

General Manager
Byron Shire Council
PO Box 219
Mullumbimby NSW 2482

1 September 2021
Our Ref: MJS:21172337

By Email: council@byron.nsw.gov.au

Privileged and Confidential

Dear Sir

DA 10.2019.0343.1 – 150 Tandys Lane, Brunswick Heads – Objection

1 The purpose of this letter

This letter contains a submission by way of objection with respect to the proposed development comprising 4 single bedroom cabins that is the subject of DA 10.2019.0343.1 (**Proposed Development**).

This submission is made on behalf of a number of residents of Andersons Hill and Tandys Lane as per the "Community Petition" dated 26 August 2021 and signed by 27 residents which we are instructed has recently been provided to Council (**Objectors**).

For the reasons given in Sections 2 and 3 below, the Objectors submit that:

- (a) Council cannot lawfully approve the Proposed Development; and
- (b) even if Council could lawfully approve the Proposed Development, it should exercise its discretion to refuse the application on the basis that it is unmeritorious, a threat to the environment and contrary to the public interest.

2 Summary of the Objection

In summary, the Objectors submit that:

- (a) the Proposed Development is properly characterised as development for the purposes of an "eco-tourist facility" which is prohibited within the RU1 Primary Production zoning applicable to part of the Proposed Development site (**Prohibited Development Objection**);
- (b) the Proposed Development creates an unacceptable fire risk due to the assessment proceeding on basis of the false (or discriminatory) assumption that cabin occupants will be ambulatory (**Fire Risk Objection**); and
- (c) the Proposed Development has been assessed on the false premise that it is the only accommodation provided on the site and contains no cumulative assessment of its impacts together with the existing on-site accommodation (**Cumulative Assessment Objection**).

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3 Details of the Objection

3.1 Prohibited Development Objection

The Proposed Development comprises 4 single bedroom cabins. Under the *Byron Local Environment Plan 2014* (BLEP):

- (a) two of the proposed cabins are located on land zoned RU1 Primary Production; and
- (b) the other two cabins are located on land zoned RU2 Rural Landscape.

The applicant seeks to categorise the development as development for the purposes of “tourist and visitor accommodation” which is permitted with consent in both the RU1 and the RU2 zone.

For the reasons explained, below we think the Proposed Development should in fact be characterised as development for the purposes of “eco-tourist facilities”. This question of characterisation is important because eco-tourist facilities are an innominate prohibited use within the RU1 zone.

Tourist and visitor accommodation is defined in the BLEP as follows (emphasis added):

... a building or place that provides temporary or short-term accommodation on a commercial basis, and includes any of the following—

- (a) backpackers’ accommodation,
- (b) bed and breakfast accommodation,
- (c) farm stay accommodation,
- (d) hotel or motel accommodation,
- (e) serviced apartments,

but does not include—

...

- (h) eco-tourist facilities.

The Proposed Development does not readily fall within any of the 5 nominated sub-categories of tourist and visitor accommodation set out in (a) to (e). This is not determinative however, as the list of sub-categories are merely illustrative and non-exhaustive.

The definition of Tourist and visitor accommodation is subject to exceptions. That is, sub-categories of accommodation which are expressly excluded from the definition. Importantly, this list of excluded sub-categories of accommodation includes “eco-tourist facilities”.

The BLEP defines “eco-tourist facilities” as follows:

... a building or place that—

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

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

The Proposed Development falls squarely within the definition of an “eco-tourist facility”. The proposed cabins:

- (a) provide short-term accommodation to visitors on a commercial basis;
- (b) have been located close to special ecological matters including remnant bushland which Council has left as “deferred matters” until it determines how they properly ought to be managed; and
- (c) have been designed to be small in scale and located so as to minimise impacts on the special ecological features on the land.

The proper characterisation of development hinges on the *purpose* of that development. In the planning law context, the *purpose* of development is determined objectively - it is the end which is seen to be served by the carrying out of the development. The subjective intent of the persons carrying the development is irrelevant when determining its purpose: see *Pet Carriers*¹.

In this case, it is clear that the objective purpose of the Proposed Development is to provide eco-tourist facilities as defined in the BLEP. Any statements regarding the developer’s subjective intentions in carrying out the Proposed Development which are to the contrary should be given little weight.

3.2 Fire Risk Objection

The fire assessment report prepared for the purposes of the Proposed Development concludes that it is non-compliant with the applicable bushfire safety standards.

To resolve this dilemma, the fire assessment report proposes a “performance-based solution” as an alternative to compliance with the applicable standards.

A critical step in the development of a performance-based solution is the formulation of the starting assumptions upon which the solution will be based.

In this case, the fire risk assessment assumes that all guests at the accommodation will be able bodied and readily able to evacuate the site quickly in the case of emergency.

- The basis upon which this assumption is made has not been explained. It presupposes that the developer will impose a discriminatory policy of only accepting able bodied persons as guests.
- In addition, the logic underpinning this assumption runs directly contrary to the objectives of the fire safety standards (which are actually quoted in the report). They read:

Tourists staying in tourist accommodation have been known to evacuate late or travel down inappropriate roads with fatal results. A better strategy may either be staying within a resilient building as a refuge or having coordinated escorted evacuation. In some cases, the attraction of the site as a bushfire setting conflicts with the need for adequate APZs, however this should not lead to a lower standard of construction or unsuitable access.

In this case, the Proposed Development:

¹ *Botany Bay City Council v Pet Carriers International Pty Limited* [2013] NSWLEC 147 at [25].

- (a) seeks to adhere to a lower fire safety standard based on a proposed discriminatory guest admission procedures and faulty assumptions as to the likely behaviour of able-bodied guests in an emergency; and
- (b) proposes cabins have been deliberately sited close to heavily forested areas (in keeping with their proposed use as eco-tourist facilities). This means that the fire hazards are far more than theoretical.

The Objectors understand that the Rural Fire Service (**RFS**) was initially unwilling to provide a Bush Fire Safety Authority (**BFS**) for the Proposed Development but was persuaded to do so on the basis of the faulty (or discriminatory) assumption outlined above.

There is nothing in the integrated development procedures contained in the *Environmental Planning and Assessment Act 1979* which restricts a consent authority from refusing a development application on bushfire risk grounds merely because the RFS has issued a BFS (unlike, say, development subject to a heritage approval which cannot be refused on heritage grounds).

Here, the bushfire risk is self-evidently high and the performance-based solution, which relies on the occupants of the cabins being able bodied person and able to run from fire, is based on inherently uncertain assumptions and is arguably discriminatory.

The high level of bushfire risk provides a compelling reason for Council to exercise its discretion to refuse to approve the Proposed Development.

3.3 Cumulative Assessment Objection

A key deficiency in the assessment undertaken for the Proposed Development is that it only assesses the impacts of the 4 cabins which are the subject of this particular application.

However, the development site:

- (a) also contains an existing approved detached dual occupancy; and
- (b) was until recently available for rent on the usual short-term accommodation websites. The “Art Studio” was tenanted and the “The Barn” was rented and marketed by the Applicants on social media and on the Byron Bay Luxury Accommodation website.

The use of the development site for accommodation purposes should not be assessed and approved on a piecemeal basis with every incremental addition to the site viewed in isolation.

That is, the Proposed Development should not be assessment merely as a 4 cabin eco-tourist facility, but as an expansion of an existing accommodation business. This is particularly important on a sensitive site of special ecological value. As far as we are aware, no independent environmental or ecological studies have been performed.

We are also instructed that the development site is currently serviced by a low quality and unsafe road which is unsuitable for the generated by the Proposed Development and completely unsuitable for the cumulative traffic generated at the site.

4 Conclusion

In circumstances where the Proposed Development, viewed objectively:

- (a) does not fall within any of the nominated sub-categories of development cited within the definition of “tourist and visitor accommodation”; but
- (b) falls squarely within the definition of “eco-tourist facilities”, which are excluded from the definition of tourist and visitor accommodation; and
- (c) where 2 proposed cabins are sited on land zoned RU1 in which zone eco-tourist facilities are an innominate prohibited use,

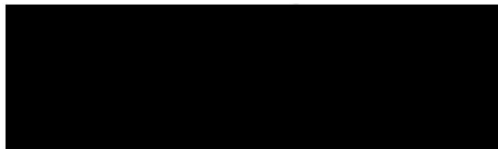
it is clear the Proposed Development cannot be lawfully approved.

Even if, contrary to the analysis outlined above, Council considers that the development should properly be characterised as a type of “tourist and visitor accommodation”, there are strong merits reasons why Council should exercise its discretion to refuse to approve the Proposed Development including:

- (a) the unacceptably high level of bushfire risk; and
- (b) the inadequate assessment of the cumulative impacts of the Proposed Development (in addition to the existing and other proposed short term accommodation facilities located on the site), which is not small scale.

Thank you for considering this objection.

Yours faithfully



Marcus Steele
Director
Bick & Steele



Date: 26 August, 2021
Attention: General Manager, Byron Shire Council and Councillors
Objection to DA: 150 Tandys Lane Brunswick Heads Application No: 10.2019.0343.1

Dear Mr Arnold and Councillors,

Tandys Lane and Anderson's Hill is a no-through, family-focused neighbourhood. We are a small community ranging from young families to the very elderly, all of whom make regular use of our no-through laneway for recreation and informal community catch ups.

The Andersons Hill and Tandys Lane Community (TLC) sincerely thank council for listening to and recognising our many concerns at the Council Meeting on August 5th.

In our address on August 5th, with limited time to address Council, our focus was on legalities and the numerous non-compliance issues. **As a community, we maintain that this DA is not permitted to be approved under the LEP for reasons already submitted and backed by substantial independent legal opinion. We write to submit further Community Concerns, supporting our unanimous request that this DA be rejected.**

Firstly, it is clear this is **no small-scale development**, nor is it in keeping with the area, which contains protected environmental zones and many species, some of which are threatened. These include koalas, white-bellied sea eagles, echidnas, goannas, many species of snakes, wallabies and bandicoots. Additionally, a past environmental study found the endangered potaroo to reside in the area. The development would represent a threat to both flora and fauna within these protected environmental zones.

Tandys Lane is a dead end, and the local traffic knows to look out for children, bikes, pedestrians, wildlife and ponies, whilst navigating the road. **To add four more dwellings in this context, in addition to the two existing significant dwellings (both comprising 4 bedrooms), will significantly increase traffic movements, impacting on the safety of the neighbourhood.** When taking into consideration service vehicles for cleaning, bedding and other services on top of the number of movements per bedroom per day (12 including the cabins), this represents more than doubling the traffic on Tandys Lane.

As it is, the lower section of the road is dangerous: unlit, winding, narrow in sections and incredibly potholed. **In fact, the Applicants themselves recognised this issue when they submitted a petition to Council in November 2018, describing how dangerous the road is for residents who are familiar with the road and the need to drive onto the verge in sections to avoid potholes and oncoming traffic.** Their proposal, which would add daily tourist traffic and large service vans to the mix, is a disaster waiting to happen. As such, Council should not accept the notion that their proposal is 'low' impact and 'low scale' to the existing community.

In addition to the large primary dwelling in which the Applicants currently reside, they converted a massive barn into a second luxury home, approved for Dual Occupancy (10.2016.818.2). This dwelling is marketed as 'The Barn'. As per the LEP, the second luxury home would 'provide alternative accommodation for rural families and workers'. **This second full-sized dwelling on the property already provides the additional 4 bedrooms, associated parking and far more than 4x60M2 provision for 'Tourist Accommodation' under the LEP and provides ample opportunity to generate additional income.** In addition, this luxury home has a large inground pool, a second 'Art

Studio' and a basketball court. As such, **we believe that no further Tourist Accommodation can be permitted.**

The TLC also notes that the Applicants recently moved two additional—and unapproved--dwellings from their existing luxury hotel in Byron Bay: 'The Atlantic' @atlanticbyronbay. One, an Airstream caravan, has been set up under a permanent structure with an outdoor area. The other, called 'The Albatross', is a separate dwelling and may or may not be still onsite. Both dwellings were accommodation offerings at The Atlantic and as such, we can only assume are fully equipped as tourist accommodation. These unapproved buildings would add a further 3+ existing bedrooms on site, not counting the unapproved cabin already situated alongside Simpsons Creek. **The TLC has always been concerned about the intended long-term objectives of The Applicants given their primary business is large scale tourist accommodation.** This concern appears well founded. We ask Council to address the Airstream Caravan and whether 'The Albatross' has been permanently located on the property in the Compliance Review, along with the removal of all 4 structures alongside Simpsons Creek.

The council review of cumulative impact has not been fully assessed, as it doesn't take into account the existing illegal rentable dwellings on site. The community is seriously concerned about the impact on our safety and the existing poor infrastructure due to these illegal rentable dwellings.

Environmental disaster. 150 Tandys Lane itself contains a number of environmental zones. In addition, the eastern boundary is a Marine Park and '7a Coastal Wetlands Area'; the southern boundary an 'Area of High Environmental Value'; and the northern boundary sees regular koala sightings, with the adjoining property containing numerous environmental zones, including several pockets of 'E2 Environmental Conservation'. As a community, we believe in the significance of these zones, are actively working to preserve and regenerate them and are asking for Council to support the ongoing protection of these critically important environmental zones.

The Applicants have consistently demonstrated a disregard for council policy and the environment. A composting toilet and two large platforms built by the Applicants on the water's edge of Simpsons Creek—a Marine Conservation Zone—have been under complaint since 2017. Despite orders for removal, they remain in place and have been used to host numerous commercial events. A recently-built large Cabin including a deck and carport sits within 30 metres of Simpsons Creek. The Instagram account @riverhawkbranch with over 20,000 followers (which has not been visible since the August 5 Council meeting) demonstrated the use of powerboats and wake-boarding by the applicants and their guests on the protected waters and banks of Simpsons Creek. **We ask Council to raise an order that all 4 structures be immediately removed and all power boat activities from the property be banned in order to protect a fragile and precious natural resource.**

The TLC has grave concerns about the intended use of this DA and the burden it places on the Council to actively police it, when the applicant has blatantly ignored existing compliance orders since 2017, has built further unauthorised structures and has until recently **illegally tenanted the 'Art Studio' and holiday let 'The Barn'** (against the conditions of the DA approval).

The TLC understand that the Applicant planted an approximately 150-metre-long hedge in response to the community objection to the development application, to block the view of the community, both local residents and visitors, to Cape Byron and Julian Rocks. The hedge is already well above fence height and is obstructing the iconic view that the community and visitors have enjoyed for generations. This is a view that most community members do not have from their individual properties and they are devastated that it can no longer be enjoyed along Tandys Lane. The Applicant raised that the hedge was planted to block the view of the proposed cabins; however,

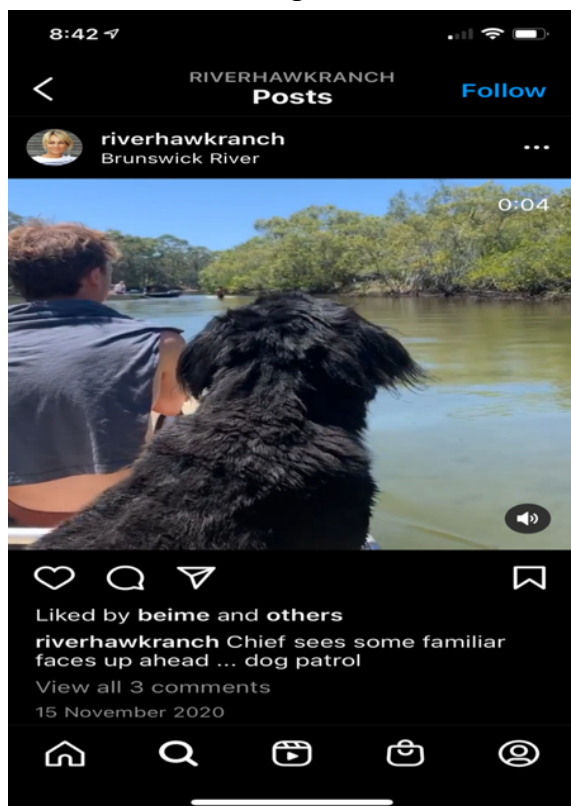
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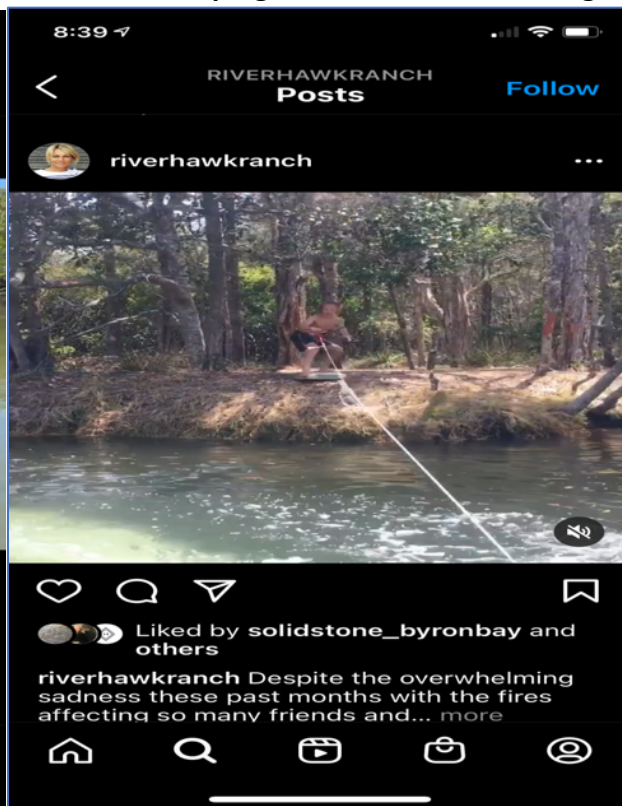
[REDACTED]

1) Images showing Applicants and Guests using water skis and wake boards on Simpsons Creek classified as a Marine Park and zoned 7a-‘Wetlands Zone’.

Nov 2020 Water skiing



Jan 2021 – Jumping off banks wakeboarding



Oct 2020 Guests and Applicants using power boats on Simpson’s Creek



SOURCE: @riverhawkranch Social Media Images

2) Example of Forthcoming Accommodation posted in 2017- “The Atlantic’s wonderful new accommodation River Hawk Ranch”. As well as both River Hawk Ranch and Atlantic Byron Bay being owned by The Applicants

NB: [@atlanticbyronbay](#) has 90,000+ followers and [@riverhawkranch](#) have over 20,000+followers: **this is not small scale promotion or reach.**



SOURCE: [@bisque_](#) Social Media Images

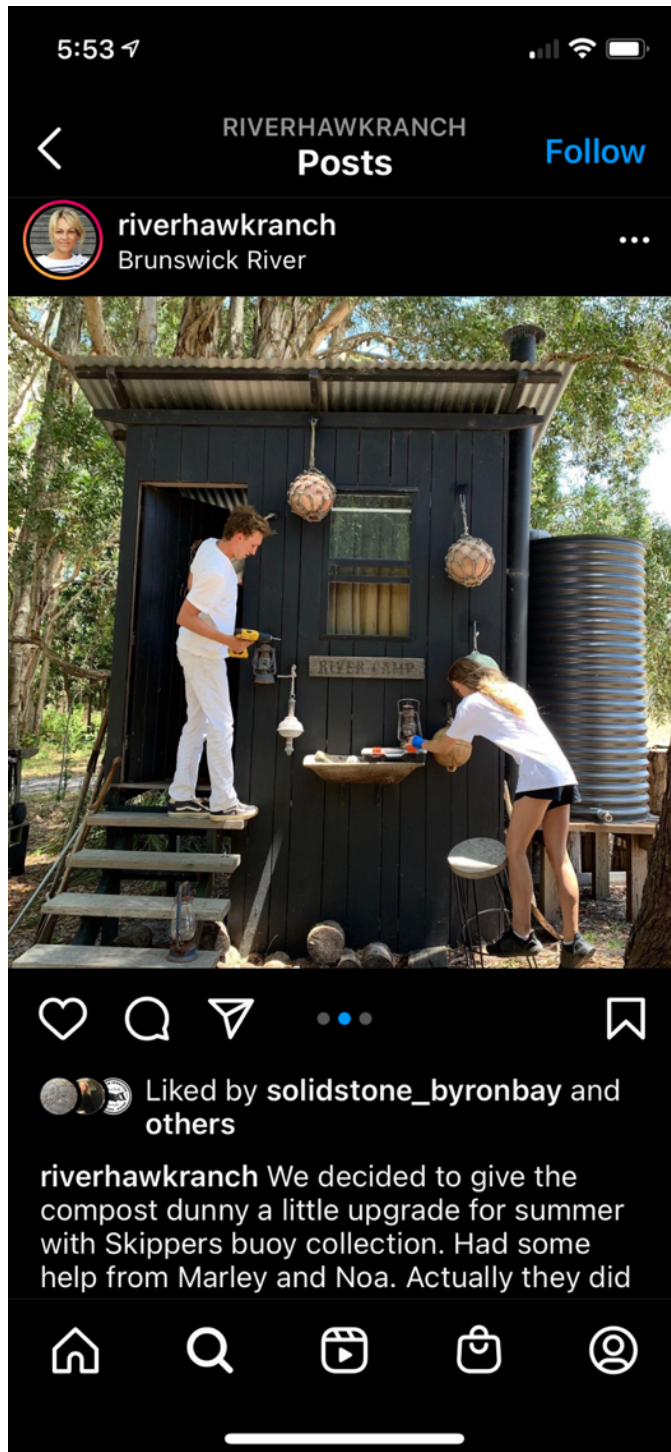
3) Unauthorised Structure 1 – Cabin adjacent to Simpsons Creek (classified as a Marine Park and zoned 7a-‘Wetlands Zone’)

This building looks the same as the cabins proposed in the DA, including a car port and deck. Built late 2019, without approval and despite existing orders from 2017 requesting the other unauthorised riverside structures in this area to be removed. Is this yet another accommodation offering in addition to the 4 cabins proposed in the DA?



4) Unauthorised Structure 2 – Composting Toilet on Simpsons Creek (classified as a Marine Park and zoned 7a-‘Wetlands Zone’)

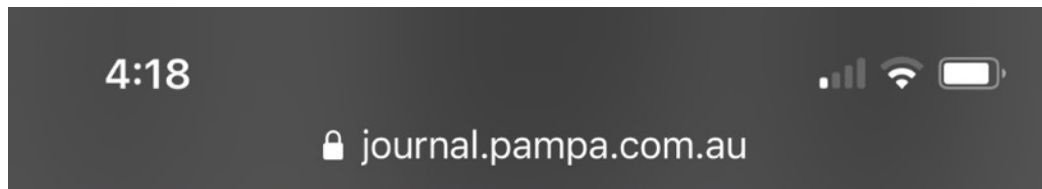
This image shows the toilet being decorated earlier this year despite Compliance Orders for removal in place since 2017.



SOURCE: @riverhawkranch Social Media Images showing unauthorised dwellings (4 in total) along the banks of Simpson's Creek.

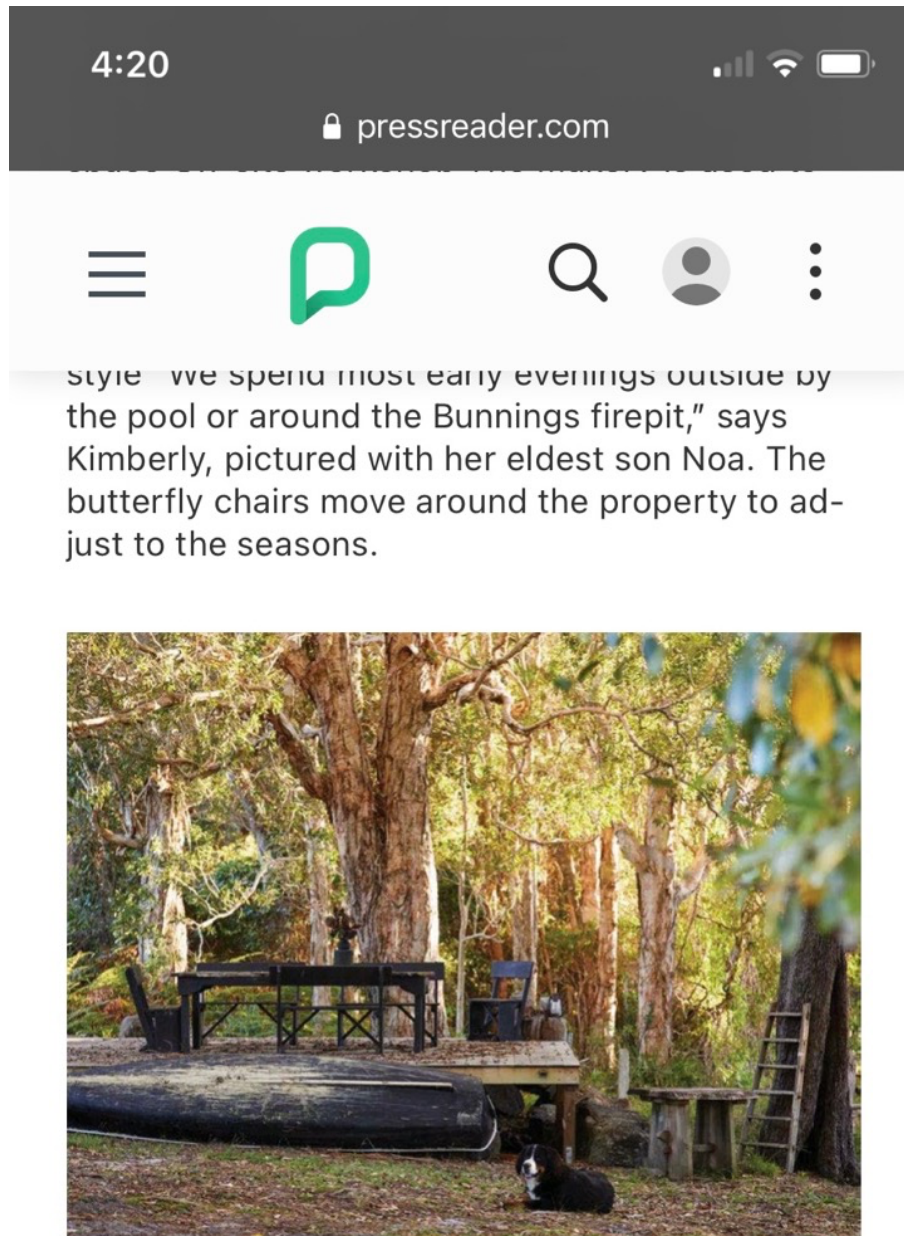
5) Unauthorised Structure 3– Large Platforms built along and over the edge of Simpsons Creek

Compliance Orders for removal of these structures have been in place since 2017. Both platforms now appear double the size shown in these images and ornate railings have been installed. These have been used for numerous Commercial Events.



6) Unauthorised Structure 4 – Second Large Platform built along the edge of Simpsons Creek

Compliance Orders for removal of these structures have been in place since 2017. Both platforms now appear double the size shown in these images and ornate railings have been installed. These have been used for numerous Commercial Events.

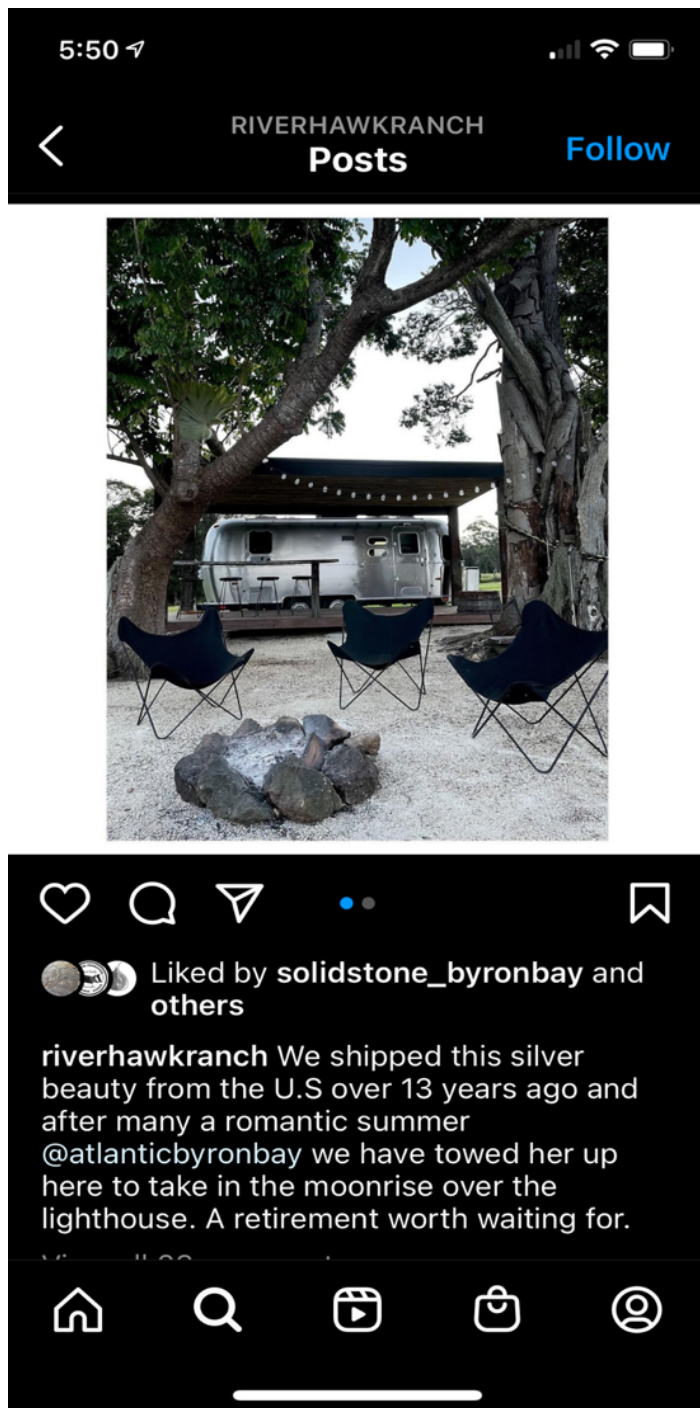


CLOCKWISE FROM TOP LEFT Home among the gumtrees A campsite has been set up by the

7) Unauthorised Structure 5 – The Airstream

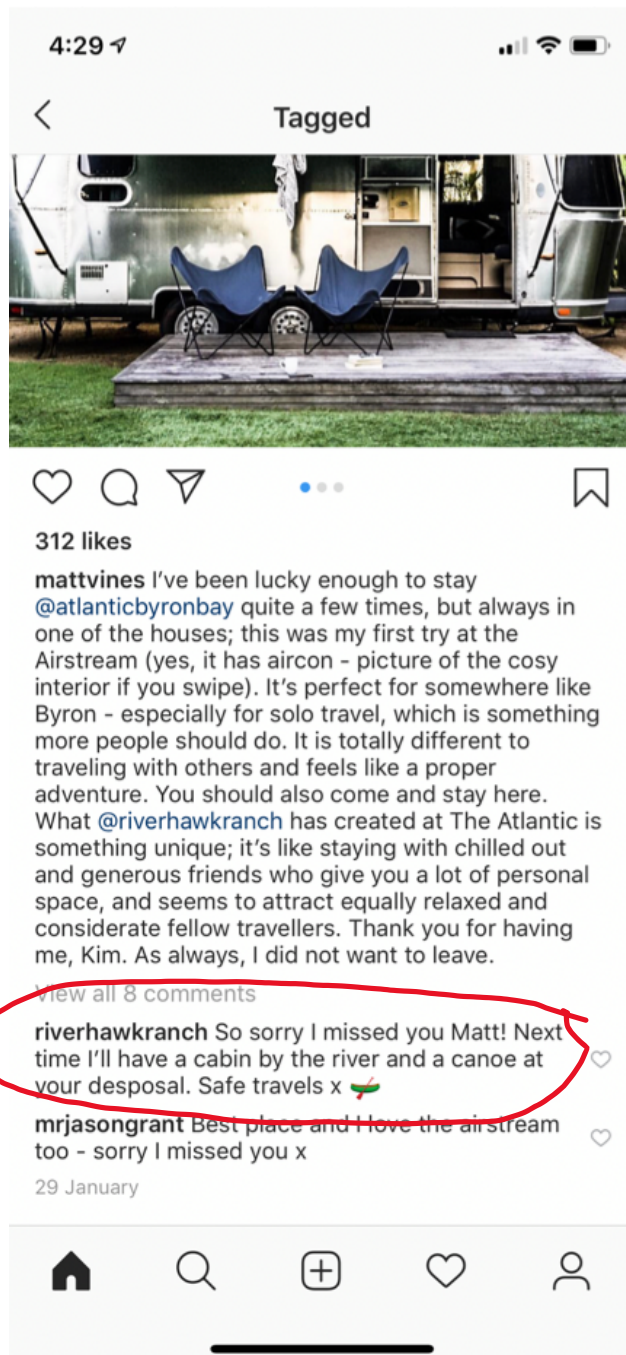
This was relocated from @atlanticbyron bay last month and placed under a fixed structure and with a paved outdoor area. Is this yet another accommodation offering in addition to the four proposed cabins?

August 2021



SOURCE: @riverhawkcranch Social Media Images.

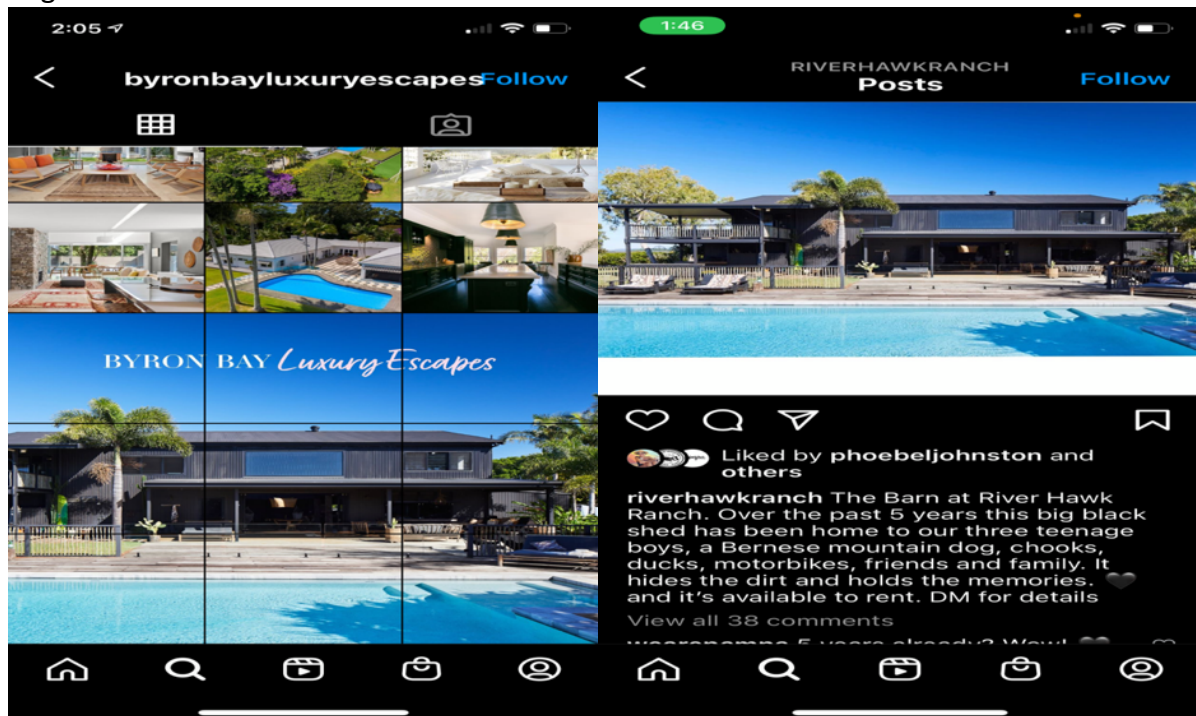
‘The Airstream’ when at @atlanticbyronbay used as an Example of “Upcoming Accommodation” posted in January 2019- Cabins & a canoe available soon



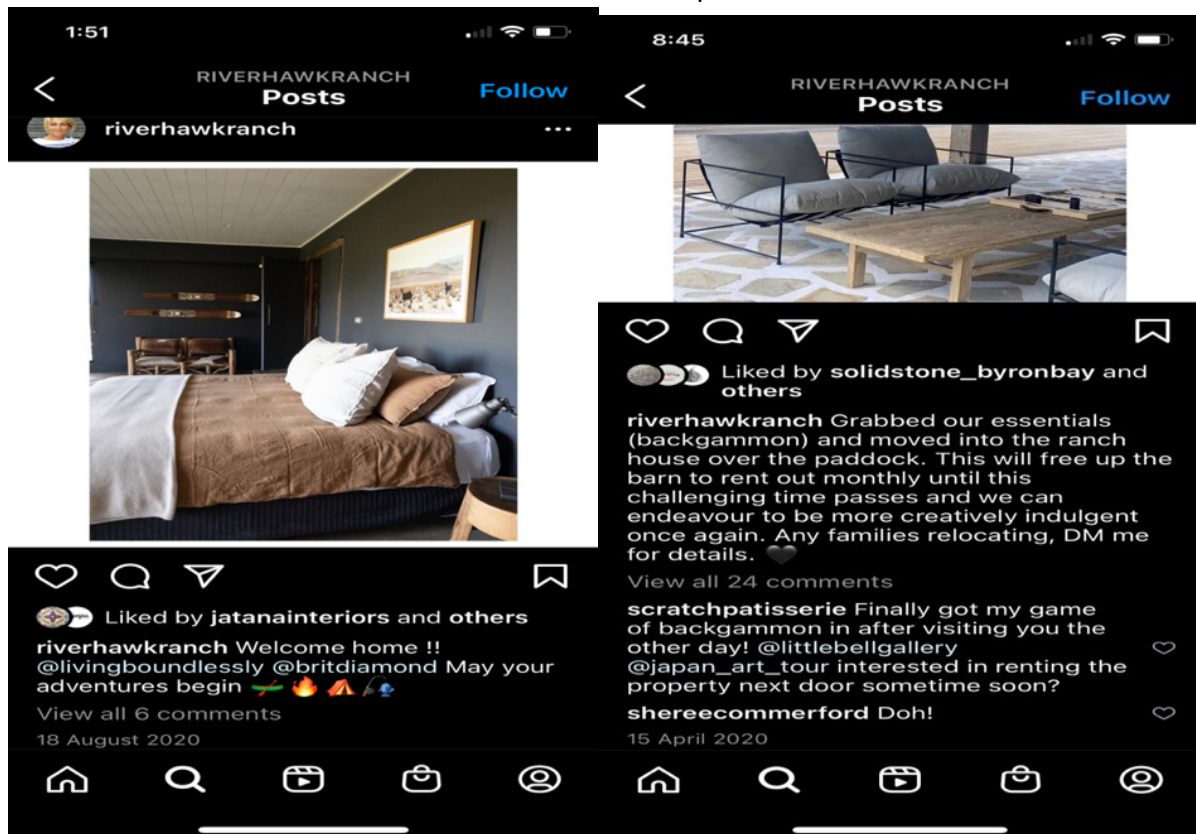
SOURCE: @atlanticbyronbay Social Media Images.

8) Social Media Images showing “The Barn” (previously the piggery) available for rent , despite the DA prohibiting this use

August 2020



April 2020



SOURCE: @riverhawkranch Social Media Images.

9) Social Media Image showing “The Makery” (authorised as an Art Studio) set up for Guests

