

TITLE: [PR-PC] Development Application DA07/0022 - Three (3) Storey Residential Flat Building Containing Five (5) Units at Lot 9 DP 14141 No. 21 Tweed Coast Road, Hastings Point

ORIGIN:

Development Assessment

FILE NO: DA07/0022 Pt7

SUMMARY OF REPORT:

On 18 November 2008 Council resolved to refuse DA07/0022 which at that time sought approval for a multi dwelling housing development comprising seven town house units across three buildings all three storeys in height.

Following Council's refusal of this application the applicant lodged a Class 1 Merit Appeal with the NSW Land & Environment Court.

Council subsequently resolved (on 16 December 2008) to defend the Class 1 Merit Appeal lodged against Council's refusal.

Since this time the appeal has been progressing through the Court system. The applicant obtained approval from the NSW Land & Environment Court to lodge amended plans (with the Court) for reconsideration. Furthermore, the Court has granted leave to allow Council to re-consider the amended plans (as lodged on 5 May 2009) before the application progresses through the Court system any further (the application is next before the Court on 29 July 2009 for a Directions Hearing).

This report seeks a determination on the amended plans that seek approval for the construction of a part two and part three storey residential flat building that comprises 5 units over ground level garaging. The application specifically consists of:

- Five garages (11 car spaces) accessible via three driveway crossovers from Young Street.
- 3 x 3 bedroom units (Units 1, 2 and 3) including open plan living, dining and lounge areas, two bathrooms, a laundry and two balconies per unit.
- 2 x 2 bedroom units (Unit 4 and Unit 5) including open plan living, dining and lounge areas, two bathrooms, a laundry and two balconies per unit.
- A ground level courtyard for each unit with an area of between 30m² and 70m².
- A riparian buffer to Cudgera Creek measuring between 16m and 21m in depth.

The amended plans have been on public exhibition for two weeks. Following this exhibition period Council received 55 individual objections opposing the development which include letters from the Hastings Point Progress Association and a local resident representing the broader community. In addition to these objections Council received a signed petition in support of the development which contained 108 names and corresponding comments.

The following report demonstrates that the amended plans have satisfied some of the prior issues raised in regards to ecological concerns and general compliance with Council's Development Control Plan No. A1 (Residential and Tourist Code) - Part C Residential & Tourist Code.

However, the assessment concludes that as a result of the Interim Site Specific Controls that apply to Hastings Point (two storeys in height and no more than two dwellings per property) the amended application can not be supported. Whilst the amended design has a high degree of architectural merit it represents a medium density development that is not consistent with the predominant existing buildings in the area.

Accordingly the application is recommended for refusal.

RECOMMENDATION:

That Development Application DA07/0022 for a part two (2) and part three (3) storey residential flat building containing five (5) units at Lot 9 DP 14141, No. 21 Tweed Coast Road, Hastings Point be refused for the following reasons: -

- 1. The proposed development is excessive and inappropriate in regards to height and inconsistent with the Area Specific Development Controls in Section A1 – Residential and Tourist Code of the Tweed Development Control Plan (“Tweed DCP”).**
- 2. The proposed development is excessive and inappropriate with regards to density and inconsistent with the Area Specific Development Controls in Section A1 – Residential and Tourist Code of the Tweed Development Control Plan (“Tweed DCP”).**
- 3. The proposed development is an overdevelopment of the site, having regard to the height, bulk, scale and existing character of the area.**
- 4. The proposed development will have a negative cumulative impact on the locality.**
- 5. The proposed development will set an undesirable precedent for similar inappropriate development in the area in the future.**
- 6. The proposed development is not considered to be in the public interest.**

REPORT:

Applicant: PDK Developments
Owner: Ms K A Campion & Mrs J A Kearney & Mrs K Gillies
Location: Lot 9 DP 14141, No. 21 Tweed Coast Road, Hastings Point
Zoning: 2(b) Medium Density Residential
Cost: \$1,200,000

THE SITE

The development site is on a prominent corner within Hastings Point with frontages to both Tweed Coast Road and Young Street. It is a long rectangular allotment with an area of 1315m² (approximate dimensions: northern boundary 77.4m, eastern boundary 18.8m, southern boundary 71m, and western boundary adjoining Cudgera Creek 21.6m). The site is located in a sensitive coastal location as defined by SEPP 71 – Coastal Protection, and between SEPP 26 littoral rainforest on the eastern side of Tweed Coast Road and SEPP 14 wetlands to the west within and around Cudgera Creek.

Cudgera Creek is the only one of the three Tweed coastal estuaries to have a natural entrance, i.e. it is not kept permanently open by the provision of training walls as is the case with Cudgen Creek at Kingscliff and Mooball Creek at Pottsville. This means that the entrance can block with sand at times and less tidal flushing occurs, so that nutrients and pollutants have greater ability to accumulate and the risk of flooding of low-lying land is increased. This has also meant that the channel depth is generally shallower than the other two creeks in their lower reaches and thus more open to impacts from sedimentation.

The proposed development site is located some 400m upstream from (or south of) Hastings Point Bridge on an outside bend of Cudgera Creek which is subject to erosion. It is a largely cleared and levelled block (courtesy of a valid Construction Certificate at the time of works). A few trees remain adjacent to Cudgera Creek although some clearing was undertaken to relocate a sewer main to the rear of the property (in accordance with a valid Sewer Application as at the time of works). Sections of concrete block and rubble exist on the creek bank, with occasional mangroves beyond. Riparian vegetation (consisting of native species with some introduced species) occurs on adjacent properties to varying width, but generally at 10m to 20m or greater.

BACKGROUND:

The subject application has an extensive history.

Council received DA07/0022 in January 2007. The application sought approval for a 3 storey 6 unit residential flat building development at 21 Tweed Coast Road, Hastings Point (on the corner of Tweed Coast Road & Young Street).

The proposal was subsequently modified to a townhouse styled development comprising of three separate building components containing two and three bedroom townhouse/units of three storeys (total of 7 units).

Council considered and approved DA07/0022 at the Planning Committee Meeting of 19 June 2007.

The validity of DA07/0022 was challenged in the NSW Land & Environment Court by Hastings Point Progress Association Incorporated. Justice Pain determined that Council failed to adequately consider the cumulative impact of the proposal which was a statutory requirement of Clause 8 of the Tweed LEP 2000. On 6 June 2008 the consent was declared void and of no effect by the Court.

On 28 August 2008 the applicant requested that Council reassess the Development Application DA07/0022 and make a determination on the proposal. Additional information supporting the application was provided.

Council re-advertised DA07/0022 to allow the public time to review the applicant's additional information in relation to:

- Clause 4 of Tweed LEP 2000;
- Clause 5 of Tweed LEP 2000;
- Clause 8 of Tweed LEP 2000;
- Draft LEP 2000 Amendment No. 81;
- Tweed Shire 2000+ Strategic Plan/Tweed Futures Strategic Plan 2004/2024; and
- Coastal Design Guidelines for NSW;

The re-exhibition occurred between 15 October and 29 October 2008. In addition to the 30 submissions and the petition of 620 signatures that Council received with respect to the first application, Council received 197 submissions as a result of the re-exhibition.

Council re-considered and resolved to refuse DA07/0022 at the Planning Committee Meeting of 18 November 2008.

A notice of determination was subsequently issued to the applicant on 20 November 2008 stating the following reasons for refusal:

1. *The application is not considered to be consistent with Section 79C 1(a) of the Environmental Planning & Assessment Act 1979 as it does not satisfy the following applicable planning instruments:*
 - a. *The Tweed LEP 2000 including Clause 4 Aims of the Plan, Clause 5 Ecologically Sustainable Development, Clause 8 Consent Considerations, Clause 11 The Zones, Clause 16 Height, and Clause 31 Development Adjoining Waterbodies;*
 - b. *The North Coast Regional Environmental Plan including Clause 15 Development Control Wetlands or Fisheries and Clause 32B Development Control – Coastal Lands;*
 - c. *Clause 8 of State Environmental Planning Policy No. 71 – Coastal Protection.*
 - d. *Tweed Development Control Plan Section A1 Residential & Tourist Development Code, & Section A2 Site Access & Parking Code.*

2. *The application is not considered to be consistent with Section 79C 1(b) of the Environmental Planning & Assessment Act 1979 as it would have a negative impact on both the natural and built environment.*
3. *The application is not considered to be consistent with Section 79C 1(c) of the Environmental Planning & Assessment Act 1979 as the proposed development has not responded to the sites constraints, the sites ecological significance or the future desired character of Hastings Point.*
4. *The application is not considered to be consistent with Section 79C 1(e) of the Environmental Planning & Assessment Act 1979 as the proposed development is not considered in the public interest.*

On 5 May 2009 the applicant served Council with amended plans the subject of this report and the current Court proceedings.

On 18 June 2009 the applicant provided Council with supporting additional information that enabled a proper assessment of the amended application.

THE PROPOSAL

The amended application seeks approval for a part two and part three storey residential flat building that comprises 5 units over ground level garaging. The application specifically consists of:

- Five garages (11 car spaces) accessible via three driveway crossovers from Young Street.
- 3 x 3 bedroom units (Units 1, 2 and 3) including open plan living, dining and lounge areas, two bathrooms, a laundry and two balconies per unit.
- 2 x 2 bedroom units (Unit 4 and Unit 5) including open plan living, dining and lounge areas, two bathrooms, a laundry and two balconies per unit.
- A ground level courtyard for each unit with an area of between 30m² and 70m².
- A riparian buffer to Cudgera Creek measuring between 16m and 21m in depth.

The following report details the amended assessment that has been undertaken including taking into account public submissions, government agency responses, an ecological assessment, an engineering assessment and planning and urban design considerations.

The amended plans have satisfied some of the prior issues raised in regards to ecological concerns and general compliance with Council's Development Control Plan No. A1 (Residential and Tourist Code) - Part C Residential & Tourist Code.

However, the assessment concludes that as a result of the Interim Site Specific Controls that apply to Hastings Point (two storeys in height and no more than two dwellings per property) the amended application can not be supported. Whilst the amended design has a high degree of architectural merit it represents a medium density development that is not consistent with the existing character in the area.

Accordingly the application is recommended for refusal.

OTHER RECENTLY APPROVED DEVELOPMENTS

In determining any DA Council should have regard to any other applications that have already been determined in the immediate area. This allows Council to project this pattern and consider the possible cumulative impact that a repeated Development Application may have. Following is a list and brief summary of those applications recently approved:

DA03/1759 – 8 Tweed Coast Road: Council approved this residential flat building comprising 5 x 3 and 1 x 2 bedroom apartments in June 2004. The building is fundamentally three-storey in height. Basement car parking was proposed with access off Tweed Coast Road.

DA04/0517 – 75 Tweed Coast Road: Council approved this multi dwelling housing development comprising 1 x two (2) bedroom unit, 3 x three (3) bedroom units and a penthouse with three (3) bedrooms and a study, within a predominantly three-storey building in July 2005. It was the lodgement of this application that triggered Draft LEP Amendment No. 81 (which is discussed later in this report).

DA06/0413 – “The Point” 87-97 Tweed Coast Road: In May 2007 Council approved an aged care facility comprising 245 units (or 394 beds) in a combination of independent living units, hostel use units and residential care units. The proposed complex would involve the construction of seven (7) distinct three-storey buildings.

This application was subject to the same third party appeal of that of the subject application. However, a different outcome was achieved in this appeal (to that for DA07/0022). In June 2008 the Land & Environment Court Judgement declares the appeal is dismissed and the decision (issued by Tweed Shire Council) as "valid".

The Hastings Point Progress Association Incorporated has since lodged an appeal to this Land and Environment Court decision in the Supreme Court (Court of Appeal). Council filed a submitting appearance only for this case and subsequently the applicant was responsible for any defence. A decision is currently pending in relation to this matter.

DA07/0411 – 18 Tweed Coast Road: In January 2008 Council approved a three storey multi dwelling residential development, comprising a total of 3 x three bedroom units and 1 x 4 bedroom unit, in two separate buildings, with on site parking for eleven vehicles.

DA07/0529 – 79-83 Tweed Coast Road: In March 2008 Council approved a development application for a three storey multi dwelling housing development, comprising of 20 units with basement car parking at 79-83 Tweed Coast Road, Hastings Point.

The above applications were all assessed on the basis of the 2(b) Medium Density zone and the statutory height limit as detailed within the LEP for 3 storeys.

Since the original determination (and approval) of DA07/0022 the Council engaged the services of Ruker & Associates Urban Design to assess the appropriateness of the height and density controls for Hastings Point as well as commencing community consultation for a Hastings Point Locality Plan. The initial review produced a final report on recommendations for the Council. Some of those recommendations have been

incorporated into DCP A1 – Interim Site Specific Controls Hastings Point. The purpose of these provisions is to restrict inappropriate development until the Locality Plan can provide detailed controls that reflect the type of developments that would be considered more appropriate for the Hastings Point Locality.

SITE DIAGRAM:

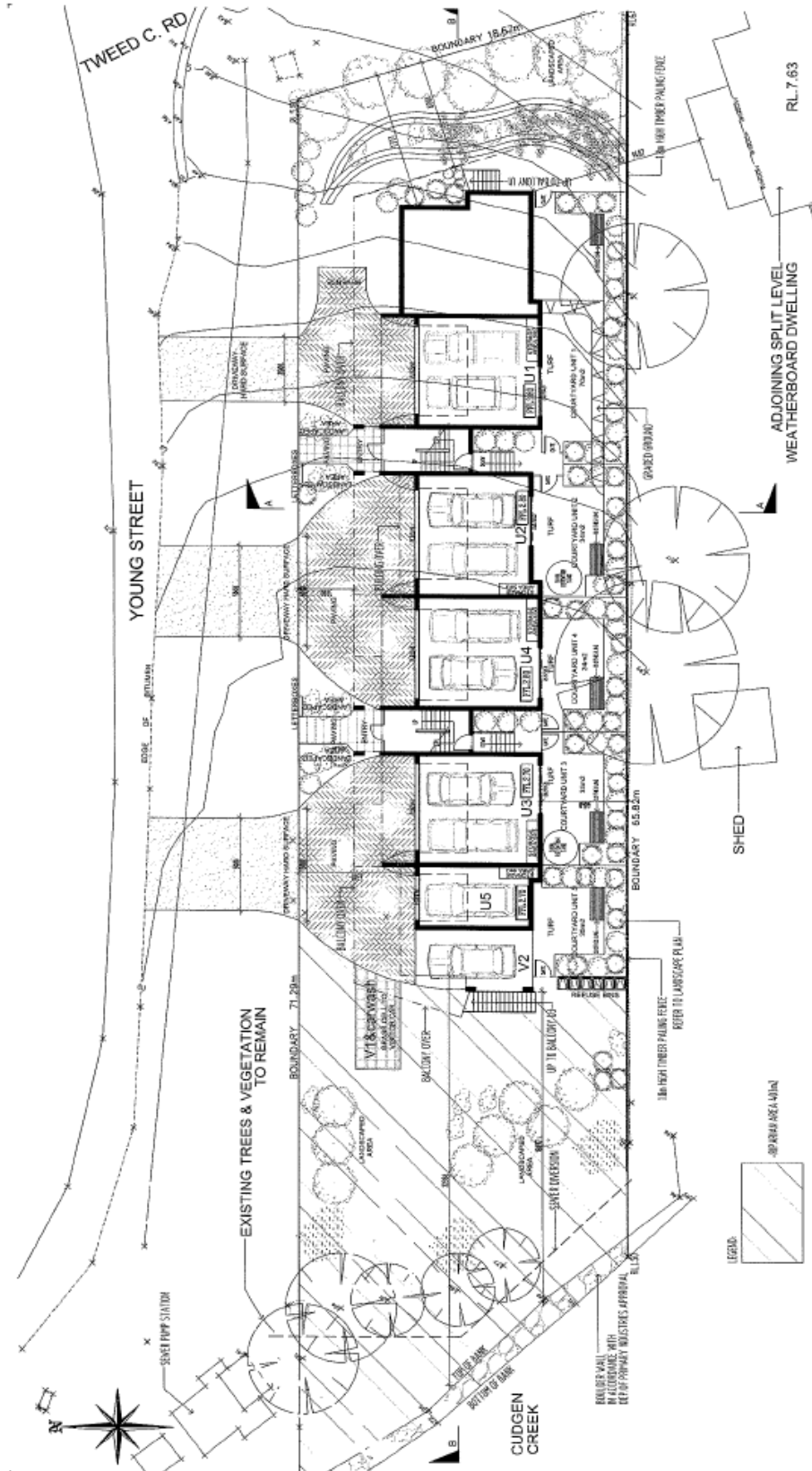


<p>© TWEED SHIRE COUNCIL 2007 Although all care has been taken with the production of this map, the TWEED SHIRE COUNCIL, its Employees, Officers and Consultants can not be Responsible for any Errors, Omissions or Inaccuracies in respect to the information supplied in this map. DO NOT SCALE COPY ONLY - NOT CERTIFIED P.O. Box 915 Tel: (02) 6670 2409 Murwillumbah, NSW, 2484 Fax: (02) 6670 2403</p>	<p><i>Tweed Shire Council</i></p> <p>Lot 9 DP 14141 No. 21 Tweed Coast Road, Hastings Point</p>		<p>PLANNING REFORMS UNIT</p> <p>Site Plan</p>
<p>File: N:\Munsys\A4P - SITE PLAN,Wor Author: J.Batchelor Date: 18/May/2007</p>		<p>Scale: 1:10,000</p>	<p>Sheet: 1 of 1</p>

2007 AERIAL PHOTOGRAPH HASTINGS POINT DEPICTING CURRENT DEVELOPMENT SITES:



DEVELOPMENT/ELEVATION PLANS:



01 PROP. SITE AND GROUND FL PLAN
SCALE 1:200

REF ID: DP14141
 SITE AREA - 1315m²
 SITE COVER - 416m² / 31.6 % OF SITE AREA
 REQUIRED LANDSCAPE - 80m²/unit = 400m²
 PROVIDED LANDSCAPE - 61m²

RAIN PAVING CALCULATIONS:
 2 CARS PER 3 BED UNIT = 6
 1.5 CARS PER 2 BED UNIT = 3
 TOTAL 15 UNITS = 125 CARS SPACES
 TOTAL PROVIDED 103 CARS SPACES

SUSTAINABILITY
 • SOLAR HOT WATER (AS POSSIBLE)
 • RECYCLED BUILDING MATERIALS WHERE POSSIBLE
 • RAIN WATER HARVESTING (LANDSCAPING & USE elsewhere)
 • INTERNAL LININGS ECO RECYCLED PLASTERBOARD

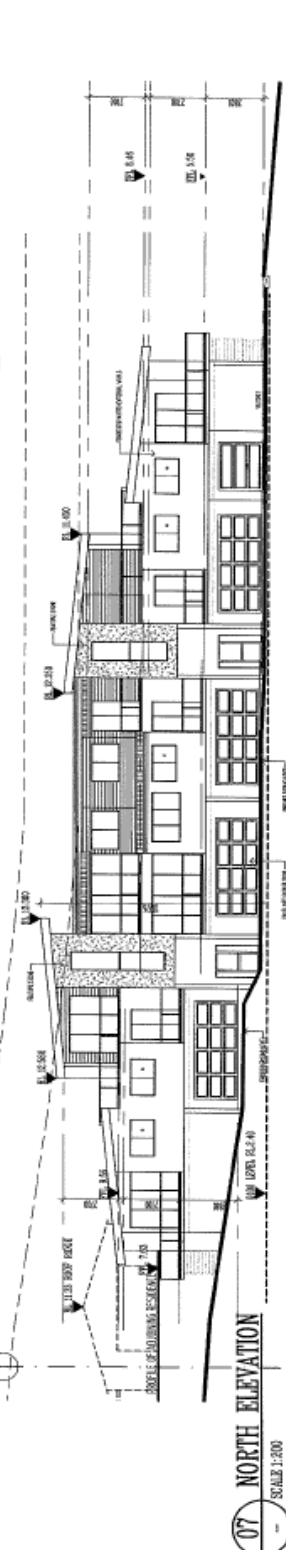
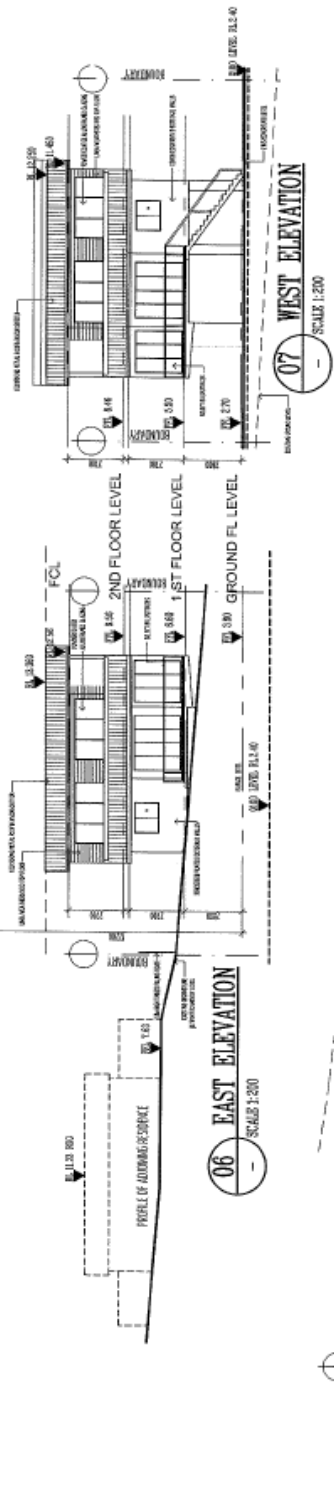
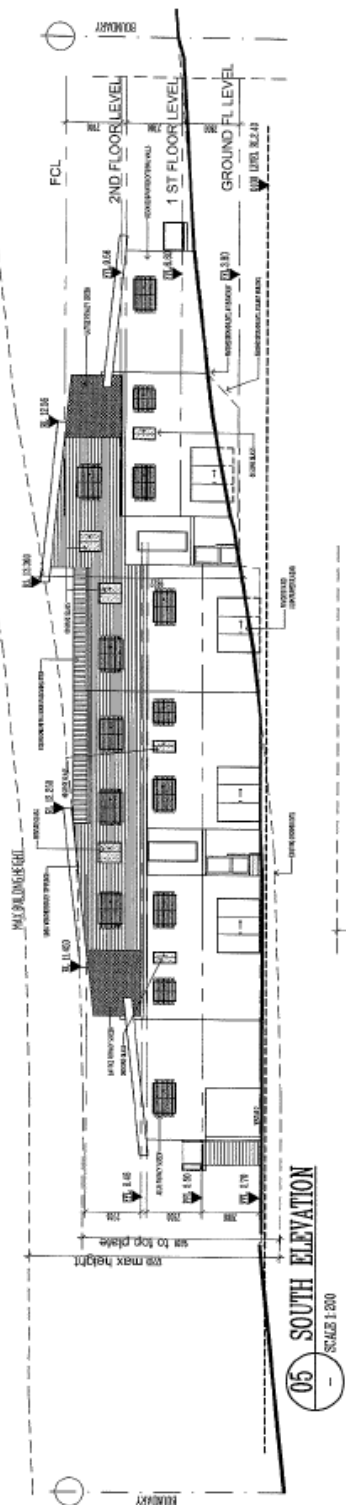
DATE	DESCRIPTION

NO.	DATE	BY	CHKD BY
1			
2			
3			

R.H. FRANKLAND & ASSOCIATES
 BUILDING AND DESIGN CONSULTANTS
 2200/2201A STURGEON ROAD, BENTLEY, VIC 3084
 PH: 03 9497 1111 FAX: 03 9497 1112
 WWW.FRANKLAND.COM.AU

DATE	BY	CHKD BY	DESCRIPTION

PROJECT: 01 PROP. SITE AND GROUND FL PLAN
 DRAWN: [Name]
 CHECKED: [Name]
 SCALE: 1:200
 DATE: [Date]



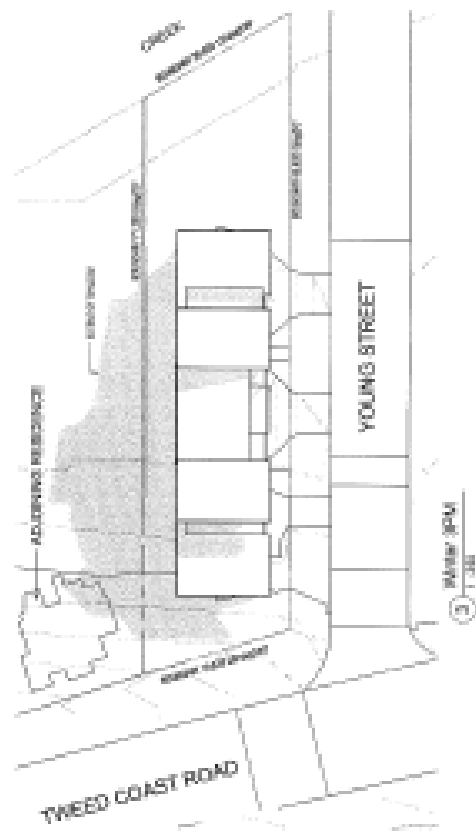
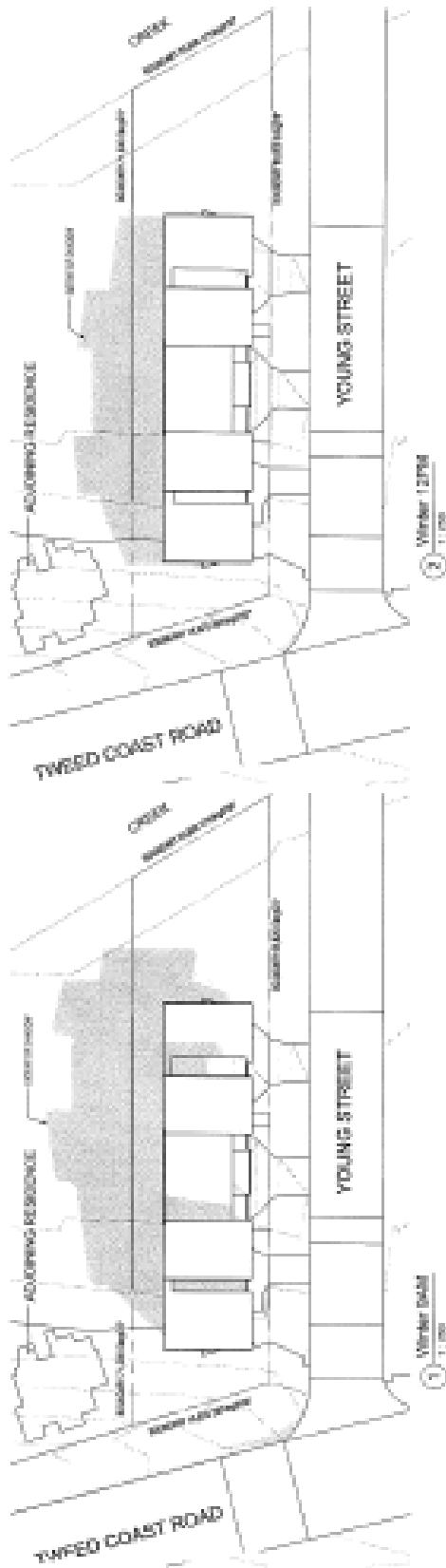
DATE	1/13/18
BY	C
PROJECT	16158

PROJECT: PROPOSED HOME UNITS DEVELOPMENT
 ADDRESS: ONE YOUNG STATION RD, HASTINGS POINT
 SHEET: PDX DEVELOPMENTS ELEVATIONS
 SCALE: 1:200(0A3)

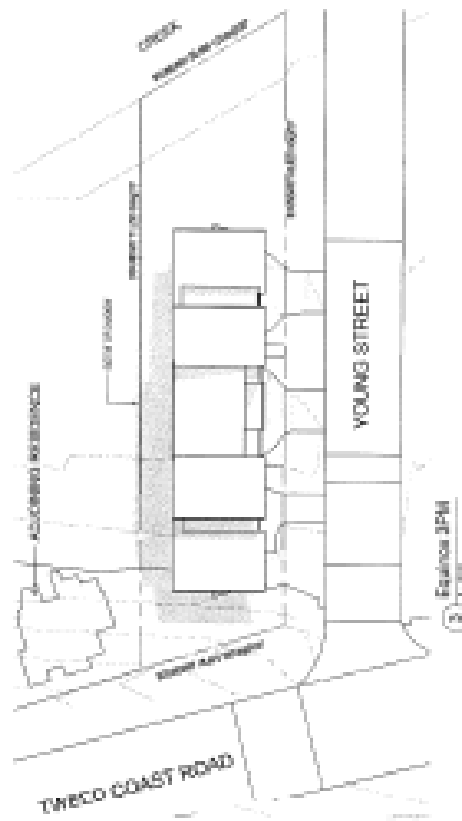
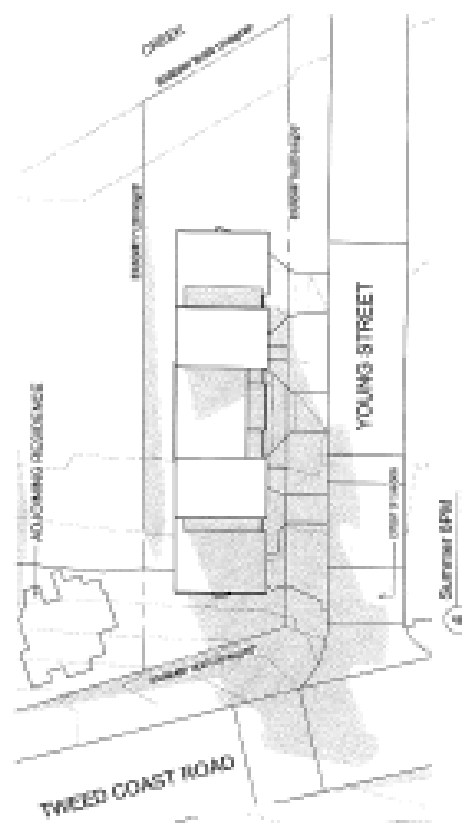
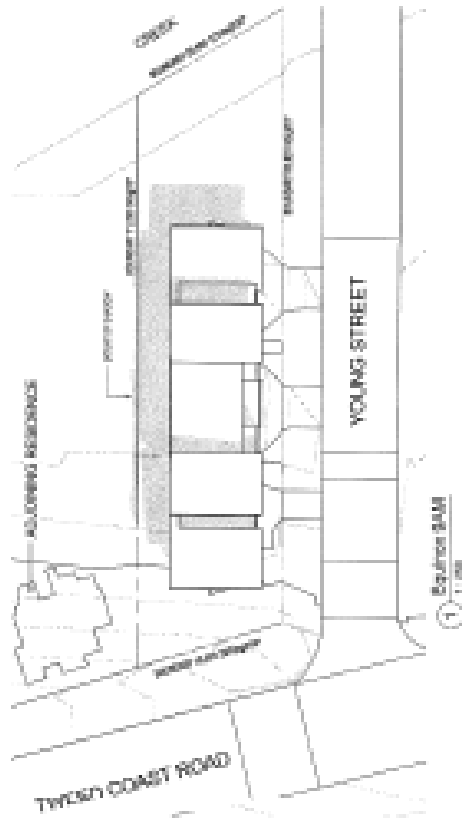
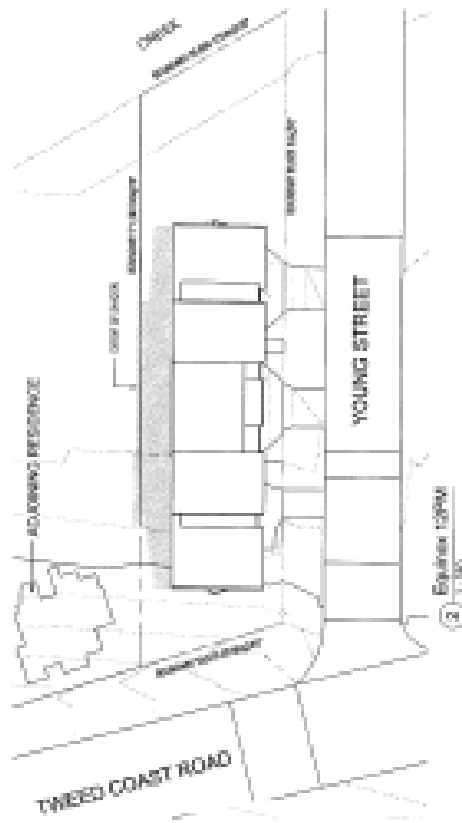
DESIGNER	FRANKLAND & ASSOCIATES
DATE	1/13/18
PROJECT NO.	16158
DATE OF ISSUE	1/13/18
SCALE	1:200
PROJECT NAME	PROPOSED HOME UNITS DEVELOPMENT
PROJECT ADDRESS	ONE YOUNG STATION RD, HASTINGS POINT
PROJECT CITY	HASTINGS POINT, BC
PROJECT PROVINCE	BC
PROJECT COUNTRY	CANADA

R.H. FRANKLAND & ASSOCIATES
 ARCHITECTS AND DESIGN CONSULTANTS
 1000 WEST 10TH AVENUE, SUITE 1000
 VANCOUVER, BC V6H 1T1
 TEL: 604-271-1111 FAX: 604-271-1112
 WWW.FRANKLAND-AND-ASSOCIATES.COM

REV	DATE	BY	DESCRIPTION
A	1/13/18	C	ISSUE FOR PERMIT
B	1/13/18	C	ISSUE FOR PERMIT
C	1/13/18	C	ISSUE FOR PERMIT



PROJECT NO: [] DRAWING NO: [] DATE: []			CLIENT: [] PROJECT: [] DRAWING: []
PROJECT: [] DRAWING: [] DATE: []			PROJECT: [] DRAWING: [] DATE: []



DATE	11/2018
TYPE	A
NUMBER	001
SCALE	1:500

PROJECT INFORMATION	PROJECT NO.
CLIENT NAME	PROJECT NAME
ADDRESS	PROJECT ADDRESS
DATE	PROJECT DATE
BY	PROJECT BY

DATE	11/2018
TYPE	Summer 2PM
NUMBER	001
SCALE	1:500



PROJECT NO.	PROJECT NAME
CLIENT NAME	PROJECT ADDRESS
DATE	PROJECT DATE
BY	PROJECT BY

DATE	11/2018
TYPE	Summer 2PM
NUMBER	001
SCALE	1:500

COLOURED PERSPECTIVES/LANDSCAPING PLANS:







01 NORTH ELEVATION (YOUNG STREET)

SCALE



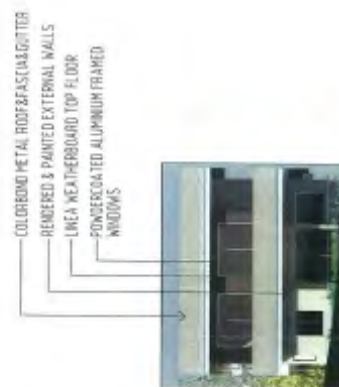
02 WEST ELEVATION

SCALE



03 SOUTH ELEVATION

SCALE



03 EAST ELEVATION

SCALE

REV	DATE	BY	SCALE	REVISION

ISSUED UNDER THE PROFESSIONAL ENGINEERING ACT 1988

R.H. FRANKLAND & ASSOCIATES PTY LTD
 ARCHITECTS AND DESIGN CONSULTANTS
 10/110 WILSON STREET, SOUTH COAST, NSW 2540
 PH: (02) 4422 1111
 FAX: (02) 4422 1112
 WWW: WWW.FRANKLAND.COM.AU

PROJECT	CLIENT	DATE	SCALE	REVISION

NEW PROPOSED HOME UNITS DEVELOPMENT
 10000 COAST RD & YOUNG RD, HASTINGS POINT
 NEW PRO DEVELOPMENTS
 COLOURED ELEVATIONS

DATE	17/06
BY	A
SCALE	1/60



YOUNG STREET ELEVATION n15

STATEMENT OF LANDSCAPE INTENT

CNR COAST ROAD + YOUNG STREET, HASTINGS POINT

Land & Site Co. of America
 10000 E. 1st Avenue
 Suite 100
 Fort Worth, TX 76102-3223
 Phone: 817.332.7111
 Fax: 817.332.7278
www.landandsite.com



CLIENT: PDK DEVELOPMENTS

DATE: REVISED APRIL 2009



Banksia integrifolia



Backhousia citrifolia



Pittosporum spp.



Acmena smithii

street + feature trees



Lycopodium obscurum



Syzygium paniculatum



Eucalyptus cretinensis



Photo database

planting palette

- TREES**
- Acmena smithii
 - Backhousia citrifolia
 - Banksia integrifolia
 - Buckinghamia celastroides
 - Cupaniopsis anacardioides
 - Pittosporum undulatum
 - Pittosporum rhombifolium
 - Syzygium oleosum

- SHRUBS + ACCENT PLANTS**
- Coraryline fruticosa
 - Coraryline peltolaris
 - Coraryline 'Red Sensation'
 - Coraryline stricta
 - Eleocharis reticulata
 - Methaenella liliifera
 - Syzygium paniculatum
 - Westringia spp.

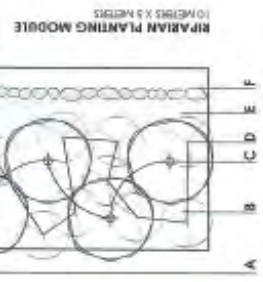
- GROUND COVERS**
- Carabobus lutescens (pig face)
 - Lomandra filiformis
 - Lomandra longifolia
 - Rhooia discolor

RIPIARIAN STRIP PLANTING

- TREES (CANOPY)**
- Acacia melanoxylon
 - Alphitonia excelsa
 - Cupaniopsis anacardioides
 - Flindersia schottiana

- TREES (SUBCANOPY)**
- Acmena smithii
 - Banksia integrifolia
 - Commersonia bartramia
 - Ficus traseri
 - Glochidion ferridrandi
 - Hibiscus tiliaceus
 - Jagiera pseudofrus
 - Macaranga lamarum
 - Omalanthus populifolius
 - Pandanus tectorius
 - Polystichum elegans
 - Syzygium oleosum
 - Trema lamaritense var. vitidis

- GROUND COVERS**
- Dianella caerulea
 - Lomandra longifolia



EXISTING VEGETATION BOSTONS TO REMAIN TO BE REPAIRED WHERE POSSIBLE

A) GROUND COVER LAYER 1: 2 SPECIES SELECTED PER MODULE REFER TO REVEGETATION PALETTE THIS PAGE; 1 MESH CURB

C) CANOPY LAYER 2: SPECIES SELECTED FOR MODULE REFER TO REVEGETATION PALETTE THIS PAGE 3 PLANTS PER MODULE

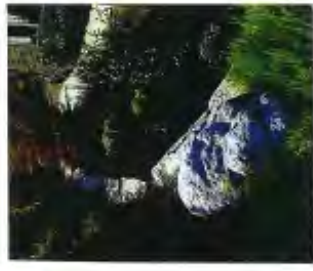
B) SUBCANOPY LAYER 3: SPECIES SELECTED FOR MODULE REFER TO REVEGETATION PALETTE THIS PAGE 15 PLANTS PER MODULE

D) GROUND COVER LAYER 2: 15 METERS TO BULK OF REMAINING WALL 2 SPECIES SELECTED FOR MODULE REFER TO REVEGETATION PALETTE THIS PAGE; 20MM CHISELS

F) REMAINING WALL REFER TO SHEET 1 FOR DETAIL

EXISTING IMPROVE STANDS TO REMAIN AS INDICATED SHEET 1

design elements



Intended surface treatment character to include pebble / aggregate surface in warm natural tones and overall landscape character to feature colourful accents against densely foliated deep green hedging and shady intimate outdoor spaces



STATEMENT OF LANDSCAPE INTENT

CNR COAST ROAD + YOUNG STREET, HASTINGS POINT

CLIENT: PDK DEVELOPMENTS

DATE: REVISED APRIL 2009

Level 2, 88 Quay Avenue
 Suite 400/401
 PO Box 98, Lower Poinsett, QLD

Telephone: 07 5547 0776
 Fax: 07 5547 0778
 web: www.planetearth.com.au

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

Clause 4 of the TLEP nominates the aims of the plan which 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 Heads 2000+ Strategy*
 - *Pottsville Village Strategy, and*
- (d) *to encourage sustainable economic development of the area of Tweed compatible with the area’s environmental and residential amenity qualities.*

The Tweed Shire 2000+ Strategic Plan (published in 1997) in conjunction with Tweed 4/24 Strategic Plan 2004-2024 forms the strategic framework and visionary direction for the Tweed Shire. They set overarching goals that will help manage the Tweed into the future. In the 1997 Tweed Shire 2000 + Strategic Plan the following recommendation should be noted:

129. Heights of Buildings *Current provisions for heights of buildings be retained in the new LEP and DCP’s with the exception of Kingscliff, Fingal, Hastings Point and Pottsville. Undertake an urban design review with public consultation to evaluate whether the heights of buildings provisions should be amended at Kingscliff. Initiate and evaluate a two storey limit at Pottsville, Hastings Point and Fingal urban zonings.*

This strategic plan informed the Tweed LEP 2000 and whilst a two storey height limit was adopted in part at Kingscliff, Fingal and Pottsville no such reduction in height occurred at Hastings Point.

However, Council has endorsed the Ruker & Associates Urban Design Report and subsequently adopted Interim Site Specific Controls for Hastings Point. Further Council has commenced community consultation in regards to a locality plan for Hastings Point.

The Interim Site Specific Controls are considered to guide the potential future character of Hastings Point and therefore the part two and part three storey, five unit development is recommended for refusal.

Clause 5 of the TLEP requires consideration of the four principals of ecologically sustainable development.

Council's Specialist Planner/Ecologist has provided that the site's location is significant in an ecological sense. It is located in a sensitive coastal location as defined by SEPP 71, between SEPP 26 littoral rainforest and SEPP 14 wetlands and has its rear boundary with Cudgera Creek.

Consideration of the intent of all relevant legislation and policy relating to coastal estuarine foreshores has shown that the following outcomes are expected:

- protection and enhancement of the riparian zone;
- maintaining or improving water quality;
- consideration of visual amenity, coastal processes, the appropriateness of public access and of the dedication of riparian zones as public land.

To achieve such aims requires a buffer between any development and the estuary. Given the significance of the site, its location on an eroding bend of Cudgera Creek, the presence of a sewer main potentially limiting planting area; uncertainties with regard to climate change; and the lack of formal public access for this part of the creek a 20m buffer of densely planted local native vegetation is the minimum acceptable riparian buffer for the site to enable ecologically sustainable development and compliance with all relevant legislation.

The applicant has amended the development giving consideration to previous advice provided by Council in relation to the riparian zone and its appropriate treatment. Although the resultant outcome does not quite comply with the recommended minimum 20m densely revegetated riparian buffer in all areas and is lacking in some detail, it is clear that substantial effort has been made to comply with Council's concerns and the majority of the development site is now able to comply with relevant regulations and guidelines. In addition, the re-designed creek bank treatment facilitates colonisation by mangroves which will lead to an expanded riparian buffer below the current creek bank of 5 to 10m width (and greater bank stability) leading to a total riparian buffer width on average of some 25 to 30m.

Thus Council's Specialist Planner/Ecologist is of the opinion that the proposal as now amended closely approximates the requested 20m buffer and accordingly recommends approval, subject to appropriate conditions, from an ecological perspective.

Clause 8 of the TLEP sets out the consent considerations when determining a development application.

8(1) 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.

To address Clause 8(1) (a) the primary objectives of the 2(b) zone states: -

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 amended development is permissible with development consent within the zone and is considered medium density development.

The amended application has achieved some good urban design outcomes by utilising the site's topography, accommodating articulation, and incorporating a variety of materials and roof pitches to emphasise articulation.

The question is whether the amended design is suitable for the subject site and locality.

Council's Urban Designer has reviewed the proposal and has indicated that whilst the development has incorporated some good design outcomes it could be further enhanced by:

- further stepping the building down the site to emphasise the topography;
- splitting the building to reduce the bulk and scale;
- providing more usable balcony areas off living areas rather than at ground level where they may not be utilised as often;
- better utilising light weight materials at the upper level to create a strong base, centre and middle of the building;
- better utilising transparent materials on stairwells and balconies;
- incorporating living areas at ground level; and

- better addressing the corner rather than representing a symmetrical approach to the corner;

Some of the above suggestions could be adopted into the current design, however, any significant changes (such as splitting the building form into two) would either reduce the riparian buffer or result in a reduction of yield.

The current yield is consistent with the medium density nature of the 2(b) zone but is not consistent with the Interim Site Specific Controls for Hastings Point.

Therefore it is considered that the application represents a reasonable urban design outcome but one that is not consistent with the possible future desired character of the area and hence why the application is recommended for refusal.

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

Secondary objectives

- *to allow for non-residential development which supports the residential use of the locality.*
- *to allow for tourist accommodation that is compatible with the character of the surrounding locality.*
- *to discourage the under-utilisation of land for residential purposes, particularly close to the Tweed Heads sub-regional centre.*

In regards to the secondary objectives it is acknowledged that one of the largest problems facing the Tweed Shire is accommodating a growing population and hence why discouraging the under utilisation of land for residential purposes is important.

The subject site is located within the town and village boundary of Hastings Point as mapped within the Far North Coast Regional Strategy (FNCRS). The strategy states that “The Regional Strategy will reduce the proportion of additional dwellings in the Coastal Area to 60% by limiting future development to within the mapped Town & Village Growth Boundaries.

The Strategy also places an emphasis on providing a balance:

“Economic growth must be balanced with conserving the natural environment and heritage assets and preserving the character of the villages and lifestyle for residents”

Council’s assessment of the original development plans (7 unit town house development with a 5m creek setback) stated:

“It is considered that the proposed development does not achieve this balance. A multi unit development on this site could be achieved with a 20m creek setback and either a two storey height limit or specifically designed sympathetic three storey development. Such development could be considered to achieve the aims of the plan, achieve compliance

with the principals of ecologically sustainable development and achieve compliance with the zone objectives.”

The amended plans have achieved an acceptable creek setback and have achieved a part two and part three storey development.

In regards to achieving a balance between economic growth and the environment, the amended application is considered adequate.

In regards to achieving a balance between economic growth and preserving the existing character of Hastings Point, the amended application is not considered adequate.

The amended application represents a modern building that would propose a significantly larger building footprint and building envelope than existing buildings in the locality on a visually prominent site. A building on this site has the potential to create a lasting impression on the character and visual quality of the locality.

To address Clause 8(1)(b) this report considers those other aims and objectives of this plan that are relevant to the development.

To address Clause 8(1)(c) this report in its entirety represents a cumulative impact report. This planning report weighs up the development as a whole and makes a recommendation based on consideration of the implications on or from the perspective of flooding, bushfire constraints, ecology, water quality, bulk and scale, overshadowing, privacy, amenity, character, economic ramifications, social impacts and the general public interest.

In the Class 4 Land & Environment Court proceedings Judge Pain provided that cumulative impact incorporates the consideration of what effect this development could have on existing developments and the approval of further similar developments and how these developments might impact on a locality, community and catchment.

The potential impacts as a result of the development need to be considered assuming a duplication of a similar development on other adjoining properties to consider the overall cumulative impact.

In recent times Council has approved five (5) developments within Hastings Point that have a three storey height limit. These applications were all approved at a time when three storey developments were the future desired character (based on a 3 storey height limit and a 2(b) Medium Density Zoning in the LEP).

Whilst this statutory framework has not changed in April 2008 an independent review by Ruker & Associate Urban Design resulted in the creation of Interim Site Specific Development Controls for Hastings Point to the effect that:

- The maximum building height is 2-storeys and 8m; and
- The maximum density on any lot or combination of lots comprising a development site is two dwellings (dual occupancy).

The proposed development seeks consent for a partial 3 storey building measuring a maximum of 10.7m in height which is contrary to the first Area Specific Development Control.

The proposed development seeks consent for 5 units or dwellings within an allotment 1315m² in size which is contrary to the second Area Specific Development control in that the maximum number of units or dwellings should be 2.

Based on these new development controls which aim to protect the existing character of Hastings Point the proposed development is considered to have a potential negative cumulative impact on the character of Hastings Point if this type of development were to be duplicated.

Therefore it is concluded that the development would have an unacceptable cumulative impact on the community, locality and catchment.

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 maximum height limitation of 3 storeys with the proposal comprising of part 3 storeys.

However, the proposed development is not considered to be consistent with the future desired character of the area with regard to bulk and scale. This future desired character has been recently established as a result of the Ruker Urban Design Report, and the Interim Site Specific Development Controls for Hastings Point (as depicted in DCP Section A1), both of which have been subject to public exhibition and extensive consultation. In this instance these strategies are considered to better represent the future desired character than the existing 3 storey maximum height limit. Therefore, the proposal is not considered to comply with the objectives of Clause 16.

Clause 22 of the TLEP relates to local designated roads such as Tweed Coast Road. The proposed development proposes no vehicular access to this road and therefore the objectives and provisions within Clause 16 are satisfied as the application is not considered to impact on the functionality of the locally designated road.

Clause 31 of the TLEP relates to development adjoining water bodies and applies to land that adjoins the mean high-water mark (or the bank where there is no mean high-water mark) of a water body. Clause 31 states that consent must not be granted in respect of such land "within such distance as is determined by the consent authority of the mean-high water mark or top of bank" unless satisfied certain criteria can be met. These criteria include: that the development will not have a significant adverse effect on scenic quality, water quality, marine ecosystems, or the bio-diversity of the riverine or estuarine area or its function as a wildlife corridor or habitat; adequate arrangements for public access to and use of foreshore areas have been

made where appropriate and desirable; the development is compatible with any coastal, estuary or river plan of management adopted by the Council under the *Local Government Act 1993* that applies to the land; and the development addresses the likely impact and amelioration measures of biting midge and mosquitoes on residents and tourists.

Clause 31 further states that the consent authority may require as a condition of consent to any development that the rehabilitation of land adjoining the waterbed to create a vegetated riparian zone or works to stabilise the bank or shoreline of a waterbed be carried out. The clause further states that, in determining a distance for the purposes of this clause the consent authority shall have regard to:

- (a) the preservation of the scenic quality of foreshores, and
- (b) minimising the risk of pollution of waterways, and
- (c) the protection of foreshore ecosystems, and
- (d) the intended or planned use for the foreshore.

It is clear that the intent of all policy relating to coastal estuarine foreshores is for protection and enhancement of the riparian zone; maintaining or improving water quality; consideration of visual amenity; coastal processes; the appropriateness of public access and of the dedication of riparian zones as public land. To achieve such aims requires a buffer between any development and the estuary.

Council's Specialist Planner/Ecologist is of the opinion that the proposal as now amended closely approximates the requested 20m buffer and accordingly recommends approval, subject to appropriate conditions, from an ecological perspective.

Clause 34 of the TLEP requires Council to minimise future flood damage by ensuring that only appropriate compatible development occurs on flood liable land.

Council's Planning & Infrastructure Engineer has provided as follows:

"Site levels vary from approximately RL 6.8m AHD at the eastern site frontage to Tweed Coast Rd, down to RL 1.5m AHD at the western frontage to Cudgera Creek. Design flood level (DFL) for Hastings Point is RL 2.4m AHD, and based on survey plans over half of the site is flood liable for the 100 year ARI flood event.

DCP-A3 specifies filling of the site to the DFL. Note that a degree of site regrading has already occurred under an earlier approval. The applicant proposes to raise the building envelope to meet these level requirements, and leave the rear yard area at natural ground level. This is an acceptable variation to the DCP requirements, and the preferred approach adjacent to the creek and riparian zone.

Garages for units 3 and 5 are at the specified minimum habitable floor level of RL 2.7m AHD (although these are not strictly habitable areas and

could be lower), with the other garage levels stepping up the site to match the finished slope.

The site access to Young St and Tweed Coast Road complies with the DCP-A3 requirements for a flood free evacuation route for emergency response purposes.

As such, there are no flood related concerns for the development proposal.”

Clause 39A of the TLEP requires Council to minimise bushfire risk to built assets and people. The proposal was reviewed by the NSW Rural Fire Service. They concluded that no objections were raised subject to the recommended conditions of consent being adopted in any approval.

North Coast Regional Environmental Plan 1988 (now deemed a SEPP)

Clause 15 - Development control—wetlands or fishery habitats

This clause states that Council shall not consent to an application to carry out development within, adjoining or upstream of a river or stream, coastal or inland wetland or fishery habitat area or within the drainage catchment of a river or stream, coastal or inland wetland or fishery habitat area unless it has considered a number of matters, including:

- the need to maintain or improve the quality or quantity of flows of water to the wetland or habitat;
- the need to conserve the existing amateur and commercial fisheries;
- any likely loss of habitat;
- whether an adequate public foreshore reserve is available and whether there is adequate public access to that reserve;
- whether the development would result in pollution of the wetland or estuary and any measures to eliminate pollution;
- whether the watercourse is an area of state protected land
- any measures to prevent soil erosion, and
- the need to ensure that native vegetation surrounding the wetland or fishery habitat area is conserved.

The site adjoins a coastal stream which is recognised as an important wetland and fishery habitat area.

Having regard to the significance of the site, including its proximity to state significant wetlands and littoral rainforest, its location on an eroding bend of Cudgera Creek, the presence of a sewer main, uncertainties with regard to climate change; and the lack of formal public access for this part of the creek it is Council's Specialist Planner/Ecologist opinion that the amended development (that comprises a riparian buffer closely approximating the requested 20m buffer) could be approved subject to appropriate conditions, from an ecological perspective.

Clause 32B - Coastal Lands

This Clause states that Council must not consent to development on land to which the Coastal policy applies if it would impede public access to the foreshore or result in waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).

The proposed development has been accompanied by shadow diagrams that illustrate no overshadowing of the foreshore reserve outside of the nominated times.

The proposal is considered to satisfy all relevant provisions contained within the NCREP 1988.

State Environmental Planning Policy (SEPP) 14 – Wetlands

SEPP14 protects mapped coastal wetland communities. The site is within 50m of a mapped SEPP 14 wetland. This land does not require assessment against SEPP 14.

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. The SEPP was not applicable to the original development (which incorporated a town house style of development) but does apply to these amended plans.

Council's Urban Designer has reviewed the amended application and assisted in the following assessment with regard to the design quality principals:

Principle 1: Context

Good design responds and contributes to its context. Context can be defined as the key natural and built features of an area.

Responding to context involves identifying the desirable elements of a location's current character or, in the case of precincts undergoing a transition, the desired future character as stated in planning and design policies. New buildings will thereby contribute to the quality and identity of the area.

The subject site is located on a visually prominent corner site fronting both the Tweed Coast Road and Young Street. The site slopes from the Tweed Coast Road down to the bank of Cudgera Creek. The site has views to the west towards Cudgera Creek and is within walking proximity to estuary and ocean foreshores and small convenience store. On the opposite side of the road is a

strip of bush land forming the hind dune to the ocean beach. The immediate area could therefore be described as having a high level of visual amenity.

Surrounding development includes mostly detached single houses with relatively modest building footprints on landscaped blocks. Many of the street edges have unformed edges where grass verges abut the carriageway. The landscape within both the public and private domains and informality of property delineation are also defining features of the streetscape. The architectural character of surrounding buildings ranges from old weatherboard and timber clad cottages to more recent two-storey brick and masonry construction.

The amended plans have certainly better responded to the sites constraints than earlier plans. The revised plans represent a modern and well articulated building. However, the application could be described as being a departure from the existing pattern of built form of small building footprint within an informal landscape setting.

A building on this site has the potential to create a lasting impression on the character and visual quality of the locality.

In producing the Hastings Point Locality Plan Ruker & Associates Urban Design Locality will look at the existing and desired future character of the locality, around which new built form controls will be derived.

Principle 2: Scale

Good design provides an appropriate scale in terms of the bulk and height that suits the scale of the street and the surrounding buildings.

Establishing an appropriate scale requires a considered response to the scale of existing development. In precincts undergoing a transition, proposed bulk and height needs to achieve the scale identified for the desired future character of the area.

The amended development has stepped down the site and broken up the roof form by having a part two and part three storey development. This type of well articulated building is normally encouraged, however, in this instance the scale must be reviewed having regard to the new Interim Development Controls.

The overall scale of the revised scheme in terms of building envelope and bulk is inconsistent with the scale of the street and surrounding pattern of built form especially when viewed from the Tweed Coast Road and Young Street intersection.

The building has some depth and articulation through balconies, materiality and fenestration. However, the presentation of the building within a single large envelope exacerbates the overall scale and bulk of the building with the main bulk and height of the building shifted towards the centre of the site.

Alternative designs to split the building bulk were unacceptable to Council due to the limited Creek setback and possible impact on the Creek. Accordingly the current design is preferred to ensure adequate Creek buffers.

Principle 3: Built form

Good design achieves an appropriate built form for a site and the building's purpose, in terms of building alignments, proportions, building type and the manipulation of building elements.

Appropriate built form defines the public domain, contributes to the character of streetscapes and parks, including their views and vistas, and provides internal amenity and outlook.

The development has some positive design elements. It has good outdoor balcony areas, has stepped down the site, and has good articulation.

Being a three-storey building, the building form could have clearly articulated a strong or grounding base, a distinct middle and a more light weight upper level approach. The recessed building line of the car parks combined with blade walls and landscaping somewhat obscure what is essentially a continuous run of garage doors.

The upper floors display slightly more depth and articulation through a material palette of rendered block work, feature stone and linear weather board. An exploration of a building with a more pronounced step with the site (3 storey's to 2 storey's) could also have resulted in additional creek views from units but a more interesting building form which would benefit the character of the streetscape.

The use of more transparent building materials to the stairwells, recessed from the front building line would create a sense of building separation and assist in reducing the single large envelope. Also a more pronounced step in the roof line combining a range of materials (roof sheeting and lighter weight timber pergolas/shades/screens) would also drastically reduce the buildings overall bulk.

Principle 4: Density

Good design has a density appropriate for a site and its context, in terms of floor space yields (or number of units or residents).

Appropriate densities are sustainable and consistent with the existing density in an area or, in precincts undergoing a transition, are consistent with the stated desired future density. Sustainable densities respond to the regional context, availability of infrastructure, public transport, community facilities and environmental quality.

The proposed density (5 units over 1315m²) reflects the first interim control for Hastings Point which specified a maximum of 1 dwelling per 250m² of site area. This control was subsequently superseded with a density provision of no more than 2 dwellings per property.

The development obviously exceeds the current site maximum density provision.

In density terms, 5 units proposed over 1315sqm or 1 unit per 263sqm in many contexts would be reasonably generous. However in consideration of the Locality Planning currently being undertaken the proposed development may not represent the development to which the Locality Plan may deem suitable. Furthermore having regard for the sites context being a visually prominent corner, directly adjoining Cudgera Creek and the surrounding pattern of development being substantially single detached dwellings on a landscaped block, the desired yield of 5 units over the site would result in a building of a mass and bulk which would impact the visual and streetscape character.

Principle 5: Resource, energy and water efficiency

Good design makes efficient use of natural resources, energy and water throughout its full life cycle, including construction.

Sustainability is integral to the design process. Aspects include demolition of existing structures, recycling of materials, selection of appropriate and sustainable materials, adaptability and reuse of buildings, layouts and built form, passive solar design principles, efficient appliances and mechanical services, soil zones for vegetation and reuse of water.

Whilst the current scheme does not specifically refer to any specific ESD measures or overriding ESD design intents, a number of passive design principles have been utilised in the planning of the building. This includes the orientation of most living areas to the north maximising utilisation of natural light.

The single unit width floor plate will allow natural light penetration and opportunity for cross ventilation. A semi-porous driveway surface would assist in limiting surface water runoff and decrease the visual impact of the significant amount of paving indicated at the ground plane.

Principle 6: Landscape

Good design recognizes that together landscape and buildings operate as an integrated and sustainable system, resulting in greater aesthetic quality and amenity for both occupants and the adjoining public domain.

Landscape design builds on the existing site's natural and cultural features in responsible and creative ways. It enhances the development's natural environmental performance by coordinating water and soil management, solar access, micro-climate, tree canopy and habitat values. It contributes to the positive image and contextual fit of development through respect for streetscape and neighbourhood character, or desired future character.

Landscape design should optimise useability, privacy and social opportunity, equitable access and respect for neighbours' amenity, and provide for practical establishment and long term management.

Council's Specialist Planner/Ecologist has reviewed the landscaping and is satisfied with the development subject to recommended conditions of consent.

Principle 7: Amenity

Good design provides amenity through the physical, spatial and environmental quality of a development.

Optimising amenity requires appropriate room dimensions and shapes, access to sunlight, natural ventilation, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas, outlook and ease of access for all age groups and degrees of mobility.

The proposed GFA for each of the units in general appears to be satisfactory, with 95m² being the smallest, up to 113m² being the largest. Each of the units also has an element of outdoor amenity space, which is also of a size and dimension which is generally acceptable.

Living areas of each of the units are generally orientated north to maximise sunlight penetration, and some of the units will have a good outlook over Cudgera Creek. As previously identified, a stepping of the building with the site from the Coast Road would provide additional opportunities to overlook the creek. The inclusion of a large landscaped common amenity space to the creek's edge also generally contributes to the occupants' level of amenity.

Principle 8: Safety and security

Good design optimises safety and security, both internal to the development and for the public domain.

This is achieved by maximizing overlooking of public and communal spaces while maintaining internal privacy, avoiding dark and non-visible areas, maximizing activity on streets, providing clear, safe access points, providing quality public spaces that cater for desired recreational uses, providing lighting appropriate to the location and desired activities, and clear definition between public and private spaces.

The relative size of the development is unlikely to raise any significant safety or security issues. The proposed building provides significant opportunity to overlook the street.

Principle 9: Social dimensions and housing affordability

Good design responds to the social context and needs of the local community in terms of lifestyles, affordability, and access to social facilities.

New developments should optimise the provision of housing to suit the social mix and needs in the neighbourhood or, in the case of precincts undergoing transition, provide for the desired future community.

New developments should address housing affordability by optimising the provision of economic housing choices and providing a mix of housing types to cater for different budgets and housing needs.

The scheme proposes 2 x 2 bedroom units and 3 x 3 bedroom units which provide an adequate mix of unit types for this size development.

As a lift or accessible unit hasn't been provided, the development precludes any of the units from the disabled or those incapacitated to use stairs. This is exacerbated by the fact that none of the units have direct at grade access to the ground plane. The limited number of units proposed (5) negates the criteria to provide social or affordable housing.

Principle 10: Aesthetics

Quality aesthetics require the appropriate composition of building elements, textures, materials and colours and reflect the use, internal design and structure of the development. Aesthetics should respond to the environment and context, particularly to desirable elements of the existing streetscape or, in precincts undergoing transition, contribute to the desired future character of the area.

The proposed development is a well designed building that has street appeal. However, the core issue is whether the development as proposed is suitable for the subject location having regard to the contextual and scale issues as discussed above.

State Environmental Planning Policy (SEPP) 71 – Coastal Protection

The application was referred to the NSW Department of Planning for works below mean high water mark. The Department raised no objection to the development subject to Council undertaking its own Clause 8 Assessment.

Clause 8 of the SEPP details *Matters for Consideration* which include provisions that require Council's to consider various matters when considering development within the coastal zone. The SEPP defines land within 100m of the ocean or coastal estuaries, SEPP 14 wetlands and SEPP 26 littoral rainforest to be a *sensitive coastal location*. The subject site fits this description and is within 300m of the ocean. The matters for consideration include (but are not limited to):

- retaining, improving and creating new opportunities for public access to coastal foreshore (includes estuary foreshores);
- avoiding detrimental impact on amenity of coastal foreshores, including overshadowing or loss of views;
- measures to conserve animals, plants, fish and their habitats and any wildlife corridors;

- consideration of coastal processes and coastal hazards; reducing conflict between land-based and water-based activities; water quality the cumulative impact on the environment; and
- The cumulative impacts of the proposed development on the environment

The proposed development is considered to have suitable regard to Clause 8 of the SEPP by providing sufficient site landscaping and a suitable setback to Cudgera Creek.

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

Draft LEP 2000 Amendment No. 81 – Height Limits Hastings Point

Draft LEP 2000 Amendment Number 81 was abandoned by Council on 19/12/2006. No further consideration of this Draft LEP is statutorily required.

(a) (iii) Development Control Plan (DCP)

Tweed Development Control Plan

A1-Residential and Tourist Development Code

The proposed development is considered to best fit within category Part C of the DCP for Residential Flat Buildings and Shop Top Housing (as a defined Small Residential Flat Building). The DCP incorporates detailed parameters for improved site outcomes. These include the requirement for deep soil zones (front and rear), 60% impermeable site area, private open space, landscaping, car parking, setbacks and general street presence.

A detailed assessment against this DCP is available on Council's files however the amended development generally satisfies the provisions of Part C including:

- Complying deep soil zones;
- Complying setbacks and separation distances;
- Complying impermeable areas;
- Complying private open spaces areas;
- Complying landscaping and riparian areas; and
- Complying on site car parking.

Minor non compliances that are considered acceptable on merit are detailed below:

Design Control 1 Public Domain Amenity - Control (d) provides that developments should “minimise driveways and hardstand areas to increase the area for deep soil zones and landscaping and to reduce the visual impact of driveways and hard surfaces from the street”

The proposed development utilises Young Street for three vehicular access points. Young street is utilised as the primary street frontage to Tweed Coast Road is elevated above the block restricting access opportunities.

The Young Street elevation is 71.29m long and the applicant therefore proposes three driveway access points along this elevation (one single driveway and two double driveways). This design has tried to minimise hard stand areas by not directing cars to behind the building as per earlier designs.

In addition the dominance of the access points has been reduced by having a cantilevered building above parts of the driveway areas creating shadow on the garage doors themselves. In addition landscaping has been provided between each access point to reduce the impact of hard stand areas.

Were the application to be approved by Council or the Court it would be recommended that the driveways be constructed of semi permeable grass pavers to ensure maximum impermeable area across the site.

On merit the design is considered to represent a suitable outcome regarding this control having regard to the alternative designs previously considered by DA07/0022.

Design Control 4 Car Parking and Access - Car Parking Generally: Control (f) provides that “The driveway width from the street to the property boundary is to be minimised”.

The amended application incorporates three driveway crossovers to Young Street. Each cross over has been minimised but cumulatively the three driveways total 15.5m out of 71.29m of the northern boundary (21%).

Given the length of frontage available three vehicular crossings in a low traffic area is considered acceptable.

Design Control 4 Car Parking and Access - Garages and carports: Control (c) provides that “For Residential Flat buildings garage doors and entries to basement car parks along the street cannot be more than 7m wide or 50% of the lot width whichever is the lesser.”

The application proposes three driveway crossovers which provide access to the following garages spaces:

- Driveway 1 – 3.5m wide providing access to a double garage 6m wide for Unit 1;
- Driveway 2 – 6m wide providing access to two double garages 6.5m and 6m wide for Unit 2 and Unit 3;
- Driveway 3 – 6m wide providing access to a double garage, a single garage and an open car space measuring 6m, 3.5m and 3.5 wide respectively for Unit 4 and Unit 5;

In total the five garages measure 28m in length across 71.29m of the northern boundary (39.2%).

Whilst collectively the garages equate to more than 7m they do not exceed 50% of the site frontage. In addition the garages have been carefully designed to be setback 3m behind a cantilevered upper level to achieve a garage

setback of 6m from the boundary. The garages have also been separated from one another by blade walls thus breaking up the appearance of the garages.

The application is considered to satisfy the objectives of the section and the controls as detailed above.

Design Control 6 Height - Control (d) provides that “9.6m is the maximum wall plate height for Residential Flat Buildings”.

In one small section of the building (2.5m in length) there is a non compliance of 200mm – 400mm. This occurs as a direct result of the level change that occurs between Unit 1 and Unit 2 (with Unit 4 sitting over the top of both units). The non compliance is a direct result of the roof pitch which is considered to form part of the positive design elements of the entry for Units 1, 2 and 4. To achieve numerical compliance in this regard would reduce the positive design features of the building. The application is therefore considered to satisfy the objectives of the section.

Having regard to Part C of the Tweed DCP Section A1 the proposed development is considered acceptable.

In addition to Part C of the DCP Hastings Point is subject to the following Interim Site Specific Controls as per the Preliminary Section of the DCP:

AREA SPECIFIC DEVELOPMENT CONTROLS

INTRODUCTION

This section of the Plan provides development provisions that have been formulated in response to an identified specific need of a particular site(s) or locality. This section is to prevail to the extent of inconsistency with any other development provision in this Plan.

Area of Application

Hastings Point – all land within the boundaries of the locality of Hastings Point.

Objectives

- *To implement the recommendations of the Hastings Point ‘Review of Height, FSR and Setback Controls’ Report, prepared by Ruker and Associates dated 26 March 2008, as resolved by Council on 22 April 2008.*
- *To limit the impact of new development on the existing character and amenity of this control settlement prior to any further locality based planning by:*
 - *Implementing interim restricting height and density provisions for new development until provisions*

appropriately tailored to larger and more dense development (where appropriate) is adopted following community consultation, that will;

- *Provide greater certainty to the protection and preservation of the areas natural and built environment.*

Controls

- a. *The maximum building height is 2-storeys and 8 metres.*
- b. *The maximum density on any lot or combination of lots comprising a development site is two dwellings (dual occupancy).*

Review Period

The review period for interim development controls outlined above for Hastings Point is 12 months from the adoption of this Plan, except where a locality or structure plan, or area specific planning controls are in preparation in which case it will be the adoption date of that body of work and the concurrent or subsequent repeal of the interim provisions.

The interim development controls relating to the Hastings Point locality shall take effect on the giving of public notice of the Council's adoption of the amended Tweed Shire Development Control Plan in accordance with clauses 21 & 22 of the Environmental Planning and Assessment Regulation 2000. There is no saving provision in respect of the area specific development controls herein above.

The proposed development seeks consent for a partial 3 storey building measuring a maximum of 10.7m in height which is contrary to the first Area Specific Development Control.

The proposed development seeks consent for 5 units or dwellings within an allotment 1315m² in size which is contrary to the second Area Specific Development Control in that the maximum number of units or dwellings should be 2.

The applicant has provided in the amended Statement of Environmental Effects the following statements to demonstrate compliance with the objectives of the Interim Site Specific Controls. The applicant's arguments conclude that:

1. There are higher order planning instruments to support the development;
2. The development would result in the efficient use of land;
3. The developments should be approved on its merits; and
4. Approval of the application would be in the interests of the broader community:

The applicants full submission is duplicated below:

"a) General Consistency with the Ruker Report

The first objective of the height and density control indicates that Council have, to a large extent, relied upon the recommendations of the Hastings Point 'Review of Height, FSR and Setbacks Controls' Report, prepared by Ruker and Associates dated 26 March 2008 (Ruker Report). An assessment of the proposal suggest that it is generally consistent with the various objectives and recommendations included in the Ruker Report. In particular the following points are noted:

- The development would promote and enhance the coastal and natural assets of Hastings Point by providing a significant setback to Cudgera Creek, proposing rehabilitation of the riparian zone and demonstrating no significant impact on the beach or its foreshore reserve.
- The development would accommodate a growing population in an area of high demand without compromising the natural environment. The development would contribute to the highest and best use of limited land supply in Hastings Point (in the context of surrounding development and the constraints of the site) and assist in sustaining a compact urban footprint.
- The development would have regard to the coastal character of Hastings Point through proposing a high level of landscaping, no front fencing, a reduced building mass particularly when viewed from Tweed Coast Road, a tapered roof and by using light weight materials on its upper most level.
- The site is within walking distance to services and water based recreational opportunities.
- A two (2) storey building form with a partial third level that comprises a roofed area of approximately 58% of the floor space of the second level has been adopted.

b) Impact of New Development on Existing Character and Amenity

The second objective of the height and density control seeks to address local character and amenity impacts caused by new development. The design of the development proposal has carefully considered the particular issues relevant to the site and to the Hastings Point locality. The development has responded to these issues by:

- Presenting as a single level development to Tweed Coast Road (the upper level is setback a further 9m) consistent in scale with the majority of existing development
- Including only a partial third level well setback from the Tweed Coast Road and Cudgera Creek frontages
- Provision of an extensive setback to Cudgera Creek in combination with a rehabilitation works that would propose removal of foreign material from the creek bank, weed removal and revegetation using endemic species suited to the location.

- *Proposing a low site coverage and utilising a large proportion of the site (46.5% or 611m²) for high quality landscaping*
- *Addressing potential amenity impacts on the adjacent dwelling to the south through:

 - *a setback of 4.6m to the southern boundary;*
 - *the use of landscaping within the setback to the southern boundary to provide visual relief and screening; and*
 - *the incorporation of privacy screens and obscure glass to windows and balconies on the buildings southern elevation.**
- *The stepping of the building has ensured that overshadowing impacts to Cudgera Creek, the beach foreshore reserve and adjoining development are minimised.*
- *The use of a variety of materials including light weight materials on the third level to reflect built form in the locality.*

In its consideration of the variations proposed to the height and density controls Council should also consider the following matters:

1) *Inconsistency with Regional and Local Environmental Planning Instruments, Policies and Strategies*

The Far North Coast Regional Strategy aims to manage the Region's expected high growth rate in a sustainable manner. One of the key principles of the strategy is to contain the spread of urban development, by encouraging development within existing settlements which utilise services and infrastructure. Compliance with the density limitation would result in the under utilisation of valuable land resources in an existing settlement.

Clause 43 of the North Coast Regional Environmental Plan states:

“(1) The council shall not grant consent to development for residential purposes unless:

(a) it is satisfied that the density of the dwellings have been maximised without adversely affecting the environmental features of the land...”

Limiting development on the site to a maximum of two dwellings would not constitute maximising the density. The development has demonstrated that a higher density can be achieved without detrimentally affecting environmental features.

The proposed density controls are not consistent with the objectives of the 2(b) Medium Density zone, as outlined in the Tweed LEP. These objectives are stated as follows:

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.*

Secondary objectives

- *to allow for non-residential development which supports the residential use of the locality.*
- *to allow for tourist accommodation that is compatible with the character of the surrounding locality.*
- *to discourage the under-utilisation of land for residential purposes, particularly close to the Tweed Heads sub-regional centre.*

Limiting the density to 2 dwellings, irrespective of site area, does not “provide for and encourage development for the purpose of medium density development”. It actively discourages most forms of medium density development, by restricting development to dual occupancy, thereby resulting in an under-utilisation of residential land.

The Council has recently adopted the Tweed Urban and Employment Land Release Strategy 2009 (Strategy). This document considers strategies to accommodate forecast population growth for the next 20 years. Council has adopted an approach that relies on currently zoned land and urban consolidation to accommodate growth (Council resolution refers to section 11.3 of the Strategy). The Strategy further suggests an objective of increasing the proportion of unit development in the Tweed from 35% to 40% in line with State government targets.

Limiting development to dual occupancy on land that could adequately support higher densities is not considered to represent the best and most efficient use of the land or represent a policy position that is in the best interest of the broader community.

2) Compliance with Council’s Planning Instruments

As described in this Statement of Environmental Effects the development has demonstrated compliance with virtually all the provisions of Councils planning instruments including the Tweed Local Environmental Plan 2000 and DCP A1 Residential and Tourist Code as well as the State Planning instruments. It is considered that these planning instruments are appropriate to control the built form outcome.

Having regard to the points raised above, it is considered that the proposed development has satisfied the objectives of the height and density provisions in the Area Specific Development Controls of DCP A1.

Further, these are logical arguments to support variation of the Councils height and density controls on the basis of the compliance with the objectives of higher order planning instruments, the efficient use of land, the merits of the proposal and the interests of the broader community.”

The applicant has addressed these issues having regard to the Recommendations for Review of Height, FSR and Setback Controls, Hastings Point, Tweed Coast, NSW, prepared for Tweed Shire Council by Ruker and Associates Urban Design.

Specifically this document states at pages 12 and 13 that:

“Given that Villas and RFB’s are desirable building forms; to increase the occupancy rate of the settlement, and given they match the existing zoning, the opportunity to explore design options for a small flat building of reduced height and reduced bulk in relation to the controls as set out in the Draft RTDCP should be undertaken as well as a Villa design that achieves a greater amount of landscaping.

To ensure appropriate building and site design all building types must be accompanied by urban design, architectural and landscape site and building design guidelines specific to Hastings Point.

Where such design exploration is not undertaken and in the absence of urban design, architectural and landscape design guidelines Residential Flat Buildings are not an appropriate building type for Hastings Point...

...Residential Flat Building are not an appropriate building type for Hastings Point unless they are governed by a building type that details a small flat building of reduced height.

The draft RTDC provides a suite of controls that achieve good urban design outcomes; however, they are generic controls and in the context of such a sensitive location development of this scale can only be adequately covered where there are controls specific to that locality. Two new building types should be investigated; a smaller RFB comprising 2 storeys and a 3 storey RFB where the third level occupies only half of the third level.”

The amended application has certainly attempted to meet these provisions as the development has produced:

- A building that responds to the topography of the land;
- A partial third level that comprises 58% of the floor space of the second level.
- A lower site coverage than previous designs (now 46.5%); and
- An extensive riparian buffer.

However, as indicated by the SEPP 65 design comments it is considered that more could be done to the design of this building to ensure the development fits in contextually with the existing development. Therefore as a result of the

Interim Controls and the SEPP 65 Design Comments the proposed development is recommended for refusal.

A2-Site Access and Parking Code

The development control plan requires the provision of 11 onsite car parking spaces (which includes the provision of 2 visitor spaces).

The application complies with these provisions.

The plan further states that the car park layout for multi unit developments should be designed to enable compliance with AS2890 which specifically states that:

“Parking areas must be designed so any vehicle which uses the area will be able to enter and leave the site in a forward direction”.

The applicants Statement of Environmental Effects (p16) states that *“all vehicles would be able to enter and leave the site in a forward direction”*

Turning templates demonstrate that a standard vehicle would not be able to leave the site in a forward direction as per the amended layout plan.

The proposed application whilst defined as a residential flat building will operate more as a dual occupancy development in regard to parking accessibility. The three vehicular accesses restrict each driveway to catering for no more than two units.

Dual Occupancy developments are not required to provide for forward entry and exit.

Therefore given the low volume of traffic in Young Street and the functionality of the three driveways the proposed vehicle manoeuvrability throughout the site is considered acceptable.

Should the Council or the Court determine to approve this application Council's Development Engineer has recommended a condition of consent requiring the applicant to amend the layout plan to enable the driveway layout to be more user friendly for reversing a vehicle (i.e. remove any unnecessary curvatures to the driveways).

In addition the applicant would be required to construct a footpath and kerb and gutter along the Young Street frontage, on an alignment to be agreed by Council, and construct the road shoulder accordingly. This alignment will need to correspond to Council's proposed drainage improvements in Young St.

A3-Development of Flood Liable Land

As detailed under the heading Clause 34 of the Tweed LEP 2000 there are no flood related problems with the amended plans. The proposed fill and finished floor levels meet the requirements of Tweed DCP Section A3.

Coastal Design Guidelines for NSW

Council should also have regard for the North Coast Design Guidelines. The Ruker & Associates Urban Design Report utilised this instrument to assist in her determination of a local hierarchy of settlements. The report concludes that Hastings Point is best defined as a “Coastal Village”. Part 1 of the Guidelines discusses desired future character, relationship to the environment, visual sensitivity, edges and water and natural areas, streets, buildings and height. In regard to height the Guidelines state that:

- a. The village centre and the main street have a maximum of up to three storeys;
- b. Some elements of important public buildings within the centre may be marginally higher than surrounding buildings;
- c. Residential buildings surrounding the centre have a maximum of two storeys;
- d. Heights are subject to place specific urban design studies. New development is appropriate to the predominant form and scale of surrounding development (either present or future), surrounding landforms and the visual settings of the settlement.

Part 2 of the Guidelines then enter into Design Principals for Coastal Settlements. These Guidelines are being used to form the policy framework for locality plans. In the interim they can be used to guide the assessment of development applications but they must be considered in the context of the existing development control plans (specifically Tweed DCP Section A1 – Residential & Tourist Development Code).

Having regard to the Coastal Design Guidelines for NSW in conjunction with the Tweed DCP Section A1 the proposed development has some good design features. However, the Interim Site Specific Development Controls for Hastings Point restrict development to no more than two dwellings per site with a maximum height limit of two storeys. Therefore the subject application is not considered suitable for a recommendation for approval.

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

NSW Coastal Policy

The 1997 Coastal Policy includes coastal waters and lands one kilometre landward of the open coast high water mark, and land within one kilometre of coastal rivers, lakes, lagoons, estuaries and islands. The subject site is within one kilometre of the ocean and adjoins a coastal estuary. The policy requires that: water quality will be maintained or improved; fisheries habitats protected and restored where possible; and coastal lands and aquatic environments with conservation values will be assessed and appropriate measures put in place to protect them.

The proposed setback to Cudgera Creek enables compliance with these controls.

Demolition

The proposal originally required the demolition of an existing shed. The demolition has already occurred in accordance with CC 07/0977.

(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 present building height restriction (3 storeys) has been in place for a considerable period of time.

Despite this the general public appears to want the maintenance of the established context and setting of the Hastings Point. 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.

It appears that the issue is one of maintaining the quiet, peaceful and natural amenity presently maintained by the low density urban development pattern and natural environment.

A reduction in building height alone will not necessarily achieve this position. There are single dwelling houses in other areas of the coast, where the design of such houses would substantially alter the existing street character in Hastings Point.

Notwithstanding given the partial third storey component of the development and the proposed density of five units the proposed development is not considered to be sympathetic to the existing developments in the area.

The proposed development is therefore not considered to fit within the future desired character of Hastings Point.

Southern Elevation and Overshadowing

The proposed development has deliberately been designed to orientate to the north. This has the effect of the southern elevation comprising only windows with limited living areas for the full length and height of the building.

This will impact on the adjoining property and will further cast a shadow over the adjoining property for some part of their site at most times throughout the year. However, the shadow moves throughout the day affording adequate solar access for the southern adjoining property.

(c) Suitability of the site for the development

Gravity Sewer Line

The subject site was constrained by a sewer line traversing the site approx 10m from the edge of the creek. This would have been located under Building No. 3 in accordance with Council's initial approval of this application. Accordingly, the original consent including an approval for the applicant to relocate the sewer line.

This work was completed prior to the original consent being overturned.

Council's Water & Sewer Engineer has reviewed the relocated sewer line and provided the following comments:

"The approval issued by Council for the relocation of the 300 dia. gravity sewer in the property has been enacted upon and the issue of whether the completed works should be reversed and the sewer in the original location should be reinstated is raised.

The situation is that the sewer relocation works approved on 25 September, 2007 have been completed although a number of conditions prior to issue of a certificate of practical completion have not yet been fulfilled. The works were inspected during construction and are considered satisfactory subject to a pressure test of the line. It has however been in service satisfactorily for a considerable period of time.

Items not yet fulfilled refer to the final commissioning (waiting on the test result), works as executed drawings, video and the dedication of the easement.

It is considered that there would be no benefit in requiring the removal of the relocated pipes and reinstatement of the original or pipes on the original alignment. The manhole adjacent to the creek is not considered likely to be a significant hazard and it appears to have been constructed at a level that means the overflow location has most likely been retained at Manhole AK/1 opposite the pump station rather than being transferred to the new manhole, although the works as executed levels needed to confirm this have not been received.

Hence, subject to the provision of the works as executed information and testing, the new line provided is considered satisfactory and does not need to be relocated."

The above engineering comments have been converted into recommended conditions of consent should the Council or the Court determine to approve the application.

Stormwater

A stormwater management plan has been provided for the subject development. Stormwater from the development will be piped to an infiltration area, which surcharges via overland flow to Cudgera Creek, being the legal point of discharge for the site. The infiltration area will be designed to

accommodate the 3 month ARI storm event, which is typical of the standards adopted for more recent development on the Tweed Coast (Salt, Casuarina etc). The infiltration system must be located clear of the nominated riparian planting zone.

A proprietary treatment device will be installed to remove oil and sediment contaminants from the driveway runoff prior to discharge to the infiltration system. This complies generally with Development Design Specification D7 - Stormwater Quality. The visitor car parking space / car wash bay will be constructed of permeable pavers, with runoff directed across the rear landscaped area, which is an acceptable treatment approach.

Details of the stormwater management and erosion and sediment controls can be finalised via a s68 Stormwater Application prior to construction.

Appropriate conditions have been drafted should the Council or the Court determine to approve this application.

Ecological Constraints & Buffers

The following comments have been provided by Council's Specialist Planner/Ecologist:

Summary

The major issue of ecological interest is the interface between the development site and Cudgera Creek, or riparian corridor. Consideration of the intent of all relevant legislation and policy relating to coastal estuarine foreshores has shown that the following outcomes are expected:

- *protection and enhancement of the riparian zone;*
- *maintaining or improving water quality;*
- *consideration of visual amenity, coastal processes, the appropriateness of public access and of the dedication of riparian zones as public land.*

To achieve such aims requires a buffer between any development and the estuary. Buffers to waterways are specifically required by Tweed LEP (Clause 31), but it is only within the Tweed Coast Estuaries Management Plan; DPI Fisheries Policy and Guidelines Aquatic Habitat Management and Fish Conservation 1999 and the Department of Water and Energy's Guidelines for controlled activities Riparian Corridors that specific widths between any development and the creek bank are discussed. With regard to the subject site on Cudgera Creek, the widths in order of documents listed above are 50m; 50m to 100m; and 20-40m.

The site is some 65 to 70m long in total thus a 100m buffer is not practical in this situation unless all development was to be precluded. An imposition of a 50m riparian corridor on the subject site would mean some two-thirds or more of the site would be unavailable for development. Given the relatively short frontage (25m) and the previous assessment approving just a 5m buffer, this could be seen as unreasonable. However, the 5m previously proposed was

insufficient to achieve any of the legislative aims, particularly when private recreational use and a sewer main were combined within this narrow zone. Thus it would seem that somewhere between these two extremes is a reasonable approach that may be guided by the particular situation and by available data for the site.

In practice, similar situations have resulted in agreement that the area from the creek bank to 20m inside the property boundary be densely revegetated, with asset protection zones and recreational or stormwater infrastructure located outside of this zone within a more open vegetated area. A core riparian zone of 20m would comply with the Department of Water and Energy's guidelines in relation to buffer width and this is a significant point as DWE are the primary body regulating works within 40m of waterways.

Given:

- *the significance of the site, including its proximity to state significant wetlands and littoral rainforest;*
- *its location on a bend of Cudgera Creek exhibiting some scour;*
- *uncertainties with regard to climate change; and*
- *lack of formal public access for this part of the creek;*

20m of densely planted local native vegetation is the minimum acceptable riparian buffer for the site to enable ecologically sustainable development and compliance with all relevant legislation.

The developer has amended the development giving consideration to previous advice provided by Council in relation to the riparian zone and its appropriate treatment. Although the resultant outcome does not quite comply with the recommended minimum 20m densely revegetated riparian buffer in all areas and is lacking in some detail, it is clear that substantial effort has been made to comply with Council's concerns and the majority of the development site is now able to comply with relevant regulations and guidelines. In addition, the re-designed creek bank treatment facilitates colonisation by mangroves which will lead to an expanded riparian buffer below the current creek bank of 5 to 10m width (and greater bank stability) leading to a total riparian buffer width on average of some 25 to 30m.

The proposal as now amended closely approximates the requested 20m buffer therefore from an ecological sense the application is recommend for approval, subject to appropriate conditions. The full ecological assessment follows:

Previous Assessment

The development was previously approved, then refused, with a 5m setback or buffer to Cudgera Creek. This width was determined using the minimum building setback policy (now revoked) for infill development. A landscape plan was provided with the former construction certificate application which gave a schematic diagram relating to rock revetment for scour protection comprising 1.5m of the 5m buffer and some detail with regard to private recreational use and replanting within this 5m setback.

Changes between previous determination and current assessment

An on-site meeting between the applicant and Council's ecologist was undertaken to discuss appropriate form and function of riparian buffers and suitable methods to address previous concerns on this site.

Amended plans and additional information has been provided proposing a greater setback from the creek bank and thus a greater area for more substantial riparian revegetation. The setback between the rear building line and the top of the current creek bank has increased from little more than 5m in the previous application to between 16.9m and 20.2m (variable) in the current application.

Bank treatment has been amended to reflect a more natural form using grading of the bank with occasional small rocks only where necessary, rather than a full rock revetment wall (see Figures below).

Table 1: Specific creek bank issues raised previously and currently addressed

Issue	Previous Application (approved then refused)	Present Application
Western boundary definition	Originally defined as mean High Water Mark which is now well out in water channel.	Top of bank taken as present western property boundary and measurements defined from this.
Bank scour protection	'Hard' option of full rock revetment (large rocks) along entire boundary placed using machinery. Likely to cause wave refraction and prohibit mangrove development. Downstream scour likely.	Bank graded (as preferred in low-velocity estuarine environment) to enable establishment of mangroves and saltmarsh. Occasional small rocks placed by hand only where absolutely necessary for bank stability.
Mangrove zone	Mangrove removal appeared likely for rock placement. Rock was to be creekward of mangroves, fill appeared to be required and mangroves would be isolated from intertidal area, demise likely.	Establishment of mangroves encouraged through removal of concrete rubble and planting behind shade cloth in-stream. Mangrove establishment out to extent of adjacent sites would add at least 5m to riparian buffer width and trap sediment to reduce any potential for scour.
Setback from top of bank	5m, of which 1.5m comprised rock, thus 3.5m effective planting width	Approximately 17 to 20m, plus mangrove establishment likely 5-10m width out from existing bank
Hardstand areas	Present within 5m setback	Small barbeque proposed at about 17m from bank, permeable paving at 20m
Access to creek	Direct private access from site to creek where seagrass present, likely trampling impact	No direct access to creek enables establishment of continuous canopy of native species and protection of seagrass beds.
Public access along creek	Not possible within narrow 5m corridor	Not proposed but possible in future (if desired by reviewed policy) on edge of planted vegetation
Overshadowing of creek	Minor impacts predicted on creek	No overshadowing of creek predicted
Integrated development	Not nominated therefore no comment from DPI Fisheries or Department of Water and Energy received	Nominated as Integrated development, referrals sent to Fisheries and DWE so that their expertise in riparian matters can

		be incorporated
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Figure 1: The previous application intended rock revetment within the mangrove zone and little planting area consisting primarily of ground covers.

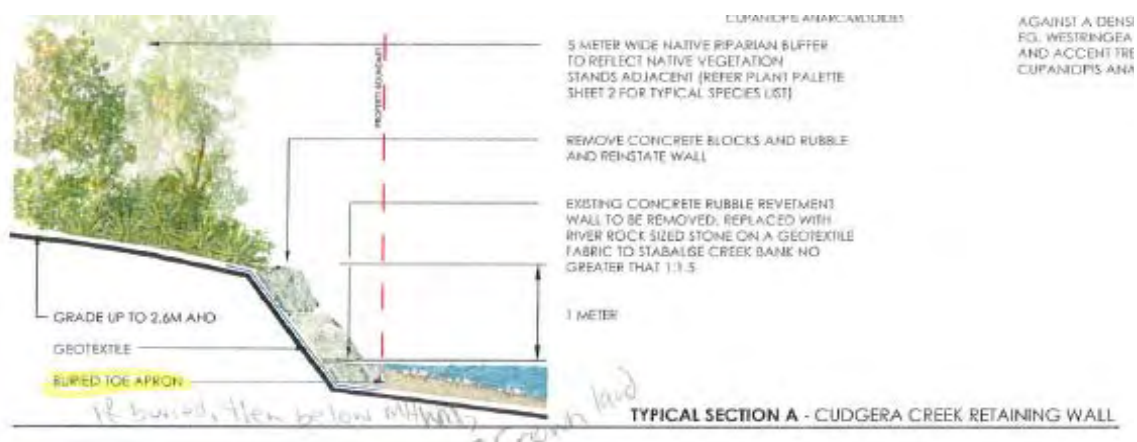
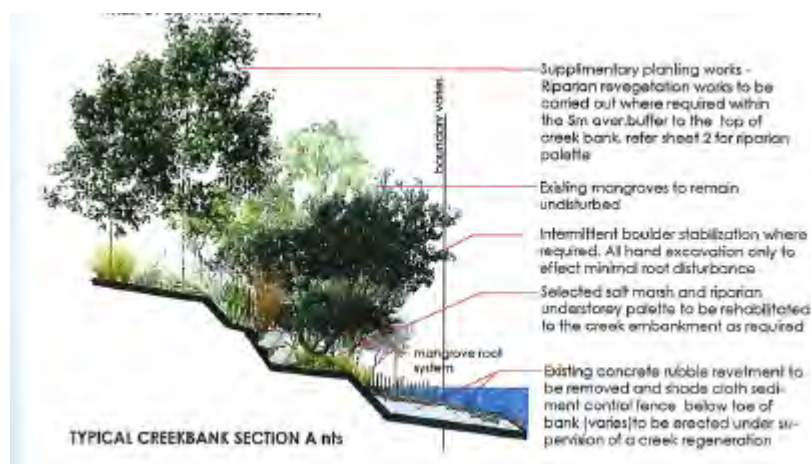
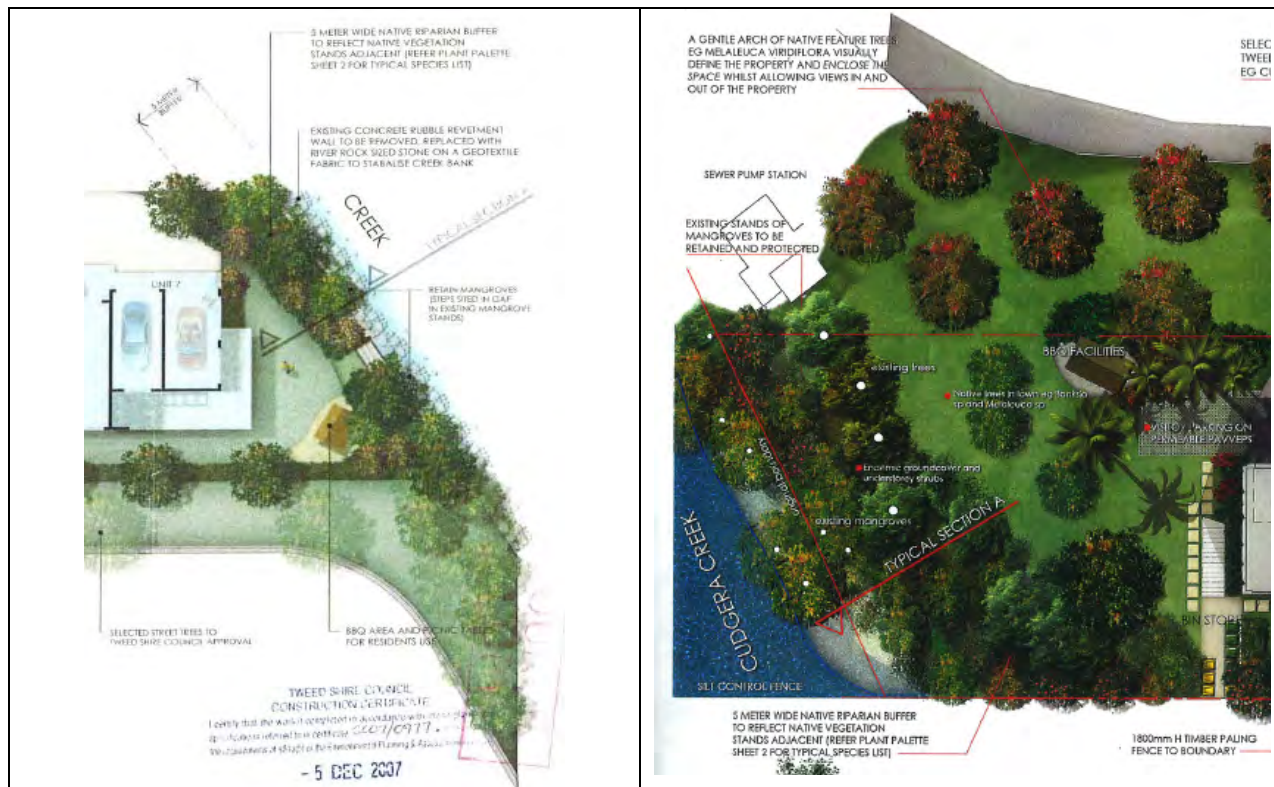


Figure 2: The current application proposes grading the bank to allow mangrove and saltmarsh colonisation and additional riparian planting area to incorporate larger trees.



Figures 3 and 4: Although mirror-reversed, comparison of previous Cudgera Creek Setback (left) and current proposed setback (right) shows a substantial increase with current proposal.



Ecological Conclusion

The importance of estuarine riparian buffers is recognised and demonstrated in a plethora of legislation applying to such areas; however, NSW has no law applying specific riparian buffer widths to specific sites. In the absence of environmental protection zones, the intent of all relevant legislation and any applicable adopted policy must therefore suffice in determining adequate buffer widths and treatment.

Three policy documents have been considered in detail in the following pages being the Tweed Estuaries Management Plan, the Department of Primary Industries (Fisheries) Policy and Guidelines Aquatic Habitat Management and Fish Conservation 1999 and the Department of Water and Energy's Guidelines for controlled activities Riparian Corridors.

The first two documents listed above recommend a 50m riparian buffer and this is the preferred minimum width for estuarine areas. However, the specific site and history is relevant in this case such that application would appear unreasonable given previous approvals and current zoning. The development can satisfy the application of DWE's policy as the minimum recommended (being 20-40m for estuarine areas), with 16.9m to 20.2m achievable above the top of bank, and a further 5m or greater achievable below the current bank through restoration of the mangrove zone.

Thus the proposal as amended closely approximates the requested 20m buffer and it is now recommend for approval, subject to appropriate conditions, from an ecological perspective.

Should Council or the Court determine to approve this application the following ecological conditions would be recommended:

1. *Prior to issue of a Construction Certificate Sheet No. TP01 revision C Proposed Site and Ground Floor Plan by RH Frankland and Associates must be amended (and submitted for approval to Tweed Shire Council's General Manager or his delegate) to reflect the revised western site boundary as defined on Sheet No. TP00 Existing Survey by RH Frankland and Associates.*
2. *Prior to issue of a Construction Certificate a vegetation management plan detailing the form and treatment of the 20m riparian buffer to Cudgera Creek must be submitted to Council's General Manger or his delegate for approval. It must comply with the Department of Water and Energy's Guidelines for controlled activities Vegetation Management Plans. Such plan must identify species composition (must be local native species), planting layout and densities, weed control and maintenance methodology and provide a maintenance schedule.*
3. *A vegetated riparian corridor of a minimum 20m width from the original Mean High Water Mark property boundary must be established, along the length of the western property boundary, between the development and Cudgera Creek in accordance with Department of Water and Energy's Guidelines for controlled activities Riparian Corridors under the Water Management Act 2000 (attached). Such buffer must be planted prior to issue of the occupation certificate and maintained in accordance with the approved vegetation management plan for a minimum period of three years.*
4. *The developer must ensure that the surfaces of river banks are graded to enable the unimpeded flow of water and that any bank retaining structures result in a stable river bank in accordance with a plan or design approved by the Department of Water and Energy. Any rock used for bank stabilisation purposes must be constructed entirely landward of the mean high water mark.*

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

Department of Water & Energy

The Water Management Act 2000 requires a Controlled Activity Approval for works within 40m of the bed of a designated stream (Cudgera Creek is included, thus such approval is required for the proposed development).

The amended application was lodged as Integrated Development and accordingly the application was forwarded to the Department of Water & Energy for General Terms of Approval if appropriate.

The Department of Water & Energy has provided comments on the application and recommends the following condition be included in any development consent.

“The construction certificate will not be issued over any part of the site requiring a CONTROLLED ACTIVITY APPROVAL until a copy of the Approval has been provided to council (from the Department of Water and Energy).”

Department of Primary Industries (Fisheries)

The Fisheries Management Act requires a permit for works within the waterway including revetment works on the creek bank and placement of netting in the creek.

The amended application was lodged as Integrated Development and accordingly the application was forwarded to the Department of Primary Industries (Fisheries) for General Terms of Approval if appropriate.

The Department of Primary Industries (Fisheries) recommended approval subject to General Terms of Approval.

Public Notification 24 June 2009 – 8 July 2009

Note: The two original exhibitions of this application received extensive opposition. All prior Council reports are annexed to this report detailing the grounds for objection.

The amended application was publically exhibited in the Tweed Link in addition to notification letters being sent to all original objectors. The amended application was available for viewing between 24 June 2009 and 8 July 2009.

Following the exhibition period Council received 55 individual objections opposing the development which include letters from the Hastings Point Progress Association and a local resident representing the broader community.

The issues raised in the submissions opposing the development included the following:

- The proposed development does not comply with the interim controls for Hastings Point in regards to height and density.
- The development does not comply with the law specifically including the North Coast Regional Strategy, the Far North Coast Regional Strategy and the North Coast Urban Design Guidelines.
- The proposed development does not represent the public interest.
- The proposed development is completely opposed to the Hastings Point character.
- The development pre-empts the Locality Plan process.
- The proposed development will create an unacceptable precedent and a negative cumulative impact.

- The proposed development will destroy vistas and views to the western hill, the southern tree canopy and the ridgeline.
- The southern elevation of the development is poor.
- The proposed building will create an unacceptable shadow.
- The development is contrary to the Noni Ruker Urban Design report which has stated that large 3 storey development is inappropriate for Hastings Point.
- The development has not had regard for the 90cm sea rise that can be expected nor the 30% increase in rainfall that can be expected.
- The applicants Statement of Environmental Effects falsely uses existing 3 storey development to justify the proposed development. This is contrary to the Ruker report which states that these large 3 storey residential flat buildings are inappropriate.

The reasons for objection form part of the recommendation for refusal of this application.

In addition to these objections Council received a signed petition in support of the development which contained 108 names and corresponding comments. The corresponding comments primarily stated that the coloured perspectives *“looked great and represented exactly what Hastings Point needs.”*

(e) Public interest

Hastings Point has been the subject of great community interest.

There are two opposing views on the matter.

The first is the developer’s interest in maintaining their right to develop property in accordance with the statutory 3 storey height limit applicable under the Tweed LEP 2000.

The second comprises some residents and owners view of wanting to maintain the village character of Hastings Point. This has been attempted through specialised controls in the Development Control Plan Section A1 (a two story height limit and a density of no more than 2 dwellings per property).

Despite these two opposing viewpoints each Development Application needs to be assessed on its individual merits.

On review of this application it is recommended that this DA be refused as the development has failed to satisfy the Interim Site Specific Development Controls for Hastings Point.

OPTION A

Indicate to the applicant and the NSW Land & Environment Court that Council does not support the development for the following reasons:

1. The proposed development is excessive and inappropriate in regards to height and inconsistent with the Area Specific Development Controls in Section A1 –

Residential and Tourist Code of the Tweed Development Control Plan (“Tweed DCP”).

2. The proposed development is excessive and inappropriate with regards to in density and inconsistent with the Area Specific Development Controls in Section A1 – Residential and Tourist Code of the Tweed Development Control Plan (“Tweed DCP”).
3. The proposed development is an overdevelopment of the site, having regard to the height, bulk, scale and existing character of the area.
4. The proposed development will have a negative cumulative impact on the locality.
5. The proposed development will set an undesirable precedent for similar inappropriate development in the area in the future.
6. The proposed development is not considered to be in the public interest.

AND

Defend the Class 1 Merit Appeal based on the above reasons for refusal

OPTION B

Indicate to the applicant and the NSW Land & Environment Court that Council supports the development based on certain justifications and subject to the attached Draft Conditions of Consent.

If Option 2 is adopted Council would need to resolve to delegate the determination of this application to the General Manager or his delegate should the applicant withdraw the Class 1 Appeal.

NOTE: Before the Council or the Court could approve this application the Department of Lands would need to provide land owners consent for works beyond the property boundary and within the waterway.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Should this matter continue through the NSW Land & Environment Court substantial costs will be incurred in defending Council’s determination.

POLICY IMPLICATIONS:

The determination of this Development Application could potentially have an impact on guiding the future desired character of Hastings Point.

CONCLUSION:

The proposed development has been the subject of multiple assessments against a variety of changing policies since initial lodgement in January 2007.

Notwithstanding these time delays and changing policies Council now has an obligation to assess this application against the controls as in place at the time of determination.

Accordingly the application is recommended for refusal.

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).

1. DA07/0022 Original Assessment Report (including plans) 19 June 2007 (ECM 1929215)
 2. Land & Environment Court Decision 6 June 2008 (ECM 1871912)
 3. DA07/0022 Second Assessment Report (including plans) 18 November 2008 (ECM 3393674)
 4. Draft Conditions of Consent - if required by the Council or the NSW Land & Environment Court (ECM 3395147)
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Land and Environment Court
of New South Wales

CITATION : **Planit Consulting v Tweed Shire Council [2009] NSWLEC 1383**

PARTIES : **APPLICANT**
Planit Consulting

RESPONDENT
Tweed Shire Council

FILE NUMBER(S) : 11245 of 2008

CORAM: Moore SC

KEY ISSUES: DEVELOPMENT APPLICATION - DEVELOPMENT CONTROL PLAN :-

LEGISLATION CITED: Environmental Planning and Assessment Act 1979
State Environmental Planning Policy Seniors Living
Tweed Shire Development Control Plan 2008
Tweed Local Environmental Plan 2000

CASES CITED: Ali v Liverpool City Council [2009] NSWLEC 1327
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
Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008] NSWLEC 219
Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472
Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226
Zhang v Canterbury City Council [2001] NSWCA 167;
(2001) 115 LGERA 373

DATES OF HEARING: 15 and 16 October and 6 November 2009

DATE OF JUDGMENT : 25 November 2009

**LEGAL
REPRESENTATIVES:**

APPLICANT
Dr S Beverling, barrister
INSTRUCTED BY
Hunt & Hunt

RESPONDENT
Mr A Seton, solicitor
Marsdens Law Group

**PUBLICATION
RESTRICTION:**

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

MOORE SC

25 November 2009

08/11245 Planit Consulting v Tweed Shire Council

JUDGMENT

- 1 **SENIOR COMMISSIONER:** Hastings Point is a coastal settlement on the far North Coast. In common with many other coastal settlements, the estuary of a creek discharging into the ocean divides the built-up area. The settlement has distinct boundaries with sections of stunted coastal forest separating it from the nearest adjacent settlements to the north and to the south. The main road, Tweed Coast Road, runs north-south behind the coastal dunes through Hastings Point. Hastings Point is a little over 3 km long.

- 2 At the northern entrance to Hastings Point, a caravan park and a bulky three-storey resort of undistinguished design are located on the western side of Tweed Coast Road. In the northern portion of Hastings Point, that which is on the northern side of Hastings Point Bridge (the bridge) across Cudgera Creek (the creek), there is residential development on the coastal dunes including some buildings that are three storeys high. On the opposite side of Tweed Coast Road, in this northern portion, with the exception of the tourism related (resort) building, the character appears to be single and two-storey dwellings of an eclectic architectural mix and the wide range of ages (from 1950s fibro beach cottages to more contemporary styles).

- 3 As was observed during the course of the site inspection, the housing down the major side street to the north of the creek was of a similar character (although, on the south-western corner of the intersection of this street [Creek Street] and Tweed Coast Road, is located a medium density development in a number of separate buildings each one of which had a two-storey form).
- 4 Crossing the bridge across the estuary of the creek – a distinct spatial separation of several hundred metres – one enters the southern portion of Hastings Point. To the right is a large caravan park. Opposite the caravan park, in the elbow of the creek as it turns from the bridge toward the sea to run parallel to the coast for 200 m or so before its mouth, is nestled in a narrow public picnic ground with parking off Tweed Coast Road. Immediately beyond the picnic ground, a road to the east climbs the gentle frontal dunes to the top of the headland from which a view of the mouth of the creek and expansive coastal views along the beaches to the north and to the south are to be had from a lookout parking area.
- 5 To the south of the headland access road turnoff, the coastal dune areas behind the beach are devoid of development save for walking tracks to the beach. Opposite the entrance to the headland access road, on the western side of Tweed Coast Road, is located the community's general store and post office, a two-storey structure that is prominently visible at the end of the straight of Tweed Coast Road from the bridge and creek crossing. Because of the path of Tweed Coast Road travelling further south following the rear of the coastal dunes, immediately behind the two-storey form of the general store, the view is shared by the gable-end of another two-storey dwelling, a dwelling which is, in fact, some hundreds of metres to the south and beyond the corner of Young Street and Tweed Coast Road.
- 6 As one continues along Tweed Coast Road to the south within Hastings Point, the presentation of the dwellings to this main thoroughfare linking the various coastal settlements is that of one and two-storey dwellings of

the same eclectic appearance as the mix of the one and two-storey dwellings to the north of the creek. It is not until one exits Hastings Point, travelling south, that one passes the major new development in the settlement. This is a three-storey development known as The Point that was approved pursuant to State Environmental Planning Policy Seniors Living (SEPP SL) for some 250 dwellings to be constructed in a number of stages. This development forms the southern residential boundary of the Hastings Point settlement. The only built elements beyond the SEPP SL development are a Shell service station and what appears to be some form of brick public utility building (such as a water or sewerage pumping station).

- 7 A little to the north of the SEPP SL development, although not yet commenced, Tweed Shire Council (the council) has approved a three-storey development proposed to contain 20 units and, also a little further to the north, another three-storey development to contain seven units. This development has also not been commenced. These approvals pre-date the adoption of the present applicable controls.

The proposal

- 8 The proposed development is to be a part one, part two and part three-storey development containing five dwellings.
- 9 The development is proposed to be located on the corner of Tweed Coast Road and Young Street (the site) with frontages to both roads. The site is a rectangular allotment with an area of 1315 sq m. The site is located on the creek some 400m upstream from the bridge.
- 10 Vehicle access to the site is proposed from Young Street. The site's rear (western) boundary is, in part, within the waterway of the creek. The site is largely cleared and levelled as a consequence of an earlier approval (subsequently set aside by the Court – as discussed later).

- 11 As Tweed Coast Road runs south from the general store, the road follows the rear of the frontal dunes, turning slightly to the east before rounding a gentle bend slightly to the west. In the middle of the centre of this bend, Young Street joins Tweed Coast Road from the right. Tweed Coast Road also rises, gently, from north to south whilst rounding this bend and Young Street slopes down to the west or north-west from its intersection with Tweed Coast Road.
- 12 The consequence of these road alignments and levels is that the site is sheltered from significant viewing when travelling northwards along Tweed Coast Road as a consequence of the curve and slope of this road and the dwellings fronting it on each of the two allotments adjacent to the south of the site (as those dwellings are set well forward and close to the road).
- 13 However, when travelling to the south, the same combination of factors concerning the orientation and slope of the roads mean that any development on the site will be highly visible from Tweed Coast Road not merely in its orientation to Tweed Coast Road but also along a significant portion (if not the whole of the length) of its presentation to Young Street.

The site inspection

- 14 The site inspection commenced within a short walk around the site including obtaining an understanding of the boundaries of the site to the west where, because of erosion over the years, the south-western corner of the site is now some distance into the creek (whilst the north-western corner appears to be on the bank of the creek). The relevance of the location of the western boundary of the site arises as a consequence of the fact that proposed retaining wall works along the bank of the creek may fall partly within Crown land and, as a consequence, owner's consent from the Lands Department would appear necessary if development approval were to be given to the proposal. If the proposal were to be otherwise acceptable, I agreed that it would be appropriate to permit a modest degree of time to the applicant to obtain the owners consent of the

Lands Department so that development consent could be issued. However, given the conclusion that I have reached in the proceedings, this is not necessary.

Resident evidence

- 15 At the conclusion of the walk around the site, I heard informal evidence from six local residents. Four of them were opposed to the proposal and two of them supported it. Notes of this evidence were taken and subsequently tendered. Although there were a range of matters put in opposition to the proposal, the primary ones related to the character that the objecting residents perceived existed in (and was desirable for) Hastings Point and the fact that controls for Hastings Point to give effect to this, derived from a community consultation process, were included by the council in the *Tweed Shire Development Control Plan 2008* (the DCP). The objectors also explained their concerns about the prominence of the site when viewed travelling in a southerly direction on Tweed Coast Road and what they considered to be the unacceptable extent of visibility and prominence of the proposed development on the site when viewed from this perspective.
- 16 Those who spoke in opposition to the proposal did so in a co-ordinated fashion and had a number of pages of signatures that specifically authorised each of them to speak on behalf of those persons who had signed the document. As a consequence, I do not propose to discuss, individually, their specific evidence and I treat what was said as a global body of evidence given on behalf of all those who authorised them to say it. However, I note, as I recently said in *Ali v Liverpool City Council* [2009] NSWLEC 1327 at (18):

It is, however, trite to say that if something is true, it is made no more true by being expressed by a large number of people saying it than if it is expressed by an individual. Further, the self-evident corollary of this is that if something has no validity as an objection, the fact that 1000 people may

repeat the objection does not make it right – it remains invalid.

- 17 Although issues concerning the long-term population impact on the creek and its estuary were also raised by the objectors (including reference to a draft report on the health of the waterway that had been completed, during the week of the hearing, for public release and comment – but had not been so released), there is no evidence that this proposed development, if it were to be approved subject to appropriate conditions during construction and on an ongoing basis, would itself have an adverse impact on this waterway. To the limited extent that any increase in population on this site would potentially increase the overall degrading pressures of this community on this waterway, I am satisfied that this would be negligible in comparison to the seasonal increases in population that would necessarily arise as a consequence of holiday visitors during the tourist season.
- 18 The two residents who spoke in support of the proposed development did so from slightly differing but generally similar perspectives. The first of them to give evidence was the proprietor of the local general store and Australia Post franchise – he is also the holder of the not yet commenced development consent for 20 residential units, a three-storey block, toward the southern outskirts of Hastings Point. His evidence was given on the basis that the economic viability of his business, including retention of the Australia Post franchise, was dependent on population growth and the attendant economic growth arising from it and this was desirable for retaining services for the local community. Although he appreciated the existing character of Hastings Point, he considered that it was inevitable (and desirable) that this would change as older houses were either replaced or renovated. He did not consider that the present proposal specifically – and three-storey development, in general – was incompatible with what he saw as the desired future character of Hastings Point.
- 19 The second resident in support of the proposal, who lives in Young Street in the vicinity of the site, did not have the same economic interests as the

proprietor of the store but concurred with the views that he expressed concerning the present and future character of Hastings Point – including the acceptability of three-storey development.

The issues

- 20 The *Tweed Local Environmental Plan 2000* (the LEP) contains height limits that are applicable to the site. These are contained in a *Height of Buildings map* imported into the LEP by cl 16(2) which is in the following terms:

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.

- 21 The Height of Buildings map shows that the LEP height control for the site is three storeys. As a consequence, the proposal is permissible pursuant to the LEP. However, it requires more detailed consideration in light of the more restrictive controls applying, pursuant to the DCP, specifically to the Hastings Point locality.
- 22 There are a number of specific controls on the DCP that are breached by this proposal. They comprise a height control and a storey control as well as a control on the number of dwellings permitted on any allotment. The height control sets a maximum height of 8 m and that which is proposed has a maximum height of 10 m; buildings are limited to 2 storeys and this proposed development is part one, part two and part three-storeys; and the DCP permits a maximum of two dwellings per allotment where as this proposal seeks five dwellings on this allotment.
- 23 The two issues arising from these breaches are:
- First, is it appropriate to permit this proposal whilst long-term controls for development for Hastings Point are being developed where the proposal breaches the present interim controls (the prematurity issue)? and

- If it is not premature to consider a proposal that breaches the present interim controls, is this non-compliant proposal acceptable despite those controls (the merit issue)?

24 Although some evidence was given by Ms Galle and Mr Shiels, the expert planners for the council and the applicant respectively, about the possible maximum yield from the site if it were to be subdivided into a number of smaller allotments, a process which would be permissible under the LEP, given the conclusions I have reached about the inappropriateness giving any approval contrary to the provisions of the DCP whilst the review process is being undertaken, I need not deal with this aspect further.

The community consultation process and reports

- 25 It is pertinent to consider the history of how the controls came to be incorporated in the provisions of the DCP. Also pertinent, in this regard, is the history of development approval for this allotment.
- 26 In 2007, the council granted development consent to two developments in the southern portion of Hastings Point – these becoming the cause of a deal of controversy in the local community. The first of them, at the southern end of Hastings Point, is The Point development pursuant to SEPP SL earlier described. The Hastings Point Progress Association unsuccessfully challenged the development consent for this project in the Court (see the decision of Pain J in *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).
- 27 The second was a development consent granted for this site for a seven unit development. The Hastings Point Progress Association successfully challenged the development consent for this project in the Court (see decision cited above and the decision of Pain J in *Hastings Point Progress Association Inc v Tweed Shire Council and Anor*; *Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 219).

- 28 These proceedings are an appeal against refusal by the council, after a further assessment, of Development Application DA07/0022 – being the development application founding the development consent set aside by Pain J.
- 29 However, that challenge had not been determined at the time of commencement of the process leading to Hastings Point-specific controls (leading to the present controls) being inserted in the DCP.
- 30 Indeed, the granting of these two development consents, initially, by the council provided the genesis for initiating the public consultation process leading to the changes in the DCP.
- 31 That process commenced in 2007. There is no doubt that this process commenced in response to the two development consents described above. However, as those two development consents were in force at the time the public consultation process commenced, it could not be said that this process was commenced with a view to defeating the approval of this development proposal in the sense discussed by McClellan CJ in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 at paras (87) to (91). The process was described as being purely directed at future development control for, initially, the southern portion of Hastings Point and the derived controls were extended, by subsequent modification by council resolution, to the whole of Hastings Point.
- 32 To undertake this process, in August 2007, the council commissioned a consultancy, Ruker & Associates, to undertake a community consultation process and provide a report recommending a strategic framework of what controls should be applied. Ruker & Associates undertook a two-stage community consultation process and in March and April 2008, provided two versions of a report to the council. The April 2008 report was a revised version of the March 2008 report (the circumstances of the second report being provided is a matter to which I will return). However, I do note that

the DCP states that the first objective of the Hastings Point-specific controls as being:

To implement the recommendations of the Hastings Point 'Review of Height, FSR and Setback Controls' Report, prepared by Ruker and Associates dated 26 March 2008 [emphasis added], as resolved by Council on 22 April 2008.

33 A number of portions of the March Ruker & Associates report are relevant to these proceedings. These extracts are reproduced below.

34 Under the heading *Regional and Local Context*, the March report says:

In order to ensure that design excellence; both a Locality Plan (a structure plan) that includes place specific building and site design controls, must be developed prior to any medium density approvals to ensure long term public and environmental good is balanced with economic returns on land redevelopment. Such plans are required to be developed and administered by council with input and consultation from the community and stakeholders.

In the event that a Locality Plan that includes site and building design guidelines is not undertaken then medium density building types are not appropriate building forms for Hastings Point.

35 The recommendation, relevant to these proceedings, from this section of the report, are in the following terms:

5. Building and site design guidelines specific to Hastings Point need to be developed as part of the Locality Plan.
6. A settlement wide Locality Plan and place specific site and building design guidelines must be completed prior to any new medium density developments being considered.

36 Under the heading *Immediate Context*, the March report says:

Given the visual sensitivity of the settlement and the impact each lot has on the whole of the study area it is injudicious to

encourage medium density building types without the certainty of carefully considered urban design site and building design controls and a Locality Plan.

37 The relevant recommendation that flowed from this is in the following terms:

2. Medium density building types are suitable for Hastings Point subject to urban design site and building design controls and a Locality Plan however without these strategic plans medium density is not suitable for Hastings Point.

38 Dealing with the topic of *Built types, height, FSR and Setbacks*, the March report recommended:

Residential Flat Buildings are not an appropriate building type for Hastings Point unless they are governed by a building type that details a small flat building of reduced height (max. 2 storeys plus a half level on the third storey) and reduced bulk (in relation of the controls set out in the draft DCP); maximum around 0.8:1 (to be tested) that are coming by detailed urban design, architectural and landscape site and building design guidelines specifically to define the built and landscaped character of Hastings Point.

39 Arising out of this process, the council adopted an initial set of controls for Hastings Point and, subsequently, on several occasions, modified those controls. Each of the steps in the process for the insertion or modification of those controls being incorporated into the DCP was accompanied by the appropriate advertising, opportunity for public submissions and council adoption process.

40 The present Hastings Point-specific provisions of the DCP are in the following terms:

AREA SPECIFIC DEVELOPMENT CONTROLS

INTRODUCTION

This section of the Plan provides development provisions that have been formulated in response to an identified specific need of a particular site(s) or locality. This section is to prevail to the extent of inconsistency with any other development provision in this Plan.

Area of Application

Hastings Point – all land within the boundaries of the locality of Hastings Point.

Objectives

- To implement the recommendations of the Hastings Point 'Review of Height, FSR and Setback Controls' Report, prepared by Ruker and Associates dated 26 March 2008, as resolved by Council on 22 April 2008.
- To limit the impact of new development on the existing character and amenity of this coastal settlement prior to any further locality based planning by:
 - Implementing interim restricting height and density provisions for new development until provisions appropriately tailored to larger and more dense development (where appropriate) is adopted following community consultation, that will;
 - Provide greater certainty to the protection and preservation of the areas natural and built environment.

Controls

- (a) The maximum building height is 2-storeys and 8 metres.
- (b) The maximum density on any lot or combination of lots comprising a development site is two dwellings (dual occupancy).

Review Period

The review period for interim development controls outlined above for Hastings Point is 12 months from the adoption of this Plan, except where a locality or structure plan, or area specific planning controls are in preparation in which case it will be the adoption date of that body of work and the concurrent or subsequent repeal of the interim provisions.

The interim development controls relating to the Hastings Point locality shall take effect on the giving of public notice of the Council's adoption of the amended Tweed Shire Development Control Plan in accordance with clauses 21 & 22 of the Environmental Planning and Assessment Regulation 2000. There is no saving provision in respect of the area specific development controls herein above.

- 41 I do not consider it necessary to set out in full the details of the sequence of variation of these controls commencing with the initial controls and culminating with those controls that currently applying to the site except to say that the various changes have not practically altered the first control – it being the relevant criterion I consider applicable to any merit consideration of the proposal.
- 42 The two reports from Ruker & Associates were, originally, put in evidence without any explanation as to how the differences between the March and April versions had arisen. Because there were differences in emphases on relevant matters and because the initial hearing in Murwillumbah did not proceed to finality (thus requiring an additional hearing in Sydney), it was possible to obtain and put in evidence e-mail correspondence between the council and Ruker & Associates concerning the March draft and the changes that were made to it.
- 43 That additional material made it clear that, although the original version was provided by Ruker & Associates and based on the community consultation process undertaken by them, the changes that were made between the first version and the second version were driven entirely by a member of the council's strategic planning staff. Whilst this might be a perfectly proper exercise of his professional responsibilities, I do not consider that the changes that he initiated can properly be considered for the purposes of me being satisfied that the contents of the April report represented the outcome of a community consultation process upon which I could found a conclusion that meets the considerations discussed by McClellan CJ in *Stockland*.

44 However, for reasons which follow, I do not consider that setting aside the terms of the April document provides any assistance to the applicant in the proceedings as the critical provisions that underpinned the storey limit are derived from the March report and were carried, without significant or relevant change, into the April report.

45 The portions of the April Ruker & Associates report (comparable to the relevant portions of the March Ruker & Associates report) are in the following terms:

46 Under the heading *Regional and Local Context*, the April report says:

In order to ensure design excellence; both a Locality Plan (a structure plan) that includes place specific building and site design controls need to be developed prior to any 3-storey and/or medium density (multi-dwelling housing) development (comprising three or more dwellings) being approved so as to ensure long term public and environmental good is balanced with economic returns on land redevelopment. Such plans are required to be developed and administered by council with input and consultation from the community and stakeholders.

In the event that a Locality Plan that includes site in building design guidelines is not undertaken then the building types referred to above are not appropriate building forms for Hastings Point particularly with regard for the study area.

47 The relevant recommendations which flowed in this section are in the following terms:

4. Design and implementation of a settlement wide urban design Structure Plan (Locality Plan) would need to be developed if there is to achieve its development potential without compromising the character of a small village. These plans must be developed by Tweed Shire Council holistically rather than by individual landholders or on a site by site basis.

5. Any locality based plan would need to include building and site design guidelines specific Hastings Point.

6. Site and building design guidelines need to be developed prior to any approval for multi-dwelling housing comprising 3 or more storeys and/or 3 or more dwellings.

- 48 Under the heading *Immediate Context*, the relevant comparable paragraph is in the following terms:

Given the visual sensitivity of the settlement and the impact each lot has on the whole of the study area it is injudicious to encourage multi-dwelling building types without the certainty of a carefully considered urban design site and building design controls located within a Locality Plan.

- 49 The relevant recommendations arising out of this section of the April report was in the following terms:

Multi-dwelling building types would only be suitable for Hastings Point subject to urban design site and building design controls which would be situated within a Locality Plan. Without these strategic measures multi-dwelling housing comprising 3 or more storeys and/or 3 or more dwellings are not suitable for Hastings Point.

- 50 Under the heading *Built types, height, FSR and Setbacks*, the April report, relevantly, says:

To ensure appropriate building and site design all building types must be accompanied by urban design, architectural and landscaped site and building design guidelines specific to Hastings Point.

Where such design exploration is not undertaken and in the absence of urban design, architectural and landscape design guidelines Residential Flat Buildings are not an appropriate building type for Hastings Point.

- 51 The relevant recommendation from this section of the April report is in the following terms:

Residential Flat Building are not an appropriate building type for Hastings Point unless they are governed by a building type that details a small flat building of reduced height. The

draft RTDC provides a suite of controls that achieve good urban design outcomes; however, they are generic controls and in the context of such a sensitive location development of this scale can only be adequately covered where there are controls specific to that locality. Two new building types should be investigated; a smaller RFB comprising 2 storeys and a 3 storey RFB where the third level occupies only half of the third level.

- 52 Comparing the various relevant elements of the March and April versions of the Ruker & Associates report quoted above, it is clear that, although there are some shifts in emphasis between the two versions, the general overall flavour of the March document (which comprises entirely work undertaken by Ruker & Associates) is largely replicated after the intervention by the council's strategic planning staff member.
- 53 In addition, although the work by Ruker & Associates provides the starting point for the subsequent processes, those processes in the evolution of the DCP controls went through the proper council staff and council processes as well as the public advertising process. As a consequence, I do not consider that there is any improper or unsatisfactory process basis for not having regard to the specific Hastings Point locality controls contained in the DCP.

Prematurity

- 54 Mr Shiels' evidence was marked by containing two quite distinct elements. The first related to his opinion that it was inappropriate to apply the controls to this site and, second, that as a general proposition, the controls were inappropriate. For me to express any views on the second element of his evidence, that is on his general proposition about the appropriateness of those of the controls presently in the DCP, would be contrary that the decision of the Court of Appeal in the recent case of *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226. I therefore do not propose to do so.

- 55 The process that Ruker & Associates has undertaken has resulted in a further consultancy being given to Ruker & Associates in January 2009 to develop a long-term strategic planning framework for the Hastings Point locality. It is quite clear from the reports and the subsequent council processes, that those controls arising from the original Ruker & Associates reports were intended to be of an interim nature pending the development of a long-term framework specifically for this locality.
- 56 Ruker & Associates have undertaken that further work and have recently provided the council with a further report (presumably recommending some long-term development control framework for Hastings Point). That report is to be considered by council officers who are to analyse it and prepare information for the council. This new Ruker & Associates' report is not publicly available and it has not been tendered in these proceedings. The applicant has not sought an adjournment of these proceedings to enable council's processes to be undertaken and it is reasonable to assume that, in timing terms, any further decisions by the council concerning planning controls for Hastings Point are unlikely to be finalised until some time in the first half of 2010, at the earliest. It is not appropriate for me to make any assumptions, of any nature, about what might be included and what changes (if any) might be made to the present controls for Hastings Point arising from that process.
- 57 As to the consideration I should give to the DCP, *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 115 LGERA 373 deals, inter alia, with the issue of consideration of relevant provisions of a DCP in determining whether to grant development consent. From what was said in *Zhang* by Spigelman CJ at para 75, three propositions emerge. First, although the Court has a wide-ranging discretion, the discretion is not at large and is not unfettered. Secondly the provisions of a DCP are to be considered as a fundamental element in, or a focal point to, the decision-making process particularly, if there are no issues relating to compliance with the Local Environmental Plan. Thirdly, a provision of the DCP directly pertinent to

the application is entitled to significant weight in the decision making process but it is not in itself determinative.

- 58 Although I have chosen, for the reasons set out earlier, to disregard the April version of the Ruker & Associates report, for the reasons set out I do not consider that this has undermined, in any way, the starting point for a valid development control plan amendment preparation process. It is clear that the council has embarked upon a structured and considered exercise in determining what should be the long-term planning controls applicable for future redevelopment of Hastings Point. It is also clear that, since the commencement of this process, the council has not made any planning decisions that are antithetical to the interim controls (founded on the March 2008 report by Ruker & Associates and as have evolved during this further period pending consideration of a second stage and final report from Ruker & Associates).
- 59 If I were to approve this proposal, prior to finalisation of the council's systematic process, I would, in my view, effectively be pre-empting and, possibly, seriously damaging that process – particularly if controls, on a permanent basis, were adopted which replicated the interim controls. To do so would, in my view, be entirely contrary to the approach determined to be appropriate by the Court of Appeal in *Zhang*. I do not propose to do so and so pre-empt the council's planning process.

Merit of the present design

- 60 Although I have reached the conclusion it would be inappropriate to intervene for the reasons set out immediately above, if I am wrong on this point, I am also satisfied that, within the terms of the present controls, it would not be appropriate, on any merit basis, to set aside the height and storey limits. I do not need to deal with this aspect at length. As I have earlier described it, the site is significantly visually prominent when viewed travelling south on Tweed Coast Road after crossing the bridge over the creek and passing the general store. The height and presentation of this

non-compliant proposal would be, in my assessment, significantly intrusive in that context and it is inappropriate for this reason in light of the present interim controls.

The NSW Coastal Design Guidelines

61 During the course of submissions, a deal of discussion took place about whether or not Hastings Point should be regarded as a "coastal village" or as a "coastal hamlet" for the purposes of the State government's Coastal Design Guidelines. The reason for this was that the guidelines offer different descriptors of appropriate height limits for such different styles of settlement. In the final analysis, I do not believe that there is a relevant significant difference between them. This conclusion does not assist the applicant in these proceedings.

62 The relevant portion of the policy document relating to the desirable height of development in coastal villages is in the following terms:

6. Height

- a. The village centre and the main street have a maximum of up to three storeys.
- b. Some elements of important public buildings within the centre may be marginally higher than surrounding buildings.
- c. Residential buildings surrounding the centre have a maximum of two storeys.

63 On the other hand, the comparable provision for a coastal hamlet is in the following terms:

6. Height

- a. Heights of up to two storeys are maintained throughout the settlement.

64 To the extent that there is a difference between them that is potentially relevant, it turns on the question of where, if the Hastings Point locality

were to be regarded as a coastal village, the "village centre and the main street" of that village would be located.

- 65 To consider how this should be assessed in the Hastings Point locality, it is necessary to provide a modestly expanded description of the Hastings Point locality.
- 66 First, with the exception of a small number of comparatively minor side streets, development in Hastings Point is ribbon development along Tweed Coast Road, the major north/south coastal road. To the limited extent that there is commercial development in Hastings Point, it is confined to the two caravan parks; the resort development in the vicinity of the caravan park to the north of the creek (this development may be associated with this caravan park – a matter of which I am uninformed and bears no relevance in these proceedings); any internal commercial activity within the caravan park south of the creek; and the Hastings Point general store and post office immediately adjacent to the southern caravan park. Two petrol stations, one at the southern extremity of Hastings Point and the other near its northern extremity, complete such commercial activity as exists within the locality.
- 67 As earlier noted, the site is to the south of the general store and post office. This building has the low scaled elements of the caravan park to the north towards the bridge over the creek and has the low scale residential development fronting Tweed Coast Road between it and Young St.
- 68 The site is separated from that commercial facility not only by Young Street but also by five conventional residences on conventional allotments (as seen during the course of the site inspection and from the aerial photograph and the zoning map in evidence). In reality, I am satisfied, Hastings Point has, for the purposes of the coastal design guidelines, no functional "village centre and the main street" to which the three-storey element of the coastal village provisions could be applied.

- 69 In this context, I note that, to the extent that the applicant relies on the general store and post office building, this building is, in itself, only two storeys in height.
- 70 However, if I be wrong and is necessary to determine that Hastings Point has a "village centre" and it is appropriate to regard that "village centre" as being the general store and post office building (a conclusion that, given the size and scale of the commercial tourism facility to the north of the creek, would be open to challenge, respectably, in my view), I do not consider it appropriate to regard Tweed Coast Road, generally, as the "main street" of Hastings Point except in the absolutely immediate frontage of the general store. To suggest that the concept of a "main street" would extend to the site and to some (unspecified) point beyond, on the applicant's case, is not acceptable.
- 71 I have reached this conclusion because of the separation of the site from the general store by the five conventional residential allotments and the houses erected upon them as well as by Young Street itself. There is no visually obvious "main street" as might conventionally be expected in a village. This means that it would not be reasonable to conclude that the site was part of the "village centre and the main street" of Hastings Point (if there were one and if it were anchored by the general store and post office building).
- 72 The consequences of these conclusions is that, however the NSW Coastal Design Guidelines might be regarded in their applicability to Hastings Point and the extent to which they might have any relevance in these proceedings, they do not provide any assistance to the applicant as the site cannot be characterised, within those guidelines, as being appropriate for three-storey development – however Hastings Point itself might be characterised.

Conclusion

73 I have concluded that:

- the relevant DCP controls were not adopted by the Council for the purposes of preventing this proposal;
- the DCP controls, although more restrictive than the "storeys" development standard in the LEP have foundation in a proper community consultation process;
- the development of the controls for the Hastings Point locality in the DCP were expressed to be of an interim nature pending the outcome of further work by the original consultant;
- this work was to be completed within a timeframe generally (but not precisely) consistent with the timeframe for that work actually being undertaken by the consultant;
- the processes for adoption of the various versions of the controls in the DCP were undertaken in an appropriate and proper fashion; and
- there is no suggestion that, during the period since the controls were adopted on the interim basis pending further studies, the council has approved any development in the Hastings Point locality that is contrary to those controls.

74 Separately, on the merits, I have concluded, in the context of the present interim controls in the DCP, the visual prominence of the proposed building is unacceptable, in a streetscape context, when viewed travelling in a southerly direction along Tweed Coast Road.

75 In addition, to the extent that they might be relevant (a matter that I need not determine), the controls in the DCP for the Hastings Point locality – to the extent, at least, that they relate to the number of storeys permitted in a development – are not inconsistent with any possibly relevant aspect of the State government's Coastal Design Guidelines.

76 As a consequence, particularly in light of the fact that the present controls for the Hastings Point locality are clearly interim ones undergoing a methodical review process and were, initially, appropriately founded, in my view it would be inconsistent with the decision of the Court of Appeal in *Zhang* for me to disregard the conclusions set out above.

77 In doing so, it is not appropriate to speculate on what might be the outcome of the present process – merely to observe that, in my view, whilst it is being undertaken in a context where relevant controls of an interim nature have been put in place, it would be inconsistent with the Court of Appeal's decision for me to pre-empt the outcome of the review process and set them aside. It necessarily follows that it would be entirely inappropriate to approve the development proposal whilst that process is in train. It therefore also follows that the proposal must be rejected.

Orders

78 The orders of the Court, therefore, are:

1. The appeal is dismissed;
2. Development Application DA07/0022 for a part one, part two and part three development containing five dwellings proposed to be erected on the corner of Tweed Coast Road and Young Street, Hastings Point is determined by the refusal of development consent; and
3. The exhibits, other than Exhibit 1, are returned.



Tim Moore
Senior Commissioner