

Responses to Questions on Notice

Received at the 2022 Ordinary and Planning Meetings of
Council

A handwritten signature in black ink, appearing to read "Mark Arnold".

Mark Arnold
General Manager

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28 APRIL ORDINARY MEETING

Question with Notice No. 1 Legal Costs

File No: I2022/455

At Council's Ordinary Meeting held on 28 April, John Anderson submitted the following question which was taken on notice:

What has been the real annual cost to Council over the past three years of employing lawyers as salaried Council staff and other costs flowing from court cases and outside expert legal consultation?

Response Ralph James Legal Counsel:

This response covers the three financial years 2018/2019, 2019/2020 and 2020/2021.

Employing lawyers as salaried Council staff

It is presumed that the term "lawyers" refers to admitted Australian Legal Professionals.

The expenditure in the three financial years referred to was \$733,141.28 relating to salaries and superannuation.

Costs flowing from court cases and outside expert legal consultation

In addition to legal professional fees for court related matters and advices the following expenditure figure includes amounts payable to experts in legal proceedings.

The expenditure in the three financial years referred to was \$1,873,621.92 (GST incl).

In the period costs totalling \$244,210 were/are being recovered.

26 MAY ORDINARY MEETING

Question with Notice No. 2 Fill for Urban Development

File No: I2022/588

At Council's Ordinary Meeting held on 26 May 2022, John Anderson submitted the following question which was taken on notice:

Given that the primary function of Council staff is to inform elected Councillors of relevant background factors, would said staff be so kind as to unambiguously clarify:

- 1) relevant current policy regarding fill*
- 2) relevant powers of private certifiers to toy with policy, statute management plans etc*
- 3) whether staff understand the concept of "full and frank disclosure"?*

Response Director Sustainable Environment and Economy:

Staff responses follow:

- 1) relevant current policy regarding fill*

DCP 2014 Chapter B14 addresses Excavation and Fill requirements for development on land zoned pursuant to LEP 2014. Maximum excavation and fill of 1.0m (or 2.0m where required for car parking or swimming pools) is permitted by the Prescriptive Measures of the DCP. One of the Prescriptive Measures requires that "any development application that seeks consent to fill land within the flood planning area will need to have regard to the provisions contained within Chapter C2 Areas Affected by Flood".

Excavation and fill to a depth exceeding 1.0m may still satisfy the requirements of the DCP if it can be demonstrated that the Objectives and Performance Criteria have been sufficiently addressed.

Chapter C2 provides that "Council will not support filling beneath the footprint of the proposed development unless it is demonstrated that it will not adversely impact on the floodplain". Also "filling outside the building footprint generally will not be permitted, other than for driveways and/or pedestrian pathways immediately adjoining the walls of the building".

DCP 2010 Chapter 1 Part K – Flood Liable Lands applies to land zoned pursuant to LEP 2010 and contains the same wording as Chapter C2 of DCP 2014 as referenced above.

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The following catchment-based flood studies are relevant to DCP 2014 and DCP 2010:

1. Belongil Creek Catchment

The Belongil Creek Floodplain Risk Management Study and Plan dated March 2015 provides that fill may be used to meet minimum floor level requirements.

2. Marshalls Creek Floodplain Management Plan (1997)

The Marshalls Creek Floodplain Management Plan was adopted by Council on 25 November 1997. Section 6.2 identifies management practices for South Golden Beach and Ocean Shores North including “place a moratorium on filling individual lots until sufficient investigation has been undertaken to identify and quantify appropriate stormwater ponding points”.

It is noted that the “Fern Beach” estate was filled to be above the 1% flood level as acknowledged within the Marshalls Creek Floodplain Management Plan Report – November 1997 prepared by Paterson Consultants Pty Limited.

Therefore, staff are of the view that the moratorium on fill is no longer applicable to the “Fern Beach” estate.

3. North Byron Floodplain Risk Management Study and Draft Plan

The North Byron Floodplain Risk Management Study and Draft Plan dated October 2020 largely replaced the Marshalls Creek Floodplain Management Plan (1997). However, the Marshalls Creek Floodplain Management Plan is still applicable to the area located north of Kallaroo Circuit in Ocean Shores.

The North Byron Floodplain Risk Management Study and Draft Plan dated October 2020 recommends that DCP 2014 be “updated to include areas where fill is prohibited to ensure future development does not cause an unacceptable impact”.

These areas include:

- Floodways
- Area northwest of Jubilee Avenue to the Brunswick River, Mullumbimby
- East of Jubilee Avenue, Mullumbimby
- East of Queen Street, Mullumbimby
- South Mullumbimby near Dalley Street and Argyle Street
- Near Chinbible Creek, Mullumbimby
- Future industrial development south of Towers Drive, Mullumbimby
- Area near Aloota Crescent, Ocean Shores

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The following recommendations were also made in regard to Billinudgel:

- Maximum development footprint of 50% of the total lot area,
- Maximum fill level set to the 1% flood + 0.5m freeboard, although minimum habitable floor levels greater than this may still apply

Further, “the recommended no fill zones from the 1997 Marshalls Creek Flood plain Management Plan are not recommended for inclusion in DCP 2014”.

It is noted that, to date, DCP 2014 has not been updated to reflect the above recommendations.

4. Tallow Creek Floodplain Risk Management Study and Plan

The Tallow Creek Floodplain Risk Management Study and Plan 2009 (updated in 2015) provides that “filling of land within the flood planning level is allowable for a development at the discretion of Council, provided that the filling will not adversely affect other land in the vicinity”. The study and plan identifies a fill exclusion zone in South Tallow Creek between Broken Head Road and Tallow Lake. Fill exclusion zones are also identified within the Central Tallow area, West of Broken Head Road and East of Coogera Circuit, and also within the Tallow Lake area.

2) relevant powers of private certifiers to toy with policy, statute management plans etc

Functions of certifiers are specified in Section 6.5 of the *Environmental Planning and Assessment Act 1979* and, for building work, include issuing construction certificates, carrying out inspections, and issuing occupation certificates.

Requirements for certifiers when issuing construction certificates are provided in the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. Sections 19 and 20 of this regulation require that a certifier must not issue a construction certificate for building work under a development consent unless the design and construction of the building is consistent with the development consent and they have demonstrated that all conditions of the development consent required to be complied with before a construction certificate may be issued have been complied with.

Once a certifier has issued a Construction Certificate, this certificate then becomes part of the development consent in accordance with Section 4.16(12) of the EP&A Act.

Only the NSW Land and Environment Court can declare, by order, that a Construction Certificate is invalid in accordance with Section 6.32 of the EP&A Act “if the plans and specifications or standards of building work or subdivision work specified in the certificate are not consistent with the development consent for the building work or subdivision work”. Proceedings for such an order must be brought to the Court “within 3 months after the issue of the certificate”. No such order can be made for an occupation certificate.

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Certifiers are also bound by the requirements of the *Building and Development Certifiers Act 2018* and regulation. Section 45 of this Act provides that NSW Fair Trading may take disciplinary action against certifiers on a number of grounds including breaches of legislation, incompetence, carrying out work in a manner that is not in the public interest etc. Any person may lodge a complaint with Fair Trading regarding the conduct of a certifier. Fair Trading may take disciplinary action against a certifier including fines, imposing conditions on their registration, suspend or cancel their registration, or disqualification either temporarily or permanently.

3) *whether staff understand the concept of “full and frank disclosure”?*

Yes. The Code of Conduct for Council Staff 2022 applies to staff in this regard.

9 JUNE PLANNING MEETING

Question with Notice No. 3 90-day cap on STRA

File No: I2022/710

At Council's Planning Meeting held on 9 June 2022, David Wallace on behalf of VOHL submitted the following question which was taken on notice:

At the 25 November 2021 Council meeting, VOHL asked a question about Council's application for a 90 day cap on STRA. It was stated in the response that the DPIE would not allow an extension of Council's application beyond 24 June 2022. Is this application still active and if so please provide details of work undertaken in the last 6 months?

Response Director Sustainable Environment and Economy:

In June 2022, Council received an amended Gateway approval from the Department of Planning that enables Council to proceed with consultation on the 90 day cap. Council has until June 2023 to finalise the matter. An engagement strategy is being prepared with community engagement expected later this year.

11 AUGUST PLANNING MEETING

Question with Notice No. 4 Fed Sheds Development

File No: I2022/1042

At Council's Planning Meeting held on 11 August, Goetz Bickert asked the following question which was taken on notice:

Are you concerned by an on-site wastewater management that uses inappropriate drainage cells designed for stormwater (clean drinking water) for the wastewater effluent and this unproven technology is called innovative and is sealed off underneath the car park, so difficult to dig up if it fails, fouls or blocks. Or concerned by the fact that the final solution and destination for all stormwater is an 'existing pit' on paper that in reality does not exist and where stormwater already overflows Coachwood court and results in flooding of properties now?

Response Director Sustainable Environment and Economy:

Council considered a 13.11 PLANNING - 10.2021.114.1 - 'Fed Sheds' Light Industry Excluding Artisan Food & Drink Premises at 467 Federal Drive, Federal at the [Ordinary \(Planning\) Meeting - Thursday, 11 August 2022](#).

The on-site wastewater management system proposed to support the development was considered in the report and discussed by councillors on the day.

At the meeting, Council resolved (**22-374**) as follows:

- 1. That a decision on the DA be deferred in the public interest, given the extent of community opposition, the need to consider social impact and specific queries raised with the proposal (consistent with section 4.15 of the EPAA 1979 - old section 79C), and that the developer be requested to conduct a workshop with invited representatives from the Federal community and the Federal Village Masterplan Committee.*
- 2. That a report come back to Council within 28 days to consider the Development Application including any modifications.*
- 3. That Infrastructure Services staff assess the drainage system in Coachwood Court in the next 4 weeks.*

A decision on the merits of the development proposal and aspects associated with it, will be made by councillors when the report comes back to council as per point 2 above.

Question with Notice No. 5 Austroad Guide to Road Design

File No: I2022/1043

At Council's Planning Meeting held on 11 August, Matthew O'Reilly submitted the following question which was taken on notice:

Does Byron Shire Council require all Development Applications and Planning Proposals to meet, as a bare minimum, the "Austroad Guide to Road Design", in relation to road, intersection and crossover design for the projected maximum vehicle usage of the new development or rezoning based on current road usage AND the future traffic growth over the next ten years?

Response Director Sustainable Environment and Economy:

All applications (and planning proposals where relevant) are assessed based on the requirements of the Chapter B3 & B4 of Council's DCP, Northern Rivers Local Government Design & Construction Guidelines (NRLG) and Standard Drawings.

- Austroads (All Parts), Australian Standards and other State Authorities Manuals and Guidelines are reference and source documents in the NRLG.
- Concept and detailed design requirements not fully contained in NRLG reverts to all reference and source documents.

Assessments investigate compliance to all aspects of geometric road design including intersection.

Assessments of traffic impacts of development on the operation of roads and transport networks and is triggered under Chapter B4 of DCP 2014.

- This chapter of the DCP refers to RMS Guide to Traffic Generating Development, Australian Standards, NRLG and Standard Drawings but not limited to.
- Traffic growth and design horizon (10 years) are critical elements in the assessment to define the current and future road and transport network requirements.

The traffic assessment will investigate the impact of developments in terms of traffic efficiency, traffic safety and mitigation measures (if any) of the current and future roads and transport network in the surrounds.

8 SEPTEMBER PLANNING MEETING

Question with Notice No. 6 Community Title Sites

File No: I2022/1249

At Council's Planning Meeting held on 8 September 2022, John Anderson asked the following question which was taken on notice:

A lot of rural landowners have in recent times constructed huge so called 'Machinery Sheds' and immediately fitted them out for comfortable accommodation sometimes with upstairs and downstairs. If the staff proposal for dual occupancy of Community Titles Sites is approved, would Council count such construction as the secondary dwelling or will Council continue to pretend that it's just a machinery shed so that we might end up with 3 dwellings per site?

Response Director Sustainable Environment and Economy:

Guidelines have been developed for how we investigate and respond to unauthorised dwellings.

[Agenda of Ordinary Meeting - Thursday, 28 October 2021 \(infocouncil.biz\)](https://www.infocouncil.biz)

The guidelines support the [Enforcement Policy 2020](#).

A link to Council's unauthorised dwelling web page follows [Unauthorised dwellings - Byron Shire Council \(nsw.gov.au\)](https://www.nsw.gov.au)

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Question with Notice No. 7 LEP and DCP Documents

File No: I2022/1250

At Council's Planning Meeting held on 8 September 2022, John Lazarus asked the following question which was taken on notice:

The community informed LEP sets building height limits in Planning Law. The Community informed DCP sets the limit in Planning Law 'that facilities on top of a building must not breach LEP height limits'. The select group, which included developers, proposed that the Byron Bay Masterplan increase height limits. Due to widespread community opposition to the Masterplans proposed increase height limits, Council held a community workshop. The Byron Environment Centre sent a rep to the workshop, which enabled the BEC to advise Council that no attendee supported increased height limits, but Council just ignored acting on that. Council then, in another attempt to increase height limits, did a Town Centre Planning Control proposal to increase heights, but due to the overwhelming individual and Petition objections, Council's final Town Centre Planning Control Report stated, 'no increase in heights, and that the 9-metre height facilitated two storeys, with the 11.5 metre height facilitating 3 storeys'. But despite not getting community support for height increases Council is now just ignoring Councils failed attempt to get height increases, has abandoned even pretence at acting on that community input, and is now just giving repeated Consents for height increases in breach of the LEP, and Consents for even greater height increases for rooftop facilities on top of buildings that already breach LEP heights.

I am aware that a previous town centre development, built to the LEP height limit, received Court Consent in breach of Councils opposition, for an approx. 1 metre breach of the LEP & DCP, to construct a roof top recreation area. But since then, Council Consents have abandoned the LEP and DCP height limits for multiple buildings, to allow construction of buildings breaching LEP heights, and additional Consent for roof top facilities on top of the buildings that already breached LEP heights.

Council's Report to the JRPP identified in this Meetings Report on Planning Variations, supported the height and DCP breaches.

Council Consents have turned the LEP and DCP into irrelevant documents. Many residents consider that Council has turned into an apartheid organisation, prejudicing Developers breaches while ignoring the residents overwhelming opposition to these breaches. Residents see Council now giving repeated prejudiced Consents for developers to breach LEP and DCP height limits and see council bending over backwards to even ignore Councils own failed attempts to get height increases from Councils community workshops and from Councils community rejected Town Centre Planning Controls proposals.

Can Council give any reason why residents shouldn't just burn these LEP and DCP documents in protest, and act outside of Council to facilitate the actual Community's aspirations for Byron?

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Response Director Sustainable Environment and Economy:

All development applications are assessed again the relevant planning instruments for a council area like a Local Environmental Plan.

Each Local Environmental Plan includes clauses that provide development standards that place restrictions on height, floor space ratios and minimum lot size requirements for development.

Clause 4.6 of the Standard Instrument LEP, as adopted by council LEPs provides flexibility in the application of development standards in certain circumstances allowing consent authorities, such as local councils, to approve a variation to development standards.

Unlike the Development Control Plan, which is a non-legislative document, in order to vary a development standard, the application needs to be accompanied by a report specified under clause 4.6 of the LEP. This clause gives the applicant the opportunity to demonstrate that the variation to the development standard is justifiable in the specific circumstance.

A clause 4.6 variation request is a complicated report that provides an assessment of the non compliance in relation to the objectives of the development standard, the objectives of the zone and the objectives of the Act. The report also assesses any other variations to the development standard that have been approved by Council in the area.

Council has an obligation to publish all variation to development standards that are approved as part of the development application process. This report is generally available on Council's website [Variations to development standards - Byron Shire Council \(nsw.gov.au\)](https://www.nsw.gov.au/developments/development-standards) and provides the numerical variation as a percentage.

A link to Council web page on Development Assessment follow:
[The DA process - Byron Shire Council \(nsw.gov.au\)](https://www.nsw.gov.au/developments/development-standards)

15 DECEMBER ORDINARY MEETING

Question with Notice No. 8 Dog fines

File No: I2022/1893

At Council's Ordinary Meeting held on 15 December 2022, Jan Barham submitted the following question which was taken on notice:

In the last five years how many dog related fines issued by council officers have been successfully challenged in court and what was the cost to council?

Response Legal Counsel:

Since 1 July 2016 there have been 19 Council related dog matters dealt with in the Local Court. Council successfully proved its case in all matters.

The breakdown of this the number of matters at end of each financial year are:

2017-2

2018-2

2019-4

2020-1

2021-7

2022-3

All matters were dealt with by Council's Legal Services team meaning that no costs to Council were incurred

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Question with Notice No. 9 DA 10.2021.114.1 'Fed Sheds'

File No: I2022/1894

At Council's Ordinary Meeting held on 15 December 2022, Peter Garrard asked the following question which was taken on notice:

Given the lack of unambiguous professional support for the proposed 'conceptual' onsite sewage management system, with the best qualified peer reviews highlighting the risks, has Council considered requiring the developer to deposit a substantial performance bond for, say, five years to cover clean-up costs and possible liability claims by neighbours and businesses using the facility, in the event that the system fails?

Response Director Sustainable Environment and Economy:

DA10.2021.114.1 (Fed Sheds) was refused by Council at the 15 December 2022 Ordinary Meeting. As to a bond to cover clean up costs in the event an Onsite Sewage Management System was to fail, such bonds cannot be levied as a condition of consent under Section 4.17 of the *EPA Act 1979*. Such bonds can only relate to public works, infrastructure and coastal protection works.

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Question with Notice No. 10 Fed Sheds Development Item 13.12 on the Agenda

File No: I2022/1895

At Council's Ordinary Meeting held on 15 December 2022, Toni Appleton submitted the following question which was taken on notice:

How did such a mess of documentation find its way through assessment and recommendation for approval? Particularly the cost of works pro forma that was based on incorrect gross floor areas and serious underestimates for the provision of services on this unserviced site as well as for professional services such as a complete quantity survey of the proposal that would have been required. This is a serious matter that results in significant loss of revenue for council and demonstrates the lack of considered risks and implications in relation to the developer's investment and intentions.

Response Director SEE:

DA10.2021.114.1 (Fed Sheds) was refused by Council at the 15 December 2022 Ordinary Meeting. The application was submitted with a Quantity Surveyors Report by Denary Quantity Surveying. The application and fees were charged based on that report and the cost of works noted on the Development Application form at the time of lodgement.

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Question with Notice No. 11 No. 13.12 Supplementary Report DA 10.2021.114.1

File No: 12022/1896

At Council's Ordinary Meeting held on 15 December 2022, Alan Goldstein asked the following question which was taken on notice:

This question relates to Point 3 of Council's resolution from 11 August Planning Meeting, report from report 13.11 - PLANNING -10.2021.114.1 - 'Fed Sheds' Light 10 Industry Excluding Artisan Food & Drink Premises at 467 Federal Drive, Federal. "3. That Infrastructure Services staff assess the drainage system in Coachwood Court in the next 4 weeks."

Do Councillors know that Federal is amongst the highest rainfall areas in NSW and that Climate Change is predicted (and this is accepted in Council's own planning for adaptation to such) to only worsen this situation? Council's and State modelling sees a prediction of more frequent longer duration rain events.

The DA proposes the transfer of storm runoff off the property at rates and volumes in excess of current rates and volumes, which already cause flooding downstream on Coachwood Court and on properties on Coachwood Court, before these impacts of Climate Change and the interference of this much hard surface within the proposed development.

Staff have relooked at their review of the stormwater management within the development but why has the Stormwater assessment looked only at a short-duration storm, but have not assessed the impact of the development for the longer duration events when the volume of runoff will be much larger. The change in the proposed development since Councillors last saw it does not really change much in regards to our experts comments/concerns of the modelling and development from a flooding perspective.

The fact remains that staff limited their assessment to an assessment of peak flow for a short-duration storm, and have not assessed the impact of the development for the longer duration events when the volume of runoff will be much larger.

The question to Councillors is "are you happy to ignore these deficiencies in the assessment?"

Response Director SEE:

DA10.2021.114.1 (Fed Sheds) was refused by Council at the 15 December 2022 Ordinary Meeting. The reason for refusal as resolved by Council included inadequacies with stormwater management.