

**STATEMENT OF
ENVIRONMENTAL EFFECTS**

**DEVELOPMENT APPLICATION
FOR USE OF
GROUND FLOOR OF PREMISES
AS CAFE**

**1031 BARRENJOEY ROAD
PALM BEACH**

JULY 2021

statement of environmental effects

Submission to
NORTHERN BEACHES COUNCIL

DEVELOPMENT APPLICATION FOR USE OF GROUND FLOOR OF PREMISES AS CAFE

1031 BARRENJOEY ROAD PALM BEACH

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This statement has been prepared in consideration of the Expert Witness Code of Conduct in the Uniform Civil Procedure Rules and the provisions relating to expert evidence. The opinions in the statement represent the professional opinions of the authors, based on an assessment of the facts and circumstances as have been cited in the document.



TABLE OF CONTENTS

1.0	INTRODUCTION	4
1.1	Status and Purpose of Document	4
1.2	Our Clients	4
2.0	PROPERTY LOCATION AND DESCRIPTION.....	4
2.1	Location and Description	4
2.2	Building Work.....	5
3.0	DEVELOPMENT PROPOSAL	5
3.1	Operating Hours	5
3.2	Proposed Seating Area	6
4.0	STATUTORY PLANNING CONTROLS	6
4.1	SEPP (Coastal Management) 2018	6
4.1.1	Objectives.....	6
4.1.2	Coastal Environment Area	7
4.1.3	Coastal Use Area	8
4.2	Pittwater Local Environmental Plan 2014	9
4.2.1	Zoning.....	9
4.2.2	Zone Objectives	9
4.2.3	Heritage	9
4.2.4	Permissibility and Existing Use Rights.....	10
4.2.5	Acid Sulfate Soils.....	13
4.2.6	Bushfire Prone Land	14
4.2.7	Flood Prone Land	14
4.3	Pittwater 21 Development Control Plan 2014	14
5.0	MERIT CONSIDERATIONS	15
5.1	Use and Building Work Permissible.....	15
5.2	Structural Integrity	16
5.3	Environmental Risk	16
5.4	Amenity Impacts	16
5.5	Noise Impacts	16
6.0	CONCLUSION	16

TABLE OF ANNEXURES

ANNEXURE 1	LOCALITY PLAN (EXTRACT FROM SIX MAPS)
ANNEXURE 2	CADASTRAL DETAIL & AERIAL (EXTRACT FROM SIX MAPS)
ANNEXURE 3	PHOTOGRAPHIC PALETTE
ANNEXURE 4	COASTAL ENVIRONMENT AREA MAP (EXTRACT FROM COASTAL MANAGEMENT SEPP)
ANNEXURE 5	COASTAL USE AREA MAP (EXTRACT FROM COASTAL MANAGEMENT SEPP)
ANNEXURE 6	LAND ZONING MAP (EXTRACT FROM PLEP)
ANNEXURE 7	HERITAGE MAP (EXTRACT FROM PLEP)
ANNEXURE 8	ACID SULFATE SOILS MAP (EXTRACT FROM PLEP)
ANNEXURE 9	BUSH FIRE HAZARD MAP (EXTRACT FROM PITTWATER BUSH FIRE PRONE LAND MAP 2013)
ANNEXURE 10	FLOOD HAZARD MAP (EXTRACT FROM NBC FLOOD HAZARD MAP)

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1.0 INTRODUCTION

1.1 Status and Purpose of Document

This Statement of environmental effects relates to an application made to Northern Beaches Council (the 'Council') for a development application ('DA') in respect of prospective use of the existing 'Coast Café' as a cafe.

The development application seeks minor changes to the hours of operation, for ancillary use the café for very occasional functions and to update the seating plan.

Certain building work associated with the extension of a pergola and deck was carried out towards the southern boundary of the property. As Council is aware, an application for a building information certificate (the 'BIC application') has been made to Council to regularise what is unlawful work.

The DA relates to, and seeks approval to use the ground floor of the premises as a cafe.

This report has been prepared based on instructions provided directly by our clients and addresses environmental impacts that may occur as a result of the use.

1.2 Our Clients

Our clients' details are as follows:

Name	Address
Nicki Keogh	1031 Barrenjoey Road, Palm Beach

2.0 PROPERTY LOCATION AND DESCRIPTION

2.1 Location and Description

The property is known as No 1031 Barrenjoey Road, Palm Beach.

The property is situated on the western site of Barrenjoey Road, Palm Beach.

Annexures 1 and 2 provide a location plan and an aerial photograph plus cadastral details of the property, respectively.

The immediate surrounding area comprises primarily low density residential development in the form of one or two storey dwelling houses, as well as public open spaces such as Sandy Beach and Iluka Park.

2.2 Building Work

The building work carried out on the property without the prior approval of Council comprises minor alterations and additions to the existing cafe. Those alterations and additions include the extension of an existing pergola and a partially reconstructed deck required as a result of removal of a large tree (with approval from Council).

Annexure 3 provides a photographic palette including photos of the extension of the pergola and deck.

3.0 DEVELOPMENT PROPOSAL

The development application seeks consent to 'use' the café, including the unauthorised work (once regularised via an BIC) on ground floor level. Small gatehrings are proposed for Friday and Saturday nights. These will wind up at 9.00pm with the facility closing at 9.30pm on Friday and Saturday.

3.1 Operating Hours

The proposed operating hours are as follows:

Day	Hours
Monday	06:30am – 5:00pm
Tuesday	06:30am – 5:00pm
Wednesday	06:30am – 5:00pm
Thursday	06:30am – 5:00pm
Friday	06:30am – 9:30pm
Saturday	07:00am – 9:30pm
Sunday	07:00am – 6:00pm

3.2 Proposed Seating Area

The seating for the restaurant is per the attached drawings prepared by O2 architects, on behalf of our clients.

There are a total of 36 seats proposed with 16 inside and 16 on the deck outside. Four (4) additional 'inside' seats are for transient diners, for example just 'grabbing' a cup of coffee and staying only for a very short period.

4.0 STATUTORY PLANNING CONTROLS

Relevantly Applicable Legislation etc:

- *Environmental Planning and Assessment Act 1979* ('EPAA');
- *Environmental Planning and Assessment Regulation 2000* ('EPAR');
- *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* ('Codes SEPP');
- *State Environmental Planning Policy (Coastal Management) 2018* ('Coastal Management SEPP');
- *Pittwater Local Environmental Plan 2014* ('PLEP'); and
- *Pittwater 21 Development Control Plan 2014* ('PDCP').

4.1 SEPP (Coastal Management) 2018

4.1.1 Objectives

State Environmental Planning Policy (Coastal Management) 2018 ('Coastal Management SEPP') applies to the property.

The primary objective of the Coastal Management SEPP is the management of the coastal environment of New South Wales in an ecologically sustainably manner for the social, cultural and economic wellbeing of the people.

The relevant clauses in the Coastal Management SEPP relating to the development proposal are referred to and discussed below, to the extent to which they are relevant to the proposed development.

4.1.2 Coastal Environment Area

The property is identified as being within the coastal environmental area.

The provisions of clause 13(1) of the Coastal Management SEPP are as follows:

- (1) Development consent must not be granted to development on land that is within the coastal environment area unless the consent authority has considered whether the proposed development is likely to cause an adverse impact on the following:
 - (a) the integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment,
 - (b) coastal environmental values and natural coastal processes,
 - (c) the water quality of the marine estate (within the meaning of the Marine Estate Management Act 2014), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1,
 - (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms,
 - (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
 - (f) Aboriginal cultural heritage, practices and places,
 - (g) the use of the surf zone.

We are of the opinion that the use will not create, any additional adverse impacts on the

biophysical, hydrological and ecological environment nor to natural coastal process.

A coastal environment area map extract from Coastal Management SEPP, depicting the site is attached at **Annexure 4**.

4.1.3 Coastal Use Area

The property is identified as being within the coastal use area.

The provisions of clause 14(1) of the Coastal Management SEPP are as follows:

- (1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority—
 - (a) has considered whether the proposed development is likely to cause an adverse impact on the following—
 - (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
 - (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,
 - (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,
 - (iv) Aboriginal cultural heritage, practices and places,
 - (v) cultural and built environment heritage.

The use will not alter existing impacts, which are negligible.

A coastal use area map extract from Coastal Management SEPP, depicting the site is attached at **Annexure 5**.

4.2 Pittwater Local Environmental Plan 2014

4.2.1 Zoning

The property is zoned R2 Low Density Residential under the provisions of PLEP 2014.

Annexure 6 provides an extract from the relevant PLEP zoning map.

4.2.2 Zone Objectives

The objectives of the R2 Low Density Residential zone are as follows:

Objectives of zone

- To provide for the housing needs of the community within a low-density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.

In our opinion, the proposal is consistent with the abovementioned zones objectives.

In particular, we submit that proposal will maintain the low-density character of the precinct.

In light of the above and the other circumstances referred to elsewhere in this report, we are of the opinion that the development application will not create any amenity impacts and is consistent with PLEP, R2 zone objectives.

4.2.3 Heritage

The property is not in the vicinity of a heritage conservation area, nor is the property a heritage item. Refer **Annexure 7**.

4.2.4 Permissibility and Existing Use Rights

The development application is not permissible, being a 'restaurant', as relevantly defined in the Dictionary in the PLEP.

The definition of 'restaurant' is as follows:

restaurant or cafe means a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, takeaway meals and drinks or entertainment are also provided.

In some cases, a BIC will suffice in respect of unapproved building work. In other cases, both a BIC and development consent will be needed, with the issue of a BIC being a prerequisite to a grant of development consent.

We note that the current use of the site is development that is not permissible in the R2 zone under PLEP 2014.

The current premises enjoys 'existing use rights' (EUR) under clause 4.65 of EPA&A Act 1979 and has not been abandoned.

The definition of 'existing use rights' is defined in Clause 4.54 of EPA&A as follows:

4.65 Definition of "existing use"

(cf previous s 106)

In this Division, **existing use** means—

- a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and
- b) the use of a building, work or land—
 - i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and

- ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.

Clause 4.66 of EP&A Act provides that nothing prevents the continuation of an existing use, subject to certain qualifications.

Clause 4.66 EP&A Act says:

4.66 Continuance of and limitations on existing use

(cf previous s 107)

1. Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.
2. Nothing in subsection (1) authorises—
 - a) any alteration or extension to or rebuilding of a building or work, or
 - b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or
 - c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use.

Clause 41 of EPAR 2000 provides indications regarding further development for properties enjoying existing use rights.

Clause 41 of EPAR 2000 says:

41 Certain development allowed

(cf clause 39 of EP&A Regulation 1994)

1. An existing use may, subject to this Division—
 - a) be enlarged, expanded or intensified, or
 - b) be altered or extended, or

- c) be rebuilt, or
 - d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act, or
 - e) if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or
 - f) if it is a light industrial use—be changed to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act).
2. However, an existing use must not be changed under subclause (1)(e) or (f) unless that change—
- a) involves only alterations or additions that are minor in nature, and
 - b) does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and
 - c) does not involve the rebuilding of the premises associated with the existing use, and
 - d) does not involve a significant intensification of that existing use.
 - e) (Repealed)

Development consent is required under Clause 42 of EPAR 2000 to permit any enlargement, expansion or intensification of and existing use. See under.

Clause 42 EPAR 2000 says:

42 Development consent required for enlargement, expansion and intensification of existing uses(cf clause 40 of EP&A Regulation 1994)

- 1) Development consent is required for any enlargement, expansion or intensification of an existing use.
- 2) The enlargement, expansion or intensification—
 - a) must be for the existing use and for no other use, and
 - b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.

The development application is in our opinion development that is permissible as an existing use. The application is permissible under Clause 41 of EPAR and with development consent under Clause 42 of EPAR.

We note the café already enjoys a development consent.

We have submitted a BIC application and a development application, the subject of this document.

4.2.5 Acid Sulfate Soils

The property is identified as being within 'Class 3' on the Acid Sulphate Soils Map. Clause 7.1 of PLEP relates to development on acid sulphate soils. The objective of the clause is to ensure that development does not disturb, expose or drain acid sulphate soils and cause environmental damage.

The proposal will not involve any work under the ground surface. Therefore, it will not involve the disturbance of more than one tonne of soil and a specialist report is not required.

It is unlikely that the development application will impact upon the water table. Accordingly, an acid sulphate soils management plan (refer clause 7.1 (6), PLEP) has not been prepared in the present circumstances.

An Acid Sulphate Soils Map extract from PLEP is provided at **Annexure 8**.

4.2.6 Bushfire Prone Land

The property is within a bushfire prone land area – Vegetation Buffer (refer Bushfire Prone Land map).

Accordingly, clause 5.11 ('Bush fire hazard reduction') of PLEP applies to the development.

A Bushfire Assessment Report prepared by Wayne Tucker accompanies this application.

The report addresses relevant issues.

A bushfire hazard map extract from Pittwater Bushfire Prone Land Map, depicting the site is attached at **Annexure 9**.

4.2.7 Flood Prone Land

The site is identified on the Flood Risk Precinct Map under the NBC Flood Hazard Map.

A flood certificate prepared by NB Consulting Engineers accompanies the application.

A flood hazard map extract, depicting the site is attached at **Annexure 10**.

4.3 Pittwater 21 Development Control Plan 2014

Pittwater 21 Development Control Plan 2014 (PDCP) applies to all land to which PLEP applies and provides more detailed provisions than PLEP for development in so much of the Northern Beaches local government area as previously comprised the former local government area of Pittwater.

PDCP applies to development on the property. The purpose of PDCP is to provide best practice standards for developments.

At the outset, it must be stressed that development control plans contain **guideline** controls at best: see *Zhang v Canterbury City Council* (1999) 105 LGERA 18. This is enshrined in sections 3.42 and 4.15(3A) of the *Environmental Planning and Assessment Act 1979*.

In our opinion, the development application achieves such of the key objectives of PDCP as are of relevance.

The proposal will not affect the other surrounding properties neither the natural environment, flora and fauna.

Thus, we are of the opinion that a more detailed assessment relating to PDCP is unnecessary and therefore has not been undertaken.

5.0 MERIT CONSIDERATIONS

5.1 Use and Building Work Permissible

Under the PLEP, building work carried out to and at the property is work that is ancillary to the carrying out of development for the purpose of a 'restaurant or cafe' as relevantly defined in the Dictionary at the end of EPI. Restaurant is a prohibited purpose in the zone. Notwithstanding the above, the current use and the proposed use (being the same) enjoy existing use rights under clause 4.65 of EPA&A Act.

Therefore, the development application is permissible under Clause 41 of EPAR with development consent under Clause 42 of EPAR.

Even though consent cannot be given to the *ex post facto* **erection** of a building or carrying out of building work, once the building has been erected or the building work has been carried out, consent can still issue with respect to:

- the *prospective* **use** of any such building or building work; and
- the carrying out of **alterations, additions or extensions** to any or all of the building work,

notwithstanding that the prior consent of Council had not been obtained in respect of the unapproved work.

Retroactively, the certificate operates to prevent the local council from taking certain action in relation to matters existing or occurring before the date of issue of the certificate: see section 6.25(3), EPAA.

Prospectively, the certificate operates to prevent the council, for a period of 7 years from the date of issue of the certificate, from taking certain action in relation

to matters arising only from the deterioration of the building as a result solely of fair wear and tear: see section 6.25(4), EPAA; cf s.6.25(5), EPAA.

5.2 Structural Integrity

We are of the opinion that the building work carried is de minimis in nature, and the proposed work will not have any impact on the structural integrity of the property.

5.3 Environmental Risk

In our opinion, the proposal will cause little if any impact in terms of, firstly, the surroundings and, secondly, the way the development application relates to indicia such as visual impact, privacy and streetscape impact. In our view the café improves streetscape appearance and activates this part of Barrenjoey Road. As well the acoustic screening proposed will mitigate to an acceptable level any minor noise impacts currently occurring.

5.4 Amenity Impacts

The development application will cause no appreciable loss of amenity of the adjoining properties.

5.5 Noise Impacts

An acoustic report prepared by Acoustic Dynamics accompanies the application. The report addresses the relevant issues relating to noise. An acoustic screen is proposed around the existing deck area.

6.0 CONCLUSION

The unapproved building work causes minimal impact on the existing environment and the retention of the work is appropriate to provide amenity to the surrounding residents and the users of the subject property as a cafe. In this regard we note that the extended pergola assists in providing acoustic amenity to the immediate neighbours.

The use of the café for very occasional functions (Friday and Saturday evenings) will also cause no amenity impacts to the

surroundings. These changes are proposed to suit the needs of the owners to use the restaurant more effectively in difficult economic times (COVID impacts).

We respectfully submit that the use is appropriate in circumstances where:

- there is no doubt about the permissibility, with consent, of the development application;
- the proposal is most unlikely to materially disturb, expose or drain acid sulphate soils, thereby causing environmental damage;
- the proposal complies with the relevantly applicable provisions of the Coastal Management SEPP;
- it is most unlikely that the proposal will cause any significant adverse impact on existing flora and fauna nor disturb the function and composition of the property;
- the continued retention of the unapproved building work will not cause any appreciable loss of amenity for adjoining properties; and
- the minor alterations involving an acoustic screen will improve acoustic privacy.

We are of the opinion that the development application is appropriate in all the circumstances, and the proposed use is meritorious.

ANNEXURE 1

LOCALITY PLAN (EXTRACT FROM SIX MAPS)



LOCALITY PLAN
EXTRACT FROM SIX MAPS



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	<p>DRAWN: TG</p>	<p>1031 Barrenjoey Road Palm Beach</p>

ANNEXURE 2

CADASTRAL DETAIL & AERIAL (EXTRACT FROM SIX MAPS)



CADASTRAL DETAIL & AERIAL

EXTRACT FROM SIX MAPS



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ANNEXURE 3

PHOTOGRAPHIC PALETTE



Photograph 1 – Subject Property from Barrenjoey Road



Photograph 2 – Entrance



Photograph 3 – Seating (before COVID)



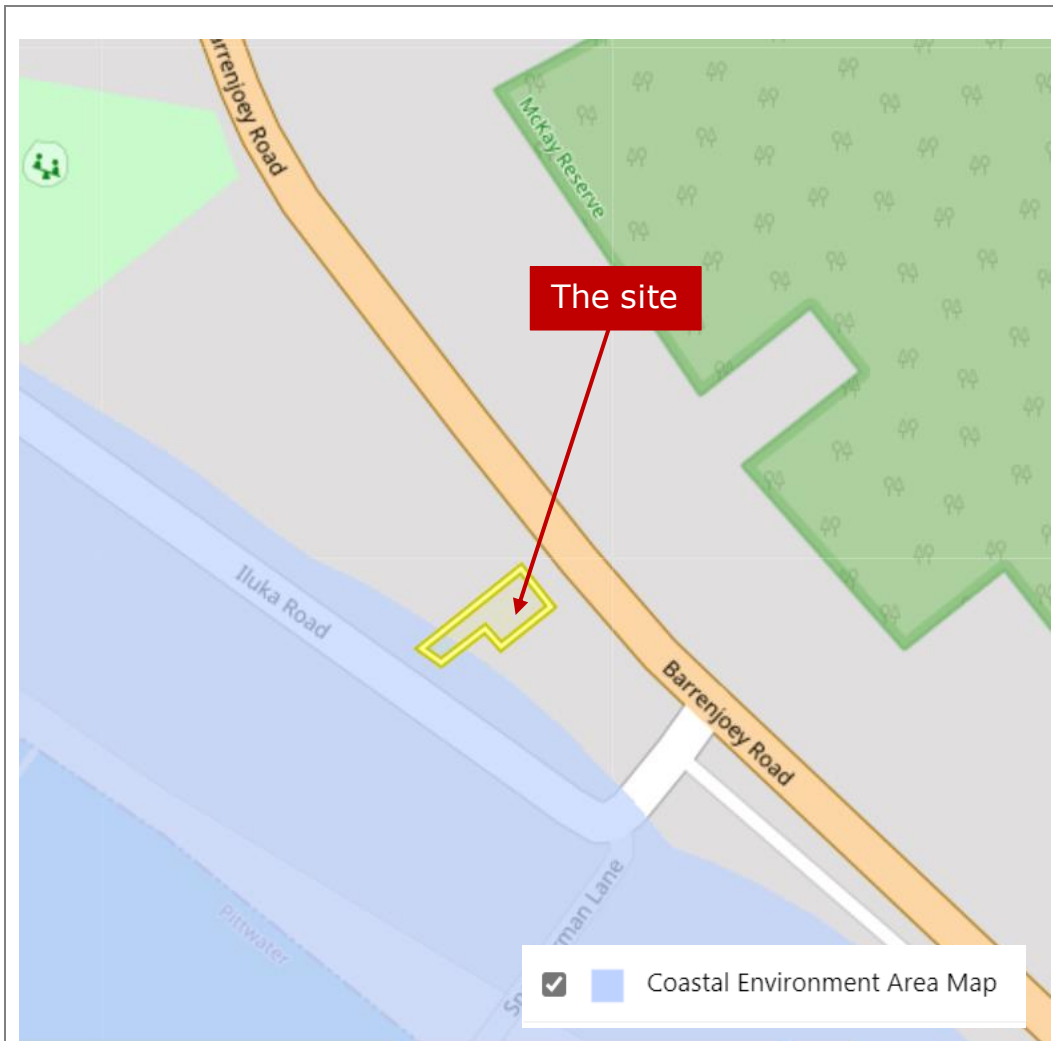
Photograph 4 – Seating (before COVID)



Photograph 5 – Deck (before COVID)

ANNEXURE 4

COASTAL ENVIRONMENT AREA MAP (EXTRACT FROM
COASTAL MANAGEMENT SEPP)



COASTAL ENVIRONMENT AREA MAP

EXTRACT FROM COASTAL MANAGEMENT SEPP



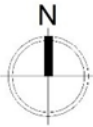
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	DRAWN: TG	<h3>1031 Barrenjoey Road Palm Beach</h3>

ANNEXURE 5

COASTAL USE AREA MAP (EXTRACT FROM COASTAL
MANAGEMENT SEPP)



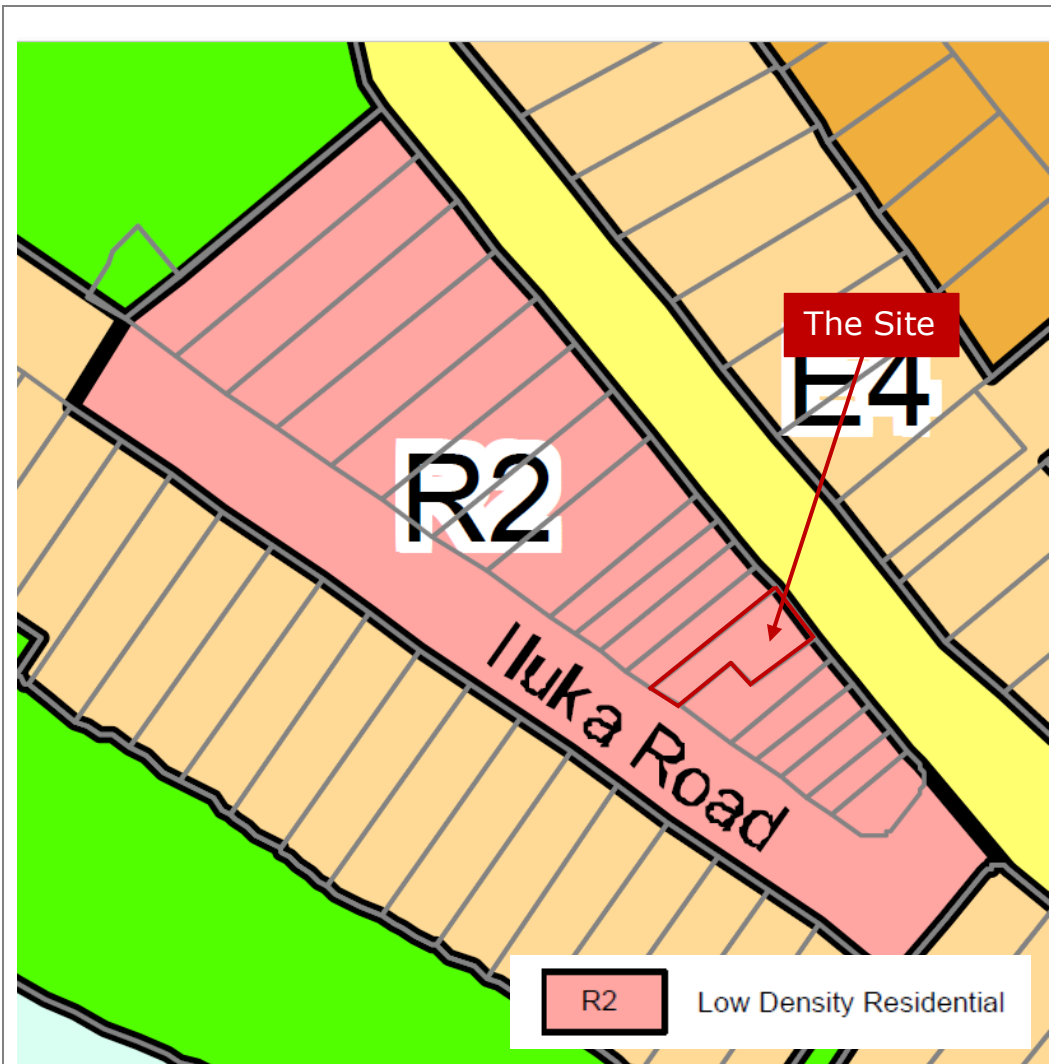
COASTAL USE AREA MAP
 EXTRACT FROM COASTAL MANAGEMENT SEPP



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ANNEXURE 6

LAND ZONING MAP (EXTRACT FROM PLEP)



LAND ZONING MAP

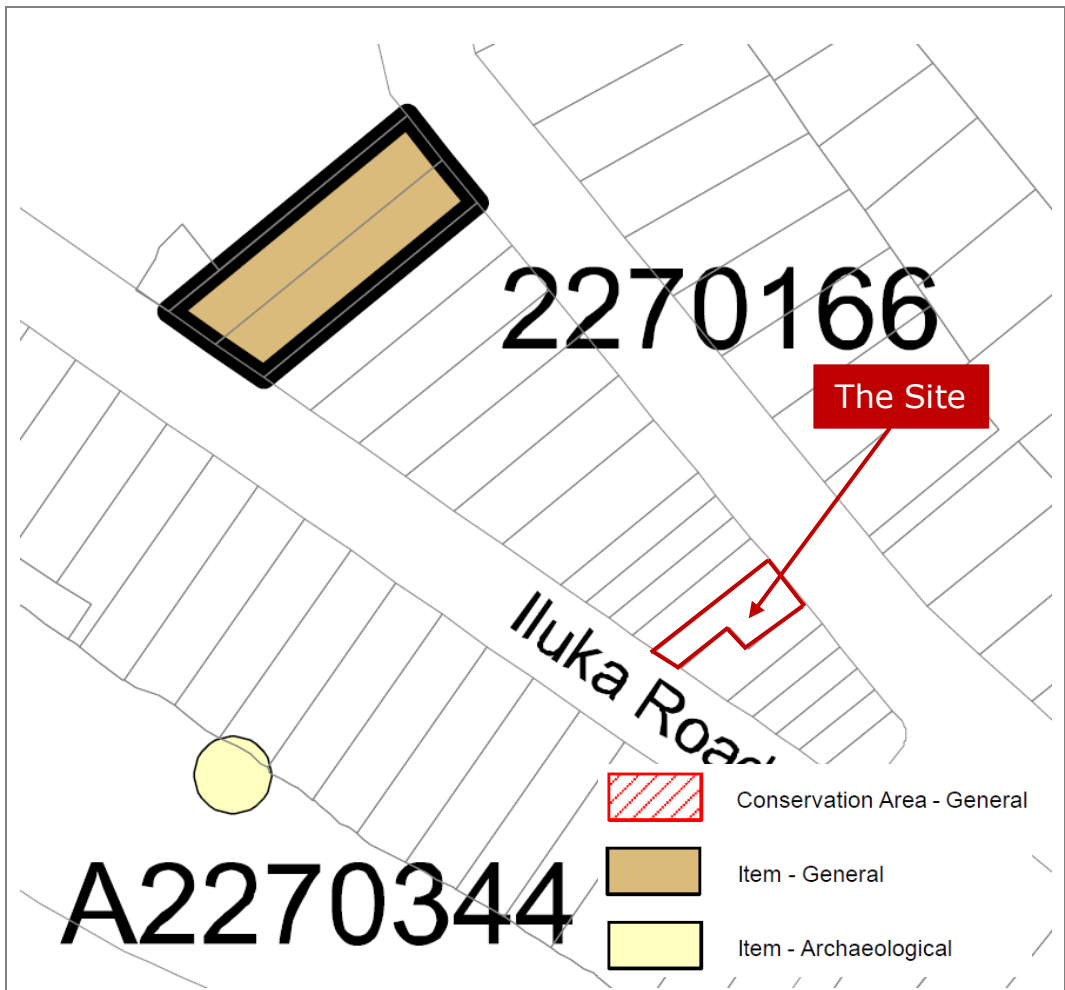
EXTRACT FROM PLEP



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ANNEXURE 7

HERITAGE MAP (EXTRACT FROM PLEP)



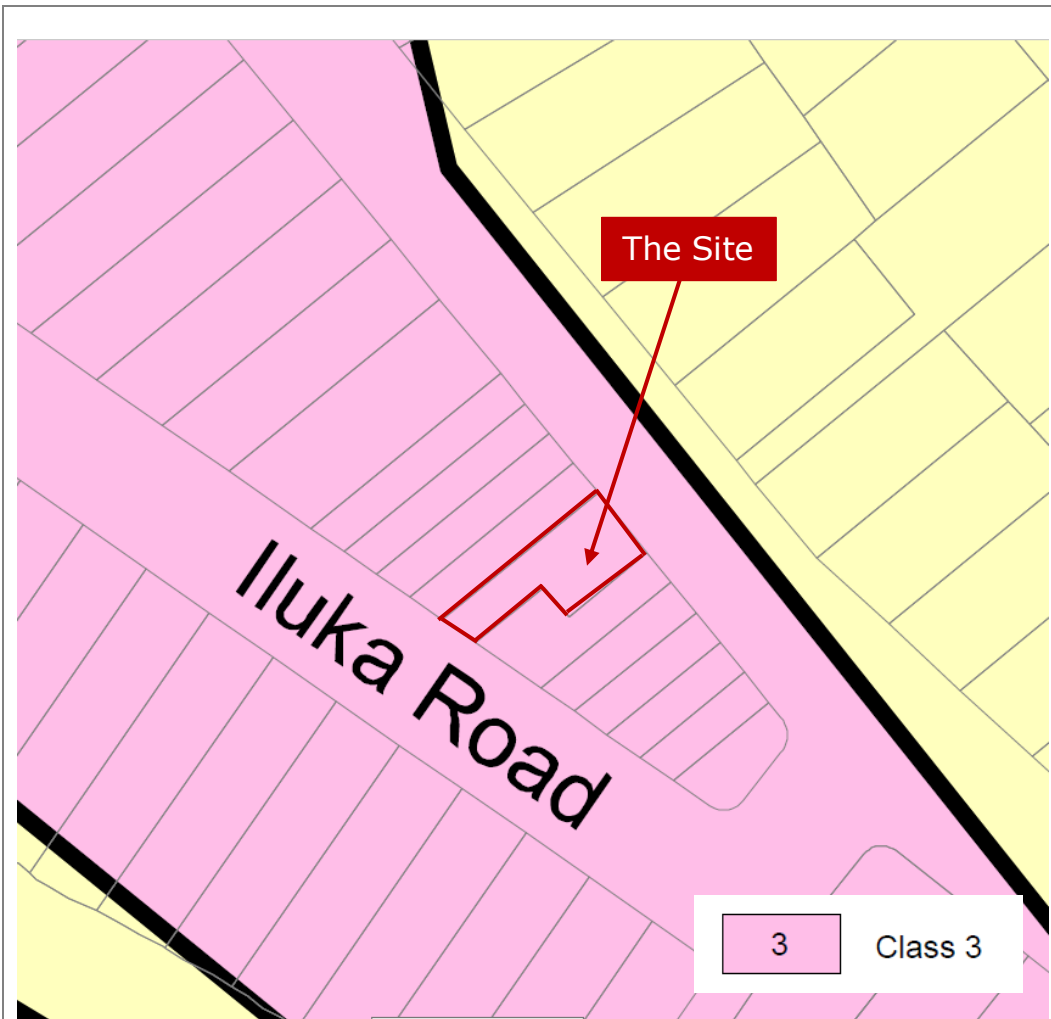
HERITAGE MAP
EXTRACT FROM PLEP



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ANNEXURE 8

ACID SULFATE SOILS MAP (EXTRACT FROM PLEP)



ACID SULFATE SOILS MAP

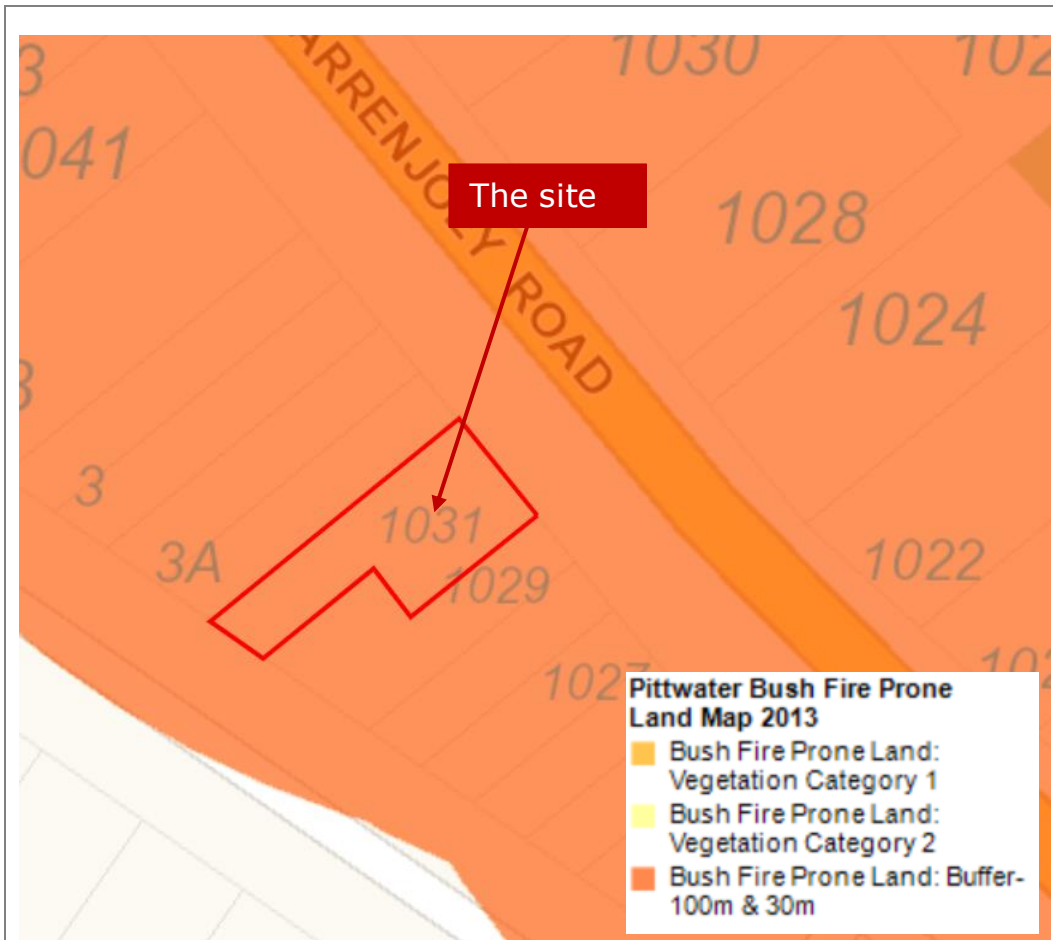
EXTRACT FROM PLEP



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ANNEXURE 9

BUSH FIRE HAZARD MAP (EXTRACT FROM PITTWATER
BUSH FIRE PRONE LAND MAP 2013)



BUSH FIRE HAZARD MAP

EXTRACT FROM PITTWATER BUSH FIRE PRONE LAND MAP 2013



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ANNEXURE 10

FLOOD HAZARD MAP (EXTRACT FROM NBC FLOOD
HAZARD MAP)



FLOOD HAZARD MAP

EXTRACT FROM NBC FLOOD HAZARD MAP



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