Ranger in a loud voice.
 5. At this point the male’s behaviour started to escalate significantly. He poked and then pushed the Ranger who said to him “Don’t push me again or you may face an assault charge.”
 6. The Ranger then attempted to walk away but they both followed at a close distance behind him. The Ranger felt that he was in danger of being assaulted by the male and believed that the Defendant’s behaviour, reignited and inflamed a very volatile situation.
 7. The Ranger walked to near Fish Heads restaurant where he was approached one of the owners who said, “Are you Ok. I have called the Police.”
 8. At this point both the Defendant and the male person left the area.
 9. The only reason why this situation with the Male person had escalated to the point it did was due to the Defendant’s intervention.

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10. Council issued a Court Attendance Notice to the Defendant for wilful obstruction of a Council employee.
11. On 20 April the Defendant was convicted and fined \$400 and ordered to pay Court Costs of \$81 and Council's professional cost of \$550.

Matter: Rising Damp Corporation Pty Ltd

Solicitor: Nil. Council lodged a submitting appearance in accordance with Res 11-765.

Legal Costs YTD: \$1363

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter: Application for a declaration that DA 90/31 issued on 31 July 1990 had been commenced in accordance with the requirements of the Environmental Planning and Assessment Act

Date of commencement of proceedings: 16 September 2011

Address: 95 Newes Road, Coorabell

Status:

On 21 September 2011 Council received a Class 4 Summons from the landowner corporation seeking declarations concerning a DA granted for multiple occupancy on the land. Staff had previously advised the landowner that this was the only course of action which would finally determine the issue once and for all.

On 7 October 2011 in the Land and Environment Court the Applicant's representative Anderson indicated that:

1. the Applicant intended to amend the Class 4 Summons to seek further relief in relation to Development Consent DA90/31, and
2. after the Class 4 Summons was amended the applicant would file and serve Points of Claim and affidavits/evidence in support of the Class 4 Application.

The Court made the following directions in the proceedings:

1. The Applicant is to file and serve any amended Class 4 Summons by Monday 10 October 2011.
2. The Applicant is to file and serve its Points of Claim and Affidavits in Chief by 4 November 2011.
3. The proceedings are listed for a second directions hearing on 11 November 2011.

The matter was reported to Council on the 13 October 2011 (the first available meeting date after service of the application) with a recommendation that Council not defend the proceedings and, subject to legal advice confirming it was appropriate for Council to do so, to file a submitting appearing and Council resolved that way **Res 11-765**.

On 7 November 2011 Rising Damp served its Points of Claim and Affidavit. On 14 November 2011 Rising Damp served its Amended Summons.

On 25 November 2011 after considering legal advice, a submitting appearance was filed in accordance with Council's resolution. The matter was reported to Council on 15 December 2011 as part of the last Compliance Services Status Report.

Judgement in the Class 4 proceedings was delivered on 1 February 2012 and a copy is attached at Annexure 14(b). The Court accepted the Affidavit evidence lead on behalf of the Applicant and declared that Consent 90/31 has not lapsed. The Court also declared that the consent was for 6

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dwelling on Lot 9 which rectified typographical errors contained in the 1990 Notice of Determination.

Matter: MAJOR

Compliance Priorities addressed: Very High 1.1 development that places peoples lives at risk.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$4,500(E)

Expert Witness Costs YTD: Nil

Date Last Reported: 15 December 2011

Type of Matter: Development without consent

Date of commencement of proceedings: 2 December 2011

Address: 139 Jonson Street, Byron Bay

AND

Matter: FLETCHER JONSON PTY LTD

Compliance Priorities addressed: Very High 1.1 development that places peoples lives at risk including places of shared commercial accommodation.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$Nil

Expert Witness Costs YTD: Nil

Date Last Reported: N/A

Type of Matter: Development without consent.

Date of commencement of

Section 76A Environmental Planning and Assessment Act 1979

proceedings: 2 December 2011

Address: 139 Jonson St Byron Bay

Status:

1. As at 2 December 2011 the first named Defendant used the premises at 139 Jonson Street Byron Bay as a **hostel**. The Byron Local Environmental Plan 1988 defines hostel as:

hostel means a building or buildings incorporating bedrooms or dormitory accommodation containing beds available for separate rental and where cooking, dining, laundry, cleaning, toilet, bathrooms and other facilities are all provided on a shared basis, and primarily used or intended for use for the overnight accommodation of travellers and their vehicles.
2. Use of this dwelling house as a hostel requires development consent.
3. Use of the property as a hostel without development consent constitutes an immediate and serious threat to the health and safety of the occupants and patrons at the property.
4. On 25 January 2011 Major entered into a lease of the property at 139 Jonson Street Byron Bay for the period 25 January 2011 to 24 January 2012.
5. The lease permitted occupation of the premises by a maximum of 8 people.
6. Since March 2011 Council had been receiving complaints and information about the premises.
7. As a result of the complaints and advertisements on the internet for schoolies accommodation Council had reason to believe that residential premises at 139 Jonson Street were being used for backpacker's style accommodation.
8. On 18 November 2011 Council became aware of a particular internet site advertising accommodation for schoolies (the accommodation organiser). The website advertisement identified premises at 139 Jonson Street as "The Gecko". The website indicated the following accommodation was available for schoolies:
 - a) One dormitory containing 4 beds and

- b) One dormitory containing 8 beds and
 - c) One double bedroom containing a single queen bed.
9. On Friday 2 December 2011 Council's health and compliance team, with the assistance of police, executed a search warrant on a residential dwelling at 139 Jonson Street Byron Bay.
 10. The dwelling included four bedrooms.
 11. Between the dwelling and the front timber paling fence was a single car garage connected to the dwelling by an open structure.
 12. Attached to the open timber structure was a white 'shade-type' temporary shelter covered by a large grey tarpaulin.
 13. The external yard was scattered with rubbish (some contained within plastic garbage bags on the ground), clothing, bicycles and miscellaneous items.
 14. A red single-axle caravan (VIC plate L88-883) was parked between the timber paling fence at the front of the property, and Jonson Street. This caravan was allegedly occupied by a male person at the time of the inspection.
 15. During the course of inspecting the premises Council made the following observations.
 16. Nineteen people were occupying the premises and eight of those nineteen people were schoolies. The schoolie occupants were staying for a period of one week and had made payments via an internet site of \$588 per person for a 4 share room and \$878 per person for a 2 share room.
 17. Occupancy of the premises was as follows:
 - i. One person was occupying a red caravan
 - ii. The Defendant Major was occupying bedroom 2
 - iii. Two backpackers were occupying bedroom 1
 - iv. Six schoolies were occupying bedroom 3
 - v. Two schoolies were occupying bedroom 4
 - vi. Four Backpackers were occupying the garage
 - vii. Three backpackers were occupying the patio and a tarpaulin between the garage and dwelling house.
 18. All persons occupying the premises were interviewed by Council staff. Sixteen occupants had resided at the premises for a period of less than 3 months.
 19. Council officers observed that the garage was being used for dormitory style accommodation comprising of mattresses on the floor, which lacked adequate ventilation or damp proofing to maintain healthy conditions.
 20. The premises lacked basic fire safety measures. Both smoke alarms and a single fire extinguisher in the dwelling were not operational, and the buildings did not comply with relevant fire safety standards. The premises posed a significant fire safety risk to the occupants.
 21. During the course of its investigation Council also obtained the following additional evidence:
 - i. evidence relating to persons entering and leaving the premises (including the depositing of luggage) that is consistent with the use of the premises for a backpackers' hostel,
 - ii. evidence of the premises being advertised expressly or implicitly for the purposes of a backpackers' hostel (including advertisements on or in the premises, newspapers, directories or the Internet)
 - iii. evidence relating to internal and external signs and notices at the premises (including price lists, notices to occupants and offers of services) that is consistent with the use of the premises for a backpackers' hostel,
 22. Evidence of the layout of rooms, and the number and arrangement of beds, at the premises that is consistent with the use of the premises for a backpackers' hostel.

23. The monies paid by the schoolies to the accommodation organiser constituted a deposit of \$110 per person at the time of booking and full and final payment 60 days prior to check in.
24. Accommodation providers are paid by the accommodation organiser to their nominated bank account for the rooms booked. Payment is made on the day prior to check in.
25. Monies paid by the schoolies totalled \$8,216. The first named Defendant was paid at the rates as per an agreement he had reached with the accommodation organiser. The amount paid was not less than 50% and not more than 90% of the sums paid by each of the schoolies to the accommodation organiser. The first named Defendant was due to be paid a sum between \$4,108 and \$7,394.
26. As accommodation bookings made by the schoolies were not honoured the accommodation organiser made full refunds of all monies paid.
27. The first named Defendant did not refund any amount paid it to him for the schoolies accommodation.
28. Council's case against the second named Defendant (the company) was not that it was aware of the circumstances of the property as they existed on 2 December 2011 but that it was aware that it was alleged that the property was being used as an illegal backpackers and, notwithstanding knowledge of the allegation, tolerated the circumstances and specifically instructed the property managers to do nothing about it.
29. Council obtained copies of correspondence held by the property managers. That correspondence discloses that on 21 January 2011 concerns were raised that "maybe put a limit on the numbers-how many do you think", that on 19 February 2011, that Company was made aware that a complainant was "going to be making an appointment with Council and have them look into the premises being used as "illegal" backpackers", and on 21 February 2011 an officer of the Company said "Sorry that the tenant has been a problem-hopefully he will settle down after you reading the riot act (and Council comes to get on his case). Please don't terminate his tendency before speaking to me.....".
30. Council was requested to withdraw the proceedings against the company. The basis of the request is set out in the company's solicitor's letter of 17 January 2012 as reinforced in their letter dated 17 February 2012.
31. Following discussions and the offering of an irrevocable undertaking Council withdrew the proceedings against the Defendant's company on 24 February 2012. A relevant document is contained at Confidential Annexure 14(c).
32. The proceedings against the first named Defendant were fixed for hearing in the Byron Bay Local Court on 20 April 2012. Council had provided the first named Defendant with a copy of the full Brief of Evidence. On 20 April 2012 the first named Defendant conceded the accuracy of the Brief and it was tendered by consent. No witnesses were called. The matter has been adjourned to 20 July 2012 for argument as to the categorising of the use of the premises.

The following matters are current in the Local Court.

Matter: ANDERSON	
Compliance Priorities addressed: Very High 1.1 action that places peoples lives at risk.	
Solicitor: Ralph James Manager Governance	
Legal Costs YTD: \$550	Expert Witness Costs YTD: Nil
Date Last Reported: N/A	
Type of Matter: Owner of moveable dwelling not ensure smoke alarm repaired/replaced as required. Environmental Planning and Assessment Regulation 186AA(2)(b)	Date of commencement of proceedings: penalty Notice Issued. Defendant Court election

Address: 95 Newes Road, Coorabell

Status:

1. The property at 95 Newes Road, Coorabell ('the property') is owned the Rising Damp Corporation Pty Limited. The principal place of business of the company is listed as the property. The sole Director and Secretary of the Company is the Defendant.
2. On 15 September 2011 Council officers, land surveyors, building surveyors and bushfire consultants engaged by Council attended 95 Newes Road, Coorabell under the authority of a search warrant.
3. Following the inspection on 15 September 2011 the land surveyors and building surveyors engaged by Council produced statements.
4. The land surveyors plotted the location of 3 structures which they identified as Structures 1, 13 and 14.
5. On the day of the inspection, Structures 1 and 14 were occupied by tenants. Personal effects were present at Structure 13 and it appeared to be occupied.
6. On 15 September 2011 the 3 structures identified in the report as Structure No. 14, Structure No. 1 and Structure No. 13 were assessed and 'had not been provided with smoke detectors in accordance with clause 3.7.2.3 Building Code of Australia (BCA) 2011 so that occupants would be warned of a fire in the building so that that they may safely evacuate'.
7. NSW Fire and Rescue has expressed its concerns about the lack of smoke alarms installed in structures at 95 Newes Road, Coorabell.
8. The structure identified as structures 1, 13 and 14 in Annexure 14(d) are cabins purchased from the Clarkes Beach Caravan Park in Byron Bay in 2007 by the Defendant.
9. On 15 December 2011 at a public access session before Council's Ordinary Meeting the Defendant said "*I'll just conclude about talking about smoke alarms. I concede that I didn't have smoke alarms at my place so I got some installed only to find that in the three cabins of mine which came from Clarkes Beach previously had alarms wired in like the good ones. In each case the wires had been disconnected and stuck back into the wall. Not since I've had them. Because they annoy people. In small cabins it's impractical to have smoke alarms because they go off when you put your toaster on, right? So they don't work and in every case where I've put them, they just simply pull the battery out and I'd say that in the Clarkes Beach cabins, in that case, they were disconnected by the staff because they were sick of the guests complaining about them so you know, I don't know what can be done about fire safety but I don't think smoke alarms is the answer.*"
10. On 19 December 2011 Council issued the Defendant, with three penalty notices for offences on 15 September 2011 under s186AA(2)(b) of the Environmental Planning and Assessment Regulations in relation to failure to repair/replace smoke alarms in Structure 1, Structure 13 and Structure 14. Each Penalty Notice was in the sum of \$200.
11. The Defendant elected to have the matters dealt with by the Local Court.
12. The matter is fixed for hearing in the Byron Bay Local Court on 4 June 2012.
13. Although not required by law to do so Council has provided the Defendant with a full copy of the Brief of Evidence. A copy of the brief (without annexures) is Confidential Annexure 14(e).

Matter: **DWC** (Defendant not named for legal reasons)

Compliance Priorities addressed: **Very High 1.1 development that places peoples lives at risk.**

Solicitor: Ralph James Manager Governance

Legal Costs YTD: NIL

Expert Witness Costs YTD: Nil

Date Last Reported: N/A

Type of Matter: Development without consent

Date of commencement of proceedings: 27 April 2012

Address: Byron Arts and Industry Estate.

Status:

1. On 22 February 2012 Council received a complaint that premises in the Arts and Industrial Estate were being used for the purposes of a nightclub with loud music and people staying overnight.
2. The premises are industrial units and do not have consent for habitation or places of public entertainment.
3. On the 24th February a second complaint was received by Council alleging loud music and the fact that "patrons" were picked up in a mini bus and dropped at the premises.
4. On the 1st March Council inspected the premises after the issue of an inspection notice. The Defendant is a person who Council has had previous dealings with over different issue – an unapproved backpacker establishment. The Defendant advised he was setting up an English Language School and the noise was from a party held by students. He advised some persons had stayed overnight and that he sometimes stayed overnight. He was advised that the units were not approved for habitation and that if anyone stayed smoke detectors were required.
5. Two further complaints were received by Council on the 14 March 2012. One alleging loud music and the other alleging backpackers were being picked up in a mini bus and taken to the industrial estate where they were charged \$150.00 per night for a bed.
6. A check of Council's records show excessive water usage for the period from the 16 August 2011.
7. Council staff conducted surveillance on the property and gained evidence and photographs to support that the property was being used for backpacker type accommodation.
8. As a result of the previous inspection and evidence gathered Council had a reasonable suspicion that the premises were being used for accommodation without necessary safety precautions in place and without consent.
9. On 16 April 2012 Council executed a search warrant for both units with the assistance of the police.
10. Council officers found 15 backpackers residing in the premises and unapproved building works which had been undertaken but were unfinished with bare electrical wires hanging from walls and the ceiling.
11. Fire safety equipment was substandard with only two fire extinguishers one of which had been partially discharged. There were no smoke detectors or fire blankets. Upstairs windows were barred and doors shown as exits were locked and could not be used in case of fire.
12. Food and hygiene standards were unsatisfactory and posed a risk to the health of the occupants. There was minimal access to toilet, bath and laundry facilities compared to the number of persons occupying the premises.
13. There appeared to be domestic rubbish and other waste left abandoned on the premises, which are likely to attract vermin and spread disease and pose a risk to the health and safety of

the occupants.

14. Based on the above evidence Council considered the premises were being used as a hostel or, alternatively, a boarding house.
15. No development consent or any approval had been granted to use the subject premises as a hostel or for any other type of short term accommodation including, any of a boarding house, tourist facility or tourist and visitor accommodation.
16. Council issued a Court Attendance Notice for carryout out development without consent.
17. The matter is first listed in the Byron Bay Local Court on 24 May 2012.

Matter: ML and PL (Defendants not identified at this time for legal reasons)

Compliance Priorities addressed: Medium 3.1 development without consent posing no immediate risk to life, property or the environment.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: NIL

Expert Witness Costs YTD: Nil

Date Last Reported: N/A

Type of Matter: Carrying out development without consent comprising building works, alterations and additions to a swimming pool deck.

Date of commencement of proceedings: 23 April 2012

Address: Koonyum Range Road, Mullumbimby Creek

Status:

The Defendants are the owners of of Lot 3 DP740203, Koonyum Range Road, Mullumbimby Creek.

On 26 July 2011 Council received a complaint in relation to alleged unauthorised building works occurring at the subject premises.

At about 11:45am on Tuesday 9 August 2011 Council compliance officers carried out an inspection of building works in progress located within the premises. Council officers observed building works comprising an extension to the pool deck.

On 27 May 2009 Council had approved a final occupation certificate for the pool deck (as approved ie not including the unauthorised extension). The occupation certificate was issued under complying development certificate 16.2007.100.1.

A search of Council records indicates that no other approvals had been given to extend the pool deck to the extent observed during Council's inspection on Tuesday 9 August 2011. Council made a comparison between the plans and the works in progress. Council alleges that significant additions have been made to the pool deck without development consent, in circumstances where development consent is required.

Council alleges that the building works outside those depicted on the plans, constitute unauthorised development.

The unauthorised building works do not comply with *Subdivision 6 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008; Balconies, decks, patios, pergolas, terraces and verandahs*. The works are not exempt development.

The unauthorised building works do not comply with *Chapter 16 of the Byron Development Control Plan 2010 Exempt and Complying Development; Decks (unroofed and attached, or ancillary, to single dwelling houses)*. The works are not exempt development.

Council alleges that the unauthorised building works were commenced without development consent and a valid construction certificate.

On 23 April 2012 Council issued Court Attendance Notices to each of the property owners in respect of the alleged offence of carrying out development without obtaining development consent.

The Court Attendance Notices are listed for mention in the Byron Bay Local Court on 24 May 2012.

Matter: La La Land

Compliance Priorities addressed: Very High 1.1 development that places peoples lives at risk.

Solicitor: Ralph James Manager Governance

Legal Costs YTD: \$550

Expert Witness Costs YTD: Nil

Date Last Reported: N/A

Type of Matter: Development not in accordance with development – unauthorised use of a deck.

Date of commencement of proceedings: 23 April 2012

Address: 6 Lawson Street, Byron Bay

Status:

1. On 16 June 2005 a Section 96 application was approved to amend development consent 10.2004.225.3. An amended plan was approved, which included additional glazing to fully enclose the balcony due to noise attenuation issues.
2. On 3 November 2010 Council had reason to carry out an inspection at La La Land due to a report of alleged unauthorised building and plumbing works. During the course of that inspection it was observed that:
 - a. Alterations and additions had been undertaken to change the floor plan of the building. New walls had been erected to reduce the floor area of the balcony.
 - b. Glazing approved under development consent 10.2004.225.3 had been removed and replaced with a slat timber screen to a height of about 1.8 metres.
3. Council wrote to the person believed to be responsible for the building works on 5 November 2010 requesting the works cease until such time as Council approval is obtained for the works.
4. The building works did not cease and on 18 November 2010 Council wrote to the land owner and issued a penalty infringement notice for development without consent.
5. A development application was lodged and Development consent 10.2010.607.1 was granted for the fit-out of existing nightclub toilets. The approved plans for this development consent state “*no access to deck or airlock by patrons subject to future DA*”.
6. At 11:16pm on Friday 18 November 2011 in conjunction with the Police and the NSW Fire Brigade Council carried out a routine fire safety inspection of the premises.
7. During the course of the inspection it was observed that the northern deck was being used as a smoking area in connection with the operation of the nightclub.
8. Use of the deck in association with the nightclub had the potential to constitute a serious risk to public health and safety. As at the date of the offence Council could not be satisfied that the deck was in compliance with the Building Code of Australia.
9. On 20 December 2011 a penalty infringement notice for development without consent was issued to the owner of the business. The defendant elected to have the matter dealt with by the Local Court.

10. A fresh court attendance notice for development not in accordance with consent was served upon the defendant by post on 16 March 2012.
11. The matter is listed in the Byron Bay Local Court on 10 May 2012 for a plea to be entered.

Matter: HUNTER**Compliance Priorities addressed: Very High 1.3 works likely to cause pollution****Solicitor:** Ralph James Manager Governance**Legal Costs YTD: \$2200****Expert Witness Costs YTD: Nil****Date Last Reported:** 15 December 2011

Type of Matter: Development not in accordance with development consent. Earthworks beyond the terms of development consent.

Date of commencement of proceedings:**Address:** 31 Pinegroves Road, Myocum**Status:**

1. Development Application No. 10.2009.427.1 proposed development at Lot 15 DP 1030574, 31 Pinegroves Road, Myocum, consisting of 2 farm storage sheds, earthworks and retaining walls
2. Relevant parts of the proposed development comprised the following elements:
 - a. Excavation to create level building, access road and vehicle manoeuvring areas – forming a level area of approx 19m width (north-south) and approx 120m length (east-west).
 - b. Rock retaining wall of between 0.8m and 2m for a 115m east-west distance to rear (north) of excavated area and a batter along the southern/downslope edge of the levelled area.
 - c. A gravel driveway from Pinegroves Road.
3. Development consent was issued under delegated authority dated 11 December 2009 but for only 1 not 2 sheds and with a specified reduced limit to the area for excavation and associated retaining wall in accordance with the site plan (P2).
4. Council received complaints about noise and alleged unauthorised activity on the property.
5. On 15 November 2011 Council observed that earthworks had been undertaken beyond the scope of development consent 10.2009.427.1 and had been undertaken in the area specifically excluded in the development consent.
6. On 16 November 2011 Council carried out an inspection of the premises under the terms of an EP&A Act inspection notice. The Defendant was present at the time.
7. The approved area of earthworks was approximately 20 metres wide and 80 metres long. The actual earthworks undertaken were about 22 metres wide and 132 metres long, representing an increased length of approximately 60%.
8. The works are partly located on flood liable land, which constitutes a flood control lot under the SEPP. The works were also within 50 metres of a natural water body.
9. Council issued a Court Attendance Notice for carrying out development without consent.
10. The landowner has subsequently caused to be lodged a s96 application to modify the development consent, by amongst other things, changing the design and location of the proposed sheds and to regularise the unauthorised earthworks and retaining wall works. That application was refused under delegated authority for reasons, including that it was not a valid s96 modification application and that Council had no power to approve it. The applicant has appealed Council's refusal – refer to separate report (the Land and Environment Court appeal

does not impact the Local Court prosecution for the carrying of development without consent).

11. In the Local Court, the Defendant has entered a plea of guilty and the matter is listed in the Byron Bay Local Court on 1 June 2012 for sentence.

Financial Implications

5 The financial implications of the legal costs incurred are as detailed in the report for each matter, with any other costs being incurred within adopted budget allocations.

10 The amount of legal costs identified in all completed Local Court matters is equivalent to the amount of costs ordered by the Court to be paid by the Defendant. Those matters have been completed, other than for staff time, on a costs neutral basis. Applications for costs will be made in all present, incomplete matters, if the prosecution is successful.

Statutory and Policy Compliance Implications

The statutory and policy compliance implications are as detailed in the report for each matter.

Report No. 13.9. Lease - Road Reserve - 29 Marine Parade Wategos Beach

Executive Manager: Corporate Management

File No: BEN400000 x 117860 #1227218

Principal Activity: Property and Contracts

Summary: Council resolved via Resolution **05-699** to enter into a lease with a portion of road reserve adjoining 29 Marine Parade Wategos Beach. Council at its Ordinary Meeting held on 28 April 2011 resolved via Resolution **11-322** to enter into a further lease over the same portion of road reserve for a period of 5 years.

Council has now received a request to assign the lease to the purchaser of 29 Marine Parade, Wategos Beach, Byron Bay.

This report seeks Council's authorisation, subject to any statutory obligations, to assign the 5 year lease with Bandora Holdings Pty Limited to Fibora Pty Limited.

5

RECOMMENDATION:

- 10 1. That Council grant the Deed of Assignment (Annexure 15(b) #1228584) of the Lease over a portion of road reserve adjoining 29 Marine Parade, Wategos Beach, Byron Bay from the Lessee, Bandora Holdings Pty Limited to the purchaser of the property at 29 Marine Parade, Fibora Pty Limited.
- 15 2. That Council authorise the General Manager to affix the Council Seal to the Deed of Assignment (Annexure 15(b) #1228584) (lease documentation) in accordance with Regulation 400 of the *Local Government (General) Regulations 2005*.

20

Attachments:

- Correspondence dated 19 April 2012 Somerville Laundry Lomax #1225526 [11 pages] **Annexure 15(a)**
- Deed of Assignment #1228584 [19 pages] **Annexure 15(b)**
- Current Lease #1116449 [11 pages]..... **Annexure 15(c)**

ReportLand Information

Council Road Reserve

5 Adjacent to Lot 3 DP 739200

Property: Watermark Beachfront Apartments

Owner: Bandora Holdings Pty Limited

Address: 29 Marine Parade, Wategos Beach, Byron Bay

10 Purchaser: Fibora Pty Limited

History

15 In 1998 the owner of 29 Marine Parade applied to Council to modify a boarding house and these modifications were approved under a S.96 application being DA 10.1998.629.3, reviewed by the Planning Review Committee on 23 February 2005, and approved under delegation.

20 During the S.96 assessment procedure it was noted by the assessment officer that the proposed modifications to the application involved modification to the landscaping on the Road Reserve Land and that even the existing building overhung by 300mm onto the Road Reserve. In accordance with then current planning procedure the application was referred to Council's Property Manager for review and recommended approval/conditions in respect to the road reserve encroachment.

25 Council's Property Manager and Development Engineer recommended that Council insert two new conditions in respect to the road reserve encroachment:

Insert new Condition C4

30 *In relation to the s 96 (10.1998.629.3) application proposed works, the property owner must apply to Council for a lease over the road reserve in accordance with the Roads Act. This lease will be allowed only for landscaping and no hard structures of any type will be allowed. The lease would be for a maximum term of five years. Further renewals of this lease would be subject to another application and Council approval. An application to lease a portion of the road reserve from Council is subject to community consultation and subsequently may take up to four months to process. All costs for establishing this lease, including an application fee, must be borne by the applicant.*

35

Insert new Condition C5**Consent required for works within the road reserve**

40 *In relation to the s 96 (10.1998.629.3) application proposed works, consent from Council must be obtained for works within the road reserve pursuant to Section 138 of the Roads Act 1993. Three (3) copies of engineering construction plans must accompany the application for consent for works within the road reserve. Such plans are to be in accordance with Council's Specification for Engineering Works and are to provide for the following works:*

45 **a) Kerb & gutter, and road pavement**

Kerb and gutter, road pavement (to edge of existing road pavement) and associated drainage construction, footpath formation including any necessary relocation of services as follows:

- i) *across the full frontage of the site;*
 - ii) *the kerb and gutter and driveway layback is to be in alignment with the existing stone retaining wall;*
- 50

b) 1.0 m wide footpath

1.0m wide footpaving for the full frontage of the site at a crossfall of 1 % or 1:100 (maximum 2.5% or 1 in 40).

55

c) Landscaping

The retaining wall closest to the road reserve is to be relocated a minimum of 1 metre to the south east of the existing retaining wall in order to accommodate the 1.0m wide footpath required in Condition C5(b) and kerb and gutter required in Condition C5(a). Landscaping is to be in accordance with New Condition C6 Landscaping plan required that is to be submitted prior to the issue of an amended Construction Certificate.

At its Ordinary Meeting of 27 September 2005 Council considered a report in relation to a condition of development consent 10.1998.629.3 requiring the applicant (Bandora Holdings Pty Ltd) apply to Council for a lease over portion of road reserve that they wish to landscape and install improved drainage on. At that meeting Council resolved:

05-699

1. *"That Council's intention to lease a portion of road reserve adjoining 29 Marine Parade be advertised for a period of 28 days in accordance with the Roads Act.*
2. *That if no objections are received during the public advertising period, Council authorise the General Manager to enter into a lease under Council Seal with Bandora Holdings Pty Ltd for a portion of the road reserve known as Marine Parade with the following minimum conditions:*
 - a) *Maximum term of 5 years*
 - b) *Lease fee based on market rent, to be established by independent valuation*
 - c) *Annual rent reviews in accordance with CPI, Sydney all groups for the June quarter*
 - d) *Use of leased area to be for landscaping and drainage improvements only*
 - e) *All costs of lease preparation including valuation to establish market rent to be paid by tenant."*

The lease was advertised, no objections received and subsequently entered into for a period of 5 years commencing 16 January 2006 and terminating 15 January, 2011.

Bandora Holdings Pty Limited at the expiry of the initial 5 year lease wrote to Council requesting a new lease. No problems were identified with the tenancy during the term of that lease.

Council's Community Infrastructure Division at that time reviewed the request for a new lease and had no objection to the continued proposed use of the road reserve for this purpose.

Council at its Ordinary Meeting held on 28 April 2011 resolved via Resolution **11-322** to grant a further lease over the same portion of road reserve for a period of 5 years to Bandora Holdings Pty Limited.

11-322 Resolved:

1. *"That notice of Council's intention to grant a lease over a portion of road reserve adjoining 29 Marine Parade be served on the adjoining landowners and advertised for a period of 28 days in accordance with the Roads Act 1993.*
2. *That if no objections are received during the public consultation and advertising period, Council authorise the General Manager to enter into a lease with Bandora Holdings Pty Ltd, in the form contained at Annexure 25(a) (#1072755), for a portion of the road reserve known as Marine Parade with the following minimum conditions:*
 - a) *Maximum term of 5 years*
 - b) *Lease fee based on market rent be established for the initial year at \$5,300*
 - c) *Annual rent reviews in accordance with CPI, Sydney all groups*

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- d) *Use of leased area to be for landscaping and drainage improvements only*
- e) *All costs of lease preparation including valuation to establish market rent to be paid by tenant*

- 5 3. *That if no objections are received during the public consultation and advertising period Council authorise the General Manager to affix the Council Seal to lease documentation for Lot 1 DP 129374 in accordance with Regulation 400 of the Local Government (General) Regulations 2005.”*

10 The lessee under the provisions of the initial lease “held over” the lease between the expiry of the initial lease and the commencement of the subsequent new Lease and occupied the site as a monthly tenant at a monthly rental equivalent to one-twelfth of the annual rent payable.

The new Lease was advertised, no objections received and subsequently entered into for a period of 5 years commencing 1 July 2011 and terminating 30 June 2016.

15 Current

20 Council on 1 May 2012 received correspondence from Somerville Laundry Lomax Solicitors dated 19 April 2012. Council in this correspondence was advised that Somerville Laundry Lomax acted for Bandora Holdings Pty Limited as the vendor of the property at 29 Marine Parade, Wategos Beach and that the property was contracted to be sold to Fibora Pty Limited with settlement scheduled on 8 May 2012. A copy of this correspondence has been included at Annexure 15(a) to this report.

25 Somerville Laundry Lomax in their correspondence made reference to the Lease over the Road Reserve adjoining this property, and sought the consent of Council for the assignment of the Lease to the purchaser of the property.

30 Somerville Laundry Lomax have been advised that the General Manager does not have the delegated authority to grant the request for the Assignment of the Lease, and that this request would be reported to this Ordinary Meeting of Council for the determination of the request.

Clause 9 - Subletting, Assignment and Parting with Possession of the Lease reads as follows:

35 *“9.1 The Lessees may not sublet, transfer or assign the Lease or part possession of the Leased premises or any part of them without the prior written consent of the Lessor which the Lessor shall be entitled to withhold absolutely in its discretion.”*

Clause 5 – Lease Binds Successor reads as follows:

40 *“5.1 The Lease will apply to the Lessee’s executors, administrators and permitted assigns or, in the case of a corporation, to its successors and permitted assigns as if they were parties to it.”*

A copy of the current Lease is also included at Annexure 15(c) to this report.

45 The term of the current Lease is for a period of 5 years, commencing on 1 July 2011 and terminating on 30 June 2016. There are no options to renew the Lease or to purchase the area of the road reserve being the subject of the Lease. The Lessee will be required, prior to the expiry of the current Lease, to make application to Council for a new Lease.

50 **Financial Implications**

The base rent per annum for the current Lease was determined on the basis of an independent Market Rental Assessment commissioned by Council and paid for by the Lessee. This valuation

assessed the market rent for the subject premises at \$5,300.00 per annum plus GST. This was the amount of the base rent per annum determined by Council.

5 The amount of the base rent and the rent payable in future years under the Lease, will be subject to annual rent reviews, and increased in accordance with CPI compounding annually.

All costs incurred for the assignment and stamping will be covered by the vendor, Bandora Holdings Pty Ltd, as set out in the Deed of Assignment at Annexure 15(b).

10 **Statutory and Policy Compliance Implications**

Clause 5 of the current lease states:

15 5. Lease Binds Successor

5.1 The Lease will apply to the Lessee's executors, administrators and permitted assigns or, in the case of a corporation, to its successors and permitted assigns as if they were parties to it.

20 Clause 9 of the current lease states:

20 9. Subletting, Assignment and Parting with Possession

25 9.1 The Lessees may not sublet, transfer or assign the Lease or part with possession of the Leased premises or any part of them without the prior written consent of the Lessor which the Lessor shall be entitled to withhold absolutely in its discretion.

Roads Act 1993 No 33

Division 2 Short-term leases of unused public roads

30 153 Short-term leases of unused public roads

(1) A roads authority may lease land comprising a public road (other than a Crown road) to the owner or lessee of land adjoining the public road if, in its opinion, the road is not being used by the public.

35 (2) However, a lease may not be granted under this Division with respect to land that has been acquired by the RTA under Division 3 of Part 12 (being land that forms part of a classified road) except by the RTA.

40 (3) A lease granted under this Division may be terminated by the roads authority at any time and for any reason.

154 Public notice to be given of proposed lease

(1) Before granting a lease under this Division, the roads authority must cause notice of the proposed lease:

- 45 (a) to be published in a local newspaper, and
(b) to be served on the owner of each parcel of land adjoining the length of public road concerned.

(2) The notice:

- 50 (a) must identify the public road concerned, and
(b) must state that any person is entitled to make submissions to the roads authority with respect to the proposed lease, and
(c) must indicate the manner in which, and the period (being at least 28 days) within which, any such submission should be made.

155 Public submissions

Any person may make submissions to the roads authority with respect to the proposed lease.

156 Decision on proposed lease

- 5 (1) After considering any submissions that have been duly made with respect to the proposed lease, the roads authority may grant the lease, either with or without alteration, or may refuse to grant the lease.
- (2) If the roads authority grants a lease, the roads authority must cause notice of that fact to be published in a local newspaper.

157 Special provisions with respect to short-term leases

- 10 (1) The term of a lease, together with any option to renew, must not exceed:
(a) except as provided by paragraph (b), 5 years, or
(b) in the case of a lease of land that has been acquired by the roads authority under Division 3 of Part 12, 10 years.
- 15 (2) A person must not erect any structure on land the subject of a lease under this Division otherwise than in accordance with the consent of the roads authority.
- 20 (3) Such a consent may not be given unless the roads authority is satisfied that the proposed structure comprises a fence or a temporary structure of a kind that can easily be demolished or removed.

ENVIRONMENT AND PLANNING – EXECUTIVE MANAGER’S REPORT

Report No. 13.10. PLANNING – DA 10.2012.2.1 Alterations/Additions to Existing Tourist Facility “Tallow Beach Houses” at 2 Alcorn Street Suffolk Park

Executive Manager: Environment and Planning

5 **File No:** Parcel No 228110 #1187437

NOTE TO COUNCILLORS:

10 In accordance with the provisions of S375A of the Local Government Act 1993, a Division is to be called whenever a motion for a planning decision is put to the meeting, for the purpose of recording voting on planning matters. Pursuant to clause 2(a) under the heading Matters to be Included in Minutes of Council Meetings of Council's adopted Code of Meeting Practice (as amended) a Division will be deemed to have been called by the mover and seconder of all motions relating to this report.

15

RECOMMENDATION:

20 **That pursuant to Section 80 of the Environmental Planning & Assessment Act 1979, development application 10.2012.2.1, for alterations and additions to existing strata titled tourist facility “Tallow Beach Houses”, be granted consent subject to the conditions listed in Annexure 6(b) #1224944.**

Attachments:

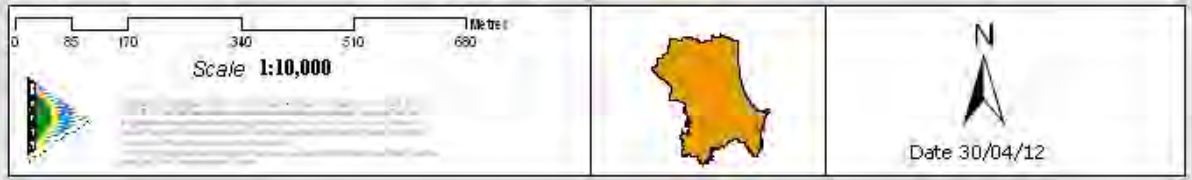
25 Locality Map

- Plans of proposed development #1226965 [10 pages].....**Annexure 6(a)**
- Consent conditions #1224944 [15 pages]..... **Annexure 6(b)**

Lot 10 DP 270196 - 2 Alcorn St Suffolk Park



Legend



BYRON SHIRE COUNCIL

ORDINARY MEETING

17 MAY 2012

(83)

DA No.	10.2012.2.1
Proposal:	Additions and alterations to existing tourist facility and 11 lot Strata Subdivision
Property description:	LOT: 10 DP: 270196 2 Alcorn Street Suffolk Park
Parcel No/s:	228110
Applicant:	Chris Lonergan - Town Planner
Owner:	Daisy Pty Ltd
Zoning:	Zone No. 7(a) - Wetlands Zone / PART 7(f1) - Coastal Lands Zone / PART 7(f2) - Urban Coastal Lands Zone
Date received:	3 January 2012
Integrated Development	Yes
Public notification or exhibition:	Level 2 advertising under DCP 2010 Chapter 17 – Public Notification and Exhibition of Development Applications Exhibition period: 26/1/12 to 8/2/12 Submissions: For = 0 Against = 1 (received late)
Other approvals (S68/138):	Not applicable
Planning Review Committee:	N/A
Delegation to determination:	Council
Issues:	<ul style="list-style-type: none"> • SEPP1 CI 11 BLEP • BPL • S88E Restriction on User buildings to remain tourist use conditioned. • S88E Restriction on User regarding coastal erosion conditioned.
Summary:	<p>The application proposes alterations and additions and strata subdivision in two stages to the existing tourist facility known as 'Tallow Beach Houses'.</p> <p>The application seeks consent to make additions and alterations to an existing strata title approved tourist facility (strata no yet registered), at the north end of Alcorn Street at Suffolk Park.</p> <p>The application proposes to change the location of two of the approved cabins, convert the existing yoga pavilion to a cabin, remove the tennis court and modify the strata lots accordingly. No additional accommodation is proposed, from what is approved (10.2010.541.1), i.e. 11 x 2 bedroom holiday cabins & 1 x 4 bedroom manager's residence.</p> <p>A SEPP1 variation to Clause 11 is sought and the Director General has granted concurrence.</p> <p>The proposed works raise no significant issues with regard to state and regional planning instruments.</p> <p>The proposal is generally similar to the current approval.</p> <p>The application raises no issues with regard to Byron Local Environment Plan 1988 and Development Control Plan 2010.</p> <p>The application is supported.</p>

1. INTRODUCTION**1.1 History/Background**

5

Development consent DA 85/457 was issued over former Lot 12 DP 625342, effective from 8/7/86 for 30 cabin type motel units, amenities block and associated facilities. Condition 4 of that consent states:

- 10 4. *The following conditions will need to be complied with at all times:*
 a) *The consent for the total development will cease in the event that any part of the coastal erosion escarpment intrudes into the subject land to a point where that part of the said escarpment comes to within 50m of any building at any time erected upon the said land.*

15

Development consent No. D96/414 was issued over former Lot 12 DP 625342 on 24 September 1997 "To subdivide land into ten (10) Community Title lots, to convert a reception building into a dwelling, reconfiguration of an existing tourist facility and for tree removal".

20 The consent was subject to various conditions, including:

- B2(j) *A provision which stipulates that any holiday cabin must be removed from the land should the erosion escarpment come within 50m of the holiday cabin.*
- 25 B4 *One of the remaining holiday cabins to be converted to a Manager's office and to include visitor ablution facilities, in accordance with a Building Application to be submitted and approved by Council*
- 30 B22 *The two unauthorised holiday cabins to be removed from the land, such that the resort comprises of only eleven (11) holiday cabins and one manager's residence.*

Section 102 variation 98/7021 amending DA 96/414 was issued on 31 August 1998, subject to the following single condition:

- 35 A. Development to be carried out generally in accordance with the Plan of Subdivision numbered Exhibit 3.1 dated October 1996 as amended by Exhibit 1A submitted on 24 June 1997, as modified by Exhibit 2 dated 5/5/98 and the draft Neighbourhood Management Statement (#1224985) including the amendments to By Law 4 submitted on 24 June 1997 and the Development Contract dated October 1996 as modified by any conditions of this consent.
- 40

45 The modification was in regard to the 10 Community Title lots however the stamped plan, Exhibit 3.1 shows, in the northern area containing the reduced tourist cabin facility, twelve units, presumably one being the manager's residence DA 96/414 Condition B22 (**eleven cabins and one manager's residence**).

S96 5.1996.414.2 to amend locations of two cabins and construct an office was refused on 14/4/2004

50 **DA 10.2002.586.1** for alterations and additions to existing tourist facility incorporating the construction of a pool, recreation building, timber fence and tree removal. was approved on 16/4/2004

55 **DA 10.2007.263.1** for Alterations and additions to a recreation building was granted Deferred Commencement, which subsequently lapsed.

DA 10.2010.541.1 for Staged development-alteration/additions to existing tourist facility and strata subdivision (12 lots) was Approved 11/08/2011 (this consent approved the manager's residence as containing 4 bedrooms).

- 5 **S96 10.2010.541.2** to modify condition 1 to include plan excluded from consent was approved on 17/10/2011

10 The current site zoning prohibits Tourist Facilities and consequently the subject land has the benefit of Existing Use Rights and associated provisions pursuant to Sections 106(b), 107 and 108 of the Environmental Planning and Assessment Act. Additions and alterations are able to be undertaken with Council's consent.

1.2 Description of the site

15 The subject land which is located at the northern end of Alcorn Street, Suffolk Park is 13.9 hectares in area. The area comprising the Tourist facility is relatively flat, with sandy soils and scattered native trees. The northern end of the site is occupied by a Tourist Facility comprising 12 holiday cabins and a 'manager's residence' with attached office, each with one or two timber verandahs, some covered by galvanised iron roof, and some uncovered. The Tourist Facility also
 20 includes a recreation building, a fenced tennis court, small free standing sauna, and a barbeque area to the north of the tennis court, access roads and passive open space. The areas immediately north of the recreation building and around the internal resort are relatively cleared. The remainder of lot 10 is well vegetated, with primarily native species.

25 A combined bitumen pathway/ cycleway runs along the Right of Carriageway on the eastern edge of the site, immediately west of the primary beach dune. The pathway/ cycleway connects Suffolk Park Village with south Byron Bay and the Byron High School.

30 Lot 10 falls partly within Zone Nos. 7(a) (Wetlands Zone) and 7(f1) (Coastal Land Zone), under Byron LEP 1988. The resort is mostly located within Zone No. 7(f1) (Coastal Land Zone). That part of Lot 10 that falls within Zone No. 7(a) (Wetlands Zone) is affected by SEPP 14 – Coastal Wetlands.

35 The eastern part of the site is affected by Level 3 Acid Sulfate Soils and the western part of the site is affected by Level 2 Acid Sulfate Soils.

The site is Bush Fire Prone land, partly Category 1 and partly Buffer area.

40 The developed area of the existing tourist facility lies within Coastal Erosion Zone Precinct 3 of Part J of Byron DCP2010.

The site is not affected by SEPP 26 – Littoral Rainforests, however Council's ecologist identified areas of littoral rainforest and swamp oak plain to the west of the cabins, both endangered ecological communities (EEC).

45 Vehicle access to the site is via private access through the community title residential development at the southern end of the site. Currently that includes people attending yoga classes in the yoga pavilion.

1.3 Description of the proposed development

50 The application seeks consent to change the location of two of the approved cabins, convert the existing yoga pavilion to a cabin, remove the tennis court and modify the strata lots accordingly. No additional accommodation is proposed, or will be provided, from what is approved (10.2010.541.1), i.e. 11 x 2 bedroom holiday cabins & 1 x 4 bedroom manager's residence.

55

The proposed development comprises the following alterations to the existing approved strata titled tourist facility:

- 5 o Approve the relocation of the cabin on previous Lot 4 (proposed Lot 5), to the east between the cabins on proposed Lots 2 & 4 thereby making room to move the cabin on proposed Lot 5 approximately 8 metres to the east on Lot 5.

The above changes give better spatial separation to the cabins thereby improving privacy for guests and also results in improved fire safety to those cabins.

- 10 o Move the cabin on previous Lot 12 approximately 6 metres to the north-west and connect it to the cabin on proposed Lot 9 to create a cabin with a larger living area (no additional bedrooms).
- 15 o Approve use of deck additions to existing cabins and yoga pavilion
- 15 o Change the use of yoga pavilion to a create a 2 bedroom cabin with a larger living area.

2. SUMMARY OF GOVERNMENT/EXTERNAL REFERRALS

	Summary of Issues
Government Authorities	Planning NSW.
	NSW RFS – Sydney Bushfire Safety Authority
	Crown Lands

Planning NSW

Applications Under State Environmental Planning Policy No 1 for Strata Subdivision of Lot 10 DP 270196, 2 Alcorn Street, Suffolk Park.

I refer to your letter of 27 October 2010 requesting the Director-General’s concurrence in the above matter.

Following consideration of the application, concurrence has been granted to vary the 40 hectare development standard contained in clause 11 of the Council’s planning instrument.

Concurrence was granted in this instance for the following reasons:

- i. The proposal is consistent with the approved development of the land;*
- ii. The subdivision will not cause detrimental impacts to the surrounding area;*
- iii. The dwelling already co-exists with the surrounding sensitive areas.*

Council should consider applying Section 88 (Conveyancing Act 1919) restrictions in relation to the excised caretaker’s residence to ensure it remains connected to the ‘tourist facility’ and is not disposed of separately.

NSW RFS

S100B Bushfire Safety Authority

The Bushfire Safety Authority required under Section 100B of the *Rural Fires Act 1997* is issued subject to the following numbered conditions.

- 1 The development proposal is to comply with the subdivision layout shown in ‘Figure 2 - Site Layout, Proposed Development & Location of Trees’ included in the Ecological Assessment prepared by Blackwood Ecological Services dated December 2011.

Asset Protection Zones

The intent of measures is to provide sufficient space for fire fighters and other emergency services personnel, ensuring radiant heat levels permit operations under critical conditions of radiant heat, Smoke and ambers, while supporting or evacuating occupants. To achieve this, the following conditions shall apply;

- 5
- 2 At the issue of subdivision certificate and in perpetuity, the following APZ's shall be maintained and managed as an inner protection area (IPA) as outlined within section 4.2.7 and Appendix 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document "Standards for asset protection zones".
- 10
- east of the cabins and managers residence to the site boundary.
 - South to the site boundary
 - 20 metres north, north west and west of the cabin (including deck) on proposed lot 4;
 - 15 • 15 metres north, north west and west of the cabin (including deck) on proposed lot 5;
 - 15 metres north) north west and west of the cabin on proposed lot 6 (excluding the extended deck) or to the 5m EEC boundary;
 - 15 metres west of the cabins on proposed Lots 7 & 8 (including decks)
 - 20 • west of the cabins on proposed lots 9 & 10 and the managers residence on proposed lot 11 (including decks) to the 5m EEC boundary

Water and Utilities

The intent of measures is to provide adequate services of water for the protection of buildings during and after the passage of a bush fire, and to locate gas and electricity so as not to contribute to the risk of fire to a building to achieve this, the following conditions shall apply:

- 25
- 3 Water electricity and gas are to comply with sections 4.1.3 and 4.2.7 of 'Planning for Bushfire Protection 2006.

Access

The intent of measures for internal roads is to provide safe operational access for emergency services personnel in suppressing a bush fire, while residents are accessing or egressing an area. To achieve this the following conditions shall .apply:

- 35
- 4 Internal roads, including the proposed Right of Way, to comply with section 4.2.7 of PBP, 2006. However; a minimum carriageway of 4m is allowable.

Evacuation and Emergency Management

The intent of measures is to provide suitable emergency and evacuation (and relocation) arrangements for occupants of special fire protection purpose developments. To achieve this the following conditions shall apply

- 5
- 45 An emergency and evacuation plan addressing Section 4.2.7 of 'Planning for Bush Fire Protection 2006' shall be prepared for the facility, or the existing plan is to be amended to reflect the altered site layout/access arrangements. A copy of the plan shall be provided to the consent authority prior to the issuing of an occupation certificate.

Design and Construction

The intent of measures is that buildings are designed and constructed to withstand the potential impacts of bush fire attack. To achieve this, the following conditions shall apply:

- 6
- 55 New construction shall comply with section 5 (BAL 12.5) Australian Standard AS3959-2009 'Construction of buildings in bush fire-prone areas' and section A3.7 Addendum Appendix 3 of 'Planning for Bushfire Protection'.

- 7 The existing cabins and manager’s residence are required to be upgraded to improve ember protection. This is to be achieved by enclosing all openings (excluding roof tile spaces) or covering openings with a non-corrosive metal screen mesh with a maximum aperture of 2mm. Where applicable this includes any sub floor areas, openable windows, vents, weepholes and eaves. External doors are to be fitted with draft excluders.
- 5
- 8 The deck attached to the cabin on proposed lot 6 and the deck extension shall be separated by a non-combustible walkway.

Landscaping

- 10
- 9 Landscaping to the site is to comply with the principles of Appendix 5 of Planning for Bush Fire Protection 2006’.

Land & Property Management – Crown Lands

15 The eastern boundary of Lot 10 DP 270196 adjoins Lot 7018 DP 1113326 comprising Reserve R755695 for Future Public Requirements, notified June 2007.

20 While the proposal does not directly impact on the Crown estate please ensure that the applicant does not undertake any activity on the Crown land or use the Crown land for any purpose associated with the development. The proponent may not:

- Encroach upon the Crown land,
- Remove any vegetation from the Crown land,
- 25 • Stockpile materials, equipment or machinery on the Crown land,
- Use the Crown land as access,
- Direct stormwater discharges on the Crown land, or
- Use the Crown land as an asset protection zone.

30 Consent conditions to reflect Crown Lands advice.

3. SECTION 79C – MATTERS FOR CONSIDERATION – DISCUSSION OF ISSUES

35 Having regard for the matters for consideration detailed in Section 79C(1) of the Environmental Planning & Assessment Act 1979, the following is a summary of the evaluation of the issues.

3.1. STATE/REGIONAL PLANNING POLICIES AND INSTRUMENTS

Requirement	Requirement	Proposed	Complies
SEPP 1 – Development Standards	Provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act. Greater than 10% variation to the standard requires determination by Council if recommended for approval.	SEPP 1 variation to Clause 11 of Byron LEP sought. However Council is of the opinion the SEPP1 is not required.	Yes See comments 3.2 CI 11 BLEP *

BYRON SHIRE COUNCIL

ORDINARY MEETING

17 MAY 2012

(89)

Requirement	Requirement	Proposed	Complies
State Environmental Planning Policy No. 71 - Coastal Protection	<p>Matters for consideration for development within the coastal zone:</p> <ul style="list-style-type: none"> - retention of existing public access to the coastal foreshore - impact of effluent disposal on water quality - development must not discharge untreated stormwater into a coastal water body 	<ul style="list-style-type: none"> - No public access to the coastal foreshore will be impeded or diminished as part of the proposal - No effluent is proposed to be disposed other than to Council's sewerage system. - Stormwater is to be discharged to the street. 	<p>Yes</p> <p>Yes</p> <p>Yes</p>
SEPP North Coast REP	<p><u>Clause 32B Coastal lands</u> – Council is to consider:</p> <ul style="list-style-type: none"> • NSW Coastal Policy 1997; • Coastline Management manual; • North Coast: Design Guidelines. <p><u>75 Development control— tourism development</u></p> <p>Council is to consider:</p> <ul style="list-style-type: none"> • Access • Must not detract from scenery or other significant features of the natural environment • Services <p><u>76 Development control— natural tourism areas</u></p> <p>Tourist developments adjoining national parks or crown reserves. Council to consider Tourism Development Near Natural Areas: Guidelines for the North Coast</p>	<p>The proposed development is consistent with these policies and guidelines.</p> <ul style="list-style-type: none"> • existing access • no additional impacts • existing services <p>Existing tourist facility - DA not inconsistent with the relevant guidelines.</p>	<p>Yes</p> <p>Yes</p> <p>Yes</p>
NSW Coastal Policy 1997	<p>Development within the Coastal Zone must be consistent with the Aims, Objectives and Strategic Actions of the Coastal Policy.</p>	<p>Existing tourist facility proposal does not intensify use.</p>	<p>Yes</p>
Building Code of Australia	<p>The proposal must be capable of compliance with the structural and safety</p>	<p>A condition has been recommended for inclusion in the consent to ensure the</p>	<p>Yes</p>

BYRON SHIRE COUNCIL

ORDINARY MEETING

17 MAY 2012

(90)

Requirement	Requirement	Proposed	Complies
	requirements of the Building Code of Australia.	BCA requirements are met.	
Demolition	Demolition works must be carried out in accordance with the requirements of work cover and Australian Standard 2601 – 2001.	A condition has been included within the consent to ensure these requirements are met.	Yes
Disability Access (DDA)	Access for persons with disabilities and integration into surrounding streetscapes without creating barriers. (Council Res.10-1118).	N/A	Yes

* Non-complying issues discussed below

State/Regional Planning Policies and instruments - Issues

5 No issues

3.2. BYRON LOCAL ENVIRONMENTAL PLAN 1988

10 **Zone:** Zone No. 7(a) - Wetlands Zone / PART 7(f1) - Coastal Lands Zone / PART 7(f2) - Urban Coastal Lands Zone

Definition: tourist facility

LEP Requirement	Summary of Requirement	Proposed	Complies
Meets zone objectives Zone 7(f1)	<ul style="list-style-type: none"> • identify and protect environmentally sensitive coastal land; • enable development which would not detrimentally effect habitat, landscape or scenic quality; • prevent development adversely affected by coastal processes; and • enable the careful control of noxious plants and weeds. 	The amended cabin sites, conversion of yoga pavilion to a cabin, alterations to an existing cabin and associated car parking does not intensify the approved use within the zone.	Yes
Permissible use	Tourist facility permissible with consent.	Existing tourist facility exercises existing use rights.	Yes (see notes below)
CI 10 – Subdivision generally	A person shall not subdivide without the consent of Council	Consent for strata subdivision sought. Strata subdivision approval was granted to previous and current DA.	Yes
CI 11 – Subdivision in rural areas for agriculture etc	Council shall not consent to the subdivision of land for agriculture, forestry or a dwelling-house within this zone to create a lot smaller than 40 hectares.	Strata subdivision proposed is not for agriculture, forestry or a dwelling-house.	Yes

BYRON SHIRE COUNCIL

ORDINARY MEETING

17 MAY 2012

(91)

LEP Requirement	Summary of Requirement	Proposed	Complies
CI 33 Development within Zone No. 7(f1)(Coastal Lands Zone)	<p>Council to consider:</p> <ul style="list-style-type: none"> – adversely affecting, or being adversely affected by, coastal processes; – adversely affecting any dune or beach of the shoreline or foreshore; – adversely affecting the landscape, scenic or environmental quality and – safeguards and rehabilitation measures to protect the environment. 	<p>By-law 28 of the community management statement includes a restriction that prohibits the use of the cabins should the erosion escarpment come to within 50m of any building or part thereof, however the terms are not clear as they advise that the cabins shall not be used for the purpose of a dwelling-house.</p> <p>To reinforce Council's planned retreat provisions suitable conditions should be imposed to ensure a restriction is created on each lot in accordance with Council's current requirements.</p>	Yes
CI 36 Development adjoining wetland	<p>A person shall not clear, drain, excavate or fill land without the consent of council.</p> <p>Development on or adjoining or contiguous to land within Zone No. 7(a) consideration must be given to effect on flora and fauna found in the wetlands and the water table</p>	<p>Council's Ecologist has recommended the establishment of 5 metre wide buffer between wetlands and bushfire asset protection zone.</p> <p>Consent conditions apply. Weed management in accordance with the RMP only activity allowed within the 5m buffer.</p>	Yes
CI 40 Height of buildings	<p>Maximum height 4.5 metres to the topmost floor level and 9.0 metres topmost part of the building above existing ground level</p>	Complies	Yes
CI 45 Provision of Services	<p>Prior adequate arrangements required for the provision of sewerage, drainage and water services to the land.</p>	All services existing	Yes
CI 52 Tree preservation	<p>A person must not ringbark, cut down, top, lop, remove, injure or wilfully destroy any tree or other vegetation covered by the tree preservation order without the consent of Council.</p>	<p>Permission sought for limb removal of some trees for bushfire protection purposes. This work is mostly exempt as the limbs are overhanging the buildings or are within 2m of the footprint.</p>	Yes

LEP Requirement	Summary of Requirement	Proposed	Complies
CI 63 Acid Sulphate Soils	Investigations required for excavations/ water table disturbance > 1m below ground level.	No works proposed > 1m below ground level.	Yes

* Non-complying issues discussed below

Byron Local Environmental Plan 1988- Issues

5 SEPP 1 – Development Standards – Clause 11 Byron LEP

SEPP1 provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act.

The applicant seeks a variation to Clause 11 of Byron LEP, the development standard applying to the minimum allotment size for subdivision within the 7(a) – Wetland zone and 7(f1) – Coastal Lands Zone. Most of the existing tourist facility lies within Zone 7(f1) a small western portion lies within Zone 7(a).

A written objection was submitted with the development application arguing that compliance with the minimum 40 hectare lot size development standard is unreasonable and unnecessary as

- The proposed subdivision will not create any dwelling entitlements, as each proposed lot contains a cabin or manager’s residence/office within a tourist facility.

The NSW Department of Planning granted concurrence for the following reasons:

- iv. The proposal is consistent with the approved development of the land;*
- v. The subdivision will not cause detrimental impacts to the surrounding area;*
- vi. The dwelling already co-exists with the surrounding sensitive areas.*

The SEPP 1 Objection was supported for the previous DA for strata tiling of the existing tourist facility and is supported for this application.

Permissible use - Existing use rights

The existing tourist facility exercises existing use rights under Section 106 of the EP&A Act. The ‘tourist facility’ was approved on 8/07/1986 under consent 85/457. The property was lawfully used as a ‘tourist facility’ at the time the Zone 7(f1) and Zone 7(a) were gazetted under Byron LEP 1988 (22/04/1988) which prohibited tourist/rural tourist facilities in those zones.

As part of consent 96/414 the resort was reduced to 11 holiday cabins and one manager’s residence.

Section 102 variation 98/7021 amending DA 96/414 was issued on 31 August 1998, subject to the following single condition:

The modification was in regard to the 10 Community Title lots however the stamped plan, Exhibit 3.1 shows, in the northern area containing the reduced tourist cabin facility eleven cabins and one manager’s residence. That modification does not alter the fact that the ‘tourist facility’ is a land use which is operating lawfully, and that is, prohibited in the current zone.

Existing use Rights

Environmental Planning and Assessment Act 1979

108 Regulations respecting existing use

- 5 (1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to:
- (a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and
 - (b) the change of an existing use to another use, and
- 10 (c) the enlargement or expansion or intensification of an existing use.

Provision of Environmental Planning & Assessment Regulation 2000	Proposal	Complies
<p>39 Definitions In this Part: relevant date means:</p> <ul style="list-style-type: none"> (a) in relation to an existing use referred to in section 106 (a) of the Act—the date on which an environmental planning instrument having the effect of prohibiting the existing use first comes into force, or (b) in relation to an existing use referred to in section 106 (b) of the Act—the date when the building, work or land being used for the existing use was first erected, carried out or so used. 	As discussed above the 'tourist facility' was approved in 1986 and the prohibiting planning instrument was gazetted on the 22/04/1988	Yes.
<p>40 Object of Part The object of this Part is to regulate existing uses under section 108 (1) of the Act.</p>	~	~
<p>41 Certain development allowed (cf clause 39 of EP&A Regulation 1994)</p> <p>(1) An existing use may, subject to this Division:</p> <ul style="list-style-type: none"> (a) be enlarged, expanded or intensified, or (b) be altered or extended, or (c) be rebuilt, or (d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act, or (e) if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or (f) if it is a light industrial use—be changed to another light industrial 	<p>Approval is sought to alter the layout of the existing use via the relocation of three cabins and conversion of a yoga pavilion to a 'cabin' within the site.</p> <p>Not a commercial or industrial use</p>	Yes.

<p>use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act).</p> <p>(2) However, an existing use must not be changed under subclause (1) (e) or (f) unless that change:</p> <p>(a) involves only alterations or additions that are minor in nature, and</p> <p>(b) does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and</p> <p>(c) does not involve the rebuilding of the premises associated with the existing use, and</p> <p>(d) does not involve a significant intensification of that existing use.</p> <p>(e) (Repealed)</p> <p>(3) In this clause:</p> <p>commercial use means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the Standard Instrument (Local Environmental Plans) Order 2006).</p> <p>light industrial use means the use of a building, work or land for the purpose of light industry (within the meaning of the Standard Instrument (Local Environmental Plans) Order 2006).</p>	<p>Minor works</p>	
<p>42 Development consent required for enlargement, expansion and intensification of existing uses</p> <p>(cf clause 40 of EP&A Regulation 1994)</p> <p>(1) Development consent is required for any enlargement, expansion or intensification of an existing use.</p> <p>(2) The enlargement, expansion or intensification:</p> <p>(a) must be for the existing use and for no other use, and</p> <p>(b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.</p>	<p>Development consent is being sought.</p>	<p>Yes.</p>
<p>43 Development consent required for alteration or extension of buildings and works</p>		

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<p>(cf clause 41 of EP&A Regulation 1994)</p> <p>(1) Development consent is required for any alteration or extension of a building or work used for an existing use.</p> <p>(2) The alteration or extension:</p> <p style="padding-left: 20px;">(a) must be for the existing use of the building or work and for no other use, and</p> <p style="padding-left: 20px;">(b) must be erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.</p>	<p>Development consent is being sought.</p>	<p>Yes.</p> <p>No. (see Cl 46)</p> <p>Yes. (see Cl 46)</p>
<p>44 Development consent required for rebuilding of buildings and works</p> <p>(cf clause 42 of EP&A Regulation 1994)</p> <p>(1) Development consent is required for any rebuilding of a building or work used for an existing use.</p> <p>(2) The rebuilding:</p> <p style="padding-left: 20px;">(a) must be for the existing use of the building or work and for no other use, and</p> <p style="padding-left: 20px;">(b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.</p>	<p>The works are to existing tourist facility on the same land as the buildings erected before the relevant date</p>	<p>N/A</p>
<p>45 Development consent required for changes of existing uses</p> <p>(cf clause 43 of EP&A Regulation 1994)</p> <p>Development consent is required:</p> <p style="padding-left: 20px;">(a) for any change of an existing use to another use, and</p> <p style="padding-left: 20px;">(b) in the case of a building, work or land that is used for different existing uses, for any change in the proportions in which the various parts of the building, work or land are used for those purposes.</p>	<p>No change proposed.</p>	<p>Yes</p>
<p>46 Uses may be changed at the same time as they are altered, extended, enlarged or rebuilt</p> <p>(cf clause 44 of EP&A Regulation 1994)</p> <p>Nothing in this Part prevents the granting of a development consent referred to in clause 42, 43 or 44 at the same time as the granting of a development consent referred to in clause 45.</p>	<p>No change proposed</p>	<p>Yes.</p>

Draft EPI that is or has been placed on public exhibition and details of which have been notified to the consent authority - Issues

N/A

5

3.3 DEVELOPMENT CONTROL PLANS

Development Control Plan 2010

Requirement	Proposed	Complies
Element C 8.1 Tourism Development in Byron Shire Council supports low rise, family-oriented, low-key development in harmony with the natural environment.	The existing and proposed tourist facility is consistent with this element.	Yes
Element C9.1 – Density: Maximum FSR 1.2:1	FSR much less than 1.2:1	Yes
Element C9.2 – Equity of access and mobility: Provide equitable access	Access as per BCU requirements. Can be conditioned	Yes
Element C9.3 – Character of cabins: Provide adequate eating, living and outdoor sitting areas.	Adequate internal space provided. This application seeks consent for relocation of three approved cabins and conversion of yoga pavilion to a ‘cabin’. No intensification results from the proposal.	Yes
Element C9.5 – Parking: To comply Part G. i.e. 19 spaces required	> 22 proposed.	Yes
Element C9.6 – Landscaping: Requirement = 30m ² per cabin.	Far in excess of 30m ² exists on site Compensatory planting required for maintenance of bushfire APZ - conditioned accordingly	Yes
Element C9.7 – Garbage:	Consent condition requires waste management be addressed in the Resort Management Plan	Yes

10

Development Control Plan 2010 - Issues

No issues

15

Other Development Control Plan/s - Issues

DCP Chapter 9 – Suffolk Park applies to the subject land, but does not impose any development requirements. The proposal does not conflict with DCP 9.

20

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

Subject to the consent conditions recommended, the application is unlikely to result in significant impacts on the natural and built environments. The natural environment will be benefitted by the implementation of a protective buffer that is to be created between the bushfire asset protection zone and EECs including SEPP14 wetland.

25

The application does not change the use from tourist facility and will not intensify the use of the site and so is unlikely to create social and economic impacts in the locale.

5

3.5 The suitability of the site for the development

The site contains an existing approved tourist facility.

10 Car Parking (Parts C, D & G, DCP 2010 / Part 3.5, DCP 15)

The same number of car spaces required under Consent 10.2010.541.1 &.2, being 19 in total, still applies to this consent.

15 Climate Change Impacts

Some of the effects of Climate Change include temperature rise and subsequent sea level rise due to expansion of the oceans and melting of ice, changing rainfall patterns, altitudinal and latitudinal movement of biota in response to temperature rise.

20

A Section 88 instrument stating that the development must cease if at any time the coastal erosion escarpment comes within 50 metres of any building associated with this development is included in the consent conditions for this application.

25 3.6 Submissions made in accordance with this Act or the regulations

“Below is a table providing a summary of submission and staff response. However, Councillors also need to refer to the full copies of all submissions which have been provided on disc, strictly on a confidential basis, to Councillors. The full copies of the submissions contain personal information such as names and addresses of the persons lodging submissions which are relevant matters to be taken into consideration in determining this matter.”

30

There was one (1) late submission made against the development application.

Issue	Comment
The proposed 11 dwelling development at 2 Alcorn Street will have very adverse impact on an already fragile ecosystem	The application does not propose any new dwellings.

35

As an adjoining land owner (Arakwal National Park), NSW EPA provided the following generic advice:

40 NSW EPA

The EPA provides the following comments in relation to Councils assessment of the proposal. It is recommended prior to determining the application that Council is satisfied that:

45

- *The proposal is consistent with the provisions of the Protection of the Environment Operations Act, 1997.*
- *The proposal is not likely to cause impacts on areas of native vegetation, with special reference to threatened or regionally significant flora and fauna species, populations and ecological communities.*

50

- *The proposed development is consistent with the threatened species provisions of the Environment Planning and Assessment Act, 1979, State Environmental Planning Policy*

(SEPP) 44 - Koala Habitat Protection, SEPP 71 - Coastal Protection and the Native Vegetation Act, 2003.

- An appropriate level of Aboriginal cultural heritage assessment has been undertaken, and that the proposal is not likely to impact on areas of cultural significance to the Aboriginal community. Also, it is important that the views of Aboriginal community groups be sought in regard to the proposed development.
- Potential direct and indirect impacts on OEH/NPWS estate, wilderness areas, wild rivers and recognised areas of high conservation value have been adequately considered.
- Any rezoning or development is in accordance with the NSW Government Flood Prone Land Policy which aims to reduce the impact of flooding and flood liability on individual owners and occupiers, and reduce private and public losses resulting from flooding. These objectives are set out in the NSW Government Floodplain Development Manual.
- The proposal is consistent with:
 - i) The NSW Coastal Policy 1987, which has as its central focus the ecologically sustainable development of the NSW coast;
 - ii) The Estuary Management Policy, with the general goal to achieve an integrated, balanced, responsible and ecologically sustainable use of the State's estuaries, which form a key component of coastal catchments;
 - The Coastline Hazard Policy 1988, with the primary objective to reduce the impact of coastal hazards on individual owners and occupiers, and to reduce private and public losses resulting from natural coastal forces; and
 - iv) Relevant Coastal Zone and/or Estuary Management Plans.
(Note: Where no plans are in place setback from coastal erosion escarpments should be established in consultation with EPA).

Your attention is also drawn to the Commonwealth legislation, the Environment Protection and Biodiversity Conservation Act 1999. If the proposal affects any species requiring consideration under this legislation then approval may be required from the Commonwealth Department of Sustainability, Environment, Water, Population and Communities.

Council is satisfied that it has assessed the considerations and that subject to consent conditions the proposed development is consistent with and/or not contrary to those considerations.

3.7 Public interest

Subject to consent conditions the granting of consent for additions and alterations to the existing tourist facility, is not contrary to the public interest.

4. DEVELOPER CONTRIBUTIONS

4.1 Water & Sewer Levies

Same as Consent 10.2010.541.1 & .2.

The development currently proposed will see the addition of 2 additional bedrooms to an existing 2 bedroom manager's residence, creating a 4 bedroom dwelling.

Development	Number	ET Rate	ET
4 Bedroom Residence	1	1	1

These proposed additions generate an additional Bulk Water, Water and Sewerage load of 1 ET.

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Council can supply water and sewerage services to the proposed development on payment of Developer Servicing Charges.

These figures are at today's date.

5

INDICATIVE CHARGES PURSUANT TO THE WATER MANAGEMENT ACT, 2000

(Office Use Only)

Water (S64W Other)	1.00	ET @	\$1,283.78	=	\$1,283.78
Bulk Water (BW-SP)	1.00	ET @	\$8,377.00	=	\$8,377.00
Sewer (S64S Other)	1.00	ET @	\$9,732.66	=	\$9,732.66
			Total	=	\$19,393.44

4.2 Section 94 Contributions

Contributions

10 Same as Consent 10.2010.541.1 & .2.

TOURIST, RETAIL, COMMERCIAL & INDUSTRIAL DEVELOPMENT **SCHEDULE OF CONTRIBUTIONS PURSUANT TO SECTION 94 OF THE** **ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979**

(Office Use Only)

Community and Cultural Facilities	(CF-SP)	1.00	SDU @	\$1,143.01	=	\$1,143.01
" - Shire Wide	(CF-SW)	1.00	SDU @	\$603.98	=	\$603.98
Open Space	(OS-SP)	1.00	SDU @	\$7,192.96	=	\$7,192.96
" - Shire Wide	(OS-SW)	1.00	SDU @	\$3,042.84	=	\$3,042.84
Roads	(R-SP)	9.00	trips @	\$823.89	=	\$7,414.99
Car Parking					=	
Cycleways	(CW-SP)	1.00	SDU @	\$776.41	=	\$776.41
Civic & Urban Improvements	(IM-SP)	1.00	SDU @	\$1,819.62	=	\$1,819.62
Rural Fire Service	-				=	
Surf Lifesaving	(SL-SP)	1.00	SDU @	\$29.62	=	\$29.62
Administration	(OF-SW)	1.00	SDU @	\$820.23	=	\$820.23
				Total	=	\$22,843.67

5. CONCLUSION

15 The application proposes alterations and additions and strata subdivision in two stages to the existing tourist facility known as 'Tallow Beach Houses'.

The application seeks consent to make additions and alterations to an existing strata title approved tourist facility (strata no yet registered), at the north end of Alcorn Street at Suffolk Park.

20 The application proposes to change the location of two of the approved cabins, convert the existing yoga pavilion to a cabin, remove the tennis court and modify the strata lots accordingly. No additional accommodation is proposed, from what is approved (10.2010.541.1), i.e. 11 x 2 bedroom holiday cabins & 1 x 4 bedroom manager's residence.

25 A SEPP1 variation to Clause 11 is sought and the Director General has granted concurrence.

The proposed works raise no significant issues with regard to state and regional planning instruments.

5 The proposal is generally similar to the current approval.

The application raises no issues with regard to Byron Local Environment Plan 1988 and Development Control Plan 2010.

10 The application is supported.

6. RECOMMENDATION

15 That pursuant to Section 80 of the Environmental Planning & Assessment Act 1979, development application 10.2012.2.1, for alterations and additions to existing strata titled tourist facility, be granted consent subject to the conditions listed in Annexure 6(b) #1224944.

7. DISCLOSURE OF POLITICAL DONATIONS AND GIFTS

Has a Disclosure Statement been received in relation to this application	No
Have staff received a 'gift' from anyone involved in this application that needs to be disclosed. Where the answer is yes, the application is to be determined by the Director or Manager of the Planning, Development and Environment Division.	No

20 Provide Disclosure Statement register details here: Nil

ORGANISATIONAL SUPPORT – EXECUTIVE MANAGER’S REPORTS

Report No. 13.11. PLANNING - BSC ats Hultgren LEC 10342/2012

Executive Manager: Organisational Support

5 **File No:** COR653000 x 80.2012.6.1 x 10.2006.648.3 x 10.2007.415.2 x 146800D x 239424D #1222293

Principal Activity: Legal Services

Summary: To advise Council of receipt of a new Class 1 Appeal against Council's refusal to modify condition No. 2 of DA 10.2006.648.2

10 **NOTE TO COUNCILLORS:**

15 In accordance with the provisions of S375A of the Local Government Act 1993, a Division is to be called whenever a motion for a planning decision is put to the meeting, for the purpose of recording voting on planning matters. Pursuant to clause 2(a) under the heading Matters to be Included in Minutes of Council Meetings of Council's adopted Code of Meeting Practice (as amended) a Division will be deemed to have been called by the mover and seconder of all motions relating to this report.

20 **RECOMMENDATION:**

That this report be noted and the General Manager be authorised to manage the litigation in accordance with the General Manager’s general delegations.

25 **Attachments:**

- Notice of Determination 10.2004.255.1 #503282 [9 pages].....**Annexure 11(a)**
- Notice of Determination 10.2006.648.1 #646028 [4 pages]..... **Annexure 11(b)**
- Notice of Determination 10.2006.648.2 #899093 [6 pages].....**Annexure 11(c)**
- 30 • Notice of Determination 10.2006.648.3 #1138086 [8 pages]..... **Annexure 11(d)**
- Notice of Determination 10.2007.415.1 #903235 [8 pages].....**Annexure 11(e)**
- Notice of Determination 10.2007.415.2 #1138240 [9 pages]..... **Annexure 11(f)**
- Applicant document “s96 application cover letter” (with attachment) #1225562 [4 pages] . **Annexure 11(g)**
- Applicant document “s96.1 & s96 DA 10.2006.648.2: lots 123 & 124 Wollongbar St”
- 35 #1225575 [6 pages]..... **Annexure 11(h)**
- Applicant documents “s96.1 and s96 DA 10.2007.415.1: Centennial Circuit” and “Description of amendments requested” #1225619 [13 pages].....**Annexure 11(i)**
- Applicants’ cover letter and Class 1 application (without attachments) #1222071 [3 pages] **Annexure 11(j)**
- 40 • Different version of Applicant document “s96 application cover letter” which was filed in Court with the Class 1 application #1225650 [1 page].....**Annexure 11(k)**

Report

The property the subject of the Appeal is located in the Arts and Industry Estate at:

- 5 a) 17 Centennial Circuit; and
b) Lots 132 and 134 Wollongbar Street

10 The history of applications relating to the above properties is extensive and spans many years. The applicants are of the belief that they have been unfairly or improperly treated through the various application processes. Significant resources have been dedicated to investigation of the applicants' complaints and responding to request for information from external review bodies but Council have not ever found any evidence of unfair treatment or improper conduct and no external review agency has raised any concerns with Council after their reviews.

15 Reproduction of the history in detail is beyond the scope of this report. While the history of any development is of obvious importance to the relevant applicants, as a matter of law in many matters such as this much of the history can be largely irrelevant as what is required in review of the facts and merits of the particular application as it is currently presented including the current context and existing development etc. A summary of the key determinations is as follows:

- 20 16/02/05 Notice of Determination 10.2004.255.1 issued approving certain development at Lot 16, 13-17 Centennial Court, subject to conditions– refer Annexure 11(a) – **this approval and conditions are still applicable to the land and are called up in conditions of 10.2007.415.**
- 25 21/12/06 Notice of Determination 10.2006.648.1 issued approving certain development at Lots 123 & 124, 12-14 Wollongbar Street subject to conditions– refer to Annexure 11(b).
- 30 16/10/09 Notice of Determination 10.2006.648.2 issued approving modifications to 10.2006.648.1 subject to conditions - refer to Annexure 11(c).
- 35 07/09/11 Notice of Determination 10.2006.648.3 issued approving further modifications subject to conditions – refer to Annexure 11(d) – **this is the current approval and conditions for 10.2006.648.**
- and
- 29/10/09 Notice of Determination 10.2007.415.1 issued approving certain development at Lot 16, 13-17 Centennial Court, subject to conditions– refer Annexure 11(e).
- 40 07/09/11 Notice of Determination 10.2007.415.2 issues approving subject to conditions modifications – refer to Annexure 11(f) - **this is the current approval and conditions for 10.2007.415.2.**

45 The bold type above identifies the relevant determinations which are currently applicable to the land and which are or could be the subject of the Land and Environment Court appeal. (The determinations at Annexures 11(d) and 11(f) already incorporate the approved changes referred to in the below tables).

50 To ensure that there is no misunderstanding of the applicants' position in either s96 modification application or the appeal, copies of the following documents lodged by the applicants, all undated and unsigned, are also attached:

- 55 i. "s96 application cover letter", with marked up copy of a Council letter to the applicants dated 8 April 2010 attached – refer Annexure 11(g);
ii. "s96 and s96.1: DA 10.2006.648.2: lots 123 & 124 Wollongbar St" – refer Annexure 11(h);

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- iii. "s96.1 and s96 DA 10.2007.415.1: 1 Centennial Circuit" and "Description of amendments requested" – refer Annexure 11(i);
- iv. Class 1 application covering letter, undated and unsigned and application (without balance of attachments, which are over 60 pgs many of which are reproduced separately in any event) – refer to Annexure 11(j);
- v. "s96 application cover letter" as was attached to the Class 1 Application filed with the Court – refer to Annexure 11(k) (which appears to be slightly different to the letter that was lodged with the application a copy of is produced at Annexure 11(g)).

10 Requested Modification to 10.2007.415

By s96 modification application 10.2007.415.2 lodged with Council on 18/07/2011 the Applicants sought 14 amendments to 10.2007.415.

15 The applicant elected to lodge the modification application under s96(1) "minor error, misdescription or miscalculation" and under s96(1A) "minimal environmental impact" (normally an application is made under one part of s96 only).

By Notice of Determination issued under delegation on 07/09/11, Council:

20

- a) approved 6 of requested changes;
- b) refused 6 of the requested changes; and
- c) in relation to 2 of the requested changes, partially agreed approving some but not all changes and/or approving the changes but on different terms to those sought by the applicants.

25

The requested changes and Council's determination are summarised as follows:

	Change Sought	Determination
1.	Delete reference to Lot 17 DP 812667 from "Land to be Developed" section.	Approved.
2.	Change description of development from "... Place of Assembly and Recreation Facility <u>with ancillary</u> restaurant" to "... Place of Assembly, Recreation Facility <u>and</u> Restaurant" (emphasis added)	Refused. Deletion of 'ancillary' status of restaurant was not supported for a variety of reasons, including without limitation that a stand alone restaurant would have different unaddressed impacts (eg traffic, carparking, water and sewerage demand and other potential impacts)
3.	Change Condition 4 to Delete 4(a) Condition which requires the ancillary restaurant to be limited to patrons of the recreation facility not members of the public. Change 4(b) to: <ul style="list-style-type: none"> - delete the 12 months trial period; - delete the prescribed monitoring of parking/traffic impacts - increase maximum attendance from 900 to 1100 people - require attendance by bus. 	Refused as noted above. Refused for a variety of reasons including, without limitation, that no new or additional information regarding potential impacts of the changes or to support the proposed increases had been submitted, the approval already requires attendance by bus so the proposal in this regard is moot and that the existing condition 4(b) without amendment is considered reasonable and prudent for the development etc.

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	<p>Change 4(c) to change the table defining types and prescribing frequency, times and maximum attendees to:</p> <ul style="list-style-type: none"> - increase the number of patrons for all types of events; - extend the permissible operating times for all types of events; - delete reference to the ancillary status of the restaurant. 	<p>Refused for a variety of reasons including for example without limitation the reasons referred to above.</p>
4.	<p>Delete notation “<i>following conditions are to be complied with prior to issue of a Construction Certificate ...</i>”</p>	<p>Approved.</p>
5.	<p>Delete notation “<i>following conditions are to be complied with prior to any building or construction works ...</i>”</p> <p>Delete Condition 6 Site construction sign</p>	<p>Approved.</p> <p>Approved.</p>
6.	<p>Delete notation “<i>following conditions to be complied with during construction ...</i>”</p> <p>Delete conditions 7 Construction times, 8 Construction noise and 9 Builders Rubbish</p>	<p>Approved.</p> <p>Approved.</p>
7.	<p>Delete notation “<i>following conditions are to be complied with prior to issue of an Occupation Certificate ...</i>”</p> <p>Delete condition 10 Works to be completed.</p>	<p>Approved.</p> <p>Approved.</p>
8.	<p>Delete Condition 11 Previous consent to be surrendered.</p>	<p>Condition 11 required an earlier consent to 10.2004.255.1 to be surrendered. Applicant sought to delete condition, ie to maintain 2 consents for similar but different approvals (presumably both of which would be argued to have been commenced) for the same property.</p> <p>Council refused the requested deletion of condition 11, but approved a modification to condition 11 to instead require voluntary modification (rather than surrender) of relevant parts of 10.2004.255, for a variety of reasons including without limitation to ensure that there is consistency between the approvals operating at the same time on the same property to reduce potential for uncertainty or confusion.</p>
9.	<p>Delete Condition 12 Lighting Plan to be submitted</p>	<p>Refused for a variety of reasons including without limitation that deletion was not necessary and that no additional information was provided to support the deletion of the condition</p>
10.	<p>Delete Condition 13 Footpath improvement works</p>	<p>Approved</p>
11.	<p>Delete Condition 14 s88B Instrument required</p>	<p>Refused. Condition requires an easement for 24 car</p>

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		parking spaces over Lot 17/812667 for events held on Lot 16/812667. Applicant requested deletion of condition because the easement has already been registered. Deletion of the condition would enable de-registration of the easement. The condition needs to be maintained as long as the easement needs to be maintained.
12.	Delete Condition 15(c) Maintenance of an 'event hotline' contact telephone number while amplified music occurs	Refused because condition is considered reasonable. Applicant does not dispute the merits of the condition rather claims it is discriminatory which is disputed.
13.	Delete Condition 18 Traffic marshal required at site for daytime large events	Refused. Condition addresses various merit issues including maintaining public safety, traffic flow and the protection of normal business operation of the industrial estate.
14.	<p>Modify the Notes to:</p> <ul style="list-style-type: none"> - delete note that Construction Certificated required. - deleted note that Occupation Certificate required. - delete notes about Principal Certifying Authority 	<p>Approved.</p> <p>Refused because an Occupation Certificate is required.</p> <p>Refused because the statutory provisions relating to Principal Certifying Authorities do apply to development.</p>

Requested Modification to 10.2006.648

5 By s96 modification application 10.2006.648.3 lodged with Council on 25/08/2011 the Applicants sought 6 amendments to 10.2006.648.

10 The applicant elected to lodge the modification application under s96(1) "minor error, misdescription or miscalculation" and under s96(1A) "minimal environmental impact" (normally an application is made under one part of s96 only).

By Notice of Determination issued under delegation on 07/09/11, Council:

- 15 a) approved 2 of requested changes;
 b) refused 1 of the requested changes; and
 c) in relation to 3 of the requested changes, partially agreed approving some but not all changes and/or approving the changes but on different terms to those sought by the applicants.

20 The requested changes and Council's determination are summarised as follows:

	Change Sought	Determination
1.	Amend Condition 1 Approved Plans to include a statement that the site plan is "a guide only as all equipment approved for use under this consent is demountable."	Partially approved. As per usual practice a notation was added in red to the plan itself that "the locations specified on this plan for activities on the site are indicative only".
2.	Amend Condition 2 Approved Usage by: <ul style="list-style-type: none"> - Deleting the limitation on the scope 	Refused. This amendment would be a fundamental change to the nature and character of the approved development on

	<p>of the consent on lots 123 & 124 which states the approval is for <i>“warm up and training sessions for performers and artists for activities related to the Byron Entertainment Centre ...”</i>.</p>	<p>Lots 123 & 124 (which are not lots covered by 10.2007.415) and would result in development without any assessment of impacts or any parameters on operations, for example there would be no development conditions managing at all things like audience numbers, event sizes, traffic management, car parking etc for events held on lots 123 & 124.</p> <p>This limitation on use of Lots 123 & 124 was intentional (arising directly from the application as lodged by the applicants) and was and remains a fundamental part of the consent as granted. The original development application for 10.2006.648.3 clearly stated that approval was sought for <i>“proposed use as a storage and warmup/training area”</i> which is the only development that was assessed and approved.</p> <p>There has been no new or additional material filed in support of the proposed change to the nature and character of the development.</p> <p>Further, it is questionable whether such a change in the nature and character of the development would have minimal impacts and/or result in substantially the same development to enliven the power to modify under s96 or whether a new development application would be required.</p>
	<p>Further amend Condition 2 Approved usage by:</p> <ul style="list-style-type: none"> - Deleting the limitation on the number of storage containers approved for installation (currently limited to 2 containers) and include instead approval for storage containers <i>“as required”</i>. - Deleting reference to four temporary tents and SEPP (Temporary Structures and Places of Public Entertainment) 2007. - Deleting <i>“The tents are approved as shelter from the elements for the benefit of performers only and are to be dismantled and stored at the completion of the events in accordance with the SEPP ...”</i> 	<p>Refused but instead increase the number of approved containers from 2 to 3 (to accommodate the Applicants’ statement that a third container may be required in future).</p> <p>Approved but deleted statement replaced with <i>“Tents must comply with SEPP (Temporary Structures) 2007”</i> to accord with legislatives changes made since the issue of the last version of the consent.</p> <p>Refused but amended instead to clarify intent and to accord with the changes to the SEPP <i>“The temporary structures are to be used by performers only and not for activities in front of an audience. Temporary structures are to be subject to the provision of State Environmental Planning Policy</i></p>

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	<ul style="list-style-type: none"> - Deleting the limitations “<i>This approval does not permit the playing of live or recorded music or activities performed before an audience on the site.</i>” 	<p>(Temporary Structures) 2007”.</p> <p>Refused. The conditions on the consent as originally assessed and granted are clear and were based on the application as lodged ie that the additional area was for warmup/training only and was not to be used for performances before an audience. The limitation on music is a merit issue and the condition is considered reasonable. The deletion as proposed would change the nature and character of the development in circumstances where no new or additional material has been lodged by the applicant.</p>
3.	Amend Condition 5 Temporary Structures to update the name of the SEPP to require temporary structures to only have to comply with SEPP (Temporary Structures) 2007.	Approved.
4.	Amend Condition 7 Site to be Landscaped and Screened to delete requirement for screening.	Condition amended to replace the words “landscape screen” with the word “landscaping” to clarify that landscaping sufficient to form a screen is what is required (not landscaping in addition to screening).
5.	Delete Condition 10 Noise Impacts (condition imposed a requirement to keep the door of the BEC building closed at certain times)	Approved. It was agreed the condition could be deleted as owner/operator is required to comply with statutory noise abatement requirements in any event.
6.	Amend the Notes to: <ul style="list-style-type: none"> - delete note that Occupation Certificate required. 	Refused. If any future works are required under the consent (eg an additional storage containers or repairs/rebuilding works are ever necessary etc) a new occupation certificate may be required and therefore it is appropriate that the notation remain.

5 It is apparent from the applications that some of the changes to conditions were requested on the basis that the work had already been done, easements had already been registered or certificates had already been obtained etc. Such an approach is incorrect. For example, even though works may have been completed in accordance with conditions, the conditions themselves remain necessary because if the building was damaged for any reason, the conditions would prescribe the standard for the repair or reinstallation works.

10 That is, development consents issued by any Council usually always contain conditions relating to required standards of work. Those conditions do not then get deleted from the consent simply because the works have been constructed. To the contrary the conditions remain part of the consent and continue to operate for the life of the development operating under that consent.

15 Some of the requested amendments said to be ‘minor’, would in fact equate to changes to the nature and character of the development for example the proposed changes to the maximum number of patrons for events, the timing of events, the ancillary nature of the restaurant or warmup/training area etc. Neither s96 modification applications included any additional information or reports identifying, assessing or addressing potential impacts from the proposed amendments which would change to the nature and character of the development.

20

The Appeal

5 A new Class 1 Land and Environment Court appeal has been commenced against Council. It was served on Council on 20/04/2012 but was filed with the Land and Environment Court, via lodgement at the Local Court, on 07/03/2012 which was the last day for the appeal to be commenced within time. The applicant is currently self-represented in the appeal.

The Class 1 application form:

10 a) provides details of the appeal as being against:

“Council’s determination of 7 September 2011 to refuse to modify condition 2 of the Applicant’s development application no. 10.2006.648.2 as described in”

15 b) but states that the orders sought by the Applicants are:

“1. That the applicant’s Appeal is upheld and consent is granted to modify condition 2 of development application 10.2006.648.2 in accordance with the Applicant’s s96 modification application dated 18 July 2011; 2. costs” (emphasis added).

20 That is, there is an inconsistency between what the application form says is being appealed (10.2006.648) and the orders which are being sought (which refer in part to 10.2007.415).

25 Further, the documents filed with the application form also include information relating to:

- a) DA 10.2004.225.1, which was the precursor to 10.2007.415 and which relates only to the Centennial Circuit part of the development; and
- 30 b) DA 10.2007.415.1 (Centennial Circuit part only), which was also the subject of the same modification application which is now being appealed; and
- c) DA 10.2006.648 (Wollongbar Street part only); and
- 35 d) DA 10.2005.607.1 which is an approved application for a brothel at 15 Wollongbar Street.

That is, the documents filed with the application suggest that the matters which the Applicant might seek to raise in the appeal go considerably further than just Condition 2 of DA 10.2006.648.3.

40 But of course irrespective of what the application says, the Court stands in the Council’s shoes and will reassess the whole of the s96 modification application/s as the Court deems fit. This means that irrespective of what the applicants claim they are appealing, approval or refusal of the entire s96 application/s, or any parts of them, will be a matter at the sole discretion of the Court.

45 As the appeal is against conditions, it will be up to the Applicant to file their Statement of Facts and Contentions. It is hoped that in their Statement, the Applicant will be able to clarify exactly what their contentions are.

Council staff will be able to give evidence in the proceedings and there will be no requirement for Council to retain external experts in this appeal.

50 Council’s options in this matter include:

- 1. Defending the appeal.

55 With this option Council would instruct solicitors. It is likely that the matter would be listed for a s34 Conciliation Conference prior to a hearing. It is possible that the assistance of a

Commissioner of the Court, which is usually given at s34 Conferences, may help in reducing/clarifying the Applicants' contentions in the appeal. It is also possible that an agreement may be able to be reached, perhaps on an amended application as is often the case, at the Conciliation Conference and the recommendation would be broad enough to allow this to occur.

At the s34 Conciliation Conference, if an agreement has not been reached, if both parties agree it is possible for the matter to proceed directly to determination and again, the recommendation would be sufficient to allow this to occur. Agreeing to proceed straight to arbitration would normally occur only if all evidence was already available for the Commissioner at the Conference.

After any s34 Conference, if the matter has not proceeded to arbitration and an agreement could not be reached, the matter would be listed for hearing and Council staff and the Applicants' consultant experts would be asked to prepare evidence jointly. Given that this is an appeal against conditions, it ought to be able to be concluded in a single day, however, that may depend on the number and type of contentions the applicants raise.

2. Attempting to finalise via Consent Orders (may not be an available option – would need to be subject of legal advice)

Neither modification application satisfies the requirements of s96(1) because the amendments sought do not rectify errors or misdescriptions and it is possible that neither satisfy the requirements of s96(1A) either. Therefore, Council would need to get legal advice on whether this is in fact an option for Council, for example:

- (a) If the proposed changes would result in development that was not substantially the same development or development with other than minimal impacts, Council (and indeed the Court) would not have the power to approve the proposed changes under s96(1A) of the Environmental Planning and Assessment Act.
- (b) There has been no new or additional information submitted articulating the impacts of the proposed amended development (for example performances and events attended by members of the public on Lots 123 & 124 as opposed to warmup and training sessions for performers only or impacts from changing the restaurant to a stand alone development) or how those impacts would be mitigated. Therefore, the required assessments under s79C and s96 of the Environmental Planning and Assessment Act may not have been able to be conducted to the extent required to give Council the power to approve the applications as current submitted.

Financial Implications

An estimate of legal costs of defending the appeal has not been obtained prior to preparation of this report. It is likely, based on recent class 1 appeal experience and assuming a 1 day s34 Conciliation Conference followed but a 1 day hearing, with staff and not external experts giving evidence, that the legal costs would be in the order of \$15,000 - \$25,000. There are sufficient funds in the 2011/12 legal budget to meet the anticipated costs of defending this appeal.

Human resource implications, will involve planning and legal services staff instructing solicitors, preparing evidence and preparing for and attending the s34 Conciliation Conference and/or Hearing.

Statutory and Policy Compliance Implications

5 This appeal is likely to proceed as a straight forward merit appeal, with no points of law arising and the determination being made on its particular facts and circumstances. Therefore, it is unlikely to give rise to any precedent or policy implications for Council.

Section 96 of the Environmental Planning and Assessment Act applies and relevant extracts are reproduced as follows:

10 (1) *Modifications involving minor error, misdescription or miscalculation.*

15 A [consent authority](#) may, on application being made by the applicant ... modify a [development consent](#) granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5) and (6), section 96AB and Division 8 do not apply to such a modification.

(1A) *Modifications involving minimal [environmental](#) impact*

20 A [consent authority](#) may, on application being made by the applicant ... modify the consent if:

- (a) *it is satisfied that the proposed modification is of minimal [environmental](#) impact, and*
 (b) *it is satisfied that the [development](#) to which the consent as modified relates is substantially the same [development](#) as the [development](#) for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
 25 (c) *it has notified the application in accordance with:*
 (i) *the [regulations](#), if the [regulations](#) so require, or*
 (ii) *a [development control plan](#), if the [consent authority](#) is a [council](#) that has made a [development control plan](#) that requires the notification or advertising of applications for modification of a [development consent](#), and*
 30 (d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the [regulations](#) or provided by the [development control plan](#), as the case may be.*

35 Subsections (1), (2) and (5) do not apply to such a modification.

.....

40 (3) *In determining an application for modification of a consent under this section, the [consent authority](#) must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the [development](#) the subject of the application. ...*

Section 79C of the Environmental Planning and Assessment Act (evaluation criteria) is of course also relevant.

Report No. 13.12. PLANNING - BSC ats Hunter LEC 10382/2012
Executive Manager: Organisational Support
File No: COR653000 x 80.2012.7.1 x 10.2009.427.2 x 237962D #1224207

Principal Activity: Legal Services

Summary: To advise Council of receipt of a new Class 1 Appeal against Council's refusal to modify DA 10.2009.427.2.

5

NOTE TO COUNCILLORS:

10 In accordance with the provisions of S375A of the Local Government Act 1993, a Division is to be called whenever a motion for a planning decision is put to the meeting, for the purpose of recording voting on planning matters. Pursuant to clause 2(a) under the heading Matters to be Included in Minutes of Council Meetings of Council's adopted Code of Meeting Practice (as amended) a Division will be deemed to have been called by the mover and seconder of all motions relating to this report.

15

RECOMMENDATION:

That this report be noted and the General Manager be authorised to manage the litigation in accordance with the General Manager's general delegations.

20

Attachments:

- 25 • Notice of Determination 10.2009.427.1 #918515 [10 pages]..... **Annexure 12(a)**
- Plans supporting medication application 10.2009.427.2 #1226969 [2 pages]..... **Annexure 12(b)**
- Evaluation Report 10.2009.427.2 #1181245 [6 pages]..... **Annexure 12(c)**
- Class 1 application (application only) #1223776 [2 pages]..... **Annexure 12(d)**

Report

5 The property the subject of the Appeal is located 31 Pinegroves Road, Myocum. The property is 49 ha in size and is located at the end of the formed part of Pinegroves Road (with the road continuing through the property but only on paper).

Located on the property are:

- 10 1. An approved dwelling house (10.2005.367.1) near the south eastern boundary of the property;
2. An approved farm shed, 12m x 6m with 3 x 3m wide roller doors (10.2004.510.1), located proximate to the dwelling house; and
- 15 3. An approved workshop/storage/garage, 15m x 15m (10.2001.555.1), located proximate to dwelling house.

Some unauthorised works may have been carried out on the property after Council issued approval to 10.2009.427.1 consisting of:

- 20 (a) earthworks and retaining wall works (which appear to have been carried out as per the plans for which approval was sought in 10.2009.427.1 but which Council expressly refused); and
- (b) location of a large number of storage containers onto the site (roughly to the area where 10.2009.427.1 proposed a second shed which proposal was refused).

25 DA 10.2009.427.1

By 10.2009.427.1 Council granted approval for a "Farm storage shed and retaining wall", with the following parameters:

- 30 (a) located adjacent to the northern boundary, with the approved location being the most western of the two locations sought (with the second requested location being expressly refused);
- (b) 34m long x 9m wide x 4.3m high (3.5m to eaves);
- 35 (c) constructed slab on ground, steel frame, steel cladding and roof, no internal partitioning, 9 roller doors on the southern elevation and a 10th on the western elevation;
- (d) retaining wall approved to the proximate to the approved shed.

40 DA 10.2009.427.1 also sought approval for a second shed of the same dimensions, plans and construction methods, with an associated retaining wall extending approximately 50m to the east of the first shed. Council approved the above shed but refused both the second, eastern, shed and the earthworks and retaining wall associated with that second shed.

45 Attached at Annexure 12(a) is a copy of the Notice of Determination 10.2009.427.1 and approved plans.

50 s96 Modification Application 10.2009.427.2

Subsequent to the issue of the above consent, Council had received complaints alleging unauthorised works on the property, the investigation of which identified unauthorised works and attempted to engage the landowners. By letter dated 15 July 2011, Council informed the landowners, inter alia:

55

- 5
- 10
- i) in relation to the unauthorised earthworks: *"It is requested that you submit a Section 96 Application to vary the original development application consent DA 10.2009.427.1"*;
 - ii) in relation to siting of shipping containers on the property *"Additionally, Subdivision 16 Farm Buildings and Structures, State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, Section 2.32(2) states 'If the development is a shipping container, there must not be more than one shipping container per lot'. As the legislation relates to farm sheds and specifies shipping containers, it is requested you submit a development application ..."*
 - iii) that in relation to both matters - the applications should be submitted within 30 days.

15

The landowners did not lodge any applications with Council nor advised that they intended to. Council subsequently issued Court attendance notices in respect of both the earthworks and the 12 shipping containers. A plea of guilty was entered in relation to the earthworks and sentencing is due in June 2012. An undertaking to clear the containers and cease commercial use of them was provided to Council and subsequent inspections confirmed compliance with the undertaking so Council withdrew the charge in relation to the shipping containers.

20

As recommended, regularisation of the unapproved works was also sought by the applicant via the lodgement on 24 November 2011, of the modification application (10.2009.427.2) seeking to modify both the earthworks and the shipping containers. Council had advised as far back as July 2011 and reiterated subsequently that a s96 modification application was not the correct way to proceed with regard to the shipping containers.

25

The application was lodged under s96(1A), ie the applicant's position is that the development as modified would have 'minimal environmental impact' and result in 'substantially the same development'.

30

The s96 modification application sought approval to *"regularise modifications to the existing shed structure which as occurred during construction, as well as earth works and retaining wall, which has occurred during construction"*. The application went on to state that the changes were:

- *"modification to the building design to change the previous 306m2 building to 297m2 building, with roof height reduced from 4.293m to 2.7m"*;
- 35 - *"change the building structure from portal frame to modular by the use of recycled shipping containers which are bolted together and covered by a single roof"*;
- change the *"shape of the building ... from a rectangle, to a boomerang shape..."*
- 40 - regularise *"the rock wall configuration and level pad development area, which generally accords with that approved ..."*

45

Attached at Annexure 12(a) are copies of the current approved plans and at Annexure 12(b) are copies of the plans of the development proposed by the modification application 10.2009.427.2.

On assessment, staff are of the opinion that changes sought by the modification application would be more properly described as:

- 50 - abandonment of the previously approved agricultural shed;
- construction instead of 20 shipping containers;
- a change in type of development from rural shed to storage sheds (with 'bulk storage' being prohibited in the zone);
- relocation of the development approximately 50m to the east to a site which was expressly rejected in the original application;
- 55 - approximate doubling of earthworks and retaining walls.

The modification application was exhibited with six objections being received.

5 On 24 February 2012 Council refused the application under delegated authority on the ground that the development as proposed would not be substantially the same as the development as was originally approved. That is, staff determined that the application was not a valid s96 Application and therefore Council had no power to approve the application.

10 It was unnecessary for Council to give reasons for refusal going to the merit of the application because the matter did not satisfy the pre-requisite legal test. However, there are also a number of merit-based reasons for refusal which would apply, if the legal test could be satisfied.

Attached at Annexure 12(c) is a copy of the s96 Evaluation Report.

15 On 17 April 2012 the Applicant lodged a s82A Review application with Council. The s82A Review application will be reported to Council for determination, given that the original application was determined at Executive Manager level. At the time of preparing this report, however, it is not known when the s82A Review application will be able to be completed for reporting to Council, although that it is likely to occur before the due date for any Conciliation Conference or Hearing in the appeal proceedings. In any event, the LEC appeal will continue notwithstanding the s82A
20 Review application remains undetermined.

25 Ideally, given that the applicant had until August 2012 to lodge their appeal, they would have first lodged the s82A application with Council and waited for its determination before lodging the appeal. Instead the applicant elected to lodge both the appeal and the s82A Review application at the same time which means both the application and the appeal will now continue concurrently.

The Appeal

30 The Class 1 Land and Environment Court appeal against the refusal of 10.2009.427.2 was filed with the Court on 20 April 2012 and served on Council on 26 April 2012. The first telephone directions hearing is listed for 28 May 2012.

35 As this is a Class 1 appeal, the Court will stand in the Council's shoes in assessing the application 'from scratch' and will need to do so against the planning and environmental laws prevailing at the time of determination (ie when the Court determines the application not when Council did).

40 A new issue may have arisen since Council's refusal in February 2012 as a result of the Commonwealth Government's listing of koalas as a vulnerable species in NSW which occurred in late April 2012. Council's GIS records indicate that an area immediately adjacent to the proposed amended development site is mapped as 'tertiary koala habitat'. It will now be a matter for the Applicant to review the application against the requirements arising under the Commonwealth Environment Protection and Biodiversity Conservation (EPBC) Act 1999 and either submit new supporting information on this issue or satisfy itself that no new information is required.

45 Council will need to file its Statement of Facts and Contentions by 22/05/2012 or a later date set by the Court, depending on what time the Applicant needs to consider the implications arising from the EPBC declaration. Work on the draft Statement had not commenced at the time of preparation for this report but it is likely that the Contentions will include, subject to legal advice, both points of law as well as merit based issues for example:
50

1. that the application is not a valid s96 application, ie that neither the Court nor the Council has power to approve the application;
- 55 2. that the development as proposed by the application should not be characterised as a 'farm storage shed' but more properly characterised as 'bulk storage' which is prohibited in the zone, or an industrial/commercial activity;

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3. that the property is zoned partly 1(ah) (General Rural)(hatched) and partly 1(c1) (Small Holdings) zones, and the development as proposed is inconsistent with the objectives of the zones and the permissible land use within the zones;
- 5 4. that insufficient information has been provided to enable assessment of the impacts of the proposed development, particularly the proposed development as it should be more properly characterised as a bulk storage facility or industrial/commercial activity;
- 10 5. that the application should be refused on its merits, given the unsuitability of the proposed development for the stated purpose and the potential impacts of the development as proposed to be amended; etc.

15 Council staff will be able to give evidence in the proceedings. It is possible that expert opinion, for example from an officer from the Department of Primary Industries or an industry expert, as to the unsuitable nature of the proposed development for the stated agricultural purpose may be obtained in addition to staff evidence.

Council's options in this matter include:

- 20 1. Defending the appeal.

25 With this option Council would instruct solicitors. It is likely that the matter would be listed for a s34 Conciliation Conference prior to a hearing. It is possible that the assistance of a Commissioner of the Court, which is usually given at s34 Conferences, that the application could end up being modified (eg to deal with earthworks only) in which case a settlement may be possible and/or the number of contentions might be significantly reduced. It is unlikely that an agreement on the entire application would be able to be reached, unless the applicant was willing to substantially alter their proposal, because of the points of law regarding the validity of the application. If the application were amended at conciliation, the recommendation would be broad enough to allow an agreement to then be entered if the merits of the amended application warranted that.

35 At the s34 Conciliation Conference, if an agreement has not been reached, if both parties agree it is possible for the matter to proceed directly to determination and again, the recommendation would be sufficient to allow this to occur. Agreeing to proceed straight to arbitration would normally occur only if all evidence was already available for the Commissioner at the Conference.

40 After any s34 Conference, if the matter has not proceeded to arbitration and an agreement could not be reached, the matter would be listed for hearing and Council staff and the Applicants' consultant experts would be asked to prepare evidence jointly.

45 People who lodged objections to the application would be advised of the hearing and given an opportunity to appear before and make their submission to the Court if they want to. Assuming that some of the objectors would want to appear before the Court, it is likely that the hearing would take two days, however, that may depend on the number and type of contentions the applicants raise.

- 50 2. Attempting to finalise via Consent Orders (may not be an available option – would need to be subject of legal advice).

55 The application is not considered to be a valid s96(1A) modification application and if Council were of a mind to considering attempting to finalise the application (as filed, that is without any changes to the application) by consent orders, Council would first need to get legal advice on whether this is in fact an option for Council, for example:

- (a) If the proposed changes would result in development that was not substantially the same development or development with other than minimal impacts, Council (and indeed the Court) would not have the power to approve the proposed changes and therefore would have no power to enter into consent orders.
- 5 (b) Whether new or additional information is required, for example in relation to the adjacent mapped 'tertiary koala habitat' vegetation and/or any other merit issues, before the required assessments under s79C and s96 of the Environmental Planning and Assessment Act can be conducted to the extent required to give Council the power to approve the applications as currently submitted.

10

Financial Implications

An estimate of legal costs of defending the appeal had not been obtained prior to preparation of this report. It is likely, based on recent class 1 appeal experience and assuming a 2 day hearing with a 1 day s34 Conciliation Conference, that the legal costs would be in the order of \$25,000 - \$30,000 and expert witness fees (if it is considered and an agricultural expert is required) could be in the order of say \$5,000.

15

Statutory and Policy Compliance Implications

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This appeal will involve points of law going to the issue of validity of the application and characterisation of the development and therefore it is possible that the outcome of the matter could have precedent or policy implications for Council. However, it is not possible to try to predict what they might be at this stage.

25

Section 96 of the Environmental Planning and Assessment Act applies and relevant extracts are reproduced as follows:

30

(1) ...

30

(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant ...modify the consent if:

35

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
- (c) it has notified the application in accordance with:
- 40 (i) the regulations, if the regulations so require, or
- (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- 45 (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

40

45

.....

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development the subject of the application. ...

50

Section 79C of the Environmental Planning and Assessment Act (evaluation criteria) is of course also relevant.

SOCIETY AND CULTURE - EXECUTIVE MANAGER'S REPORT

Report No. 13.13. Native Title Issues in Byron Shire

Executive Manager: Society and Culture

5 **File No:** ADM300300 #1204873

Principal Activity: Community Services

Summary: The National Native Title Tribunal has provided Council with information about three active Native Title claims in Byron Shire. This report seeks to clarify Council's obligations to, and relationships with, recognised Native Title claimants and other legitimate Aboriginal stakeholder groups.

RECOMMENDATION:

10

1. That Council note that there are three active Native Title claims in Byron Shire recognised by the Native Title Tribunal, involving:

15

- a) the Byron Bay Bundjalung (Arakwal) People;
- b) the Widjabul Aboriginal People;
- c) the Numbahjing Clan within the Bundjalung Nation.

20

2. That Council continue to recognise and formally engage with the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) as Traditional Owners and as the Aboriginal stakeholder with the largest parcel of land claimed under Native Title within the Byron Shire.

25

3. That Council also seek to acknowledge the other recognised Native Title Claimants in the Shire (being the Widjabul Aboriginal People and the Numbahjing Clan within the Bundjalung Nation) and attempt to build partnerships with them as appropriate. This process could include:

30

- a) inviting relevant recognised Native Title Claimants to participate in ceremonies and events held within their lands;
- b) inviting relevant recognised Native Title Claimants to participate in consultation regarding development and planning relevant to their land claims;
- c) acknowledging all recognised Native Title Claimants on Council's website, signage and stationery, as being part of the wider Bundjalung Nation;
- d) establishing formalised agreements, such as Memoranda of Understanding, between Council and recognised Native Title Claimants where relevant and appropriate.

35

40

4. That Council seek advice from the National Native Title Tribunal and/or other expert sources on the specific obligations flowing from the Native Title claims in Byron Shire.

5. That Council continue to build relationships with the Local Aboriginal Land Councils (LALC) (being the Tweed Byron LALC and the Jali LALC) as appropriate.

45 **Attachments:**

- Native Title Boundaries Map – Byron Shire #1174459 [1 page]..... **Annexure 5**

Report

5 The National Native Title Tribunal has provided information on three active Native Title claims within the Byron Shire boundaries. This report provides Council with information and options for establishing relationships with these recognised Native Title claimants and other legitimate Aboriginal stakeholders within the Shire.

Native Title

10 The Native Title Act 1993 was enacted as a result of the decision made by the High Court of Australia in Mabo v Queensland (No.2) 1992. Native Title is the recognition by Australian law that Indigenous people have rights and interests to their land that come from their traditional laws and customs. The Mabo No.2 decision rejected the notion of "Terra Nullius"; that is, that Australia was not occupied before European colonisation. The Mabo Judgement stated in law that Indigenous
15 Australians have, due to prior occupation, ownership of land where Native Title has not been extinguished. In addition to confirming these rights, the Native Title Act seeks to establish a legal regime which respects Native Title rights.

20 Local councils need to have a good understanding of the processes involved in Native Title legislation. As government bodies, local councils are custodians of substantial tracts of land and carry out functions on behalf of the wider community, sometimes in areas where Native Title exists or may exist. Therefore, Native Title matters should be addressed in councils' strategic, corporate and operational decision-making in the same way that local councils address environment and heritage functions.

25

Native Title Boundaries in Byron Shire

The National Native Title Tribunal has provided information in regards to three active Native Title claims in Byron Shire. These are:

30

1. N6020/10 – Byron Bay Bundjalung (Arakwal) People
2. N6019/2001 – Widjabul Aboriginal People
3. NSD1844/08 – Numbahjing Clan within the Bundjalung Nation.

35 Council has been briefed on these matters in the past.

Annexure 13 contains a map from the National Native Title Tribunal which outlines the boundaries of the Native Title claims in Byron Shire. The Byron Bay Bundjalung (Arakwal) People and the Widjabul People share an agreed boundary in the western side of the shire. The Numbahjing Clan within the Bundjalung Nation and the Byron Bay Bundjalung (Arakwal) People share a boundary in
40 the southern part of the shire.

The three Native Title claimants listed above cover land up to the Brunswick River - north of the river there may also be other legitimate interest groups or stakeholders. However, the National
45 Native Title Tribunal has not advised of any other current claims.

Widjabul People – Native Title Claim

50 Council has recently been advised that mediation has ceased in relation to the Widjabul People's Native Title Claim. Council is a party to this claim, which covers an area of about 1,617 km². The claim crosses the boundaries of Ballina, Byron, Tweed, Richmond Valley, Kyogle and Lismore Councils. The application does not include all land and waters within the boundary of the claim. For example, it excludes private freehold land and other areas where native title has been
55 extinguished. The Federal Court has advised that it will now be proceeding to orders.

5 Council has advised the Court that it remains interested in the progress of the claim, and has requested that it continue to receive notifications. Council has reserved the right to prepare representation in relation to its interests within the claim area should the proposed orders impact on Council's infrastructure or assets. Council staff have also contacted Rous Water for clarification of that organisation's interests and approach to the Widjabul People's claim.

10 Should the Widjabul People's Native Title Claim be recognised by the Court, it may be necessary for Council to consider entering a Memorandum of Understanding or Indigenous Land Use Agreement with the Widjabul People, as it has with the Byron Bay Bundjalung (Arakwal) People.

Relationship between Byron Shire Council and the Byron Bay Bundjalung (Arakwal) People

15 The Byron Bay Bundjalung (Arakwal) People have undertaken all of the legal steps necessary, via the Native Title process, to be recognised as Traditional Owners. It is important to recognise the difference between those Native Title Claimants who are still engaged in the early stages of the legal process and those such as the Arakwal, who have progressed beyond the 'positive determination' stage, and therefore have been officially and legally recognised as Traditional Owners.

20 Byron Shire Council's commitment to the Byron Bay Bundjalung (Arakwal) People as Traditional Owners is formalised through the 1998 Heads of Agreement, and through the consultations on Indigenous Land Use Agreements 1, 2 and 3. The achievements from this relationship have been remarkable and are often cited as an example of how government and Traditional Owners can work together. The outcomes for Council, the Arakwal People, and the wider community have been
25 considerable.

30 Byron Shire Council has demonstrated its ongoing commitment to the Byron Bay Bundjalung (Arakwal) People through: the current review of the 1998 Heads of Agreement; its intention to create a Memorandum of Understanding in 2012; the recently drafted Statement of Commitment; and through Council resolutions to include acknowledgment of the Shire's Traditional Owners on Council's stationery, signage and website.

35 It is important that Council continues to place importance on the achievements that have been made between Council and the Arakwal People. The Arakwal People will continue to be Council's major Aboriginal stakeholder within the Byron Shire as they are the Traditional Owners with the largest parcel of land under claim in the Shire. There is no need for this relationship to diminish as Council seeks to establish relationships with other legitimate Aboriginal stakeholders.

Land Councils and the NSW Land Rights Act 1983

40 The NSW Land Rights Act 1983 sets out the rights and responsibilities for Local and Regional Aboriginal Land Councils to acquire and manage Crown land; and for the provision of community benefit schemes by or on behalf of those Land Councils.

45 There are two Aboriginal Land Council boundaries in Byron Shire: the Tweed Byron Local Aboriginal Land Council (LALC) situated in Tweed Heads and the Jali LALC situated in Ballina. The Tweed Byron LALC owns parcels of land north of the Brunswick River. Jali LALC has holdings in the south of the Shire. Both Land Councils have a right to be informed in the planning, protection and preservation of cultural sites and areas under the NSW Aboriginal Land Rights Act.
50

The Tweed Byron LALC has recently approached Council to increase its engagement, and it is understood that the LALC could also potentially assist with the delivery of Indigenous services and programs in the Byron Shire. Staff have sought further clarity from the Tweed Byron LALC on its needs and interests, and these will be reported to Council as appropriate when received.
55

Implications

5 Council has a responsibility to Traditional Owners within the Shire and to not recognise legitimate stakeholders is potentially divisive to the Aboriginal community and may also be considered offensive and/or unlawful. There are many implications for Council flowing from the Native Title Act and Land Rights Act. Council may need to obtain assurance as to its legal obligations under the relevant legislation, and to ensure that the appropriate processes are in place to facilitate these obligations. There are likely to be implications across all Council divisions.

10 For example, management has recently taken steps to add a native title layer to its GIS, which shows the boundaries of native title claims in the Shire, so that officers investigating developments/works throughout the Shire have an additional tool to consider whether to approach Native Title claimants about Aboriginal cultural heritage issues.

15 Aboriginal Heads of Agreement PRG

20 Formal consultation between Council and Traditional Owners is currently centred in the Aboriginal Heads of Agreement Project Reference Group (PRG). This sets out Council's commitment to the Bundjalung of Byron Bay Aboriginal People (Arakwal) through the monitoring of the 1998 Heads of Agreement.

25 Management considers that it is appropriate that this PRG continues to be restricted to the Arakwal People, as the PRG's objectives are focused on review of the 1998 Agreement between Council and the Arakwal People; and on the development of the terms of a proposed 2012 Memorandum of Understanding (MOU) with the Arakwal People. Management has been advised that it would not be culturally appropriate for other Aboriginal stakeholders to be involved in this PRG at this time.

Relationships with other Native Title Claimants

30 If the MOU-development process with the Arakwal in 2012 proves to be successful, Council may wish to consider entering similar MOUs with other recognised Native Title Claimants in the Shire.

35 These MOUs could set out the objectives for the relationships, as well as arrangements for the future monitoring and reporting on them. This could include, for example, the establishment of further Project Reference Groups or Consultative Committees to oversee them. The recognised claimants in the Shire are at different stages of organisation, and have different interests.

40 Council also needs to be clear about its role in engaging with the different groups. It is the role of the Federal Court and the National Native Title Tribunal to make decisions about the legitimacy of different claims and interests. It is not Council's role to mediate in this.

45 Management does not consider that it is appropriate or necessary to have a multi-stakeholder Committee representing different Aboriginal groups at this time. These relationships can be appropriately developed through engagement at a political level with the Mayor and Councillors, and at the operational level with all relevant staff, including the Aboriginal Project Officer.

In light of this information and advice, Council may need to re-consider some outstanding resolutions relating to the recognition of Aboriginal heritage in Byron Shire. For example:

- 50
1. instead of recognising just the Arakwal People on stationery, Council could reference the broader 'Bundjalung Country';
 2. Council's website could also contain a page acknowledging the different custodian groups;
 3. signage could be generic in some places 'Welcome to Bundjalung Country' and specific in places special to the different groups (ie the Ti-tree lakes, Byron Lighthouse etc).

Staff will continue to seek and build relationships with Native Title Claimants in the Shire, and will continue to report to Council as the relationships develop, and should the need for the engagement require formalisation. While Council's involvement/engagement may vary, recognition and respect of its Native Title obligations continues to be important.

5

Financial Implications

Nil from this report

10 **Statutory and Policy Compliance Implications**

1998 Heads of Agreement between Byron Shire Council and the Arakwal People
Engaging with Local Aboriginal Communities (A Resource Kit for Local Government in NSW) 2007
Local Government Act 1993

15 Native Title Act 1993

Land Rights Act 1983

WATER AND RECYCLING - EXECUTIVE MANAGER'S REPORT

Report No. 13.14. Laboratory Building Future Options

5 **Executive Manager:** Water and Recycling
File No: ENG500000 #1197240

Principal Activity: Water and Recycling

Summary: Council's Environmental Laboratory ceased operation at the end of October 2011 and laboratory services have since been procured from Tweed Shire Council until a tender for services is advertised latter this year.

The Laboratory is owned by the sewer fund and is located at Lot 6 DP 812667 Centennial Circuit, Byron Bay and has a land area of approximately 999 squ metres. The property adjoins Lot 2 DP 1004514 Bayshore Drive, which is the large 2.9 hectare industrial zoned lot owned by Council that is currently the subject of assessment for future options (including affordable housing).

The purpose of this report is to seek direction from Council on the future use of the laboratory property.

RECOMMENDATION:

10 **That Council lease the laboratory property located at Lot 6 DP 812667 Centennial Circuit, Byron Bay for a twelve month period.**

15 **Attachments:**

- Laboratory plan #1226090 [1 page] **Annexure 10(a)**
- **CONFIDENTIAL** Valuation #1229011 [41 pages]..... **Annexure 10(b)**

Report

In August 2011, Council considered a report on the future of Environmental Laboratory operations and resolved:

5

Res 11-639

10

1. *That Council close the Environmental Laboratory at Centennial Drive Byron Bay and delegate to the General Manager to make all necessary arrangements including any associated staff redundancies.*
2. *That Council receive a further report regarding options for the assets associated with the Environmental Laboratory and steps to be taken to procure laboratory services in the future.*

15

The Laboratory ceased operation at the end of October and laboratory services have been procured from Tweed Shire Council until a tender for services is advertised latter this year.

20

The Laboratory is owned by the sewer fund and is located at Lot 6 DP 812667 Centennial Circuit, Byron Bay and has a land area of approximately 999 squ metres. The property adjoins Lot 2 DP 1004514 Bayshore Drive, which is the large 2.9 hectare industrial zoned lot owned by Council that is currently the subject of assessment for future options (including affordable housing).

25

The Laboratory building is approximately 320 squ metres and was purpose built for laboratory operations. A plan of the building is included at annexure 10(a). The building layout and appointments are sufficiently versatile to be suitable for a range of small businesses.

Options

30

A number of options have open to Council regarding the future of the Laboratory property and these include:

- 1) Use of the property by Council
- 2) Sale of the property
- 3) Lease of the property

35

Consideration was given to the potential relocation to this site of water and sewer operational staff currently occupying the office space behind the Bayshore Drive depot training rooms. Such a move would free the training room offices for other uses but there are disadvantages associated with the cost of relocation and also the dislocation from the workshop activities which must be continued at the depot.

40

The property could be sold and the proceeds used to pay down loans associated with the sewer fund major capital works program. A property valuation has been obtained and is provided at confidential annexure 10(b). Property prices have fallen and given the property is debt free; it is not an optimal time to sell this property.

45

The property could be leased and the payments used to offset ongoing maintenance costs. A property lease valuation has been obtained and is provided at confidential annexure 10(b). Lease of the property would allow time for Council to consider what, if any, strategic advantages should be exploited in association with the future use options for the adjoining Council property (Lot 2 DP 1004514 Bayshore Drive).

50

Financial Implications

55

A formal property valuation for sale or lease has been obtained and is provided at confidential annexure 10(b).

Sale of the property would assist Council in paying down sewer fund loans and reducing the debt servicing charges which are currently \$4,168,600 per annum.

Statutory and Policy Compliance Implications

- 5
- 377 General power of the council to delegate**
- (1) A council may, by resolution, delegate to the general manager or any other person or body (not including another employee of the council) any of the functions of the council, other than the following:
- 10 (h) the compulsory acquisition, purchase, sale, exchange or surrender of any land or other property (but not including the sale of items of plant or equipment),

COMMUNITY INFRASTRUCTURE - COMMITTEE REPORT
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Report No. 14.1. Report of the Access Advisory Committee Meeting 19 April 2012

Executive Manager: Community Infrastructure

File No: ENG220200 #1224907

Principal Activity: Infrastructure Planning

Summary: This report provides the Unconfirmed Report of the Access Advisory Committee (AAC) meeting held on 19 April 2012.

Council's adoption of the recommendations from the meeting, or management's recommendations, will allow for the project to be progressed.

RECOMMENDATION:

1. That Council note the unconfirmed minutes (Annexure 7(a) #1225098) of the Access Advisory Committee (AAC) meeting held on 19 April 2012.

2. That in relation to Report No. 4.1 – Proposed Pedestrian Improvements at the intersection of Jonson and Bay Streets, Council adopt:

Committee Recommendation AAC: 4.1.2

Options for reconfiguration of the parking spaces to the immediate east of the Byron Bay swimming pool be developed, with particular consideration to improved parking for people with a disability.

3. That in relation to Report No. 4.4 – Access to the CWA Hall in Brunswick Heads, Council adopt:

Committee Recommendation AAC: 4.4.1

1. Council receive a report on options for improving the safety of the access in the road reserve adjacent to the CWA Hall.

2. Council seek advice from the CWA committee about wheel chair access at the main entrance to the hall.

4. That in relation to Agenda Item 5 – Other Business, Council adopt:

Committee Recommendation AAC: 5.1.1

That Mr Max Brown be appointed to the Access Advisory Committee as a community member and that the constitution be amended accordingly.

5. That in relation to Agenda Item 5 Other Business, Council adopt:

Committee Recommendation AAC: 5.2.1

- 5 1. **Where Building Code of Australia (BCA) access requirements are not strictly satisfied in applications before Council or where alternative access solutions are being proposed that advice from the Access Advisory Committee be sought.**

- 10 2. **Further advice be provided to the Committee from Council’s Planning department regarding proactive provision of information to developers as to how they will consider broader access issues, e.g. integration into surrounding streetscapes.**

Attachments:

- 15 • Unconfirmed report of Access Advisory Committee meeting 19 April 2012 #1225098 [3 pages].....**Annexure 7(a)**
- Access Advisory Committee Agenda #1225131 [18 pages]..... **Annexure 7(b)**

20 *Annexure 7(b) has been provided on the Councillor’s Agenda CD only; an electronic copy can be viewed on Council’s website.*

Report

This report provides the recommendations of the Access Advisory Committee meeting held on 19 April 2012 for determination by Council.

5

Committee Recommendation AAC 4.1.1

That the Access Advisory Committee endorse the proposed intersection improvements at Jonson and Bay Streets, Byron Bay as detailed in Council Plan #2065.

10

Management comment

Management supports this recommendation and notes that it has already been dealt with by Council as the proposed improvements were reported to Council at its Ordinary Meeting on 26 April 2012, via the Local Traffic Committee, which resulted in resolution **12-348**.

15

Res 12-348 That Council endorse the proposal, depicted in Council Design Plan No. 2065 for potential improvements to the intersection of Bay Street and Jonson Street, Byron Bay, inclusive of the removal of the Give Way on Bay Street immediately to the north-east of the Jonson Street intersection and seek funding information or cost sharing possibilities.

20

Committee Recommendation AAC 4.1.2

The Access Advisory Committee recommend to Council that options for reconfiguration of the parking spaces to the immediate east of the Byron Bay swimming pool be developed, with particular consideration to improved parking for people with a disability.

25

Management comment

Management supports this recommendation.

30

Committee Recommendation AAC 4.2.1

That the Access Advisory Committee note the planned relocation of the Telstra phone booths in Burringbar Street and Stuart Street, Mullumbimby.

35

Management comment

Management supports this recommendation and notes that it has already been dealt with by Council as it has been reported to Council at its Ordinary Meeting held 22 March 2012, which resulted in resolution **12-152**.

40

Res 12-152 That in relation to Report 4.5 - Use of Tactile Ground Surface Indicators (TGSI), Council adopt:

45

Committee Recommendation AAC 4.5.1:

That the Committee recommend to Council that the Access Advisory Committee develop a Draft Policy on the use of Tactile Ground Surface Indicators (TGSI) across the shire for consideration by Council and that the following be clarified to inform such a policy.

50

- a) Seek advice from Telstra regarding their policies and responsibilities.
- b) Contact RMS for advice on their rationale and policy for use of TGSI.
- c) Contact Christine Minkov, Lismore City Council, for advice on TGSI issues.
- d) Contact Jessica Zammit of Blind Citizens Australia regarding TGSI issues.

55

Committee Recommendation AAC 4.5.2:

That staff contact NOROC Councils in relation to what policies they share.

5 Committee Recommendation AAC 4.5.3:

The Committee recommend that Council write to Telstra advising of the hazards associated with the Telstra cabinets on Burringbar and Stuart Streets, Mullumbimby, and request that they be moved to more suitable locations as advised by Council so as to reduce hazards effecting vision impaired people.

10

Committee Recommendation AAC 4.4.1

The Access Advisory Committee recommend that:

15

1. Council receive a report on options for improving the safety of the access in the road reserve adjacent to the CWA Hall.
2. Council seek advice from the CWA committee about wheel chair access at the main entrance to the hall.

20

Management comment

Management supports this recommendation.

25 Committee Recommendation AAC 5.1.1

The Access Advisory Committee recommend to Council that Max Brown be appointed to the Access Advisory Committee as a community member and that the constitution be amended accordingly.

30

Management comment

Management supports this recommendation.

35 Committee Recommendation AAC 5.2.1

The Access Advisory Committee recommend to Council that:

40

1. Where Building Code of Australia (BCA) access requirements are not strictly satisfied in applications before Council or where alternative access solutions are being proposed that advice from the Access Advisory Committee be sought.
2. Further advice be sought from Council's Planning department regarding proactive provision of information to developers as to how they will consider broader access issues, e.g. integration into surrounding streetscapes.

45

Management comment

Management supports this recommendation and clarifies that advice sought is to be provided back to the Access Advisory Committee.

50

Financial Implications

As per the reports listed within the Access Advisory Committee Meeting Agenda of 19 April 2012 (Annexure 7(b)).

55

Statutory and Policy Compliance Implications

As per the reports listed within the Access Advisory Committee Meeting Agenda of 19 April 2012 (Annexure 7(b)).

SOCIETY AND CULTURE - COMMITTEE REPORT

Report No. 14.2. Report of the Tourism Advisory Committee Meeting held on 13 April 2012

5 **Executive Manager:** Society and Culture
File No: ADM900020 #1221240

Principal Activity: Economic Development

Summary: This report provides the minutes of the Tourism Advisory Committee (TAC) meeting held on 13 April 2012.

It includes several recommendations for Council adoption, including the extension of the timeframe for the Byron Shire Identity/Brand Project Reference Group (PRG); the establishment of a Visitor Services PRG to consider the draft reports on the Byron Shire and Regional Visitor Services Strategies; and the re-commencement of the Tourism Levy and Governance Framework project.

RECOMMENDATION:

- 10
1. That Council note the minutes of the Tourism Advisory Committee (TAC) meeting held on 13 April 2012 (#1213133).
 - 15 2. That, in relation to Council resolutions 12-121 and 12-120, Council:
 - A. not adopt TAC recommendations 4.3.1.1 and 4.3.1.2 but adopt instead:
Committee Recommendation TAC 4.3.1
20 1. That Council note the recommendations of the Tourism Advisory Committee and resolve to:
 - 25 (a) make as much of Annexure 2(a) of its Agenda of 2 February 2012 (#1190736) public as would be permissible under the Government Information (Public Access) Act 2009; and
 - (b) maintain confidentiality of Annexure 2(b) of its Agenda 2 February 2012 (#1190728).
 - 30 B. adopt the following TAC recommendation with references to the Committee removed where necessary:
Committee Recommendation TAC 4.3.2
35 That, in recognition of Resolution No. 12-120, the timeframe for the Identity/Brand Project Reference Group be extended to September 2012 to allow development of recommendations for identity implementation and possible application.
 - 40 3. That, in relation to Report No. 5.1 – Byron Shire and Northern Rivers Regional Visitor Services Strategies, Council note Committee Recommendation TAC 5.1.1:

Committee Recommendation TAC 5.1.1

- 5 1. That a Visitor Services Project Reference Group be created, to include discussion of the outcomes of the draft Byron Shire Visitor Services Strategy report, to meet for the first time from 10am-1.00pm on 3 May.
- 10 2. That the Tourism Advisory Committee note that the Stafford Group report (Byron Shire Visitor Services Strategy) is to be sent to Byron United, Byron Bay Visitors Centre, the Bangalow, Mullumbimby and Brunswick Heads Chambers of Commerce, potential partners and stakeholders (National Parks, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), Cape Byron Reserve Trust, Marine Parks) and the Byron Community Centre for comment and any feedback for the purpose of finalising the report.
- 15 4. That, in relation to the new timeline for the Tourism Levy and Governance Framework project, Council adopt the following TAC recommendation with references to the Committee removed where necessary:

Committee Recommendation TAC 6.1.1

20 That, noting resolution 11-938, the General Manager appoint a consultant by July 2012 (consistent with delegations) to undertake community and business consultation in regards to a possible tourism levy.

25 ***Attachments:***

- Report of the Tourism Advisory Committee meeting 13 April 2012 #1213133 [3 pages] **Annexure 4(a)**
- 30 • Tourism Advisory Committee (TAC) Agenda, including annexures, for meeting 13 April 2012 #1210997 [156 pages] **Annexure 4(b)**
- New Timeline for Tourism Levy and Governance Framework #1222031 [1 page]..... **Annexure 4(c)**

Note: Annexure 4(b) has been provided on the Councillors' CD only and is available on Council's website.

Report

5 This report provides the minutes of the Tourism Advisory Committee (TAC) meeting of 13 April 2012 for consideration by Council. The report from the meeting is at Annexure 4(a) and the agenda of the meeting is attached at Annexure 4(b).

10 An electronic and hard copy of the agenda was distributed to all Councillors on 29 March 2012, and is also available on Council's website. The draft Stafford Group report on the Byron Shire Visitor Services Strategy (Annexure 1a of the 13 April 2012 agenda) has not been provided again in hard copy as it is 156 pages, but is available on the Councillors' CD, and also via Council's website. The report is still a draft under discussion by the TAC, and is not intended to be considered by Council for adoption at this meeting.

15 At the meeting of 13 April 2012, the TAC discussed a number of issues including: an update on the activities of the Volunteer Tourism and Visitor Trails Development Project Reference Groups; next steps for the Byron Shire identity project; the draft Byron Shire Visitor Services Strategy and the draft Northern Rivers Regional Visitor Services Strategy. The main discussion of the meeting surrounded the Byron Shire Visitor Services Strategy.

20 Some of the Committee's recommendations were procedural and do not require adoption by Council, with the exception of Committee Recommendations below.

Byron Shire Identity

25 Council considered submissions on the proposed Byron Shire identity at its meeting on 1 March 2012. Council supported the proposed identity (Res **12-120**) and referred the project back to the TAC for recommendations as to its implementation and possible application.

30 In considering the submissions, which were attached as confidential annexures, Council also resolved (Res 12-121) that the TAC be asked to review the confidential nature of the annexures, and recommend to Council the TAC's proposed status for these documents.

35 The Tourism Advisory Committee considered the resolutions of Council **12-121** and **12-120** and made the following recommendations respectively:

Committee Recommendation TAC 4.3.1

- 40 1. That the Tourism Advisory Committee recommends to Council that the Tourism Advisory Committee acknowledges the desirability of transparency, whenever possible, and recommends to Council to publish Annexure 2(a) (#1190736), with names and identifying personal details removed, of its Agenda of 2 February 2012.
- 45 2. That the Tourism Advisory Committee recommends to Council that, due to the retrospective nature of the request, it should maintain the confidentiality of Annexure 2(b) (#1190728) of its Agenda of 2 February 2012.

Management Comments:

50 The Committee considered that different information had been given to the submitters / respondents in Annexures 2(a) and 2(b), with those in Annexure 2(a) participating via a public exhibition process, where it was clear that information submitted may become public; whereas those in Annexure 2(b) had engaged in discussions with TAC members, which were later summarised, and were therefore possibly not aware and/or did not consent to the results being made public. For this reason, TAC members recommended that Annexure 2(b) remain
55 confidential.

It is not possible to amend the Agenda once published and Council must comply with the requirements of the Government Information (Public Access) Act. A modified version of TAC recommendation 4.3.1 is recommended which would meet the intent of the TAC of enabling production of copies of Annexure 2(a) of its Agenda of 2 February 2012 (#1190736) and maintaining confidentiality in Annexure 2b of its Agenda of 2 February 2012 (#1190728) while still ensuring that Council is compliant with its statutory obligations.

Committee Recommendation TAC 4.3.2

10 That the Tourism Advisory Committee recommends to Council that, in recognition of Resolution No. 12-120, the timeframe for the Identity/Brand Project Reference Group be extended to September 2012 to allow development of recommendations for identity implementation and possible application.

15 **Management Comments:**

This recommendation is supported.

Visitor Services Strategies

20 The Tourism Advisory Committee received presentations on two draft reports from the consultants appointed to develop the Byron Shire Visitor Services Strategy (The Stafford Group) and the Northern Rivers Regional Visitor Services Strategy (Aurora Research) respectively.

25 The following recommendations were made to Council in respect to these strategies:

Committee Recommendation TAC 5.1.1

- 30 1. That a Visitor Services Project Reference Group be created, to include discussion of the outcomes of the draft Byron Shire Visitor Services Strategy report, to meet for the first time from 10am-1.00pm on 3 May.
- 35 2. That the Tourism Advisory Committee note that the Stafford Group report (Byron Visitor Services Strategy) is to be sent to Byron United, Byron Bay Visitors Centre, the Bangalow, Mullumbimby and Brunswick Heads Chambers of Commerce, potential partners and stakeholders (National Parks, Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), Cape Byron Reserve Trust, Marine Parks) and the Byron Community Centre for comment and any feedback for the purpose of finalising the report.

40 **Management Comments:**

The recommendation is supported. As it is procedural Council only need note the recommendation.

45 The Visitor Services PRG will consider the final reports of both the Byron Shire and the Northern Rivers Regional Services Strategies and make recommendations to the Tourism Advisory Committee, which will subsequently be reported to Council for consideration / adoption.

Tourism Levy and Governance Framework PRG

50 In 2011, the Strategic Planning Committee noted that the Independent Pricing and Regulatory Tribunal had brought forward the dates for making an application for a special rate for 2012/13, reducing the time available for community consultation, and resolved under delegated authority (Res **11-938**) that consultation be deferred to 2012, with the intention of making an application for the 2013/14 financial year.

55

A new timeline for the Tourism Levy and Governance Framework project has been created and is attached at Annexure 4(c). In order to meet the timeframes outlined in the timeline, the Tourism Advisory Committee made the following recommendation to Council at its 13 April 2012 meeting:

5 **Committee Recommendation TAC 6.1.1**

That the Tourism Advisory Committee recommends to Council that, noting resolution 11-938, the General Manager appoint a consultant by July 2012 (consistent with delegations) to undertake community and business consultation in regards to a possible tourism levy.

10

Management Comments:

The recommendation can be supported.

15 As per the new timeline, the intention is that the Tourism Levy and Governance Framework PRG will meet during May to review the currency and validity of the documentation prepared during 2011, and a consultant will be appointed by July/August to plan and facilitate community consultation . As noted in the timeline at Annexure 4c, consultation would be likely to occur in late September/early October 2012.

20

Financial Implications

Nil associated with this report. A budget of \$5,000 was allocated in the endorsed 11/12 budget (and has been carried over into the draft 12/13 budget) for the tourism and levy governance framework project.

25

Statutory and Policy Compliance Implications

Byron Shire Council Tourism Management Plan 2008 – 2018.
Government Information (Public Access) Act 2009

30

CORPORATE MANAGEMENT - CONFIDENTIAL REPORT

Report No. 15.1. **CONFIDENTIAL Byron Shire Council Holiday Parks Contract Management**

Executive Manager: Corporate Management

5 File No: BEN204000 #1226581

Principal Activity: Financial Services

Summary: Council at its Ordinary Meeting held on 11 August 2011 considered a report on the contract management of its Holiday Parks. Council subsequently resolved:

11-589 Resolved:

1. *"That Council extend the existing management contracts for Suffolk Park Holiday Park and First Sun Holiday Park under the same terms and conditions therein from the period 1 September 2011 to 31 May 2012 by mutual agreement with the existing Holiday Park Managers.*
2. *That Council by 31 May 2012, undertake a tender process for the operation of the Suffolk Park Holiday Park and First Sun Holiday Park on a combined basis, under a generic single management contract, and that this process be undertaken in accordance with the procurement process required by Section 55 of the Local Government Act 1993.*
3. *That the report of the closed part of the meeting remain confidential until 31 May 2012. This report is to seek Council approval in regard to the contract management of both Holiday Parks."*

The intent of this report is to seek further approval from Council in regards to the contract management of both Holiday Parks and to advise business related issues associated with the Holiday Parks.

RECOMMENDATION:

- 10 1. **That pursuant to Section 10A(2)(c) of the Local Government Act, 1993, Council resolve into Confidential Session to discuss the following report, namely Byron Shire Council Holiday Park Contract Management.**
- 15 2. **That the reasons for closing the meeting to the public to consider this item be that the report contains information that would, if disclosed, confer a commercial advantage on a person with whom the Council is conducting (or proposes to conduct) business.**
- 20 3. **That on balance it is considered that receipt and discussion of the matter in open Council would be contrary to the public interest, as disclosure of the confidential information could compromise the commercial position of the existing Holiday Park Managers, could adversely affect Council's ability to contract with the Holiday Park Managers or could affect Council's ability to attract competitive tenders in the event a future tender is invited.**