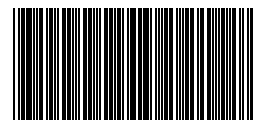




Filed: 26 October 2022 1:01 PM



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### Statement of Facts and Contentions

#### COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2022/00242095

#### TITLE OF PROCEEDINGS

First Applicant	NCV ENTERPRISES PTY LTD ACN 628880428
First Respondent	TWEED SHIRE COUNCIL ABN 90178732496

#### FILING DETAILS

Filed for	TWEED SHIRE COUNCIL, Respondent 1
Legal representative	ALAN JOSEPH MCKELVEY
Legal representative reference	
Telephone	02 4924 7200

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Statement of Facts and Contentions (Statement of Facts and Contentions (signed).pdf)

[attach.]

## STATEMENT OF FACTS AND CONTENTIONS

### COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	2022/00242095

### TITLE OF PROCEEDINGS

Applicant	<b>NCV Enterprises Pty Ltd</b> <b>ACN 628 880 428</b>
Respondent	<b>Tweed Shire Council</b> <b>ABN 90178732496</b>

### FILING DETAILS

Filed for	<b>Tweed Shire Council, Respondent</b>
Filed in relation to	Applicant's Class 1 Application
Legal representative	Alan McKelvey, Sparke Helmore Lawyers
Legal representative reference	DEG/TWE002-00058
Contact name and telephone	Dianna Grant, +61 2 4924 7627
Contact email	Dianna.grant@sparke.com.au

### PART A - FACTS

#### 1 The proposal

1.1 This is an appeal against the refusal by the Northern Regional Planning Panel (**NRRP**) of Development Application No. DA21/0010 (**the DA**). The DA is known as "Nightcap on Minjungbul".

1.2 The DA is made under section 4.22(1) of the *Environmental Planning & Assessment Act 1979* (**EPA Act**) and seeks development consent for:

- (a) A concept proposal for a staged Rural Land Sharing Community (**RLSC**) and associated works over 24 lots together with Crown land which are to be subdivided into 11 lots to allow for 392 dwelling plots over 10 lots to create 10 interconnected RLSCs (the remaining lot is proposed to contain all of the RU5 Village zoned land), and
- (b) Stage 1 works (as described in paragraph 1.3(a) below).

1.3 The proposal seeks approval for 12 stages to develop the site. The stages are as follows:

- (a) **Stage 1** – Involves the upgrading and sealing of an approximately 75m long 6m wide internal private road access

to Kyogle Road (opposite Mebbin Drive on the northern side of Kyogle Road). Stage 1 also proposes the construction of an office and storage area on Lot 11 DP 1194471. All works are located within private property and do not propose the undertaking of any works within Kyogle Road or the Kyogle Road Reserve. Vegetation removal, stormwater drainage and earthworks are associated with the proposed internal road works.

(b) **Future Stage 2** – Subdivision of the existing 24 lots and Crown land into 11 Torrens title lots as well as:

- (A) the establishment of essential service infrastructure (telecommunication and electrical connection),
- (B) Earthworks and vegetation removal,
- (C) Vegetation protection/regeneration,
- (D) Associated works and upgrades to internal access roads, and
- (E) the completion of a servicing strategy (ie waste, resource recovery, recycled water etc).

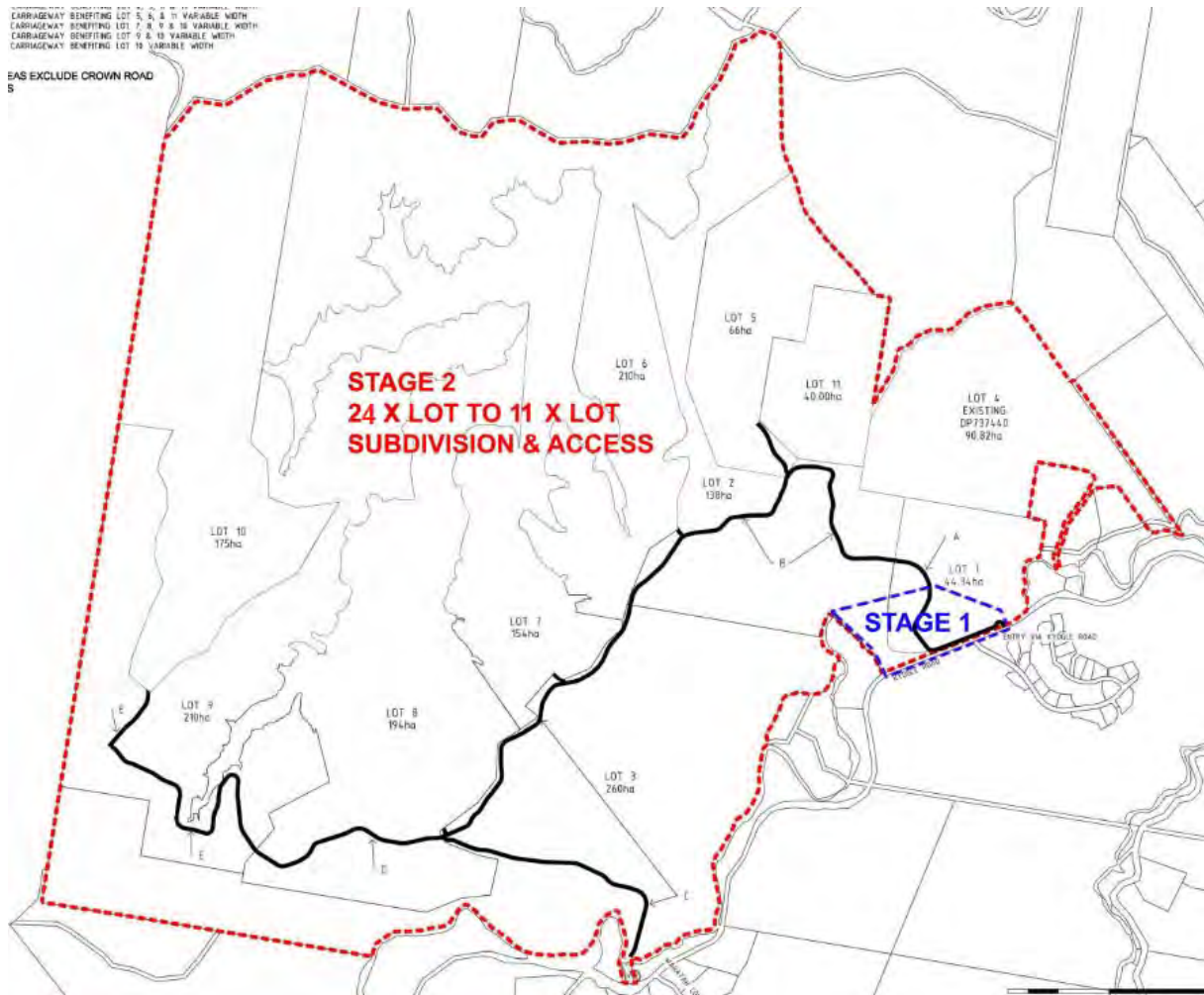
(c) **Future Stages 3-12** – Establishment of RLSCs and associated works including:

- (F) the identification of specific dwelling plots and detailed studies on plot and locational specifics,
- (G) the construction of community infrastructure (including community facilities, roads, services etc),
- (H) Vegetation removal/protection/regeneration.

1.4 The road works proposed by future stages 2-12 will involve:

- (a) the establishment of a 26.3km internal road network, and
- (b) the construction of three upgraded intersections to the surrounding road network.

1.5 The concept plan lodged with the DA which depicts the proposed staging of the development is extracted below:



## 2 The Land

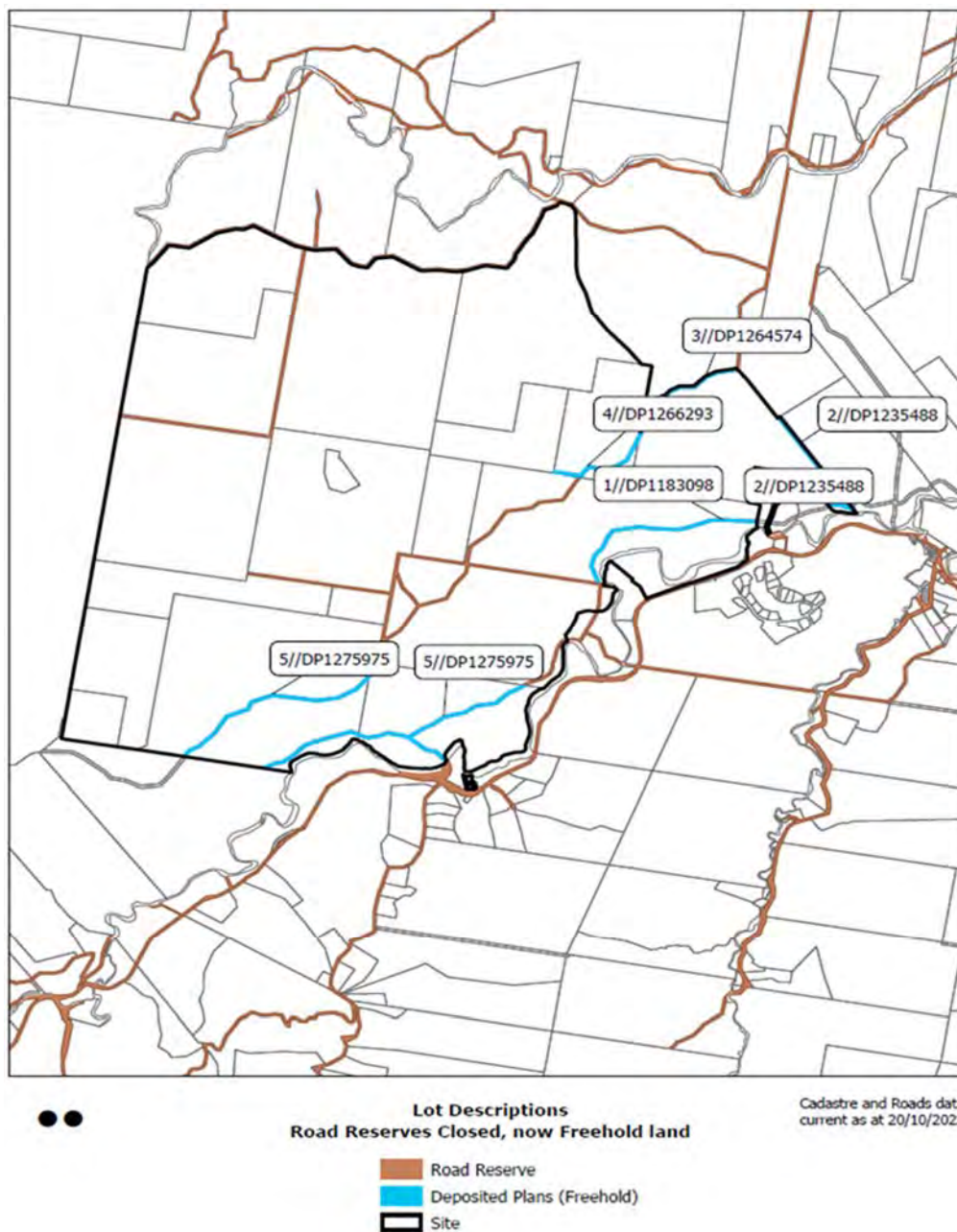
2.1 The development relates to land formally described as Lot 4 DP 737440 & Lot 2 DP 1235488, No. 2924 Kyogle Road; Lot 34 DP 755714, No. 2956 Kyogle Road; Lot 121 DP 134446, Lot 1 DP 390311, Lot 5 DP 582299, Lot 2 DP 582300, Lots 1-2 DP 611556, Lots 3, 8, 19, 22, 31-33, 35 DP 755714; Lot 1 DP 1183098; Lot 11 DP 1194471 No. 2984 Kyogle Road, Kunghur; Lot 20 DP 755714 & Lot 2 DP 1148316, No. 3222 Kyogle Road, Mount Burrell; Lot 5 DP 1275975, No. 3222 Kyogle Road Mount Burrell; Lot 4 DP 1266293, No. 2956 Kyogle Road Kunghur; Lot 3 DP 1264574, No. 2924 Kyogle Road Kunghur hereinafter referred to as “the site”.

2.2 The lots comprising the site are in separate ownership as set out below:

- Kempcove Pty Ltd- Lot 4 DP 737440, Lot 2 DP 1235488, and Lot 3 DP 1264574
- Lieshout, Cooke and Kovac - Lot 34 DP 755714 and Lot 4 DP 1266293,

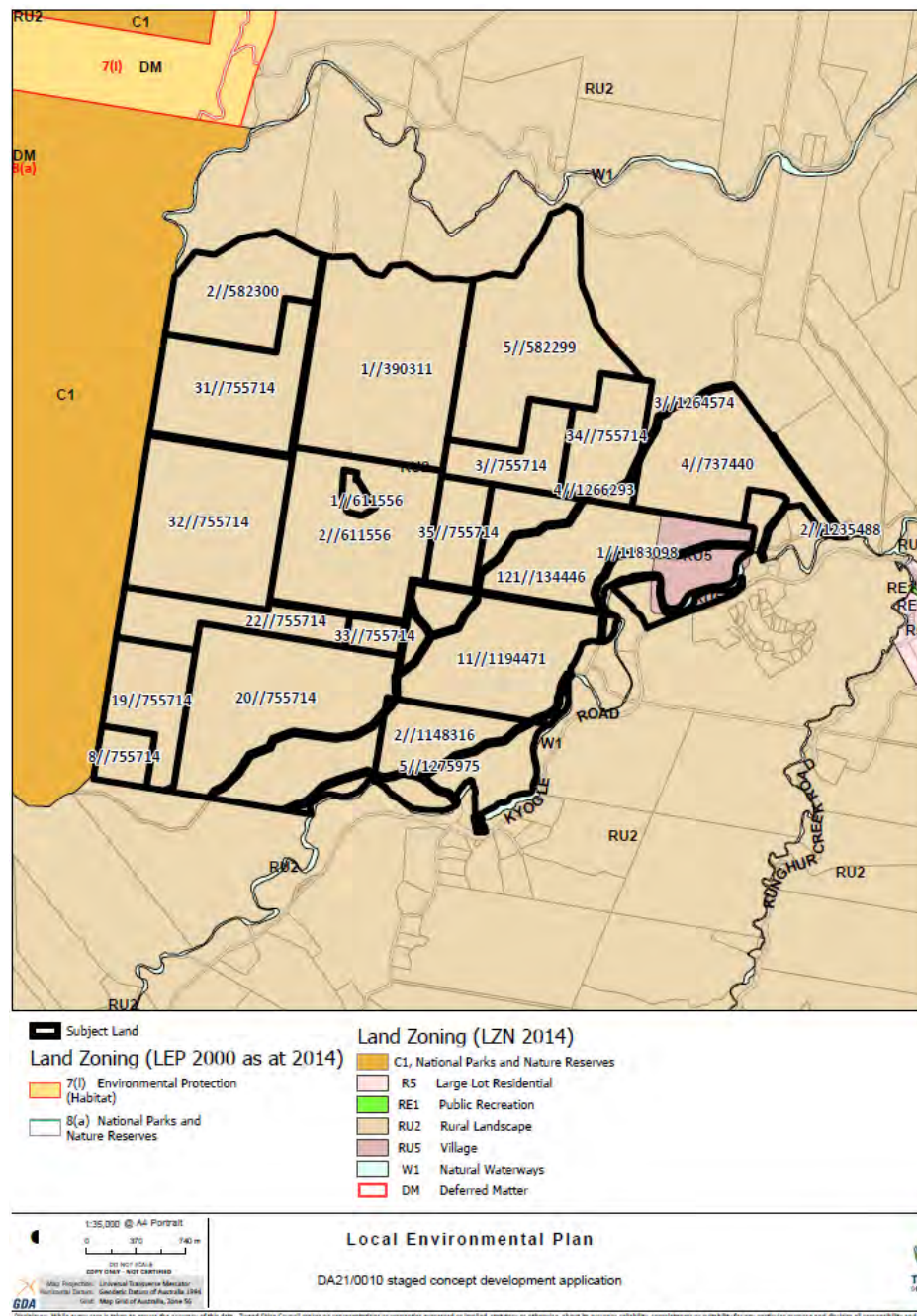
- Zimmerland Pty Ltd – Lot 121 DP 134446, Lot 1 DP 390311, Lot 5 DP 582299, Lot 2 DP 582300, Lots 1-2 DP 611556, Lots 3, 8, 19, 22, 31-33, Lot 35 DP755714; Lot 1 DP 1183098 and Lot 11 DP 1194471.
- The Applicant – Lot 2 DP 1148316, Lot 20 DP 755714 and Lot 5 DP 1275975.

2.3 The site also comprises the Crown land depicted by the orange lines in the below plan. The land depicted by blue lines was previously Crown land but is now in private ownership.

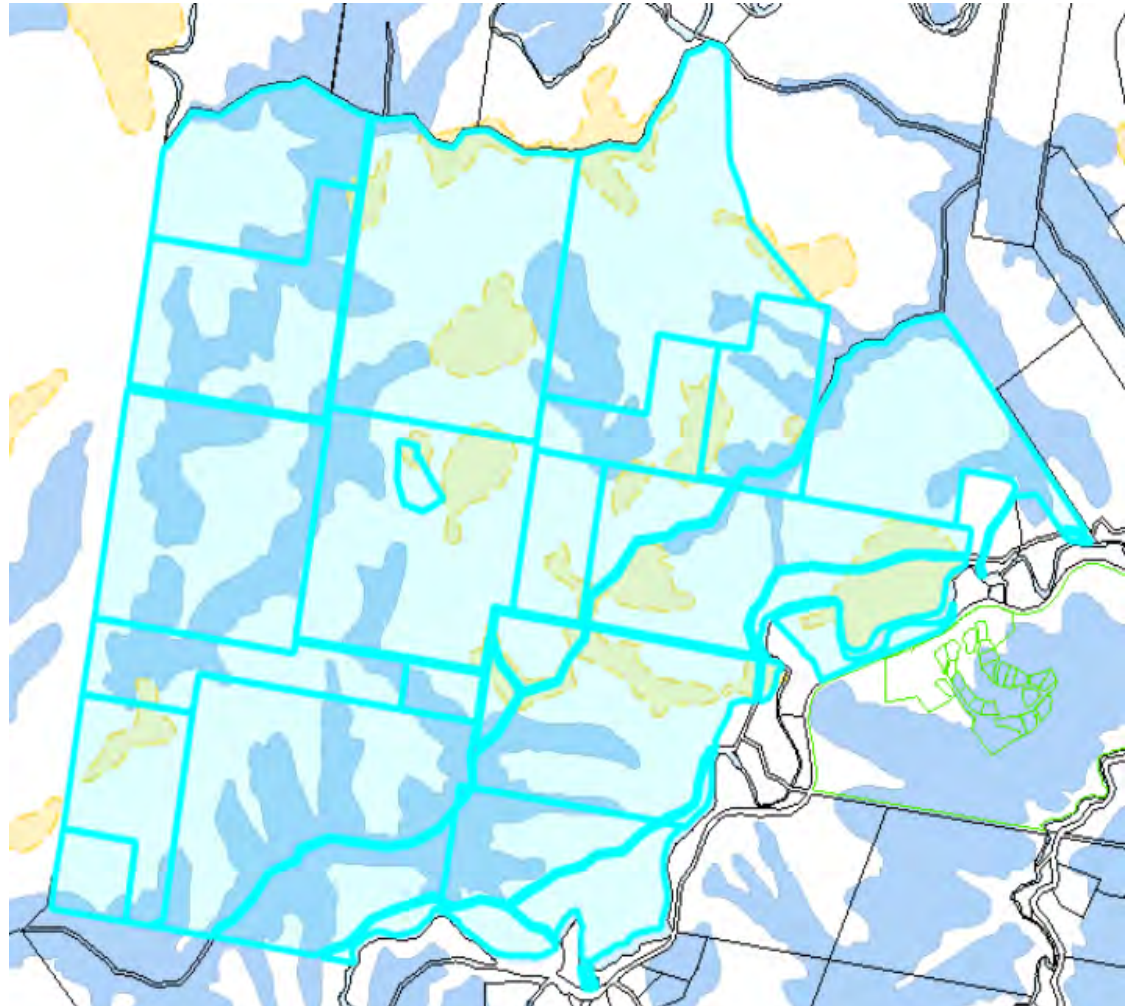




- 2.4 The site is a large irregular shape and consists of 24 existing lots together with the Crown land described above with multiple structures and uses, which consist of several dwellings, farmland, plantations, campgrounds, cabins, rural sheds and internal roads. The site contains three existing access points on to Kyogle Road (which is a classified road), and borders Mebbin National Park to the west and is bordered to the east by Kyogle Road and the Tweed River.
- 2.5 The site has an area of 1,163 hectares (including 12.63 hectares of Crown land) zoned mainly RU2 Rural Landscape with an area zoned RU5 Village and minor area zoned W1 Natural Waterways under the *Tweed Local Environmental Plan 2014 (TLEP 2014)* (as depicted in the below zoning map extract).



- 2.6 The site is identified as being of both predictive Aboriginal Cultural Heritage and known Aboriginal Place of Heritage Significance under the Tweed Shire Council Aboriginal Cultural Heritage Management Plan 2018. The site is highlighted on the below Map Sheet ACH002E:

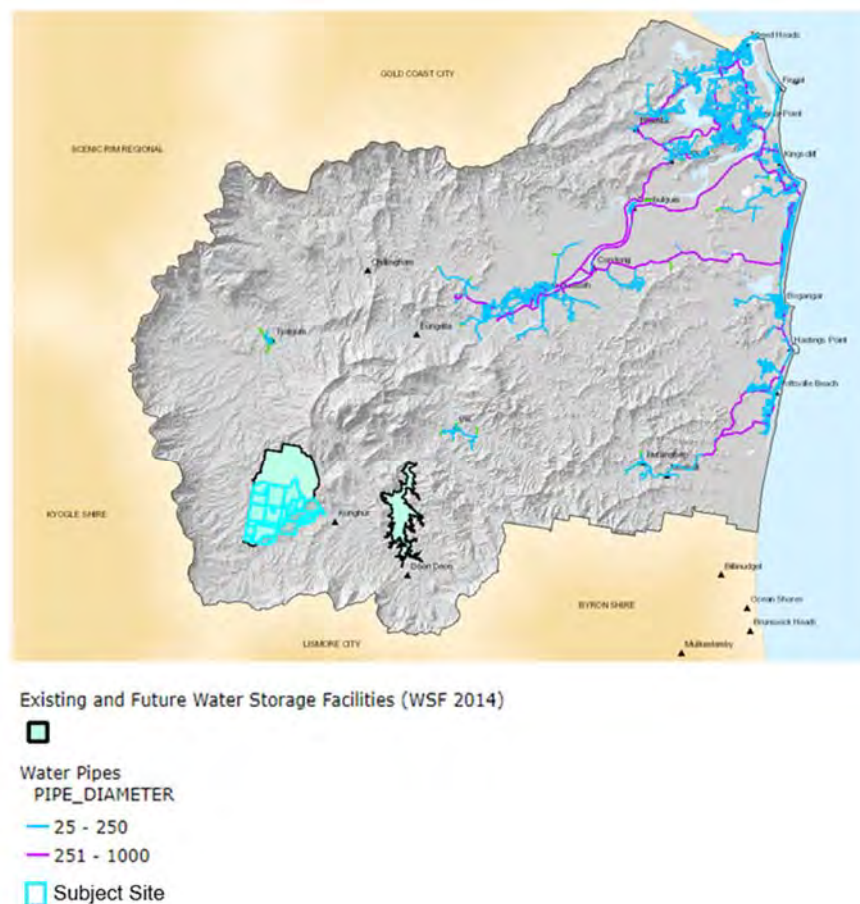


**Known and Predictive Locations**

- Aboriginal Place of Heritage Significance
- Predictive Aboriginal Cultural Heritage

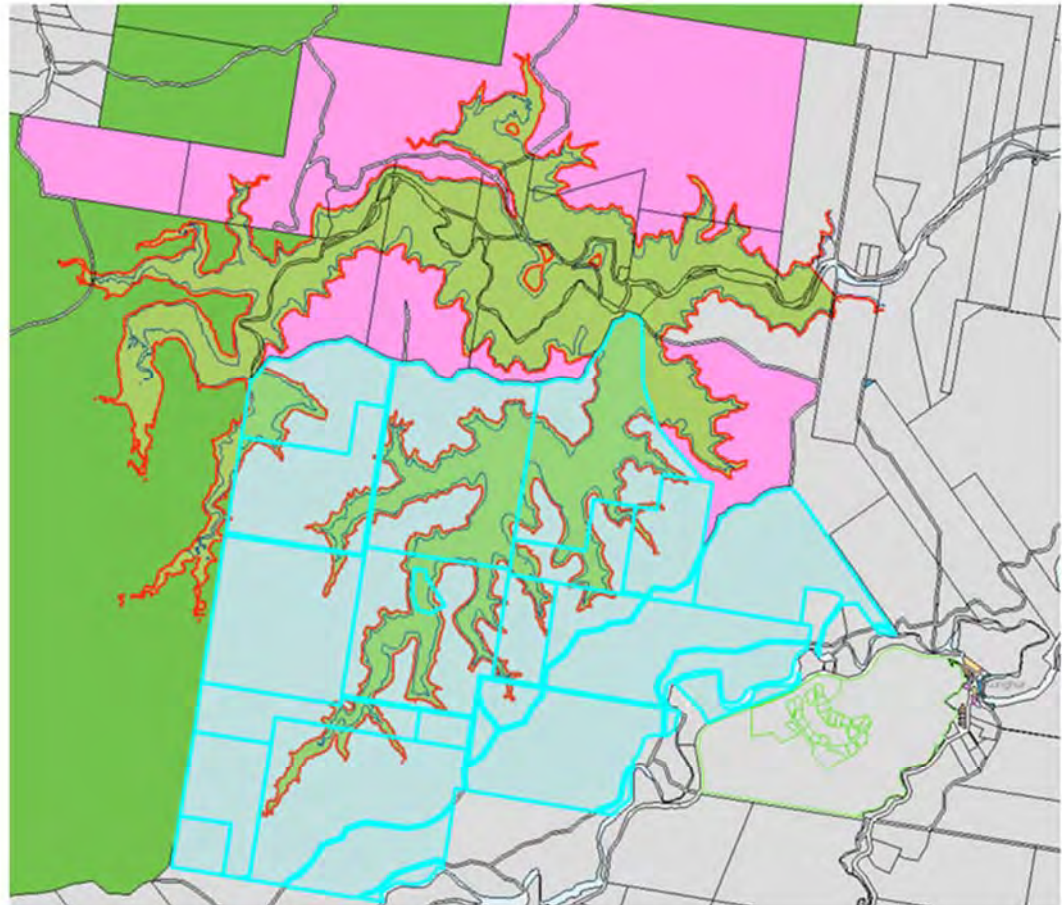
- 2.7 The site is mapped as bushfire prone land and as containing vegetation category 1 and 2.
- 2.8 The site is in the uppermost reaches of the Tweed River and Byrrill Creek. Council does not hold detailed flood studies for these areas. The site contains the Tweed River, creeks and gullies.
- 2.9 The topography of the site is varied with grades ranging from 0 degrees to in excess of 30 degrees, with heights varying from 68.3 metres to 227.7m AHD.

- 2.10 The site is within a Drinking Water Catchment and is identified on the Drinking Water Catchment Map under clause 7.7 of the TLEP 2014.
- 2.11 Part of the site is land identified as “Existing and Future Water Storage Facilities” and is marked on the Existing and Future Water Storage Facilities Map under 7.12 of TLEP 2014. This is for the future Byrrell Creek Dam, which is a proposed water supply storage to meet the Tweed local government area’s projected water demand from 2046. A large portion of the site has been identified for future inundation (from the Byrrell Creek Dam). Council already owns the majority of land in the catchment/inundation area of Byrrell Creek Dam, but discussions with remaining landowners will not be undertaken prior to May 2032, which is the expiry of the Tweed Shire Council moratorium on any dam proposal at Byrrell Creek. Byrrell Creek Dam remains a viable option for augmenting the Tweed District Water Supply. It also has regional significance as options exist to connect the Tweed Shire Water System to neighbouring shires.
- 2.12 The map below shows the land identified as “Existing and Future Water Storage Facilities” in the Tweed Local Environmental Plan 2014.





- 2.13 The map below shows the proposed Byrrill Creek Dam (Free Surface Level at contours 133m and Flood Level at contour 140m) and Land Tenure of the surrounding lots.



Byrrill Creek Dam Inundation Option 1  
HEIGHT

— 133 FSL

— 140 Flood

140 Flood Option 1



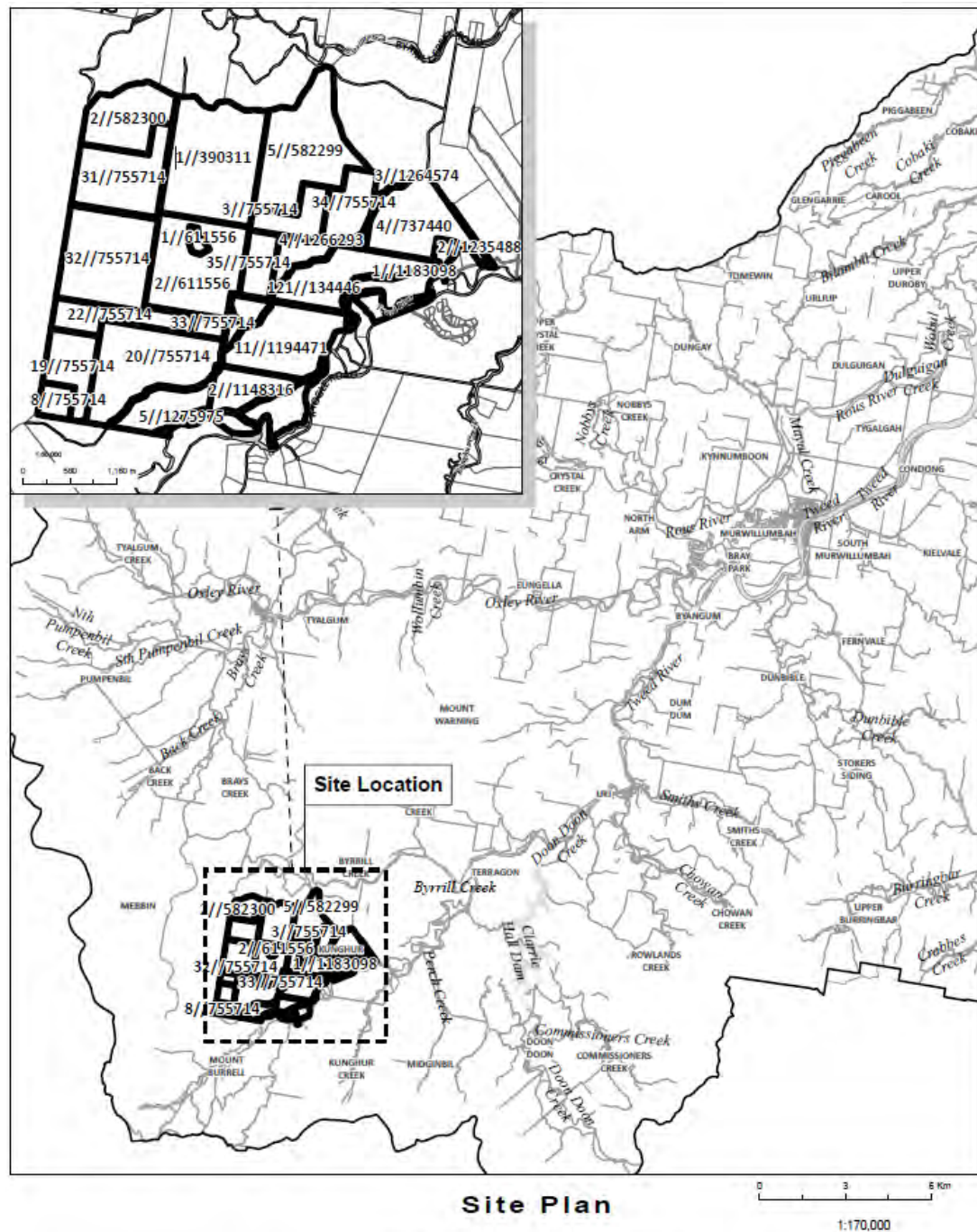
Freehold

Protected Areas (NPWS)

Operational Land (Council Owned)

Subject Site



2.14 The land is located approximately 32km south of Murwillumbah (refer to site map below).



DA21/0010 staged concept development application

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\* To find below You Dig's enquiry must be made by calling 1100. The information contained on this document remains valid for 30 days after the date of supply.

  Cadastre: 20 October, 2022  
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Coordinate System - MGA Zone 56  
Datum - GDA 84

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Civic and Cultural Centre  
3 Tumbulgum Road  
Murwillumbah NSW 2484  
PO Box 818  
Murwillumbah NSW 2484

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F: (02) 8670 2485  
W: [www.tweed.nsw.gov.au](http://www.tweed.nsw.gov.au)  
E: [planning@tweed.nsw.gov.au](mailto:planning@tweed.nsw.gov.au)



**TWEED**  
SHIRE COUNCIL

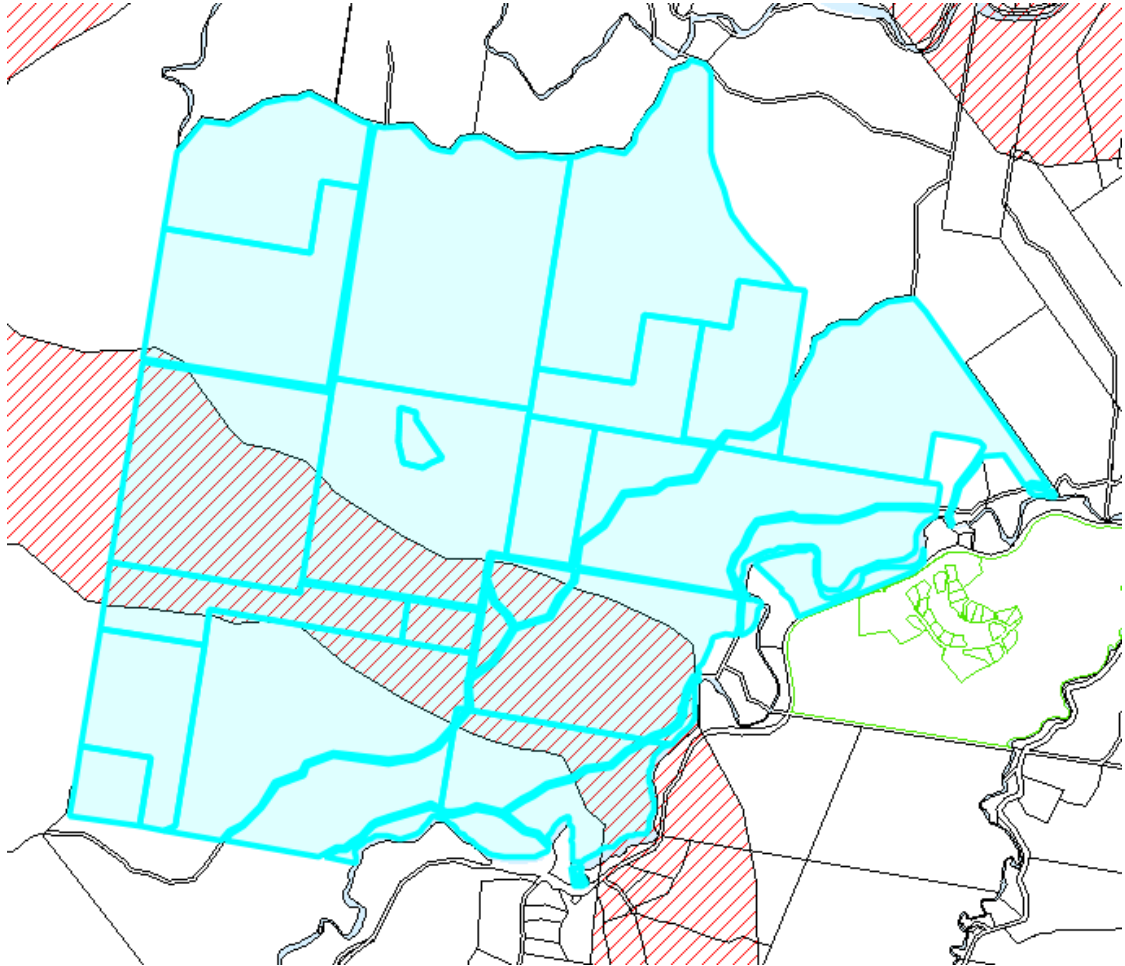


2.15 The site is heavily vegetated as depicted in the below aerial image.



2.16 The Department of Planning & Industry & Environment – Biodiversity & Conservation Division (**BCD**) has advised the Respondent in a letter dated 13 May 2021 that the site includes a mapped regional wildlife corridor linking the Mebbin National Park to Nightcap National Park. The regional corridor is

identified in *Scotts, D 2003, Key Habitats and Corridors for Forest Fauna: A Landscape Framework for Conservation in North-east New South Wales, NPWS Occasional Paper no. 32, National Parks and Wildlife Service, Sydney, NSW*. This corridor is depicted on Council's mapping extracted below



### 3 The statutory controls

#### **State Environmental Planning Policies**

- 3.1 *State Environmental Planning Policy (Resilience and Hazards) 2021*
- 3.2 *State Environmental Planning Policy (Transport and Infrastructure) 2021 (Infrastructure SEPP)*
- 3.3 *State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP)*
- 3.4 *State Environmental Planning Policy (Primary Production) 2021 (Primary Production SEPP)*
- 3.5 *State Environmental Planning Policy (Biodiversity and Conservation) 2021*



### ***Local Environmental Plan***

#### **3.6 TLEP 2014:**

- (a) Clause 1.2 – Aims of the plan;
- (b) Clause 2.3 – Zone objectives and land use table;
- (c) Clause 2.6 – Subdivision consent requirements;
- (d) Clause 4.1 – Minimum subdivision lot size;
- (e) Clause 4.2B – Erection of dwelling houses and dual occupancies on land in certain rural and residential zones;
- (f) Clause 5.10 – Heritage Conservation;
- (g) Clause 5.11 – Bush fire hazard reduction;
- (h) Clause 5.16 – Subdivision of or dwellings on land in certain rural, residential or conservation zones,
- (i) Clause 5.21 – Flood planning;
- (j) Clause 6.1 – Arrangements for designated State public infrastructure
- (k) Clause 7.1 – Acid sulfate soils;
- (l) Clause 7.2 – Earthworks;
- (m) Clause 7.4 – Floodplain risk management,
- (n) Clause 7.6 – Stormwater management;
- (o) Clause 7.7 – Drinking Water Catchments;
- (p) Clause 7.10 – Essential services.
- (q) Clause 7.12 Existing and future water storage facilities.

### ***Development Control Plans***

#### **3.7 Tweed Development Control Plan 2008**

- (a) Section A1 – Residential and Tourist Development Code
- (b) Section A2 – Site Access and Parking Code
- (c) Section A3 – Development of Flood Liable Land
- (d) Section A5 – Subdivision Manual (DCP A5)
- (e) Section A16 – Preservation of Trees or Vegetation

#### 4 **Actions of the respondent consent authority**

- 4.1 The DA was lodged on 14 January 2021.
- 4.2 The DA was advertised and notified for a period of 28 days from Wednesday 17 February 2021 to Wednesday 17 March 2021.
- 4.3 During this time 225 submissions were received objecting to the proposal. Concerns raised in these submissions included the following:
  - (a) The DA will give rise to a significant impact on biodiversity, noting the region is recognised as one of 15 national biodiversity hotspots (DECC, 2014) and is the most biologically diverse hotspots in NSW.
  - (b) The wildlife corridor that runs through the proposed development is critical for the movement of fauna through the landscape and hence, to maintain genetic diversity and population health and viability. To suggest moving this corridor would go against all ecological principles.
  - (c) The site contains rare, vulnerable and endangered species.
  - (d) The DA seems very vague about some critical environmental impacts such as sewerage and grey water and impacts on the waterways.
  - (e) The proposed density of the development is unsuitable to the rural amenities of the area and would be bigger than the villages of Uki and Kunghur.
  - (f) The scale of the development requires a major upgrade of roads and infrastructure.
  - (g) RLSCs have been proven to be very unsuccessful in adjacent LGAs and inevitably run into land-use conflict that ultimately become the problems that Council has to resolve.
  - (h) The development is inappropriate and appears to be designed to circumvent the state planning regulations.
  - (i) The development is inconsistent with the RU2 rural zone as it comprises a high-density residential development over rural

land damaging the rural landscape, native vegetation, environmental corridors and fauna habitat.

- (j) The development is not consistent with the Primary Production SEPP in a number of respects.
- (k) The proposal does not meet the objectives of the Tweed Local Strategic Planning Statement and other planning instruments, and also fails to adequately address the practical and efficient provision of infrastructure or other relevant strategic planning criteria including those regarding the protection and enhancement of rural character and sensitive environmental values.
- (l) The proposal will give rise to a sprawling development of multiple clustered residences in a ribbon type development and concomitant environmental problems from the proposed 50 km of internal roads and associated housing clusters. The proposal essentially constitutes an ad-hoc, un-planned and un-serviced residential development.
- (m) The provision of essential services infrastructure to the proposed housing is not adequately described or substantiated.
- (n) The ecological assessment is inadequate considering the importance of this land as a wildlife corridor as described in the Atlas of NSW Wildlife' database (NPWS 2019). The vegetation clearing regime figures seem dubious. The mapped fauna corridor "constraint" has been strategically moved to a convenient location and disregards the impact this will have on a corridor with little ecological justification or substantiation.
- (o) The DA represents an inappropriate and gross over-development of the site, as well as a disregard for the sensitive environmental values of the subject land and immediate surrounds.
- (p) The DA gives rise to many flaws and unanswered questions regarding; loss of wildlife and vital wildlife corridors, loss of habitat for endangered and vulnerable species, degradation to creek and erosion due to mass land clearing, lack of road and infrastructure and damage to the roads.

- (q) The addition of 1000 people will adversely impact on emergency services during flooding and bushfire events.
  - (r) The massive removal of food source trees for koalas to construct roadways and building sites.
  - (s) The development will essentially comprise a proposed town located in between two national parks, which does not sit comfortably with the unique environment and natural features of the region that tourists wish to experience.
- 4.4 Stage 1 of the DA is integrated development under sections 89, 90 and 91 of the *Water Management Act 2000 (WM Act)*. Approval under the WM Act is required as works are proposed within 40 metres of a waterway.
- 4.5 Future stages of the DA will likely also be integrated development under the *Heritage Act 1977, National Parks & Wildlife Act 1974, Roads Act 1993* and *Rural Fires Act 1997*.
- 4.6 The DA was referred to the following public authorities for comment and responses were received as set out below:
- (a) Natural Resources Access Regulator (NRAR) – Response received 5 March 2021 in which NRAR requests a plan showing appropriate setbacks from the Tweed River.
  - (b) Transport for NSW (TfNSW) – Response received 13 April 2021. TfNSW recommends additional information be provided.
  - (c) NSW Heritage Council – Response received 12 April 2021 and advises, among other matters, that an Aboriginal Heritage Impact Permit will be required prior to commencement of any works if Aboriginal objects will be harmed as a result of the proposed development.
  - (d) NSW Rural Fire Service (RFS) – Response received 12 April 2021. RFS advised that it could not support the DA and additional information was required to enable a detailed assessment of the concept plan.
  - (e) BCD – Response received 13 May 2021. BCD advised, among other matters, that the DA would require extensive land clearing of approximately 106 ha of native vegetation with a further 220 ha of impact on native populations and areas described as



‘cleared/grassed paddocks with scattered trees, regrowth and weed thickets’. The BCD further advised that the estimated cost of Biodiversity Offsets required to offset the loss of biodiversity values to enable the proposed development is in excess of \$27 million. The BCD raised concerns about whether the DA meets the aims of the Primary Production SEPP and recommended that a range of additional and revised information be provided.

- 4.7 On 20 May 2021 the Respondent wrote to the Applicant and requested that the DA be withdrawn by 25 May 2021 on the basis that it was prohibited development. The DA was not withdrawn.
- 4.8 The NRPP was the consent authority for the DA based on the Applicant’s revised calculation of the capital investment value of \$39,850,000 (provided 16 June 2021) being above the \$30 million threshold (set out in clause 2 of Schedule 7 to the *State Environmental Planning Policy (State and Regional Development) 2011*, now Planning Systems SEPP).
- 4.9 The DA was referred by the Respondent to the Panel for determination on 15 July 2021. In its assessment report to the Panel dated 15 July 2021, the Respondent recommended that the DA be refused for the following reasons:
  1. The proposal is not consistent with Schedule 5 of the Primary Production and Rural Development SEPP, as the development is not development on a single lot for 3 or more dwellings contrary to clause 4(1)(a) of Schedule 5 and is therefore prohibited (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);
  2. The proposal is not consistent with Schedule 5 of the Primary Production and Rural Development SEPP, as the development on each lot relies on development on other lots contrary to clause 4(1)(a) of Schedule 5 and is therefore prohibited (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);
  3. The proposal is not consistent with the aims in clause 2(a) and 2(c) of Schedule 5 of the Primary Production and Rural Development SEPP, as the development:
    - (a) proposes to undertake subdivision to create lots for interconnected rural land sharing and is therefore prohibited under clause 4(1)(g) of Schedule 5;
    - (b) creates unacceptable undue harm to the environment and is therefore prohibited under clause 4(1)(g) of Schedule 5 (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);
  4. The proposal is not consistent with Schedule 5 of the Primary Production and Rural Development SEPP, as the development is in breach of the cap on population density in clause 7 of Schedule 5 to the SEPP (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);

5. The proposal is not consistent with Schedule 5 of the Primary Production and Rural Development SEPP, as the development is on land that is a wildlife corridor contrary to clause 4(1)(d) of Schedule 5 to the SEPP and is therefore prohibited (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);

6. The proposal is not consistent with Schedule 5 of the Primary Production and Rural Development SEPP, as an Aboriginal Cultural Heritage Assessment of the surrounding land has not been undertaken and therefore consent cannot be granted because Council is unable to take into account the heritage characteristics of the land and surrounding land as required by clause 5(c) of Schedule 5 to the SEPP (Section 4.15 (1)(a)(i) of the Environmental Planning & Assessment Act 1979);

7. The proposal is considered to create significant environmental impacts on both the natural and built environments, due to significant amount of native vegetation removal and impact on native fauna (Section 4.15 (1)(b) of the Environmental Planning & Assessment Act 1979);

8. The site is considered not to be suitable for the proposal due to the existing constraints (Section 4.15 (1)(c) of the Environmental Planning & Assessment Act 1979);

9. The proposal is considered not to be in the public interest due to the high impact on the environment and cultural heritage, the isolated location and the absence of a coherent management strategy for capital and recurrent funding of proposed infrastructure and environmental management (Section 4.15 (1) (e) of the Environmental Planning & Assessment Act 1979);

10. Insufficient information has been submitted with the Development Application to enable an assessment of the impacts of the proposal (Section 4.15(i)(b)).

- 4.10 On 18 August 2021 the NRPP determined the DA by way of refusal for the following reason:

The Panel is not satisfied that the proposed use is permissible because it does not satisfy the provisions of the State Environmental Planning Policy (Primary Production and Rural Development) 2019 and therefore refuses the application.

- 4.11 On 26 August 2021 the Respondent issued the Applicant with Notice of Determination of the DA.

- 4.12 This appeal was filed on 16 August 2022.

## PART B - CONTENTIONS

The Respondent contends that the DA should be refused having regard to the contentions set out below:

**1      Contention 1: The DA is prohibited under both TLEP 2014 and Schedule 5 of the Primary Production SEPP and there is no power to grant development consent**

1.1      By a combination of the RU2 zoning and the development standards concerning lot size for rural subdivision and the erection of dwelling houses on land in rural zones, the proposed development is prohibited under the TLEP 2014. It is for the purpose of land preparation for multi-dwelling housing (3 or more dwellings on one lot of land), which is not a permissible use in the RU2 zone.

1.2      The DA can only be permissible as a result of the Primary Production SEPP.

1.3      Schedule 5(1) of the Primary Production SEPP does not include the Tweed local government area. This is as a consequence of Tweed Local Environmental Plan (Amendment No 35) (**LEP Amendment**) which commenced on 13 May 2022 and removed the references to the Tweed local government area in sections 1(o) and (p) of Schedule 5 to the Primary Production SEPP. The LEP Amendment also inserted the following savings provision into section 1.8A(3) of the TLEP 2014 and clause 58(3) of the *Tweed Local Environmental Plan 2000*:

A development application made but not finally determined before the commencement of Tweed Local Environmental Plan 2014 (Amendment No. 35) must be determined as if that Plan had not commenced.

1.4      The savings provision does not apply to the DA because, at the time the LEP Amendment commenced, the DA was “finally determined”. On this basis, the DA is prohibited under the TLEP 2014 and the provisions of Schedule 5 of the Primary Production SEPP have no application to the DA.

1.5      In the alternative to paragraph 1.4 above, there is no power for the consent authority to grant development consent to the DA because:

(a)      The consent authority cannot be satisfied that the development is development on a single lot with an area of not less than 10 hectares, contrary to clause 4(1)(a) of Schedule 5 of the Primary Production SEPP;

- (b) The consent authority cannot be satisfied that there will be no building on land that is a wildlife corridor and that the development will not adversely affect that wildlife corridor, contrary to clause 4(1)(d) of Schedule 5 of the Primary Production SEPP;
- (c) The consent authority cannot be satisfied that the development is consistent with all of the aims of Schedule 5, contrary to clause 4(1)(g) of Schedule 5 of the Primary Production SEPP,
- (d) The consent authority cannot be satisfied that there will be adequate provision for water and waste management, bushfire management, flora and fauna management, the provision and maintenance of internal roads, fencing and services contrary to clauses 6(a) & (c)-(e) of Schedule 5 of the Primary Production SEPP; and
- (e) The proposal is in breach of the cap on population density contained in clause 7 of the Primary Production SEPP.

**2      Contention 2: It has not been demonstrated that the arrangements for operating and managing the RLSC will be satisfactory, this being a relevant consideration under clause 5(a) of Schedule 5 to the Primary Production SEPP**

- 2.1      Clause 5(a) of Schedule 5 to the Primary Production SEPP provides that a consent authority must not grant development consent unless it has taken into account (among other matters) the “*arrangements for operating and managing the community*”.
- 2.2      The concept proposal involves a relationship of co-dependence between each of the lots on which the RLSCs are proposed, including a complex structure of s 88B instruments for access and services and a system of sharing maintenance costs.
- 2.3      The Applicant has not demonstrated that the RLSC can be operated and managed satisfactorily. In particular:
  - (a)      it is not clear how the environmental rehabilitation, pollution control and monitoring obligations, as well as the maintenance of the significant internal road network, are to be funded,
  - (b)      further detail on the proposed biodiversity stewardship agreement in lieu of paying offset contributions is required,



- (c) the financial relationship between the proposed RLSCs needs to be clarified, and
- (d) it has not been demonstrated how, in the event of insolvency of one or more of the RLSCs, the remaining RLSCs will remain financially viable and compliant with their obligations under the various proposed 88B instruments, any development consent and/or the proposed biodiversity stewardship.

**3      Contention 3: It has not been demonstrated that necessary roads, utilities and other services will be available to the proposed development, which is a relevant consideration under clause 5(d) of Schedule 5 to the Primary Production SEPP and matters that the consent authority must be satisfied of under clause 7.10 of the TLEP 2014**

- 3.1      Clause 5(d) of Schedule 5 to the Primary Production SEPP provides that a consent authority must not grant development consent unless it has taken into account (among other matters) the “*availability of roads, utilities and other services*”.
- 3.2      Clause 7.10 of TLEP 2014 provides that consent must not be granted unless the consent authority is satisfied that electricity, water, sewage, drainage and suitable vehicular access are available or that adequate arrangements have been made to make it available when required.
- 3.3      Insufficient information has been provided to demonstrate that necessary roads, utilities and other services will be provided. In particular, there is insufficient information about:
  - (a) any consultation undertaken by the Applicant with utility services providers,
  - (b) the impact of and ability to provide utility services across large distances for 392 dispersed dwellings (with the potential population of about 1000 people) in an isolated location on vegetated steep land that is traversed by waterways and gullies,
  - (c) the impact of construction of the proposed 26.3 kilometres of internal roads on vegetation and waterways,
  - (d) the coordination of construction of the internal road network and utility provision across the eleven RLSCs,

- (e) the extent of cut and fill required to construct internal roads,
- (f) the funding and sequencing for internal road construction, as well as the maintenance and the funding of same,
- (g) whether the proposed internal roads will meet standards for emergency service vehicles,
- (h) whether the water supply will be adequate, particularly in the event of bushfire, noting the Applicant's Water Supply Strategy (Appendix H to the SEE at page 4) states "The above scenarios do not cater for firefighting water that will need to be sourced and managed separately according to regulator requirements",
- (i) whether the disposal and management of sewage as an essential service is adequate, sustainable and designed in accordance with relevant guidelines / standards. Requirements of Tweed Development Control Plan Section A5 need to be addressed in full. An assessment of Appendix I of the DA identifies the following key areas concerns:
  - (1) method and disposal of wastewater from Community Facilities,
  - (2) locations of on site sewerage management systems and irrigation areas being indicatively significantly less than 100m distance to water body for Byrrill Creek Dam (Full Supply Level at RL133 and Flood Level at RL140m)
  - (3) governance system for on-site sewage system ongoing management and maintenance
  - (4) reliance of onsite sewage systems options identified dependence on reliable power supply

**4      Contention 4:    Insufficient information has been provided to enable an assessment of the impact of the development on the environment to be undertaken (as required by clause 5(e) of Schedule 5 to the Primary Production SEPP), and it should therefore be assumed that the development will have an adverse impact on the environment**

4.1      Clause 5(e) of Schedule 5 to the Primary Production SEPP provides that a consent authority must not grant development consent unless it has taken into account (among other matters) the *"impact of the development on the environment and any present or future use of the land"*.

- 4.2 Insufficient information has been provided to enable the impact of the DA on the environment to be properly assessed.
- 4.3 The Applicant's Biodiversity Development Assessment Report prepared by Planit Consulting dated November 2020 (**BDAR**) and DA documentation is inadequate in a number of respects, including the following:
- (a) The BDAR has not been prepared in accordance with the Biodiversity Assessment Method 2017 (**BAM**).
  - (b) The DA fails to identify how "open space" areas (total area comprising 240 hectares) containing native vegetation contribute to fauna habitat and fauna habitat connectivity and will be used and managed,
  - (c) The proposed "environmental protection/rehabilitation" area (total area of 541 hectares) and "environmental linkages/proposed rehabilitation" areas (total area of 96 hectares) are bisected by roads which is inappropriate,
  - (d) The extent of land to be retained for protection is uncertain, with the Preliminary Rehabilitation Plan prepared by Planit Consulting dated October 2020 mapping over 900 hectares of the total site area as "potential" stewardship areas,
  - (e) It has not been adequately demonstrated how the "environmental protection/rehabilitation" areas and "environmental linkages/proposed rehabilitation" areas can be protected and managed in perpetuity, noting:
    - (1) the proposed protection of the retained areas via a Biodiversity Stewardship Agreement has not been confirmed as appropriate by the Biodiversity Conservation Trust,
    - (2) the Draft Architectural Design Guidelines for the proposed development appears to place the burden of protection and restoration on individual owners of community plots, and
    - (3) it has not been demonstrated how, in the event of insolvency of one or more of the RLSCs, the remaining RLSCs will remain financially viable and compliant with any biodiversity stewardship agreement or alternatively any environmental plan of management.
  - (f) The BDAR does not include an assessment of biodiversity impacts arising from:

- (1) Bushfire asset protection zones,
  - (2) Access roads,
  - (3) Fence lines for new property boundaries,
  - (4) Community buildings and facilities,
  - (5) Allowable activities permitted under the *Local Land Services Act 2013* that would be enabled for each new lot (including clearing for rural infrastructure) and APZs.
- (g) The BDAR inappropriately proposes to remove and relocate a mapped wildlife corridor.
- (h) The BDAR fails to consider impact on the connectivity of different areas of habitat of threatened species, particularly threatened fauna species with poor dispersal capability or the impacts of vehicle strikes on threatened species vulnerable to this impact.
- (i) Further assessment and investigation is required of the areas nominated in the BDAR as “cleared areas/grassed paddocks with scattered trees, regrowth and weed thickets” to assess their value as threatened species habitat and determine if they require offsetting.
- (j) Further information is required as to the status of the forest agreement(s) referred to in the DA documentation, given the BDAR refers to 370 hectares of plantation areas as “cleared/modified areas” which have not been designated a plant community type and which have not been assessed as threatened fauna habitat,
- (k) The flora survey plot location approach taken in the BDAR is not in accordance with published field survey method guidelines and may not be representative of vegetation zones.
- (l) Targeted flora survey is not consistent with the OEH (2016) guidelines and there is no evidence of agreement to a variation to this method.
- (m) The BDAR has not provided justification for the clearance of 106 ha of native vegetation and fauna habitat via an assessment of feasible alternatives.

- (n) The extent of Scrub Turpentine (*Rhodamnia rubescens*) and Green-leaved Rose Walnut (*Endiandra muelleri* subsp. *bracteata*) within the development footprint needs to be clarified to enable an assessment to be undertaken of whether the development will give rise to a serious and irreversible impact.
- (o) Assessment of SAI for Scrub Turpentine and Green-leaved Rose Walnut do not address the minimum requirements of BAM.
- (p) An assessment of SAI has not been undertaken for a number of relevant threatened fauna species,
- (q) Species credit species have been incorrectly removed from assessment.
- (r) The fauna survey effort undertaken in the BDAR is not in accordance with the referenced Commonwealth guidelines, does not follow the NSW Guidelines for Threatened Biodiversity Survey and Assessment (DEC 2004) and is inadequate and inappropriate to detect the presence of likely threatened species.
- (s) The BDAR includes an inadequate assessment of the impact of the development (for instance impacts of stormwater runoff) on water quality, water bodies and hydrological processes that sustain threatened species and ecological communities,
- (t) The DA fails to adequately identify and ensure the protection of the required riparian buffers from the Tweed River and the numerous second and first order streams on the site,
- (u) The DA documentation includes a future dam inundation area in circumstances where the Respondent is not at this time progressing with this water supply option, The DA documentation fails to consider the impacts of the proposed development on the adjoining Mebbin National Park and of the Park's significance as a source area of colonists for Nightcap and Mount Jerusalem National Parks,
- (v) The BDAR provides no assessment of many entities, particularly CAMBA, JAMBA and ROKAMBA species listed under the *Environment Protection and Biodiversity*

*Conservation Act 1999* other than threatened ecological communities,

(w) The BDAR does not reference relevant past studies conducted on and adjoining the site (e.g. Gilmore and Milledge 1984, CSIRO 1995, SCU Sustainable Farm Forestry project 2013-14) that contain information important to the assessment of threatened fauna species,

(x) Refer also to the matters raised in Contention 5 below.

4.4 For these reasons the BDAR is not a BDAR within the meaning of the *Biodiversity Conservation Act 2016* (**BC Act**) and without such a BDAR consent cannot be granted under section 7.7(2) of the BC Act.

4.5 Based on the documentation submitted with the DA, the consent authority could not be satisfied that the proposed development will not have an adverse impact on the environment and biodiversity values of the site.

## 5 **Contention 5: The DA must be refused because a Koala Plan of Management has not been prepared**

5.1 Chapter 3 of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (**Biodiversity SEPP**) applies to the site because of its RU2 zoning (section 3.3 of the Biodiversity SEPP).

5.2 Before granting development consent to carry out development on land to which Chapter 3 applies, the consent authority must be satisfied as to whether or not the land is a “potential koala habitat” or is a “core koala habitat” (sections 3.6 and 3.7 of the Biodiversity SEPP). A Koala Plan of Management is required before development consent can be granted where land comprises “core koala habitat” (section 3.8 of the Biodiversity SEPP).

5.3 The documentation submitted with the DA fails to specifically identify whether potential or core koala habitat (as defined in the Biodiversity SEPP) exists on the Land.

5.4 The Applicant’s Biodiversity Development Assessment Report dated November 2020 (**BDAR**) does however disclose the following:

(a) The presence on the site of “koala feed tree species” identified in Schedule 1 of the Biodiversity SEPP, including *Eucalyptus microcorys* (Tallowwood) and *Grey Gum* (*E. propinqua*),

- (b) The application of polygons for Koala habitat on the development site (Refer to Figure 16 of the BDAR),
- (c) The recording of koalas onsite by survey method and trace evidence (Refer to Appendix 2 Fauna Survey Data of the BDAR),
- (d) Appendix 3 of the BDAR notes:

*Recorded – The Koala was recorded within eucalypt forests of the site on several occasions. Although no mothers with young was observed, it is considered likely that breeding occurs within the subject site given its size and connectivity to expansive areas of bushland.*

5.5 The SEE at page 66 also acknowledges that koalas have been recorded throughout the site and that the site contains koala habitat, but the necessary field investigations do not appear to have been undertaken to ascertain whether the site contains “potential koala habitat” or “core koala habitat”, as defined under the Biodiversity SEPP.

5.6 However, at page 68 of the SEE states:

The proposed Stage 1 works do not remove any significant koala vegetation nor trigger the requirement of a Koala Plan of Management. As such, a Koala Plan of Management (KPoM) will be prepared at the first subdivision DA (Stage 2). The future KPoM will respond to relevant legislation as required and as in effect at the time.

5.7 The ecological information provided with the submitted DA material indicates that the site is likely to comprise both “potential koala habitat” and “core koala habitat”.

5.8 A Koala Plan of Management, endorsed by the Respondent, is therefore required to be lodged with the DA under sections 3.8 and 3.11(2) of the Biodiversity SEPP.

**6 Contention 6: Insufficient information has been provided to enable the cultural heritage characteristics of the proposed site and surrounding land to be taken into account (as required by clause 5(c) of Schedule 5 to the Primary Production SEPP) and the integrity of any heritage assessment is likely to be undermined in any event**

6.1 Clause 5(c) of Schedule 5 to the Primary Production SEPP provides that a consent authority must not grant development consent unless it has taken into



account (among other matters) the “*the physical and heritage characteristics of the proposed site and surrounding land*”.

- 6.2 The Applicant’s “Aboriginal Heritage Cultural Assessment” dated September 2020 prepared by Everick Heritage (**Everick Report**) includes the following recommendation:

It is recommended that additional Aboriginal community consultation is undertaken in accordance with the Aboriginal Cultural Heritage Consultation Requirements for Proponents (DECCW 2010) guidelines to provide an informed and more complete view of the potential of the Proposed Works to impact on Aboriginal cultural values and sites. The consultation should aim to develop a process for potential Aboriginal stakeholders in the RLSC project to consider the overall objectives and layout of the project and to assist with the development and management policies and strategies, inclusive of completion of additional cultural heritage research and archaeological investigation.

- 6.3 The DA has not been accompanied by a cultural heritage assessment based on information supplied by traditional informants. The community consultation recommended in the Everick Report has not been undertaken.
- 6.4 The Everick Report does not provide sufficient archaeological data, mapping or significance assessment that could be used to accompany an Application for a Aboriginal Heritage Impact Permit for salvage by collection or for further investigation.
- 6.5 Until an Aboriginal cultural heritage assessment of the site or surrounding land is completed, it is not open to the consent authority to grant development because it is unable to take into account the heritage characteristics of the site and surrounding land, as required by clause 5(c) of Schedule 5 to the Primary Production SEPP.
- 6.6 The Statement of Environmental Effects (at page 61) refers to the “gifting” of up to 39 dwelling plots to tribal and Aboriginal members who will need to be consulted for cultural knowledge about the site and its surrounds as part of any Aboriginal cultural heritage assessment undertaken. The offer of up to 39 dwelling sites is likely to undermine the objectivity and integrity of any future cultural heritage assessment because the same traditional informants could be the recipients of the gift.

**7      Contention 7: The DA should be refused because the Applicant has failed to adequately assess its effect on an Aboriginal place of heritage significance and taking into account concerns raised by the local Aboriginal community following notification of the DA, being relevant considerations under section 4.15(1)(b) of the EPA Act, section 5(c) of Schedule 5 to the Primary Production SEPP and clause 5.10(8) of TLEP 2014**

7.1      The site is identified as being of both predictive Aboriginal Cultural Heritage and known Aboriginal Place of Heritage Significance under the Tweed Shire Council Aboriginal Cultural Heritage Management Plan 2018. It contains locations of significant cultural view lines to Wollumbin, the Pinnacle and other peaks.

7.2      The Everick Report identifies 36 registered sites on the site. The Everick Report also identifies 39 finds and alludes to up to 16 potential archeological deposit areas.

7.3      Section 5(c) of Schedule 5 to the Primary Production SEPP is outlined in Contention 6 above.

7.4      Clause 5.10(8) of TLEP 2014 provides as follows:

**(8) Aboriginal places of heritage significance**

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

- (a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and
- (b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.

7.5      The Everick Report is inadequate in the following respects:

- (a) It relies on site survey details from August 2018 which are now over 4 years old,
- (b) It contains an outdated search of AHIMS database (dated 21.8.18), not all of which are mapped in relation to their survey findings (see Everick Report Figure 2), but which are also recorded and plotted on the Tweed Byron Local Aboriginal Land Council (**TBLALC**) site database and the Tweed Shire Council Aboriginal Cultural Heritage Management Plan,

- (c) It does not have a map showing Survey Units, as it defines them, so it is difficult to determine the extent of survey coverage relative to the study area landforms,
- (d) It does not refer to the findings of a previous fully comprehensive ACHAR within the study area, which included extensive community consultation and which provided recommendations for two conservation areas and further archaeological investigations at three sites and AHIPS for three isolated finds,
- (e) It is not clear how cultural heritage has been assessed in relation to the Stage 1 road works, noting that the location of these works comprises the highest concentration of known and registered sites,
- (f) It does not provide sufficient detail to be considered a suitable Aboriginal Cultural Heritage assessment for development of the nature and scale of the DA,
- (g) It provides copies of correspondence to the TBLALC but provides no summary record of input or feedback,
- (h) It is unclear how the proposed development has sought to avoid harm to known Aboriginal cultural heritage (highly likely to be contained in ridge lines, upper slopes and low spurs) when the proposed development so closely follows a similar pattern (ie the report notes that *“by far the majority of the dwellings under the Proposed Works are sited on the ecotone between ridge crests and upper slopes”*),
- (i) It proposes that contractors at each dwelling site be charged with identifying any previously undiscovered Aboriginal objects under an unexpected finds protocol. This is not Best Practice given the size of the proposed development and the lack of any detailed site or PAD archaeological investigation or extensive Aboriginal community consultation
- (j) It fails to provide an overlay of the proposed development with all AHIMs Registered sites, those identified by their own surveys and the predictive Aboriginal cultural heritage areas and PADS,

- (k) It fails to provide an overlay of the proposed development with the identified and predictive Aboriginal cultural heritage areas and PADS,
- (l) It does not consider how the proposed development has sought or been redesigned to avoid harm, to Aboriginal cultural heritage as a priority,
- (m) It fails to look at the site holistically and avoid areas of known/registered Aboriginal cultural heritage within the concept footprint, structure and access layout,
- (n) Further information needs to be provided in the form of a comprehensive Aboriginal Cultural Heritage Assessment, in consultation and conjunction with the Aboriginal community, in accordance with the recommendations in the Everick Report, the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW (2010)* and the *Aboriginal Cultural Heritage Consultation Requirements for Proponents (2010)*. In addition to a management framework this assessment should include (in a mapped format) locations to be conserved and protected, locations requiring further assessment and areas considered to be suitable for future development.

7.6 In April 2021, the TBLALC provided the Respondent with comments on the DA which are summarised below:

- (a) the whole area is replete with Aboriginal cultural heritage Objects (artefacts),
- (b) there are numerous new artefacts that were located during TBLALC surveys of the broader project area in January and March 2019 have not yet been registered on AHIMS,
- (c) The TBLALC was not consulted on the Stage 1 works,
- (d) During a walkover of the Stage 1 area on 13 April 2021, the TBLAC identified three AHIMS registered sites and 20 artefacts within or adjacent to the footprint of the Stage 1 works – therefore clearly the area is very rich in Aboriginal Objects which are protected by legislation,

- (e) During the 13 April 2021 walkover, recent earthworks within the access track were observed which is of concern,
- (f) TBLALC's recommendations will likely be that a comprehensive archaeological investigation be undertaken of the area of Stage 1, which will most likely require or result in an application for an AHIP, prior to any substantial ground disturbance. Alternatively, the proponents should withdraw and / or modify their plans in order to avoid harm to Aboriginal cultural heritage,
- (g) Stage 1 of the DA should not be further considered by the Respondent,
- (h) Any development plans for the wider land sharing community project in the area should not progress without much more detailed Aboriginal cultural heritage assessment,
- (i) While the TBLALC has participated in the assessments of the area that have contributed to the ACHA to-date, this is considered to be a 'first-pass' which identified a large number of ACH objects,
- (j) The abundance of ACH Objects in the area identified by the first-pass assessment cautions all concerned for much greater scrutiny of the area,
- (k) At this stage TBLALC is of the opinion that any proposed development of the larger project area which will involve any ground disturbances will require further site-specific assessments in the future approval processes.

**8      Contention 8: The proposed development is not consistent with the objectives of the RU2 Rural Landscape zone under TLEP 2014**

8.1      The DA is not consistent with the following objectives of the RU2 zone:

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To maintain the rural landscape character of the land.
- To provide for a range of compatible land uses, including extensive agriculture.
- To provide for a range of tourist and visitor accommodation-based land uses, including agri-tourism, eco-tourism and any other like tourism that is linked to an environmental, agricultural or rural industry use of the land.

8.2      The proposed development will not maintain the rural landscape character of the land, by virtue of:

- (a) The extent of the proposed new built form across a large area which would produce an urban-like character and form which is inconsistent with the dominant rural land use character
- (b) The removal of native vegetation which is a key element of the existing rural character (involving removal of a substantial area of native vegetation (approximately 106 ha) and a further 220 ha area described as 'cleared/grassed paddocks with scattered trees, regrowth and weed thickets')
- (c) The location of internal roads mostly along site ridgelines which will require the removal of mature native trees from these visually sensitive and prominent locations.

8.3 The proposed development does not provide for primary industry production and will not be compatible with surrounding land uses.

8.4 The proposed development does not provide for tourist and visitor accommodation-based land uses that are linked to an environmental, agricultural or rural industry use of the land.

**9 Contention 9: The proposed development has not demonstrated consistency with the aims of the TLEP 2014**

9.1 The proposed development has not demonstrated that it is consistent with the following aims set out in clause 1.2 of TLEP 2014:

- (a) Aim (a) - "to give effect to the desired outcomes, strategic principles, policies and actions contained in the Council's adopted strategic planning documents, including, but not limited to, consistency with local indigenous cultural values, and the national and international significance of the Tweed Caldera",
- (b) Aim (c) - "to promote the responsible sustainable management and conservation of Tweed's natural and environmentally sensitive areas and waterways, visual amenity and scenic routes, built environment, and cultural heritage",
- (c) Aim (d) – "to promote development that is consistent with the principles of ecologically sustainable development and to implement appropriate action on climate change",

- (d) Aim (h) - “to promote the management and appropriate use of land that is contiguous to or interdependent on land declared a World Heritage site under the Convention Concerning the Protection of World Cultural and Natural Heritage, and to protect or enhance the environmental significance of that land”,
- (e) Aim (i) – “to conserve or enhance areas of defined high ecological value”, and
- (f) Aim (j) – “to provide special protection and suitable habitat for the recovery of the Tweed coastal Koala”.

**10     Contention 10: Insufficient information has been submitted with the DA to enable an assessment to be undertaken under section 4.6 of the *State Environmental Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP)***

10.1     Section 4.6(2) of the Hazards SEPP 2021 applies to the DA and states:

*(2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subsection (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.*

10.2     A Preliminary Contamination Land Assessment Report prepared by Precise Environmental dated May 2019 (**PLCA**) submitted with the DA indicates that there is potential contamination of the site from previous agricultural activities that may have involved the broad application of herbicides. The PLCA recommends that areas of potential concern be quantitatively assessed through a detailed site investigation (**DSI**).

10.3     Section 4.6(3) of the Hazards SEPP 2021 provides:

*(3) The applicant for development consent must carry out the investigation required by subsection (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.*

10.4     The DA, which proposes 392 dwelling plots on 2000m<sup>2</sup> areas that are not static, should be supported by a DSI prepared by a suitably qualified consultant in



accordance with section 4.6(3) of the Hazards SEPP 2021 that confirms the site is suitable for the proposed residential use.

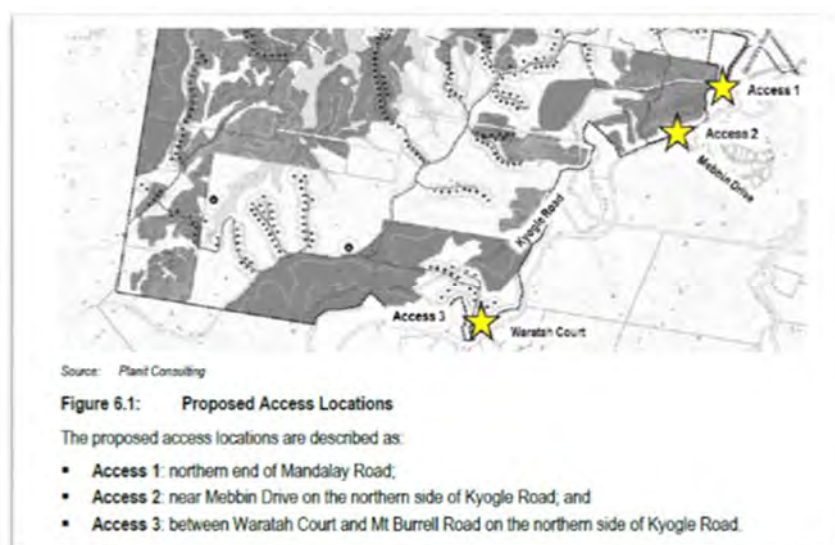
10.5 The Applicant's contamination assessment should also:

- (a) Be accompanied by a Contaminated Land Summary Table,
- (b) Address all lots, noting the PLCA appears to only consider 20 lots,
- (c) Address the Tweed River Water Quality Objectives,
- (d) Provide clarification on how dwelling footprints will be assessed and potentially deemed suitable when the DA states that dwelling plot areas are not static and does not propose to set limitation/building envelopes for future dwellings.

10.6 Until the DSI is provided and information in paragraph 10.5 is provided, the consent authority cannot be satisfied under section 4.6(1) of the Hazards SEPP 2021 that, if the land is contaminated, the land is suitable in its contaminated state (or will be suitable after remediation) for the proposed residential use.

**11 Contention 11: Insufficient information has been submitted with the DA to enable the future proposed road intersections (which include an intersection to a classified road) and associated internal road works to be properly assessed**

11.1 The DA proposes three (3) points of access to the concept proposal which are depicted below:



11.1 Kyogle Road is a classified road and the concept proposal identifies future intersection works along this road at Access 2 and Access 3. Because the concept proposal exceeds the threshold of residential accommodation (of 300

or more dwellings with access to a classified road,<sup>1</sup> referral to Transport for NSW (**TfNSW**) is required under section 2.122 of the Infrastructure SEPP.

11.2 Section 2.122(3) of the Infrastructure SEPP provides as follows (emphasis added):

(3) A public authority, or a person acting on behalf of a public authority, must not carry out development to which this section applies that this Chapter provides may be carried out without consent unless the authority or person has—

(a) given written notice of the intention to carry out the development to TfNSW in relation to the development, and

(b) **taken into consideration any response to the notice that is received from TfNSW within 21 days after the notice is given.**

11.3 The Applicant's Traffic Impact Assessment (**TIA**) is inadequate in the following respects:

- (a) The TIA does not address the concerns raised and information requested in relation to Access 2 and 3 in the letter from TfNSW to the Respondent dated 13 April 2021,
- (b) Additional information is required for Access 1 in relation to the proposed road width, noting the current road reserve width is 9.8 metres however Council's requirements would require a width of 20 metres. It is not clear from the DA as to how this road width can be accommodated given the land on either side of the road reserve is not owned by the Applicant,
- (c) Further analysis of the intersection at Access 1 is required, giving consideration to sight distances, traffic volumes and associated safety concerns created by increased traffic,
- (d) Further assessment of the suitability of Council's bridge immediately adjacent to Access 1 is required to determine if any upgrade works will be required to cater for increased traffic volumes and loads,
- (e) The close proximity of an existing bridge immediately to the east of the proposed Access 3 has not been adequately investigated and assessed by the TIA. The TIA simply suggests that further investigation is required for future stages

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<sup>1</sup> Column 1 of Schedule 3 to *State Environmental Planning Policy (Transport and Infrastructure) 2021*

of the proposed development. The Respondent contends that this assessment should be undertaken by the Applicant now to identify whether any upgrade of the existing bridge will be required or whether Access 3 will need to be relocated in order to accommodate the proposed intersection treatment. The further intersection analysis should include details of the extent of any required upgrade to the existing bridge, concept engineering plans, anticipated costs and timeframes for carrying out the upgrade, and

- (f) The Applicant's traffic assessment report has not adequately justified the claim for a 25% reduction for internal trips for the purposes of calculating contributions should the proposed village area proceed.

**12     Contention 12: The DA does not include any assessment of the impacts of a flooding event on the proposed development**

- 12.1     The site is in the uppermost reaches of the Tweed River and Byrrill Creek, and includes the Tweed River, creeks and gullies. The Respondent does not hold detailed flood studies for these areas.
- 12.2     The DA documentation provides no assessment of the implications of flooding of the Tweed River on access and provision of services to the development site in the event of flood isolation, noting all three access points are reliant on bridges over the river.
- 12.3     No flood study has been provided. It is therefore not possible to assess:
  - (a)     Whether suitable site access is available to the development during a 1% AEP flood event and PMF as per Clause A3.2.6 of Tweed DCP 2014,
  - (b)     There are numerous watercourses that need to be crossed to access the site. The location of these crossings and access upgrade requirements has not been documented,
  - (c)     Whether the development is affected by flooding,
  - (d)     Whether the development is compatible with flood hazards, and
  - (e)     The impacts of the development on adjoining property, existing infrastructure and the environment, including site access upgrade works and watercourse crossings.

- 12.4 No Flood Response Assessment has been provided detailing the site flood risk management approach (evacuation or shelter-in-place), anticipated occupants and demographics, peak flood levels, flood response times and inundation durations of the Tweed River and site waterways for the 1% Annual Exceedance Probability (AEP) flood and Probable Maximum Flood events or details of any proposed community emergency facilities.
- 12.5 Having regard to the matters for consideration under section 4.15(1)(b) and (c) of the EPA Act and clauses 5.21 and 7.4 of the TLEP 2014, the Applicant has not demonstrated that the site is suitable for the proposed development.

**13 Contention 13: The DA includes inadequate information to determine if it will have an adverse impact on water quality**

13.1 Clause 7.7 of the TLEP 2014 applies to the DA as the land is within a Drinking Water Catchment.

13.2 Clause 7.7(3) provides as follows:

- (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider the following—
  - (a) whether or not the development is likely to have any adverse impact on the quality and quantity of water entering the drinking water storage, having regard to the following—
    - (i) the distance between the development and any waterway that feeds into the drinking water storage,
    - (ii) the on-site use, storage and disposal of any chemicals on the land,
    - (iii) the treatment, storage and disposal of waste water and solid waste generated or used by the development,
  - (b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

13.3 Clause 7.7(4) further provides:

- (4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—
  - (a) the development is designed, sited and will be managed to avoid any significant adverse impact on water quality and flows, or
  - (b) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
  - (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

13.4 There is uncertainty and insufficient information provided with the DA to determine how sewage will be treated and disposed of, and what environmental impacts occur as a result of the development, including at its constituent future stages. In particular, for the site office and ablution amenities proposed for construction during Stage 1, community facilities and dwellings in subsequent stages, the following information has not been provided:

- (a) No assessment of constraints to wastewater disposal has been undertaken, including for example slope, soils, groundwater, buffers to sensitive areas and vegetation, watercourses and flooding,
- (b) No soil testing has been undertaken to demonstrate that sewage can be satisfactorily disposed of at the site,
- (c) No land or soil capability assessment to accept sewage in accordance with relevant guidelines has been prepared,
- (d) No impact assessment of the risks to groundwater has been provided, noting that parts of the proposal area are mapped as containing moderately vulnerable groundwater resources,
- (e) No impact assessment of the risks to surface water has been provided,
- (f) No impact assessment of the risks to drinking water catchment has been provided. Based on the plans submitted with the DA, the distance between the water body RL133 (Byrrill Creek Dam Full Supply Level) or RL140 (Byrrill Creek Dam Flood Level) and to the onsite system for many sites will be substantially less than 100m presenting a high risk to water quality,
- (g) The location and site layout of sewage management infrastructure has not been provided, including locations and type of sewage treatment systems, sludge management facilities, effluent storage systems, effluent disposal areas and any required environmental buffers,
- (h) The management of sludge and other waste products arising from future sewage treatment plants has not been provided, and
- (i) The governance of infrastructure, including ownership, maintenance, operation, monitoring and reporting requirements.

13.5 There is uncertainty and insufficient information provided with the DA to determine if stormwater generated by the development can be appropriately managed and whether impacts on local creeks and rivers arising from the proposed future earthworks and roads are acceptable. In particular, for the site

office, access road and storage area for construction during Stage 1, as well as roads, earthworks, community facilities and dwellings in subsequent stages, the following information has not been provided:

- (a) The location of all overland flow paths and watercourses impacted by the proposal, including future earthworks and roads has not been identified. Crossings will be required over numerous 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> order creeks or rivers.
- (b) The location of riparian corridors and impacts of the proposal on these corridors has not been assessed.
- (c) The impact of the proposal on the hydrology of natural watercourses has not been assessed.
- (d) The location of any on-site stormwater detention (OSD) facilities to mitigate impacts on the downstream receiving environment.
- (e) No stormwater design or modelling has been provided.
- (f) Details of proposed future site drainage requirements, including overland flow paths and trunk drainage system.
- (g) Compatibility of the proposal, including position of internal roads, with the future water body for Byrrill Creek Dam and with existing natural watercourses, and
- (h) The applicant has not demonstrated that the proposal is consistent with clause 7.7 in TLEP 2014.

13.6 There is insufficient information provided with the DA to determine if it will have any adverse impact on water quality. In particular:

- (a) The DA proposes no formal stormwater quality treatment measures for runoff into waterways,
- (b) No stormwater quality modelling has been undertaken.
- (c) It is unclear how the RLSCs will manage responsibility for maintaining unsealed roads to achieve effective soil and water management.
- (d) The impact of the proposed widening of 28km of existing unsealed roads to comply with RFS requirements on water

quality for watercourses and waterbodies on the site has not been assessed.

- (e) The applicant has not demonstrated that the proposal is consistent with clause 7.7 in TLEP 2014.
- (f) There is inadequate information about the disposal and management of sewage on the site. The Applicant's Appendix I to the DA identifies the following key areas of concern:
  - (1) The proposed locations of systems and irrigation areas are indicatively significantly less than 100m distance to water body for Byrrill Creek Dam (Full Supply Level at RL133 and Flood Level at RL140m),
  - (2) The proposed governance system for on-site sewage system ongoing management and maintenance is unclear, and
  - (3) The DA proposal is reliant on onsite sewage systems.

13.7 In the absence of adequate information the consent authority cannot be satisfied that the DA will be managed to avoid any significant adverse impact on water quality and flows and development consent must not be granted.

**14 Contention 14: Inadequate information has been provided which clearly details the extent of earthworks proposed and to enable an assessment to be undertaken under clause 7.2 of the TLEP 2014**

14.1 Clause 7.2 of the TLEP 2014 provides as follows:

- (3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—
  - (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
  - (b) the effect of the development on the likely future use or redevelopment of the land,
  - (c) the quality of the fill or the soil to be excavated, or both,
  - (d) the effect of the development on the existing and likely amenity of adjoining properties,
  - (e) the source of any fill material and the destination of any excavated material,
  - (f) the likelihood of disturbing relics,
  - (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
  - (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,
  - (i) the proximity to, and potential for adverse impacts on, any heritage item, archaeological site, or heritage conservation area.

14.2 The DA fails to provide adequate information about the proposed earthworks in the following respects:



- (a) There is no information provided regarding the magnitude of the earthworks required to carry out the development,
- (b) No estimates of cut and fill have been provided, nor has the location of earthworks been identified,
- (c) There has been no assessment of the impact of earthworks on waterways,
- (d) No information about the balance of cut and fill has been provided,
- (e) No information has been provided about whether fill will be imported to the site or overburden transported from the site,
- (f) There is no information about the management, duration and sequencing of earthworks,
- (g) No details regarding proposed dust, erosion and sedimentation control has been provided,
- (h) No stormwater details have been provided, and
- (i) No information has been provided regarding any proposed buffers around sensitive sites such as cultural sites or waterways.

14.3 In the absence of the information set out above and taking into account the mandatory considerations under clause 7.2 of TLEP 2014, the DA should be refused.

**15 Contention 15: The DA does not demonstrate that the risk of harm to residents in the event of bushfire can be appropriately managed**

15.1 The site is identified as bushfire prone land and includes vegetation categories 1 and 2.

15.2 The NSW Fire Service does not support the proposed development based on the documentation submitted with the DA and in a letter dated 12 April 2021 has requested additional information to enable a detailed assessment of the DA.

15.3 In a letter to the Respondent dated 26 March 2021, the Kunghur Rural Fire Brigade has also expressed the following concern with proposed development:

...It appears on the aerial map that there are many narrow roads through timbered areas linking these clusters [of isolated dwellings surrounded by

heavily timbered areas]. I am concerned for the safety of the people who may choose to live in this type of environment as well as the safety of the volunteer Fire Crews entering this area as it appears to have entry but no egress and the danger of flashover and crown fires are a very real possibility.

15.4 The DA documentation is inadequate in the following respects:

- (a) The DA proposes primary internal road linkages through areas of high value vegetation which could give rise to flame contact, tree fall and reduced visibility all adversely impacting on access arrangements during a bushfire event.
- (b) The DA does not address how the shared internal road system will be maintained to meet the minimum requirements of Planning for Bushfire Protection 2019 by the 10 neighbourhood precincts.
- (c) The co-operative management of Asset Protection Zones located between neighbourhood precincts and provision of community fire-fighting water supplies is not addressed.
- (d) The proposed precincts 9 and 10 are serviced only by one internal road which traverses through high value vegetation communities. Additional access arrangements are required to support these precincts.
- (e) The DA does not include an internal road layout plan to support each of the ten stages of the RLSC precincts.
- (f) The draft Neighbourhood Management Statement does not reference the minimum 20,000 litre static water supply identified as necessary by the Applicant's Bushfire Management Plan (**BFMP**).
- (g) The BFMP does not include any assessment of Emergency Management and Evacuation Planning which is critical given the landscape of the site includes significant undulating terrain, with some of the housing precincts in remote areas or on "dead end" roads.
- (h) A detailed bushfire assessment report has not been provided that addresses the bushfire hazard to the office buildings proposed at Stage 1 of the DA.

- (i) The DA does not comply with Section 5.1.1 – Isolated Development and Section 5.2 Specific Objectives – bushfire protection measures of Tables 5.3a, Table 5.3b of Planning for Bushfire Protection 2019. For example, Table 5.3b requires development comprising more than three dwellings to have access by a dedicated road and not by a right of way.
- (j) The bushfire assessment does not address management measures in the event that the proposed dam does not proceed. If the proposed dam does not proceed, the retention of the vegetation on the land shown as containing the dam will increase the bushfire hazard to the development and also increase the area to be managed by the RLSC.
- (k) The scenarios in the Applicant's Water Supply Strategy document state "The above scenarios do not cater for firefighting water that will need to be sourced and managed separately according to regulator requirements" (p.4 Appendix H of DA). Requirements of Tweed Development Control Plan Section A5 need to be addressed in full.

**16      Contention 16: The DA does not provide adequate information about the proposed Stage 1 office building**

16.1    The DA documentation is inadequate in that it does not include:

- (a)    A plan showing the details for the proposed office building or the amenities that need to be provided in association with the office building,
- (b)    Details of the provision of carparking areas and appropriate physical and legal access to the office, storage areas and carparking areas,
- (c)    Details of the proposed storage areas, including whether any clearing or fencing is required for these areas.

**17      Contention 17: There is no power to grant development consent as consent has not been granted by all landowners**

17.1 Consent has not been granted to the DA by the owners of Lot 3 DP 1264574, Lot 4 DP 1266293 and Lot 5 DP 12775975.

**18      Contention 18: It would be contrary to the public interest to grant development consent to the DA**

18.1 It would be contrary to the public interest to grant consent to the DA in circumstances where:

- (a) the effect of LEP Amendment No. 35, which is a proposed environmental planning instrument under section 4.15(1)(a)(ii) of the EPA Act, is to remove the application of Schedule 5 of the Primary Production SEPP to the Tweed local government area, and
- (b) the savings provision only saves the concept plan and Stage 1 components of the DA, not any subsequent development applications seeking to implement the concept plan.
- (c) the inadequacy of the information submitted with the DA and its consequent failure to demonstrate that the proposed development will not have a significant adverse impact on the environment and cultural heritage of the site,
- (d) the scale of the development and its isolated location and constraints,
- (e) the absence of a coherent management strategy for capital and recurrent funding of environmental management and necessary infrastructure for the RLSCs,
- (f) the DA proposes the creation of allotments that will be significantly impacted in the event that the Byrill Creek Dam proceeds, and
- (g) the public interest would not be served if the potential Byrill Creek Dam is jeopardized in any way given the inadequate consideration the DA documentation has given to this potential future water storage facility.

**19      Contention 19: The Development is likely to have a significant adverse impact on the natural state of land identified as “Existing and Future Water Storage Facilities” under clause 7.12 of the TLEP 2014.**

19.1 The Development will significantly impact on the natural state of the land, by virtue of:

- (a) the extent of the proposed new built form and associated infrastructure across a large area which would produce an urban-like character and form,
- (b) the removal of a substantial area of native vegetation (approximately 106 ha) and a further 220 ha area described as 'cleared/grassed paddocks with scattered trees, regrowth and weed thickets', and
- (c) Increased human and domestic animal occupation.

19.2 The impact on the natural state of the land may have a significant adverse impact on:

- (a) stormwater runoff,
- (b) erosion and sediment,
- (c) pathogen risk to the water supply catchment (both existing as well as the potential Byrrill Creek Dam) from:
  - (1) the proposed disposal and management of sewage (reliant on-site sewage management systems), and
  - (2) increased pathogen load from human and other domestic animal populations.
  - (3) sediment and nutrient load to waterways which may impact raw water quality of the Tweed water supply (both existing as well as the potential Byrrill Creek Dam), particularly in relation to turbidity and risks of algal blooms.

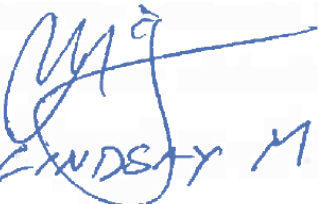
**SIGNATURE**

Signature of authorised officer of  
respondent consent authority

Name of authorised officer

Capacity

Date of signature



CANDSEY M'GAVIN  
COUNCIL DELEGATE

26 October 2022