



SUMMARY

The proposal: MCU18/0190.04

The minor change application MCU18/0190.04 as submitted, “*seeks the **removal** of conditions 70 (a) – (c)*” and offers no enforceable alternative to the certainty and validity of reliance on Council’s DA approval conditions.

The same application seeks the “*removal of the Lighting Concept prepared by Rubidium Light as a referenced document*”. This referenced document supported the approval conditions 70 (a), (b) and (c) for the approval of MCU18/0190.01 and, without modification, two subsequent change applications.

The same application also seeks the “*inclusion*”, as referenced documents (if approved):

- (i) the *Artificial Light Management Plan (ALMP)* labelled as prepared by Pendoley Environmental and
- (ii) *Lighting Outcome Report* prepared by MBE Services Group

Rejection of the minor change proposal

We request this minor change application be **refused over its significant and unacceptable impact on endangered loggerhead turtles**. Removal of approval conditions 70 (a), (b) and (c) does not provide enforceable compliance criteria, nor ongoing certainty that protection measures will be undertaken, nor that the *ALMP* will not be altered from time to time (with no review or oversight by Council) further diminishing any protection and putting the ecosystem at risk.

Removal of approval conditions 70 (a), (b) and (c) may undermine Council’s legislative responsibility to protect MSES – the very reason that the approval conditions were established.

Removal of approval conditions 70 (a), (b) and (c) may create an arguable case that any proposed actions are uncertain and unenforceable with a potential outcome the decision to grant the approval should be set aside.

Removal of approval conditions 70 (a), (b) and (c) and diluting the minimum requirements of the approval, reflects inconsistency and contradiction, given multiple other DA approvals by Council specifically include similar turtle lighting control elements (such as 15% VLT on glazed surfaces).

Removal of, or diluting any of these minimum requirements, would likely demonstrate preferential treatment by Council in favouring this particular developer by providing (i) reduced compliance and (ii) increased financial advantage by facilitating significant cost reductions (*\$millions*) not available to other developers who have complied with similar approval conditions. This may lead to reputational damage for Council.

Is this application a minor change?

Removal of enforceable approval conditions 70 (a), (b) and (c) and the supporting Lighting Concept report can only increase the severity of known impacts (Artificial Light at Night on an endangered species). Diluting the lighting conditions established to minimise the impact of the 7 storey development on turtle nesting, their sea-finding behaviour and ocean orientation of hatchlings cannot be reversed, if the removal of 70 (a), (b) and (c) is approved. Contrary to the notion suggested by *Project Urban Cover Letter* page 3, removal of these approval conditions cannot possibly “ameliorate” nor “enhance” the negative impacts of artificial light at night on adjacent turtle nesting grounds; rather, the removal will intensify both light spill and skyglow.

Should a referral to SARA be disregarded?

Although the original application was not referred to SARA, it is noted that DES now recognises and has recently mapped the endangered turtle nesting habitat on the Sunshine Coast. The proposed substantial dilution of the approved turtle lighting conditions may be sufficient to trigger a referral to SARA to validate the DES (*Threatened Species*) interest.



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TURTLE LIGHTING APPROVAL CONDITIONS

Purpose and Compliance with SCPS

The purpose of the approval conditions numbered 68-71 specifically relate to Turtle Lighting and compliance with the SCPS *Coastal Protection Overlay Code*. The development site is located 100% within the mapped area of the code.

The Overall Outcomes of that code require that *development protects ... biodiversity within coastal areas* and PO12 (b) requires that *development ... maintains or enhances coastal ecosystems*. By definition, this includes the endangered loggerhead turtles and their nesting habitat.

The intent of the code reflects that no adverse outcomes impact the endangered loggerhead turtle and their nesting habitat on Buddina beach, as a result of the development. Protection under the code is not diluted by wording limitations nor timeframe limitations.

Ongoing stringent, enforceable approval conditions are required to achieve compliance. Approval condition 70 outlines prescribed measures to “*minimise light spill and maintain or reduce the existing established sky glow levels at the adjacent turtle nesting grounds*”. This is not limited to the beach directly in front of the development site - “adjacent” refers to the Buddina beach nesting habitat - one of the most important and densely nested habitats in the Sunshine Coast region.

Council determined that their Planning Officers’ recommendations in MCU18/190.01 were sufficient to satisfy Council’s legislative responsibility to protect the MSES recognised endangered loggerhead turtles. The established principles for the protection are to ensure:

- (i) NO increase in direct artificial light at night is visible from the beach and inshore waters as a result of the development;
- (ii) NO increases in sky glow at night as a result of the development;
- (iii) Certainty and enforceability of approval conditions to achieve (i) and (ii) above

Condition 70, in its current form was approved by Council on 23 July 2020 (minor change MCU18/0190.01); resolution reference is **OM20/70**. The Decision Notice was issued on 30 July 2020. The developer/s did not exercise their Right of Appeal.

Legal Challenge resulting in amendments to Turtle Lighting Approval Condition 70

An Originating Application was lodged in November 2019 challenging various aspects of the April 2019 approval of MCU18/0190, including the Turtle Lighting conditions which were unenforceable.

During the legal processes from November 2019 to November 2020, Council and the developer sought to change the approval conditions relating to Turtle Lighting, in particular approval condition 70 and many of its sub-clauses, in order to remove the uncertainty and unenforceable components.

The legal process was suspended for several months from April to July 2020 allowing Council to process the amendments to Turtle lighting and other related approval conditions. Council's changes and approval resulted in the updated approval conditions in MCU18/0190.01 being acknowledged as *certain, valid, enforceable and lawful*. This action denied any further legal argument relating to SCPS *Coastal Protection Overlay Code* (PO12).

Any subsequent variations to Condition 70 are anticipated to be *certain, valid, enforceable and lawful*.

Approval Condition 70 provides prescriptive measures for endangered species protection

This condition is specific to the protection of the nesting habitat of the endangered loggerhead turtles through restrictions of artificial light at night (ALAN) from the 7 storey, high density, development. All sub-clauses of



condition 70 are intended to **minimise** (not just reduce) light spill and **maintain or reduce** the existing established sky glow levels. These approved conditions are enforceable for the life of the building.

Removal of (or diluting) any of these approved minimum requirements, fails the specific objective to **minimise** impacts; any dilution will diminish the protection of the endangered loggerhead turtles.

The current application MCU18/0190.04 as submitted seeks to remove 3 key sub-clauses of approval condition 70, namely (a), (b) and (c). That proposal is anticipated to be contrary to the code and legislative compliance. Currently, approval condition 70 and sub-clauses (a), (b) and (c) include specific design requirements for the site lighting controls to *minimise light spill and maintain or reduce the existing established sky glow levels*:

- (a) all glazing (including windows and doors) on the north, south and eastern elevations must be tinted with non-reflective tinting, or utilise smart glass technology, to achieve a maximum 15% visible light transmittance;
{Explanatory Note: 15% VLT blocks 85% of artificial light when tinted glazed doors and windows are closed and consistently blocks 85% of artificial light on all tinted glazed fixed panels. Tinted glazed doors and windows can be opened at all times, 24/7, 365 days each year at the discretion of the residents};
- (b) all windows and doors within all units on the north, south and eastern elevations must be fitted with automatic opaque blinds. The automated blinds must be configured to be closed automatically, and must remain closed, between 8:00 pm and sunrise during turtle nesting and hatching season (1 October – 31 May);
{Explanatory Note: When tinted doors and windows are open at night, the closed blinds block a high % of artificial light during turtle nesting season, otherwise residents can keep the blinds opened during daylight hours 365 days each year at the discretion of the residents};
- (c) indoor and outdoor paint/surfaces/fixtures must be matte and dark in colour and have a maximum reflectance value of 30%.
{Explanatory Note: LVR of 30% absorbs 70% of the light, which can help reduce energy costs plus reducing LVR to 30% can have a significant impact on skyglow at night - by reducing the amount of light that is emitted upward, less light will be scattered back down, resulting in less skyglow};

Diluting Approval Condition 70 risks certainty and enforceability

This condition specifies the minimum requirements through measurable standards and automated controls required within the build. These approval conditions remove the uncertainty of manual processes, such as residents being required to turn off lights at night, close blinds and draw curtains during turtle nesting season.

Removal of or diluting any of these approved minimum requirements, is likely to reintroduce uncertainty about enforceable conditions. These were addressed in July 2020 and reintroducing similar uncertainty may create an arguable case that any proposed actions are uncertain and unenforceable, with the potential outcome of a Council decision (to grant such an approval) should be set aside.

Diluting Approval Condition 70 risks reputational damage to Council

Removal of or diluting any of these approved minimum requirements, contradicts multiple other DA approvals by Council that specifically include some of these lighting control elements, such as 15% VLT on glazed surfaces.

Removal of or diluting any of these approved minimum requirements, would likely demonstrate preferential treatment by Council in favouring this particular developer by providing (i) reduced compliance and (ii) financial advantage by facilitating significant cost reductions (\$millions).

Preferential treatment for this particular developer, related parties or the builder would likely reflect poorly on Council and risk reputational damage.



Approval Condition 70 is not about cost-cutting opportunities for the Developer nor Tomkins

This condition is specific to the protection of the nesting habitat of the endangered loggerhead turtles and specific to minimisation of the impacts of artificial light at night. It should not be modified to provide opportunities to reduce the construction costs to achieve a windfall financial gain by:

- Removing the prescribed tinting requirement of 15% VLT or diluting the prescribed tinting requirement of 15% VLT to 42% VLT, or any other cheaper value;
- Removing the prescribed automatic blinds closures or diluting the requirement to merely a manual process, reinstating uncertainty, an invalid approval;
- Removing the prescribed maximum reflectance value on painted surfaces of 30% or diluting the prescribed reflectance outcomes;
- Diluting other sub-clauses by way of comment in the documents submitted via Project Urban, rather than complying with the minimum standards identified within condition 70 (note the return of the language “when not in use” at condition 70 (k) reinstates uncertainty). In particular, given the supposedly compliant commentary, conflicts with the condition imposed.

The higher cost of glazing with 15% VLT is acknowledged as being more expensive than other glazing due to the increased amount of light-blocking technology required to achieve this level of opacity.

The approval condition requiring 15% VLT was established as Council’s standard for all development adjacent to turtle nesting habitat to achieve the protection requirements for an endangered species. Lowering that standard “flies in the face” of (1) the purpose of the approval conditions, (2) the compliance criteria of PO12 and the OO’s of the Coastal Protection Overlay code and (3) Council’s recent Biosphere accreditation.

The higher cost of automated blinds, closing at 8pm during turtle nesting season, ensures that residents can leave their doors and windows open without contributing to light spill and skyglow. Without the automated blinds closures, then if the doors and/or windows are open, the minimisation objective relating to the impact of the 7 storey development on turtle nesting, is simply not achievable, therefore, uncertain and invalid.

The developer agreed to approval conditions 70 (a), (b) and (c) when approved in July 2020 and the developer was aware (or should have been aware) that more expensive options were embodied throughout Condition 70. The requirement of 15% VLT and the higher cost of glazing at 15% VLT has been a known factor. Similarly, the higher cost of automated blinds and the prescribed maximum reflectance value on painted surfaces have been known factors. None of this is new.

Disparate approval processes: *Bokarina* MPC within a DPAP vs *Buddina* MCU within the SCPS

Suggested wording in the documentation referenced in this minor change application attempts to link comparative values for Turtle Lighting conditions applied to the Bokarina Seanna Apartments and the Beachfront Buddina Apartments.

Apart from the coincidences of the same construction company (*Tomkins*) and the same town planners (*Project Urban*), nothing in terms of (i) assessment processes and (ii) the development sites are in any way, comparable.

The instruments are incongruent, as are the sites, as shown in the table below:



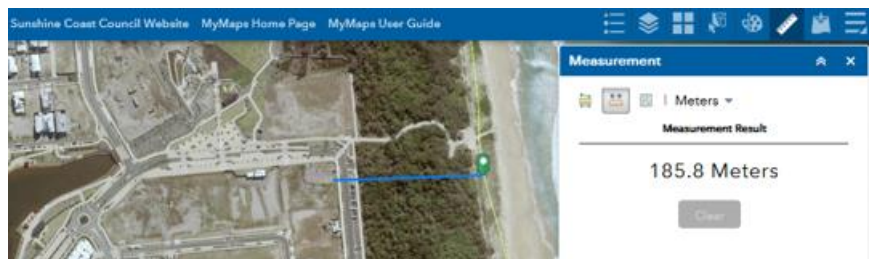
Beachfront Buddina Apartments	Bokarina Seanna Apartments
assessed according to the SCPS and the relevant codes, approved July 2020	assessed according to the original Detailed Planning Area Plan (DPAP), approval April 2016
based on more current technology and have been validated for certainty and enforceability	based on 7 year old technology, less advanced than current conditions, not validated for certainty and enforceability in the same manner as Buddina
required to be compliant with the SCPS Coastal Protection Overlay code; therefore, these must be more stringent than the Bokarina conditions	not required to be compliant with the SCPS Coastal Protection Overlay code; thus, these can be (and are) less stringent than the Buddina conditions
relevant to a development located 47m from the HAT (highest astronomical tide)	relevant to a development located 185m from the HAT (highest astronomical tide)
Distance disparity of 138m	
relevant to a development with spare vegetation of 25m between the site and the HAT	relevant to a development with dense vegetation of 160m between the site and the HAT
Distance and significant Vegetation density disparity of 135m	
nesting density of the endangered loggerhead turtle during 2022-23 was 9 times that at Bokarina and a significant 40% of Council's TurtleCare program	nesting density of the endangered loggerhead turtle during 2022-23 was small, nevertheless important to Council's TurtleCare program

Accordingly, any *loose* comparison of turtle lighting conditions (set by differing assessment approval instruments and site circumstances) should be disregarded.

Beachfront **Buddina** site



Seanna **Bokarina** site



CONCLUSION

We respectfully request the minor change application be **refused over its significant and unacceptable impact on endangered loggerhead turtles.**



APPENDIX A PROPOSED REFERENCE DOCUMENTS (as submitted)

The change application prepared by *Project Urban* seeks the inclusion of two referenced documents in the approval (if granted by Council).

- the *Artificial Light Management Plan (ALMP)* labelled as having been prepared by Pendoley Environmental and
- the *Lighting Outcome Report* labelled as having been prepared by MBE Services Group Pty Ltd.

Artificial Light Management Plan (ALMP) document, prepared for TOMKINS

This document does NOT provide any recommendations that supports the *Project Urban Cover Letter* notion that the approval conditions 70 (a), (b) and (c) warrant removal. There is no reference in the document that suggests “justification for the removal of these conditions” as suggested in the *Project Urban Cover Letter*.

As the ALMP does not contain recommendations for the removal of the approval conditions 70 (a), (b) and (c), it cannot be regarded as a “reference document” for that purpose.

It is noted on page 2 that the final version of this report was not authorised by Dr Pendoley which is the usual practice of Pendoley Environmental. This variation to validation of the document is of concern.

The extraordinary variation in writing style and content in Table 2 also warrants investigation by Council as to the validity of relying on this section of the report, particularly where the author of the contentious comments in column 5 does **not** appear to be the same author held out to be Pendoley Environmental.

Within Table 2 of the report, on page 23 of 49, the Comments column, at condition 70 appear to indicate the commentary was made by MBE rather than Pendoley Environmental:

Column 3	Where addressed	This ALMP, MBE Lighting Outcome Report Rev 2 (MBE, 2023)
Column 4	Assessment - does design criteria meet condition or not?	
Column 5	Comments	MBE (2023)

In order to reference this document in the approval, Council has carriage of ensuring any of the alternatives proposed are **certain, valid, enforceable and lawful** for this particular development whilst ensuring compliance the relevant provisions of the SCPS.

Assessment under the DPAP for Tomkins’ Bokarina development does not translate to the codes and provisions of the SCPS applicable to the Buddina Beachfront – creating that misperception appears to be the intent of the commentary in Table 2.

The comments in column 5 of Table 2 that refer to Condition 70 (a) are confused

15% VLT will prevent any daylight entering the apartments and is particularly oppressive for residents. Objective of minimising light spill is being met by: increased management of internal, external and balcony lights, tinted glazing on all window, doors and balcony glass; fixed and mobile wooden screening; and body corporation management of internal curtains and blinds.

The representations in this commentary 70 (a) appears somewhat confused and potentially misleading:

- 15% VLT will **not** prevent **any** daylight entering the apartments; the 15% VLT provides significant sun, heat and glare protection, blocking out most of the harmful UV rays, making it more comfortable and reducing the need for air conditioning;
- Residents are **not** restricted whatsoever in opening their doors and windows during daylight hours **nor** during the evenings 24/7, 365 days of the year;
- There is **no** increased management proposed for *internal, external and balcony lights*, in fact at 70 (k) the contradiction is introduced suggesting balcony lights can be manually switched on and off “when



not in use". That would be non-compliant with condition 70 (k) and should raise an "alarm bell" as to the certainty and validity of allowing a condition to be modified by such commentary;

- There is **no** increased management proposed for *tinted glazing on all window, doors and balcony glass* is already a requirement of 70 (a) which states the requirement for "All glazing"; and
- The body corporate by-laws are noted as pending (70A)

The comments in column 5 of Table 2 that refer to Condition 70 (b) are confused

As above, automatic blinds are oppressive for residents and will prevent resident access to their balconies for 8 months of the year. Managed via internal curtains and body corporation requirements for use in turtle season.

The representations in this commentary 70 (b), like 70 (a) also appear somewhat confused and potentially misleading:

- residents are **not** restricted, whatsoever in accessing their balconies 24/7, 365 days of the year;
- Suggesting that managing light by manually drawing internal curtains with oversight by the body corporate during turtle season is unlikely to satisfy the requirement for **certain, valid, enforceable and lawful** approval conditions – that issue was resolved in MCU18/0190.01 by including the automated opaque blinds that must remain closed, between 8:00 pm and sunrise during turtle season.

The comments in column 5 of Table 2 that refer to Condition 70 (c) are confused

Internal – Generally Snowy Mountain Quarter in Matt finish and LVR 89. Darker paint finishes internally unacceptable for residents.

External – All finishes will be Matt finish. Dark Grey (Western Myall) and Dark Green Oakbank meet the LVR requirement. The white finish to be Snowy White Mountain Quarter that has an LVR of 89.

To be managed by using amber balcony lighting and tinted balcony balustrades (exceeds DA requirement), tinted windows and external screens.

The representations in this commentary 70 (c), like 70 (a) and (b) also appear somewhat confused and potentially misleading:

- Suggesting that using amber balcony lighting exceeds DA requirement contradicts the requirements to have the balcony lights turned off in turtle season and only be activated by proximity sensors or motion detectors per condition 70 (k). In addition, condition 70 (d) requires that all outdoor lights must have a maximum of 2700 K correlated colour temperature (CCT);
- Suggesting that installing tinted balcony balustrades exceeds DA requirement is a fallacy – tinted balcony glass is already a requirement of 70 (a) which states the requirement for "All glazing"

The comments in column 5 of Table 2 that refer to Condition 70 (k) are confused

... .. External Unit Balcony Lighting External unit balcony true PC Amber LED lighting to be manually controlled from within each unit and fitted with motion sensors to turn lights off when not in use.

The representations in this commentary 70 (k), like others also appear somewhat confused and potentially misleading:

- Diluting this sub-clause by way of comment in the documents submitted, rather than complying with the minimum standards identified within condition 70 (k) is retrograde. The return of the language "when not in use" is unlikely to satisfy the requirement for **certain, valid, enforceable and lawful** approval conditions – that issue was resolved in MCU18/0190.01
- How can a light *be manually controlled and fitted with motion sensors to turn lights off when not in use* – that's an irreconcilable contradiction within the same sentence.



Lighting Outcome Report document

This document (report) is labelled revision 2, dated 19 December 2022 by Michael Burgess. The report was prepared by MBE Services Group Pty Ltd. This document is referred/quoted to in the ALMP as **MBE (2023)**.

Page 3, at 1.1, the MBE consultant states:

*There is **minimal screening** between the beach and proposed development, the dune itself is elevated and with trees **sparsely** located across the dune and road reserve.*

This statement claiming **minimal screening** ... with trees **sparsely** located is contradicted by the following statement Page 4, at 1.2, the MBE consultant states:

*It is estimated the lower 4 stories of the building are going to be **completely obscured** from view due to the existing dunes and vegetation.*

Given the contradiction in statements 1.1 and 1.2 only an onsite visit would verify that there is in fact **minimal screening and the trees which are appearing more sparsely located**.

Page 7, at 2.5, the MBE consultant states:

as part of the purchaser hand over package purchasers will be directed to purchase both a block out and a sheer {curtain} for external windows and doors. Curtains are to be drawn during turtle nesting season, the body corporate is to ensure owners and tenants comply.

Council is responsible for ensuring compliance with the relevant provisions of the SCPS through approval conditions.

A *body corporate* (in Qld) can make new *by-laws*, or *change* its existing ones at any time, except for example where it is bound by DA approval conditions. If Council were to remove approval condition 70 (b) in favour of a body corporate by-law requiring residents to manually draw curtains at night, such an action may be unlawful as the body corporate bylaws must be legal in order to be enforceable.