

15 April 2025

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Attention: Neil Beck and Jenny Elphinstone

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Your reference:	Our reference:
MCUI 2024_5682/1	4079032

Dear Assessment Manager

Further Submission from Kubirriwarra Yalanji Aboriginal Corporation against Development Application for Material Change of Use for Extractive Industry (30,000 tonnes per year) over Lot 1 on RP893855 – Development Application No. MCUI 2024_5682/1 (Development Application)

1 Preliminary

1.1 We refer to the above Development Application, which we understand:

- (1) is in the decision-making stage under the *Development Assessment Rules*; and
- (2) will be decided by the Douglas Shire Council (**Council**) on 29 April 2025.

1.2 We act for Kubirriwarra Yalanji Aboriginal Corporation ICN: 9206 (**KYAC**) which lodged the properly made submission on 16 December 2024 opposing the Development Application, **enclosed in Appendix A**.

1.3 KYAC comprises individuals who are Eastern Kuku Yalanji Traditional Owners. As set out in the properly made submission, the Kubirriwarra and more broadly, the Eastern Kuku Yalanji People have maintained a continuous cultural connection to Cooya Beach and the Killaloe area.

1.4 The wetlands in the vicinity of the land the subject of the Development Application are culturally and spiritually important to the Eastern Kuku Yalanji People, and consequently, they are concerned with any significant adverse impacts to the wetlands and the surrounding coastal area. The wetlands are a traditional hunting area and are relied on by the traditional owners for education, tourism and as a food source. The reliance on this area and the environmental concerns were outlined in the properly made submission of [REDACTED] dated 12 December 2024, which is contained in **Appendix B**. Our client obtained [REDACTED] consent to include it in this submission.

1.5 We urge the Council to consider and give significant weight to the contents of this further submission, as part of the "common material" to the Development Application pursuant to s.45(5)(a)(ii) of the *Planning Act 2016* (Qld) (**Planning Act**) and s.31(1)(g) and Schedule 24 of the *Planning Regulation 2017* (Qld).

APAC-#312006522-v1

2 Executive Summary

2.1 For the reasons set out in this further submission:

- (1) the Development Application does not, and cannot comply with, the assessment benchmarks in the *Douglas Shire Planning Scheme 2018 (v.1.0)* (**Planning Scheme**) and there are no “relevant matters” in the public interest that warrant approval of the Development Application; and
- (2) in the circumstances, the Council must refuse the Development Application.

2.2 In summary:

- (1) The Land, under the Planning Scheme and State Planning Policy (**SPP**) mapping, is both highly constrained in terms of flooding, coastal erosion and storm tide and has mapped values that include high agricultural values, medium and high landscape values and environmental values. These must be carefully considered through the impact assessment of the Development Application
- (2) The Development Application, proposed plans and supporting reports are **severely deficient** and do not consider the impacts of the proposed development nor include a proper assessment against the assessment benchmarks in the Planning Scheme. In particular, as explained in this letter, the proposal does not and cannot demonstrate compliance with:
 - (a) sections 3.6.4(1) and 3.6.4.1(2) and (3) of the Planning Scheme as they specifically relate to extractive industry uses; and
 - (b) the Rural Zone Code (**RZ Code**), the Flood and Storm Tide Hazard Overlay Code (**FSTHO Code**), the Coastal Environment Overlay Code (**CEO Code**) and the Landscape Values Overlay Code (**LVO Code**).
- (3) There are no relevant matters that have been advanced that can demonstrate the proposed development is in the public interest despite the above non-compliances.

2.3 We understand the Applicant is preparing a response to the further issues letter issued by Council and dated 14 February 2025 which will be provided between 14 to 29 April 2025 (**Further Issues Letter**). Evidently, there is limited time for Council (and the community) to consider any response and reports provided by the Applicant before a decision is made on **29 April 2025** by the Council.

2.4 Given our client's (and the broader community's) interest in the Development Application, we urge the Council to carefully consider any further supporting plans or reports submitted in support of the Development Application and its assessment against the Planning Scheme.

2.5 In the event that concerns about the Development Application remain, we urge the Council to refuse the Development Application as it is a substantial development that will impact the local community and the traditional owners of the area. In our view, the Planning Scheme sets a 'high bar' for the assessment of an extractive industry use and its impacts.

3 The Land

3.1 The land the subject of the Development Application (**Land**) is:

- (1) located at Lot 1 Captain Cook Highway (with frontage to Killaloe Dump Road and the unnamed road off Bonnie Doon Road), Killaloe;
- (2) described as Lot 1 on RP893855;
- (3) approximately 40.47ha in size;
- (4) currently vacant; and

- (5) surrounded by sugar cane production (cropping uses) to the north, south and west and has varying topography up to 11m.
- 3.2 Our client has supplied photographs of the Land in **Appendix C**.
- 3.3 Under the Planning Scheme, the Land is:
- (1) situated in the Rural Zone;
 - (2) subject to the following overlays:
 - (a) the Bushfire Hazard Overlay;
 - (b) the Coastal Environmental Overlay (Erosion Prone Area);
 - (c) the Flood and Storm Tide Hazard Overlay (Medium and High Storm Tide Hazard Area and Floodplain Assessment Overlay);
 - (d) the Landscape Values Overlay (High and Medium Landscape Values);
 - (e) the Natural Areas Overlay (MSES¹ Regulated Vegetation (Intersecting a Watercourse), Regulated Vegetation and High Ecological Significance Wetlands);
 - (f) the Transport Network Overlay (Minor Rural Road).
- 3.4 Under the SPP mapping:
- (1) the wetland to the east of the site is designated as a regulated vegetation (wetland); and
 - (2) the Land (except for the south-east portion subject to the wetland) is classified as Agricultural Land (Class A and B).
- 3.5 Having regard to the Planning Scheme and SPP mapping, the Land is both highly constrained and has mapped values that include high agricultural values, medium and high landscape values and environmental values, which therefore must be carefully considered through the impact assessment of the Development Application.
- 4 The Development Application**
- 4.1 As at the date of this further submission, the Development Application comprises:
- (1) The supporting reports lodged originally with the Development Application, which are:
 - (a) a town planning report dated 16 October 2024, which provides a limited assessment against the Planning Scheme;
 - (b) an environmental assessment report dated 15 October 2024, which provides a limited assessment for environmental, flooding and noise impacts; and
 - (c) a site-based management plan dated 16 October 2024, which is primarily an operational plan that is focused on the operation of the sand mine;
 - (2) A marine plant survey memorandum dated 13 November 2024 which was submitted to SARA and provides that:
 - (a) the site was inspected and the wetland protection area contains various marine plants;

¹ Matters of State Environmental Significance.

- (b) that area of the site has been avoided, together with the implementation of 500m buffer; and
 - (c) the northern area of the site is historically cleared and grassed for cattle grazing and no endemic woody vegetation was observed;
 - (3) An information response letter dated 26 November 2024, enclosing:
 - (a) preliminary pit test results;
 - (b) an elevation legend and site plan dated 22 November 2024; and
 - (c) wind direction and wind speed data from the Bureau of Meteorology.
- 4.2 In its Further Issues Letter dated 14 February 2025, the Council raised meritorious concerns with the Development Application. In our view, and generally consistent with Council's views, the Development Application is **severely deficient** in that:
- (1) The town planning report:
 - (a) does not assess the proposed extractive industry use against the assessment benchmarks in the Planning Scheme;
 - (b) provides that the existing land use is for agriculture purposes, however, due to the landform, cane farming cannot occur; and
 - (c) lacks clarity about the previous agricultural purpose of the Land and whether there would be agricultural impacts by fragmenting and impacting land that was used for agriculture and is surrounded by agricultural uses.
 - (2) The extent of the sand extraction, including the pre and post-extraction surface levels, the locations and heights of stockpiling of extracted material or the top soil, the staging, the location and timing for sand extraction and the rehabilitation intent are unclear.
 - (3) It would be expected that an extraction plan be included which outlines these matters, particularly given the extraction area is 22ha which is not an insignificant area for extraction.
 - (4) The impact on the agricultural value of the Land, noting the SPP mapping and surrounding agricultural uses has not been assessed, including considering:
 - (a) the existing agricultural uses over the Land and surrounding Land;
 - (b) the existing agricultural quality and soil quality of the Land as compared to the post agricultural quality and soil quality of the Land; and
 - (c) the ability of the Land to be used for cropping or with adjoining sites.
 - (5) The noise and air quality (i.e. dust or sand) impacts from the proposed use have not been assessed, including to sensitive land uses and the agricultural uses.
 - (6) The traffic engineering impacts to the local road network due to the haul vehicles have not been assessed, including the haul route and where the extracted sand would be transported to.
 - (7) The flooding, water quality, storm tide and coastal erosion impacts have not been assessed due to:
 - (a) the uncertainty of the extent of the sand extraction, the changes to the natural ground level and soil profile;

- (b) the uncertainty of the consequential water quality and flooding impacts to the surrounding land (and agricultural uses) as well as the wetland area due to the topography and extraction; and
 - (c) the management of resource and topsoil stockpiles, vehicles and any other operational matters during times of flooding.
- (8) The visual amenity and scenic amenity impacts have not been assessed due to:
- (a) the fact that the Land and extraction area is elevated up to 11m in certain areas;
 - (b) the Land and sand dunes are highly visible from Captain Cook Highway and forms part of the landscape character;
 - (c) the uncertainty of the scale and extent of the sand extraction, including land profiles, stockpiling of extracted material or the top soil, staging or timing for sand extraction over the land profile and the rehabilitation framework.
- (9) The extent of need for the sand resources for the extractive industry use and the public interest or community benefit for the extractive industry have not been assessed.

5 The Planning Act Framework

5.1 As the Council is aware, the statutory assessment and decision-making framework in assessing and deciding the Development Application involves the following:

- (1) The Development Application must be assessed in accordance with s.45(5)(a) and (b) and decided in accordance with ss.59(3) and 60 of the Planning Act.
- (2) Sections 45(3)(a) and 45(5)(a)(i) mandate an assessment of the development application against the Planning Scheme, which is the relevant local categorising instrument in effect when the Development Application was properly made.
- (3) The decision for an impact assessable development application calls for a '*broad evaluative judgment*', including taking into account any relevant matters under s.45(5)(b).²
- (4) The discretion conferred under s.60(3) admits of more flexibility to approve an application in the face of non-compliance with the Planning Scheme. However, in exercising the discretion, s.60(3) requires an assessment manager to examine the nature and extent of any non-compliance to determine how, and in what way, it impacts upon the exercise of the assessment manager's discretion.³
- (5) To ascertain the weight to be attributed to a non-compliance with the Planning Scheme in undertaking the exercise of the planning discretion, one must examine the verbiage of the Planning Scheme to ascertain the degree of importance that the planning scheme attaches to the requirements in the provisions.⁴
- (6) The PA does not alter the characterisation of a planning scheme – it remains a reflection of the public interest.⁵

5.2 In simple terms, the Council has a broad discretion to approve a development application even if there is non-compliance with the Planning Scheme, particularly where it is in the public interest demonstrated by relevant matters such as economic or community need.

² *Brisbane City Council v YQ Property Pty Ltd* [2021] QPELR 987, *Abeleda v Brisbane City Council* (2020) 6 QR 441, *Wilhelm v Logan City Council & Ors* [2021] QPELR 1321 and *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexis Funds Management Limited v Fabcot Pty Ltd & Ors* [2022] QPELR 309

³ *IB Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36.

⁴ *IB Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36, [288] and *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, 335-7 [18]-[22].

⁵ *Abeleda v Brisbane City Council* (2020) 6 QR 441.

6 Consideration and Assessment of the Development Application

- 6.1 As Council is aware, the Development Application is impact assessable and must be assessed against the whole of the Planning Scheme. That said, in our view, the assessment benchmarks and codes outlined below are fundamental to the Council's assessment.

Strategic Framework

- 6.2 Importantly, within the Strategic Framework, there are specific provisions relating to extractive industries outlined in s.3.6.4 and s.3.6.4.1(2) and (3). For completeness, we have extracted the full provisions that apply below:
- (1) *Section 3.6.4(1) – Douglas Shire is not, and is not likely to be, a major resource extraction area. However, where extraction does occur, it is small-scale, visually unobtrusive and managed in an environmentally responsive manner. All land disturbed by mining and extractive industries is appropriately rehabilitated.*
 - (2) *Section 3.6.4.1(2) – Other extractive industries do not detrimentally impact on community well-being or the Shire's ecological, landscape, scenic amenity and rural production values, and in particular the sugar industry.*
 - (3) *Section 3.6.4.1(3) – Extractive industries are either progressively rehabilitated to a natural state, or are rehabilitated upon completion of extractive industries, with all buildings, machinery and other associated infrastructure being removed.*
- 6.3 Sections 3.6.4(1) to (3) are fundamental as they relate specifically to extractive industry uses. This provision has not been addressed by the Applicant. In our view, it requires consideration of whether the extractive industry
- (1) is small-scale;
 - (2) is visually unobtrusive;
 - (3) is managed in an environmentally responsible manner;
 - (4) is appropriately rehabilitated upon completion of extractive industries; and
 - (5) does not detrimentally impact on community well-being (i.e. noise and air quality impacts), landscape and scenic amenity (i.e. visual amenity impacts) and rural production values (i.e. agricultural impacts).
- 6.4 The notion of "small-scale" was considered in *Griffith Capital Pty Ltd v Redland City Council* [2022] QPEC 21 and the Queensland Court of Appeal in *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors* [2021] QCA 95. In particular:
- (1) "small-scale" is defined to mean to be "of limited size or extent" or as "unambitious, or of small extent, as an enterprise"; and
 - (2) there is no bright line to define whether a proposed development is "small-scale". It is a relative phase that calls for a factual determination having regard to the terms of the assessment benchmarks viewed through the lens of the local context in which the development is proposed.
- 6.5 In our view, the proposed development would not be small-scale, and in any event, there is insufficient material for the Council to form a concluded view, given that:
- (1) the proposed development seeks to extract a substantial amount of sand resources over 22ha of the Land which is a large area and there is no extraction plan;

- (2) although the applicant has advised that there would only be one excavator on-site and one 20 tonne haul truck, we have serious reservations that this would be the only associated vehicles for the extractive industry given the removal of topsoil, proposed rehabilitation and stockpiling. It would be expected that other vehicles such as loaders, bulldozers and other machinery would be required, which would require more staff to be present;
 - (3) there are likely to be visual impacts due to the extent and scale of the sand extraction and the impact on the sand profile and sand dunes; and
 - (4) there is limited information about the actual extraction plan and its operation over the life of the development.
- 6.6 In terms of the balance of the matters that need to be addressed in the above provisions, the Development Application material is severely deficient as it is not supported by a hydraulic impact assessment, a visual impact assessment or an agricultural impact assessment. There is only one very limited noise and air quality impact assessment report.
- 6.7 Additionally, our client is significantly concerned with the coastal environment, flooding and water quality impacts of the proposed development. In particular:
- (1) there is a strong likelihood of consequential water quality and environmental impacts to the southern wetlands which is a culturally important wetland for KYAC (including consequential impacts to the surrounding agricultural land);
 - (2) there has been no accurate environmental survey or study undertaken to assess the eastern boundary which adjoins mangroves and potentially marine plants that have root systems on the Land that may be damaged because of the proposed development;
 - (3) notwithstanding the buffer zone to the protected wetland, there has been no consideration of the indirect impacts due to the substantial changes proposed to the flood environment, the coastal environment and the loss of the sand dunes; and
 - (4) given the nature of the proposed use and the assessment benchmarks, it would be reasonably expected that the Applicant would provide reports from appropriately qualified persons to consider the impacts.
- 6.8 Having regard to the above, the Council would be more than satisfied that the proposed development as currently lodged, does not, and cannot, achieve ss.3.6.4(1) to (3) of the Strategic Framework.

RZ Code

- 6.9 The Land is situated in the Rural Zone. We make the following observations about the RZ Code provisions as they relate to land use:
- (1) the anticipated land uses are rural uses, including cropping, intensive horticulture, intensive animal industries, animal husbandry, animal keeping and other primary production activities;⁶
 - (2) the purpose of the zone is the primacy of rural production, including sugar cultivation, and other farming practices in rural areas;⁷
 - (3) areas for use of primary production are conserved and fragmentation is avoided;⁸
 - (4) adverse impacts of land use, both on-site and on adjoining areas, are avoided and any unavoidable impacts are minimised through location, design, operation and management;⁹

⁶ Planning Scheme, RZ Code, Purpose (1)(a).

⁷ Planning Scheme, RZ Code, Local Government Purpose (2)(b) and Overall Outcome (3)(a);

⁸ Planning Scheme, RZ Code, Overall Outcome 3(a).

⁹ Planning Scheme, RZ Code, Overall Outcome 3(c).

- (5) other uses that may be appropriate include those that:
- (a) promote rural activities such as agriculture, rural enterprises and small scale industries that serve rural activities; or
 - (b) promote low impact tourist activities based on the appreciation of the rural character, landscape and rural activities; or
 - (c) are compatible with rural activities.¹⁰
- 6.10 The town planning report appears to argue support for the extractive industry use because it is either "compatible with rural activities" or a "small-scale industry" that serves rural activities.
- 6.11 In our view, the Development Application and proposed development is inconsistent with the outcomes sought in the Rural Zone Code for the following reasons:
- (1) The proposed development has not demonstrated, through an appropriate agricultural impact assessment that:
 - (a) the Land is unsuited for cane farming, or as part of agricultural uses, noting that it has been historically used for agriculture;
 - (b) how and why it would not fragment areas for use of primary production (cane farming) given it is surrounded by cane farming; and
 - (c) how the proposed development's operation and the substantial changes to the natural environment due to the removal of sand dunes would not impact the soil quality or nearby surrounding agricultural uses due to the indirect impacts (i.e. flooding, erosion and water quality); and
 - (d) how the land would be rehabilitated for future agriculture uses, including the future soil quality.
 - (2) The extractive industry use is not compatible with rural activities and the surrounding agricultural uses in PO5. Put simply:
 - (a) "Rural activities" is a defined activity group in SC1.1 of the Planning Scheme and sets out various rural uses.¹¹
 - (b) The ordinary meaning of "compatible" in the Macquarie Dictionary is "*capable of existing together in harmony*".
 - (c) The extent of the operations of the extractive industry is unclear and it is likely to generate adverse air quality, noise, water quality and flooding impacts which are likely to impact the nearby agricultural uses. These have not been considered, nor addressed.
 - (d) The scale and nature of the operations (i.e. stockpiling, rehabilitation, number of vehicles) is unclear and it is likely to be starkly different to reasonably expected rural activity operations over the life of the development.
 - (3) The proposed development cannot be considered "small-scale" for the reasons in paragraph 6.5 and there is no evidence that it would serve rural activities, as required under PO5.

¹⁰ Planning Scheme, RZ Code, PO5.

¹¹ Rural activities are animal husbandry, cropping, function facility (small scale), roadside stall, rural industry, tourist attraction (small scale), tourist park (small scale) and wholesale nursery.

- (4) The extractive industry use has not demonstrated that it would not generate adverse off-site impacts to surrounding properties, including noise, air quality, flooding, coastal erosion, water quality and environmental impacts.

6.12 Additionally, the photographs contained in Appendix C demonstrate that the Land:

- (1) is surrounded by significant agricultural uses, including cane farming; and
- (2) could be used for rural or agricultural pursuits and does not appear to be constrained for agricultural uses.

6.13 Having regard to the above, in our view, the Development Application does not demonstrate, and cannot demonstrate, it achieves the assessment benchmarks in the Rural Zone Code.

FSTHO Code & CEO Code

6.14 The Land is situated in the Medium and High Storm Tide Hazard Sub-category and the Floodplain Assessment Sub-category of the FSTHO Code and the Erosion Prone Area of the CEO Code.

6.15 In summary and relevant to the extractive industry use:

- (1) the FSTHO Code requires that the development:
 - (a) achieve an acceptable or tolerable risk level, based on a fit for purpose risk assessment;¹²
 - (b) directly, indirectly and cumulatively avoids an unacceptable increase in the severity of the natural hazards and does not significantly increase the potential for damage on site or to other properties;¹³
 - (c) avoids the release of hazardous materials as a result of a natural hazard event;¹⁴
 - (d) maintains the natural processes and protective function of landforms and/or vegetation;¹⁵
 - (e) directly, indirectly and cumulatively avoids any increase in water flow velocity or flood level and does not increase the potential flood damage on site or to other properties.¹⁶
- (2) the CEO Code requires that the development:
 - (a) facilitate the protection of both coastal processes and coastal resources;¹⁷
 - (b) maintain the erosion prone area as development free buffer zone (other than for coastal dependent, temporary or relocatable development);¹⁸
 - (c) maintain or enhance natural processes and the protective function of landforms and vegetation that can mitigate risks associated with coastal erosion;¹⁹

¹² Planning Scheme, FSTHO Code, Overall Outcome (2)(b).

¹³ Planning Scheme, FSTHO Code, Overall Outcome (2)(e).

¹⁴ Planning Scheme, FSTHO Code, Overall Outcome (2)(f).

¹⁵ Planning Scheme, FSTHO Code, Overall Outcome (2)(g).

¹⁶ Planning Scheme, FSTHO Code, PO5.

¹⁷ Planning Scheme, CEO Code, Overall Outcome (2)(a).

¹⁸ Planning Scheme, CEO Code, Overall Outcome (2)(d). **Note:** An extractive industry use is not "coastal-dependent development" or "temporary or relocatable development" pursuant to the definitions in State Code 8.

¹⁹ Planning Scheme, CEO Code, Overall Outcome (2)(a).

- (d) is not located within the erosion prone area, unless the development reflects the preferred development in accordance with the zoning of the site, or that erosion prone areas are free from development to allow for natural coastal processes.²⁰

6.16 Given the above provisions, a hydraulic impact assessment report is required to consider the above matters. Importantly, the current material does not address:

- (1) the extent (i.e. depths, lengths and rehabilitation) of the extraction and how it affects the flooding on the Land and surrounding area;
- (2) the extent of any storage of hazardous materials and how this would be stored or managed to avoid release of that material during flood events;
- (3) the extent of the sand extraction and how it could affect the protective function of the sand dunes and vegetation on the Land; and
- (4) the extent of any flood impacts to adjoining agricultural land uses, or the impacts to the wetland on the site.

6.17 As an observation, the CEO Code and FSHTO Code seeks to maintain the erosion prone area as a development buffer zone given the importance of the sand dunes (and the Land) as having a protective function which mitigates risks associated with the coastal erosion and processes. Importantly:

- (1) Our client and the traditional owners are significantly concerned with the proposed development's impact on the flooding, storm tide, water quality and the interplay with the natural environment.
- (2) The removal of the sand dunes by the proposed development will likely have substantial flooding, coastal erosion, storm tide and water quality impacts due to the changing topography, the operations and the scale of the development which have not been considered. These are likely to manifest in indirect impacts on the environment.
- (3) These wetlands and the waterways (including the drainage channels adjoining the Land) form part of a connected mangrove system that connects into the ocean and contain various fauna that are food sources for traditional owners. As shown in Appendix C, the whole of the eastern boundary adjoins a large, well-managed and high value mangrove ecosystem, which is likely to be impacted by the extractive industry use.

6.18 Based on the Development Application material, the proposed development does not, and cannot, achieve the assessment benchmarks contained in the FSTHO Code and the CEO Code.

LVO Code

6.19 The Land is situated within the High and Medium Landscape Values area under the Landscape Values Overlay mapping.

6.20 In summary and relevant to the extractive industry use, the LVO Code requires that the development:

- (1) protects, retains and enhances area of high landscape value;²¹
- (2) manages to integrate and limit the visual impact of development on areas of medium landscape value;²²

²⁰ Planning Scheme, FSTHO Code, AO4.1(b) and PO4.

²¹ Planning Scheme, LVO Code, Overall Outcome (2)(a).

²² Planning Scheme, LVO Code, Overall Outcome (2)(b).

- (3) ensures the landscape character type remain predominantly natural in appearance, including the coastal landscape character and the rural character of cane fields and lowlands landscape character types that are predominantly rural or natural in appearance;²³
- (4) is consistent with the prevailing landscape character of its setting, and is neither visually dominant nor visually intrusive;²⁴
- (5) in the high landscape value area:
 - (a) avoids extractive industry operations;
 - (b) avoids detrimental impacts on landscape values and excessive changes to the natural landform as a result of the location, position on site, scale, design, extent and alignment of earthworks;²⁵
- (6) in the medium landscape value area:
 - (a) avoids extractive industry operations, or where they cannot be avoided, screened from view; and
 - (b) avoids detrimental impacts on landscape values and excessive changes to the natural landform as a result of the location, position on site, scale, design and extent²⁶

6.21 As shown in the photographs in **Appendix C**, the Land is:

- (1) highly visible from Captain Cook Highway;
- (2) has landscape and scenic values that contribute to both the coastal and rural character of the local area.

6.22 Given the above provisions, we note that a visual impact assessment study has not been prepared to consider the visual impact of the proposed development, including the lengths, depths, exposure of extraction areas, operation of haulage vehicles, internal circulation, stockpiling of materials and rehabilitation.

6.23 Based on the Development Application material, the proposed development does not, and cannot, achieve the assessment benchmarks contained in the LVO Code.

Relevant Matters and Conclusion for Assessment

6.24 Having regard to all the above, in our view, the Development Application as currently framed does not and cannot comply with the assessment benchmarks contained in the Planning Scheme.

6.25 Moreover, the Development Application material does not advance any "relevant matters" that the Council should have regard to under s.45(5)(b) of the Planning Act.

6.26 Given the Planning Scheme is a reflection of the public interest, in our view, the Council must refuse the Development Application because:

- (1) The Development Application fails to comply with the Planning Scheme; and
- (2) There are no public interest considerations that warrant departing from that substantial non-compliance.

²³ Planning Scheme, LVO Code, Overall Outcome (2)(f)(iii).

²⁴ Planning Scheme, LVO Code, Overall Outcome (2)(h).

²⁵ Planning Scheme, LVO Code, AO1 and PO1.

²⁶ Planning Scheme, LVO Code, AO 1 and PO2.

15 April 2025

 **NORTON ROSE FULBRIGHT**

7 Council's Future Consideration of the Development Application

- 7.1 We understand the Applicant is preparing a response to the Further Issues Letter which will be provided between 14 to 29 April 2025. Evidently, there is limited time for Council (and the community) to consider the any response and reports provided by the Applicant before a decision is made on **29 April 2025** by the Council.
- 7.2 Given our client's (and the broader community's) interest in the Development Application, we urge the Council to carefully consider any further supporting plans or reports submitted in support of the Development Application and its assessment against the Planning Scheme
- 7.3 We expect that these reports will be immediately considered by our client and the community to determine the extent of the impacts, which as clearly raised in this submission, are yet to be properly considered by the Applicant.
- 7.4 In the event that concerns about the Development Application remain, we urge the Council to refuse the Development Application as it is a substantial development that will impact the local community and the traditional owners of the area. In our view, the Planning Scheme sets a 'high bar' for the assessment an extractive industry use and its impacts.
- 7.5 We understand Council noted its power to grant a preliminary approval instead of a development permit, however, we would caution this approach given the Development Application is yet to demonstrate compliance with the Planning Scheme or address impacts associated with the development, as required as part of the impact assessment framework under s.45(5)(b) of the Planning Act.
- 7.6 We trust that the Council will take into account the contents of this further submission and will carefully consider the Development Application.

Yours faithfully



Rebecca Hoare
Partner
Norton Rose Fulbright Australia
Contact: Evan Leong

Appendix A – KYAC Submission

Kubirriwarra Yalanji Aboriginal Corporation ICN: 9206



Yundu binal yundu wanjabu janay—kaki yundu ngujakuramunbu janay

To the Assessment Manager,

Douglas Shire Council,

64-66 Front Street,

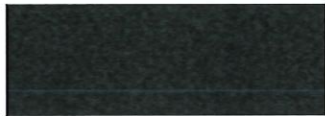
MOSSMAN QLD 4877

Monday, 16th December 2024

Sent by email: [REDACTED]

c.c. enquiries@douglas.qld.gov.au

OBJECTION TO DA LODGED BY:



Mossman 4873 Mossman

E: [REDACTED]

Re: Council Application Number MCUI 2024_5682/1 NQ Asphalt P/L seeking a material change of use for Lot 1 on RP 893855 from Rural to Extractive Industry Use – Sand quarry.

Dear Ms [REDACTED],

I am Eastern Kuku Yalanji Traditional Owner and common law native title holder.

I self-identify as a Kubirriwarra individual, Kubirri being the Southernmost clan of the wider Eastern Kuku Yalanji tribe. My native title rights and interests were recognised in the native title determination of *Walker on behalf of the Eastern Kuku Yalanji People v State of Queensland* [2007] FCA 1907 ('EKY Determination') and the current registered EKY #2 claim for Mossman and surrounding areas of which there are two Kubirriwarra applicants noted on the claim.

The Kubirriwarra and more broadly, the Eastern Kuku Yalanji People have maintained continuous cultural connection to Cooya Beach (Kuyu Kuyu) and the

Kubirriwarra Yalanji Aboriginal Corporation ICN: 9206



Yundu binal yundu wanjabu janay—kaki yundu ngujakuramunbu janay

Killaloe area. The proposed mining site adjoins a wetland area of significant importance to the Eastern Kuku Yalanji People.

As required by the Extractive industry code, the sand mining operation will not be adequately separated from sensitive land uses and if approved it will have significant ecological impact on the mangroves that adjoin the eastern boundary of Lot 1. On 27 February 2023 Traditional Owners registered a claim with the Native Title Tribunal (file No QC2022/007; QLD 356/2022) (EKY #2 Claim).

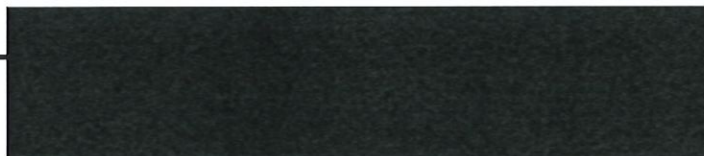
Further, there has been no future act notice received by Kubirriwarra Yalanji as required by the native title act regarding the proposed development nor, has a request to provide a Cultural heritage assessment and audit of the proposed mining development area by the Kubirri Traditional Owners which Kubirriwarra Yalanji believe is inconsistent with the Aboriginal cultural heritage act.

Sincerely,



Chairperson KYAC – ICN 9206

Appendix B —





[REDACTED] 873, QLD.

12 December 2024.

To whom it may concern,

I, [REDACTED] are the owners of Kuku Yalanji Cultural Habitat Tours Pty. Ltd. We have operated this business for 26 years.

Our cultural educational tours are carried out into the mangroves and shoreline from the southern end of Cooya Beach right up to the mangrove area that is next to Lot 1 on RP 893855 and further on to Muddy Creek which is next to the Killaloe Transfer Station. Our business is very successful with both domestic and international tourists, and we rely 100% on the mangroves and wetland along this part of the coast for not only educating people about the environment but also as our staple food source. Our daily tours mean visitors walk around 7 to 8 kilometres learning about the ocean and the vast ecosystem as a whole. The noise generated by heavy machinery and trucks from a sand quarry would significantly harm our guests' experience and, in turn, our business. It would completely disrupt the ambiance and tranquillity that our customers cherish, which is intrinsically tied to the serene mangrove systems surrounding us.

I know from Traditional teachings that there are underground freshwater springs that are potted around both the Southern side of Cooya Beach and Killaloe towards and around the proposed sand quarry. These are quite substantial in terms of size and influence on the biodiversity of environment especially the mangroves to the east of the proposed quarry site.

We have maintained a high cultural continued use and access connection to this land from the old times. Old People occupied these areas, in particular during ceremony seasons and the wealth and abundance of the Cooya Beach/Killaloe area as a rich food resource is widely known and provided well for the People.

Estuaries and watercourses in the area and these areas around the Cooya Beach/ Killaloe area and proposed sand quarry site are significant as spawning sites for various sea animals. The moderate waterway to the north of the proposed quarry along the boundary with the unnamed road and Nagan family home at Lot 54 on SP292874 Bonnie Doon Rd holds, crocodile, barramundi, mangrove jack and is tidal. The 2 farm drains that run from close to the Killaloe waste station to the west of the proposed site along the adjoining block are also tidal with the aforementioned animals being found in them as well as mullet. The whole of the proposed quarry site is surrounded by tidal waters.

The mudflats, estuaries, coastal water south of Cooya Beach towards Killaloe including Morey Reef are all significant for ecological reasons. The water also contains significant beds of seagrass which is a primary food source for green sea turtles and dugong. Culturally, in an Indigenous sense, the hunting and consumption of green sea turtles and dugong is a major practice and is still practised today.

Furthermore, Morey Reef is a listed Conservation Park Zone area within the wider Great Barrier Reef Marine Park. It is therefore, a World Heritage listed area and an area of National Environmental Significance.

In Kuku Yalanji language, the name for mangrove is “mangurru”, and is a major source of sustenance of life. Waterways in general are a significant part of Kubirriwarra cultural as “Kurriyala” (rainbow serpent) travels along them, along with other significant creation stories surrounding the Cooya Beach/Killaloe area. This forms cultural lore and imparts knowledge and decision-making responsibilities which are the basis of traditional management.

Bookending the proposed sand quarry site is also a vast mangrove system which is also nesting area for the Pied Imperial Pigeon among other species of birds. These nesting birds are especially sensitive to noise. This vast mangrove ecosystem provides an abundance of food which include but are not limited to muscles, periwinkles, mud crab, blue swimmer crab and crayfish that us and our families still use as a daily food source and as a source of income for our businesses. Disruption of the natural ecological environment and naturally occurring phenomena would spoil this natural resource that holds significant cultural importance and in a literal sense, sustains life, particular for the more impoverished who live in the area;

The proposed sand quarry and the adjacent mangroves which border it are low-lying coastal shoreline. Knowing how prone to storm surges this area is, the mangroves will be vulnerable to cyclonic activity on a low-lying coastal shoreline.

I am also concerned as to the proposed significant earthworks required to construct the NQ Asphalt project, the access road that is intending to be built, and the bridge over the moderate waterway to the north of the site will potentially dam up Bonnie Doon Road which will then prohibit anyone leaving Cooya Beach as when it floods the Junction Bridge (alternate exit) is the first go over. The large scale of this sand quarry will potentially leave the capture of rainwater and overland flow to interfere with natural processes. During the wet seasons and tidal changes there will be an overflow of fresh water from the site into the mangrove wetlands. This overflow of fresh water will kill the mangroves and everything that relies on the mangroves for survival.

I, nor any other Kubirriwarra or Eastern Kuku Yalanji Traditional Owners that I'm aware of, was ever consulted by NQ Asphalt Pty Ltd. In my view, it does not appear that a proper and rigorous assessment of the proposed project and its potential impacts has been undertaken.

This lack of proper assessment affects an area of important significance to First Nations people. On 27 February 2023 Traditional Owners registered a claim with the Native Title Tribunal (file No QC2022/007; QLD 356/2022) (EKY #2 Claim).

NQ Asphalt has not effected its obligations of consultation either under the *Cultural Heritage Act 1993 (Qld)*, *Environmental Protection and Biodiversity Conservation Act [1999] (Cth)*, *Planning Act 2016 (Qld)*, *State Code 9: Great Barrier Reef wetland protection areas* and associated Development Assessment Rules among other statutory and regulatory frameworks.

Every members of community suffers damage and loss when development projects occurring on-country are carried out in manners inconsistent with cultural traditions and law. The Kubirriwarra People's identity, sense of self-esteem and customary responsibilities are guided by their connection and management of country. Kubirriwarra People have held long-standing local associations with governmental and non-governmental organisations in providing advice on the management of World Heritage areas in the Great Barrier Reef, which appears to have been foregone on this occasion.

Yours sincerely,

A black rectangular box redacting the signature of the sender.

Owner

Kuku Yalanji Cultural Habitat Tours Pty. Ltd.
Bama Way Cultural Activities Pty Ltd
First Nations Cultural Consultants Pty Ltd

"Protecting, Practicing & Sharing Our Culture"

Appendix C – Photographs of Land from Captain Cook Highway

