



Land and Environment Court  
of New South Wales

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**CITATION :** Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008] NSWLEC 180

**PARTIES :** APPLICANT  
Hastings Point Progress Association Inc  
FIRST RESPONDENT  
Tweed Shire Council  
SECOND RESPONDENTS  
Aeklig Pty Ltd  
Planit Consulting Pty Ltd  
THIRD RESPONDENTS  
Kylie Ann Campion  
Jody Anne Kearney  
Kelly Anne Gillies

**FILE NUMBER(S) :** 40785 of 2007, 40967 of 2007

**CORAM:** Pain J

**KEY ISSUES:** Development Consent :- application under State Environment Planning Policy (Seniors Living) 2004 (SEPPSL) - whether inconsistency between SEPPSL and mandatory precondition to grant of development consent in local environmental plan - whether decision to grant development consent manifestly unreasonable

Development Consent :- application under Tweed Local Environmental Plan 2000 - whether Council failed to consider strategic review of heights of buildings - whether cumulative impact assessment required and undertaken - whether decision to grant development consent manifestly unreasonable

**LEGISLATION CITED:** Associations Incorporation Act 1984  
Environmental Planning & Assessment Act 1979 s 64, s 79C  
Land and Environment Court Act 1979 s 25B  
Manly Local Environmental Plan 1998  
Penrith Local Environmental Plan No 231  
State Environmental Planning Policy No 5 – Housing for Older People or People with a Disability  
State Environmental Planning Policy No 71 – Coastal Protection  
State Environmental Planning Policy (Seniors Living) 2004 cl 4, cl 5, cl 17, cl 18, cl 30, cl 31, cl 78  
Sutherland Local Environmental Plan 1993  
Tweed Local Environmental Plan 2000 cl 4, cl 5, cl 8, cl 11, cl 16



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Sutherland Local Environmental Plan 1993  
Tweed Local Environmental Plan 2000 cl 4, cl 5, cl 8, cl 11, cl 16

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Centro Properties v Hurstville City Council (2004) 135 LGERA 257  
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Kindimindi Investments Pty Ltd v Lane Cove Council & Anor (2006) 143 LGERA 277  
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Weal v Bathurst (2000) 111 LGERA 181  
Westfield Management Ltd v Perpetual Trustee Company Limited and Anor [2006] NSWCA 245  
Woolworths Limited v Wyong Shire Council & Ors [2005] NSWLEC 400

**DATES OF HEARING:** 5 February 2008  
6 February 2008  
7 February 2008  
27 March 2008 (additional written submissions)

**DATE OF JUDGMENT:** 6 June 2008

**LEGAL REPRESENTATIVES:** APPLICANT  
Mr A Pickles with Ms Y Cachia  
SOLICITOR  
Environmental Defenders Office  
FIRST RESPONDENT  
Submitting appearance  
SECOND and THIRD RESPONDENTS  
Mr P McEwen SC with Dr S Berveling  
SOLICITOR  
Stacks

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**THE LAND AND  
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OF NEW SOUTH WALES**

**Pain J**

**6 June 2008**

**40785 of 2007      Hastings Point Progress Association Inc v  
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**40967 of 2007      Hastings Point Progress Association Inc v  
Tweed Shire Council and Ors**

**JUDGMENT**

- 1     **Her Honour:** In two separate Class 4 applications the Applicant seeks declarations in each proceeding that development consents granted by the Tweed Shire Council (the Council) are invalid and of no effect. Because of the similarity of issues the matters were heard together. Evidence in one matter is generally evidence in the other.
  
- 2     The Applicant is an association incorporated under the *Associations Incorporation Act* 1984. The Council has filed a submitting appearance save as to costs in both matters. At the time the relevant decisions were made the Council was constituted by four administrators.
  
- 3     Proceedings 40785 of 2007 (the Aeklig proceedings) challenge the grant of development consent by the Council to the Respondent Aeklig Pty Ltd on 8 May 2007 for the development of land at 87-89 Tweed Coast Road, Hastings Point for a Seniors Living development under *State Environmental Planning Policy (Seniors Living) 2004* (SEPPSL) as then in

force. The subject property is zoned 2(c) Urban Expansion under the *Tweed Local Environmental Plan 2000* (TLEP).

- 4 In proceedings 40967 of 2007 (the Planit proceedings) on 19 June 2007 the Council granted development consent to the Respondent Planit Consulting Pty Ltd for multi-dwelling housing comprising seven units at 21 Tweed Coast Road, Hastings Point. The subject property is zoned 2(b) Medium Density Residential under the TLEP.
- 5 The claims in both proceedings are similar, in that they both relate to a failure of the Council to consider relevant matters under the *Environmental Planning and Assessment Act 1979* (EP&A Act). Further, or in the alternative, it is claimed that the grant of both development consents by the Council was manifestly unreasonable.

*Relevant legislation*

- 6 The EP&A Act provides for the making of environmental planning instruments including local environmental plans (LEPs) as statutory instruments.

*Tweed Local Environmental Plan 2000*

- 7 Clause 4 TLEP provides:

*The aims of this plan are:*

- (a) *to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan which was adopted, after extensive community consultation, by the Council on 17 December 1996, the vision of which is:*

*"The management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced", and*

- (b) *to provide a legal basis for the making of a development control plan that contains more detailed local planning policies and other provisions that provide guidance for*

*future development and land management, such as provisions recommending the following:*

- (i) that some or all development should be restricted to certain land within a zone,*
  - (ii) that specific development requirements should apply to certain land in a zone or to a certain type of development,*
  - (iii) that certain types or forms of development or activities should be encouraged by the provision of appropriate incentives, and*
- (c) to give effect to and provide reference to the following strategies and policies adopted by the Council:*  
*Tweed Shire 2000+ Strategy*  
...
- (d) to encourage sustainable economic development of the area of Tweed compatible with the area's environmental and residential amenity qualities.*

8 Clause 5 deals with ecologically sustainable development:

*An objective of this plan is to promote development that is consistent with the four principles of ecologically sustainable development ...*

9 Clause 8(1) provides:

**8 Consent considerations**

*The consent authority may grant consent to development (other than development specified in Item 3 of the Table to clause 11) only if:*

- (a) it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and*
- (b) it has considered those other aims and objectives of this plan that are relevant to the development, and*
- (c) it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.*

10 Clause 11 sets out the objectives of each zone.

11 Clause 16 relates to height of buildings and provides:

**16 Height of buildings**

*(1) Objective*

*• to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.*

*(2) Consent must not be granted to the erection of a building which exceeds the maximum height or number of storeys indicated on the Height of Buildings map in respect of the land to which the application relates.*

...

12 The Height of Buildings map identifies the maximum height of three storeys for the subject sites.

*State Environmental Planning Policy (Seniors Living) 2004 (SEPPSL)*

13 There is no dispute that the SEPPSL applies to the Aeklig land as it is zoned for urban purposes and to allow dwelling houses to be built, accordingly cl 4(a) and (b) are satisfied.

14 Clause 2, "Aims of Policy", is a relevant provision of the SEPPSL as in force when the development consent was granted (SEPPSL has been amended since). Clause 2(2) states the aims of the policy will be achieved by setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this policy. Clauses 5, 17 and 18 of SEPPSL as then in force provided as follows:

**5 Relationship to other environmental planning instruments**

...

*(3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.*

...



### **17 What Chapter does**

*This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:*

- (a) *Development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and*
- (b) *Development on land that adjoins land zoned primarily urban purposes for the purpose of any form of seniors housing consisting of a hostel or a residential care facility.*

### **18 Development consent required**

*Development allowed by this Chapter may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent.*

- 15 Division 2 Part 3, Design requirements, cl 30 and 31 of SEPPSL state:

#### **30 Design of residential development**

*A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied that the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2.*

#### **31 Neighbourhood amenity and streetscape**

*The proposed development should:*

*(a) recognise the desirable elements of the location's current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and*

...

*(c) maintain reasonable neighbourhood amenity and appropriate residential character by:*

- (i) providing building setbacks to reduce bulk and overshadowing, and*
- (ii) using building form and siting that relates to the site's land form, and*
- (iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and*
- (iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and*

...

16 Clause 78 states:

***78 Inter-relationship of Part with design principles in Part 3***

*Nothing in this Part permits the granting of consent to a development application made pursuant to this Chapter if the consent authority is satisfied that the proposed development does not demonstrate that adequate regard has been given to the principles set out in Division 2 of Part 3.*

17 Non-statutory instruments referred to in cl 4 of the TLEP and in submissions included the Tweed Shire 2000+ Strategic Plan, Tweed Future Issues Paper and the Far North Coast Regional Strategy (referred to in cl 4(a) and (b)). After the substantive hearing it was also agreed that the Coastal Design Guidelines played a role. A short summary of these documents follow.

18 The aim of the Tweed Shire 2000+ Strategic Plan (dated September 1997) is "to provide a broad overview of Council's intention and directions for the future in relation to development, the environment and infrastructure provision. These intentions and directions will be formally expressed in a range of legal documents". The Plan states that it "should be read in conjunction with State Environmental Planning Policies" and that "it is intended to incorporate the policies and strategic objectives of this Plan in the review of the Tweed LEP (anticipated 1998)". The Plan identifies in detail various policies with respect to the need for urban development, inter alia, to improve in "diversity, design and efficiency" and the need to "provide for changing demographic needs of the community". Hastings Point is identified, amongst other areas, for the initiation and evaluation of a two-storey height limit.

19 The Coastal Design Guidelines for NSW (dated February 2003) are provided for decision-makers and development applicants and provide a framework for coastal developments by highlighting a hierarchy of settlement types along the coast and their desired future characters. Design principles for coastal settlement structure are also identified in relation to best practice outcomes and include the development of

buildings appropriate to a coastal context. The Guidelines finally deal with implementation, and cite themselves as being "part of an evolving set of support documents to assist in the better planning, management and use of precious coastal resources."

- 20 The Tweed Future Issues Paper (open to public comment from November 2003) notes the fact that the Tweed Shire 2000+ Strategic Plan is in need of review and to this end highlights various strategic challenges in the Tweed area. The Paper is intended to provide a basis on which discussion within the community can be held and covers various issues such as sustainable development, the environment and rural land use. Among the recommendations is a plan to prepare individual locality plans for the various villages and rural townships in the Tweed shire as opposed to having the TLEP manage development in these areas.
- 21 The aim of the Far North Coast Regional Strategy (dated December 2006) "is to manage the Region's expected high growth rate in a sustainable manner" with an outlook to the year 2031. It states the intention to manage future growth by checking coastal development and encouraging development of non-coastal centres. A review of building height limits is also listed as an action to be taken by the Council in a review of settlement and housing, as well as ensuring that LEPs provide that new development reinforces existing urban centres. The Regional Strategy is intended to be implemented primarily through LEPs, development control plans (DCPs) and the State Infrastructure Strategy.

*Aeklig proceedings - Summary of issues based on the Further Amended Points of Claim*

- 22 The Aeklig development application was made pursuant to SEPPSL. The development was also permissible development under the TLEP.

*(a) Failure to consider clause 8 of the TLEP*

- 23 In granting consent to the development, the Council failed to consider the matters that it was required to consider pursuant to cl 8 and failed to be

satisfied about those matters before it granted consent to the development.

#### Particulars

- (i) The Statement of Environmental Effects fails to make any reference to cl 8 of TLEP or the objectives of the zone or the TLEP (including cl 4 and cl 5 of TLEP) and makes no assessment of the consistency or otherwise of the development with those requirements;
- (ii) The report to the Council on 8 May 2007 failed to make any reference to cl 8 of TLEP or make any assessment of the matters required to be considered including the objectives of the zone and aims and objectives of the TLEP including cl 4 and cl 5 of TLEP;
- (iii) There was no inconsistency between the provisions of clause 8 of TLEP and SEPPSL and between the objectives of the zone and SEPPSL so as to cause SEPPSL to prevail over the provisions of TLEP and avoid the need to consider the provisions of cl 8 or the zone objectives.

#### *(b) Manifestly unreasonable*

- 24 The decision to grant consent was manifestly unreasonable, and therefore invalid. In July 2005 the Council resolved to prepare an amendment to TLEP to restrict the height of development at Hastings Point south of Cudgera Creek, to two storeys. The Draft LEP was to be known as Draft Amendment No 81 – Heights of Buildings, Hastings Point (Amendment No 81).
- 25 The Council submitted Amendment No 81 to the Director-General pursuant to s 64 of the EP&A Act on or about March 2006.
- 26 Despite the Council later resolving in December 2006 to defer the making of Amendment No 81, the Director-General issued a delegation to issue a section 65 certificate in respect of Amendment No 81 authorising the Council to exhibit Amendment No 81.

- 27 Further, or in the alternative, in approving a development of three storeys in height, the Council's decision to grant consent was manifestly unreasonable.

Particulars

- (i) Given the authorisation to exhibit Amendment No 81, no reasonable decision maker could have approved a development of three storeys.
- (ii) Given the Director-General's expressed concern, about which the Council was aware when it granted the consent, relating to the sensitive coastal location and that a reduction in building heights would better reflect the aims and objectives of the NSW Coastal Policy, the decision was manifestly unreasonable.
- (iii) Given the provisions of the Tweed Shire 2000+ Strategic Plan adopted in December 1996 which proposed the initiation and evaluation of a two storey height limit for Hastings Point, the decision was manifestly unreasonable.
- (iv) The adoption by the Council on 12 April 2006 of the Coastal Design Guidelines supports a finding that the decision had no plausible justification.
- (v) Given the existing one and two storey character of Hastings Point, no reasonable decision maker could have concluded that a three storey development would maintain neighbourhood amenity and appropriate residential character and that the proposal would thus satisfy the requirements of cl 31 of SEPPSL.

*Planit proceedings - Summary of issues based on Amended Points of Claim*

*(a)(i) Failure to consider – clause 8 of TLEP*

- 28 In granting consent to the development, the Council failed to consider the matters that it was required to consider pursuant to cl 8(1)(b) and (c) and failed to be satisfied about those matters before it granted consent to the development.

#### Particulars

- (i) The Statement of Environmental Effects fails to make any reference to cl 8 of TLEP or the objectives of TLEP including cl 4 and cl 5 and makes no assessment of the consistency or otherwise of the development with those requirements.
- (ii) The report to the Council on 19 June 2007 failed to make any reference to cl 8 of TLEP or make any assessment of the matters required to be considered pursuant to cl 8(1)(b) and (c) including the aims and objectives of the TLEP including cl 4 and cl 5 of TLEP;

#### *(a)(ii) Failure to consider - height of building*

- 29 Further, in July 2005 the Council resolved to prepare an amendment to TLEP to restrict the height of development at Hastings Point south of Cudgera Creek, to two storeys. The Draft LEP was to be known as *Draft Amendment No 81 – Heights of Buildings, Hastings Point* (Amendment No 81).

#### Particulars

- (i) Agenda Report for Council's Planning Meeting of 6 July 2005.
- (ii) The Council submitted Amendment No 81 to the Director-General pursuant to s 64 of the EP&A Act on or about March 2006.

#### *(b) Manifest unreasonableness*

- 30 Further, or in the alternative, in approving a development of three storeys in height, the Council's decision to grant consent was manifestly unreasonable. The grounds argued are the same as for Aeklig in par 27(i) – (iv) (the ground relevant to SEPPSL does not apply).

#### **Evidence**

- 31 The parties filed an agreed bundle of documents concerning the documents from the Council file relied upon, inter alia. Additional affidavits were relied on by the Respondent. These included an affidavit of Mr Gibson, town planner, dated 31 January 2008 read over the objections of the Applicant. Mr Gibson has worked in the Council area for many years

including as a senior town planner at the Council for five years since 1992. His evidence is that he has been involved in the preparation of hundreds of development applications to the Council for a range of proposals. He is familiar with cl 8 of the TLEP. In his experience the matters raised for consideration by cl 8(1) are guiding contextual principles under which each development application is assessed. He did not consider they were dealt with separately but as part of the merits assessment of a particular proposal. He considered it was rare to refer separately to cl 8 in a development application or in a council planner's report. A specific reference is more likely to cl 8 if the matters are assessed as a major issue or where there is some assessed incompatibility with the provisions of the clause. He reviewed about 234 development applications which came before the Council between June 2002 and May 2003 and January 2006 and June 2007. Only about 6.5 per cent contained a specific reference to cl 8(1). This supported his statement that cl 8 was dealt with as part of the development assessment process.

- 32 Administrator Boyd's affidavit dated 30 January 2008 was relied on in relation to the Aeklig proceedings in particular. It was agreed by the parties he was not a member of the Council for the Planit DA approval (contrary to the formal minutes of the meeting at which that development application was approved). Mr Boyd was a former councillor at the Council for 41 years. He stated that he had been aware of the contentiousness of the three-storey height limit in Hastings Point and that there was concern, at the time of the relevant decision, in relation to accumulative impact. He was also aware that most issues raised by objectors to the development were covered in the Council reports. He stated that he was aware of the TLEP and the need to consider cl 8 of the TLEP and that he was clear that any cumulative impact had been assessed. Affidavits of Mr Ingham, planner, were also admitted in part to the extent these were relevant to a consideration of s 25B of the *Land and Environment Court Act 1979* (the Court Act) if this arose.

- 33 Ms Denise Galle, Senior Town Planner at the Council swore an affidavit dated 6 February 2008 which was read. She also gave oral evidence. Her evidence relates to the Aeklig proceedings and the report she prepared on this development application. This was considered by the Council Planning Committee on 8 May 2007. As identified in her affidavit, before the planning committee meeting she briefed Administrators Boyd, Willan and Payne. She told them that the development satisfied the current future intended character based on the TLEP zoning and the three storey height limit. She was present at the planning committee meeting and noted that the committee was addressed by several objectors. The committee recommended approval of the development by the Council.
- 34 In cross-examination, Ms Galle agreed that cl 8 of the TLEP was the provision on which assessments were made by her and others, and that one must ultimately be satisfied of all the provisions in cl 8 and not merely be conscious of them.
- 35 In re-examination, Ms Galle clarified that cl 8 is the basis on which she herself performs any given assessment. Factors that have weight in her opinion include the permissibility in the zone, consistency with zone objectives and the aims of the TLEP itself, other clauses in the TLEP and whether, in a cumulative sense, the application would have an impact on the community. For any given application, Ms Galle would look to subclauses (a) and (b) of cl 8(1) to ensure that that the application was not prohibited or inconsistent with the zone objectives and then to cl 8(1)(c) for a cumulative assessment. Her report in the Aeklig matter had regard for the cumulative impacts of environment, flooding, character and height issues.
- 36 Ms Galle also stated that, as part of the TLEP amendment preparations, consultants were to be engaged to conduct a review of various aspects including building heights in a time frame that would allow it to be gazetted by 2009.



- 37 Subsequent to the hearing the parties agreed that additional evidence and issues should be raised in relation to the manifest unreasonableness argument by referring to the Coastal Design Guidelines for NSW published February 2003 (a brief summary is outlined above at par 19). An extract of the Council's minute dated Wednesday 12 April 2006 (which I have labelled exhibit H) recommended that:

*Council adopts the Coastal Design Guidelines for New South Wales, to be used by Council, as follows: 1. As part of Council's Planning Reform Program to review to achieve better planning, management and use of precious coastal resources; and 2. To supplement existing planning controls pending the finalisation of the Planning Reform Program.*

The minute of the Council committee decision dated 12 April 2006 (also in exhibit H) recommended adoption of the Guidelines.

- 38 The Applicant provided a chronology based on the documents tendered. The Respondent argued that steps in the strategic planning process concerning building heights after the grants of development consent on 8 May 2007 and 19 June 2007 were not relevant. This is referred to in the first part of the chronology which follows. Parts of that process occurred at the same time the development consents were under consideration. Two dates are after the development consents were granted and were referred to by the Applicant principally to demonstrate that the process was ongoing.

#### *Strategic Planning processes*

7 April 2000	TLEP gazetted
25 November 2003 – 31 January 2004 6 July 2005	Tweed Futures Issues Paper exhibited  Council resolved to amend the TLEP by reducing the maximum height of buildings south of Cudgera Creek at Hastings Point from three storeys to two storeys. Prepares Amendment No 81.
March 2006	Draft Far North Coast Regional Strategy prepared by Department of Planning and exhibited
6 March 2006	Council writes to the Director General of the Department of Planning requesting delegated authority to issue a s 65 certificate which would permit Council to put Amendment No

81 on exhibition.

30 March 2006	Director General of the NSW Department of Planning informs Council that he is withholding the issuing of Authorisation to exercise delegation to issue a s 65 certificate with respect to Amendment No 81 until Council reviews building heights along the Tweed Coast to give a 'strategic context' for heights at Hastings Point.
12 April 2006	Council adopts Coastal Design Guidelines for NSW
December 2006	Far North Coast Regional Strategy published
17 December 2006	Tweed 2000+ Strategic Plan adopted
19 December 2006	Council resolved to abandon pursuing Amendment No 81 at its general meeting.
20 March 2007	Director General provides Council with written Authorisation to exercise delegation which conferred the right onto the Council to issue a s 65 certificate and publicly exhibit the draft amendment.
10 May 2007	Council invites comments from public in Hastings Point regarding proposed re-zoning and reduction of building heights [Ex C Tab 6]
After Aeklig DA granted consent 10 June 2007	Council reports results of survey to Administrators [Ex C Tab 7]
After Planit DA granted consent 25 September 2007	Council notifies Minister for Planning of its height review survey and its ongoing review of building heights and notes that determination of development applications for Hastings Point are to be deferred [Ex C Tab 8]
<b>Aeklig DA</b>	
27 April 2006	DA06/0413 is lodged by Jim Glazebrook and Associates for development of a three stage seniors living facility on behalf of Alan and Suzanne McIntosh.
17 May to 31 May 2007	Public exhibition of proposal. (DA 06/0413)
8 May 2007	At its general meeting, the Council (administrators Boyd and Willan) adopted the recommendations of the Planning Committee and approved DA06/0413 subject to certain conditions.
14 May 2007	Notice of determination granting approval for the Development Application.
14 August 2007	Class 4 application filed.
<b>Planit DA</b>	
10 January 2007	Development Application 07/0022 lodged with Council by Planit Consulting for a three storey 'townhouse' style

development.

- 19 June 2007 Administrators Willan and another resolved to adopt the recommendations of the Planning Committee and approved DA07/0022 subject to certain conditions.
- 28 June 2007 Notice of Determination issued.
- 28 September 2007 Class 4 Application filed.

### **Aeklig proceedings – Failure to consider cl 8 TLEP**

#### *Inconsistency between SEPPSL and TLEP*

- 39 Before the Applicant's argument concerning the failure to consider cl 8 of the TLEP can be considered the issue arises of whether that provision is inconsistent with the SEPPSL (third particular in par 23). As the Respondent argued, if it is, cl 8 cannot apply to the Aeklig development consent. This ground of review would not then be available and much of the evidence concerning the Aeklig DA does not need to be considered.
- 40 In order to understand the arguments and findings, parts of the Council town planner's report of Ms Galle prepared in relation to that development need to be identified. The Council planner's report describes the application as for a SEPPSL development and notes the proposal is permissible under the SEPPSL and allows the Council to set aside planning controls that are inconsistent with the SEPPSL. The report considers the provisions of the TLEP under s 79C of the EP&A Act. The proposed development is permissible in the zone. The primary objective of the zone is referred to and she refers to cl 15 (provision of accredited services), cl 16 (three storey height limit), cl 22 (development near designated roads), cl 25 (where development on land adjacent to land zoned for environmental protection) and cl 34 (minimisation of flood damage), inter alia. The report concludes the development generally complies with the TLEP. The report then considers various SEPPs including SEPPs 11, 14, 21, 55, 71 and SEPPSL. In relation to SEPPSL the report states in relation to Pt 3 design requirements:

*Clause 31 Neighbourhood amenity and streetscape*

*This clause specifies a number of requirements that must be taken into consideration when assessing such a facility. They include the need for new development to add to the character and amenity of the area, maintain neighbourhood amenity and appropriate residential character, including setbacks, building form and building heights, appropriate planting and where possible retain existing major trees on the site.*

*The bulk and scale of the development is a controversial component of the development as a whole. Whilst the Tweed LEP stipulates that the subject site is affected by a three-storey height limit, Council has previously considered reducing the height limit to two storeys in this location. Draft LEP 81 has since been deferred for consideration in the new LEP and therefore the three-storey height limit remains in force.*

*The proposed development complies with this height limit but would not be consistent with the existing one to two-storey character of the area. Given the applicable three-storey height limit it can be argued that this development is one of the first to contribute to a changed character for Hastings Point. This is topical, however, given the three-storey height limit for the purposes of this Clause. The proposed development is considered satisfactory based on a changing character for Hastings Point.*

*The subject application satisfies all the above-mentioned requirements. The proposal will add and enhance the character and amenity of the area, through the introduction of modern architecturally designed buildings. The proposal does not involve the clearing of any native vegetation and has the benefit of being relatively cleared, enabling the proposal to be designed with substantial setbacks to Cudgera Creek and its environs. The proposal has also adopted a building form and siting that relates to the site's landform, through 15 metre front setbacks to the street and adopted building heights in Building B that provide for transitional scale.*

The report concludes the proposal is acceptable under SEPPSL.

#### *Applicant's submissions*

- 41 Clause 5(3) of the SEPPSL states that it will prevail over any other planning instrument that applies to a development to the extent there is any inconsistency. There is no inconsistency between the two instruments

and consequently cl 8 of TLEP applies. Inconsistency requires that there be a lack of harmony or want of consistency or congruity and there is none. *Central Coast Care v Wyong Shire Council* (2003) 124 LGERA 320 and *Mete v Warringah Council* (2004) 133 LGERA 420 which dealt with the relationship between *State Environment Planning Policy No 5 – Housing for Older People or People with a Disability* (SEPP 5, the predecessor to SEPPSL and similarly worded), SEPPSL and a LEP, support such an approach in this context.

- 42 There is no inconsistency between the requirement to take into account matters prescribed by cl 8 and the objective of the zone, and the requirement to consider the provisions of SEPPSL. The provisions are not mutually exclusive. Clause 8 should be construed to apply to any development of land to which the plan applies.
- 43 The Respondent relied on *G W Rothwell & Associates v North Sydney Council* (2000) 108 LGERA 361. While the Applicant agreed that the principles in *Rothwell* are the correct approach to be considered in relation to inconsistency these provide no answer in these circumstances.
- 44 Further, cl 30 and cl 78 of SEPPSL state that development consent cannot be granted unless a consent authority is satisfied that the proposed development has adequate regard to the principles in Div 2. Clause 31 considers neighbourhood amenity and streetscape. Even though height and density may be consistent with SEPPSL, this does not allow consent to be granted if the proposal is inconsistent with the principles in Div 2 (cl 30 and cl 31, inter alia). SEPPSL gives priority to the principles in Div 2 over the controls in Pt 7 Div 1. It follows that the aims and objectives of the TLEP and its provisions in prescribing development consistent with the location and other buildings including cl 8 are effectively incorporated into the considerations in Div 2 of SEPPSL. These enable consideration of the extent to which the proposal will recognise elements of the location's character and "adopt building heights which are consistent and compatible in scale with adjacent development".

45 *DEM (Aust) Pty Limited v Pittwater Council* (2004) 136 LGERA 187 relied on by the Respondent is not authority for the proposition that the aims and objectives of a LEP could never form the basis for refusal of a SEPPSL development. The facts in that case were different, unlike this case where the development is permissible under the LEP and SEPPSL.

*Respondent's submissions*

46 The development application was made under SEPPSL not the TLEP and that election binds the Council, see *Mete* at 428 and *Central Coast Care* at 327 (at [27]).

47 A provision of a LEP is not able to operate to prevent a SEPPSL development as that gives rise to an inconsistency. *Rothwell* is adopted. Clause 8 operates as a fetter on the grant of a consent otherwise available under SEPPSL. It does not matter what issues for consideration or satisfaction might overcome that fetter. It is directly inconsistent with cl 17 of SEPPSL. This argument is supported by the Court of Appeal decision in *DEM*.

*Finding*

48 The Applicant has applied for development consent under SEPPSL as specified in its development application and not pursuant to the TLEP (cf *Central Coast Care* and *Mete*). The proposed development is also permissible development under the 2(c) zone in the TLEP. I also note that s 36(1)(a) of the EP&A Act specifies that in the event of an inconsistency there is a general presumption that a SEPP prevails over an LEP made before or after the SEPP.

49 In the Council town planner's report (summarised at par 40) the development application was assessed as satisfying the requirement of the SEPPSL Div 2 Pt 3 design requirements. That assessment under SEPPSL is not directly challenged by the Applicant in this part of the case. The town planner's report also concluded that the development generally

complies with parts of the TLEP. The Applicant is challenging the assessment of the DA in relation to cl 8 of the TLEP. Before that argument can be considered the issue arises of whether cl 8 can operate at all because it is inconsistent with the SEPPSL. The satisfaction of cl 8 is a precondition to the grant of consent under the TLEP (see par 91 below).

*TLEP and SEPPSL not inconsistent*

- 50 The Applicant puts its case in two ways. Firstly, it makes the general argument that the TLEP and SEPPSL both apply unless inconsistent. As the application of cl 8 does not give rise to any inconsistency it should also be applied to the assessment of the Aeklig DA.
- 51 In *Central Coast Care* Lloyd J considered in separate questions of law raised in Class 1 proceedings whether a development application made pursuant to a LEP could be considered in a s 97 appeal to the Court as a Seniors Living application. His Honour held that a development application made on this basis would constitute a new and different development application and could not be considered by the Court in the s 97 appeal. Lloyd J stated in obiter that a LEP can apply at the same time as SEPP 5, as is provided by cl 5(2) of SEPP 5 (identical to cl 5(3) of SEPPSL), to the extent there is no inconsistency between the two instruments. It was not necessary for him to determine if there was any inconsistency between the instruments. The Applicant relies on that decision to support its submission that in this case the TLEP remains relevant and must be considered despite the application being under SEPPSL (unlike in *Central Coast Care*).
- 52 In *Mete*, the Court was considering preliminary questions of law in Class 1 proceedings where a development application had been lodged under the relevant LEP. At the time the development application was lodged SEPP 5 was in force but did not apply to the land to which the LEP applied. SEPPSL was subsequently gazetted repealing SEPP 5 after a s 97 appeal was lodged in the Court. Talbot J held that the SEPPSL was relevant to the application under s 79C(1)(a) EP&A Act as an environmental planning

instrument which applied to land zoned and situated in NSW. As the development application had been made pursuant to the LEP the Court was required to consider it as an application under the LEP not SEPPSL but the consent authority had to consider both instruments to discern any inconsistency between the two when determining the application under the LEP. These environmental planning instruments could apply concurrently. A consent authority and the Court could consider the provisions of SEPPSL to discern if there was any inconsistency between the LEP and SEPPSL. Whether there were inconsistencies did not have to be addressed by his Honour.

- 53 The Applicant argued that, in this case, where the application is under SEPPSL, both instruments apply. Accordingly, the Council was bound to determine whether there was any inconsistency between the LEP and SEPPSL. While these cases support the Applicant's submission that the LEP and the SEPPSL can both apply concurrently, as is provided for by implication in cl 5(3) of the SEPPSL in any event, that does not provide much assistance in determining this case. Neither case was considering the circumstances here where the application is made and therefore assessed under SEPPSL (primarily on one view) and it is necessary to determine whether there is in fact an inconsistency between two instruments.
- 54 The Applicant argued that as there is no inconsistency on the face of the instruments, then both instruments apply. There is no reference to cl 8 of the TLEP in the planner's report. Whether there is an inconsistency between that clause and the provision of the SEPPSL is not addressed in the planner's report. This was argued to be a failure by the planner in the Applicant's oral submissions which argued that there has to be clear inconsistency identified on the face of the instruments. Such a criticism of the planner's report appears unrealistic in the context of a town planner, who is not a lawyer, preparing a planning report to a Council to enable it to determine a grant of development consent. Inconsistency between the instruments does not have to be formally identified as a matter of law in



the planning report. The Respondent argued that inconsistency can arise at a general level and can include the capacity to prevent a development under SEPPSL from operating. This could arise if the clause is applied. The Applicant's argument was at a more specific level whereby the wording of a particular clause of the TLEP has to be considered and, if not inconsistent on its face, must be applied.

- 55 Both parties agreed that *Rothwell* identified principles to be applied when considering inconsistency although such principles were not of great assistance in resolving the matter. In *Rothwell* Lloyd J considered potentially contradictory provisions of a LEP and a regional environmental plan (REP). The latter stated that it prevailed to the extent of any inconsistency. His Honour held in that case that the prohibition on certain development in the LEP was not inconsistent with the REP's more general objectives. At [27]-[29] Lloyd J identified relevant principles in *Coffs Harbour Environment Centre v The Minister for Planning* (1994) 84 LGERA 324. Kirby P said (at 331):

*The term "inconsistency"... is to be construed having regard to the ordinary meaning of the word. ...Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is "want of consistency or congruity"; lack of accordance or harmony" or "incompatibility, contrariety, or opposition" with another environmental planning instrument.*

- 56 Lloyd J noted that there is a general reluctance by the courts to find that there is an inconsistency between two statutory provisions if both provisions can be given effect unless such an intention is clearly expressed, relying on *Hume Steel Limited v Attorney-General for Victoria* [1927] HCA 24; (1927) 39 CLR 455, per Higgins J.
- 57 I consider there is a clear intention identified in the SEPPSL that it is the primary instrument which applies for those developments which seek to rely on it at the expense of the application of planning controls in a LEP. I have noted above s 36(1)(a) of the EP&A Act concerning the general presumption that a SEPP prevails over a LEP if there is an inconsistency.

The REP provisions before Lloyd J in *Rothwell* did not include the specific words of the SEPPSL in cl 2(2) and cl 17 that the achievement of the aims of the policy is to be by the setting aside of local planning controls. Clause 17(a) of SEPPSL (see par 14) applies so that no environmental planning instrument can prevent a development if it is carried out in accordance with the SEPPSL. Adequate regard must be had to the design requirements are identified in cl 31, inter alia. Failure to comply with these may give rise to a refusal of consent under the SEPPSL as provided by cl 78 (see par 16) of SEPPSL. In this case the DA was found to be acceptable under that instrument in the report of the Council's town planner as identified above at par 40.

- 58 In decisions of this Court SEPPSL proposals have been refused on the basis they have failed to satisfy a "desired future character requirement" defined under a DCP (or LEP) but that has been in the context of SEPPSL, cl 78. Reference was made in argument to the decisions of commissioners where Seniors Living development applications have been refused on the basis of taking into account local planning controls, including DCPs. For example, in *Marina Bay Developments Pty Ltd v Pittwater Council* [2006] NSWLEC 577 the refusal of development consent occurred because the design requirements of the SEPPSL were not met. Refusal was due to the operation of the SEPPSL not the provisions of a LEP or DCP. These latter instruments were relied on to inform the Commissioner's consideration required under the SEPPSL but were not decisive of the issues in their own right. I note that in that matter the proposed development was prohibited by the relevant zone but was permissible under SEPPSL (see [10] of that judgment).
- 59 While SEPPSL states in cl 5(3) that the policy prevails if there is an inconsistency with a LEP, suggesting that a LEP also applies subject to that provision, the other provisions referred to above are clear in identifying the primacy of the SEPPSL. In light of these provisions, I agree with the Respondent that there is a potential inconsistency between SEPPSL and the application of cl 8 of the TLEP. That inconsistency can

be at a generalised level of “incompatibility, contrariety or opposition” as per Kirby J in *Coffs Harbour Environment Centre*. A clause in a LEP which when applied to the SEPPSL development could give rise to a refusal is inconsistent with the SEPPSL. The Applicant’s submission that there will be no inconsistency if both provisions can be given effect to does not take into account the specific provisions of SEPPSL in cl 17 which means that cl 8 cannot prevent this SEPPSL development if the clause is not satisfied.

60 The decision in *DEM* would appear to support the Respondent’s argument. That case considered SEPP 5, predecessor to SEPPSL, and the Pittwater LEP. The issue arose of whether land located in a zone in which dwelling houses were permissible only if in conjunction with commercial premises or industry, was land to which SEPP 5 applied. SEPP 5 stated that it applied to land where development for dwelling houses was permitted. McColl JA (Santow and Giles JJA concurring) held the appropriate approach to statutory construction of such remedial provisions required that full relief within the fair terms of the legislation be allowed. At [51] her Honour held:

*SEPP No. 5 starts from the premise that obstacles to its aims may be found in local environmental planning instruments and that it is to prevail notwithstanding. This is made clear in the aims (cl 3(2)(a)), the fact that it prevails where it is inconsistent with any other environmental planning instrument (cl 5(2)) and the fact that it allows development despite the provision of any other environmental planning instrument in certain circumstances (cl 10).*

61 The Court of Appeal held that SEPP 5 applied to the land in question. As identified in the Respondent’s submissions the reasoning in *DEM* can be applied also to the application of SEPPSL, cl 5(3), which has similar provisions to those in SEPP 5 in relation to inconsistency. The Applicant argued that because in this case the development is permissible under the TLEP as well as the SEPPSL it is wrong to argue the aims and objectives of the TLEP can never be the basis for refusal of a SEPPSL but the wording of the SEPPSL suggests to the contrary. The TLEP’s aims and objectives could be potentially relevant to a refusal under the SEPPSL

based on the required analysis of design requirements required (this is raised by the second argument of the Applicant). Whether development is permissible or not under a LEP does not however alter the overriding operation of SEPPSL. Inconsistency clearly applies beyond the issue of permissibility under a LEP.

- 62 If the LEP can apply but only if not inconsistent with the SEPPSL when applied to a particular development, is there is an obligation on the Council to assess the matters under cl 8 to determine whether cl 8 is satisfied? If assessed as not satisfied cl 8 cannot prevent the approval under the TLEP of the development under SEPPSL. I do not consider there can be such an obligation given the provisions of SEPPSL I have referred to. These express a clear statutory intention to alter the application of environmental planning instruments in the case of SEPPSL developments.

*Whether Clause 8 TLEP should be considered under SEPPSL*

- 63 Secondly, the Applicant also argued that the assessment of the design requirements under SEPPSL cl 30 and cl 78 requires consideration of cl 8 of the TLEP and this has not occurred. These clauses require that adequate regard be given to the principles in Div 2 of Pt 3. Clause 31 specifies some of the matters to which regard must be had. The application of cl 8 in this context, of informing an assessment of the design requirements in cl 31, could have some relevance given the subject matter of cl 8 but precisely what impact legally an analysis under cl 8 can have in this context is unclear. The failure to be satisfied under cl 8 cannot on its own give rise to a refusal of the DA under SEPPSL as I have already found on the issue of inconsistency above.
- 64 The requirement of the SEPPSL is that there must be demonstration that adequate regard has been had to the specified design requirements. The language in cl 30 and 78 is not the same as the more onerous satisfaction required before development consent can be granted in cl 8 of the TLEP. This important difference in the terms of the respective instruments and the primacy of the SEPPSL suggests cl 8 of the TLEP is inconsistent with

this part of the SEPP. The finding on inconsistency above must also apply in this context so that cl 8 cannot apply.

- 65 I consider the Respondent's argument on inconsistency should be upheld. Accordingly, I do not need to further consider whether cl 8 of TLEP was considered in relation to the Aeklig DA.

### **Planit proceedings**

- 66 The Council considered the Planit DA on 19 June 2007 by resolving to adopt the recommendations of the Planning Committee. The Planning Committee recommended that the DA for multi-dwelling housing be approved subject to conditions.

- 67 The Council planner's report considered the TLEP as required by s 79C of the EP&A Act. The report refers to cl 15, 16, 34 and 39, inter alia, but not to cl 4, 5 or 8. The primary objective of zone 2(b) Medium Density Residential is set out, namely:

*To provide for and encourage development for the purpose of medium density housing (and high density housing in proximity to the Tweed Heads sub-regional centre) that achieves good urban design outcomes.*

- 68 The proposed development is stated to be consistent with the zone objective and to satisfy the provisions of cl 11.

- 69 Under the heading of "Provisions of Any Draft Environmental Planning Instruments", the report stated:

*The proposal is not adversely affected by any draft EPIs. It should be noted that a previous resolution aimed at reducing the permissible building height in the locality was not pursued by Council, and had never made it to a public exhibition stage. It is of no relevance to the assessment of the present application.*

- 70 Under "Any matters prescribed by the Regulations", the NSW Coastal Policy is referred to as being satisfied.

- 71 In relation to the Tweed DCP under the heading "Section B18 – Tweed Coast Building Heights" the report states:

*Section B18 prescribes, as an overarching objective for building height that, new development should minimise the visual and physical impact and apparent bulk that it has on adjoining development and public streets and spaces.*

*Within the Building Height component of Section B18, an acceptable solution is offered for 3 storey residential development, prescribing that a building has a maximum height of 9 metres to the uppermost ceiling (as measured from finished ground level) and 11 metres to its highest point (ridge point of the roof). The proposal complies with these numerical requirements. Other design elements referenced within Section B18, (i.e. building envelope and setback requirements) have been discussed previously in this report, concluding that the design submitted obtains the objectives and performance criteria of the Plan.*

- 72 The report in part (b) – "The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality" states:

*Context & Setting/Building Height Restrictions*

*The maintenance of the established context and setting of the Hastings Point locality has been a prominent issue throughout the assessment of the subject application. In this regard, Council has been in receipt of a significant number of public submissions, particularly identifying the desire for a 2 storey height restriction throughout Hastings Point.*

*Council resolved not to pursue draft Tweed Local Environmental Plan 2000, Amendment No 81 – Height of Buildings (Hastings Point) at this time on the basis of the Department of Planning's advice that a more strategic approach is required. This advice was changed in late March 2007, however due to the time factor in dealing with this amendment separately, it will be addressed in the new Tweed LEP. The present building height restriction has been in place for a considerable period of time and the statutory planning framework does not make allowance for statutory plan alterations without proper justification for doing so.*

*On the basis of the community concern over the present building height controls, the land owners of 2(b) zoned land*

*in Hasting Point were asked to participate in a survey with the aim of gauging their support for the reduction in building height. However the terms of the survey do not reflect the concerns and views represented by other members of the local community.*

*It appears that the issue is one of maintaining the quiet, peaceful and natural amenity presently maintained by the low density urban development pattern and natural environment. A reduction in [sic] building height alone will necessarily achieve this position. There are single dwelling houses in other areas of the coast, the design of which would substantially alter the existing street character in Hastings Point, approved by Council.*

*The proposed development provides a density commensurate with the existing local area, it is an attractive design that will maintain far higher levels of amenity than that of an alternative building design that may otherwise be permissible on the site, as evidenced by the original design.*

*(i) Failure to consider clause 8 of TLEP*

*Applicant's submissions*

- 73 The Applicant argued that the Council failed to consider the provisions of cl 8 of the TLEP and to be satisfied of the matters required by cl 8(1)(b) and (c). This was required by s 79C(1)(a) EP&A Act. It is agreed by the parties and is clear from the Council planner's report to the Council Planning Committee on 19 June 2007 that there is no mention of cl 8 in the report. It is not necessary to specifically refer to cl 8 if the substance of what that clause requires is apparent on the face of the report.
- 74 Clause 8(1)(a) requires that the Council be satisfied that the development is consistent with the primary objective of the zone within which it is located. Mere advertence to the section or its substance alone is not sufficient consideration. The report adverts to the primary objectives of the zone. There is, in respect of cl 8(1)(a), a statement which may be taken to be a degree of satisfaction in accordance with the sub-clause. It must be accepted that although barely canvassing the objective and the meaning

of it with respect to the application, the officer reaches a conclusion which could be taken to cover cl 8(1)(a).

- 75 Clause 8(1)(b) requires the Council to consider the other aims and objectives of the plan that are relevant to the development. No such aims and objectives are referred to in the DA or in the Council officer's report on the project. The particular aims of the TLEP relevant to the application were in cl 4(a), 4(b) and 4(c). In particular, the Tweed Shire 2000+ Strategic Plan adopted by the Council and specifically referred to in cl 4(a) and (c), makes reference, at [129], to the heights of buildings in Hastings Point and the adoption by the Council of the initiation and evaluation of a two storey height limit at Hastings Point. This strategic plan was relevant and the fulfilment of that objective was highly relevant. Undoubtedly, the review of building heights in a general sense and Amendment No 81 in particular, was considered. However, its relevance was discarded and the application considered against the existing three storey height limit. In particular the officer states:

*Since the date of the above letter from the Department of Planning Council has not reinstated Draft LEP 81 and therefore the current application has been considered against the current applicable height limit of three storeys.*

Quite apart from misrepresenting the facts, by ignoring the ongoing review being undertaken, this amounted to discarding, in the *Hale* sense, a relevant consideration (see *Parramatta City Council v Hale* (1982) 47 LGRA 321).

- 76 There is no evident consideration of any of the other aims and objectives of the plan that are relevant to the development. There is a complete absence of any reference to the aims in cl 4 of the TLEP or indeed, any of the matters relevant under the Tweed Shire 2000 + Strategic Plan.
- 77 Clause 8(1)(c) requires the Council to be satisfied the development would not have an unacceptable cumulative impact on the community and locality, inter alia. The word "cumulative" anticipates a consideration of not



just the development the subject of the application, but the development in combination with other development in the locality and the effect that the accumulation of such development and successive development of a similar type, will have on the community or locality. Thus it imports concepts of precedent as well as consideration of the effect of past approvals and developments.

- 78 There is also judicial support for this interpretation to include not only the effect of the subject development, but to include other developments of a similar type that might take place in the future and developments already approved; see for example *BT Goldsmith Planning Services Pty Limited v Blacktown City Council* [2005] NSWLEC 210, *Dames and Moore Pty Ltd v Byron Council* [2000] NSWLEC 46) both adopted in *Gales Holdings Pty Limited v Tweed Shire Council* [2006] NSWLEC 85.
- 79 There is no assessment in the report to the Council of the cumulative impact of the development or an express statement of satisfaction of the matters required by cl 8(1)(c) that the development would not have an unacceptable cumulative impact on the community, locality or catchment.
- 80 Under the heading of “Considerations under s 79C of the Environmental Planning & Assessment Act”, the report to the Council noted some of the provisions of the TLEP, including the primary objective of the 2(b) zone. There is no reference in this discussion to the provisions of cl 8 of the TLEP.
- 81 Mason P in *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185, and *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 are relied on being mindful of cautionary comments by Basten JA (Handley JA and Hunt AJA concurring) in *Kindimindi Investments Pty Ltd v Lane Cove Council & Anor* (2006) 143 LGERA 277 at 79 and Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 186 that any review must not stray into the merits of a particular decision. Nevertheless in *Kindimindi* the formulation of the requirement to take into account relevant matters by

Moffit P in *Hale* was accepted. Adverting to relevant matters is not sufficient to discharge the requirement for consideration.

- 82 Further, relying on *Currey v Sutherland Shire Council & Ors* (1998) 100 LGERA 365, *Franklins Ltd v Penrith City Council & Anor* [1999] NSWCA 134 and *Manly Council v Hortis* (2001) 113 LGERA 321, cl 8 is a precondition meaning its satisfaction is a precondition to the exercise of the power to grant development consent.
- 83 The absence of direct reference to a relevant consideration should lead to the inference that it was not considered, see *Hale*. Secondly, that inference should be drawn from all the available evidence being the material before the Council on the date of the decision, in this case the planner's report to the Council's Planning Committee (tab 23 Planit bundle of documents). Thirdly, individual councillors can bring their own general knowledge and matters they are aware of over a period of time through discussions and are also presumed to be knowledgeable about the LEP; see *Currey v Sutherland, Somerville v Dalby* (1990) 69 LGRA 422 per Hemmings J at 429. Fourthly, that general knowledge cannot be assumed to extend to a detailed provision of the LEP or the processes required to apply it. The satisfaction of cl 8(1)(a) and (c) is required by the TLEP and positive attention to cl 8(1)(b) is also required; *Franklins* per Stein JA (Powell and Giles JJA concurring).

#### *Respondents' submissions*

- 84 As a general response to the Applicant's grounds of review, these are really an attempt to have the merits of the grant of development consent reconsidered. This must be resisted in judicial review proceedings. The Applicant has not discharged its onus of proving there was a failure to consider cl 8 of the TLEP when the development consent was approved by the Council, see *Kimber v Ku-ring-gai Council* (1990) 130 LGERA 117. In that case no specific reference was made to a relevant provision of a LEP concerning a heritage item. Cripps J was not prepared to assume that the Council was ignorant of its own plan. The mere failure in this case to

refer to cl 8 in the planner's report does not mean that the Council did not deal with cl 8 (this is conceded by the Applicant). The Applicant has the onus of showing there has been a failure to take into consideration a relevant matter and has not discharged this onus.

- 85 The Planit land is in zone 2(b) Medium Density Residential, the primary objective of which is (in cl 11 of the TLEP) "to provide for and encourage development for the purpose of medium density housing (and high density housing in proximity to the Tweed Heads sub-regional centre) that achieves good urban design outcomes". The Applicant now concedes that cl 8(1)(a) was dealt with. The Council planner's report, which considers the TLEP thoroughly, suggests that the relevant matters in cl 8(1)(b) and (c) were also considered. The approach is confirmed by the affidavit evidence of Mr Gibson town planner concerning the general practice of the Council. It was also evident from Ms Galle's oral evidence (although I note that she considered the Aeklig DA not the Planit DA).

*Clause 8(1)(b)*

- 86 In relation to cl 8(1)(b), cl 4 TLEP aim (a) is an action that occurred as a result of the making of the LEP, and requires no further consideration in the assessment of any development application to which the LEP relates. In the alternative, the Tweed Shire 2000+ Strategic Plan provides relevantly (at par 129 of its Policies & Actions):

*129 Heights of Buildings. Current provisions for heights of buildings be retained in the new LEP and DCP's with the exception of Kingscliff, Fingall, Hastings Point and Pottsville. . . . Initiate and evaluate a two-storey height limit at Pottsville Hastings Point and Fingal urban zonings.*

- 87 The initiation and evaluation of a two-storey height limit in Hastings Point occurred, and resulted in Amendment No 81 and its subsequent abandonment by the Council. Clause 4 TLEP aim (a) was taken into consideration in the Planit matter. In relation to cl 4 aim (b), that is not relevant to the assessment of a development application, providing only for the LEP to provide a legal basis for the making of a DCP. In relation to

cl 4 aim (c), this was taken into consideration in the planner's report (p 8.5). Tweed Shire 2000+ Strategic Plan refers to heights of buildings (see par 86 above).

88 In relation to cl 4 aim (d) which requires the encouragement of sustainable economic development, that was considered in the Planit Statement of Environmental Impacts at p 16.8 and this document was before the Council.

89 Clause 8(1)(c) concerns the assessment of cumulative impact. The issue of "cumulative" impact is not possible when a single development application is being considered. What is called for is an assessment of impacts from the subject development adding to (accumulating) the extant circumstances of the "community, locality or catchment". Any failure to articulate the word "cumulative" in any assessment of any development application does not cause a relevant matter not to have been considered, let alone for the consent to be able to be declared invalid.

90 It is submitted that the matters to which cl 8(1)(c) is directed (impact on the community, locality or catchment) are dealt with in detail in the town planner's report. A list identifying the references in the town planner's report to "Community, locality and catchment" according to the Respondents was handed up at the hearing. The list identified that the report referred to good planning and development, visual impacts, amenity, density, access, height and scale and streetscape, inter alia. Several of these references are identified above. Accordingly, it is submitted that the substance of cl 8(1)(c) was properly dealt with in the Planit matter.

*Finding on failure to consider clause 8(1)(b)/(c) of TLEP*

91 The parties agreed that cl 8 had to be satisfied before development consent could be granted in relation to the Planit DA. I agree that the clause is a precondition to the exercise of the Council's power to grant development consent, as identified in *Currey, Hortis and Franklins*.

92 In *Currey* the Court of Appeal considered cl 19 of the *Sutherland Local Environmental Plan* 1993 which prohibited the council from consenting to development on land within a foreshore building line unless it was satisfied in relation to certain matters. Clause 19 was referred to in a council officer's report. Stein JA (Mason P and Handley JA concurring) considered the clause operated before any merit consideration, applying *Clifford v Wyong Shire Council* (1996) 89 LGERA 240. Reference to cl 19 in the planning officer's report to the Council was insufficient to discharge the Council's obligation to consider the clause (at 375).

93 In *Franklins* the Court of Appeal had before it cl 32(2) of the *Penrith Local Environmental Plan No 231* which provided:

*Despite any other provisions of this Order, a person may, with the consent of the Council, carry out development for the purposes of a wholesale and retail warehouse on land to which this clause applies, but only if the Council is satisfied that not less than 60% of the goods sold from the land will be resold by retail after being removed from the land.*

94 At [23] Stein JA (Powell and Giles JJA concurring) considered that cl 32(2) had the effect that the development was prohibited unless the Council formed the opinion required by that clause. At [28] his Honour stated:

*... What is here involved is a question of power. If the pre-condition in cl 32(2) was not satisfied, then Council had no power to grant consent. The existence of the mental state of satisfaction is an 'essential condition' or preliminary to the exercise of the power, Craig v South Australia (1995) 184 CLR 163 at 179 and Timbarra Protection Coalition Inc. v Ross Mining NL [1999] NSWCA 8 per Spigelman CJ at paras 42 and 94. Accordingly, the Land and Environment Court and this court on appeal can review whether the Council held the requisite satisfaction. ...*

95 In *Hortis*, the *Manly Local Environment Plan* 1998 provided in cl 17 that:

*The Council shall not grant consent to the carrying out of development unless it is satisfied that the development will not have a detrimental effect on the amenity of the Foreshore Scenic Protection Area"*

- 96 At [30] the Court of Appeal (Powell, Giles and Fitzgerald JJA) held that this clause was "relevantly similar" to the preconditions in *Currey* and *Franklins*. The question was whether the Council was "*aware that any detrimental effect on the development of the Foreshore Scenic Protection Area was not merely a factor for it to consider when deciding whether or not grant the applications but an absolute bar to a decision to issue the approval*". *Currey* and *Franklins* were applied in holding that the absence of express reference to the clause in the information available to the Council and the extent of that information were likely to cause the Council to overlook the nature of cl 17. Clause 8 of the TLEP has a similar legal effect to the clauses considered in these cases.
- 97 The parties disagreed on whether subclauses (b) and (c) of cl 8 have been satisfied in relation to the consideration of the Planit DA. The primary evidence of that consideration is the town planner's report prepared for the planning committee of the Council. There is no reference in the town planner's report, parts of which are set out above at par 72, to cl 8(1)(b) and (c).
- 98 The Applicant has relied substantially on the findings of Moffit P in *Hale* to argue there is an absence of consideration of the required matters in cl 8(1)(b) and (c) because there is no reference to the relevant clause in the planner's report or otherwise to the matters required to be considered by those clauses. The cases referred to by the Applicant in its submissions (par 78 and following) have been considered and applied on numerous occasions by this Court.
- 99 In *Woolworths Limited v Wyong Shire Council & Ors* [2005] NSWLEC 400 I considered the cases referred to by the Applicant at [221] – [223] as follows:

*Numerous cases in this Court have had to consider the extent of council consideration of development applications. The relevant principles in relation to this issue are contained in Parramatta City Council v Hale (1983) 47 LGRA 319 and Weal v Bathurst City*

Council (2000) 111 LGERA 181. The decision of the Court of Appeal in *Hale* established that a failure by a consent authority to give "real" consideration to the provisions in an environmental planning instrument which a consent authority is required to take into account in determining a development application, is an error of law which renders that development consent invalid (per Moffitt P at 344). However, *Hale* is also authority for the proposition that an inference that a consent authority failed to give real consideration to such a matter can only be drawn after "anxious consideration" (per Moffitt P at 345).

...

In *Weal Giles JA* said at 201 [80]:

*Taking relevant matters into consideration called for more than simply advertent to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration (Parramatta City Council v Hale at 335-6, 339; King v Great Lakes Shire Council at 384; Currey v Sutherland Shire Council (1998) 100 LGERA 365 at 374-5).*

Recently these authorities were considered in *Centro Properties Ltd v Hurstville City Council (2004) 135 LGERA 257* where *McClellan J* set out at 266 – 267 [37] a distillation of the principles in *Hale* and *Weal* including:

- *the onus falls upon the challenger to satisfy a court that the relevant discretion has miscarried;*
- *when exercising its decision-making power, an administrative body must give "proper, genuine and realistic consideration" to the merit of the matter: see Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291 at 292; Paramanatham v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 at 64. Mere advertence to a matter may not be sufficient. Zhang at NSWLR 601;*
- *legally sufficient consideration of a relevant issue may require consideration of conditions which could ameliorate any prospective harm to the environment from the development;*
- *generally speaking, understanding the scope of a problem is a prerequisite to a lawful decision with respect to it;*

...

- 100 These cases must be applied subject to the caution expressed by Basten JA in *Kindimindi* where he noted the need to exercise caution when considering the ground of failure to consider to ensure impermissible merit review does not occur at [75] - [79]. He also stated at [74] that "proper,

genuine and realistic consideration” of relevant matters should not be considered as an opportunity to assess the adequacy of the consideration accorded in a particular case, which is more appropriate to an assessment of whether a decision is manifestly unreasonable, referring to Mason J in *Peko-Wallsend Ltd and Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* (2003) 198 ALR 59. As submitted by the Applicant, the approach of Moffit P in *Hale* continues to be relevant to a consideration of a council’s decision-making process.

101 In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, referred to later in relation to the submissions on manifest unreasonableness, Kirby J stated at 291 that reasons (here the Council’s report) must be read as a whole without adopting a fine appellate tooth-comb approach particularly where the decision under review is of an administrative body and not a legal one.

*Clause 8(1)(b)*

102 Clause 8(1)(b) states, in general terms, that those aims and objectives relevant to the development must be considered. This has been argued by the Applicant to require consideration of the matters in cl 4 of the TLEP. The primary matter requiring consideration under cl 4(a) and (c) is giving effect to the Tweed Shire 2000+ Strategic Plan. Clause 4(b) provides for the making of a DCP, as the Respondents submitted, and does not require a specific consideration in this case. There is no specific reference to the Tweed Shire 2000+ Strategic Plan in the town planner’s report. It is clear from the references in the town planner’s report referred to in the Respondents’ submissions that, while the aims of cl 4 (a) and (c) were not explicitly identified in relation to a consideration of such matters under cl 8(1)(b), the essential matters referred to in the Tweed Shire 2000+ Strategic Plan in relation to building height were considered. This is identified in the parts of the report set out above at par 72. The issue of the existing general building height of two storeys is discussed in the report. The process of considering this, including undertaking a survey of residents, is referred to. Considering the factors discussed in *Centro*



*Properties*, the material in the planner's report suggests there was an understanding of the issue of building height and whether two storeys should be the height limit. That is the issue raised particularly by the Applicant in relation to the Tweed Shire 2000+ Strategic Plan. The reference to the issue in the report is more than "mere advertence" to the issue and suggests that real consideration of that issue did take place in the town planner's report. It was therefore a matter that was brought to the Council's attention.

*Clause 8(1)(c)*

- 103 Clause 8(1)(c) requires assessment of cumulative impact. Assessment of cumulative impact requires that the impact of similar developments to the one proposed and the accumulation of such development and successive developments of a similar type on the community or locality be conducted, see *BT Goldsmith* at [90] and *Dames and Moore* at [46], adopted in *Gales Holdings* at [43]. The issue of whether a development establishes a precedent is also required. It appears that this development is the first of its type in this medium density residential zone. I accept the Applicant's argument of what such an assessment requires (see par 77-78). It follows that it is not sufficient to assess the impact of the single development on the locality and community as the planner's report does.
- 104 Further, I do not agree with the Respondents' submission (par 89) that such a provision can have no application for a single development application as that would render meaningless an important provision in the TLEP. It is, in any event, required to be satisfied before development consent can be given and cl 8(1)(c) should be interpreted to give it an effective operation in the context of a planning instrument such as this LEP.
- 105 The limited roles that expert evidence can play in judicial review proceedings is recognised in cases such as *Caldera Environment Centre Inc v Tweed Shire Council*, unreported; NSWLEC, Talbot J, 13 July 1993, *King v Great Lakes Council* (1986) 58 LGRA 366 and *ULV Pty Ltd v Scott*

*and Ors* (1990) 19 NSWLR 190, considered in *Woolworths Ltd v Wyong Council* at [166]-[169]. Talbot J in *Caldera* identified six circumstances in which expert evidence may be able to be taken into account.

- 106 I allowed in Mr Gibson's affidavit evidence of his experiences in the Tweed Shire over a lengthy period to the effect that the subsection is rarely referred to in development assessment reports of the Council. His evidence is concerned with the practice of the Council rather than with the substance of its decision making. The only category identified by Talbot J which this conceivably comes under is evidence "to explain factors, principles or materials relevant to the determination" but it is debatable whether the evidence does fall within that category. This evidence is not an answer to the legal requirement contained in cl 8(1)(c) in this case.
- 107 The affidavit of Mr Boyd who was on the Council's planning committee for the Planit DA (but did not approve the DA) also does not assist the Respondents. Mr Boyd states that he considered that a cumulative assessment had been carried out. There is no evidence that it had, in that there is no evidence in the substance of the planner's report of such an assessment. Awareness that there has to be an assessment is not sufficient to discharge a council's responsibility, see *Hortis* at 334.
- 108 The Applicant bears the onus of establishing that the Council has failed to consider a relevant matter in the exercise of its planning discretion. The Respondents submitted that the Applicant could have called the individual administrators but did not and the inference therefore arises, it was submitted, that the evidence was available but no explanation is provided for why it was not called. I do not agree that the Applicant was required to call such evidence to discharge its onus of proof. It is the decision of the Council as a collegiate body undertaking its statutory functions that is relevant to this review, not the individuals who make up that collegiate body. The formal records as found on the Council's file consequently have an important role in identifying what was before the Council in the absence of the Council providing a statement of reasons for its decision.

- 109 The Respondents relied on *Kimber* but I note that it is distinguishable on its facts. Although there was no specific mention of a particular provision in a town planner's report there was evidence of the relevant provision being referred to by persons who addressed the Council about the relevant matter. The evidence of Mr Boyd does not overcome the lack of reference in the planner's report however, for the reasons stated above.
- 110 It was also submitted by the Respondents that there is evidence of satisfaction because the development consent was issued but that submission is made without any authority and does not overcome a total lack of evidence in the Council planner's report on a relevant matter. There is no evidence of assessment of cumulative assessment and the findings of Moffit P in *Hale*, relied on by the Applicant apply. There was a failure to consider this mandatory matter in the planner's report and consequently there is no evidence that matter was considered by the Council.
- 111 I consider the Applicant's submissions in relation to the failure to consider cl 8(1)(c) of the TLEP should be upheld. This ground of challenge to the Planit DA is upheld.

*(ii) Failure to consider - height of buildings/Amendment No 81*

- 112 The particulars identified in the Amended Points of Claim in the Planit proceedings are set out in par 29 and refer to a failure to consider Draft Amendment No 81 which dealt with the height of buildings in Hastings Point. This ground of appeal is similar to that already considered in relation to cl 8(1)(b) as that also involved the consideration of building height. A brief chronology regarding draft Amendment No 81 is as follows:
- (a) On 6 July 2005, Council resolved to prepare a LEP to amend the LEP to restrict the height of buildings south of Cudgera Creek at Hastings Point.

- (b) By letter dated 30 March 2006, the Director-General of the Department of Planning advised that an authorisation to use his delegation to issue a s 65 certificate would not be issued;
- (c) On 19 December 2006 Council resolved to abandon the pursuance of a draft amendment to restrict the height of buildings south of Cudgera Creek at Hastings Point, as a review of the Hastings Point building heights will be undertaken within a Shire-wide review as part of TLEP;
- (d) By letter dated 20 March 2007, the Director-General of the Department of Planning granted an authorisation to Council to use his delegation to issue a s 65 certificate with respect to proposed Amendment No 81 – Height of Buildings at Hastings Point;
- (e) By letter dated 10 May 2007, Council invited comments on a proposal regarding a desire to reduce the allowed building heights for the Hastings Point area;
- (f) By letter dated 4 July 2007, Council advised residents of Hastings Point of the outcome of its invitation for comments.

113 As identified earlier in the judgment, the strategic planning process and approval of the Planit DA were proceeding at the same time. The strategic planning process commenced continued well before and after the Planit DA was approved.

*Applicant's submissions*

114 The particulars specified in the Amended Points of Claim refer to the agenda report of the Council planning meeting of 6 July 2005 and the submission of Amendment No 81 to the Director-General in March 2006 under s 64 of the EP&A Act. Although Amendment No 81 had not been placed on public exhibition and was not, therefore, a matter for consideration required by s 79C(1)(a), it was nevertheless a document of considerable importance in the public submissions and by reference to the Tweed Shire 2000+ Strategic Plan. By the time the Council considered the Planit DA in June 2007 it was well aware of the Director-General's view

that the Council should proceed with Amendment No 81 in order to reduce the building height limit in Hastings Point from three to two storeys to be consistent with the Coastal Policy. Even though its provisions could not be treated as an exhibited draft plan, it is submitted that Amendment No 81 was a relevant consideration as a matter of great public interest under s 79C(1)(e) of the EP&A Act.

- 115 Contrary to this position, the Council officer's report to the Council stated that the draft instrument was "of no relevance to the assessment of the application" (see par 69). The assessment of the application proceeded on the basis draft Amendment No 81 was irrelevant and that the application should be determined according to the existing statutory height controls. It is submitted that this was tantamount to an error of the type identified by Moffitt P in *Hale* in that although the Council adverted to the relevant matter, it then discarded it without taking it into consideration in its overall assessment of the merits of the application. The express statement by the officer that it was of no relevance to the assessment means that the draft Amendment No 81 was given no weight at all in the assessment process and that it was, for the purposes of the application before the Council, discarded as a consideration.

*Respondents' submission*

- 116 Despite the authorisation given by the Director-General in his letter dated 20 March 2007, the Council did not utilise, pursuant to the discretion that it retained, the Director-General's delegation to issue a s 65 certificate. Accordingly, draft Amendment No 81 is not a matter that needs to be taken into consideration pursuant to s 79C(1)(a)(ii) of the Act. Despite this, the draft Amendment No 81 is argued by the Applicant to be a matter to be taken into consideration pursuant to s 79C(1)(e) of the Act as a matter of public interest.
- 117 The evidence shows that reference is made to Amendment No 81 in the Assessment Report to Council dated 19 June 2007 at page 195. The issue of height of the proposed development is referred to at pages 178, 179,

194, 195, 196 and 197. Reference is thus made both to the draft Amendment No 81, and to its substance, namely height.

- 118 Contrary to the Applicant's submissions, there is no basis for stating that the Director-General of Planning had expressed the view in the letter to the Council that Amendment No 81 should proceed in order to reduce the building height limit in Hastings Point. The letter of 20 March 2007 states that the Council can continue with the proposed amendment to building heights at Hastings Point. The decision whether to proceed was left up to the Council. The Director-General's letter states "*... a reduction in building heights would appear to better reflect the aims and objectives of the NSW Coastal Policy.*" This suggest that no final conclusion has been made on this issue.
- 119 Due to the heightened public agitation concerning the height and number of storeys for developments in Hastings Point, the issue of reducing the control governing the number of storeys was common knowledge to all relevant participants in the process.
- 120 Section 79C does not require that a development application be assessed in accordance with a draft LEP, it merely requires that various matters be taken into consideration. In the present case, Amendment No 81 was taken into consideration. Furthermore, the substance of Amendment No 81, namely the issue of reducing the height limit from three to two storeys and the ramifications thereof, was also taken into consideration, through the assessment of the development application in accordance with the controls that were applicable, as well as general non-numeric controls. There was no failure to consider as alleged by the Applicant. The effect of the Applicant's submissions is that a future review of building heights is elevated as a matter of public interest to having as much or more weight than the existing legal controls in the TLEP.

*Finding on failure to consider heights of buildings – Amendment No 81*

- 121 This ground of review covers similar subject matter to that already considered for cl 8(1)(b), namely the consideration of building heights. In relation to the Council planner's report, firstly, the whole of the report on the Planit DA must be considered to understand the context in which the statement that Amendment No 81 has no relevance to the assessment of the present application, was made. The Applicant relies on that statement in the Council officer's report primarily as demonstrating the inadequacy of consideration by the Council. That statement by the Council officer under the section of the report detailing whether there are any draft environmental planning instruments required to be taken into account is correct in that the draft was never placed on public exhibition so that it did not satisfy the description of a draft LEP as referred to in s 79C(1)(a)(ii). That is clear from the brief chronology in relation to Amendment No 81 set out at par 112.
- 122 In terms of the substance of Amendment No 81, it was concerned with a reduction in building height to two storeys for Hastings Point. The issue of the building height in Hastings Point, which is arguably a matter of public interest under s 79C, was identified and considered by the planner's report. The reference to Amendment No 81 is not the entirety of the material available to the Council on the issue of building height as identified in the report set out above at par 69 and following. I consider, as the Respondents submitted, that the issue of building height was properly ventilated in the planner's report and was therefore a matter about which that Council was properly informed and was able to consider when assessing the DA.
- 123 The general knowledge of local councillors can be recognised in terms of their awareness of local issues although care must be exercised in doing so. For example, that was held not to extend to an assumption of knowledge about detailed provisions in an LEP (see *Franklins* per Stein J at [26]). The chronology of the strategic review process is identified above at par 38. It has been ongoing for some time. While the Council may not

have been aware of all aspects of the review, the issue of building heights was likely to be a matter about which the Council was aware, given the ongoing strategic review process which commenced well before the Planit DA was lodged on 10 January 2007 and continued after that DA was approved. At the time the DA was approved the Council had resolved to hire a consultancy firm to consider height and density provisions in Hastings Point.

- 124 I consider the height of buildings was therefore a matter required to be considered by the Council under s 79C and it was adequately considered. This ground of appeal is unsuccessful.

*Manifest unreasonableness (Planit and Aeklig matters)*

- 125 Similar arguments were made in relation to both matters.

*Applicant's submissions*

- 126 The Council's decision to approve the two development consents was manifestly unreasonable as referred to in *Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Various formulations for what this means can be found in *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821, and in the authorities reviewed by Biscoe J in *Save Our Street Inc v Settree* [2006] NSWLEC 570 at [31]
- 127 One formulation particularly relied on is found in *Re Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* in which it was held that the decision in issue was not "illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds" (per McHugh, Gummow and Callinan JJ, Kirby J dissenting). This formulation was applied in *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources* (2005) 138 LGERA 11 at [129]. The conclusion of the Council's planner that the proposed development was capable of approval in the face of the ongoing review of building heights, the preference expressed in the letter from the Director-General of



Planning that Amendment No 81 be exhibited, and the finding by the planner that the development would be inconsistent with the existing character of Hastings Point, was illogical and lacked any factual basis.

- 128 The Tweed Shire 2000+ Strategic Plan was adopted by the Council on 17 December 1996 and is required to be considered pursuant to the TLEP (cl 8) under the aims of the plan in cl 4(c). The strategy identifies the need to initiate and evaluate a two storey height limit at Hastings Point and the development of locality plans. The Tweed Future Issues Paper was publicly exhibited in November 2003 to January 2004 and recognised the particular provisions of rural townships and villages such as Hastings Point. The Council resolved to reduce the height of buildings at Hastings Point to two storeys. The Department of Planning did not allow Amendment No 81 to proceed at that stage so that on 19 December 2006 it was resolved to abandon it. The Director-General of the Department of Planning then wrote on 20 March 2007 saying the amended LEP could be exhibited. The development consents were granted after that date. The Council has since resolved to engage consultants to undertake an assessment of the height and density provisions. Given the content of other strategic planning documents in relation to building height the decisions to grant the two development consents were so unreasonable they should be declared invalid.
- 129 The history and the documentation contained in the bundle of documents reveals that the Council was fully aware of the Director-General's desire to reduce building heights in Hastings Point, as well as public submissions and a public interest in doing so. The Council was also aware that there was an ongoing review being undertaken by its consultants in relation to building heights in the locality.
- 130 Further, the Coastal Development Guidelines (CDG), prepared by the NSW Government, provides specific guidance in relation to the seven settlement types identified in the guidelines. These include coastal villages and hamlets. Hastings Point is most accurately defined as a coastal

hamlet, albeit with a population of 700. The CDG refers to the desired future character of coastal hamlets as "building heights of up to two storeys are maintained throughout the settlement" (at p 25). The CDG had been adopted and was part of the information available to the Council and relevant to the need to maintain the existing character of Hastings Point, being the retention of a two storey building height limit for the locality.

- 131 The Council itself determined to consent to the development despite the review of building heights being under way and the information outlined above. All of these matters taken together suggest the decision was devoid of plausible justification or was illogical or irrational and therefore manifestly unreasonable.

*Respondents' submissions*

- 132 The Applicant has particularised its claims for manifest unreasonableness by reference to the appropriateness of granting consent to a three storey development, the sensitive coastal location of each proposed development, and the provisions of Tweed Shire 2000+ Strategic Plan that had been adopted in December 1996 which proposed the initiation and evaluation of a two storey height limit for Hastings Point.
- 133 The existence of the three storey height control in the TLEP envisages the future character of Hastings Point to contain three storey developments in the context of the locality with its (assumed) one and two storey developments. It cannot be manifestly unreasonable to consent to a development that meets current controls. The Applicant's case elevates a future review of building heights to having greater significance than the current legal controls.
- 134 The Second Respondent in the Aeklig proceedings and the Third Respondents in the Planit Proceedings submitted that the decisions that the Council had made were reasonably open to it, given what the proposals consisted of, the issues that had been raised, and the assessments put before Council in relation to those issues. In any event:

- (a) granting consent to three storey developments was in accordance with the Height of Buildings Map pursuant to cl 16 of the TLEP; and
- (b) the Assessment Report for each of the Aeklig DA and of the Planit DA referred to the coastal location of the subject site, character of the surrounding area and height issues.

135 The Applicant also relies on the provisions of the CDG. The CDG is a policy document and its adoption by the Council does not add any weight to the Applicant's argument in relation to manifest unreasonableness. It must be considered under s 79C(1)(c) of the EP&A Act but is not legally binding. The weight to be given to it is minor given the lack of evidence of its gestation, consultation or basis and its frequency or regularity of application after adoption; see *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254 at 272-273.

136 After the Introduction, the CDG consists of three parts. Part 1 is headed "Determining a local hierarchy of settlements" which includes a reference to the desired future character for coastal hamlets. The Introduction of the CDG states that:

*Part 1 describes the concept of determining a hierarchy of coastal settlements and how this relates to planning within a local area. It also defines seven coastal settlement types, which can be used to analyse and understand urban development along the NSW coast.*

*Part 1 describes each settlement type in terms of:*

*...*

*Desired future character – describing the link between the future built and natural character of a place.*

137 The references to the desired future character are no more than part of the Coastal Council of NSW's description of coastal hamlets. There is no requirement that a proposed development comply with the description in the CDG of desired future character of the settlement in which the proposed development might be located.

138 Further, in any event, the desired future character of Hastings Point was taken into consideration in the assessment and determination of the Aeklig and Planit DAs:

(a) in relation to the Aeklig matter (approved 8 May 2007 – bundle of documents volume 2, exhibit D, tab 16)

- (i) the report considered, in accordance with the requirement in cl 8 of *State Environmental Planning Policy No 71 – Coastal Protection* (SEPP 71), “the suitability of development given its type, location and design and its relationship with the surrounding area” at p 91 and the conclusion at p 92.7 (“The proposed development is considered to comply with SEPP 71”);
- (ii) the report considered cl 31 of SEPPSL – Neighbourhood amenity and streetscape, at p 96-97;
- (iii) the report considered building heights at Hastings Point at p 111-112 and also p 115-116;
- (iv) the report considered the character of Hastings Point at p 119-120. Specifically, there it is noted:

*The proposed development complies with this height limit but would not be consistent with the existing one to two storey character of the area. Given the applicable three-storey height limit it can be argued that this development is one of the first to contribute to a changed character for Hastings Point. This is topical, however, given the three-storey height limit for the purposes of this Clause [sic] the proposed development is considered satisfactory based on a changing character for Hastings Point.*

- (v) the report considered the submissions relating to the Hastings Point Residents' Association Vision Plan at p 125-126.

(b) In relation to the Planit matter (approved 19 June 2007, exhibit D tab 23):

- (i) the comment at p 178 of the report to the Council's planning committee meeting of 19 June 2007 that

*the amended design is characteristic of the emerging design styles in the locality, possesses far greater levels of*

*amenity and will generally provide an attractive contribution to the local built environment of Hastings Point.*

- (ii) the report considered at p 184, cl 16 of TLEP and in particular the clause objective. The report concluded that the proposal complies with cl 16;
- (iii) the comment in the report at p 190-191:

*The contemporary coastal architecture of the development is representative of the emerging and somewhat distinctive style of multi-dwelling housing in the coastal area of the Tweed. The integrity of the quiet, peaceful and natural environmental attributes that characterise Hastings Point are not compromised by this development.*
- (iv) the assessment in the report at p 195:4-196:3 of submissions concerning context and setting/building height restrictions.

139 The Second Respondent in the Aeklig proceedings and the Third Respondents in the Planit Proceedings submitted that the decisions the subject of these proceedings were not manifestly unreasonable.

*Finding on manifest unreasonableness*

140 As identified in many cases, a ground of challenge to an administrative decision based on manifest unreasonableness grounded in *Wednesbury* is confined and the criteria must be stringently applied; see *Weal v Bathurst City Council* per Mason P at 188 [27], *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, *Westfield Management Ltd v Perpetual Trustee Company Limited and Anor* [2006] NSWCA 245 per Tobias JA at [71]. The limits of judicial review are also identified in numerous cases as not being concerned with the merits of a particular decision; *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484 at 518; [1986] 1 All ER 467 at 474 inter alia.

141 In *Minister for Immigration and Multicultural Affairs v Eshutu* (1999) 197 CLR 611 per Gleeson CJ and McHugh J at [44]:

*In Wednesbury itself, which was concerned with an issue as to whether the imposition of a condition imposed by a licensing authority was so unreasonable as to be beyond the*

*proper exercise of the authority's powers, Lord Greene MR said that what a court may consider unreasonable is a very different thing from "something overwhelming" such that it means that a decision was one that no reasonable body could have come to. As Mason J pointed out in Minister for Aboriginal Affairs v Peko-Wallsend Ltd, when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another "a court should proceed with caution ... lest it exceed its supervisory role by reviewing the decision on its merits".*

This was cited in *Save Our Street* by Biscoe J at [31] with approval. His Honour also cited with approval Rares J in *Tran v Minister for Immigration and Multicultural Affairs* (2006) 235 ALR 78 at [27]-[29]:

*... that between its extreme ends are many categories of decision with which the courts might not agree or which they could regard as unreasonable but which a reasonable person could have made.*

142 The Applicant's submissions rely on the formulation found in *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* (applied in *Murrumbidgee Groundwater*, see par 127). The illogicality and irrationality is argued to arise in the reports of the town planners in both matters as the findings on the desired future character made are not supportable on logical grounds according to the Applicant.

143 As pointed out in the Respondents' submissions there is a need in judicial review of administrative decisions to apply appropriate standards or criteria to such a process. This was identified particularly by Kirby J in *Wu Shan Liang* at 291 in the context of a judicial review of an administrative decision based on manifest unreasonableness as follows:

*1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law (77);*

*2. This admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others (78). This is not to condone double standards between the reasons and*

*decisions of legally qualified persons and others. It is simply to recognise the fact that where, by law, a decision is to be made by a person with a different, non-legal expertise, or no special expertise, a different mode of expression of the decision may follow. It must be taken to have been contemplated by the lawmaker;*

*3. Specifically, the reviewing judge must be careful to avoid turning an examination of the reasons of the decision-maker into a reconsideration of the merits of the decision where the judge is limited to the usual grounds of judicial review, including for error of law (79);*

*4. Nevertheless, the reasons of a decision-maker will usually provide the only insight into the considerations which were, or were not, taken into account in reaching the decision which is impugned. It is therefore legitimate for the person affected, who challenges those reasons, to analyse both their language and structure to derive from them the suggestion that a legally erroneous approach has been adopted or erroneous considerations taken into account or a conclusion reached which is wholly unreasonable in the requisite sense;*

...

(footnotes omitted)

144 These findings have been applied in whole or in part in numerous decisions in this Court, see *Gee v Council of the City of Sydney* (2004) 137 LGERA 157 at [45] and *Bechara v Plan Urban Services* (2006) 149 LGERA 41 at [49] amongst others. In this case that means the reports of the planners must be considered as a whole and in light of their role in providing advice to the Council on planning matters.

145 The Applicant argued that while the current controls in the TLEP which are required to be considered under s 79C(1)(a)(i) specify a maximum height limit of three storeys for the whole of Hastings Point, that is not relevant to the assessment of the appropriate character applicable in a particular zone. Because the two developments proposed are higher than the existing one and two storey buildings in Hastings Point it is essentially argued that any conclusion that the buildings are satisfactory in relation to existing or desired character in the context of Hastings Point must be illogical or irrational and a conclusion lacking any rational basis.

- 146 Useful context for considering these arguments can be found in *Stockland* at 272-274 where McClellan J was considering whether determining weight should be given to a planning policy which had not been included in the DCP (which is required to be considered under s 79C(1) EP&A Act). His Honour was considering a detailed planning policy which had been adopted by a council for the Balgowlah Shopping Centre and he identified at [92] relevant matters such as the extent of public consultation and the time the policy had been in force in determining the weight to be given to such a policy.
- 147 The strategic policy documents relied on by the Applicant, namely the Tweed Shire 2000+ Strategic Plan, the Tweed Future Issues Paper and the Far North Coast Regional Strategy, are briefly outlined earlier in par 18, 20 and 21. These are documents to assist in the development of the statutory planning framework by the Council. They make recommendations to assist when such planning is undertaken at the local council level.
- 148 Subsequent to the hearing the Applicant sought to rely on the provisions of the CDG which were adopted by the Council in April 2006. A broad outline is provided at par 19. As identified by the Respondents' submissions at par 135 and 136, the CDG is a strategic policy document intended to provide "a best practice framework for ensuring that design reflects the character of different places" (Introduction to CDG). It identifies seven settlement types, including coastal hamlets, and provides a broad description of these. It states this "offers a framework for future planning" (at p 9). It also states that a detailed process of planning and designing for each settlement along the coast is necessary in conjunction with the guidelines. While it was part of the information available to the Council it is not a document intended to be applied directly to the development application process. Although not specifically stated in submissions the inference from the Applicant's argument is that the decision to approve the two development applications was contrary to the CDG. The CDG is directed



at informing the development of the statutory planning framework by the Council. It is not directed to the assessment of individual development applications. It forms part of the relevant background material for the Council's consideration.

- 149 In this case, apart from the provisions in the TLEP, there was no formal planning policy adopted by the Council on building heights in Hastings Point at the time the two development applications were approved. The Tweed Shire 2000+ Strategic Plan and the Issues Paper 2005 refer to an intention to evaluate a two-storey height limit for Hastings Point, inter alia. A process was embarked upon by the Council which lead to draft Amendment No 81. This was subsequently abandoned by the Council when the Director-General of the Department of Planning refused to issue a s 65 certificate to allow its public exhibition in March 2006. The letter from the Director-General of Planning in March 2007 enabling exhibition of draft Amendment No 81 provided that opportunity to the Council but was not a direction to it to exhibit the draft LEP. I agree with the Respondents that the letter does not provide a concluded view of the Director-General on the issue of building height. Nor does it have any statutory standing in its own right.
- 150 At the time of the approval of the development consents in issue the Council had not adopted a formal policy to limit the height of buildings in Hastings Point to two storeys. While the tenor of all the material relied on by the Applicant in relation to the strategic planning process suggests such an outcome could be desirable, there was simply no concluded outcome. The decision had not yet been made by the Council to adopt a lesser height limit in a formal policy (as there was in *Stockland*) or in a draft or final LEP or DCP.
- 151 The consideration of the respective DAs must occur in light of the case law identified above and the existing statutory framework identified above in par 147-150.

*Planit DA*

- 152 In relation to the Planit DA the Applicant criticised the town planner's report for its discussion of building heights and their consideration under s 79C to the effect that there was no plausible justification for the conclusion that the proposal satisfied a changed character given the history of the review of building heights to date. As identified by the Respondents there was no specific review of building heights going on as at 8 May 2007. A review by a consultant was commissioned after that date by the Council. There is validity in the Respondents' argument that the prospect of a review of heights should not be seen as overriding the existing controls in the case of the Planit DA. The planner's report refers to the development as part of a changing character for Hastings Point. That is not an illogical conclusion lacking rationality. It is a conclusion on which minds may differ. I do not consider the ground of manifest unreasonableness is made out in relation to the Planit DA.

*Aeklig DA*

- 153 The Aeklig DA sought approval under SEPPSL and that instrument has different assessment requirements to the TLEP which applied to the Planit DA. An additional particular relied on in the Applicant's case is that the decision to grant consent was manifestly unreasonable in relation to the assessment of the design requirements. The design requirements that adequate regard must be given to are identified in cl 31(a) and (b), inter alia. As set out above in par 15, cl 31(a) requires that the proposed development "*recognise the desirable elements of the location's current character ... so that new buildings contribute to the quality and identity of the area*". It also stated that in the case of precincts undergoing transition where described in local planning controls, the desired future character should be recognised.
- 154 As submitted by the Applicant the three storey height limit was carried over from the LEP 1987 (see letter from the Council to Ms Julie Boyd, exhibit G). There is no evidence of a changed character from the existing planning controls.

155 The focus of the Applicant's argument is therefore that the reasoning of the Council officer in relation to the Aeklig DA concerning desired future character is irrational and illogical. The crux of the report's recommendation is, according to the Applicant, the statement that:

*The proposed development complies with this height limit but would not be consistent with the existing one to two storey character of the area. This is topical but given the three story height limit for the purpose of this clause the proposed development is considered satisfactory based on a changing character for Hastings Point.*

156 These statements were argued to be illogical and lacking any justification given that at every stage of the Council's strategic planning process (the Tweed Shire 2000+ Strategic Plan, and the Issues Paper 2005 and the steps taken in relation to Amendment No 81) the reduction in height to one to two storeys was contemplated, inter alia. As already identified, the difficulty for the Applicant's argument is that the strategic planning process is not completed. At the time development consent was granted there was no final outcome of that process. It cannot be illogical or irrational or perverse not to apply a lesser building height limit to an assessment of desired future character where the strategic process is ongoing and the final outcome yet to be determined. The planner has chosen to consider the existing three storey height limit as part of her assessment of desired future character. Building height is not the only basis on which such an assessment was undertaken in the report. There are other matters referred to in her report concerning neighbourhood amenity and residential character in the context of desired future character; see the Respondents' submission at par 138 on other parts of the report which considered that issue.

157 The Council officer's statement that the existing character was one or two storeys so that her conclusion that three storeys is the desired future character in the urban expansion zone is not illogical or irrational giving rise to an error of law. It is an expression of her opinion about a matter that minds may differ on. The Applicant's arguments are really directed to a

dissatisfaction with the merits of the analysis of the design requirements in the SEPPSL and that is not a matter I can consider in these judicial review proceedings. I do not consider the ground of manifest unreasonableness is made out in relation to the Aeklig DA.

**Conclusion**

158 The challenge to the Aeklig consent has been unsuccessful and can be dismissed. I have upheld the challenge to the grant of the Planit consent in relation to the failure to consider cumulative impact as required by cl 8(1)(c) of the TLEP. The issue therefore arises of whether I should make a s 25B order under the *Land and Environment Court Act* 1979 as I am required to consider doing by s 25E of that Act. The parties have filed some evidence and made submissions on this issue and I need to clarify that nothing further is intended to be relied on. If not I will provide a further short judgment on the application of s 25B.

I CERTIFY THAT THIS AND  
THE 55 PRECEDING PAGES ARE  
A TRUE COPY OF THE REASONS FOR  
JUDGMENT HEREIN  
OF THE HONOURABLE JUSTICE  
N. H. M. PAIN

*A Winstead*  
Associate

Date 6/6/08

