BACKGROUND

Application

1. I refer to the application for review DR166 of 2020 (the Application) between Nyamba Buru Yawuru Ltd (Applicant) and the Western Australian Planning Commission (Respondent or WAPC). This Application was lodged with the State Administrative Tribunal (SAT or the Tribunal) and I have called it in for determination, as Minister for Planning, pursuant to section 246(2)(a) of the Planning and Development Act 2005 (PD Act).

Location and Proposal

2. The subject of this review is a Local Structure Plan (Structure Plan or LSP) for a 5.4ha portion of Lot 3082 Cable Beach Road East (the subject land).

3. The Structure Plan proposes the establishment of indicative service commercial uses in Broome, adjacent to the intersection of Cable Beach Road East and Gubinge Road.

4. The subject land addresses Cable Beach Road East and abuts the Broome International Airport to the north and North Regional TAFE to the east.
5. The subject land is owned by the Applicant. It is one of the sites granted to the Applicant as a part of the Rubibi Native Title determination and subsequent Indigenous Land Use Agreement (ILUA) between the Yawuru People (re relevantly here, represented by the Applicant), the State of Western Australia in various capacities and the Shire of Broome.

6. The Structure Plan proposes that the land be developed for service commercial purposes, being uses such as: showroom, warehouse, motor vehicle sales.

History of Application and Proposal

7. At its meeting on 26 May 2016, the Shire of Broome resolved the following:

“1. The Shire supports Nyamba Bum Yawuru Ltd.’s aspirations to develop land granted to the Yawuru Native Title Holders Aboriginal Corporation RNTBC under the ILUA and the development of land for service commercial purposes in Broome.

2. In the event Nyamba Bum Yawuru Ltd wishes to proceed with the lodgement of a formal application, the Shire advises that a Structure Plan would need to be prepared and submitted in accordance with Clause 4.44.1 of Local Planning Scheme No 6 and Clause 15 (a) (ii) of the Planning and Development (Local Planning Schemes) Regulations 2015.”

8. Subsequently, the Applicant proceeded to prepare the Structure Plan. At its meeting of 21 November 2019 the Shire of Broome resolved to advertise the Structure Plan in accordance with clause 18 of Schedule 2 of the Planning and Development (Local Planning Schemes) Regulations 2015 for a minimum of 28 days.

9. I note in passing that the Applicant may have taken the Shire of Broome’s advice that a structure plan would need to be prepared and submitted to indicate some level of support for the Structure Plan. The Shire has denied this. My understanding is that the Shire was following statutory process only and its actions in regard to the Structure Plan should not be taken as support for the Structure Plan.

10. Following advertising, a reduced quorum of the Shire of Broome (as approved by the Minister for Local Government) considered the Structure Plan and resolved to recommend to the WAPC that it refuse the Structure Plan.

11. On 30 June 2020 the Statutory Planning Committee (SPC) of the WAPC considered the proposal. The report on the proposal to the SPC prepared by the Department of Planning, Lands and Heritage recommended that the Structure Plan be modified and resubmitted to the WAPC for approval. At its 30 June 2020 meeting SPC resolved to refuse the...
Structure Plan, on the basis that it is inconsistent with the local planning framework, being the Shire of Broome Local Planning Strategy 2014 and the Shire of Broome Local Commercial Strategy 2017.

12. On 26 July 2020, the Applicant filed an application at the SAT for the review of the Respondent’s decision.

13. On 11 August 2020, I wrote to the President of SAT and directed this Application be “called-in”, by being referred to me for determination in accordance with section 246(2)(a) of the PD Act.

14. Pursuant to section 246(4) of the PD Act, a copy of the direction was tabled in both Houses of Parliament on 13 August 2020, and published in the Government Gazette on 18 August 2020.

Submissions

15. The Applicant, the Respondent and the Shire of Broome (all three constituting the Parties) were invited to provide written submissions by 5pm on Tuesday 8 September 2020.

16. Submissions were exchanged on 9 September 2020.

17. The Parties were invited to provide any submissions in response by 5pm Monday 21 September 2020.

18. Submissions from other persons, including members of the public were received and collated.

19. The submissions of the Parties and other persons were published by making them available to the public during the office hours of the office of the WAPC, in accordance with regulation 44 of the Planning and Development Regulations 2009.

20. Under section 246(6) of the PD Act I am to have regard to the submission of the Parties when determining this Application. I have had regard to the submissions of the Parties comprising:

   a) an initial submission from each Party;

   b) an additional submission from each Party in response,
being six separate submissions in total.

21. I may also have regard to any other submissions received, pursuant to section 246(6) of the PD Act. The word “may” indicates a discretion and I am not bound to have regard to submissions other than those of the Parties.

22. I have exercised my discretion to consider submissions from other persons where they were received before the closing date for initial submissions. There were 16 such submissions, the content of which I will refer to where relevant. I have provided these submissions to the Parties and the Parties have had the opportunity to respond to them.

23. A further 11 public submissions were received after the closing date. These further submissions were not provided to the Parties.

24. The general public were consulted on the Structure Plan upon the advertising of the Structure Plan by the Shire of Broome. The Shire of Broome reported on those submissions arising out of the advertising process pursuant to clause 20(2) of the Deemed Provisions. I have reviewed the Shire’s report along with the rest of the material put before the Respondent as the original decision maker.

25. In its submission, the Shire of Broome expressed concern that the process that I undertook in order to determine the Application did not include further public advertising. The process was undertaken in accordance with the PD Act, which I consider to be sufficient and appropriate.

LEGAL FRAMEWORK

Structure Plan

26. Part 4 of Schedule 2 to the Planning and Development (Local Planning Schemes) Regulations 2015 (Deemed Provisions) sets out the legislative basis for preparing and approving structure plans.

27. Clause 22 of the Deemed Provisions provides that the WAPC may approve or refuse a proposed structure plan.

28. If the WAPC does not approve a structure plan, the owner/applicant may apply to the SAT for review in accordance with Part 14 of the PD Act (clause 25 of the Deemed Provisions).
29. If approved, the Structure Plan must be given due regard by relevant decision makers when determining relevant proposals, including applications for development and subdivision approval under clause 27 of the Deemed Provisions. Structure Plan approvals are usually for a period of 10 years (being the default under clause 28 of the Deemed Provisions), or as specified in a condition of approval.

Jurisdiction

30. The jurisdictional basis for my decision is set out in sections 246 and 247 of the PD Act. For ease of reference, I will set out those sections here:

246. Minister may call in application to SAT for review

(1) This section applies to an application made to the State Administrative Tribunal if the Minister considers that the application raises issues of such State or regional importance that it would be appropriate for the application to be determined by the Minister.

(2) The Minister may direct —

(a) the President to refer an application to which this section applies to the Minister for determination; or

(b) the State Administrative Tribunal to hear the application but, without determining it, to refer it with recommendations to the Minister for determination.

(3) The Minister cannot give a direction under subsection (2) —

(a) in respect of an application made to the State Administrative Tribunal under the Heritage of Western Australia Act 1990; or

(b) more than 14 days after the application was made to the State Administrative Tribunal; or

(c) after a final determination has been made in relation to the application.

(4) The Minister, within 14 days after a direction is given, is to cause a copy of it to be published in the Gazette and, as soon as is practicable, is to cause a copy of it to be laid before each House of Parliament or dealt with under section 268A.

(5) If the Minister gives a direction under subsection (2)(a), each party to the proceeding may present the case of that party to the Minister.

(6) The Minister is to have regard to the submissions of the parties and may have regard to any other submission received by the Minister.
(7) A copy or transcript of any submission to which the Minister has regard is to be —

(a) given to each party; and

(b) published in the manner prescribed by the regulations.

247. Determination of application by Minister

(1) In determining an application the Minister is not limited to planning considerations but may make the determination having regard to any other matter affecting the public interest.

(2) When the Minister determines an application that determination has effect according to its tenor.

(3) When an application is referred to the Minister under section 246(2)(b) the executive officer of the State Administrative Tribunal is to —

(a) give a copy of the recommendations that accompanied the referral to each party within a reasonable time after the referral; and

(b) make a copy of the recommendations available during office hours for inspection by any person without charge.

(4) The Minister is to —

(a) give to each party written reasons for the determination of the Minister on the application; and

(b) as soon as is practicable, cause a copy of those reasons to be laid before each House of Parliament; and

(c) upon payment of a fee determined in the manner prescribed by the regulations, supply a copy of those reasons to any other person.

(5) The decision of the Minister is final.

31. I understand that the nature of my role is not simply to critique the WAPC's original decision of 30 June 2020 but to consider the question of whether the Structure Plan should be approved.

32. Section 247(1) PD Act provides me with a broad power to consider not just planning matters, but any other matters that affect the public interest.
However, I am still bound by the scope of duties and functions set out in the PD Act. In this regard, I am guided by the remarks in *Hanson Construction Materials Pty Ltd and City of Vincent* [2017] WASAT 81 at [35] that:

In fact the PD Act does not specify what powers are available to the Minister when determining a review application called in pursuant to s 246 of the PD Act. The powers of the Tribunal on determining a review application, including one made under Pt 14 of the PD Act, are specified in s 29 of the SAT Act. The Minister is to determine the review application as specified in s 247(1) of the PD Act. That determination is to have effect according to its tenor: s 247(2) of the PD Act.

Planning principles

34. A structure plan is made pursuant to the Deemed Provisions of a local planning scheme. A structure plan may be prepared if required by the local planning scheme (as is the case in this instance), a State planning policy, or if the WAPC considers that a structure plan for the area is required for the purposes of orderly and proper planning (clause 15 of the Deemed Provisions).

35. As set out in clause 14 of the Deemed Provisions, a structure plan is a plan for the coordination of future subdivision and zoning of an area of land.

36. Unlike for development approval, the legislative framework does not give specific guidance around the principles for deciding whether or not to approve a structure plan.

37. Nevertheless, I consider these matters to be generally relevant:

   i. The purposes of the PD Act, which include in section 3(1) to:

   ... 

   (b) provide for an efficient and effective land use planning system in the State; and

   (c) promote the sustainable use and development of land in the State.

   ii. The purpose and intent for which structure plans are prepared, being to coordinate the future subdivision and zoning of an area of land: see clause 14 of the Deemed Provisions.
iii. The planning information set out in clause 16(1), which includes everything from the key attributes and constraints of the area, to the planning context, to major proposed land uses and zonings, to estimates of the number of lots created, to population impacts, to transport considerations, to any staging of subdivision or development, to any factors, and other information the WAPC requested.

iv. The submissions and report provided by the local government under clauses 19 and 20 of the Deemed Provisions.

v. Relevant provisions of the local planning scheme, pursuant to section 73(2A) of the PD Act, noting that a local planning scheme takes effect as subsidiary legislation and therefore has the status of written law.

vi. Relevant documents comprising the local planning framework including local planning policies and local planning strategies.

vii. The State Planning Framework, including the Kimberley Regional Planning and Infrastructure Framework (Framework), published by the WAPC in December 2015. The Framework identifies Broome as a regional city, that is, a focus of higher order functions and services that provide not just for the town itself, but for its regional catchment.

viii. Other well-established planning principles, many of which are codified in clause 67 of the Deemed Provisions in relation to development applications, but which otherwise have a long history of applying to planning matters generally in this State and across Australia.

Public interest principles

38. The Tribunal usually makes decision of this nature, and does so with utmost professionalism, but Parliament has provided me with the power to “call-in” applications if, on rare occasions such as this one, the matter is one of State or regional significance. Part of the legislative intent behind such a power is that pursuant to section 247(1) of the PD Act, I am not limited to planning considerations but may make my determination having regard to any other matter affecting the public interest. In addition to any ground of planning merit, I have duly considered any points raised in the submissions going to issues of public interest.
39. Pursuant to section 247(4)(b) of the PD Act, I must cause this decision to be laid before each House of Parliament. In having regard to other matters affecting the public interest, I have also reflected upon my own role as a Minister of the Crown ultimately responsible for this determination to the people of Western Australia through Parliament.

ISSUES

Reasons for refusal

40. As set out in the minutes of the meeting of the Statutory Planning Committee of the Respondent for the meeting of 30 June 2020, the Respondent gives the following as reasons for its refusal:

The Statutory Planning Committees [sic] resolves that the Cable Beach Road East Service Commercial Local Structure Plan be refused as it is inconsistent with the local planning framework, being:

- Shire of Broome Local Planning Strategy 2014.

41. The Respondent also noted that the Shire of Broome has initiated a review of its Local Planning Strategy and Local Planning Scheme, which will inform the future land permissibility.

Scope of issues as set out in submissions

42. The submissions by the Parties and others addressed matters beyond the original reasons for refusal. This is to be expected since I am making the decision afresh and may have regard to public interest matters rather than strictly planning considerations.

43. Unsurprisingly, the Applicant’s submissions were in favour of approval of the Structure Plan. The Shire of Broome advocated for refusal. Although the Statutory Planning Committee of the Respondent originally resolved to refuse the Structure Plan, the Respondent (being the Western Australian Planning Commission proper) has reconsidered its position and has given reasons why the Structure Plan could be approved.

44. In addition to the submissions, I have reviewed the material which the Respondent had before it, including the schedule of submissions received by the Shire of Broome following the original advertising of the Structure Plan by the Shire of Broome.

45. The main issues as I see them are as follows:
(a) Consistency with the local planning framework, which relevantly consists of:
   (i) Local Planning Scheme No. 6 (LPS 6 or Scheme).

(b) The Shire’s intention to review the Local Planning Strategy and LPS 6, and whether approving the Structure Plan ahead of the review may prejudice that review and any subsequent scheme amendments.

(c) Whether matters affecting the public interest favour approval or refusal of the Structure Plan including:
   (i) Economic benefit for Broome.
   (ii) Economic benefit for the Applicant.
   (iii) Community views (including amenity and environmental impacts).

(d) The suitability of the Structure Plan for approval.

ANALYSIS

Local Planning Framework

46. As mentioned above, there is no particular dispute that the local planning framework relevantly consists of the Local Planning Scheme No. 6, the Local Planning Strategy 2014 and Local Commercial Strategy 2017.

Local Planning Scheme

47. The subject land is zoned Development in LPS 6. This zoning requires that development be guided by an approved structure plan.

48. The subject land was first zoned Development when the Shire of Broome Town Planning Scheme No.4 (TPS 4) was first published in the Government Gazette on 21 December 1999. TPS 4 was revoked when the Shire of Broome Local Planning Scheme No. 6 was first published in the Government Gazette on 30 January 2015. LPS 6 matches TPS 4, with regard to the zoning of the subject land. In effect, the subject land has been zoned Development since 21 December 1999.

49. Local planning schemes are subsidiary legislation. See section 5 of the Interpretation Act 1984 which states:
subsidiary legislation means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument, made under any written law and having legislative effect.

[emphasis added]

50. The objects of the Development zone are set out in LPS 6 as follows:

The objectives of the Development Zone are to:

(a) provide for a range of mixed land uses and subdivision in accordance with an adopted structure plan;

(b) enable the preservation and management of areas of cultural and environmental significance;

(c) provide for the coordinated provision of infrastructure, facilities and developable land through relevant structure plans and associated development contribution plans.

51. The Scheme does not provide any further guidance as to what sorts of uses might be suitable in the subject land, save that it can be for mixed use, should be coordinated and enable the preservation and management of areas of cultural and environmental significance.

52. The Respondent did not say that the Structure Plan is inconsistent with the Scheme as part of its reasons for refusal, and neither did the Shire of Broome in its submissions.

53. The submissions from the public which requested the refusal of the Structure Plan state that the Structure Plan is inconsistent with the Scheme. With respect, I cannot accept those submissions.

54. No uses are explicitly excluded or prohibited by the Scheme. Specifically, service commercial use as contemplated by the Structure Plan is not prohibited. Accordingly, the Structure Plan is not inconsistent with the Scheme.

55. Should the Structure Plan be approved, the subsequent land use and development will need to be in accordance with the provisions of LPS 6. As the Structure Plan indicates the relevant zoning to be Service Commercial, I would expect decision makers for the development approval to give due regard to the provisions of LPS 6 which apply to a Service Commercial zone.

56. The purpose of the Service Commercial zone is set out in LPS 6 as follows:
3.7.1 The purpose of the Service Commercial zone is to provide for a wide range of uses including service industry, warehousing and showrooms which, by reason of their scale, character, operational and/or land requirements, cannot conveniently or economically be accommodated within the Town Centre Zone or Light Industry Zone.

57. This means that the broad intent of the Structure Plan, which is to provide for service commercial uses, may be approved under the Scheme. The question then becomes whether the Structure Plan ought to be approved having regard to the rest of the local planning framework, general planning and public interest considerations.

Local Planning Strategy

58. A local planning strategy is a precursor step to making a local planning scheme. Part 3 of the Planning and Development (Local Planning Schemes) Regulations 2015 sets out the process for making a local planning strategy, which culminates in the WAPC endorsing and publishing the local planning strategy.

59. The Shire of Broome’s Local Planning Strategy 2014 (Strategy) was endorsed by the WAPC in 2014.

60. Under the Strategy, the subject land is within the Future Development Area of “Precinct 9” with the objective that this area be established as an “education/health precinct providing for student accommodation, sporting facilities and residential development and potential relocation of the hospital”.

61. As noted in the Respondent’s reasons for refusal, the Shire of Broome’s submissions, and submissions from two third parties, the use proposed by the Structure Plan is inconsistent with the Strategy. This is essentially correct.

62. Nevertheless, both the Applicant and the Respondent have submitted that the objectives of the Strategy can only be fulfilled if the Broome International Airport is decommissioned from its existing site. At present the subject land abuts the airport and is unsuitable for the type of development proposed in the Strategy.

63. The Applicant has submitted that the Broome International Airport is unlikely to be decommissioned from its existing site in the short to medium term, because:

a) More than $57 million has been spent on airport upgrades between 2008 and 2015.
b) The airport's runway was only recently resurfaced (in the last 5 years) at considerable expense.

c) The international terminal is presently being renovated and extended at an estimated cost of $14 million.

d) The Royal Flying Doctors' Service recently completed the construction of its new hangar for approximately $4.5 million.

e) The airport owns the current site freehold and the owners have no tenure over the potential new airport site identified by the planning framework.

64. It is public knowledge that in August 2019 Broome International Airport announced plans for a major upgrade of their facilities. The Shire of Broome's submissions in response did not challenge these submissions, and I therefore accept them.

65. Being a precursor to a local planning scheme, a local planning strategy is in the nature of a guidance or policy document. Decision makers should therefore have regard to a local strategy but are not bound by it.

66. The fact that the successful implementation of the Strategy is predicated on the decommissioning of the airport from its existing site affects the weight to be given to the Strategy.

67. I accept the submissions of the Applicant and Respondent that the Strategy should be given less weight because of the unlikelihood of the airport being decommissioned from its existing site in the near future. Consequently, I consider that I am able to approve the Structure Plan even though it is inconsistent with the Strategy, if the planning and public interest factors warrant it.

Local Commercial Strategy

68. The Shire of Broome Local Commercial Strategy 2017 (LCS) was adopted by the Shire of Broome in October 2017.

69. The LCS describes its status as:

an informing document within the Shire's Corporate Business and Planning framework and will provide guidance in the review of the Shire's Local Planning Strategy and Local Planning Scheme No. 6. Further to analysis of the best available data, the recommendations of the Commercial Strategy provide direction
for land-use planning over the medium to long-term. The recommendations are not binding and will be subject to further investigation.

[emphasis added]

70. The WAPC has not endorsed the LCS, and is not required to do so.

71. The Shire submits that the Structure Plan is inconsistent with the LCS. If I understand the Shire’s argument correctly, the inconsistency arises because the LCS:

(a) identifies the land addressing Frederick Street between Chinatown and the Boulevard as appropriate for bulky good/larger format retail; and

(b) finds that sufficient land is already allocated to service commercial purposes.

72. Therefore, the Shire submits, if service commercial were permitted in another area, this “additional area for service commercial land uses would result in an over-allocation and fragmentation of land for commercial purposes”. The Shire contends that the proposal would create an independent service commercial area as set out in the Structure Plan would result in the “erratic and piecemeal development of service commercial land uses” within Broome.

73. I acknowledge that there are servicing and access efficiencies in the co-location of service commercial uses. Conversely, fragmentation of commercial land can reduce the opportunity to benefit from such efficiencies. I understand that Broome’s existing commercial / retail spatial pattern may be characterised as being somewhat fragmented, with existing bulky goods type retail generally established in light and service industry areas.

74. As I understand it, the Shire, through its LCS has identified two preferred consolidated service commercial sites: a larger area addressing Frederick Street adjacent to the Boulevard Shopping Centre, and; a smaller centre at the corner of Frederick Street and Cable Beach Road East.

75. I will not consider the merits or otherwise of the Frederick Street land identified in the LCS, as I am only concerned with the land the subject of the Structure Plan.

76. I do not consider that the potential for “over allocation” of service commercial land in Broome is a significant issue that should impact my consideration of the Structure Plan.
77. There is potential for amenity impact if there are service commercial zones in multiple locations. However, I note that thus far no larger format premises have established in either of the Frederick Street service commercial areas. I also consider that the amenity impact of fragmentation for service commercial uses is less than that of other uses, such as retail. Accordingly, whilst I acknowledge that fragmentation is not ideal, the impact is not significant in this case, especially given that fragmentation already exists in Broome’s commercial areas.

78. The Structure Plan effectively proposes the establishment of a new type of commercial precinct in Broome, within a landscape of already fragmented commercial areas. Isolated from the traditional and tourist precincts of Cable Beach and Chinatown, the Boulevard suburban shopping complex and other dispersed commercial uses, the proposal appears to provide for the colocation of larger format premises into a single precinct.

79. I therefore consider that approval of the Structure Plan would provide a service commercial site which will enable larger format service commercial uses to benefit from the servicing and access efficiencies of colocation without compromising the underlying principles of the LCS.

80. I acknowledge the Applicant’s contention that the LCS incorrectly assumes that there is currently no unmet demand for service commercial uses in Broome, and that if there is demand that locating such proposals on land zoned Light Industrial is sufficient to meet demand. A test of market demand may be the willingness of an investor to commit to such an enterprise. The Applicant advises in its submission that a larger format service commercial operator has signalled interest in investing in the site, should the Structure Plan be approved, and the land developed. My deliberations do not fall on the options of one possible tenant or another, but I do note that such interest would not be garnered if demand was low.

Strategic Planning and Proposed Review of Local Planning Framework

81. The Shire submits that approving the Structure Plan that is contrary to the current strategic planning framework would undermine public and investor confidence in the planning system.

82. I acknowledge that planning decision makers should be cautious about departing from established planning strategies, and planning decisions should not be made capriciously.
However, although the planning framework should properly inform decision making, it
does not necessarily constrain it; and if departure from the framework can be justified
either on planning grounds, in the public interest, or both, then this can be done.

83. The Shire of Broome further submits that it would set an undesirable precedent to
approve the Structure Plan ahead of the Shire’s review of the overall strategic planning
framework. If the Structure Plan is approved first, then that, the Shire submits, could
prejudice the review process.

84. The Shire of Broome also refers to the Action Plan for Planning Reform which I launched
in August 2019, specifically the focus on strategic planning.

85. The community engagement phase of the Local Planning Strategy and Local Planning
Scheme review started on 1 July 2020 and is no doubt progressing normally.

86. I appreciate that at a practical level, if the Structure Plan is approved, it will essentially
pre-empt the Shire’s review of its local strategic planning framework. That may in turn
have some bearing on any future review and amendment of the Scheme, if such an
amendment is found to be warranted.

87. For better or worse, a planning review process is a relatively lengthy one. There are
processes for advertising, consultation and WAPC endorsement for a new planning
strategy, and the same again for changes to the local planning scheme, with the addition
of approval by the Minister for Planning to any scheme amendments.

88. The Shire is in the early stages of a review process that can be expected to take some
years to complete. It is still too early to know with any certainty as to how the Strategy
may change, if at all, let alone any potential amendment to the Scheme that may flow on
from a review of the Strategy.

89. Were a scheme amendment imminent, or being seriously considered, then I would need
to take the proposed amendments into consideration. However, where any change to the
planning framework might be in the more medium to long term, there is authority to the
effect that the potential future schemes and strategies ought not place a moratorium on
development or prevent a use that might otherwise be consistent with orderly and proper
planning: see Coastal MidWest Transport and City of Canning [2012] WASAT 202 at
[72]. In that case also, the Tribunal held at [73] “it remains open to consider the merits
of a development proposal, on the basis of the zoning and scheme provisions that are in place, to provide the framework for a decision."

90. It is also possible that upon review, the current Strategy may change. As noted above, the Strategy is predicated on the existing Broome International Airport being decommissioned from its current site, something which evidence suggests is unlikely to occur in the short to medium term.

91. Whilst I have some sympathy for the Shire’s submission, their planned review is only one factor among many, and the same argument could apply to stop or defer any proposed use in the subject area. Planning systems are continually in states of review and change, which is why greater weight is usually limited to circumstances where those changes are seriously entertained and imminent. Moreover, the Respondent has submitted that the Structure Plan can be supported prior to the review being finalised.

92. Accordingly, I consider that the most weight should be given to the relevant planning framework that is applicable today, and the Structure Plan should not be refused merely because the planning framework is undergoing review.

Matters of Public Interest

93. The Application has generated significant interest within the community of Broome. The initial advertising of the Structure Plan by the Shire of Broome yielded public submissions which were overwhelmingly against the proposal.

94. I have received 16 submissions from persons who are not Parties, which were received within time, and a further 11 submissions out of time.

95. As mentioned above, I am having regard to the 16 submissions received within time. Of these 16 submissions, 14 were in support of approving the Structure Plan and 2 were against. I have taken into account the content of each submission. I am not giving extra weight to the submissions supporting approval simply because there are more of them; considering the merits of the Application is not a numbers game.

96. The views of the community are important to me, but I should note that the views of particular individuals from amongst the public, or matters of public attention do not necessarily reflect matters that affect the public interest. In Director of Public Prosecutions v Smith [1991] 1 VR 63 at 75 it was stated that:
"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is, therefore, the interest of the public as distinct from the interest of an individual or individuals. There are several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community events occur which attract public attention. Such events are of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest."

Economic Considerations

97. In general, economic matters are not relevant planning considerations. In this case however I am expressly authorised to take into account matters affecting the public interest.

98. At this time, with the world in the grip of a pandemic, and many economies in recession, economic factors are particularly important.

99. There are submissions from the Applicant and others in the Broome community that approval of the Structure Plan and the subsequent development it would allow will have a positive impact on the local economy of Broome. Opportunities for employment would exist during the construction phase of the eventual development, as well as in the operation of the service commercial business(es) to be established on the subject land.

100. The Applicant estimates $57 million in direct economic activity during development and construction activity. Further flow-on effects on broader economic activity in the order of $86 million is projected.

101. In addition to the jobs created during the construction phase, the development is expected to support ongoing employment opportunities, directly through the development together with supply chain and consumption effects. Indigenous people are expected to benefit from the increased employment opportunities generated by the proposed development.

102. The Shire of Broome does not dispute that approving the Structure Plan would lead to economic benefits, but submitted that these could be achieved in other ways. In particular, the Shire submitted that the potential tenant associated with the Application has also expressed interest in other sites, and the Shire is currently considering an
application for amendment to a Local Development Plan to allow a similar development to occur there. The Shire submits that this illustrates two points:

(a) firstly that the economic potential will not be lost to Broome if the Structure Plan is not approved; and

(b) secondly that it shows that there are viable alternative sites available for the proposed service commercial development.

103. The Shire of Broome further makes the point that even if the Structure Plan is approved, the development may not ultimately proceed, as the potential tenant may well decide to locate elsewhere.

104. As in all planning matters, a successful application only confers a right, not an obligation to move forward with development. In this case the Application is only for a Structure Plan and separate development approval will be required before any construction occurs. However, that argument could be made in relation to any planning decision. When assessing the merits of a planning proposal, planning decision makers must assume that development will continue; that the building will be built. I think it is reasonable to make these same assumptions when assessing the economic benefits of this particular proposal.

105. As to the potential economic benefits being had elsewhere, I note that my role is only to decide on the proposal in front of me. I have no way of knowing if the requisite approvals will ultimately be obtained for any other proposal. Even if they are, there is no guarantee that the proponents will go ahead with those other developments either. Therefore while I take the Shire’s point, I consider that the correct approach is to treat the Application on its own merits without regard to other potential proposals, and on the basis that construction will ultimately proceed.

106. It is essentially undisputed that through the Structure Plan any associated development, if it proceeds, will positively contribute to Broome’s economy. I find that the economic benefits of the Structure Plan are a relevant public interest matter that I should take into account.
Benefit to Applicant

107. The nature of the ownership of the subject land is pertinent to the consideration of the Application, though I note that the identity of a proponent is not usually material. This however, is a special case.

108. The Yawuru people are the traditional owners, and have been determined by the Federal Court to be native title holders of the lands and waters in and around Rubibi (the town of Broome). The Applicant was formed to hold land interests on behalf of the Yawuru people.

109. The Applicant has come to own the subject land as part of the ILUA between the Yawuru people (represented by the Applicant) and the State of Western Australia (in various capacities) and the Shire of Broome. Relevantly to this Application, the Applicant was transferred the subject land as part of the compensation for impairment or extinguishment of the Yawuru people’s native title rights.

110. The ILUA is intended to, among other things, promote social and cultural maintenance and enrichment for the Yawuru people, and promote their economic independence and the development of economic and commercial capability and capacity.

111. The Applicant in its submissions identified that this particular proposal will provide a strategic opportunity for the Applicant to commercialise its land assets in order to generate income for its operations. The Applicant has found that other parcels of land which it owns do not have the same development potential as the subject land.

112. It is in the public interest to enable the Yawuru people to fulfil the intentions of the ILUA. These purposes are after all, one of the reasons why the land was transferred to the Applicant.

113. The Applicant referred to clause 13.2 of the ILUA which states:

13.2 Planning processes

Where planning processes are undertaken by State agencies or local government in respect of any portion of the Determination Area, the State and the Shire (as applicable) shall support Yawuru RNTBC participation and consultation.

13.3 Local government issues
• The State agrees to take part in discussions with the Shire and to be supportive of Nyamba Buru Yawuru being made exempt by the Shire from the payment of rates until Nyamba Buru Yawuru has created an ongoing income stream from the development of any of the land transferred to it under this Agreement.

• Where at any time prior to or after transfer of the freehold to Nyamba Buru Yawuru of any parcel of Yawuru Land, Nyamba Buru Yawuru reasonably considers that the parcel should be rezoned in order that Nyamba Buru Yawuru may maximise its development potential and commercial viability, then the State and the Minister for Lands shall be supportive of an application for rezoning, and shall execute any appropriate documents required by Nyamba Buru Yawuru in order to enable the lodgement of an application with the Shire, but the Parties acknowledge and agree that nothing in this clause 13.3(b) in any way fetters the exercise of any discretionary power of the State or the Minister for Lands under any law or planning scheme.

• The Shire acknowledges and agrees that where it has been agreed by the Parties that land will be transferred hereunder, the Parties to the transfers shall not be required to refer those transfers to or consult with the Shire.

114. The Applicant has submitted that “at the time of the respective decisions to refuse the structure plan, the Shire and the SPC did not have any or sufficient regard to the intent nor the provisions of the ILUA as set out above”. The Shire in its response has rejected any implication that it has not complied with its obligations under the ILUA. For what it is worth, I do not see that claim being made against the Shire. Even if it were, I doubt that the ILUA would require the Shire to support every planning application made by the Applicant, regardless of its quality or appropriateness.

115. The Applicant and the Shire of Broome both correctly recognise that the ILUA does not operate to fetter decisions made by the State under any law or planning scheme. The SPC on behalf of the Respondent is not bound to approve the Structure Plan simply on the basis of the ILUA.

116. In Bac Village Pty Ltd and WAPC [2013] WASAT 58 the SAT determined that objectives such as providing sustainable economic, social and cultural welfare for traditional owner proponents could not be used as the sole justification for an outcome which is inconsistent with orderly and proper planning.

117. Accordingly, as submitted by the Shire of Broome, clause 13.3 of the ILUA allows me to exercise my discretion to refuse the proposed Structure Plan.
On the other hand, in determining this Application, I am able to have regard to public interest matters. I consider the objectives of the ILUA and the potential economic, social and cultural benefits to the Applicant, together with the economic benefits of the proposal to the wider Broome community as being relevant public interest matters which favour approval of the Structure Plan. These public interest matters are to be considered and weighed against relevant planning matters including the State Planning Framework, the Local Planning Scheme and the Local Planning Strategy.

Community Concerns

The public submissions requesting refusal of the Structure Plan echo some of the arguments put forward by the Shire of Broome and these have been addressed elsewhere.

I understand the community concerns around amenity impacts, principally traffic, noise and light pollution.

With regard to adverse impact on amenity, I note that the subject land is separated physically and visually from residential areas. The closest residential area is separated from the site by Cable Beach Road East and an adjoining vegetated drainage reserve. The subject land is either not visible or visible to only a very minor degree from the residential area due to distance, elevational differences and vegetation buffering.

Potential amenity impacts with respect to noise and light pollution are also minimised by the significant physical separation between the site and the closest residential area. Notwithstanding this, I consider that this could be managed through modifications to the Structure Plan to ensure that amenity concerns be addressed at subsequent, more detailed phases of planning.

I note that amenity concerns based on potential behaviours associated with the proposal were considered by the Shire and WAPC in their deliberations. Types of behaviours noted that could adversely affect the amenities of the locality included: litter, anti-social behaviour, criminal opportunity and increased pedestrians walking through the adjacent suburban areas. It appears that these concerns are founded on the possibility of a fast food outlet being established on the subject land if the Structure Plan is approved and the land developed.

I note that the Structure Plan lists ‘fast food outlets’ as a proposed use, and that ‘fast food outlet (drive-through)’ is a permitted use in the Service Commercial zone under LPS 6.
I remain uncertain as to whether the types of behaviours cited are consequential to the existence of a fast food outlet, or indeed whether some of those behaviours do have an adverse amenity impact. Nevertheless, I acknowledge the concerns of the community in this regard, although I note such concerns seem to be common to proposed fast food outlets throughout the State. I would also expect the suitability of any particular fast food outlet, on certain conditions, would be something best addressed in further detail as part of any future development application.

Community concerns have also been raised over the potential impact on the character of Broome, and the potential for inappropriate built form to eventuate.

In relation to the character of Broome, I appreciate the sentiment expressed by the Shire and those who would like to see the Structure Plan refused. It is difficult to quantify how the cumulative effects of any given change or development may affect feelings of the uniqueness or specialness of a place. Needless to say, Broome has changed tremendously over the past 130 years, and will continue to do so. It appears to me that any question of the character of Broome must begin with a consideration of Yawuru people. That the Applicant represents Yawuru people provides, in my view, a compelling argument that the proposal will fit within the history and character of Broome.

Having regard to the site characteristics, the subject site is part of a cell of land between the Broome International Airport and Cable Beach Road East/Frederick Street that is used for non-residential purposes. This cell includes the Boulevard Shopping Centre, the Broome Recreation and Aquatic Centre and the North Regional TAFE. There is no residential land use within this cell. Cable Beach Road East and Frederick Street represent a boundary between this cell and residential development to the south.

The Structure Plan provides for service commercial uses that are consistent with the established pattern of land use in the cell to the north of Cable Beach Road, and will not negatively impact the character of the area.

Some submissions opposed to the Structure Plan cite environmental concerns as a sufficient, or at least contributing reason for refusal. Issues noted in submissions include habitat loss, water management, increased pollution and urban heat. These matters, to some extent, have been determined by the nature of the zoning in LPS 6. Consideration to zone the land Development necessarily required consideration of macro environmental
concerns such as habitat loss. Matter such as water management could be managed at more detailed stages of development. With regard to these matters, I consider that, on balance, the Structure Plan is not unreasonable or beyond what might be expected for the subject land which has already been identified as suitable for urban development in the Local Planning Scheme.

130. In relation to built form, the Structure Plan provides for the land to be used for a broad purpose, with precise land use and development to be determined at subsequent planning phases. In its submission the Applicant advises that it is willing to modify the Structure Plan to include a requirement for a Local Development Plan “to provide further assurance that amenity and character will be maintained”.

131. Modifying the Structure Plan to reference the requirement for a Local Development Plan would enable a range of amenity, character and built form outcomes to be managed.

132. I am of the view that the Structure Plan should, if approved, be modified to require that a Local Development Plan be prepared at a subsequent planning phase to guide the site layout and built form outcomes on the subject land.

Suitability of Structure Plan for Approval

133. The technical qualities of the Structure Plan are somewhat limited. However, the subsequent information provided by the Applicant in their submissions clarifies a range of matters to a satisfactory standard. If approved, the Structure Plan will require modifications as part of the conditions of approval in order to bring the Structure Plan into line with current policy and practice for the preparation of structure plans.

134. The Structure Plan was prepared with regard to five technical studies that consider the following issues:

- Traffic impact assessment
- Bushfire hazard level assessment
- Flora and Fauna assessment
- Geotechnical analysis
- Local water management
The technical studies are appended to the Structure Plan, and I consider these studies sufficient to inform my decision on the Structure Plan. However, this should not be taken as endorsement of the use of those studies for any further step in the planning and development process.

**DECISION**

136. I am satisfied that the Structure Plan is not inconsistent with LPS 6, and is capable of approval.

137. The decision of whether or not to approve the Structure Plan therefore comes down to a weighing of the various planning and public interest matters.

138. I acknowledge that the Structure Plan is not consistent with the Strategy, or LCS, but these documents do not have the legislative effect that the Scheme does.

139. As I have discussed above, the Strategy should be given less weight because its implementation is predicated on an event (the decommissioning of Broome International Airport from its present location) that is unlikely to occur in the near future.

140. The potential economic benefits for the community of Broome and the Applicant are matters affecting the public interest which strongly favour the approval of the Structure Plan.

141. The planning assessment indicates that the subject land is suitable for service commercial use.

142. I acknowledge that the Structure Plan diverges from the LCS and the potential for fragmentation of service commercial uses in Broome may impact on the amenity for the community. However, I am not persuaded that this possibility, in the context of already fragmented commercial areas and the other factors which favour approval, provides sufficient reason to refuse the Structure Plan.

143. I am content that the community concerns around amenity and eventual built form can be addressed by future more detailed planning processes. To achieve this I will require modifications to the Structure Plan so that a Local Development Plan must be prepared prior to undertaking development on the subject land.
144. For the reasons outlined above, I determine that the Structure Plan as presented to the WAPC for approval be approved, subject to conditions and modifications.

145. The Respondent, Applicant and the Shire of Broome have all submitted recommended modifications to the Structure Plan in their submissions. I have considered all of these recommendations in my deliberations, and settled on what I believe to be reasonable and appropriate modifications.

146. The conditions (incorporating the modifications required) which apply to the approval are set out in Annexure A.

147. I now will cause these reasons to be given to the Parties, laid before each House of Parliament, and provided to any other person as requested, pursuant to 247(4) of the PD Act.

[Signature]

HON RITA SAFIOTI MLA
MINISTER FOR PLANNING

26 NOV 2020
That the Minister for Planning resolves to approve the Local Structure Plan titled ‘Lot 3082 Cable Beach Road East Service Commercial Structure Plan (December 2019)’ and submitted by Nyamba Bura Yawuru Ltd, subject to the following conditions:

Minister’s conditions:

1. The Local Structure Plan is to be modified generally in accordance with the Schedule of Modifications attached, to the satisfaction of the Minister for Planning.

2. The modified Local Structure Plan required under condition 1 is to be received by the Minister for Planning no later than 90 days from the issue of this decision.

3. The Minister’s approval is valid for 10 years from the date of the Minister’s confirmation of satisfaction that the modifications have been completed as per condition 1.
## CONDITION 1 – SCHEDULE OF MODIFICATIONS

<table>
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<tr>
<th>Item</th>
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<tbody>
<tr>
<td>3.</td>
<td>Part 1 – Clause 2</td>
<td>Expand “Operation” to include reference to the ‘due regard’ nature of structure plans and to note the effective period of 10 years.</td>
</tr>
<tr>
<td>4.</td>
<td>Part 1</td>
<td>Prior to “3 Development Requirements” add “Structure Plan Objectives” and include the following wording: i. To provide guidance on the subdivision and development of the structure plan area. ii. To facilitate the orderly and proper planning of the structure plan area within the context of the site’s opportunities and constraints. iii. To provide guidance with respect to the application of discretion in terms of land use and development. iv. To provide mechanisms for built form and landscape control.</td>
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<td>5.</td>
<td>Part 1</td>
<td>Prior to “3 Development Requirements” add “Staging” and provide brief commentary on the anticipated staging of the development.</td>
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<td>6.</td>
<td>Part 1 – Clause 3.1</td>
<td>Using the preferred document structure shown at Modification 36 redraft for accuracy and clarity and include land use controls that reference service commercial in Local Planning Scheme No.6.</td>
</tr>
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<td>7.</td>
<td>Part 1 – Clause 3.2</td>
<td>Include a requirement for the preparation of a Local Development Plan to guide and coordinate site layout and built form outcomes of the proposal, to address the following: i. Interface / amenity ii. Spatial layout iii. Landscaping iv. Built form.</td>
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<td>8.</td>
<td>Part 1 – Clause 3.2</td>
<td>Include a requirement for the preparation of the following: i. Noise Management Plan – condition of development approval</td>
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<td>Item</td>
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<td>10.</td>
<td>Part 2 – Clause 1.1.1</td>
<td>Reword this section to clearly demonstrate the planning considerations relevant to the purpose of the document in addition to the social and economic considerations. Include information regarding: Why a structure plan is required (as per the Development Zoning in LPS 6); the purpose of the structure plan (to provide a planning framework to guide development); describe the format of the LSP (Part 1, Part 2, and technical appendices).</td>
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<td>13.</td>
<td>Part 2 Clause 1.4.1</td>
<td>Delete</td>
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<td>14.</td>
<td>Part 2 Clause 1.4.2</td>
<td>Relocate to a section specifically relating to implementation and staging as per Modification 36. Delete last paragraph.</td>
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<td>15.</td>
<td>Part 2 Clause 1.5</td>
<td>Relocate to a section specifically relating to the Alternative Locations as per Modification 36.</td>
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<td>16.</td>
<td>Part 2 Clause 2.1</td>
<td>Relocate after relevant state and local documents as per Modification 36. Remove reference to rezoning. Bullet points 1 and 2 could relocate to the Background section.</td>
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<td>17.</td>
<td>Part 2 Clause 2</td>
<td>Add section discussing relevant state planning framework</td>
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<td>18.</td>
<td>Part 2 Clause 2.1.1 Remove section</td>
<td>Incorrect interpretation. This cannot be undertaken prior to lodgement as inferred by the current wording.</td>
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<td>19.</td>
<td>Part 2 Clause 2.2.2 Remove section</td>
<td>Per previous comments, re scheme amendment.</td>
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<td>20.</td>
<td>Part 2 Clause 2.2.5 Relocate Bushfire Assessment result and commentary to a section specifically relating to Bushfire Management as per Modification 36.</td>
<td>Consistency with WAPC Structure Plan Framework.</td>
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<td>21.</td>
<td>Part 2 Clause 2.2.6 Remove reference to “Homemaker Centre” and refer to a portion of the site or a portion of stage 1.</td>
<td>The LSP should be prepared in such a manner that does not relate to a specific proposal.</td>
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<td>22.</td>
<td>Part 2 Clause 2.2.6 Remove references to height of the homemakers centre and reword to note all future development will be required to comply with the Obstacle Limitation Surfaces (OLS) contours.</td>
<td>For clarity</td>
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<td>23.</td>
<td>Part 2 Clause 3.1 Expand the commentary regarding the appropriateness of service commercial land use on this site in the context of the LPS.</td>
<td>For clarity</td>
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<td>24.</td>
<td>Part 2 Clause 3.2 Include figures referenced within the LCS Remove reference to former LCS Remove reference to LCS not being endorsed / having little to no status.</td>
<td>For clarity</td>
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<td>25.</td>
<td>Part 2 Clause 4.1 Relocate to section 1.2.2 as per as per Modification 36.</td>
<td>Consistency with WAPC Structure Plan Framework.</td>
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<td>26.</td>
<td>Part 2 Clause 4.3 Relocate to a section specifically relating to the Structure Plan as per Modification 36. Provide a summary of existing traffic and movement network conditions</td>
<td>Consistency with WAPC Structure Plan Framework.</td>
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<td>27.</td>
<td>Part 2 Clause 4.6 and 4.6.1 Relocate to a section specifically relating to the Structure Plan as per Modification 36. Provide a summary of groundwater and surface water conditions on the site.</td>
<td>Consistency with WAPC Structure Plan Framework.</td>
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<td>Item</td>
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<td>30.</td>
<td>Part 2 Clause 5</td>
<td>Reword as per recommendations / comments within this table and relocate as Executive Summary. Consistency with WAPC Structure Plan Framework.</td>
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</table>
| 31. | Structure Plan Map: Plan No.1 | Modify Map 1 to improve legibility and clarity, including:  
  i. depicting relevant Local Planning Scheme zones, reserves and 'other' items.  
  ii. ensuring that RGB values are generally consistent with Planning and Development (Local Planning Schemes) Regulations 2015.  
  iii. depicting abutting and adjacent land cadastre.  
  iv. providing metadata confirming data use and ownership arrangements. Consistency with WAPC Structure Plan Framework. |
| 32. | Figure 1: Lot 3082 Location | Modify Figure 1 to improve legibility and clarity, including:  
  i. depicting the site.  
  ii. depicting landmark and relevant locations and infrastructure throughout Broome.  
  iii. providing metadata confirming data use and ownership arrangements. Consistency with WAPC Structure Plan Framework. |
| 33. | Figure 2: Aerial | Modify Figure 2 to improve legibility and clarity, including:  
  i. framing with northern orientation.  
  ii. provide metadata confirming data use and ownership arrangements. Consistency with WAPC Structure Plan Framework. |
| 34. | Figure 3: Conceptual Layout | Move this plan to Part 2 - Clause 1.4, and as per Modification 36. Consistency with WAPC Structure Plan Framework. |
| 35. | Figure 4 | Modify Figure 4 to improve legibility and clarity, including:  
  i. providing a legend.  
  ii. providing metadata confirming data use and ownership arrangements. For clarity. |
| 36. | General | Restructure document as follows:  
  Table of Contents  
  Executive Summary  
  Part One – Implementation  
  1. Implementation  
  2. Structure Plan Area  
  3. Structure Plan Objectives  
  4. Operation  
  5. Subdivision and Development Requirements  
  Part Two – Explanatory Section  
  1. Introduction and Purpose  
  1.1 Introduction  
  1.2 Nyamba Buru Yawuru  
  2. Land Description  
  2.1 Locational and Regional Context Consistency with WAPC Structure Plan Framework. |
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<td>2.3 Legal Description and Ownership</td>
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<td>2.4 History</td>
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<td>2.5 Land Use</td>
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<td>3. Planning Framework</td>
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<td>3.2 Local Planning</td>
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<td>3.3 Planning Specific to Lot 3082 Cable Beach Road East</td>
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<td>4. Site Conditions and Constraints</td>
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<td>4.1 Biodiversity and Natural Assets</td>
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<td>4.2 Landform and Soils</td>
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<td>4.7 Airport Considerations</td>
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<td>4.8 Alternative Locations</td>
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<td>5. The Structure Plan</td>
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<td>5.1 Zones</td>
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<td>5.7 Acoustics</td>
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<td>5.8 Bushfire Management</td>
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<td>11. Implementation and Staging</td>
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