



Coastal Assessments, Development Assessment and Systems Performance

## Director-General's Report

### Application to Modify the Minister's Approval for a Residential Subdivision at 1 Survey Street, Lennox Head (Lot 2 DP622475)

#### Major Project 06\_0002 MOD 1

## 1.0 SUMMARY

This report is an assessment of a request to modify Major Project 06\_0002 for a residential subdivision at 1 Survey Street, Lennox Head in the Ballina local government area, pursuant to section 75W of the *Environmental Planning and Assessment Act 1979* (the Act).

The Minister for Planning approved the Major Project for a 42 lot residential subdivision on 23 August 2007. Project approval was granted for:

- 39 residential lots;
- One residue lot for open space; and
- Two residue lots for vegetation conservation.

The location of the subject site is depicted below in **Figure 1**.



Figure 1: Subject Site

## 2.0 THE PROPOSED MODIFICATION

On 18 May 2009, SAKE Development Pty Ltd, on behalf of Wavehill Investments Pty Ltd (the Proponent) submitted to the Director-General a request for modification of Major Project 06\_0002. The Proponent proposes to modify the following conditions of approval:

- Condition A2 – Project in Accordance with Plans – to reflect the amended plans outlining the proposed changes;
- Condition A6 – Planning Agreement – to be deleted;
- Condition B19 – Realignment of the cycleway; and
- Condition B21 – Realignment of the sewer.

## 3.0 ASSESSMENT PROCESS

The approval for Major Project 06\_0002 was granted in accordance with Part 3A of the Act Section 75J Clause (2).

Section 75W of the Act provides for the modification of the Minister's approval. Under Section 75W(2) of the Act, a Proponent may request the Minister to modify the Minister's approval for a project. This section also states that the Minister's approval is not required if the project as modified will be consistent with the existing approval under this Part.

It is concluded that some of the proposed modifications are not consistent with the Minister's approval and are therefore the subject of an application for modification.

Pursuant to Section 75W(3) of the Act, the approval of the Minister for Planning has been sought by the Proponent to modify the approval for the residential subdivision as outlined in the proponents modification report at **Appendix A**.

Section 75W(3) of the Act provides that the Director-General may notify the Proponent of environmental assessment requirements (DGRs) with respect to the proposed modification that the Proponent must comply with before the matter will be considered by the Minister. Following an assessment of the modification request, it is considered that DGRs are not necessary.

Under Section 75W(4) of the Act, the Minister may modify the approval (with or without conditions) or disapprove the modification. The following report describes the Department's assessment of the requested modifications and supporting documentation as provided by the Proponent, and recommends **approving** the proposed modifications, with conditions.

## 4.0 DESCRIPTION OF PROPOSED MODIFICATIONS

The proposed modifications to the approved project are described in detail below.

### 4.1 Cycleway Realignment

A recommended condition of approval for the original subdivision application required the cycleway to be relocated in order to minimise any impacts on the Hairy Joint Grass (HJG) (*Arthraxon hispidus*) population. HJG is listed as a threatened species under both the NSW *Threatened Species Conservation Act 1995* and the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. The condition required the north-south orientated cycleway connecting to Seamist Place be relocated along the western boundary of the site, outside of the ecological polygon for the HJG.

An east-west oriented section of footpath connecting to the cycleway was also required to be redesigned to ensure there was minimal impact on the HJG population. The proposal seeks to maintain this section of footpath generally in the same alignment as originally proposed.

The modification proposes maintaining both the north-south and east-west cycleway alignments generally in the same configuration as originally proposed. Specific measures have been introduced to reduce the impacts on the HJG population, including a raised boardwalk over the

ecological polygon; and the use of transparent materials to allow for natural light to penetrate to the grass below. This is discussed further in the assessment of the modification under **Section 6.0**.

#### **4.2 Sewer Realignment**

The conditions of approval require the sewer alignment to be located outside of the ecological polygon for the HJG. The modification application seeks to have the sewer layout generally in the same alignment as the proposed cycleway through an area of low density HJG and subsequently crossing the existing watercourse at only one location. This is discussed further in the assessment of the proposed modification under **Section 6.0**.

#### **4.3 Deletion of the Planning Agreement**

The conditions of approval require the proponent to enter into a Planning Agreement with the Minister to ensure the retention and protection of the HJG population. The modification application seeks to delete this condition from the consent on the basis that separate conditions require the preparation of an Environmental Management Plan (EMP) and the dedication of the open space areas to Council. The EMP relates to the management of the HJG ecological buffer, and is required to be submitted to the Department for approval.

#### **4.4 Amendments to Conditions of Consent**

As a result of the amended plans proposed by the Proponent, it is proposed to modify the following conditions of approval:

Condition A2 - Project in Accordance with Plans – Approval is sought to alter this condition to reflect the revised plans outlining the proposed modification. This condition relates to plan numbering and identification.

Condition A6 – Planning Agreement – Approval is sought to delete this condition in its entirety which involves entering into a Planning Agreement with the Minister to provide for the protection, retention and management of HJG within the site.

Condition B19 – Cycleway and Footpath – Approval is sought to maintain the cycleway in its current alignment and implement design features to minimise impacts on the HJG.

Condition B21 – Sewer Connection – Approval is sought to have the sewer layout in a similar alignment as the proposed cycleway.

### **5.0 CONSULTATION AND EXHIBITION**

Under Section 75W of the Act, a request for a modification of an approval does not require public exhibition. However, under Section 75X(2)(f) of the Act, the Director-General is to make publicly available requests for modifications of approvals given by the Minister. In accordance with Clause 8G of the *Environmental Planning and Assessment Regulation 2000*, the request for the modification was placed on the Department's website.

#### **5.1 Ballina Shire Council**

The modification application was referred to Ballina Shire Council on 21 May 2009. Council responded in a letter received by the Department on 13 July 2009 and raised the following ecological and engineering issues with the proposed modification:

##### Ecological Issues

- The cycleway route along the western edge of the site is a more desirable outcome as minimal tree removal is required; it does not remove any areas of littoral rainforest; and, the trees required to be removed along the western edge of the site are already dying due to excessive groundwater and overcrowding;

- The cycleway is located in an area subject to constant groundwater seepage and it is unknown what sort of ecological impact an elevated boardwalk in this location will have on areas of HJG.
- The height of the elevated boardwalk needs to be determined to allow for the management of HJG underneath; and
- The cycleway alignment through the ecological polygon will attract people to the area, increasing the potential for detrimental ecological impacts and disturbances.

#### Engineering Issues

- An elevated boardwalk structure as proposed requires a greater level of ongoing maintenance than a standard concrete footpath/cycleway;
- A concrete path as opposed to a boardwalk has a greater lifespan (20 to 30 years); is less vulnerable to vandalism; and will provide less cost to Council over its serviceable lifespan; and
- A boardwalk will require handrails at either side, which creates an increased risk to cyclists should they accidentally veer off course. In addition, the metal surface of the elevated boardwalk would be a more slippery surface than a concrete path, particularly when wet.

An alternative cycleway and sewer alignment was provided by Council and is depicted in **Figure 2** below.

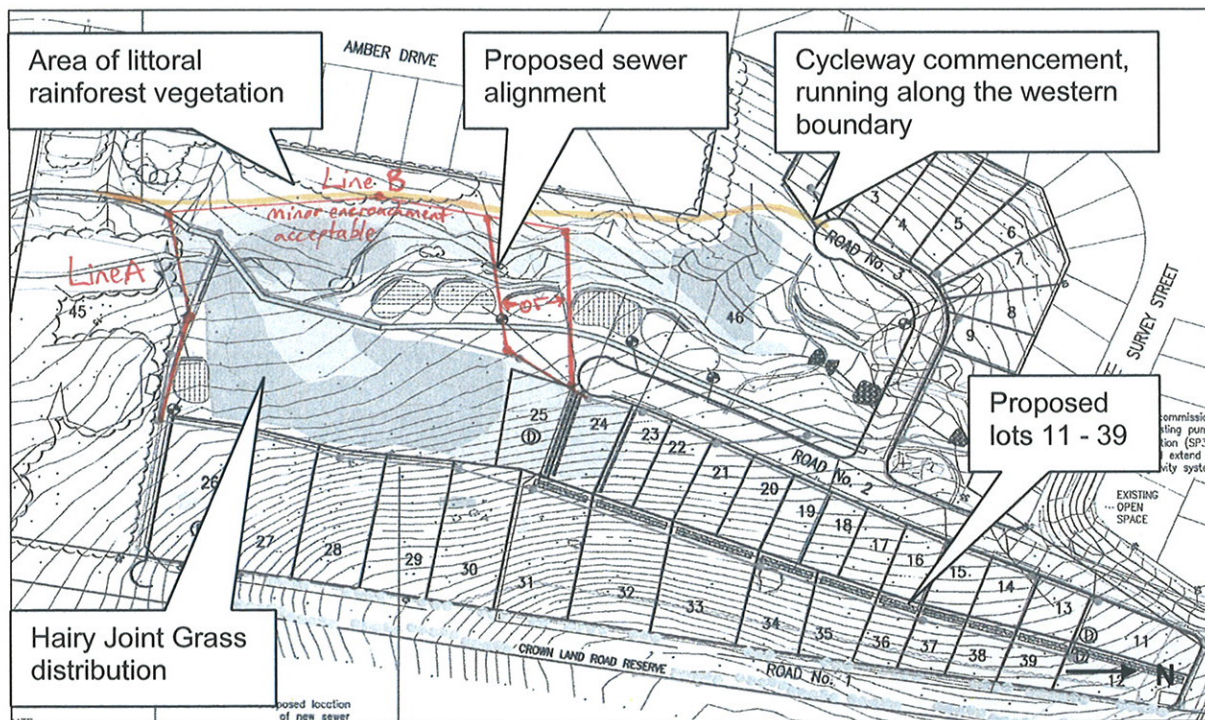


Figure 2: Councils Preferred Alignment

#### 5.2 Department of Environment and Climate Change

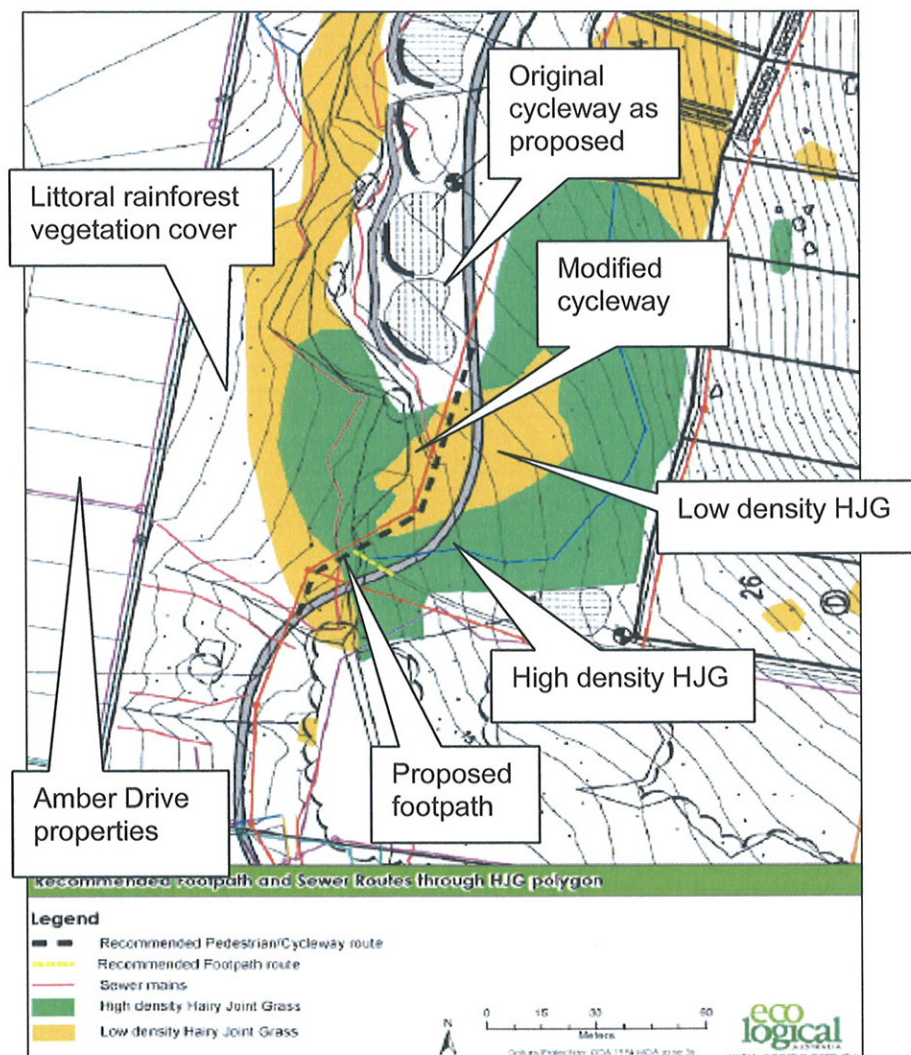
The modification application was referred to the Department of Environment and Climate Change (DECC) on 21 May 2009. DECC responded in a letter received by the Department on 11 June 2009 and raised no objections to the proposed modifications. DECC agreed that any clearing of littoral rainforest for the cycleway along the western site boundary was not a favourable environmental outcome for the site. Furthermore, DECC concurred that the construction of an elevated boardwalk made of transparent material over the HJG ecological polygon would be a satisfactory measure to ensure protection of the species.

The Department has assessed the issues raised by both Council and DECC. The relevant issues have been addressed in **Section 6.0** below.

## 6.0 ASSESSMENT

### Proposed Cycleway Alignment

In order to minimise the impacts on the HJG distribution within the site, a recommended condition of approval for the original application required the north-south oriented cycleway connecting to Seamist Place to be relocated along the western site boundary and outside of the area populated by HJG. A study undertaken by Eco-Logical Australia has identified the areas of high density and low density HJG distribution, as illustrated in **Figure 3** below. **Figure 3** also indicates the area of littoral rainforest identified by DECC along the western site boundary. The modification application seeks to maintain the north-south cycleway generally in the same alignment as proposed, although moved marginally to the west through an area of low density HJG and crossing a narrow band of high density HJG. The proposed alignment is the shortest possible route through the HJG ecological polygon. This alignment will avoid the need to remove areas of dense littoral rainforest vegetation along the western boundary of the site and to the rear of existing Amber Drive properties.



**Figure 3: Proposed Cycleway Alignment**

The proponent has advised that a raised boardwalk platform will be constructed over the ecological polygon of HJG. The proposed boardwalk will be perforated, which will allow for natural sunlight to penetrate to the areas of HJG below. In addition, the boardwalk will have handrails on either side to prevent cyclists and pedestrians from entering within the HJG ecological polygon. The Department has recommended a condition of approval that the cycleway be constructed in accordance with DECC's *Guidelines for the Design and Construction of Paths Along Watercourses and Riparian Areas*. This will ensure the functioning of the existing watercourse is not adversely impact upon by the proposed cycleway.

Eco-Logical Australia recommended construction works within the HJG distribution area only be undertaken only during the winter months as during this time HJG seedlings have not yet emerged; and, as the winter months are traditionally the driest, heavy rainfall is less likely to create soil erosion and potentially deposit destructive weed seedlings into the HJG distribution area. The conditions of approval have been amended to ensure the cycleway is constructed during the winter months to minimise impacts on the existing HJG population.

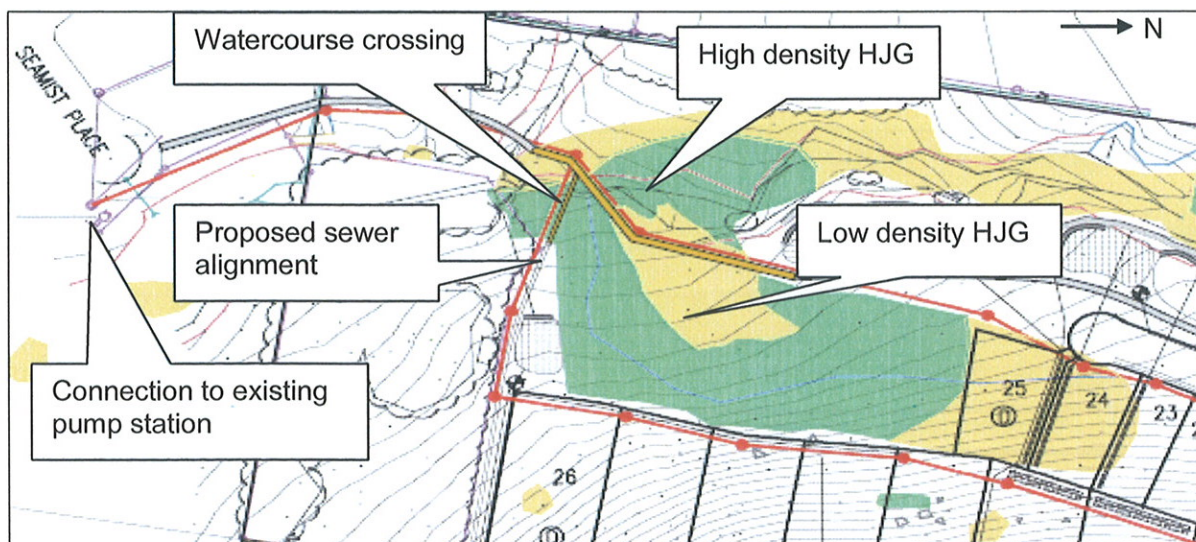
From an urban design perspective, the modified cycleway alignment is the preferred option as it is more easily accessible for a greater number of people than the alignment proposed by Council; and is less likely to facilitate anti-social behaviour. The cycleway alignment as conditioned under the existing approval and the option preferred by Council would see the cycleway beginning at the end of a cul-de-sac road (refer **Figure 2**), a greater distance from lots 11 to 39 than the proposed modified alignment. If the cycleway was constructed as proposed by Council, it would run alongside the rear boundaries of Amber Drive residential properties and adjacent to significant areas of dense vegetation cover. It is considered that this alignment has the potential to detrimentally impact on the social environment of the locality as it presents a greater opportunity for anti-social behaviour being in an area that is at the rear of existing properties and concealed by the existing dense vegetation matter.

The Department considers that the modified cycleway alignment is an acceptable route due to the fact that a significant area of littoral rainforest vegetation will be retained; measures to protect the HJG ecological polygon are implemented; and, sound urban design principles are adhered to.

### **Proposed Sewer Alignment**

The proposed sewer alignment connects to the existing pump station at the end of Seamist Place, as illustrated in **Figure 4** below. The topography of the site slopes generally to the south which is an ideal arrangement considering the sewer network is a gravity fed system. From an engineering perspective, the modified sewer alignment is a preferred arrangement as the sewer trench (which is approximately 1m in width) is short, direct, and is gravity fed to the existing pump station. The proposed alignment is also favourable from an environmental perspective as the clearing of littoral rainforest vegetation along the western site boundary is avoided, and the sewer line only crosses the existing watercourse at a single location. DECC has advised that sewer alignment as proposed is the preferred arrangement for the site.

The Department considers the modified sewer alignment as a more favourable route as it is generally aligned in the same configuration as the proposed cycleway; avoids the removal of littoral rainforest vegetation; and crosses the existing watercourse at only a single location.



**Figure 4: Proposed Sewer Alignment**

### **Deletion of Condition A6 – Planning Agreement**

A condition of approval for the original application involved the proponent entering into a Planning Agreement with the Minister in order to ensure the retention and protection of HJG on the site through the preparation of an Environmental Management Plan (EMP). The proponent seeks to delete this condition in its entirety on the basis that other conditions within the consent adequately address retention and protection of HJG.

The Department considers the proposal to delete condition A6 as a reasonable request on the basis that the retention and protection of HJG is covered in other conditions of the consent, namely;

- Condition *A7 – Environmental Management Plan*, which relates to the preparation of an EMP in consultation with both Council and DECC for the management of the HJG ecological buffer and surrounding open space area; and,
- Condition *B17 – Approval of Environmental Management Plan*, which requires the EMP as prepared to meet the requirements of condition A7 to be submitted to and approved by the Director, Coastal Assessments.
- Condition *E17 – Dedication of Open Space*, which requires the dedication of open space areas to Council and the preparation of a deed of agreement with Council to allow the proponent to carry out management and maintenance works on this land during the five years following construction, prior to Council maintaining this area.

Taking into consideration the fact that an EMP is required for the site, the EMP requires approval by the Department and the area of open space will be dedicated to Council, it is considered unnecessary for the proponent to enter into a planning agreement with the Minister. The Department supports the proponents request to delete condition A6.

The modifications sought have been assessed against the relevant planning controls and are considered to be consistent with the original assessment of the project. The proposed modified alignment of the cycleway and sewer are considered to provide the most appropriate development outcome for the site, both from an environmental and urban design perspective. It is therefore recommended that the proposed modifications be approved subject to conditions.

## **7.0 MODIFICATIONS TO CONDITIONS OF APPROVAL**

The Department recommends that conditions of approval apply to the proposed modifications. These are included within **Appendix B**.

## **8.0 PROPONENT'S COMMENTS ON CONDITIONS**

The Proponent has not raised any concerns with the wording of the conditions.

## **9.0 CONCLUSION**

The proposed modifications result in a more favourable development outcome for the site by maintaining a significant area of littoral rainforest vegetation that would have otherwise been removed; whilst introducing methods to ensure the protection of the existing HJG population. The proposed modifications do not alter the approved subdivision arrangement of the site.

The modifications to the approval sought do not affect the previous assessment against the applicable environmental planning instruments and other planning documents and policies. As such the documents and policies have not been specifically mentioned in the report.

It is considered that the proposal, as modified, still achieves the same objectives as assessed for the originally approved subdivision development. The modifications do not alter the overall

nature of the approved project, nor does it introduce any detrimental environmental, social or economic impacts upon the site.

## RECOMMENDATION

It is recommended that the Executive Director, Major Projects Assessment, as delegate for the Minister for Planning, under Section 75W of the Act, approve the modifications as detailed in **Section 4** of this Report; and vary the conditions of approval as set out in **Appendix B**. A full version of the approval (as modified) is included within **Appendix C**.

Prepared by:



Brent Devine  
Environmental Planner

Endorsed by:



Sally Munk  
A/Team Leader



Alan Bright  
A/Director  
Coastal Assessments

Approved by:

  
31/7/09

David Kitto  
A/Executive Director,  
Major Projects Assessment

**Appendix A – Request for Modification to Major Project 06\_0002**

## Appendix B – Modifying Instrument

# Modification of Major Project Approval

Section 75W of the *Environmental Planning & Assessment Act 1979*

I, the Acting Executive Director, Major Projects Assessment, as delegate for the Minister for Planning modify, under s.75W of the *Environmental Planning and Assessment Act 1979*, the Project approval referred to in Schedule 1 in the manner set out in Schedule 2.



David Kitto  
**A/Executive Director**  
**Major Projects Assessment**

Dated this **31** day of **7** 2009

06\_0002 MOD 1  
File no. 9041497

## SCHEDULE 1

### PART A—TABLE

<b>Application made by:</b>	SAKE Development c/- Wavehill Investments Pty Ltd (the proponent)
<b>Application made to:</b>	Minister for Planning
<b>Project Application:</b>	06_0002
<b>On land comprising:</b>	Lot 2 DP622475 - 1 Survey Street, Lennox Head
<b>Local Government Area</b>	Ballina
<b>For the carrying out of:</b>	A 42 lot subdivision comprising 39 residential lots, one residual lot for open space dedication and two residual lots for vegetation conservation.
<b>Type of development:</b>	Project Application
<b>Determination made on:</b>	23 August 2007
<b>Date approval is liable to lapse:</b>	5 years from the date of determination
<b>Section 75W Application</b>	Modification to 06_0002 in the following manner: <ul style="list-style-type: none"> <li>• Amend condition A2 to reflect the revised plans outlining the proposed changes.</li> <li>• Delete condition A6 regarding a planning agreement to be entered into.</li> <li>• Amend condition B19 regarding the alignment of the cycleway.</li> <li>• Amend condition B21 regarding the alignment of the sewer.</li> </ul>

### PART B—NOTES RELATING TO DETERMINATION OF APPLICATION: 06\_0002

#### ***Responsibility for other consents / agreements***

The Proponent is solely responsible for ensuring that all additional consents, approvals and agreements are obtained from other authorities, as relevant.

#### ***Appeals***

The Proponent has the right to appeal to the Land and Environment Court in the manner set out in the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000*.

#### ***Appeals—Third Party***

A third party right to appeal to this approval in the manner set out in the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000*.

#### ***Legal notices***

Any advice or notice to the approval authority shall be served on the Director-General.

## PART C—DEFINITIONS

In this consent,

**Act** means the *Environmental Planning and Assessment Act, 1979* (as amended).

**Advisory Notes** means advisory information relating to the approved development but do not form a part of this approval.

**Council** means Ballina Shire Council.

**CPI** means Consumer Price Index.

**Department** means the Department of Planning or its successors.

**Director-General** means the Director-General of the Department.

**Environmental Assessment** means the Environmental Assessment prepared by SAKE Development dated September 2006

**Minister** means the Minister for Planning.

**MP No. 06\_0002** means the Major Project described in the Proponent's Environmental Assessment.

**PCA** means a Principal Certifying Authority and has the same meaning as Part 4A of the Act.

**Proponent** means SAKE Development or any party acting upon this approval.

**Regulation** means the *Environmental Planning and Assessment Regulation, 2000* (as amended).

**Subject Site** has the same meaning as the land identified in Part A of this schedule.

## SCHEDULE 2

The above approval is modified as follows:

### PART A—ADMINISTRATIVE AND GENERAL CONDITIONS

(a) Delete Condition A2 and replace with the following:

#### **A2 Project in Accordance with Plans**

The development shall be in accordance with the plans and associated documentation lodged by or, on behalf of, the proponent including plans and documentation prepared by SAKE Development, including the Draft Statement of Commitments, draft site specific Development Control Plan, and amendments prepared by SAKE Development Pty Ltd dated May 2009 and in accordance with the following:

Environmental Assessment entitled Coastal Grove prepared by SAKE Development dated September 2006			
Subdivision Drawings prepared by <i>HASSELL</i>			
Drawing No.	Revision	Name of Plan	Date
PSL 3394 / PA02	E	Subdivision Plan	20/06/07
Stormwater Drawing prepared by <i>Patterson Britton &amp; Partners Pty Ltd</i>			
Drawing No.	Revision	Name of Plan	Date
-	-	Coastal Grove - Revised Conceptual Stormwater Management Strategy	6/07/07
Landscape Drawings prepared by <i>HASSELL</i>			
Drawing No.	Revision	Name of Plan	Date
PSL 3394 / PA 03	D	Landscape Plan	6/07/07
Survey Drawings prepared by <i>Aspect North Limited</i>			
Drawing No.	Revision	Name of Plan	Date
BA050026-SV4	B	Detail Survey Over Lot 2 DP 622475 Coast Road, Lennox Head	10/08/06

As amended by the following drawings (06\_0002 MOD 1):

Civil Engineering Drawings prepared by <i>Ardill Payne &amp; Partners</i>			
Drawing No.	Revision	Name of Plan	Date
6919 SK.1	-	Conceptual Sewer Layout	May 2009
Landscape Drawings prepared by <i>HASSELL</i>			
Drawing No.	Revision	Name of Plan	Date
PSL 3394 / PA 03	E	Landscape Plan	May 2009

**(b) Delete the following Condition A6:**

**A6 Planning Agreement**

Prior to the issue of the Construction Certificate, the Proponent shall:

- (1) Enter into a Planning Agreement with the Minister under section 93F of the EP&A Act. This Agreement must be generally consistent with commitments in the terms of the offer made by the Proponent on 18 July 2007, and specifically provide for:
  - The retention and protection of Hairy Joint Grass within the ecological buffer identified in Figure 6 of the *Review of Hairy Joint Grass (Arthraxon hispidus)* prepared by Eco Logical and dated May 2007.
  - The preparation of an Environmental Management Plan to manage the area within the ecological buffer.
- (2) Register the Planning Agreement on the title of the land in accordance with the *Real Property Act 1900*.

**PART B—PRIOR TO ISSUE OF CONSTRUCTION CERTIFICATE**

**(c) Delete condition B19 to be replaced with new condition B19:**

**B19 Cycleway and Footpath**

The north-south oriented footpath/cycleway shall be designed to minimise impact on the Hairy Joint Grass identified in Figure 6 of the *Review of Hairy Joint Grass (Arthraxon hispidus)* prepared by Eco Logical and dated May 2007. The design and construction of the cycleway is to comply with the requirements as detailed below:

- (a) Any construction works within the Hairy Joint Grass distribution area as identified in Figure 6 of the *Review of Hairy Joint Grass (Arthraxon hispidus)* prepared by Eco Logical and dated May 2007, are to be undertaken during the winter months only;
- (b) Construction must be in accordance with the Department of Environment and Climate Change's *Guidelines for the Design and Construction of Paths Along Watercourses and Riparian Areas*;
- (c) The design is to include an elevated structure/boardwalk over the Hairy Joint Grass ecological polygon which is high enough to enable the management of Hairy Joint Grass by seasonal slashing;
- (d) The design is to consist of perforated or transparent material over the ecological polygon to allow for the penetration of natural light to areas of Hairy Joint Grass below; and
- (e) The east-west oriented footpath shall be designed to ensure that it has the least possible impact on the ecological polygon for the Hairy Joint Grass identified in Figure 6 of the *Review of Hairy Joint Grass (Arthraxon hispidus)* prepared by Eco Logical and dated May 2007.

Design plans for both footpaths are to be submitted to Council prior to the issue of a Construction Certificate.

- (d) Delete condition B21 to be replaced with new condition B21:

**B21 Sewer Connection**

Sewerage services shall be provided to the development in accordance with the '*Coastal Grove, Lennox Head Infrastructure Strategy*' report, prepared by Patterson Britton and Partners dated September 2006; as amended by the '*Draft Statement of Commitments*' (Schedule 3). The 'Sewer Layout' contained within the Infrastructure Strategy shall be updated for the approved subdivision layout. Any construction works within the Hairy Joint Grass distribution area as identified in Figure 6 of the *Review of Hairy Joint Grass (Arthraxon hispidus)* prepared by Eco Logical and dated May 2007, are to be undertaken during the winter months only.

Design plans are to be in accordance with Councils *Subdivision Code* (as current at the time of construction works commencing) and are to be approved by Council prior to issue of the Construction Certificate.

**PART D—DURING CONSTRUCTION**

- (e) Insert new condition D19:

**D19 Maintenance of Disturbed Soils**

Any soil disturbance during construction works for either the cycleway, footpath or sewer trench within the Hairy Joint Grass ecological polygon must be retained and kept as weed-free as possible during construction. Following completion of the works, the soil is to be returned to its original location, to the satisfaction of Council.