TITLE: [PR-PC] Development Application DA07/0022 for Multi-Dwelling Housing Comprising 7 Units at Lot 9 DP 14141, No 21 Tweed Coast Road, Hastings Point

ORIGIN:

Development Assessment

FILE NO: DA07/0022 Pt2

SUMMARY OF REPORT:

Council is in receipt of an application for a 3-storey multi-dwelling housing development at 21 Tweed Coast Road, Hastings Point.

Notice has been received of a Class 1 Appeal before the NSW Land and Environment Court on the basis of a deemed refusal by Council. Council's Solicitors have been engaged to assist in the appeal, with the first 'call-over' set for 2 July 2007.

The application initially proposed a 3-storey residential flat building, but, after considerable consultation with Council Planning Officers the proposal was substantially modified to a townhouse styled development comprised of three separate building components of two and three bedroom townhouse / units of three storeys. The amended proposal represents a good planning and design outcome for the site and locality generally.

The application complies with Council's current planning controls and policies and is recommended for approval.

RECOMMENDATION:

That: -

A. The State Environmental Planning Policy No. 1 objections to Clause 32B of North Coast Regional Environmental Plan 1988 regarding the overshadowing of the adjoining reserve be supported and the concurrence of the Director-General of the Department of Planning be assumed

B. Development Application DA07/0022 for multi dwelling housing comprising 7 units at Lot 9 DP 14141, No. 21 Tweed Coast Road Hastings Point be approved subject to the following conditions and the applicant be requested to withdraw the Appeal: -

GENERAL

1. The development shall be completed in accordance with the Statement of Environmental Effects and Plan Nos 06158 - sheet Nos TP01 Rev B, TP02 Rev B & TP03 Rev C, prepared by R.H. Franklin & Associates and dated 04/04/07, 04/04/07 & 05/04/07 respectively, except where varied by the conditions of this consent.

[GEN0005]

2. **The use of crushing plant machinery, mechanical screening or mechanical blending of materials is subject to separate development application.**

[GEN0045]

3. **The issue of this Development Consent does not certify compliance with the relevant provisions of the Building Code of Australia.**

[GEN0115]

4. **Construction shall comply with AS3959 - 1999 level 2 'Construction of Buildings in bushfire prone areas'. Construction of the western facade shall comply with AS3959 - 1999 level 1 'Construction of Buildings in bushfire prone areas'.**

[GENNS02]

5. **As the units have been assessed under 79BA for residential purposes and not 100B for Special Protection Development (tourist facility) the building/s shall not be used as a tourist facility.**

[GENNS02]

6. **All fencing shall not be constructed from brushwood or treated pine materials.**

[GENNS02]

7. **Roller doors, tilt-a-doors and the like shall be sealed to prevent the entry of embers into the structure.**

[GENNS02]

8. **The entire property shall be managed as an 'Inner Protection Area' as outlined within section 4.2.2 in Planning for Bushfire Protection 2001.**

[GENNS02]

9. **Access shall comply with section 4.3.2 Planning for Bushfire Protection 2001**

[GENNS02]

10. **Reticulated water supply shall comply with AS2419. Locations of fire hydrants are to be delineated by blue pavement markers in the centre of the road.**

[GENNS02]

11. **All works shall comply with the Erosion and Sediment Control Plan (Cozens, Regan, Williams Prove, November 2006).**

[GENNS01]

12. **The development is to be carried out in accordance with Tweed Shire Council Development Control Plan Part A5 - Subdivision Manual and Councils adopted Development Design and Construction Specifications.**

[GEN0125]

PRIOR TO ISSUE OF CONSTRUCTION CERTIFICATE

13. **In accordance with Section 109F(i) of the Environmental Planning and Assessment Act 1979 (as amended), a construction certificate for SUBDIVISION WORKS OR BUILDING WORKS shall NOT be issued until any long service levy payable under Section 34 of the Building and Construction Industry Long Service Payments Act, 1986 (or where such levy is payable by instalments, the first instalment of the levy) has been paid. Council is authorised to**

accept payment. Where payment has been made elsewhere, proof of payment is to be provided.

[PCC0285]

14. **The bin storage area for each unit is to be appropriately screened. Details of the screening method proposed are to be submitted to Council for approval by the General Manager or their delegate prior to the issue of a construction certificate**

[PCCNS02]

15. **A river bank and riparian vegetation management plan is to be submitted to the satisfaction of the Waterways and Coast Coordinator of Council prior to the issue of a construction certificate. The plan is to contain the following;**
    a) **River bank works are to be designed in accordance with the Tweed River Estuary Bank Management Plan, 1998.**
    b) **Riparian rehabilitation works to use endemic species only.**
    c) **The submitted plan must detail the species used, planting density, and locations upon the bank and provide some typical cross-sections to scale of the proposed riverbank revetment works.**

[PCCNS01]

16. **Prior to Issue of Construction Certificate**
    a) **The site is to be filled to a minimum level of RL 2.4m AHD, where the building footprint is located. The fill level of 2.4m AHD is to grade down to the riparian vegetation area located at the rear of the property. The fill is to be retained by perimeter structural walls with concrete lined perimeter drainage or other approved treatment. Site filling and associated drainage is to be designed to address drainage on the site as well as existing stormwater flows onto or through the site, and minimizing the impact of filing on local drainage. Detailed engineering plans of fill levels and perimeter drainage shall be submitted with a S68 stormwater application for Council approval.**

    b) **Details of proposed filling/regarding earthworks in the rear yard shall be submitted with the construction certificate application. Finished levels in this area shall match into building pad levels, levels of adjoining land, and levels of the riparian zone, without adverse impact on stormwater management in the area. Retaining walls and batters in excess of 1m in height are not permitted, in accordance with DCP No.47.**

[PCCNS01]

17. **Erosion and Sediment Control shall be provided in accordance with the following:**
    (a) **The Construction Certificate Application must include a detailed erosion and sediment control plan prepared in accordance with Section D7.07 of *Development Design Specification D7 - Stormwater Quality.***
    (b) **Construction phase erosion and sediment control shall be designed, constructed and operated in accordance with *Tweed***

Shire Council Development Design Specification D7 - Stormwater Quality **and its Annexure A - "Code of Practice for Soil and Water Management on Construction Works".**

[PCC1155]

18. A construction certificate application for works that involve any of the following:-

- **connection of a private stormwater drain to a public stormwater drain**
- **installation of stormwater quality control devices**
- **erosion and sediment control works**

Applications for these works must be submitted on Council's standard s68 stormwater drainage application form accompanied by the required attachments and the prescribed fee.

Where Council is requested to issue a construction certificate for civil works associated with this consent, the abovementioned works can be incorporated as part of the cc application, to enable one single approval to be issued. Separate approval under section 68 of the LG Act will then NOT be required.

[PCC1145]

19. Stormwater

(a) Details of the proposed roof water disposal, including surcharge overland flow paths are to be submitted to and approved by the Principal Certifying Authority prior to the issue of a Construction Certificate. These details shall include likely landscaping within the overland flow paths.

(b) All roof water shall be discharged to infiltration pits located wholly within the subject allotment.

(c) The infiltration rate for sizing infiltration devices shall be 3m per day:

- **As a minimum requirement, infiltration devices are to be sized to accommodate the ARI 3 month storm (deemed to be 40% of the ARI one year event) over a range of storm durations from 5 minutes to 24 hours and infiltrate this storm within a 24 hour period, before surcharging occurs.**

(d) Surcharge overflow from the infiltration area to the street gutter, inter-allotment or public drainage system must occur by visible surface flow, not piped.

(e) Runoff is to be pre-treated to remove contaminants prior to entry into the infiltration areas (to maximise life of infiltration areas between major cleaning/maintenance overhauls).

(f) If the site is under strata or community title, the community title plan is to ensure that the infiltration areas are contained within common land that remain the responsibility of the body corporate (to ensure continued collective responsibility for site drainage).

(g) All infiltration devices are to be designed to allow for cleaning and maintenance overhauls.

(h) All infiltration devices are to be designed by a suitably qualified Engineer taking into account the proximity of the footings for the proposed/or existing structures on the subject

property, and existing or likely structures on adjoining properties.

(i) All infiltration devices are to be located clear of stormwater or sewer easements.

[PCC1135]

20. Permanent stormwater quality treatment shall be provided in accordance with the following:

(a) The Construction Certificate Application shall include a detailed stormwater management plan (SWMP) for the occupational or use stage of the development prepared in accordance with Section D7.07 of Councils *Development Design Specification D7 - Stormwater Quality*.

(b) Permanent stormwater quality treatment shall comply with section 5.5.3 of the Tweed Urban Stormwater Quality Management Plan and Councils Development Design Specification D7 - Stormwater Quality.

(c) The stormwater and site works shall incorporate water sensitive design principles and where practical, integrated water cycle management. Typical water sensitive features include infiltration, maximising permeable/landscaped areas, stormwater retention /detention/reuse, and use of grass swales in preference to hard engineered drainage systems.

(d) Specific Requirements to be detailed within the Construction certificate application include:

1. All driveway runoff shall be treated to remove gross pollutants, oil and sediment contaminants prior to discharge to the stormwater infiltration system.

2. Roof water does not require treatment prior to discharge to the stormwater infiltration system.

[PCC1105]

21. Application shall be made to Tweed Shire Council under Section 138 of the Roads Act 1993 for works pursuant to this consent located within the road reserve. Application shall include engineering plans and specifications for the following required works: -

a) kerb and gutter and associated road widening is to be constructed along the full frontage of the site on Young Street.

b) 1.2m wide concrete footpath is to be constructed along the full frontage of the site on Young Street.

The kerb & gutter, associated road widening and 1.2m wide concrete footpath are to be designed and constructed in accordance with Tweed Shire Council's adopted Development Design and Construction Specifications.

The above mentioned engineering plan submission must include copies of compliance certificates relied upon and details relevant to but not limited to the following: -

- **Road works/furnishings**
- **Stormwater drainage**
- **Water and sewerage works**
- **Sediment and erosion control plans**
- **Location of all services/conduits**
- **Traffic control plan**

[PCC0895]

22. **A traffic control plan in accordance with AS1742 and RTA publication "Traffic Control at Work Sites" Version 2 shall be prepared by an RTA accredited person shall be submitted to the Principal Certifying Authority prior to issue of the Construction Certificate. Safe public access shall be provided at all times.**

[PCC0865]

23. **A detailed plan of landscaping is to be submitted and approved by Council's General Manager or his delegate prior to the issue of a Construction Certificate.**

[PCC0585]

24. **All imported fill material shall be from an approved source. Prior to the issue of a construction certificate details of the source of fill, description of material, proposed use of material, documentary evidence that the fill material is free of any contaminants and haul route shall be submitted to Tweed Shire Council for approval.**

[PCC0465]

25. **A certificate of compliance (CC) under Sections 305, 306 and 307 of the Water Management Act 2000 is to be obtained from Council to verify that the necessary requirements for the supply of water and sewerage to the development have been made with the Tweed Shire Council.**

Pursuant to Clause 146 of the Environmental Planning and Assessment Regulations, 2000, a Construction Certificate shall NOT be issued by a Certifying Authority unless all Section 64 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" and a "Certificate of Compliance" signed by an authorised officer of Council.

Annexed hereto is an information sheet indicating the procedure to follow to obtain a Certificate of Compliance:

Water DSP6: 4 ET @ $4598 $18,392

Sewer Hastings Point: 5.25 ET @ $2863 $15,031

These charges to remain fixed for a period of twelve (12) months from the date of this consent and thereafter in accordance with the rates applicable in Council's adopted Fees and Charges current at the time of payment.

A CURRENT COPY OF THE CONTRIBUTION FEE SHEET ATTACHED TO THIS CONSENT MUST BE PROVIDED AT THE TIME OF PAYMENT.

Note: The Environmental Planning and Assessment Act, 1979 (as amended) makes no provision for works under the Water Management Act 2000 to be certified by an Accredited Certifier.

[PCC0265]

26. **Section 94 Contributions**

Payment of the following contributions pursuant to Section 94 of the Act and the relevant Section 94 Plan.

Pursuant to Clause 146 of the Environmental Planning and Assessment Regulations, 2000, a Construction Certificate shall NOT be issued by a Certifying Authority unless all Section 94 Contributions have been paid and the Certifying Authority has sighted Council's "Contribution Sheet" signed by an authorised officer of Council.

A CURRENT COPY OF THE CONTRIBUTION FEE SHEET ATTACHED TO THIS CONSENT MUST BE PROVIDED AT THE TIME OF PAYMENT.

These charges will remain fixed for a period of 12 months from the date of this consent and thereafter in accordance with the rates applicable in the current version/edition of the relevant Section 94 Plan current at the time of the payment.

A copy of the Section 94 contribution plans may be inspected at the Civic and Cultural Centres, Tumbulgum Road, Murwillumbah and Brett Street, Tweed Heads.

(a)	**Tweed Road Contribution Plan:** **S94 Plan No. 4 (Version 4.0)** **Sector8a_4**	**$10,784**
(b)	**Open Space (Structured):** **S94 Plan No. 5**	**$2,790**
(c)	**Open Space (Casual):** **S94 Plan No. 5**	**$596**
(d)	**Shirewide Library Facilities:** **S94 Plan No. 11**	**$2,462**
(e)	**Eviron Cemetery/Crematorium Facilities:** **S94 Plan No. 13**	**$499**
(f)	**Community Facilities (Tweed Coast - South)** **S94 Plan No. 15** **South Coast**	**$3,504**
(g)	**Emergency Facilities (Surf Lifesaving)** **S94 Plan No. 16**	**$717**
(h)	**Extensions to Council Administration Offices & Technical Support Facilities** **S94 Plan No. 18**	**$7,141.75**
(i)	**Cycleways** **S94 Plan No. 22**	**$1,258**
(j)	**Regional Open Space (Structured)** **S94 Plan No. 26**	**$8,315**
(k)	**Regional Open Space (Casual)** **S94 Plan No. 26**	**$3,058**

[PCC0215]

27. **The developer shall provide 12 parking spaces including parking for the disabled in accordance with Tweed Shire Council Development Control Plan Part A2 - Site Access and Parking Code. Full design detail of the proposed parking and manoeuvring areas including integrated landscaping shall be submitted to and approved by the Principal Certifying Authority prior to the issue of a construction certificate.**

[PCC0065]

28. **Any car parking floodlighting shall not spill beyond the boundaries of the site.**

[PCC0055]

PRIOR TO COMMENCEMENT OF WORK

29. **The erection of a building in accordance with a development consent must not be commenced until:**
    - **(a) a construction certificate for the building work has been issued by the consent authority, the council (if the council is not the consent authority) or an accredited certifier, and**
    - **(b) the person having the benefit of the development consent has:**
        - **(i) appointed a principal certifying authority for the building work, and**
        - **(ii) notified the principal certifying authority that the person will carry out the building work as an owner-builder, if that is the case, and**
    - **(c) the principal certifying authority has, no later than 2 days before the building work commences:**
        - **(i) notified the consent authority and the council (if the council is not the consent authority) of his or her appointment, and**
        - **(ii) notified the person having the benefit of the development consent of any critical stage inspections and other inspections that are to be carried out in respect of the building work, and**
    - **(d) the person having the benefit of the development consent, if not carrying out the work as an owner-building, has:**
        - **(i) appointed a principal contractor for the building work who must be the holder of a contractor licence if any residential work is involved, and**
        - **(ii) notified the principal certifying authority of any such appointment, and**
        - **(iii) unless that person is the principal contractor, notified the principal contractor of any critical stage inspection and other inspections that are to be carried out in respect of the building work.**

[PCW0215]

30. **Prior to work commencing, a "Notice of Commencement of Building or Subdivision Work and Appointment of Principal Certifying Authority" shall be submitted to Council at least 2 days prior to work commencing.**

[PCW0225]

31. **Residential building work:**

(a) Residential building work within the meaning of the *Home Building Act 1989* must not be carried out unless the principal certifying authority for the development to which the work relates (not being the council) has given the council written notice of the following information:

(i) in the case of work for which a principal contractor is required to be appointed:

*** in the name and licence number of the principal contractor, and**

*** the name of the insurer by which the work is insured under Part 6 of that Act,**

(ii) in the case of work to be done by an owner-builder:

*** the name of the owner-builder, and**

*** if the owner-builder is required to hold an owner builder permit under that Act, the number of the owner-builder permit.**

(b) If arrangements for doing the residential building work are changed while the work is in progress so that the information notified under subclause (1) becomes out of date, further work must not be carried out unless the principal certifying authority for the development to which the work relates (not being the council) has given the council written notice of the updated information.

[PCW0235]

32. A temporary builder's toilet is to be provided prior to commencement of work at the rate of one (1) closet for every fifteen (15) persons or part of fifteen (15) persons employed at the site. Each toilet provided must be:-

(a) a standard flushing toilet connected to a public sewer, or

(b) if that is not practicable, an accredited sewage management facility approved by the council

[PCW0245]

33. Where prescribed by the provisions of the Environmental Planning and Assessment Amendment (Quality of Construction) Act 2003, a sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:

(a) showing the name, address and telephone number of the principal certifying authority for the work, and

(b) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working hours, and

(c) stating that unauthorised entry to the site is prohibited.

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.

[PCW0255]

34. The building is to be protected from attack by termites by approved methods in accordance with the provisions of Australian Standard AS 3660.1, and:

(a) Details of the proposed method to be used are to be submitted to and approved by the Principal Certifying Authority prior to start of works; and

(b) Certification of the works performed by the person carrying out the works is to be submitted to the PCA; and

(c) A durable notice must be permanently fixed to the building in a prominent location, such as in the electrical meter box indicating:-

(i) the method of protection; and

(ii) the date of installation of the system; and

(iii) where a chemical barrier is used, its life expectancy as listed on the National Registration Authority label; and

(iv) the need to maintain and inspect the system on a regular basis.

Note: Underslab chemical treatment will not be permitted as the only method of treatment unless the area can be retreated without major disruption to the building.

[PCW0775]

35. Prior to commencement of work on the site all erosion and sedimentation control measures are to be installed and operational including the provision of a "shake down" area where required to the satisfaction of the Principal Certifying Authority.

[PCW0985]

36. Sewer main within site is to be accurately located and the Principal Certifying Authority advised of its location and depth prior to start of any building works.

[PCW1055]

37. An application to connect to Council's sewer or carry out plumbing and drainage works, together with any prescribed fees including inspection fees, is to be submitted to and approved by Council prior to the commencement of any building works on the site.

[PCW1065]

38. The proponent shall accurately locate and identify any existing sewer main, stormwater line or other underground infrastructure within or adjacent to the site and the Principal Certifying Authority advised of its location and depth prior to commencing works and ensure there shall be no conflict between the proposed development and existing infrastructure prior to start of any works.

[PCW0005]

DURING CONSTRUCTION

38. Construction site work including the entering and leaving of vehicles is limited to the following hours, unless otherwise permitted by Council: -
Monday to Saturday from 7.00am to 7.00pm

No work to be carried out on Sundays or Public Holidays

The proponent is responsible to instruct and control subcontractors regarding hours of work.

[DUR0205]

40. **All building work (other than work relating to the erection of a temporary building) must be carried out in accordance with the requirements of the Building Code of Australia (as in force on the date the application for the relevant construction certificate was made).**

[DUR0375]

41. **Building materials used in the construction of the building are not to be deposited or stored on Council's footpath or road reserve, unless prior approval is obtained from Council.**

[DUR0395]

42. **The Principal Certifying Authority is to be given a minimum of 48 hours notice prior to any critical stage inspection or any other inspection nominated by the Principal Certifying Authority via the notice under Section 81A of the Environmental Planning and Assessment Act 1979.**

[DUR0405]

43. **It is the responsibility of the applicant to restrict public access to the construction works site, construction works or materials or equipment on the site when construction work is not in progress or the site is otherwise unoccupied in accordance with WorkCover NSW requirements and Occupational Health and Safety Regulation 2001.**

[DUR0415]

44. **All demolition work is to be carried out in accordance with the provisions of Australian Standard AS 2601 "The Demolition of Structures" and to the relevant requirements of the WorkCover NSW, Occupational Health and Safety Regulation 2001.**

[DUR0645]

45. **Minimum notice of 48 hours shall be given to Tweed Shire Council for the capping of any disused sewer junctions. Tweed Shire Council staff in accordance with the application lodged and upon excavation of the service by the developer shall undertake Works.**

[DUR0675]

46. **All cut or fill on the property is to be battered at an angle not greater than 45° within the property boundary, stabilised and provided with a dish drain or similar at the base in accordance with Tweed Shire Councils Design and Construction Specifications, Development Control Plan, Part A5 - Subdivision Manual and Development Control Plan, Part A14 - Cut and Fill on Residential Land to the satisfaction of the Principal Certifying Authority.**
Please note timber retaining walls are not permitted.

[DUR0835]

47. **All work associated with this approval is to be carried out so as not to impact on neighbourhood, adjacent premises or the environment. All necessary precautions, covering and protection shall be taken to minimise impact from: -**

- **Noise, water or air pollution**
- **Minimise impact from dust during filling operations and also from construction vehicles**
- **No material is removed from the site by wind**

[DUR1005]

48. **Building materials used below Council's minimum floor level of RL 2.7m AHD shall be flood compatible.**

[DUR1405]

49. **Subject to the requirements of the local electricity authority, all electrical wiring, power outlets, switches, etc, should, to the maximum extent possible be located above the design flood level. All electrical wiring installed below the design flood level shall be provided with earth leakage devices.**

[DUR1415]

50. **Any damage caused to public infrastructure (roads, footpaths, water and sewer mains, power and telephone services etc) during construction of the development shall be repaired in accordance with Councils adopted Design and Construction Specifications prior to the issue of a Subdivision Certificate and/or prior to any use or occupation of the buildings.**

[DUR1875]

51. **A garbage storage area shall be provided in accordance with Council's "Code for Storage and Disposal of Garbage and Other Solid Waste".**

[DUR2195]

52. **Council is to be given 24 hours notice for any of the following inspections prior to the next stage of construction:**
    (a) internal drainage, prior to slab preparation;
    (b) water plumbing rough in, and/or stackwork prior to the erection of brick work or any wall sheeting;
    (c) external drainage prior to backfilling.
    (d) completion of work and prior to occupation of the building.

[DUR2485]

53. **Plumbing**
    (a) A plumbing permit is to be obtained from Council prior to commencement of any plumbing and drainage work.
    (b) The whole of the plumbing and drainage work is to be completed in accordance with the requirements of the NSW Code of Practice for Plumbing and Drainage.

[DUR2495]

54. **An isolation cock is to be provided to the water services for each unit in a readily accessible and identifiable position.**

[DUR2505]

55. **Dual flush water closet suites are to be installed in accordance with Local Government Water and Sewerage and Drainage Regulations 1993.**

[DUR2515]

56. Back flow prevention devices shall be installed wherever cross connection occurs or is likely to occur. The type of device shall be determined in accordance with AS 3500.1 and shall be maintained in working order and inspected for operational function at intervals not exceeding 12 months in accordance with Section 4.7.2 of this Standard.

[DUR2535]

57. All new hot water installations shall deliver hot water at the outlet of sanitary fixtures used primarily for personal hygiene purposes at a temperature not exceeding:-

* **43.5^{0}C for childhood centres, primary and secondary schools and nursing homes or similar facilities for aged, sick or disabled persons; and**
* **50^{0}C in all other classes of buildings.**

A certificate certifying compliance with the above is to be submitted by the licensed plumber on completion of works.

[DUR2555]

58. Where two (2) or more premises are connected by means of a single water service pipe, individual water meters shall be installed to each premise beyond the single Council water meter *(unless all the premises are occupied by a single household or firm).*

[DUR2615]

59. The structure is to be sited at least one metre horizontally clear of sewer main on site. All footings and slabs within the area of influence of the sewer main are to be designed by a practising Structural Engineer. The engineer is to submit a certification to the Principal Certifying Authority that the design of such footings and slabs will ensure that all building loads will be transferred to the foundation material and will not effect or be affected by the sewer main.

[DUR2645]

60. A Sewer manhole is present on this site. This manhole is not to be covered with soil or other material.
Should additional fill be proposed in the area of the sewer manhole application shall be made to Council's Engineering & Operations Division for the raising of the manhole.

[DUR2655]

61. Acid sulfate soils shall not be exposed or disturbed. The maximum depth of excavation, except for placement of service pipes, shall be 1 metre.

[DURNS01]

62. All demolition works are to observe the guidelines set down under the Environment Protection Authority publication "A Renovators Guide to the Dangers of Lead" and the WorkCover guidelines on working with and handling of asbestos. All asbestos sheeting material shall be disposed to an approved landfill facility.

[DURNS01]

63. **No retaining walls or similar structures are to be constructed over or within the zone of influence of Council's sewer main.**

[DUR2705]

64. **During construction, a "satisfactory inspection report" is required to be issued by Council for all s68h2 permanent stormwater quality control devices, prior to backfilling. The proponent shall liaise with Councils Engineering and Operations Division to arrange a suitable inspection.**

[DUR2445]

65. **All waters that are to be discharged from the site shall have a pH between 6.5 and 8.5 and suspended solids not greater than 50mg/kg.**

[DUR2435]

66. **The site shall not be dewatered, unless written approval to carry out dewatering operations is received from the Tweed Shire Council General Manager or his delegate.**

[DUR2425]

67. **Appropriate measures are to be put in place during the construction and/or demolition period to prevent the transport of sediment from the site. Should any material be transported onto the road or any spills occur it is to be cleaned up prior to cessation of same days work and/or commencement of any rain event.**

[DUR2405]

68. **Regular inspections shall be carried out by the Supervising Engineer on site to ensure that adequate erosion control measures are in place and in good condition both during and after construction.**

[DUR2375]

69. **Appropriate arrangements to the satisfaction of Council's General Manager or his delegate shall be provided for the storage and removal of garbage and other waste materials. A screened, graded and drained garbage storage area shall be provided within the boundary.**

[DUR2205]

70. **The builder must provide an adequate trade waste service to ensure that all waste material is contained, and removed from the site for the period of construction.**

[DUR2185]

71. **No portion of the structure may be erected over any existing sullage or stormwater disposal drains, easements, sewer mains, or proposed sewer mains.**

[DUR1945]

72. **Where the kerb is to be removed for driveway laybacks, stormwater connections, pram ramps or any other reason, the kerb must be sawcut on each side of the work to enable a neat and tidy joint to be constructed.**

[DUR1905]

73. **Where the construction work is on or adjacent to public roads, parks or drainage reserves the development shall provide and maintain all warning signs, lights, barriers and fences in accordance with AS 1742 (Manual of Uniform Traffic Control Devices). The contractor or property owner shall be adequately insured against Public Risk Liability and shall be responsible for any claims arising from these works.**

[DUR1795]

74. **All practicable measures must be taken to prevent and minimise harm to the environment as a result of the construction, operation and, where relevant, the decommissioning of the development.**

[DUR1025]

75. **The burning off of trees and associated vegetation felled by clearing operations or builders waste is prohibited. All such materials should be chipped on site and used in landscaping unless it is not possible due to size, non suitability of the material or some other limitation, in which case the material will be disposed of at Council's Stotts Creek depot.**

[DUR1015]

76. **The surrounding road carriageways are to be kept clean of any material carried onto the roadway by construction vehicles. Any work carried out by Council to remove material from the roadway will be at the Developers expense and any such costs are payable prior to the issue of a Subdivision Certificate/Occupation Certificate.**

[DUR0995]

77. **No soil, sand, gravel, clay or other material shall be disposed of off the site without the prior written approval of Tweed Shire Council General Manager or his delegate.**

[DUR0985]

78. **Provision to be made for the designation of 2 durable and pervious car wash-down areas. The areas must be identified for that specific purpose and be supplied with an adequate water supply for use within the areas. Any surface run-off from the area must not discharge directly to the stormwater system.**

[DUR0975]

79. **All new residential dwellings (and extensions comprising over 50% of the original floor area) are to fully comply with Tweed Shire Council Development Control Plan, Part A9 - Energy Smart Housing Policy. In order to comply with the Policy consideration must be given to the building envelope, orientation, insulation, ventilation, thermal mass and zoning.**

[DUR0915]

80. **The use of vibratory compaction equipment (other than hand held devices) within 100m of any dwelling house is strictly prohibited.**

[DUR0815]

81. **All reasonable steps shall be taken to muffle and acoustically baffle all plant and equipment. In the event of complaints from the neighbours, which Council deem to be reasonable, the noise from the construction site is not to exceed the following:**

    A. **Short Term Period - 4 weeks.**

       L10 noise level measured over a period of not less than 15 minutes when the construction site is in operation, must not exceed the background level by more than 20dB(A) at the boundary of the nearest likely affected residence.

    B. **Long term period - the duration.**

       L10 noise level measured over a period of not less than 15

minutes when the construction site is in operation, must not exceed the background level by more than 15dB(A) at the boundary of the nearest affected residence.

[DUR0215]

82. **The provision of 12 off street car parking spaces including parking for the disabled where applicable. The layout and construction standards to be in accordance with Tweed Shire Council Development Control Plan, Part A2 - Site Access and Parking Code.**
[DUR0085]

PRIOR TO ISSUE OF OCCUPATION CERTIFICATE

83. **A person must not commence occupation or use of the whole or any part of a new building or structure (within the meaning of Section 109H(4)) unless an occupation certificate has been issued in relation to the building or part (maximum 25 penalty units).**
[POC0205]

84. **Prior to occupation of the building the property street number is to be clearly identified on the site by way of painted numbering on the street gutter within 1 metre of the access point to the property.**
The street number is to be on a white reflective background professional painted in black numbers 100mm high.

On rural properties or where street guttering is not provided the street number is to be readily identifiable on or near the front entrance to the site.

For multiple allotments having single access points, or other difficult to identify properties, specific arrangements should first be made with Council and emergency services before street number identification is provided.

The above requirement is to assist in property identification by emergency services and the like. Any variations to the above are to be approved by Council prior to the carrying out of the work.

[POC0265]

85. **Prior to the issue of a final occupation certificate adequate proof and/or documentation is to be submitted to the Principal Certifying Authority to identify that all commitment on the BASIX "Schedule of Commitments" have been complied with.**
[POC0435]

86. **Prior to the occupation or use of any building and prior to the issue of any occupation certificate, including an interim occupation certificate a final inspection report is to be obtained from Council in relation to the plumbing and drainage works.**
[POC1045]

87. **The creation of easements for services, rights of carriageway and restrictions as to user as may be applicable under Section 88B of the Conveyancing Act including the following:**
    a) **A 3 metre wide easement for the existing sewer main, located at the rear of the property is to be created, burdening the subject lot and benefiting Tweed Shire Council. The easement is to be registered with the Land Titles Office prior to the issue of a occupation certificate.**

Pursuant to Section 88BA of the Conveyancing Act (as amended) the Instrument creating the right of carriageway/easement to drain water shall make provision for maintenance of the right of carriageway/easement by the owners from time to time of the land benefited and burdened and are to share costs equally or proportionally on an equitable basis.

Any Section 88B Instrument creating restrictions as to user, rights of carriageway or easements which benefit Council shall contain a provision enabling such restrictions, easements or rights of way to be revoked, varied or modified only with the consent of Council.

[POCNS01]

88. **All works specified in the River bank and Riparian vegetation management plan are to be completed to the satisfaction of the General Manager or his delegate prior to the issue of an occupation certificate.**

[POCNS01]

89. **Prior to the issue of an occupation certificate, the applicant shall produce a copy of the "satisfactory inspection report" issued by Council for all s68h2 permanent stormwater quality control devices.**

[POC0985]

USE

90. **The premises shall be maintained in a clean and tidy manner.**

[USE0965]

91. **All externally mounted air conditioning units and other mechanical plant or equipment are to be located so that any noise impact due to their operation which may be or is likely to be experienced by any neighbouring premises is minimised. Notwithstanding this requirement all air conditioning units and other mechanical plant and or equipment is to be acoustically treated or shielded where considered necessary to the satisfaction of the General Manager or his delegate such that the operation of any air conditioning unit, mechanical plant and or equipment does not result in the emission of offensive or intrusive noise.**

[USE0175]

92. **The use to be conducted so as not to cause disruption to the amenity of the locality, particularly by way of the emission of noise, dust, odours or the like.**

[USENS01]

REPORT:

Applicant: Planit Consulting Pty Ltd
Owner: Ms LP Wiseman & Mr J Bortoli
Location: Lot 9 DP 14141, No. 21 Tweed Coast Road Hastings Point
Zoning: 2(b) Medium Density Residential
Cost: $1,000,000

BACKGROUND:

Council is in receipt of an application for a 3-storey multi-dwelling housing development at 21 Tweed Coast Road, Hastings Point.

Notice has been received of a Class 1 Appeal before the NSW Land and Environment Court on the basis of a deemed refusal by Council. Council's Solicitors have been engaged to assist in the Appeal, with the first 'call-over' set for 2 July 2007.

The application as received and exhibited comprised a residential flat building with two levels of residential over ground level garaging. The design attracted public comment and was generally viewed by our Planning Officers as uncharacteristic of the building designs emerging in the locality and providing by design unnecessary amenity impacts. However, after considerable consultation the applicant has resubmitted an amended design that embodies the advice provided. Notably, the design has changed from a residential flat building to a townhouse styled design, resulting in a mix of attached and detached buildings that improve the visual permeability of the design, that is, view corridors are maintained between the buildings opposed to a continuous unbroken façade as originally proposed. 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.

As a background note it is relevant to qualify the reference to the amended design as a townhouse 'style' development because townhouses by design have a vertical internal layout, that is, the dwellings are side by side not on top of each other as would be the case with other horizontal building types. Buildings 1 and 3 which are located at either end of the site comprise two units in a horizontal arrangement, but, in accordance with *State Environmental Planning Policy 65 – Residential Flat Development*, they are not defined as a residential flat building as that would require a minimum of 4 units in a building. Strictly speaking Building 1 and 3 represent a design akin to a dual occupancy, however given that there are several buildings on site and each with the general appearance of a townhouse it is appropriate to consider them as such. If the buildings were defined as either a dual occupancy or alternatively as an integrated development the building setback requirements would reduce significantly. The design typically represents a townhouse development. Notwithstanding this the development is defined as a "multi-dwelling house" under Council's LEP.

The development site has an area of 1315m^2, is of a regular shape with frontages to Tweed Coast Road and Young Street. The site is zoned 2(b) Medium Density Residential under Tweed LEP 2000, with a permissible building height of 3 storeys.

The amended design complies with the present height restriction and represents a good design response for the site.

Building Characteristics

As mentioned, the application was originally submitted as a residential flat building that comprised of 6 x 3 bedroom units over ground level garaging.

In response to the public submissions and concerns held by our Planning Officers the application was amended to include 3 individual buildings, which consist of:

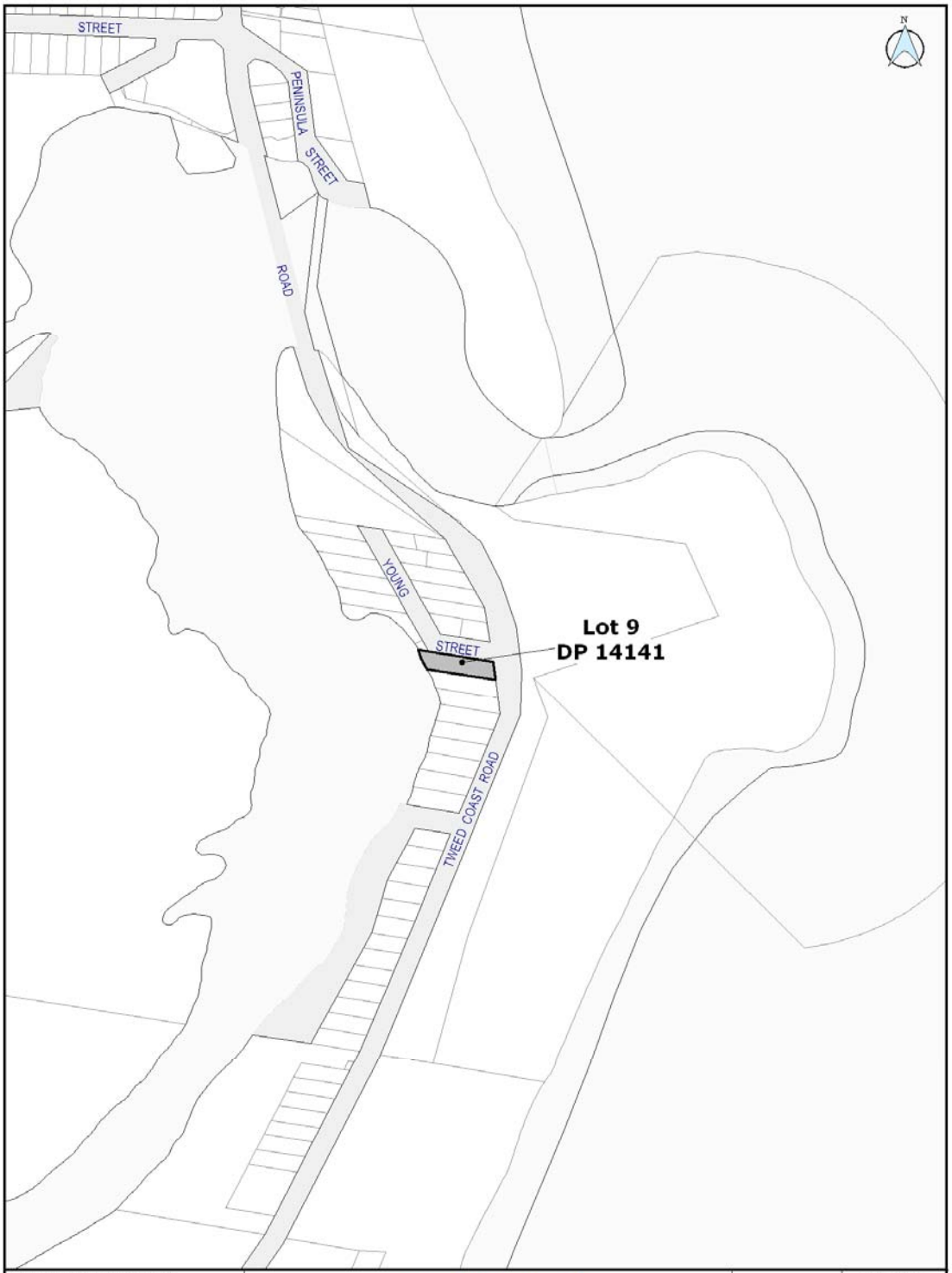
> Units 1 & 2 – these units comprise building no.1 located at the eastern end (Tweed Coast Road) of the site. Each unit has 3 bedrooms and Car parking and garaging is provided at ground level, with the garaging and access located at the rear of the dwellings. The building is within the permitted three 3 storey height limit and the open space is provided via private balconies and a ground level shared area off the northern elevation.
>
> Units 3, 4 & 5 - these units comprise building no.2 located in the centre of the site. Each unit has 2 bedrooms and car parking and garaging is similar to that of building no.1, except that the garages front Young Street in away not dissimilar to an ordinary dwelling house. Each of these units has a rumpus room and open space is provided via a private courtyard at ground level.
>
> Units 6 & 7 – these units comprise building no.3 located at the western end of the site. They are of a similar format and layout to Units 1 & 2 (building no.1).

The amended design has significantly improved all aspects of the development both internally and externally, in particular, the redesign and location of the access driveways off Young Street, which originally joined off Tweed Coast Road, has provided a far better access solution and has minimised potential traffic hazards on the Coast Road.

Public Notification

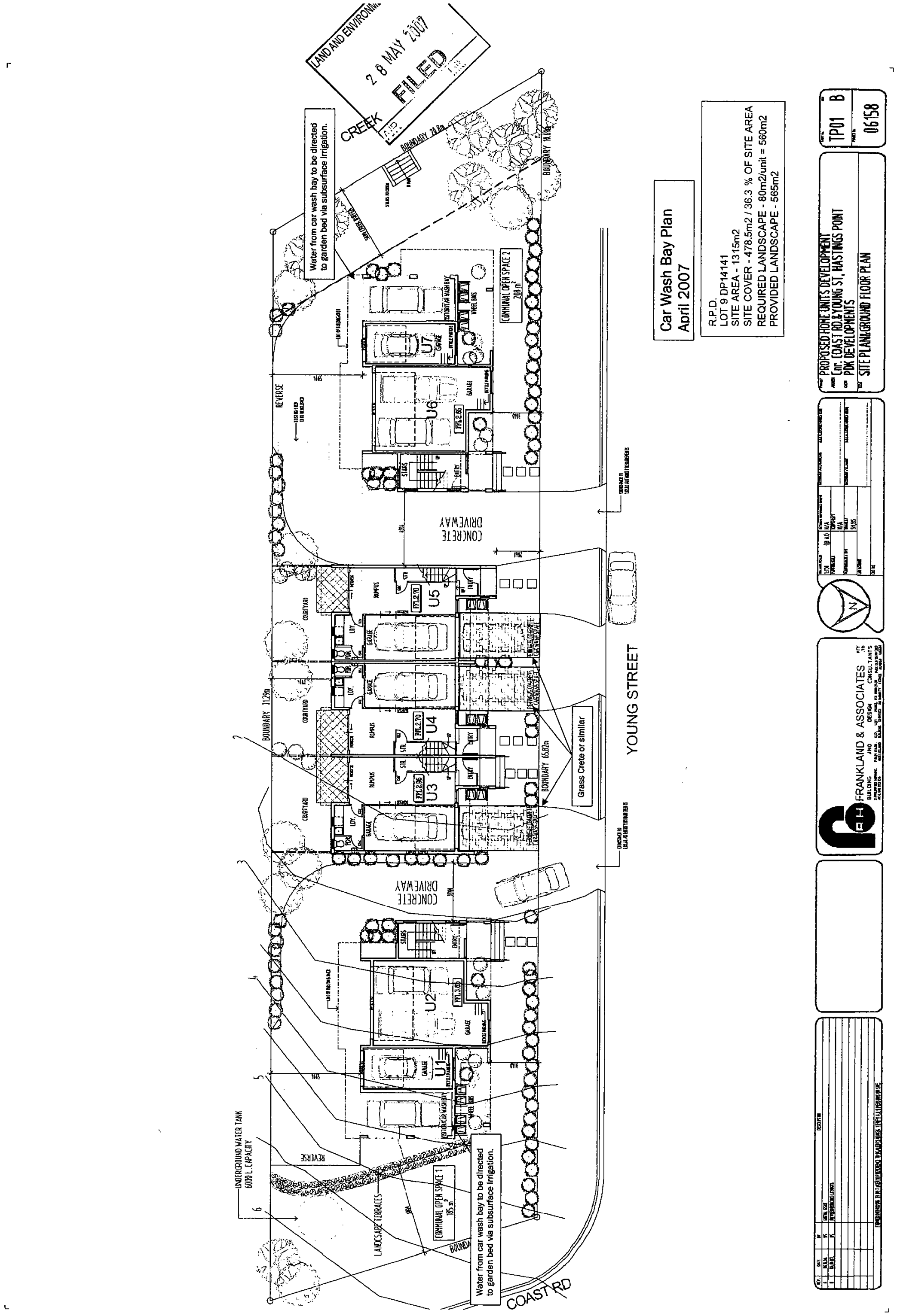
The advertising of the proposal attracted 30 submissions and a petition containing approximately 620 signatories, predominately regarding the building height controls of Hastings Point. The issues raised within the submissions are discussed further within Section (d) of this report.

SITE DIAGRAM:

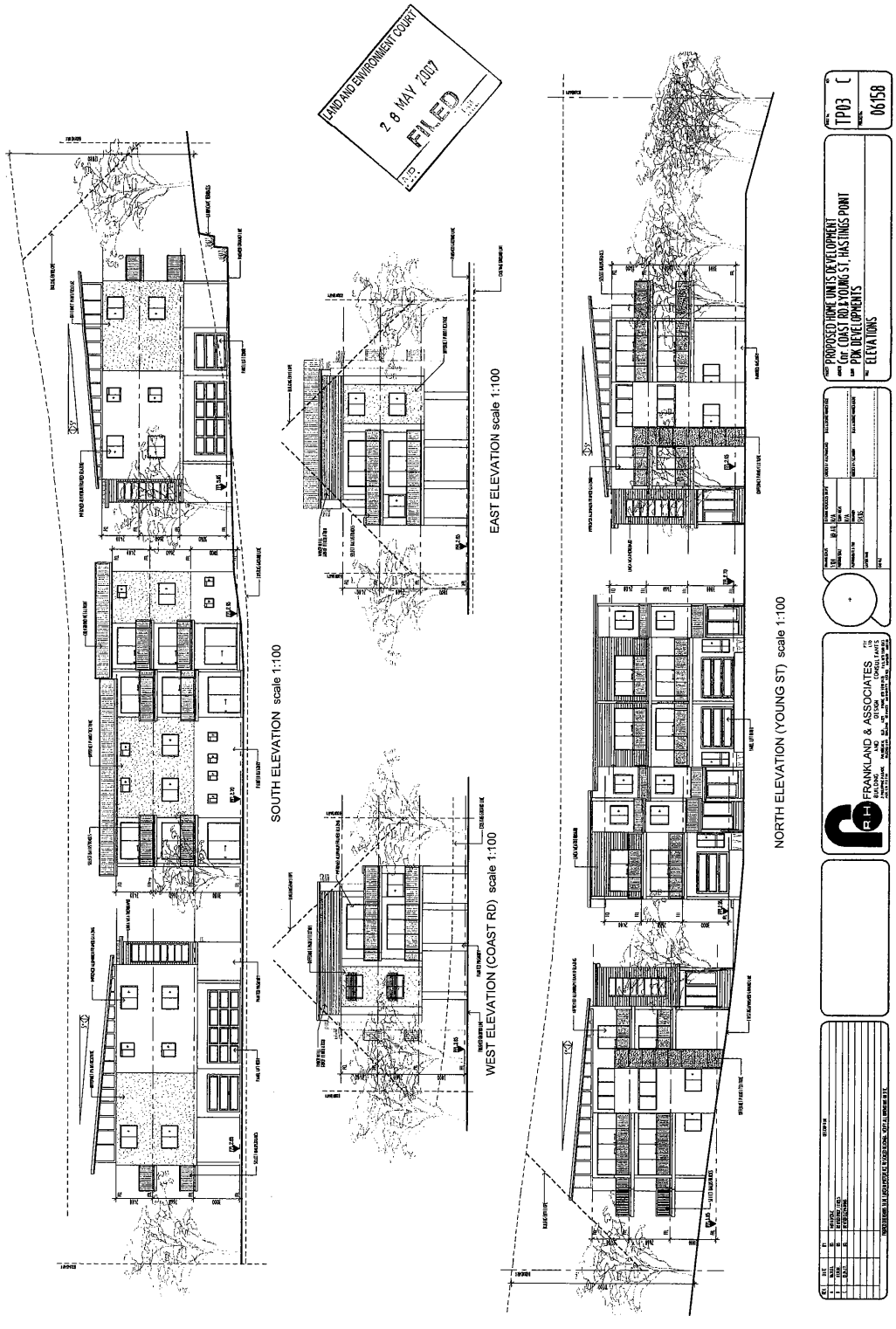


The subject land has an area of 1315m^2, comprising a 18.67m frontage to Tweed Coast Road and a 65.82m frontage to Young Street. The subject land falls from a high of 6m AHD in the north-eastern corner, to 2m AHD at the southern end of the site.

SITE PLAN


Car Wash Bay Plan
April 2007
R.P.D.
LOT 9 DP14141
SITE AREA - 1315m2
SITE COVER - 478.5m2 / 36.3 % OF SITE AREA
REQUIRED LANDSCAPE - 80m2/unit = 560m2
PROVIDED LANDSCAPE - 565m2
Water from car wash bay to be directed to garden bed via subsurface irrigation.
Water from car wash bay to be directed to garden bed via subsurface irrigation.
Grass Crete or similar
YOUNG STREET
COAST RD
CREEK
CONCRETE DRIVEWAY
CONCRETE DRIVEWAY
U1
U2
U3
U4
U5
U6
U7
COMMUNAL OPEN SPACE 1
COMMUNAL OPEN SPACE 2
UNDERGROUND WATER TANK 6000 L CAPACITY
LANDSCAPE TERRACES
REVERSE
LAND AND ENVIRONM
2 8 MAY 2007
FILED
FRANKLAND & ASSOCIATES
PROPOSED HOME UNITS DEVELOPMENT
Cnr. COAST RD & YOUNG ST, HASTINGS POINT
PDK DEVELOPMENTS
SITE PLAN & GROUND FLOOR PLAN
TP01 B
06158

ELEVATIONS


LAND AND ENVIRONMENT COURT
28 MAY 2007
FILED
SOUTH ELEVATION scale 1:100
EAST ELEVATION scale 1:100
WEST ELEVATION (COAST RD) scale 1:100
NORTH ELEVATION (YOUNG ST) scale 1:100
PROPOSED HOME UNITS DEVELOPMENT
CNR COAST RD & YOUNG ST, HASTINGS POINT
FOR DEVELOPMENTS
ELEVATIONS
TP03
06158
FRANKLAND & ASSOCIATES

CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

(a) (i) The provisions of any environmental planning instrument

Tweed Local Environmental Plan 2000

The subject land is zoned 2(b) Medium Density Residential pursuant to the provisions of Tweed LEP 2000.

The objectives of the 2(b) zone state: -

Primary objective

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 proposed development is permissible with development consent within the zone. The proposed density of the development is considered an appropriate response to the site characteristics, its context, and is considered to result in the orderly and economic use of the land.

The proposed development is consistent with the zone objectives and satisfies the provisions of Clause 11.

Clause 15 of the TLEP requires Council to ensure adequacy of services prior to determining the application. All essential services are currently provided to the subject site.

Clause 16 of the TLEP requires Council to ensure that the height and scale of development is appropriate to the site and the surrounding built and natural environment. The subject land has a height limitation of 3 stories with the proposal comprising of 3 stories. Concern was raised with respect to the scale and general design of the building, however, these initial concerns were removed with the amended proposal. The proposal complies with the provision of clause 16.

Clause 34 of the TLEP requires Council to minimise future flood damage by ensuring that only appropriate compatible development occurs on flood liable land. The proposal has been reviewed by Council's assessing Development Engineer and Infrastructure and Planning Officer, whom have confirmed that whilst the proposal is located on flood prone land, adequate design measures have been incorporated to ensure habitable floor levels are above the design floor level. Accordingly, the proposal is seen to meet the objectives of clause 34.

Clause 39A of the TLEP requires Council to minimise bushfire risk to built assets and people. The proposal as been reviewed by the NSW Rural Fire Service, concluding that no objections were raised subject to the conditions of consent attached.

North Coast Regional Environmental Plan 1988

The proposal includes a non-compliance with the prescriptive overshadowing requirements within Clause 32B of the NCREP. The applicant has lodged a SEPP 1 Objection in this regard, which is discussed later in this report, concluding that the proposal is satisfactory in it's present design. The proposal is considered to satisfy all other relevant provisions contained within the NCREP 1988.

State Environmental Planning Policies

State Environmental Planning Policy (SEPP) 1 – Development Standards

The application includes a SEPP 1 objection to the requirements of Clause 32b of the North Coast REP 1988. The applicant has provided the following detail in response to the prescriptive requirements;

> *The proposed development partially overshadows part of the foreshore reserve at 7 pm Mid Summer to the east of the site. This shadow extends past the road reserve and into the foreshore reserve for a distance of approximately 8 metres assuming a road reserve width of 20 metres. It is contended that the overshadowing created by the proposed development will not fall upon 'open space' as identified in Clause 32B of the NCREP 1988, and has no impact upon the beach or similar areas of useable open space. In this regard, shadows created by the proposal will fall upon vegetation within the reserve. It is noted that the NCREP 1988 does not define open space, however upon adoption of a practical stance, open space is more closely aligned to open recreational parkland and foreshore areas such as the beach as opposed to dense bushland and the like.*
>
> *It is also noted that the development will partially overshadow the adjacent Cudgera Creek during the morning hours which is zoned 6(a) Public Open Space. As such and for reasons of abundant caution, this proposal is accompanied by a SEPP 1 variation as follows:-*
>
> *Clause 32(b) of the NCREP 1988 states, inter alia:-*
>
> *(1) This clause applies to land within the region to which the NSW Coastal Policy 1997 applies.*
>
> *(2) In determining an application for consent to carry out development on such land, the council must take into account:*
>
> *(a) the NSW Coastal Policy 1997,*
> *(b) the Coastline Management Manual, and*
> *(c) the North Coast: Design Guidelines.*
>
> *(3) The council must not consent to the carrying out of development, which would impede public access to the foreshore.*
>
> *(4) The council must not consent to the carrying out of development:*

(a) on urban land at Tweed Heads, Kingscliff, Byron Bay, Ballina, Coffs Harbour or Port Macquarie, if carrying out the development would result in beaches or adjacent open space being overshadowed before 3pm midwinter (standard time) or 6.30pm midsummer (daylight saving time), or

(b) elsewhere in the region, if carrying out the development would result in beaches or waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).

Whilst the proposed development is generally consistent with intent of this clause, it does result in the overshadowing of the reserve immediately across the road from the site during the evening, and part of Cudgera Creek during the morning hours. The section of reserve opposite the site to the east is heavily vegetated and is in part SEPP 26 Littoral Rainforest. In this regard, the attached overshadowing plans indicate that some overshadowing will occur at 7.00pm midsummer (EDST), whilst no overshadowing will occur during (midwinter).

The expected shadow cast will be in the order of approximately 90m^2 in area only and as such will not adversely impact upon the enjoyment or use of the beach or recreation areas. Significantly the overshadowing created by this development will never reach the beach which is located a further 100 metres to the east but will fall wholly within and upon the vegetation within foreshore reserve.

In terms of the morning overshadowing the development will in part shadow the creek as demonstrated in the Sun Shadow Plans. At 9 am midwinter this is estimated as having an area of approximately 80 m^2 whilst in mid summer the overshadowing is reduced to approximately 36 m^2. This will fall into the adjacent waterway during both mid summer and midwinter as opposed to on land which is designated as public open space.

*State Environmental Planning Policy No.1 – Development Standards, provides a mechanism by which Council can consent to a variation to a development standard where it is considered **unreasonable** or **unjustified** to request strict adherence to the standard or where the granting of such a variance will not result in the compromising of the objects of the Act.*

The objective of the standard contained within Clause 32(b) is related to the protection of the recreational integrity of foreshore open space areas and the need to restrict adverse impacts upon same by the erection of buildings in close proximity.
It is contended that the proposal is consistent with the abovementioned objective and that the integrity of Clause 32(b) would not be impacted upon via the approval of the structure. In this regard, the following matters are considered relevant to assessing the merits of the proposed departure from the development standard:-

- The extent of overshadowing at the prescribed time (approx 90 sq.m - 7 pm midsummer, 80 sq.m 9 am midwinter and 36 sq.m – 9 am

midsummer) is considered to be minor in scale, relative to the overall size of Cudgera Creek to the west of the site the Coastal Reserve to the east of the site;

- That area subject to overshadowing during the morning periods is in part overshadowed pre-dominantly by Riparian Vegetation and additional plantings proposed adjacent to the creek will provide further shading of the creek

- The overshadowing of the creek in no way impacts upon the useability or function of the waterway.

- The overshadowing of the creek will not impact upon active recreational space such as parkland areas.

- That area subject to overshadowing in the evening is heavily vegetated and the overshadowing will not extend into active recreational areas such as parkland or the beach.

- The proposed overshadowing of both the creek and the reserve opposite the site in no way precludes the future use or reclassification of these parcels of land;

- No overshadowing of the reserve to the east will occur before 3pm in midwinter (please see attached overshadowing plan);

- The proposal does not overshadow the beach to the east.

- The building has been designed and sited on the allotment to provide substantial setbacks to the rear boundary and Cudgera Creek to ameliorate visual impacts upon this waterway and to enable further rehabilitation of the river bank by way of additional plantings of native species.

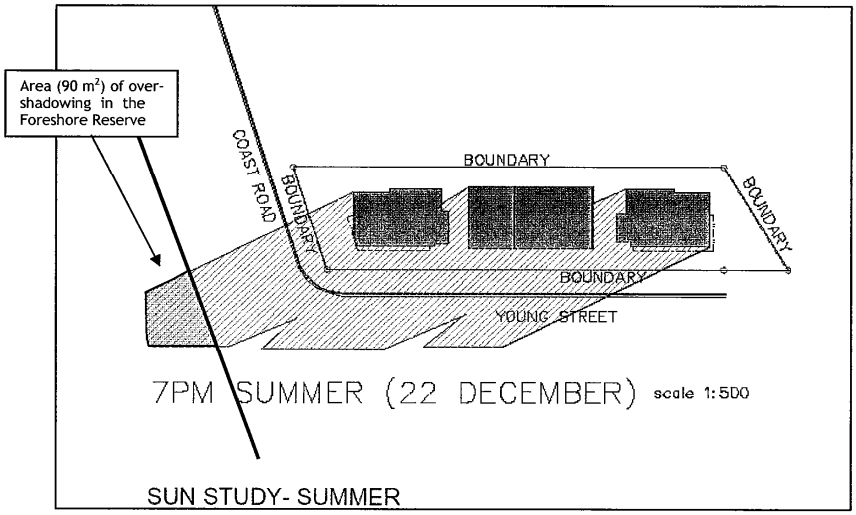
- Given the time frames of overshadowing expected, the development will not overshadow waterfront open space and arguably no variation is necessary.

In the light of the foregoing analysis it is concluded that compliance with the development standard is both unreasonable and unnecessary. Furthermore, as the proposed development demonstrates consistency with the intent and objective of the development standard, the granting of a variance in this instance would not prejudice the future integrity of that standard nor impact upon the amenity of the locality.

It is also further noted that table 3 of the NSW Coastal Policy 1997 provides for comments under the heading of ***'Design and Locational Principles for Consideration in LEPs, DCPs and Development Control'****. In this regard and with reference to the overshadowing standard within NCREP 1988, the policy states, Inter alia:*

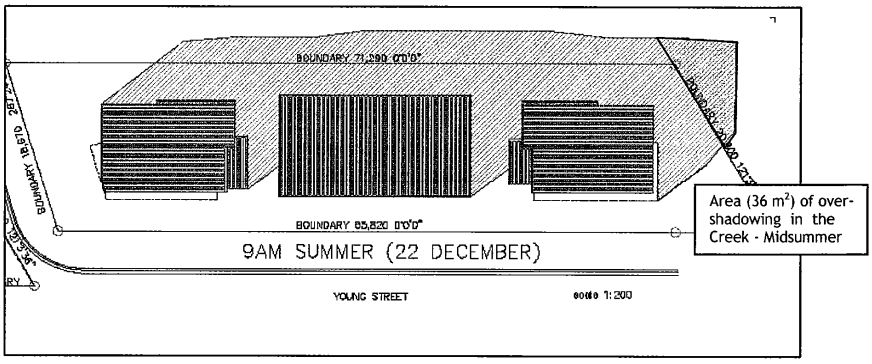
'The suggested standard in this principle may be difficult to apply in highly urbanised environments. An LEP or DCP which is tailored to local conditions and which has the overriding objective of minimising overshadowing may be required in these situations'

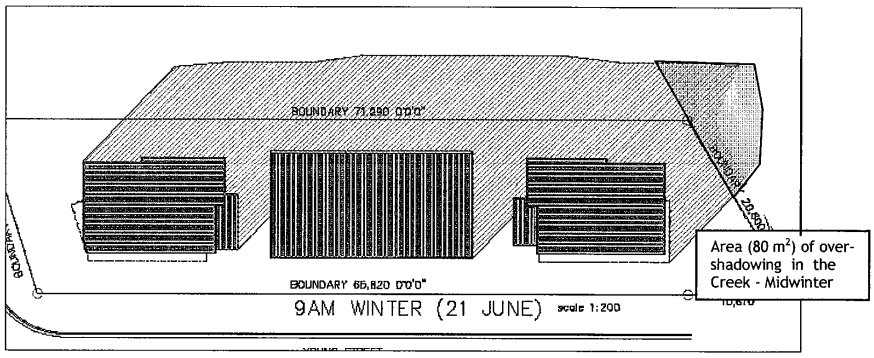
In this circumstance, the subject environment is indeed urbanised, with the proposal representing an infill development of an existing residential allotment. Further, the proposal is consistent with the current overriding objectives of the Tweed LEP in that medium density development consistent with Council's desired density is proposed.

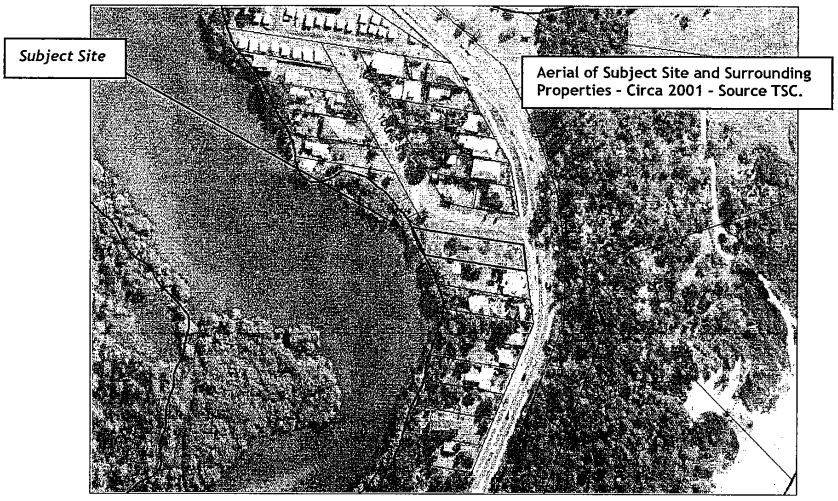


Given the locational characteristics of the area, its evolution as an urbanised centre, the fact that the sun sets at 7.42 pm mid summer (source: Geoscience Australia) with the level of twilight far less than what is received in more southern climates, and the scale and nature of the reserve opposite, strict compliance with the standard in the evening period is considered both unjustifiable and unnecessary.

In terms of the morning overshadowing Council's attention is drawn to the aerial photo below whereby it is clearly obvious that this shadow will fall into the waterway itself which is in part overshadowed by adjacent vegetation.







Again the scale of overshadowing is minor and will in no way impact upon the Creek or its ability to be used for recreational purposes and strict compliance with the standard in the morning period is considered unnecessary and unwarranted, and a variation is justified in this instance.

Having regard to the objects of the Act (as listed under section 5), it is also submitted that the proposal will not compromise their attainment, with particular reference to the management and preservation of valuable community assets and the continued use and enjoyment of public foreshore areas and waterfront open space.
Council's support in assuming the concurrence of the Director in this instance is respectfully requested.

It is generally agreed that the impact of overshadowing will be limited to a reasonable amount based on the nature of the development, the context of the existing planning regime and the purpose of the Plan, which are satisfied by this proposal. In this instance the State Environmental Planning Policy No. 1 objection to Clause 32B of North Coast Regional Environmental Plan 1988 regarding the overshadowing of the adjoining reserve should be supported and the concurrence of the Director-General of the Department of Planning be assumed.

State Environmental Planning Policy (SEPP) 26 – Littoral Rainforest

The subject land is located approximately 42m from land mapped as SEPP 26 Littoral Rainforest. This land does not require assessment against SEPP 26 or concurrence as the parcel is defined a 'Residential Land'.

State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development

Clause 30 of SEPP No. 65 requires the consent authority to consider each of the ten (10) design quality principles when determining a development application for a residential flat building. Whilst this SEPP is not considered to strictly apply to the development, an assessment against the relevant criteria has been undertaken nonetheless.

In this regard, the applicant has provided a comprehensive assessment of the proposal against the relevant design quality principles. It is considered that the design of the proposed development exhibits suitable regard for these principles and demonstrates good practice in urban design. The contemporary coastal architecture of the development is representative of the emerging and somewhat distinct 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.

State Environmental Planning Policy (SEPP) 71 – Coastal Protection

The proposal has been assessed to be in accordance with clause 8 of the Policy.

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

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.

(a) (iii) Development Control Plans (DCP's)

Tweed Development Control Plan

Section A1 – Multi-Dwelling Housing

The following table assesses the proposed development in relation to the acceptable solutions of this DCP:

Standard	Acceptable Solution	Proposal	Complies
Floor Space Ratio	0.5:1 (657.5m^2)	0.64:1 (848m^2)	NO*
Minimum Landscaped Area	Large Dwelling - 80m^2 per dwelling (560m^2)	Approximately 480m^2	NO*

Standard	Acceptable Solution	Proposal	Complies
Setbacks	Primary frontage 6m Side and Rear Setbacks 3m	See Comment Below	NO*
Streetscape	The maximum width of the garages should be 50% of the frontage width.	Garages comprise less than 50% of the frontage width	YES
Streetscape	Garages should be setback behind the front façade of the building.	Satisfactory	YES
Building Envelope	45° from 3.5m high at the side and rear boundary (excluding eaves and the like)	The proposal involves only the encroachment of eaves and the like into the building height plane, which is permitted under the DCP	YES
Minimum Private Open Space	20% of the site (263m^2), with a minimum dimension of 3m	Greater than 263m^2	YES
	One part min 25m^2 with min dimension of 4m	With the exception of Unit 1 & 6, the proposal affords a minimum of 25m^2 per unit in the form of both ground level yard and balcony areas.	NO*

NO* - See Assessment Below

Floor Space Ratio

The prescribed 0.5:1 ratio is not suited to the orderly and economic use of 2(b) Medium Density zoned land. The proposal involves a floor space ratio of 0.64:1, which is substantially lower than the average 1:1 - 1.35:1 generally associated with other multi dwelling housing developments in the 2(b) zone.

As a guide, reference may be made to the draft Residential and Tourist Development Code (draft DCP 6) which was publicly exhibited for 3 months between November 2006 to March 2007, as it proposes an FSR of 0.8:1 for townhouse development. This proposed ratio received no public criticism during the extended public consultation period. The proposed development is significantly below the draft provision also.

In light of the above, the proposal satisfies the site density objectives provided in s. 3.1.3 of DCP 6.

Landscaping

The proposal involves approximately 450m^2 of traditional vegetation and landscaping (deep soil zones), additional permeable area is provided via a grasscrete driveway to each of the townhouses; units 3, 4 & 5.

The landscaped areas incorporate functional areas within the front, side and rear setback of the units, as well as areas around the perimeter of the site. Although the numeric figure is slightly lower than the acceptable solution provided in the DCP it meets the objectives of the Plan by providing adequate contribution to the appearance of the site, water infiltration, and occupier enjoyment and privacy. A condition of consent has been proposed that requires the approval (by Council) of a full landscape plan prior to the issue of a construction certificate to ensure the final detail of the landscaping is appropriate.

Setbacks

The main building itself is setback a minimum of 6 metres from the primary frontage, 5 metres from the rear boundary and 3 metres or greater from the secondary frontage and side boundary, with minor exception to the 2nd and 3rd storey balcony areas servicing Units 1 & 2, which project into the 6metre building line by 500mm. Given the benefits of encouraging the proposed amended design this encroachment will have negligible impact in contrast to the former proposal. The impact will be largely imperceptible and of no adverse consequence to the buildings amenity.

The entry statements to each townhouse unit 3, 4 & 5 project into the secondary setback by 200mm, resulting in a reduced (secondary) setback of 2.8metres. This encroachment is a result of design elements incorporated to enhance the appearance of the development and is negligible in terms of adverse impact.

The above encroachments do not give rise to inconsistency with Council's planning or policy controls and are acceptable based on the positive attributes of the amended design.

Private Open Space

As referred to earlier, with minor exception to units 1 and 6 all the units provide private open space areas above that required in the DCP. Units 1 & 6 have sacrificed a small area of balcony private open space in order to facilitate more useable internal living space. Nonetheless, the balconies will provide adequate opens space area to service the unit, which meets the objectives of the DCP.

Section A2 – Access & Car parking

The following table details the compliance of the proposed development with the relevant on-site car-parking provisions:

Standard	**Requirement**	**Proposal**	**Complies**

On Site Car Parking	Apartment Units - 2 spaces per unit, (8 spaces) Townhouse Units – 1 garage space and 1 additional space within the driveway (6 spaces)	14 spaces in total (12 which comply)	NO*

*See comment below

At the time of lodgement of the application, Council had not adopted the consolidated DCP or associated changes to the car parking requirements for multi-dwelling housing. The application is required to be assessed in accordance with the DCP in force at the time of its lodgement, as well as, having due regard to the 'new' DCP. In this regard, the intent and justification of any additional or amended requirements under the changed planning scheme would need to be considered. The recently adopted car parking controls modified the provision ratio of car parking from 1.5 spaces per unit to 1 space per 1 bedroom unit, 1.5 spaces per 2 bedroom unit and 2 space for 3 of more bedroom units.

The modification came about principally because apartment buildings, in particular those with basement parking, were not seen to be providing adequate car parking for visitors, which led to an increase in on-street parking to the detriment of neighbours. This was due primarily because the majority of approved apartment buildings comprised three bedroom units and despite the visitor parking stipulations of the strata plans these spaces were being utilised by the occupants of the units. In fact, there have been several occasions were strata application inspections by Council Officers have revealed this to be true. In addition, there have been occurrences where access to the visitor car parks have been obstructed, most notably because the visitor parks have not been adequately separated from residential parks which are often gated. This issue is presently being investigated in the draft Residential and Tourist Code.

The proposed development provides all parking at ground level. It incorporates a sufficient number of visitor parks on-site and is capable of providing some on-street parking if required, without impact to either the road efficiency or the local residential community. As such, the provisions of the relevant DCP (DCP No.2 Car Parking and Access Code) are sufficient to meet the needs of the proposed development. While the modifications to the new DCP appear to be well founded the reason for their alteration is based on a premise which is largely un-associated with the building type in the present application.

Section A3 – Development of Flood Liable Land

The proposal requires a small amount of fill at the rear of the site to raise the level of the land to the design flood level of 2.4m AHD. All finished floor levels are located at or above the required floor level for residential development (2.7m AHD) and the provisions of Section A3 are satisfied.

Section B18 – Tweed Coast Building Heights

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 it's 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.

The development complies with the DCP.

(a) (iv) Any Matters Prescribed by the Regulations

NSW Coastal Policy

The proposed development satisfies the provisions of Policy.

Demolition

The proposal requires the demolition of an existing shed. The applicant has submitted a demolition plan, and appropriate conditions of consent have been proposed for any consent.

(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

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 Hastings 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 is 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.

(c) Suitability of the site for the development

The subject land has a number of natural constraints, particularly flooding, bushfire and proximity to SEPP 14 and 26 mapped areas. However, the submitted building design has had appropriate regard to these constraints and is considered suitable for the site as proposed.

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

The advertising of the proposal attracted 30 submissions and a petition containing approximately 620 signatories, predominately regarding the building height controls of Hastings Point. This matter has been discussed extensively earlier in this report, concluding that the current proposal must be assessed in accordance with the current controls, which allow for a three storey building height.

In addition, a number of objections have been received detailing concern that the proposal was not in keeping with the character of Hastings Point, applicable planning controls and the Tweed Local Environmental Plan 2000. These items have been discussed extensively within this report. The amended proposal complies with Council's current controls as well as providing an appropriate design response which is considered to positively contribute to the locality whilst meeting Council's desired planning outcomes, as established within applicable sections of the DCP and the Tweed LEP 2000.

Concerns have also been raised in relation to loss of views, seabreezes and overshadowing, as well as increased traffic and overshadowing. The following comments are offered in these areas:
Loss of Views and Seabreezes, Overshadowing - The subject site and a number of adjoining properties currently enjoy vistas towards the ocean/creek to the north. Property to the south would bear the most impact, however it should be noted that the primary view corridors of these premises are unrestricted to the east and west. It is the secondary view corridor to the north which would be impeded, but, as with many older underdeveloped urban areas it is a benefit that cannot be maintained in most instances of redevelopment.

The proposed development is not unreasonable by design and context and based on the orientation of the site and that of the adjoining land does not represent an unreasonable impact on the adjoining land. The NSW Land and Environment Court has considered the issue of view loss at great length. The *Tenacity Consulting Pty Limited v Warringah Council* [2004] Court decision, established a test to be applied. The proposed development has been considered against the principles outlined in this case with the conclusion that the proposal is justified and reasonable.

*Additional Traffi*c - The additional traffic generated by the proposal has been assessed as satisfactory, as has the amended vehicular access, which details access from Young Street as opposed to Tweed Coast Road. Refusal of the application on this basis is not considered warranted.

(e) Public interest

The application provides a good planning and design outcome for the site and locality despite a significant number of objections being received to the height of the development.

OPTIONS:

1. Council approves the amended application subject to the conditions attached to this report and requests the applicant to withdraw the Appeal.

2. Council does not support the application with appropriate reasons. As an Appeal has already been lodged, Council would need to engage a qualified town Planning consultant to assist in the defence of this Appeal.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Should this matter proceed to an Appeal substantial costs may be incurred in defending Council's determination.

POLICY IMPLICATIONS:

Nil.

CONCLUSION:

The proposal has been thoroughly investigated and is considered to be suitable to the site; unlikely to cause any significant negative impacts to the surrounding built and natural environment and meets all of Council's applicable requirements within the TLEP and relevant DCPs. The proposal is recommended for approval.

UNDER SEPARATE COVER/FURTHER INFORMATION:

*To view any **"non confidential"** attachments listed below, access the meetings link on Council's website www.tweed.nsw.gov.au or visit Council's offices at Tweed Heads or Murwillumbah (from Friday the week before the meeting) or Council's libraries (from Monday the week of the meeting).*

Nil.

Land and Environment Court
of New South Wales

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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Bromley London Borough v Greater London Council [1983] 1 AC 768
Bruce v Cole (1998) 45 NSWLR 163
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Central Coast Care v Wyong Shire Council (2003) 124 LGERA 320
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Kimber v Ku-ring-gai Council (1990) 130 LGERA 117
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Manly Council v Hortis (2001) 113 LGERA 321
Marina Bay Developments Pty Ltd v Pittwater Council [2006] NSWLEC 577
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Minister for Immigration and Multicultural Affairs v Eshutu (1999) 197 CLR 611
Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002 (2003) 198 ALR 59
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Parramatta City Council v Hale (1982) 47 LGRA 321
Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
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Save Our Street Inc v Settree [2006] NSWLEC 570
Somerville v Dalby (1990) 69 LGRA 422
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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

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Pain J

6 June 2008

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

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 incompatability 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	Tweed Futures Issues Paper exhibited
6 July 2005	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]
Aeklig DA	
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.
Planit DA	
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 of 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 is [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 adverting 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;* Paramanamtham 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 Watson
Associate

Date 6/6/08