



Section 430 Investigation

TWEED SHIRE COUNCIL

**Ross Woodward
Departmental Representative**

INTRODUCTION

This report is prepared by the Departmental Representative, Mr Ross Woodward, following an investigation under section 430 of the Local Government Act 1993 into aspects of the activities of the Tweed Shire Council. The report is presented to the Minister for Local Government and the Director General of the Department of Local Government and copied to the Council, pursuant to the terms of section 433(1) of the Act. The Investigation commenced on 24 March 2005.

Authorisation of the Investigation

Following the completion of the public hearings phase of the Public Inquiry into Tweed Shire Council, the Commissioner, Emeritus Professor Maurice Daly, wrote to the former Minister for Infrastructure and Planning and Minister for Natural Resources, the Hon CJ Knowles MP, by letters dated 15 and 22 March 2005, recommending the interim appointment of a planning administrator under section 118 of the Environmental Planning and Assessment Act 1979 (EP&A Act). Professor Daly also wrote to the former Minister for Local Government, the Hon AB Kelly MLC advising him of his recommended course of action.

Professor Daly registered his concern that the prima facie evidence before him suggested the Tweed Shire Council had not enforced various provisions of the EP&A Act, which he thought, may be repeated in the period between the closure of the Public Hearings (18 March 2005) and the tabling of his report (expected to be July 2005).

In light of the serious matters raised and to ensure natural justice and procedural fairness, Mr Knowles requested Mr Kelly to immediately initiate an investigation under section 430 of the Local Government Act into the exercise of the Council's planning and assessment functions. He requested that the investigation also consider if grounds exist to recommend the appointment of an environmental planning administrator under Section 118 of the EP&A Act.

Mr Kelly accordingly requested the Director General of the Department of Local Government, Mr Garry Payne, to consider the matter and advise whether he would use his discretion to commence an investigation.

On 24 March 2005, the Director General approved an investigation under section 430 of the Local Government Act into the Tweed Shire Council.

Mr Ross Woodward, Deputy Director General of the Department of Local Government, was appointed and authorised as Departmental Representative to conduct the investigation and to report to the Minister and the Director General on the results of the investigation.

Terms of Reference.

The terms of reference for the investigation were as follows:

To investigate and report on:

- council's processes for performing its environmental planning and assessment functions, including the processing, assessment and determination of significant development applications, the determination of contributions under section 94 of the Environmental Planning and Assessment Act 1979 and applications to modify development consent conditions under section 96 of the Environmental Planning and Assessment Act 1979;
- whether there has been any failure by council to comply with, carry into effect or enforce the provisions of the Environmental Planning and Assessment Act and/or of any environmental planning instrument;

- whether sufficient grounds exist to recommend the appointment of an environmental planning administrator pursuant to section 118 of the Environmental Planning and Assessment Act 1979; and
- any other matter that warrants mention.

The Investigation Process

A section 430 investigation is not a public inquiry process and therefore does not include the calling of public submissions. In view of the fact that a public inquiry was nearing completion, it was not my intention to duplicate and reopen issues being addressed by the Commissioner. My primary task was to review and monitor the Council's planning decisions following the public hearings and prior to the Commissioner handing down his report.

My investigation began immediately the announcement was made. I concluded my fieldwork with the release of the Commissioner's first report to the Minister on 25 May 2005, which resulted in the dismissal of the Council, and the appointment of administrators. This report records my findings up to that date.

The dismissal of the Council and appointment of administrators largely superseded the need to report on whether grounds exist to recommend the appointment of a planning administrator.

I made two visits to the Tweed Shire Council during the course of the Investigation. The first was on 31 March 2005 to meet with key staff and familiarise myself with planning and development issues in the Tweed. The second was on 9 and 10 May 2005 to examine specific issues I had identified as warranting closer review. I used the Council's website as the key tool for monitoring the passage of development issues through the Council.

Issues examined.

The investigation focussed on the Council's strategic planning framework and its translation into development assessment decisions. Of particular interest was the veracity of planning instruments in guiding appropriate development and how planning decisions are made in the Council. The investigation also closely monitored the passage of development applications through the Council during the period of review.

i) Strategic Planning

Tweed Shire Council has in place a series of strategic planning documents, a comprehensive Local Environmental Plan (LEP 2000) and numerous Development Control Plans. I did not review all these documents in detail but was more concerned with how they integrate and set the parameters for development decisions.

It became immediately apparent that with respect to a statutory planning framework, the Council is suffering from a succession of poor strategic and land use planning decisions emanating largely from the 1980s. While the Council was unable to produce the historical documents to track how decisions were made to zone land for urban purposes in that era, it is clear that, with today's understanding of the environmental impacts of development, some lands, particularly in the sensitive coastal fringe should not have been zoned for urban purposes. It is acknowledged that the decisions at the time were supported and approved by the State Government.

It is also unfortunate that lands identified for potential urban expansion were zoned Residential 2(c) Urban Expansion rather than retain a rural zone until the environmental constraints and development capacity of the land was known. Large expanses of land were zoned in this way, which only served as a blueprint for the development industry and for the rapid and possibly unrealistic inflation of land values.

Planning practice at the time in other locations in NSW was to generally stage urban releases as the necessary environmental studies were undertaken. The Tweed practice seems to have been a case of the “cart before the horse” with the result being strong and unnecessary development pressures on some locations. In such a scenario, the question of back zoning becomes extremely difficult due to the expectations and financial commitment of landowners.

The assumption that the development assessment process can deal with such a situation is flawed because refusal of applications which are permissible in the zone is notoriously difficult, particularly when a proponent is prepared to progressively modify the proposal to overcome constraints.

It is acknowledged that the growth pressures on the Tweed are different now than in the 1980s. At that time the Gold Coast was becoming a major city in its own right and the Tweed feared being left behind. Land use zoning decisions were presumably made in order to compete for a market share and to generate economic development.

The broad nature of zonings appears to have been based on a different understanding of environmental issues to current thinking, a philosophical view that oversupply of land would attract investment and an assumption that the development control process would deal with the detail. The result has been regular conflict between the development industry and local communities over development outcomes that are acceptable to the community and which respect the particularly sensitive coastal ecosystems common in the Tweed.

Discussions with Council officers and the Department of Infrastructure, Planning and Natural Resources (DIPNR) indicated that there is not a solid working relationship with regard to strategic planning. The work being done by the Council does not seem to be well connected to the framework document, the draft *Far North Coast Strategy*, being prepared by DIPNR.

Land use planning at the local level can only be successful if it is integrated with the State and Regional priorities being set through documents like the draft *Far North*

Coast Strategy. Council officers repeatedly mentioned the difficulty of engaging with State agencies and felt that their strategic planning was often done in a "vacuum". They looked to DIPNR to play a co-ordinating role but felt that it was lacking. Council officers therefore claimed that they were unable to take into account the physical and community infrastructure needs being determined by the State agencies. The Council however did not produce evidence of attempts it had made to engage with state agencies, including DIPNR. Strategic planning in the Tweed would benefit from the Council taking a leadership role in this regard.

With regard to strategic planning I conclude the following:

- poor zoning decisions in the 1980s is making current development control decisions difficult;
- the window of opportunity to rectify the situation, potentially through back zoning, is rapidly closing;
- the Council has a series of well prepared planning strategies which are issue focussed but not well integrated, nor do they appear to link with work being done at the regional level by DIPNR, through its draft *Far North Coast Strategy*. A close working relationship with DIPNR is essential and urgent.

Development Assessment

During the brief period of my investigation, I only monitored in detail development applications being considered by the full Council and not those delegated to staff. The overwhelming majority of development applications are dealt with by the staff under delegation. The quality of reporting and decision making by the staff under delegation gave no cause for concern. Of particular interest were matters where the decision of the Council was different to the recommendations of the staff in the planning report. There were two such cases during my investigation. These were:

1. Development application DA04//1129 for a part 2, part 3 Storey Residential Development Comprising Six (6) Dwellings at Lot 3 DP617743 No 15b

Charles Street, Tweed Heads – reported to Council on 16 February 2005 and 20 April 2005; and

2. Development application DA04/1300 for an Integrated Housing Development Incorporating 6 Dwellings Being part 2 and part 3 Storey at Lot 15 DP21680 Lot 14 Sec 6 DP17606 No 17 and 19 Moss Street, Kingscliff – reported to Council on 20 April 2005.

On examination of the relevant files, site inspections and discussion with Council officers, both were considered to be sound decisions in the circumstances. However, they raised concerns about the transparency of Council decision making.

The investigation process revealed that, like many councils, the Tweed Shire Council does not always have a transparent decision making process. Under the EP&A Act, if a council decides to refuse an application, then the reasons must be clear and can become the basis for an appeal to the Land and Environment Court. If, however, a council decides to approve an application, against staff recommendations, no reason is required to be given. This creates a risk of multiple interpretations as to motive and is not transparent to the community. A council is perfectly entitled to come to a different conclusion to staff, but it is considered appropriate that the reasons for a decision should be clearly outlined.

Consideration of these applications also raised an internal reporting process issue, which the senior executive may wish to consider. While the quality of staff reporting is high, the views of the senior executive do not appear to be always explicitly known prior to the matters being considered by the Council. There are two schools of thought on this practice but it would be worthwhile for the senior executive to re-consider this issue particularly in situations where a staff recommendation is not supported by the senior executive. This would assist the decision makers and provide greater transparency.

The investigation also revealed a certain “ad hoc” nature of development assessment. Because the assessment process is being used to overcome the deficiencies of previous zoning decisions in some locations, there appears to be a

risk of negative impacts from the cumulative effect of a plethora of small decisions. Furthermore, there is evidence that decision making is not always consistent, which is confusing to the community, eg building heights at Kingscliff.

Once again, the relationship with DIPNR arose, this time in regard to development applications being determined under State Environmental Planning Policy No.71 (Coastal Protection). Council staff felt that a significant input into these applications was being provided by the Council without resourcing or the benefit of knowing community views. This is because the application fees go to DIPNR and the Council opportunity to comment is only during the exhibition period. There was a clear desire by both the Council and DIPNR to improve the manner in which applications are assessed so the best possible development and environmental outcomes are achieved. Even though the Council is not the consent authority for major developments, it is desirable that there be shared ownership, wherever practicable, for the final decision.

With regard to development assessment I found the following:

- Council planning staff are operating with an appropriate level of professionalism and competence;
- development assessment is difficult without a clear strategic planning framework;
- Council planning decisions are not always transparent;
- the cumulative impact of small developments can lead to significant impacts if they do not have a strong strategic framework; and
- there is an urgent need for the Council and DIPNR to develop a close working relationship in the assessment of development applications under SEPP 71.

Conclusion

The s430 investigation was brief and not exhaustive. It focussed on planning decisions and their context between 24 March 2005 and 25 May 2005. It was not

intended to retrace the steps of the Public Inquiry and ceased earlier than originally anticipated. Nevertheless, it was sufficient time to make some general findings and recommendations which may assist the administrators in their work.

The Department of Local Government conducts comprehensive reviews of councils under the Local Government Reform Program – Promoting Better Practice. These reviews span a range of council functions to check compliance and facilitate improvements. It is an early intervention program aimed at assisting councils. A review has not yet been conducted at Tweed. Planning is one of the functions addressed in the reviews. For councils where planning is a major issue, such as Tweed, there would be benefit in DIPNR providing a planning resource to assist in the review process. This would ensure there is adequate specialist advice available to help councils improve their planning administration. Tweed Council would benefit from a review within the next twelve months.

My investigation found the following during the period of review in relation to the Terms of Reference:

1. The Council made no inappropriate planning decisions under the provisions of the Environmental Planning and Assessment Act 1979.
2. No grounds exist to appoint an environmental planning administrator under section 118 of the EP&A Act 1979, particularly in view of the fact that administrators are now in place.
3. Council planning staff operate at an appropriate level of competence and professionalism.
4. Planning decisions in the 1980s has led to an unsatisfactory strategic framework for current development decisions. There is an urgent need for a review of parts of LEP 2000, to address the possibility of back zoning and to clarify development standards in some zones.
5. The relationship between the Council and DIPNR is variable and is in urgent need of improvement.
6. The Council would benefit from a Promoting Better Practice Review by the Department of Local Government.

Recommendations

As a result of the investigation, it is recommended that:

1. The Council and DIPNR establish a framework for improving their working relationship. The Department of Local Government may have an assisting role to play.
2. The Council review its strategic planning documents in the light of the draft *Far North Coast Strategy* and work with DIPNR to ensure maximum and urgent participation in the Strategy.
3. The Council place a moratorium on spot rezonings, until recommendation 2 above is completed.
4. The Council review the Residential 2(c), Urban Expansion zones in Tweed LEP 2000, with a view to back zoning environmentally sensitive land where urban development is inappropriate.
5. The Council and DIPNR review the administration of SEPP 71 and consider progressively increasing the Council's delegations.
6. The Council review LEP 2000 to provide clarity with regard to development standards as they apply to the coastal zone and work with local communities to establish an acceptable framework for future development.
7. The Department of Local Government and DIPNR review the reporting requirements of councils when approving developments contrary to the recommendations of council staff.
8. The Department of Local Government and DIPNR consider a joint approach to planning components of the Promoting Better Practice Reviews for councils where there is evidence of significant planning issues.
9. The Department of Local Government schedule a Promoting Better Practice Review of the Council within the next twelve months.



Ross Woodward

Department Representative

Deputy Director General

10 August 2005