RESULTS OF APPLICATIONS FOR SPECIAL LEAVE TO APPEAL

SYDNEY

FRIDAY, 12 FEBRUARY 2010

SPECIAL LEAVE APPLICATIONS HEARD IN SYDNEY

No.	*Applicant*	*Respondent*	*Court appealed from*	*Result*
1.	University of Western Australia	Gray (P40/2009)	Full Court of the Federal Court of Australia [2009] FCAFC 116	Special leave refused with costs
2.	Heperu Pty Limited & Ors	Perpetual Trustees Australia Ltd (S105/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 84	**Granted in part**
3.	Varas	Fairfield City Council (S176/2009)	Federal Court of Australia [2009] FCA 689	Special leave refused with costs
4.	Liddiard	Bostik Australia Pty Ltd & Anor (S177/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 167	Special leave refused with costs
5.	Lujans	Yarrabee Coal Company Pty Ltd & Anor (S201/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 85	Special leave refused with costs
6.	M W McIntosh Pty Ltd & Anor	Commissioner of Taxation (S205/2009)	Full Court of the Federal Court of Australia [2009] FCAFC 88	Adjourned to a date to be fixed
7.	Concept Equity Pty Ltd	Challenger Group Holdings Ltd (S222/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 190	Special leave refused with costs
8.	Lopwell Pty Limited	Clarke & Ors (S233/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 165	Special leave refused with costs
9.	Republic of Croatia	Snedden (S253/2009)	Full Court of the Federal Court of Australia [2009] FCAFC 111	**Granted**
10.	Wicks	State Rail Authority of New South Wales known as State Rail (S262/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 261	**Granted**
11.	Sheehan	State Rail Authority of New South Wales known as State Rail (S263/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 261	**Granted**
12.	Lewis	Shimokawa (S267/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 266	Special leave refused with costs
13.	Hastings Point Progress Assocation	Tweed Shire Council & Anor (S270/2009)	Supreme Court of New South Wales (Court of Appeal) [2009] NSWCA 285	Special leave refused with costs

LEGAL - COSTS
LEGAL - COURT CASES
LN: 8522

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TWEED SHIRE COUNCIL
FILE No: DA06/0413 Pt 13
DOC. No:
RECD: 24 FEB 2010
ASSIGNED TO: GALLE.D
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Your Ref: A1010.2641
Attention: Denise Galle

The General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

19 February 2010

Dear Sir,

Re: Appeal by Hastings Point Progress Association Incorporated – Appeal to New South Wales Court of Appeal Case No. 40279 of 2008
Ppty: Lot 1 DP 7865570 (87-89) Tweed Coast Road, Hastings Point

We refer to the above matter and in particular to our correspondence to you of 8 February 2010.

It has been confirmed in a telephone call with John O'Reilly and by correspondence received from the solicitors for Aeklig Pty Ltd, which we enclose herewith, that the High Court of Australia has refused the application by Hastings Point Progress Association Incorporated for special leave.

Accordingly the earlier decision by the New South Wales Court of Appeal in dismissing the appeal by the Hastings Point Progress Association Incorporated stands.

There is no further avenue of appeal for the Hastings Point Progress Association Incorporated. It would seem that the only matter that might remain an issue is the issue of costs between the Hastings Point Progress Association Incorporated and Aeklig Pty Ltd.

Council's involvement in this matter is however now finalised. We will therefore now close our file and we enclose herewith our tax invoice for work performed in this matter since our interim tax invoice to you of 29 October 2009. We would appreciate early payment of the same.

We thank you for your instructions in this matter and should you have any further queries concerning the same then please do not hesitate to contact the writer.

Yours faithfully
MARSDENS LAW GROUP

DAVID BAIRD
Partner

Encl.

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16 February 2010

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ATTENTION: DAVID BAIRD

Dear Sirs

RE: AEKLIG PTY. LIMITED & TWEED SHIRE COUNCIL
ATS. HASTINGS POINT PROGRESS ASSOCIATION INC.
HIGH COURT OF AUSTRALIA – NO. S270 OF 2009

We wish to advise that the special leave application by Hastings Point Progress Association Inc, was refused with costs on Friday 12th February 2010.

While we are still awaiting the outcome of the Court of Appeal reconsideration of costs for that matter, the decision of the High Court on the 12th February 2010 brings the process of appeal to a conclusion.

Our client will be vigorously chasing the Association and the individual committee members in regards to the costs issue.

Yours faithfully
STACKS//THE LAW FIRM

Per:

Mark Delany
Solicitor

New South Wales
Court of Appeal

CITATION:	**Hastings Point Progress Association Inc v Tweed Shire Council (No 2) [2009] NSWCA 404**
HEARING DATE(S):	On the papers
JUDGMENT DATE:	10 December 2009
JUDGMENT OF:	McColl JA at 1; Young JA at 1; Basten JA at 13
DECISION:	1. Motion dismissed. 2. Costs of the motion reserved. 3. Appellant to file and serve written submissions and any evidence in support addressing the issue of the costs of the appeal and the motion on or before 18 December 2009. 4. Second respondent to file and serve written submissions addressing the issue of the costs of the appeal and the motion on or before 15 January 2010. 5. Appellant to file and serve any written submissions in reply on or before 22 January 2010.
CATCHWORDS:	PROCEDURE – judgments and orders – amending orders – application to amend orders from dismissing appeal to allowing appeal – inherent jurisdiction of Court to correct order – Uniform Civil Procedure Rules 2005 (NSW), 36.17
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 (NSW) State Environmental Planning Policy (Seniors Living) 2004 Tweed Local Environmental Plan 2000 Uniform Civil Procedure Rules 2005 (NSW)
CATEGORY:	Consequential orders
CASES CITED:	Brooker v Friend & Brooker Pty Ltd (No 2) [2008] NSWCA 129 Hastings Point Progress Association Inc v Tweed Shire Council [2009] NSWCA 285; (2009) 168 LGERA 99 Newmont Yandal Operations Pty Ltd v J Aron Corp [2007] NSWCA 195; (2007) 70 NSWLR 411
PARTIES:	Hastings Point Progress Association Inc - Appellant Tweed Shire Council - First Respondent Aeklig - Second Respondent
FILE NUMBER(S):	**CA** 40279 of 2008

COUNSEL:	P Greenwood SC/A Pickles – Appellant P J McEwen SC/Dr S Berveling – Second Respondent
SOLICITORS:	Environmental Defender's Office, Lismore – Appellant Marsdens Law Group – First Respondent Stacks/Gray, Murwillumbah – Second Respondent
LOWER COURT JURISDICTION:	Land & Environment Court
LOWER COURT FILE NUMBER(S):	LEC 40785/07
LOWER COURT JUDICIAL OFFICER:	Pain J
LOWER COURT DATE OF DECISION:	6 June 2008
LOWER COURT MEDIUM NEUTRAL CITATION:	[2008] NSWLEC 180

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA No: 40279/08
LEC No: 40785/07

McColl JA
Basten JA
Young JA

10 December 2009

Hastings Point Progress Association Inc v Tweed Shire Council & Anor (No 2)

Judgment

1 McCOLL and YOUNG JJA: Judgment in this matter dismissing the appeal by majority (McColl and Young JJA, Basten JA dissenting) was delivered on 11 September 2009: *Hastings Point Progress Association Inc v Tweed Shire Council* [2009] NSWCA 285; (2009) 168 LGERA 99 ("*Hastings 1*"). By motion filed on 13 October 2009 the appellant sought orders pursuant to Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") 36.17 vacating the orders made on 11 September 2009, and in lieu allowing the appeal and requiring the second respondent to pay its costs of the appeal. In the alternative to the costs order it proposed, the appellant sought an order that the costs order be vacated with the parties being given the opportunity to be heard on costs. This was because if successful on its primary application that the appeal should be allowed, the respondent had not hitherto resisted an order that costs should follow the event.

2 The parties then exchanged written submissions pursuant to directions made by the Registrar of the Court of Appeal. In its submissions in reply, the appellant indicated its application was not limited to reliance on UCPR 36.17. This was wise as prima facie the application was outside the ambit of the slip rule. The appellant sought to amend its motion to indicate it also sought to invoke the inherent jurisdiction of the Court to correct an order which did not reflect the intent and meaning of the Court: *Newmont Yandal Operations Pty Ltd v J Aron Corp* [2007] NSWCA 195; (2007) 70 NSWLR 411.

3 The parties advised the Registrar that they were content for the Court to deal with the notice of motion on the basis of the written submissions, although in the event it became necessary for the question of costs to be argued (paragraph [12], second respondent's submissions), counsel sought the opportunity to make further written submissions in that respect.

4 Broadly speaking, the appeal concerned the interaction between cl 17 of the State Environmental Planning Policy (Seniors Living) 2004 ("SEPP – SL") and cl 8 of the Tweed Local Environmental Plan 2000 ("TLEP 2000") and the effect of s 36 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EP&A Act"). The majority concluded that cl 8 mandated refusal of the application and was, therefore inconsistent with cl 17 of SEPP – SL: *Hastings 1*, per McColl JA (at [8]); per Young JA (at [94]); cf Basten JA (at [51] – [55]).

The order dismissing the appeal

5 The appellant contends the substituted order for which it contends is supported by reference to Basten JA's statement that "[i]t was common ground between the parties that if the appellant were correct and cl 8(1) applied, the decision of the Land and Environment Court should be set aside and the matter remitted to that Court to determine whether in fact the Council had failed to be satisfied of the matters identified in cl 8(1)": *Hastings 1* (at [13]).

6 The respondent challenges the appellant's reliance upon Basten JA's observation, contending that it should be read literally, that is to say, to mean that the course there identified as common ground flowed if the appellant successfully challenged the proposition that there was inconsistency between cl 8 and the SEPP-SL.

7 In our view the appellant has not identified any matter which would attract the relief it seeks. The order that the appeal be dismissed reflected the appellant's failure to sustain its central argument that cl 8 of the TLEP 2000 was not inconsistent with the SEPP – SL.

8 We should add that in dealing with the application on its merits, we are not to be taken as acknowledging that the inherent jurisdiction referred to in *Newmont Yandal* was attracted. There is public interest in the final disposal of appeals as soon as possible. The Court expects that if a party considered that there is some inadvertent error in the court's reasons, the same will be raised when judgment is delivered or within 14 days thereafter. The Court would usually only intervene in the clearest case after that period.

Costs

9 At the close of submissions on the appeal, the appellant asked the Court to reserve liberty to apply on the issue of costs on the basis there may be public interest questions which would need to be addressed by evidence if necessary. This was overlooked when judgment was delivered and, regrettably, counsel who were present when judgment was delivered did not draw the Court's attention to the oversight. The respondent does not object to that course being pursued now, notwithstanding that no application for costs relief was made until more than a month after

judgment was delivered.

10 The appellant also asks that the existing costs order be vacated. It is not appropriate to do that at this stage. Whether or not that course should be taken will depend on the court's consideration of the written submissions.

11 Save as to the issue of costs, the motion should be dismissed. Having regard to the fact the appellant is being given leave to address the issue of costs, it is appropriate to reserve the costs of the motion too with the intent that the written submissions to be filed as to the costs of the main appeal also address the issue of the costs of the motion.

Orders

12 The following orders should be made:

1. Motion dismissed.
2. Costs of the motion reserved.
3. Appellant to file and serve written submissions and any evidence in support addressing the issue of the costs of the appeal and the motion on or before 18 December 2009.

4. Second respondent to file and serve written submissions addressing the issue of the costs of the appeal and the motion on or before 15 January 2010.

5. Appellant to file and serve any written submissions in reply on or before 22 January 2010.

13 BASTEN JA: I agree that the parties should have an opportunity to provide written submissions (and evidence if appropriate) in relation to the issue of costs of the appeal. I agree with the directions proposed in the joint judgment giving effect to that conclusion.

14 So far as the motion filed on 13 October 2009 sought orders vacating the orders made on 11 September, and in place thereof allowing the appeal with costs, I express no view, as the orders proposed were those which I would have made in accordance with my judgment delivered on that date: see *Brooker v Friend & Brooker Pty Ltd (No 2)* [2008] NSWCA 129 at [94].

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Last Modified: 11/12/2009

New South Wales
Court of Appeal

CITATION:	**HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL [2009] NSWCA 285**
HEARING DATE(S):	1 May 2009
JUDGMENT DATE:	11 September 2009
JUDGMENT OF:	McColl JA at 1 Basten JA at 11 Young JA at 70
DECISION:	Appeal dismissed with costs
CATCHWORDS:	ENVIRONMENT AND PLANNING – planning schemes and instruments – consistency of instruments – construction and interpretation – meaning of 'inconsistency' – Local Environmental Plan – State Environmental Planning Policy – whether permission under Policy inconsistent with prohibition under Plan – whether Policy intended to operate as exclusive code – whether Policy mandated consent when development proposal in accordance with terms of Policy STATUTORY INTERPRETATION – environment and planning – meaning of 'inconsistency' – *Environmental Planning and Assessment Act 1979* (NSW), s 36 WORDS & PHRASES – 'consent considerations' – 'cumulative impact' – 'development consent' – 'environmental planning instrument' – 'general presumption'
CATEGORY:	Principal judgment
FILE NUMBER(S):	**CA** 40279/09
PARTIES:	Hastings Point Progress Association Inc – Appellant Tweed Shire Council – First Respondent Aeklig Pty Ltd – Second Respondent

LEGISLATION CITED:	Constitution, s 109 *Environmental Planning and Assessment Act 1979* (NSW), ss 4, 36, 37, 39, 69, 70, 78A, 79C, 80, 117; Pt 4, Divs 1, 2 *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW), Sch 2(5) State Environmental Planning Policy (Seniors Living) 2004, cll 2, 4, 5, 16, 17, 18, 19, 25, 26, 27, 28, 38, 39, 53, 79; Ch 3, Pts 2-7 Tweed Local Environmental Plan 2000, cll 8, 11
CASES CITED:	*Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 *Butler v Attorney-General (Vic)* [1961] HCA 32; 106 CLR 268 *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52 *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1994) 84 LGERA 324 *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 *DEM (Australia) Pty Ltd v Pittwater Council* [2004] NSWCA 434; 136 LGERA 187 *Ferdinand v Commissioner for Public Employment* [2006] HCA 5; 225 CLR 130 *Franklins Ltd v Penrith City Council* [1999] NSWCA 134 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39 *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 *Parramatta City Council v Hale* (1982) 47 LGERA 319 *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56
TEXTS CITED:	Blackshield T and Williams G, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) at 376 Pearce D C and Geddes R S, *Statutory Interpretation in Australia* (2006, 6th ed) at [4.42]
COUNSEL:	P Greenwood SC/A Pickles – Appellant P J McEwen SC/Dr S Berveling – Second Respondent
SOLICITORS:	Environmental Defender's Office, Lismore – Appellant Marsdens Law Group – First Respondent Stacks/Gray, Murwillumbah – Second Respondent
LOWER COURT JURISDICTION:	Land & Environment Court

LOWER COURT FILE NUMBER(S):	LEC 40784/07
LOWER COURT JUDICIAL OFFICER:	Pain J
LOWER COURT DATE OF DECISION:	6 June 2008
LOWER COURT MEDIUM NEUTRAL CITATION:	*Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 180

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40279/08
LEC 40785/07

McCOLL JA
BASTEN JA
YOUNG JA

11 September 2009

HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL

Headnote

On 8 May 2007 the Tweed Shire Council granted development consent in response to an application seeking approval for a "proposed seniors living facility" in Hastings Point, lodged by the respondent (Aeklig Pty Ltd) on 27 April 2006. This application was made under the State Environmental Planning Policy (Seniors Living) ("the SEPP-SL"), though it also addressed relevant requirements of the Tweed Local Environmental Plan 2000 ("the TLEP") amongst other environmental planning instruments. Clause 5(3) of the SEPP-SL stated that in the event of inconsistency between it and any other environmental planning instrument the SEPP-SL was to prevail to the extent of the inconsistency. Section 36 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EP&A Act") provides that in the event of inconsistency, the SEPP-SL would be generally presumed to prevail over the TLEP.

In the Land and Environment Court the appellant sought to challenge the validity of that consent on the basis that the Council failed to consider, and satisfy itself of one of the requirements set out in cl 8(1) of the TLEP, namely 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". Pain J upheld the grant of consent on the basis of a potential for inconsistency to arise between cl 8(1) of the TLEP, which could give rise to a refusal of consent, and cl 17 of the SEPP-SL, which permitted the development to occur. The appellant brought an appeal to this Court challenging her Honour's decision.

The issue for determination on appeal was the correct approach to ascertaining the existence of an inconsistency for the purposes of s 36 of the EP&A Act and cl 5(3) of the SEPP-SL.

Held, dismissing the appeal:
(per McColl JA):

1. Where cl 8(1) of the TLEP mandates that the Council refuse consent to development unless the three conditions to which it refers are satisfied, and cl 17 of the SEPP-SL permits the development to which it refers despite the provisions of any other instrument if the development is carried out in accordance with the SEPP-SL, the two clauses are incapable of concurrent operation, and inconsistency arises as between them: [8].

    Coffs Harbour Environment Centre Inc v Minister for Planning (1994) 84 LGERA 324; *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; 155 LGERA 52, cited.

(per Basten JA, dissenting):

2. Inconsistency may arise where an intention to cover the field is discernible on the part of the instrument having paramountcy. It may also arise where a requirement found in one environmental planning instrument prohibits a particular use on land to which another instrument applies which permits that use. Where the provisions of the SEPP-SL do not demonstrate an intention to cover the field, and are silent on the subject matter giving rise to a refusal of consent under cl 8(1)(c), no inconsistency can be said to arise: [51]–[55].

    Coffs Harbour Environment Centre Inc v Minister for Planning (1994) 84 LGERA 324; *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284, considered.

    Parramatta City Council v Hale (1982) 47 LGERA 319; *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31; *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565; *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39; *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56, referred to.

(per Young JA):

3. The cumulative effect of cll 2(2) and 17 of the SEPP-SL is to impart to the SEPP-SL an aim to encourage the development of certain housing by overriding planning controls that would prevent such development. Clause 8(1) of the TLEP purports to remove the power of a council to consent to an application which complies with the SEPP-SL, but which neglects to address 'cumulative impact', and accordingly gives rise to an inconsistency: [94] – [96].

    Currey v Sutherland Shire Council 91998) 100 LGERA 365; *Franklins Ltd v Penrith City Council* [1999] NSWCA 134; *DEM (Australia) Pty Ltd v Pittwater council* [2004] NSWCA 434; 136 LGERA 187, referred to.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40279/08
LEC 40785/07

McCOLL JA
BASTEN JA
YOUNG JA

11 September 2009

HASTINGS POINT PROGRESS ASSOCIATION INC v TWEED SHIRE COUNCIL

Judgment

1 **McCOLL JA**: I have read the reasons in draft of Basten JA and Young JA. The history of the litigation is sufficiently set out in their reasons and I shall not repeat it. In short it concerned the proper construction of cl 17 of the State Environmental Planning Policy (Seniors Living) 2004 ("SEPP – SL") and cl 8 of the Tweed Local Environmental Plan 2000 ("TLEP 2000").

2 Basten JA has identified at [54] the issue on appeal as being "in substance, whether the Policy precludes the consent authority taking into account any consideration which is not identified in [it]".

3 With respect, that was not the issue. The critical issue on appeal was whether cl 8 of the TLEP 2000 was inconsistent with cl 17 of SEPP – SL for the purposes of s 36 of the *Environmental Planning and Assessment Act* 1979 (NSW) (the "EP Act") because it mandated refusal of a development which nevertheless was to be carried out in accordance with SEPP-SL.

4 Thus, the issue was not whether SEPP – SL mandated the grant of development consent in the event the respondent submitted a development which accorded with its provisions. Rather, the question was

whether cl 8 was inconsistent with cl 17 of the SEPP – SL because it mandated refusal of consent to the respondent's proposed development if it failed to comply with any of its provisions.

5 It is unnecessary, in my view, to engage in a semantic analysis of the meaning of the word "inconsistency". In the present case it carries its plain meaning – whether cl 8 of the TLEP 2000 and cl 17 of the SEPP – SL could operate concurrently: *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1994) 84 LGERA 324 (at 331) per Kirby P; *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164; (2007) 155 LGERA 52 (at [41]) per Tobias JA (Bell J agreeing).

6 Relevantly one can distil from Basten JA's reasons, the following propositions with which I agree:

(a) when any environmental planning instrument is relevant to a particular proposed development, it is required to be taken into account pursuant to s 79C of the EP Act;

(b) in considering whether to grant approval for a development which falls under the SEPP – SL, the consent authority must also take into consideration the matters set out in s 79C(b) – (e);

(c) it thus follows that the fact that a development proposal to which SEPP-SL applies accords with its provisions does not mandate that it be granted consent;

(d) accordingly, the fact that a consent authority has power to grant consent for a development which accords with the requirements of SEPP-SL does not prevent it, in the exercise of its discretion, from refusing to grant that consent;

(e) the distinction drawn by Preston CJ in *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC

284 referred to by Basten JA at [52] between the existence of the power to consent and the manner of its exercise as reflected in the present case, is reflected in proposition (d) above.

7 Had cl 8 of the TLEP 2000 been drafted in a manner which required the Tweed Shire Council to take into consideration the factors to which it referred, there would have been no inconsistency in the sense to which I have referred between it and cl 17 of the SEPP – SL.

8 However, as Young JA points out at [94] that is not how cl 8(1) is drafted. It mandates that the Council may grant consent to development only if the three conditions to which it refers are satisfied. In other words, it mandates that consent be refused unless each of those conditions are satisfied. That provision cannot, in my view, operate concurrently with cl 17 of SEPP – SL which permits the development to which it refers "despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy".

9 This is not to say that the consent authority is not required by s 79C to take those conditions into account in its consideration of a development that otherwise complies with SEPP-SL. But having done so, the consent authority has a discretion to grant consent, notwithstanding that it is not satisfied of each of the three conditions in cl 8(1). The inconsistency arises because cl 8(1) mandates refusal in those circumstances.

10 I agree with the orders Young JA proposes.

11 **BASTEN JA**: On 27 April 2006 the second respondent, Aeklig Pty Ltd ("the respondent"), lodged a development application with the first respondent Tweed Shire Council ("the Council"), seeking approval for a "proposed seniors living facility" on Coast Road near Hastings Point in northern New South Wales. The proposed development involved 84 independent living units, 94 hostel units and a residential care facility with 67 beds. With the application to Council, the agent for the developer

lodged a statement of environmental effects which, while asserting that the proposal would be developed under the State Environmental Planning Policy (Seniors Living) ("the SEPP-SL" or "the Policy"), also addressed relevant requirements of the Tweed Local Environmental Plan 2000 ("the TLEP"), the North Coast Regional Environmental Plan 1988, other State environmental planning policies concerning development standards, coastal wetlands and remediation of land, and relevant development control plans applicable to the area.

12 On 8 May 2007 the Council gave consent to the application. The appellant sought to challenge the validity of that consent in the Land and Environment Court on the basis, critically for present purposes, that the Council failed to satisfy itself 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". The obligation to be so satisfied was sourced to cl 8(1)(c) of the TLEP. The primary judge, Pain J, dismissed the application on the basis that the requirement in the TLEP was inconsistent with the terms of the SEPP-SL and was not, therefore, applicable to the development: see *Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 180 at [65].

13 The appellant asserts that the primary judge misapprehended the interrelationship of the relevant environment planning instruments and erred in concluding that cl 8(1) of the TLEP did not constrain the Council's power to consent to the development. It was common ground between the parties that if the appellant were correct and cl 8(1) applied, the decision of the Land and Environment Court should be set aside and the matter remitted to that Court to determine whether in fact the Council had failed to be satisfied of the matters identified in cl 8(1). The Council took no part in the proceedings, in accordance with the principles stated in *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 at [12] (Gaudron and Gummow JJ).

Legal structure of planning controls

14 The legal structure of planning control in this State is primarily found in the *Environmental Planning and Assessment Act 1979* (NSW) ("the EP&A Act"). Again in general terms, the EP&A Act envisages that development may be identified by reference to three categories, namely that which does not need consent, that which does need consent and that which is prohibited: EP&A Act Pt 4, Div 1. To identify the category into which a particular development falls it is necessary to ascertain the effect of the relevant environmental planning instrument. For most purposes, that will be determined by looking to the local environmental plan and ascertaining the zoning provisions with respect to the particular land to be developed.

15 The EP&A Act further provides that a person may apply to a consent authority for consent to carry out development: s 78A. Consideration of such an application is governed by subsequent provisions in Pt 4, Div 2, including, relevantly for present purposes, s 79C(1) which provides:

> **"79C Evaluation**
>
> (1) **Matters for consideration — general**
>
> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
>
> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> ...
>
> (iii) any development control plan ...
>
> that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest."

16 The term "environmental planning instrument" is defined to mean a State environmental planning policy, a regional environmental plan, or a local environmental plan: s 4(1), ***environmental planning instrument***.

17 A critical issue in the present case was whether cl 8 of the TLEP applied to the land: whether or not it did depended in part on the effect of the SEPP-SL. The answer to that question required consideration of the terms of each instrument, and their interrelationship.

18 A State environmental planning policy is made by the Governor, on recommendation of the Minister, by reference to a draft policy prepared by the Director-General: EP&A Act, ss 37 and 39.

19 A local environmental plan is made by the Minister after considering a report by the Director-General under s 69 of the EP&A Act: see s 70. The plan may be in accordance with a draft submitted by the council, or may contain "such alterations as the Minister thinks fit relating to any matter which in the opinion of the Minister is of significance for State or regional environmental planning": s 70(1)(a)(ii). Section 69 reads, in part, as follows:

"**69 Report by Director-General**

(1) The Director-General shall furnish a report to the Minister as to:

(a) whether the draft local environmental plan submitted under section 68(4) is inconsistent with any State environmental planning policy, regional environmental plan, or relevant direction under section 117, applying to the land to which the draft plan applies,

(b) if there is such an inconsistency—whether the inconsistency is justifiable in the circumstances,

...

(d) the relationship between the draft plan, and other proposed and any existing environmental planning instruments, and any relevant directions under section 117, applying to the land to which the draft plan applies ...."

20 Section 117 empowers the Minister to give directions to a council with respect to the content of a draft local environmental plan. (No such direction was given in the present case.) Significantly, both ss 69 and 70 envisage that there may be inconsistency between a local environmental plan and a State policy. They do not provide for resolution of that inconsistency. That is dealt with by s 36 which reads as follows:

"**36 Inconsistency between instruments**

(1) In the event of an inconsistency between environmental planning instruments and unless otherwise provided:

(a) there is a general presumption that a State environmental planning policy prevails over a regional environmental plan or local environmental plan made before or after the policy, and

(b) there is a general presumption that a regional environmental plan prevails over a local environmental plan made before or after the regional environmental plan, and

(c) the general presumptions of the law as to when an Act prevails over another Act apply to when one kind of environmental planning instrument prevails over another environmental planning instrument of the same kind.

(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved."

21 The proper application of s 36 gives rise to a number of questions, including the following:

(a) how is the existence of an "inconsistency" to be determined?

(b) what is the status of the relevant "general presumption"?

(c) where should one look to find provision "otherwise" than that contained in s 36(1) itself?

22 In the present case, the TLEP was made in 2000, and therefore before the SEPP-SL, which was promulgated in 2004. If there were inconsistency between the TLEP and SEPP-SL it would not have been identified by the Director-General under s 69 when considering a draft of the TLEP.

23 In considering the operation of s 36, it is convenient to note that, in the course of its history, it has undergone a number of striking changes. As enacted, s 36 read as follows:

> **"Inconsistency between instruments**
>
> **36** In the event of an inconsistency between environmental planning instruments, then, to the extent of the inconsistency and unless otherwise provided:
>
> (a) there is no general presumption that:
> (i) a State environmental planning policy prevails over a regional environmental plan or a local environmental plan; or
> (ii) a regional environmental plan prevails over a local environmental plan; and
> (b) the provisions of a later instrument prevail over the provisions of an earlier instrument, unless the contrary intention appears."

24 In 1996, a new provision was inserted in the following terms:

> **"36 Inconsistency between instruments**
>
> (1) In the event of an inconsistency between environmental planning instruments, then, to the extent of the inconsistency and unless otherwise provided:
>
> (a) there is no general presumption that an environmental planning instrument of one kind prevails over an environmental planning instrument of another kind, and

(b) the provisions of a later environmental planning instrument prevail over those of an earlier environmental planning instrument, whether of the same or a different kind.

(2) A State environmental planning policy prevails over a regional environmental plan or a local environmental plan made before or after the policy to the extent of any inconsistency, if the policy expressly so provides.

(3) A regional environmental plan prevails over a local environmental plan made before or after a regional environmental plan to the extent of any inconsistency, if the regional environmental plan expressly so provides.

(4) Nothing in this section prevents an environmental planning instrument from being expressly amended by a later environmental planning instrument, of the same or a different kind, to provide for the way in which an inconsistency between them is to be resolved."

25 Section 36 achieved its present form through amendments contained in the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW), Sch 2(5). No explanation of the significant changes in the provision were given by the Minister in the second reading speech, which was relevantly limited to the following observations (Hansard, Legislative Council, 9 June 2005, p 16,768):

> "The amendments in schedule 2 to the bill will support those reforms to simplify and modernise statutory land use planning. The amendments do not involve a radical rewrite of part 3 of the Act and are limited to changes necessary for delivering major elements of the reform program."

The major elements of the reform program appear to have been directed to the streamlining of approvals for critical infrastructure projects.

26 At least since the 1996 amendments, the section expressly envisaged that an environmental planning instrument might itself provide the manner in which an inconsistency was to be resolved. Absent other provision in the EP&A Act or the regulations made under it, or any other relevant legislation, it may be assumed that 'provision otherwise', referred to in

s 36(1), was intended to include such provision in an instrument. No doubt such a provision could be made in a local environmental plan with respect to a State environmental planning policy, so as to overcome the general presumption, because the plan would only be made with the approval of the Minister and after consideration by the Director-General. There was no such provision in the present case; rather, as will be seen shortly, SEPP-SL contained a provision consistent with the general presumption identified in s 36(1)(a).

27 The legislative scheme concludes (relevantly for present purposes) with the imposition on the consent authority of an obligation to determine a development application either by granting or refusing consent: s 80(1). That obligation is qualified in various ways by subsequent provisions, but none are relevant for present purposes.

The relevant instruments

28 This case requires the consideration of specific provisions in two environmental planning instruments. The earlier in time, the TLEP contained two relevant provisions. The first involved the zoning of the land the subject of the development application.

29 The TLEP listed the subject land under zone 2(c), which provided that the buildings, works and uses proposed in the application were allowable only with consent: see TLEP, cl 11, Table, zone 2(c) urban expansion, item 2. One form of development permitted only with consent was that of "dwelling houses if each is on an allotment of at least 450m^{2}". Had the proposed development been limited to "environmental facilities" it would have been allowed in this zone without consent; if it had involved certain other forms of development, it would have fallen either within item 3, which permitted development only in accordance with the provisions of cl 8(2), or item 4, which identified prohibited uses.

30 Zone 2(c) was entitled "urban expansion" and the primary zone objective was identified in the following terms:

"To identify land for urban expansion (which will comprise mainly residential development focused on multi-use neighbourhood centres) and to ensure its optimum utilisation consistent with environmental constraints and the need to minimise residential landtake."

31 The other relevant provision of the TLEP was cl 8 which, so far as relevant provided:

> "8 **Consent considerations**
>
> (1) The consent authority may grant consent to development ... 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."

32 It is the requirement in cl 8(1)(c), which was the focus of the present case. It was that which Pain J determined was "inconsistent" with relevant provisions of SEPP-SL. It is necessary, therefore, to turn to the Policy.

33 SEPP-SL, as promulgated in March 2004, replaced an earlier policy entitled "Housing for older people or people with a disability". There seems to have been some vacillation as to sensitivities, as, having changed the name to "Seniors Living" in 2004, the current name of the Policy refers to "Housing for Seniors or People with a Disability". It is convenient for present purposes to use the title in force at the date of the development application, which was lodged in April 2006. The Policy has been significantly amended since that date but cl 53(1) of the current Policy provides that the amendments do not apply to a development application which had been lodged, but not finally determined, before the commencement of the amending instrument. It was common ground

between the parties that the present application had not been finally determined at the date of the amendments, namely 12 October 2007.

34 Clause 4(1) of the SEPP-SL stated:

> "4 **Land to which Policy applies**
>
> (1) This Policy applies to land within New South Wales:
>
> (a) that is zoned primarily for urban purposes or that adjoins land zoned primarily for urban purposes, and
>
> (b) on which development for the purpose of any of the following is permitted:
>
> (i) dwelling houses ...."

35 The operation of the SEPP-SL was dependent upon the relevant local environmental plan, the zoning under that plan and the category of development applicable under the plan. Chapter 3 was headed "Development for seniors housing". It included cl 18, in the following terms:

> "18 **Development consent required**
>
> Development allowed by this Chapter may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent."

36 The appellant drew attention to cl 16 of the SEPP-SL which provided that the objective of Ch 3 "is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frailer, and other people with a disability regardless of their age". That objective, the appellant noted, did not seek to prescribe an exclusive approach to the consideration of a development application for seniors housing, nor did it preclude reference to other provisions of relevant environmental planning instruments. So much may be accepted;

nevertheless, the SEPP-SL did identify conditions with which development applications must comply and conditions with which they need not comply.

37 Clause 17 is also of significance for the present case and read:

> "**17 What Chapter does**
>
> This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:
>
> (a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and
>
> (b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel or a residential care facility."

38 Consistently with the terms of cl 17, cl 5(3) specified the relationship between the SEPP-SL and other instruments:

> "**5 Relationship to other Environmental Planning Instruments**
>
> ...
>
> (3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency."

39 Both parties referred in the course of argument to the terms of cl 2. It is a matter which is to be taken into account in construing other provisions in the Policy and should therefore be set out in full:

> "**2 Aims of Policy**
>
> (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:

(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
(b) make efficient use of existing infrastructure and services, and
(c) be of good design.

(2) These aims will be achieved by:

(a) setting aside local planning controls that prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
(b) setting out design principles that should be followed to achieve built form that corresponds to the characteristics of its site and form, and
(c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes."

Contentions of parties

40 The primary question for determination is whether cll 5(3) or 17 (or both in combination) of the Policy operated so that:

(a) any development proposal to which the Policy applied and which was in accordance with its terms must be given consent by the relevant consent authority, or

(b) any proposal to which the Policy applied and which was in accordance with its terms might obtain approval from the relevant consent authority, but the requirements of other relevant environmental planning instruments may still be taken into consideration when deciding whether to grant or refuse consent to the proposal.

The respondent contended for (a), while the appellant contended that (b) was the proper approach.

41 There may be a third possibility, namely that a development proposal that accords with the Policy may be refused based on considerations permitted under other legislation or environmental planning instruments, but cannot be the subject of mandatory refusal, even on grounds not addressed by the Policy. Why that should be considered a significant distinction is unclear. Once it is accepted that a council is entitled to consider other factors (not addressed by the Policy) it would seem to follow that a council may refuse consent on such a ground. If it may refuse consent (that not being inconsistent with the Policy), an obligation to refuse consent on the same basis will not be inconsistent with the Policy. To describe the Policy as 'permissive' and cl 8 as 'preclusive' is to invoke a semantic characterisation at too high a level of generality; it fails to pay regard to the actual scope of inconsistency, discussed below at [51]-[53].

42 The respondent sought to put a similar argument, submitting that the Policy did not constitute a code of relevant and irrelevant considerations, except to the extent that any permissible consideration which might lead the consent authority to reject an application which was in accordance with the Policy, would itself be inconsistent with the Policy and therefore ineffective. However, a gloss in those terms is misconceived. Either a council has power to consider factors in accordance with the local environmental plan, which might lead it to exercise its discretion against grant of approval, or it does not. It makes little sense to say that a factor can be considered but only to the extent that it favours approval of the proposal.

43 Although the agent for the respondent asserted in the statement of environmental effects that the application was made "under" the provisions of the SEPP-SL, the application was in fact made under s 78A of the EP&A Act. As the appellant contended, the Council was required to determine the application in accordance with s 79C of the EP&A Act. That required the Council to take into consideration each environmental planning instrument of relevance to the subject of the application:

s 79C(1)(a)(i). That, the appellant contended, required consideration of the TLEP.

44 That argument took the matter little further: in its terms it was correct, but the statutory provision was clearly intended to pick up only those parts or provisions of a relevant planning instrument which "apply" to the subject of the application. If a provision of the TLEP was not applicable to the current application because it was inconsistent with the SEPP-SL, its consideration was not required by s 79C.

Approach in Court below

45 In the Land and Environment Court, Pain J appears to have come to the conclusion that cl 8(1)(c) did not apply because inconsistent with the SEPP-SL on the basis of three interrelated propositions: see [2008] NSWLEC 180 at [57]-[59]. First, her Honour stated at [57]:

> "Clause 17(a) of SEPPSL ... applies so that no environmental planning instrument can prevent a development if it is carried out in accordance with the SEPPSL."

46 Secondly, her Honour found that there was a clear intention that SEPP-SL have "primacy" over other environmental planning instruments: at [57] (first sentence) and [59] (first sentence). It is not entirely clear whether that was a second basis for rejecting the appellant's contentions. If it were, it operated at a level of generality which was only consistent with the Policy constituting an exclusive code as to the relevant criteria.

47 The third limb in the reasoning, which may be a part of the second, held that there was "a potential inconsistency between SEPPSL and the application of cl 8 of the TLEP", to the extent that the application of cl 8 could give rise to a refusal of a development which is in accordance with the Policy. In substance, this was no more than the specific application of the exclusive code construction.

Determination of issue

48 The parties approached this case primarily on the basis that it turned upon a proper understanding of the meaning of "inconsistency" in cl 5(3) of the Policy. However, on one view, to commence with either or even both of the environmental planning instruments was a misconception. Primacy must be given to the statutory scheme in the EP&A Act: unless that Act permits otherwise, an instrument made under it cannot affect its operation. On that approach, it would be necessary to consider the relationship between the various factors which, to the extent that they are relevant, are mandatory considerations prescribed by s 79C(1). Thus, although an environmental planning instrument may affect aspects of the considerations identified in pars (b)-(e) of the subsection, arguably it cannot remove the obligation of the consent authority to take such matters into account. On that approach, it is not possible for a State environmental planning policy, or a local environmental plan, to mandate the outcome of the consent authority's consideration by restricting the matters to which it is required to have regard: cf *Parramatta City Council v Hale* (1982) 47 LGERA 319. As that approach raises large questions as to the scope of an environmental planning instrument to limit the operation of s 79C, and as that was not the way in which this case was argued it is necessary to leave that approach out of consideration, at least for the present.

49 A seminal discussion of the concept of "inconsistency" in the present context (albeit with reference to an earlier form of s 36) is to be found in *Coffs Harbour Environment Centre Inc v Minister for Planning* (1994) 84 LGERA 324. Kirby P noted a matter warranting comment as the need to construe the term "inconsistency" in s 36 "having regard to the ordinary meaning of the word": at 331. His Honour continued:

> "The resolution of this dispute requires only that the word 'inconsistency' be given its ordinary and natural meaning without the gloss which has necessarily developed around the meaning of the word in a constitutional setting. Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is 'want of consistency or congruity';

'lack of accordance or harmony' or 'incompatibility, contrariety, or opposition' with another environmental planning instrument."

50 The other members of the Court (Mahoney JA and Sheller JA) did not resort to synonyms; nor is it clear that any great assistance is achieved by substituting consideration of a number of words for the one used in the statute. The synonyms raise variations in connotation which tend to distract.

51 Nevertheless it is not self-evident that no assistance is to be gained from the discussions of the concept of inconsistency in the context of s 109 of the Constitution. Context and purpose is an important point of distinction: the constitutional provision gives primacy to the law of the Commonwealth over an inconsistent State law, a principle of paramountcy which is not necessarily reflected when judging inconsistency of State laws: see *Butler v Attorney-General (Vic)* [1961] HCA 32; 106 CLR 268 at 276 (Fullagar J). On the other hand, it is also necessary to distinguish the approach to inconsistency adopted when seeking to reconcile the provisions of two statutes of the same legislature, or identify the extent of any implied repeal: see *Ferdinand v Commissioner for Public Employment* [2006] HCA 5; 225 CLR 130 at [47]-[49]. This is a case where paramountcy is to be accorded to one instrument over another where inconsistency is established. In undertaking that task, it may be of assistance to characterise potential inconsistency by reference to one of the three broad approaches identified in Blackshield T and Williams G, *Australian Constitutional Law and Theory* (Federation Press, 4th ed, 2006) at 376 in the following way:

(1) the impossibility of obedience to both laws, as in the case of an obligation combined with a prohibition;

(2) the conferral of a power by one law and its removal or diminution by another, and

(3) a discernable intention to "cover the field", on the part of the law having paramountcy.

52 A clear example of inconsistency would be a case in which the zoning requirement in a local environmental plan prohibited a particular use on land to which the Policy applied and with respect to which that use was permitted with consent: see *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 at [33] (Preston CJ).

53 The Policy also contains provisions which prohibit consent in certain circumstances: eg, cll 19, 25, 26, 27, 28, 38, 39. If, under the local environmental plan, consent could be given in such circumstances, there would be direct inconsistency between the Policy and the plan. That, however, is not the present case.

54 The issue in the present case is, in substance, whether the Policy precludes the consent authority taking into account any consideration which is not identified in the Policy. Although the term can be imprecise, one way of describing that situation is to identify the Policy as a "code" in respect of the criteria for assessment of developments to which it applies. Another way of describing that result is that the Policy was intended to "cover the field" of relevant and irrelevant considerations with respect to such development.

55 The provision primarily relied upon in support of that conclusion was cl 17, set out at [37] above. On one view the opening words of the clause ("This Chapter allows") mean that the consent authority is required to give consent to a development proposal to be carried out "in accordance with" the Policy. However, read in context, that is an implausible construction. The preceding provision, cl 16, describes the objective of the chapter as "to create opportunities for the development of housing" for seniors and those with disabilities. The subsequent provision, cl 18, expressly requires that consent is a necessary precondition for such development: see at [35]. The following clauses, as already noted, include a large number of

prohibitions on the grant of consent, but nowhere is there a clause expressly saying that if the requirements of the Policy are complied with the consent authority must give consent.

56 The subsequent Parts of Ch 3 are as follows:

> "Part 2 Site-related requirements
>
> Part 3 Design requirements
>
> Part 4 Development standards to be complied with
>
> Part 5 Development on land adjoining land zoned primarily for urban purposes
>
> Part 6 Development for vertical villages
>
> Part 7 Development standards that cannot be used as grounds to refuse consent."

57 Part 7 is significant in this context. It contains different divisions for different facilities. Division 2 refers to residential care facilities and identifies as grounds on which consent cannot be refused standards with respect to (a) building height; (b) density and scale; (c) landscaped area and (d) parking for residents and visitors. If the Policy were intended to provide a code, or an exclusive statement of the requirements for such development, one might expect that Part 7 would prohibit refusal of consent on any ground outside the terms of the Policy. It does not do so.

58 Furthermore, the kinds of matters dealt with in the Policy are almost entirely site-related or related to the design of the development. The exceptions relate to heritage conservation areas and heritage items and bushfire prone land. Broadly speaking, what is missing is any consideration of the likely impact of such a development on the locality, or on the facilities and services available in the locality or more widely. Absent clear words, one would not expect to find a State policy which prevented a consent authority taking such matters into account. To do so might impose on other public authorities significant costs, for example with respect to waste disposal, public transport or roads.

59 It is permissible (though not essential) in support of this conclusion to refer back to the terms of s 79C(1). A reason for not construing the Policy as excluding such wider considerations is the fact that, where they are relevant to a particular proposed development, they are required to be taken into account by the EP&A Act, s 79C(1)(b)-(e). It was not suggested in the course of argument that a State policy could derogate from that requirement.

60 Before leaving the question of construction, it is desirable to refer to the reliance placed by the respondent on the "objects clause", being cl 2 of the Policy. Clause 2(1) identified the aims of the Policy, including the encouragement of the provision of housing for seniors and people with a disability. Clause 2(2) described the means by which the Policy achieved those aims.

61 As in a statute, the statement of objects in the Policy provided an expression of the purpose or purposes underlying the Policy and may also help to resolve any uncertainty or ambiguity in the operative provisions: see Pearce D C and Geddes R S, *Statutory Interpretation in Australia* (2006, 6th ed) at [4.42]; and *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 75 and 78 (Cole JA). In *Rosemount*, Cole JA further accepted that "the objects clause does not control clear statutory language". However, the line between uncertainty or ambiguity and clear meaning is often difficult to draw and it is often unhelpful to try. A preferable approach is to use an objects clause as part of the statutory context in construing the operative provisions. That is likely to provide a more nuanced approach, providing a factor to be weighed in the balance: see, eg, *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 at 568 (Black CJ), noting that "reference to the objects of the Act points against the expansive interpretation of the power ...".

62 In the present case, the question remains whether cl 17 had the effect of "setting aside local planning controls that would prevent the development of housing for seniors or people with a disability" in all circumstances, or only in the circumstances which the Policy addressed. Given that key provisions in the Policy (such as cll 30 and 78) identified prohibitions on the grant of consent, the objects clause provides little assistance in giving an expansive interpretation of this kind to cl 17, which is not otherwise supported by the Policy read as a whole. The object of the Policy is not in doubt, nor are the mechanisms by which the objects were to be achieved. That conclusion may properly be reached by reference to cl 2; otherwise the clause takes the matter no further.

63 Once it is concluded that, in general terms, the Policy does not provide an exclusive set of criteria for consideration by the Council in considering the development application, there remains the possibility that some specific provision in SEPP-SL is inconsistent with cl 8(1) of the TLEP for the purposes of cl 5(3) of the SEPP-SL. However, no such provision was identified in submissions, nor is any apparent.

64 This conclusion is consistent with *Australian Lifestyle Corporation*, handed down by the Chief Judge of the Land and Environment Court after her Honour's judgment. After noting that the Policy was effective to override a prohibition against such development in a local environmental plan, Preston CJ continued:

> "[34] However, a distinction needs to be drawn between the existence of the power and the manner of exercise of the power. The fact that SEPP (SL) enlivens the power of a consent authority to determine a development application for a seniors housing development on land to which SEPP (SL) applies does not necessitate that such a power be exercised in only one manner, namely to grant consent to the seniors housing development. The consent authority has a discretion, to be exercised in accordance with law and having regard to the merits of the particular development in the development application.

> [35] In exercising the discretionary power under s 80(1) to determine the development application, the consent authority must consider the matters of relevance to the development application in s 79C(1) of the [EP&A Act].
>
> ...
>
> [41] There are also the relevant, general matters in s 79C(1)(b), ...; s 79C(1)(c) ...; and s 79C(1)(e) ...."

65 Although Preston CJ also discussed the possible relevance of other environmental planning instruments referred to in s 79C(1)(a), that discussion has been omitted for the reasons earlier given, namely that the applicability of such instruments will depend upon the operation of the paramountcy provision.

66 Although each State environmental planning policy must be considered in its own terms, the reasoning set out above is consistent with that adopted by this Court in *Najask Pty Ltd v Palerang Council* [2009] NSWCA 39 (Tobias JA, Spigelman CJ and Ipp JA agreeing), in relation to SEPP 21, dealing with caravan parks and related home developments. In concluding that there was no inconsistency between SEPP 21 and the relevant local environmental plan, Tobias JA noted that Jagot J had reasoned to similar effect in *Wygiren Pty Ltd v Kiama Municipal Council* [2008] NSWLEC 56 at [32]-[33]: *Najask* at [34].

Conclusions

67 It follows that there was no "inconsistency" between the requirement of cl 8(1) that the Council be satisfied as to the matters it identified and the terms of the Policy. The SEPP-SL did not purport to impose an exclusive code with respect to considerations relevant to the determination of the development application. (Arguably it could not have done given the terms of s 79C(1)(b)-(e).)

68 Her Honour's conclusion in this respect was erroneous and must be set aside. It being common ground that, in those circumstances, the matter must be remitted to the Land and Environment Court for determination as

to whether the Council had indeed considered and been satisfied of the matters specified in cl 8(1), that course should now be taken.

69 I would propose the following orders:

(1) Allow the appeal and set aside the judgment and orders in the Land and Environment Court.

(2) Remit the proceedings to the Land and Environment Court.

(3) Order the Second Respondent to pay the Appellant's costs of the appeal.

(4) Grant to the Second Respondent a certificate under the *Suitors' Fund Act 1951* (NSW), if not disqualified by s 6(7).

70 **YOUNG JA**: I have had the privilege of reading in draft the reasons of Basten JA. I gratefully adopt the first 29 paragraphs, [11]-[39], of his Honour's reasons in which he sets out the various planning instruments and basal facts and also his paragraphs [45], [46] and [47].

71 I have found this a very difficult matter indeed, but regret to say that after much consideration, I am unable to agree with his Honour's conclusion.

72 The basal problem is that there are two sets of planning instrument which, in any given case, actually or potentially overlap.

73 This then calls into play s 36(1) of the *EP & A Act* which, so far as relevant, provides that in the event of an inconsistency between environmental planning instruments, and unless otherwise provided, there is a general presumption that a State environmental planning policy prevails over a local environmental plan made before or after the policy.

74 I respectfully agree with Basten JA's paragraph [21] that the proper application of this statutory provision gives rise to questions including:

(a) what is an "inconsistency" and how is its existence determined?

(b) what is meant by "general presumption"?

I myself do not see the need to consider the expression "unless otherwise provided".

75 As to the second question, there is no definition of "general presumption", but it seems to me that it means rebuttable presumption rather than conclusive presumption and that the term means that unless, on a proper construction of the relevant instruments one can see some other legislative intention, in the event of an inconsistency, the State environmental planning policy prevails and a provision of a local environmental plan ceases to apply to the extent of the inconsistency.

76 As to inconsistency, I would agree with Basten JA's analysis.

77 At this point I might be permitted to make two digressions. Digression A, dealing with some of the facts of this case, and digression B dealing with some propositions which appear to be common ground between the parties.

78 As to A, the basal facts which I take from the council officer's report about the development which commences at 282 of the Blue Appeal Book, the facts are that the subject site is at the southernmost end of Hastings Point Village and is separated from other residential zoned land by Crown reserves. The application was for a three stage seniors' living development. Stage 1 would comprise the construction of independent living units, Stage 2 hostel units and Stage 3, residential care units, additional hostel units and a dining and servery area and there would be gradual winding down of the existing caravan park facility on the site.

There would be buildings of three storeys high on the site, the tallest building being Building F, part of Stage 3, which would come to a height of 10.8 metres.

79 The application provoked a considerable amount of adverse comment from persons who claimed to be affected. One of the prime matters of concern raised by objectors was the height of the building and how permitting buildings of this height in Hastings Point would affect the area generally. The TLEP in clause 16, when read with the height of buildings map, permits three storey development on the subject site.

80 On 6 July 2005, the Tweed Shire Council resolved to amend the TLEP by reducing the maximum height of buildings south of Cudgera Creek from three storeys to two storeys and the council prepared proposed amendment No 81. However, the Director General of the NSW Department of Planning, informed council on 30 March 2006, that he was withholding the issuing of authorisation with respect to amendment No 81. On 19 December 2006, council resolved to abandon pursuing amendment No 81. On 20 March 2007, the Director General provided the council with authorisation conferring the right to exhibit publicly the draft amendment. The council did so on 10 May 2007, and invited comment from the public. The council approved the development application at its general meeting on 8 May 2007 and gave notice of the determination granting approval on 14 May 2007.

81 Miss Galle, town planner, prepared her report to the council in relation to the development. She said in that report, inter alia (Blue 336):

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

> The proposed development complies with this height limit but would not be consistent with the existing one to two-storey character of the area. Given the applicable three-storey height limit it can be argued that this development is one of the first to contribute to a changed character for Hastings Point. This is topical, however, given the three-storey height limit for the purposes of this Clause the proposed development is considered satisfactory based on a changing character for Hastings Point.
>
> The proposal will add and enhance the character and amenity of the area, through the introduction of modern architecturally designed buildings ... ".

82 As to digression B, it seems to me that it was accepted by everybody that one effect of clause 17 of SEPP-SL is that any zoning restriction preventing housing for seniors or disabled persons in a particular zone of a shire is overridden.

83 Mr Greenwood SC for the appellant, submitted that is as far as the clause operated.

84 Next, Mr Greenwood acknowledged that if there is a situation where there is a "can do" under the SEPP-SL and a "can't do" under the local environmental plan, then the SEPP-SL prevails; see *DEM (Australia) Pty Ltd v Pittwater Council* [2004] NSWCA 434; 136 LGERA 187.

85 Thirdly, it is conceded that the provisions in the SEPP do not override the need to comply with s 79C of the *EP & A Act.* However, Mr McEwen SC for the second respondent made it clear that a consent authority's statutory obligation to take into consideration the provisions of any environmental planning instrument picks up only applicable environmental planning instruments. Thus, it will only pick up an LEP if it is applicable despite the SEPP.

86 Both counsel agree clause 2 of SEPP-SL is significant. It reads as follows:

> **"Aims of Policy**

(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:

(a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
(b) make efficient use of existing infrastructure and services, and
(c) be of good design.

(2) These aims will be achieved by:

(a) setting aside local planning controls that would prevent the development of housing for seniors ... ".

87 Mr Greenwood says that subclause (2) is merely aspirational. He submits that it doesn't in fact set aside local planning controls and that what one must bear solidly in mind is the aim of the policy in subclause (1).

88 Whilst the submission as to subclause (2) may be correct, clause 17 of SEPP-SL and s 36 of the *EP & A Act* seem to do the work that clause 2(2) of SEPP-SL aspired to do.

89 I now turn back to my mainstream consideration of the current appeal.

90 There was discussion during oral argument as to whether the SEPP-SL was a code. I believe the upshot of this decision was that Mr Greenwood posited that the SEPP-SL was not a code, whilst Mr McEwen put that whilst it was not a complete code, it was a species of code in that it endeavoured to cover completely various aspects of the planning process. It comprehensively dealt with site analysis and design requirements, even to the extent of the minutiae of prescribing the format of letter boxes. However, there may be other aspects which were not covered by SEPP-SL.

91 Certainly, the SEPP-SL deals with certain matters in great detail. I need not go into all of these matters, but so far as height of building is concerned, there are provisions which deal with the subject. However,

they do not deal totally with the subject. Clause 38(4) of SEPP-SL deals with the height in zones where residential flat buildings are not permitted, and mandates that buildings in such zones must be 8 metres or less in height. Now that does not apply in the instant case. However, what is significant is that if a building was 10.8 metres in height, but was three storeys, then it could be approved under the TLEP, but could not be approved under the SEPP-SL and there would be a clear inconsistency.

92 Clause 79 of SEPP-SL (and 80 and 81 are in the same plight) provides that:

> "A consent authority must not refuse to consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:
>
> (a) **building height:** if all proposed buildings are 8 metres or less in height."

93 Mr Greenwood says that, properly read, that means that a consent authority may refuse consent if it finds that a building in the development application exceeds 8 metres in height. That is probably correct. However, again, if all the buildings in this development were 8 metres or less in height, could a consent authority say (now referring to TLEP clause 8(1)(c)) that the council declined to consent to a development because, taking into account factors including building height, it was not satisfied that the development "would not have an unacceptable cumulative impact on the community or locality" (I cannot get away from the triple negative!)?

94 However, I do not need to answer that question because it seems to me that Mr McEwen, in his submissions, put an unanswerable proposition. Clause 8(1)(c) of the TLEP says that the consent authority may grant consent to development *only* if it is satisfied that the development would not have an unacceptable cumulative impact on the locality etc [the italics are mine]. Cases such as *Currey v Sutherland Shire Council* (1998) 100 LGERA 365 and *Franklins Ltd v Penrith City Council* [1999] NSWCA 134

(especially at [23]) point out the significance of the sort of phraseology used in 8(1) and that is to deprive the consenting authority of any power to issue a consent unless the precondition is satisfied.

95 Accordingly, here, we have the situation where the SEPP contains an aim in cl 2 to encourage the provision of housing that will increase the supply and diversity of residences that meet the needs of seniors and make efficient use of existing infrastructure and services. There are detailed considerations to be given, for instance, in Part 3 of Chapter 3 of SEPP-SL recite analysis, there are provisions with respect to site area, height, landscaping etc, all of which can be set at nought if a council has no power to approve the development because an assessment of cumulative impact of existing and similar proposals to the one in the application has been carried out and the result found to be acceptable.

96 Mr Greenwood says that the SEPP does not deal with cumulative impact at all; therefore, there is no inconsistency with clause 8(1)(c) of the TLEP with the SEPP. For the reasons I have just given, that, in my view, is not the correct way of looking at the matter. Whilst it would be a quite different matter if clause 8 had said that a consent authority was to take into account cumulative impact, when the clause removes the power of a council to consent to an application which complies with SEPP but which does not address cumulative impact, then, to my mind, there is an inconsistency.

97 Thus, in my view, her Honour was quite correct in saying that the failure to be satisfied under clause 8 cannot, on its own, give rise to a refusal of a development application which is for a development that is within SEPP-SL.

98 Accordingly, in my view the appeal should be dismissed with costs.

****

I Certify that this and the 29 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Basten and of the court.

Date 11 September 2009

Associate .....

Land and Environment Court
of New South Wales

CITATION :	**Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors [2008] NSWLEC 180**
PARTIES :	APPLICANT Hastings Point Progress Association Inc FIRST RESPONDENT Tweed Shire Council SECOND RESPONDENTS Aeklig Pty Ltd Planit Consulting Pty Ltd THIRD RESPONDENTS Kylie Ann Campion Jody Anne Kearney Kelly Anne Gillies
FILE NUMBER(S) :	40785 of 2007, 40967 of 2007
CORAM:	Pain J
KEY ISSUES:	Development Consent :- application under State Environment Planning Policy (Seniors Living) 2004 (SEPPSL) - whether inconsistency between SEPPSL and mandatory precondition to grant of development consent in local environmental plan - whether decision to grant development consent manifestly unreasonable Development Consent :- application under Tweed Local Environmental Plan 2000 - whether Council failed to consider strategic review of heights of buildings - whether cumulative impact assessment required and undertaken - whether decision to grant development consent manifestly unreasonable
LEGISLATION CITED:	Associations Incorporation Act 1984 Environmental Planning & Assessment Act 1979 s 64, s 79C Land and Environment Court Act 1979 s 25B Manly Local Environmental Plan 1998 Penrith Local Environmental Plan No 231 State Environmental Planning Policy No 5 – Housing for Older People or People with a Disability State Environmental Planning Policy No 71 – Coastal Protection State Environmental Planning Policy (Seniors Living) 2004 cl 4, cl 5, cl 17, cl 18, cl 30, cl 31, cl 78 Sutherland Local Environmental Plan 1993 Tweed Local Environmental Plan 2000 cl 4, cl 5, cl 8, cl 11, cl 16

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DATES OF HEARING:	5 February 2008 6 February 2008 7 February 2008 27 March 2008 (additional written submissions)
DATE OF JUDGMENT:	6 June 2008
LEGAL REPRESENTATIVES:	APPLICANT Mr A Pickles with Ms Y Cachia SOLICITOR Environmental Defenders Office FIRST RESPONDENT Submitting appearance SECOND and THIRD RESPONDENTS Mr P McEwen SC with Dr S Berveling SOLICITOR Stacks

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Pain J

6 June 2008

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

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

JUDGMENT

1 **Her Honour**: In two separate Class 4 applications the Applicant seeks declarations in each proceeding that development consents granted by the Tweed Shire Council (the Council) are invalid and of no effect. Because of the similarity of issues the matters were heard together. Evidence in one matter is generally evidence in the other.

2 The Applicant is an association incorporated under the *Associations Incorporation Act* 1984. The Council has filed a submitting appearance save as to costs in both matters. At the time the relevant decisions were made the Council was constituted by four administrators.

3 Proceedings 40785 of 2007 (the Aeklig proceedings) challenge the grant of development consent by the Council to the Respondent Aeklig Pty Ltd on 8 May 2007 for the development of land at 87-89 Tweed Coast Road, Hastings Point for a Seniors Living development under *State Environmental Planning Policy (Seniors Living)* 2004 (SEPPSL) as then in

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

4 In proceedings 40967 of 2007 (the Planit proceedings) on 19 June 2007 the Council granted development consent to the Respondent Planit Consulting Pty Ltd for multi-dwelling housing comprising seven units at 21 Tweed Coast Road, Hastings Point. The subject property is zoned 2(b) Medium Density Residential under the TLEP.

5 The claims in both proceedings are similar, in that they both relate to a failure of the Council to consider relevant matters under the *Environmental Planning and Assessment Act* 1979 (EP&A Act). Further, or in the alternative, it is claimed that the grant of both development consents by the Council was manifestly unreasonable.

Relevant legislation

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

Tweed Local Environmental Plan 2000

7 Clause 4 TLEP provides:

> *The aims of this plan are:*
>
> *(a) to give effect to the desired outcomes, strategic principles, policies and actions of the Tweed Shire 2000+ Strategic Plan which was adopted, after extensive community consultation, by the Council on 17 December 1996, the vision of which is:*
>
> > *"The management of growth so that the unique natural and developed character of the Tweed Shire is retained, and its economic vitality, ecological integrity and cultural fabric is enhanced", and*
>
> *(b) to provide a legal basis for the making of a development control plan that contains more detailed local planning policies and other provisions that provide guidance for*

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

(i) that some or all development should be restricted to certain land within a zone,
(ii) that specific development requirements should apply to certain land in a zone or to a certain type of development,
(iii) that certain types or forms of development or activities should be encouraged by the provision of appropriate incentives, and

(c) to give effect to and provide reference to the following strategies and policies adopted by the Council:

Tweed Shire 2000+ Strategy

...

(d) to encourage sustainable economic development of the area of Tweed compatible with the area's environmental and residential amenity qualities.

8 Clause 5 deals with ecologically sustainable development:

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

9 Clause 8(1) provides:

8 Consent considerations

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

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

10 Clause 11 sets out the objectives of each zone.

11 Clause 16 relates to height of buildings and provides:

> ***16 Height of buildings***
>
> *(1) Objective*
>
> > *• to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.*
>
> *(2) Consent must not be granted to the erection of a building which exceeds the maximum height or number of storeys indicated on the Height of Buildings map in respect of the land to which the application relates.*
>
> ...

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

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

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

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

> ***5 Relationship to other environmental planning instruments***
>
> ...
>
> *(3) If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.*
>
> ...

17 What Chapter does

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

(a) Development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and

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

18 Development consent required

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

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

30 Design of residential development

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

31 Neighbourhood amenity and streetscape

The proposed development should:

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

...

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

(i) providing building setbacks to reduce bulk and overshadowing, and

(ii) using building form and siting that relates to the site's land form, and

(iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and

(iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and

...

16 Clause 78 states:

> ***78 Inter-relationship of Part with design principles in Part 3***
> *Nothing in this Part permits the granting of consent to a development application made pursuant to this Chapter if the consent authority is satisfied that the proposed development does not demonstrate that adequate regard has been given to the principles set out in Division 2 of Part 3.*

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

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

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

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

20 The Tweed Future Issues Paper (open to public comment from November 2003) notes the fact that the Tweed Shire 2000+ Strategic Plan is in need of review and to this end highlights various strategic challenges in the Tweed area. The Paper is intended to provide a basis on which discussion within the community can be held and covers various issues such as sustainable development, the environment and rural land use. Among the recommendations is a plan to prepare individual locality plans for the various villages and rural townships in the Tweed shire as opposed to having the TLEP manage development in these areas.

21 The aim of the Far North Coast Regional Strategy (dated December 2006) "is to manage the Region's expected high growth rate in a sustainable manner" with an outlook to the year 2031. It states the intention to manage future growth by checking coastal development and encouraging development of non-coastal centres. A review of building height limits is also listed as an action to be taken by the Council in a review of settlement and housing, as well as ensuring that LEPs provide that new development reinforces existing urban centres. The Regional Strategy is intended to be implemented primarily through LEPs, development control plans (DCPs) and the State Infrastructure Strategy.

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

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

(a) Failure to consider clause 8 of the TLEP

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

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

Particulars

(i) The Statement of Environmental Effects fails to make any reference to cl 8 of TLEP or the objectives of the zone or the TLEP (including cl 4 and cl 5 of TLEP) and makes no assessment of the consistency or otherwise of the development with those requirements;

(ii) The report to the Council on 8 May 2007 failed to make any reference to cl 8 of TLEP or make any assessment of the matters required to be considered including the objectives of the zone and aims and objectives of the TLEP including cl 4 and cl 5 of TLEP;

(iii) There was no inconsistency between the provisions of clause 8 of TLEP and SEPPSL and between the objectives of the zone and SEPPSL so as to cause SEPPSL to prevail over the provisions of TLEP and avoid the need to consider the provisions of cl 8 or the zone objectives.

(b) Manifestly unreasonable

24 The decision to grant consent was manifestly unreasonable, and therefore invalid. In July 2005 the Council resolved to prepare an amendment to TLEP to restrict the height of development at Hastings Point south of Cudgera Creek, to two storeys. The Draft LEP was to be known as Draft Amendment No 81 – Heights of Buildings, Hastings Point (Amendment No 81).

25 The Council submitted Amendment No 81 to the Director-General pursuant to s 64 of the EP&A Act on or about March 2006.

26 Despite the Council later resolving in December 2006 to defer the making of Amendment No 81, the Director-General issued a delegation to issue a section 65 certificate in respect of Amendment No 81 authorising the Council to exhibit Amendment No 81.

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

Particulars

(i) Given the authorisation to exhibit Amendment No 81, no reasonable decision maker could have approved a development of three storeys.

(ii) Given the Director-General's expressed concern, about which the Council was aware when it granted the consent, relating to the sensitive coastal location and that a reduction in building heights would better reflect the aims and objectives of the NSW Coastal Policy, the decision was manifestly unreasonable.

(iii) Given the provisions of the Tweed Shire 2000+ Strategic Plan adopted in December 1996 which proposed the initiation and evaluation of a two storey height limit for Hastings Point, the decision was manifestly unreasonable.

(iv) The adoption by the Council on 12 April 2006 of the Coastal Design Guidelines supports a finding that the decision had no plausible justification.

(v) Given the existing one and two storey character of Hastings Point, no reasonable decision maker could have concluded that a three storey development would maintain neighbourhood amenity and appropriate residential character and that the proposal would thus satisfy the requirements of cl 31 of SEPPSL.

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

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

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

Particulars

(i) The Statement of Environmental Effects fails to make any reference to cl 8 of TLEP or the objectives of TLEP including cl 4 and cl 5 and makes no assessment of the consistency or otherwise of the development with those requirements.

(ii) The report to the Council on 19 June 2007 failed to make any reference to cl 8 of TLEP or make any assessment of the matters required to be considered pursuant to cl 8(1)(b) and (c) including the aims and objectives of the TLEP including cl 4 and cl 5 of TLEP;

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

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

Particulars

(i) Agenda Report for Council's Planning Meeting of 6 July 2005.

(ii) The Council submitted Amendment No 81 to the Director-General pursuant to s 64 of the EP&A Act on or about March 2006.

(b) Manifest unreasonableness

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

Evidence

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

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

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

33 Ms Denise Galle, Senior Town Planner at the Council swore an affidavit dated 6 February 2008 which was read. She also gave oral evidence. Her evidence relates to the Aeklig proceedings and the report she prepared on this development application. This was considered by the Council Planning Committee on 8 May 2007. As identified in her affidavit, before the planning committee meeting she briefed Administrators Boyd, Willan and Payne. She told them that the development satisfied the current future intended character based on the TLEP zoning and the three storey height limit. She was present at the planning committee meeting and noted that the committee was addressed by several objectors. The committee recommended approval of the development by the Council.

34 In cross-examination, Ms Galle agreed that cl 8 of the TLEP was the provision on which assessments were made by her and others, and that one must ultimately be satisfied of all the provisions in cl 8 and not merely be conscious of them.

35 In re-examination, Ms Galle clarified that cl 8 is the basis on which she herself performs any given assessment. Factors that have weight in her opinion include the permissibility in the zone, consistency with zone objectives and the aims of the TLEP itself, other clauses in the TLEP and whether, in a cumulative sense, the application would have an impact on the community. For any given application, Ms Galle would look to subclauses (a) and (b) of cl 8(1) to ensure that that the application was not prohibited or inconsistent with the zone objectives and then to cl 8(1)(c) for a cumulative assessment. Her report in the Aeklig matter had regard for the cumulative impacts of environment, flooding, character and height issues.

36 Ms Galle also stated that, as part of the TLEP amendment preparations, consultants were to be engaged to conduct a review of various aspects including building heights in a time frame that would allow it to be gazetted by 2009.

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

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

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

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

Strategic Planning processes

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

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

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

Aeklig proceedings – Failure to consider cl 8 TLEP

Inconsistency between SEPPSL and TLEP

39 Before the Applicant's argument concerning the failure to consider cl 8 of the TLEP can be considered the issue arises of whether that provision is inconsistent with the SEPPSL (third particular in par 23). As the Respondent argued, if it is, cl 8 cannot apply to the Aeklig development consent. This ground of review would not then be available and much of the evidence concerning the Aeklig DA does not need to be considered.

40 In order to understand the arguments and findings, parts of the Council town planner's report of Ms Galle prepared in relation to that development need to be identified. The Council planner's report describes the application as for a SEPPSL development and notes the proposal is permissible under the SEPPSL and allows the Council to set aside planning controls that are inconsistent with the SEPPSL. The report considers the provisions of the TLEP under s 79C of the EP&A Act. The proposed development is permissible in the zone. The primary objective of the zone is referred to and she refers to cl 15 (provision of accredited services), cl 16 (three storey height limit), cl 22 (development near designated roads), cl 25 (where development on land adjacent to land zoned for environmental protection) and cl 34 (minimisation of flood damage), inter alia. The report concludes the development generally complies with the TLEP. The report then considers various SEPPs including SEPPs 11, 14, 21, 55, 71 and SEPPSL. In relation to SEPPSL the report states in relation to Pt 3 design requirements:

Clause 31 Neighbourhood amenity and streetscape

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

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

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

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

The report concludes the proposal is acceptable under SEPPSL.

Applicant's submissions

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

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

42 There is no inconsistency between the requirement to take into account matters prescribed by cl 8 and the objective of the zone, and the requirement to consider the provisions of SEPPSL. The provisions are not mutually exclusive. Clause 8 should be construed to apply to any development of land to which the plan applies.

43 The Respondent relied on *G W Rothwell & Associates v North Sydney Council* (2000) 108 LGERA 361. While the Applicant agreed that the principles in *Rothwell* are the correct approach to be considered in relation to inconsistency these provide no answer in these circumstances.

44 Further, cl 30 and cl 78 of SEPPSL state that development consent cannot be granted unless a consent authority is satisfied that the proposed development has adequate regard to the principles in Div 2. Clause 31 considers neighbourhood amenity and streetscape. Even though height and density may be consistent with SEPPSL, this does not allow consent to be granted if the proposal is inconsistent with the principles in Div 2 (cl 30 and cl 31, inter alia). SEPPSL gives priority to the principles in Div 2 over the controls in Pt 7 Div 1. It follows that the aims and objectives of the TLEP and its provisions in prescribing development consistent with the location and other buildings including cl 8 are effectively incorporated into the considerations in Div 2 of SEPPSL. These enable consideration of the extent to which the proposal will recognise elements of the location's character and "adopt building heights which are consistent and compatible in scale with adjacent development".

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

Respondent's submissions

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

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

Finding

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

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

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

TLEP and SEPPSL not inconsistent

50 The Applicant puts its case in two ways. Firstly, it makes the general argument that the TLEP and SEPPSL both apply unless inconsistent. As the application of cl 8 does not give rise to any inconsistency it should also be applied to the assessment of the Aeklig DA.

51 In *Central Coast Care* Lloyd J considered in separate questions of law raised in Class 1 proceedings whether a development application made pursuant to a LEP could be considered in a s 97 appeal to the Court as a Seniors Living application. His Honour held that a development application made on this basis would constitute a new and different development application and could not be considered by the Court in the s 97 appeal. Lloyd J stated in obiter that a LEP can apply at the same time as SEPP 5, as is provided by cl 5(2) of SEPP 5 (identical to cl 5(3) of SEPPSL), to the extent there is no inconsistency between the two instruments. It was not necessary for him to determine if there was any inconsistency between the instruments. The Applicant relies on that decision to support its submission that in this case the TLEP remains relevant and must be considered despite the application being under SEPPSL (unlike in *Central Coast Care*).

52 In *Mete*, the Court was considering preliminary questions of law in Class 1 proceedings where a development application had been lodged under the relevant LEP. At the time the development application was lodged SEPP 5 was in force but did not apply to the land to which the LEP applied. SEPPSL was subsequently gazetted repealing SEPP 5 after a s 97 appeal was lodged in the Court. Talbot J held that the SEPPSL was relevant to the application under s 79C(1)(a) EP&A Act as an environmental planning

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

53 The Applicant argued that, in this case, where the application is under SEPPSL, both instruments apply. Accordingly, the Council was bound to determine whether there was any inconsistency between the LEP and SEPPSL. While these cases support the Applicant's submission that the LEP and the SEPPSL can both apply concurrently, as is provided for by implication in cl 5(3) of the SEPPSL in any event, that does not provide much assistance in determining this case. Neither case was considering the circumstances here where the application is made and therefore assessed under SEPPSL (primarily on one view) and it is necessary to determine whether there is in fact an inconsistency between two instruments.

54 The Applicant argued that as there is no inconsistency on the face of the instruments, then both instruments apply. There is no reference to cl 8 of the TLEP in the planner's report. Whether there is an inconsistency between that clause and the provision of the SEPPSL is not addressed in the planner's report. This was argued to be a failure by the planner in the Applicant's oral submissions which argued that there has to be clear inconsistency identified on the face of the instruments. Such a criticism of the planner's report appears unrealistic in the context of a town planner, who is not a lawyer, preparing a planning report to a Council to enable it to determine a grant of development consent. Inconsistency between the instruments does not have to be formally identified as a matter of law in

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

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

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

56 Lloyd J noted that there is a general reluctance by the courts to find that there is an inconsistency between two statutory provisions if both provisions can be given effect unless such an intention is clearly expressed, relying on *Hume Steel Limited v Attorney-General for Victoria* [1927] HCA 24; (1927) 39 CLR 455, per Higgins J.

57 I consider there is a clear intention identified in the SEPPSL that it is the primary instrument which applies for those developments which seek to rely on it at the expense of the application of planning controls in a LEP. I have noted above s 36(1)(a) of the EP&A Act concerning the general presumption that a SEPP prevails over a LEP if there is an inconsistency.

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

58 In decisions of this Court SEPPSL proposals have been refused on the basis they have failed to satisfy a "desired future character requirement" defined under a DCP (or LEP) but that has been in the context of SEPPSL, cl 78. Reference was made in argument to the decisions of commissioners where Seniors Living development applications have been refused on the basis of taking into account local planning controls, including DCPs. For example, in *Marina Bay Developments Pty Ltd v Pittwater Council* [2006] NSWLEC 577 the refusal of development consent occurred because the design requirements of the SEPPSL were not met. Refusal was due to the operation of the SEPPSL not the provisions of a LEP or DCP. These latter instruments were relied on to inform the Commissioner's consideration required under the SEPPSL but were not decisive of the issues in their own right. I note that in that matter the proposed development was prohibited by the relevant zone but was permissible under SEPPSL (see [10] of that judgment).

59 While SEPPSL states in cl 5(3) that the policy prevails if there is an inconsistency with a LEP, suggesting that a LEP also applies subject to that provision, the other provisions referred to above are clear in identifying the primacy of the SEPPSL. In light of these provisions, I agree with the Respondent that there is a potential inconsistency between SEPPSL and the application of cl 8 of the TLEP. That inconsistency can

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

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

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

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

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

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

Whether Clause 8 TLEP should be considered under SEPPSL

63 Secondly, the Applicant also argued that the assessment of the design requirements under SEPPSL cl 30 and cl 78 requires consideration of cl 8 of the TLEP and this has not occurred. These clauses require that adequate regard be given to the principles in Div 2 of Pt 3. Clause 31 specifies some of the matters to which regard must be had. The application of cl 8 in this context, of informing an assessment of the design requirements in cl 31, could have some relevance given the subject matter of cl 8 but precisely what impact legally an analysis under cl 8 can have in this context is unclear. The failure to be satisfied under cl 8 cannot on its own give rise to a refusal of the DA under SEPPSL as I have already found on the issue of inconsistency above.

64 The requirement of the SEPPSL is that there must be demonstration that adequate regard has been had to the specified design requirements. The language in cl 30 and 78 is not the same as the more onerous satisfaction required before development consent can be granted in cl 8 of the TLEP. This important difference in the terms of the respective instruments and the primacy of the SEPPSL suggests cl 8 of the TLEP is inconsistent with

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

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

Planit proceedings

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

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

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

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

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

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

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

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

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

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

> *Context & Setting/Building Height Restrictions*
>
> *The maintenance of the established context and setting of the Hastings Point locality has been a prominent issue throughout the assessment of the subject application. In this regard, Council has been in receipt of a significant number of public submissions, particularly identifying the desire for a 2 storey height restriction throughout Hastings Point.*
>
> *Council resolved not to pursue draft Tweed Local Environmental Plan 2000, Amendment No 81 – Height of Buildings (Hastings Point) at this time on the basis of the Department of Planning's advice that a more strategic approach is required. This advice was changed in late March 2007, however due to the time factor in dealing with this amendment separately, it will be addressed in the new Tweed LEP. The present building height restriction has been in place for a considerable period of time and the statutory planning framework does not make allowance for statutory plan alterations without proper justification for doing so.*
>
> *On the basis of the community concern over the present building height controls, the land owners of 2(b) zoned land*

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

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

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

(i) Failure to consider clause 8 of TLEP

Applicant's submissions

73 The Applicant argued that the Council failed to consider the provisions of cl 8 of the TLEP and to be satisfied of the matters required by cl 8(1)(b) and (c). This was required by s 79C(1)(a) EP&A Act. It is agreed by the parties and is clear from the Council planner's report to the Council Planning Committee on 19 June 2007 that there is no mention of cl 8 in the report. It is not necessary to specifically refer to cl 8 if the substance of what that clause requires is apparent on the face of the report.

74 Clause 8(1)(a) requires that the Council be satisfied that the development is consistent with the primary objective of the zone within which it is located. Mere advertence to the section or its substance alone is not sufficient consideration. The report adverts to the primary objectives of the zone. There is, in respect of cl 8(1)(a), a statement which may be taken to be a degree of satisfaction in accordance with the sub-clause. It must be accepted that although barely canvassing the objective and the meaning

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

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

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

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

76 There is no evident consideration of any of the other aims and objectives of the plan that are relevant to the development. There is a complete absence of any reference to the aims in cl 4 of the TLEP or indeed, any of the matters relevant under the Tweed Shire 2000 + Strategic Plan.

77 Clause 8(1)(c) requires the Council to be satisfied the development would not have an unacceptable cumulative impact on the community and locality, inter alia. The word "cumulative" anticipates a consideration of not

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

78 There is also judicial support for this interpretation to include not only the effect of the subject development, but to include other developments of a similar type that might take place in the future and developments already approved; see for example *BT Goldsmith Planning Services Pty Limited v Blacktown City Council* [2005] NSWLEC 210, *Dames and Moore Pty Ltd v Byron Council* [2000] NSWLEC 46) both adopted *in Gales Holdings Pty Limited v Tweed Shire Council* [2006] NSWLEC 85.

79 There is no assessment in the report to the Council of the cumulative impact of the development or an express statement of satisfaction of the matters required by cl 8(1)(c) that the development would not have an unacceptable cumulative impact on the community, locality or catchment.

80 Under the heading of "Considerations under s 79C of the Environmental Planning & Assessment Act", the report to the Council noted some of the provisions of the TLEP, including the primary objective of the 2(b) zone. There is no reference in this discussion to the provisions of cl 8 of the TLEP.

81 Mason P in *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185, and *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 are relied on being mindful of cautionary comments by Basten JA (Handley JA and Hunt AJA concurring) in *Kindimindi Investments Pty Ltd v Lane Cove Council & Anor* (2006) 143 LGERA 277 at 79 and Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 186 that any review must not stray into the merits of a particular decision. Nevertheless in *Kindimindi* the formulation of the requirement to take into account relevant matters by

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

82 Further, relying on *Currey v Sutherland Shire Council & Ors* (1998) 100 LGERA 365, *Franklins Ltd v Penrith City Council & Anor* [1999] NSWCA 134 and *Manly Council v Hortis* (2001) 113 LGERA 321, cl 8 is a precondition meaning its satisfaction is a precondition to the exercise of the power to grant development consent.

83 The absence of direct reference to a relevant consideration should lead to the inference that it was not considered, see *Hale*. Secondly, that inference should be drawn from all the available evidence being the material before the Council on the date of the decision, in this case the planner's report to the Council's Planning Committee (tab 23 Planit bundle of documents). Thirdly, individual councillors can bring their own general knowledge and matters they are aware of over a period of time through discussions and are also presumed to be knowledgeable about the LEP; see *Currey v Sutherland*, *Somerville v Dalby* (1990) 69 LGRA 422 per Hemmings J at 429. Fourthly, that general knowledge cannot be assumed to extend to a detailed provision of the LEP or the processes required to apply it. The satisfaction of cl 8(1)(a) and (c) is required by the TLEP and positive attention to cl 8(1)(b) is also required; *Franklins* per Stein JA (Powell and Giles JJA concurring).

Respondents' submissions

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

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

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

Clause 8(1)(b)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

96 At [30] the Court of Appeal (Powell, Giles and Fitzgerald JJA) held that this clause was "relevantly similar" to the preconditions in *Currey* and *Franklins*. The question was whether the Council was *"aware that any detrimental effect on the development of the Foreshore Scenic Protection Area was not merely a factor for it to consider when deciding whether or not grant the applications but an absolute bar to a decision to issue the approval"*. *Currey* and *Franklins* were applied in holding that the absence of express reference to the clause in the information available to the Council and the extent of that information were likely to cause the Council to overlook the nature of cl 17. Clause 8 of the TLEP has a similar legal effect to the clauses considered in these cases.

97 The parties disagreed on whether subclauses (b) and (c) of cl 8 have been satisfied in relation to the consideration of the Planit DA. The primary evidence of that consideration is the town planner's report prepared for the planning committee of the Council. There is no reference in the town planner's report, parts of which are set out above at par 72, to cl 8(1)(b) and (c).

98 The Applicant has relied substantially on the findings of Moffit P in *Hale* to argue there is an absence of consideration of the required matters in cl 8(1)(b) and (c) because there is no reference to the relevant clause in the planner's report or otherwise to the matters required to be considered by those clauses. The cases referred to by the Applicant in its submissions (par 78 and following) have been considered and applied on numerous occasions by this Court.

99 In *Woolworths Limited v Wyong Shire Council & Ors* [2005] NSWLEC 400 I considered the cases referred to by the Applicant at [221] – [223] as follows:

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

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

...

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

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

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

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

...

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

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

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

Clause 8(1)(b)

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

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

Clause 8(1)(c)

103 Clause 8(1)(c) requires assessment of cumulative impact. Assessment of cumulative impact requires that the impact of similar developments to the one proposed and the accumulation of such development and successive developments of a similar type on the community or locality be conducted, see *BT Goldsmith* at [90] and *Dames and Moore* at [46], adopted in *Gales Holdings* at [43]. The issue of whether a development establishes a precedent is also required. It appears that this development is the first of its type in this medium density residential zone. I accept the Applicant's argument of what such an assessment requires (see par 77-78). It follows that it is not sufficient to assess the impact of the single development on the locality and community as the planner's report does.

104 Further, I do not agree with the Respondents' submission (par 89) that such a provision can have no application for a single development application as that would render meaningless an important provision in the TLEP. It is, in any event, required to be satisfied before development consent can be given and cl 8(1)(c) should be interpreted to give it an effective operation in the context of a planning instrument such as this LEP.

105 The limited roles that expert evidence can play in judicial review proceedings is recognised in cases such as *Caldera Environment Centre Inc v Tweed Shire Council,* unreported; NSWLEC, Talbot J, 13 July 1993, *King v Great Lakes Council* (1986) 58 LGRA 366 and *ULV Pty Ltd v Scott*

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

106 I allowed in Mr Gibson's affidavit evidence of his experiences in the Tweed Shire over a lengthy period to the effect that the subsection is rarely referred to in development assessment reports of the Council. His evidence is concerned with the practice of the Council rather than with the substance of its decision making. The only category identified by Talbot J which this conceivably comes under is evidence "to explain factors, principles or materials relevant to the determination" but it is debatable whether the evidence does fall within that category. This evidence is not an answer to the legal requirement contained in cl 8(1)(c) in this case.

107 The affidavit of Mr Boyd who was on the Council's planning committee for the Planit DA (but did not approve the DA) also does not assist the Respondents. Mr Boyd states that he considered that a cumulative assessment had been carried out. There is no evidence that it had, in that there is no evidence in the substance of the planner's report of such an assessment. Awareness that there has to be an assessment is not sufficient to discharge a council's responsibility, see *Hortis* at 334.

108 The Applicant bears the onus of establishing that the Council has failed to consider a relevant matter in the exercise of its planning discretion. The Respondents submitted that the Applicant could have called the individual administrators but did not and the inference therefore arises, it was submitted, that the evidence was available but no explanation is provided for why it was not called. I do not agree that the Applicant was required to call such evidence to discharge its onus of proof. It is the decision of the Council as a collegiate body undertaking its statutory functions that is relevant to this review, not the individuals who make up that collegiate body. The formal records as found on the Council's file consequently have an important role in identifying what was before the Council in the absence of the Council providing a statement of reasons for its decision.

109 The Respondents relied on *Kimber* but I note that it is distinguishable on its facts. Although there was no specific mention of a particular provision in a town planner's report there was evidence of the relevant provision being referred to by persons who addressed the Council about the relevant matter. The evidence of Mr Boyd does not overcome the lack of reference in the planner's report however, for the reasons stated above.

110 It was also submitted by the Respondents that there is evidence of satisfaction because the development consent was issued but that submission is made without any authority and does not overcome a total lack of evidence in the Council planner's report on a relevant matter. There is no evidence of assessment of cumulative assessment and the findings of Moffit P in *Hale*, relied on by the Applicant apply. There was a failure to consider this mandatory matter in the planner's report and consequently there is no evidence that matter was considered by the Council.

111 I consider the Applicant's submissions in relation to the failure to consider cl 8(1)(c) of the TLEP should be upheld. This ground of challenge to the Planit DA is upheld.

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

112 The particulars identified in the Amended Points of Claim in the Planit proceedings are set out in par 29 and refer to a failure to consider Draft Amendment No 81 which dealt with the height of buildings in Hastings Point. This ground of appeal is similar to that already considered in relation to cl 8(1)(b) as that also involved the consideration of building height. A brief chronology regarding draft Amendment No 81 is as follows:

(a) On 6 July 2005, Council resolved to prepare a LEP to amend the LEP to restrict the height of buildings south of Cudgera Creek at Hastings Point.

(b) By letter dated 30 March 2006, the Director-General of the Department of Planning advised that an authorisation to use his delegation to issue a s 65 certificate would not be issued;

(c) On 19 December 2006 Council resolved to abandon the pursuance of a draft amendment to restrict the height of buildings south of Cudgera Creek at Hastings Point, as a review of the Hastings Point building heights will be undertaken within a Shire-wide review as part of TLEP;

(d) By letter dated 20 March 2007, the Director-General of the Department of Planning granted an authorisation to Council to use his delegation to issue a s 65 certificate with respect to proposed Amendment No 81 – Height of Buildings at Hastings Point;

(e) By letter dated 10 May 2007, Council invited comments on a proposal regarding a desire to reduce the allowed building heights for the Hastings Point area;

(f) By letter dated 4 July 2007, Council advised residents of Hastings Point of the outcome of its invitation for comments.

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

Applicant's submissions

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

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

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

Respondents' submission

116 Despite the authorisation given by the Director-General in his letter dated 20 March 2007, the Council did not utilise, pursuant to the discretion that it retained, the Director-General's delegation to issue a s 65 certificate. Accordingly, draft Amendment No 81 is not a matter that needs to be taken into consideration pursuant to s 79C(1)(a)(ii) of the Act. Despite this, the draft Amendment No 81 is argued by the Applicant to be a matter to be taken into consideration pursuant to s 79C(1)(e) of the Act as a matter of public interest.

117 The evidence shows that reference is made to Amendment No 81 in the Assessment Report to Council dated 19 June 2007 at page 195. The issue of height of the proposed development is referred to at pages 178, 179,

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

118 Contrary to the Applicant's submissions, there is no basis for stating that the Director-General of Planning had expressed the view in the letter to the Council that Amendment No 81 should proceed in order to reduce the building height limit in Hastings Point. The letter of 20 March 2007 states that the Council can continue with the proposed amendment to building heights at Hastings Point. The decision whether to proceed was left up to the Council. The Director-General's letter states *"... a reduction in building heights would appear to better reflect the aims and objectives of the NSW Coastal Policy."* This suggest that no final conclusion has been made on this issue.

119 Due to the heightened public agitation concerning the height and number of storeys for developments in Hastings Point, the issue of reducing the control governing the number of storeys was common knowledge to all relevant participants in the process.

120 Section 79C does not require that a development application be assessed in accordance with a draft LEP, it merely requires that various matters be taken into consideration. In the present case, Amendment No 81 was taken into consideration. Furthermore, the substance of Amendment No 81, namely the issue of reducing the height limit from three to two storeys and the ramifications thereof, was also taken into consideration, through the assessment of the development application in accordance with the controls that were applicable, as well as general non-numeric controls. There was no failure to consider as alleged by the Applicant. The effect of the Applicant's submissions is that a future review of building heights is elevated as a matter of public interest to having as much or more weight than the existing legal controls in the TLEP.

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

121 This ground of review covers similar subject matter to that already considered for cl 8(1)(b), namely the consideration of building heights. In relation to the Council planner's report, firstly, the whole of the report on the Planit DA must be considered to understand the context in which the statement that Amendment No 81 has no relevance to the assessment of the present application, was made. The Applicant relies on that statement in the Council officer's report primarily as demonstrating the inadequacy of consideration by the Council. That statement by the Council officer under the section of the report detailing whether there are any draft environmental planning instruments required to be taken into account is correct in that the draft was never placed on public exhibition so that it did not satisfy the description of a draft LEP as referred to in s 79C(1)(a)(ii). That is clear from the brief chronology in relation to Amendment No 81 set out at par 112.

122 In terms of the substance of Amendment No 81, it was concerned with a reduction in building height to two storeys for Hastings Point. The issue of the building height in Hastings Point, which is arguably a matter of public interest under s 79C, was identified and considered by the planner's report. The reference to Amendment No 81 is not the entirety of the material available to the Council on the issue of building height as identified in the report set out above at par 69 and following. I consider, as the Respondents submitted, that the issue of building height was properly ventilated in the planner's report and was therefore a matter about which that Council was properly informed and was able to consider when assessing the DA.

123 The general knowledge of local councillors can be recognised in terms of their awareness of local issues although care must be exercised in doing so. For example, that was held not to extend to an assumption of knowledge about detailed provisions in an LEP (see *Franklins* per Stein J at [26]). The chronology of the strategic review process is identified above at par 38. It has been ongoing for some time. While the Council may not

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

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

Manifest unreasonableness (Planit and Aeklig matters)

125 Similar arguments were made in relation to both matters.

Applicant's submissions

126 The Council's decision to approve the two development consents was manifestly unreasonable as referred to in *Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Various formulations for what this means can be found in *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821, and in the authorities reviewed by Biscoe J in *Save Our Street Inc v Settree* [2006] NSWLEC 570 at [31]

127 One formulation particularly relied on is found in *Re Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* in which it was held that the decision in issue was not "illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds" (per McHugh, Gummow and Callinan JJ, Kirby J dissenting). This formulation was applied in *Murrumbidgee Groundwater Preservation Association v Minister for Natural Resources* (2005) 138 LGERA 11 at [129]. The conclusion of the Council's planner that the proposed development was capable of approval in the face of the ongoing review of building heights, the preference expressed in the letter from the Director-General of

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

128 The Tweed Shire 2000+ Strategic Plan was adopted by the Council on 17 December 1996 and is required to be considered pursuant to the TLEP (cl 8) under the aims of the plan in cl 4(c). The strategy identifies the need to initiate and evaluate a two storey height limit at Hastings Point and the development of locality plans. The Tweed Future Issues Paper was publicly exhibited in November 2003 to January 2004 and recognised the particular provisions of rural townships and villages such as Hastings Point. The Council resolved to reduce the height of buildings at Hastings Point to two storeys. The Department of Planning did not allow Amendment No 81 to proceed at that stage so that on 19 December 2006 it was resolved to abandon it. The Director-General of the Department of Planning then wrote on 20 March 2007 saying the amended LEP could be exhibited. The development consents were granted after that date. The Council has since resolved to engage consultants to undertake an assessment of the height and density provisions. Given the content of other strategic planning documents in relation to building height the decisions to grant the two development consents were so unreasonable they should be declared invalid.

129 The history and the documentation contained in the bundle of documents reveals that the Council was fully aware of the Director-General's desire to reduce building heights in Hastings Point, as well as public submissions and a public interest in doing so. The Council was also aware that there was an ongoing review being undertaken by its consultants in relation to building heights in the locality.

130 Further, the Coastal Development Guidelines (CDG), prepared by the NSW Government, provides specific guidance in relation to the seven settlement types identified in the guidelines. These include coastal villages and hamlets. Hastings Point is most accurately defined as a coastal

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

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

Respondents' submissions

132 The Applicant has particularised its claims for manifest unreasonableness by reference to the appropriateness of granting consent to a three storey development, the sensitive coastal location of each proposed development, and the provisions of Tweed Shire 2000+ Strategic Plan that had been adopted in December 1996 which proposed the initiation and evaluation of a two storey height limit for Hastings Point.

133 The existence of the three storey height control in the TLEP envisages the future character of Hastings Point to contain three storey developments in the context of the locality with its (assumed) one and two storey developments. It cannot be manifestly unreasonable to consent to a development that meets current controls. The Applicant's case elevates a future review of building heights to having greater significance than the current legal controls.

134 The Second Respondent in the Aeklig proceedings and the Third Respondents in the Planit Proceedings submitted that the decisions that the Council had made were reasonably open to it, given what the proposals consisted of, the issues that had been raised, and the assessments put before Council in relation to those issues. In any event:

(a) granting consent to three storey developments was in accordance with the Height of Buildings Map pursuant to cl 16 of the TLEP; and

(b) the Assessment Report for each of the Aeklig DA and of the Planit DA referred to the coastal location of the subject site, character of the surrounding area and height issues.

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

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

> *Part 1 describes the concept of determining a hierarchy of coastal settlements and how this relates to planning within a local area. It also defines seven coastal settlement types, which can be used to analyse and understand urban development along the NSW coast.*
>
> *Part 1 describes each settlement type in terms of:*
> ...
> *Desired future character – describing the link between the future built and natural character of a place.*

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

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

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

(i) the report considered, in accordance with the requirement in cl 8 of *State Environmental Planning Policy No 71 – Coastal Protection* (SEPP 71), "the suitability of development given its type, location and design and its relationship with the surrounding area" at p 91 and the conclusion at p 92.7 ("The proposed development is considered to comply with SEPP 71");

(ii) the report considered cl 31 of SEPPSL – Neighbourhood amenity and streetscape, at p 96-97;

(iii) the report considered building heights at Hastings Point at p 111-112 and also p 115-116;

(iv) the report considered the character of Hastings Point at p 119-120. Specifically, there it is noted:

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

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

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

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

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

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

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

(iii) the comment in the report at p 190-191:

> *The contemporary coastal architecture of the development is representative of the emerging and somewhat distinctive style of multi-dwelling housing in the coastal area of the Tweed. The integrity of the quiet, peaceful and natural environmental attributes that characterise Hastings Point are not compromised by this development.*

(iv) the assessment in the report at p 195:4-196:3 of submissions concerning context and setting/building height restrictions.

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

Finding on manifest unreasonableness

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

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

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

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

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

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

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

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

> *1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law (77);*
>
> *2. This admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others (78). This is not to condone double standards between the reasons and*

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

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

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

...
(footnotes omitted)

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

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

146 Useful context for considering these arguments can be found in *Stockland* at 272-274 where McClellan J was considering whether determining weight should be given to a planning policy which had not been included in the DCP (which is required to be considered under s 79C(1) EP&A Act). His Honour was considering a detailed planning policy which had been adopted by a council for the Balgowlah Shopping Centre and he identified at [92] relevant matters such as the extent of public consultation and the time the policy had been in force in determining the weight to be given to such a policy.

147 The strategic policy documents relied on by the Applicant, namely the Tweed Shire 2000+ Strategic Plan, the Tweed Future Issues Paper and the Far North Coast Regional Strategy, are briefly outlined earlier in par 18, 20 and 21. These are documents to assist in the development of the statutory planning framework by the Council. They make recommendations to assist when such planning is undertaken at the local council level.

148 Subsequent to the hearing the Applicant sought to rely on the provisions of the CDG which were adopted by the Council in April 2006. A broad outline is provided at par 19. As identified by the Respondents' submissions at par 135 and 136, the CDG is a strategic policy document intended to provide "a best practice framework for ensuring that design reflects the character of different places" (Introduction to CDG). It identifies seven settlement types, including coastal hamlets, and provides a broad description of these. It states this "offers a framework for future planning" (at p 9). It also states that a detailed process of planning and designing for each settlement along the coast is necessary in conjunction with the guidelines. While it was part of the information available to the Council it is not a document intended to be applied directly to the development application process. Although not specifically stated in submissions the inference from the Applicant's argument is that the decision to approve the two development applications was contrary to the CDG. The CDG is directed

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

149 In this case, apart from the provisions in the TLEP, there was no formal planning policy adopted by the Council on building heights in Hastings Point at the time the two development applications were approved. The Tweed Shire 2000+ Strategic Plan and the Issues Paper 2005 refer to an intention to evaluate a two-storey height limit for Hastings Point, inter alia. A process was embarked upon by the Council which lead to draft Amendment No 81. This was subsequently abandoned by the Council when the Director-General of the Department of Planning refused to issue a s 65 certificate to allow its public exhibition in March 2006. The letter from the Director-General of Planning in March 2007 enabling exhibition of draft Amendment No 81 provided that opportunity to the Council but was not a direction to it to exhibit the draft LEP. I agree with the Respondents that the letter does not provide a concluded view of the Director-General on the issue of building height. Nor does it have any statutory standing in its own right.

150 At the time of the approval of the development consents in issue the Council had not adopted a formal policy to limit the height of buildings in Hastings Point to two storeys. While the tenor of all the material relied on by the Applicant in relation to the strategic planning process suggests such an outcome could be desirable, there was simply no concluded outcome. The decision had not yet been made by the Council to adopt a lesser height limit in a formal policy (as there was in *Stockland*) or in a draft or final LEP or DCP.

151 The consideration of the respective DAs must occur in light of the case law identified above and the existing statutory framework identified above in par 147-150.

Planit DA

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

Aeklig DA

153 The Aeklig DA sought approval under SEPPSL and that instrument has different assessment requirements to the TLEP which applied to the Planit DA. An additional particular relied on in the Applicant's case is that the decision to grant consent was manifestly unreasonable in relation to the assessment of the design requirements. The design requirements that adequate regard must be given to are identified in cl 31(a) and (b), inter alia. As set out above in par 15, cl 31(a) requires that the proposed development *"recognise the desirable elements of the location's current character ... so that new buildings contribute to the quality and identity of the area"*. It also stated that in the case of precincts undergoing transition where described in local planning controls, the desired future character should be recognised.

154 As submitted by the Applicant the three storey height limit was carried over from the LEP 1987 (see letter from the Council to Ms Julie Boyd, exhibit G). There is no evidence of a changed character from the existing planning controls.

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

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

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

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

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

Conclusion

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

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

A Watson
Associate

Date 6/6/08