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Our Ref: CR: 330370

5 August 2022

The General Manager
Byron Shire Council
PO Box 219,
Mullumbimby NSW 2482

Attention: Shannon Burt and Chris Larkin

Dear Sir,

CONDITIONS OF CONSENT – BYRON SEWERAGE TREATMENT PLANT

1. Council has instructed us, in conjunction with Barker Ryan Stewart (Civil Engineers- Chris Borg) to review the conditions of consent approved in relation to the Byron Bay Sewerage Augmentation Scheme (**Consent**).
2. We are aware that Council had identified a particular concern in relation to condition 9.
3. We have prepared a Table of Review of Conditions which is **attached**, that sets out an interpretation and response to each of the conditions (**Review of Conditions**).
4. In preparing this letter and the Review of Conditions, the following documents were reviewed:
 - a. The EIS dated 30 August 2001;
 - b. SIS dated 30 August 2001;
 - c. Byron Bay Sewerage Augmentation Representations Report, dated September 2002;
 - d. Conditions of Concurrence in the Concurrence report for the Proposed Establishment of a 24 ha Melaleuca Regeneration Area, West Byron Treatment Plant, dated June 2002;
 - e. Effluent Reuse & Wetland Regeneration [24 ha Site]: Operation & Management Guidelines, March 2007;
 - f. AWC Byron Bay STP Licence and Conditions review dated 15 June 2021; and
 - g. Letter to Council from Chris Borg of BRS dated 12 July 2022.
5. We have also liaised with Chris Borg, of Barker Ryan Stewart in preparing the Review of Conditions.
6. We have approached the Review of the Conditions adopting the following principles in relation to the interpretation of Consent:

- a. A development consent is to be construed according to its terms, having regard to its enduring nature, and that it is not personal to the Applicant but is a public document operating *in rem* for the benefit of third parties such as incoming owners, occupiers and security holders, and in some respects is equivalent to a document of title: *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498; [2000] NSWCA 44 at [23];
 - b. The nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates, aided only by that evidence admissible in relation to construction which establishes, or helps to establish, the true meaning of the document as the unilateral act of the relevant authority, not the result of a bilateral transaction between the applicant and the council: *Parramatta City Council v Shell Co of Australia Ltd* [1972] 2 NSWLR 632 at 637.
 - c. In construing a development consent, reference may be made to documents other than the consent itself if those documents or parts of them, are incorporated into the consent expressly or by necessary implication: *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* (2013) 195 LGERA 82[2013] NSWCA 103 at [43] (*Allandale*).
 - d. The test of necessary implication is whether, in the absence of express incorporation, the consent is complete on its face, or whether it is ambiguous or otherwise such that a reader of it, or a person acquainted with the physical features of the land, would conclude that recourse to other documents would be necessary to give it a sensible meaning (*Allandale* at [26], per Macfarlan JA, also [186] per Ward JA).
7. Condition 1 of the Consent expressly incorporates the following documents into the development consent:
- a. The EIS dated 30 August 2001
 - b. SIS dated 30 August 2001
 - c. Byron Bay Sewerage Augmentation Representations Report, dated September 2002; and
 - d. Conditions of Concurrence in the Concurrence report for the Proposed Establishment of a 24 ha Melaleuca Regeneration Area, West Byron Treatment Plant, dated June 2002
(Incorporated Documents).
8. Condition 1 requires that the proposal be carried out in accordance with the Incorporated Documents. We have included in the Review of Conditions any relevant parts of the Incorporated Documents.
9. The terms of the Consent are clear (including the Incorporated Documents). A reader of the document, or a person acquainted with the physical features of the land would be able to give the Consent sensible meaning. There is no basis for extraneous material to be incorporated into the Consent.

10. We have concluded that condition 41 and some other conditions relating to the Operational Environmental Management Plan have probably not been complied with. Those conditions are detailed in the Review of Conditions. However we understand that Council has been primarily concerned in relation to the operation of Condition 9.
11. Condition 41 requires that an Operational Environmental Management Plan must be adopted. We are instructed by Council that the OEMP adopted by Council pursuant to condition 41 was the Effluent Reuse & Wetland Regeneration [24 ha Site]: Operation & Management Guidelines, March 2007 (**2007 OEMP**). We understand that Council has been conducting the management of the STP in accordance with the Byron bay Recycled Water Operational Management Plan (May 2013) (**2013 OEMP**). Whilst this is a revised version of the 2007 OEMP, the 2013 OEMP is not prepared in accordance with condition 41 because:
 - a. As we understand it, the 2013 OEMP is not formally adopted by Council in accordance with condition 41; and
 - b. Neither the Consent, nor the terms of the 2007 OEMP provide for a revised OEMP to be prepared.
12. Whilst there are inferences in the 2007 OEMP that suggest it would be sensible for a revised document to be prepared, there is no explicit provision for the preparation of a revised OEMP, or any process for that revised document to be prepared in accordance with. For these reasons, the 2007 OEMP is the document that presently must be complied with under the terms of the Consent.
13. We have been provided with the AWC Byron Bay STP Licence and Conditions review dated 15 June 2021 (**AWC Review**). The AWC Review recommends that the 2013 OEMP be updated to address certain monitoring, recording, and documentation requirements. Having regard to that conclusion, and our review of the Consent, Council may consider a section 4.55 modification application to adjust condition 41 and related conditions, to enable the Consent to be updated with a revised OEMP, but also enable Council to review and update the OEMP, then conduct the STP in accordance with the revised OEMP. This will provide Council with more flexibility in undertaking monitoring and compliance.
14. In relation to Condition 9 it has been demonstrated that the reuse capacity provided is larger than the volume of treated effluent from the additional loads, and therefore condition 9 is being complied with.

Yours faithfully
WILSHIRE WEBB STAUNTON BEATTIE



CECILIA ROSE
Partner

Encl.