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MATTERS FOR CONSIDERATION UNDER SECTION 79(C)(1) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

The following are the matters Council is required to take into consideration under Section 90 of the Environmental Planning and Assessment Act 1979 in assessing a development application.

MATTERS FOR CONSIDERATION

1. In determining a development application, a consent authority shall take into consideration such of the following matters as are of relevance to the development the subject of that development application:
 - (a) the provisions of
 - (i) any environmental planning instrument; and
 - (ii) any draft environmental planning instrument that is or has been placed on exhibition and details of which have been notified to the consent authority, and
 - (iii) any development control plan, and
 - (iv) any matters prescribed by the regulations,that apply to the land to which the development application relates,
 - (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts of the locality,
 - (c) the suitability of the site for the development,
 - (d) any submissions made in accordance with this Act or the regulations,
 - (e) the public interest.

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Reports from Director Development Services

1. **ORIGIN:** Development Assessment Unit

FILE REF: DA3340/325 Pt2

REPORT TITLE:

Proposed Mixed Use Development at Lot B DP 102496, Lot B DP 372324, Lot 3 DP 825580 & Lots 4 & 5 DP 24376 No. 78-80 Marine Parade, Kingscliff

SUMMARY OF REPORT:

Council is in receipt of an application to erect a mixed-use development on the subject site. The proposal incorporates predominantly tourist accommodation units and retail/refreshment room areas on the Marine Parade frontage. The applicant has amended the proposal and undertaken extensive consultation with Council to a point where the proposal is considered generally satisfactory from a design and function perspective. At this stage however, the proposal has failed to adequately address the matter of groundwater contamination in accordance with the relevant guidelines. In this regard, and despite acknowledgement of contamination, the provisions of State Environmental Planning Policy No. 55 have yet to be satisfactorily addressed although it is understood the applicants are carrying out further testing.. Indeed, insufficient information has been submitted in relation to the level of contamination, the source of contamination and the method and person responsible for remediation. Accordingly, it is recommended that Council do not determine the application by way of granting consent (inclusive of deferred commencement) and that the proposal be deferred to permit further assessment in relation to the contamination of the site.

RECOMMENDATION:

That:-

- A. Development Application 0242/2001DA submitted by Blue Arc Network for the erection of a mixed use development on Lot B DP 102496, Lot B DLP 372324, Lot 3 DP 825580 & Lots 4 & 5 DP 24376 (No 78-80) Marine Parade, Kingscliff be deferred and the applicant be requested to provide Council with a detailed contamination report prepared in accordance with the relevant guidelines.
- B. The applicant be advised that subject to a satisfactory resolution to the matter referred to in A. Council generally supports the proposal.

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REPORT:

Applicant: Blue Arc Network Pty Ltd

Owner: NJH Pty Ltd, Dr Frank G Wyton & Mr Noel and Mrs Susan Holmes

Location: Lot B DP 102496, Lot B DP 372324, Lot 3 DP 825580 & Lots 4 & 5 DP 24376

Zoning: 3(b) General Business Zone

Est. Cost: \$7,000,000

BACKGROUND/PROPOSAL

Council is in receipt of an application for a proposed mixed use development at 78-80 Marine Parade, Kingscliff. The proposed development is significant in scale and incorporates the following key features:-

- 39 Tourist Accommodation Units
- 12 Motel Units
- Three (3) refreshment rooms and two (2) retail units on the Marine Parade frontage
- Three (3) storey construction and basement parking
- Roof deck areas for third storey units
- Managers accommodation
- Pool / Open space area
- Dual frontage (Pearl Street and Marine Parade)
- Vehicular access off Pearl Street
- Pedestrian access easement to Seaview Street
- 99 parking spaces at basement level
- Relocation of services within site

A copy of the plans will be displayed at the meeting for the information of Councilors.

The proposal is centred upon one of the most significant and prominent sites in Kingscliff, opposite the existing Kingscliff Community Centre and in close proximity to the 'fig tree' roundabout. To facilitate the proposal, the applicant is presently negotiating the purchase of a number of properties in the immediate area, inclusive of an existing motel, doctors surgery, units and dwelling house.

The subject site incorporates an area of 3254m², with frontage to both Marine Parade and Pearl Street. Adjoining the site to the south is an existing service station, dwelling house and Laundromat, whilst to the north lies an existing single storey dwelling/commercial unit and an existing tourist accommodation complex.

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The applicant has held several meetings with Council officers and some Councillors prior to the preparation of this report. In this regard, the applicant has significantly amended the external design of the proposal in order to generally satisfy concerns raised by Council staff. In general terms, the proposed Pearl Street and Marine Parade elevations are now at a stage considered satisfactory.

Notwithstanding the amendments made by the applicant to date, the proposal still incorporates a number of areas of concern. These issues are summarised as follows:-

- Proposed parking configuration and provision (see section titled DCP No. 2)
- Proposed pedestrian access to Seaview Street via easement
- Inconsistencies with DCP No. 43 – Kingscliff and DCP No. 2 – Site Access & Parking Code
- Contamination (see background and section titled SEPP 55)
- Loss of Views

Each of these issues are discussed in greater detail within the body of this report, with particular reference to the presence of contamination and the question of whether Council is in a position to grant consent in the absence of relevant information. In this regard, the applicant has yet to provide a detailed contamination report in accordance with the requirements of State Environmental Planning Policy No. 55. Accordingly, the proposal is incomplete at this stage and should not be determined. Indeed, to approve the application in the absence of a proper analysis of contamination is inconsistent with the statutory requirements of SEPP No. 55.

Sufficient concern exists in relation to the proposed legal right of the applicant to utilise the existing easement to Seaview Street to not permit it at this stage. Despite the submission of legal advice from both the applicant and the affected owner, the issue remains questionable, with particular reference to whether the proposed use of the easement is consistent with this intended use and users. It should be noted that insufficient time has been provided to undertake further consultation with the applicant, the affected owner and arguably Council's solicitors. It is recommended that Council do not consent to the use of the easement for the proposed purposes at this stage. In this regard, the applicant may at a later date and upon resolution of outstanding matters, resubmit a proposal for same.

CONSULTATION

The development application was advertised and adjoining owners notified of the proposed development.

A total of nine (9) submissions of objection were received during the formal exhibition period. A summary of the issues raised, the applicant's response and a comment are provided as follows:-

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Issue	Applicants Response	Comment
<p>Proposed roof decks will obstruct views and create adverse impacts on the amenity of the area. Proposed roof structures constitute a fourth storey.</p>	<p>The proposed provision of roof decks is consistent with the definition of story as provided for in TLEP 2000. Furthermore, although the proposal is likely to result in some loss of views, the proposed design will provide for greater view retention than if the proposal incorporate a standard pitched roof. The applicant submits that the use of the proposed roof areas will not create any more significant impacts than that currently created by way of restaurants etc in the 3(b) Commercial Zone.</p>	<p>The proposal complies with the three (3) storey restriction pursuant to TLEP 2000. The applicant has amended the proposal to virtually eliminate any proposed roof structures, thereby limiting the obstruction of views to a level considered acceptable. Suitable conditions can be applied in relation to the hours and level of usage of proposed roof decks in order to ameliorate potential amenity impacts.</p>
<p>Loss of views in relation to existing development on Kingscliff Hill.</p>	<p>The applicant acknowledges that some loss of views will occur, however the proposal is consistent with Council's height limit and on the basis of recent design amendments (deletion of unroofed roof structures) will assist in view retention.</p>	<p>Whilst it is acknowledged that some views will be lost in relation to existing development to the south and west, the level of loss is considered acceptable given the commitment given for this level of development by TLEP 2000. This issue is noted, however refusal of the proposal on this basis is considered unjustified.</p>



Reports from Director Development Services

Issue	Applicants Response	Comment
Adverse impacts associated with construction on adjoining / neighbouring properties.	The applicant has met with the adjoining landowner and apparently eased the objectors concerns via discussion of the proposed construction timetable and methods.	This issue is considered able to be satisfactorily ameliorated via the imposition of relevant conditions.
Excessive traffic generation.	The applicant asserts that sufficient capacity exists to accommodate the proposed development and that the proposal will not conflict with peak usage times relating to the adjacent school and other neighbouring landuses.	Council's Traffic & Transport Engineer has undertaken an assessment of the proposal and raised no objections in terms of the capacity of the local road network.
The proposal represents an overdevelopment of the site and does not incorporate sufficient landscaping.	The applicant asserts that the proposal has been designed in accordance with relevant Council building line polices and is in general accordance with Council's Development Control Plan No. 43 – Kingscliff.	The proposal incorporates the maximum utilisation of space available, with landscaping restricted to the internal recreation area and along Pearl Street. Notwithstanding the latter, the proposal is consistent with Council's building line policy and with reference to the latest set of amended plans, provides for sufficient articulation to soften the appearance and massing of the building.

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Issue	Applicants Response	Comment
Proposal incorporates undesirable stacked Carparking.	The applicant asserts that sufficient parking has been provided in relation to the proposed uses.	See section titled DCP No. 2 – Site Access and Parking Code for comment.
The proposed elevations do not incorporate sufficient articulation.	The applicant asserts that submissions of objection relating to design were done so in relation to the originally submitted plans. The applicant asserts that the submitted amended plans are of a satisfactory standard and do not represent an overdevelopment of the site or exhibit insufficient articulation.	This submission is supported in relation to the plans originally submitted by the applicant. The most recent plans have addressed this matter and are considered to be a vast improvement in terms of design, with satisfactory articulation and design characteristics.
Adequacy of services relocation, stormwater collection / disposal.	The applicant asserts that all services will be provided for in consultation with Tweed Shire Council requirements.	Noted. This issue is considered able to be satisfactorily ameliorated via the imposition of relevant conditions and does not warrant refusal of the application.
Internal pool and water theme areas are a litigation nightmare.	The applicant notes the submission.	Noted. This issue is considered able to be satisfactorily ameliorated via the imposition of relevant conditions and does not warrant refusal of the application.

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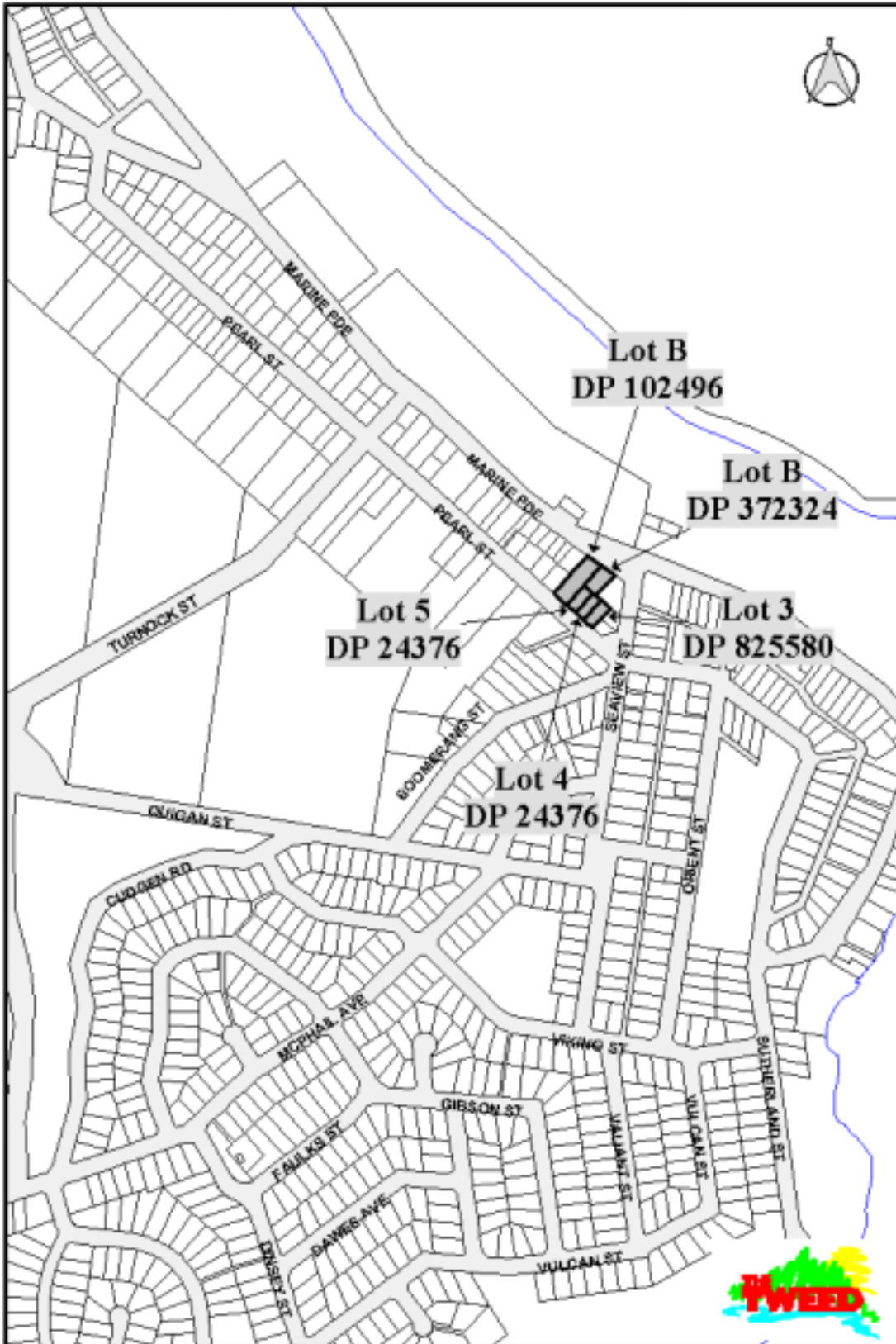
Reports from Director Development Services

Issue	Applicants Response	Comment
<p>Use of existing easement to gain pedestrian access to Seaview Street is likely to create adverse impacts on the owner / resident of Lot 1 DP 825580. Furthermore, the existing instrument was created for the purposes of access to service sanitary services and was not created for the purposes now proposed. It is also submitted that the proposal will provide access from property which is not even party to the easement and that given that the land in question is currently utilised for the purposes of a driveway, safety concerns would arise in relation to pedestrian users. The proposal may also impact upon the redevelopment potential of the site for the current owners.</p>	<p>The applicant asserts that a legal right exists to utilise the subject easement for the purposes proposed. It is however acknowledged that the applicant does not have the right to erect fencing or lighting along this route. Accordingly, the applicant now proposes to pave the easement only.</p>	<p>Sufficient concern exists to warrant the imposition of a condition that restricts any works within the subject easement, with the exception of those consented to (in writing) by the affected landowner. Insufficient time has been provided to allow further discussion with Council's solicitors in this regard. The proposed use of the easement should not be permitted at this stage. Further discussion is provided under the heading of 'Access, Traffic and Transport' in the 'Likely Impacts' section of this report.</p>
<p>Concern over the location of services in relation to Lot 1 DP 825580.</p>	<p>Services will only be relocated / adjusted within the development site.</p>	<p>It is apparent that the existing sewer will be relocated along the internal wall (basement parking) along the southern boundary. In this regard, no works are permitted or proposed on the adjacent property, whilst full internal access will be provided for maintenance and construction.</p>

Those issues discussed above are discussed in greater detail under the relevant heading within that section of the report which addresses the matters listed under Section 79C of the Environmental Planning & Assessment Act, 1979.

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SITE DIAGRAM



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EVALUATION

Following is an assessment of the proposal in accordance with Section 79C of the Environmental Planning & Assessment Act, 1979.

(a) (i) The provisions of any Environmental Planning Instrument

Tweed Local Environmental Plan 2000 (TLEP 2000)

The subject land is zoned 3(b) General Business under the provisions of TLEP 2000. Tourist Accommodation is permissible with the consent of Council if not at street level, whilst both motels and refreshment rooms/retail/commercial units are permissible with the consent of Council. The applicant has recently amended the proposal to convert the proposed seven (7) ground floor units to 'Motel' accommodation, which is permissible on the ground floor. The remainder of the proposed units are to be utilised for tourist accommodation only.

The proposal is considered to be consistent with the primary and secondary objectives of the zone.

The following clauses are also applicable to the proposal:-

Clause 15 – Availability of Services

All essential services are available to the site. The proposal is considered to be consistent with this clause.

Clause 16 – Heights of Buildings

The site is identified as being within an area restricted to a three (3) storey height limit. Notwithstanding the provision of open roof decks and basement parking, the proposal is considered to be consistent with the strict interpretation of 'storey' as contained in TLEP 2000. Furthermore, the applicants latest amendments to the proposed design are considered to further enhance the proposals ability to comply with the objective of the three (3) storey limit.

Clause 17 – Social Impact Assessment

The proposed development is unlikely to have a social or economic impact that is of a scale to warrant the preparation of a social impact assessment.

Clause 35 – Acid Sulfate Soils

The subject site is identified as possessing Class 5 Acid Sulfate Soils pursuant to Council's Acid Sulfate Soils Planning Maps. The applicant has stated that the proposed works are unlikely to lower the watertable below 1m in adjacent Class 1, 2, 3 and 4 lands. Council's Environment & Health Services Unit have undertaken an assessment of the proposal in this regard and concurred with the applicant. The submission of an Acid Sulfate Soil Management Plan is considered unnecessary.

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Clause 39 – Remediation of Contaminated Land

This clause calls up the requirements of State Environmental Planning Policy No. 55. The proposal is considered to be inconsistent with the latter policy given the current level of information on this matter. Please see section titled SEPP No. 55 for relevant comments.

North Coast Regional Environmental Plan 1988 (NCREP 1988)

Clause 32(b)(2) of NCREP 1988 applies to land within the region to which the NSW Coastal Policy 1997 applies and requires Council to take the following documents into account in determining an application to carry out development:-

- NSW Coastal Policy 1997;
- Coastline Management Manual; and
- North Coast Design Guidelines.

The proposal is considered to be consistent with the relevant provisions of the policies referred to.

State Environmental Planning Policies (SEPPs)

State Environmental Planning Policy No. 11 – Traffic Generating Development

The proposal was referred to the Local Traffic Committee in accordance with the provisions of SEPP No. 11. The committee reinforced those comments provided by Council's Traffic & Transport Engineer, which are further addressed under the heading of 'Traffic & Transport Engineers Comments'.

State Environmental Planning Policy No. 55 – Remediation of Land

This policy is the primary instrument in the management of contaminated land in association with the processing of Development Applications. In this instance, the applicant has provided Council with a brief groundwater contamination report, which identifies contamination levels (lead) above the relevant thresholds. The content and format of the report submitted by the applicant falls a significant way short of the requirements required in the 'Managing Contaminated Lands' guidelines referred to within SEPP No. 55. Indeed, the report submitted fails to incorporate testing of all relevant contaminants, a legible sampling diagram, a discussion of results gained, any recommendations or a remediation plan.

Given that it is probable that the contamination of the site is associated with the adjacent service station, SEPP No. 55 clearly requires the preparation of a preliminary contamination report (prepared in accordance with the relevant guidelines referred to in the SEPP). The applicant has not completed this work at the time of preparing this report. Accordingly, the proposal is incomplete and should not be finally determined at this stage.

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The applicant has provided Council with the following response in relation to the requirements of SEPP No. 55:-

“It is acknowledged that as a result of ground water contamination originating from the adjacent site, special measures will need to be in place during the dewatering of the subject site. In this regard Council’s ability to consent to the approval (sic) is stated in Clause 7 of SEPP No. 55. Specifically this clause states:

A consent authority must not grant consent to the carrying out of any development on land unless:

- i. it has considered whether the land is contaminated, and*
- ii. if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable after remediation) for the purpose for which the development is proposed to be carried out, and*
- iii. if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that that the land will be remediated before the land is used for the purpose’*

It is our submission that Council can consent to the carrying out of development on the grounds that:

- Council has considered whether the land is contaminated and has found evidence to suggest contamination of the groundwater;*
- A preliminary investigation has been carried out;*
- The applicant acknowledges that there is some contamination of the groundwater and that special measures must be put in place to ensure suitable remediation;*
- Council acknowledges that the site can be remediated and as such would be suitable for the use once remediated;*
- SEPP 55 requires that Council be satisfied that the land can be remediated, but does not require that Council be satisfied HOW this will be achieved, as there obviously many options;*
- Council has the ability to include a condition of approval that requires the submission of a remediation plan prior to the release of the construction certificate and that the site is remediated to Council’s satisfaction prior to the commencement of building works.”*

The applicants submission, as detailed above, is considered not to represent a proper interpretation of SEPP No. 55 and should therefore not be supported. Having regard to the applicants submission, the following comments are offered:-

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- The applicant makes no reference to the guidelines which are referred to in SEPP No. 55. These guidelines set out the requirements for contamination reporting, with clear reference to the need to carry out detailed analysis in relation to contamination. Information supplied by the applicant to date falls short of the reporting requirements identified in the guidelines.
- A preliminary investigation has been carried out, however this investigation did not test for particular contaminants or expand on the source, the extent of contamination, the sampling method or the need for or method of remediation. The applicant is essentially proposing to defer these matters to a later time.
- Council officers cannot acknowledge that the site can be easily remediated as they are unaware of the full extent of contamination and, given that the source is likely to be on an adjacent property, that the contamination can be contained or stopped or who is responsible for remediation. Further information and consultation with the owner of the likely source of the contamination is required. Indeed, given the absence of information, the ultimate ability of the site to accommodate development of the nature proposed is not certain.

In support of the above comments and those offered in the introduction to this report, Council's Environment & Health Services Unit have offered the following comments:-

"The following response is provided to a request from Council's Development Assessment Unit for a report regarding contaminated lands issues influencing the above development.

Current Reporting Level

A preliminary report dated February 2001 by McConnell Consulting has been submitted to Council, which provides information on groundwater and soil contamination. However, this report does not comply with NSW EPA Guidelines for Assessing Service Station Sites (GASSS, 1994).

NOTE : Whilst the exact source of contaminants is not known with certainty at this time, given the lack of any nearby potential source for lead/hydrocarbon contamination and that a service station exists immediately adjacent to the site, the service station is considered at this time to be the most likely source of the contaminants. Therefore assessment and reporting is required to comply with NSW EPA Guidelines for Assessing Service Station Sites (GASSS, 1994).

In respect to soils it does appear that the relevant parameters have been tested in soils as specified in GASSS. A minimal number of sampling points were assessed and the results are reported to be 'below ecological investigation levels of NEPC'. Unfortunately, given that groundwater sampling indicates that the site is contaminated, a more comprehensive sampling regime of soils across the site is required in accordance with GASSS.

With respect to groundwater there are a number of anomalies with the groundwater assessment as follows:

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Polycyclic aromatic hydrocarbons have not been tested as required by Table 2, GASSS, 1994.

The C10 – C36 fraction of total petroleum hydrocarbons has not been tested as required by Table 2, GASSS, 1994.

*The reported test results for lead of 200ug/L and 50ug/L exceed the threshold concentration of 1-5 ug/L for protection of aquatic ecosystems (Table 4, GASSS, 1994), **INDICATING THAT GROUNDWATER IS CONTAMINATED.***

As contaminants have been detected a more comprehensive sampling regime of soils across the site is required in accordance with GASSS ie the minimalist approach taken to date is considered to be unsatisfactory in terms of reasonably establishing the levels of contaminants on site.

Additional Considerations

It is important that the nature of foundation materials and groundwater movements and fluctuations on the site be noted. The consultant reports that:

“The upper 3-4m of strata below the site are very variable. Some very loose sands and some very soft clay layers exist. It seems likely that this site has been filled at some past time. The (groundwater) levels measured across the site show a natural hydraulic gradient towards the sea shore....the level is 1.4m above the planned basement level there are also indications that the groundwater level varies with time will probably occasionally rise to higher levels.”

With respect to ongoing groundwater control the consultant states:

“On those occasions when groundwater levels rise above the design level, the (basement) de-pressurisation system will operate. At these times, either allow the basement to flood (and thus counteract pressures), or alternatively collect the de-pressurisation water in a system of drains and sumps and pump it away.”

Clearly both of these options are considered unsatisfactory for contaminated groundwater.

The responsibility for, and extent of remediation works also require consideration. It is considered unlikely that the contaminants originated from the development site under consideration. Therefore it may be that the owner of the site where the contaminants originated from should be responsible for remediation works. However this may take some time. Further, unless all groundwaters are remediated thoroughly, it is considered likely that contaminated groundwaters would infiltrate back to the site in future, thereby affecting the residential nature of the proposal.

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Finally, the provisions of SEPP 55 should be considered. Clause 7 of SEPP 55 provides as follows:

7. *Contamination and remediation to be considered in determining development application*
 - (1) *A consent authority must not consent to the carrying out of any development on land unless:*
 - (a) *it has considered whether the land is contaminated, and*
 - (b) *if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
 - (c) *if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*
 - (2) *Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.*
 - (3) *The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.*

As a thorough assessment has not been completed to date the level of contaminants on the site cannot be known with certainty. Therefore Council cannot be certain that Clause 7(1)(b) and (c) have been satisfied. Therefore the 'consent authority must not consent to the carrying out of the development'.

Summary

As the levels of lead are above the reported threshold, groundwater on the site is considered to be contaminated. Therefore a thorough contaminated lands assessment of the site is required to be submitted for consideration in accordance with relevant NSW EPA site assessment and reporting guidelines. The location and number of samples taken shall comply with GASSS and this assessment shall include PAHs and the TPH fraction noted above.

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Where this assessment concludes that the site is contaminated, Council requires the assessment, and any future remediation plan and works, to be reviewed by an independent 'site auditor' as defined under the Contaminated Lands Management Act, 1997, and deemed to be satisfactory.

Upon receipt of this assessment, the matter could be considered further. Should the assessment report the property to be contaminated it is likely that Council will require a remediation plan to be developed for consideration (refer SEPP 55, Clause 7).

The current level of information regarding contaminants on the site is not sufficient for Council to proceed to a conditional approval.

Recommendation

Officers strongly recommend that Council not provide an approval for the proposal at this time for the following reasons:

As a thorough site assessment has not been completed Council does not know the levels of all potential contaminants on site, nor whether those contaminants can be remediated, as required by SEPP 55. In this case SEPP 55 clearly states that Council 'must not consent to the carrying out of the development'.

The current level of investigation and reporting for the site does not meet the minimum requirements established by the NSW EPA Guidelines for Assessing Service Station Sites, 1994. Therefore officers believe that Council cannot reasonably proceed to an approval as the nature and extent of all potential contaminants on the site is not currently known. [Note ; The adjacent service station is considered at this time to be the most likely source of the contaminants. Therefore assessment and reporting is required to comply with NSW EPA Guidelines for Assessing Service Station Sites (1994)].

It has not been determined exactly who is responsible for remediation works (if any), whether remediation works can be satisfactorily completed and how extensive those remediation works will have to be.

The reported test results for lead of 200ug/L and 50ug/L exceed the threshold concentration of 1-5 ug/L for protection of aquatic ecosystems, INDICATING THAT GROUNDWATER ON THE SITE IS CONTAMINATED.

The proposed methods for disposing of contaminated groundwaters from the proposed basement area are considered unsatisfactory.

(a) (ii) The Provisions of any Draft Environmental Planning Instruments

No draft environmental planning instruments are applicable to the proposed development.

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(a) (iii) **Development Control Plans (DCPs)**

Development Control Plan No. 2 – Site Access & Parking Code

The proposed development incorporates the provision of parking at the basement level. In the latest plans submitted, the applicant has nominated two (2) retail outlets and three (3) refreshment room outlets. The following table sets out the proposals compliance with the provisions of DCP No. 2 – Site Access & Parking Code.

Component	DCP 2 Requirement	Proposed
Refreshment Room/Restaurant	1/3 seats or 1/7 ^{m2} = 32 spaces	225m ² (allowing for 30m ² /unit for kitchen area) NB. Tenancies C, D & E are designated for refreshment room use = 32 spaces
Retail Outlets	3.5/100m ² and 0.5/100m ² for staff = 12 spaces	260m ² of retail area = 13 spaces
Tourist Accommodation	1 per unit plus 0.5 per staff member = 40.5 spaces	39 units (one managers residence)/assume three (3) staff = 41 spaces
Motel Units	1 per unit plus 0.5 per staff member = 13 spaces	12 units/assume two (2) staff members = 13 spaces
Unloading/Dock	One (1) per refreshment room and one (1) for the proposed retail component	None
Relaxation of 30% on ESD principles – applicable to refreshment room/retail component	Requiring justification.	Relaxation justified.
Total	77 spaces (ESD relaxation incorporated)	99 spaces

The proposal incorporates the provision of a total of 99 basement spaces, with the total requirement (pursuant to DCP No. 2) being 77 and in this regard, it is apparent that the proposal complies with the full numerical requirements of the parking code even without the application of the 30% reduction. The proposal does not, however provide for unloading / service delivery parking, with the applicant arguing that deliveries will be made via the Marine Parade frontage or in the case of smaller deliveries, via the basement parking (in this regard, the applicant proposes a short term parking bay in the vicinity of the lift). In normal circumstances, accessible delivery parking is to be provided in all instances. It is however accepted that deliveries could be made via the basement parking and that in a practical sense, delivery companies will utilise the Marine Parade frontage in the main. In this regard, the applicant’s argument is supported, having regard to the likely usage, the provision of excess parking and the nature of the proposed uses.

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The proposal incorporates the provision of 10 spaces in a stacked configuration. Although generally not favoured, DCP No. 2 permits the provision of a limited number of stacked employee spaces. In this instance the applicant has submitted the following argument in support of the proposed variance:-

“The current plans include 10 tandem parking bays. It is noted that section 3.71 of DCP No. 2 states that tandem parking bays are generally not favoured. The DCP acknowledges however that in certain cases the provision of employee parking can be provided in this way. It is submitted that the 10 spaces will be allocated to the two (2) managers spaces, plus nine (9) spaces for staff associated with the proposed restaurant and shops. Customers will therefore be able to park directly behind these spaces. These spaces will be signed accordingly.”

The applicant’s argument is considered reasonable, with appropriate conditions to be applied to ensure on-going compliance.

Although no bicycle parking is provided, a suitable area is available and a condition should be imposed in this regard.

Development Control Plan No. 6 – Medium Density Development

Although not strictly applicable to the proposed development, this DCP provides for a number of broad objectives, which are relevant to the proposed form of development. The proposal is considered to be generally consistent with the provisions of DCP No. 6.

Development Control Plan No. 43 – Kingscliff

DCP No. 43 is Council’s primary design guideline for development within the Kingscliff area. The plan aims to achieve high quality outcomes for urban development, public facilities and amenities in accordance with the character of Kingscliff. The plan also identifies precincts and general design guidelines which apply to development within the Kingscliff area.

In general terms, the DCP encourages articulated buildings, inclusive of individual elements aimed at reducing building mass and continuous facades. The plan also incorporates a requirement to step rooflines, provide pedestrian linkages, encourage active facades and promote construction materials and colours in accordance with the character of Kingscliff.

The originally submitted design plans were considered to represent a significant departure from the objectives and design guidelines identified within DCP No. 43. However, the applicant has since amended the proposal to incorporate a design that features significant greater variation in relation to both the Marine Parade and Pearl Street elevations. Although significant in scale, the proposal is not considered to be an overdevelopment of the site, rather, the proposed design is likely to provide guidance in relation to the further redevelopment of the immediate area. It is noted that both the southern and northern elevations are blank given that it is likely that future development on adjoining sites will be built up to the property line. Notwithstanding, a suitable condition should be imposed requiring the submission of design detail and suitable

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colours for each of these elevations prior to the release of the construction certificate. Although the proposal continues to provide for a relatively continuous roofline on the upper level, the Marine Parade elevation incorporates a number of easily identifiable building components that are broken up through the use of varied building materials, veranda's and feature components.

The proposal incorporates what is considered to be a non-compliance with the provisions of DCP No. 43 in that no provision has been made for suitable public access through the site to Pearl Street. Indeed, the proposal, with the exception of basement fire stairs, does not even provide for pedestrian access to Pearl Street for guests. DCP No. 43 strongly encourages the provision of pedestrian links where possible. Given the scale of the proposal, the failure to provide for such a facility is considered to be a significant lost opportunity. Despite numerous requests and extensive consultation with Council officers, the applicant has not amended the plans, rather, they have argued that the proposed pedestrian access easement to Seaview Street is sufficient. Given that the legal right to use the existing easement to Seaview Street is questionable, it is considered that a condition of consent be applied (in the event that Council choose to approve the application), requiring some form of pedestrian access to Pearl Street, if not for the general public, then at least for guests.

The applicant has submitted plans indicative of the proposed landscaping along Pearl Street. The latter is considered consistent with the provision of DCP No. 43.

The proposal is considered to be generally consistent with the provisions of DCP No. 43. Although the non-provision of a pedestrian access link to Pearl Street is not desirable, refusal of the application on this basis is considered unjustified.

(a) (iv) Any matter prescribed by the regulations

The proposal is considered satisfactory in respect of the matters for consideration in the Regulations.

(b) The likely impacts of the development including impacts on both the natural and built environment, and social and economic impacts in the locality.

Context and Setting

As stated previously, the subject site is significant in both size and locational prominence. The site is centrally located in reference to existing commercial development, community facilities, recreation facilities and public transport, whilst also being within easy walking distance to established residential areas. Although the proposal represents a significant departure from the existing character of the area, the proposal will in all probability set the trend for the future redevelopment of the Kingscliff business centre. Furthermore, the proposal is considered to be generally consistent with the relevant provisions of DCP No. 43.

Views & Privacy

The proposal is likely to impact upon views currently enjoyed by residents immediately to the west (units) and to a lesser extent, residents within Boomerang Street. Although

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the likely loss of views is acknowledged, the proposal is consistent with the height restrictions set by Council for the area. Furthermore, residents in the area would be expected to have an appreciation that in time, sites along Marine Parade would be redeveloped to the detriment of views. This issue does not warrant refusal of the proposal. No significant adverse impacts are considered likely in relation to the privacy associated with adjacent buildings.

Noise

Despite containing additional refreshment rooms, pool areas and increased traffic, the proposal is considered unlikely to create excessive noise within the immediate area. In this regard it should be noted that the site is located in close proximity to established refreshment rooms and a hotel. Council's Environment & Health Services Unit has not raised any concerns in this regard.

Amenity

Although the proposal is likely to alter the existing amenity of the area, the likely changes are considered to be consistent with the desired future character of the area. No significant adverse impacts are considered likely in this regard.

Suitable conditions should be imposed in relation both air conditioning and ducted exhaust (refreshment rooms / basement parking).

The owner of the property immediately to the south of the proposal is likely to be impacted upon via the enforcement and use of the existing right of carriageway through the site. In this regard, the applicant proposes at this stage to pave the land and to disregard the original proposal to erect fencing and lighting. It is evident that the existing property owner utilises the subject land for the purposes of access to an existing garage. This garage, although evidently useable, is in a poor state. Notwithstanding, the applicant has provided legal advice asserting that there is a legal right to utilise the proposed land for the purposes of a pedestrian access way. The affected owner has also submitted an objection from their solicitor, which was discussed in detail in the 'consultation' section of the report. It should be noted that insufficient time has been allowed for this issue to be referred to Council's solicitors for independent advice or further consult with the applicant and the affected owners. Accordingly, it is recommended that the proposed easement not be supported at this stage given that it is unclear as to the rights of the applicant to utilise the easement for the proposed purpose. This issue is further discussed under the heading of 'Access, Traffic and Transport' in the 'Likely Impacts' section of this report.

Design

To avoid repetition, this issue is discussed in greater detail under the heading of Development Control Plan No. 43 – Kingscliff. In general terms, the proposed design is considered to be of a satisfactory standard.

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Utilities

All relevant utilities are available to the site, however, given the footprint of the proposal, significant relocation is required. In this regard, it is proposed to run services within the basement parking area. No objections have been raised by Council's Engineering Services Division in this regard, subject to the imposition of relevant conditions.

Construction Impacts

Potential adverse impacts in this regard are considered able to be satisfactorily ameliorated via the imposition of relevant conditions.

Contamination

Despite acknowledging that the site is presently contaminated, the applicant has at this stage not provided sufficient information to satisfy the requirements of SEPP No. 55.

Access, Traffic and Transport

The proposal was reviewed by Council's Traffic and Transport Engineer, who has raised concern in relation to the collection and disposal of garbage, the configuration of the proposed access ramp and the internal parking layout. In response, the applicant undertook a number of amendments to the proposal. In relation to the latest set of submitted design plans, the following comments were provided:-

Garbage Collection

I am still concerned about the safety aspects of the collection process. Whilst the response does not address the issue in detail it is my understanding that front load vehicles collect these bins and therefore the bins must be put in front of the cabin of the truck to be collected. To pick them up from the footpath the truck would need to be at an angle across the road or the bins placed on the actual road carriageway.

Storing or collecting these bins from the carriageway or truck reversing is not supported on the road reserve due to the high use by pedestrians particularly school children.

It is suggested the following condition could be applied to prevent the above.

"The garbage collection bins are not to be positioned on the road carriageway or obstructing the footpath in Pearl Street at any time. The collection bins are also to be positioned in such a way that collection vehicles do not have to undertake reversing manoeuvres within the Pearl Street road reserve."

Car Park Access Ramp

AS2890.1 – requires a 6.1m wide ramp. There seems no reason why this cannot be achieved. However, they claim a Council engineer agreed that a reduction was possible but I am unaware of who this was.

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In regards to traffic circulation within the car park suggested condition may be applied.

“The car park is not to be fenced off in sections in such a way that would obstruct access to the car park circulation isles.”

The issue of loading areas for service vehicles is still not adequately addressed. The applicant states existing loading zones in Marine Parade will be used. There are no loading zones in Marine Parade and given the local concern regarding lack of car parking in Marine Parade it is unlikely any loading zones will be approved. The development will increase demand for such facilities and they should be provided on site as per DCP2. This issue needs further consideration. (see section titled DCP No. 2 for further comment).

Suggested condition regarding bicycle provision is:

“The development is to contain bicycle parking spaces that comply with DCP2 and the spaces generated by the commercial component are to be located on the Marine Parade frontage as they are readily accessible.”

The supporting statement for the 30% reduction in commercial car spaces is a Development Assessment Unit decision but it should be noted that the local organisations are of the opinion that Council should remove the reduction for the Kingscliff area.

Other conditions:

The pedestrian access from the site to Seaview Street is to be provided with street lighting complying with AS1158 Pt3 category P3. Details are to be submitted and approved by the Director Development Services prior to construction. (see below for further comment)

A detailed car park signage plan is to be developed and approved by the Director Development Services prior to installation.

Conditions for Section 68 and Section 138 Applications need to be applied along with TRCP based on development components.”

Council officers have also raised concern in relation to the legal right of the applicant to utilise and carry out works over the existing easement through Lot 1 DP 825580 to Seaview Street. In response to Council’s concerns, the applicant’s solicitor has provided the following information:-

- *“There is a legal right to utilise the existing right of carriageway for ‘all purposes’. As such, the use of the land for pedestrian access is permitted.*
- *The existing easement is silent in terms of who is to construct, maintain or repair the right of way.*

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- *Despite the application originally incorporating fencing, landscaping and lighting, the applicant's solicitor has since advised that the instrument probably does not consent to the erection of fencing or lighting.*
- *The use of the land by the grantor (existing owner) should not be affected by the erection of fencing or any other improvement."*

Accordingly, the applicant has since advised Council that the proposed pedestrian accessway will be paved only, with no provision for either fencing, lighting or landscaping. As stated previously, the owner of the affected property has also provided a submission from their solicitors, which states that the existing instrument does not confer a legal right to utilise for the purposes proposed. Accordingly, and having regard to the insufficient time permitted to further consult with the affected owner, the applicant and possibly even Council's solicitors, the proposed pedestrian access to Seaview Street should not at this stage be supported.

Flora & Fauna

With the exception of ornamental gardens, the subject site is devoid of any vegetation of note. No significant adverse impacts are considered likely in this regard.

(c) **The Suitability of the Site for the Development**

In general terms, the site itself is considered suitable for redevelopment, with little significant constraints. One notable exception is the issue of site contamination. In this regard, the applicant has not at this stage provided sufficient information in order for Council to be satisfied that the site is suitable for development.

(d) **Any Submissions made in accordance with the Regulations or Act**

The submissions received by Council during the formal exhibition period have been outlined in the 'consultation' section of this report.

(e) **The Public Interest**

Having regard to the issue of contamination, approval of the application at this stage is considered to be inconsistent with the public interest.

OPTIONS

Options in this instance appear to be as follows:-

1. Defer the proposal to allow further consultation in relation to site contamination
2. Refuse the application on the basis of insufficient information to determine the likely impact of the proposal, with particular reference to site contamination and non-compliance with the provisions of State Environmental Planning Policy No. 55 – Remediation of Land
3. The applicants have canvassed the option of issuing a "deferred commencement" consent, the deferred matter being the resolution of the contamination issues. Although there is provision in the legislation for deferred commencement approvals, given the lack of relevant

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information in relation to the contamination issue, it is not considered appropriate that the application be determined in this way.

CONCLUSION

The proposed development is considered to be at a stage where approval cannot be justified. Despite the applicant's argument that the provisions of State Environmental Planning Policy No. 55 have been addressed, it is considered that information submitted by the applicant falls short of this requirement. Indeed, fundamental questions relating to the source and extent of contamination, compliance with the statutory process and method and persons responsible for remediation remain unanswered. It is considered that the granting of consent, inclusive of deferred commencement consent, should not be supported.

C. F. Beck

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CHAIRMAN

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