

From: [Mike Worrall](#)
To: [submissions](#)
Subject: Draft Coastal Zone Management Plan- Eastern Embayment
Date: Wednesday, 23 May 2018 4:36:22 PM
Attachments: [CZMP"18 Submission WBPA.docx](#)

Attention Chloe Dowsett,
On behalf of the Wategos Beach Protection Association I attach the
comments of our members.
Kind Regards,
Mike Worrall, Secretary

Submission from Wategos Beach Protection Association

In response to Byron Shire Council's Call for Submissions on the Draft Coastal Zone Management Plan 2018 (Eastern Embayment)

The Wategos Beach Protection Association is an incorporated, not-for-profit association and represents the consensus opinions of the owners of about 3/4 of the 80 properties in Wategos Beach.

The Association was formed in the late 1990's and its principal activities have been to act as a community interface with all relevant authorities:

- to protect and defend the general amenity of the area;
- to work for the protection and restoration of the beachfront and other community facilities within the area; and
- to seek advice and prepare submissions on development and planning issues affecting the Wategos Beach and the Cape Byron Headland area.

We welcome the opportunity to make this submission. It is prepared from that 'Wategos perspective' and is organised under three headings:

- the CZMP's general approach
- the beach itself
- access and infrastructure.

1. Comment on General Approach to the CZMP

We support and endorse the CZMP Vision 2100, which is to:

"manage Main Beach to Wategos Beach (including Little Wategos) to maintain a natural, undisturbed beach and dune system, minimise impacts to natural coastal processes, and retain a high standard of beach amenity and access".

However, beach erosion appears to be considered an emergency - with works and strategies identified and prioritised - only when it threatens to damage people or property. **The beach itself doesn't seem to be prioritised** when it comes to nominating specific high-risk beach erosion areas.

On this point, in particular, we believe that the CZMP should attach more weight to the conclusions of Council's 2016 community survey (summarised in Appendix 5 Table 1 of CZMP-EP). The survey defined the **most important**

features of Byron Bay, and the top 6 all focus on the beach and the foreshore reserves:

- going for a swim (79% of respondents rated it in their top 2 features)
- using the beach with family and friends or groups for exercise or relaxation (71%)
- using the beach alone (65%)
- going for a surf (62%)
- using the foreshore reserve for exercise (62%)
- using the foreshore reserve for picnics (57%)

2. The Beach at Wategos

The section describing the Eastern Embayment beaches (Appendix 6) mentions (at p.2):

"there are intermittent, inter-tidal rocky outcroppings south of The Pass and towards Clarkes Beach. It should be noted that the extent of these intermittent outcroppings varies depending on the volume of sand within the beach profile at any given time; for example they may only be apparent after a series of coastal erosion events. After severe storms, outcroppings of coffee rock may become visible at The Pass and Clarkes Beach."

However, it **fails to mention the extensive areas of beach at Wategos that are also intermittently eroded**, often down to bedrock (see attached photos).

Why do we think that this is an important point?

Two years ago there were proposals to implement so-called 'small-scale adaptive nourishment' in order to solve sand erosion problems at Belongil. This consisted of pumping beach-sand from Cosy Corner to Clarkes Beach, thereby reducing the amount of sand in the littoral drift passing Wategos and The Pass, but increasing the amount of sand in the littoral drift from Clarkes to Belongil.

It was euphemistically called "small scale", not because there was less sand to be moved than originally recommended by Council's expert consultants, but because it was using smaller equipment to move that sand (the original consultants had recommended dredging some of the massive amount of sand accumulating offshore in the Cape Byron Sand Lobe, not from the beach).

And it was called "adaptive" because they were unable to specify how much sand was to be moved: they would turn the pumps on when they wanted more sand at Belongil; and then off when it looked like there was going to be

enough; and then back on when more was needed; and so on. But nowhere was the likely impact on the beach at Wategos ever mentioned.

We therefore request that the CZMP-EP clearly identifies the intermittent erosion of the inter-tidal sections of Wategos beach, so that when authorities come to grapple with the problems at Belongil, they will not again overlook the fragility of the beach at Wategos and the extensive loss of public use caused by erosion that would be exacerbated by human intervention.



3. Beach Access and Marine Parade Infrastructure

Ignoring the Marine Parade Footpath at Wategos, which has now been completed, only a couple of the hazards/actions during extreme storm events referred to in the document are specific to Wategos:

- investigate and repair Marine Parade stormwater outlets, medium priority but unbudgeted; and
- investigate future risks of inundation at Marine Parade, low priority but unbudgeted.

However the report acknowledges that it did not audit the assets at risk in the Wategos precinct and noted that further investigation is warranted, particularly to **determine bedrock levels**, as this will determine the degree of risk that we face. For example, it says that our multiple beach access points are "ad-hoc and not sure if they go to bedrock". However we know that in most cases they don't, and therefore work is needed. The damage to the beach foreshore and danger to the public, by not properly constructing to bedrock at a recent and otherwise well-constructed stairway, is illustrated below.



There have been significant building construction projects along Marine Parade over the past few years, all of which would have had detailed geotechnical investigations. Therefore, we suggest that Council provides relevant information on sub-surface conditions to NPWS, which is responsible for the beach access structures, so that risks can be assessed and works designed. One of our members has suggested that retired BSC Engineer Mr Ian Cook would also hold some useful information on this issue.

Appendix 7 of the CZPM shows the 8 'official' beach access points at Wategos, however there are about the same number of unofficial tracks that cause even more damage, as illustrated by the photo below. These need to be either reinstated or formalised.



A related issue is the potential enhanced risk of beach erosion due to extreme runoff events and associated backup around the vicinity of the stormwater easement and pump station, draining across Marine Parade to the beachside retaining wall. The pump station sump is believed to be below sea level and so inundation would raise the risk of raw sewage being released at the surface.

On behalf of Wategos Beach Protection Association
Mike Worrall, Secretary
23 May 2018

From: [M Gardner](#)
To: [submissions](#)
Subject: CZMP east submission
Date: Friday, 25 May 2018 2:30:00 PM
Attachments: [CZMP East Submission.docx](#)

Greetings!

Attached please find my submission about the East CZMP

I am happy to explain more if required.

This submission is rushed and lists key points with little explanation.

Mary Gardner
PhD Historical marine ecology and deep resilience
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Dr Mary Gardner
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Byron Bay 2481
0423 742 792

Some comments and issues re draft CZMP Eastern Precincts. I am happy to elaborate, if you request more information. I am rushed in making these comments today and realise that they could be explained more thoroughly.

1. I agree upgrade to Main Beach works and amenities required. Although Masterplan and other documents cited as if discussions have come to an end, I feel the discussion is still largely unresolved about the car park, boardwalk, pool etc. I would rather these are not presented as if discussion concluded and the plans are shovel ready. These topics are still unresolved. I am surprised to see statements such as 'car park retained' 'pool history acknowledged' and 'surf club upgraded' when as part of the MasterPlan group, I know these are topics still unresolved. See point 3 below

2. I am concerned that whole of catchment goals and targets cannot be referenced: we need catchment management plans. In relation to the beachfronts, we need these goals that say 'eliminate or greatly minimise stormwater drainage to beach, ensure stormwater cleansed, no armouring (large scale or small scale) of any private/commercial accesses to beachfronts' so we can set the standards for how new works relate to all the sites of interest on this stretch of the coast.

Another goal we need is to reduce impermeable solutions – couldn't ramps be designed to be water sensitive? Permeable? Integrated better within beach and beach works?

The Clarke's beach works at Cowper and at Holiday Park need to be referenced to whole of catchment goals – can't some interim whole of catchment plans and goals be compiled or some reference made to the development of whole of catchment /MasterPlan for water

3. I am glad that DuneCare are mentioned as a support agency. I feel the MasterPlan group could also be mentioned as a support agency and proof of ongoing engagement with community that has some stability and continuity. The principles of the MasterPlan group should be included.

4. I am alarmed that there is no reference to coastal and marine biodiversity issues and goals. For instance Main Beach works could aim for ecological engineering that creates coastal hard shore/sandy shore habitat niches. Yes, the wildlife friendly lighting reference is good, but must be stronger. I applaud the special mention of the needs of turtles and hatchlings. I also note tree lighting is another issue which is a night-light pollution issue. I am concerned that sharks and other large marine fauna are not more specifically mentioned.

5. Dunes: the recycle water use is not mentioned. I understand there is dune irrigation planned. Is this with the support and involvement of DuneCare groups

I read that the New Brighton and other sites' beach scraping is mentioned. I am uneasy about beach scraping and wonder if a review and consideration of some ecological updates may be included rather than 'business as per usual'.

6. I was puzzled by the LEP comparisons and then realised that perhaps this is the reference to planned retreat policy. I wonder about that and the broader issues with global warming and wondering where longer term provisions come in: given ongoing erosion, the Holiday Park at upper Clarke's beach may need to move in part back across the Lighthouse road, perhaps visitors access to beach must be restricted to the one by Beach Cafe, the swimming pool changed/decommissioned, main beach access altered.

5. Yes, I support more varied and more useful disability and elderly access. Though I don't agree with constructing walls around the access points.

From: [Duncan Dey](#)
To: [submissions](#)
Subject: CZMP submission
Date: Friday, 25 May 2018 10:07:59 PM

Dear Council

Thank you for putting the Draft "CZMP EP BBE" on public exhibition.

While I support much of the Draft Plan, I object to its highest and most costly priority action, that of upgrading coastal protection works at Main Beach (Jonson Street).

I support maintaining the Jonson Street artificial headland in its current form but not the costly enhancements proposed in the Draft Plan.

I don't support re-armouring the headland as proposed. The Plan could consider minor changes including removal of the three finger groynes, which are dilapidated and whose materials could be strewn around the Bay in storms. But the main thrust of the Plan should be to relinquish this artificial structure. Such an approach is known as "Planned Retreat".

Philosophically, this would also indicate to parties seeking to retain or enhance other artificial coastal structures on Byron's coastline that this community does not accept that approach to our future. When sea levels have risen the metre or two we know is coming, all current works will be useless. The short time-frame of this Draft Plan is an impediment to sound planning. This Plan should have long-term vision into the future, accompanied by shorter term actions (and inactions).

To rebuild the Jonson Street headland commits public money in the structure and private money behind it. Such investment entrenches views and supports the cycle we are in now at Belongil, where landholders have over-invested and prefer to fight court cases rather than retreat when nature tries to win back its losses at the coast.

The model to aim for is one where nature sets the location of the water frontage, as it does on undisturbed coasts like Tyagarah Nature Reserve.

There is then no long-term cost commitment, once pointless coastal protection works have been removed.

At the Jonson Street headland, let's allow the next big storm to set a new coast line. Each subsequent storm will do the same. These erosion outcomes are predictable. The timing of storm events is unpredictable but their impacts are predictable. If money is to be spent, it should be to get ready for that change. This includes not allowing expenditure beyond maintenance. There should be no enhancements of armouring and no major rebuilding, like a new Surf Club or Beach Hotel. Such facilities should be located at strategic distances from the erosion zone.

The CZMP and Master Plan should espouse a wholesome philosophy of retreat from the Jonson Street headland: "enjoy it while it's here; spend a bit on tarting it up (for people not cars); have a new plan ready for when nature takes it away". Let's commit to minor (beautification) works now and bank money annually for repair works after destructive storm events. The works would not be based on armouring but would be to make this iconic area safe for people, whilst accommodating coastal processes. After storm damage, safety would be best served by removing and relocating buildings. Timing is important. Funding should be banked / accumulated in the years or decades leading up to the destruction.

While I don't agree with keeping the whole headland, I do acknowledge that the MasterPlanning process (which cost us \$250,000) came to that

conclusion. Slow retreat (based on natural attrition as I describe) allows for that. I don't think community would accept active removal. It will be planned for and done by nature, the result of ocean events which we should call "cyclones".

The key action of the Plan should be to abandon the carpark post-damage and to stop investment. Community shouldn't be spending on the pool or Fishheads or expensive revetments. And the lease to Fishheads should state that they cease trading if the coast cuts to within 20m (as for the rest of the Shire's coast).

Damage to any armouring is inevitable, even if the walls are built to a one-in-whatever-year standard. The large storms that once placed the dunes at the back of the beach will return. Dunes work like a "sand bank" - nature deposits the sand handily at the back of the beach and borrows from it in later storms to replenish the beach. This exchange generally prevents storm waves travelling inland, by having the waves' energy smash onto the sloping beach. Removing the beach or locking up the sand under a building is not smart. Revetments do both.

I also submit that resolution of the shocking erosion from the caravan park at Clarkes Beach should be included in the Draft Plan.

Yours faithfully, Duncan Dey

Positive Change for Marine Life
Coastal Zone Management Plan for
the Eastern precinct of the Byron Bay Embayment.
May 25th, 2018, Byron Bay, Australia.

Positive Change for Marine Life, founded in Byron Bay in 2012, **Positive Change for Marine Life** is a not-for-profit-organisation that works with communities around the world to ensure practices and systems are geared toward conserving vital marine ecosystems.

Concerns regarding:

1. The impact of proposed dune reformation/beach scraping works on flora and fauna communities.

Recommendations for:

1. Proposed dune reformation/beach scraping works

Foreword:

Shoreline recession is the progressive landward shift as an implication of increasing sea levels and sediment loss. Beach scraping is used to mitigate the impact of shoreline recession and erosion, by removing small to medium amounts of sand from the lower section of a littoral beach system to the upper beach/dune system using mechanical equipment such as bulldozers. Scraping aims to mimic natural beach recovery process.

Beach scraping is advantageous in terms of protecting infrastructure and housing situated along the coastline and is minimally invasive in comparison to other coastal management strategies, as natural and matching sediment supply is beneficial to beach flora and fauna and natural dune formation. Furthermore, beach scraping is a more holistic approach to mitigating

the impact of shoreline recession and erosion and has minimal impact to the natural cycles of the coast and is also beneficial to recreational use and tourism.

However, beach scraping is a short term solution to the long-term, on-going issue of coastal erosion and recession, which is expected to increase in on-coming years due to anthropogenic activity and the increasing threat of climate change. Beach scraping can also modify and disturb flora and fauna habitats, particularly if beach scraping is an on-going process.

Infauna communities:

Organisms that live within the sediment are known as 'infauna'. Beach scraping can cause a decline in the density of organisms as losses can occur through direct transport into uninhabitable higher portions of the beach, by burial shore or longshore transports into inlets or increasing exposure to predation (Lindquist and Manning, 2001). The removal of Infauna communities ultimately affects the food chain as fish and larger crustaceans such as blue crabs and horseshoe crabs feed on Infauna. Infauna communities also assist in filtering water and recycling organic matter (Smithsonian Environmental Research Center, 2018).

Macrofauna communities:

Beach scraping causes direct mortality to benthic macrofauna. The deposits of sand-dunes may potentially smother macrobenthic fauna on the foredune, these include animals such as: ghost crabs, polychaete worms, crustaceans, molluscs, pipis and other invertebrates.

Conversely to Infauna communities, macrofauna organisms are also highly important to the marine food web as higher order species feed on macrofauna (University of Tasmania, 2018). The removal of these organisms will ultimately alter the food chain.

Megafauna communities:

Sea-turtle species such as the Logger Head turtle (*Caretta caretta*), Leatherback turtle (*Dermochelys coriacea*) and Green Sea turtle (*Chelonia mydas*) have been previously

identified nesting in the Byron/Ballina region. Beach scraping can have adverse effects on sea turtle communities if not managed properly (Ballina Shire Council, 2010).

A number of nesting seabirds are known to inhabit the Belongil Creek entrance, including: Beach stone-curlew (*Esacus neglectus*), listed as Endangered under the *Threatened Species Conservation Act, 1995 (NSW)*, Great Knot (*Calidris tenuirostris*) listed as Vulnerable under *Threatened Species Conservation Act 1995 (NSW)* and under both CAMBA and JAMBA, Little Tern (*Sterna albifrons*) listed as Endangered under the *Threatened Species Conservation Act 1995 (NSW)*; and under both CAMBA and JAMBA., Red Capped Plover (*Charadrius ruficapillus*), Lesser Sand Plover (*Charadrius mongolus*), listed as Vulnerable under *Threatened Species Conservation Act 1995 (NSW)* and Osprey (*Pandion cristatus*), listed as Vulnerable under *Threatened Species Conservation Act 1995 (NSW)* and Brolga (*Grus rubicunda*), listed as Vulnerable under *Threatened Species Conservation Act 1995 (NSW)* (Coastal Zone Management Plan, Byron Bay Embayment – Part D: Open Ecosystem Health).

PCFML express concern for how this may have an implication of residing fauna communities along the coastal dune system, particularly if beach scraping is an on-going procedure. Although previous studies indicate that beach scraping causes little damage to infauna and megafauna communities (Smith, et al.), it should be ensured that it remains so by the implementation of proper management techniques. Suggestions for management techniques are listed below.

Recommendations for:

The proposed area of refurbishment is listed as a ‘habitat protected zone’ under federal legislation and is consists of the Cape Byron Marine Park, so maintaining the rich and unique biodiversity of fauna at the site is suggested to be a priority.

1. Beach scraping impacts on ecological communities:

- To mitigate the ecological impacts of beach scraping at proposed refurbishment areas. A qualified ecologist should be present during the procedure to prevent the disturbance of beach scraping to nesting shorebirds and seabirds.
- Prior to beach scraping, an ecological assessment should be undertaken to determine the presence of any nesting seabirds, shorebirds and sea turtles.
- If cost and time allows, undertaking a Multiple Before-After, Control-Impact (MBACI) study design could assist to determine the impacts of beach scraping on ecological communities in the Byron Shire which would assist for future management over a long-term spatial and temporal scale.
- Conduct a 'trial scraping', as *Parsons Brinckenhoff* (PB, 2009) did at New Brighton Beach. They identified that sea turtles will typically nest between November to January, therefore a trial scraping was not conducted beyond the 30th of September. Identifying whether species of turtles are the using the proposed area for nesting.

Concluding statement:

Studies have shown that beach scraping is a suitable method of mitigating shoreline recession with minimal impact to fauna as possible. If proper management techniques are applied, then there will be minimal impact on the community, otherwise there is potential for damage to the existing ecological community.

Reference:

Ballina Shire Council. 2010. State of Environment Report. Retrieved from web:
https://www.ballina.nsw.gov.au/cp_themes/default/page.asp?p=DOC-TPM-34-34-68

Byron Shire Council. Coastal Zone Management Plan, Byron Bay Embayment – Part D:
Open Ecosystem Health.

Lindquist, N. and Manning, L. n.d. Impacts of Beach Nourishment and Beach Scraping on
Critical Habitat and Productivity of Surf Fishes. Final Report.

Smith, S., Harrison, M.A., Rowland, J. and Fitzgibbon, B..E. N.D. n.d. Assessing the impacts
of beach scraping on the Macroinvertebrates of New Brighton Beach, Northern NSW.

Smithsonian Environmental Research Centre. 2018. Infaunal Benthic Invertebrates. Retrieved
from web: <https://serc.si.edu/research/projects/test-2>

University of Tasmania. 2018. Explainer: What are Marine Macrofauna? Retrieved from
web: <http://www.utas.edu.au/news/2017/11/28/467-explainer-what-are-marine-macrofauna/>



BYRON PRESERVATION
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**The Mayor & Councillors
Byron Shire Council**

SUBMISSION OPPOSING THE DRAFT COASTAL ZONE MANAGEMENT PLAN ON PUBLIC EXHIBITION

Dear Mayor & Councillors

Please find set out below a short form Overview of the Full Submission (which follows) lodged by the Byron Preservation Association and on behalf of a number of Belongil landowners.

Overview

1 Council has come once again to the longstanding problem of the failure to implement a viable, lawful Coastal Zone Management Plan for the Byron Bay Embayment. Council has been engaged on this task literally for about 20 years. It is in breach of many Ministerial Directions to prepare a coastal zone management plan.

2 Existing presently in the Embayment as protective structures are:

(a) Jonson Street Structure

This structure has the following features:

- It was built by the Council notwithstanding it had advice that it would cause erosion.
- The structure extends artificially by about 90 metres into the active surf zone and interferes with natural coastal processes.
- Council has decades of reports advising that the structure has caused erosion extending beyond Belongil Creek.
- Council has endorsed, by binding resolution, that advice for the purpose of preparing this Coastal Zone Management Plan and Council is bound by that.
- Byron Township does require some sort of protection to deal with extreme events which occur from time to time – as does the rest of the embayment – but does it need to be protected by a structure which extends into the ocean and interferes with natural coastal sand movements for the sake of some extra car parks?

- (b) Northwest and downstream of the impact of the Jonson Street Structure is a series of rockwalls which have been built by the Council and/or the community to protect the community from the effects of the erosion caused by the Jonson Street Structure.

These walls have the following features:

- They play an important role in extreme storm events.
- During such events these walls protect this part of the Byron community as well as valuable infrastructure including roads, railways and service trunk supply lines.
- They also play an important role in protecting the freshwater environment of the wetlands behind Belongil Spit and the Belongil Estuary.
- These walls are not in touch with the ocean on a day to day basis and therefore are not part of coastal processes and do not cause erosion.
- This has been confirmed to Council in the reports which it has accepted by binding resolution.

- 3 By every reasonable parameter, it seems obvious that Council should approach the management of the Byron Bay Embayment in a holistic way providing a plan for the whole of the embayment – not just one part to the detriment of the other.
- 4 Nevertheless, Council is now going forward with a proposal to deal only with the protection of the town and that part of the embayment – and not at all with the rest of the embayment which Council knows and accepts is adversely affected by the Jonson Street Structure.
- 5 Many of the present Councillors have indicated that they are against rock walls and have a preference for no rock walls at all.
- 6 However, the Councillors are now proceeding with a plan to spend Seven (\$7,000,000) million dollar enlarging the Jonson Street Structure both lengthways and seaward by the addition of many tonnes of new rocks onto the beach.
- 7 Councillors do not need any legal, political or governance advice to see immediately that there is an incongruity about this Council:
- proposing to spend millions of dollars and bring many tonnes of new rocks to enlarge the Jonson Street Structure and move parts of it seaward;
 - at the same time ignoring, rather than dealing with the erosion impacts that the Jonson Street Structure causes and will continue to cause,
 - doing nothing about the rest of the embayment except expressing a wish to take down the rock walls there and impose planned retreat (notwithstanding the Supreme Court Injunction).
- 8 The irrationality and inconsistency of that position is obvious. It is not defensible in any forum. It is important to recognise that the powers of the Council are not private powers to be used as Councillors feel fit. The powers of the Council are public powers which must be exercised by each Councillor in accordance with the law and legal standards and the exercise of which is subject to oversight by the Courts.
- 9 We submit that the appropriate course for this Council is to try and achieve what no Council has yet achieved and that is to come up with an acceptable whole of bay solution for the entire Byron Bay Embayment.

- 10 The solution in the last draft Coastal Zone Management Plan submitted to the Minister did attempt to provide a whole of embayment solution. The proposal of a new public walkway along Belongil Beach had many benefits for the public including the provision of disabled and recreational access along a pathway which could extend for more than one kilometre and become a wonderful recreational facility for the whole community.
- 11 The Minister wrote to Council in August 2017 advising that she would certify the last draft Coastal Zone Management Plan if Council addressed two minor requisitions.
- 12 We submit that Council should return to that plan and address the two minor requisitions to formalise a whole of embayment solution and achieve compliance with the Ministers Direction. It appears to have made no attempt to do so – notwithstanding that both matters are easily resolved, including:
- (a) the walls along Belongil Beach above the high tide mark would have no downstream impacts;
 - (b) the draft CZMP previously submitted had a series of steps to monitor impacts and deal with any impacts if they occurred;
 - (c) correspondence from the Department of Industry indicated they would co-operate in facilitating implementation of the whole plan.
- 13 The attempt to produce a Coastal Zone Management Plan only for the Jonson Street Structure, expanding it and adding more rocks, without dealing with its downstream impacts at all is obviously flawed for many reasons. We have set these out in detail in this Submission. The size of what is proposed to be added to the Jonson Street Structure is enormous.
- 14 The decision about what to do at Jonson Street is not a policy or a political decision. Council's decision-making powers here are constrained by many legal obligations including:
- the provisions of the Coastal Protection Act and manual;
 - other environmental legislation;
 - private law including the law of nuisance and the law of tort;
 - the effect of the Supreme Court injunction;
 - past advices to the Council about the impact of the Jonson Street Structure; and
 - the resolutions which the Council has passed already recognising the impact of the Jonson Street Structure.
- 15 Councillors are not in a situation where they can merely decide what their preference is for the Jonson Street Structure without regard to this body of mandatory considerations summarised in the previous paragraph.
- 16 This part of the coastline has already seen an extended period of litigation. The Coastal Zone Management Plan of the Mid-Coast Council is now subject to challenge by residents in the Land & Environment Court. There is nothing objectionable about residents litigating these matters. The courts exist to enforce the rule of law and to supervise the decision-making processes of Councillors to ensure that they act within the legal constraints that apply to them.
- 17 We urge the Councillors to look very carefully at the obligations of the Council and the personal legal obligations of each Councillor.
- 18 We have set out these obligations in detail in the attached submission. Councillors are under an obligation to use their powers for proper purposes, having regard to relevant considerations and in compliance with all legal obligations. Councillors cannot act in

disregard of all of those obligations without the risk of incurring liability, both for the Council, its insurers and personal liability for themselves.

19 We urge this Council to be proactive in finding a solution for the whole of the Byron Bay Embayment which:

- recognises the history of what has occurred in the embayment;
- pays heed to the decades of reports which the Council has received about the impact of the Jonson Street Structure;
- recognises the duties operating on the Council as a result of its creation and maintenance of the Jonson St Structure
- pays regard to and complies with the Council's past resolutions;
- is compliant with all aspects of the law applying to this situation- both statutory, regulatory and the common law.

20 The Minister has provided Council with an opportunity to perfect a whole of embayment solution. In our submission it should turn to doing that. This effort to try and extend and enlarge the Jonson Street Structure by bringing many more tonnes of rock to that structure, without doing anything for any other part of the embayment, is legally flawed and should not be considered further.

21 As representative of the Belongil community, we urge Councillors to pursue an equitable and legal solution for the whole of the embayment. Residents are willing to work with the Councillors on such a solution. In the meantime, all legal rights are reserved.

Yours sincerely



Michael Siddle
President

siddlem@ramsayhealth.com.au

ANNEXURE A

Extract from Further Amended Statement of Claim filed in SC Proceedings

Reports, studies and advice concerning the Jonson Street Structure

The 1960s

38A On 6 April 1964, the Shire Engineer wrote to the Shire Clerk of the Council in the following terms:

"It was also disclosed that in the estimation of the Public Works Department the construction of a groin from the Shore to the Wollongbar wreck would certainly silt up the area south of the wall but could have a further detrimental effect on the area north of the site."

The 1970s

39 On or about 24 October 1972, the Council received a letter from the New South Wales Department of Public Works providing information concerning beach erosion. That letter advised:

- (a) that the best technical method of dealing with beach erosion was sand nourishment so as to offset the erosion;
- (b) that a second method was to build a flexible revetment of stone or concrete blocks at a slope not steeper than 1 in 4 so that the beach could re-build against it;
- (c) that a revetment, by preventing erosion, could cause compensatory erosion elsewhere.

40 In or about November 1978, the Department of Public Works prepared a report entitled "Byron Bay - Hastings Point Erosion Study", which was provided to the Council shortly after its preparation.

41 That study contained the following statements:

- (a) "Rock protection in front of the town centre has caused increased erosion to the north. The sand blow out to the south is very extensive".
- (b) "The town centre now protrudes as an artificial, rock protected headland. Erosion to the north along Belongil Spit is very severe, threatening housing, the meat works and the railway line. The blowout to the south of the town has been stabilised and developed".
- (c) "In general however, the beach to the south has been stabilised whilst accelerated erosion has resulted in the region of the caravan park to the immediate north".

The 1980s

42 On or about 14 February 1983, Council received a letter from James Black & Co, solicitors dated 10 February 1983.

43 That letter referred to certain comments of the Department of Public Works, sent to the Council at an earlier time, which were in the following terms:

"The Byron Bay - Hastings Point Erosion Study predicted future erosion rates on the basis that the "ad hoc" protective measures at the end of Jonson Street will ultimately fail. These works have not been designed and to date the council has not given an undertaking to retain and maintain this protection in its present location. If council is willing to guarantee the continued maintenance and structural adequacy of this protection then the Department would be prepared to reassess the future predicted erosion rates in the region. Broadly the impact of this would be a decrease in future erosion rates at the town centre and to the east of town near the sandhills estate. Corresponding to this would be an increase in the future erosion rates along the Belongil Spit".

43A On 26 April 1983, the Public Works Department wrote to the Council in the following terms:

"It is expected that due to the commitment to maintain Jonson Street groynes as a control point the erosion rates to the north of the three groynes would increase resulting in an increased threat from erosion to the existing development on the Belongil Spit and Walker's Meat-works

Council should be aware of the above consequences and should consider management strategies in this section of the coastline in conjunction with an assessment of the state of the existing groyne at Jonson Street"

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43B On 24 May 1983 the Council resolved that the information referred to in paragraph 43A above "be noted".

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43C On 3 May 1983, the Minister for Public works and Ports advised that the groyne option chosen by Council was a suitable type of protection work for Byron Bay and that no objection would be raised to the implementation of such a scheme.

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Particulars

Letter of 3 May 1983 to Byron Shire Council from the Minister of Public Works and Ports

43D In October 1983, the Council resolved to adopt the concept of erosion protection works by construction of groyne fields as listed in the Byron Bay Hastings Point Study and by such other means as may be considered effective. No such steps were taken.

Particulars

Recommendation to Council of October 1981 and resolution of Council of 25 October 1983 at its ordinary meeting on that day.

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The 1990s

44 In or about February 1990, a report was produced by a Mr Anthony Moratti, a coastal engineer engaged by the New South Wales Department of Planning in proceedings involving the Council, entitled "Coastal Engineering Advice to the Department of Planning in relation to Lots 11-14, Section 3, D. P. 1623, Childe Street, Byron Bay".

45 That report stated (in relation to the Belongil Spit):

"Suffice to say the effect of any rock protection works is one of increasing erosion on adjoining properties, more particularly those downdrift on the coastlines undergoing littoral drift. This process is attributable to the protected area locking up sand from the active beach system, at the same time realigning an updrift fillet".

46 In or about September 1990, the Crown produced a document styled the New South Wales Coastline Management Manual of which the Council had knowledge from at or about that time.

47 That manual recorded as follows:

"The results for the open coast indicates strong demand during major storm events ranging from 200 to 240 m³/m of beach above AHD with the exception of the

measurement for Byron Bay of 320 m³/m of beach above AHD. This storm bite was measured immediately down drift of a sea wall protecting a carpark. Down drift erosion would have been increased by the presence of rock protection on this high long-shore transport rate coast. The largest landward movement of erosion of escarpments measured by PWD in New South Wales during major storm events are 17m at Wamberal in 1978 and 18m at Byron Bay in 1989. Again, this second figure would have been influenced by the rock protection immediately adrift of the measured location."

The 2000s

48 In or about 2000, WBM Oceanics Australia prepared and provided a report to the Council styled the Byron Shire Coastline Hazard Definition Study.

49 That study noted:

"There is evidence of a localised accretion of sand immediately to the east of the structure and accelerated erosion immediately to the west indicating that the structure is acting as a groyne. The general protruding alignment of the wall with respect to the adjacent shoreline also indicates that the wall has locked up sand which would normally be part of the active beach system. It is unclear how far to the west the impacts of the protection works are felt as a combination of short term erosion, long term recession and the impact of ad-hoc seawalls makes analysis difficult. However, it is considered that if the protection works were removed then local shoreline realignment would occur with erosion in some areas and accretion in others". (Section 5.3.4, page 88)

50 In or about November 2000, a Mr Angus Jackson, a coastal engineer, prepared a report on the WBM Oceanics Hazard Definition Study, which was provided to Council.

51 That report stated:

"There is strong evidence that rock works to protect the Memorial Pool and car park constructed in the late 1960's have increased the erosion rate downdrift at Belongil. This has been both admitted and recognised by Byron Shire Council and the NSW Government in the past, and has been recognised in this brief by the statement that:

'Particular attention will need to be given to quantifying the exacerbation of the hazards of beach erosion and long-term recession caused by existing protection works'."

"In discussing the various options, the 'retreat strategy' was considered by the Arakwal representative to be most detrimental in that it would result in the loss of sites along the foreshore. The various 'structural' options were also considered to have a potential impact on sites in that the necessary works on the foreshore may result in disturbance of sites. The 'nourishment' options were clearly the preferred options for two reasons. First, the construction process would not likely disturb sites, particularly those close to the foreshore. Secondly, the nourishment options would ensure the retention of existing sites".

"Immediately to the west of the Memorial Pool Carpark in the zone up to Border Street, the erosion rates are highest. The immediate hazard zone remains undeveloped and a natural beach is retained although a steep erosion scarp exists in the high dunes in this area. Longer term hazard zones in this area extend back and across the state north/south railway line into private land behind."

52 In or about December 2000, the Council prepared a report entitled "Byron Coastline Values Study".

53 That study stated:

"In the longer term, although rock walls can protect property, they can also cause the beach to be eroded until it is lost. This has happened next to the Main Beach car park in Byron Bay, in Stockton on the Central Coast of NSW, and on the East Coast of the US (Cuillton 1991)".

54 In or about 2004, WBM Oceanics produced for the Council a Coastline Management Study.

55 That study stated:

"The Memorial Pool carpark Protection Works are acting as a control which is stabilising the beach to the east but has also exacerbated the erosion to the west along this beach compartment. It should be recognised that the erosion in this beach unit has not been caused solely by the protection works, however they have acted to exacerbate the erosion." (Section 3.10)

"...continuation of planned retreat under existing planning instruments with a commitment to enforcement and amendments to improve though not overcome some of its deficiencies (option G). This is likely to have poor outcomes and there remain some uncertainties with respect to the legal enforceability of such an option..." (Page viii of the Executive Summary)

56 In or about March 2004, Mr Angus Jackson prepared a report styled "Technical Comments on Byron Coastline Management Study - Belongil Spit Issues", which report was provided to the Council at or about that time.

57 That report contained the following:

- (a) *"The retreat options proposed are only partial retreat - i.e. the Memorial Pool car park Protection Works are to be retained but areas such as Belongil Spit will be allowed to retreat. For completeness and equity, removal of all walls including the Memorial Pool car park protection works should be an option considered. A further [partial] retreat option is to upgrade and maintain the town car park wall and the Belongil walls westward of Border Street allowing the section between the town car park and Border Street to retreat, effectively creating embayed sandy beaches to the east and west of the car park wall"* (Page 5); and
- (b) *"Thus, in this location, retreat will not automatically provide wide safe beaches requiring no active management works and does not provide beaches with the same amenity as nourished beaches. While retreat simplistically appears a solution, especially on geological timeframes, it is generally not a long-term solution as ongoing relocation landward is not sustainable..."* (Page 6).

58 In or about 2005, the Council prepared the Byron Bay, Suffolk Park and Ewingsdale Local Environmental Study.

59 That study states (at page 47):

"The Byron Bay central business district is protected to some degree by a rock seawall that has substantially stabilised the Main Beach - Clarkes Beach area but has severely affected beach access and amenity seaward of the wall and also exacerbated the erosion threat down-drift along Belongil Beach".

60 In or about March 2006, a report was prepared by Dr. Ian Goodwin and provided to Council.

61 That report states:

"Storm wave erosion along Belongil beach will continue to be exacerbated due to artificial sand starvation by the Jonson Street Headland Control Structure, following storms and/or during IPO La Nina-like phases." (Page iii)

"Between 1967 to 1999, the Main Beach to Clarks Beach section has been relatively stable, due to the construction of the Jonson Street Headland Control

*Structure. Downdrift of the structure, **Belongil Beach continued to realign and recede by an additional 20-25m.**” (Page iii) [emphasis added]*

- 62 On or about 12 April 2006, Tim Rabbidge of the NSW Department of Natural Resources wrote to the Council in the following terms:

“An additional complexity to the implementation of planned retreat is the presence of the existing Memorial Pool car park protection works at the northern end of Jonson Street. These rock protection works are providing a level of coastline control that has substantially stabilised the Main Beach to Clarkes Beach compartment to the east. On the other hand downdrift impacts from the works have exacerbated erosion impacts northwards towards Belongil Spit. It could also be argued that the presence and necessary repair and maintenance on the Memorial Pool car park protection works are contrary and inconsistent with a planned retreat philosophy”.

- 63 On or about 14 November 2006, the Council passed a resolution in the following terms:

“That Council commit to protecting the Byron Bay Town Centre through retention of the approved works and identify as a action in the plan to investigate the potential for modification to reduce the impact on Belongil Beach”.

- 64 In or about 2007, the Griffith University Climate Response Program prepared a report styled “Climate Response: Issues, costs and liabilities in adapting to climate change in Australia” which report was provided to Council at or about that time.

- 65 That report contained the following (at page 9):

“Byron Shire Council... has adopted a policy which completely bans any engineering approaches, even including the repair of existing protective structures by individual oceanfront landholders. At the same time, however, the Council has retained a large engineering structure constructed some decades ago in conjunction with the State Government in order to protect parts of the town centre. This structure has been retained even though it has caused, or at least exacerbated, significant erosion in downdrift areas, with risks to both public infrastructure and private residential property. The position taken by the Byron Shire Council puts it severely at odds with the rest of the region, and greatly complicates the development of a coherent climate response across the region as a whole, or indeed even throughout the rest of NSW”.

- 66 In a letter dated 20 April 2007, sent by the solicitors for the plaintiffs to the Council, those solicitors drew attention to the effects of the Jonson Street Structure pleaded in paragraphs

34 to 38 above and to the reports and studies referred to in paragraphs 40, 48, 54 and 60 above and, among other things, called upon the Council to protect the plaintiffs from the danger created by the Jonson Street Structure.

67 In a letter dated 7 June 2007, sent by the solicitors for the plaintiffs to the Council, those solicitors again drew attention to the effects of the Jonson Street Structure pleaded in paragraphs 34 to 38 above and to the reports and studies referred to in paragraphs 42, 44 and 58 above and the resolution described in paragraph 63 above, and to the duty of the Council.

68 In a letter dated 14 December 2007, from the solicitors for the plaintiffs to the Council, those solicitors referred to the effects of the Jonson Street Structure pleaded in paragraphs 34 to 38 above and to the reports and studies referred to in paragraphs 40, 42, 44, 48, 52, 54, 58 and 60 above and the resolution described in paragraph 63 above, and to the duty of the Council.

69 In or about June 2008, Parsons Brinckerhoff prepared a document styled "Draft Byron Coastal Zone Management Plan", which document was provided to the Council at or about that time.

70 The document stated:

"As discussed above, the Memorial Pool car park protection works are acting as a control point which is stabilising the beach to the east but has also potentially exacerbated the erosion to the west however this has not been investigated or quantified. It should be recognised that the erosion in this beach unit has not been caused solely by the protection works, however, aerial photography shows that they have acted to exacerbate the erosion in the area to the immediate west of the Memorial Pool car park" (Page 31).

71 In or about June 2009 the Council received a report, commissioned by it, from the University of New South Wales Water Research Laboratory prepared by Dr J T Carley and Professor Ron Cox.

72 That report stated:

"It is generally accepted that the Jonson Street Protection Works do have some impact on the planform of the beach to the north-west, but it is not known what the northward extent of this is"; and

"WBM (2000) found increased long term recession to the north-west of the Jonson Street works. They noted the recession was higher for the area up to 1km north-west of Jonson Street and was lower in the area 1 to 2km northwest of Jonson Street."

73 On or about 1 July 2009 Council prepared a draft Coastal Management Plan.

74 That Plan stated as follows:

"It is generally accepted that the Jonson Street Protection Works do have some impact on the planform of the beach to the north-west..."

"As a result of these various protection measures, the amenity of the beach has been significantly affected and there are extended periods of time when there is effectively no usable beach in front of the properties" (Page 32).

75 In a letter dated 26 August 2009, sent by the solicitors for the plaintiffs to the Council, those solicitors referred to the failure by Council to comply with its legal obligations and stated that the plaintiffs had suffered a diminution in the value of their properties.

76 In a letter dated 7 October 2009, sent by the solicitors for the plaintiffs to the Council, those solicitors referred to their previous correspondence since April 2007 and extracted the text of the June 2009 report from the University of New South Wales Water Research Laboratory which is pleaded in paragraph 71 above.

77 That letter stated:

"We remind you again that it is our clients' position that the Jonson Street structure is creating a realignment of the shoreline downdrift of that structure along Belongil Beach which is having an adverse effect on our clients. Our clients call on Council again to discharge its duty to protect from the danger which the Council has created and/or which emanates from property of which Council is the sole and exclusive manager and occupier."

78 In a letter dated 21 October 2009, sent by the solicitors for the plaintiffs to the Council, those solicitors referred to their previous correspondence of 14 December 2007 and to the reports and studies referred to in that correspondence, and extracted the text of the letter sent to Council on 10 February 1983 which is pleaded in paragraph 42 above.

79 That letter stated:

"We ask that you take this into account in assessing Council's ongoing obligations in tort to protect from the danger that it has created and maintained by reason of the Jonson Street Structure."

80 On 29 October 2009, Dr J T Carley of the University of New South Wales Water Research Laboratory gave evidence in open Court in the Land and Environment Court in proceedings 40342 and 40344 of 2009 as follows, in response to the following questions posed by Senior Counsel representing the sixth and seventh plaintiffs:

“SENIOR COUNSEL: Do you agree it is generally accepted that the Johnson Street protection works do have some impact on the plan form of the beach to the north-west but it is not known what the northward extent of this is?”

DR CARLEY: Yes, I wrote those words and I--

SENIOR COUNSEL: Stick by them?

DR CARLEY: I stand by them.”

81 On or about 22 December 2009, the solicitors for the plaintiffs wrote to the Council. That letter referred to the effects of the Jonson Street Structure pleaded in paragraphs 34 to 38 above.

The 2010s

82 At a time shortly after 2 November 2010, the Council received a report commissioned by it from BMT WBM Pty Ltd.

83 That report advised Council to the following effect:

- the Jonson Street Structure has had a long shore distribution extending over a long section of the shoreline at Belongil (2.6 Conclusions);
- according to the modelling diagrams attached to the report, the impact of the Jonson Street Structure to which the report refers, extends from immediately northwest of the Jonson Street structure all the way to Belongil Creek (Figure 21, Figure 22);
- according to this report, the impact has caused approximately 20 metres of landward recession since 2000, and is continuing (2.6 Conclusions);
- the impact of seawalls constructed by residents along the Belongil Spit (including the present plaintiffs) “has been relatively modest and local to date” (2.5 Model Results).

84 That report also stated in its conclusion:

“The modelling of shoreline change without future sea level rise indicates the following key results:

- *The seawall at Jonson St has prevented what may have been about 50m of erosion that would otherwise have occurred naturally at Main Beach to date and potentially a further 10-50m over the next 50 years (in the absence of sea level rise);*

- *Correspondingly, the seawall at Jonson Street has affected Belongil Spit erosion as an incremental increase in addition to what would have occurred naturally in its absence, but is thus not the whole contributor to the erosion that has occurred. This incremental effect has an unusual and unexpected longshore distribution, being of relatively modest extent (approx 20m) extending over a long section of shoreline rather than a more extensive effect over a limited distance (refer Figure 22). This is probably related to the nature of the processes along the area immediately west of the seawall where significant erosion would otherwise have occurred naturally;*

...

- *Correspondingly, all of the seawalls have contributed to shoreline stability to their east, quite markedly at Byron Main Beach and along the shoreline between Jonson Street and Border Street.*
- *Broadly, the seawalls have provided significant stability to the shoreline position along the whole length from Main Beach to Manfred Street, although unprotected parts and sections with flexible sand bag walls are subject to storm erosion."*

85 In a covering letter to that report sent from BMT WBM to the Council and dated 2 November 2010, BMT WBM's Director Dean Patterson stated that the results obtained from the modelling, and set out in the report, "may be regarded with confidence as sufficiently reliable for the intended purpose of indicating the seawall impacts".

86 On 24 November 2010, the solicitors for the plaintiffs wrote to the Council, referring to the letters sent by those solicitors on 20 April 2007, 7 June 2007 and 14 December 2007, and to the content of various of the advices received by the Council including that referred to in paragraphs 82 to 85 above, and describing some of the impacts on the plaintiffs including losses in property values and certain property damage.

87 'The Northern Star' on 25 November 2010, in an article entitled "Landowners threaten court action", it was reported that:

"Byron Shire mayor Jan Barham said the council never denied the protection works contributed to erosion at Belongil, and the new report was part of a process aimed partly at reducing the impact of the works."

87A On 16 November 2012, WorleyParsons prepared a report for the Council entitled "Jonson Street Protection Works Modelling and Evaluation of Preliminary Design Options Report".

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The overall objective of the report was stated to be to investigate and develop a preferred design for the potential modification or redesign of the Jonson Street Protection Works and was underpinned by the following objectives:

- (a) to provide adequate protection to the Byron Bay town centre against coastal erosion and inundation against a design storm event and with due consideration of future sea level rise ...; (page 2); and
- (b) to mitigate adverse impacts on coastal processes (eg end wall erosion effects downdrift) of the Jonson Street Protection Works. The existing works interrupt natural sediment transport along the beach and have compartmentalised the beach into two discrete sections. Options have been examined that attempt to realign the structures and restore the natural sediment transport processes within the embayment" (page 2).

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87B That report also advised the Council to the following effect:

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"The existing works interrupt natural sediment transport along the beach and have compartmentalised the beach into two discrete sections. Options have been examined to realign the structures and restore the natural sediment transport processes within the embayment" (page 2)

...

"The Jonson Street Protection Works extend onto the active beach and act as a headland, interrupting longshore sediment transport and compartmentalising the beach into two discrete areas, making it difficult to maintain a usual beach on their seaward side" (page 64).

...

"As discussed in Section 3, the existing Jonson Street Protection Works extend out onto the active beach zone, compartmentalising the beach and interrupting longshore sediment transport" (page 65).

...

"The Jonson Street Protection Works would continue to interrupt sediment transport from east to west along Belongil Beach despite removal of the spur groynes and some sand initially being transported westward around the location of the former groynes" (page 82)

87C On 1 March 2013, WorleyParsons prepared a further report for the Council entitled "Byron Bay Erosion Protection Structures - Risk Assessment". That report advised the Council of the impact of the Jonson Street Structure including to the following effect:

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"The structure has had a marked visual impact on coastal processes in the area, with the beach having been compartmentalised into two discrete areas with evidence of past erosion on the downdrift and build-up of sand on the updrift side" (page 20)

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"From the historical escarpment locations, it can be seen that the profile of the Jonson Street Protection Works is seaward of the historical shoreline position and therefore acts as a headland, protruding onto the active beach. This has the effect of compartmentalising the beach into two distinct areas - Main beach east of the Jonson Street Protection Works, and Belongil Beach west of the Jonson Street Protection Works (page 52).

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87D In September 2013, Mr Dean Patterson of BMT WBM Pty Ltd prepared a report for the Council entitled "Byron Shire Coastline Hazards Assessment Update" ("**Hazard Assessment Update**"). That report advised the Council of the impact of the Jonson Street Structure including to the following effect:

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(a) at page 103 of the Hazards Assessment Update, Dr Patterson refers to figure 4-26 which he says "*reaffirms how the pattern of loss has altered over time with Main/Clarke's beach becoming dynamically more stable since 1973, showing some recent accretion, while the sand loss has become distributed progressively further north*";

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(b) at page 105 of the Hazards Assessment Update, Dr Patterson advised the Council that the Delft Hydraulics Laboratory Report (1970 and the Parsons Britton Partners PWD Report of 1978 ("Byron Bay - Hastings Point Erosion Study") and the WBM Report of 2000 ("Coastline Hazard Definition Study") were not sufficiently reliable and a larger underlying long term recession trend was considered likely;

(c) Figure 4.30, on page 109, provided an illustration of the impact of the Jonson Street Structure showing that from the 1970s:

(i) the shoreline east and west of the Jonson Street Structure has been behaving differently;

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(ii) east of the Jonson Street Structure has been steadily accreting - contrary to the behaviour of the coastline in the rest of the embayment;

(iii) west of the Jonson Street Structure has been steadily eroding -- well above the regional average and contrary to the behaviour of the coastline east of the Jonson Street Structure;

(d) "the cumulative downdrift erosion effects of the coastal protection works along the Byron and Belongil Spit area have progressed north to the Northern part of the BBC. The relative contributions to the effects of each of the works are not known. Modelling by Patterson (2010) provides the only available information in that regard".

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The reference to Patterson (2010) is a reference to the report and its contents pleaded in paragraphs 82 to 85 of this Further Amended Statement of Claim.

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87E The Council endorsed this report at its meeting on 10 October 2013.

87F On 11 February 2014, WorleyParsons produced a further report for the Council titled "Investigating the Re-Design of the Jonson Street Protection Works", which contained further advice about the impact of the Jonson Street structure to the similar effect to the advice recorded in paragraph 87A to 87C. This report was adopted by the Council on 27 February 2014 (Resolution 14-66).

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88 The plaintiffs will rely on the terms of the documents referred to in paragraphs 39-38A to 8687F above, when produced, for their full force and effect.

Present state of the Belongil Coast

89 The Belongil Coast is a sand barrier coast extending northwards from the Jonson Street Structure to a point immediately north of the Tenth Plaintiff's Property.

90 Between Manfred Street up to the point immediately north of the Tenth Plaintiff's Property, the sand barrier coast comprises land between the ocean on the north-eastern side, and a creek known as the Belongil Creek that runs broadly parallel to the ocean on the south-western side of the Belongil Spit, and which connects to the ocean at the point which marks the northwestern-most point of the Belongil Coast.

91 The foredune landform crest of the ocean-facing sections of the properties owned by the plaintiffs, and other properties along the Belongil Coast, are significantly higher than the land behind those sections that are closest to the Belongil Creek.

92 Along various stretches of the Belongil Coast, on property owned by certain plaintiffs, there are works of various kinds, including protective rock works and geobag revetments.

Annexure B

1 Council's attitude to repair applications along Belongil

1.1 We have obtained a copy of a letter of 8 May 2017 which Mr Gainger wrote to the New South Wales Coastal Panel commenting on the applications to make repairs to existing rock walls which presently constitute a public safety danger and in respect of which the applications are only to repair.

1.2 In that letter Mr Gainger set out the following principles as relevant in the opinion of Council:

... "end effects of rock walls are well documented. If an enhanced version of current protection is contemplated, it is possible that most of the beach in front of the walls may be lost to erosion in the long term".

Another point made by Mr Granger is that "the proponents have merely stated that there will be no increase in impacts beyond the status quo". ... Council submit that it is not sufficient to simply say that the proposed post repairs state of the walls will have less impact than on the status quo and therefore no mitigation or funding arrangements are required to be implemented".

As it happens, no enhanced version of the current protection is contemplated in the repair applications. The comments are not applicable to the repair applications. However, an expanded version of the current protection at Jonson Street is definitely contemplated in the Flawed CZMP.

Accordingly, Council should apply the same considerations as set out by Mr Granger in this letter to the Jonson Street Structure proposed in the Flawed CZMP.

1.3 If the offsetting Belongil wall is dropped from the Previous CZMP in the Flawed CZMP, there will be no offsetting or mitigation arrangements at all. This needs to be addressed by the Council. We do not understand why Councillors would not be concerned to deal with the impact of the expanded rock walls proposed to be built at Jonson Street under their authority.

Council Resolutions

1.4 It is implicit in Council resolutions 06-721 and 06-802 that Council has already accepted that the Jonson Street Structure causes a downstream erosion impact on Belongil Beach, and that the most recent WP report was both instructed and prefaced upon an acknowledgement by both Council and Worley Parsons of this premise [refer page 1 of the Worley Parsons Report under the heading "Introduction"].

Section 55C

1.5 Mr Gainger in his letter refers to section 27 of the Coastal Management Act. In the context of the draft Coastal Zone Management Plan the relevant provision is section 55C(1)(g) of the Coastal Protection Act. Councillors will there see that it is necessary to make provision in a Draft CZMP for any **changed or increased** impacts of a structure which is subject to works in the Draft CZMP. Councillors should particularly note the terms of Section 55(1)(g) which provides that a CZMP **must** make provision for:

*"managing the associated impacts of such works (such as **changed or increased** erosion)."*

1.6 Mr Gainger has complained in the letter to the Panel that the repair applications make no arrangements for beach nourishment. Neither does the Flawed CZMP (without the walls at Belongil proposed under the Previous CZMP) make any proposal for beach nourishment or any other form of ameliorating step to offset the impact of the Jonson Street Structure.

1.7 Every Councillor has a duty while exercising statutory powers to exercise those powers properly and in accordance with their terms. No Councillor has the power to ignore the provisions of section 55C.

1.8 The letter from Mr Gainger we submit is not appropriate in the context of a repair application. It is however appropriate in the context of the major reconstruction and expanded works proposed for the Jonson Street Structure as proposed in the Flawed CZMP. Furthermore, Council cannot operate to a double standard of purporting to apply one set of principles to the repair of the rock wall along Belongil Beach and another set of rules to its own proposed works at Jonson Street.

- 1.9 We ask all Councillors to consider the application of the principles submitted to the Panel by Mr Gainger and, also to the mandatory provisions of section 55C to their ongoing work in relation to the Flawed CZMP.

This is not an area where Councillors are free to make a policy decision in a vacuum. Compliance with the applicable mandatory provisions of legislation such as Section 55C is essential.

Duty to protect

- 1.10 Aside from the obligations contained in the Coastal Protection Act, because Council has built and managed the Jonson Street Structure it has a common law duty to protect from the danger it has created.
- 1.11 This was the basis of the claims made in the Supreme Court action. Joint application was made to the Supreme Court for the injunction and payment of \$2.75 million. It is clear from the Minutes of the Council Meetings in 2016 that Council participated in that joint application because of the legal advice it had received.
- 1.12 That legal advice remains relevant. This is because the Supreme Court action did not bring the cases based on the impact of the Jonson Street Structure to a complete end. The Orders made by the Supreme Court in August, 2016 provided compensation for the damage caused up until the day of the judgment – but not beyond that. Accordingly, it is open both to the residence who participated in the Supreme Court action – and any other resident, to again sue the Council and Councillors, if appropriate, for ongoing breaches of the duty to protect from the impact of the Jonson Street Structure.
- 1.13 It is important that the Councillors understand the legal issues with which they are dealing here. They are not matters that can be ignored except at the peril of the Council and its Councillors.
- 1.14 We suggest that Councillors refer to the past advice provided to the Council and take further legal advice about their ongoing duties of the Council in tort because of the impact of the Jonson Street Structure.

Reporting to Insurers

- 1.15 It would seem unlikely that the insurers of the Council will want to provide insurance coverage for a new, bigger version of the Jonson St Structure built without any attempt to protect property owners from its impact. It would seem prudent for Council to check this with insurers before embarking on such an exercise and creating an exposure to damages without insurance. Mr Gainger has advised insurers have not yet been advised of the action of the Council in 2017.

Environmental and economic concerns are relevant matters

- 1.16 In the letter of 8 May 2017 the General Manager of the Council expressed concern that a breakthrough of Belongil Spit could occur with possible migration of Belongil Creek to the south.
- 1.17 We agree that a breakthrough of Belongil Spit into the creek or Belongil wetlands is a major environmental concern.
- 1.18 It is important that Council understand that the Jonson Street Structure has created that risk by narrowing the width of Belongil Beach. It is the current rock walls at Belongil which provide protection from that environmental disaster. As such, the existing walls and any improvement to them play an important role in environmental protection of the natural wetlands. In addition, previous Council had assessed how much public infrastructure is protected by the existing Belongil walls. The list which was prepared by the Council in 2010 was as follows:
- (a) trunk infrastructure (water, stormwater and sewerage mains; pump stations and set-off valves; gas pipelines, power lines, telephone lines; underground communication cables);
 - (b) road infrastructure;
 - (c) bridges and the railway;
 - (d) public amenities (eg community buildings, toilet blocks).

Previous Councils have estimated the loss of infrastructure in excess of \$50 million.

Again, these are not matters to be ignored – they are highly relevant matters which must be taken into account by the Councillors. There is no doubt that public infrastructure would be at risk if the Belongil walls were to fail and there was an ocean breakthrough.

Summary

In summary:

1. Council built the Jonson Street Structure;
2. there are decades of reports advising the Council that the Jonson Street Structure has caused erosion;
3. this creates particular duties for the Council under section 55C of the Coastal Protection Act;
4. it also creates particular duties for the Council and the Councillors under the common law of tort to protect from the danger it has created;
5. the Supreme Court awarded \$2.75 million in damages and an injunction in 2016. This is not the end of potential litigation. That award of damages applied only to the date of judgment. Ongoing failures to protect from the danger create new liabilities for the Council and also potentially the Councillors if they were to act knowingly in breach of their duties and without power.
6. The works currently proposed in the Flawed CZMP expand the length and area of the Jonson Street Structure. The proposed works involve a large amount of additional rocks and concrete. If the Flawed CZMP does not include offsetting walls proposed for Belongil under the Previous CZMP (or some other positive action to ameliorate the downstream erosion effect of the Jonson Street Structure), there will be a total failure to protect from the impact of the Jonson Street Structure.
7. Council through its Councillors must discharge the duty to protect from the danger created by the Jonson Street Structure – this still has not been addressed and creates an ongoing exposure to liability and damages.
8. The changed impact of those works must also be addressed by Council in accordance with Section 55C of the Coastal Protection Act. In this context, we refer to Mr Darney's letter of 21 March 2014 in which Council undertook that it would meet its obligations pursuant to Section 55C(1)(g) of the Coastal Protection Act in relation to any works proposed at Jonson Street.
9. A failure to do so will result in a very clear risk, on many grounds, that the Flawed CZMP will be an invalid plan which can be challenged in the Courts and potential liability in damages.
10. Councillors should check with its insurers before proceeding to expand the Jonson Street Structure without compensating protection for the rest of Byron Bay Embayment.

Councillors cannot come in and ignore that history as if it had not occurred and proceed as if Council had not built the structure and received decades of reports about its impact increasing erosion.

ANNEXURE C

SCHEDULE OF LEGAL NON COMPLIANCE – FORMULATION OF COASTAL ZONE MANAGEMENT PLAN

**BYRON SHIRE COUNCIL - FORMULATION OF COASTAL ZONE MANAGEMENT PLAN
SCHEDULE OF LEGAL NON COMPLIANCE**

1. The outcome of the coastal zone management plan was predetermined by Council with respect to the retention of the artificial headland known as the Jonson Street Protective Works:-
 - a. Council's initial instructions to BMT WBM (the authors of the Erosion Hazards Assessment Update) are summarised in the attached extract of the initial draft report dated 22 November 2012 as :-

"Council's specifications for the erosion hazard assessment are based on retention of the Jonson Street protection works and potential removal of all other protective sea walls in order to identify the erosion hazard extents that would apply to that situation"
 - b. The final BMT WBM Byron Coastal Hazards report dated 19 September 2013 assessing only two scenarios as described on page XV of that report:-
 - i. ***"Scenario 1: Retention and permanent maintenance of all existing coastal erosion works and interim beach access stabilisation works along the Byron Bay Embayment; and***
 - ii. ***Scenario 2: Retention of only the Jonson Street protection works and removal of all other coastal erosion protection works and interim beach access stabilisation works along the Byron Bay Embayment"***.
 - c. Council approving the development of land situated within the 7(f2) Urban Coastal Lands Zone on 20 December 2012 by way of Development Application 10.2012.407.1 relating to 45-47 Lawson Street. The land is to be rezoned medium density in the Draft LEP against the directives of the Minister who directed all 7(f2) Urban Coastal Lands Zone land were to be deferred matters in the current LEP process.
 - d. Council resolving to adopt the recommendations of the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson [sic] Street Protection Works" at a meeting of Council on 27 February 2014
 - e. At the direction of UMWELT [and concurrence of James Carley, Councillors and Council staff], the workshop held on 18 February 2014 and entitled "Evaluating options to manage hazards on our coast" proceeded on the basis that the only issue that required consideration by the invitees was the erosion and inundation issues at Belongil Beach.
2. Council Resolution 13-21 passed on 14 February 2013 did not authorise Council to predetermine to protect the town centre through the retention of the approved works [Jonson Street Protection Works] because Council Resolution 13-21 resolved that the entire resolution 06-721 "not apply to the preparation of the Draft Coastal Zone Management Plan.." not just the limb referring to "planned retreat" as interpreted by Council staff.

3. The instructions by Council staff to BMT WBM (the authors of the Erosion Hazards Assessment Update) were inconsistent with and ultra vires to Council Resolution 13-21 passed on 14 February 2013 for Resolution 06-721 not to apply to the preparation of the draft Coastal Zone Management Plan.
4. The exclusion from the Byron Bay Embayment of the Belongil Estuary for the purposes of the preparation of the coastal zone management plan
5. The processes undertaken by Council and/or BMT WBM in the formulation of the draft coastal zone management plan, including the final BMT WBM Byron Coastal Hazards report dated 19 September 2013, have ignored and continue to ignore any consideration of:-
 - (a) the Belongil Estuary and the management of estuary health and any risks to the estuary arising from coastal hazards in breach of, inter alia, Section 55C(1)A(e) of the Coastal Protection Act 1979 given the serious adverse environmental impacts on the Belongil estuary and wetlands if the Belongil protective works are removed.
 - (b) Council Resolution 13-21 which required consideration of a range of potential actions to manage the risks from coastal hazards, including but not limited to building and infrastructure setbacks (planning and development controls), coastal protection works (short-term or long-term), beach nourishment and emergency management, as detailed in Table 3 of the statutory 'Guidelines for Preparing Coastal Zone Management Plans' (DECCW 2010).
 - (c) The many alternative options to **Scenario 1** other than **Scenario 2** [refer paragraph 1(b) above] discussed and/or recommended in all of the previous studies with Council and/or WBM BMT effectively presupposing that **Scenario 2** is the only possible option to **Scenario 1** which is inconsistent with the findings of all previous studies, none of which recommended **Scenario 2**.
 - (d) The non-compliance of **Scenario 2** [refer paragraph 1(b) above] with OEH 2013 Coastal Management Principles, particularly 3, 5 & 8.
 - (e) Any unbiased management options preferred by the whole of community after due and proper process in accordance with the coastal protection legislation and focused on consideration of **Scenario 2** as the only alternative to **Scenario 1** [which effectively represents the status quo] which seems to be a further indication that Council has predetermined **Scenario 2** as its preferred option [Refer to paragraph 1 above]
 - (f) Whether Council has any legal right to remove the existing protective works, most of which was sanctioned by Council's engineers prior to construction and having regard to the various common law and statutory obligations and duties owed to existing landowners to enable them to utilise their properties in the manner in which they have been zoned;
 - (g) The cost to Council of litigating to enforce the removal of the existing protective works and the liability, contingent or otherwise, that Council may face if it is unsuccessful.
6. The processes undertaken by Council, BMT WBM and/or Worley Parsons in the formulation of the draft coastal zone management plan, including the final BMT WBM Byron Coastal

Hazards report dated 19 September 2013 and the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson Street Protection Works" have ignored and continue to ignore:-

- (a) the requirement for any such proposed arrangements for the construction of coastal protection works to also provide for the adequate management of associated impacts of such works (such as changed or increased erosion elsewhere) in breach of, inter alia, Section 55C(1)A(g) of the Coastal Protection Act 1979; and
- (b) the adverse impact of the Jonson Street Protection Works on Belongil Spit which is a fundamental flaw given the Jonson Street Protection Works is arguably the most serious of all of the erosion hazards in the Byron Bay Embayment,

which seems to be a notable omission and/or failing of these reports given Patterson's finding that the rate of recession at Belongil Beach has increased from parity to almost five (5) times the regional average since construction of the Jonson Street Protective Works.

7. It is inappropriate for Council to act upon and/or adopt any recommendations of the final BMT WBM Byron Coastal Hazards report dated 19 September 2013 given Council must have regard to the following limitations and qualifications in considering the report:-

- (a) The acknowledgement by the author of the final BMT WBM Byron Coastal Hazards report dated 19 September 2013 within that report that the EVO-MOD model upon which the report has been based cannot give definitive answers for complex coastal systems such as Byron with a high degree of variability;
- (b) Council are aware that the work of BMT WBM on this embayment has been critically peer reviewed by many coastal experts including Professor Cox of UNSW, James Carley of UNSW, Professor Goodwin of Access MQ and Angus Jackson of ICM.

James Carley, an expert routinely retained by Council, wrote the following in relation to Patterson's work – *"Due to the limited scope of the Patterson (2010) study, additional studies are needed before using it as the basis of decision making."*

- (c) The acknowledgement within the report that uncertainty remains about the underlying rate of recession and that there is "insufficient knowledge" to be definitive about the processes which are actually occurring on this section of coastline.
- (d) The EVO MOD model adopted by WBM BMT has been "forced" to include a loss of sand to the Byron Lobe at an average rate of 50,000 m³/yr affecting the cross-embayment transfer – which is an assumption used in the model and not a verified scientific or modelled finding – in other words Patterson acknowledges that he "fudges his model" to arbitrarily remove 50,000 m³/m/yr because it can't simulate the cross shore sand transport to generate his finding of shoreline recession west of the Jonson Street Protection Works [refer page 109].

The downstream erosion effects of the Jonson Street Protection Works on Belongil Beach will necessarily be understated to the extent that this arbitrary assumption is overstated.

- (e) The sea level rise predictions adopted within the report are no longer in accordance with more recent NSW government policy
8. The recommendations of the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson [sic] Street Protection Works" at a meeting of Council on 27 February 2014 effectively amount to an inducement for Council to commit the tort of nuisance and non-compliance with Coastal Protection legislation/guidelines and Council's legal duty to protect Belongil landowners from the danger caused by the Jonson Street Protective Works.
9. Council resolving to adopt the recommendations of the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson [sic] Street Protection Works" at a meeting of Council on 27 February 2014 effectively is a resolution to commit the tort of nuisance, non-compliance with Coastal Protection legislation/guidelines and Council's legal duty to protect Belongil landowners from the danger caused by the Jonson Street Protective Works.
10. Council should not have made any decision as it was premature to adopt the recommendations of the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson [sic] Street Protection Works" at a meeting of Council on 27 February 2014 because Council should be considering the options for Jonson Street Protection Works in the context of giving considerations to the recommended solutions for the whole of the Byron Bay Embayment – the requirement for Jonson Street Protection Works to be decided as part of the overall plan [and not in isolation] is consistent with sound coastal engineering practices and the requirements of the Coastal Protection Act.
11. Failings in the public consultation process including, but not limited to:-
- (a) Pre-determination of the outcome of the Erosion Action Sub-Plan prior to the workshop being held which is the subject of previous correspondence with Council;
 - (b) Notwithstanding multiple invitations to Council, a failure to engage with Belongil landowners to ascertain their willingness to contribute to rock protective sea-walls to the extent they protect private property, and on what terms and conditions;
 - (c) The online questionnaire/survey compiled by Council and UMWELT contained leading questions, embedded assumptions, questions inappropriate for surveys of this nature and presupposed Council has legal power to undertake a wide range of actions which Council know are being challenged in current Supreme Court proceedings with Belongil landowners, all of which were designed to predetermine the outcome of the survey in accordance with Council policy – this is the subject of separate correspondence.
 - (d) The scheduling of the workshop held on 18 February 2014 and entitled "Evaluating options to manage hazards on our coast" some two (2) weeks in advance of the final date for submissions in respect of the final BMT WBM Byron Coastal Hazards report dated 19 September 2013 and in advance of the Council resolution to adopt the recommendations of the Worley Parsons Report dated 11 February 2014 entitled "Investigating the Re-design of the Jonson [sic] Street Protection Works" at a meeting of Council on 27 February 2014
 - (e) The failure of James Carley, the expert presenter at the workshop held on 18 February 2014 and entitled "Evaluating options to manage hazards on our coast" to present findings to the attendees in relation to historical rates of recession and the quantified

extent of erosion at Belongil Beach [both in terms of measured recession and distance] directly attributable to the Jonson Street Protective Works that were consistent with the Patterson Reports adopted by Council

- (f) The inappropriate compression of the public consultation period appears to have been motivated by the need to compress the original timetable for completion of the draft coastal zone management plan because of delays in completion of tasks required as pre-requisites to the public consultation process.

SUBMISSION OPPOSING DRAFT CZMP ON PUBLIC EXHIBITION

1. On 19 April 2018 Council resolved to place a draft CZMP on public exhibition [**“Flawed CZMP”**]
2. This submission has been prepared on behalf of the various Belongil landowners who initiated Supreme Court Proceedings numbered 426979 of 2010 [**“SC Proceedings”**] and other past and present Belongil landowners [**“Belongil Litigants”**] as well as the Byron Preservation Association.

Background to this Submission re the draft CZMP

3. The essence of the SC Proceedings was that the Belongil Litigants claimed that the Jonson Street Structure, which had been built by the Council approximately 90 meters seaward of the original escarpment on about 1.2 hectares of land reclaimed from the sea, had created a danger for all other properties located to the northwest in the Byron Bay embayment by causing downstream erosion. This danger arose because the artificial headland unnaturally traps sand to its east and interrupts the normal nearshore process of sand movement resulting in a material landward recession of the original beach and escarpment at Belongil Beach.
4. Pages 9 to 22 of the Statement of Claim filed by the Belongil Litigants in the SC Proceedings contains a summary of the litany of experts reports received by Council over many decades advising of this downstream erosion hazard (often from experts retained by Council). This summary is extracted as **Annexure A** to this Submission.
5. In particular, your attention is drawn to paragraphs 38A & 39 of the Statement of Claim set out below:-

“38A On 6 April 1964, the Shire Engineer wrote to the Shire Clerk of the Council in the following terms:

“It was also disclosed that in the estimation of the Public Works Department the construction of a groin from the Shore to the Wollongbar wreck would certainly silt up the area south of the wall but could have a further detrimental effect on the area north of the site”

“39 On or about 24 October 1972, the Council received a letter from the New South Wales Department of Public Works providing information concerning beach erosion. That letter advised:

(a) that the best technical method of dealing with beach erosion was sand nourishment so as to offset the erosion;

(b) that a second method was to build a flexible revetment of stone or concrete blocks at a slope not steeper than 1 in 4 so that the beach could re-build against it;

(c) that a revetment, by preventing erosion, could cause compensatory erosion elsewhere.”

6. The original Jonson Street Structure was built in late 1964 – 1965.
7. When Council re-built the Jonson Street Structure in 1975, it also ignored the above mentioned advice of the NSW Department of Public Works.
8. In the six (6) years the SC Proceedings remained on foot, Council failed to submit any evidence in response to the expert evidence filed by the Byron Litigants evidencing this downstream erosion effect, and instead elected to settle the SC Proceedings approximately two (2) months before trial.
9. Notwithstanding Council has been aware for so long that it has created the primary erosion hazard in the Byron Bay Embayment, Council has failed in the 54 years that have subsequently elapsed to:-
 - a. take any positive steps to ameliorate these downstream erosion effects it created;

- b. effect any coastal management policy; and
 - c. formulate a valid Coastal Zone Management Plan in spite of decades of trying.
10. Council has been operating under a Statutory Direction made on 12 October 2011 by the then Minister of the Environment, Minister Parker under section 55B of the *Coastal Protection Act 1979* to prepare a draft CZMP for the whole of the Byron Bay embayment – not just part of it - with the deadline for completion extended several times, most recently to 30 June 2015. All extensions have expired.
 11. The FAQ page of the Council website dealing with the Previous CZMP noted as follows:-

“Belongil Beach has been categorised as a ‘coastal erosion hot spot’ by the NSW Government.....Given the erosion risks along Belongil Beach, the Minister directed Council to make the CZMP.”

“Councils must make a CZMP if directed to do so by the Minister”
 12. At the time, the Councillors were very conscious of the need to comply with the long outstanding Statutory Direction from the Minister.
 13. Council submitted a draft Draft Coastal Zone Management Plan to Minister Stokes on 30 June 2016 [**“Previous CZMP”**]
 14. Page 1 of the Flawed CZMP makes it clear that the Flawed CZMP is still an effort by Council (a futile effort in our opinion) to comply with Minister Parker’s Statutory Direction from 2011.

Advice of Minister Upton

15. We are aware that Minister Upton (Minister Stokes moved departments in the interim) has written to Council on 28 August 2017 advising that she does not propose to certify the Previous CZMP in the form in which it had been submitted (which included restoration of the existing rock protective works at Belongil) with a public access walkway.
16. We do not yet accept this to be a lawfully made decision. It appears to us that it was founded upon advice from the Coastal Panel that contained serious errors of fact and law (some of which contradict Council’s own position as resolved by full Council dating as far back as 2006) which may have misinformed the certification process. Council is aware that our legal advisers have previously written to the Minister and the solicitors for the Coastal Panel about this.

We reserve all of our rights in this regard. Please note that the remainder of this Submission is prefaced upon this position.

17. The Minister’s letter contemplated that Council may be permitted to prepare a Draft Coastal Zone Management Plan which deals only with new construction on the Jonson Street Structure but does not contain a plan which in any way deals with the downstream erosion effects of the Jonson Street Structure along Belongil Beach.

We disagree that this option will result in a draft CZMP that is capable of certification pursuant to the terms of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines for the many reasons outlined in the balance of this Submission.

18. The Minister’s letter also clearly indicated that she *“will be in a position to certify the”* Previous CZMP provided *“other changes to the draft CZMP are made”*. *“In particular, the following key issues must be resolved:-*
 - *The recommended strategy of a seawall with walkway along Belongil Spit must adequately address the impact this structure will have on the adjacent and adjoining (down drift) coastline*
 - *There must be agreement from the relevant public authorities about any proposed actions or activities to be carried out by them or relating to any land or other assets owned or managed by them.”*
19. Council appears to have failed to make any effort to deal at all with these two outstanding requisitions which would have enabled:-

- a. the Minister to certify the Previous CZMP; and
 - b. Council to comply with Minister Parker's long outstanding Statutory Direction from 2011.
20. No Council acting reasonably could legitimately justify such a decision to:-
- a. ignore compliance with the Minister's Statutory Direction; and
 - b. abandon the five (5) year process by which the Previous CZMP had been compiled (at considerable expense) without making any effort to deal with two outstanding requisitions.
21. An important factor here is that the Belongil walls are **not** regularly in touch with the ocean and cannot be causing erosion. Only the Jonson Street Structure is in the active ocean processes and interfering with them. The clear inference is that Councillors have been wilfully blind to that option clearly afforded by the Minister to have the Previous CZMP certified and meet compliance with the Statutory Direction, because that option didn't suit their political ideology.

Mystery Structure proposed to be built at Jonson Street by Flawed CZMP

22. Instead, Council then resolved to proceed with a draft coastal zone management plan only for the area east of the Byron Bay Township.

23. Page 6 of the Flawed CZMP (at 1.5.3) states

At the forefront of this plan, the highest and most costly priority action is to upgrade the coastal protection works at Main Beach (Jonson Street) to protect the town centre from coastal hazards and improve beach access and amenity'.

24. Page 13 of the Flawed CZMP (at 2.1.1) states:-

"A concept design exists for the upgrade of the JSPW, as presented in the Worley Parsons, 2014 report, however further work is required to refine a preferred concept after other alternatives have been re-considered. At the 22 February 2018 meeting Council resolved (Res 18-104) that further options for the upgrade be canvassed, evaluated and costed (Appendix 8 – 'Council Resolutions'). Hence the first stage in the delivery of the project will be to reconsider the various design options available, undertake a contemporary assessment of the options and refine a preferred concept design that meets the project objectives (as outlined above) in consultation with the community". [emphasis added]

This concept design referred to in the Flawed CZMP was not one of the design options which underwent a triple bottom line assessment in the above mentioned Worley Parsons Report.

25. The "Stage One – Pre Construction Sub-actions" identified on page 13 of the Flawed CZMP (at 2.1.1) directly contradict what is proposed by the Flawed CZMP (as set out in para 24 above) and proposes that only one preferred concept be costed with no community consultation in the selection of the preferred concept.

26. In Councillor Jan Hackett's supporting information contained in the Agenda for Council Resolution 18-104, she stated the following and offered the following supportive images (only 2 of 5 reproduced):-

"From recent coastal conferences, I have noted that marine engineers are now looking at new and more innovative ways to approach protecting beach assets from sea rise and storm impacts. Somewhere between hard rock revetments (which scour the beach of sand - as we have seen at Main Beach- and have a high failure rate), and retreat (although even that nasty is now been considered and costed), there are middle ground options being designed and proposed as alternative and gentler (but just as effective) ways of extending the life of both the beach and the commercial & residential assets built on the beachfront itself.

Byron Shire calls itself an innovative and 'different' community which protects its environment and lifestyle options. We need to demonstrate this by seeking innovative as well as cost effective ways of improving our world famous foreshore and make it something we are truly proud of.

Subsequent to the 8 February SPW, Chloe Dowset has approached the OEH and found they would be open to revisit the JSPW as per the 2016 CZMP and consider new concepts for the upgrade.

I move therefore that the OEH be invited to attend a future SPW asap to discuss new ideas and suggestions for a revitalized concept plan for the JSPW that meets their requirements of:

- protecting public assets*
- reducing the constructed footprint on the natural environment*
- having a positive impact on adjacent and downdrift beaches (Cavvanbah, Belongil) i.e. removing the groynes for one*
- where possible, preferencing soft stabilization and the management of social and natural ecosystems.*

Following the EOH workshop, I move that Council engage a recognized and innovative coastal engineer (similar to Angus Gordon for example), to explore and draw up a range of concept plans that meet OEH requirements and fit in with the BB Masterplan vision for Main Beach.”



27. Councillor Jan Hackett also spoke to her Motion in full Council on 22 February 2018 in the following terms:-

“I think it is still possible with some inventive designers and engineers to still build as they did 100 years ago to still build on the beach....but allow the beach to resume its natural form....build above the sand dunes.... cantilevered architecture above the beach.....allow the beach underneath to retain its ability to resume its natural form.....we used to have jetties...in the UK they have these piersthese piers that go outthe timber pylons which hold them up still allow sand to pass through”

28. Both the Flawed CZMP and Council Resolution 18-104 clearly indicate that a range of alternative protection structures, ranging from engineering solutions as diverse as cantilevered timber pylons to traditional rock or concrete structures, will be considered in the first stage of the Flawed CZMP (if and when certified).
29. As such, on any reading of the Flawed CZMP it is impossible to ascertain:-
- exactly what type of structure is proposed to be built;
 - exactly what type of engineering solution will be used to build that structure;
 - exactly what beach footprint will be occupied by that structure; and
 - exactly what impact that structure will have on coastal processes.
30. How can there be any meaningful public consultation with respect to what is described in the Flawed CZMP as the “forefront of this plan” and “the highest and most costly priority action” is still a complete mystery.
31. The Flawed CZMP is, in effect, “a plan to make a plan” and incapable of being legally characterised as a valid CZMP pursuant to the terms of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines. The Flawed CZMP cannot possibly be certified by the Minister for this reason alone.
32. The illustrative example touted by Council in the Flawed Plan is an expanded version of the existing Jonson Street Structure [**“Jonson Street Megastructure”**] estimated to cost approximately \$7,000,000. For ease of reference, set out below is a layout plan extracted from the Worley Parsons Report (discussed below at paras 67-85) which shows the additional works proposed at the Jonson Street carpark. These works are clearly substantial. The magnitude of the works is illustrated by the estimated cost of \$7,000,000. Of this, the Flawed CZMP estimates that \$3.5m will be spent on the rock revetment and \$1.5m on the proposed concrete stepped seawall (exclusive of approval, design & consultant’s cost and contingency). The layout plan clearly indicates that only one of the spur groynes is to be removed. Instead, the proposed wall is to move seaward to incorporate the two shorter groynes into an expanded rock wall which also extends further lengthways and seawards.

Thus the proposal of Council discussed in the Flawed CZMP is to add length and bulk to the existing rock wall by adding more rocks. This design was not one of the options modelled by Worley Parsons. It has chosen an option of adding a very large amount of rock. Council did not have to take this choice.

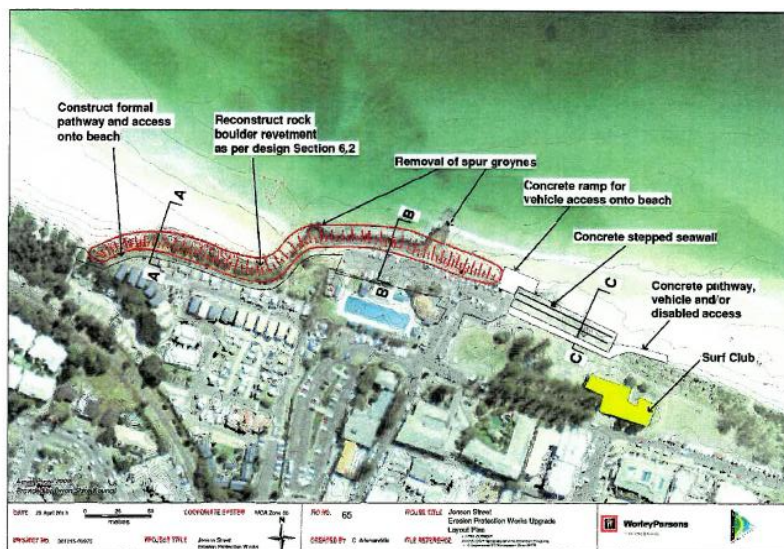


Figure 65 – Layout Plan – Rock Revetment and Stepped Concrete Seawall option

33. This proposal contradicts Page 10 of the Flawed CZMP (at 2.1.1) which misleads readers when it states:-

“Removal of the spur groynes is expected to have a positive impact on the adjacent and down-drift coastline through a release of unencumbered sand transported east to west around the JSPW, from the area in front of the Surf Lifesaving Club to the area in front of the First Sun Caravan Park” [emphasis added],

because it is not proposed for the three spur groynes to be removed in their entirety (as one can clearly see from the above layout plan) under the Jonson Street Megastructure proposal.

34. Furthermore, this assertion contradicts the findings in the Worley Parsons Report (at page 85 in relation to the recommended option versus the more erosion prone Jonson Street Megastructure) which states:-

“To the west, the slug of sand transport resulting from removal of the spur groynes may initially increase the beach berm width in front of the First Sun Caravan Park, with the existing sand bypass rate re-established after a few months. Following re-establishment of the existing sediment transport rate, long term erosion to the west of the JSPW would continue at around the present rate as influenced by the various contributing factors including the JSPW...” [emphasis added]

35. Inexplicably, this option selected for the Previous CZMP and touted as the indicative example in the Flawed CZMP was not modelled as one of the design options which underwent a triple bottom line assessment in the above mentioned Worley Parsons Report. This is discussed in more detail below.

BMT WBM Reports [“Patterson Reports”]

36. The Patterson Reports consist of a 2010 report entitled BMT WBM Modelling Byron Bay Erosion Processes 2010 and a 2013 report entitled BMT WBM Byron Shire Coastline Hazards Assessment Update Report
37. The Patterson Reports undertook a technical analysis which sought to identify the likely extent of coastal risks that may affect the Byron coastline now and in the future (including sea level rise).
38. In the course of the formulation of the Flawed CZMP, Council endorsed the advice of Dean Patterson from BMT WBM which confirmed the downstream erosion impact of the Jonson Street structure on Belongil Beach. This is recorded in formal Resolution 13-542 of the Council.
39. The Patterson Reports confirmed to Council, and Council has endorsed the finding, that the impact of the Jonson Street structure has been to trap sand on the south side of the structure and that the impact of the structure extends beyond the creek, causing recession of at least 20 metres.
40. The Patterson Reports were intended to inform a later management study and plan which was intended to determine strategies and policies to deal with how those hazards are best managed.
41. The 2010 report advised Council to the following effect:
- a. the Jonson Street Structure has had a long shore distribution extending over a long section of the shoreline at Belongil (2.6 Conclusions);
 - b. according to the modelling diagrams attached to the report, the impact of the Jonson Street Structure to which the report refers, extends from immediately northwest of the Jonson Street structure all the way to Belongil Creek (Figure 21, Figure 22);
 - c. according to this report, the impact has caused approximately 20 metres of landward recession since 2000, and is continuing (2.6 Conclusions);
 - d. the impact of seawalls constructed by residents along the Belongil Spit (including the present plaintiffs) *“has been relatively modest and local to date”* (2.5 Model Results).
42. The 2010 Report also stated in its conclusion that:-

“The modelling of shoreline change without future sea level rise indicates the following key results:

- *The seawall at Jonson St has prevented what may have been about 50m of erosion that would otherwise have occurred naturally at Main Beach to date and potentially a further 10-50m over the next 50 years (in the absence of sea level rise);*

- *Correspondingly, the seawall at Jonson Street has affected Belongil Spit erosion as an incremental increase in addition to what would have occurred naturally in its absence, but is thus not the whole contributor to the erosion that has occurred. This incremental effect has an unusual and unexpected longshore distribution, being of relatively modest extent (approx 20m) extending over a long section of shoreline rather than a more extensive effect over a limited distance (refer Figure 22). This is probably related to the nature of the processes along the area immediately west of the seawall where significant erosion would otherwise have occurred naturally;*
- *Correspondingly, all of the seawalls have contributed to shoreline stability to their east, quite markedly at Byron Main Beach and along the shoreline between Jonson Street and Border Street.*
- *Broadly, the seawalls have provided significant stability to the shoreline position along the whole length from Main Beach to Manfred Street, although unprotected parts and sections with flexible sand bag walls are subject to storm erosion."*

43. The 2013 Report:-

- a. advised Council that the 2010 Report provides the most recent information available to Council about the relative contribution to erosion of the Jonson Street structure;
- b. confirmed to Council that the Jonson Street structure has had a major impact in trapping sand and this impact now extends all the way along Belongil Beach
- c. provided precise measurements to Council about the amount of sand which has been trapped by the Jonson Street structure which ought to have made its way to Belongil Beach.

44. In formally resolving to adopt the findings of the Patterson Reports, Council and their consultants are now duty bound to rely only on the Patterson Reports to inform the formulation of the draft CZMP. That is what the Council Resolution says.

45. New Councillors are bound by past resolutions of Council.

46. Page 9 (at 2.1) and Appendix 4 (at 1.1) of the Flawed CZMP discuss the Patterson Reports. Inexplicably, none of the above mentioned findings of Patterson with respect to the downstream erosion effect of the Jonson Street Structure are mentioned in the Flawed CZMP, not even under the heading "Other assets at risk from coastal hazards" (at 1.2.2) of Appendix 4. This must be corrected failing which any public consultation is flawed as is the overall process due to the failure to have regard to relevant matters.

47. Given the Flawed CZMP makes no mention whatsoever of the downstream erosion impact of the Jonson Street Structure, it is impossible for any independent observer to find any evidence that the Patterson Reports have informed Council in its formulation of the Flawed CZMP. As previously mentioned, we emphasise this is just two of many reports to the Council to this effect. Again, we refer you to the complete list contained in **Annexure A** to this Submission.

48. Councillors cannot wilfully ignore information that doesn't suit their political ideology without risk of serious personal consequences.

Water Research Laboratory ["James Carley"] Reports

49. As mentioned previously, the Patterson Reports were intended to inform a later management study and plan which was intended to determine strategies and policies to deal with how those hazards are best managed.

50. If a draft CZMP is not formulated in accordance with this procedure, it fails to meet the requirements of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines

51. So best practice in coastal management dictates that the solution for protecting the Byron town centre should be decided as part of the overall plan for coastal management which ought properly to have been informed by the results of a Coastal Hazard Management Study in order for the outcome to be consistent with sound coastal engineering practice and the requirements of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines.

52. WRL (James Carley) prepared a study entitled Coastal Hazard Management Study – Byron Bay Embayment [**“Hazard Management Study”**] for Council in 2016 which considered the coastal hazard risks identified in the Patterson Reports and determined the feasibility of a range of coastal hazard management options for those risks. That report was endorsed by Council in the formulation of its Flawed CZMP.
53. Excluding the annexures which contain reports compiled by external consultants, the Hazard Management Study is 355 pages long and primarily deals with a consideration of the hazard management options that could possibly be implemented to deal with the coastal hazard risks at Belongil Beach. Only 2 of the 355 pages of the Hazard Management Study (pages 77 & 137) deal with the geographical area that is the subject of the Flawed CZMP.
54. It seems odd that the Flawed CZMP discusses the Hazard Management Study on page 9 (at 2.1) and Appendix 4 (at 1.2) yet makes no mention of the downstream erosion impact of the Jonson Street Structure, nor any of the recommendations of the Hazard Management Study to deal with that erosion impact when that subject occupies 353 of the 355 pages in the Hazard Management Study.
55. In these circumstances, it is impossible to imagine that process of formulation of the Flawed CZMP is compliant with the provisions of the requirements of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines
56. Any independent observer could only conclude that the Councillors failed to take account of the Hazard Management Study in the formulation of the Flawed CZMP. As previously mentioned, we emphasise this is just one report of many to the Council to this effect. Again, we refer you to the complete list contained in Annexure A.
57. Councillors cannot wilfully ignore information that doesn't suit their political ideology without risk of serious personal consequences.

Pre-determination

58. There is yet another fundamental legal flaw in the procedure by which Council formulated the Flawed CZMP which undermines its validity.
59. As mentioned previously, the solution for protecting the Byron town centre should be decided as part of the overall plan for coastal management which ought properly to have been informed by the results of a Coastal Hazard Management Study
60. Contrary to the requirements of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines, the outcome of the Flawed CZMP was predetermined by Council with respect to the retention of the Jonson Street Structure.
61. A decision to protect the Byron town centre from coastal risks identified in the Patterson Report by retaining and/or bolstering the Jonson Street Structure ought properly to have been made as a result of a recommendation from the later Coastal Hazard Management Study.
62. Instead Council predetermined the solution for protecting the Byron town centre in providing its initial instructions for the Patterson Reports. It is ironic and improper for Council to have pre-determined to retain and/or bolster the Jonson Street Structure in providing instructions to BMT WBM for these reports which subsequently identified the Jonson Street Structure as the largest hazard in the Byron Bay Embayment.
63. Council's initial instructions to BMT WBM are summarised in the below extract of the initial draft of the Patterson Report dated 22 November 2012 as:-

“Council's specifications for the erosion hazard assessment are based on retention of the Jonson Street protection works and potential removal of all other protective sea walls in order to identify the erosion hazard extents that would apply to that situation”
64. The final Patterson Report dated 19 September 2013 assessed two scenarios both of which included the retention of the Jonson Street Structure, as described on page XV of that report extracted below:-

- i. **“Scenario 1: Retention and permanent maintenance of all existing coastal erosion works and interim beach access stabilisation works along the Byron Bay Embayment; and**
- ii. **Scenario 2: Retention of only the Jonson Street protection works and removal of all other coastal erosion protection works and interim beach access stabilisation works along the Byron Bay Embayment”.**

65. Any predetermination of part of the draft Coastal Zone Management Plan process potentially results in further non-compliance with many aspects of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines. Council is duty bound to, (but failed) to consider options for protecting the Byron town centre which do not have downstream erosion effects for other parts of the Byron Bay Embayment.
66. Finally, it seems clear that the premise upon which the Patterson Reports have been completed is obsolete as a result of the injunction granted as part of the SC Proceedings preventing Council from taking any steps to remove the majority of the coastal protection works at Belongil Beach. Scenario 2 cannot be considered as part of any Hazard Assessment Study which purports to comply with the provisions of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines

Scenario 2 would be a contempt of Court if sought to be implemented by the Council by removing the coastal protection works protected by the Injunction.

Worley Parsons Report

67. As previously mentioned, the Jonson Street Megastructure was discussed but was not one of the design options which underwent a triple bottom line assessment in a report prepared by Worley Parsons entitled “Investigating the Re-design of the Jonson Street Protection Works” dated 11 February 2014 [“WP Report”].
68. Consistent with the various Council Resolutions and Management Actions detailed in the WP Report’s introduction, in investigating the upgrade and design of coastal protection works at Jonson Street, the WP Report was to specifically address the potential to:-
- a. *“minimise down-drift impact and address safety concerns”*; and
 - b. *“reduce the impact on Belongil Beach”*
69. Council is aware that the WP Report provided Council with a number of other options to deal with the impact of the Jonson Street Structure. The advice from Worley Parsons was that the Jonson Street Structure was clearly having an impact and creating erosion. At page 70 of the report Worley Parsons, wrote as follows:
- “... the JSPW extends out onto the active beach zone, compartmentalizing the beach and interrupting longshore sediment transport. The JSPW act as a headland, dividing the beach into two discrete compartments and altering the plan in front of the beach. This makes it difficult to maintain a useable beach in front of the structure and will result in increasing incident wave heights at the structure over time. This has been recognised by various studies including the Byron Shire Coastline has a definitions study (WBM 2000).”*
70. At page 84, Worley Parsons noted the following disadvantage of maintaining the current alignment of the Jonson Street Structure:-
- “The structure would continue to interrupt sediment transport from east to west along Belongil Beach as is the case at present, potentially causing further erosion immediately downdrift of the structure and acting as a headland. Further, the beach on either side of the carpark area would be expected to recede as a result of future sea level rise, enhancing the future headland effect of the carpark and increasing the future downdrift erosion rate.”*
71. At page 85, Worley Parsons predicted no material improvement in downstream erosion impact as a consequence of any proposal to remove the spur groynes:-
- “Following re-establishment of the existing sediment transport rate, long term erosion to the west of the JSPW would continue at around the present rate as influenced by the various contributing factors including the JSPW.”*

72. Worley Parsons (at page 142) recommended the following option (with an indicative construction cost of approximately \$5,000,000) for concept design and further investigation: -
- removal of the spur groynes;
 - reconstruction of the rock boulder revetment in front of the carpark (in its existing location), and extension of this revetment westwards along the shoreline to the western boundary of the First Sun Caravan Park (to prevent outflanking of the revetment from the western side and to provide upgraded engineered erosion protection in this area)
 - replacement of the existing rock rubble in front of the reserve with an upgraded rock revetment
73. On 27 February 2014, Council did not accept the option recommended by Worley Parsons and instead resolved to protect the Byron Bay town centre through an alternative design incorporating *“a concrete stepped seawall for the eastern portion of the works in front of the reserve”* (at page 142) with an indicative construction cost of \$6,400,000.
74. The option adopted by Council is that depicted in the layout plan extracted at para 32 above which differs markedly from the recommendation made by Worley Parsons. The layout plan clearly indicates that the spur groynes are only to be partially removed. Rather the proposed wall is to move seaward to incorporate the two shorter groynes into an expanded rock wall which also extends further lengthways.
75. Inexplicably, this option Council resolved to pursue and now touts as the indicative example in the Flawed CZMP was not modelled as one of the design options which underwent a triple bottom line assessment in the above mentioned Worley Parsons Report.
76. As mentioned in para 71 above, Worley Parsons predicted no material improvement in downstream erosion if their recommended option was implemented. The advice of our coastal engineer is that the alternative design adopted by Council results in significantly worse downstream erosion than the option recommended by Worley Parsons.
77. Having regard to the instructions Council gave to Worley Parsons extracted in para 68 above, it defies belief that Council resolved to proceed with an option that does not result in any amelioration of the downstream erosion effect of the Jonson Street Structure.
78. The WP Report (at page 141) also noted that the Jonson Street Structure *“would continue to interrupt sediment transport into the future unless it is moved landward”*.
79. For this reason, Worley Parsons also provided Council with options to move the Jonson Street Structure landward to restore as closely as possible the natural beach alignment and natural longshore sediment transport regime. At pages 90 & 91, Worley Parsons discussed the following alternatives:-
- “The location of the historical escarpments indicates that, even in the early 20th century, the active beach extended over the area of the existing Jonson Street carpark. Restoring the longitudinal beach profile so that the JSPW no longer extend onto the active beach (as per the 1913 profile) would therefore require removal of the carpark, pool and adjacent reserve area, so that the seaward boundary of the works are located landward of the 1913 beach erosion escarpment (due to ongoing beach recession that has occurred since that time).*
- To reduce the impact of the works on the active beach, an option for realignment of the works would involve removal of the carpark and reconstruction of the works along an alignment seaward of the swimming pool and kiosk. Such an alignment would be similar to the position of the 1921 erosion escarpment.”*
80. Council chose to ignore these options presented in the WP Report notwithstanding the continued use of disingenuous “vision” statements such as *“minimise impacts to natural coastal processes”, “mitigate coastal hazard risks”* (page 5 at 1.4.1) throughout the Flawed CZMP.
81. Council passed this resolution more than two years prior to completion of the Hazard Management Study which ought properly to have informed that decision according to the requirements of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines
82. As previously mentioned, Council’s predetermination of the draft Coastal Zone Management Plan process meant Council failed to consider the options contained in the WP Report which protected the

Byron town centre but which did not have downstream erosion effects for other parts of the Byron Bay Embayment.

Further legal issues surrounding Council's improper pre-determination are contained in **Annexure C** entitled "*Byron Shire Council – Formulation of Coastal Zone Management Plan – Schedule of Legal Non Compliance*" forwarded to Council under cover of letter from the Byron Preservation Association dated 20 March 2014. This is discussed in more detail in paras 151-153 below.

83. All Councillors should take note of the unequivocal advice they have received about the erosion impact of the Jonson Street Structure in yet another report formally commissioned and endorsed by Council. As previously mentioned, we emphasise this is just one report of many to the Council to this effect. Again, we refer you to the complete list contained in **Annexure A** to this Submission.
84. Councillors cannot wilfully ignore information that doesn't suit their political ideology without risk of serious personal consequences.
85. If Council or the Councillors have a political agenda against rock protective works, why doesn't Council adopt one of the options provided by the WP Report to restore the original alignment at Jonson Street (described at para 79 above). For the loss of only some car parks at Jonson Street, the downstream erosion is substantially resolved and the protective works would no longer be required at Belongil (once Belongil Beach has been given some time to recover)

Council's Previous Resolutions & Legal Advice

86. As mentioned in paragraphs 68 above, in retaining Worley Parsons to produce the WP report into the possible expansion of the Jonson Street Structure, Council specifically asked Worley Parsons to address Council Resolutions 06-721 & 06-802 (refer page 1 of the Worley Parsons Report) in which a Barham-led Council resolved in late 2006:-
 - a. Resolution 06-721 – *"that Council commit to protecting the Byron Bay town centre through retention of the approved works and identify as an action in the plan to investigate the potential for modification to reduce the impact on Belongil Beach"* [emphasis added] ; and
 - b. Resolution 06-802 – *"that Council pursue a funding application with the Emergency Management Authority (EMA) for a research project to assess the impacts and potential mitigation for Belongil Beach from the protection works at Main Beach."* [emphasis added]
87. It is implicit in these Council resolutions that Council has already accepted that the Jonson Street Structure causes a downstream erosion impact on Belongil Beach. Further:
 - a. the resolutions do not authorise an expansion of the Jonson Street Structure but talk of "retention" of the approved works and "modification to reduce the impact on Belongil Beach"; and
 - b. the entire WP report is prefaced upon an acknowledgement by both Council and WP of this premise.
88. The Council Agenda Papers and Resolution from 14 July 2016 also make it very clear that Council received legal advice from Norton Rose requiring it to settle the SC Proceedings.
89. That legal advice would be readily available to all Councillors who were not Councillors in mid 2016, and must be considered by those Councillors.
90. So much has happened over the years that it is easy to forget some of what has occurred and why. It seems even the Councillors have forgotten that formal Council Resolutions acknowledge the downstream erosion impact of the Jonson Street Structure on Belongil Beach
91. Past resolutions are binding on new Councillors and cannot be ignored. There are significant legal issues of liability here. Individual Councillors or Council staff cannot ignore all the expert reports which the Council has, all its legal advice and the past resolutions of the Council. The impact of the Jonson Street Structure is not a free policy zone where a new Council can decide to ignore past legal and expert advice and its own past resolutions.
92. Councillors cannot wilfully ignore information (and consequent legal ramifications) that doesn't suit their political ideology without risk of serious personal consequences.

Ignoring by Council of downstream erosion impact of Jonson Street Structure

93. As previously mentioned, the Flawed CZMP inexplicably makes no mention whatsoever of the downstream erosion impact of the Jonson Street Structure. It is incredible that Councillors have resolved to place the Flawed CZMP on public exhibition and chosen to ignore the 54 year history of expert advice given to Council in this regard in compiling that document.
94. The Flawed CZMP is so patently deficient in failing to discuss this downstream erosion effect that any independent observer could only conclude that the Councillors have failed to take account any of the conclusions of the many expert reports Council commissioned and endorsed in the formulation of the Flawed CZMP.
95. The Flawed CZMP is also ultra vires and inconsistent with the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines (and does not amount to a plan for the purposes of that Act) because it:-
- a. makes no provision for protecting and preserving beach environments and beach amenity, in as much as it makes no provision for protecting or preserving Belongil Beach;
 - b. makes no provision for emergency action in relation to Belongil Beach and, in particular, makes no provision for the protection of property affected or likely to be affected by beach erosion that occurs through storm activity; and
 - c. fails to ensure continuing and undiminished public access to beaches, headlands and waterways, particularly (as in the present case) where public access is threatened or affected by erosion, sand deficit and realignment.
96. This failure of the Flawed CZMP to deal with the downstream erosion impact of Jonson Street compounds the inability of the Flawed CZMP to meet other requirements of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines
97. Yet another key failing of the Flawed CZMP is the section entitled "2.1.1 Upgrade of the Jonson Street Protection Works" which contains general preliminary cost estimates. There is no estimate for the following items:-
- a. the cost of managing the associated impacts of such works (such as the downstream erosion effects at Belongil Beach) as required by Section 55C(1)(g) of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines whether that be achieved by way of sea walls, nourishment, groynes or other end control structures; and
 - b. removal of the Jonson Street Structure at the end of the duration of the Flawed CZMP (refer 1.7) in June 2033 (or earlier in accordance with responsible adaptive management);
98. In circumstances where Council has already resolved by way of the Flawed CZMP to upgrade the Jonson Street Structure, there appears little justification for allocating substantial portions of any of these costs to other stakeholders in a future draft CZMP or CMP dealing with Belongil Beach. The failure to consider these substantial costs for which Council will be liable upon making any decision to upgrade the Jonson Street Structure is yet another serious failing of the Flawed CZMP.
99. It seems Council deliberately chooses, as a matter of policy, to maintain a denial of the downstream erosion impact of Jonson Street Structure. In a letter written as recently as 7 April 2017, Mark Arnold the Acting General Manager of Byron Shire Council wrote to Professor Bruce Thom, the Chair of the NSW Coastal Panel in the following terms:-
- "Council notes that in the additional information provided by the applicant's [sic] it is stated that there is "long-documented impact of the Jonson Street structure on the downdrift beaches at Belongil". Council acknowledges that the alleged impact of the Jonson Street structure was part of the Plaintiffs' Supreme Court claim.*

Council does not admit the alleged impact and requests that the Coastal Panel ignore the statement in its consideration of the development applications." [emphasis added]

100. In the context of Annexure A to this Submission, the Patterson Reports (refer paras 36-48), the Hazard Management Report (refer paras 49-57), the Worley Parsons Report (refer 67-85), and previous Council Resolutions & legal advice (refer paras 86-92), Mark Arnold's denials have no basis in any factual, legal or expert material held by the Council.

101. Any decision by Council to proceed contrary to the expert advice it has received from the experts it engaged for this task (and which Council has accepted) would be in breach of the requirements of the Coastal Protection Act 1979 and the underlying Manual, Regulations, Guidelines and the general law.

102. Accordingly, these are matters that have been reviewed and accepted by the Council. They cannot be ignored or disregarded by the new Councillors. They must be considered carefully and taken into account.

103. In these circumstances, where Councillors have been wilfully blind to information that didn't suit their political ideology:-

- a. Council will lose the benefit of any good faith defence on this ground alone.
- b. no Councillor will be able to avail themselves of any good faith defence and may incur personal liability.

104. Acting upon incorrect advice/directions of OEH or the Coastal Panel will not mitigate the liability of Council or Councillors.

The Critical Issue for the Flawed CZMP

105. Given the nature of the proposed expanded works at Jonson Street, and the extensive advice which Council has received over decades about its impact, the question which obviously arises is whether Council can have a valid CZMP which:

- (a) proposes to undertake the works at Jonson Street (as per the Johnson Street Megastructure discussed in the Flawed CZMP); and
- (b) proposes no action to protect from the erosion danger which has been created and will continue to be created by the expanded Jonson Street Megastructure.

106. Our position is that it would be unlawful for the Council to proceed in such a way. We say that for the reasons set out below in summary and in more detail in **Annexure B**.

Section 55C of the Coastal Protection Act

107. This section requires a Council to address coastal hazards in a draft CZMP. The Jonson Street Structure is, according to the advice already accepted by Council, the main source of coastal erosion hazard in the Byron Bay Embayment. The Flawed CZMP is obviously deficient if it does not deal with that erosion hazard.

108. Furthermore, section 55C(1)(g) requires that a Coastal Zone Management Plan must address:

"Managing the associated impacts of works [in the Coastal Zone Management Plan] such as changed or increased erosion".

109. Accordingly, a plan that does not deal with the impact of the Jonson Street Megastructure does not comply with the section.

110. Council has already recognised this obligation:-

- a. as per Council Resolutions 06-721 & 06-802 (which are set out in detail in para 86 above);
- b. by the manner in which Council instructed Worley Parsons to prepare the WP report [refer para 68 above]; and
- c. by way of letter dated 21 March 2014 from Ray Darney, its Executive Manager Environment & Planning, Council in which Council advised as follows:

“As per Section 55C(1)(g) of the Coastal Protection Act 1979, the draft CZMP will make provision for proposed arrangements for the management of any associated impacts of proposed coastal protection works where they are funded by Council or a private landowner or both.”

111. By this letter, Mr Darney responded to the specific concern (raised by the Belongil Litigants in February 2014) and undertook that Council would meet its obligations pursuant to Section 55C(1)(g) of the Coastal Protection Act in relation to any works proposed at Jonson Street.

112. Council has now resiled from this position in the Flawed CZMP.

113. Council appears to be operating under the misapprehension that because it amended the geographic area that is the scope of the Flawed CZMP (we would allege, invalidly) to exclude the Belongil area, it can ignore the mandatory requirement of Section 55C(1)(g) to manage the erosion hazard.

114. The provisions of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines do not support this position adopted by Council

The duty to protect at Common Law

115. In the formulation of the Flawed CZMP, Council endorsed inter alia the Patterson Reports, the Hazard Management Study and WP Reports which confirmed to Council that the impact of the Jonson Street Structure extends the whole way along Belongil Beach and past Belongil Creek.

116. The law is clear that a Council which has created a danger, comes under a duty to protect from the danger.

117. Council contested, but was forced to confront that it is capable of coming under a duty to protect after the ruling of Hidden J in March 2016 during the course of the SC Proceedings.

118. Councillors will be aware that the Belongil Litigants initiated SC Proceedings on the basis that, as a matter of law, Council has a duty to protect from the danger which it had created by the construction of the Jonson Street Structure which the Council built in the 1960's and rebuilt in the 1970's. That duty was the basis of the damages and injunction awarded by the Supreme Court against the Council in August 2016.

119. It is important that Councillors understand that that judgment is **not** the end of liability for the Jonson Street Structure.

120. Council has still done nothing to protect from the danger created by the Jonson Street Structure. As a result, the duty to protect from the danger and the liability for a failure to do so continues including for damages post the Orders made on 11 August 2016.

121. This is made very clear by the Supreme Court Rule 30.3 which applied in relation to the impact of the Orders which were granted in August 2016.

122. Councillors should take legal advice if they are in any doubt about the continuing legal obligations and exposure as a result of the fact that this Council has still done nothing at all about the duty to protect from Jonson Street. See, for example, the decision in *Henly v The Mayor of Burgess of Lyme* 1828 (copy attached). The decision in *Henly* is relevant to the Council's potential liability in relation to its obligations set out in the 2001 Development Consent, the IBAS and other works which the Council has resolved to construct at Belongil Beach but has failed to undertake either properly or at all.

123. This duty ought properly to inform the manner in which Council must discharge its statutory powers.

Neither Council nor Minister can authorise tortious activity in a valid CZMP

124. Maintaining or expanding the Jonson Street Structure without taking steps to protect others from the danger it creates, is the continuation of a tort (in either nuisance or negligence).

125. These tort claims were the basis on which the Supreme Court was empowered to grant an injunction in the SC Proceedings.

126. Neither the Council nor the Minister has the power to authorise activity which is tortious in nature,

127. The Flawed CZMP cannot be considered a valid CZMP in accordance with the provisions of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines where the "forefront of this plan" and "the highest and most costly priority action" constitutes tortious behaviour.

Consistent decision making

128. Page 16 of the Flawed CZMP (at 2.1.3) states:-

"In essence the CZMP does not support or advocate any new "hard" coastal protection works (seawalls) however, it does include the option for small scale armouring works to protect significant Aboriginal middens....."

yet, the Flawed CZMP openly discusses the greatly expanded Jonson Street Megastructure costing \$7,000,000 as the likely option to protect the town centre.

129. It is an impermissible double standard for the Flawed CZMP to:-

- a. propose rock walls to protect the town centre, when the expert advice provided to Council by its consultants have determined those rock walls will continue to cause erosion; and
- b. contain no plan to protect, or even deal with that part of the beach adversely affected by such erosion.

130. Council must act consistently and fairly in its decision making. It cannot, in the application of its statutory powers, apply one standard to the coastal protection works it proposes for the town centre and another for other parts of the Shire, whether that be the repair of the existing rock protective works along Belongil Beach, or new protective works which attempt to preserve Aboriginal middens at Clarke's Beach.

131. All of Council's powers and duties must be exercised in accordance with the rule of law which requires these obligations of consistency and fairness. Council and Councillors can be liable in damages if they knowingly depart from the required standards in relation to the exercise of their powers.

Failings specifically identified to Council in the Previous CZMP process

132. In a letter dated 21 September 2016, Professor Bruce Thom, the Chair of the NSW Coastal Panel wrote to Minister Rob Stokes in the following terms about the Previous CZMP:-

*"Unfortunately, key elements of the CZMP dealing with hazard management along Belongil Spit do not meet fundamental legislative requirements and therefore the Panel **cannot recommend certification** of the draft Byron Bay Embayment CZMP in accordance with the provisions of the Coastal Protection Act 1979.*

In particular, in the view of the Panel, the recommended strategy of a 'seawall with walkway' along Belongil Spit fails to adequately consider the impact of such a structure on environmental and amenity values, especially what impact it will have on the adjacent and adjoining (downdrift) coastline. Section 55C(1)(g) Coastal Protection Act 1979 requires that the Plan must make provision for managing associated impacts of such works (such as changed or increased beach erosion elsewhere.....

.....Section 55C(2)(b) Coastal Protection Act 1979 requires that the Plan must not include proposed actions or activities to be carried out by any public authority or relating to land or other assets owned or managed by a public authority, unless the public authority has agreed to the inclusion of those proposed actions or activities in the plan.

.....The limited exhibition period impacts on Council's ability to fully satisfy necessary requirements of the Coastal Protection Act 1979 ...

The complexity of issues surrounding management of the Belongil Spit precinct and the associated high costs of various alternative management options necessitate considerable attention to Coast Benefit Analysis (CBA) as key decision making tool for transparent decision making

Suggests that Council, as a matter of urgency, enter into discussions with Department of Industry-Lands on improvements to Jonson Street works”

133. As mentioned previously, Minister Upton wrote to Council on 28 August 2017 enclosing a copy of the above mentioned letter and advising she did not intend to certify the Previous CZMP (as submitted). In that letter she advised Council:-

“I recommend that Byron Shire Council consider the Coastal Panel’s most recent advice, which is attached for your information, in amending the draft CZMP.”

134. The Minister recommended Council consider, in amending the Previous CZMP, Professor Bruce Thom’s written advice that :-

“Section 55C(1)(g) Coastal Protection Act 1979 requires that the Plan must make provision for managing associated impacts of such works (such as changed or increased beach erosion elsewhere.....”

As discussed above. the Flawed CZMP fails to mention this issue, let alone deal with this issue.

135. The Minister recommended Council consider, in amending the Previous CZMP, Professor Bruce Thom’s written advice that :-

“Section 55C(2)(b) Coastal Protection Act 1979 requires that the Plan must not include proposed actions or activities to be carried out by any public authority or relating to land or other assets owned or managed by a public authority, unless the public authority has agreed to the inclusion of those proposed actions or activities in the plan” and “Suggests that Council, as a matter of urgency, enter into discussions with Department of Industry-Lands on improvements to Jonson Street works”

The Flawed CZMP has not complied with this mandatory requirement, nor could it possibly have appropriately dealt with it given it merely consists of a “plan to make a plan”.

As previously mentioned, on any reading of the Flawed CZMP, it is impossible to ascertain exactly what form of structure the expanded Jonson Street Structure will take, or its exact footprint. In such circumstances, it is impossible for Council to have obtained, and ultra vires for the relevant public authorities to have granted the necessary consents when such consent cannot be properly defined.

136. The Minister recommended Council consider, in amending the Previous CZMP, Professor Bruce Thom’s written advice that :-

“The complexity of issues surrounding management of the Belongil Spit precinct and the associated high costs of various alternative management options necessitate considerable attention to Coast Benefit Analysis (CBA) as key decision making tool for transparent decision making”

In a direct contradiction to this advice from Bruce Thom, the Flawed CZMP proposes to cement as the “forefront of this plan” and “the highest and most costly priority action” the expenditure of approximately \$7,000,000 on an expanded Jonson Street Structure without first undertaking any form of cost benefit analysis.

137. The Minister recommended Council consider, in amending the Previous CZMP, Professor Bruce Thom’s written advice that :-

“The limited exhibition period impacts on Council’s ability to fully satisfy necessary requirements of the Coastal Protection Act 1979”

The Flawed CZMP has endured no public consultation prior to exhibition and has the exact same duration public exhibition period as the Previous CZMP. Council’s blatant disregard for the requirement of public consultation is discussed on more detail below.

138. This advice from Professor Bruce Thom extracted at para 132 above has been paraphrased on page 1 of the Flawed CZMP, a document which then fails to deal with the very issues which:-

- a. according to Professor Bruce Thom, invalidated Council's earlier efforts with Previous CZMP;
- b. according to Minister Upton, should be considered *"in amending the draft CZMP"*.

139. It is little wonder Council has failed to formulate a valid CZMP notwithstanding decades of trying, and tens of millions of dollars in wasted costs and resources.

Consultation

140. Page 8 of the Flawed CZMP (at 1.8) states:-

"Various forms of stakeholder consultation have been conducted during the development of this CZMP. An extensive consultation process was undertaken during 2016 for preparation of the CZMP BBE, with further consultation undertaken by Council in 2018 on the newly formed plan for the Eastern Precincts of the BBE."

141. Page 8 of the Flawed CZMP (at 1.8.1) also states that:-

"A Community Engagement Plan, 2018 developed by Council guided the community engagement activities including Website updates, Media Releases, Newspaper Alerts and Workshops."

142. These extracts from the Flawed CZMP are highly misleading because the Flawed CZMP has not been subjected to the requisite public consultation required by the provisions of the Coastal Protection Act 1979 and the underlying Manual, Regulations and Guidelines, and is therefore invalid:-

- a. Public consultation undertaken in respect of the Previous CZMP (an entirely different CZMP dealing with a different geographical area but containing an effective hazard management strategy - versus none in the Flawed CZMP - presenting a balanced whole of embayment solution), cannot be credited to the Flawed CZMP.

Council has incorrectly assumed stakeholders who were comfortable with the balanced whole of embayment solution in the Previous CZMP would also be supportive of the Flawed CZMP which is an entirely different proposal and does not contain any effective hazard management strategy for the main erosion hazard identified by the various expert reports endorsed by Council in the process of formulating the Flawed CZMP;

- b. It is incorrect for Council to state in its Flawed CZMP that either *"further consultation undertaken by Council in 2018 on the newly formed plan for the Eastern Precincts of the BBE"* or the *"Community Engagement Plan"* provided any form of effective public consultation with respect to the Flawed Plan.

This is self evident from a review of Table 1 of Appendix 3 of the Flawed CZMP which discloses that the only consultation with the general community during the course of 2018 (prior to the Flawed CZMP being placed on public exhibition) was limited to a *"website notice"*.

- c. All stakeholders should be advised of the options canvassed by Worley Parsons in 2014 and their impact.
- d. Inexplicably, the Flawed CZMP does not mention any of the above mentioned findings of the Patterson Reports, the Hazard Management Study or WP Report with respect to the downstream erosion effect of the Jonson Street Structure.

Emergency Action Sub-Plan – No Protection for Belongil

143. Section 55C of the Coastal Protection Act requires that a coastal zone management plan must make provision for:

"emergency actions carried out during periods of beach erosion, including the carrying out of related works, such as works for the protection of property affected or likely to be affected by beach erosion, where beach erosion occurs through storm activity or an extreme erosion event".

144. By virtue of the advice provided to Council by, inter alia, the experts retained by Council in the formulation of the Flawed CZMP regarding the impact of the Jonson Street Structure, Council knows

that the properties belonging to the Belongil Litigants at Belongil Beach are likely to be affected by beach erosion through storm activity or an extreme erosion event.

145. Council pre-determined that:-

- a. it would not include any provisions in the Emergency Action Sub-Plan for the protection of private property; and
- b. the only protective steps that would be included in the Emergency Action Sub-Plan as intended emergency actions would be to support the protection afforded by the Jonson Street Structure to the township of Byron Bay by monitoring and repairing the Jonson Street Structure as and when required.

146. The Council, as part of its preparation of the Emergency Action Sub-Plan, purported to consult with the community as it was required to do. In particular, the Council purported to comply with this obligation by holding a community meeting on 1 September 2011.

147. However, at the outset of that meeting, the Council officers present at the meeting indicated that Council had already determined that it would not consider and would not discuss at the consultation meeting the possibility of steps being included in the Emergency Action Sub-Plan for the protection of private property as contemplated by section 55C(1)(b) of the Coastal Protection Act.

148. At the meeting, and subsequently by letter, the Belongil Litigants indicated to Council that they wished to discuss contribution by way of funding to such steps and asked Council to meet with them to consider such an option

149. The Council never responded in substance to that offer made at the meeting or in writing. Consequently, the Council has failed to fulfil the public consultation requirements of the of the Coastal Protection Act, 1979 and the underlying Manual, Regulations and Guidelines because it never consulted with the Belongil Litigants about either:

- a. the possibility of steps being included in the Emergency Action Sub-Plan for the protection of their properties; or
- b. the possibility of the Plaintiffs contributing to the costs of such steps if they were included in the Emergency Action Sub-Plan.

150. In the circumstances, the Council failed to comply with the Guidelines for Preparing Coastal Zone Management Plans (2010).

SCHEDULE OF LEGAL NON COMPLIANCE – FORMULATION OF COASTAL ZONE MANAGEMENT PLAN

151. Under the cover of a letter addressed to Ray Darney & Catherine Knight from Council dated 20 March 2014, the Byron Preservation Association wrote in relation to the process by which, to that point in time, the draft Coastal Zone Management Plan had been formulated and placed on written record *"concerns about a number of areas of non-compliance with the Coastal Protection Act and the underlying Manual, Regulations and Guidelines"*

152. A copy of the Schedule of Legal Non Compliance which accompanied that letter to Council dated 20 March 2014 is contained as Annexure C to the Submission.

153. Since Council has elected to recycle many of the preliminary steps previously undertaken by Council from as far back as 2011 in the process of formulating the Flawed CZMP, the concerns contained in the Schedule of Legal Non Compliance remain valid with respect to the Flawed CZMP and should be considered as part of this Submission.