

## **SUBMISSION**

### **INTRODUCTION**

1. This submission is lodged on behalf of the registered proprietors of beachfront properties located at 1, 2 & 3 Don Street at Belongil Beach.
2. These properties should be well known to the Department as photographs of these properties are regularly featured in articles and workshop materials concerning coastal erosion.
3. Because of the tight timeframe between the deadline for lodgement of this submission and that for comment on the Byron Shire Council coastal hazard management study ["Byron Submission"] (which was due Friday 28 February), I have annexed a copy of the Byron Submission and will make references to that document in the body of this document.
4. The Byron Bay Embayment is seen as one of the most important and contentious coastal erosion hotspots in NSW.
5. The purpose of this submission is to make the Department aware of what is faced by landowners where a local Council fails to comply, in a serial manner spanning decades, with:-
  - the duties and obligations owed by it to landowners under common law and statute;
  - the coastal protection legislative framework,because of its fixation with implementing political ideology with no regard for the level of non-compliance with its legal duties and obligations and the coastal protection legislation at various points in time.
6. I am hopeful that the Department will further examine these issues and take these matters into account in its policymaking of the proposed reforms for the coastal protection legislation.
7. The Coalition promised to reverse the 2011 amendments of Labour and prohibit "planned retreat" in developed communities in the lead up to the election.
8. Since the election, the State Government has made it expressly clear that it will only permit "planned retreat" to be adopted by Councils as a last resort and this has been confirmed by representatives of the Office of Environment and Heritage ["OEH"]. Minister Parker has also confirmed the Government's position in relation to "planned retreat" in parliament.

It is time the government delivered.

### **JONSON STREET ARTIFICIAL HEADLAND FOUND RESPONSIBLE FOR EROSION AT BELONGIL BEACH BY COUNCIL'S OWN MANDATED EXPERT REPORTS**

9. The largest coastal erosion hazard in the Byron Bay Embayment is the 1.2ha artificial headland built by Byron Shire Council ["BSC"] with the cooperation and funding of State Government in the 1960's.
10. There has been a litany of experts reports over the past forty years warning BSC about the downstream erosion effects caused to Belongil Beach.
11. BSC has taken no notice of these reports and:-
  - Has done nothing to ameliorate the downstream erosion effects; and
  - Prevented landowners from erecting protective works in order to comply with their duty to mitigate damages.
12. BSC engaged BMT WBM to prepare two recent reports ["Hazard Report"] in relation to erosion processes in the Byron Bay Embayment.

As discussed in paragraphs 1 – 8 of the attached Byron Submission, the Hazard Report finds that the Jonson Street artificial headland is directly responsible for a recession of the escarpment at Belongil Beach by an amount that is quantified as approximately 20m over a long section of shoreline rather than a limited distance.

13. In other words, the expert retained by BSC, has confirmed to BSC that the coastal protection works for which it has responsibility, has caused a very material and quantified measure of erosion of the escarpment at Belongil Beach.

#### **COUNCIL IGNORES FINDINGS OF HAZARD REPORT IN FORMULATION OF CZMP**

14. BSC resolved to endorse the Hazard Report on 10 October 2013 for informing and incorporation into the draft Coastal Zone Management Plan for the Byron Bay Embayment
15. On any objective view of BSC process either relating to its role in the formulation of, or its actions subsequent to the receipt of the Hazard Report, it is difficult to come to any conclusion other than BSC has failed to take any notice of the contents of the Hazard Report in many decisions by BSC and its staff relating to important aspects in the formulation of the draft coastal zone management plan
16. A detailed five (5) page Schedule of Legal Non-Compliance is annexed to the Byron Submission and many of these decisions are outlined in that Schedule.

A cursory review of that document will highlight how BSC has treated the whole legislative framework governing the formulation of draft coastal zone management plans with such a cavalier disregard, it seems implicit that BSC considers that it has "carte blanche" to write any plan it desires and have it registered.

In all of the circumstances, one wonders why the State Government bothered legislating any coastal protection legislation at all?

17. I do not wish to mire this submission with a long winded discussion about the serial non-compliance by BSC with due process but I do wish to highlight two very important and fundamental issues in the body of this document, namely:-

#### **A. BSC had predetermined to retain the Jonson Street Protective Works;**

For the reasons outlined in paragraphs 13 – 16 of the attached Byron Submission, BSC had already predetermined for the outcome in relation to the most significant coastal hazard [Jonson Street artificial headland] before it provided BMT WBM with instructions to prepare the Hazard Report in the second half of 2012.

Such was the extent of predetermination, BMT WBM made note in their first draft report that their investigation into only one coastal management option as directed by BSC was consistent with "Council current policy".

#### **B. BSC had predetermined for the Jonson Street Protective Works to be rebuilt in its current alignment**

On 27 February 2014, BSC resolved to adopt the recommendations of a Worley Parsons Report dated 11 February 2014 ["WP Report"] which investigated a number of different management options for the upgrade and design of the coastal protection works at Jonson Street but favoured the construction of a new protective works in the current alignment.

For the reasons outlined in paragraphs 17 – 30 of the attached Byron Submission, it is difficult for any objective review of BSC's conduct to conclude otherwise than BSC had already predetermined for the Jonson Street Protective Works to be rebuilt in its current alignment from as early as the second half of 2012.

Given the Hazard Report, as specifically mandated by BSC, does not even deal with any of the alternative scenarios in the WP Report except those which effectively retained the Jonson Street Protective Works in their current place, BSC could not have adopted any of the other possible management options outlined in the WP Report

Notwithstanding the WP report was mandated by BSC to specifically address the potential to:-

- *"minimise down-drift impact and address safety concerns";* and
- *"Reduce the impact on Belongil Beach",*

BSC's resolution to rebuild the protective works in their current alignment appears to have been made in complete isolation to the Hazard Reports and all other important aspects of the draft coastal zone management process.

In resolving to expend funds on these coastal protective works BSC is effectively making a decision to:-

- Commit the tort of nuisance and negligence with respect to Belongil landowners;
- Breach the duty of care owed to those affected by the Jonson Street Protective Works;
- Contravene the coastal protection legislative framework particularly S55C(1)A(g).

#### **PLANNED RETREAT AMOUNTS TO VERY LITTLE ON ANY OBJECTIVE LEGAL ANALYSIS**

18. As mentioned previously, BSC has done nothing to ameliorate the downstream erosion effects of the Jonson Street Protective Works except advocate a policy of "planned retreat" for the last 36 years.

Those advocating this policy see it as a remedy akin to "compulsory acquisition without compensation" and believe it will avoid BSC having to meet the duties and obligations it owes to Belongil landowners.

19. The OEH, CSIRO and many other unashamed advocates of "planned retreat" hold Byron Bay as the shining example for the implementation of "planned retreat".

In doing so, they have failed to carefully examine what exactly BSC has actually implemented, and the degree of ineptitude with which it has done so.

20. There is considerable confusion even within BSC staff and amongst Councillors (spanning many administrations) and the community as to what "planned retreat" actually is.

The lack of understanding displayed by participants at the recent coastal hazards workshop for the Byron Bay Embayment was alarming given many of the attendees are playing critical roles in the decisions which will help formulate the Draft Coastal Zone Management Plan.

21. The extent of this misunderstanding is a direct result of the previous Mayor [Jan Barham] and other key protagonists of the "planned retreat" policy continually imposing threats of "planned retreat" and removal of protection at Belongil in circumstances where there was never any such right founded in law.

Paragraphs 45-54 of the attached Byron Submission contain a detailed legal analysis in support of this contention.

22. A detailed review of the legal framework will confirm that any assertion by or on behalf of BSC that it was able to impose "planned retreat" on all properties in Belongil Beach amounted to "slander on title" in relation to those properties, a cause of action similar to defamation.

The former Mayor effectively ran an irresponsible and concerted "scare campaign" with no legal foundation in an attempt to "bully" Belongil landowners out of their legal rights.

23. What is just as worrying is that OEH seemed to accept much of this rhetoric at face value without any investigation into its merit, or the degree of BSC ineptitude in implementation.
24. There is no such thing as a "planned retreat" policy in law.

BSC merely has a limited power pursuant to Part J to relocate a small minority of dwellings in circumstances where those owners had subjected themselves to this power.

25. Any enforcement of these Part J conditions will be extremely problematic for BSC for the reasons outlined in paragraph 54 of the attached Byron Submission.

In particular, would you note that BSC has been culpable to a large degree in its likely inability to enforce these conditions because:-

- BSC has been negligent in not ensuring the required warnings were placed on title in many instances; and
- the Hazard Report mandated and adopted by BSC has found the Jonson Street Protective Works to be responsible for an amount of recession of the escarpment equal to the 20m trigger distance for Part J - BSC will not be able to enforce Part J conditions where it can be demonstrated to be the very cause for the recession of escarpment line

26. Paragraph 54 of the attached Byron Submission also contains a very detailed analysis of the wording of Section 149 Certificates and warnings on title which are very relevant to the proposed reforms.

Powers, such as Part J conditions, are very draconian and it is important that Councils ensure that:-

- Section 149 Certificates practically convey an appropriate warning of these draconian powers; and
- Appropriate warnings are actually placed in title,

if Councils are to ensure they have the ability to legally enforce such draconian conditions particularly against third parties with interests in the properties, such as mortgagees.

27. The attached Byron Submission makes the case that BSC has critically failed in this regard and will have significant difficulty enforcing any of the Part J conditions against property owners.

### **PLANNED RETREAT IS A VERY FLAWED POLICY**

28. This is a legally flawed policy which BSC will have little chance of implementing under current coastal protection legislation.
29. Practically, it is a nonsensical policy that will achieve nothing of substance at Belongil except leave BSC, which is virtually bankrupt already, with an even greater pile of debt from the costs of litigation, management of the mess left behind and the massive contingent liabilities it will face if the Courts do not share BSC's optimistic views.

Please refer to paragraphs 38-49 of the attached Byron Submission in this regard.

30. In the meantime, the Belongil Spit, Wetlands & Estuary, the littoral forest at North Shore, sites of indigenous cultural heritage important to the Arakwal Community and the vibrant community that is Belongil Beach will have been destroyed.

Please refer to paragraphs 31-37 of the attached Byron Submission in this regard.

31. 'Planned Retreat', Byron style, is the most inequitable, unreasonable and divisive coastal management policy that has ever devised in this country's history.

It has also been the most costly in this country's history having been advocated unsuccessfully for some 36 years.

Imagine if there had been someone with some sense at BSC or OEH in 1988 who could have dispatched "planned retreat" to the waste paper bin?

The wasted administrative, staff, expert report, litigation etc costs over that period of time would amount to more than \$20 million which could fix a lot of potholes and flooding sports fields in the Byron Shire, which have had to go neglected because successive administrations were more focused on political ideology than compliance with the coastal protection legislation at various points in time.

More importantly, the efforts of BSC and a significant part of the community could have been devoted to Byron Bay achieving its full potential instead of fighting each other.

## **PRACTICES OF COUNCILS WITH RESPECT TO Sec 149 CERTIFICATES AND WARNINGS ON TITLE MUST BE IMPROVED**

### **PLANNED RETREAT MUST BE ABOLISHED IN DEVELOPED COMMUNITIES**

For the reasons outlined, I urge the government to:-

1. Ensure Councils issue Section 149 Certificates which practically convey an appropriate warning of any draconian powers being used as a coastal management tool such as those similar to Part J in Byron Shire or timed consents etc;
2. Ensure Councils actually place appropriate warnings on title of any draconian powers being used as a coastal management tool such as those similar to Part J in Byron Shire or timed consents etc;
3. Protect landowners and other parties with an interest in affected properties [such as mortgagees] by making it a critical failure in the enforcement of any such conditions if Councils have failed to comply with 1 & 2 above; and
4. Abolish "planned retreat" as a coastal management option for existing developed communities to ensure rogue Councils do not continue to capriciously ignore the duties and obligations owed to NSW landowners.

## **SUBMISSION - BYRON COASTAL HAZARD MANAGEMENT STUDY**

### **A. BMT WBM Byron Shire Coastline Hazards Assessment Update Report dated 19 September 2013 ["Patterson Update Report"]**

1. Pursuant to Resolution 13-542, Council resolved to endorse the Patterson Update Report on 10 October 2013 *"for informing and incorporation into the draft Coastal Zone Management Plan for the Byron Bay Embayment"*.

### **B. BMT WBM Modelling Byron Bay Erosion Processes 2010 ["Original Patterson Report"]**

2. The Patterson Update Report confirmed to Council that the Jonson Street structure has had a major impact in trapping sand and the impact of the resultant downstream erosion effect now extends all the way along Belongil Beach past Belongil Creek.
3. The Patterson Update Report advises Council that the Original Patterson Report provides the most recent information available to Council about the relative contribution of the Jonson Street structure to the downstream erosion effect.
4. The Original Patterson Report and the Patterson Update Report provide precise measurements about the amount of sand which has been trapped by the Jonson Street structure, and which ought to have made its way to Belongil Beach.

### **C. Patterson's Findings from the Original Patterson Report and Patterson Update Report**

5. The Original Patterson Report advised Council to the following effect:
  - the Jonson Street Structure has had a long shore distribution extending over a long section of the shoreline at Belongil (2.6 Conclusions);
  - according to the modelling diagrams attached to the report, the impact of the Jonson Street Structure to which the report refers, extends from immediately northwest of the Jonson Street structure all the way to Belongil Creek (Figure 21, Figure 22);
  - according to this report, the impact has caused approximately 20 metres of landward recession since 2000, and is continuing [my underlining] (2.6 Conclusions);
  - the impact of seawalls constructed by residents along the Belongil Spit (including the present plaintiffs) "has been relatively modest and local to date" (2.5 Model Results).
6. That Original Patterson Report also stated in its conclusion that:-

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

  - *The seawall at Jonson St has prevented what may have been about 50m of erosion that would otherwise have occurred naturally at Main Beach to date and potentially a further 10-50m over the next 50 years (in the absence of sea level rise);*
  - *Correspondingly, the seawall at Jonson Street has affected Belongil Spit erosion as an incremental increase in addition to what would have occurred naturally in its absence, but is thus not the whole contributor to the erosion that has occurred. This incremental effect has an unusual and unexpected longshore distribution, being of relatively modest extent (approx 20m) extending over a long section of shoreline rather than a more extensive effect over a limited distance (refer Figure 22). This is probably related to the nature of*

*the processes along the area immediately west of the seawall where significant erosion would otherwise have occurred naturally;[my underlining]*

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

7. The Patterson Update Report advised Council to the following effect:-

- previous reports such as the 1978 PWD report and the 2000 WMB report have overstated the underlying long term recessional trend in the Byron Bay Embayment (Page 105);
- the rates are relatively low and probably immeasurable if the natural sand variability is taken into account
- the impact of the Jonson Street structure extends to more than 3.1km downstream from the Jonson Street Structure;
- the Jonson Street Structure has been the primary cause of erosion damage to Belongil properties and its adverse impact now extends to beyond Belongil Creek.

8. Accordingly, the above mentioned findings of Patterson in the Original Patterson Report and the Patterson Update report ought to inform Council in the formulation of the draft Coastal Zone Management Plan.

The most important of these findings is that **Patterson finds the Jonson Street artificial headland is directly responsible for a recession of the Belongil escarpment by an amount that Patterson quantifies as approximately 20m over a long section of shoreline rather than a limited distance.**

**D. Council's response to the Original Patterson Report and the Patterson Update report**

9. As mentioned above, Council resolved to endorse the Patterson Update Report on 10 October 2013 for informing and incorporation into the draft Coastal Zone Management Plan for the Byron Bay Embayment
10. On any objective view of Council process either relating to its role in the formulation of, or its actions subsequent to the receipt of the Patterson Update Report, it is difficult to come to any conclusion other than Council has failed to take any notice of the contents of the Original Patterson Report and the Patterson Update report in many decisions by Council and its staff relating to important aspects in the formulation of the draft coastal zone management plan
11. A detailed Schedule of Legal Non-Compliance is annexed as part of this Submission and many of these decisions are outlined in that Schedule
12. I do not wish to mire this submission with a long winded discussion about the serial non-compliance by Council with due process but I do wish to highlight two very important and fundamental issues in the body of this document.

**E. Predetermination to retain the Jonson Street Protective Works**

13. The Patterson Update Report dated 19 September 2013 assessed only two scenarios as described on page XV of that report:-

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

14. The original draft of the Patterson Update Report was provided to Council on 22 November 2012. It only assessed one scenario which included retention of the Jonson Street Protective Works.
15. There is no avoiding the conclusion that as early as November 2012 [and most likely at a point much earlier in time], Council predetermined the retention of the Jonson Street Protective Works as this is implicit from Council's instructions to BMT WBM.
16. The Patterson Update Report is meant to inform Council in the formulation of its draft Coastal Zone Management Plan for the Byron Bay Embayment, yet Council had already predetermined the outcome in relation to the the Jonson Street Protective Works which Patterson finds to be the most significant of all hazards in the Byron Bay Embayment

**F. Councils Resolution to adopt the Recommendation of the Worley Parsons Report dated 11 February 2014 ["WP Report"]**

17. Council resolved yesterday to adopt the recommendations of the WP Report which includes, amongst other things, the recommendation that Council expend an amount of approximately \$5-7 million on the rebuilding of the Jonson Street Protective Works in its current alignment.
18. While this recommendation included the proposed removal of the spur groynes, the WP Report, by its own admission, concludes that the recommendation does little to minimise or reduce the down-drift erosion impact on Belongil Beach.
19. This is a very unusual result given the WP Report, in investigating the upgrade and design of coastal protection works at Jonson Street, was to specifically address the potential to:-
  - *"minimise down-drift impact and address safety concerns"; and*
  - *"Reduce the impact on Belongil Beach",*

consistent with the various Council resolutions and Management Actions detailed in the introduction of the WP Report

20. In all of the circumstances, and having regard to the findings within the WP Report, it is difficult to see how Worley Parsons could make any recommendation to Council other than realignment of the protective structure back to its original 1913 or 1921 beach alignment unless a corresponding recommendation was made to provide for adequate downstream protective works.
21. It is impossible to understand how Council could adopt the recommendations of the WP Report given Council's own expert Patterson has informed Council that the Jonson Street artificial headland is directly responsible for a recession of the Belongil escarpment by an amount that Patterson quantifies as approximately 20m over a long section of shoreline rather than a limited distance.
22. Effectively, the WP Report makes a recommendation for the construction of coastal protection works in circumstances where WP is aware [the Original Patterson Report is referenced in the WP Report] that those works will have a serious downstream erosion effect,



without also recommending Council or alerting Council for to the need to take countervailing action to manage the downstream erosion effects of its recommendation.

23. Critically, in resolving to adopt the recommendations of the WP Report yesterday, Council has made a conscious decision to construct protection works in circumstances where Council is aware [by virtue of Patterson's findings in the Original Patterson Report and Paterson Report Update] that those works will have a serious downstream erosion effect, without also resolving to take countervailing action to manage the downstream erosion effects of the protection works proposed to be constructed.
24. It is difficult to understand how Council's resolution will not be objectively viewed as Council resolving to:-
  - Commit the torts of nuisance and negligence in relation to the downstream erosion effects of the Jonson Street Protective Works [as reconstructed];
  - Breach the duty of care Council owes to those affected by the downstream erosion effects of the Jonson Street Protective Works [as reconstructed]; and
  - Contravene many aspects of the coastal protection legislation including Section 55C(1)A(g) of the Coastal Protection Act
25. Furthermore, Council appears to have made this decision yesterday in complete isolation to:-
  - the Original Patterson Report and the Patterson Update report which were meant to have informed Council in its formulation of draft Coastal Zone Management Plan for the Byron Bay Embayment; and
  - all other important aspects in the formulation of the Draft Coastal Zone Management plan.
26. Additionally, the Patterson Update Report does not even deal with any of the alternative scenarios in the WP Report except those which effectively retained the Jonson Street Protective Works in their current place.
27. As such, Council could not have adopted any of the other possible management options outlined in the WP Report because it would have had to recommence the Draft Coastal Zone Management Plan process because Council mandated hazard studies that specifically did not deal with those alternative scenarios at its express direction.
28. In these circumstances, it is difficult for any objective review of Council's conduct to conclude otherwise than Council had already predetermined for the Jonson Street Protective Works to be rebuilt in its current alignment from as early as the second half of 2012.
29. This is clearly inconsistent with any due process required by the legislative framework relating to the formulation of Draft Coastal Zone Management Plans.
30. The clear failure of due process in all of the issues raised in paragraphs 17 – 29 above will also impact upon Council's ability to rely on any "good faith" type defences in relation to yesterday's resolution.

#### **G. Environment**

31. The Original Patterson Report and Paterson Report Update emphasise that the protective works along Belongil Beach have operated to protect the existing natural environment.
32. The Paterson Report Update advises Council [at page 134] that any removal of this protection would result in catastrophic consequences for the environment:-

*"where seawalls are not retained, the dominant process would be shoreline recession into the low-lying high-dune areas, resulting in a major reconfiguration of the beach, dune and creek morphology and processes."*

33. Any Council resolution to implement a Draft Coastal Zone Management Plan along the lines of Scenario 2 [refer paragraph 13 above] which includes the removal of all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach would be a de-facto Council resolution to destroy:-

- the Belongil Spit
- the ecosystem of the Belongil Wetlands;
- the little tern nesting area
- the littoral rainforest just north of Belongil Creek
- the ecosystem of the Belongil Estuary

#### **H. Arakwal Community Perspective**

34. At the recent Coastal Hazards Workshop, Councillor Duncan Dey paid tribute to the original inhabitants of the Belongil region as part of the introduction.
35. It is of vital importance that feedback from indigenous groups be considered as an integral part of any processes addressing options for coastal management and the impact on indigenous cultural heritage.
36. As part of WBM's Coastline Management Study adopted by Council in 2004, it was noted that the Arakwal Community viewed "planned retreat" as the most detrimental of all of the various coastal management options as it would result in the loss of sites along the foreshore.
37. Any Council resolution to implement a Draft Coastal Zone Management Plan along the lines of Scenario 2 [refer paragraph 13 above] which includes the removal of all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach would be a de-facto Council resolution to destroy sites of indigenous cultural heritage along the Belongil foreshore.

#### **I. Infrastructure**

38. In relation to the previous Draft CZMP in 2009/10, Council noted that the following infrastructure and utility services would have to be removed and relocated if there were a 20 metre retreat:
- i. Trunk infrastructure including water, stormwater and sewerage mains, pump stations and shutoff valves; gas pipelines, power lines, telephone lines; underground communication cables.
  - ii. Road infrastructure.
  - iii. Bridges and the railway.
  - iv. Public amenities such as community buildings and toilet blocks.
39. This infrastructure is very valuable and Council has never reviewed the fiscal consequences of removal of these items from its balance sheet, nor factored the cost of replacement
40. It is difficult to imagine State Government or any instrumentalities contributing to the replacement of such infrastructure where Council deliberately resolved to destroy the infrastructure in such a capricious manner.

41. There would also be serious economic consequences from the following:-

- Loss of publicly owned land [State and Council] of considerable value;
- Loss of privately owned land of considerable value;
- Loss of rates and land tax revenues from the privately owned land that no longer exists;
- the placing of north Byron existing communities at risk due to a breakthrough from the ocean, the collapse of Belongil Spit and a merging of the ocean and the Belongil Creek leading to flooding.

42. Another massive cost to Council would be the litigation that would surely follow any decision to implement "planned retreat" from affected landowners and businesses. In addition to the sheer quantum of legal costs, Council would have to provision a substantial sum to cover its contingent liability in the event its defence of these legal actions was unsuccessful.

Such a provision would have to be based on the current market value of the existing properties at Belongil which would be worth well in excess of \$200 million.

43. Council has not undertaken any economic analysis of any of these costs at any stage

44. Any Council resolution to implement a Draft Coastal Zone Management Plan along the lines of Scenario 2 [refer paragraph 13 above] which includes the removal of all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach would be a de-facto Council resolution to recklessly gamble Council's already precarious financial position with a potential and not unlikely outcome of Council having to enter some form of bankruptcy proceedings.

#### **J. Removal of Protective Works at Belongil Beach**

45. Any Council resolution to implement a Draft Coastal Zone Management Plan along the lines of Scenario 2 [refer paragraph 13 above] incorrectly presumes that Council has the legal power and authority to remove *"all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach"*

46. In many instances, Council will have no legal right to remove the existing protection for, inter alia, the following reasons:-

- much of this protection had been constructed with Council's approval/acquiescence;
- Council owes duties and obligations to landowners seeking to use their properties for the purposes for which they had been zoned by Council;
- Tortious liability of Council
- Statutory provisions such as Section 177 Conveyancing Act
- Defences from landowners based on Council liability for the downstream erosion effects of the Jonson Street artificial headland now confirmed in reports adopted by Council prepared by Patterson, an expert retained by Council of its own volition.

47. Another massive cost to Council would be the litigation that would surely follow any decision to remove *"all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach"* from affected landowners and businesses. In addition to the sheer quantum of legal costs, Council would have to provision a substantial sum to cover its contingent liability in the event its defence of these legal actions was unsuccessful.

Such a provision would have to be based on the current market value of the existing properties at Belongil which would be worth well in excess of \$200 million.

48. Council has not undertaken any legal analysis of its ability to remove *"all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach"*

49. Council has not undertaken any economic analysis of any of these costs at any stage

#### K. Legal Status of Planned Retreat

50. In addition to the critical legal issue of whether Council has any legal right to remove *"all other coastal erosion protection works and interim beach access stabilisation works at Belongil Beach"*, there is considerable confusion within Council and the community as to what *"planned retreat"* actually is.

The lack of understanding displayed by participants at the recent coastal hazards workshop was alarming given many of the attendees are playing critical roles in the decisions which will help formulate the Draft Coastal Zone Management Plan.

51. We suspect the extent of this misunderstanding is a direct result of the previous Mayor and other key protagonists of the planned retreat policy continually referring to imposing threats of *"planned retreat"* and removal of protection at Belongil in circumstances where there was never any such right founded in law.

52. A detailed review of the legal framework will confirm that any assertion by or on behalf of Council that it was able to impose *"planned retreat"* on all properties in Belongil Beach amounted to *"slander on title"* in relation to those properties, a cause of action similar to defamation.

53. There is no such thing as a *"planned retreat"* policy in law

54. Council merely has a limited power to relocate a small minority of dwellings.

For the reasons outlined in subparagraphs (1) through (5) below, Council only has the right to enforce the Part J powers in a very limited number of instances.

##### ***(1) Part J only applicable to dwellings approved post 1988***

The powers contained within Part J may only be validly exercised by the BSC against dwellings built after 1988.

##### ***(2) Council cannot use Part J where Council is the cause of the recession of escarpment line***

Furthermore, of those dwellings at Belongil Beach built after 1988, many landowners would have a valid defence against the exercise of any powers in Part J where any recession of escarpment lines (the trigger for relocation under Part J) could be attributable to either:-

- the downstream erosion effects of the Jonson Street Protective Works; or
- Council's failure to maintain interim erosion protection works under a number of planning consents (including a Development Consent determined by BSC on 8 November 2001 covering five key areas of Belongil Beach), where landowners reasonably relied upon BSC constructing and maintaining those interim erosion protection works in accordance with the requisite specifications as it is so obliged under the terms of those planning consents.

As mentioned in paragraphs 6 & 8 above, the expert Council chose to undertake the Hazard Study Patterson has found the Jonson Street artificial headland is directly responsible for a recession of the Belongil escarpment by an amount quantified as approximately 20m.

Council will have no chance of enforcing any Part J powers given:-

- the trigger under Part J is 20 metres: and

- Patterson has found Council to be responsible for recession of the escarpment by 20 metres.

***(3) BSC practically restricted from using Part J powers where impacts pre 1988 approved dwellings***

Existing owners of pre 1988 properties have significant legal rights in relation to the use of their property for the purpose for which it was zoned and an expectation of both State and Local Governments to act reasonably to assist in that continued occupation and with respect to the continued provision of access and services to those properties.

Any purported exercise of these Part J powers will expose BSC to significant damages claims from neighbouring landowners with dwellings that have been validly approved for residential purposes where BSC's actions (or even inaction) with respect to adjoining properties necessarily places those properties at risk.

It is difficult to understand how Part J powers could be enforced along Belongil Spit any closer east than the most western situated pre 1988 approved dwelling (since any retreat closer eastward necessarily risks access and services to that most western dwelling).

***(4) Council appears to have been negligent in not ensuring the required warnings were placed on title***

In development approvals issued by Council, it is usually a condition with a requirement for a following warning phrased along the lines of the following to be placed on title pursuant to Section 88E of the Conveyancing Act:-

*"The subject land and any improvements thereon shall not be used for the purpose of a residential dwelling in the event that the erosion escarpment as defined by the Development Engineer of the Council of the Shire of Byron from time to time comes within less than 20 meters of any part of the dwelling house, excluding the balconies"*

You will see that the Act requires Council to have been a party to the necessary documentation required to be registered at the Titles Office to perfect the intended warning on title.

*"88E(3) A restriction or public positive covenant referred to in subsection (2) may be imposed in relation to land under the provisions of the Real Property Act 1900 by a memorandum of restriction or public positive covenant in the form approved under that Act that:*

*(a) specifies the prescribed authority that is imposing the restriction or public positive covenant,*

*(b) is executed by that prescribed authority, by the registered proprietor of the land and by each other person who has a registered estate or interest in the land and is to be bound by the restriction or public positive covenant, and*

*(c) is lodged in the office of the Registrar-General.*

*and such a restriction or public positive covenant takes effect when the Registrar-General has made, in the Register kept under that Act, such recordings with respect to the restriction or public positive covenant as the Registrar-General considers appropriate."*

It is now clear that no explicit warnings are contained on the majority of titles to the beachfront properties purportedly subject to this type of development condition. Where no warning exists on title, this necessarily means no final building approval should have been issued by Council.

Alternatively, the fact the explicit warning doesn't appear on the title search can clearly give rise to the inference that, for whatever reason, Part J powers are not applicable to that particular property.

Perhaps Council negligently or carelessly either failed to obtain the documents from applicants or failed to lodge the documents with Titles Office

There is no doubt Council would have obtained legal advice before settling the terms of a pro forma Section 149 Statement and this condition of the pro forma development approval. The Section 149 Statement is a generic town planning advice issued by Council that must accompany a draft sale contract (like PAMD forms).

Council's negligent failure to get this very specific warning on title will prevent Council's ability to exercise the onerous powers within Part J on subsequent purchasers (who may not have had notice of the conditions of the development approval).

#### **5) Inadequacy of Section 149 Certificates**

In reality, the Section 149 Certificates relating to post 1988 dwellings should also have this very specific warning on them, not the motherhood statement relating to objectives and the oblique reference to Part J (which may or may not apply to the particular property in question)

Curiously the oblique reference to Part J is in reference to "*whether or not the land is affected by a policy.....that restricts the development of the land because of the likelihood of land slip, bushfire, flooding, tidal inundation, subsidence, acid sulfate soils or any other risk*" (my underlining)

Once again the wording seems inadequate compared to the onerous powers contained in Part J

The same reference is contained in Section 149 certificates issued by Council in relation to the purchase of both post 1988 and pre 1988 approved dwellings (to which the Part J powers are inapplicable)

In other words, it is not a specific warning (similar to that intended to be placed on title specific to a particular property) but a general statement that Part J may (or may not) be applicable to the property you are buying.

If a buyer is happy with the existing improvements on a property being considered for purchase, a reference to a policy "*that restricts the development of land*" may not concern such a buyer because they may have no intention of developing the land in the future.

The "warning" (and I use this term loosely) contains no reasonable indication that there may be circumstances where the existing use right can effectively "disappear".

Certainly this wording is nothing like the very explicit warning that was intended to be placed on titles since 1988. Council clearly obtained legal advice that this very explicit warning was required in order for them to enforce the onerous powers within Part J.

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

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

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

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



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

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

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

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

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

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

- (c) The acknowledgement within the report that uncertainty remains about the underlying rate of recession and that there is "insufficient knowledge" to be definitive about the processes which are actually occurring on this section of coastline.
- (d) The EVO MOD model adopted by WBM BMT has been "forced" to include a loss of sand to the Byron Lobe at an average rate of 50,000 m<sup>3</sup>/yr affecting the cross-embayment transfer – which is an assumption used in the model and not a verified scientific or modelled finding – in other words Patterson acknowledges that he "fudges his model" to arbitrarily remove 50,000 m<sup>3</sup>/m/yr because it can't simulate the cross shore sand transport to generate his finding of shoreline recession west of the Jonson Street Protection Works [refer page 109].

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

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

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

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