

INTER - DIVISIONAL MEMO

TO : Rowena Michel
FROM : Patrick Knight
SUBJECT : Major Project Application 06_Concept Plan and Project Application for Casuarina Town Centre, Casuarina Beach Owners Consent for Development on Council Land.
FILE :
DATE : 14-05-2009

1. Part 3A Applications for Casuarina Town Centre - Owners Consent from Council

Applications have been made under Part 3A of the Environmental Planning & Assessment Act 1979 to the NSW Department of Planning for Concept plan approval and Project (Stage 1) approval for development of the Casuarina Town Centre.

Part 3A of the Act requires owners consent to be provided before approval under Part 3A can be issued. The majority of the Town Centre development is on land owned by the proponent being lots 223 DP1048494, 144 DP1030322 and 3 DP1042119. However the plans submitted indicate part of the proposed development will be on Council land being lots 10 and 13 DP1014470 and an easement/right of carriageway benefiting Council over lot 223 DP104849. Also required would be the closure of Dianella Drive onto the Tweed Coast Road as this intersection would be replaced by the new intersection and road into the Town Centre
The proposed development on Council land is:

| Council Land or Interest | Proposed Development |
|--|---|
| 10/1014470, Sportsfield | Adjustment to stormwater drainage channel |
| 13/1014470 Coastal Reserve | <i>"effect operational works in Lot 13 associated with the proposed Stage 1 development, namely drainage works, landscaping works, and pedestrian and bicycle path works"</i> formal owners request by letter dated 8 August 2008 |
| Dianella Drive | Close intersection onto Tweed Coast Road. To be replaced by new intersection with Town Centre Main Street |
| Easement/Right of Carriageway Benefiting Council over lot 223 DP104849. The easement/right of way is 32m and 36m wide and contains landscaped open space, bikeway/pathway, an open stormwater drain and underground gravity sewerage pipes. It provides an openspace and bikeway/pathway connection between the coastal reserve/bikeway and the playing field and further continuation of the bikeway/pathway through Casuarina and in the future to Kings Forest | Resort/residential buildings, shops, supermarket car park, new roads. Full site regarding and levelling. |

An examination of the plans indicates that Council owner's consent will be critical and that it is unlikely that the proposed development could proceed if the proponent cannot gain possession of this land. This particularly applies to the Easement/Right of Carriageway Benefiting Council over lot 223 DP104849 as this is a large area and contains critical elements of the development proposal.

The following Plan has been provided by a local resident. It shows the Easement/Right of Way superimposed over the Original Concept Plan. The Concept Plan has now been modified, but this sketch is helpful to illustrate the extent of the incursion of the development onto the Easement/Right of Way.



There are a number of issues Council should consider, prior to making a decision on granting owners consent, which include:

- Will there be any public benefit
- Will there be any loss of public benefit
- Will there be a net public benefit
- Will there be a benefit on the proponent

- Any statutory obligations
- If owners consent is given and the Department approves the development, should Council require the proponent to pay compensation for the benefit of using Council's land, and having the benefit of Council relinquishing its easement/right of way.

The principal future public benefits will firstly be enhanced amenity and convenience for Casuarina and other Tweed Shire residents by provision of the supermarket, shops, parking, extension to provide continuity of Casuarina Way, beachside park, landscaping, beach access and other facilities to be included in the town centre development. Secondly there would be a significant stimulus to the Tweed economy and employment opportunities in both the construction and operational phases of the development. There is no doubt that the amenity and economic benefits to Tweed Shire from this development would be substantial, especially given the current state of the world economy. It is not known whether all of these benefits would be lost in the event of Council owner's consent being withheld (and this being legally sustainable). In such circumstances the proponent or a subsequent may resubmit a town centre proposal at a later date in a form that is consistent with maintaining the presence of the easement/right of way.

There will also be a loss of current public benefit from the loss of the amenity and level of service to local residents provided by the Easement/Right of Carriageway benefiting Council over lot 223 DP104849, but this will be partially compensated by provision of alternative reserve and right easements to be provided through the town centre area as designated in the proponents revised concept plan.

There will be a considerable benefit to the proponent. It is understood that the elimination of the easement/right of way enables the development to be better configured from a commercial perspective. The elimination of the easement/right of way also enables the proponent to place buildings and other commercial development on the former easement which improves development yield and profitability of the venture.

The legal status of Council's ability to withhold owner's consent for the easement/right of way is unclear. Attached to this report is a letter from the Environmental Defenders Office Ltd to Andrew Robinson a local resident which explores this issue.

The proponents have advised that as the Department are the designated determining authority for this development, Council should advise that Department, that if the Department of Planning were of a mind to approve the application, then Council would provide owner's consent to enable the application to proceed. The proponents believe Council would not be acting appropriately if Council used the device of withholding "owners consent" to thwart the will of the Department who are the designated planning authority for this matter. The Proponents also believe in the event of the Department of Planning deciding to issue consent, then a withholding of owner's consent would be overturned legally which and would only delay progress of the consent.

2. Effect of the Proposal on Council Land and Easement/Right of Way

2.1 Lots 10 and 13

The effect on lot 10 is minimal.

There are substantial effects on lot 13, however this is mostly a redesign of the existing open space area to interface better with the town centre development. There is an effect on the stormwater drainage system in lot 13 causing loss of continuity in the existing drainage swale, however advice from the proponent's consultant is that this is a design error and can be corrected. This error could be dealt with by means of a suitable consent condition.

2.2 Dianella Drive

Closure of the intersection of Dianella Drive and Tweed Coast Road would be necessary if the proponents application for the town centre proceeds as it would be replaced by the new intersection at the entrance to the town centre. Issues regarding the closure of the Dianella Drive intersection can be addressed by suitable conditions of consent.

PLAN FORM 2

SEALING AND SIGNING ONLY

DIRECTOR
DIRECTOR



DIRECTOR
DIRECTOR

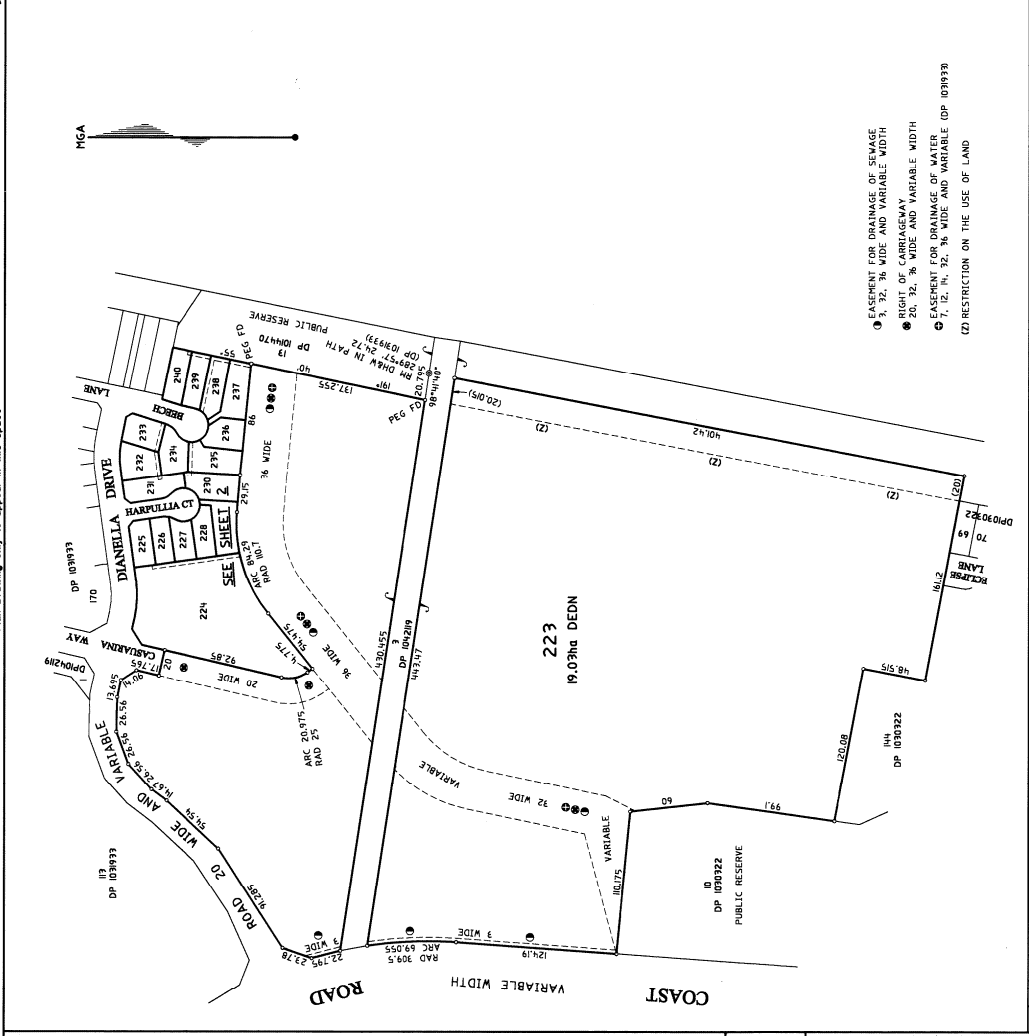
WISCONSIN BANKING CORPORATION
PO BOX 35000 BOSTON MA 02211
SERVICES UNDER POWER OF ATTORNEY
BOOK 6283 AND 332.

Subdivision Certificate

DP 1048494
DP 1048493
DP 1048492
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DP 1048494
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Plan Drawing only to appear in this space



| | |
|---|---|
| <p>DP 1048494</p> <p>Registered: TORRENS</p> <p>Title System: SUBDIVISION</p> <p>Purpose: SUBDIVISION</p> <p>Ref. Map: X 5467-7</p> <p>Last Plan: P 1048410</p> | <p>OF SUBDIVISION OF LOT 71 IN DP 1048416</p> <p>PLAN</p> <p>Lengths are in metres</p> <p>Resection Date: 12000</p> |
| <p>LOA: TWEED SHIRE</p> <p>Locality: KINGSCLIFF</p> <p>Parish: CUDGEN</p> <p>County: ROUS</p> <p>Sheet 1 of 2 Sheets</p> <p>This is sheet 1 of 2 sheets which contain this subdivision.</p> | <p>ASPECT NORTH</p> <p>2A CARRINGTON ST., LISMORE NSW 2480</p> <p>A surveyor registered under the Survey Act 1981 has surveyed the land shown on this plan and has found that it complies with the Survey Act 1981 and the Survey Regulation 1981. The survey is correct and the plan is true and correct.</p> <p>Surveyed by: [Signature]</p> <p>Date: 11th DEC 2002</p> <p>Signature: [Signature]</p> <p>There is no representation of Survey/Completion.</p> <p>DP 1048494 DP 1048493 DP 1048492 DP 1048491 DP 1048490</p> |
| <p>PANEL FOR USE ONLY for statements of intention to create public roads, to create public reserves, drainage easements, public utility easements, restrictions on the use of land or positive easements.</p> <p>IT IS INTENDED TO DEDICATE TO THE PUBLIC AS ROADS:</p> <p>HARRILLIA COURT EXTENSION OF BEECH LANE</p> | <p>PURSUANT TO SECTION 89B OF THE CONVEYANCING ACT 1998, AS AMENDED IT IS INTENDED TO:</p> <p>CREATE:</p> <ol style="list-style-type: none"> EASEMENT FOR DRAINAGE OF SEWAGE EASEMENT FOR DRAINAGE OF WATER RESTRICTION ON THE USE OF LAND RESTRICTION ON THE USE OF LAND RESTRICTION ON THE USE OF LAND RESTRICTION ON THE USE OF LAND <p>(CONTINUED ON SHEET 2)</p> |

2.3 Easement/Right of Carriageway Benefiting Council over lot 223 DP104849.

The easement/right of way provides the following functions:

- Contains 225mm gravity sewer
- Open stormwater drainage channel - provides for in excess of ARI 100 year flows. Conveys stormwater from the coastal swale back to controlled outlet No. 11. Also contains a series of infiltration basins sized, to infiltrate stormwater flows from storms up to ARI 3 months intensity.
- Provides open space linkage between the coastal reserve and sportsfields adjacent to Tweed Coast Road as indicated in Land & Environment Court Consent for DA s96/135, *Kings Beach Development Plan*
- Contains walkway/cycleway as indicated in Land & Environment Court Consent for DA s96/135, *Kings Beach Development Plan*
- Provides a greenbelt/buffer between residential uses to the north and more intensive urban uses in proposed town centre.

Sewer Assets

It is understood that subject to appropriate detailed design and provision of an alternative easement, the sewer asset can be satisfactorily amended.

Stormwater Assets

The landforming and associated drainage concept for Casuarina provided for most stormwater drainage to flow in an easterly direction towards the coast where it is intercepted by a coastal swale. The drainage in the coastal swale then flows north or south to east/west open drains that convey the runoff in a westerly direction, under the Tweed Coast Road and thence to Cudgen Creek. The easement over Lot 223 contains one of these east/west open drains that collects stormwater runoff from part of the central precinct to the south of the Town Centre and runoff from part of the northern precinct to the north of the Town Centre site.

The open drain provides a fail safe stormwater conveyance system, designed for ARI 100 year storm flows, but, being open, can cater for much larger storm events. Contained within the open drain in the lot 223 easement are also a number of infiltration basins.

The stormwater treatment/water sensitive urban design concept for Casuarina provides for all roof runoff to be directed to on site infiltration pits with a capacity to accommodate the ARI 3 months storm. The infiltration pits are designed to overflow to the public stormwater system in storms of intensity greater than ARI 3 months. The public stormwater system has a conventional network of pipes/pits etc in the urban areas that discharge to the north/south coastal swales. Prior to discharge to the coastal swales, the stormwater is passed through Gross Pollutant Traps (GPT) that capture gross pollutants, oil & grease and sediment. The coastal swales and the east/west swales contain imbedded infiltration basins (open sand areas with some spinifex plantings) that are designed and sized to infiltrate runoff from the public domain (streets, open space etc) for storms up to ARI 3 months.

The infiltration basins in the drain in the easement on lot 223 are part of this system.

The proponent has advised that the area of infiltration basins to be lost by eliminating the basins in the lot 223 easement will be replaced by additional infiltration basins in the coastal swale (east of the town centre site) and two additional areas to be dedicated to Council west of Casuarina Way.

Open space, bikeway/pathway

The effect on the open space, bikeway/pathway is substantial. Currently the easement/right of way is part of a relatively wide stretch of open space network that extends from the coastal reserve to the Tweed Coast Road with imbedded bikeway/pathway linkages.

The proponents initial plan eliminated the open space area and relocated the bikeway/pathway down the verge of the proposed Town Centre main street. This plan has subsequently been amended by the proponents to provide the bikeway/pathway in an off street location that more closely resembles the existing setting and a 15m wide part of the existing easement/right of way has been reinstated as a public reserve to the north east of the town centre site. The remainder of the cycleway would be located in a dual purpose easement passing through core of the Town Centre.

3. Background to Easement/Right of Carriageway Benefiting Council over lot 223 DP104849

3.1 Origin of the Easement/Right of Carriageway

The original Kings Beach Consent for the locality now known as Casuarina was a Land & Environment Court judgement of 16 December 1998 for DA s96/135.

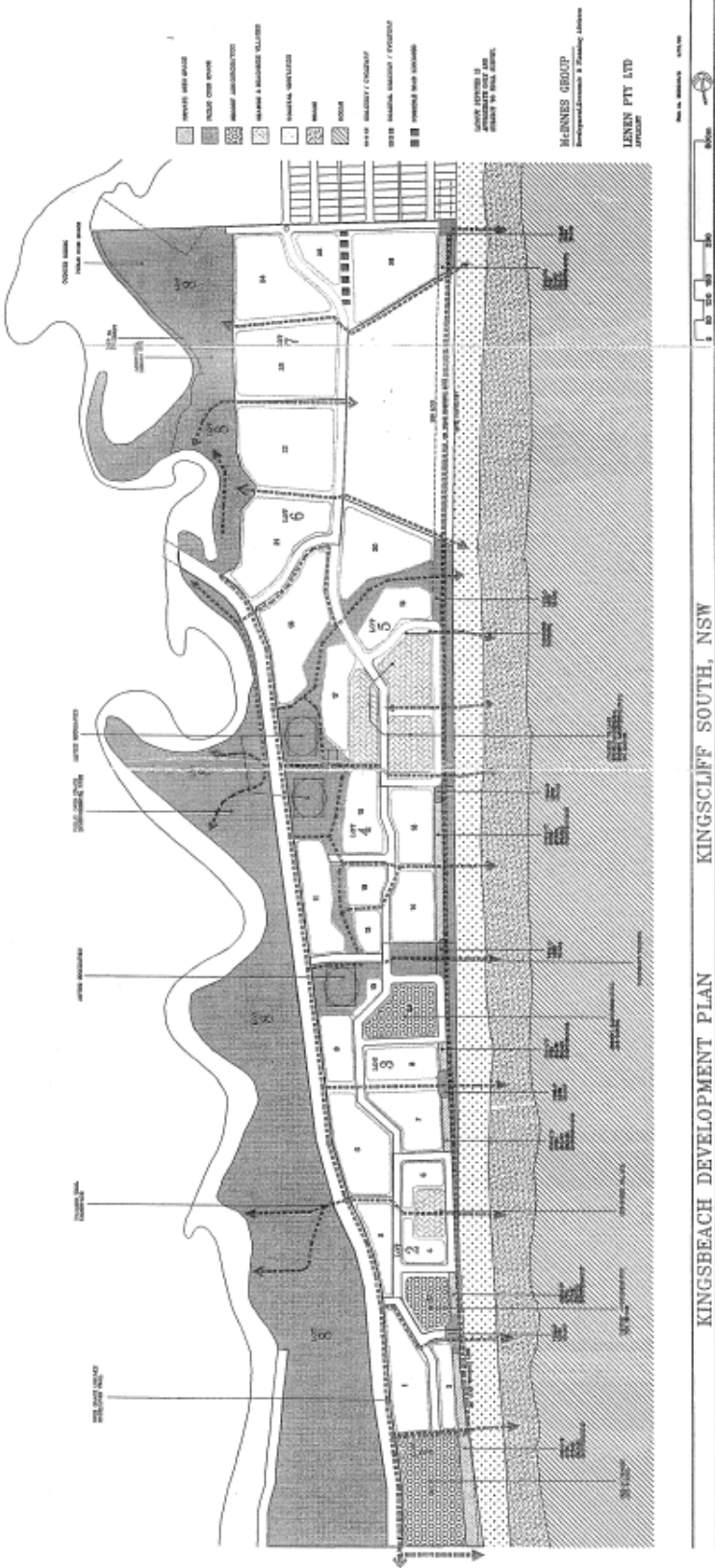
The consent was for subdivision of Kings Beach into 14 "management lots" and provision of Stage I works (key trunk infrastructure).

The consent included a "*Kings Beach Development Plan*" that provided a "masterplan" for the future development of Kings Beach. The consent advised it was granted for "*The development of the management lots for the purposes of low density residential, retail, commercial and tourist development together with associated and related uses and facilities generally in accordance with the Development Plan.*"

A copy of the *Development Plan* is attached to this report. The area now referred to as the "Casuarina Town Centre" was referred to in the *Kings Beach Development Plan* as "Seaside Village" and the *Development Plan* detailed the general location, footprint and road configuration of the town centre. To the north and west of the town centre, the *Development Plan* shows a significant public open space and walkway/cycleway area linking the coastal openspace/walkway/cycleway at a point north of the town centre to the sportsfields west of the town centre and to the walkway/cycleway network on the Tweed Coast Road and beyond. The configuration of this area in the *Development Plan* was fleshed out by the developer into the "*Kings Beach Concept Master Plan*" also attached to this report. The *Concept Master Plan* was not a statutory document, but was included with all of the Casuarina Beach Stages 1 - 6 Development applications as illustrating how the whole Casuarina area would be developed. Development of the Town Centre area was delayed by the court consent as it contained blossom bat feed trees that had to remain undisturbed for many years whilst compensatory plantings west of the Tweed Coast Road became established.

The Open space/walkway/cycleway linkage area (to the north and west of the town centre site) was created in earlier stages of the Casuarina subdivision as it was a part of the Open space/walkway/cycleway and stormwater drainage network necessary to support stages 3 and 6 of the Casuarina development. This area was constructed and placed in an easement and right of carriageway on lot 223 benefiting Council (see attached plan DP1048494, certified 15 January 2003).

At the time this consent was granted, the developer requested the tenure for the Open space/walkway/cycleway linkage area (to the north and west of the town centre site) to be an easement/right of way rather than being created as a Council reserve. It was understood that this was to enable minor adjustments of the easement boundary to be made at a future time when the town centre was being developed, as the future detailed design of the town centre and associated changes of landform levels may necessitate minor boundary changes. It was considered that this would be administratively simpler with an easement than with a dedicated Council reserve.





3.2 Town Centre Application

The Town Centre application as submitted to the NSW Department of Planning, did not follow the configuration and footprint of either the Court's *Development Plan* or the Developer's own *Concept Master Plan*. It was an entirely new proposal that followed a different geometric layout and in the process consumed the Easement/Right of Carriageway Benefiting Council over lot 223 DP104849 as part of their development footprint.

In the initial period following lodgement of the Town Centre Application, the proposal was discussed with Council's Administrators. Both the Department of Planning and the Developer were advised that because of the valued functionality and amenity of the Easement/Right of Way, that it would not be released, nor would owners consent by Council be granted over the easement for the Casuarina Town Centre Development. The Developer was requested by Council officers to amend the application to conform more closely with the principles of the Court's *Development Plan* and the Developer's own *Concept Master Plan*. It was also advised that there was considerable concern by Casuarina resident regarding the possible loss of the Easement/Right of Carriageway Benefiting Council over lot 223 DP104849. These residents considered they had some justification in expecting the Developer's proposal for the town centre to conform in principle with the strategic documents that were in place when their land purchase decisions were made.

Notwithstanding this negative response to the removal of the easement/right of way, the Developer and the NSW Department of Planning continued to progress the Town Centre application including formal exhibition.

During this period the Developer's consultants met with Council officers on a number of occasions and submitted various amendments to their original town centre plans to address concerns regarding the elimination of the easement/right of way.

3.3 Revised Town Centre Concept Plan

The revised concept plan (see below) submitted to the Department partly responds to concerns raised by Council officers.

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The following table summarises the current proposal and its impacts on the Easement/Right of Carriageway Benefiting Council over lot 223 DP104849.

| Issue | Existing | Proponents Revised Proposal | Comments |
|---------------------|---|--|---|
| Open Space | 36m and 32m wide, easement that conforms with the open space corridor designated in the L&E Court <i>Development Plan</i> . The easement footprint includes a large open drain that does not materially provide an open space function. | 15 m wide reserve then multi use (shared with driveways in main street rear area) easement. Open space will not contain "unsightly open drain". | There is still a loss of the open space area and continuity compared with the L&E Court <i>Development Plan</i> . Open space amenity of Proponents amended proposal is a substantial improvement on the original. It could be improved by further widening of the reserve to say 20m and conditioning the easement section for minimum width, construction of cycleway/pathway and, separation (as far as practical) from vehicular traffic and associated landscaping. |
| Cycleway Pathway | Off street through open space area that accords with L&E Court <i>Development Plan</i> . Would contain one major road crossing when Casuarina Way is extended. | Partly in open space reserve, partly in shared area (see above). Contains two major road crossings. | Not same level of amenity as that designated in the L&E Court <i>Development Plan</i> . However is a substantial improvement on original proposal. |
| Stormwater Drainage | Fail safe stormwater conveyance function and provision of substantial area of infiltration basin capacity | Underground piped system, can be designed for ARI 100 year capacity with adequate safety factor. It is not understood if adequate provision has been made in subdivision layout to replace full area of lost infiltration basins | Existing arrangement is superior due to fail safe nature of open stormwater drain and known capacity of existing infiltration basins. Whilst failure of underground pipe stormwater system with adequate factor of safety is unlikely, failure could result in break out to the beach. |
| Separation of Uses | 36m and 32 m separation of residential uses from more urbanised town centre uses | 15m separation in reserve and proponent advises there will be 5m building setback in their land. | Not same level of separation as that designated in the L&E Court <i>Development Plan</i> . Separation in proponents proposal could be improved by widening of proposed reserve to say 20m and extending it to Casuarina Way. |
| View corridors | 36, wide depressed swale drain provides view corridors for adjacent residents to the north. | 15m wide reserve provides reduced view corridors. | Not same width of view corridor as that implied by the L&E Court <i>Development Plan</i> . View corridors in proponents proposal could be improved by widening of proposed reserve to say 20m and extending it to Casuarina Way |

4. Options for Council Regarding Owners Consent

3 Options are considered.

Option 1

- (a) Subject to (b), (c) and (d) below, Council grant owners consent relating to lots 10 and 13 DP1014470, the easement/right of carriageway benefiting Council over lot 223 DP104849 and Dianella Drive for the purpose only of permitting the application to proceed to determination by the Department.
- (b) Consent does not include owner's consent to enter upon Council's land to carry out works
- (c) Consent does not include Council's consent to relinquish its benefits relating to easements and right of way on lot 223 DP104849.
- (d) The matters referred to in (b) and (c) above would be the subject of further negotiations with the proponent, in the event that the Pt 3A application is successful. Negotiations would include monetary compensation to Council relating to these transactions.

Option 2

(a) Subject to (b), (c) and (d) below and the proponent agreeing to change the concept plan to:

- (i) Widen the east/west open space reserve on the northeast of the Town Centre site from 15 to 20m and lengthen it to reach Casuarina Way and
- (ii) provide a 15m wide easement, optimise the alignment, optimise separation of vehicular traffic and provide landscaping satisfactory to Council for the balance of the walkway/cycleway commencing in the reserve referred to in (i) above and extending to lot 10 DP1014470D,

- Council grant owners consent relating to lots 10 and 13 DP1014470, the easement/right of carriageway benefiting Council over lot 223 DP104849 and Dianella Drive for the purpose only of permitting the application to proceed to determination by the Department.
- (b) Consent does not include owner's consent to enter upon Council's land to carry out works
- (c) Consent does not include Council's consent to relinquish its benefits relating to easements and right of way on lot 223 DP104849.
- (d) The matters referred to in (b) and (c) above would be the subject of further negotiations with the proponent, in the event that the Pt 3A application is successful. Negotiations would include monetary compensation to Council relating to these transactions.

Option 3

- (a) Council withhold owners consent relating to lots 10 and 13 DP1014470, the easement/right of carriageway benefiting Council over lot 223 DP104849 and Dianella Drive.
- (b) Council advise the proponents and the Department that it supports the concept of the Town Centre proposal and would more favourably consider a request for owners consent if a revised concept plan was submitted that conformed with the intent of the *Kings Beach Development Plan* contained in the Land & Environment Court consent of 16 December 1998 for DA s96/135.

5. Conclusion

Whilst the proponent has made a genuine attempt to mitigate the adverse impacts of the proposed elimination of the Easement/Right of Carriageway Benefiting Council over lot 223 DP104849, they have not provided sufficient evidence to justify:

- The major departure from the L&E Court *Kings Beach Development Plan*
- The loss of level of service and amenity to residents provided by the easement/right of way and assets contained therein. Particularly given that residents who purchased in this area would have had a reasonable expectation that the open space contained in the easement/right of way would remain, as it is specifically designated in the L&E Court *Kings Beach Development Plan* and the proponents own *Kings Beach Concept Master Plan*

It is acknowledged that there could be a substantial economic and amenity loss if this action leads to the cancellation of the Casuarina Town Centre Project, however it is believed that the availability of this land in such a key location and within a large unserved catchment will ensure that it does proceed.

It is considered that submission of a revised proposal that conforms with the intent of the Land & Environment Court *Kings Beach Development Plan*, and preserves the open space now contained in the easement/right of way on lot 223 DP104849 would be in the public interest. Option 3 is therefore supported.

6. Recommendation

That

- (a) Council withhold owners consent relating to lots 10 and 13 DP1014470, the easement/right of carriageway benefiting Council over lot 223 DP104849 and Dianella Drive.
- (b) Council advise the proponents and the Department that it supports the concept of the Town Centre proposal and would more favourably consider a request for owners consent if a revised concept plan was submitted that conformed with the intent of the *Kings Beach Development Plan* contained in the Land & Environment Court consent of 16 December 1998 for DA s96/135.

Our Ref: CLSIS:32526

11 September 2008

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Dear Mr Robinson

Extinguishment of easement (drainage swale) by proposed Casuarina Beach Town Centre concept plan

Background

1. You have sought the advice of the Environmental Defender's Office Northern Rivers regarding the possible extinguishment of an easement located on Lot 223 in DP 1048494, Kingscliff due to the current development proposal for Casuarina Beach Town Centre by Kings Beach (No 2) Pty Ltd. We note that the development proposal is being assessed under part 3A of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") and is currently on public exhibition. Also relevant is the *Tweed Local Environmental Plan 2000*.
2. To prepare this advice we have been briefed with the following documents:
 - a. Registered Plan of subdivision of Lot 71 in DP1048494 dated 9 September 2002 ('registered plan');
 - b. Final Concept Plan Scale 1:2500 Casuarina Beach Town Centre: Master Planning Report.
 - c. Section 88B Instrument for DP1048494 setting out terms of Easements *inter alia*, registered 17 February 2002 ('s88B instrument');
 - d. Earlier versions of master plans for Casuarina Beach Town Centre; and
 - e. documents relevant to the development application for Casuarina Beach Town Centre on the Department of Planning's register of major projects on exhibition on its website.

The Easement

3. The easement to which we refer is an east-west easement noted on the registered plan. The registered plan and the s88B instrument indicate that the easement is an 'Easement for drainage of sewage', a 'Right of Carriageway' and possibly an 'Easement for drainage of



water' to the benefit of Tweed Shire Council ("Council"). We use the word 'possibly' regarding this latter right of use by easement because although this easement (for drainage of water) appears on the plan diagram, it is not included on the s88B instrument detailed for DP 1048494 that you have provided to us. We note that you could do a title search of the land to ascertain whether the easement for drainage of water is still in fact current. Notwithstanding this, two easements are confirmed by the documents that you have provided to us, namely an Easement for drainage of sewage and Right of carriageway, this is sufficient for the following discussion.

4. We note that in a letter from Victor G Feros, the proponent's planning consultants, dated 12 August 2008 to the Department of Planning located in Appendix C of the Environmental Assessment (August 2008), the relevant easement is referred to as a 'drainage swale'. Curiously, it seems that this drainage swale is not referred to as or associated with the term 'easement' in the environmental assessment documents at all. Nevertheless, as discussed below, it would appear that this so called swale is a valid and current easement benefited by Council across Lot 223.

The Concept Plan

5. Contrary to previous concept plans and master plans for the proposed Casuarina Beach Town Centre, it appears that the currently exhibited Final Concept Plan for Casuarina Beach Town Centre envisages a substantial encroachment of the development onto the abovementioned easement.
6. We note that at 6.04.1 in the Environmental Assessment (August 2008) it is stated that: The existing frontal and east-west swales on this site contain infiltration basins which were sized to accommodate any future development of this Precinct. However, the redevelopment of the site will remove the east-west swale, and modify the frontal swale'.

Extinguishment of Easements

7. Pursuant to section 47(6A) of the *Real Property Act 1900* easements such as the all the types described above may only be extinguished by the registered proprietor of the easement (in this case Tweed Shire Council) or extinguished pursuant to s89(8) of the *Conveyancing Act 1919* by Order of the Supreme Court.¹
8. We are instructed by you that Council does not consent to the extinguishment of its proprietary right of easement and the proponent has not obtained an order for extinguishment from the Supreme Court. Therefore, it would appear that the rights associated with the easement still apply to the land in question.

Development Consent and Easements

9. Section 28 of EP&A Act provides that an environmental planning instrument may enable development under the EP&A Act, to be carried out in accordance with a consent, which includes approval granted under Part 3A, and to specifically override regulatory instruments

¹ Department of Lands, 'Cancellation or Extinguishment of Easement', <<http://rgdirections.lands.nsw.gov.au/dealing/rpadealingforms/easements/cancellationorextinguishmentofeasement20ecc>> at 10 September 2008.



for that purpose. Regulatory instrument means ‘any Act (other than the EP&A Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made’. In the case of *Doe v Cogente* (1997)², the judge (Cowdroy AJ) found that a regulatory instrument included an easement.³ Such a position is supported by a leading text on Land Law by Peter Butt published in 2006.⁴ This interpretation of the law could lead one to think that an approved concept plan under Part 3A of the EP&A Act combined with the effect of s 28 could extinguish the easements (to the necessary extent required to complete the approved development) located on Lot 223.

10. However, in a more recent case in the NSW Land and Environment Court, *Cracknell and Lonergan Pty Limited v Council of the City of Sydney* [2007] NSWLEC 392, Chief Justice Preston disagreed with the finding of Cowdroy AJ in *Doe v Cogente*. The Chief Judge held that s 28 did ‘not directly operate on the “rights” of the dominant owners under a right of way’ and that ‘[r]ights are not regulatory instruments’.⁵ Under this reasoning, an easement for the drainage of sewage and a right of carriageway are not rights/easements that can be overridden by an environmental planning instrument made in reliance on s 28 of the EP&A Act. In other words, the agreement of Council or an order from the Supreme Court may be required to extinguish the easements included in the east-west swale; an approval of a concept plan by the Minister of Planning may not, in itself, be sufficient.
11. It is important to note that both of these cases were decided by a single judge in the NSW Land and Environment Court, so they carry equal weight in that the later judgment does not necessarily trump the earlier judgment. Until there is a further ruling from a higher Court either approach could be argued in court.
12. Clause 56 of the *Tweed Local Environmental Plan 2000* states that “any covenant, agreement or similar instrument” will not apply to restrict or prohibit development that is allowed by that Plan. However, given the above case law and even if this clause applied to the development under Part 3A of the Act, there is a real question whether it would enable development to occur in such a way as to override the easement/rights described above.

Conclusion

13. There is some uncertainty as to the effect of any concept plan approval that purports to allow encroachment upon or extinguishment of the easement that Council has the benefit of, without Council’s consent or an order from the Supreme Court.
14. There may be some utility in raising this matter with the Department of Planning and Council at this stage of the development assessment process.

² (1997) 94 LGERA 305

³ *Doe v Cogente Pty Ltd* (1997) 94 LGERA 305.

⁴ P Butt, *Land Law* (5th ed, 2006) 485.

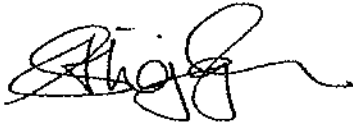
⁵ *Cracknell and Lonergan Pty Limited v Council of the City of Sydney* [2007] NSWLEC 392 at [65].



We hope this advice is of assistance to you. If you have any questions regarding this matter please contact the writer on 02 6622 7381 or 0428 227 363 or by email at sue.higginson@edo.org.au.

Yours sincerely

Environmental Defender's Office (Northern Rivers) Ltd



Sue Higginson
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