

7 March 2016

The Hon. Rob Stokes
Minister for Planning
c/o The Director Regions, Northern
Department of Planning and Environment
Locked Bag 9002
GRAFTON NSW 2460

Online submission

Copy to: Carolyn McNally, Secretary, NSW Department of Planning and Environment: information@planning.nsw.gov.au

Vaughan Macdonald, General Manager, Richmond Valley Council:
council@richmondvalley.nsw.gov.au

Dear Minister

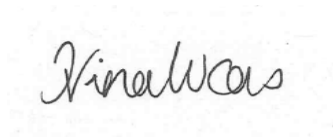
Draft Master Plan for the Iron Gates Residential Release, Evans Head

We act for Mr Alan Oshlack in relation to the above matter.

We are instructed to lodge the **attached** submission to the Draft Master Plan on behalf of our client as he is currently overseas.

If you have any questions please do not hesitate to contact the writer on 02 9262 6989 or by email to nina.lucas@edonsw.org.au.

Yours sincerely,
EDO NSW



Nina Lucas
Outreach Solicitor

Submission of Mr Alan Oshlack objecting to Draft Master Plan for the Iron Gates Residential Release, Evans Head

Gold Coral Pty Ltd – Lot 163 DP831052, Lots 276 & 277 DP755624

This submission has been prepared to outline my objections to the Draft Master Plan (**Draft MP**) for the proposed development at Iron Gates, Evans Head.

Summary

The Draft MP should be refused.

The Iron Gates site is unsuitable for the type and scale of the proposed development. The site comprises large portions of E2 and E3 zoned land, contains habitat for a number of threatened species, as well as an area of listed littoral rainforest Endangered Ecological Community (**EEC**). The proposed development is likely to cause unacceptable impacts on this habitat and a number of threatened species. As such a species impact statement (**SIS**) should have been submitted with the development application as required by section 78A the *Environmental Planning and Assessment Act 1979* (**EPA Act**). Because the proposed development is likely to significantly affect the habitat of a number of threatened species, the application should be referred to the Chief Executive of the Office of Environment and Heritage (**OEH**) (section 79B EPA Act).

The site and surrounding area are well-known to be of Aboriginal heritage significance. The impacts of the proposed development on Aboriginal heritage have not been adequately assessed, and the site should be not be disturbed but preserved and safeguarded as a significant heritage area.

This type of development is deemed to be designated development, not integrated development as it is currently classified. An environmental impact statement (**EIS**) should be prepared and placed on public exhibition (clause 7(3) of SEPP 14 – Coastal Wetlands). Concurrence from the Director-General of the Department of Planning and Environment is also required before the proposed development can go ahead: clause 7(1) SEPP 14.

It is not in the public interest to allow the applicant, Gold Coral Pty Ltd, to undertake the development on the site. The applicant's director has a poor track record of complying with environment and planning law. The applicant's director has failed to comply with court orders to remediate past damage to the site caused by unlawful activities. The courts have said that the past conduct of a proponent may be of relevance in determining whether to grant or refuse development consent for proper planning reasons.¹

In addition to this, recent clearing of native vegetation on the site is currently under investigation by the NSW Government. Approval of the Draft MP for the development would condone the director's previous unlawful activities at the site, and would fail to deter the applicant from breaching the law in relation to the current development. It would also fail to deter other developers from breaching the law in relation to any future development in the region.

Impacts of the proposed development on ecology

In 2014, I engaged Landmark Ecological to review the Statement of Environmental Effects for the Iron Gates development application (that report is attached as **Appendix 1 to**

¹ *Jonah Pty Limited v Pittwater Council* [2006] NSWLEC 99; 144 LGERA 408.

Attachment A). The key conclusions of that review which are still relevant to the current draft MP are:

1. *14 threatened fauna species are known from the site and another five threatened species can be considered likely or highly likely to occur on the basis of the presence of suitable habitat.*
2. *Planit's methodology was inadequate to detect several threatened species that can be expected to be dependent on the site's habitats and the reporting of results is confused, with the omission of key data and references preventing any independent analysis of findings.*
3. *It appears probable that the proposal will have a significant effect on the threatened Eastern Blossom Bat and Eastern Long-eared Bat, and possibly on the Common Planigale and Koala. This is due to the potential for the cumulative impacts from the proposal to place local populations at risk of extinction, particularly in relation to impacts on the littoral rainforest in the site. These impacts may also result in a substantial modification to the structural and floristic composition of the endangered ecological community termed Littoral Rainforest of the South East Corner, Sydney Basin and North Coast Bioregions, placing its long-term occurrence in the site at risk of extinction. These findings suggest that the preparation of a species impact statement (SIS) may be required.*
4. *Lack of remediation (as ordered by the Land and Environment Court in 1997) of the site following clearing and draining in 1996, together with additional clearing in 2014, is likely to have removed and damaged the habitat of a number of threatened fauna species and damaged an endangered ecological community.*

I have again engaged Landmark Ecological Services Pty Ltd to review the ecological assessment aspect of the Draft MP, namely the Ecological Assessment dated 23 October 2015 (Annexure 1 Part 1 to the Draft MP) and the Original Flora and Fauna Assessment dated August 2014 prepared by Planit Consulting (Annexure 1 Part 2 to the Draft MP).

The ecological assessment for the Draft MP contains a number of deficiencies, confusions, and omissions as identified in Landmark Ecological Service's further independent expert review (attached as **Attachment A**). The key conclusions of the independent review are set out below:

1. *The proposal sets out to fail to protect and sustain the important environmental value of the area as it is likely to have a significant adverse impact on the site's Threatened ecological community and species values and on its biodiversity values generally. (pg. 9)*
2. *As a result of the failure to undertake additional field surveys and assessments, together with failing to satisfactorily redress the omissions, misconceptions and errors contained in Annexure 1 Part 2 (Original Flora and Fauna Assessment), the ecological assessment presented in the Draft Master Plan remains substantially flawed and does not adequately consider and redress the likely impacts on the Littoral Rainforest EEC and key Threatened fauna species known from or likely to occur in the site's habitats. (pg. 9)*
3. *The design of the site layout isolates the main stand of the Littoral Rainforest EEC, and [Key Threatening Processes] KTPs likely to continue to operate and increase as a result will severely modify its floristic composition and eventually lead to its demise. (pg. 9)*

4. *The proposed location of roads and concrete barriers immediately adjacent to the main stand of the Littoral Rainforest EEC, contrary to the claims in Annexure 1 Part 1 that this provides a buffer, will exacerbate harm to the EEC. (pg. 3) The proposal is likely to result in a suite of detrimental impacts on the main stand of the Littoral Rainforest EEC in the site (pg. 4)*
5. *It is likely that a number of key threatening processes (KTPs) will be exacerbated by the proposed development, including impacts from introduced plants and introduced predatory animals (such as the Cane Toad, Red Fox, and Feral Cat). (pgs. 7-8)*
6. *Isolation and fragmentation of habitats will also adversely affect a number of Threatened fauna species supported by the site's habitats and together with the probable continued operation and increase of KTPs, will most likely cause the extinction of local populations of at least one and possibly three of these species. (pg. 9)*
7. *A SIS should be prepared to fully assess and mitigate the likely adverse impacts on Threatened biodiversity from the proposal, which requires major modification to reduce impacts to a level where they will not have a significant adverse effect on the site's Threatened ecological community and Threatened species attributes. (pg. 9)*
8. *The review identified a number of inadequacies and errors in the assessment of potential significant impacts on the Eastern Blossom-bat and Eastern Long-eared Bat, Common Planigale, and Koala (pgs. 4-6).*
9. *The Site is not suitable for the proposed development because the lot and road layout physically isolates the most important stand of an Endangered Ecological Community (EEC) on the site. Residential development is also proposed to surround the EEC, apart from a small section in its south-eastern corner, and to claim that connectivity is maintained to an adjoining area of the EEC to the south via "twin 300mm culverts" (Annexure 1 Part 1, comment under Points 9 and 10) demonstrates little understanding of the operation of fauna corridors and road underpasses. (pg. 2)*
10. *The site's vegetation communities growing on low-nutrient sands, particularly the heath communities, are likely to be highly susceptible to nutrient enrichment resulting from leaching from imported fill. (pg. 6)*
11. *As a result of the cumulative impacts from the activities and threats associated with the Iron Gates Residential Release development proposal, as detailed above, it is considered likely that there will be a significant adverse effect on the main stand of the Littoral Rainforest EEC in the site so that its floristic composition will be substantially adversely modified and the local occurrence placed at risk of extinction. (pg. 9)*
12. *There is also likely to be a significant adverse effect (under s.5A, EPA Act 1979) on the life cycle of the Eastern Blossom-bat and probably on the life cycles of the Common Planigale, Koala and Eastern Long-eared Bat due to these cumulative impacts. As a consequence, it is considered that a Species Impact Statement, as required under s.5A of the EPA Act 1979 should have been prepared for the proposal. (pg. 9)*

The proposed development is likely to have a significant effect of a number of threatened species and their habitat. The applicant should have been required to submit a SIS with the application for development (section 79A EPA Act). The application should be referred to the Chief Executive of OEH (section 79B EPA Act), as the proposed development is likely to significantly affect the habitat of a number of threatened species.

Previous development undertaken by the applicant's director's now deregistered company Iron Gates Pty Ltd (**Iron Gates**) was found to be in breach of laws designed to protect threatened species and their habitat. Iron Gates was also found to be in breach its previous development consent for the site. That previous development was very similar to the proposed development, and the proposed development is once again likely to be in breach of laws designed to protect threatened species and their habitat. For this reason the application should be refused.

Designated Development

The development application should be refused because it is incorrectly characterised as integrated development when it is actually designated development (section 29 and 77A of the EPA Act). The Draft MP states that no "works" are proposed within the mapped SEPP 14 wetland areas, yet clearing and/or filling on SEPP 14 wetland areas is proposed. Both the Flora and Fauna Assessment by Planit Consulting Pty Ltd dated August 2014 and the Engineering Services and Civil Infrastructure Report by Hyder Consulting Pty Ltd dated 21 July 2015 state that the parts of the site will be filled, and that "proposed filling of the eastern drainage line may affect draw down of the water table from within the mapped SEPP area." In addition, clearing (including trimming, pruning and lopping) of vegetation in the SEPP 14 area is proposed to facilitate access to the site via Iron Gates Road.

Any clearing, draining, filling or construction of a levee on SEPP 14 wetlands requires the consent of Richmond Valley Council, concurrence of Director-General of the Department of Planning and Environment, and is deemed to be designated development (clauses 7(1) and 7(3) of SEPP 14). This means that the development application must be accompanied by an EIS and be placed on public exhibition for public comment, pursuant to section 79 of the EPA Act.

I refute the applicant's claim that clearing of SEPP 14 wetland associated with maintaining Iron Gates Road is ancillary to the primary purpose of the development, and therefore does not trigger characterisation as designated development. The existing Iron Gates Road is the primary sole access point to and from the site and is to be used as such permanently. Given that the road is and may be used for purposes other than only to access the site, and given that it is not a temporary but permanent component of the development, it cannot be characterised as ancillary to the development. Vegetation clearing associated with Iron Gates Road which runs through the SEPP 14 wetland triggers designated development.

I am very concerned that such a fundamental error in the characterisation and assessment of the development and Draft MP has been made. The proposed development is clearly designated development and accordingly, a more rigorous assessment process is required, including an EIS which appropriately triggers third parties appeal rights (sections 78A, 79, 98 EPA Act). That Council and/or the applicant have ignored the correct legal process applicable to this development application is most alarming, and indicative of several other flaws of this proposal.

Referral requirements under SEPP 71 – Coastal Protection

As stated in the Draft MP, the development is located within 100m below mean high water mark of the sea, a bay or an estuary and is therefore "significant coastal development" (clause 9(1)(c) SEPP 71).

Under clause 11 of SEPP 71, Council is required to send a copy of a development application for significant coastal development to the Director-General of the Department of Planning and Environment, and must not determine it until the steps under clause 11(3) are

followed. None of the material associated with this development indicates that the application has been referred to the Department of Planning and Environment as required.

Impacts of the proposed development on Aboriginal Heritage

I have engaged an independent anthropologist, Ms Inge Riebe, to review the Aboriginal Cultural Heritage Assessment dated September 2015 by Everick Heritage Consultants Pty Ltd (**the Heritage Report**). That review, attached as **Attachment B**, identified a number of inadequacies and resulted in the following conclusions:

1. *The two major concerns are:*
 - a. *the failure to have suitability qualified individuals engaged in relation to assessing what is acknowledged to be a site with asserted intangible landscape based cultural heritage values, and*
 - b. *the failure of the literature review, which is central to the report's conclusions in relation to intangible cultural heritage values, to include a wide range of material that is of direct relevance to the question of the intangible cultural heritage values of the site.*
2. *The Heritage Report does not assess the cultural heritage value of material sites to the relevant Indigenous community let alone intangible sites.*
3. *The Heritage Report fails to explore such cultural links and their value and significance in relation to this site.*
4. *The consultation process with Aboriginal stakeholders appears to be flawed and inadequate in various ways e.g. the consultation process as Appendix C: Iron Gates Community Consultation File has not been made available.*
5. *Relevant documentation and information relied on in the Heritage Report has not been made available e.g. the mitigation strategy.*
6. *There are few, if any, other sites of this integrated, complex nature still available for protection on the Eastern sea board of Australia, where once such sites were numerous. That at least one such site should be preserved and safeguarded as the unique example of the rich traditional culture of the wider area would seem to be indicated.*
7. *In Ms Riebe's opinion, the traditional owners regard development activity as highly harmful to the site.*
8. *As a special heritage assessment was not undertaken there is a lack of evidence from the authenticated oral tradition that would help to establish the likelihood and nature of material remains.*

Vegetation clearing on the site is still under investigation by the NSW Government

Large areas of native vegetation at a number of locations on the site were cleared in 2014. Photographs of the cleared land are attached as **Attachment C**. The OEH has advised that it has not granted any approvals, consents or permits under legislation it administers in relation to this clearing of native vegetation. OEH has recently confirmed that the clearing continues to be the subject of an ongoing investigation. Landmark Consulting's 2014 report finds that this recent clearing is likely to have removed and damaged the habitat of a number of threatened fauna species and damaged and endangered ecological community.

The approval of an application for development on a site that may have been unlawfully cleared is not in the public interest, and would condone this clearing rather than deter the applicant from breaching the law in relation to development on this site, as well as other developers in relation to any future development on other sites in the region.

Failure by the applicant's director to remediate the site in accordance with Court orders

Iron Gates received a number of development consents from Richmond River Council (now Richmond Valley Council) in the early 1990s to undertake residential and related development of the site. The director of Iron Gates, Mr Graeme Angus Ingles, is also the director of the applicant Gold Coral Pty Ltd.

Following proceedings in the Land and Environment Court (**Court**) in 1996 and 1997,² Iron Gates, in carrying out certain aspects of the development, was found to be in breach of:³

1. Section 76(2) of the EPA Act;
2. Conditions 1, 9, 18 and 26 of DA No 149/92;
3. Section 118D of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**).

The Court made a number of orders, including that:⁴

1. Iron Gates be restrained from carrying out any development pursuant to development consent No 149/92; and
2. Iron Gates be restrained from carrying out further works of and incidental to the clearing, formation and construction of an access road on any parts of lots 1, 2 and 3 DP 823583 in so far as any such works are outside of the boundaries of lot 1 in DP 47879 without obtaining prior approval in accordance with the EP&A Act.

The Court also ordered⁵ that Iron Gates was required to commence remediation of the site in accordance with a Remediation Plan immediately, and complete the work by 4 July 1999. Work required to be carried out included:⁶

1. Testing of water tables beneath littoral rainforest and wetland within two months of 4 July 1997;
2. Backfilling of drains within three months of 4 July 1997;
3. Removing roads within two months of 4 July 1997; and
4. Replanting within nine months of 4 July 1997.

Those orders also specifically stated that if Iron Gates disobeyed the orders, Mr Graham Ingles will be liable to fine or sequestration of property or both, and imprisonment (see **Attachment D**).

Iron Gates appealed the Court's decision in the Court of Appeal, but this appeal was dismissed.

On 23 April 1998 Iron Gates was placed under voluntary administration, and the company was deregistered by ASIC on 22 September 2014.

Iron Gates failed to carry out the remediation work ordered by the Court. This failure to comply with orders of the Court displays the applicant's director's blatant disregard for the environment and for the authority of the law in general. Landmark Consulting's 2014 report

² *Oshlack v Iron Gates Pty Ltd and Another* (1997) 130 LGERA 189.

³ *Oshlack v Iron Gates Pty Ltd and Another* (1997) 130 LGERA 189, 210.

⁴ *Oshlack v Iron Gates Pty Ltd and Another* (1997) 130 LGERA 189, 210-1.

⁵ *Oshlack v Iron Gates Pty Ltd* [1997] NSWLEC 89.

⁶ *Oshlack v Iron Gates Pty Ltd* [1997] NSWLEC 89.

indicates that Iron Gates' failure to remediate the land as ordered by the Court is likely to have removed and damaged the habitat of a number of threatened fauna species, and damaged an endangered ecological community. It is possible that breaches of section 118D of the NPW Act have once again occurred.

Approval of the Draft Management Plan for the development would condone the director's previous environmental harm and unlawful activities in relation to the site, and his failure to comply with orders of the Court. Approval would also fail to deter the applicant from breaching the law in relation to this site, as well as failing to deter other developers from breaching the law in relation to any future development in the region. It also shows that the site is not suitable for the proposed development.

The courts have said that the past unlawful activity of a proponent seeking development consent is not relevant to the decision to grant or refuse development consent, on the basis that development consent runs with the land and is not granted as a right in personam. However, it is clear that the courts have said that the past conduct of a proponent may be of relevance in determining whether to grant or refuse development consent for proper planning reasons.⁷

I strongly recommend that the application be refused. Should the determining authority consider approving the Draft Management Plan, a species impact statement should be required to be submitted by the applicant, and the application should be referred to the OEH.

Assessment of Draft Master Plan

Finally, I refer to the Department of Planning and Environment's media releases dated 1 and 24 February 2016 regarding the public exhibition of the Draft MP.⁸ Both media releases contain the following statement:

As part of the assessment of the draft master plan, the department will take into consideration the NSW Government's proposed coastal reforms, which aim to make the management of NSW coastal areas simpler and more strategic.

I note that the draft Coastal Management Bill 2015 and associated SEPP are not, and may not become, law. The Minister is no doubt well aware that he is not to take into consideration any unmade laws, and indeed the coastal reforms, in assessing the Draft Management Plan. Any such consideration would give rise to a successful challenge to the approval of the Draft MP. The matters requiring the Minister's consideration are set out in clause 22 of SEPP 71. I request confirmation that the coastal reforms will not be considered in assessing the reforms. The Department should be more mindful of the content of its media releases.

Yours Sincerely,

Mr Alan Oshlack
PO Box 125
Lismore NSW 2480

⁷ *Jonah Pty Limited v Pittwater Council* [2006] NSWLEC 99; 144 LGERA 408.

⁸ Available online: <http://www.planning.nsw.gov.au/~media/Files/DPE/Media-Releases/2016/February/01022016-plans-to-subdivide-land-for-176-new-homes-at-evans-head-to-go-on-public-exhibition.ashx> and <http://www.planning.nsw.gov.au/~media/Files/DPE/Media-Releases/2016/February/24022016-exhibition-extended-for-draft-master-plan-at-iron-gates-drive.ashx>